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The Doctrine of Exhaustion of Administrative Remedies in Michigan

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By

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A. IN GENERAL

THE doctrine that a litigant must exhaust his administrative remedies prior to seeking judicial relief performs much the same function as the comparable rule in trial courts that an appeal can be taken only from a *final* order. The exhaustion doctrine, like the rule of finality, is concerned with the timing of judicial review of administrative action. Where the exhaustion doctrine is applicable, it requires that the administrative proceeding reach its completion before judicial review may be obtained.

Although federal and state courts have often repeated the statement that judicial relief *must* be denied until administrative remedies have been exhausted, the case law does not support this extreme position. State and federal courts have often provided judicial relief in the absence of exhaustion of administrative remedies. Professor Kenneth C. Davis reaches the following conclusions:

> **The law embodied in the holdings clearly is that sometimes exhaustion is required and sometimes not. No court requires exhaustion when exhaustion will involve irreparable injury and when the agency is palpably without jurisdiction; probably every court requires exhaustion when the question presented is one**

within the agency's specialization and when the administrative remedy is as likely as the judicial remedy to provide the wanted relief. In between these extremes is a vast array of problems on which judicial action is variable and difficult or impossible to predict.[1]

The most common type of exhaustion problem involves attempts to challenge the jurisdiction of an agency in advance of completion of an administrative proceeding. *Myers* v. *Bethlehem Shipbuilding Corp.*[2] is the leading federal case requiring exhaustion of administrative remedies. The NLRB issued a complaint against the company charging unfair labor practices. After the case had been set for hearing, the company filed a bill in equity in a federal district court to enjoin the holding of the hearing, alleging that the Board was exceeding its constitutional powers because the company's products were not sold in interstate or foreign commerce, and that the hearing would cause irreparable damage not only by reason of direct cost and loss of time but also because of serious impairment of good will and harmonious relations existing between the corporation and its employees. The Supreme Court held that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted."[3] But the court's broad language is contradicted by the holdings of many cases in which the court has passed upon questions of administrative jurisdiction without requiring exhaustion of administrative remedies.[4]

The *McCulloch* case[5] is illustrative of the cases allowing injunctive relief despite the failure to exhaust administrative remedies. A foreign shipowner sought to enjoin the Regional Director of the NLRB from holding a representation election. The court said nothing of the "long-settled rule of judicial administration" which it had stated in absolute terms in the *Myers* case. It justified district court jurisdiction to enjoin by saying:

. . . While here the Board has violated no specific prohibition in the Act, the overriding consideration is that the Board's assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government. Important interests of the immediate parties are of course at stake. But the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power.[6]

In short, the question whether judicial relief is available prior to the completion of the administrative proceeding rests upon a balancing of the reasons for and against requiring exhaustion in the particular situation.

1. Principal reasons for requiring exhaustion. A number of cases rely on technical legal grounds in requiring exhaustion of administrative remedies in particular situations: (a) a court of equity will not grant equitable relief if an adequate remedy at law, *i.e.*, the administrative remedy and judicial review thereof, is available;[7] (b) an im-

1. 3 Davis, Administrative Law Treatise §20.01 (1958).

2. 303 U.S. 41, 58 S. Ct. 459 (1938).

3. 303 U.S. at 51, 58 S. Ct. at 463.

4. *McCulloch* v. *Sociedad Nacional de Marineros*, 372 U.S. 10, 83 S. Ct. 671 (1963); *Leedom* v. *Kyne*, 358 U.S. 184, 79 S. Ct. 180 (1958); *Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 74 S. Ct. 745 (1954); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 67 S. Ct. 1026 (1947) (state courts had first decided jurisdiction without imposing exhaustion requirement); *Order of Railway Conductors of America* v. *Swan*, 329 U.S. 520, 67 S. Ct. 405 (1947) (stalemate between two divisions of National Railroad Adjustment Board); *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456, 63 S. Ct. 369 (1943); *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557, 39 S. Ct. 375 (1919).

5. 372 U.S. 10, 83 S. Ct. 671 (1963).

6. 373 U.S., at 16-17, 83 S. Ct. at 675.

7. *E.g.*, *School District of Royal Oak* v. *State Tenure Comm'n*, 367 Mich. 689, 117 N.W.2d 181, 183 (1962): "...Equity should not be used to obtain injunctive relief where there is no proof that complainant would suffer irreparable injury."

plication or express statement in the particular statute that a "final" order is necessary for judicial review;[8] and (c) the statement that the review procedure prescribed by statute is the "exclusive" method of judicial review.[9] Although these formal arguments are stated in a number of cases, the practical considerations that underlie the exhaustion doctrine are more important in determining actual results. The practical considerations favoring the exhaustion doctrine have to do with furthering orderly procedure, preserving the efficiency of the administrative process, conserving judicial energies, and properly allocating responsibilities between agencies and courts. Among the most important considerations are the following: (a) precipitate resort to a court involves the same problems of delay, disruption and expense that may result from interlocutory appeals from trial courts; (b) in some instances, application and interpretation of law by a court is greatly assisted by the full development of the factual context by a prior administrative hearing; (c) the complainant may win before the agency, making resolution of the question posed to the court unnecessary; and (d) there are some issues which fall within administrative discretion (*i.e.*, the agency has greater relative competence on the particular issue than a reviewing court).

2. Reasons for not requiring exhaustion. The usual blanket statement of the doctrine of exhaustion of administrative remedies rests upon several premises relating to the nature of the administrative remedy that is involved: (a) the administrative remedy must be available on his own initiative to the person seeking judicial review; (b) it must not involve unreasonable delay or expense; and (c) the administrative remedy must substantially protect the individual's claim of right. It is clear that no exhaustion is required if these preconditions do not exist. Moreover, the exhaustion doctrine is a discretionary door-closing doctrine which need not be applied even when these basic conditions are satisfied. Other circumstances may outweigh the reasons supporting the exhaustion rule. Among the most important circumstances justifying nonapplication of the exhaustion rule are the following: (a) the extent of injury from pursuit of the administrative remedy; (b) the relative importance of the issue raised to the integrity of the administrative process or to the competency of the administrative tribunal; (c) the degree of clarity or doubt about the question at issue; and (d) the extent to which the issues involve, on the one hand, the specialized understanding of the agency or, on the other hand, the interpretive abilities of courts in dealing with statutory and constitutional questions.[10]

B. THE EXHAUSTION DOCTRINE IN MICHIGAN

The attitude of the Michigan courts with respect to exhaustion of administrative remedies reflects an understanding of the general considerations discussed above. The doctrine that administrative remedies must normally be exhausted is viewed as a rule of orderly procedure which embodies due and deferential regard for the legislative judgment and policy in providing expert administrative tribunals to deal with specialized fields. Yet the doctrine is not viewed as an absolute jurisdictional rule, but as a discretionary rule of thumb to be departed from when the interests of justice so require.

1. Cases requiring exhaustion. The typical case for the application of the ex-

8. *E.g.*, *Eastern Utilities Associates* v. *SEC*, 162 F.2d 385 (1st Cir. 1947), in which a Boston company sought judicial review of an administrative order setting a case for hearing in Philadelphia. The court held that "administrative orders of a merely preliminary or procedural character are not directly and immediately reviewable." 162F.2d, at 386.

9. Cf. *Lajiness* v. *Yaeger*, 352 Mich. 468, 90 N.W.2d 487 (1958) (where statute provided for review of pension determination by certiorari, declaratory judgment action was unavailable).

10. See 3 Davis, Administrative Law Treatise §§20.01-20.10 (1958); Jaffe, *The Exhaustion of Administrative Remedies*, 12 Buffalo L. Rev. 327-57 (1963).

haustion doctrine is one in which a party seeks judicial relief without having taken an available and expeditious appeal to higher administrative authorities. Two recent Michigan cases are illustrative. In *School District of Benton Harbor* v. *State Tenure Comm'n*,[11] a teacher left his classroom and stayed away two days; when he sought to return he was told that his actions had been taken as a resignation. He filed a petition with the tenure commission, which scheduled a hearing on the question whether the teacher had been discharged in violation of the tenure act. At this point the school district brought an injunction suit in the circuit court, seeking to enjoin the commission from holding the hearing. The circuit court dismissed the suit on the ground that the school district had not exhausted its administrative remedies, and the Supreme Court affirmed the dismissal. The only issue in the case was whether the teacher had voluntarily quit or had been discharged, and this was precisely the factual issue that the commission had been authorized to determine. The administrative process would be short-circuited if the trial of this issue of fact could be shifted to the circuit court by filing an injunction suit. Judicial review of the commission's determination was fully adequate to protect all of the rights of the school district; in fact, a proceeding for judicial review of the commission's final order in the case (concluding that the teacher had been unlawfully discharged) was pending in circuit court when the Supreme Court decided the appeal in the injunction suit.

Norman v. *Barber Examiners Board*[12] is similar. The board notified a barber to appear at a hearing to show cause why his license should not be suspended or revoked. Instead of responding to this notice, the barber sought an injunction restraining the board from holding the hearing. He charged that the board was "out to get" him and that his opportunity to present witnesses would be unduly restricted. The court held that fear and apprehension concerning what may happen at a proposed hearing does not state a claim for injunctive relief, a result that seems clearly correct.

The board was the duly constituted authority to hear factual issues involving the revocation of barber license. The statutory procedure would be disrupted and the authority of the board abridged if a litigant could get a court to hear testimony that the board was biased against him and would not conduct the proposed hearing fairly. The barber's allegations did not go to the competency of the board to entertain the case, but only to the possibility that it might abuse its power in conducting the hearing. If procedural errors in fact did occur during a subsequent hearing, they could be considered in an appeal from the board's determination.

In cases such as *Benton Harbor School District* and *Norman*, *supra*, all the reasons favoring the exhaustion doctrine (utilizing the experience and judgment of the agency, avoiding piecemeal appeals, recognizing the primacy of the agency in the field committed to it by the legislature) are applicable. There are no countervailing considerations which justify a departure from the general rule.

Other Michigan cases are to the same effect in closely analogous situations. One important line of cases holds that actions for injunctive or declaratory relief cannot be used as a substitute for statutory review procedures. Thus in *Slezenger* v. *Liquor Control Comm'n*,[13] an administrative decision revoking a liquor license could not be reviewed in an injunction suit when the legislature had prescribed a fully adequate method of review by certiorari. Similarly, it was held in *Lajiness* v. *Yaeger*[14] that a declaratory judgment action could not be

11. 372 Mich. 270, 126 N.W.2d 102 (1964).

12. 364 Mich. 360, 111 N.W.2d 48 (1961).

13. 314 Mich. 644, 23 N.W.2d 243 (1946).

14. 352 Mich. 468, 90 N.W.2d 487 (1958).

used as a substitute (apparently untimely) for the method of reviewing employee pension claims prescribed by statute. Another line of cases holds that a member of a union must exhaust his intra-union remedies before seeking judicial relief against the union for an alleged failure of its fiduciary responsibilities.[15] In the *Holman* case,[16] which involved the seniority claims of employees who had been placed in a new bargaining unit along with persons employed at a newly purchased plant, the court also held that the plaintiffs, by abandoning charges filed with the NLRB when the regional director declined to issue a complaint, had failed to exhaust remedies available under federal law, which preempted the field; the injunction suit in the state court, therefore, was dismissed.

2. Cases excusing failure to exhaust administrative remedies. As has already been indicated, the exhaustion doctrine is inapplicable unless an adequate and expeditious administrative remedy, which will substantially protect his claim of right, is available to an individual. A number of Michigan cases explore the meaning of these prerequisites for the application of the exhaustion doctrine.

The inadequacy of the administrative remedy was involved in *Trojan* v. *Taylor Township*.[17] A property owner requested township officials to issue a building permit for the construction of a trailer park. They refused to do so, and, without exhausting his administrative remedy before the board of zoning appeals, the property owner brought a mandamus suit to compel issuance of the permit. He alleged that the administrative remedy was "vain and useless" because the officials had made up their minds in advance. The court held that mandamus jurisdiction could be exercised under such circumstances. The court quoted with apparent approval from the opinion of Judge Baum in the circuit court:

> **. . . There is a general rule that persons seeking authority from a governmental unit must exhaust their remedies within such governmental unit before seeking relief in court. To this rule requiring the plaintiff to exhaust his administrative remedies, there are a number of exceptions, one clear exception is that the law will not require a citizen to undertake a vain and useless act. The law does not require useless expenditures of effort. Where it is clear that resort to the administrative body is but a formal step on the way to the courthouse, the law will not require such a step to be taken.**[18]

In other cases the exhaustion doctrine is inapplicable because the administrative agency does not have authority to vindicate the claim of right asserted by the person invoking the jurisdiction of the court. Thus, many cases allow constitutional questions to be raised in a judicial proceeding in advance of any administrative determination. In *Dation* v. *Ford Motor Co.*,[19] the court stated the usual rule that constitutional questions are for judicial rather than agency determination: "Generally speaking, an administrative board, commission or department possessing powers of [quasi-judicial] character does not undertake to determine constitutional questions."[20]

If the claim asserted does not involve factual issues but rests upon constitutional interpretation, administrative remedies need not be exhausted because the agency is not competent to resolve the constitutional questions. It has been repeatedly held, for example, that an equity court may consider the constitutionality of regulatory or tax statutes prior to an attempt to enforce them against the complainant. In *Diggs* v.

15. *Duffy* v. *Kelly*, 353 Mich. 682, 91 N.W.2d 916 (1958); *Cortez* v. *Ford Motor Co.*, 349 Mich. 108, 126-27, 84 N.W.2d 523, 532 (1957); *Holman* v. *Industrial S. & Mfg. Co.*, 344 Mich. 235, 260-61, 74 N.W.2d 322, 333 (1955).

16. *Holman* v. *Industrial S. & Mfg. Co.*, 344 Mich. 235, 74 N.W.2d 322 (1955).

17. 352 Mich. 636, 91 N.W.2d 9 (1958).

18. 352 Mich., at 638-39, 91 N.W.2d, at 10.

19. 314 Mich. 152, 22 N.W.2d 252 (1946).

20. 314 Mich., at 159, 22 N.W.2d, at 255.

State Board of Embalmers,[21] a funeral director, instead of taking an appeal from an administrative proceeding in which his license had been revoked, brought a suit in equity in the circuit court alleging that the licensing statute was unconstitutional. It was held that injunctive relief was available. The funeral director was not required to utilize a statutory procedure which he claimed was part of the unconstitutional scheme; the remedy provided in the license revocation proceeding, since it could result in loss of livelihood to the individual, is one that exposes him to irreparable harm.

Thus it is well established in Michigan that where a licensing or other regulatory statute is attacked as unconstitutional, the court may grant injunctive relief on a claim of irreparable injury without requiring exhaustion of administrative remedies.[22]

Other cases in which failure to exhaust administrative remedies has been excused involve nonconstitutional claims of right which for one reason or another need not be asserted before the administrative agency. In *London* v. *City of Detroit*,[23] a property owner who desired to continue to use land zoned for residential purposes as a parking lot sought to enjoin the city from interfering with his plans. The failure to seek a special permit, and the pendency of an enforcement proceeding brought by the city under the zoning ordinance, did not prevent the court from granting injunctive relief. The result turned on the fact that the landowner's claim rested upon his assertion of preexisting use. Since his rights stemmed from the zoning ordinance itself, which recognized preexisting uses, he was not required to apply for a permit to continue a valid nonconforming use. In short, the rights he was asserting could not be vindicated in the administrative proceeding; hence a resort to that procedure was unnecessary.

Other zoning cases seem to recognize broader departures from the exhaustion doctrine. In *Long* v. *Township of Norton*,[24] it was held that the court might interpret a zoning ordinance in a declaratory judgment proceeding even though the property owner had not exhausted his administrative remedies before the township building inspector and the zoning board of appeals. The court emphasized that only a legal question was involved, "which does not turn upon any disputed issue of fact. . . ."[25] In *Long* v. *City of Highland Park*,[26] declaratory and injunctive relief was obtained by a property owner who alleged that the zoning ordinance was unreasonable and confiscatory as applied to his property. The court stated that relief need not first be sought from the zoning authorities because they "do not have the power to declare the ordinance unconstitutional and void as applied to plaintiffs' property and they could not grant the relief here sought. An attempt by them to do so, which in effect would result in a violation of the ordinance, would have been ineffective."[27]

21. 321 Mich. 508, 32 N.W.2d 728 (1948), cert. denied 355 U.S. 885, 69 S. Ct. 234, (1948).

22. *Fitzpatrick* v. *Liquor Control Comm'n*, 316 Mich. 83, 25 N.W.2d 118 (1946) (female bartenders could bring a suit to enjoin the liquor control commission from enforcing a statutory provision excluding women, with some exceptions, from bartending); *General Motors Corp.* v. *Attorney General*, 294 Mich. 558, 293 N.W. 751 (1940) (allegation that threatened criminal prosecutions will result in irreparable harm must be taken as true on motion to dismiss an injunction suit); *Lewis* v. *State Board of Dentistry*, 277 Mich. 334, 269 N.W. 194 (1936) (dentists who were not in compliance with statutory requirement that they practice under the name stated on their licenses could invoke equity jurisdiction, prior to the institution of any administrative proceeding against them, to determine the constitutionality of the statutory requirement).

23. 354 Mich. 571, 93 N.W.2d 262 (1958).

24. 327 Mich. 627, 42 N.W.2d 764 (1950).

25. 327 Mich., at 633, 42 N.W.2d, at 767.

26. 329 Mich. 146, 45 N.W.2d 10 (1951).

27. 329 Mich., at 149, 45 N.W.2d, at 11.

3. Asserted lack of administrative jurisdiction. The most common situation involving the applicability of the exhaustion doctrine arises when attempts are made to challenge the jurisdiction of an agency in advance of completion of an administrative proceeding. The decisions – in Michigan and elsewhere – appear on the surface to go both ways; but when the cases are examined in the light of the policy considerations discussed at the outset of this paper, an underlying consistency emerges.

The grounds on which administrative jurisdiction is challenged make a difference. The easiest situation is that in which the basic statute authorizing the agency to act is alleged to be unconstitutional. Since agencies normally lack power to hold their enabling legislation unconstitutional, it is apparent that an administrative proceeding cannot resolve the claim of right which has been asserted. Exhaustion of administrative remedies will not be required in this situation unless a factual hearing before the administrative agency is necessary to develop a record on which the court can better determine the constitutional issues. In Michigan exhaustion has not been required in this situation.[28]

Where the judicial challenge to agency jurisdiction is based on the ground that the agency's exercise of jurisdiction is unauthorized by its governing charter, whether statute or constitution, failure to exhaust administrative remedies is commonly excused. In *Ward* v. *Keenan*,[29] the leading case, Chief Justice Vanderbilt stated that administrative remedies need not be exhausted "... first, when the jurisdiction of the statutory tribunal [is] questioned on persuasive grounds...; second, when...the charges asserted before it [are] so palpably defective that its jurisdiction [is] merely colorable...."[30] Similarly, other state courts have declared that there is an exception to the normal requirement of exhaustion where the agency lacks jurisdiction in the matter.[31]

Only two Michigan cases seem to deal with advance challenges to administrative jurisdiction, and they appear on the face to go in opposite directions. In *Highland Park* v. *Fair Employment Practices Comm'n*,[32] the city brought an injunction proceeding in a circuit court after the FEPC had initiated a proceeding involving charges that the city was discriminating against Negroes in employment. The city contended that the FEPC was without authority to hold the hearing because the fair employment practices act invaded municipal authority and was unduly vague. In an appeal by the city from the dismissal of the suit, the court held that the authority of the commission to entertain the case should be considered and decided in this injunction suit prior to the completion of the administrative proceeding.

On the merits the court then upheld the authority of the commission to entertain the complaint and to conduct the hearing. The strength of the holding on the jurisdictional question is en-

28. *Long* v. *City of Highland Park*, 329 Mich. 146, 45 N.W.2d 10 (1950); and see the other cases cited in notes 19 and 22, *supra*.

29. 3 N.J. 298, 70 A.2d 77 (1949).

30. 3 N.J., at 308, 70 A.2d, at 8.

31. *E.g.*, *County of Los Angeles* v. *Department of Social Welfare*, 41 Cal.2d 455, 260 P.2d 41 (1953); *St. Luke's Hospital* v. *Labor Relations Comm'n*, 320 Mass. 467, 70 N.E.2d 10 (1946) (jurisdiction to conduct certification proceeding may be challenged without exhausting remedies); *Western Pennsylvania Hospital* v. *Lichliter*, 340 Pa. 382, 17 A.2d 206, 132 A.L.R. 1146 (1941) (jurisdiction of state labor board may be challenged in injunction proceeding before board has completed its proceeding); cf. the recent case of *Willamette Valley Lumber Co.* v. *State Tax Comm'n*, 226 Or. 543, 359 P.2d 98 (1961), in which the court weighed factors of (1) irreparable injury, (2) doubt on the jurisdictional question, and (3) relative competence of agency and court to decide the question in holding that the jurisdiction of state tax commissioners to increase personal property assessments could not be challenged until after the taxes had been assessed and paid.

32. 364 Mich. 508, 111 N.W.2d 797 (1961).

hanced by the fact that the court did not entertain questions relating to the validity of provisions governing the manner of appeal from final commission orders. The appeal provisions, which were separable from the remainder of the act, could not be attacked until after the administrative remedy had been exhausted. The city was not invoking the appeal procedure, and it was problematical whether it ever would do so. But the exhaustion doctrine was not applied to the basic question of the commission's authority. In refusing to accept the commission's contention that the entire case should be dismissed because of the city's failure to exhaust administrative remedies. the court noted that the portions of the bill relating to the authority of the commission did not present any factual issues for determination. "The claims of unconstitutionality contained therein could properly have been determined in this chancery proceeding on a motion to dismiss the bill."[33]

In *School District of Royal Oak* v. *State Tenure Comm'n*,[34] on the other hand, the court applied the exhaustion doctrine in holding that a school district could not obtain injunctive relief against a tenure hearing before the state commission prior to the completion of the administrative proceeding. The school district's attack on the administrative proceeding purported to rest on the commission's lack of jurisdiction. On closer examination, however, it is apparent that the consideration favoring the exhaustion doctrine outweighed the opposing considerations. For the case did not really present a legal question involving the jurisdiction or authority of the commission, but a factual dispute on a matter within the competence and specialized jurisdiction of the tenure commission.

The facts of the *Royal Oak* case are simple: a school district refused to renew the contract of a teacher, claiming that it was applying an established "retirement" policy. The teacher initiated a proceeding before the tenure commission, seeking a hearing on the reasons for discharge. At this point the school district, alleging that the commission had authority only of discharges and not of "retirement," sought injunctive relief in the courts. The Supreme Court held that in the absence of a showing of hardship or irreparable harm, judicial relief is not available unless administrative remedies have been exhausted. Although the language of the opinion, as is true of many of these cases, is overly broad, the result is sound.

The jurisdiction of the commission over teacher dismissals was clear and unquestioned. Its authority over retirements as distinct from dismissals could best be determined after a factual hearing by the agency. The court could not pass intelligently upon the legal question without exploring a number of factual issues which had been delegated to the tenure commission: What was the school district's "retirement" policy? How had it been administered in the past? Was the practice of year-to-year renewals for teachers over 60 years of age merely a device to circumvent the statutory tenure requirements? Etc.

A current issue of concern is whether uncertainties involving the constitutional authority of Michigan's new Civil Rights Commission can now be considered by courts in advance of final disposition of a case by the commission. There is serious question, for example, whether the Civil Rights Commission has any authority to entertain proceedings involving racial discrimination in the field of private housing. I have elsewhere examined the materials which relate to this question of constitutional interpretation and ventured certain conclusions.[35] Suppose, for example, that a property owner refuses to sell his home

33. 364 Mich., at 519, 111 N.W.2d.

34. 367 Mich. 689, 117 N.W.2d 181 (1962).

35. See Cramton, *The Powers of the Michigan Civil Rights Commission*, 63 Mich. L. Rev. 5-58 (1964).

to a Negro because of the latter's race. No common or statutory law in Michigan provides any protection against this form of private discrimination.[36] The jurisdiction of the Civil Rights Commission, under article V, §29, of the 1963 constitution, extends only to "civil rights guaranteed by law and by this constitution." Whether the new constitution created enforceable guarantees against racial discrimination in the field of private housing is clearly a matter of great public importance. May that issue be immediately taken to the courts by a property owner who has been charged with such discrimination in a proceeding brought before the commission? Or does the doctrine that administrative remedies must be exhausted preclude an immediate judicial determination of the constitutional question?

The proper answer is not entirely clear, but the manner in which it should be resolved is. A deliberate weighing of the considerations for and against the application of the exhaustion doctrine is called for. The following considerations might well enter into the balance:

(1) The extent to which Michigan's new constitution created enforceable rights in private citizens against the discriminatory acts of other private citizens is purely a question of law. No factual materials will help to settle that issue. It is a matter of constitutional interpretation which must be decided upon the basis of the constitutional language and its legislative history. The only materials that need to be consulted are those which are the proper subject of judicial notice (the Journal of the Constitutional Convention, the Address to the People, and, to a lesser extent, newspaper and circular material explaining the work of the constitutional convention).

Moreover, the Civil Rights Commission, even though it is a constitutionally-created entity, remains an administrative agency. The language of article V, §29, which subjects the commission to general laws governing "administrative agencies" and to *de novo* review by the courts, clearly indicates that the commission is an "inferior tribunal." It is not empowered to determine the scope of the constitutional rights which fall within its jurisdiction. That is a legal question for the Michigan courts; no prior administrative hearing will clarify the meaning of the constitutional language. In short, the question involved is not only without the expertise of the agency but is beyond the agency's competence in the sense that it can be finally determined only by the courts.

(2) The administrative proceeding before the commission does not provide an adequate and expeditious remedy for the claim of right raised by the hypothetical property owner who has been accused of discriminating in the sale of his home. His claim of right goes to the commission's total lack of any authority in this area. Since the commission's view on this question is well-known and predetermined, an administrative hearing on the factual issue of whether discriminatory conduct did take place serves no useful purpose. The commission, speaking through its co-chairmen and its executive director, has repeatedly made it clear that it accepts the position advanced by Attorney General Frank J. Kelley, who has declared that the 1963 constitution vested exclusive jurisdiction in the commission to vindicate broad new civil rights protecting individuals from private racial discrimination in the housing field.[37] There is even some question whether the commission, even if it so desired, could depart from the view expressed by

36. See *McKibbin* v. *Corporation & Sec. Comm'n*, 369 Mich. 69, 119 N.W.2d 557 (1963).

37. *Ops. Mich. Att'y Gen. No. 4161* (July 22, 1963); *id., No. 4195* (Oct. 3, 1963); *id., No. 4211* (Nov. 18, 1963).

the chief law enforcement officer of the state, prior to the expression of differing views in an authoritative judicial decision. As in *Trojan* v. *Taylor Township*,[38] the administrative remedy would be "vain and useless," since it cannot result in a prompt resolution of the question of constitutional interpretation.

(3) It cannot be disputed that the question of constitutional interpretation casts a large shadow upon any assertion of power by the Civil Rights Commission in the field of private housing. There is no question but that the issue is a serious and debatable one, however it may be finally resolved. If the 1963 constitution did not create enforceable new rights against private discrimination, then the commission is entirely without jurisdiction in that important area, since the commission's jurisdiction extends only to "the civil rights guaranteed by law and by this constitution." The existing uncertainty prevents the commission from taking the forceful action in the housing field that it might take if its authority were not so doubtful. It prevents local governments, even those such as Ann Arbor and Grand Rapids which have enacted fair housing ordinances, from seeking to remedy the evils of housing discrimination by local action. And it strengthens the hand of those in the legislative branch of government who would frustrate the protest movement by stalling and temporizing. A prompt and authoritative judicial resolution of the legal issues would end this period of paralysis.

(4) A consideration which relates only to the situation under discussion, and not to the general problem of exhaustion of administrative remedies, arises from the language of the constitutional provision creating the Civil Rights Commission. Article V, §29, of the 1963 constitution, which creates the commission and governs its powers, is qualified by the following sentence:

> . . . **Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.**

This sentence might be taken as obviating any consideration of the general principles relating to the exhaustion problem, since it refers to the "right" of any "party" before the commission "to direct and immediate" "equitable" remedies in the courts of the state. I believe such a view would be mistaken. The sentence does not create any new judicial remedies; it merely preserves those which existed at the time. If equitable relief against administrative action could be obtained under prior law, the same remedies may be obtained against the Civil Rights Commission today. The framers were apparently concerned lest the constitutional status of the commission lead the courts to the erroneous conclusion that it should not be treated in the *same* manner as other administrative agencies. But the framers did not intend to abolish the doctrine of exhaustion of administrative remedies insofar as the Civil Rights Commission was concerned.

(5) The only consideration weighing in the other direction is the modest showing of irreparable harm that can be advanced by the property owner. Forcing him to postpone judicial resolution of the questions of constitutional interpretation until after a factual hearing by the commission will cause him expense, inconvenience and embarrassment. His business practices may be affected in the meantime. But the degree of hardship and injury is not very great.

The willingness of the Supreme Court in *Highland Park* v. *Fair Employment Practices Comm'n*,[39] to con-

38. 352 Mich. 636, 91 N.W.2d 9 (1958).

39. 364 Mich. 508, 111 N.W.2d 797 (1961).

sider the constitutionality of the fair employment practices act prior to the completion of the administrative hearing suggests that the same approach is likely to be taken in the analogous situation under discussion. Support might also be drawn from cases involving the same questions which have arisen in other jurisdictions. *Levitt & Sons* v. *State Division Against Discrimination*,[40] is squarely in point. A housing-project developer was charged in complaints filed with the division with discriminating against individual Negroes in the sale of houses. When conciliation failed, the complaints were set for administrative hearing. The developer then brought suit in a trial court of general jurisdiction, challenging the jurisdiction of the division to hear the complaints and attacking the constitutionality of the underlying statute. The trial court dismissed the suit on ground that the developer had failed to exhaust its administrative remedies. The New Jersey Supreme Court held that the exhaustion doctrine was inapplicable:

> **Since the questions involved in this appeal relate to the jurisdiction of the administrative agency and the constitutionality of the statute on which the administrative action in question is based, it is apparent that plaintiffs should not be made to exhaust their administrative remedies before pursuing the present action. Fischer v. Bedminister Tp., 5 N.J. 534, 76 A.2d 673 (1950); Ward v. Keenan, 3 N.J. 298, 302-309, 70 A.2d 77 (1949). The questions are purely legal, an area where the administrative expertise would be of no real value. Under such circumstances, we have consistently held that exhaustion of administrative remedies will not be required. Honigfeld v. Byrnes, 14 N.J. 600, 604, 103 A.2d 598 (1954); Nolan v. Fitzpatrick, 9 N.J. 477, 89 A.2d 13 (1952).**[41]

Similarly, a New York court considered and upheld the constitutionality of a New York City fair housing ordinance even though the plaintiff had not exhausted his administrative remedies.[42]

CONCLUSION

In Michigan and elsewhere, cases involving the doctrine of exhaustion of administrative remedies contain overly broad language indicating that exhaustion is *always* required or *never* required. Upon closer analysis, however, the decisions appear to reflect a careful balancing of relevant considerations. Exhaustion of administrative remedies is required when early resort to a court will endanger the objectives of the exhaustion doctrine: furthering orderly procedure, preserving the efficiency of the administrative process, conserving judicial energies, and properly allocating responsibilities between agencies and courts. On the other hand, the exhaustion doctrine is not applied — mechanically or unthinkingly — when other considerations outweigh the objectives of the exhaustion rule. Thus, the Michigan cases do not require exhaustion when (1) the plaintiff would suffer serious injury if he were required to exhaust his administrative remedy; or (2) the issue which he raises is a doubtful question of law which is not within the competence or the expertise of the administrative agency. A viable jurisprudence emerges when one consults, not the broad language of isolated cases, the holdings of the decisions. However, a greater degree of articulation of the controlling factors in the opinions would be desirable, since it would make the law easier to understand and to administer.

40. 31 N.J. 514, 158 A.2d 177 (1960), appeal dismissed 363 U.S. 418, 80 S. Ct. 1215 (1960).

41. 31 N.J., at 523; 158 A.2d, at 181.

42. *Martin* v. *City of New York*, 22 Misc. 2d 389, 201 N.Y.S.2d 111 (Supreme Court 1960). The recent case of *Marshall* v. *Kansas City*, 355 S.W.2d 877, 93 A.L.R.2d 1012 (Mo. 1962), allowed a restaurant owner to use a declaratory judgment action to attack an ordinance prohibiting racial discrimination in places of public accommodation.