COMMENTARIES

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In opening the discussion on the first paper of this seminar, it is necessary to resist the temptation to range further afield, to anticipate what is coming in later papers, for if I may say so the several papers hang together in a way that is alas unusual for conferences and similar activities. That this is the case is very much to the credit of the organisers of the seminar, and of the authors of the papers. It is clear that the papers will make an integrated whole in a way that very few published-papers-of-the-seminar do. Within that wider picture, Mr Curtis's paper plays its part admirably; it speaks the prologue for more tightly focused papers to come, and I will direct these few remarks to the widest questions in the expectation that we will burrow deeper as the seminar progresses.

Would-be reformers of the Australian constitutional system may, I think, be divided into three tendencies:

- the Pruners, who want to nip off bits of deadwood, useless sections like part of 7 or 44 or 45;
- the Gothicks (who receive most attention in the media) who speak of an earlier design which has been subverted and ought to be restored, usually by putting somebody back in their original place; and
- the Utopians who want to try something new, or at least which had not previously been thought to exist here.

I think Mr Curtis is closer to the Utopians than the Gothicks, and yet there are overtones in this seminar, faint perhaps but recognisable, that so smack of the grand seventeenth century debates that the first question I would pose is: Will we always discuss this matter in so matter of fact, moderate a way? Over a period of ten years a considerable constitutional change has been brought about without its implications being discussed in wider arenas in the way that the powers of the Governor-General or of the Senate, the distribution of power between the Commonwealth and the States, have been discussed.

Why has this been so? One factor has been that the argument for the changes which have already taken place has been fairly straightforward and gone like this: The state has got a lot bigger. It makes many decisions which affect citizens, giving or withholding benefits, regulating affairs, and so on. Sometimes these decisions are thought to be wrong by the citizen affected. Getting them altered by the existing machinery does not work very well. Sometimes more needs to be done, and that something is more than a right to ask for a different decision, it is a right to get a different decision which is more favourable to the citizen if that is what he is entitled to. As Mr Curtis says, the Kerr Committee does not seem to have been bothered by conceptual problems, "or to have seen its proposals as involving an improper intrusion by the judiciary into the domain of the

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administrator". Both the parliamentary process and the traditional courts have proved unable to cope, and something else had to be tried.

Parliament, and perhaps even the Executive, have not been interested in individual cases but have been primarily interested in policy. This I think is corroborated by the thrust of most, if not all, endeavours to reform Parliament over this period. With attention directed elsewhere, the defects of the parliamentary process have been recognised and admitted, and judicial solutions accepted. This has been reinforced by the continued high prestige of the judiciary and their methods, which has rubbed off on a variety of judicial and quasi-judicial arrangements for getting things done which at other times and in other places would have been left to the executive and/or the legislature and their traditional methods. Over the past decade a reassuring voice has come from the administrative hen-house, "Ain't nobody in here but us judges and quasi-judicial persons", and the executive and legislature have rolled over and gone back to sleep.

In the future, if claims to review and replace policies are pressed, then is it not likely, probable perhaps, that battle will be joined? If it is, it will be necessary to make explicit the merits of the new "artificial reason" (as Coke originally put it) or whatever can be put in its place as the justification for extending the judicial role further into the administrative sphere. And so my second question is, *why* should legal persons and methods be likely to produce better decisions the second time around than administrative persons and methods? It was observed some time ago that the executive has "excellent science, and great endowments of nature", but not being learned in the law had ultimately to be subordinate. Any person exercising judicial review is likely to begin paying tribute to the expertise and specialist knowledge of those being reviewed; if they are especially courteous, like the Master of the Rolls looking over the shoulder of the Race Relations Board, they go on to say what thoroughly decent and hard-working persons the reviewed are.

No doubt judicial self-restraint will continue to be a mitigating factor, diminishing the friction between the two arms of government concerned. But if we are to encourage, or authorise by statute (or maybe even constitutional amendment), second-guessing by others than the first-guessers, we need to ask *why* they are likely to come up with decisions which are "demonstrably more preferable in the circumstances" than those we got the first time round. One answer no doubt will be that judges and their like are more likely to be neutral between the state and the citizen, which really means that other part of the state that is currently dealing with the citizen. This will not go down very well with the Marxists, or a great many non-Marxists of mildly reformist bent, but such has been the prestige of the judiciary in this country for many years, it is still going to carry a lot of weight, and might well carry the day.

And now to my third question. There are frequent references to some unspecified limitation of the proposed extension. Mr Justice Brennan in 1979 said "to control the exercise of some administrative powers"; the Kerr Committee in 1971 said that it would be a matter of policy what classes of decisions should be within such a system, and so on. As Mr Curtis says, the characteristic of policy so far has been pragmatism; pragmatism in politics

often is the product of pulling and hauling between interested parties. My question is whether this need necessarily be so. To state an uninformed prejudice of my own in Fuller's terms I would think the "yes/no" and the "how much" questions are much more readily amenable to a form of review that may substitute a new decision than are the "polycentric" questions—if what is involved is not a single decision but an inter-connected series of decisions, a house of cards as the New South Wales Legislative Assembly was told by way of explanation why it could not tinker with electoral boundary decisions once they had been drawn by a statutory commission. Mr Curtis speaks of "broader" issues like freeway-building, and I think they overlap substantially the "polycentric". He would leave such issues outside review by a judicial tribunal. I am not so certain of that yet. Perhaps it depends on what you mean by a judicial tribunal in that connection. His other point about the number of affected persons does not bother me, and I think group actions will bend that line. Again, once decisions by Ministers had a particular, special quality; that has been diminished. Perhaps the answer is that there are no criteria for drawing the line behind which the administrators remained unreviewed. If so, perhaps it would be better to drop the unspecific qualification lest too much horse-trading go on behind it.

If time allowed, I would have asked a fourth question: whether the "infinite number of grave and learned men" (Coke again) was readily available to operate the extended system, but as it seems they can safely be diluted except at the last, highest levels by lesser breeds without the law, I will not press it.

Mr P. J. LANIGAN*

I do not think anyone could really disagree with Lindsay Curtis's very mild conclusion that there is a place for judicial review in the administrative process. But at this time, when so recently no less a person than the Lord Chief Justice of England has told us all that the British have a greater fear of being over-judged than of being over-administered, perhaps there is less risk than would normally be the case of being branded as reactionary or unenlightened if someone tries to pursue a cautious point of view. It seems appropriate to ask why people like Lord Lane should find it necessary to remind us that not everyone accepts the fundamental assumption that, the more complete and comprehensive the appeal process, the better the system of justice will be.

I spent most of the last four years in the social security system which, until relatively recent times, was seen as a process for distributing government handouts, which the recipients were expected to accept in good grace. There were no formal external appeals. Before that I spent much of my

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