NORMATIVE AUTONOMY AND THE JUDICIALISATION OF TRIBUNALS

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Introduction

When Justice Beazley approached me about giving this talk, I have to say that I felt some hesitation. I am not an administrative lawyer, but rather very much a constitutional lawyer. Moreover, one of the consequences of being Dean is that one has no time whatever for research. That means that it is very difficult to develop the breadth of knowledge in Australian practices that I would like to have before speaking to an Australian topic, particularly because I did not come to Australia to act as a Canadian expatriate.

Nevertheless, there has been one topic in the administrative field that has intrigued me since my arrival in February, and it is that topic that I would like to address this evening. I hope you will forgive my lack of depth in contemporary Australian administrative law. In partial compensation, I will draw upon an earlier dimension of my own scholarship that did cross the Australian/Canadian divide: my work on the specialised administrative regimes established to govern industrial relations at the turn of the century – arbitration in Australia, conciliation in Canada.[2] That example speaks in important ways, I believe, to important challenges facing Australian administrative tribunals today.

I understand that this year, your seminar series has tended to focus on tribunals, and especially the extent to which they may be coming under increased pressure from governments of the day. My concern is with one common response to such pressures – a response that tries to insulate tribunals from political pressures by attempting to wrap them in the cloak of judicial independence. I am concerned, in other words, with the increasing judicialisation of administrative tribunals.

Factors encouraging judicialisation of tribunals

There are, of course, a number of factors driving this process. One is the factor to which I have just referred: the attempt to buttress tribunals' independence by emphasising the extent to which they act like courts. Another is the attempt to harness the authority – the symbolic weight - of courts to tribunals, by for example the obvious expedient of appointing judges as their members. And of course, there is no doubt a measure of institutional self-interest at work among tribunal members. The prestige and flattery of judicial trappings doubtless exercise their own attraction.

There are also a number of structural factors that tend towards judicialisation (without being themselves determinative). One is, I believe, the constitutional requirement of the separation of the judicial and executive powers. Now this may seem paradoxical, for ostensibly that separation forces tribunals **not** to be judicial. But of course, one of the principal ways in

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1 My thanks to Eric Ghosh for his research assistance, and to Associate Professor Margaret Allars and Mr Brian Opeskin for their helpful comments.

2 See especially Webber, "Compelling Compromise: Canada chooses Conciliation over Arbitration 1900-1907" (1991) 28 Labour/Le Travail 15.

which the separation of powers is respected is by dividing different stages of regulation between the tribunals and the courts, often in a manner that permits the courts to revisit matters that tribunals address in first instance. When this occurs, tribunals will inevitably perform their role in a manner that keeps one eye firmly fixed on the courts; inevitably, they will be pulled towards a court's view of the world.

The tendency to create general appellate or review tribunals, like the AAT or the ADT, also must create a bias in favour of judicialisation. I know that expedients have been found to preserve elements of specialisation and expertise in the make-up of panels. But nevertheless, the very fact of having a general review tribunal that is not, in principle, subject-specific, must push the process towards greater generality of standards, less responsiveness to particular domains, and more straight-line adjudication.

I suspect, however, that the strongest tendency towards judicialisation operates on a more theoretical level – that it is driven by a genuine concern that tribunals *should* act like courts, that really the only viable administrative justice consistent with the rule of law and democratic control is one in which tribunals apply, as faithfully as possible, express rules pre-established by an open and democratic process. This means having real law applied by institutions that look (as far as possible) like real courts. This view is influential in a great many jurisdictions, although I wonder whether it might be especially pronounced in Australia, where there tends to be a vibrant distrust for authority, and especially for authority that operates by discretion or presumes to found its decisions on anything but the most explicit norms.

It is this position against which I most want to argue. I wish to argue that there is a significant cost to judicialisation, a cost that may very well undermine many of the purposes for which tribunals were initially created. I am thinking particularly of tribunals' ability to deal with disputes in ways profoundly different from courts, ways that in turn relate to a very different idea of legal normativity. In trying to make our tribunals look and act like courts, we may be surrendering their primary advantage. It is to that cost that these remarks are directed.

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Why autonomous tribunals?

Why do we create autonomous administrative tribunals?

The decision-making autonomy of tribunals has been justified on a variety of grounds. Most tend to focus upon procedural advantages. Tribunals can decide matters more quickly and less expensively. They can blend a range of dispute settlement strategies: adversarial adjudication, inquisitorial adjudication, fact-finding, mediation. They are arguably more accessible and comprehensible to ordinary citizens for they can avoid the technicality and expectations about parties' autonomy typical of adjudication before courts. And the procedural advantages do not accrue solely to individuals: governments themselves benefit from agencies that can administer mass programs quickly and inexpensively.

Other justifications focus on the substance of tribunals' decision-making. Generally, these emphasise the expertise that tribunals can enjoy in particular domains. Thus, an industrial commission knows the employment context, has some grasp of the web of legal regulation that bears upon that milieu, and can craft appropriate solutions more efficiently than a non-specialist court. Specialisation is valuable, in other words, essentially because the tribunal begins the proceeding with a comprehensive grasp of the law, and has the factual background necessary to a sound appreciation of the evidence.

These justifications are (in many instances) compelling and I do not want to understate their importance. I believe, however, that there is another advantage to tribunals that is often

neglected, precisely because it demands a different understanding of what law is all about. Sometimes tribunals are valuable not just because they apply the law more efficiently or more accurately, but because they are capable of applying a very different kind of law. They are valuable because of the very different conception of legal normativity that they embody.

Normative dimensions of tribunals' activities may vary with the field

Now, I want to make clear that what I am about to say may not be true of all tribunals. My sense is that in this area, differences in the normative dimension of tribunals' activities vary with the field. In some, there may be little claim to a conception of law different from that of courts. And even where there is such a claim, the internal operation of that normative order may be very different depending upon whether one is dealing with, for example, labour negotiations, a securities market, or telecommunication regulation.

One way of conceiving of this different approach is found in the work of the administrative law theorist Harry Arthurs. He emphasises that one of the great merits of administrative tribunals is that they can be responsive to the norms that are generated out of the patterns of social interaction in particular contexts - the "indigenous" norms of the workplace, or those of securities markets, for example. Administrative tribunals should be understood, then, not simply to be applying a law pre-determined by the legislature, but rather to be responding to and elaborating the norms particular to specific domains of regulation. Arthurs himself draws an analogy to Lord Mansfield's use of special juries in the development of the commercial law, in which those actually engaged in trade were actively involved in determining the norms applicable. [3]

This approach therefore places a high premium on the autonomy of robust and independent administrative tribunals, working in a manner almost entirely exempt from judicial oversight, precisely because the tribunals themselves are best placed to understand the specific context in issue and the norms appropriate to it. On this view, the emphasis on administrative tribunals' expertise takes on a whole different – and indeed normative - dimension, because the expertise relates not just to the legal rules, but to the capacity to grasp and articulate the norms emergent in the parties' own interaction.

This kind of picture has been influential in a number of domains (although not without some commentators expressing significant concerns about the "capture" of regulators by the interests they are supposed to be regulating). It has been particularly important in labour relations, but it has also been invoked in such fields as telecommunication regulation or the self-regulation of the professions. I do not wish to claim that it is equally significant, or that it should work in the same way, in all domains. There may be some circumstances in which it is entirely unreal to speak of normative standards emerging from the parties' own interaction. Decision-making in immigration or refugee matters, where there is no substantial interaction, would be a clear example of this. There may also be situations in which one emphatically does not want to defer to the autonomous ordering of the domain itself, but rather wants to impose outcomes in the interest of society as a whole. Nevertheless, in many contexts there is a great deal to be said for a more responsive form of decision-making. And even where one does not want to defer to the parties' own methods of social ordering, one may be wise to intervene in a way that takes full account of those forms of ordering, if only to maximise the chances of regulatory success.

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3 See H.W. Arthurs, '*Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985) at 54-56. See also: H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) *17 Osgoode Hall L.J.* 1; H.W. Arthurs, "Understanding Labour Law: The Debate over 'Industrial Pluralism'" [1985] *Current Legal Problems* 83.

There is a further concern with Arthurs' postulate of a spontaneous normative order that emerges in the workplace or in other contexts: it tends to emphasise commonality within those domains and neglect the extent to which standards of justice in those domains may be highly contested. This contestation needs to be taken into account, but I don't think that it entirely undermines the force of the legal pluralist justification for administrative tribunals. Adjudication inevitably involves the interpretation of norms in specific contexts. In highly contested situations, that elaboration can often benefit from an awareness of the different perspectives of the individuals involved. Otherwise, legal interpretation can slip into contentious and skewed interpretations, often through the simple fact that the decision-maker is oblivious to the interests in cause. In other words, even in situations of contestation, a tribunal may well want to see the dispute from the perspectives of those actually involved, in order to interpret the law in a manner that at least considers and reflects upon the principal concerns of the protagonists.[4]

This brings me to my example of this evening, which I hope will give substance to the fairly abstract position for which I have been arguing.

Case study – industrial tribunals

In the industrial field, tribunals have long been structured in a tripartite manner: they have frequently consisted of members nominated, in equal numbers, by representatives of employees and employers, with the chair of the tribunal (or a cluster of "neutral" members) appointed in a manner designed to achieve impartiality (eg they are appointed in the same manner as superior court judges, appointed by the Chief Justice of the jurisdiction, or appointed on agreement of the employee and employer nominees). Now, if these tribunals are expected to exercise their functions in the manner we commonly associate with courts - essentially applying pre-determined rules to the facts in issue - then their structure appears to be seriously defective. The representatives of labour and capital appear to be, almost by definition, biased. And indeed such criticisms have been current since at least the turn of the century. They remain with us today, and indeed one index of the judicialisation of tribunals has been the extent to which the parties' nominees have been replaced by members all of whom have been appointed by a method designed to ensure "neutrality".

In fact, there was a recent example of precisely this at the University of Sydney, where the Academic Board has just acted to remove the staff member's nominee from committees hearing appeals in promotions applications, replacing that nominee with a member appointed by Academic Board. Why? Precisely because the staff member's nominee was biased in favour of the employee. Now I have little doubt that, prior to the change, the staff member's nominee did have a special affinity for the complainant. But is the change justified? Is the conception of adjudication on which it is premised appropriate, or is it rather the misapplication of a conventional court-centred model onto tribunals that should march by a very different drummer?

In 1891, the NSW Royal Commission on strikes delivered a report that played a key role in the long history of experimentation with conciliation and arbitration in Australian industrial relations. This remarkable Commission grew out of the great Maritime Strike of 1890. Its recommendations were translated (with important qualifications) into the 1892 Trade Disputes Conciliation and Arbitration Act of NSW. This particular law was not terribly

4 For an example of this in practice, see Webber, "The Mediation of Ideology: How Conciliation Boards, Through the Mediation of Particular Disputes, Fashioned a Vision of Labour's Place within Canadian Society" (1989) 7(2) Law in Context 1. See also, Webber, "Living Wage and Living Profit: Wage Determination by Conciliation Boards under the Industrial Disputes Investigation Act, 1907-1925" in W. Wesley Pue and Barry Wright, *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988) at 207.

effective, in large measure because it departed in crucial ways from the Commission's recommendations. But it was the first of the measures that evolved into the arbitration regime that has dominated Australian industrial law for so long.

In one of the most insightful discussions of conciliation and arbitration in the literature, the 1891 Commission specifically addressed the question of impartiality. The terms it used are worth quoting. The Commission first noted the issue with refreshing honesty:

> [The representatives of the parties on a conciliation board] will inevitably have the bias of their class, and will feel some responsibility towards their associates for upholding their class interests, and therefore at the Board will act in the mixed capacity of advocates and judges.[5]

The Commission noted, however, that it was important that the result have some degree of acceptance among all parties. It continued:

> It follows that the Arbitration Court cannot consist exclusively of independent judges, but must consist predominantly of persons chosen to represent class interest, the purely judicial function being performed only by the umpire [the chair], who would decide when the votes were equal. It is true that the members of the Court would be chosen on account of their high character, and would be expected to be fair and impartial: still their special function is to see that their class is not wronged.[6]

Note the argument here. The Commission recognises that, by conventional judicial standards, this structure would be defective. But it also notes the need to have workers' views represented in the deliberations of the tribunal. Doesn't this make good sense? Even if one does want to have these tribunals operate as tribunals of justice, rather than mere negotiating committees, doesn't it remain important that they be cognisant of workers' conceptions of what justice demands, not simply the opinions of employers (or of judges who often came from a background that tended to dispose them more towards the employers' view of the world)? When adjudication inevitably involves a measure of adjustment and interpretation to the specific context, doesn't it serve justice, rather than detract from it, if the perspectives of those immediately affected are represented in the deliberations of the tribunal?[7]

In fact, these tribunals' effectiveness tended to depend upon the tension between nominees' two roles: representation of the parties' interests on the one hand, combined with an aspiration to impartiality and justice on the other. Note the combination of both in the passage just quoted: nominees will feel some responsibility for upholding class interests, but they will also be expected to be "fair and impartial". There is a fascinating set of letters between the drafter and administrator of a comparable Canadian regime – William Lyon Mackenzie King, who later became prime minister of Canada - and the chairs of conciliation boards, in which King manifests a remarkable ambivalence, exhorting board members towards a measure of impartiality and detachment, but at the same time recognising how crucial it is to have all interests integrally represented in the process.[8] That kind of interplay is, it seems to me, important in the operation of such tribunals not just for pragmatic reasons, but because the quality of justice they are likely to produce will be different. Those tribunals lose something important – sensitivity to the perspective of employees – if they are restructured to achieve a perfect "neutrality". This inevitably affects the quality of their law.

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5 *Report of the Royal Commission on Strikes* (Sydney, 1891) at 29.

6 Ibid.

7 See, for example, "The Mediation of Ideology", supra, note 4.

8 Charles W. Gordon to W.L.M. King, 25 June 1909, and King to Gordon, 2 July 1909, King papers, National Archives of Canada, MG 26, J 1, vol. 11, 10508-10513.

This may be a specific case, unique to the labour context. But it does point towards one of the hidden costs of the judicialisation of our tribunals, by which I mean their restructuring on the basis of models of process derived uncritically from the judicial paradigm. The law applied by tribunals may well be different law, deriving from very different sources. And it may be all the better for it.