THE JUDICIAL POWER OF THE COMMONWEALTH

In a large number of cases since *Huddart Parker v. Moorehead* [1] the High Court (and on one occasion the Privy Council) [2] has had to analyse the nature of a judicial function for the purpose of applying Chapter 3 of the Commonwealth Constitution. In *Huddart Parker's Case*, [3] Griffith, C.J., propounded the following definition, which has been repeated with approval in almost every subsequent decision: [4] "The words 'judicial power' as used in sec. 71 of the Constitution mean the power which every sovereign must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." This definition is on its literal terms broad enough to include many functions which have since been said not to be judicial; for example, the administrative tribunals such as the Registrar of Trade Marks referred to by Isaacs, J., in the *Shell Case* (H.C.) [5] The definition also contains a number of ambiguities. What is meant by "binding," "authoritative" and "called upon to take action"? The subsequent decisions may be regarded as a gloss upon the definition of Griffith, C.J., having the effect of restricting its generality and resolving some of its ambiguities. The purpose of this article is to summarize as a sort of code what is conceived to be the effect of these decisions.

It is necessary first to emphasise that the delimitation of the frontiers of judicial power for the purpose of applying Chapter 3 of the Constitution is never likely to be reduced to a deductive system of propositions. Like so many other questions of constitutional law, its solution requires judicial statesmanship in which questions of expediency and the adjustment of governmental methods to the changing needs of a complex society must play a large part. These considerations were emphasised by Isaacs, J., in the *Shell Case* (H.C.); [6] Starke, J., who shows a general preference for clear

[1] (1908) 8 C.L.R. 330.

[2] The *Shell Case* (Shell Co. of Aust. Ltd. v. Federal Commissioner of Taxation, (1931) A.C. 275, 44 C.L.R. 530) For convenience, this will be called *Shell Case* (*P.C.*) and the same proceedings in the High Court, (1926) 38 C.L.R. 153, will be called *Shell Case* (*H.C.*).

[3] At 357.

[4] Including *Shell Case* (*P.C.*) at 295-6.

[5] At 179, and see *R. v. Commissioner of Patents*, (1939) 61 C.L.R. 240.

[6] "Some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. . . . Other matters may be subject to no a priori exclusive delimitation, but may be capable of assignment by Parliament in its discretion." See 176-182.

governing rules of interpretation, has pointed out in ***Lowenstein's** Case* [7] that any rigid separation of governmental functions is analytically impossible and practically inexpedient. Hence we must expect to find decisions which cannot easily be fitted into any code of related propositions. For example, courts martial answer to almost any conceivable theoretical definition of judicial power, but in *R. v. Bevan* [8] and *R. v. Cox,* [9] the High Court had no difficulty in treating them as not governed by the restrictions of secs. 71 and 72 of the Constitution, because it would be practically inexpedient, injurious to army discipline under field conditions and inconsistent with long established British and American practice to require such tribunals to be staffed with persons holding on life tenure. The decisions in relation to deportation of immigrants and internment during war time can be reconciled with a logical theory of judicial function, [10] but the Courts have obviously been influenced by practical considerations rather than theoretical analysis in upholding the vesting of such powers in Ministers of the Crown. [11] Hence the following propositions can be regarded only as the sort of presumptions which will be applied in the absence of some overwhelming consideration of practical convenience or of some traditional classification of functions in which juristic analysis has been disregarded.

All the definitions assume that the first requirement of judicial power is the decision of a dispute between parties by an officer of the Government authorised for that purpose. What further characteristics are necessary to the judicial function?

(1) The dispute must be decided by reference to a pre-existing legal rule or standard. If a tribunal itself creates legal rights or obligations in determining a dispute as to whether such rights or obligations should be brought into existence, then the function is not judicial.

The most celebrated formulation of this doctrine is in the judgment of Isaacs and Rich, JJ., in *Alexander's Case,* [12] which established the view that the making of industrial arbitral awards is akin to legislation; "the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare . . . . what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other." [13]

[13] *ibid.* at 463.

[7] (1938) 59 C.L.R. at 576-7.
[8] (1942) 66 C.L.R. 452.
[9] (1945) 71 C.L.R. 1.
[10] On the ground that the Minister's opinion is the "factum" on which Parliament's will operates; see rule (1) post.
[11] *Lloyd v. Wallach,* (1915) 20 C.L.R. 299; *Ex p. Walsh* (1942) 48 A.L.R. 359; *R. v. McFarlane,* (1923) 32 C.L.R. 518; and see *Roche v. Kronheimer,* (1921) 29 C.L.R. 329.
[12] (1918) 25 C.L.R. 434.

This opinion also established a general conception applicable to many administrative functions; namely that of "finding the factum" upon which a statute operates to create a right or duty. [14] Thus if the operation of a statute is made dependent upon the opinion of some person, the making of that opinion is not judicial function even though it is arrived at after a hearing similar to that of a Court; hence if liability to tax, or to internment or deportation, is made dependent upon the opinion of an official, the official is not exercising judicial function. [15] It is otherwise if the statute itself prescribes the conditions of such liability and the official is empowered to decide whether those conditions have arisen. [16]

An interesting limiting case of this doctrine is the power of the Commonwealth Court of Conciliation and Arbitration to give an "interpretation" of its awards. In *Waterside Workers' Federation v. Gilchrist Watt and Sanderson* [17] and *Pickard v. John Heine and Son Ltd.,* [18] Isaacs, J., held that although interpretation of an award is not variation yet it is not a judicial function. There is no logical foundation for this view; the "interpretation" of a will on originator would certainly be treated as a judicial function. This problem provides yet another indication that the distinction between legislation and adjudication depends ultimately on the techniques of government to which people are accustomed. In many systems of law the power to interpret a statute has been treated as essentially a legislative function. We are accustomed to treating it as characteristically judicial, but experience of Arbitration Court interpretation cases demonstrates that there would be no purpose in the procedure if the "interpretation" of an award were merely a tautologous re-statement of its original terms.

It is possible that the Courts would not permit the legislature to evade the requirements of Chapter 3 by taking advantage of this doctrine of "finding the factum." Suppose a Commonwealth law passed under sec. 51(i) authorised a minister to direct the imprison-

[14] *ibid.* at 464, and see per Isaacs, J., in the *British Imperial Oil Case,* (1925) 35 C.L.R. at 436, 439, quoted in Sawer, "Cases on Constitutional Law" 433. This case must not be confused with the *Shell Case* (*H.C.*), as to which see note 2, and is described hereafter as the "B.I.O. Case."

[15] Hence rent and price control are not judicial: *Silk Bros. v. S.E.C.,* (1943) 67 C.L.R. 1; nor de-registration of unions and disallowance of their rules: *Penton's Case,* (1946) 73 C.L.R. 1.

[16] Per Starke, J., *Industrial Lighting Case,* (1943) 67 C.L.R. at 422; per Williams, J., *Case of Jehovah's Witnesses,* (1943) 67 C.L.R. at 167-8, Starke, J., *contra* on the actual regulations in question. War-time punitive acquisition of property from enemy aliens and subversive associations, considered here and in *Roche v. Kronheimer,* presents a logical dilemma which the courts have disregarded. If the liability to confiscation is defined by the legislation, then conclusive official action is analytically judicial function. If acquisition is dependent on official discretion, then it should be subject to section 51 (xxxi) of the Constitution, and require just terms. Here again the answer seems to be that such acquisition is a traditional technique not to be judged by logical analysis.

[17] (1924) 34 C.L.R. 482.

[18] (1924) 35 C.L.R. 1.

ment at his pleasure of persons whose activities are deemed by him to be injurious to the peaceful and orderly conduct of inter-State trade and commerce. Analytically, this would be indistinguishable from the internment cases, but the Court might say that in peace time the imprisonment of persons for conduct ordinarily dealt with by positive prohibitions of the criminal law is "characteristically," i.e. traditionally, a judicial function. [19] Perhaps the Court would rationalise the decision by treating the statute as impliedly establishing a norm of conduct which the minister has to interpret; there are suggestions of such an approach in the dissent of Rich and Williams, JJ., in *Penton's Case*. [20]

(2) Not every "interpretative" decision is necessarily judicial. The tribunal must also satisfy at least one of the following three conditions:—

(a) *If a tribunal has power to enforce its decision on the parties by some process of execution, without reference to any further tribunal, then the function is judicial.* [21]

It would have made for greater clearness of the law if power of enforcement had been treated as *essential* for judicial function. In the *Rola Case* [22] Latham, C.J., appeared in one part of his decision to be developing the proposition that power to enforce is a necessary condition, and he interprets Griffith, C.J.'s, expressions, "binding and authoritative," and "called upon to take action," in that sense. [23] But the absence of power of enforcement in the Income Tax Board of Appeal and the later Board of Review, considered in the *B.I.O.* and *Shell Cases,* was not regarded either by the High Court or by the Privy Council as concluding the question in favour of the validity of the tribunal. Only Higgins, J., in the *Shell Case* (H.C.) [24] regarded the question of enforcement as important; he did not sit in the *B.I.O. Case* and his view was in substance a dissenting one. The Privy Council did not in the *Shell Case* expressly approve the decision of the High Court in the *B.I.O. Case* holding the Board of Appeal to be a judicial tribunal, but the lines on which their Lordships distinguished the B.I.O. decision seem inferentially to rule out the possibility of now treating power of enforcement as necessary to judicial function. The opinion of Latham, C.J., in the *Rola Case* (with which McTiernan, J., concurred) does not purport to dissent from the decision in the *B.I.O.*

[19] See per Williams, J., *Case of Jehovah's Witnesses,* (1943) 67 C.L.R. at 162-3. The passage does not directly relate to the problem under discussion, but to the scope of the defence power. The law supposed above might similarly be dealt with by denying connection with the inter-State trade power, or even by applying s.92; sed quaere.

[20] (1946) 73 C.L.R. at 561.

[21] *Alexander's Case,* cit. supra, n.12; *The Inter-State Commission Case* (1915) 20 C.L.R. 54.

[22] (1945) 69 C.L.R. 504.

[23] *ibid.* at 198-9.

[24] (1926) 38 C.L.R. at 202.

Case, while Rich and Williams, JJ., held to be judicial the functions of a Committee of Reference which clearly had no power to enforce its decisions.

(b) *If a tribunal's decision is conclusive, the tribunal exercises judicial power.*

This proposition was first developed by the Privy Council in the *Shell Case.* The Board did not dissent from the opinions in the High Court emphasising other differences between the position of the former Board of Appeal and the new Board of Review, but their Lordships emphasised the absence in the second tribunal of the power of conclusive decision as to facts which had been possessed by the earlier tribunal. The decision seems further to imply that conclusive power to determine the existence of facts is judicial; the tribunal need not have a power to declare conclusively the application of relevant law to those facts. The only subsequent decision in which this question of conclusiveness has been extensively discussed is the *Rola Case.* There Rich and Williams, JJ., expressed a clear opinion that conclusive decision as to facts is judicial. [25] Williams, J., interprets Griffith, C.J.'s, "binding and authoritative" in this sense. [26] He also refers to the consequence of an opposite opinion: if administrative tribunals can validly be empowered to find facts conclusively, "then, since, in many cases, there is no dispute as to the law, and the whole controversy turns on questions of fact, all that would be left for a Court to do would be to give a formal judgment, and, as an entirely ancillary and subordinate body, to enforce rights and obligations, the controversy as to which had, in every substantial sense, been predetermined by a tribunal that is not a Court." [27] Neither he nor Rich, J., expressly based their opinion on the *Shell Case* but rather upon general conceptions of what they considered to be the marks of judicial power. Starke, J., held that the determination of facts (semble even conclusively) is not exclusively an attribute of judicial power. He considers that judicial power requires also some power to state the legal characteristics or consequences of these facts. This is not necessarily inconsistent with the Privy Council's decision in the *Shell Case;* in ordinary legal usage "questions of fact" usually include some questions of legal interpretation and this was certainly true of the "facts" dealt with by the Income Tax Boards. Starke, J.'s, view requires a stricter definition of fact; he would apparently confine the valid fact-finding authority of Commonwealth administrators to "identification" of persons, events and things. [28] It is difficult to state clearly the basis of Latham, C.J.'s, opinion in the *Rola Case* in favour of the validity of the Committees of Reference. After reaching a point where it seemed he would hold absence of power of enforcement to be the critical factor, he developed an argument which suggested but did not plainly state

[25] (1945) 69 C.L.R. at 207, 217.
[26] *ibid.* at 216.
[27] *ibid.* at 217.
[28] *ibid.* at 211-2.

that the Committees were not judicial because they had no power of "conclusive" decision; but the passage could also be read as endorsing the view of Starke, J., that the decision of the committees was confined to physical facts in the purest sense, and that this is not sufficient for judicial power. [29] The "just terms" cases under sec. 51 (xxi) contain some discussion of the question whether assessment of compensation after acquisition is a judicial function. [30] The discussions are inconclusive: most of the opinions do not deal with the "judicial power" argument but only with the requirements of "just terms." There are several dicta suggesting that an administrative tribunal may be authorized at least to ascertain the facts relevant to compensation, but these dicta do not distinguish between conclusive and reviewable findings.

It would seem that a "conclusive" decision is one which cannot be re-opened in collateral proceedings, such as proceedings for enforcement in another tribunal. In the *Rola Case,* Latham, C.J., implied that amenability to review on prerogative writ may deprive a decision of conclusive effect; [31] the difficulties in this view are mentioned by Rich, J., in the same case. [32] Usually, the "merits" of a decision cannot be re-opened on prerogative writ. However, if the jurisdictional facts on which the authority of the tribunal depends are also the only issues which the tribunal may investigate, and those facts are in a particular case open to review on prerogative writ, then of course it could be held that the tribunal's decision lacks conclusiveness; this was in effect the view which Latham, C.J., took of the authority of the Committees of Reference. It is an unusual type of case; usually the facts investitive of jurisdiction are quite distinct from the issues which a tribunal has power to determine, and the tribunal's finding on the jurisdictional facts as well as its decision on the "merits" is usually presumed to be beyond control by prerogative writ. [33]

(c) If the constitution, procedure and powers of a tribunal are such as to indicate that Parliament intended it to be treated as exercising judicial power, then the tribunal will be so treated.

This is sometimes referred to as "the trappings test," from a passage in the Privy Council decision in the *Shell Case.* [34] The only actual decision depending on this doctrine is that of the High Court in the *B.I.O. Case;* since, however, as indicated above, that decision can be explained on the "conclusiveness" doctrine, it cannot be said that the trappings test is firmly established. If the High Court judgments in the *B.I.O.* and *Shell Cases* are considered together, it would seem that the first decision must be treated as depending upon

[29] *ibid.* at 199-200.
[30] *Andrews v. Howell,* (1941) 65 C.L.R. 255; *Tonkin's Case,* (1942) 66 C.L.R. 77; *Nelungaloo Case,* (1948) A.L.R. at 174-5.
[31] (1945) 69 C.L.R. at 196-7.
[32] *ibid.* at 204, and see Sawer, "Cases," pp. 447-8.
[33] *Colonial Bank of A/asia v. Willan,* (1874) L.R. 5 P.C. 417; *Canadian Knight Co. etc. v. Frazer,* (1932) N.Z. L.R. 1295.
[34] (1931) A.C. at 296-7.

only one "trapping," namely the provision for appeals from the Board of Appeal to the *appellate* jurisdiction of the High Court. There is a suggestion in the opinions of Knox, C.J., and Isaacs, J., in the *B.I.O. Case* [35] that the power of the Board to decide (non-conclusively) questions of law, and the option given to tax-payers of resorting either to the Board or to a Court, also helped to show that the tribunal was invested with judicial power, but these points must be taken to have been abandoned in the second decision since the Board of Review did not differ from the Board of Appeal in those respects.

Hence the general principle stated above might be reducible to a dogmatic rule that appeal to the appellate jurisdiction of an ordinary Court is conclusive evidence that the lower tribunal exercises judicial function. However, it would be equally reasonable in such cases to classify a tribunal as non-judicial (if other considerations suggested that) and, if necessary, to treat the provision for appeal as invalid and severable. [36] Whatever form it takes, the "trappings" test is an unsatisfactory one from the point of view of predictibility, since it requires an intuitive apprehension of the general character of the tribunal in question. The decision of the Privy Council in the *Shell Case* might be treated as rejecting any such doctrine. However, even if this doctrine no longer survives as a major independent test of judicial function, the considerations to which it draws attention may still be relevant for other purposes. If, for example, the relevant legislation leaves the Court in doubt whether a tribunal is "factum-finding" or is interpreting a pre-existing standard, the general setting of the tribunal might well assist in determining this question of interpretation; if it appears that Parliament intended the tribunal to be regarded as a Court, then it is more likely that the tribunal will be considered bound by some legal standard and so as satisfying the "interpretation" test. On the other hand, there is clear authority for the proposition that if the functions of a tribunal are clearly non-judicial, it does not become judicial because Parliament has called it a Court and given it judicial trappings. [37]

(3) A tribunal may be held to exercise judicial power although resort to its jurisdiction is optional.

The sole basis for this proposition is the decision in the *B.I.O. Case* and the fact that in the *Shell Case* the Privy Council did not purport to overrule the *B.I.O. Case*. Resort to the Income Tax Boards was, and is, optional as far as the taxpayer was concerned. There are dicta tending against the rule proposed. [38] It seems

[35] 35 C.L.R. at 432, 436.

[36] It is not settled whether the Federal Courts can be required to exercise administrative functions by giving them power to reconsider in its entirety an administrative decision not governed by pre-existing legal standards. The American decisions on this topic are not readily applicable since the High Court has not adopted, even in relation to judicial function, any dogmatic concept of separation of powers. See per Starke, J., 38 C.L.R. at 212.

[37] *Alexander's Case,* (1918) 25 C.L.R. at 467.

[38] *Alexander's Case,* (1918) 25 C.L.R. at 452, per Barton, J., *Rola Case,* (1945) 69 C.L.R. at 217-8, per Williams, J.

clear that arbitral proceedings invoked by mutual consent are not judicial, and it has never been argued that the position is different when statute makes the submission irrevocable and the award enforceable.[39] In the *Rola Case,* Williams, J.,[40] appears to suggest that the decision in the *Shell Case* (P.C.) is explicable on the ground of optional submission. The Privy Council did refer to the option given to the taxpayer to resort either to a Board or a Court, but the difficulty is that if the option had been by itself sufficient to establish the validity of the Board of Review, then the earlier Board of Appeal should have been held on the same ground to be validly constituted; but the Privy Council did not purport to dissent from the decision in the *B.I.O. Case* invalidating the earlier Board. It is true that in the taxation procedure, the taxpayer is formally the plaintiff and the proceedings are in a sense in invito the Commissioner. A more real view, however, is that the Commissioner is the active party and the taxpayer is choosing the forum in which he will be in substance the defendant. It would seem that the political and social purposes of Chapter 3 of the Constitution would be adequately served if its requirements of tenure are confined to tribunals given compulsory jurisdiction over the substantial defendant —the citizen—in disputes concerning administrative action. But if the *B.I.O. Case* must still be taken as correctly decided, then a strong argument could be made against the validity of Part XV of the Commonwealth Customs Act. This part, which is very frequently used, gives the Minister power, with consent of the defendant, to hear and determine charges made under the Act and to impose enforceable penalties. But for the option given the defendant, there could be no question that the function is judicial and therefore invalidly given to a person not holding on judicial tenure. Is the option given any different in substance from the option given the taxpayer to resort to a Board—an option not thought sufficient to save the Board in the *B.I.O. Case?*

The decisions in the *B.I.O.* and *Shell Cases* thus seem to have been unfortunate in many respects. They have got rid of the simple and satisfactory rule that power of enforcement is necessary to judicial function, they have introduced the rule of "conclusiveness" of decision with its attendant ambiguities, they have given some countenance to the unsatisfactory "trappings" test, and they have cast doubt upon the convenient practice of giving the citizen the option of referring an administrative dispute involving legal interpretation to an administrative tribunal or to a court as he pleases.

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[39] In *Johnston Fear etc. v. Commonwealth,* (1943) 67 C.L.R. 314, an argument was based upon submission of compensation claims to arbitration under State Acts, but the objection was to choice of an arbitrator by the Commonwealth in default of agreement; as usual in the compensation cases, what looked like the beginning of a discussion of judicial power developed into a contention as to "just terms." The Court did not deal with the point.

[40] (1945) 69 C.L.R. at 218.