Parliament, the executive, the courts and the people*

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1. Introduction

The search for theories of everything to explain the physical universe or the dynamics of social and political organisation has long been an object of human endeavour. But as one prominent astronomer wrote —'there is more to Everything than meets the eye'.[1] While physics legitimately continues the search, experience in the social sciences and particularly the field of constitutional jurisprudence, counsels deep scepticism about the utility of all embracing explanations.

A paper titled 'Parliament, the Executive, the Courts and the People' may elicit, for some, associations with the question about Life, the Universe and Everything which was considered and answered in the *Hitchhikers' Guide to the Galaxy*. The purpose of this paper is not so ambitious. Nor, it is to be hoped, will its outcome be so unsatisfactory. Its object is to raise issues for those concerned about the requirements of our community for justice according to law, how those requirements are met by our institutional arrangements and, particularly, the relationships between the functions of the judiciary, the legislature and the executive. In discussing those issues, which can sometimes be hypnotically interesting or mesmerisingly narcotic depending upon perspective, it is important to retain a sense of the purpose of laws and the justice which, in accordance with those laws, courts are bound to deliver. In that regard, I respectfully adopt the observation of the late Sir Victor Windeyer who wrote:

> The famous words of the Roman writer [Emperor Justinian], "Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere", remain a statement of objects which law seeks eternally to attain.[2]

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1 Barrow, J. 1991, *Theories of Everything*, Clarendon Press, Oxford, 210.

2 Windeyer, W.J.V. 1957, *Lectures on Legal History*, 2nd edn (revised), Law Book Company, Sydney, 4 (the precepts of the law

Any comprehensive discussion of the role of courts in contemporary Australian society requires a consideration of issues which go to their relationship to the community generally, and to the other arms of government specifically. Those issues include:

1. The separation of powers between the courts and other arms of government.
2. The role of the constitutional court as interpreter and law-maker.
3. The role of the courts as law interpreters and law-makers generally.
4. The relationship of the courts to the executive.
5. The extent to which courts reflect community values.
6. The independence of courts.
7. The accountability of courts.
8. The responsibility of courts to inform the community of their function and value to the community.

This paper will focus upon the formal relationship of the judiciary and other arms of government, the emerging role of "the people" in constitutional jurisprudence, the place of community values and the law making function of the courts.

2. Separation of powers

There is a seductive simplicity about a triune metaphor of government in which Parliament makes laws, the executive implements them and the courts interpret them. The history of the doctrine, however, is one of organic evolution, rather than pristine logical unfolding from a Trinitarian big bang. The present reality in Australia is adequately described as a partial separation of powers. Nevertheless, the simple model sometimes underlies public debate, particularly on the topic of judicial law making.

The concept of separation of powers can be traced back to Aristotelian notions of mixed government involving monarchical democratic and aristocratic elements. It emerges in the 15th Century writings of John Fortescue, Chancellor to King Henry VI. He spoke of 'the advantages consequent from that political mixed government which obtains in England'. The King could not despoil the subject without making ample satisfaction for same. He could not, by himself or his Ministers, lay taxes, subsidies or impositions of any kind upon the subject. He could not alter the laws or make new ones without the express consent of the whole kingdom in Parliament

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are these: to live honourably, not to harm another, to render to each his own).

assembled. As to the inhabitants, they could not be sued at law but before a judge where they would be treated with mercy and justice according to the laws of the land. Neither were they impleaded in point of property or arraigned for any capital crime, however heinous, but before the King's judges and according to the laws of the land.[3]

On 10 November 1612, the Chief Justice of Common Pleas, Sir Edward Coke, in an act of singular courage, rejected the claims of the King, James I, to exercise the powers of a judge. That rejection was a resounding affirmation of the separation of judicial and executive power which, although not put firmly into place until after the revolution of 1688, has echoed down the centuries. Coke, having told the King that he could not adjudge any cause but that all cases were to be decided in some court of justice, the King replied that law was founded on reason, and he and others had reason as well as judges. Coke responded:

> True it is that God has endowed Your Majesty with excellent signs and great endowments of nature.Your Majesty is not learned in the laws of your realm of England, and causes which concern the life or inheritance of goods or fortunes of your subjects are not to be decided by natural reason but by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognisance of it.

The King breathed 'treason', but Coke survived. There is a rather haunting modern relevance in this confrontation, occasioned as it was by the issue of a Writ of Prohibition directed to an administrative tribunal set up by the Crown to regulate the Church, but seeking to extend its authority to affect the rights of citizens free of fixed rules or appeals.

Through the writings of Baron de Montesquieu, separation of powers gained status as a political theory reflected in the United States Constitution and, to a degree, that of Australia. Of the relationship between the powers he wrote:

> ... there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the

3 Fortescue, Sir John, *De Laudibus Legum Anglie* (c.1470) Trans (by Gregor, Cincinnati, Robert Clarke & Co. (1874)). Reprinted by Legal Classics Library (1984), 139-146.

> executive power, the judge might behave with all the violence of an oppressor.[4]

B-grade movie buffs will immediately bring to mind Sylvester Stallone in his role as Judge Dredd, a fearsome combination of adjudicator and law enforcer roaming a 21st century urban jungle. Heavily armed and flamboyantly armoured as society's answer to an effete and ineffectual judiciary, he rides a levitating Harley Davidson and announces his authority by roaring at miscreants: 'I am the Law'. Proceedings are brief and end with the summary execution or incarceration of the suspect followed by the words 'Court adjourned'. It is a truly Montesquieuan vision of the fusion of executive and judicial functions. The frightening thing about the film, apart from its shallowness, is that it casts the fusion in a positive light.

It has been said that Montesquieu did not understand how imperfect the separation of powers was in England.[5] Nevertheless his views greatly influenced the drafters of the United States Constitution. James Madison, writing in *The Federalist*, quoted the passage cited above while recognising the impracticality of avoiding any admixture of the three arms of government.[6] He accepted, for example, that direct appointment of judges by the people would not be feasible because 'peculiar qualifications being essential in the members the primary consideration ought to be to select that mode of choice which best secures these qualifications; second, because the permanent tenure by which the appointments are held in that department must soon destroy all sense of dependence on the authority conferring them'.[7] Enunciating the principles generally applicable to ensure the independence of the various arms of government from each other, Madison wrote:

> But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be

4 Montesquieu, C. 1949, *The Spirit of Laws*, Legal Classics Library, Book XI, ch. 6, 185.

5 *R. v. Trade Practices Tribunal Ex parte Tasmanian Brewers Pty Ltd* (1970) 123 CLR 361 at 392 per Windeyer J.

6 Hamilton, A., Madison, J. & Jay, J. 1961, *The Federalist Papers*, New American Library, New York, No. 47, 302-304.

7 Id at No. 51, 321.

> made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.[8]

The practical validation of Madison's view in its application to the United States Supreme Court is seen, to some degree, in the results of judicial appointments bearing a perceived sympathy to the appointing president's philosophy. Before Oliver Wendell Holmes was appointed to replace Associate Justice Horace Gray, who resigned in 1902, Theodore Roosevelt wrote to Senator Henry Cabot Lodge of Massachusetts noting that a majority of the court had upheld the policies of the Republican Party in the Congress and had rendered a great service to mankind and the nation. The minority on the other hand stood for 'reactionary folly'. Roosevelt told Lodge that he would like to know that Holmes was in sympathy with their views before he could feel justified in appointing him. He asked Lodge to have Holmes 'come down here and spend a night with me, and then I could make the announcement on the day that he left after we had talked together'. Holmes was duly appointed and some, but not all, of his decisions met Roosevelt's expectations. Following his dissent in one case, Roosevelt is said to have remarked 'out of banana I could have carved a Justice with more backbone than that'.[9] Chief Justice Rehnquist, writing in 1987, remarked on the independence of the Supreme Court from the legislative and executive branches of government. He acknowledged its subjection to the presidential use of the appointment power but pointed to institutional pressures which tend to overcome residual loyalty to the appointing president:

> He identifies more and more strongly with the new institution of which he has become a member, and he learns how much store is set by his behaving independently of his colleagues. I think it is these institutional effects, as much as anything, that have prevented even strong presidents from being any more than partially successful when they sought to pack the Supreme Court.'[10]

Chief Justice Rehnquist once put it another way when he described his colleagues as being as 'independent as hogs on ice'.

Fears that the Supreme Court of Judicature (the High Court) for which the draft Australian Constitution provided might be packed by the government of the day were invoked by anti-federal publicist Bernard O'Dowd. He wrote a pungent clause by clause commentary

8 Id at 321-322.

9 Rehnquist, W.H. 1987, *The Supreme Court—How It Was, How It Is*, William Morrison & Co. Inc., New York, 242-244.

10 Id at 250-251.

on the draft Constitution shortly prior to the Victorian referendum in June 1898. The proposed High Court was described, *inter alia*, as 'the most dangerous cancer in this diseased constitution', 'a Bartonian High Bumbledom' to be 'composed of men drawn from classes inimical and generally inaccessible to progressive ideas, over Parliament and people, Victoria and Australia'. On the possibility of packing the Court, he wrote:

> "Save your money and buy a gun".
> That's the way the message run;
> But take a hint—the merest nudge—
> Save your money and buy a Judge.[11]

While there have been appointments of former politicians to the High Court bench the only instance in which an appointee is known to have been asked about his judicial philosophy is the well known case of Albert Piddington, a Sydney barrister who replied by cable to William Hughes' inquiry about his attitude to Commonwealth powers with the words 'In sympathy with supremacy of Commonwealth powers'. The outcry that followed from the Sydney and Melbourne Bars led to his resignation from the Court before he took his seat. A somewhat less precious attitude was expressed by Chief Justice Rehnquist when he spoke of the incident at the Australian Legal Convention in 1988. The question which Hughes had put was 'the sort of question that any appointing authority should feel free to put to a potential appointee'.[12]

The separation of the legislature, the executive and the judiciary is nominally recognised in the arrangement of the *Commonwealth Constitution*. Chapter I, entitled "The Parliament", vests the legislative power of the Commonwealth in the Federal Parliament.[13] Chapter II, entitled "The Executive Government", vests the executive power of the Commonwealth in the Queen and provides that it is exercisable by the Governor-General as the Queen's representative.[14] Chapter III, entitled "The Judicature", provides that the judicial power of the Commonwealth shall be vested in the High Court of Australia and such other federal courts as the Parliament creates or invests with federal jurisdiction.[15]

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11 Anderson, H. (ed), Tocsin. 1977, *Radical Arguments Against Federation 1897-1900*, Drummond, 128-129.

12 Solomon, D. 1992, *The Political Impact of the High Court*, Allen and Unwin, Sydney, 178-179.

13 *Commonwealth of Australia Constitution Act* (UK), s. 1.

14 Id at s. 61.

15 Id at s. 71.

The separation between legislature and executive in Australia is of considerably less significance than the separation between those two arms of government and the judiciary. For under the system of responsible government, Ministers of the Crown are members of the Parliament and answerable to it. Moreover, Parliament has been allowed by the court great latitude in delegating law-making power to the executive.[16] As Sir Harry Gibbs has observed:

> Such is the theoretical dominance of the legislature in Australia—theoretical because in fact the executive often controls it—that it has never even been suggested that legislation might infringe the executive power.[17]

On the other hand, the separation of powers between the judiciary on the one hand and the legislature and executive on the other, is sharp and anchored by provisions of the Constitution providing for the tenure of the judges.

The appointment of Justices of the High Court and federal courts is a matter for the executive government constituted by the Governor-General in Council. However, once appointed a Justice shall not be removed except on an address from both Houses of the Parliament in the same session praying for removal on the ground of proved misbehaviour or incapacity.[18] Moreover, a Justice shall receive such remuneration as the Parliament may fix but it shall not be diminished during continuance in office. The term of appointment prior to 1977 was for life, but thereafter expires upon the Justice attaining the age of 70 years.[19]

The judicial power of the Commonwealth can only be exercised by a court composed of judges with the tenure for which Chapter III of the Constitution provides.[20] In 1956 the Court went further and held that it is not open to create a tribunal under Commonwealth law which exercises both judicial and non-judicial powers, notwithstanding that some of its members are appointed in accordance with Chapter III. In this the Court was upheld by the

16 Gibbs, H., 'The Separation of Power—A Comparison' (1987) 17 *FL Rev* 151 at 154-156, and see generally Winterton, G. 1983, *Parliament, The Executive and the Governor-General*, Melbourne University Press, Melbourne, 85-92.

17 Id at 156.

18 Fn. 13, s. 72(ii).

19 Id at s. 72.

20 *Huddart Parker & Co. Pty Ltd v. Moorhead* (1908) 8 CLR 330; *New South Wales v. The Commonwealth* (1915) 20 CLR 54.

Privy Council.[21] The doctrine has been eroded by virtue of its inconvenience and in particular the difficulty of drawing a sharp line between judicial and non-judicial functions. The correctness of the decision has been questioned.[22]

Nevertheless, the High Court has held the line firmly against attempts to confer judicial powers upon non-judicial bodies—the point upon which Coke stood up to King James I. The application of the principle has been productive of inconvenience, but it is under no serious challenge nor should it be.[23] The quarantining of judicial functions to Chapter III courts is a great protective device, for it links the exercise of those functions to courts whose tenure is protected and whose independence is thereby secured.

It is difficult to call to mind more than one example of an attempt by the Parliament to confer legislative power on the courts. Section 12 of the *Native Title Act 1993* (Cwlth) provided that after 30 June 1993 the common law of Australia in respect of native title would have the force of a law of the Commonwealth. The common law being the judge made law, s. 12, it was said, attempted to confer legislative power upon the judicial branch of government and was invalid accordingly:

> Under the Constitution, the Parliament cannot delegate to the Courts the power to make law involving, as that power does, a discretion or, at least, a choice as to what that law should be.[24]

From time to time administrative or executive functions, non-judicial functions, are conferred upon judges not sitting as the court of which they are members but as *persona designata*. For example, the power to issue telecommunications interception warrants is conferred on any federal judge who consents to being appointed as an eligible judge

21 *R. v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

22 Meyrick, J., 'Whatever Happened to Boilermakers?' (1995) 69 ALJ 106 and 189; Gibbs, fn. 16 at 158-159; Winterton, fn. 16 at 61-64.

23 *Brandy v. Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 in which a law giving effect to determinations of the Commission as orders of the Federal Court following registration in the Court was held to confer an impermissible judicial power on the Commission. The decision also had implications for the determinative role of the National Native Title Tribunal operating under a similar legislative model.

24 *Western Australia v. The Commonwealth* (1995) 183 CLR 373 at 486.

and who is so appointed.[25] Such powers can validly be conferred without affecting the separation of powers principle if two conditions are fulfilled:

1. The judge consents.
2. The function is not incompatible either with the judge's performance of his or her judicial function or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.[26]

The tension between the judicial and administrative function was well illustrated in Mr Bruno Grollo's unsuccessful challenge to the validity of the appointment of federal judges for the purpose of issuing telecommunication interception warrants. The joint judgment of the majority in the High Court characterised the decision to issue a warrant as:

> ... an unreviewable in camera exercise of executive power to authorise a future clandestine gathering of information.[27]

They observed that a view might be taken that this is no business for a judge to be involved in, much less the majority of judges of the Federal Court. On the other hand, it was precisely because of the intrusive and clandestine nature of interception warrants and the necessity for their use in the battle against serious crime that some impartial authority, accustomed to dispassionate assessment of evidence and sensitive to the common law protection of privacy and property, be authorised to control official interceptions. The Court held the function not to be incompatible with the exercise of judicial power and therefore valid.

Judgment in the *Grollo* case was delivered on 21 September 1995. Less than a year later, on 6 September 1996, the Court held that the function of providing a report to the Minister for Aboriginal and Torres Strait Islander Affairs, under s. 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cwlth), was incompatible with the reporter's commission as a judge of the Federal Court of Australia.[28] So the appointment of Justice Jane Mathews to inquire and report to the Minister in relation to the protection of Hindmarsh Island in South Australia was held to be invalid.

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25 *Telecommunications (Interceptions) Act 1979*, s. 6D.

26 *Grollo v. Palmer* (1995) 184 CLR 348 ("*Grollo*").

27 Id at 367.

28 *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 138 ALR 220 ("*Wilson*").

The separation of powers between the judicial arm of government and its legislative and executive arms was restated with emphasis. The words of Harrison Moore describing the separation as a "great cleavage" were cited. The majority judges described the judicial function thus:

> The function of the federal judicial branch is the quelling of justiciable controversies, whether between citizens (individual or corporate), between citizens and executive government (in civil and criminal matters) and between the various polities in the federation. This is discharged by ascertainment of facts, application of legal criteria and the exercise, where appropriate, of judicial discretion. The result is promulgated in public and implemented by binding orders. The institutional separation of the judicial power assists the public perception, central to the system of government as a whole, that these controversies have been quelled by judges acting independently of either of the other branches of government.
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> The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges.[29]

The essentially political function of the reporter in making recommendations to the Minister, the requirement to furnish advice on questions of law and the close connection of the reporter's function to the ministerial decision making power, were all relevant to the finding that the role was incompatible with that of a Chapter III judge. These two decisions of the Court come at a time when there has been an increasing tendency to resort to judges to carry out a variety of non-judicial functions. The present Chief Justice of the High Court was the first President of the Administrative Appeals Tribunal. Other federal judges serve as Presidential Members of that body. Justice Toohey, another member of the High Court, held office as a Federal Court judge and Aboriginal Land Commissioner in the Northern Territory. Four serving Federal Court judges are Presidential Members of the National Native Title Tribunal, the primary function of which is mediation. Judges of the Federal Court sit with non-judicial members on the Australian Competition Tribunal, the Defence Force Discipline Appeal Tribunal, the Federal Police Disciplinary Appeal Tribunal and the Copyright Tribunal. A serving judge of the Federal Court carried out the Chamberlain Royal Commission. Some years ago, the present Chief Justice of Victoria

29 Id at 226.

was commissioned as a Federal Court judge contemporaneously with his appointment as full-time Chairman of the National Crime Authority.

There is no evidence of any coherent policy on the part of the executive to suggest a basis for any limits on the appointment of judges to non-judicial tasks. Absent any such policy there is a risk that persons who are not judges might be induced to accept non-judicial office, of a difficult or controversial character, with the offer of a contemporaneous, though initially "nominal", appointment to a Federal Court. At this time the primary sources of policy are the recent decisions of the High Court in *Grollo* and *Wilson*. At their core is the need to maintain public confidence in the judicial arm of government by ensuring that such non-judicial functions as are undertaken do not detract from the perceived independence and impartiality of the judges.

There is an attraction for governments in using judicial officers to carry out difficult tasks. The authority of the office and its perceived neutrality may engender confidence in the processes and outcomes obtained, which would not be possible of an appointee potentially beholden to the patronage of politicians. Hence the attraction of using judges or retired judges to undertake inquiries or Royal Commissions in areas of political sensitivity. The High Court in *Wilson* allowed that the conduct of a Royal Commission could be compatible with judicial office depending on its terms of reference and enabling legislation. The role of judges on the Administrative Appeals Tribunal was compatible because of its independence from the legislature and the executive government.

In taking on non-judicial tasks however, there is a risk that the judge, and by association in the public mind, the judiciary as a whole, may be drawing upon capital—the capital being the confidence and authority that derives from the special character of judicial office and its independence of the executive and the legislature.

There is no State based separation of powers doctrine for State courts which is protected by the State Constitutions. Nevertheless, the High Court on 12 September 1996 struck down an Act of the New South Wales Parliament which sought to impose a non-judicial function on the Supreme Court of that State.[30] The *Community Protection Act 1994* (NSW) was directed specifically at one person, Gregory Wayne Kable. It authorised the Supreme Court to make a

30 *Kable v. The Director of Public Prosecutions (NSW)* (1996) 138 ALR 577.

detention order against Kable on the ground that he was likely to commit a serious act of violence. He had been convicted and sentenced to imprisonment for the manslaughter of his wife. The conduct relied upon to attract the legislation was the sending of threatening letters through the mail. Justices Toohey, Gaudron, McHugh and Gummow held the legislation to be invalid. The Chief Justice and Dawson J dissented.

In entertaining the application which the Act required, the Supreme Court was exercising federal jurisdiction invested in it under Chapter III, because constitutional points were taken which it would have to determine. The majority held that it could not validly have thrust upon it, when exercising its federal jurisdiction, a function incompatible with its judicial function as a court exercising invested federal jurisdiction.

Gaudron, McHugh and Gummow JJ saw Chapter III of the *Constitution* as establishing an integrated Australian court system as a vehicle for the exercise of the judicial power of the Commonwealth. For that reason, and by virtue of covering clause 5 of the *Constitution*, State legislatures do not have unlimited power in respect of State courts. In particular it would seem that State Supreme Courts may not be able to be abolished by State law. Thus, in at least a partial sense, the separation of powers doctrine has been extended to State courts exercising federal jurisdiction.The full implications of this decision have yet to be worked out.

3. The role of the constitutional court and the sovereignty of the people

This paper has to this point largely been concerned with the impact of legislative and executive action upon the role of the courts. The courts themselves have a dramatic impact upon the exercise of legislative and executive power. Most dramatic is a declaration by the High Court that an exercise of legislative power by the Parliament of the Commonwealth, or by the Parliament of a State, is ineffective in a particular case.

The Court can hold that a law of the Commonwealth is invalid as beyond constitutional power or in contravention of some constitutional prohibition. It can strike down State laws on a similar basis. Although this function of the Court was evidently accepted by participants in the Constitutional Convention debates, there is nothing in the *Constitution* which expressly empowers the Court to so act. One commentator has observed:

> Australian courts have not provided a clear and consistent elucidation of the constitutional source of judicial review. Differing provisions and rationale have been espoused by judges when fleetingly, in the course of an opinion, devoting several paragraphs to this issue. This failure is the antithesis of the demand made by the judiciary when examining the validity of legislative and executive acts where the judiciary relentlessly requires authorization to be provided by the text of the Constitution. The authority of the courts must be measured by the same standard. Not to concede this would permit the judiciary in contra-distinction to other authorities to act outside the Constitution.[31]

Despite this absence of express authority, the power of the High Court to strike down Commonwealth or State laws which transgress constitutional limits has never been in doubt. Indeed the question may be asked—who is there to doubt it?

The *Constitution* is part of an Imperial Statute. It is annexed to, and derives its formal legal authority from, the *Commonwealth of Australia Constitution Act 1900* (UK). Its statutory origins do not mean that its interpretation is merely a matter of parsing its words consistently with its evident purpose.[32] As a *Constitution* it is a living document whose interpretation and application must respond to conditions and circumstances never contemplated by those who drafted it. In deciding upon its operation and application to contemporary Australia the High Court is faced with choices of high policy. Traditionally these have focussed on the scope of Commonwealth powers for which the *Constitution* provides, their interaction with the powers of the States and the express prohibitions which the *Constitution* imposes upon the ways in which legislative powers can be exercised.[33] The choices made by the Court, because of

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31 Thompson, J.A. 'Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution', in Craven, G. (ed.) 1986, *The Convention Debates 1891-1898: Commentaries Indices and Guide*, Legal Books Pty Ltd, Sydney, 201.

32 Although a reading of the joint judgment in *New South Wales v. The Commonwealth* (1989) 169 CLR 482 (*"The Incorporation Case"*) might convey a contrary impression.

33 *Commonwealth of Australia Constitution Act 1900* (UK), ss. 92—Freedom of trade; 99—No preference to one State or any part thereof; 100—No abridgment of use of waters; 114—States not to raise forces; 115—States not to coin money; 116—Commonwealth

their policy content, will attract public scrutiny and sometimes political controversy. By way of example, the Court's application of the provisions of the *Constitution* conferring power on the Commonwealth to make laws with respect to external affairs, has been seen as supporting a concentration of legislative power never contemplated by the founding fathers. As to that, it is fair to say that the founding fathers did not contemplate the explosion of international law and treaty making, the recognition of individuals as proper subjects of international law and the increasing interdependence of otherwise sovereign nations under the general heading of globalisation.

The *Constitution* is more than just a statute concerned with the distribution of powers between the federal polities. The opening words of the *Constitution Act* recite that it is the product of an agreement among 'the people' of the former colonies 'to unite in one indissoluble federal commonwealth'. It constructs at the federal level a system of government based upon representative democracy. Although it derives in a formal sense from an exercise of legislative power by the British Crown, its legitimacy ultimately rests upon the authority accorded to it by the people whose predecessors made the agreement that led to its enactment. Explicit recognition of the sovereignty of the people has appeared in High Court judgments over the last few years. Former Chief Justice Mason wrote in the *Political Broadcasting case*:

> Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people. Hence, the prescribed procedure for amendment of the Constitution hinges upon a referendum at which the proposed amendment is approved by a majority of electors and a majority of electors in a majority of the States (s.128). And, most recently, the *Australia Act* 1986 (U.K.) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people.[34]

The constitutionally entrenched system of representative democracy, and the underlying concept of popular sovereignty, supported an

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not to legislate in respect of religion; 117—No discrimination between residents of States.

34 *Australian Capital Television Pty Ltd v. The Commonwealth* (1992) 177 CLR 106 at 138 ("*The Political Broadcasting case*").

implied freedom of discussion which invalidated restrictive legislation in the *Political Broadcasting case* and a case concerning the contempt provisions of the *Industrial Relations Act 1988* (Cwlth).[35] The former case concerned legislation to restrict political broadcasting on the electronic media. The *Industrial Relations Act* made it an offence by writing or speech to use words 'calculated ... to bring a member of the [Industrial Relations] Commission or the Commission into disrepute'.[36] In the two cases a majority of Justices of the High Court found the *Constitution* to embody a system of representative government carrying with it an implied freedom of communication relevant to political and public affairs.

The nature of the exercise undertaken by the Court has been likened to the deliberative processes of the Parliament which had made the laws. The political broadcasting law had been the subject of considerable debate and political compromise between the Government and the Democrat Party in the Senate.[37] It has been suggested by Professor Zines, however, that in this area the critical issue is the preservation and strengthening of representative government:

> What is at stake are the processes and machinery which lead to democratic policy making by representatives of the people. A Court seems obviously a more appropriate body to ensure this than members of the Legislature and Government who may be affected by self-interest or, at any rate, group interest. If in the course of this exercise, judicial policy making takes place that, in itself, is not so much desirable, as merely necessary.[38]

On this rationale it is the independence of the Court from political self interest that accords legitimacy to its policy making role. There is an analogy here with the discharge of non-judicial roles by serving judges, which may be a caution against pushing it too far. If the proposition enunciated by Professor Zines is accepted, it must also be subject to the recognition and the caveat that policy making by courts, constitutional or otherwise, is reactive. Courts respond to cases put before them. A constitutional court cannot formulate legislation to validly address the legitimate concerns which led to the enactment of the political broadcasting legislation. The reactive

35 *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1.

36 *Industrial Relations Act 1988* (Cwlth), s. 299(1)(d).

37 Zines, L. *Courts Unmaking the Laws*, Courts in a Representative Democracy, AIJA Conference Papers, Canberra, 11-13 November 1994, p. 132.

38 Id at 133.

character of the courts and the close association of judicial policy making with the decision of a particular case limits it to a narrow focus. Where it goes beyond a narrow focus there is a risk of controversial and disorderly intrusion upon the role of the legislature.

The judiciary is in a very real sense the weakest branch of government. It is dependent upon the executive and the Parliament for its funding and resources. In the end it must be sustained by a community consensus as to its worth. Sir Ninian Stephen made the point in the 1981 Southey Memorial Lecture:

> What ultimately protects the independence of the judiciary is a community consensus that that independence is a quality worth protecting, the citizen being better served if the judiciary is preserved from domination by those more overtly powerful elements of governments, on whose support the judiciary is dependent, yet whose exercise of power the judiciary is charged with keeping within bounds prescribed by law.[39]

This consensus however, may be undermined if the judiciary is engaged in 'highly activist law making'. The further the judiciary intrudes into the proper province of the legislature the greater the risk of its involvement in controversy.

While the *Mabo*[40] decision was praised in many quarters, the negative response to it represented probably the greatest concentration of criticism and abuse to which the Court has been exposed in recent memory. The Member for Kalgoorlie described the Justices of the Court as 'pissants'. This was not a malapropism for puissant. The Mayor of Burke Shire, told *The Australian* of 11 April 1996:

> If the High Court is going to write legislation, then we have to be given the opportunity to vote for the High Court. Otherwise we'll have to shoot them all or hang them.[41]

The Dean of the Law Faculty of Queensland University told a New Zealand Conference in August 1993:

> The *Mabo* case, therefore, except in relation to the Murray Islanders, is nothing more than a monstrous, presumptuous obiter dictum. In the mould of *Tasmanian dams* it represents yet another usurpation by the Court of

39 Stephen, N. M., 'Southey Memorial Lecture 1981: Judicial Independence—A Fragile Bastion' (1981-82) 13 *MULR* 334 at 339.

40 *Mabo v. Queensland [No. 2]* (1992) 175 CLR 1 at 42 ("*Mabo*").

41 Molony, J., in 'Boom or Bust', *The Australian*, 11 April 1996, p. 13.

> the constitutional power of the Australian Parliaments and people.[42]

Professor Walker also castigated the Chief Justice for publicly defending the Court's decision in the media noting that 'public comment by a judge in the media about cases decided by his court is normally considered a breach of judicial ethics in Australia'.[43]

There can be little doubt that the High Court was well ahead of community attitudes in its *Mabo* decision. Rightly or wrongly it was characterised by a number of commentators as engaging in a major and controversial piece of legislative activity. In many ways that case represented a sea change in official attitudes to indigenous people and their rights. It offered and still offers immense opportunities. It also exemplifies the risks to which a court, taking such a contentious policy decision, is exposed and its ultimate dependence upon the sovereignty of all the people.

Law-making, sometimes misleadingly brought under the umbrella of judicial activism, is an incident of the judicial process of statutory interpretation and the development of the common law. Choices have to be made, whether about the development of common law principle or the construction of statutes. The word "activism" cannot properly be applied to those routine judicial processes. It might be applied to the case in which a court is seen to depart from previously established principle or construction to serve the ends of a curial perception of justice. Thus, the *Mabo* decision was seen as a dramatic display of "judicial activism". That characterisation, as a pejorative term, and as a matter of political convenience, was also applied to the decision of the High Court in *Wik*.[44]

That response to the *Wik* decision demonstrates the irrationality and misunderstanding that can affect public debate about the courts in contentious areas. *Wik* was an example of a conservative judicial approach to the question whether pastoral leases extinguish native title. The majority relied substantially upon the statutes creating the

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42 Walker, G., 'Some Democratic Principles for Constitutional Reform in the 1990s', in Gray, B. & McClintock, R. 1995, *Courts and Policy—Checking the Balance*, Brookers and Legal Research Foundation Inc., 189-190.

43 Id at 190, n. 13.

44 *Wik Peoples v. The State of Queensland & Ors* (1997) 141 ALR 129 ("*Wik*"). See for example the speech by the Premier of Queensland delivered to the Queensland Farmers Federation on 18 February 1997 in which the Wik decision was lumped in with *Mabo* as involving the re-invention of the common law and the rejection of 'centuries of jurisprudence'.

leases to determine the scope of the rights conferred by them. They did not apply the judge made common law governing private leasehold interests. They eschewed sweeping principle beyond the proposition that the pastoral leases in question did not necessarily extinguish native title and that each case would have to be considered on its own merits. Moreover the rights of pastoralists would prevail over the rights of native title holders.

Notwithstanding the application of accepted and conservative cannons of judicial reasoning by the majority in *Wik* it attracted the designation of "judicial activism" from those whom the decision did not suit. The reaction to the decision and the criticism of the High Court that followed made the point that the courts are subject to labelling and false stereotyping as much as other social institutions and groups and that "judicial activism" is a powerful tool to that end.

4. Courts as law makers

There was once a myth that courts find and declare the law. Consistently with that myth Blackstone was able to describe the judges as '... the depositary of the laws; the living oracles, who must decide in all cases of doubt'.[45] Neither Pollock nor Dicey accepted the myth. Dicey wrote that as all lawyers are aware, a large part and, as many would add, the best part of the law of England is judge made law.[46] MacAuley's draft Penal Code for India, produced in 1832 included "Illustrations", hypothetical cases demonstrating the operation of the various sections. It was a species of legislative case law. And its expressed intent was to stop the judges making the law:

> ... a loosely worded law is no law, and to whatever extent a legislature uses vague expressions, to that extent it abdicates its functions, and resigns the power of making law to the Courts of Justice.[47]

There has been repeated public recognition in Australia of the fact that our judges have a law making function. In 1981, Sir Ninian Stephen in his Southey Lecture said:

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45 Blackstone, W. 1992, *Commentaries on the Laws of England*, vol. 1, 69.

46 Dicey, A. V. 1914, *Lectures on The Relation Between Law and Public Opinion in England During the Nineteenth Century*, 2nd edn, McMillan & Co., London, lecture X, 361.

47 A Penal Code prepared by the Indian Law Commissioners, London; Pelham Richardson, Cornhill (1838) p. v.

> Let me immediately disclaim any belief that judges either do not or should not make law.[48]

In 1989 Justice McHugh, then on the New South Wales Court of Appeal delivered a paper titled, 'The Law Making Function of the Judicial Process'.[49] There was no doubt in that lengthy paper about the fact that judges make law. It was recognised, however, that the acceptability of judge made common law must depend on its compatibility with contemporary views.[50]

What is surprising is that when Sir Anthony Mason, within the last eighteen months, adverted to the law making function of the courts and, using Lord Reid's language, dismissed the contrary belief as a fairytale, it was seen as something novel by the press. That may be a tribute to the persistence of the myth identified over 60 years ago by Jerome Frank, that the law is fixed and certain, a myth fuelled by deep seated desires for fixity and certainty.[51]

There are two principal ways in which judicial law making occurs, other than by constitutional interpretation. One is in the development of the common law. The other is in giving content to statute law, that process so inimical to the Benthamite goals of Lord MacAuley and the Indian Law Commissioners.

The development of the common law is generally incremental and may be underpinned by slow growing policy. The process of judicial law making allows for the adjustment of rules as new occasions for their application occur. The generalisation of existing rules into emergent higher order principles is also part of the process. Judicial law making can deal with a wide variety of individual cases. It favours generally conservative formulations and is relatively detached from political pressures. But this kind of law making has its limits. Old rules no longer relevant to modern conditions can become so entrenched that nothing short of parliamentary action will shift them.[52] Another weakness is the dependence of common law development on which cases go to trial and on to appeal. The tension between the pace at which law evolves through the judicial process and the need for predictable and comprehensive legislation as a matter

48 Stephen, fn. 39 at 339.

49 Reproduced in (1988) 62 *ALJ* 15 and 116.

50 Id at 122.

51 Frank, J. 1930, *Law and The Modern Mind*, Brentano's, New York, 10-12; 13-21.

52 Eg *State Government Insurance Commission v. Trigwell* (1979) 142 CLR 617 in which the court applied old English common law relating to straying stock which was inapplicable to Australian conditions.

of urgency becomes acute, particularly where the Parliament cannot meet that need.

In the common law of native title there are literally dozens of pressing and unanswered questions. What are the interactions of pastoral leases, mining leases, commons, parks, reserves and Aboriginal trust lands with native title? Can the common law recognise native title in the sea? The nature of native title suggests a legislative response to the questions, unless negotiated between all the stakeholders, is unlikely to be politically feasible or fair. It may take years for the many legal issues to be resolved. The pace, scope and sequence of that resolution will depend in large part upon accidental factors. It will not involve a comprehensive and systematic treatment of the land use issues that will arise between co-existing interests. Yet unless negotiated outcomes are actively sought by governments and others interested in these areas there is little alternative to the fine grinding of the common law mill.

In the construction of statutes there is almost always room for choice about the meaning of words and the way in which they apply to particular cases. There is undoubtedly an element of judicial law-making at work in statutory construction. But here the judges are on safer ground. They are giving meaning to a statute which has itself the stamp of democratic legitimacy. Section 52 of the *Trade Practices Act 1974* (Cwlth) has been the subject of a great volume of cases since it was enacted. Many principles governing its application have been established. It is an excellent demonstration of the way in which a broadly based statutory direction can provide scope for creative law-making activity within the framework of a coherent and consistent policy sanctioned by a democratically elected legislature.

5. Community values

Beyond the recognition of popular sovereignty as a backdrop to constitutional construction, there is also resort to community standards and values involved in a number of decisions, including the *Mabo* case. There Brennan J wrote:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.[53]

53 *Mabo*, fn. 40 at 42.

Justice Finn in a recent book has pointed to the alternative role now being assigned by the Court to the Australian people in a number of settings—the right to legal representation in serious criminal trials,[54] rape in marriage[55] and non-therapeutic sterilisation.[56] He writes:

> Standards and values are being ascribed to the community and in turn are being reflected back into the law itself. While this practice is not without its difficulties and critics, and there well may be cases where 'it is necessary to guard against the tyranny which majority opinion may impose', it reflects an open acceptance that judges, in forming and reforming the common law, should be attentive to its perceived suitability, its aptness, to the community whose interests the law exists to serve.[57]

The identification of "community values" is a matter of judicial perception which means there is a risk that they will eventually be taken to be the judges' values. It may be that distinctions can be drawn between community values and community attitudes.[58] An advantage of a "community values" concept is that it can be enunciated by the judges and assessed by those who read their reasons. The enunciation of such values renders the judging process more transparent, and to that extent, more capable of securing and retaining a community consensus than reliance upon undisclosed philosophies.

6. Conclusion

The courts in a sense walk a tight rope between the executive and the legislature, responsive to community sovereignty, endeavouring to be sensitive to community values, but not yielding to the tyranny of the majority. The question may be asked—where should the balance be struck in managing the tensions that exist? There are a number of possible answers all consistent with the lawful discharge of judicial functions.

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54 *Dietrich v. R.* (1992) 177 CLR 292.

55 *R. v. L* (1991) 174 CLR 379.

56 *Secretary, Department of Health and Community Services v. J.W.B. and S.M.B.* (1992) 175 CLR 218.

57 Finn, P. 'A Sovereign People, A Public Trust' in Finn, P. (ed), 1995, *Essays in Law and Government*, vol. 1, Law Book Company, Sydney, 6-7. See also Finn, P. *Of Power and the People: Ends and Methods in Australian Judge Made Law* (1994) 1 *TJR* 255.

58 Braithwaite, J., 'Community Values and Australian Jurisprudence' (1995) 17 *Syd LR* 351.

In his role as first Attorney-General of the Commonwealth, Alfred Deakin was asked in 1903 for an opinion on an important matter of constitutional law.[59] Was the Commonwealth Customs Department chargeable with the cost of catching rats on Victorian wharves? He replied: 'The question is one of moral rather than legal obligation'. I reply in like vein: It is, and always will remain, for the judges a matter of judgement, which is what they are paid to provide.

59 *Opinions of the Attorney-General of the Commonwealth of Australia*, AGPS (1981), Vol. 1, p. 167.