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Rule of law, separation of powers and judicial decision making in Australia: Part 1

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Part 1

Introduction

The doctrines of the Rule of Law and the Separation of Powers are the cornerstone of the Australian Constitution, establishing the federalist system under which we are governed. The Australian Constitutional System is very much a hybrid system, incorporating many of the nuances of the British Colonial system, as brought to the Australian shores upon colonization. It also embraces features of the USA constitutional system. This is reflected in the Australian federal system of states, analogous to the federal system found in the United States of America.

Whatever system of representative democracy the fathers of Federation embraced, what was clearly retained was the application of the Rule of Law to this Constitutional Monarchy, with a separation of powers outlined in the Constitution. This system of government has been preserved to this day, with the High Court playing an ever increasing role in the interpretation of the Constitution, particularly in the exercise of Commonwealth and State power throughout the 20th century.

As the High Court has gone about applying judicial reasoning and interpretation to delineate the boundaries of Commonwealth and State powers, the court itself has also embarked on a journey, delineating the boundaries of its own powers within this separation of powers. This article uses the concepts of the rule of law and separation of powers to consider judicial decision making within the constitutional framework of Australia. This article will discuss judicial reasoning as it relates to constitutional law since Federation and in particular the last thirty years. Part 1 will deal with some fundamental principles while Part 2 will consider how the High Court has interpreted the Constitution since Federation to the present time.

The Origins of the Federalism System in Australia

British colonization bought many things to Australia – convicts, sheep, chains, and, most importantly in legal terms, the Blackstone Principle.[1] The Blackstone Principle is the cornerstone of the Australian legal system, given our humble beginnings as a British penal colony. The principle incorporates the notion that the common law follows British subjects, when they occupied or settled colonies, such as Van Dieman's Land, and the Swan River colony. The cornerstone of the principle is *"it hath been held that if an uninhabited country being discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately in force."*[2] This included the concept of *terra nullius*, or empty lands, which deemed the Australian landscape to be "empty land", without settled law or inhabitants. This concept, and its application to Australian land and constitutional law, was turned upside down with the *Mabo*[4] judgment of the Mason court, recognizing the claim of indigenous peoples to Native Title, and the rejection of *terra nullius* as applicable to Australia.

The colonization of Australia continued throughout the late 18th and 19th Century, until by the 1880's there were six separate Australian colonies (states) competing with each other, whilst at the same time attempting to protect their own domestic interests.

The concept of a federation of Australian states arose primarily because of four factors:

- A desire to decrease or abolish tariffs between the colonies;
- A need to address external affairs (particularly since for the fist time Australians were fighting in a British War (Boer War));
- A need to address the issue of defence of the colonies of Australia;
- A desire to have free movement of people (immigration) between the states.

Through this complicated process that managed to unite the colonies in a way that nothing had ever managed to do so before, the *Constitution of the Commonwealth of Australia Act (Imp) 1900* was passed by the British Parliament hence proclaiming Australia a Federation, whilst still retaining the British system of government with the monarch at the apex.

The Australian constitutional system retains the British system of representative government, adapted to meet local needs due to the absence of an upper class gentry to fill the House of Lords. To fulfill this role, the Constitutional Convention looked at the American constitutional system, with its separate House of Representatives and Senate, and incorporated these organs of government in the Australian Constitution (see chapters I and II). The Australian Constitution was modeled on the written American constitution, with the greatest difference between the two defined eloquently by Justice Dixon in 1935:

> *"...in one respect the Constitution of our Commonwealth was bound to depart altogether from its prototype. It is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominion.*[5]

Essentially, the American Constitution was forged by a fledgling nation that extracted its independence with war and bloodshed. This is reflected in their constitution with a complete separation of powers, ensuring that power could

never be concentrated into a single organ or person. The common feature of both the Australian and USA Constitution is the embedding of *Lockean* and *Hobbsean* elements of social contractarianism, with the inherent role of the judicature (see chapter III of the Constitution) as the arbitrator of both appellate cases and original jurisdiction cases, including Constitutional interpretation. This social contractarianism is fundamental, since a Constitution, with all of its values and conventions embedded within it, is essentially a contract between the people and the government, setting out the rules by which the government must operate in order for the Rule of Law to be preserved, and the boundaries of democracy to be maintained.[6]

Rule of Law and the Australian Constitution

The principle of the Rule of Law means that every citizen is subject to the laws enacted by the legislature.[7]

The Rule of Law was best described by A V Dicey in the late 19th century. He considered the Rule of Law incorporated:[8]

1 The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, excluding the existence of arbitrariness. We are ruled by law, and the law alone: a man can be punished for a breach of law, but for nothing else (this was supported in the decision in *Chu Kheng Lim v Minister for Immigration*);[9]

2 Equality before the law: the Rule of Law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs the citizens or from the jurisdiction of the ordinary tribunals (see the decision in *A v Hayden [No. 2]*);[10]

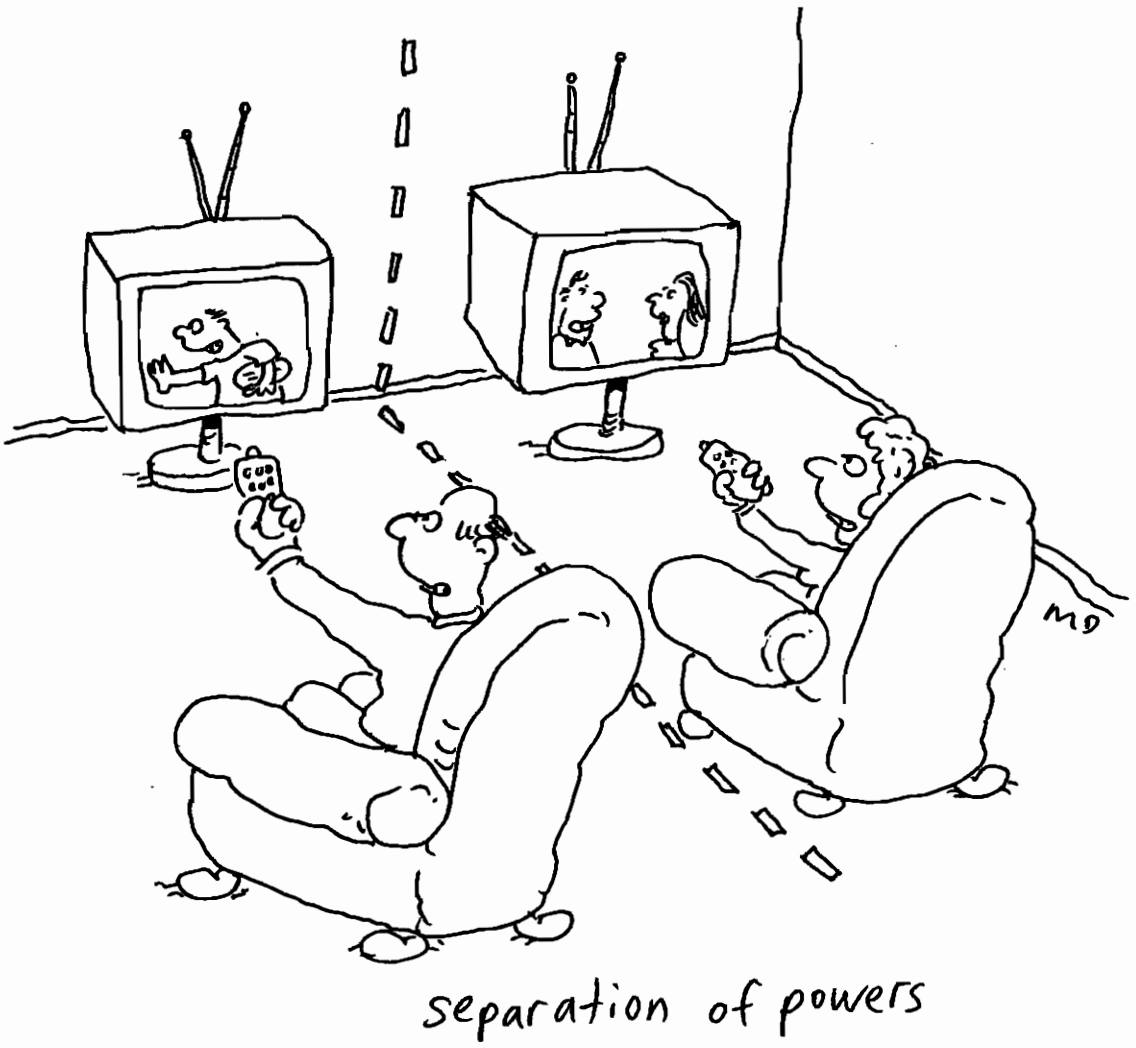
These Diceyan Rules of Law are applicable to the High Court. One aspect of the Rule of Law is reflected in clause 5 of the preamble to the Constitution (*Commonwealth of Australia Constitution Act (Imp)* 1900) which states:

> *"This Act, and all laws made by parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of ever state and of every part of the Commonwealth"*[11]

The dominance and importance of the Rule of Law, and its place in the decisions of the High Court has been demonstrated by the defining and delineating of the importance of the Rule of Law by the Justices. Murphy J considered the Rule of Law in the constitutional case of *S & Others v Hayden & Others* (1984), when he noted that *'the Governor-General, the Federal Executive Council and every officer of the Commonwealth are bound to observe the laws of the land'*.[12]

This principle of the Rule of Law is also demonstrated in the binding nature of the Constitution:

> *"two features of the Constitution are important in explaining its character at the time of its enactment. First, its legal status was derived from the fact that*



it was contained in an act of the British Imperial Parliament. Secondly, its political legitimacy or authority was based on the words contained in the preamble to the enactment which refer to the people of the Australian colonies have agreed to unite in a "Federal Commonwealth". Whatever the legal position, these words draw attention to the political reason for the enactment, the document having been in large measure approved by the people of Australia, even if the number of persons who actually voted was only 60% of the eligible voters. The importance of the role played by the Australian people was to be further underlined by the ability given by them to amend the Constitution in accordance with the proposals initiated by the Federal Parliament under s128."[13]

The Hon. Keith Mason has described the Rule of Law in its modern context as having a "chameleon-like quality", which can be "illustrated by the many different claims made for its application, including among other things, parliamentary supremacy, judicial review of the executive action, judicial review of legislative action, adherence to precedent, persistence in a minority opinion and the protection of human rights.[14] An examination of the qualities and decisions of the High Court of the last thirty years sees individual justices, and the Bench, proclaiming these qualities regularly, weaving them into the fabric of the judgments, ensuring the upholding of the Rule of Law in the interpretation of cases.

There have also been criticisms of Diceyan theory of Rule of Law, particularly due to his perception of the sovereignty of the parliament and the supremacy of the Rule of Law.[15] This criticism is important, since Australian constitutional law is particularly focused on imposing limits on the government, ensuring a restriction on the exercise of excessive and arbitrary power. The expressed and implied Commonwealth constitutional powers are balanced by the express and implied constitutional restrictions to Commonwealth powers. The High Court must balance these powers and restrictions, by the application of judicial reasoning either through the words of the Constitution, or precedent. In recent years the Federal Parliament has sought greater discretionary powers, as a response to social or political issues such as terrorism or illegal immigration (eg the *ASIO Act 2003*, and *ASIO Amendment Bill*, 2004).

Whatever the analysis of Rule of Law, and its application to the Australian legal system, the Rule of Law is an important feature of our constitutional system. Without the Rule of Law there is no constitutionalism, separation of powers, or equality and access. The Rule of Law is bigger than the issues of Human Rights, equality and freedom. Rather it sits above these principles to become the Higher Principle (or 'Grundnorm' as Kelson calls it) of the principles of constitutionalism itself.

Separation of Powers in Australian Constitutionalism

Fundamental to the Rule of Law in the Constitutional system of Australia is the doctrine of separation of powers. The separation of powers doctrine suggests there are three arms of the Government (executive, judicature and legislative) that are separate, and their respective powers are mutually exclusive.[16] This federal notion of the separation of powers was influenced by modern social theorists such as Locke and Montesquieu. It was Locke, the liberal constitutionalist, who distinguished between the three powers, and played a huge role in the development of the Constitution of the USA in the later half of the 18th century.[17] The separation of power becomes highly developed in Montesquieu's *Spirit of the Laws*, where he distinguishes between the three powers. He suggests it is necessary to ensure the balance of power in government, and to preserve the expression of liberty through the Constitution.[18] Fundamentally, this separation of powers is seen by Montesquieu as essential to government in general:

"...nor is there liberty if the power of judging is not separate from legislative power and executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to the executive power, the judge could have the force of an oppressor.."[19]

The influence of Montesquieu in the establishment of the USA Constitution is evident in the use of words such as *liberty* in its text. Montesquieu, along with Locke and Hobbs, also playing an important role in the development of allegedly constitutional government in France after the glorious revolution of 1789.

The Constitution of Australia formally separates the powers in the first three Chapters of the Constitution. Chapter I delineates the roles, functions and boundaries of the Parliament, Chapter II The Executive Government, and Chapter III The Judiciary,[20] with the central characteristic being the domination by the Crown. The Constitution Act defines the agreement of the people to unite "under the Crown", with the new political entity of the Commonwealth of Australia called into being by Royal Proclamation.[21] This formal separation has been recognised by the arms of the Federal government since Federation, defining the legislative and executive powers through the interpretation of the Constitution, especially relating to the role of the courts, with the Constitution as the *Grundnorm*. Locke, as philosophical and theoretical defender of liberal constitutionalism, distinguishes between the three powers. The *legislative* power is seen as the supreme, although not arbitrary power, dispensing justice through the crafting of laws within the delineated powers, and the utilization of a known and trusted *judiciary*. The *executive* power is ministerial and therefore by its very nature subordinate to the legislative power, with the primary function of executing the laws the legislative has enacted, including the prerogative powers.[22] The powers of the executive and the legislature are inextricably linked, with the executive in Australia a subset of the legislature, a factor that Locke recognizes as the norm in all but the rarest of democracies (perhaps the best separation of the two occurs in the USA federal system).

In recognition of the interrelationship of the legislative and executive powers, Montesquieu saw the need to keep the judicial power, and its role in interpreting the role of the legislature and executive, as independent as possible, and completely distinct from the other two arms of government. He saw this separation as 'the most important part of the separation of powers, as it guards the government against its own lawlessness, prevents any deviation from the rule of law by allowing the legislative and executive powers to be

checked by the judicial arm that will interpret the laws and apply them equally to everyone",[23] thus ensuring that the Rule of Law, and thus individual liberty is protected.

The issues of natural law and social contractarianism, and the philosophical meanderings of Hobbs, Locke, and Montesquieu provided a strong influence on the development of the Constitution of Australia. Yet a more modern jurisprudence influence came to bear on the Australian Constitution, with its principles based on modern political science...

> *"the regular distribution of power into distinct departments, – the introduction of legislative balances and checks – the institutions of the courts composed of judges, holding their offices during good behaviour – the representation of the people in the legislature by deputies of their own election – these are either wholly new discoveries or have made their principal progress toward perfection in modern times."*[24]

This separation of powers was woven into the fabric of the Constitution as a consequence of political history, where monarchs had controlled parliament, sat above the law, and taken colonies on a whim. If the government of a colony was to federate in a peaceful action and succeed, then the separation of powers was needed as a precaution against the encroaching nature of power, since *"the accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny".*[25]

The Judiciary, Rule of Law and Separation of Powers

> *"...fundamental to the system is that the validity of all legislation and executive action is judged by the courts, not legislature or executive"*[26]

The separation of powers purports to be just that – a distinct delineation of the judiciary from the other two arms of the government (ie the executive and the legislature). The role of the High Court from Federation was to determine the constitutional validity of the laws enacted and executed by the two arms of the government, in an independent manner, through Chapter III of the Constitution. The High Court was established under s71 of the Constitution, as a Federal Supreme Court, having both original and appellate jurisdiction.[27]

It is part of the role of the High Court, as embodied in s76 of the Constitution, to interpret the Constitution. The High Court has been given original jurisdiction (that means those actions are commenced in the High Court rather than being an appeal from a lower court ie a state Court of Appeal) in *"all matters arising under the Constitution or involving its interpretation."* A significant part of the High Court's work is hearing and determining constitutional questions, often in proceedings regarding Commonwealth powers and their validity or invalidity.[28]

This interpretation and decision-making function has been embraced by the High Court since federation, and is the embodiment of the federalist system under which Australia operates, and particularly the separation of powers. Indeed, it is the judges of the High Court who, in developing the common law, give meaning to the Constitution in a society that has experienced immense political social and economic change throughout the first century of federation.[29] The issues which face the Justices were aptly articulated by Lord Porter in the *Bank Nationalisation Case "the problem to be solved will often not be so much legal as political, social or economic. Yet it must be solved in a court of law".*[30]

Judicial Decision Making in Australia

Sitting alongside the issue of separation of powers and the judiciary, is the fundamental, philosophical nature of judicial reasoning. The concept of judicial restraint is grounded in the idea that each branch of government will stick to its own defined function, and not step outside these responsibilities.[31] This approach dominated the thinking of all Justices who sat in the first two thirds of the twentieth century.

For the first half of the century the court was influenced by the judicial reasoning process related to rule-based reasoning and its connection with Jeremy Bentham,[32] and later Hart. In Bentham's positivist view of legal reasoning, public decision-making authorities need to give guidance to lower courts, future legislators, and citizens through *clear, abstract rules laid down in advance of actual applications.*[33] Hart developed this form of judicial reasoning by suggesting the principle that all cases should be treated alike, and different cases should be treated differently, fitting into the principle of *formal* justice.[34] This view treats the law as a body of rules, where judicial decisions are concerned with the application of rules, the value of formal justice, and factual, non-moral criteria.[35]

This rule based legal system served Australia well for the first half of the 20th Century, applied by a body of men well versed in classical positivist legal reasoning theory. However legal positivists such as Hart himself admits that there are difficult or 'penumbral' cases, that sit outside the rule-based system of formal-justice, defying the ability to classify and catalogue.[36] Justice Murphy, noted that hard cases (when referring to entrenched statutory or precedent law), make 'bad law',[37] – such was Murphy's commitment to the issue of hard cases, that be uttered his famous interpretation of the doctrine of Precedent:

> *"then there is the Doctrine of Precedent, one of my favourite doctrines. I have managed to apply it at least once a year since I have been on the bench. The doctrine is that whenever you are faced with a decision, you always follow what the last person who was faced with the same decision did. It is a doctrine eminently suitable for a nation overwhelmingly populated by sheep. As the distinguished chemist, Cornford, said, 'the doctrine is based on the theory that nothing should ever be done for the first time'"*[38]

Furthermore, Murphy notes that when both judiciary and the legislature are out of step with the deeper moral conscience of the community they serve, it is the duty of the judges, as much of the legislature, to be radical.[39]

Murphy's views were expressed at a time when there was a shift from positivist, rule-dominated law, devoid of morality, encouraging legal academics, and later judicial decision-makers, to consider the morality, society and policy within this formal judicial decision-making. Thus the post-war era

was characterised by the consideration of principles based legal reasoning, where legal principles are seen to be deeper and more general than legal rules.[40]

Part 2 in the next issue will chart the changes in judicial reasoning followed by the High Court from Federation to recent times.

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