CHAPTER 4

TRIBUNALS AND ENQUIRIES

The basic reason for this brief discussion on the role of tribunals and the conduct of enquiries at this point is the inadequacy of the existing control mechanism over the administration. Thus far we have found that there is no opportunity for the decision of a department to be reviewed on its merits. Courts strictly limit their findings to the legality of the matter by insisting on technical procedure and formality. Within the departments, the in-built mechanism by which decisions of lower officials may be reviewed by officials at higher levels is also not very valuable, as once a department makes the decision, it is usually supported by his brethren, particularly if the reputation of the department is at stake.

Realising the existence of a gap, the question now is whether Tribunals can meet these expectations. The adoption of the Tribunal system could help improve the administration in a number of ways. For one thing, Tribunals can be used in lieu of courts. The Industrial Court is a good example of this and it saves time and increases efficiency in the settlement of labour-management dispute. Secondly, instead of an official of higher rank deciding on the validity or otherwise of his juniors' decision, a Tribunal could do well in his place from the point of view of bias in particular. Thirdly, the value of Tribunals as an appellate body cannot be disputed in view of the role of the Special Commissioners of Income Tax for example. Finally, in

the countries where the Ombudsman System prevails, it is provided that where a right of appeal to a Tribunal exists, the Ombudsman cannot intervene[1].

Thus, among the main reasons for setting up Tribunals is the fact that, as the State indulges in more and more socio-economic activities which create tension, there arises a corresponding need for impartial adjudication - adjudication that avoids the formality of courts, and the expense of legal procedure. The courts cannot be further over-worked in view of the fact that the backlog of cases in Malaysia now stretches to a few years[2]. Furthermore, some of the disputes that arise today require expert and specialised knowledge which a court with a wide general jurisdiction might not acquire.

Although the creation of Tribunals has at times been considered to endanger the position of the judiciary and the influence of the law as applied in the ordinary civil and criminal courts, it must be appreciated that modern government gives rise to disputes which cannot be solved by applying objective principles or standards. Ultimately what is desirable in public interest as a matter of social policy must reflect the "functional capacity of the judicial machine[3]. Thus, whatever it is possible to formulate, the relevant criteria for decision as a body of statutory principles, it would be desirable to vest the power in Tribunals.

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1 Eg S5 (2) (a) of the English Parliamentary Commissioner Act 1967.
2 Paper by L.P. Tan Sri Mohd. Suffian: "Some Problems facing the Administration of Justice in Malaysia" - 3rd Malaysian Law Conference, Kuala Lumpur. Oct. 13 - 15, 1975.
3 E.C.S. Wade and A.W.Bradley: "Constitutional Law" 8th Edition (Longmans) 1970, p. 693 Per L Greene in Johnson & Co. v Min. of Health [1947] 2 AER 395.

In England, the Franks Committee[4] reported that "tribunals are not ordinary courts, neither are they appendages of Government Departments. We consider that Tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration ..... Parliament has deliberately provided for a decision outside and independent of the department concerned". The product of this Committee's Report has been the Tribunal & Enquiries Act, 1958 for England which brought into existence the Council on Tribunals to keep under review the constitution and workings of Tribunals, to consider reports with respect to administrative procedure, the holding of enquiries, and so on. Several criticisms have been launched against Tribunals. L.J. Bloom-Cooper in an article on "An Ombudsman in Britain"[5] stated that "only the wealthy, the persistent and the individual with an influential M.P. has hopes of being granted an ad hoc enquiry or a hearing". Be that as it may, Tribunals have been born out of necessity and will continue to stay.

Tribunals v Courts

The main danger of Tribunals is their informality of procedure and the possibility of policy bias. These problems could, to some extent, be minimised by provision for right to legal representation, right of appeal and the enforcement of the requirement to state reasons for any decision. Their other defects such as lack of publicity, absence of open hearing and poor quality investigation can be overcome.

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4 Report of the Franks Committee: July 1957, page 40.
5 (1960) Pub. Law 145.

The main advantages that Tribunals have over courts is that they make greater use of experts who sit as adjudicators and hence are far more familiar with the subject-matter in issue. Whereas the courts only use the adversarial method of arguing a case, tribunals are empowered to carry out their own-independent investigation. Apart altogether from this difference in procedure, what is more significant is the "atmosphere" between that in a tribunal and in court. To a tribunal the appellant is a "customer" in whose problem the tribunal is involved, but in the court he is a "supplicant" and his problems are viewed with detachment by the court.

In Malaysia, the question whether a body is or is not a tribunal is relatively clear-cut. As Garner[6] points out "whether a body is a court or a tribunal is primarily a matter of statute law". There is little literature on this subject of tribunals, their numbers, powers and jurisdiction. Basically, the tribunal-function is carried out by bodies to whom Parliament has conferred jurisdiction. Examples include the Industrial Arbitration Tribunal, Housing & Development Board, the Special Commissioners of Income Tax, the Rent Assessment Board, the Land Evaluation Tribunal, various Appeal Boards or Boards of Inquiry established under particular status and other disciplinary bodies for instance those under the Architects Ordinance 1951, the Medical Council Act, 1971 and the Legal Profession Act, 1975.

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6 Garner: "Administrative Law" 4th Edition, page 195.

Two pieces of legislation that I would like to draw attention to in this context are the Arbitration Act, 1952 (Revised - 1972) (A 93) and the Commissions of Enquiry Act, 1950 (Revised - 1973) A 119.

The Arbitration Act relates to the conduct of proceedings when the two parties in dispute agree to refer it to arbitrators. Section 13 of the Act deals with the conduct of proceedings, power to call for documents, examination of witnesses and so on. By virtue of Section 14, any party to a reference may in certain situations apply to the High Court to intervene in the arbitration. In such cases, Section 13 (6) defines the powers of the High Court in the making of orders for the purpose of and in relation to a reference.

Every arbitration agreement is deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the person claiming under them respectively: Section 17. However, under Section 22 (1) "An arbitrator or umpire, may, and shall if so directed by the High Court state -

(a) any question of law arising in the course of the reference, or

(b) an award or any part of an award in the form of a special case for the de cision of the High Court.

S 22 (3) "A decision of the High Court under this Section shall be deemed to be a judgment of the High Court within the meaning of Section 67 of the Courts of Judicature Act, 1964 ....., but no appeal shall lie from the decision of the High Court on any case stated under Sub-section (i) (a) without leave of the High Court or of the Federal Court".

These provisions clearly illustrate what seems to be a highly acceptable way of settling a dispute. In the absence of a Council on Tribunals as in the United Kingdom or an Administrative Act as in the United States, this supervisory function of the High Court is vital.

Leaving the individual aside for a while, if a substantial portion of a community are affected prejudicially by administrative action or a question of public importance needs to be resolved in the area of administrative law:

> "The Yang di-Pertuan Agong may, where it appears to him to be expedient so to do, issue a Commission appointing one or more Commissioners and authorising the Commission to enquire into -
> (a) the conduct for management of any Federal Officer;
> (b) the conduct or management of any department of the public service in the Federation;
> (c) the conduct or management of any public institution;
> (d) any other matter in which an enquiry would in the opinion of the Yand di-Pertuan Agong, be for the public welfare .....[7].

Similar powers are also given to State Authorities[8] over the conduct of State Officers, Departments and Institutions.

Broadly speaking, these powers are wide, but the problem is that the provisions are seldom invoked unless and until the issue is of such major importance either in terms of money or if it affects public security, morality etc. So far the Law Revision Commission, the Royal Commission on Non-Muslim Marriages have

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7 Section 2 (1): Commission of Enquiries Act, 1960 (Revised 1973) (A.119)
8 Ibid Section 2 (3).

submitted Reports. The Commission to enquire into the fire in Campbell Complex is the most recent one.

The Act also states that "every enquiry under this Act shall be deemed to be a judicial proceeding within the meaning of the Penal Code" - this is in Section 10. Section 22 leaves it to the "discretion" of the Commissioners to decide on procedure and forms.

In concluding this Chapter, the only point I wish to emphasize is that Tribunals have the potential, in fact, they are the only instruments of control whereby an administrative decision may be reviewed on its merits. Tribunals dispensing with "administrative justice" are in substance doing a specialised kind of court-work. A final point is that if the Public Complaints Bureau or other institution purporting to handle complaints also entertained complaints about the conduct of enquiries or about malpractices in procedure of tribunals, this would make for greater effectiveness of such 'control'.