POWER WITHOUT DISCIPLINE
THE "RULE OF NO-LAW" IN WESTERN AUSTRALIA: 1964.*

In the case of *Ridge v. Baldwin*[1] in delivering his opinion in the House of Lords, Lord Reid said:—

> "We do not have a developed system of administrative law principles because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases, the Courts had to grope for solutions and have found that old powers, rules and procedures are largely inapplicable to cases which they were never designed or intended to deal with."[2]

The fact that these old powers, rules and procedures are inapplicable (or thought to be inapplicable) to many situations involving the citizen as a member of the welfare state, is in our time a threatening danger to the freedom of the individual. This paper is not directly concerned with police powers (and these remarks do not apply to the criminal law) nor with the different and difficult problem of delegated legislation. The paper is directed to the eclipse of the Rule of Law and the dawn of the "rule of no-law" in the socialized state, although it is not necessarily confined to public administration as such. Many of the points apply with equal force to domestic tribunals, from the football club to the trade organization.

The spreading tentacles of the "rule of no-law" have resulted in the criteria for the application of the shrinking area of the Rule of Law being to a large extent identified with the concept of natural justice, and the concept of natural justice is now mainly made up of the ideas that the other party should be heard and that no man should be a judge in his own cause. In public administration in this State if the former idea is thought to have been realized in a particular case then the latter is often ignored altogether. Further there is no clear idea as to what amounts to compliance with the former. The right to be heard is sometimes thought to be satisfied by giving the

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1 [1964] A.C. 40.

2 *Ibid.*, at 72.

party the right to state his case, either in writing or verbally, to the deaf ear and the inscrutible face of the sphinx. This is not being heard at all in any real sense and is not a fair hearing. In many cases the term "fair hearing" only has meaning, if a hearing is accompanied by the right to skilled representation, the right to advance evidence on oath, and cross-examine witnesses on oath, and the right to advance arguments to an open-minded audience.

Even in these senses the remaining area of the Rule of Law is indeterminate. An illustration is the recent case of *Testro Bros. Pty. Ltd. v. Tait.*[3] In that case the High Court of Australia decided by a majority of three to two that an inspector carrying out an investigation under section 171 of the Companies Act was not bound before making a report on the company's affairs to give the company an opportunity of being heard. The majority appeared to hold this to be so on two grounds, (i) that the Companies Act imposes no obligation on an inspector to act judicially and (ii) that the result of the investigation was merely a report which could not of its own force prejudicially affect the rights of the company. The minority held that an obligation to act judicially was not necessary and as the report could give rise to a liability on the company to be compulsorily wound up that there was a sufficient possibility of prejudice to attract the rules of natural justice. All judges however agreed that if the report was a report and nothing more then the rules of natural justice would not be applicable. This case is interesting in that it illustrates two things. Firstly that the "rule of no-law" is not confined to conventional areas of public administration, and secondly that the criteria as to whether any remnant of the Rule of Law is applicable or not is so indeterminate that judges of the High Court of Australia can disagree. To make matters worse some of the dicta of the majority in the High Court as to the necessity of the presence of an obligation to act judicially are inconsistent with some of the opinions in the House of Lords. The truth of the matter is that except in some conventional fields the Rule of Law no longer exists.

It is questionable whether it ever did exist outside these fields. Dicey, who popularized the phrase, seemed to consider that its content involved equality before the law and the adjudication of the rights of individuals by judicial process. This is vague enough, but it was thought to have something to do with the preservation of the rights of the individual. This curious notion is still entertained at times by some lawyers. The Lord Chief Justice of England, Lord Parker of

[3] (1963-1964) 37 AUST. L.J.R. 100, [1963] Argus L.R. 769.

Waddington, is recently reported as having said:—[4]

> "The truth of the matter as I see it is that there is a reciprocal duty on the Courts and on Parliament. It is the duty of the Courts to give effect to the expressed purpose of Parliament. It is the duty of Parliament to recognize and uphold the standards of justice adopted by the Courts. Given a proper performance of those duties there can be little risk of a clash, and the liberty of the subject can be safely left in the hands of the Judges."

If the liberty of the subject is in the hands of the judges it can be safely left there, but the liberty of the subject is not in the hands of the judges. Parliament is supreme and the judges are merely one of the organs of the administration to assist to carry out the administrative process by applying and enforcing the law as laid down by Parliament and at times oiling the machinery by resolving ambiguities in the written statement of the law. The liberty of the subject is not involved in this at all. His Lordship also remarked that "another important role that the Judges occupy in the preservation of liberty is that they are the guardians of the common law which is in our countries the true home of freedom." In this sense of the common law, the common law is as dead as the Rule of Law itself.

Recently in the United States the President of the American Bar Association in his annual address, said:—[5]

> "let us be more prompt and energetic in our action and always courageous and unafraid to espouse the observance of the Rule of Law at home and abroad in the preservation of individual rights and liberties of all citizens."

For Western Australia this statement is self-contradictory. If law as made by Parliament takes away or does not preserve individual rights and liberties then this is the law which rules, and the belief of the lawyer that his role is to preserve such individual rights and liberties is a sentimental hallucination.

The same question begging appears in the conclusions reached by the International Commission of Jurists in the Act of Athens of the 18th June 1955. Declaration 4. declares "Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the Rule of Law. . . ." In a Parliamentary democracy the individual does not necessarily have any rights whether under the Rule of Law or any other rule. It is interesting to note

4 Lord Parker, *The Role of the Judge in the Preservation of Liberty*, (1961-1962) 35 AUST. L.J. 63, at 64.

5 (1963) 49 A.B.A.J. 852.

however that at the African Conference at Lagos, Nigeria in 1961, the Committee on Human Rights concluded that the individual *should* have some rights, and agreed "that there should be available to the person aggrieved a right of access to (a) a hierarchy of administrative courts of independent jurisdiction or (b) where these do not exist to an administrative tribunal subject to the over riding authority of the ordinary Courts."

The legal profession has been largely inert because it has continued to believe in some vague way in the existence of the Rule of Law—to put faith in a myth of uncertain and perhaps no content. We have declined to enter the public arena and instead are loyal to a spook. This has recently been characterized as a "Study in Inertia."[6]

To talk of the things we used to love as if they still existed is an endearing human characteristic and for a lawyer to lighten his rigorous days with the occasional delusion that he is helping to preserve the rights of individuals is a justifiable emotional aspirin. But the time has now come to call a spade a spade. If the legal profession does not step down from its ivory tower to grapple with this problem of individual freedom then no other educated group in the community will.

Taking the cue from Lord Reid, the Rule of Law may be stated in terms of powers, rules, and procedures. But also it must be stated in terms of *rights,* which the former are designed to protect. One without the other results in no-law. They require separate definition and this as to the former is mine.

It is to some extent an arbitrary definition and I can only hope that most lawyers will agree with it.

The Rule of Law in terms of powers, rules, and procedures:

"Any matter except a matter of government policy, which might affect the interests of a person must be determined after due notice to the parties, by a professional adjudicator, independent and disinterested, through a process involving a hearing of the parties, in public, evidence on oath, the right of parties to subpoena, examine and cross-examine witnesses and present arguments, the publication of the adjudicator's decision and his reasons therefore in writing, the decision being based on the evidence adduced, the parties having equal access to evidence, and equal access to the adjudicator, and subject to an appeal under the same conditions."

6 Whitmore, *Australian Administrative Law—A Study in Inertia,* (1962-1963) 36 AUST. L.J. 255.

This definition requires some analysis and explanation. In regard to the exception of matters of government policy, it is clear that some matters of broad government policy cannot be called into question by an individual otherwise than through the ballot box. No Rule of Law (other than perhaps constitutional law) can be applied to the decision of a government to buy a ship or to build a railway line. To say this however is not to encourage the idea that new fields of the "rule of no-law" should be opened up under the guise of government policy. For example, a decision that a railway line should be built linking one point with another, or that a city should have a ring road, might well be a matter of policy but a decision as to the precise route which the line or road should take is not a matter of policy but a matter of the execution of the policy, and in this respect the best way to execute it can be determined from proved facts. There is no reason why an individual should not be able to endeavour to prove that a better route would be ten chains to the east or west of the proposed route and there is no reason why this suggestion cannot be determined in accordance with the Rule of Law as defined. There is no reason why a judicial officer should not determine this as well as he can determine a question of land valuation on a resumption, or the degree of carelessness involved on each side in a traffic accident. All are to some extent matters of opinion but of an opinion based on proved facts.

"*Which might affect the interests of a person.*" The reference is *might* not *must*. The word rights has not been used. "Interests" is a better word than "rights" in this respect because the word "rights" is often interpreted in the Hohfeldian sense as the correlative of duties. The word "interests" is sufficiently wide to cover the *Testro* type of situation. It is clear enough that an adverse report even though it is only a report might have the result of affecting the interests of a corporation or a person and in this respect even adverse publicity or adverse comment from an official is sufficient. It is also intended to cover aesthetic interests *e.g.*, whether a view should be obscured or whether a river should be filled in!

"*After due notice to the parties.*" This includes both reasonable time of notice, and reasonable detail of the matter to be dealt with, including real access to particular detail and proper facilities to study it.

"*A professional adjudicator.*" The adjudicator need not be a Judge in the conventional sense but he must have sufficient training and discipline in the art of ascertaining and analysing facts and in drawing inductive conclusions from the facts. This eliminates amateur ad hoc tribunals. Impartiality is a habit not generally acquired

accidentally. Any one who has had anything to do with fact finding knows that a certain expertise is required, and an habitual discipline in confining the movement of inference to the factual premises.

"Independent and disinterested." Both words are important. The adjudicator must be independent altogether of the interests of the parties and he must also be disinterested so far as his own interests are concerned. It is important for example that an adjudicator in relation to the site of a sewerage works should not own land in the vicinity. It is perhaps even more important that he should not be in any way connected with the public authority responsible for the recommendation of the scheme or with any organization of which the objectors might be members such as a ratepayers association, or a society for "the preservation of civil rights." It is questionable whether having representatives of vested interests sitting with a chairman is sound. Abuse of power has many faces.

"By a process involving a hearing of the parties." I have already indicated that this must be a real hearing and not merely a charade in the shadow of a monument.

"In public." Too much emphasis cannot be placed on the importance of publicity. Publicity is in itself a discipline for not only the tribunal but also the parties. A tendency to try to solve administrative problems by a sort of back-slapping process behind closed doors is to be deplored. Terms such as "laying cards on the table," "a round table conference," "a man to man talk" are toadstools which readily sprout in the field of no-law and often leave one or other of the parties feeling that although it has all been very friendly he has somehow or other been diddled. This is not to say that negotiation does not have a place in appropriate circumstances.

"Evidence on oath." This is essential, but the right to cross-examine is even more essential. We all know the little value in broad statements which although not downright untrue are not subject to testing by cross-examination.

"The right to parties to supoena." This should be an unrestricted right and the subpoena should go if necessary to any administrative experts who may have been responsible for a proposal, the refusal of a permit etc.

"The publication of the adjudicator's decision with the reasons for it in writing." Publication of the decision is important to maintain public confidence, and reasons in writing provide several safeguards. One is the discipline of having to give reasons and the other is that if reasons can be seen to be irrelevant then an appeal or one of the

prerogative writs might lie. Even if there is no remedy, at least the dubious grounds for the result would be publicly known. It is just as important that good grounds for the finding should be publicly known.

"The decision being based on the evidence adduced." The tribunal should never base its decision on reference to documents or evidence which has not been properly placed before it, as this means that one or other of the parties has not had the opportunity to contradict or comment on this material. Provisions allowing a tribunal to inform itself in any manner that it thinks fit and to reach a conclusion according to equity and good conscience and the substantial merits of the case (whatever all that means) ought to be avoided. They merely invite sloppiness in the inductive process.

"The parties having equal access to the evidence." This involves a full system of discovery of documents. It also involves the recognition that experts should be available to both sides. This latter is particularly pressing in the welfare state when available experts are often in the employ of the State and hesitate to make their service available to the citizen if the State or a Department thereof is involved.

"Equal access to the adjudicator." This involves equality before the law. The powerful corporation with inexhaustible resources when opposed to the individual has always provided a problem in this respect. However, the problem is becoming worse because in the welfare state the government engages in state enterprise and in some respects in monopoly enterprise. This means that more and more often one of the parties to an enquiry or dispute is the State or an instrumentality of the State. It is bad enough for an individual to find himself opposed to the resources of a powerful corporation. It is worse when he is opposed to the resources of the State because in this case not only are the State's expenses paid from the public purse but in addition Crown advisers often have access to official sources of evidence which are not available to the individual.

"Subject to an appeal under the same conditions." The right of appeal is important because even a judicial officer operating under the Rule of Law can be mistaken. It is desirable that this appeal should be to the ordinary courts. The mere existence of a right of appeal to the ordinary courts tends to reduce the occasions when an appeal is necessary. It highlights the necessity for a record of the evidence to be taken and for reasons to be given in writing and of course operates as a disciplinary element in the statement of reasons.

The Legislation Committee of the Council of the Victorian Law Institute has recently prepared a report which recommends that in

relation to all administrative procedures it should be a statutory requirement that full and adequate written reasons be given by any organ of the administration for any *decision* which it makes affecting individuals. This would be a step in the right direction but in two respects does not go far enough. Firstly, there are organs which make reports and recommendations and although these are not *decisions* they are tantamount to decisions to the extent that they are acted upon without any further open enquiry.

In this respect a topical example of the "rule of no-law" in Western Australia and which directly affects the interests of individuals is contained in the Metropolitan Region Town Planning Scheme Act 1959-1962. The procedure is laid down by section 31. The Metropolitan Region Town Planning Authority submits a Scheme to the Minister for his preliminary approval. If approved, copies of the Scheme are deposited in certain public places for inspection and notice thereof is advertised in the Gazette and the press. There is provision that objections to the Scheme may be made. So far so good. It is then provided that the Authority shall consider all objections and shall not dismiss an objection until the objector or his agent has been given the opportunity of being heard. This complies with the first conventional requirement of natural justice. So far so good. A curious feature is that the Authority seems to be the *deciding* authority to dismiss an objection but is probably only a *reporting* authority to allow an objection. This is curious because there could be two individuals, one of whom wants the objection allowed and the other of whom wants it dismissed. It seems that there can only be a contest between the Authority and an individual objector, and that a person who wants to maintain the Scheme unaltered has no right to be heard against an objector who wants it altered. However that may be, the "rule of no-law" now takes over. The Authority or the Committee thereof hearing the objections includes several of the public officers mainly responsible for the preparation of the scheme. The objectors are therefore in the position of endeavouring to persuade experts against a course about which they have already made up their minds. There is no provision to ensure that individual members of the tribunal shall be independent or disinterested. There is no provision for the hearing to be in public. There is no provision for evidence on oath. There is no provision for the right to cross-examine anyone playing a part in the recommendation of the Scheme. There is no provision for the publication of reasons whether in writing or otherwise. There is no provision that the decision must be based on evidence

adduced—perhaps not surprisingly because there is no evidence adduced. There is no provision for discovery of documents.

In due course the Authority must submit the Scheme with or without modifications together with a copy of all written objections and a report thereon to the Minister. There is no provision as to what this report shall contain and there is no provision except as hereinafter mentioned for its publication. The Minister is then required to present the Scheme to the Governor for his consideration. This of course means to the Governor in Council. The Minister may, however, require the Authority, if the scheme has been modified, to deposit it again for public inspection. There is no provision for anybody to be heard by the Minister as to whether this action should or should not be taken. If the Scheme is so deposited again then an objector to modification may notify the Minister in writing and the Minister must then direct the Authority to consider and report on this objection. It appears that it can dismiss this objection in which case there is nothing more to be said, or alternatively report about it. The Governor in Council then may approve the Scheme with or without modifications. There is no provision for anybody to be heard at this level. If it was intended that the Governor in Council should make an independent review of all the provisions of the Scheme, or even only those which were subject to objection, then Parliament has imposed a Herculean task and my sympathies are all with the Ministers involved. Whether such an independent review is attempted I do not know. At this point the Scheme as modified is published in the Gazette and the maps are thrown open again for public inspection. The Scheme together with the report on the objections is then laid before Parliament. It is now that the objector can have his member of Parliament look at the report on his objection, but even if there is anything informative in the report (which is seldom the case) this privilege is of little use to him because if the whole scheme is not disallowed by Parliament it becomes law as if "enacted by this Act." Parliament has no power to disallow a portion of the scheme. It must disallow the whole or nothing, and consequently it may be a case of undesirable provisions being tacked to desirable ones without any possibility of severance.

The interesting thing about this procedure is that it is dressed up with some democratic trappings: the publication of the scheme, the right of objectors to be heard, the laying of the scheme before the Houses and the right of the Houses to disallow. The untutored might think that this provides an example of the Rule of Law. Actually it is an example of some artificial legal flowers being planted in an arid

area of no-law. It is fair to say that the recent objections to the Metropolitan Scheme were not altogether a charade in the shadow of a monument because some of the objections were allowed more or less. This might be better than nothing in the sense that to own a car which could run off the road at any moment is better than not owning a car at all. The point is debatable. I should add that I am not criticizing this or any other Government or this or any other individual or organ. If Parliament proclaims the "rule of no-law" then administrators and ministers can do nothing but make the best of it.

The second respect in which a recommendation such as the Victorian one does not go far enough is that it fails to define the Rule of Law in terms of rights. The Rule of Law equals rights and remedies. Neither is of any use without the other.

The Rule of Law in terms of rights.

The Rule of Law in terms of rights may be stated thus:

1. No person shall be compelled to do or abstain from doing, nor in his person nor in his property nor in his interests be subjected to the doing of, any act except such as shall be provided by law.
2. Every law shall prescribe in terms the facts which control its operation and if it is such as it may operate at the discretion of a person the facts and criteria controlling the exercise of that discretion shall be prescribed.
3. Every person affected in his person or in his property over his interests by the operation of a law shall be entitled to call into question the existence of the facts and the application of the criteria controlling the operation of that law, and the questions so raised shall be judicially determined.

If the Rule of Law is postulated in terms only of procedures then one is left with arbitrary power, and even though such power is exercised by a judge through the judicial process it is still arbitrary. In this respect Rule of Law procedures may thereby cloak the "rule of no-law." Controlling criteria are, therefore, necessary. In some cases criteria can be simple, in other cases exact although complex, in others necessarily vague. There may be some cases which defy criteria but this is not a reason for failing to try to provide criteria in those cases where it is possible. Vagueness is no objection. Under the Rule of Law abstract terms are analysed and refined by the court and difficulties of application are thus gradually restricted. An example is the vague and yet workable norms provided in section 129 C of the

Transfer of Land Act[7] relating to the judicial discharge or modification of restrictive covenants. Another is the handling by the courts of such terms as "disruption," "severance" and "injurious affection" under the Public Works Act.[8]

An example where vague criteria could be laid down is in the power to impose conditions on permits for subdivisions under the Town Planning Act. At present there is an appeal to the Minister but the court can exercise no discipline, except for frank jurisdictional fault.

A case which lacks both right and procedures is in the field of railway construction. By virtue of the provisions of section 16 of the Government Railways Act 1904-1953 and section 96 of the Public Works Act 1902-1963, a railway may only be made under the authority of a special Act of Parliament which states the line of the railway and the terminus thereof. It is lawful to deviate a distance of one mile on either side or such other distance as may be provided in the special Act. For example, the Kalgoorlie to East Northam standard gauge may deviate five miles on either side and the balance of the Kalgoorlie-Kwinana Line one mile. After the passing of the special Act the map must be deposited in the office of the Master of the Supreme Court and shall be open to public inspection. If any individual accidentally happens to know this and can work up enough enthusiasm to make an inspection, it gets him nowhere because he has no rights in the matter whatsoever. At any time after the passing of a special Act the authorities may enter upon the land and proceed with construction. No notice of entry is required. Although I understand that in practice one is given, the individual still has no rights of any sort. After the passing of the special Act, the land may be resumed in the ordinary way by notice in the Government Gazette. Construction may have proceeded *before* the resumption. At some stage either before or after resumption the Minister must serve notice of resumption on the owner or the occupier. Once again the individual has no rights of any sort. To make doubly sure of this the Act provides that no notice taking land or closing a road or street shall be impeached or defeasible on any ground whatsoever. There are no provisions providing for even the limited type of objection in town planning procedure or even allowing an owner to make representations that the line should or should not be deviated within the permissible statutory limits. Surely both procedural powers, and criteria, could be devised.

7 The Transfer of Land Act 1893-1959 (Western Australia).
8 Public Works Act 1902-1961 (Western Australia).

Here Parliament has in both respects created a situation to be governed by the "rule of no-law." It is not surprising that the farmer who sees the heavy machinery of the State crawling across his land should think that the law and lawyers have failed him, but there is nothing that a lawyer can do about it except to tell him to apply for compensation.

Our statutes provide for the "rule of no-law" varying from rights without remedies, through no rights at all to inadequate rights or inadequate remedies. The hit and miss nature of legislation in this respect can be seen at a glance. Looking at the Index to the Statutes one sees provisions relating to "Agents (enquiry) Argentine Ants, Auctioneers, Alsatian Dogs, and Architects." Of these five groups four are in the "rule of no-law," more or less. Architects have an appeal in certain circumstances from a decision of the Architects' Board to a magistrate of the Local Court, but the Board is not obliged to give reasons in writing, although the decision must be promulgated in writing. It is provided that the decision of the magistrate is final and is not subject to any appeal.[9] Auctioneers in certain circumstances have a hearing before a magistrate and section 6 of the Auctioneers Act 1921-1938 starts with great promise in that it provides that every hearing of an application shall be a judicial proceeding, it shall be open to the public and the magistrate shall hear the applicant and any objector, and the party may appear by a solicitor or agent. The promise is not realized. Section 21 provides that there shall be no appeal against the decision of any magistrate granting or refusing a certificate for a license or the transfer of a license. These two are examples of inadequate remedies. The owners of Alsatian dogs do not fare so well. By section 9 of the Alsatian Dog Act 1962 an official may determine that a dog of any sort is an Alsatian dog for the purposes of the Act. These purposes include that the dog shall be destroyed. Section 11 provides that "without otherwise limiting the rights of a person at law compensation is not payable in respect of an Alsatian dog destroyed under provisions of this Act." This is an example of no remedy. It is also an example of criteria with inadequate sanction for enforcement. The Act duly lays down detailed standards for determining what is an Alsatian dog but they are of little use to the owner, unless he can catch the inspector, as it were red handed, so that he might be enjoined. When it comes to Argentine Ants, section 12 of the Argentine Ant Act 1955 courteously provides for publication or service of a notice on an owner before the authority

[9] Architects Act 1921-1956 sec. 22A.

descends on his property. This is presumably merely so that he will have the opportunity to warn his wife and daughter because he has no other rights. This is an example of where the criteria could be simple and exact (ants or no ants) and the remedy straightforward. Neither are provided. Enquiry agents fare better than dogs and ants. Indeed they fare better than auctioneers and architects. Their affairs are heard and determined, by virtue of section 6 of the Enquiry Agents' Licensing Act 1954, under the provisions of the Justices Act including those relating to appeal by way of order to review. These gentlemen therefore have access ultimately to the Supreme Court. I knew one private detective of the old school who considered himself to be an officer of the Court. Perhaps Parliament shares this view. Observing the diverse handling of agents, ants, auctioneers, architects and alsatians one is somewhat discouraged from pursuing researches under the (B) section of the Index by noting the juxtaposition of "Barley Board, Barristers Board and Bastardy." However, a glance at "Bees" discloses the illuminating information that the term "Beekeeper" means "any person who keeps bees." It was however disappointing to see that there was no "Bee Board." Parliament has contented itself with regulating the Industry by such phrases as "if an inspector certifies"; "the director may order"; "The director may prohibit"; "if the Governor is of the opinion that"; "if an inspector is satisfied"; "if the Governor decides." If a beekeeper objects to an interim prohibition order about his bees he may appeal to the Minister by causing written grounds of his objection to be served on the Minister. The decision of the Minister "has effect according to its tenor and is final"—an example of no criteria and inadequate remedy. This act is rather like one of those "damned deeming" statutes.

> "If anything may seem,
> the Minister may deem;
> his certificate of demption
> confers complete exemption."[10]

One could go on almost indefinitely. There is "Boat Licensing, Bookmakers, Bodies, (dead) Brands, Bread, Builders" and so on, all subject to special legislation and the "rule of no-law" either more so or less so. Jumping to the end of the Index under (R) the Rights in Water and Irrigation Act 1914-1962 requiring a licence to take artesian waters, again provides no criteria, and no-law procedures. These are examples of the "rule of no-law" deliberately created or fostered by

[10] MEGARRY, MISCELLANY AT LAW (1955, Stevens), 361.

Parliament. They are not antiquarian examples. They are modern. This is happening now.

An allied area of the "rule of no-law" arises from the grant of power coupled with a no-law mandate either through the absence of rights or of remedies.

It might be seen as arbitrary power or the misuse of power, both difficult to detect or remedy in the absence of reasons and criteria for formulating the reasons. Equally important is:—

(i) *The non-use of power.* This is particularly unfortunate in monopoly activity, *e.g.*, where the State has a monopoly of an essential service. As an example the Electricity Act 1945-1953 and the State Electricity Commission Act 1945-1959 constitute an exclusive monopoly for the supply of electricity. There is no general obligation to supply[11] power without duty. There is some obligation to continue a supply once provided, but there is no general obligation to allow any particular individual to share in it. In the special case requiring an extension of mains, when a consumer applies for a supply, the Commissioner may make the supply available or with the consent of the Minister may reject the application—and this is an essential service under State monopoly control. The citizen can either like it or lump it—no criteria for rights, no remedies. This legislation provides another example of the "rule of no-law" in that if an existing supply is wrongfully cut off the consumer may take a complaint to the Minister and the Minister may refer the complaint for enquiry and determination to, believe it or not, the Commission. The naivete of this is almost incredible.

(ii) *The abdication of power.* Sir Guy Powles the New Zealand Ombudsman in his first report said:—

> "Our laws contain many provisions empowering departments or organisations to exercise discretion in individual cases, but I have found that sometimes the department or organisation concerned follows a firm rule of practice. I am concerned to see that this discretion is continually exercised on the merits . . ."[12]

There are many situations where this difficulty can arise. By-law 444 of the Uniform General Building By-laws provides for certain safety requirements "Unless specially exempted by the Shire after consultation with the Chief Fire Officer." If the Chief Fire Officer were to be in favour of or against granting exemption, it would still

11 See Bennett and Fischer Ltd. v. Electricity Trust of South Australia, (1961-1962) 106 Commonwealth L.R. 492.

12 See (1963-1964) 37 AUST. L.J. 171.

be for the Local Authority to make the decision in the exercise of a real discretion and not to automatically follow the opinion of the Chief Fire Officer.

It is a human characteristic that while we are anxious at times to assume power we are equally anxious at other times to abdicate power. The latter is particularly so if the point in question is a sharp one in terms of public controversy.

Another reason for this tendency to abdicate power is the propensity of the administrator to be hypnotised by the expert. It is much easier to accept the opinion of somebody thought to be an expert than to do the work oneself. How often have we heard administrators and even Ministers of the Crown say "this is a matter for experts. I can only rely on the advice of my experts." This habit is altogether destructive of the rational process when the expert is not subjected to cross-examination as to the facts upon which he has formed his opinion. Any lawyer knows that a so-called expert can appear to be very much less expert when subjected to a cross-examination on oath, in which the word "why"? plays a prominent part. It sometimes appears that he is not an expert at all on the issue in question. For example, the constitution of the concrete of a bridge might be a matter for an expert but the position of the bridge or whether the public wants a bridge at all might not be a matter for an expert. An equally important consideration is that under the Rule of Law it may be shown as a result of cross-examination that the expert's opinion is within his field and is soundly based on probable facts. To show that an expert is probably right is just as important as to show that he is only guessing or is probably wrong.

The attempt to provide some sort of review by the device of the appeal to the Minister does not advance the matter if the appeal itself is subject to the "rule of no-law," as is almost of necessity the case. A Minister of the Crown cannot hold a court. He does not have the time to sit perhaps for days hearing sworn evidence and performing the functions of a judge. In many situations the most conscientious Minister is almost compelled to abdicate his function in favour of departmental officals. There is the further difficulty that a matter at the Ministerial level might become involved in politics or the Minister might have already made up his mind as to what should be done. This is particularly so where no standards are laid down.

So far in Western Australia we have avoided such scandals in England as the Crichel Down Affair or the case of Mr. Ramfield, a case where the Central Electricity Authority had unofficially upheld

an owner's representations as to the route of supply line, but its officers went ahead with the original plan any way. Mr. Ramfield took defensive measures. These included guard dogs, bulls, booby-traps with sawn-off shot guns, a patrol of ex-army armoured cars and extensive barbed-wire entanglements. The "piece de resistance" was a minefield so cunningly laid that the authority had access to the agreed alternative route but any attempt to carry out construction on the original route would result in everyone being blown sky high.[13]

This is the sort of thing that eventually happens in an area of no-law, and it says a lot for our public administrators that it has not so far happened here. Luckily our administrators and politicians are average Western Australians and the average Western Australian is a normally decent conscientious and reasonably competent person who would not willingly harm his neighbour and if given the opportunity would actively help him. My neighbour does not suddenly become vicious when he accepts public office but neither is he superhuman, and it is only a superhuman who can control his own power under the "rule of no-law."

Because our administrators are decent people, they do not wish to make enemies, they do not wish to cause departmental friction, they do not wish to be disloyal to subordinates, they do not wish to waste public time or money, and they do wish to do what they think is best. All these admirable qualities are just the qualities which help to prevent an impartial adjudication, and it is not only not right from the public point of view but is not fair on the people concerned for administration to proceed in a lawless vacuum. Decisions, reports, and so on should be made under the Rule of Law which predicates facts, norms, or criteria as a basis, and judicial procedures for testing the presence of the basis.

The report of the Legislation Committee of the Victorian Law Institute recommends the formation of a Statutory Tribunals Committee charged with the review and regulation of the constitution and procedures of all existing tribunals and the advising of the Government in connexion with new tribunals. Where some organ has a pure discretion it is recommended that there should be a general tribunal to exercise such jurisdiction by way of review as the Tribunals Committee assigns to it. This idea is rather like that contained in the English Tribunals and Enquiries Act 1958. To deal with cases of maladministration such as abuse of power or lack of proper responsibility, an Ombudsman is recommended.

13 See UTLEY, OCCASION FOR OMBUDSMAN (1961), 74.

The definition of the Rule of Law in terms of procedures given earlier in this paper corresponds closely with the recommendations of the Frank's Committee on Administrative Tribunals and Enquiries set up in England in 1955.[14] The terms of reference of the Frank's Committee were however limited to the working of existing tribunals and of administrative procedures involving the holding of an inquiry or hearing. The Committee considered that the terms excluded from its consideration those many cases in which no formal procedure had been prescribed. It was not able to tackle the problem of what administrative functions should be submitted to special procedures. The Frank's Committee did however, express sympathy with the wish to provide machinery for hearing appeals against administrative decisions generally. These ideas have now been carried further by the Whyatt Report.[15] Responsible opinions have been expressed in other quarters directed to the establishment of a general administrative appeal tribunal with jurisdiction to hear not only appeals from tribunals or from decisions of Ministers acting under special statutory procedures but also appeals against harsh or unfair administrative decisions where no special procedure is provided.[16] The two main arguments against this are that if the procedure is to be of a judicial nature then an ultimate appeal should lie to the ordinary courts. This point is easily met by providing for such an appeal. The second argument against it is that it might create two different systems of law. The evils (if any) of this are not clear, but the objection is met by a suggestion in a paper entitled "Rule of Law" published in 1955 by the Inns of Court Conservative and Unionist Society. This proposed the establishment of a new division of the Court called the Administrative Division which would have appellate jurisdiction over administrative decisions generally. Perhaps something like this is what we require. Not perhaps an Administrative Division of the Court but a Supreme Court Judge who devotes his time to administrative appeals. He should be able to hear an appeal from a subordinate administrative tribunal on fact, law, and the merits with a further right of appeal to the Full Court on matters of law. There seems no reason against such a jurisdiction being alternative to and not exclusive of such legal procedures as are at present available through the prerogative writs and the developing

14 Report of Frank's Committee, Cmd. 218, July 1957.

15 *The Citizen and the Administration.* A report by *Justice,* (Stevens and Sons, London, 1961).

16 FRIEDMANN AND BENJAFIELD, AUSTRALIAN ADMINISTRATIVE LAW (2nd ed. 1962), 216-217.

remedy of declaration. The constituant statute should strike down all privitive clauses in both existing and, so far as possible, future legislation *i.e.,* clauses which are designed to oust the prerogative writs or to prevent appeal or to preclude an approach to the administrative tribunal. It is difficult to see the objection to a system of administrative law being developed, providing it is under the Rule of Law and providing that the two streams of administrative law and common law meet in the Supreme Court. After all English equity grew up in this way.

We could have then an administrative tribunal of subordinate jurisdiction governed by the Rule of Law, having power to decide questions capable of decision, to prohibit, to direct on the use or non-use of power, to declare, to recommend, to advise, to order and to quash. From this there would be an appeal to the administrative court presided over by a Judge of the Supreme Court on all questions of law, fact and merits. From this there would be an appeal to the Full Court on questions of law.

All this relates to procedure. Not enough emphasis has been placed on rights to be entailed from the existence of facts. This is fundamental. The equation can be restated as Rule of Law = Rights $\angle$ Facts + Procedures + Sanctions: $L = R < F + P + S$.

There remains the field of pure administrative discretion which is not capable of being handled in this way. For example, if no policeman could even start to make an enquiry, or no Registrar of Companies could even start to recommend an investigation, or if no fireman could put out a fire, without having a full hearing then the administrative problem would be solved because before long there would be nothing to administer. To cope with problems at these levels the Ombudsman is still necessary. Two defects in the powers of the New Zealand Ombudsman are that he has no executive power in that he only reports and recommends, in the first instance to the Department concerned, and ultimately to Parliament. The other is that he has no jurisdiction to investigate and report in regard to the activities of local authorities and the like. He is confined to matters of central Government administration. The existence of an administrative tribunal in Western Australia would enable the duties of the Ombudsman to be extended in that he could be given the power in appropriate cases to lay a complaint before the administrative tribunal. As pointed out by Sir Guy Powles, in practice many problems at the Ombudsman level are solved by the mere fact that he exists. The occasions for drastic action would probably be few.

It might be that at least in the developmental stages some sort of steering committee as has been suggested in Victoria, and as operates in England as the Council on Tribunals, would be wise. At any rate the whole question needs thorough examination at Parliamentary level, by an officially established commission which I suggest should itself set an example by procedure involving the Rule of Law.

In the words of Dr. C. K. Allen in *Law in the Making*:—[17]

> "It is clear that some new principles and methods are necessary in our public law. If they do not take the form of an explicit system of administrative law they will assuredly take that of bureaucratic law—a sore affliction for any community which has to live under it. The process of decentralisation must therefore be regulated by a modified conception of legal sovereignty and an adaptation of constitutional principles, which, far from destroying the authority of the state, will lend it greater efficiency by giving it greater poise."

JOHN WICKHAM.*

[17] 2nd ed. (1930) at 363.

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APPENDIX.

PRESENCE OR ABSENCE OF THE ESSENTIALS OF THE RULE OF LAW IN SELECTED STATUTORY TRIBUNALS IN WESTERN AUSTRALIA.*

1. Tribunal.	Government School Teachers' Tribunal. (Education Act, 1928-1962)	Promotions Appeal Board. (Government Employees (Promotions Appeal Board) Act, 1945-1956)	Appeal Board. (Government Railways Act, 1904-1960)
2. Composition of Tribunal.	A legal practitioner as chairman, one nominee of the Minister, one member elected by the Teachers' Union. (Sec. 37 (3) (4) (6) & (7))	A magistrate as chairman, a person to represent the recommending authority, an employees' representative. (Sec. 6 (2))	One magistrate appointed by the Governor, one person appointed by the Commission, and 5 elected by branches of wages staff. (Sec. 78 (1))
3. Does the process involve a hearing of the parties?	Yes. (Secs. 37 AE and AI)	Yes—by implication. (Secs. 6 (4) & 17)	Probably. (Sec. 82)
4. Must the hearing be in public?	Yes. (Sec. 37AI (2))	Yes. (Sec. 17 (2))	No.
5. Must the evidence be taken on oath?	Yes. (Sec. 37AI (6))	Yes. (Sec. 16 (2))	No, but it may be. (Sec. 82 (3))
6. Are the parties entitled to legal representation?	Only by consent of Tribunal. (Sec. 37AI (3) (4) (5))	Yes. (Sec. 16 (1))	No. (Sec. 82 (4))
7. Do the parties have the right to subpoena witnesses?	Yes, with the consent of the Tribunal only. (Sec. 37AI (6))	Yes. (Sec. 16 (2))	Indirectly, yes. (Sec. 82 (5)

8. Do the parties have the right to examine and cross-examine witnesses?	Yes, with the consent of the Tribunal only. (Sec. 37AI (6))	Yes. (Sec. 16)	Probably. (Sec. 82 (5))
9. Do the parties have the right to present their arguments?	Yes—by implication. (Sec. 37AI (3))	Yes. (Sec. 16)	No mention.
10. Must the written decision of the adjudicator be published?	No mention.	Yes, to interested parties. (Sec. 18 (1))	No mention.
11. Must the reasons for the decision be published?	No mention.	No. (Sec. 18 (1))	No mention.
12. Is there any requirement that the decision be based on the evidence adduced?	No. (Sec. 37AI (i) (b))	No—to the contrary. (Sec. 17 (3))	No mention.
13. Is there an appeal from the decision of the adjudicator and if so, under what conditions?	No—decision is "final and conclusive." (Sec. 37AE (1))	No—decision is final. (Sec. 18 (3))	No—decision is final. (Sec. 83)
14. Are there any specified criteria on which decisions are to be made—and if so, what?	Yes—superior efficiency to that of the teacher promoted or equal efficiency and seniority to the teacher promoted. (Sec. 37AF (3) (a))	Yes—superior efficiency to that of the employee promoted or equal efficiency and seniority to the employee promoted. (Sec. 14 (2))	No mention.

* The author wishes to thank Mr. G. J. Ruse, Crown Solicitor of Western Australia, for the details relating to some Statutory Tribunals. For the purposes of brevity the Appendix has been recast; any errors resulting from this are not those of the Mr. Ruse.

1. Tribunal.	Police Appeal Board. (Police Act, 1829-1963)	Appeal Board. (Prison Regulations, 1903-1954)	Public Service Appeal Board. (Public Service Appeal Board Act, 1920-1960)	Appeal Board. (State Electricity Commission Act, 1945-1959)
2. Composition of Tribunal.	A magistrate as chairman, a person appointed by the Commissioner of Police, a person elected by the force. (Sec. 33B)	One person appointed by the Governor (as chairman), one person appointed by Compt.-Gen. of Prisons, one person elected by the prison officers. (Reg. 89 (c))	Judge (as chairman) or stipendiary magistrate. 1 member appointed by Governor. 1 to represent division of Public Service concerned. (Sec. 3 (2))	Magistrate as chairman, 1 person appointed by Commission. 1 person elected by salaried staff, 1 person elected by wages employees. (Sec. 36 (3) (a))
3. Does the process involve a hearing of the parties?	Yes. (Sec. 33G)	Probably.	Probably.	Probably. (Sec. 36)
4. Must the hearing be in public?	No.	No.	No. (Sec. 8 (2))	No.
5. Must the evidence be taken on oath?	No, but it may be. (Sec. 33G (1) (a))	No.	No, but it may be. (Sec. 8 (3))	No, but it may be. (Sec. 36 (6) (c))
6. Are the parties entitled to legal representation?	Yes. (Sec. 33G (4))	No. (Reg. 89 (i))	Yes. (Sec. 8 (5))	No. (Sec. 36 (6) (d))
7. Do the parties have the right to subpoena witnesses?	Yes. (Sec. 33G (2))	No.	Indirectly, yes. (Sec. 8 (3))	Board may issue a summons. (Sec. 36 (6) (e))

8. Do the parties have the right to examine and cross-examine witnesses?	Yes. (Sec. 33 (4))	No.	No. Within the Board's discretion. (Sec. 8 (2) & (3))	Yes. (Sec. 36 (6) (c))
9. Do the parties have the right to present their arguments?	Yes.	No.	No. Within the Board's discretion. (Sec. 8 (2) & (5))	No. (But possibly by implication.) (Sec. 36)
10. Must the written decision of the adjudicator be published?	No mention.	No.	To interested parties only. (Reg. 27)	No.
11. Must the reasons for the decision be published?	No. (Sec. 33H (2))	No.	No.	No.
12. Is there any requirement that the decision be based on the evidence adduced?	No mention.	No.	No. (Sec. 8 (2))	No.
13. Is there an appeal from the decision of the adjudicator and if so, under what conditions?	No—decision is final. (Sec. 33H)	No.	No—decision is final. (Sec. 10)	No—decision is final. (Sec. 36 (8) (a))
14. Are there any specified criteria on which decisions are to be made—and if so, what?	No mention.	No mention.	No mention.	No mention.