Reconceptualising Error of Law

Christopher Enright
Sinch
for smarter lawyers

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Summary

Error of law is a ground for judicial review and a common ground for a statutory appeal. It has haunted lawyers for some time by appearing to provide an insoluble problem. To outward appearances, it has defied analysis and explanation. So far no one has been able to say exactly what an error of law means with any degree of certainty.

This paper seeks to solve the problem, but by a novel means. First, it explains why the problem exists. Essentially common law labelled the ground but did not explain its contents. It is all label and no substance. Given this, it is futile to hunt for some authentic substance because there never was any. So instead of searching for an authentic meaning, four solutions are considered that do not involve seeking an authentic meaning but a workable meaning.

Solution 1
Solution 1 consists of the common approach that lawyers have attempted whereby they classify an error in adjudicative decision making as either an error of law or an error of fact. At the same time they acknowledge that the classification is not totally simple by admitting a class of error that can be mixed law and fact (although they generally do not explain exactly what this hybrid error is). There are two problems with this approach. First, its proponents do not explain how to distinguish between errors of law and errors of fact. Second, the proponents also do not explain what is meant by an error. The most logical explanation is that it involves misinterpreting the law. This is in fact the core of Solution 2.

Solution 2
Solution 2 interprets ‘error of law’ to mean an error of interpretation. An authority has said that a word or phrase means X whereas it really means Y. This seems to be a direct and simple solution, but it is incomplete. It is still necessary to determine whether all errors of interpretation qualify or only some.

Solution 3
Solution 3 rests on the fact that in a case that actually raises the question of the meaning of ‘error of law’ there is invariably both a ‘law’ and an ‘error’ whose respective identities are not in doubt. Consequently, the apparently innocuous preposition ‘of’ is the source of ambiguity because it prescribes, however broadly and imprecisely, the relationship between the error and the law. For this
Summary

reason, Solution 3 explores the possible relationships that might exist and could define the ground.

Solution 4
Solution 4 proposes that law makers engage in a fundamental appraisal of the grounds of review. This involves examining the processes deployed in making adjudicative decisions. Then law makers use the understanding gained from this examination to work out all the major or obvious ways in which an error can occur. Now some of these errors will already constitute established grounds of review. Therefore the analysis focuses on the remaining errors. It determines which of them should become grounds for review. Then it formulates the new grounds. Finally, it confers appropriate labels on these grounds. Obviously the solution is wider than the problem because it involves full examination and renovation of the grounds for review. It is however, a rational way to resolve the problem.
Error of Law
Error of law is a ground for review at common law. Error of law is also a common statutory ground for review. Currently the state of this ground is somewhat messy with regard to the meaning of the pivotal phrase ‘error of law’. This article seeks to suggest ways to clear up the mess.

Analysing Law
My introduction to a good method for legal analysis occurred in my first year working as a solicitor. I wanted to purchase a house. I found an old house that was delightful but needed some repair. I hired a builder to advise me on the feasibility and cost of repair. We looked at a brick wall that had a large crack near the top. I pointed to the top of the wall where the crack was and said: ‘There is a problem there.’ The builder, however, pointed to the foundations of the wall and said: ‘That is where the problem is.’ A crack appears in a brick wall because the foundations move – so to fix the crack one first needs to stabilise the foundations. Then it is possible to patch the crack.

A common way for writers to analyse and appraise common law is to start with the actual words of the judges, the verba ipsissima (the words themselves) as the Latin puts it. In building terms, many legal writers treat these as bedrock and build their analysis from there. In literal terms writers assume that the words in the judgment embody a coherent principle then seek to find that principle. Sometimes they find it easily while at other times they do not and then have to speculate as to what the judges really meant.

An alternative method of analysis is to go right back to taws. Start with the problem that the court faced. Consider the possible solutions. Then examine what the court has said, using the possible solutions as tool for analysing and appraising the law. In other words, identify all the options then analyse and appraise judicial choice against that background. This approach is necessary when the law is in a messy state, as is the situation with error of law, but it is worth doing in other situations as well because it provides a deeper and broader analysis. In short it is necessary to break out and break up before you break through.¹

¹ An illustration of deeper analysis is the author’s approach to the concept of legitimate expectation in administrative law. The analysis appears in Enright (2001) Federal Administrative Law, Chapter 33 Application of Natural Justice. There I concluded that the concept of ‘legitimate expectation’ was a crude although praiseworthy attempt to deal with a problem about the application of natural justice.
This article adopts this wider approach. It does not seek to sort out error of law by examining, manipulating and shaking about the case law on error of law, then transforming the whole lot into some principles that put the findings of the case into a rational and coherent body of law. Instead it seeks to examine the possibilities as to what the ground might mean as a matter of reason to enable a remake of the ground. This remake may be done either by some superior court that is prepared to take the initiatives or by one or more of the legislatures of the several States and the Commonwealth.

**Error of Law**

Error of a law is a ground on which superior courts can review decisions of inferior courts and administrative decisions makers. Error of law has three forms. Two of these forms of the ground come from common law and are labelled jurisdictional error of law and non jurisdictional error of law. The third form of the ground comes from statute.

**Jurisdictional Error of Law**

Judicial review at common law had long recognised error of law as a ground for judicial review when the error went to jurisdiction – it was thus described as jurisdictional error of law or jurisdictional error for short. Jurisdictional error of law was a ground for issue of the writ of certiorari, which brought the relevant decision into the King’s court to certify that it was or was not made within the jurisdiction that the decision maker legally possessed. It so happens that jurisdictional error is a troubled ground of review, so much so that it now resides in an advanced state of anarchy. The remedy for this is logically the same remedy that is proposed for non jurisdictional error of law namely a complete reappraisal and reformulation of the grounds of review. The point, obviously, is that this review would also clean up jurisdictional error.

**Non Jurisdictional Error of Law**

There are two requirements for non jurisdictional error of law. There must be an error of law and the error of law must be on the face of the record of the decision.

However lawyers and judges used it and expanded it mindlessly so that on both counts it became a problem. The solution was to abandon the concept, then return to the problem for which it was meant to be a remedy and fashion a better and less troublesome solution. By contrast, fiddling or playing with the concept on the surface would not solve any problem but only expand or worsen the problem since the concept itself was deeply flawed.

2. *Rex v London County Council; Ex parte Entertainments Protection Association* [1931] 2 KB 171, 205 Scrutton LJ
Reconceptualising Error of Law

Error of Law

Non jurisdictional error of law commenced its modern phase in the landmark case of Shaw. There, the Court of King’s Bench had to consider whether certiorari was available for a non jurisdictional error of law.\(^3\)

The applicant for the writ, Mr Thomas Shaw, was formerly the clerk to the West Northumberland Joint Hospital Board. Shaw had performed two types of service – he had served with the hospital board from 7 October 1936 to 31 March 1949 and he had performed other types of service as well. Consequent upon the passing of the National Health Service Act 1946 Shaw suffered the loss of his employment with the Board. Shaw then sought compensation for loss of office under a statutory scheme. For the purpose of assessing Shaw’s claim the Northumberland Compensation Appeal Tribunal took into account only Shaw’s service with the hospital board from 7 October 1936 to 31 March 1949. It did not take into account his other types of service. However, Regulation 2 of the National Health Service (Transfer of Offices and Compensation) Regulations 1948, which covered Shaw’s situation, defined ‘service’ in a manner that included these other types of service undertaken by Shaw in addition to his service with the hospital board. This meant that the tribunal had misinterpreted Regulation 2 of the compensation regulations. It was an error of legal interpretation. The tribunal had decided a point of law incorrectly. In consequence of this error the tribunal had awarded Shaw a lesser amount of compensation than the amount to which he was properly entitled.

At the time of Shaw’s Case the dominant opinion was that the prerogative writs of certiorari and prohibition were available only for an error of law that affected the jurisdiction of the original decision maker, typically an official, a tribunal or an inferior court. In Shaw, however, the Court of King’s Bench overruled this dominant opinion. Instead it decided that these writs extended to any error of law, be it jurisdictional or otherwise, provided that in the case of non jurisdictional error the error of law was an error on the face of the record of the decision.

There were several reasons for deciding in this way. First, the wording of the writ of certiorari made it clear that the writ extended to all errors of law. It required that the Court of King’s Bench do to the original decision ‘what of right and according to the law and custom of England’ ought to be done.\(^4\) The

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3. *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 339 per Denning LJ
4. *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 339 per Denning LJ
'amplitude' of these words in the writ was clearly not confined to jurisdictional error but included non jurisdictional errors as well.\textsuperscript{5}

Second, text writers had taken this view. Thus the illustrious writer Joseph Chitty in his text on practice of 1833 had said that by the writ of certiorari ‘the Court of King’s Bench has a most extensive power to bring before it their proceedings and fully to inform itself upon every subject essential to decide upon the propriety of the proceedings below.’\textsuperscript{6}

Third, there was judicial authority for the proposition. Lord Sumner was direct and specific when he asserted that the supervision provided by certiorari ‘goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.’\textsuperscript{7} In \textit{Walsall Overseers v London and North Western Railway Co} the House of Lords was also of the view that certiorari was available for non jurisdictional error of law.\textsuperscript{8}

Fourth, up until about 100 years before Shaw, certiorari was regularly used to correct non jurisdictional errors of law on the face of the record.\textsuperscript{9} For some reason, perhaps lack of necessity, it had fallen into disuse.

Fifth, there was the justice of the case. In the case before the Court of King’s Bench there was an error of law, which in the words of Denning LJ deprived ‘Mr. Shaw of the compensation to which he is by law entitled. So long as the erroneous decision stands, the compensating authority dare not pay Mr. Shaw the money to which he is entitled lest the auditor should surcharge them. It would be quite intolerable if in such case there were no means of correcting the error.’\textsuperscript{10} As the maxim goes, \textit{ubi ius ibi remedium} – where there is a right there is a remedy.\textsuperscript{11}

\begin{itemize}
  \item \textsuperscript{5} R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw [1952] 1 KB 339 per Denning LJ
  \item \textsuperscript{6} Chitty (1833) Volume 2, 353
  \item \textsuperscript{7} Rex v Nat Bell Liquors [1922] 2 AC 128, 156; [1931] 2 KB 215, 233. See also Williams v Bagot (1824) 4 D & R 315.
  \item \textsuperscript{8} Walsall Overseers v London and North Western Railway Co (1878) 4 App Cas 30
  \item \textsuperscript{9} R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw [1952] 1 KB 339 per Denning LJ
  \item \textsuperscript{10} R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw [1952] 1 KB 339 per Denning LJ
  \item \textsuperscript{11} There is also a converse form of this maxim – \textit{ubi remedium, ibi ius}, that is, where there is a remedy there is a right. See \textit{Ashby v White} (1703) 92 ER 126 and \textit{Bivens v Six Unknown Named Agents} 403 US 388 (1971).
\end{itemize}
These reasons are overwhelming. So, as a result of Shaw’s Case, in judicial review at common law error of law on the face of the record is one of the grounds of review regardless of whether the error goes to jurisdiction.

**Face of the Record**

As a common law ground for review there is an additional requirement for non jurisdictional error of law. Not only must there be an error of law, but the error of law must appear on the face of the record. This means that the error is visible on or detectable from the record of the decision. It must be patent not latent.

This requirement is not directly relevant to the issue as to what constitutes an error of law so it is not necessary to consider it in any detail. However, some brief comments are appropriate to give readers some idea of its function and shape as a requirement for the error of law ground of review.

To appreciate why the ground carries this requirement consider what would happen if this requirement was not part of the ground. This would mean that any error of law anywhere in the proceedings would do. Therefore someone of zealous disposition would scour any documents generated by the proceedings looking for something that could constitute an error of law. This would represent ‘a significant increase in the financial hazards to which those involved in even minor litigation in this country are already exposed’.\(^\text{12}\) For this reason common law imposed the requirement that the error of law be on the face of the record. Being not only on the record, but also on the face of the record, means in principle at least that the error is very exposed.

**Error of Law as a Statutory Ground of Review**

Error of law is also commonly a ground of review under statutory provisions for review of a decision by an official, a tribunal or a court. In labelling this ground ‘error of law’ a statute is adopting the common law meaning of that expression unless something in the statute indicates otherwise.

**Meaning of Error of Law**

Error of law as a ground of review is beset with a major problem. As innocent as the phrase seems, its meaning is now regarded as a mystery of major proportions, the legal equivalent of the problem that Fermat’s last theorem delivered to mathematicians.\(^\text{13}\)

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13. Fermat’s Last Theorem is names after the French lawyer and mathematician Pierre de Fermat (1601-1665). Essentially the conjecture for which he sought proof to convert it into a theorem was that it is impossible to separate any power higher than
In fact there is a reason for this failure by lawyers to determine the meaning of ‘error of law.’ The reason for failure is that attempts to define an error of law have been undermined by a fundamental mistake, which must be rectified before an answer can be found. This mistake goes back to the origin of the ground that analytically stranded it from the outset because things were done the wrong way round. Putting it simply, courts put the cart before the horse and chaos ensued from then on.

**Adjudicative Decisions**

To explore this question more it is necessary to explain to the reader by way of background some basic facts about adjudicative decisions. Adjudicative decisions are decisions that are made by a court, a tribunal or an official that confer some benefit or detriment on at least one of the parties. Although the decision makers differ in composition and constitutional designation (judicial or administrative), the decision making task is essentially the same in each case. Two core points are relevant. First, there is a model that describes the basic decision making task where it involves proof of disputed facts, as is commonly the case. Second, an adjudication that determines a dispute involves not one but several legal rules.

**Model**

At the core of the dispute there is a legal rule that authorises the making of the relevant decision. In litigation in a court this rule is labelled a cause of action. Like most legal rules, this rule possesses elements, which can be labelled Elements 1-\(n\). While it would be sufficient to portray the model using just Element 1 and Element \(n\), the table below also includes Element 2 to give a better sense that a cause of action is constituted by a list of elements.

Each element describes a class of fact. This means that an element is satisfied in a case when there is a fact that fits within this class. In other words, Elements 1-\(n\) are satisfied by the appropriate facts, labelled Facts 1-\(n\) such that Fact 1 satisfies Element 1, Fact satisfies Element 2 and so on. In disputes facts are proved by evidence. In the model, Evidence 1 is the label for the evidence that

the second into two like powers. That is, if an integer \(n\) is greater than 2, then the equation \(an + bn = cn\) has no solutions in non-zero integers \(a\), \(b\), and \(c\). Over the years some proofs were found or proffered for specific values of \(n\). However, it was not until 357 years later in 1995 that a proof was finally published by Andrew Wiles, a British mathematician at Princeton University.

14. Under the conventional terminology, a court is a judicial body while tribunals and officials are classified as administrative bodies. See Enright (2001) Federation pp 47-64.
can prove Fact 1, Evidence 2 is the label for the evidence that can prove Fact 2 and so on. Collectively, and stated in simple form, Evidence 1-n can prove Facts 1-n.

When Elements 1-n are satisfied, various consequences follow. These are labelled Consequences. Here now is the table setting out this model:

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Figure 1. Model for Adjudicative Decisions

Legal Rules
There are three major types of legal rules that are part of a dispute:

1. Substantive Rules. The core of the dispute is a substantive rule. This is the rule that authorises the decision maker to make the primary decision, being the decision that can change the legal position of one or more of the parties. In Figure 1 represents this rule in Column 1 by Elements 1-n and Consequences.

2. Jurisdictional Rules. Jurisdictional rules determine the authority of a court, an official or a tribunal to decide a case.

3. Adjectival Rules. Adjectival rules do not directly determine the applicant’s legal position but dictate to the parties and the adjudicator how the dispute is to be heard. Conveniently these rules fall into three categories:

   3.1 Pleading. Rules of pleading lay down the manner in which parties must formally state their case for the benefit of the adjudicator and the other parties. (However decision making by a tribunal or an official may involve very informal pleadings.)

   3.2 Evidence. Rules of evidence lay down what sort of evidence the adjudicator can consider and possibly also in what circumstances and to what effect. At common law there are two sets of rules of evidence. There are the judicial rules for courts and the administrative rules for tribunals and officials.

   3.3 Procedure. Rules of procedure determine what is done at the hearing and in what order. One of the major common law rules of procedure consists of the rules of natural justice. In brief form these require that a party receive a fair hearing from an unbiased decision maker.
**The Problem: Cart Before the Horse**

The problem that has beset error of law involves an anachronism in the core sense of that term, namely that the proper time sequence for events was disrupted. In the popular expression it entails putting the cart before the horse. This can be explained by a marketing anecdote and by a literary story about the plot of an unusual play.

The marketing anecdote tells of the launch of a new soft drink in Australia a few decades ago. It is said that the marketers found a label for the drink. They called it *Solo*. The manufacturer launched it in Australia in 1973 as the ready to drink version of traditional ‘pub squash’ which was lemonade with upgraded lemon flavour.

Having found the label, the marketers created and filmed a television commercial for the drink that showed a fit young man engaging in strenuous and dangerous activities, and then refreshing himself with the soft drink. All of this time he was under the admiring looks of some beautiful young women whose ardent attention he ignored because he was consumed by having the soft drink.

Some little time before the advertising campaign for this soft drink was launched, the firm that planned to sell this drink realised that they had not yet devised the recipe for the soft drink. Consequently, with great haste the firm had to devise the recipe and commence manufacture so that all would be ready for the launch of their new product.

The literary story comes from the plot of the play ‘Six Characters in Search of an Author’ (*Sei personaggi in cerca d’autore*) by the Italian writer Luigi Pirandello (1867-1936). At the commencement of the play an acting company is preparing to rehearse a play, which incidentally is one of Pirandello’s own, ‘Mixing It Up’ (*Il Gioco delle Parti*). Six strange people arrive on the set and interrupt the rehearsal. These are unfinished characters in search of a story. They need their story finished so that they can develop their characters. They persuade the manager to stage their story so that this can happen. The full account of the characters emerges as they play out and grapple with their given roles in the dramatist’s plot.\(^\text{15}\)

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\(^{15}\)Ironically by placing the characters in the real world in ‘Six Characters’ Pirandello highlights their unreal nature. At the same time he creates a clever and powerful metaphor for alienation. If we are not performing our chosen role in our own story we are adrift in the world waiting for someone else to direct our lives in the hope that this will give meaning to them.
In both of these fables there is an anachronism. In the world of marketing the proper sequence is to devise the product then formulate the campaign so sell it. In the field of play writing, the proper process is to devise the characters and the plot together to create a drama.

An anachronism that involved disregard of the proper sequence occurred with error of law. To proceed rationally, if a ground of review at common law was to be developed courts should first have identified the way of making an adjudicative decisions that they regarded as wrong (being for example inefficient, ineffective or unfair), and being so wrong that it should constitute a ground for judicial review. Having identified the error courts should then have labelled the ground appropriately.

Error of law, however, has proceeded in the opposite direction. Common law first labelled the ground without explaining what it meant. In consequence, there has been a huge amount of inquiry ever since, trying to find the meaning behind the label. Inevitably this would be futile since the ground was initially constituted as a mere label without substance. There was nothing to be found.

The damage that this mistake has wreaked on common law jurisprudence is plainly visible in any cases that attempt to define error of law. With respect to counsel and judges who make the decisions, one is hard pressed to find much enlightenment or much reasoning that is either clear or convincing. Thus one will not find a plausible meaning of error of law by digesting and analysing these cases. Because of the fundamental error that was made with this ground of review and the failure of courts to detect it, these cases are off target before the first word of a judgment has been written.

To summarise the position in plain terms, those who sought to explain the meaning of error of law assumed that it was a label on a package. All that was necessary was to open the package to find the meaning, which had been there all along. In truth, this is not the case. ‘Error of law’ is a label on an empty package. There is nothing inside to be found.

The Four Possible Solutions

Introduction
There are four possible solutions to the problem:

- Solution 1 involves distinguishing errors of law from errors of fact.
- Solution 2 involves equating an error of law with an error of interpretation.
- Solution 3 entails interpreting the word ‘of’ in the phrase ‘error of law’.
- Solution 4 requires a full reappraisal of the grounds of judicial review.
Solution 1: Distinguishing Errors of Law from Errors of Fact
Solution 1 says that an error in adjudicative decision making is basically either an error of law or an error of fact. Lawyers therefore have to classify an error in decision making as one or the other. If it is an error of fact it does not fall within the ground of review. If it is an error of law then it does fall within the ground of review. To deal with difficult cases there is hybrid category labelled as an error of mixed law and fact, which courts tend to treat as an error of law. One problem with this approach is that lawyers have had difficulty in distinguishing errors of law from errors of fact. Another is that is essentially the same answer as Solution 2, except that Solution 2 is a simpler – it focuses directly on errors of interpretation without the detour imposed by first attempting to distinguish law and fact.

Solution 2: Error of Interpretation
Solution 2 says that an error of law comprises an error of interpretation. Somewhere along the line the original decision maker misinterpreted a law. This, however, raises two questions:
1. Location of the Error. The question is where this error has to be. Does it have to be in the rule authorising the decision (the substantive rule)? Or can it be in some other rule involved with the decision (a jurisdictional rule or an adjectival rule)? If it can be a jurisdictional or adjectival rule can it be in any such rule or only in some? If it is only in some of these rules, how are these rules identified?
2. Overt and Covert Errors. Does the error have to be overt, that is, the decision maker states a wrong interpretation of the law? Or can it also be covert where the decision maker acts in a way that intimates they have made an error of law?

Solution 3 Interpreting ‘Of’
Solution 3 entails interpreting the word ‘of’ in the phrase ‘error of law’. If the label determines the content this ground has three components. There must be an error, there must be a law and there must be a relationship between the error and the law that is defined by ‘of’. Now it is clear what constitutes an error – something should have been done one way and was done in another. It is clear what a law is – it is a legal rule. It is, however, far from clear as to what is the necessary relationship between an error and law to constitute the error as an error ‘of’ law. The solution is to interpret the word ‘of’.

There is a lesson here. Sometimes a little word can create a big ambiguity. A classic example occurs in s8-1 of the Income Tax Assessment Act 1997 (Cth) that creates the right to make what are called general deductions to lessen the amount of taxable income. There, the major ambiguity lies in the word ‘in’. This is a most lucrative of prepositions for tax practitioners since the s8-1 is the
major source of tax litigation. However, the cases have yet to acknowledge this as the source of the ambiguity, probably because legal education and lawyers are not much concerned with ambiguity even though it creates the need for legal interpretation.  

Solution 4 Appraising the Grounds of Review

Solution 4 is the root and branch solution. It proposes that an appropriate body such as a law reform commission make a full inquiry that entails a complete and total reappraisal of the grounds of judicial review. The aim is to find any gaps in the grounds. A gap consists of wrong doing in an adjudicative decision that logically and fairly should constitute a ground of review but does not yet do so. When the inquiry finds a gap it formulates one or more possible versions of the ground of review that would fill the gap. Then it chooses the best version. Finally it gives the chosen version an appropriate label before handing its report to a government that can legislate to implement the report into law.

Appropriate legislation would fix the problem in that there would now be reasonable certainty that the grounds for review of adjudicative decisions were as correct and as comprehensive as human endeavour could make them. Consequently there could be no reasonable claim that out in the ether there was some administrative wrong doing called ‘error of law’ that needed to be brought down to earth so that it was accessible to those who wished to challenge adjudicative mistakes.

In the Commonwealth sphere the appropriate legislation would obviously amend the Administrative Decisions (Judicial Review) Act 1977 (Cth), which creates a statutory version of judicial review. How this can be done is explained below, but in short form the proposal is to amend this statute in two further ways. First, expand the scope of review so that anything that can now be reviewed under judicial review at common law can be reviewed under this Act. Second, abolish judicial review at common law, thus making review under the Administrative Decisions (Judicial Review) Act 1977 (Cth) as the one true path.

In this context the motivation for this review of grounds is to fix the problem with error of law. However, the review could fix other problems as well. For example as was mentioned above, the ground of review called jurisdictional error is also in a parlous state. The review proposed here would also be able to clarify this ground and reclaim the acres of uncertainty over which it now sprawls.

Solution 1: Distinguishing Errors of Law from Errors of Fact

Solution 1 says that from this perspective an error in adjudicative decision making falls into one of three categories. It is either an error of law, an error of fact or a mixed error of law and fact:

1. Error of Law. If an error is an error of law it falls within the ground of review.
2. Error of Fact. If an error is an error of fact it does not as such fall within the ground of review. However, the error of fact may have been caused by an error of law in which case this error of law is subject to review.
3. Mixed Error of Law and Fact. If an error is a mixed error of law and fact it may fall within the ground of review.

Problems
There are two problems with this solution. First, as the solution is proposed it is incomplete because there is no explanation offered as to how to distinguish between law and fact. However, when one understands the nature of a legal rule – that it constitutes a conditional statement that is part of the syllogism for applying a legal rule to facts – both the distinction and similarity between law and facts become crystal clear, at least in principle. Second, since the core of this solution is that error of law comprises an error of interpretation of a legal rule there seems no need to engage in the task of distinguishing law and fact, because the nature and identity of a legal rule is clear. In the light of this one can see that Solution 1 is really a needlessly clumsy version of Solution 2 (where error of law consists of an error in the interpretation of a legal rule).

Distinction Between Law and Fact
This version of error of law rests on a distinction between law and fact. An error is either a reviewable error of law or an unreviewable error of fact (with difficult cases being shuffled off to a hybrid called mixed errors of law and fact which are reviewable). Therefore the issue, as the courts now see it, is how one draws the distinction.

Our analysis above argues that it is not necessary to distinguish between law and fact. Nevertheless it is worth a brief examination for the sake of completeness, especially because there is, in principle, a simple distinction between law and fact that is worth explaining. To explain this, the article first mentions the standard approach that courts have adopted which involves despair at the distinction, then follows the account of how the distinction can be formulated.
**Standard Analysis of the Distinction**

While lawyers have asserted this distinction between law and fact is the way to go, they have virtually abandoned hope of ever determining how the distinction can be formulated. As Justice Windeyer put the position: ‘When the distinction [between questions of fact and questions of law] determines whether or not in a particular case an appeal lies, there is room for questioning whether it has in philosophy or logic an essential and abstract and universal character’.\(^{17}\) In like manner, frustration at not being able to unravel the problem led Justice Graham Hill, regarded as an outstanding intellect, to declare in a case in 1995: ‘I do not wish to add to the confusion surrounding the issue whether, in a particular case, there is or is not a question of law’.\(^{18}\) In a similar vein, the High Court of Australia emphasised the failure of lawyers to explain the meaning of ‘question of law’ and ‘questions of fact’ and virtually despaired at the possibility of ever doing so: ‘The distinction between questions of fact and questions of law is a vital distinction in many fields of law. Notwithstanding attempts by many distinguished judges and jurists to formulate tests for finding the line between the two questions, no satisfactory test of universal application has yet been formulated’.\(^{19}\) This problem with the meaning of error of law also arises in legal texts. Accounts of it in textbooks typically recycle and attempt to extract meaning from some of the judicial utterance, but without producing a coherent description of the ground.\(^{20}\)

**Alternative Analysis of the Distinction**

The starting point for an alternative analysis of the distinction between law and fact consists of the model for adjudicative decisions that was described earlier and represented in Figure 1.\(^{21}\) Column 1 of this model contains the elements of the rule that authorises the decision, Elements 1-\(n\), while Column 3 contains the material facts, Facts 1-\(n\). The key to further understanding is to recognise that a legal rule is framed as a conditional statement.\(^{22}\) It operates in the following way.

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17. *Da Costa v R* (1968) 118 CLR 186, 194 per Windeyer J.
18. *Cowell Electric Supply Co v Collector of Customs* (1995) 54 FCR 1, 10; 127 ALR 257, 265, per Hill J
20. See, for example Aronson (2006).
21. In *Jegatheeswaran* [2001] FCA 865 [52]-[59] Justice Finkelstein set forth the various ways to classify facts as positive and negative; past, present and future; primary and secondary; perceived and inferred; evidential and ultimate, operative, dispositive, material or constitutive; proven and intuited.
Each element of a legal rule delineates a category of facts. Element 1 delineates a category of facts. Fact 1 is the label that the model gives to a fact that falls within the category of facts delineated by Element 1. Similarly, Fact 2 is the label given to a fact that falls within the category of facts delineated by Element 2. Obviously, this analysis can be repeated for each element. Collectively, therefore, Facts 1-n are the labels for facts that fall within the categories delineated by Elements 1-n.

A legal rule must incorporate this structure because it is seeking to change the world. Elements 1-n of the legal rule describe the part of the world that the rule seeks to change. Element 1 describes one category of facts, Element 2 describes a second category and so on. Lawyers describe facts that fit the elements as material, essential or relevant facts. The part of the world to which the rule applies (its catchment area) consists of any set of facts that includes facts that fall within each of the categories delineated by Elements 1-n. (Note that the presence of other categories of facts in the set does not alter this.)

To impose legal consequences on facts of this kind each adjudicative rule consists of a conditional statement framed in the following manner: ‘If facts occur that satisfy the elements, the consequences prescribed by the rule apply to those facts’. This is how the conditional form of the rule confers its legal authority. Facts 1-n fit within the categories delineated by Elements 1-n so the Consequences of the rule apply according to their terms.

This legal authority is impounded in a syllogism that depicts and underpins the application of any legal rule to some facts. In this syllogism the major premise consists of the legal rule that authorises the adjudicative decision. To illustrate this syllogism we will use our standard labelling system where the elements of a legal rule are labelled Elements 1-n and the facts that fit within those elements are labelled Facts 1-n. The syllogism can then be set out in a diagram in the following way:

<table>
<thead>
<tr>
<th>Components</th>
<th>Relationships</th>
</tr>
</thead>
<tbody>
<tr>
<td>Major Premise</td>
<td>Facts that fall within the categories designated by Elements 1-n cause Consequences.</td>
</tr>
<tr>
<td>Minor Premise</td>
<td>The material facts in this case, Facts 1-n, fall within the categories designated by Elements 1-n.</td>
</tr>
<tr>
<td>Conclusion</td>
<td>Facts 1-n cause Consequences.</td>
</tr>
</tbody>
</table>

Figure 2. Syllogism for Applying Law to Facts

Summary
This analysis performs two functions:
1. Law and Fact. It demonstrates in principle both the similarity and the distinction between law and material facts (which are the facts that can generate confusion). Each element of a legal rule delineates a class of fact. A material fact is a fact that fits within one such class. In abstract terms an element of a legal rule is a category of facts and a material fact is a member of such a category.
2. Application of Law to Fact. It explains how applying law to facts rests on a syllogism that takes a standard form.25

Solution 2: Error of Interpretation

Introduction
A simple and natural meaning of the phrase ‘error of law’ is that the decision maker has made an error when interpreting law in the course of making the decision. In propounding this, as we stated above, Solution 2 is really a simplified version of Solution 1. It is simplified because it avoids the unnecessary bother of incorporating a distinction between errors of law and errors of fact.

There are three aspects to the notion that an error of law is an error of interpretation. One is the nature of the error, which is simple in principle. The other two aspects involve questions for which there are not simple and direct answers – where the error should be located and whether the error can be covert as well as overt.

Nature of an Error
In principle an error of interpretation is a simple concept. An ambiguous provision has two or more meanings. Assume for the sake of illustration that a provision has four meanings that can be labelled Meaning 1, Meaning 2, Meaning 3 and Meaning 4. Assume also that a decision maker decides that Meaning 2 is the legally correct meaning. A review court, however, decides that Meaning 4 is legally correct. In this case the original decision maker has made

25. For those who approach error of law in a conventional way the fact that applying law to facts is a syllogism may assist in determining whether getting the application wrong is an error of law or an error of fact. There is a good argument that this syllogism is inherent in the nature of legal rules, which become, as explained, the major premise of the syllogism. Since the syllogism is inherent in the nature of legal rules making an error in applying law to fact should be an error of law. For judicial discussion see, for example, Collector of Customs v Pozzolanic Enterprises (1993) 43 FCR 280 and Collector of Customs v Agfa-Gevaert (1996) 186 CLR 389 which are in contrast to Brutus v Cozens [1973] AC 854.
an error of interpretation in deciding that Meaning 2 and not Meaning 4 was the legally correct meaning of the ambiguous provision.

In *Shaw’s Case* the error of law did consist of an error of interpretation. There the decision maker, the Gosforth Urban District Council, took a narrow view of the meaning of ‘service’ by an employee because it overlooked or misconstrued a wider view of ‘service’ in the relevant legislation. In consequence, when the Gosforth Urban District Council assessed Shaw’s compensation for loss of employment it failed to take into account service other than his service with the West Northumberland Joint Hospital Board. This meant that it determined the amount of compensation as much lower than it should have been.26

**Type of Error**

Which errors of interpretation constitute the ground? Will any error of interpretation constitute the ground (a version of the rule which is both simple and wide reaching)? Or is it just some errors of interpretation? If it is just some errors the courts will have to lay down rules for deciding which errors of interpretation constitute the ground and which do not. There is a multitude of criteria and combinations of criteria. Three examples or possibilities will illustrate the point:

# Possibility 1: An error of interpretation in the substantive rule constituting the cause of action, as distinct from such an error in the jurisdiction or adjectival rules, constitutes a ground of review.

# Possibility 2: An error of interpretation that it is likely to have affected the outcome of the decision comprises a ground of review. An example of such an error occurred in *Shaw*.27

# Possibility 3: Any error of law that is an error of law on the face of the record of the decision constitutes a ground for review.

If courts did decide to interpret error of law as an error of interpretation they have to make a policy decision as to which errors constitute the ground. This may be a difficult task, but there is some respite. With the common law method courts proceed on a case by case basis, rather than laying down eternal and universal rules on the first occasion when the question arises. This allows time for academics and judges to give their opinions and for the wisdom acquired by the passing of time and the concomitant opportunity for reflection to bear edible fruit.

27. *R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw* [1952] 1 KB 339
Reconceptualising Error of Law

Overt and Covert Errors
An error of interpretation may be overt or covert. An error of interpretation is overt when the authority makes a formal finding as to how a legal rule is interpreted and that interpretation is wrong. An error of interpretation can be covert when the authority wrongly applies a rule to facts but has not made a formal finding as to how the rule is to be interpreted. Instead they have assumed that it means one thing, whereas correctly interpreted it means another. Given that an error may be either overt or covert a question arises: must the error be overt or can it also be covert?

There are two further points to note about this distinction. First, covert errors of law may be the genesis of the concept of a mixed error of law and fact that courts developed when using Solution 1. A misapplication of law to facts based on a covert error of law will appear to have a factual component, although in truth the error lies entirely in the misinterpretation of the legal rule. Second, in some cases a covert error may not constitute a ground for review because it is not on the face of the record. It depends on how the court interprets the ‘face of the record’ requirement.

Solution 3: Interpreting ‘Of’
When parties invoke error of law as a ground of review for the making of a decision commonly two of the requirements for the ground are met. First, there has been an error. Something was done in the making of the decision that should not have been done or should not have been done in the way that it was done, or something was not done that should have been done. Second, there is also some law that authorises the making of the decision. There are also some ancillary laws that are invoked when the decision is made consisting of the rules of procedure, pleading and evidence. Since the requirements of ‘error’ and ‘law’ are now satisfied, the issue clearly resides in the word ‘of.’ This preposition can be read as prescribing the relationship that must exist between a law and an error for the ground of error of law to be made out.

This relationship can be whatever the courts choose to make it. That said, we can see how wide is this choice by stating three possibilities:

# Possibility 1: The error of law occurs directly with regard to the legal rule that authorises the decision because the court misinterprets this legal rule.

# Possibility 2: There is an error is an error of law such as to constitute the ground of review when the error thwarts the purpose of the legal rule that authorises the decision and does so to a sufficient degree. The most obvious standard for ‘sufficient degree’ is that the error causes the decision to be made
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with a different outcome to the one that would have eventuated had the decision maker not made the error.

Possibility 3: The error of law can occur anywhere in the decision making process. The point is that there is always a connection between the error and the rule that authorises the decision. But since the error can occur in a number of places in the decision making there can be varying degrees of directness and proximity between the law and the error.

While this approach based on attaching some meaning to the word ‘of’ is logical it comes with a price. It may make this ground of review very wide ranging. In this case it can also easily be perverted by judges keen to do justice by becoming an excuse for deciding a case in favour of an applicant whom they deem to have suffered an injustice. The point here is that if judicial review needs some residual or catchall ground, it should be explicitly devised as such and appropriately framed. It should not develop it as a corruption of an ordinary ground of review.

Solution 4: Reappraising Grounds of Review

Introduction
In earlier discussion this article explained that the problem with error of law occurred because the name or the label was conferred on the ground before the substance of the ground had been identified. Solutions 1, 2 and 3 sought to fix the problem by trying to match some error in making a decision with the label. Solution 4 seeks an answer by an alternate route that consists of reappraising the grounds of review to fill any gaps. This will involve six steps that are set out in the following table:

<table>
<thead>
<tr>
<th>Step</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Step 1</td>
<td>Make a thorough analysis of the process of adjudicative decision making.</td>
</tr>
<tr>
<td>Step 2</td>
<td>Identify the errors that might occur in the process.</td>
</tr>
<tr>
<td>Step 3</td>
<td>Single out the errors that are not already grounds of review.</td>
</tr>
<tr>
<td>Step 4</td>
<td>Determine which of these errors should be grounds of review, formulate the new grounds and enact them into law.</td>
</tr>
<tr>
<td>Step 5</td>
<td>Label these new grounds appropriately.</td>
</tr>
<tr>
<td>Step 6</td>
<td>Periodically have a parliamentary committee or the law reform commission review the operation of the new grounds.</td>
</tr>
</tbody>
</table>

Figure 3. Reappraising the Grounds of Review

In this context the author is proposing this review in an attempt to solve the problem of the meaning of error of law. However, a comprehensive review of the grounds with a view to reformulating them as the need to do so becomes apparent can potentially flush out and provide something of a solution to any
Reconceptualising Error of Law

other problems with defining and labelling grounds of review. Indeed this article has already flagged one other major problem with a ground of review, namely the problem in defining the ground described as jurisdictional error.

Step 1: Analysing the Decision Making Process
The first step involves analysing the process of making a decision. Any solution to the problem with error of law commences with an examination of the nature or anatomy of an adjudicative decision. It is only when we fully and properly understand how a decision should be made that we can identify an error, which represents how a decision should not be made.

So, for this analysis legislators must analyse the adjudicative process whereby a decision is made. By doing this they can understand the structure or anatomy of a decision. In consequence they are in a position in the next step to identify the types of errors that occur in this process.

But many lawyers, especially those who are fuelled by fervour for separation of powers, tend to see adjudicative decision as those determined by the courts and thus in some significant way to be different from decisions of tribunals and administrative officials. In reality, a court, a tribunal and an official vested with determinative power all make adjudicative decisions. When analysed, the functions involved in decisions by these three bodies are identical. Each involves the processes of taking evidence, finding facts, interpreting law, exercising discretions and applying law to facts to reach a decision. Essentially an adjudicative decision is made to resolve one or more of three issues – issues as to the meaning of a provision in a law, issues as to which version of a fact is correct and issues as to how a discretion should be exercised. To examine this process it is necessary to understand how to define an issue and how to resolve an issue.

Step 2: Identifying Errors in the Decision Making Process
This step builds on the analysis of decision making in the preceding step. It uses that exposition of making a decision to perform the crucial task of identifying the possible errors that can occur in the process. A proper analysis of decision making will tell us what should and should not take place. This is needed to identify errors because an error occurs when something that should happen does not happen or when something that should not happen does happen.

29. Christopher Enright 2015) Legal Method
Some obvious types of errors involve a wrong interpretation of law, a wrong finding of facts and a wrong application of law to facts. These errors can occur for a number of reasons. For example a wrong finding of facts may arise from failure to consider relevant evidence, consideration of irrelevant evidence, a faulty weighing of conflicting evidence or making a finding of fact in the absence of proper evidence.

**Step 3: Identifying Established Grounds of Review**
The preceding step identified all of the possible errors that can occur in making a decision. This step identifies the errors that are already covered by established grounds of review. When this has been done, it possible to remove these errors from further consideration. Thus the remaining part of the process, commencing with Step 4, concentrates on the errors in decision making that are not already grounds of review.

**Step 4: Creating the New Grounds of Review**
Step 3 involved scrutinising the list containing all possible errors then identifying those errors that already constituted a ground of review. These errors require no further consideration. Now in Step 4 the task is to focus on the remaining errors, being those that are not grounds of review. Step 4 decides whether any of these remaining errors should constitute a ground of review. Where an error is judged to be appropriate to constitute a ground of review, the step also includes defining or formulating the ground.

**Basic Questions**
A way to approach the task of assessing these errors is to consider the following questions:
1. How serious is the error in principle and in practice? Obviously, the more serious it is, the stronger the claim to be a ground of review. In assessing how serious is the error one of the major considerations is the effect that the error might have on the final decision. How likely is it to affect the final decision and how serious is this effect?
2. Is the error latent or patent – in other words, how much trouble is needed, and how much resources would need to be expended, to identify the error?

**Implementing the Changes**
The Commonwealth parliament enacted the *Judicial Review Act*, which is the popular name for the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*. This statute provides a system of judicial review that is more streamlined than the common law system and that operates as a parallel system to it. My
proposal here is to use this statute to implement the changes in a scheme that involves abolishing judicial review at common law.

**Power to Legislate on Judicial Review**

One potential obstacle to this proposal is a widespread view among Australian lawyers that s75(v) of the *Constitution* entrenches judicial review at common law so that the only way to abolish judicial review at common law is to amend the *Constitution*. Section s75(v) says, so far as relevant, that ‘in all matters . . . [i]n which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth[,] the High Court shall have original jurisdiction.’ In another article the author argues that despite its wide acceptance, this view involves a fundamental misreading of s75(v). The key propositions are these:

1. Prior to federation the United Kingdom parliament and the parliament in each of the six Australian colonies had power to abolish judicial review and reconstitute it in statute, or even just to abolish it without replacement. The framers of the *Constitution* established the Commonwealth government in this spirit – a legislature could always amend, abolish or replace any rules laid down in common law that operated in the jurisdiction.
2. Section 75(v) merely confers jurisdiction on the High Court to hear an action for judicial review. It says nothing about the substantive content of judicial review. It imposes no specific prohibition on the legislative powers of the parliament regarding judicial review.
3. Section 75(v) functions as a conditional statement, as do most legal rules. When certain conditions are met the High Court has jurisdiction. If the conditions are not met the High Court does not have jurisdiction. Section 75(v) says nothing explicitly or implicitly about the power of parliament to legislate to alter those conditions.

**Operation 1. Changing the Base of Judicial Review**

The most basic amendment involves the following steps to transfer judicial review from a common law base to a statutory base:

1. Widen the scope of the *Judicial Review Act* so that it is at least coextensive with the scope of judicial review at common law.
2. Insert a provision in the *Judicial Review Act* that a party can initiate judicial review at common law only with the leave of the court.
3. Over a period of time law-makers should review the operation of the statutory system to see whether there is any justification to retain judicial review at common law. At the same time make any additional amendments to ensure that

the *Judicial Review Act* covers everything that common law judicial review covers.

4. When it becomes clear that there is no good reason to retain judicial review at common law, abolish it.

**Operation 2.1 Introduction of New Grounds**

There are two major means for introducing new grounds of judicial review – enact a specific ground or enact a residual ground. It is possible to use either means or to use both in some combination.

**Operation 2.2 Enact Specific Grounds**

A law reform commission could devise what it considered were specific grounds of review that are currently lacking in administrative law. Then a legislature could enact legislation to amend the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to insert these grounds. As with any reform it is advisable to monitor how these changes work and make appropriate amendments if they are not working properly.

**Operation 2.3 Enact a Residual Ground**

Creating the Residual Ground

An alternative method allows for creativity and testing options by trial and error. This entails creating a statutory ground that confers a creative power on courts. There are in fact some provisions that go some way towards this in s5(1)(j) and s6(1)(j) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Section s5(1)(j) allows review of a decision on the ground that ‘the decision was otherwise contrary to law.’ Section s6(1)(j) allows review of conduct for a decision on the ground that ‘the making of the proposed decision would be otherwise contrary to law.’ These grounds, however, limit creativity by containing a ‘contrary to law’ – the big question is whether some aberrant conduct in decision making that is not legally recognised as a ground of review at present should become a ground of review.

So, the ideal catch-all ground should encompass the notion that a court can review a decision because something occurred in the making of the decision that should rightly constitute a ground for review but does not do so now. If the parliament inserted this ground into the *Judicial Review Act* it would give the courts power to identify administrative wrong doing that does not but should constitute a ground of review. When the court uses this ground it should state why it believes that what occurred should constitute a ground for review.
Review of the Residual Ground

After courts had had some experience in using this residual ground a law reform commission could review its operation. It may be that the residual ground was working perfectly well in its present form. If, however, there were problems the law reform commission could make suggestions for rectifying them.

Step 5: Labelling the New Grounds of Review

The operation of the residual ground potentially falls into two classes:

1. Recurring Wrong Doing. Some types of wrong doing in decision making may well recur. In this situation, by working on a case-by-case basis courts could define the limits and content of this recurring wrong. At the same time the courts could label this type of wrong doing for identification in some appropriate way. (Clearly the label ‘error of law’ is inappropriate and should be confined to legal history to provide a cautionary tale for what can happen when common law furnishes a label for a ground but omits to furnish a substance.)

2. Non-Recurring Wrong Doing. Some types of wrong doing may not recur. In this case leave them as one off cases without a label (unless or until the wrong doing does recur in which case it is appropriate to label it).

Step 6: Reviewing the New Grounds of Review

Ideally legislators will review any major changes to law. In fact there is a cycle of review that involves trial, review, detection of error, amendment, review and so on as the cycle continues. These are the steps in this cycle:

1. Amend the Administrative Decisions (Judicial Review) Act 1977 by doing either or both of the following:
   1.1 Adding new grounds of review to cover gaps in the law.
   1.2 Creating a residual ground of review that gives the courts a creative capacity (as described above).

2. Monitor and review the operation of the Act in its revised form.

3. Make any amendments that seem necessary, appropriate or beneficial.

4. Keep monitoring and reviewing the operation of the Act in its revised form until it works properly.

The basic idea is to keep performing this process until the point is reached where it does not seem possible to improve the Act. But that said, circumstances can change and changed circumstances may find the Act deficient. This is a general piece of wisdom that indicates it is important to keep at least some surveillance on the operation of every Act. The price of well functioning law is some form of constant vigilance.
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