Judges, Courts and Tribunals

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Introduction

In the Annual Report for 1988 of the Supreme Court of Victoria, attention was drawn to a number of matters which it was claimed were diminishing the standing and the constitutional role of the Court as the third and independent arm of government in the state, and as the guardian in Victoria of the rule of law. It referred to the rule of law as "a concept of the utmost importance implying the subordination of all authorities, legislative, executive and judicial, to certain principles generally accepted as characteristic of law such as fundamental principles of justice, of morals, of fairness and of due process. It involves equality before the law, and uniformity, consistency and certainty in decisions arrived at by a disinterested and impartial application of legal rules." The chief function of the Supreme Court was to guarantee the administration of justice according to law. It then asserted that the existence and nature of the body politic of the state depended upon the capacity of the Supreme Court to exercise its function as the state's court of general jurisdiction, and that it must follow that any whittling down of the Court's jurisdiction tended to impair that capacity. To deprive courts of jurisdiction in favour of others who did not have the independence of the iudiciary must weaken the rule of law.

The report then stated:

> "Since 1975 [when the Victorian Constitution was restated by the Parliament in the Constitution Act 1975] many Acts have conferred jurisdiction on tribunals whose members do not have the permanency of appointment of judges but rely on the Executive for reappointment at the end of a period. Some of these members are liable to summary dismissal by the Executive. We draw attention to the fact that jurisdiction which previously belonged to the Court has been conferred upon other bodies and individuals who, however distinguished, are not obviously independent of the Executive."

It added:

> "There have been instances where legislation has sought to confer on a tribunal jurisdiction which is exclusive of the jurisdiction of the courts in cases of a kind commonly brought before the courts."

The report invokes principles commonly conceived as fundamental in our constitutional system—the separation of powers, the rule of law, the independence of the judges of the highest courts as guardians of the rule of law—and implies that these are under serious threat from the process of tribunalisation by

which jurisdiction in matters traditionally falling within the jurisdiction of the courts has been conferred (sometimes exclusively) on tribunals which do not have the independence from the Executive of the Judges of the Supreme Court.

The process of tribunalisation has a long history, but it is in this century that tribunals have proliferated so as to be an essential part in common law jurisdictions of the machinery of government. In such diverse spheres of government as the regulation of economic policy, including the maintenance of free competition, industrial relations, consumer protection and public utility regulation, in the field of social welfare including workers' compensation, unemployment, health benefits and pension schemes, in housing, land planning and environmental protection controls, and in areas involving human rights issues such as non-discrimination, immigration and deportation and the practice of professions, they are the instruments to which governments have increasingly had recourse to solve problems of administration. In Wade and Forsyth's *Administrative Law*[1] there is included a table which lists the areas in which tribunals have been constituted in England, the number of tribunals constituted and the number of cases decided by them in 1992. In some areas the number of cases decided is enormous. In the United States it appears from Davis and Pierce's *Administrative Law Treatise*,[2] that the Department of Health and Human Services alone has 800 administrative law judges (about equal to the number of federal district judges) who adjudicate about 320,000 contested cases a year (more than the number of civil cases resolved annually in all federal and district courts). In Australian jurisdictions also there is an extensive and increasing reliance on administrative tribunals at both Commonwealth and State levels.

In some instances the functions conferred on these tribunals raise no issue of possible intrusion on matters which have traditionally fallen within the jurisdiction of the courts, but in others they have been created in such a way as to be viewed as court substitutes, as alternatives to the traditional courts. It is with the growth of these adjudicatory tribunals that the concern to which reference has been made is directed. They do however form such an integral part of the machinery of contemporary government that it may seem futile to seek to wind back the clock to the situation which prevailed at an earlier time. It is suggested that a more realistic course is to begin by accepting that certain social, economic and other factors have led to the reliance by governments on adjudicatory tribunals, and to examine how far they do in fact exercise judicial functions, and so far as they do, how the concerns expressed in the Victorian report require the imposition of judicial controls on the functioning of adjudicatory tribunals in our contemporary legal order.

It is intended to carry out this examination having regard to the three matters addressed in the report, namely the principle of separation of powers and of the Supreme Courts as the superior courts of general jurisdiction; the impact of tribunalisation on the rule of law; and the issue of independence from the Executive of adjudicatory tribunals.[3]

Courts, Tribunals and De Facto Separation of Powers

I begin with an examination of the principle of separation of powers, since I consider that too formalistic a conception of the nature and role of that principle in our constitutional system has been productive of much confusion in respect to the relation of courts and administrative tribunals.

The principle of separation of powers is invariably linked with the names of Locke and Montesquieu, though it had its origin in Aristotle's Politics. Locke had made the principle that the main powers of government should be separated applicable only to the separation of the legislative and executive functions. He had not conceived the judicial as a distinct power, and had not sought its separation. He distinguished between the executive power and what he termed the "federative" power, the power of making war and peace and concluding treaties, but thought that they should lie in the same hands. This distinction was reformulated by Montesquieu into the now classical distinction between legislative, executive and judicial powers. The reason for insisting on the distinction is given in Book XI, Chapter 6 of *The Spirit of the Laws* which is headed "Of the Constitution of England".[4] It is preceded by the claim that "one nation in the world has for the direct end of the constitution political liberty; and that an

examination would be made of the principles on which this liberty was founded." He expressed one principle in these terms:

> "When the legislative and executive powers are vested in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again there is no liberty if the judicial power be not separated from the legislative and executive. Were it joined with the legislative the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise these three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

It may be remarked while Montesqueiu's formulation of the principles implied a rigid separation, Blackstone, who was greatly influenced by Montesquieu, reformulated the second proposition in terms which required that the administration of justice be in some degree separated from the legislative and also from the executive power.[5]

Separation of the legislative, executive and judicial powers was thus essential for the establishment and maintenance of political liberty. But what excited Montesquieu's admiration was not only the separation of the three powers, but also the balance between the three orders of the realm, the King, Lords and Commons. The judiciary was excluded from his study of the balance of power, as in this respect it was, he thought, "in some measure next to nothing". The English model seemed to him to provide a mixed constitution of an ideal type, and it was the English system of checks and balances which he thought maintained a state of equilibrium between King, Lord and Commons which ensured civil liberty. He summed up his treatment of the matter of balance of powers with this observation:

> "Here, then, is the fundamental constitution of the government we are thinking of: The legislative body being composed of two parts, they check one another by the mutual privilege of rejecting. They are both restrained by the executive power as the executive is by the legislative."

It was easy to discern in the England of the first half of the eighteenth century the existence of a constitutional system which could be described as resting on the three institutional pillars of the Courts, the Crown and the bicameral Parliament. The effect of the constitutional settlement after the Revolution of 1688 was that the independence of the judges of the superior courts was strengthened by giving them tenure during good behaviour. The jurisdiction of the courts was not affected, as the long challenge for the prerogative courts had been virtually ended in 1641. The specific limitations imposed on the power of the Crown were not extensive. The King had no power to suspend or dispense with statutes; he could not by proclamation create new offences, and he could not raise and keep a standing army in time of peace without the consent of Parliament. It is true that the whole basis on which the Crown's power rested was transformed: the King had become a statutory monarch. Nevertheless, the exercise of executive power remained vested in the Crown. The great achievement of the Revolutionary Settlement was to confirm that sovereignty lay not with the King but with the King in Parliament.

At the time when Montesquieu wrote, there was a de facto separation of powers of Crown, Parliament and Courts. There was also in operation a system of checks and balances between the King, Lords and Commons. As Sir David Keir has pointed out,[6]

> "to some extent the praise [of admiring contemporaries] for the rule of law and the separation of powers which preserved it was justified. The law of the land was supreme. The units of government were divided, yet it is plain that the emphasis placed in this latter point was over-

> stressed. Interconnections abounded. The Crown was an organ common to the legislative and executive. Ministers sat in both Houses. Both Houses had judicial powers, and the Lords were as an appellate tribunal an integral part of the judicial system. Local courts of justice possessed administrative functions which the central courts supervised. There undoubtedly was check and balance. But there was no complete separation."

The principle of separation of powers had never been rigidly applied in England, even within the central government, but it was not until the latter part of the nineteenth century that pragmatic considerations arising from the vast increase in administrative activities and services led on the one hand to the growth of delegated legislation (and with it brought into prominence the issue of judicial control over such subordinate legislation) and on the other to the extensive conferral of "quasijudicial" authority on public bodies other than the courts.

There could of course be no question that the establishment of tribunals with such powers was a matter in which Parliamentary authority was supreme so far as their legality was concerned. The matter of the expediency of the policy is different, and has led to sharp conflict of views. One approach is to claim that, as the function of the doctrine of separation of powers is to maintain the rule of law, it must be a cardinal matter of policy that the exercise of judicial power must be vested exclusively in the holders of judicial office. That position may be justified, but it is not mandated by any rigid principle applied under the English Constitution or under the Constitutions of the Australian States. While there is broad agreement on the general principle of the need for separation of legislative, executive and judicial powers for the maintenance of political liberty and the rule of law, there is no settled doctrine as to the formulation of that principle in England or in most other common law jurisdictions, or for that matter in the constitutional systems of Western Europe. It is rather a principle which is capable of multiple and varying expression and which reflects historical conditions rather than logical derivation from a settled doctrine.

It may be mentioned that this point is made in the judgment of Kitto J in *R* v *Davison*.[7]

Kitto J like Blackstone referred to the doctrine as requiring that the three functions should be to some extent dispersed rather than concentrated in one set of hands, and as being not a product of abstract reasoning alone but based upon observation of the experience of government.

It has been affirmed in several decisions of State Supreme Courts that the doctrine of separation of powers is not part of their constitutional law,[8] and in *McCawley* v *The King*[9] it had been decided by the Privy Council that the Queensland legislature had the power by an ordinary enactment to alter the state constitution including the judicial institutions of the State and the tenure of judges. The separation of powers within the state is a matter for constitutional propriety and not a requirement of constitutional law.

In *Kable* v *DPP for NSW*,[10] the High Court affirmed in the judgments of all its members who considered the question that the doctrine of the separation of the judicial power from the legislative and executive powers was not part of the constitutional law of New South Wales. Nevertheless, the majority judgments in that case seized upon the position of the state courts as repositories of federal judicial power under Ch III of the Commonwealth Constitution to conclude that the Supreme Court of New South Wales could not be invested with functions which were incompatible with the exercise of federal judicial power. The conclusion by the majority was that the Act under challenge was invalid because it imposed on the Supreme Court an authority which tended to undermine public confidence in the impartiality of the Supreme Court which would be seen by members of the public as an instrument of executive government policy.

This is not the occasion to examine in any detail the reasoning which led to that conclusion. It is enough to point to three matters. The first is that, as McHugh J said, the working of the Constitution requires and implies the continued existence of a system of state courts with a Supreme Court at the head of the state judicial system. Subject to that, the states can abolish or amend the structure of existing courts and create new ones. The second is that the state courts form part of an integrated Australian judicial system and are institutions which exercise federal as well as state judicial power. Accordingly, neither the state nor

federal Parliament can invest them with functions incompatible with the exercise of federal judicial power. And the third is that while a state may confer nonjudicial functions on a State Supreme Court in respect of non-federal matters and on a State court judge as persona designata, such conferral would be invalid if it gave the appearance that the court or judge was not independent of the executive government of the state. The end result is, as McHugh J said, that although New South Wales has no entrenched doctrine of the separation of powers and although the Commonwealth doctrine of separation of powers cannot apply to the State, in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of powers.

To that extent there has been a transition from a situation of de facto separation of powers to one of de jure separation. What the ambit of the Kable doctrine will be is a matter which it would be unfruitful to consider in this paper. The critical point of the case for present purposes is the assertion that the states do not have unlimited power in respect of state courts.

Courts, Tribunals and De Jure Separation of Powers

The doctrine of separation of powers is written deep in the structure and language of the Commonwealth Constitution. The legislative power of the Commonwealth is vested in a federal Parliament (s. 1); the executive power is vested in the Queen and is exercisable by the Governor-General as the Queen's representative (s61); and the judicial power is vested in the High Court of Australia, in such federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction (s71). This de jure separation of powers and specific provisions in Ch III of the Constitution has led the High Court to adopt an interpretation of it which requires a strict separation of the judicial power from the legislative and executive powers, while permitting a wide delegation of law-making authority to the executive. This has involved the High Court in formulating a definition of the judicial power, in determining whether the vesting of a nonjudicial power in a court or judge acting as a member of the court is ancillary or incidental to the exercise of judicial power, or whether judicial power has been conferred upon a person or body precluded by Ch III from exercising federal jurisdiction. Most recently it has been concerned to determine the limits on the power to confer nonjudicial functions on Ch III judges as designated persons. Underlying its formulation has been a strong recognition of the necessity for the maintenance of liberty that there should be a separation of judges from persons who perform legislative and executive functions, and that the character of the judicial or other power should be determined according to traditional British conceptions. The principle of judicial independence, consecrated in s72 of the Constitution, the principle that other branches of government may not exercise the judicial power of the Commonwealth and that functions may not be imposed on a federal court which are not proper to the exercise of the judicial power, the necessity for the maintenance of public confidence in the independence of the judiciary, and the special role of the judicial power in a federal system of government, have been critical components in the High Court's analysis. The result has been a rigorous application of the principle of separation of powers which has built upon but has gone beyond the de facto system which developed in England.

Under the Commonwealth system, there is rigorous enforcement of the principle that judicial power may not be vested in bodies other than courts. There seems to be little controversy over this.[11] The reasons which underlie that principle are powerful, and provide a strong basis for believing that in constitutional systems which are not built upon a rigid separation of powers doctrine the policy should be that only in very exceptional circumstances, if at all, should judicial power be exercisable by bodies which are not courts. There is some controversy on the matter of the doctrine of the *Boilermakers Case*,[12] namely that the Commonwealth Parliament may not invest a federal court with power that is not part of the judicial power of the Commonwealth, or which is not ancillary or incidental thereto. That particular issue has become quiescent in recent years with the adoption of refinements to the doctrine which have introduced a degree of flexibility. In particular, on pragmatic grounds the appointment of Ch III judges as members of tribunals can be highly beneficial, and if it is not constitutionally incompatible with the holding of judicial office on grounds stated in recent cases,[13] it is not precluded.

It may be pointed out that in the United States there is considerable controversy, and at a fundamental level, on the implications to be drawn from the principle of separation of powers. In a decision given in 1881 shortly before the drafting of the Commonwealth Constitution, the US Supreme Court referred to the principle that "persons entrusted with power in any of these three branches should not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other".[14] That view has been rejected in favour of one that the separation of powers did not make each branch autonomous, but left each dependent upon the others. As Kennedy J said, in a recent case,[15] separation of powers does not mean that each of the three branches of government must be entirely separate and distinct, for that was not the governmental structure of checks and balances established by the Framers.

While the US Constitution provides for the vesting of legislative powers in Congress (Art I), of executive power in the President (Art II), and of the judicial power in the Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish (Art III), the concern of its founders was with the need for checks by the three branches of government on the power of each rather than with the adoption of some settled version of separation of powers. An attempt to write one into the Constitution failed. Madison thought that separation of powers "can amount to no more than this, that where the whole power of one department of the government is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted."[16]

On the particular question of the constitutional legitimacy of adjudication by administrative tribunals, the US Supreme Court has experienced marked shifts of opinion. In 1982 it held[17] a bankruptcy statute unconstitutional because it empowered judges who did not hold the qualifications provided in Art III to modify contractual rights, on the ground that private right disputes were inherently judicial, because they had an independent antecedent source in the judicially enforced common law. This approach was rejected in 1986 in *Commodity Futures Trading Commission* v *Schor*.[18] The majority judgment in that case emphasised that "practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Art III." It asserted that Art III served the purpose of protecting the role of the independent judiciary within the constitutional scheme, and safeguarded the rights of litigants to have claims decided before judges who were free of political domination by other branches of government. In relation to the first of these matters, it concluded that courts evaluating Art III challenges should look to a variety of factors, including "the extent to which the essential attributes of judicial power are reserved to Art III courts, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Art III courts, the origins and importance of the right to be adjudicated, and the concerns animating Congress's departure from the requirements of Art III". In relation to the second matter, it concluded that Schor had waived his right to have his claims decided by judges by filing them with the Commission.

The position of the United States Supreme Court appears to be one adopted on more pragmatic grounds than that of the High Court, reflecting the vast explosion in the

workloads of both courts and nonjudicial agencies, and the practical difficulty of handling this while preserving a strict separation of judicial and other adjudicatory functions. It is not of course a system which is free from constitutional restraints, but it appears to have a degree of flexibility which is greater than under the Commonwealth Constitution. Flexibility is obviously a virtue, but just as obviously it is not the only matter for consideration. The critical questions, it is suggested, are those of the criteria which should be applied to determine whether the matter is one which must be reserved for decision to the courts, or should be so reserved, or whether it is one which may be left to tribunals which are not courts; and if it is of the latter kind the question of the ability of the courts to control the exercise of jurisdiction by tribunals.

Courts, Adjudicatory Tribunals and the Rule of Law

The differentiation between courts and tribunals has been made historically on the ground that the judicial

power is fundamentally different from the executive power. This has been denied by some writers, including Jennings and Robson[19] who, while agreeing that the judicial process was characterised by independence from political influence and a special historical and institutional background, considered that the function of judges was essentially administrative, the administration of justice, and that in this respect it was no different from that of tribunals which were also concerned with the dispensation of justice. The important matter was that the tribunals should operate in accordance with the best features of the judicial technique. Most writers have however continued to insist that there is a basic distinction between judicial and administrative functions, though there is sometimes manifested a tendency to make the distinction in terms of whether decisions are made on the basis of pre-existing legal rights or on policy grounds. That is not a satisfactory distinction. There are many tribunals which seek, and are obliged to seek, as much as do the courts to apply the existing law to the facts before them, and they may not be obliged to give effect to policy unless it is expressed in the language of the law. It is of course well settled law that inquiry as to facts and application of the law to those facts does not necessarily involve the exercise of judicial power, they may take their character from the purpose for which they are undertaken. [20] The distinction is a functional one, involving in broad terms a distinction between the administrative function of the application of the law and government policy to individual cases, and the judicial function of authoritative determination of controversies on the basis of pre-existing law. That this distinction may involve considerable difficulty in application is undoubted. One has only to recall the litigation relating to the establishment of the taxation boards of review to appreciate this.[21]

If the superior courts are to be the bodies upon which falls the duty of guaranteeing the administration of justice according to law, it is necessary to define precisely those attributes which must coexist if a body is to be considered to be a court. It is suggested that three matters are essential. First, the body must be one which makes decisions which (subject to appeal) finally determine the legal rights of the parties and bind them in law. Secondly, it makes its decisions after due process. Thirdly, its judges are appointed until retirement at a fixed age (and not for a term, renewable or not renewable). A body without all these characteristics is not a court but a tribunal. In other words, the essential concepts are those of judicial function, judicial process and judicial tenure.

The criteria for defining the concept of the judicial function has been a matter for frequent consideration by the High Court. It has admitted that it is difficult, if not impossible, to frame a definition of judicial power that is at once exclusive and exhaustive.[22] Generally it involves the determination of controversies between citizens, or between citizens and the executive government, though certain traditional exercises of curial jurisdiction by English courts which do not involve the determination of controversies may fall within the ambit of the power. That determination is made by the ascertainment of facts, the application of an antecedent legal standard, and the exercise where appropriate of judicial discretion. The result is promulgated in public and implemented by binding orders.[23] In the recent case of *Brandy* v *The Human Rights and Equal Opportunity Commission*,[24] reference was made to a statement by Dixon CJ, and McTiernan J, in R v Davison that "the truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within the judicial power, so that the Parliament cannot confide the function to a person or body other than a court constituted under ss71 and 72 of the Constitution." It was then commented that the expression "judicial determination" means an authoritative determination by means of the judicial method, that is an enforceable decision made by applying the relevant principle of law to the facts as found.

The second essential feature of a court is that it must act in accordance with the judicial process. This is indeed comprehended within the definition of judicial power. As Gaudron J explained in *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs* "so critical is the judicial process to the exercise of judicial power that it forms part of the definition of that power. Thus judicial power is not simply a power to settle justiciable controversies but a power which must be and must be seen to be exercised in accordance with the judicial process". It requires that judges "act openly, impartially and in accordance with fair and proper procedures for the purpose of determining the matter in issue ascertaining the facts and the law and applying the law as it is to the facts as they are." The critical matter is that controversies are determined by impartial judges after a hearing of both sides, oral or written.

The third feature is judicial tenure. The measures which have traditionally been adopted by parliaments in common law jurisdictions (and sometimes by constitutional provision) to protect judicial independence have been those of providing security of tenure and that the remuneration of judges is not decreased during their tenure of office. These measures reflect the community conviction that the principle of judicial independence is fundamental to our system of government. It is designed to ensure that in the determination of cases involving litigation between citizens, or between citizens and organs of government, the courts and judges will not be subject to pressures which may affect or be seen as likely to affect their impartially. It exists as an essential element in securing that the rights and liabilities of members of the community are determined by the impartial application of the law. Though originally the guarantee of tenure in the form established by the Act of Settlement of 1701 was accorded only to judges of the superior courts of Westminster, it has been extended in somewhat varying forms in Australian jurisdictions to all holders of judicial office.

It is suggested that the maintenance of the rule of law requires, as one critical matter, that litigants must have the right of initiating proceedings in the Supreme Courts of the states in all matters falling within their general jurisdiction. That jurisdiction has been conferred by different formulae, but the position in all states is as provided in s85 of the Constitution Act 1975 of Victoria, that the Supreme Court has jurisdiction in all cases and has unlimited jurisdiction. Any provision excluding that right would have the direct effect of limiting the capacity of the Supreme Court to intervene in order to ensure the observance of the rule of the law. But while the Supreme Court is invested with unlimited jurisdiction, it is given the discretion not to exercise it in relation to any matters in respect of which jurisdiction is given to any other court, tribunal or body. The discretion belongs to the Court, and as the Victorian report recognises, it would seldom be exercised, an appeal to the Supreme Court from the lower court or tribunal would usually be regarded as sufficient. Nevertheless, legislation which confers on a tribunal jurisdiction which is exclusive of the jurisdiction of the courts is reprehensible. The rule of law is placed in jeopardy by any provision which excludes the courts from the exercise of their iurisdiction.

It does not follow that legislation which confers on tribunals jurisdiction which falls within the concept of judicial power is necessarily unacceptable. It is a requirement of the Commonwealth Constitution that the judicial power of the Commonwealth may be exercised only by the courts specified in Ch III. It is not a requirement of state constitutions, and there are important practical reasons which have made it difficult to insist on it as an inflexible requirement. These relate predominantly to issues of cost and delays in judicial proceedings. To some extent public concern with the perceived inability of the courts to handle their work expeditiously and at a reasonable cost can be mitigated through the reform of court processes and administration, and vigorous measures are being adopted to achieve this, but such steps may not suffice to quell the movement towards tribunalisation.

There have clearly been cases in the states where matters which traditionally fall within the jurisdiction of the courts have been entrusted to tribunals, for example small claims tribunals and rent tribunals which can make orders for ejectment. Such departures from the principle that the judicial function should be exercised exclusively by courts may be warranted on the ground of cost, efficiency and expedition, provided that the jurisdiction of the Supreme Court in relation to such matters is not excluded, and that the tribunals which exercise judicial power are subject to control by the courts.

It should however be recognised that pressure for the establishment of adjudicatory tribunals has not come mainly from a desire to entrust judicial functions to tribunals.

It has come from a very different conception, namely that administrative decisions which affect the rights of citizens should be made by tribunals which have substantial independence from the executive branch of government. This point is cogently expressed in the 1957 Report of the Committee on Administrative Tribunals and Enquiries (the Franks Committee). It stated its view as being that "tribunals are not ordinary courts, but neither are they appendages of Government departments. We consider that tribunals should properly be regarded as machinery provided by parliament for adjudication. The essential point is that in all these cases Parliament has deliberately provided for a decision outside and independent of the

Department concerned. The intention of Parliament to provide for the independence of tribunals is clear and unmistakable."[25]

In relation to adjudicatory tribunals which do not exercise judicial power, the maintenance of the rule of law is primarily achieved by subjecting the act or order of the administrative tribunal to judicial review, in order to determine whether or not it should be allowed to stand. Rights of appeal from a tribunal to a court may also be provided by statute particularly to ensure consistency of application of the law by different tribunals. The function of judicial review is to ensure that decisions are made in accordance with law and the requirements of natural justice; it is not to review the decision on its merits.[26] It is an essential element in maintaining the rule of law.

Judicial Tenure and the Independence of Adjudicatory Tribunals

One of the concerns expressed in the Victorian report was that to deprive the courts of jurisdiction in favour of others who do not have the independence of the judiciary must weaken the rule of law. That proposition is irrefutable. The impartial administration of justice requires the determination of controversies between citizens, and between citizens and government, by persons who are independent of the executive and whose independence is buttressed by security of tenure. To say this is merely to affirm that the absence of any of the three characteristics of a court as already defined means that a tribunal which administers justice does so without the institutional structure and guarantees which have traditionally been found essential to the maintenance of the rule of law. While there may be circumstances in which some departure from the principle that the judicial function should be exercised exclusively by courts may be justified, it is suggested that any such departure entails a risk to the administration of justice and requires close scrutiny before it is accepted.

It is however on the subject of the independence of adjudicatory tribunals which are not invested with judicial powers that I should like to address some brief concluding remarks. As already mentioned, the Franks Committee recognised the clear intention of Parliament that these bodies should be independent, and it made a number of recommendations to secure this.

If a tribunal is to be seen as a body able to make decisions affecting the rights of citizens which stands between citizens and the administration, it must be so organised as to ensure a degree of institutional separation from the administration in matters bearing on the exercise of its functions, and the independence of its members in performance of their role. This bears an obvious parallel to the institutional and individual aspects of judicial independence to which attention has been drawn particularly in recent decisions of the Supreme Court of Canada.[27] Tribunals which, though not invested with judicial power, are required to act judicially, must act and be seen to act impartially, and it is of critical importance that these tribunals and their members, like courts and judges, must not be subject to pressures that may affect or be seen as likely to affect their impartiality. It is therefore natural to suppose that, as tenure until retirement at a fixed age is a guarantee provided to secure judicial independence, so appointments until a fixed retiring age subject to removal for proven misconduct or incapacity is as necessary to ensure the independence of tribunals as it is of courts.

There are however very considerable difficulties in adopting this approach. In a recent report of the Administrative Review Council[28] it stated that it does not consider that tribunal members should be tenured (appointed to retirement age). The needs of the of review tribunals change over time, and no selection process can guarantee that a person considered suitable for appointment will remain so indefinitely in the light of changing circumstances and demands. Tenured appointments reduce the flexibility of tribunals to ensure that their pool of members remains appropriate to the current set of tasks. This is particularly the case because review tribunals may review decisions on their merits rather than on legal grounds alone. It recommended that review tribunal members should be appointed for terms of between three and five years, and should be eligible for re-appointment.

The issue of tenure for appointees of Commonwealth Tribunals was examined a few years ago by a Joint

Select Committee of the Parliament. It recommended that for quasijudicial tribunals an "adequate" term of office should be provided. It suggested that for the senior members of such tribunals that term was approximately until a retiring age of 65 or 70. Other members should be appointed for a reasonable length of time, for example seven years. Removal before expiration of the term should be for cause specified in the relevant legislation and adequate provisions for removal should be ensured. In submissions to that Committee it was strongly argued that tenure of the type provided for in s72 of the Constitution was essential for full time members of "peak tribunals". Such tenure is not in fact at present accorded to all members of Commonwealth peak tribunals. The great diversity of situations which call for the exercise of power judicially and of persons and institutions which may be involved, varying from part-time lay committees to full-time professional commissions, the need to ensure that appointees continue to have the special expertise required to carry out their functions, and the existence in some fields of appellate administrative bodies which may review decisions of other administrative bodies~on their merits, are factors which have made it difficult to accept as a general rule that members of adjudicatory tribunals should be accorded the type of tenure accorded to judges.

It is of course not suggested that tenure is the only element in securing independence. All that is being suggested is that the conferral of judicial functions on tribunals which lack the traditional judicial guarantee provided by tenure has the effect that a matter which long experience has demonstrated to be an essential element in ensuring that rights are determined by the rule of the law is abandoned. If state adjudicatory tribunals which have been invested with elements of judicial power are so constituted that their members have judicial tenure, and they are required to exercise their authority judicially, they will in effect be courts. Perhaps the conclusion is that it is with courts that the exercise of judicial power should remain exclusively vested, as it is in the case of the Commonwealth. At least, any departure from that position requires strong justification.

Footnotes

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Seventh edition (1994) Clarendon Press, Oxford, at pp956-963.

2

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3

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4

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5

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6

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7

(1954) 90 CLR 353 at pp 380-381, in a passage cited in *Wilson*v *Minister for Aboriginal and Torres Strait Islander Affairs*.

8

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9

(1920) 28 CLR 106.

10

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11 See Report of the Advisory Committee to the Constitutional Commission on the Australian Judicial System (1987) p 66.

12 (1957) 95 CLR 529.

13 These include *Grollo* v *Palmer* (1995) 184 CLR 348; and *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs*, delivered 6 September 1996.

14 *Kilbourn* v *Thompson* (1881) 103 US 168 at pp190-1.

15 *Private Citizen* v *US Department of Justice* (1989) 491 US 440.

16 Federalist 47.

17 *Northern Pipline Co*. v *Marathon Pipeline Co* (1982) 459 US 50.

18 (1986) 478 US 835.

19 See Wade, HWR: Quasi-Judicial and Its Background, 10 CLJ 210.

20 See for example *Ranger Uranium Mines Pty Ltd* (1987) 163 CLR 656 at pp 665-6; *Precision Data Holdings Ltd* v *Wills*(1991) 173 CLR 167 at p 189.

21 *Shell Co*. *of Australia* v *FCT* (1926) 38 CLR 151; affd (1930) 44 CLR 530.

22 *R* v *Davison* (1954) 90 CLR 353 at p 360.

23 *Wilson* v *Minister for Aboriginal and Torres Strait Islander Affairs*.

24 (1995) 127 ALR 1.

25 Paragraph 40.

26 See the paper by Sir Anthony Mason: Administrative Review. The Experience of the First Twelve Years. 18 FLR 122.

27 *Valente* v *The Queen* (1985) 2 SCR 673; and *The Queen* v *Beauregard* (1986) 2 SCR 56.

28 Better Decision: Review of Commonwealth Merits Review Tribunals, Report No. 39, 1995.