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THE CHARITY COMMISSION OF ENGLAND AND WALES AS A MODEL: COULD HONG KONG AND AUSTRALIA BE IMPORTING A CONSTITUTIONAL PROBLEM?

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The Charity Commission of England and Wales is granted powers under the *Charities Act 2011* of decision-making about charitable status and public benefit of entities which were formerly the province of the judiciary. Considering that the incursion of government into charity law has become such a controversial issue, it is remarkable that the intermingling of administrative and judicial power in the *Charities Act 2011* has received so little attention. This article explores the constitutional challenges faced by charity law in the UK and reveals what lessons may be learned by Australia and Hong Kong as each jurisdiction prepares to introduce a charity commission. In particular, the article contends that complications concerning the operation of the doctrine of separation of powers remain unresolved in England and Wales and that both Australia and Hong Kong need to give the judiciary a formidable role in adjudication of charitable status, so that the charity commission of each jurisdiction, although an arm of the executive, can be checked in crucial cases.

I. INTRODUCTION

The terms of reference of the Charity Commission of England and Wales ("the Charity Commission") under s. 6(1A)(3) of the *Charities Act 2006*[1] gave authority to it to make determinations on the charitable status of entities and to do so "on behalf of the Crown". For the first time in the regulation of charity law in England and Wales, this explicitly granted a judicial function to an executive organ. Further clouding matters, however, s. 6(1A)(4) provided a disavowal, namely that the Charity Commission "shall not be subject to the direction or control of any Minister of the Crown". These provisions have been carried over by ss. 13(3) and 13(4) of the *Charities Act 2011*[2] (which came into force in March 2012). Taking aim at the clause that was to become s. 6(1A) of the *Charities Act 2006*, and later s. 13 of the *Charities Act 2011*, the Charity Law Association ("CLA") made a submission in 2004 against the power of determination and executive power being combined in the same section and in the same body. In the view of the CLA, the offending provision should have been struck out by the Joint Committee on the Draft Charities Bill because it "raised both issues

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1 (U.K.), 2006, c. 50 [*Charities Act 2006*].
2 (U.K.), 2011, c. 25 [*Charities Act 2011*].

of public perception and constitutional law" and that, "[i]f the Charity Commission is to be a credible regulator, it must be separate from Government."[3] The CLA went yet further and contended:[4]

> If the Charity Commission is a Government department then it is likely to lessen, rather than increase, public confidence in charities. It will be seen as susceptible to being used by the Government to further its own policies. Indeed, it is conceivable that this is in fact what the relationship between the Commission and the Government would develop into; it may not only be only a matter of perception.

The CLA's submission indicates the establishment of a charity commission can lead to a body with a confusion of executive and judicial powers, which potentially transgresses the doctrine of the separation of powers. This article examines the extent to which this is a problem that legislators in Australia and Hong Kong ought sensibly to avoid as they prepare to usher charity commissions into their jurisdictions. Here we contend that the legitimacy of charities in the perception of the public is based on more than the need to know that charity funds are being applied to a worthy purpose; it is also a matter of the regulation of charities being at an arm's length from the government.

The framework of this inquiry is as follows:

(1) To begin with, we introduce the modern conception of a charity commission in light of the history and functions of charity commissioners;
(2) then we offer an analysis of the constitutional question of the separation of powers with reference to a prominent Australian example; and
(3) we explain why the powers of the Charity Commission raise a problem as regards the separation of powers which will not go away.

Finally, *Independent Schools Council v. the Charity Commission for England and Wales*[5] is used as an illustration of the problems of the constitutional function of the Charity Commission. The concerns of the CLA on constitutional grounds appear to be a lost battle in England and Wales, but this does not have to be the case in jurisdictions which take the English model as an inspiration, such as Hong Kong and Australia.

The general aim of this article is to identify the constitutional dimensions that charity law in the United Kingdom currently faces and to specify why the Charity Commission, as currently constituted, is not fit for purpose. British constitutionalists Wade and Bradley observe generally that "it is idle to boast of an independent judiciary if major justiciable issues are excluded from the jurisdiction of the Courts and entrusted to administrative authorities".[6] In a constitutional democracy, if a charity commission is vested with judicial power or directed in its work by the executive,

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3 Joint Committee on the Draft Charities Bill: Minutes of Evidence, vol. II (HL 167-II/HC 660-II), Supplementary memorandum from the Charity Law Association (DCH 194) London, House of Lords, 16 June 2004, Ev. 71 at para. 2.

4 *Ibid*. at para. 2.1.

5 [2012] 2 W.L.R. 100 (Upper Tribunal) [*Independent Schools Case*].

6 Emlyn C.S. Wade, George G. Phillips & Alexander W. Bradley, *Wade and Phillips Constitutional Law* (London: Longmans, 1965) at 31 [*Wade & Bradley*].

then it is neither fish nor fowl. In particular, the Australian experience in *Attorney-General (Commonwealth) v. The Queen*[7] speaks relevantly to this[8] as it was decided by the Privy Council and it contains a valuable lesson on separation of powers which remains good law in Australia to this day. As the Charity Commission has been granted powers of decision-making about charitable status and public benefit which were formerly the province of the judiciary (and independent commissioners acting in a quasi-judicial capacity), its claim to freedom from executive interference need be rigorously questioned in light of the separation of powers doctrine.

It is freely conceded that, with the exception of the CLA, there has been little discussion inside England and Wales about the constitutionally anomalous position of the Charity Commission. It may be unproblematic that, in the same section of the *Charities Act 2011* there is provision that "the functions of the Commission shall be performed on behalf of the Crown"[9] *and* ascription of the habitually judicial power of "determining whether institutions are or are not charities".[10] However, considering that charity law has become such a strongly contested domain in the courts and the popular media, it is remarkable that the intermingling of administrative and judicial authority has received so little attention. This is especially the case when the Charity Commission determines whether organisations that have political mandates as a significant or subsidiary purpose are charitable. Dunn has gone a step further and raised the prospect that the independence of the charity sector is in question because of its use by governments as an alternative source of social services and that there is growing concern about the phenomenon of what she terms "state capture".[11] As one would expect, there is provision in the *Charity Act 2006* and *Charity Act 2011* for judicial review of the Charity Commission's decisions.[12] However, owing to the use by the Charity Commission of quasi-judicial power, *any* unsupportive review action taken by a court or judicial tribunal could look like a gambit to re-secure jurisdiction in a polity in which it has been legislatively decided that judges are no longer to be the first port of call in charity disputes. It is argued later in the article that this is what makes the ruling in the *Independent Schools Case* a decision with constitutional implications.

This article takes the line that the uneasy correspondence of administrative and judicial powers in the Charity Commission is not a healthy development. As mentioned above, new charity commissions are to be introduced in Australia (July 2012) and Hong Kong (date yet to be specified). Thus, the question of separation of powers and determination of charitable status will be an issue for jurisdictions beyond

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7 (1957) 95 C.L.R. 529 (H.C.A.).

8 *Attorney General (Commonwealth) v. The Queen* (1957) 95 C.L.R. 529 (P.C.) [the *Boilermakers' Case*]; *R v. Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 C.L.R. 254 [the *Boilermakers' Case* (H.C.A.)].

9 *Charities Act 2011*, *supra* note 2 at s. 13(3).

10 *Ibid*.

11 Alison Dunn, "Charities and Restrictions on Political Activities: Developments by the Charity Commission for England and Wales for Determining the Regulatory Barriers" (2008) 11 The International Journal of Not-For-Profit Law 22 at 24.

12 *Charities Act* 2006, *supra* note 1 at Schedule 4; *Charities Act 2011*, *supra* note 2 at s. 317. For further discussion of this, see John Kong Shan Ho & Rohan B.E. Price, "Reform of Charity Law in Hong Kong and Australia: What Lessons Can Be Learned from the United Kingdom?" (2011) 6 Asian J. of Comp. L. 1 at 5, online: <http://www.degruyter.com/view/j/asjcl.2011.6.1/1932-0205.1375/1932-0205.1375.xml?format=INT> [*Ho & Price*].

English shores as both will look to the example of England and Wales. The exposure draft of the *Australian Charities and Not-for-profits Commission Bill 2012*[13] grants the Charity Commissioner the threshold judicial role to determine which charities act in the public benefit for the purpose of registration,[14] but also explicitly confers on the office the powers of the executive[15] and legislature.[16] Australia has a proud heritage of upholding the doctrine of the separation of powers to protect discretely exercised judicial power. This must surely be tested by the new development.

In June 2007, the Chief Justice and the Secretary for Justice in Hong Kong asked the Law Reform Commission ("LRC") to review the law and regulatory framework relating to charities in Hong Kong and to make recommendations for reform. The Charities Sub-committee of the LRC eventually published a consultation paper on charities in June 2011 with the aim of reforming the law on this subject.[17] The consultation paper has made a number of recommendations to reform the law on this matter and after examining the law of a number of common law jurisdictions, it seems to have recommended the adoption of the United Kingdom approach on three major issues, that is, to implement a clear statutory definition of what constitutes a charitable purpose,[18] to introduce a sole regulatory body similar to the United Kingdom's Charity Commission to process and grant all permits and licences necessary for charitable fundraising, and to monitor the use of funds raised by these activities.[19]

The recent case of *Church Body of the Hong Kong Sheng Kung Hui v. Commissioner of the Inland Revenue*[20] decided that the Anglican Church in Hong Kong, when engaging in property development to the benefit of its governing committee, was not carrying out a charitable purpose for humankind or even its own parishioners. The case confirmed the independent timbre of the Court of First Instance and also highlighted the risk in Hong Kong of a government-established charity commission 'playing favourites' among charities on behalf of the executive. The Hong Kong LRC consultation paper on charities argues that a number of other jurisdictions already have a centralised regulatory body for charities and that Hong Kong should not be left behind on this issue if it wants the sector to continue thriving.[21] But in a *laissez-faire* economy like Hong Kong, there are concerns as to whether establishing a single regulator such as a charity commission to monitor the sector would create bureaucratic regulatory-monopoly and an undue administrative burden on charities which could otherwise use their resources to help needy members of the community. The Hong Kong reform proposal has also recommended mechanisms for aggrieved parties to appeal against certain decisions of the proposed Charity Commission to the Court of First Instance. Also, in line with the example of England and Wales,

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13 Exposure draft: <http://archive.treasury.gov.au/documents/2263/PDF/acnc_exposure_draft_em.pdf> [*Australian Bill 2012*].

14 *Ibid*., cl. 2-10(a).

15 *Ibid*., cl. 2-15(f).

16 *Ibid*., cl. 2-15(g).

17 The Law Reform Commission of Hong Kong, *Charities Sub-Committee Consultation Paper*, June 2011, online: The Law Reform Commission of Hong Kong <http://www.hkreform.gov.hk/en/publications/charities.htm> [*LRC Consultation Paper*].

18 See *LRC Consultation Paper, ibid*., Recommendations 1 and 2 for details.

19 See *LRC Consultation Paper, ibid*., Recommendation 13 for details.

20 [2010] HKCFI 61.

21 See *LRC Consultation Paper*, *supra* note 17 at paras. 59, 60 for this discussion.

the LRC considers that the Secretary for Justice should continue to contribute to the framework of supervision and control over charities which will be implemented by the future Charity Commission.[22] So, what lessons and experiences can jurisdictions such as Australia and Hong Kong draw from the United Kingdom in establishing a charity commission and what are the constitutional challenges that they may face? This is to where the article shall now turn. Before that, it is necessary to take a short detour to understand the historical origins of the current charity regulation system of England and Wales.

II. The Idea of a Charity Commission

The reign of Queen Elizabeth I saw the introduction of the 1601 *Statute of Charitable Uses* which introduced Commissions of Inquiry and established what purposes were regarded as charitable. It was not, however, until 1853 that the United Kingdom's first Charity Commission was established by an Act of Parliament. This development responded to concerns in the mid-Victorian period about incompetent administration of charities and misuse of their resources.[23] The nineteenth century experience showed that a charity commission seldom comes "out of the blue" and so consideration of the circumstances leading to the establishment of the Charity Commission's latest incarnation in 2006 is a useful point of departure if we are to develop a broad understanding of its current constitutional problems.

In the nineteenth and twentieth centuries, the Charity Commissioners for England and Wales ("the Commissioners") had no legal existence as a body and their functions were held personally by Commissioners.[24] The Commissioners were vested with the ad hoc power of determining charitable purposes and from Elizabethan to Victorian times they used to travel by horseback from town to town listening to the claims of trustees and ruling on their statuses.[25] Between 1900 and 1974 there was an ongoing state of jurisdictional tension between the Commissioners and the Minister of Education (and later the Secretary of State for Education) for control over decision-making on educational charities and there has been little consistency in the way Tory or Labour governments made policy in regard to the Commissioners. In 1949, under Clement Atlee's Labour government, all powers over endowments that were partly educational were taken from the Commissioners by the Minister of Education, and in 1964, they were exercised by the Secretary of State for Education and Science; in 1973, the Commissioners were given exclusive jurisdiction over educational trusts by the Edward Heath's Tory Government and the remaining powers of the Secretary of State over educational trusts and certain trusts relating to religious education came to an end in 1974 under the Labour Government of Harold Wilson.[26] The lack of historical tenure of the Commissioners and the chop and change nature of their

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22 See *ibid*. at paras. 66, 67 for details.

23 David Locke, "Is Australia ready to change the way we treat our nonprofit sector? A view from the UK", online: <http://www.charity-commission.gov.uk/About_us/About_the_Commission/Speeches/david_speech_0610.aspx>.

24 Hubert Picarda, *The Law and Practice Relating to Charities*, 4th ed. (Haywards Heath: Bloomsbury, 2010) at 766.

25 Locke, *supra* note 23.

26 *Ibid*.

jurisdiction leaves little room for doubt that their role turned on who the government of the day nominated as the decision-maker over charitable trusts under the Education Act.

In light of such antecedents, it is conceivable that the tenuous position of the Charity Commission under s. 13 of the *Charities Act 2011* will *not* come to be seen as an improvement when compared with the role of the Charity Commissioners (1949-2005). The Commissioners may not have had complete independence or any tenure of jurisdiction but their *personal* rather than institutional role meant, at least, that they did not wield judicial power as a department of the executive and maintained a semblance of detachment. Such interpretation finds Brodie in accord; he argues the Commissioners, in determining which entities were admitted to the register of charities, "had to be independent" and that, because the Charity Commission has allowed political organisations to be regarded as charities, it should be scrapped and replaced with the old system of Commissioners.[27] Edge and Loughrey also follow the thesis that the Commissioners were independent and argue that the decision-making modus of the Commissioners was "reminiscent of judicial lawmaking" and "potentially activist and quasi-judicial".[28] Taking this line, the uninstitutionalised Commissioners and, later, the Victorian incarnation of the Charity Commission, although relying frequently on judicial pronouncement for guidance, may have usurped the judicial role to a certain extent but were judicial in the sense that they maintained recognised independence from the executive. From independent and generally uninstitutionalised origins, the modern Commission emerged as a new and distinctive body following a range of reforms to the charity sector and it is to these reforms in 2006 that this article now turns.

III. The Road to the *Charities Act 2006*

The origins of the recent charity law reform in the United Kingdom go back to the mid-1990s and the recommendations made under the *Deakin Report*.[29] One of the most important recommendations made by the *Deakin Report* was that the common law definition of charity ought to be replaced with a single definition based on a new concept of public benefit and there should be an independent Charity Appeal Tribunal to review decisions by the Charity Commission on the registration of charities. A review of the developments since the *Deakin Report* was undertaken in 2001.[30]

The *Deakin Report* recommendations for reforming the definition of charity was taken forward by the Charity Law Reform Advisory Group, which was established in 1998 by the National Council for Voluntary Organisations ("NCVO") to explore

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27 Stanley Brodie, "The Charity Commission Politicised and Politicising" (2010) 30 Economic Affairs 9.

28 Peter W. Edge & Joan M. Loughrey, "Religious charities and the juridification of the Charity Commission" (2006) 21(1) The Journal of the Society of Legal Scholars 36 at 37 [*Edge & Loughrey*].

29 U.K., National Council for Voluntary Organisations, Commission on the Future of the Voluntary Sector, *Voluntary Action: meeting the challenges of the 21st century* by Campbell Robb, *et al*. (London: NCVO, 1996) [*Deakin Report*].

30 U.K., Centre for Civil Society, *Next steps in voluntary action*: *An analysis of five years of developments in the voluntary sector in England, Northern Ireland, Scotland and Wales* by Nicholas Deakin (London: NCVO, 2001).

whether the law on charitable status should be reformed to bring it in line with modern circumstances.[31] This was preceded by some initial work and a conference called "The Foundations of Charity", carried out in collaboration with King's College London. The Charity Law Reform Advisory Group considered seven options and they were included in the final report, For the Public Benefit?—A Consultation Document on Charity Law Reform ("the NCVO Report").[32] The chosen option was probably the most conservative at the time, namely, to extend the same positive public benefit test to all purposes, that is, to remove the presumption of public benefit from the first three heads of charity under the *Pemsel* classification. The reason expressed for the rejection of the option of a statutory definition at the time was that this would lead to inflexibility and render existing case law irrelevant.[33] Those who opposed the proposed modernisation were concerned about the loss of flexibility, loss of existing case law and the scope for government interference.[34]

However, at about the same time, Tony Blair, the Prime Minister of the time, commissioned a review of the law and regulation of charities by the Performance and Innovation Unit (later renamed the Strategy Unit) (the "Strategy Unit Review"). The Strategy Unit was an elite unit based in the UK Cabinet Office between 2002 and 2010 and its purpose was to provide the Prime Minister with in-depth strategy advice and policy analysis on key priorities. According to Tony Blair, the Strategy Unit would "look ahead at the way policy would develop, the fresh challenges and new ideas to meet them".[35] The Strategy Unit Review was part of a wider agenda of partnership with the voluntary sector and it continued the work started in the Compact and the Getting Britain Giving Initiative[36] in the year 2000. According to the UK Institute of Fiscal Studies, the proportion of all households giving to charity fell from over 33 per cent in 1978 to lower than 30 per cent in 1996.[37] In response to this problem, the government initiated a consultative process in order to draft new legislation related to charitable giving. The government announced several important legislative reforms in November 1999 intended to create a "democracy of giving".[38] The broad impetus of these initiatives was a desire to increase the effectiveness of charities in the context of their enhanced role in public service delivery, and to explore other forms of partnership in delivering the government's objectives. The Strategy Unit Review was informed by a growing awareness of the need to modernise the legal framework for charities, to decrease some of the red tape and to increase public confidence.[39] The resulting report[40] was published in September 2002. It comprised

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31 Kerry O'Halloran, *et al.*, "Charity law reforms: overview of progress since 2001" in Myles McGregor-Lowndes & Kerry O'Halloran, eds., *Modernising Charity Law: Recent Developments and Future Directions* (Cheltenham: Edward Elgar, 2010) at 13.

32 U.K., NCVO Charity Law Reform Advisory Group, *For the public benefit?—A consultation document on charity law reform* by Winifred Tumim, *et al*. (London: NCVO, 2001).

33 *Ibid*. at 37.

34 *Ho & Price*, *supra* note 12 at 5.

35 Tony Blair, *A Journey* (London: Random House, 2010) at 339.

36 U.K., Her Majesty's Treasury, *Getting Britain Giving in the 21st Century* (Budget, 2000).

37 James R. Michels, "U.K. Charity Law: Is it Creating a True Democracy of Giving?" (2001) 34 Vand. J. Transnat'l L. 169 at 175.

38 *Ibid*.

39 *Supra* note 31 at 50.

40 U.K., Strategy Unit, *Private Action, Public Benefit: A Review of Charities and the Wider Not-for-Profit Sector* (London: Her Majesty's Stationery Office, 2002) [*Strategy Unit Report*].

a number of recommendations including:

(1) reform of the Charity Commission;
(2) liberalisation of the rules on trading by charities;
(3) introduction of a Charity Appeals Tribunal; and
(4) introduction of a new incorporated legal structure for charities.

On the issue of charitable definition, the Strategy Unit Report repeated the recommendation of the NCVO Report to introduce the single public benefit test for all charities, but it also included a proposed new statutory definition setting out a list of charitable purposes. These purposes were broadly similar to those already recognised as charitable by the court and the Charity Commission with some extensions. The longer list was proposed to provide a clearer picture of what is charitable under charity law.[41]

The government responded to the *Strategy Unit Report* in July 2003[42] by accepting a majority of its recommendations. On the issue of definition, the government merely sought to add two additional purposes, namely the promotion of animal welfare and the provision of social housing. The proposed Charities Bill eventually entered the drafting stage in early 2004 and was amended in the light of the Joint Committee's recommendations and came to the House of Lords in December 2004. It ultimately received its final debate before the Law Lords in November 2006 and, as with the debates on the draft Charities Bill, much of the discussion was on public benefit and independent private schools and the effect of the decision in *Re Resch's Will Trusts*.[43] Almost six decades after the first recommendation[44] the statutory definition finally reached the statute book in the *Charities Act 2006*. Much of the debate in the press coverage at the time focused on the new emphasis of public benefit, and particularly how this would affect fee-charging charitable schools and religious organisations.[45] It is the reversal of the public benefit presumption, rather than any extension of charitable purposes, that is regarded as the modernising element.[46]

One major feature of the *Charities Act 2006* is the strengthening of the role of the Charity Commission. During scrutiny of the Charities Bill by the Joint Committee and the passage through both Houses, there were many debates about the need for the independence of the Charity Commission, in particular with its role in determining charitable status and the public benefit test. Hence, on the issue of independence, the legislation provided that, in the exercise of its functions, the Charity Commission shall not be subject to the direction or control of any Minister of the Crown or other government department.[47] According to the Charity Commission's own words, it has the same powers as the court when determining whether an organisation has charitable status and the same powers to take into account changing social and economic

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41 *Supra* note 31 at 51.

42 U.K., Home Office, *Charities and Not-for-Profits: A modern legal framework* by David Blunkett (London: Her Majesty's Stationery Office, 2003).

43 [1969] 1 A.C. 514 (P.C.) [*Re Resch's Will Trusts*].

44 U.K., *Report of the Committee on the Law and Practice Relating to Charitable Trusts* (Cmd 8710) by the Nathan Committee (London: Her Majesty's Stationery Office, 1952).

45 *Ho & Price*, *supra* note 12 at 196.

46 *Supra* note 31 at 48.

47 *Charities Act 2006*, *supra* note 1 at s. 6(1A)(4).

circumstances, whether to recognise a purpose as charitable for the first time or to recognise that a purpose has ceased to be charitable. Indeed, since 2006, the Charity Commission has accepted a number of new charitable purposes and extended existing purposes such as the advancement of conflict resolution, the promotion of equality and diversity.[48] Moreover, the Charity Commission has also been enmeshed in a number of sensitive political issues. There were criticisms made of it in 2010 in relation to its decision to not suspend registration of the Muslim Aid charity amidst allegations of links to terrorist organisations. A media outlet accused it of failing to consult a wide enough body of materials in coming to its decision (including Israeli and United States terrorist watch lists).[49] More recently, the charitable status of independent fee-charging schools (as will be discussed later on in this article) has also led to a debate of the Charity Commission's role in exercising its power. The regulator's suspension of Mustapha Kamal Mustapha as Imam of Finsbury Park Mosque on grounds of his alleged terrorist connections was upheld as justified by the European Court of Human Rights. The case indicates that the Charity Commission must continue to draw a careful line between safeguarding legitimate charity and preventing those who would use charity as a front to fund hatefulness.[50] It also highlights the political nature of the Commission's work in deciding the difference between terrorist supporters and *bona fide* Muslim aid societies.

Further, the *Charities Act 2006* also established the Charity Appeal Tribunal to hear appeals from decisions of the Charity Commission. The Charity Appeal Tribunal has the power to review certain decisions of the Charity Commission in a process similar to judicial review.[51] The call for a Charity Appeal Tribunal dates back to the recommendation made under the Goodman Report in 1975.[52] One rationale for setting up the Charity Appeal Tribunal was that, in recent years, there had been very few appeals to the High Court from decisions of the Charity Commission on charitable status and it was felt that a tribunal with cheaper, simpler and faster procedures would facilitate the development of the law on charity, particularly in the light of new statutory definition.[53] However, decisions of the Charity Appeal Tribunal do not set a binding precedent; nor is the Charity Appeal Tribunal a court of record. Since September 2009, appeals from the Charity Appeal Tribunal lie to the Tax and Chancery Chamber of the Upper Tribunal, which includes the High Court Judiciary and is a Superior court of record. If it is desirable to set a precedent, for example, in a public benefit case or one involving the interpretation of the statutory definition, a reform could entail proceedings going straight to the Upper Tribunal with an appeal lying to the Court of Appeal.[54] The threshold and routine determinations are for the Charity Commission and, if the *Independent Schools Case* is a reliable guide, the

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48 *Supra* note 31 at 53.

49 Andy Rickets, "Charity Commission rejects criticism over Muslim Aid investigation", *Third Sector Online* (20 December 2010), online: Third Sector <http://thirdsector.co.uk/news/Article/1047280/Charity-Commission-rejects-criticism-Muslim-Aid-investigation/>.

50 *Mustafa Kamal Mustafa (Abu Hamza) (No. 1) v. the United Kingdom* [2011] ECHR 211.

51 *Charities Act 2006*, *supra* note 1, Schedule 1.

52 U.K., House of Commons Expenditure Committee, *Charity Commissioners and Their Accountability: Tenth Report from the Expenditure Committee* (London: Her Majesty's Stationery Office, 1975).

53 *Supra* note 31 at 54.

54 For details of cases and discussion on the working and reform of the Tribunal system, refer to the website online: <http://www.justice.gov.uk/tribunals/charity>.

Upper Tribunal will decide politically sensitive applications on a case-by-case basis and implore the legislature to develop overarching policy if it deems it necessary. The apparent deference and accommodation of the Upper Tribunal in relation to the legislature is analysed in the final section of the article.

IV. The Charity Commission in the Context of the Separation of Powers

Jurists in the United Kingdom, Australia, Canada and elsewhere in the common law world take as a truism Bennion's observation that "only the legislature can legislate and this is all they do; only the judiciary can judge and this is all they do; and the executive can do everything else".[55] This makes an administrative body which wields both judicial and administrative/executive powers, such as a charity commission or an industrial court, an odd hybrid for the purposes of an accountable constitutional system. Among jurists outside the United Kingdom there exists a strain of thinking that it is vital to the separation of powers doctrine for the judiciary to brook no executive or legislative incursion on its independence and this is a key aspect of the British legacy of constitutional government. For example, in the Australian state of Victoria, its Chief Justice observed:[56]

> History informs us that in any British-based constitutional system, there will be a touchstone—the doctrine of the separation of powers. The executive of the day of any modern government under such a system must acknowledge the role of the courts in their system in both in principle and in practice. Similarly, history informs us that as long as the system exists, the judiciary will not go away, and, when necessary, it will not be silent.

As central as the doctrine may be to the life of a constitutional democracy, in both its idealism and susceptibility to literal application, it is—of course—very easily transgressed by a legislature or an executive. Its slavish application ought not to be called for and even the accusation that a charity commission is adversely affected by hybridism in its sources of power needs to be examined closely. Although the doctrine has been apt to be used as the basis of a point scoring exercise conducted by hermetically-inclined academics against the executive, not every case in which judicial power is usurped should be regarded as a crying shame. Equally, there will be cases in which serious issues of constitutional governance are at stake; one such recent example is the *Independent Schools Case*. In it, the justices of the Upper Tribunal regarded the charitable status of independent schools as properly a legislative terrain, not a judicial one, and that its decision should be limited to the charitable status of the schools in the case rather than have an overarching effect.

Bennion points out that the powers of the Executive and the Legislature are "inextricably mixed" in the United Kingdom but that the protection of discrete judicial power from incursion by the legislature or the executive has been before British

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[55] F.A.R. Bennion, "Separation of Powers in Written and Unwritten Constitutions" (2006) 15 Common Law 17 at 19, online: Francis Bennion <http://www.francisbennion.com/pdfs/fb/2006/2006-015-separation-of-powers.pdf>.

[56] Chief Justice Marilyn Warren, "What Separation of Powers?" (2005) 31 Monash U.L. Rev. 1 at 11.

courts in the last decade.[57] This raises the question of why the activities of the Charity Commission have been generally thought to be exempt from the doctrine of separation of powers, or at least not prompt serious examination of the doctrine's role. The decision of Justice Walker in *R (on the application of Girling) v. Parole Board*,[58] on whether the Minister of the Home Office and the Parole Board (acting as a court) were properly separate in their functions, indicated that the separation of judicial power is still a live issue in the United Kingdom in some, if not all, cases. When a parliament unilaterally reallocates what has been a judicial function to a new administrative organ, it necessarily transgresses the separation of powers doctrine. In the case of the Charity Commission's role, it is arguable that it does not do so with a progressive or justifiable effect.

A. *Conflicting Constitutional Theories*

Manning has recently essayed the views of two opposing constitutional camps, namely, the formalists and the functionalists, each of which holds strong views on the separation of powers".[59] His analysis would indicate that the CLA is firmly in the formalist camp. The formalists resist the efforts of the legislature to reallocate power from one branch to another. They do so because they take an originalist view of the checks and balances concept and suppose that any contemporary legislature could only be reassigning the power of decision to benefit the centralist desires of an executive government. Wade and Bradley indicate that such a suspicion is considered unexceptionable in the United Kingdom too: "[Q]uestions of principle… arise from the exercise by the Executive of judicial functions which may have a direct interest in securing that the decision does not conflict with the policy of the department."[60] In contrast, functionalists believe that good governance and the public interest can only be realised by a parliament with a relatively free reign to disperse public decision-making power across a variety of agencies and non-agencies, such as courts. While it is recognised that the cost efficiencies of administrative authorities make them appealing to governments, it is only when a citizen challenges the government that the value of an independent forum becomes evident.[61] On this basis, s. 13 of the *Charities Act 2011* centralises inconsistent powers in a single and controllable agency, the Charity Commission. There is, of course, a right of appeal to a judicial tribunal which gives the aggrieved individual a non-agency right of redress from a decision of the Commission, but the formalists would still contend that executive incursion on judicial power at any point is objectionable.

B. *The Australian Separation of Powers: The* Boilermakers' Case

The general principle on separation of judicial and executive powers was articulated by Viscount Simonds when he spoke for the Privy Council in the *Boilermakers'*

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57 Bennion, *supra* note 55 at 19.
58 [2006] 1 All E.R. 11 (H.C.).
59 John F. Manning, "Separation of Powers as Ordinary Interpretation" (2011) 124 Harv. L. Rev. 1939.
60 *Wade & Bradley*, *supra* note 6 at 33.
61 *Ibid.* at 32.

Case[62] and it contains a decidedly originalist principle at its core. The Boilermakers' Society ("the Society") had been charged with contempt and fined £500 by the Australian Commonwealth Court of Conciliation and Arbitration. The Society argued that the contempt power and other coercive powers of the Court were judicial powers and that it was primarily an arbitral body which settled interstate industrial disputes by making awards and that this was a non-judicial power. Upholding the decision of the High Court of Australia, the Privy Council ruled that, to satisfy the separation of powers doctrine, the Commonwealth government, in exercising its power under s. 71 of the *Australian Constitution* to set up courts with federal jurisdiction, needed to keep judicial and non-judicial powers separate. Provisions of the *Conciliation and Arbitration Act 1904*[63] that enabled judges to have judicial and arbitral power were thus invalid. Viscount Simonds averred:[64]

> Such facts as that the same qualities of fairness patience and courtesy should be exhibited by a conciliator arbitrator or judge alike and that none of them should act without hearing both sides of the case do not weigh against the fact that the exercise of the judicial function is concerned, as the arbitral function is not, with the determination of a justiciable issue.

It may be suspected that, as long as there is a right of appeal to a court from the decision of the Charity Commission, no great harm is done in having executive and judicial functions in the same body. It was noted in the introduction that there is a right of appeal from the Charity Commission to the Charity Tribunal[65] and right of appeal from the Charity Tribunal to the High Court.[66] In terms of general principle, Lord Hoffmann observed in *Matthews v. Ministry of Defence* that:[67]

> A right to the independence and impartiality of the judicial branch of government would not be worth much if the executive branch could stop you from getting to the court in the first place. The executive would in effect be deciding the case against you. That would contravene the rule of law and the principle of the separation of powers.

Applied to the appeal procedure from a decision of the Charity Commission, it is clear that few procedural or substantive bars exist to an appeal being made. However, none of these rights of appeal alleviate the fact that the Charity Commission has exactly the same problem that the Australian Court of Conciliation and Arbitration had: it is wielding judicial *and* non-judicial powers and Lord Simonds observed that this "is to remove a vital constitutional safeguard".[68] Giving the Commission judicial powers is manifestly an encroachment by the legislature and the executive on judicial independence. A similar finding in the *Boilermakers' Case* led to the allocation of the Arbitration Court's arbitral functions to a new Arbitration Commission. This is clearly an originalist/formalist approach and its implication is that the courts would resume an exclusive jurisdiction over determination of charitable

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62 The *Boilermakers' Case*, *supra* note 8.
63 (Cth.) [*Conciliation and Arbitration Act 1904*].
64 The *Boilermaker's Case* (P.C.), *supra* note 61 at para. 31.
65 *Charities Act 2006*, *supra* note 1, Schedule 1C.
66 *Ibid*. at s. 8(2C).
67 [2003] UKHL 4, [2003] 1 A.C. 1163 at para. 28.
68 The *Boilermakers' Case*, *supra* note 8 at para. 27.

status and the Charity Commission would content itself with the administration of charities once they are deemed capable by a court of being registered. The likelihood of the Charity Commission becoming a registration body which is at the behest of the courts is very small principally because of the irreversible intrusion of the executive into charity affairs and, as Brodie sees it, their politicisation.

V. How Acute a Problem is the Charity Commission's Mixed Role?

We move on now to consider some of the practical problems caused by the Charity Commission wielding judicial powers. Back in 2006, the functionalist view of the separation of powers triumphed in the United Kingdom and the Charity Commission; not judges or even independent Commissioners, was the first port of call for parties seeking recognition or confirmation of charitable status. Since that time, however, there has been a number of controversies created by the work of the Commission and the most recent one—on the charitable status of independent schools—has seen the Commission itself subjected to judicial review. When lawyers and judges are banished from a jurisdiction, they are like ivy; they have a tendency to creep back. Although there is a sense of inevitability about this process, calls for the courts to be restored to resuming both a first instance determination role *and* a review role should not be underestimated, as nothing less is at stake than which body is to be the proper province of decision-making on charitable status.

In 2006, the Charity Commission was bestowed with an invigorated threshold role to decide whether an entity has a charitable purpose or not. However, it is neither an independent court of record such as the High Court nor, exactly, a government department expected to follow Ministerial directives and this was not arguably the position of 'personal' Commissioners before 2006. Moreover, the Charity Commission considers that it has the following powers when determining whether an organisation has charitable status:[69]

> We have the same powers as the court when determining whether an organisation has charitable status and the same powers to take into account changing social and economic circumstances—whether to recognise a purpose as charitable for the first time or to recognise that a purpose has ceased to be charitable. We interpret and apply the law as to charitable status in accordance with the principles laid down by the courts. Faced with conflicting approaches by the courts, we take a constructive approach in adapting the concept of charity to meeting the constantly evolving needs of society. The Register of Charities is therefore a reflection of the decisions made by the courts and our decisions following the example of the courts.

The Charity Commission's powers when determining charitable status are not set out expressly in the statute. The only statutory reference is the requirement that every charity must be entered in the register of charities.[70] The Charity Commission has adopted this approach when considering applications for charity registration,

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[69] U.K., The Charity Commission, *Recognising New Charitable Purposes* (London: Charity Commission, 2001), online: <http://www.charitycommission.gov.uk/Library/guidance/rr1atext.pdf> at para. 8.

[70] See the *Charities Act 2006*, *supra* note 1 at s. 9.

in particular when cases come to be considered under its internal review process. This process was amended since 2008 and there is now a single stage of the review process when cases are referred to a panel. Where the review will set a precedent the panel will include a member or members of the Board of the Commission. An appeal from the decision of the Charity Commission to refuse registration now lies, in the first instance, to the Charity Tribunal. The Charity Tribunal was introduced by the *Charities Act 2006*.[71] Prior to this, an appeal lay direct to the High Court. Since 2006, the Charity Commission has accepted a number of "new" charitable purposes and extended existing purposes using its powers set out above, such as the advancement of conflict resolution, promotion of sustainable development and the promotion of religious and racial harmony.

The Commission has described its own status in this way:[72]

> The Charity Commission for England and Wales is a non-Ministerial Government Department, part of the Civil Service. The Commission is completely independent of Ministerial influence and also independent from the sector it regulates. It has a number of quasi-judicial functions where it uses powers similar to those of the High Court.

However, in light of the political realities of 2009, this self-assessment began to look decidedly shaky. Indeed, during the drafting and debating stage of the Charities Bill back in 2004 and 2005, there were several discussions in relation to the public benefit of independent schools and the effect of the Commission's determinations on cases like *Re Resch's Will Trust*.[73] Political figures became vociferous about the charity issue. During the summer of 2009, Mr. Ed Balls, the then Schools Secretary, was reportedly "furious" that the Charity Commission reneged on a plan to ask independent schools forgo £100 million in tax breaks.[74] He "expected" the plan to remove their charitable status to be carried out by the Commission.[75] The Commission's decision instead to scrap the plan was consonant with the Tories' policy in a time when it was increasingly clear that they would form the next government. The issue of the charitable status of independent schools, in particular, has been reported in the media to have created doubt in the community about the truth of the Commission's statement that it is completely independent of Ministerial influence.[76]

The courts have consistently recognised that it is beyond their constitutional scope to determine whether a political purpose of a charity would be for the public benefit as to do so would involve courts making law and trespassing against the separation of powers.[77] Thus, the very idea of a government establishing a Charity Commission can be motivated, at least in part, by a desire to overcome the courts' self-imposed constitutional restriction. Having regard to the politically charged environment in which many Charity Commission rulings are made, bestowing the Commission with

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71 See the *Charities Act 2006*, *supra* note 1 at s. 8.

72 U.K. Charity Commission, online: Charity Commission Governance Framework <http://www.charity-commission.gov.uk/About_us/About_the_Commission/Our_status_index.aspx> at 4.1.

73 *Supra* note 43.

74 Joanna Sugden, "Independent schools to keep tax breaks after charity chief backs down" online: <http://journalisted.com/article/13idi>.

75 *Ibid*.

76 *Ibid*.

77 Council of Europe: *Associations and Foundations*. (Strasbourg, Council of Europe, 1998) at 39.

power to decide on the charitable status of an entity which has a mixed political and charitable purpose would seem in such a light an obviously political move designed to quell or magnify the political power of a political organisation such as Amnesty or Greenpeace, depending on the ideology of the governing party.

VI. The Example of the *Independent Schools Case*

The Charity Commission's decision about independent schools subsequently triggered a planned judicial review of the Charity Commission's guidance on independent schools.[78] On receiving news that a judicial review was to occur, Independent Schools Commission ("ISC") deputy chief executive Mr. Matthew Burgess said: "Our schools have had to wait a long time, but the court has finally confirmed today that ISC's central contention—that the Charity Commission's guidance on public benefit is legally flawed—is robust and should receive a full hearing."[79] The Upper Tribunal (Tax and Chancery) made a judgment on 13 October 2011 in the *Independent Schools Case*.[80] The court was asked to determine an application for judicial review by the ISC, representing over 1,200 fee-charging schools, in relation to Guidance issued by the Charity Commission on the public benefit requirement under ss. 2 and 3 of the *Charities Act 2006*.[81] According to the legislative provisions, the Commission had a duty under the *Charities Act 2006* to issue guidance regarding its objective of promoting awareness and understanding of the operation of public benefit requirement. The guidance focused on two stated principles of public benefit: (i) There had to be an identifiable benefit and that benefit had to be to the public or a section of the public; and (ii) Charity trustees were to have regard to the guidance when exercising their powers and duties. The ISC considered the Commission's guidance to be wrong and over-prescriptive and claimed that it should not substitute the function of the school trustees in determining how the purposes of a charity should be furthered.

The decision of the Upper Tribunal in the *Independent Schools Case* is the latest installment in the controversy-mired recent history of the Charity Commission and some of the troublesome constitutional resonances discussed to this point are found in the case. It dealt with the issue of which independent schools could demonstrate the public benefit necessary to retain status as charitable organisations and the considerable tax benefits that go with it. In delivering its judgment, the Upper Tribunal held that whether the public benefit was outweighed by disbenefits arising from the charging of fees required a balancing exercise and, in the instant case, the material before the court had *not* displaced the conclusion that the nature of the education provided was for the public benefit. Precedent demanded that the terms of a particular charitable trust had to be considered on a case-by-case basis.[82] The second issue was whether the class of beneficiaries (*i.e.* those who can afford the fees) was a sufficient section of the community who might benefit from the purpose.[83] It held that

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78 "Private schools granted charity rules judicial review" *BBC News* (7 October 2010), online: BBC News <http://www.bbc.co.uk/news/education-11443535>.

79 *Ibid*.

80 *Supra* note 5.

81 *Supra* note 5, Case Analysis (Westlaw).

82 *National Anti-vivisection Society v. Inland Revenue Commissioners* [1948] A.C. 31 (H.L.).

83 *Oppenheim v. Tobacco Securities Trust Co Ltd* [1951] A.C. 297 (H.L.).

a charitable organisation which in practice excluded the poor nevertheless remained a charity, so long as it made some provisions for the poor to pass the "de-minimis" hurdle and provide more than a token benefit. Therefore, the Charity Commission's guidance stating that a person's exclusion due to an inability to pay would not have aims that were for the public benefit was erroneous. The guidance stated that there was a "practical requirement" that people who could not afford to pay had to be able to benefit in some other material way, yet the court rejected this on the ground that it required a level of benefit which the Charity Commission considered to be reasonable, which went beyond what was necessary. The proper test, according to the Upper Tribunal, is whether the school's trustees had exercised its power properly subject to the "de-minimis" threshold and, if they provided a modest benefit for the poor, then that would be sufficient to fulfill the public benefit requirement. Hence, the original guidance issued by the Charity Commission in relation to the public benefit requirement contained in the *Charities Act 2006* was erroneous and needed to be corrected.[84]

As alluded to above, in 2008, the Charity Commission issued a set of guiding principles on the extent to which trustees of independent schools need go to offer of scholarships, bursaries, concessionary or other discount or subsidy schemes in order to retain their charitable status.[85] In July 2009, there was a furore in the community caused by the Charity Commission's decision that two out of the five fee-charging schools assessed during its public benefit assessment exercise did not spend enough on means-tested bursaries to justify charitable status. Accordingly, they would have to make changes in the way they operated in order to retain charitable status. The decision was not well received in the community; some sections of the print media claimed the Charity Commission was carrying out a vendetta against private schools.[86] Whatever may be one's concerns about inconsistency of charities case law, were a judge called on to make a decision about the charitable status of an institution, he or she would be unlikely to face questions about the probity of the process of the decision or his/her motive in coming to a particular decision. The presumed detachment of the judiciary from other organs of government is what makes this so.

It was noted in the introduction of this analysis that the Upper Tribunal in the *Independent Schools Case* did not avoid the separation of powers issue in the course of its judgment. The issue could not be the centrepiece of the judgment without rejecting the role of the Charity Commission and the mandate of the legislature to establish it. It will be recalled that their Honours said that the parliament is to solve the political issue of independent schools getting tax exemptions in the name of charity, *i.e*., as the establishment of the Commission and its application of the relevant Guidelines[87] are extensions of parliamentary or executive political will. This is a

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84 *Independent Schools Case*, *supra* note 5 at paras. 224-236.

85 U.K., Charity Commission, *Public Benefit and Fee Charging* (London: Charity Commission, 2008) online: <http://www.charity-commission.gov.uk/library/guidance/pbfeechatext.pdf>.

86 "Let's Pickle a few more costly commissions", Comment, *The Daily Telegraph* (23 August 2010); Sheila Lawlor, "No faith in the Charity Commission", Comment, *The Guardian* (15 July 2009).

87 The relevant guidelines are: "Charities and Public Benefit—the Charity Commission's General Guidance on Public Benefit" (issued in January 2008), "Public Benefit and Fee-Charging" and "The Advancement

clear recognition by the Upper Tribunal of the parliament's authority to establish and execute the rules of charitable status and public benefit. Thus, the Commission is akin to a government department whose operation can be changed legislatively if its independence becomes politically troublesome and we need only recall the chop and change nature of the Commissioners' jurisdiction in the 1960s and 1970s to know that governments do take an interest in this issue.

Historically, the courts have neither flinched at making potentially controversial decisions on nuanced and politically sensitive questions of charity law nor necessarily entreated the legislature to clarify the law when there has been uncertainty about the extent of the public benefit that an entity need demonstrate in order to claim charitable status. Depending on how broadly one conceptualises judicial power, in the *Independent Schools Case* the Upper Tribunal either (1) upheld the doctrine of separation of powers by refraining sensibly from playing a legislative role; or, more contentiously, (2) avoided a sensitive question which is squarely within the province of judicial decision-making. If contention (1) is true, had the Upper Tribunal decided broadly on the question of charitable schools' charitable status, it would have been *ultra vires* its judicial power. If, in contrast, contention (2) is a useful characterisation of the decision, the Upper Tribunal avoided controversy by ruling only that the Charity Commission had been too prescriptive in the way it assessed the public benefit provided by the two fee-paying schools in question—S. Anselm's Preparatory School in Derbyshire and Highfield Priory in Lancashire (*i.e*. if the Charity Commission is not regarded as being truly independent, the Upper Tribunal's decision would be an example of deference to the executive). If, on the other hand, contention (2) is false, the decision of the Upper Tribunal in the *Independent Schools Case* in fact *affirmed* its judicial review role over the Charity Commission and its Guidance on public interest. Such a view would necessarily contend that, since 2006, the Charity Commission has infringed on the determination of charitable status as a purely judicial responsibility (at least in the first instance).

To its great credit, the Upper Tribunal concluded its judgment with a general reference to the separation of powers problem:[88]

> Our decision will not, we know, give the parties the clarity for which they were hoping. It will satisfy neither side of the political debate. But political debates must have political conclusions, and it should not be expected of the judicial process that it should resolve the conflict between deeply held views. We venture to think, however, that the political issue is not really about whether private schools should be charities as understood in legal terms but whether they should have the benefit of the fiscal advantages which Parliament has seen right to grant to charities. It is for Parliament to grapple with this issue.

In this way, the Upper Tribunal treated the problem of tax advantages for independent schools as a political issue, if not in exactly the same way as the questions of whether law reform efforts of Amnesty or the National Anti-Vivisection Society precluded either from enjoying a charitable purpose. In this case, the Upper Tribunal is

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of Education for the Public Benefit" (these latter two were both issued in December 2008 and are together referred to as "the Guidance").

88 *Supra* note 5 at para. 260.

abstaining on the ground that each side of national politics and members of the community have deep political convictions about the desert or otherwise of independent schools. But just as with the constitutional restraint shown by courts in 'classical' questions of the charitable status of political organisations, the space is left for a government-initiated charity commission, if not to do the government's bidding in every circumstance, then to move more fluidly within the real politic and do so in a way no court ever could do.

VII. Conclusion

The Charity Commission is stranded invidiously between two roles and mired frequently in controversy. Although the United Kingdom's charity law reform was primarily focused on defining and encoding in statutory form certain core common law concepts and with establishing a more efficient regulatory framework with an empowered regulator, it has inevitably led to controversies as to how this regulatory body comes to its decisions and the on-going turf fight with judicial tribunals is unlikely to abate. This is because there is confusion in the community as to how the Commission's functions should be regarded.

The Upper Tribunal's decision in the *Independent Schools Case* is undoubtedly minimal if one recalls the energetic role of the Charity Commissioners prior to 2006. Edge and Loughrey described the Commissioners as engaging in "law-making" and becoming "increasingly liberal" in their interpretation of existing case law.[89] The decision is also intentionally minimal if the Tribunal's own words are taken as a guide. The decision can be regarded as the Upper Tribunal properly shying away from a legislative role but it is not a good example of robust judicial authority over charity law. This would indicate that the Bench prefers not to protect its independence by theorising openly about the separation of powers in judgments. Rather, it insists on a limited, case-by-case approach to decision-making and this has the effect of fostering the ubiquity and inevitability of its appellate role. By not ruling broadly on issues with serious political implications, the Bench avoids root and branch reform of responsibility for determination of charitable purpose such as would make it entirely an unreviewable function of the executive. Much of the tentativeness in the *Independent Schools Case* can be explained by this.

In their decision, the Justices of the Upper Tribunal limited themselves to observing that the Charity Commission had misdirected itself as to the rules of charitable status as they currently stand in relation to the schools in that case and declared that it is up to the legislature to determine the charitable status of independent schools at large because it is a political question. In so doing, the decision raises questions of the scope of judgment in politically sensitive questions. The Upper Tribunal's non-interventionist approach in the *Independent Schools Case* is an incident of determination which is framed by the legal duty placed on it by ss. 2(2) and 3 of the *Charities Act 2006*. Under these sections, purposes of an entity commonly thought charitable, such as relief of sickness or poverty or the advancement of religion or education, may not be in the public benefit if carried out in a particular way, and it

[89] *Edge & Loughrey*, *supra* note 28 at 37.

is clear that s. 2(2) requires the weighing of benefits and disbenefits by the Commission, and on review, the Upper Tribunal.[90] In the Upper Tribunal, the weighing of benefit and disbenefit is an ordinary aspect of judicial practice, but this becomes presumptively akin to a legislative act if it rules on the charitable status of more than one or two schools and lays down principles of general application to all independent schools. As the result of the Upper Tribunal's decision, the Charity Commission has agreed to "review and amend" its Guidance to achieve greater clarity on what measures an independent school needs take in order to achieve public benefit through provision of bursaries or infrastructure sharing with public schools,[91] but this has not answered satisfactorily questions about the Upper Tribunal's extent of judgment or when it becomes legislative in character.

For the time being, the Upper Tribunal is, by saying that it is not for it to decide on political questions, avoiding a robust judicial review role. In the *Independent Schools Case*, it did little more than tell the Charity Commission to tidy up its Guidelines and say that every school's charitable status is a case-by-case matter. At first reading, this could be regarded as an underwhelming decision; however, its significance lies *precisely* in it not seeking to be definitive; it leaves open the prospect of decades of determinative work in charity disputes for the courts and judicial tribunals. In this context, the observation of their Honours in the *Independent Schools Case* that several parliamentary committees "have never been able to come up with a definition of charity of more use than the concept which has developed through case law"[92] can only read as claim for jurisdiction.

It will be recalled that Viscount Simonds upheld the majority's decision in the High Court of Australia (by Dixon C.J. and McTiernan, Fullagher and Kitto JJ.) that the Arbitration Court's contempt order relied on a section of the *Conciliation and Arbitration Act 1904* which was invalid because it vested judicial power in an essentially arbitral (administrative) body. In his finding that the separation of powers doctrine ought *not* apply, Justice Williams was the lone dissentient judge in the High Court in the *Boilermakers' Case*. Much of what Williams J. averred in his dissent is rather reminiscent of the Charity Commission's view of itself:[93]

> In settling an industrial dispute the part of the continuous process that calls for the greatest display of knowledge, commonsense, fairness and impartiality is the making of the award. It is then simply a question of determining whether the award has been broken and applying the appropriate sanction. There is no incompatibility in the one tribunal making the award and afterwards seeing that it is obeyed. That is normal judicial procedure—to make an order and to see that it is obeyed.

In a similar fashion, the Commission cannot avoid the conclusion that it dispassionately regulates *and* judicially decides and that the conflict between the two makes

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90 On this point, see *Catholic Care (Diocese of Leeds) v. Charity Commission for England and Wales* [2010] EWHC 520 (Ch.) (H.C.) at paras. 66, 67.

91 "Public benefit requirement for independent charitable schools: Charity Tribunal decision" *Charity Commission* (14 October 2011), online: Charity Commission <http://www.charity-commission.gov.uk/charity_requirements_guidance/charity_essentials/public_benefit/pb_tribunal.aspx>.

92 *Supra* note 5 at para. 260.

93 The *Boilermaker's Case* (H.C.A.), *supra* note 8 at 308, 309.

its role problematic. The *Boilermakers' Case* was recently observed extra-judicially by Federal Court Justice Buchanan to be an on-going feature of the Australian legal landscape:[94]

> …[D]uring that latter part of the 20th century, a keen expectation developed that the High Court would revisit, and perhaps reverse, the *Boilermakers' Case*. That moment never arrived and the tide seems now to have turned decisively in the other direction.

Thus, the principle in the *Boilermakers' Case*, although regarded as entrenched in Australia and raises a troublesome question in the context of its new Charity Commission's establishment. The separation of judicial from other kinds of power by the Privy Council—in line with the ruling of the High Court of Australia—is a piece of joint history which both Australia and the United Kingdom can benefit from recalling.

Wade and Bradley's characterisation of judicial and non-judicial (executive or administrative power) holds that "the judicial function involves the application of settled law to facts while an administrative decision is primarily determined by the discretion of the administration in applying policy".[95] A similar conception was recognised by Justice Kirby in the Australian High Court in *Commissioner of Taxation v. Word Investments Ltd*[96] when his Honour observed that determining what is a charitable purpose has been predominantly been a function of "decisional law" rather than enacted law.[97] Although the judicial practice in relation to charities was initially based on the Statute of Elizabeth I, it has been the decision of the Privy Council in *Commissioners for Special Purposes of the Income Tax v. Pemsel*[98] and its case law progeny which have loomed largest in judicial decision-making on charitable status. If one considers that a decision about charitable status is, in essence, a judicial act, then it makes questionable the "general functions" of the Charity Commission, as the text of the *Charities Act 2011* also co-locates "determining whether institutions are or are not charities" with the function of "encouraging and facilitating the better administration of charities."[99] This can be seen as problematic for a number of reasons, not the least of which is that determination of charitable status is a judicial power and that facilitating the better administration of charities is an administrative power bestowed by a legislature, and the twain ought never meet.

Wade and Bradley state that "judicial function involves the application of settled law to facts",[100] and this approach applies to a judicial determination of whether an entity should be declared charitable. Judges are experts at ruling facts in or out and making decisions in finely balanced cases. Carefully drafted reasons issue from the Bench as to why materials were or were not ruled admissible. There may still be a

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94 Justice R.J. Buchanan, "The Shifting Balance in Federal/State Relations—Some Observations on its Impact on the Australian Judicial System and Other Matters" (Paper presented to the Staff at the University of Tasmania, 4 November 2011) at para. 51.

95 *Ibid*.

96 (2008) 236 C.L.R. 204 (H.C.A.).

97 *Ibid*. at para. 77.

98 [1891] A.C. 531 at 581, 582 (H.L.).

99 *Charities Act 2011*, *supra* note 2 at s. 15(1).

100 *Wade & Bradley*, *supra* note 6 at 33.

media controversy about particular organisations benefiting from judicial discretion in a charity case; but the community regard for the independence of the judiciary leaves little room for doubt about the probity or sincerity of the process when judges are in charge of it. However, if the *Independent Schools Case* is an assertion of the judicial control of charity law, it would appear to be a fairly timid one.