LIMITS ON THE USE OF JUDGES

BY THE HONOURABLE MR JUSTICE F. G. BRENNAN*

The traditional function of the judicial process in adjudicating upon the existence of rights and obligations between defined persons or classes of persons will continue to be discharged by the judiciary. There are risks involved in an extension of the role of judges beyond that traditional function. Mr Justice Brennan argues that these risks must in appropriate cases be accepted, otherwise the judiciary itself may become irrelevant to the community which it serves.

INTRODUCTION

In 1972, the English Solicitors' Journal wrote:

> The politicians are overdrawing on the capital of the judges' high reputation for competence and impartiality in reaching conclusions by the judicial process of reasoning. Each time a judge is misused by being put up as a facesaver behind whose report a government can hide in carrying out a policy which they shirked adopting directly, a little of the long standing esteem in which judges are held is lost and some of their authority undermined.[1]

The controversy between those who would assign a more active role to the judiciary, and those who would limit it to the traditional curial functions is ongoing.[2] Opinions differ within and without the judiciary, for there are arguments of weight on either side of the controversy. But it is agreed by both sides that the public interest is the touchstone by which the true solution to the controversy is to be found.

Public interest is, of course, a many-faceted gem, the brilliance of which is easier to admire than to analyse. One value upon which there is general agreement is the desirability of maintaining public confidence in the judiciary, and thereby preserving general acceptance of the authority and integrity of the courts. It is not an overstatement to say that public confidence in a judiciary is a condition precedent to an ordered society and social stability.[3]

Confidence is not easy to describe or to quantify, but it is indispensable to the efficient working of the judicial system as we know it. It is an attitude of mind and it is susceptible to change. Political change is a continuum of shifting confidences. Perhaps the genius of our social

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[1] (1972) 116 Pt 1 Solicitors Journal 149.

[2] See Right Honourable Sir Leslie Scarman: "The Judge—A Man for All Seasons" (1977) Vol. 267 "Round Talk" 230.

[3] Freely acknowledged is the distinctive contribution the courts make to the social order. Horowitz, *The Courts and Social Policy* (1977).

system lies in our ability to shift our confidence in politicians and to keep our confidence in judges. We thus achieve flexibility and a responsiveness to new developments within a stable framework.

Although we may be unable to quantify the community's confidence in the judiciary, it is possible to identify the institutions and policies which tend to preserve it. At base, confidence is born of the circumstance that the judicial function is well performed by judges.[4] That is a truism which I should like to explore.

The judicial function is definable within limits. Judges are usually trained within a system of judicial functioning—they are familiar with that system, their minds are cast in the mould of the system, they develop personal qualities which are compatible with the system, and they are proficient ministers of the system's rituals. Their acquired competence, learning, qualities of impartiality and independence, and even their familiarity with the mores of the legal system commend them to the community. They both determine and are formed by the functions which they discharge.

In *The Queen* v. *Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd*,[5] Kitto J. felicitously described what is generally involved in a judicial function. He said:

> Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.[6]

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[4] In 1941 Chief Justice Stone wrote:

> The Court . . . has of late suffered from overmuch publicity. After all, its only claim to public confidence is the thoroughness and fidelity with which it does its daily task. . . . The majority are new in their positions and not too familiar with the traditions of the Court which have stood it in such good stead during the 150 years of its history. The upshot of all this is that I am anxious to see the Court removed more from the public eye except on decision day. . . .

Quoted in Mason, "Extra-Judicial Work for Judges: The Views of Chief Justice Stone" (1953) 67 Harvard Law Review 193, 200.

[5] (1970) 123 C.L.R. 361.

[6] *Id.* 374.

The judicial function is essentially syllogistic. The applicable principles—"the law as it is"—provide the major premise; "the facts as they are" provide the minor premise; the judgment follows inexorably by applying "the law as determined to the facts as determined".

At the centre of the controversy about judicial activism is the question whether judges should be asked and, in the public interest, be expected to perform duties which cannot be discharged by the traditional judicial methods: whether the solution of problems in the community might be remitted to them even though the traditional judicial method is not appropriate to the solution of these problems. The judicial function generally involves the ascertainment of an existing right or obligation. Should judges be asked not only to determine issues *ex post facto*, but also to fashion solutions for the future? The judicial function generally falls to be performed when there are parties in conflict, and a judicial determination is sought to settle a question "as between defined persons or classes of persons". Should judges be asked to determine questions in which there are no adversary claims? A judgment by its own force generally settles for the future the rights and obligations of the parties litigant. Should the judges become involved in duties which would require them to contribute merely some of the factors, for example, recommendations, which would be relevant to the making of a final decision? How significant are the risks of losing public confidence if judges are asked to function outside their traditional methodology and what are the reasons which justify the incurring of those risks?

Professor Cox, reviewing the role of the United States Supreme Court, was recently moved to ask, but not to answer, some critical questions:

> Has the legal profession exaggerated the importance of judicial adherence to a rule of law? Are there other, stronger sources of legitimacy? Or has society been living on the momentum of a legitimacy won by earlier adherence to a system of law which is bound to decline if un-elected judges continue to take over functions once thought to be suitable only to the political branches?[7]

There are no absolute or universal rules which answer these questions. The answers depend upon where the balance is struck between the necessity to draw upon judicial skills in non-traditional ways, and the risk of thereby diminishing confidence. An undue timorousness in drawing upon judicial skills leads to the development of problem-solving machinery that is less satisfactory than it should be, and to a sense that the judiciary is unduly irrelevant to many issues of community concern. Too adventurous an approach requires the judges to expose themselves to an assessment—political or otherwise controversial

[7] Cox, "The New Dimensions of Constitutional Adjudication" (1976) 51 Washington Law Review 791, 827.

—and to a consequential loss of confidence in the judiciary and in judicial institutions.

As the purpose of asking the judiciary to perform non-traditional functions is to acquire the benefit of judicial skills (or of a reputation founded upon the demonstrable use of judicial skills), the skills which are available should be identified. It is not the peculiar gifts of a particular judge which need concern us here, for the special case will always emerge as an exception to the rules or guidelines of a general policy. A function which a judge performs with distinction will enhance the esteem of the judiciary, but the problem is to evaluate the considerations which bear upon the undertaking of the function. The identification of judicial skills is thus concerned with the skills acquired by judges. The particular mystique which surrounds the judicial office is not, I venture to suggest, the result of a fortunate but fortuitous history of reputable bearers of the office. The qualities that are believed to inhere in the judiciary are qualities which are fashioned by the daily performance of a judge's duty and which in turn create the values common to the judiciary. Thus syllogistic reasoning leaves little room for idiosyncrasies, and the ascertainment of the relevant legal principle gains little from the emotions. The essentially syllogistic nature of the judicial function evokes an ability to analyse, to identify cognate legal principles; it requires industry in discovery, and a capacity to reason analogically. The "inquiry for the law as it is" becomes the absorbing passion, and it gives birth to industry, learning, impartiality and rationality.

The search for the facts of a case leaves larger room for inference. The resolution of conflicting testimony develops some appreciation of worldly wisdom, particularly at *nisi prius*. Fact-finding depends upon proof and upon the categorizing of the facts proved so that their relevance appears. The syllogism demands that no conclusion be reached until the minor premise is established. The skills of factual analysis, an insistence on proof and not on rumour, and respect for the requirements of natural justice are the essential armoury of the judicial office.

The court articulates the reasons for its judgment. The expression of the syllogistic conclusion requires the exposure, at least to the judicial mind, of the unsuspected prejudices or predilections which might have affected a decision given without reasons, or away from the glare of publicity. A habit of intellectual integrity is engendered.

The classical curial process thus contributes directly to the development of judicial skills and to the resultant confidence which the community has in its judges. The areas of possible activity which lie beyond the traditional judicial function would draw upon the traditionally acquired skills. Given the skills, how far ought judges be asked to go outside their syllogistic endeavour?

DETERMINING THE PRINCIPLE

The judge who has no criteria to guide him in his judgment is not thought to be performing a judicial function. If he is required to give a judgment without applying rules already defined to some extent, he is said to be performing an administrative or legislative, but not a judicial function. It is thought that courts are not fitted to perform functions of those kinds.[8] In the *Boilermakers'* case,[9] Williams J. held the attempted investiture of non-judicial power was bad for the reason, *inter alia*, that:

> The functions must not be functions which courts are not capable of performing consistently with the judicial process. Purely administrative discretions governed by nothing but standards of convenience and general fairness could not be imposed upon them. Discretionary judgments are not beyond the pale but there must be some standards applicable to a set of facts not altogether undefined before a court can hear and determine a matter.[10]

And in *The Queen* v. *Spicer; ex parte Australian Builders' Labourers' Federation*, Dixon C.J. held that a judicial discretion must proceed "upon grounds that are defined or definable, ascertained or ascertainable, and governed accordingly".[11] The restriction of curial decision-making to cases where there is an available and applicable *a priori* rule may have been held to be necessary for the purposes of Chapter III of the Constitution, but is it the appropriate criterion for limiting the use of judicial skills? Some kinds of dispute may be well solved by judicial skills although it is not possible to ascertain an appropriate *a priori* rule to govern their solution. Even in the constitutional domain, one discovers observations which make it difficult to distinguish the precision which is fit for application in the exercise of judicial power from the imprecision which must be left to be grappled with by the executive. In *The Queen* v. *Joske; ex parte Australian Building Construction Employees*,[12] Barwick C.J. allowed to the judicial power a capacity to resolve questions according to criteria of significant breadth:

> The determination whether some activity or its result is oppressive, unreasonable or unjust is not something which is foreign to the exercise of judicial power.[13]

A comparison between cases which lie on either side of the judicial line does not easily lead to a statement of unifying principle. It is an

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[8] Jowell, *Law and Bureaucracy* (1975) 161.

[9] *R.* v. *Kirby; ex parte The Boilermakers' Society of Australia* (1955-1956) 94 C.L.R. 254.

[10] *Id.* 315.

[11] (1957) 100 C.L.R. 277, 291.

[12] (1974) 130 C.L.R. 87.

[13] *Id.* 94.

exercise of judicial power to make orders settling property in a matrimonial cause if the judge finds that there are "cogent considerations of justice founded on the conduct and circumstances of the parties . . .",[14] but not to determine what kind of anti-competitive conduct is contrary to the public interest.[15] What is "just and equitable" can be determined in private litigation by a judge[16] but not in major industrial controversies.[17]

The unsatisfactory aspect of the "vagueness" criterion in determining what is and what is not fit for judicial decision-making is pointed out by Lord Guest and Lord Devlin who dissented in *Devanayagam's* case:[18]

> Experience shows that out of a jurisdiction of this sort there grows a body of principles laying down how the discretion is to be exercised and thus uniformity is created in the administration of justice. In this fashion, as was said in *Moses* v. *Parker*, there emerges inevitably a system of law.[19]

The human mind has a need of some sort of order, and the evolution of principles to govern relationships is a function which judges are accustomed to perform.[20] Principles emerge from analysis, debate, and the need to assign reasons for decision, and these are at the heart of the judicial process.

There is, I therefore suggest, no need to restrict the employment of judges in cases where judicial skills are otherwise required merely upon the ground that there are no rules sufficiently defined to govern their decisions. Given that their decisions are to be reasonable, fair and just, the procedures of judicial determination will give rise to rules which in time will give precise (and perhaps even rigid) guidance in the resolution of like disputes. The appropriate limitation on the demand for use of judicial skills ought not arise from inability to ascertain the appropriate principle, but rather from the kind of problem which is to be solved. The better policy consideration, I suggest, lies in a circumstance which is related to but distinct from the specificity of rules. It may well be unwise to permit judges to make policy decisions which affect the community at large, or the interests of large sections of the population —decisions which are in truth political decisions—under the guise of determining what is "fair" or "just" or "reasonable". The terms take on a connotation which broadens as the affected interests increase, and judges do not have, or ordinarily are not given, the resources which would feed into the judicial process the mass of information which is required to form a judgment of coercive wisdom. A recent article by a

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[14] *Sanders* v. *Sanders* (1967) 116 C.L.R. 366, 376 *per* Barwick C.J.

[15] *R.* v. *The Trade Practices Tribunal; ex parte Tasmanian Breweries Pty Ltd* (1970) 123 C.L.R. 361 particularly *per* Windeyer J., 401.

[16] *Cominos* v. *Cominos* (1972) 127 C.L.R. 588, especially *per* Gibbs J., 599.

[17] *United Engineering Workers Union v. Devanayagam* [1968] A.C. 356.

[18] [1968] A.C. 356.

[19] *Id.* 384.

[20] Jowell, *op. cit.* 27.

Smithsonian lawyer/sociologist points to the strengths and limits of judicial activity:

> Reason can reign when courts decide cases in which the number of unknowns is limited, in which doctrinal signposts exist, in which the relevant facts, though disputed, can be ascertained with a fair degree of reliability for purposes of the litigation, and in which the consequences of a decision one way or the other are limited in scope and generally foreseeable.[21]

The vagueness of rules does not inhibit the judicial solution of problems where the consequences of the decision "are limited in scope and generally foreseeable". But there is a limitation on judicial activity in rule making and it is a policy which the courts have imposed upon themselves, largely to avoid becoming engaged in controversies for which they are ill-equipped. The more mechanistic the role, the less the risk of embarrassment in controversy.

When the enunciation of a new rule is required the courts have traditionally been sensitive to the co-ordinate position of the other branches of government. Rules of general application are not enunciated in derogation of the powers of Parliament to legislate or of the executive to regulate. Even in the United States, where social activism is a more notable trait of judicial activity than in the Anglo-Australian system, there is an area bounded by the limits of the political question doctrine which is immune from judicial interference. In *Baker* v. *Carr* Brennan J. said:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due co-ordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[22]

These are the considerations which, I suggest, mark the limits of the proper use of the judiciary in adjudication. Whether the judge be sitting in a court or in some other tribunal, he ought not be asked to expound and apply a rule which is of a kind ordinarily expounded by the legislature or the executive. Part of the reason for this restriction

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[21] Horowitz, "The Courts as Guardians of the Public Interest" (1977) 37 Public Administration Review 148.

[22] (1962) 369 U.S. 186, 217. See also the dissenting judgment of Frankfurter J. at 266 especially at 287.

is no doubt the display of a proper regard for the co-ordinate rights and responsibilities of these other branches, and a prudent recognition of the risks of assuming the functions of those branches. Chief Justice Stone wrote to President Roosevelt:

> A judge, and especially the Chief Justice, cannot engage in political debate or make public defense of his acts. When his action is judicial he may always rely upon the support of the defined record upon which his action is based and of the opinion in which he and his associates unite as stating the ground of decision. But when he participates in the action of the executive or legislative departments of government he is without those supports. He exposes himself to attack and indeed invites it, which because of his peculiar situation inevitably impairs his value as a judge and the appropriate influence of his office.[23]

Nor ought a judge be required to expound and apply a rule for the resolution of a dispute unless he is given the necessary material to discover an appropriate solution:

> . . . the sources of judicial information can affect not only the soundness of a decision, but also its legitimacy and ultimately its impact. A decision out of touch with the reality familiar to the specialised functionaries affected by the decision may inspire resistance rather than respect. Even without a specialised audience for a decision, a dubious empirical foundation can provide a focal point for resistance.[24]

Subject to the *Baker* v. *Carr* limitations as to subject matter, there seems to be little risk to judicial esteem in vesting a rule-making power in a judicial tribunal if the material provided to the tribunal is adequate to permit the formation of a sound judgment. Difficulties might arise not so much because the tribunal's decisions would lay down normative rules for the future conduct of affairs, but because the tribunal might be thought unable to take fully into account the wide effect which the rules may have. It is of real importance that judicial tribunals be properly informed about the cases before them, but the further the tribunal moves from the traditional judicial role of resolving a dispute *inter partes*, the greater is the need for special knowledge of the area of controversy.[25] Special knowledge can be acquired by adding to the tribunal, members who have special experience and expertise in the relevant area.

It is the adoption of this expedient which leads me to be optimistic as to the usefulness of appointing judges of the Federal Court to preside over the Administrative Appeals Tribunal and the Trade Practices Tribunal. It is a feature of both Tribunals that, by their lay

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[23] Letter dated 20 July 1942, quoted in Mason, *op. cit.* 203.
[24] Horowitz, *The Courts and Social Policy* (1977) 278.
[25] *Id.* 266-267.

membership, they seek to acquire the necessary expertise which a judge sitting alone may not possess.

The esteem of the judiciary is not at risk because they are charged with a duty to define new rules, even if the rules might give rise to controversy. Judicial skills have, after all, developed our existing rules and it would be an undue limitation upon the use of those skills to preclude the development of new doctrine and new remedies. The appropriate limitations are twofold—the request of the co-ordinate branches of government and the supply of the material necessary for the formation of a sound decision. Absent these conditions, and an eroding lack of confidence in the judiciary may become manifest; but if the conditions be met, the new tribunals bid fair to follow the courts into venerability.

The safeguard for confidence in the judiciary is not nostalgia for the safe and well-worn paths of precedent, but a seemly respect for the legislature and the executive and an eagerness for expertise.

DETERMINING THE FACTS

The rules of natural justice may be taken in general as the minimum procedural requirements for any fact-finding tribunal over which a judge may be asked to preside. The public conduct of proceedings,[26] adequate notice of the hearing,[27] notice of the case to be met,[28] the opportunity to meet it[29] and the right to cross-examine[30] are essential if justice is to be seen to be done. Judges should not be required to sit on tribunals which do not ordinarily meet these procedural requirements.

There may be exceptions, however, where the nature of the jurisdiction is such that the modification of the rules of natural justice are essential to the proper exercise of a jurisdiction fit to be exercised by a judge. Lord Evershed, in *In re K. (Infants)*,[31] thought that efficient discharge of the wardship jurisdiction of the Court of Chancery was more important than insistence on the rules of natural justice. He said:

> The jurisdiction is not only ancient but it is surely also very special, and being very special the extent and application of the rules of natural justice must be applied and qualified accordingly. The judge must in exercising this jurisdiction act judicially; but the means whereby he reaches his conclusion must not be more important than the end. The procedure and rules, in the language of Ungoed-Thomas J., should serve and not thwart the purpose.[32]

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[26] *Scott* v. *Scott* [1913] A.C. 417; *McPherson* v. *McPherson* [1936] A.C. 177.
[27] *R.* v. *Thames Magistrates' Court; ex parte Polemis* [1974] 1 W.L.R. 1371.
[28] *Davies* v. *Ryan* (1933) 50 C.L.R. 379.
[29] *Johnson* v. *Miller* (1937) 59 C.L.R. 467.
[30] *Allen* v. *Allen and Bell* [1894] P. 248; *Blaise* v. *Blaise* [1969] P. 54.
[31] [1965] A.C. 201.
[32] *Id.* 219.

Confidence in the judiciary may not be weakened where it can be demonstrated that there is a special need for departure from the usual procedures of an open court and from the usual natural justice safeguards. National security *may* provide such a special need. The risk of sapped confidence does arise when the function to be performed may lawfully be performed without those procedures and safeguards—but that is really saying that judges ought not be asked to undertake tasks where they are not ordinarily bound to act judicially.

APPLYING THE PRINCIPLE TO THE FACTS

Should judges do anything but decide issues by the syllogistic method? The most influential view giving a negative reply to this question is contained in what has become known as the Irvine Memorandum.

In 1923 a political controversy developed in Victoria relating to the management of Warrnambool harbour. The controversy involved serious allegations of bribery and of misconduct in the carrying out of public works. The Government of the day announced its intention to conduct an inquiry into the affair and the Attorney-General wrote to the Chief Justice of Victoria, Sir William Irvine, with a request that one of the Judges of the Supreme Court be made available to act as a Royal Commissioner. The Chief Justice felt unable to comply with the Attorney-General's request. The reasons for his refusal are contained in his letter to reply to the Attorney-General (the Irvine Memorandum). In part the letter reads:

> The duty to His Majesty's Judges is to hear and determine issues of fact and of law arising between the King and the subject, or between subject and subject, presented in a form enabling judgment to be passed upon them, and when passed to be enforced by process of law. There begins and ends the function of the Judiciary. It is mainly due to the fact that, in modern times, at least, the Judges in all British communities have, except in rare cases, confined themselves to this function, that they have attained, and still retain, the confidence of the people. Parliament, supported by a wise public opinion, has jealously guarded the Bench from the danger of being drawn into the region of political controversy. Nor is this salutary tradition confined to matters of an actual or direct political character, but it extends to informal inquiries, which though presenting on their face some features of judicial character, result in no enforceable judgment, but only in findings of fact which are not conclusive expressions of opinion which are likely to become the subject of political debate.[33]

[33] Letter dated 14 August 1923 from Sir William Irvine to Sir Arthur Robinson, quoted in McInerney, *The Appointment of Judges to Commissions of Enquiry and Other Extra-Judicial Activities*, a paper delivered to the 1974 Annual Judicial Conference.

It would, I think, be right to say that that is the strongly preferred view—if not the inflexible rule—of the Supreme Court. It was the view when Mr Justice McInerney delivered his excellent paper "The Appointment of Judges to Commissions of Enquiry and other Extra Judicial Activities" when he addressed the 1974 Annual Judicial Conference. It was the view of the Victorian Bar Council in 1954:

> The complete public confidence in the impartiality of judges is the reason for the Commonwealth Government's request. That confidence can continue only as long as nothing is done to impair it. Judges must accordingly be entirely independent of the executive on whose actions they from time to time must sit in judgment. . . . Moreover, like all executive action, the proceedings and findings of Royal Commissions may properly be, and frequently are, the subject of public controversy.
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> Judges are not exempt from criticism, but it is most undesirable that they should intrude into areas where their conduct, not as Judges, but as persons performing an administrative function, may give rise to reflections upon them.
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> It is not easy for the public to remember that such reflections are not upon them in their judicial capacity and the reputation of the courts must inevitably suffer.[34]

These are weighty views, and they have been demonstrated to have practical merit, for they have kept the Supreme Court of Victoria aloof from controversy.

Though I have much sympathy for the Victorian view, I do not share it. In deference to so firm and respected a tradition, I should state my reasons.

The institutions of social regulation are not now as simple as they were some few years ago. Decisions which affect the interests of citizens are taken by a plethora of councils, boards, tribunals, committees and individual administrators in government instrumentalities and by company boards and officials in the private sector. The area of social regulation which is left to the courts is proportionately reducing. The inhibitions of costs and procedural complexities further limit the use of judicial skills in social regulation. If the skills be in scarce supply and if the mechanisms of social regulation are increasingly non-curial, it is reasonable to seek the services of judges to perform the new duties. Law Reform Commissions, Royal Commissions, Committees of Enquiry, and Tribunals and Commissions of differing kinds are part, and an important part, of the pattern of social regulation. Judicial skills are required to make them work efficiently. Judicial skills should not be denied to them unless their jurisdiction or procedure require the judge to depart so substantially from the traditional judicial function that the departure carries an unacceptable risk of loss of confidence.

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[34] Statement of the Victorian Bar Council 1954, quoted in McInerney, *op. cit.*

A distinction is to be made between the instrumentality in which the judge would be required to abandon his remote indifference to the results of his decisions and to adopt the role of an administrator or entrepreneur, and an instrumentality where that indifference is the very quality which is required. Controversy may ensue, but the alternative may be a gracious decline in relevance to the needs of the community. I should far prefer to see the judges of our courts controlling a discretion relating to rehabilitation treatment after an accident than assessing the quantum of lump sum compensation in later years.

NON-ADVERSARY ISSUES

The concern of the courts not to overstep their proper area of responsibility rightly leads them to abstain from deciding questions of political importance when the principles required to resolve the questions have not been previously formulated. The enunciation of a political solution is not the function of the courts. But the restriction should not be misunderstood. The courts do not shrink from deciding cases because the issues are of political significance. The *Nabalco* decision of Blackburn J.[35] and the native lands decision of the Privy Council in *Ikebife Ibeneweka* v. *Peter Egbuna*[36] are examples of cases of much political importance, but they are cases where the solving principles were at hand.

Where the principles have been laid down and their application is sought to solve a problem of major importance, is there any policy consideration which warrants the declining of jurisdiction on the ground that there is no adversarial *lis*? A number of considerations have been suggested: the possibility of the decisions being disregarded by the executive,[37] the want of a party's interest in the issues to be determined,[38] and the absence of conflict to hone the minds of both advocates and court.[39] These are persuasive but not conclusive considerations, though they find a readier acceptance because of the constitutional prohibition against the vesting of a federal jurisdiction to give advisory opinions.[40]

In the United States, another consideration which is thought to be relevant to the prohibition upon advisory opinions is that it may lead to judicial interference in the areas reserved for the other branches of government. In *Flast* v. *Cohen*[41] the Supreme Court said:

> Embodied in the words "cases" and "controversies" are two complementary but somewhat different limitations. In part those words

[35] *Milirrpum* v. *Nabalco Pty Ltd* (1971) 17 F.L.R. 141.
[36] [1964] 1 W.L.R. 219.
[37] *Hayburn's* case (1972) 2 U.S. 409.
[38] *Baker* v. *Carr* (1962) 369 U.S. 186, 204.
[39] *United States* v. *Fruehauf* (1961) 365 U.S. 146, 157.
[40] *In re the Judiciary and Navigation Acts* (1921) 29 C.L.R. 257.
[41] (1968) 392 U.S. 83.

> limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government. Justiciability is the term of art employed to give expression to this dual limitation placed upon federal courts by the case-and-controversy doctrine.[42]

In the United Kingdom the concern was to prevent the overbearing of the judiciary.[43] But the Privy Council's jurisdiction was not affected either by a history or precept of separation of powers, and the Judicial Committee has advised upon questions referred by the Executive Government.[44] When exercising a non-adversarial jurisdiction it regards itself as sitting judicially.[45] It has determined appeals from the decisions of colonial or dominion courts which passed upon such questions.[46]

If the giving of advisory opinions were limited to cases initiated by the executive or by others having the fiat of the Attorney-General, and if the court were entitled to decline the jurisdiction in a particular case for reasons which appeared sound to it, the risks of trespassing into the areas of the legislature or executive might be removed.

JUDICIAL RECOMMENDATIONS TO THE EXECUTIVE

The function of determining questions as an ordinary step in advising the executive upon the exercise of executive power is not a proper function for judges. It tends to making the judicial function either nugatory or subservient, and neither of those results can long sustain public confidence in the judicial office.

There may be some exceptions to this general proposition, but it is difficult to identify an exception which is satisfactory.

CONCLUSION

The judiciary will continue to discharge the traditional functions described by Kitto J. The traditional functions are both the nursery of judicial skills and the explanation of public confidence. Where the resolution of disputes requires the exercise of judicial skills, and the traditional functions of the courts do not extend to solving the problem in an appropriate way, judges may reasonably and prudently be asked, and may reasonably and prudently agree, to undertake the resolution

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[42] *Id.* 94.

[43] See Holdsworth, *History of English Law* v, 351. Zamir, *The Declaratory Judgement*, 46 and *cf.* a more recent debate: 46 L.Q.R. 169 and 47 L.Q.R. 43.

[44] *The Queensland Money Bills* case (1886), *Halsbury's Laws of England* (3rd ed.) IX, par. 883.

[45] *In the Matter of the Representatives of the Island of Grenada and the Hon. John Sanderson, Chief Justice* (1847) 6 Moo. P.C.C. 38, 13 E.R. 596.

[46] *In re The Initiative and Referendum Act* [1919] A.C. 935.

of disputes if the risk of loss of confidence in the judiciary is small and the need to use judicial skills is great.

The risk of loss of confidence in the judiciary is proportionate to the disparity between the functions proposed for performance by the judge and the functions traditionally performed by the courts. The risk is greatest when the proposed function would ordinarily involve advisings to the executive on the exercise of executive power, the adoption of procedures inconsistent with the rules of natural justice, and the enunciation and application of new rules which ought properly be enunciated by the legislature or by the executive. The risk is not substantial merely because judicial advice without adversary litigation is sought, or because the judiciary is asked to develop new rules to solve problems of a kind which the legislature or the executive wish the judiciary to solve, provided they are problems which may be solved by the acquisition of the necessary knowledge and the exercise of an impartial judgment.[47]

Where the function proposed is significantly different from the traditional function, the risk can be justified, but can only be justified, by the urgency of the community's need to use the judge's skills. A very special kind of national interest, and perhaps the unique fitness of a particular judge, must there be prayed in aid.

In the end, therefore, the question remains one of prudence in judgment. Sir William Irvine is right as to the way in which the court may be protected from controversy, but his views would confine the judiciary in too narrow an area of activity. Caution is needed in moving into the non-traditional area, measuring the risks by the yard-stick of traditional function, and there will be some unwished-for controversies on the way. But the risks must be run, or the institution of the judiciary may lose its relevance or, at the least, fall short of discharging fully the functions which the community would commit to it.[48]

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[47] *Cf.* Horowitz, *The Courts and Social Policy* (1977) 258.

[48] Cox, "The New Dimensions of Constitutional Adjudication" (1976) 51 Washington Law Review 791.