SEPARATION OF POWERS AND THE STATUS OF ADMINISTRATIVE REVIEW

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Introduction

As Else-Mitchell recognised in 1961, the framers of the Constitution did not have in mind the modern administrative state when they adopted a separation of powers structure. After commenting on the appropriateness of the rigid separation of powers found by the High Court in the circumstances of the *Boilermakers Case*,[1] he said:

> the wisdom of separation of powers in the field of industrial relations has little relevance to one problem which the Founding Fathers hardly considered, namely the scope of administrative action and for the integration of administrative and judicial power.[2]

Similar comments doubting the relevance of a formalist[3] approach to the separation of powers in a modern administrative state have been expressed in America. Fallon has said:

> A second objection to article III literalism arises from policy concerns of the modern administrative state. The role of federal government has expanded far beyond that contemplated by the framers. At the time of the Constitution's adoption, government enforced the system of private rights defined by the common law but otherwise had limited functions. As government has created more entitlements and assumed responsibility for enforcing a broader range of legal rights, functional concerns have supported the assignment of adjudicative responsibilities to non-article III decision-makers.[4]

Can a practical theory of governmental structures be developed that recognises the intrinsic values of the constitutional text and separation of powers, and better accommodates existing structures in a way that supports and enhances independent administrative review, while promoting fundamental constitutional values, but without overturning too much existing authority?

This article proposes a new approach to separation of powers under the Australian Constitution. It has not received acceptance by the High Court,[5] but it is an approach that I consider could validly be taken, and if it were taken, would significantly strengthen and support the validity of the current system of administrative review, without radically changing accepted notions of separation of powers.

A new functionalist approach

Applying a more functionalist approach to separation of powers issues, I suggest that Parliament could give powers and functions to Chapter III courts provided that those powers are not inconsistent with:

- the values inherent in "separation of powers"; and
- the traditional role of courts.

Equally, Parliament could decide to give those same powers and functions to a non-Chapter III institution provided:

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- implied constitutional values are not breached; and

- it is not a power or function that has traditionally, and exclusively, been exercised by courts in the Anglo-Australian tradition.

A fourth arm of government

The idea that government is divided into three distinct and separate functional parts has never been applied in practice in any country. This is so even in the United States of America where the notion of separation of three types of powers is often assumed to be an essential element in the fabric of government. In Australia, considerable overlap has always been permitted in the exercise of executive and legislative powers. But it is in the area of judicial power that the High Court has been concerned to make distinctions and invalidate legislation and legislative schemes, far more so than the Supreme Court has done in America. It is the approach to judicial power, and its impact on administrative review, with which this article is primarily concerned, and in which I suggest a new paradigm for the assessment of separation of powers issues.

Because the Commonwealth is a creature of statute (the *Commonwealth of Australia Constitution Act 1900*), all its powers are statutory.[6] As the Constitution divides those powers into three, and only three, categories. every power that is exercised by a Commonwealth agency must be an exercise of one or more of those categories of powers.

While the Constitution appears to divide government into three arms associated with the three powers, I suggest that Parliament and the executive can create, and effectively have created, a fourth arm of government, independent of, but subject to oversight by, Parliament, the executive, and the judiciary. This fourth arm, which exercises all three types of powers (executive, legislative and judicial), comprises those independent agencies of government that are not subject to direct Ministerial (ie, executive) or Parliamentary control—including administrative tribunals, the Ombudsman, Auditor-General, and numerous other similarly independent governmental instrumentalities and statutory office holders. Because not all of its members have the tenure of Chapter III judges, by definition, these agencies of government must exercise either, or both of, the "executive power of the Commonwealth" or the "legislative power of the Commonwealth", but not the "judicial power of the Commonwealth".

Defining the "judicial power of the Commonwealth"

The "judicial power of the Commonwealth" is not *any* judicial power exercised in respect of, or under, a Commonwealth law (including the Constitution), but should be taken to be a technical term,[7] limited by:

- The text of the Constitution—that is, the jurisdiction given to Federal courts by Chapter III of the Constitution or by laws of the Parliament made for the purposes of Chapter III;

- Historical judicial traditions—that is, the kinds of matters traditionally dealt with, and functions traditionally exercised by, Anglo-Australian courts; and

- Implied values—that is, the values inherent in the idea of separation of powers implied from the structure of the Constitution.

Taking this approach, one does not have to employ the fiction, which the High Court has employed, of calling a judicial power "administrative", "executive", "arbitral", or "legislative". It has been said that "the Court looks considerably sillier when it stoutly maintains that a fish is a tree than when it explains that, under appropriate

constitutional theory, it simply does not matter whether the item is a fish or a tree."[8]

This suggested approach gives broad and flexible policy control regarding the structure and nature of governmental institutions to the executive and Parliament, and protection of fundamental constitutional values to the judiciary. It has some judicial support. Murphy J said:

> Whether adjudication is treated as part of the judicial power or not is often in practice the decision of the legislature. If it places the function with a court (within Ch. III) then in general the adjudicative power is treated by this Court as part of the judicial power of the Commonwealth. If not, it is treated as administrative adjudication. ... Other functions, even with a minimal adjudicative aspect, because traditionally they have been dealt with by courts, can be regarded as part of judicial power if the legislature cares to place them with the courts.[9]

If the executive creates an institution using its prerogative power, that institution can only exercise the "executive power of the Commonwealth".

If the Parliament creates an institution, it can delegate to that institution part of the "legislative power of the Commonwealth". or give it part of the "judicial power of the Commonwealth", or give it part of the "executive power of the Commonwealth". If Parliament creates a Chapter III court, it must give it only "judicial power of the Commonwealth", but if it creates a non-Chapter III institution, it can give it "executive power of the Commonwealth" and/or delegate to it "legislative power of the Commonwealth".

Within each of the three "powers of the Commonwealth" there may reside elements of executive, legislative, and judicial power that can, and sometimes must, be used in order to exercise, effectively and lawfully, the relevant power of the Commonwealth by the particular institution to perform its statutory functions.

The Chapter III courts must remain separate from the other arms of government because it is the judiciary that oversees and establishes the rule of law It is the conscience of government and final arbiter of disputes. The fundamental purpose of the notion of the separation of powers is, by institutionalising separateness, to ensure that tyrannical power cannot accrete to any single institution. Chapter III courts are given the role of invalidating action taken by any other institution of government that is inconsistent with this constitutional value. To ensure that those courts cannot themselves be corrupted by power, executive powers that are not directly related to the judicial function are deemed to those courts, and the legislature can override any legislative decisions of the courts except those that relate to the continued existence of the most fundamental human rights (that is, human rights inherent in the Constitution itself that cannot be removed by legislation).[10]

Finally, it is the trust and confidence of the people in the institutions of government that give them their validity and continued role. Whatever the constitutional structure and institutional functions, the institutions of government retain their legitimacy through the continued acceptance by the people and by those institutions of the judgments of the courts and the rule of law.

Text of the Constitution

The "judicial power of the Commonwealth" can only ever be exercised if there is an "appeal" from a State Court or the Inter-State Commission[11] (s.73); or a "matter" (ss. 73, 75, 76, 77, or 78) to be determined. By limiting the jurisdiction of Chapter III courts in this manner, the Constitution limits the nature of the "judicial power of the Commonwealth" to the power used in determining particular sorts of controversies in particular sorts of cases. The "judicial power of the

Commonwealth" includes certain executive and legislative powers (which can, and should, be described as such), but which are executive (or administrative) and legislative[12] powers within the "judicial power of the Commonwealth," not within the "executive power of the Commonwealth" spoken of in section 61 or within the "legislative power of the Commonwealth" spoken of in section 1 of the Constitution. Any other functions that might be said to be "judicial" in nature or character do not involve an exercise of the "judicial power of the Commonwealth," but must be characterised as an exercise of judicial powers within the executive or legislative power of the Commonwealth.

The "judicial power of the Commonwealth" is not co-extensive with judicial power exercised in the execution of, or in making, Commonwealth laws, because to the extent that such exercise does not fall within sections 73 and 75 to 78 of the Constitution, it is either part of the "executive power of the Commonwealth" or the "legislative power of the Commonwealth".

Effectively, the judicial power of the Commonwealth relates only to the exercise of a power in deciding "matters", ie, controversies concerning "some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law", involving "adjudication ... in proceedings *inter partes* or *ex parte*", but it does not involve determining abstract questions without the right or duty of any body or person being involved.[13]

Section 75 confers original jurisdiction on the High Court in certain enumerated types of matters. Sections 76 and 77 permit Parliament to confer and limit the jurisdiction of Chapter III courts in other types of matters, but these sections do not expressly state that these other types of matters can only be given to Chapter III courts. On one interpretation of these sections, it is only if the Parliament confers jurisdiction that the adjudication of such a matter becomes an exercise of the judicial power of the Commonwealth. Unless Parliament confers such jurisdiction on a Chapter III court, it cannot be an exercise of the "judicial power of the Commonwealth". If Parliament confers it on some other body, it must be an exercise by a non-Chapter III institution (which might even be called a court) of a judicial power within the executive power or the legislative power of the Commonwealth.

Therefore, applying this approach, the terms of the Constitution and the legislation enacted under or in support of Chapter III are the primary factors limiting and defining the scope of the "judicial power of the Commonwealth".

Historical judicial traditions

The importance of implications from historical traditions as an essential element in determining whether a particular type of decision *must* be made by a Chapter III court is seen when regard is paid to the fact that the only expressly essential elements of a Chapter III "court" are the tenure of its members and the non-diminution of remuneration. Consider the following example:

> The *Swift and Sure Decision-making Act 1999* is passed establishing the Pensions Court as a statutory corporation, which is then 100% privatised—the Commonwealth purchases the services of this Court, not on a case-by-case basis but on a pre-arranged annual fee (the contract bases the fee on a formula reflecting the Court's previous year's claim finalisation and rejection rates). Its "justices" are appointed by the Governor-General, are given tenure until age 70, and are guaranteed salary of not less than $25,000 per annum. All that these judges do is finally decide the facts and law in each case and determine pension claims. No hearings are held, and the claims are determined on the material on files submitted to it by Centrelink. The legislation precludes appeals to the High Court under section 73 of the Constitution or to any Chapter III court

> under any other Commonwealth legislation (thus negating any jurisdiction under section 76 of the Constitution). The legislation deems the decisions of these justices to be decisions of the Court. The High Court has no jurisdiction under section 75 (v) because there is no "Commonwealth officer" who makes a relevant decision, merely a corporation.[14] The Commonwealth cannot be sued in relation to any particular matter before the Court under s. 75 (iii) because the Court is a 100% privately owned corporation, and the legislation declares that the only party to any matter before the Court is the claimant and the Commonwealth shall not be a party to proceedings. Further, the legislation provides that failure of a judge to accord due weight to Ministerial guidelines constitutes misbehaviour for the purposes of section 72 of the Constitution.

On a *literal* reading of Chapter III of the Constitution (and for the moment disregarding the general ineffectiveness of ouster clauses), there is no reason why this scheme would not successfully remove jurisdiction for all pension decisions from any of the current Chapter III courts, including the High Court—and save the Commonwealth lots of money.

What this extreme example shows is that there must be more to a "court" than tenure and remuneration. No one would regard the way in which this "court" does its business as being court-like. No hearing is given, the funding arrangements and threat of impeachment would influence decision-making, it is not a public institution, its judges need not be legally qualified, and they are remunerated at a rate that would not attract experienced governmental decision-makers, thus promoting poor quality, unreviewable, decision-making. The cry would be, "where is the justice?"—and there wouldn't be any! But, on a strict literal reading, it is "constitutional".

The fact that there is no "justice" in this type of arrangement must be an indication that it could not be a "court" exercising the "judicial power of the Commonwealth."

One must look to the history of Anglo-Australian courts to see what must have been intended to be the fundamental matters that could not be taken away from a court exercising the judicial power of the Commonwealth. It is from that history that we get our sense of what are the essential things that courts do, and must continue to do, and which must be implied into Chapter III of the Constitution.

Bruff has said "separation of powers principles suggest that some 'inherent' or 'core' functions may not be taken from the constitutional courts."[15] In *Leeth v. The Commonwealth*, Mason CJ, Dawson and McHugh JJ said:

> It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the *Boilermakers' Case*, a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers.[16]

When the Constitution came into operation, the judiciary was given (by implication) a new power not previously held by English or Australian courts, that of judicial review of legislation for want of validity.[17] Other than matters giving rise to such issues, the types of matters expressly given to the judiciary by the Constitution were those traditionally dealt with by Anglo-Australian courts. While the Parliament can confer additional jurisdiction on Chapter III courts, there is nothing in the Constitution to suggest that the judiciary was to have any different role or function from that which it ever had. Causes of action were not enlarged (other than in relation to validity of legislation) and the types of matters referred to in Chapter III reflected traditional fields of judicial activity. Thus, after 1 January 1901 one could not go to a Chapter III court to obtain any new remedies or

pursue new causes of action unless the Constitution or the Parliament provided that such should be the case.

If the Parliament provided for a new remedy or new cause of action, it would be up to the Parliament to decide whether this would have to be pursued in a Chapter III court (and so Parliament could enlarge the judicial power of the Commonwealth) or in a non-Chapter III institution (by which Parliament could enlarge the executive power of the Commonwealth or delegate legislative power of the Commonwealth[18]). If a non-Chapter III institution were given authority to administer such new remedies or causes of action it could be required to act judicially, but would not be exercising any of the "judicial power of the Commonwealth".

The types of matters that have been regarded as being essential to be heard by courts are fairly limited. They concern matters relating to:

- imposition of criminal penalties;
- loss of liberty;
- forfeiture of property; and
- imposition of civil penalties.

But even in some of these matters, it has only ever been essential that courts have had supervision and ultimate control over their administration. For example, a person can lawfully be arrested by a police officer and thus lose his or her liberty, and a customs official can confiscate a person's property, without any order of a court. It is only if the person challenges the exercise of those powers that a court need get involved. In either case an aggrieved person might opt to pursue a further administrative avenue rather than take the matter directly to a court (for example complain to a more senior officer or apply for review to an administrative tribunal). The decision of that senior officer or tribunal might satisfy the person. But if not, ultimately, the matter must be brought before a court, which has the legal authority to determine finally the rights and liabilities of the person. It is that finality and authority that makes a court a court.

If a person chooses to waive the right to have such a matter determined by a Chapter III court, then there is nothing wrong with the final decision, in that particular case, being made by a non-Chapter III person or institution. The notion of waiver has arisen in a number of American cases concerning separation of powers issues.[19] It was also an element in the *BIO Cases*,[20] where it was held that provided there was an alternative avenue of appeal to a Chapter III court, it was not inconsistent with the doctrine of separation of powers for the adjudication of taxation matters to be decided by an administrative tribunal, and complainants could not complain that their matter had been dealt with by an administrative tribunal rather than a court when they had chosen to take that course themselves. An important issue then, becomes what is the nature of the alternative review undertaken by a Chapter III court in those circumstances—does it have to be a *de novo* review or merely a review on legal issues concerning the original administrative decision?

It has been said that in taxation matters, because of the nature of tax—"a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered"[21]—fundamental rights are involved that require the highest adjudicatory standards. Certainly, the Constitution treats taxation laws differently to other legislation, and so one might infer that such matters require a higher standard of "justice" to be applied. In *MacCormick v. Federal Commissioner of Taxation*, Brennan J said that where Parliament:

> imposes a tax by reference to prescribed criteria, it is for the courts and not for the executive to determine whether each of those criteria exists in a particular case ... an opportunity to obtain a judicial determination as to the existence of the fact may be validly limited (as it is under the Income Tax Assessment Act) to judicial proceedings on appeal from disallowance of an objection to an assessment, but it cannot be wholly excluded.[22]

Perhaps the doubts that Gummow J raised[23] concerning the validity of the *Administrative Appeals Tribunal Act 1975* are groundless given the alternative avenue in taxation matters, which is an area of public law that is *sui generis*. No other areas of public law traditionally were subject to *de novo* hearings by courts, and so it is not necessary that Chapter III courts have that jurisdiction today.

The roles and functions of courts have varied depending on the nature of the dispute. In public law matters, courts traditionally have interfered only when there has been legal error, including issues relating to procedural fairness. It is only in special public law areas, such as taxation, that courts have demanded, and traditionally been given, a greater role.

While there is no reason that the Parliament cannot give courts a greater role in areas of public law, there is no historical reason to suggest that they need have any greater role. Any other role could be given to a non-Chapter III institution, which could be called a court or tribunal and which could be required to act judicially, being, in appropriate circumstances bound by the rules of evidence, and acting, for all intents and purposes as a court would normally act. But, because its decisions would be subject to the supervision of a Chapter III court, and would not have the finality of those of a Chapter III court—at least in relation to questions of law—it would not be exercising the "judicial power of the Commonwealth".

While it is not possible to find any "original intention" support for a fourth arm of government, there is some support in early constitutional text books for the idea that public law matters could be decided by non-Chapter III institutions utilising judicial-type powers. Allan Hall has also suggested that there is a historical difference between private and public rights, liabilities and privileges and the exercise of judicial power, and that, as a consequence, there is no essential requirement that they be decided by Chapter III courts.[24]

At the time of framing the Australian Constitution, it was settled law in America that "public rights" could be decided outside constitutional courts. This doctrine originated in *Murray's Lessee v. Hoboken Land & Improvement Co.*[25] After stating that Congress could not withdraw from the courts any "matter which, from its nature" is judicial, the US Supreme Court noted that:

> At the same time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.[26]

Harrison Moore recognised this and applied it to the Australian Constitution, saying:

> The question then is—what is 'the judicial power of the Commonwealth' within the terms of sec. 71? Even in those Constitutions in which the separation of powers has been accepted as fundamental, by no means every function which is in its nature judicial is exclusively assigned, or permitted, to the judicial organ. Therefore, although neither history nor usage nor practical convenience can determine the nature of 'judicial power', logical consistency may have to yield something to history and familiar and established practice in determining what is the judicial power of the Commonwealth committed to the Courts by sec. 71.[27]

Quick and Garran, in 1900, also noted that executive officials would have to undertake some judicial functions and act judicially. They said:

> The distinction between judicial and executive functions is not always easy to draw. 'Doubtless the non-coercive part of executive business has no affinity with judicial business. ... The same may be said, for the most part, of such coercive work of the executive as consists in carrying out decisions of judges; e.g., the imprisonment or execution of a convict. But there are other indispensable kinds of coercive interference which have to be performed before or apart from any decisions arrived at by the judicial organ; and in this region the distinction between executive and judicial functions is liable to be evanescent or ambiguous, since executive officials have to "interpret the law" in the first instance, and they ought to interpret it with as much judicial impartiality as possible.' (Sidgwick, Elements of Politics, p. 358).[28]

Implied values

Separation of powers has a prophylactic function. Adherence to its principles in structuring governmental institutions prevents abuse of power through limiting undue accretion of power in any one organ of government.[29] Some of the values that flow from the concept include:

- independence of decision-making;
- countermajoritarian check on majoritarian institutions;
- rule of law; and
- prohibition of the exercise of arbitrary power.[30]

Independence of decision-making

Chapter III courts under this fourth-arm-of-government model would remain independent of the executive and Parliament. It is fundamentally important that they be so, and the judicial independence is the purpose of the tenure and guaranteed remuneration clauses of the Constitution. It is also that independence that the lower level "independent" decision-makers in the fourth arm of government can rely upon to validate their own actions, and assert and maintain their own independence from the executive and Parliament.

Where an agency has statutory duties or functions to carry out, the High Court insists upon the proper fulfilling of those duties and functions in accordance with, and not in excess of, the powers given to that agency. While the Court will permit discretion to be applied within the scope of the powers and nature of the function of the agency, there are common law rights and administrative law standards that the Court will insist are not encroached upon. Thus, the influence of the executive on such agencies is minimised, notwithstanding that the executive might have power to dismiss the office holders. In the end, the Chapter III courts set the standard of proper functioning of such agencies.

A new principle that would be important to introduce into fourth-arm-of-government jurisprudence is a notion of "structural" procedural fairness. In *Canadian Pacific Ltd v. Matsqui Indian Band*,[31] Lamer CJ of the Canadian Supreme Court held that the very structure of a tribunal could constitute a reasonable apprehension of bias at common law, and thus invalidate its decisions. In his view, the level of structural independence that is required of a tribunal depends on the nature of the tribunal, the interests at stake, and whatever other indicia of independence are available, such as oaths of office. In this matter, Lamer CJ held that the Bands' Appeal Tribunal did not meet the requisite standard of independence for three reasons: the by-laws creating the tribunal made no provision for financial security for the tribunal members; security of tenure for tribunal members was either absent or was ambiguous; and the Indian bands both appoint the tribunal members and are a party to the dispute. He held that it

was all three factors in combination that led him to his conclusion. He stated:

> [I]t is a principle of natural justice that a party should receive a hearing before a tribunal which is not only independent, but also appears independent. Where a party has a reasonable apprehension of bias, it should not be required to submit to the tribunal giving rise to this apprehension. Moreover, the principles for judicial independence outlined in *Valente*[32] are applicable in the case of an administrative tribunal, where the tribunal is functioning as an adjudicative body settling disputes and determining the rights of parties. However, I recognize that a strict application of these principles is not always warranted.[33]

By advancing such principles, the High Court could influence the structure and independence of institutions within the fourth arm of government, ensuring that proper standards were adopted, both procedurally and structurally, thereby ensuring that the exercise of judicial power within the executive or legislative power of the Commonwealth was appropriate to the nature of the matters dealt with by the relevant agencies.

Countermajoritarian check on majoritarian institutions

While a fundamental value contained in the Constitution is the democratic nature of government—the representation of the people in Parliament and the sovereignty of the people—an essential value of separation of powers is the avoidance of the "tyranny of the majority" by having the judiciary independent of popular will. The judiciary is a countermajoritarian institution, which protects individual and minority rights. Sir Gerard Brennan said recently:

> Responsibility for the state of the law and its implementation must rest with the branches of government that are politically accountable to the people. The people can bring influence to bear on the legislature and the executive to procure compliance with the popular will. But a clamour for a popular decision must fall on deaf judicial ears. The Judiciary are not politically accountable. The Courts cannot temper the true application of the law to satisfy popular sentiment. The Courts are bound to a correct application of the law, whether or not that leads to a popular decision in a particular case and whether or not the decision accords with executive policy. ...
>
> [I]f the Courts were to seek popular acclaim, they could not be faithful to the rule of law. Confidence is based on faithful adherence to the law by the Courts which are charged with its declaration and application. Our Constitution, rooted in the common law, does not need to express the proposition that the nation is under the rule of law and that the Courts are the organ of government responsible ultimately for the enforcing of the rule of law. That is the Constitution's fundamental postulate, inherent in its text, especially in Ch III. As Dixon J said in the *Communist Party Case*, the Constitution 'is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.'[34]

The same values can, and should, be seen in the fourth arm of government. The function of independent tribunals is closely related to the operation of the rule of law. The legislation under which they operate generally provides that their decisions are deemed to be the decisions of the primary decision-maker. This has the automatic legal effect of imposing on the executive agency the decision of the tribunal that has been made independently of that executive agency and in accordance with the law as interpreted by the tribunal. The only way in which that decision, lawfully, need not be implemented is by an appeal to the judiciary. Thus the fourth arm of government is also countermajoritarian in nature, but subject to the laws of the democratically elected Parliament.

Rule of law

The notion of rule of law is closely linked to the separation of powers, and flows

from the fact that no arm of government has total power to do as it might wish. Each is subject to, and submits to, some control by another arm, and it is the courts that authoritatively state the rules and apply them to the agencies of government. Sir Gerard Brennan said:

> The courts do not seek to assert some personal supremacy over the other branches of government; they simply discharge their duty of applying the law to them as they apply it to themselves. Precedent, analogy and logic as well as experience confine judicial decision-making in cases of political significance as in cases concerning purely individual rights and liabilities.
>
> The rule of law is the cement of the Westminster system in our federal Constitution.[35]

Thus, a fundamental consideration in the structure of government is whether the proposed scheme promotes or detracts from the rule of law. The notion of a fourth arm of government promotes and enhances rule of law ideals.

Applying the values of separation of powers to adjudication by non-Chapter III institutions should require that such jurisdiction will be validly given to such an institution only if its decisions are subject to review by a Chapter III court.[36] This was the principle applied by Hughes CJ of the US Supreme Court in *Crowell v. Benson*,[37] where he held that Congress may give adjudicatory power to administrative agencies if, and only if, the Article III courts are given adequate power to control the legality of those agencies' exercise of these powers through judicial review of all questions of law, including the sufficiency of evidence upon which facts are found, and that the essence of federal judicial power lies in the control that the court ultimately exercises in reviewing whether the law was correctly applied and whether the findings of fact had reasonable support in the evidence.[38] Thus, if Parliament gave judicial power to a non-Chapter III institution without also giving an appeal right to a Chapter III court on legal and procedural issues, it would breach this important constitutional value, and render the grant of power to that institution invalid.

Prohibition of the exercise of arbitrary power

Barendt has said:

> the separation of powers is not in essence concerned with the allocation of functions as such. Its primary purpose ... is the prevention of arbitrary government, or tyranny, which may arise from the concentration of power. The allocation of functions between three, or perhaps more, branches of government is only a means to achieve that end. It does not matter, therefore, whether powers are always allocated precisely to the most appropriate institution.[39]

If the division of powers and functions between three arms of government works to prevent the exercise of arbitrary power, where the division between the executive and the legislature is not distinct (such as in Australia), the introduction of a further semi-autonomous arm of government can be seen to enhance this constitutional value. In relation to the American system, where the separation between the executive and legislature is clearer than in Australia. Peter Strauss has suggested that government agencies comprise a fourth arm of government:

> An agency is neither Congress nor President nor Court, but an inferior part of government. Each agency is subject to control relationships with some or all of the three constitutionally named branches, and those relationships give an assurance—functionally similar to that provided by the separation of powers notion for the constitutionally named bodies—that they will not pass out of control. Powerful and potentially arbitrary as they may be, the Secretary of Agriculture and the Chairman of the SEC for this reason do not present the threat that led the framers to insist on a splitting of the authority of government at the very top. What we have, then, are three named repositories of authorizing power and control, and an infinity of institutions to which parts of the authority of each

> may be lent. The three must share the reins of control; means must be found of assuring that no one of them becomes dominant. But it is not terribly important to number or allocate the horses that pull the carriage of government.[40]

The types of control exercised by the executive, legislature, and judiciary on the fourth arm of government are very different in nature and extent. The executive can set policy objectives, but once a statutory power has been granted to an agency, that agency has authority to exercise those statutory powers to their full extent and in accordance with its own discretion. In *Re Drake*, Brennan J said:

> There are powerful considerations in favour of a Minister adopting a guiding policy ... Decision-making is facilitated by the guidance given by an adopted policy, and the integrity of decision-making in particular cases is the better assured if decisions can be tested against such a policy. By diminishing the importance of individual predilection, an adopted policy can diminish the inconsistencies which might otherwise appear in a series of decisions, and enhance the sense of satisfaction with the fairness and continuity of the administrative process.
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> Of course, a policy must be consistent with the statute.[41]

In earlier proceedings before the Full Federal Court, Bowen CJ and Deane J said:

> It is not desirable to attempt to frame any general statement of the precise part which government policy should ordinarily play in the determinations of the Tribunal. That is a matter for the Tribunal itself to determine in the context of the particular case and in the light of the need for compromise, in the interests of good government, between, on the one hand, the desirability of consistency in the treatment of citizens under the law and, on the other hand, the ideal of justice in the individual case. ... Such a decision, even though it involves the application of government policy to the relevant facts, is the outcome of the independent assessment by the Tribunal of all the circumstances of the particular matter. It is to be contrasted with the uncritical application of government policy to the facts of the particular matter which represents an abdication by the Tribunal of its functions.[42]

Here we can see the role of the judiciary in its oversight of the fourth arm of government in its decision-making. The Courts will not interfere in the application by the agency of the executive's policy unless it appears to it that the agency has abdicated its statutory function (ie, the function given to it by the Parliament) to the executive's will.

Conclusion

The story has been told of former President Harry Truman, on hearing the news that General Eisenhower had been elected President, said, "Ike will be very disappointed in office. He will say, 'Do this, do that' and, unlike in the Army, it won't happen." This clearly, is the Australian executive's experience of the fourth arm of government. It is not directly under the executive as some government departments might be. The executive has very limited control over it. Once statutory powers are granted to independent agencies of government, the courts will ensure that they are exercised independently of undue executive influence.

The rumours that have circulated, and some of the issues made public by the Government, concerning matters under consideration by the Inter-Departmental Committee on Commonwealth Merits Review Tribunals are clear indications that the executive has recognised it does not have control over the fourth arm of government, and is seeking ways to bring its tribunals under greater executive influence. Some of the means that have been suggested by which this might be achieved are arguably contrary to separation of powers notions. Thus, it might (and should) be the case that the judiciary would promote the continued existence of a fourth arm of government by adopting separation of powers values

to invalidate certain changes that would tend to compromise the independence of tribunals.

While the fourth-arm-of-government notion has not gained formal acknowledgment by the courts in the United States, in *Mistretta v. United States*, the Supreme Court indicated the way in which it keeps agencies independent of the branch of government in which they are said to reside:

> In adopting [a] flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch.[43]

If a similar approach were to be adopted by the High Court, the effective result would be a recognition that there is a fourth arm of government—the independent tribunals and similar agencies of government—that needs the protection of a separation-of-powers doctrine to maintain its checking and balancing role within government. The fourth arm of government is under the rule of law because of its supervision for legal error and adherence to constitutional values by the judiciary.[44] It operates under rules made by the legislature, and pays regard, but not slavish adherence, to executive policy.

Adopting this fourth-arm-of-government approach there should be no doubt concerning the validity of the administrative law package of legislation and its institutions. Agencies within it can exercise all three types of powers, but are always subject to forms of supervision and oversight of the three branches of government named in the Constitution, which do not unduly compromise its independence.

Endnotes

1 *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, affirmed on appeal by the Privy Council, *Attorney-General of the Commonwealth of Australia v. The Queen* (1957) 95 CLR 529.

2 Else-Mitchell, R, Introduction to *Essays on the Australian Constitution*, Else-Mitchell, R (Ed), Law Book Company, 1961, p. xxxi.

3 The terms "formalist" and "functionalist" have been applied by American theorists to different separation of powers theories. A formalist theory is one that seeks to apply a rigid separation of both powers and functions between the three arms of government. A functionalist theory retains a basic separation of the functions of government, but does not require a strict divide between the three types of powers of government—it permits the one agency of government to exercise all three powers in the exercise of its functions, but the oversight and control of the use of each type of power ultimately resides with the relevant constitutionally vested arm of government.

4 Fallon, R H, Jr, "Of legislative courts, administrative agencies, and Article III", (1988) 101 *Harvard Law Review* 915, at p 920.

5 Nevertheless, it is an approach that has been mentioned by Finn J as having possible application in Australia: *Hughes Aircraft Systems International v Air Services Australia* (1997) 146 ALR 1, 21.

6 While this view is not universally accepted, I submit that even the prerogative and other implied executive powers can be seen to be statutory powers because they are included by implication within the power vested in the Executive by section 61 of the Constitution. George Winterton has said, "It is arguable that the implied incorporation of the prerogative powers of the Crown in s. 61 has converted those powers into 'statutory' powers": Winterton, G, *Parliament, the Executive and the Governor-General*, 1983, 134. This appears to have been recognised by Brennan J in *Davis v. Commonwealth* (1988) 166 CLR 79, 108-111.

7 Similarly, "executive power of the Commonwealth" and "legislative power of the Commonwealth" are technical terms.

8 Redish, M H, *The Constitution as Political Structure*, Oxford University Press, New York, 1995, p. 102.

9 *R. v. Hegarty; ex parte City of Salisbury* (1981) 147 CLR 617, 632.

10 Toohey, J has said "[W]here the people of Australia, in adopting a Constitution, conferred power upon a Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties." "A

government of laws and not of men", (1993) 4 *Public Law Review* 158, 170,

11 A body rendered effectively defunct because of a restrictive view of the separation of powers doctrine.

12 An example of legislative power is the power of the High Court to declare the common law. Legal realism as developed by judges and academics such as Oliver Wendell Holmes Jr held that all law is, in reality, judge-made, and thus the courts are the ultimate legislature. In *Southern Pacific Co v. Jensen* (1917) 244 US 205. 221. Holmes J said, "judges do and must legislate".

13 (*In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 266-267).

14 This was part of the ratio of Tamberlin J's judgment in *VVAA(NSW) v. Cohen* (1996) 70 FCR 419 as to why the Federal Court did not have jurisdiction under section 39B of the *Judiciary Act 1903* in an action seeking prerogative relief against the members of the Specialist Medical Review Council and the Repatriation Medical Authority.

15 Bruff, H H, "Specialized courts in administrative law", (1991) 43 *Administrative Law Review* 329 at p. 353.

16 *Leeth v. The Commonwealth* (1992) 174 CLR 455 at p. 470.

17 Legislation can be ruled invalid on the ground that it is either in excess of the powers of the Parliament (an implied judicial power) or it is a State law that is inconsistent with a valid Commonwealth law (while this is expressly provided for in s 109, the Constitution appears to be self-executing, and it would be open to argue that the executive or legislature could declare State law to be invalid just as effectively as the judiciary). While the rule in *Marbury v. Madison* (1803) 1 Cranch 137 is not expressly provided for in the Constitution and runs counter to the English doctrine of the supremacy of Parliament, it was accepted by the framers of the Constitution that it would apply in Australia. However, the idea of courts invalidating legislation was not entirely unknown to English law. The inclusion of s 109 of the Constitution permitting a court to invalidate State law that is inconsistent with Commonwealth law is analogous to the jurisdiction of Anglo-Australian courts to rule colonial laws to be invalid if they were inconsistent with Imperial legislation.

18 An example of this is the Specialist Medical Review Council, set up as a review body under the *Veterans' Entitlements Act 1986* to review the legislative decisions of the Repatriation Medical Authority. The legislation provides that a relevant person may seek review of the contents of a legislative instrument determined by the Repatriation Medical Authority. The Council must then review the contents of the legislative instrument, and may require the Authority to amend the instrument in accordance with its findings. The Federal Court, in *VVAA(NSW) v. Cohen* (1996) 70 FCR 419, 46 ALD 290, held that, in performing this review function, the Council exercises legislative power. Yet, in performing its task, the Council acts judicially, and its task possibly could have been given to a Chapter III court instead.

19 For example, *Commodity Future Trading Commission v. Schor* (1986) 478 US 833.

20 *British Imperial Oil v. Federal Commissioner of Taxation* (1925) 35 CLR 422; *Federal Commissioner of Taxation v. Murrio; British Imperial Oil v. Federal Commissioner of Taxation* (1926) 38 CLR 153 affirmed on appeal by the Privy Council in *Shell Co of Australia v. Federal Commissioner of Taxation* (1930) 44 CLR 530.

21 *Matthews v. Chicory Marketing Board* (1938) 60 CLR 263, 276 per Latham CJ.

22 (1984) 158 CLR 622 at p. 658.

23 In *TNT Skypak International (Aust) Pty Ltd v. Federal Commissioner of Taxation* (1988) 82 ALR 175, Gummow J suggested that s 44 of the *Administrative Appeals Tribunal Act 1975*, which provides for a right of appeal to the Federal Court only on a question of law, might be invalid on this ground.

24 Hall, A N, "Judicial power, the duality of functions and the Administrative Appeals Tribunal" (1994) 22 *Federal Law Review* 13.

25 (1856) 59 US (18 How) 272.

26 Quoted in Bruff, H H, "Specialized courts in administrative law", (1991) 43 *Administrative Law Review* 329 at p. 354.

27 Moore, W Harrison, *The Constitution of the Commonwealth of Australia*, 1910 edition, reprinted 1991, Legal Books, Sydney, 315-316.

28 Quick, J, and Garran, R R, *The Annotated Constitution of the Australian Commonwealth*, 1901 edition, reprinted 1976, Legal Books, Sydney, 720.

29 Redish, M H, *The Constitution as Political Structure*, Oxford University Press, New York, 1995, 114.

30 Barendt, E, "Separation of powers and constitutional government", [1995] *Public Law* 599, 602.

31 [1995] 1 SCR 3.

32 *Valente v. R.* [1985] 2 SCR 673.

33 *Canadian Pacific Ltd v. Matsqui Indian Band* [1995] 1 SCR 3, 49.

34 Brennan, Sir Gerard, "The Parliament, the Executive and the Courts: roles and immunities", speech given at the School of Law, Bond University, 21 February 1998, <http://www.hcourt.gov.au/bond2.htm> (11/09/98).

35 Brennan, Sir Gerard, "The Parliament, the Executive and the Courts: roles and immunities", speech given at the School of Law, Bond University, 21 February 1998,

<http://www.hcourt.gov.au/bond2.htm> (11/09/98).

36 Under the AD(JR) Act, extensions to the Judiciary Act, and review by statutory right (e.g. s.44 AAT Act), the right to Chapter III review is guaranteed for most administrative decisions, and decisions of non-Chapter III tribunals and institutions. The Australian system is unlike that which exists in the United States, where Article III courts give deference to the decisions on questions of law of lower courts or tribunals by only requiring that the interpretation be reasonable, rather than the correct or preferable interpretation. Thus the notion of appellate review as an element of separation of powers theory has more likelihood of success in Australia than in America. Australian courts already exercise complete control over the interpretation of legal questions by administrative tribunals, and it cannot be said that any authoritative discretion has been given to those tribunals on legal questions if they are subject to complete review and no deference given by the reviewing court, on such matters. As Fallon notes, "There is some risk to judicial integrity insofar as courts give their imprimatur of validity to judgments that, but for the agency's decision, they would not have reached.": Fallon, R H, Jr, "Of legislative courts, administrative agencies, and Article III", (1988) 101 *Harvard Law Review* 915, 985-986.

37 (1932) 285 US 22.

38 Discussed in Bator, P M, "The Constitution as architecture: legislative and administrative courts under Article III", (1990) 65 *Indiana Law Journal* 233, 267.

39 Barendt, E, "Separation of powers and constitutional government", [1995] *Public Law* 599, 606.

40 Strauss, P L, "The place of agencies in government: separation of powers and the fourth branch", (1984) 84 *Columbia Law Review* 573, 579-580.

41 *Re Drake and the Minister for Immigration and Ethnic Affairs (No. 2)* (1979) 2 ALD 634, 640.

42 *Drake v. Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577, 590-591.

43 (1989) 488 US 361, 381.

44 Fallon, R H, Jr, "Of legislative courts, administrative agencies, and Article III", (1988) 101 *Harvard Law Review* 915, 947, said: "Appellate review can provide an effective check against politically influenced adjudication, arbitrary and self-interested decision-making, and other evils that the separation of powers was designed to prevent. It can help ensure fairness to litigants and can be sufficiently searching to preserve judicial integrity."