



*The Third Branch of Government
The Constitutional Position of the Courts of
Western Australia*

Address by

The Honourable Wayne Martin AC
Chief Justice of Western Australia

Constitutional Centre of WA
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Today's seminar is concerned with the Constitution of Western Australia. I have been asked to address the role of the courts as the third branch of government within the constitutional framework of the State. It is perhaps ironic that, for reasons which I will develop, the Commonwealth Constitution has become the primary fount of legal doctrine with respect to the constitutional position of the courts of the States of Australia.

The Constitutional Instruments

Generally (but imperfectly) speaking, the constitutional position of the courts of Western Australia can be sourced from the following constitutional instruments:

1. *Constitution Act 1889 (WA)*
2. *Constitution Acts Amendment Act 1899 (WA)*
3. *Australia Acts 1986 (Commonwealth and UK)*
4. *Commonwealth of Australia Constitution Act 1900*

Perhaps counter-intuitively, the last of these has become the most significant to the constitutional position of the courts of the State.

The Constitution Acts

The written constitution of Western Australia is inconveniently contained in two separate Acts of the Parliament of Western Australia. The first, passed in 1889, substituted a bicameral representative legislature for the unicameral legislature which had existed since the early days of the colony. The Act contains a number of parts headed variously Parliamentary, Electoral, Elective Council, The Governor, Local

Government, Judicial, Legal, Financial and Miscellaneous. Part IV entitled 'Judicial' contains only two sections:

54. Judges continued in the enjoyment of their offices during good behaviour

The Commissions of the present Judges of the Supreme Court and of all future Judges thereof shall be, continue, and remain in full force during their good behaviour, notwithstanding the demise of Her Majesty (whom may God long preserve), any law, usage, or practice to the contrary notwithstanding.

55. But they may be removed by the Crown on the address of both Houses

It shall be lawful nevertheless for Her Majesty to remove any such Judge upon the Address of both Houses of the Legislature of the Colony.

The Supreme Court of Western Australia was created by an ordinance which came into effect on 17 June 1861. The court had therefore been in existence for almost 30 years when the *Constitution Act 1889* was passed. Over that period it had been the practice for all judges of the court to be appointed by the Queen, rather than the Governor. There had been acrimonious disputes between the Governor and the judiciary from time to time (perhaps the most notable being the dispute between Governor Broome and Chief Justice Onslow) which had been resolved in Westminster, rather than in Perth. This practice explains the reference to 'Her Majesty' in both sections 54 and 55.

Section 75 of the *Constitution Act 1889* defines 'Her Majesty' to mean 'Her Majesty, her heirs and successors.' The same expression defines 'Governor in Council' to mean the Governor acting with the advice of the Executive Council. Accordingly, on the face of the Act, it might be thought that section 55, properly construed, empowered only the monarch to remove a judge upon the address of both Houses of Parliament, and did not similarly empower the monarch's representative in Western Australia,

the Governor. However, the section has to be read with section 7(2) of the Australia Act which provides that:

All powers and functions of Her Majesty in respect of the State are exercisable only by the Governor of the State.

There are two exceptions to this provision (contained in subsections (3) and (4) of section 7) - the power to appoint and terminate the appointment of the Governor of a State, and the power of the monarch to exercise all powers and functions while personally present in a State. Both exceptions are themselves constrained by subsection (5) which provides that the advice to Her Majesty in relation to the exercise of her powers and functions in respect of a State shall be tendered by the Premier of the State.

Other provisions of the 1889 Act are also relevant to the role of the courts. Section 57 provides that all laws, statutes, and ordinances in force at the time of commencement of the Act are to remain in force until repealed or varied, except in so far as they are repugnant to the Act itself. Accordingly, all the laws of the colony with respect to the creation of the courts of the colony and the exercise of judicial powers remained in force. That result was put beyond doubt by section 58 of the Act which provides:

58. Courts of justice, commissions, officers, etc.

All Courts of Civil and Criminal Jurisdiction, and all legal commissions, powers, and authorities, and all officers, judicial, administrative, or ministerial, within the Colony at the commencement of this Act shall except in so far as they are abolished, altered, or varied by this or any future Act of the Legislature of the Colony or other competent authority, continue to subsist in the same form and with the same effect as if this Act had not been passed.

Relevant also is section 73 of the Act which contains a manner and form requirement in relation to specified categories of legislation. Other speakers at this seminar will consider the operation and effect of this provision in detail. For present purposes it is sufficient to note that the Supreme Court of Western Australia has not hesitated to exercise jurisdiction to determine whether or not this provision of the Constitution has been complied with, thereby exercising jurisdiction to rule upon the validity of legislation passed by the Parliament of Western Australia (see for example, *Marquet v Attorney General of Western Australia*¹).

There is very little of relevance to the constitutional position of the judicial branch of government in the 1899 Act. There is only one provision of any potential significance (section 41) which confers jurisdiction upon the Court of Appeal to determine the validity of the election of a member of the Legislative Assembly.

The Australia Acts

Reference has already been made to section 7 of the Australia Acts. Other provisions of that legislation which bear specifically upon the constitutional position of the courts of the State include section 3(1), which provides that *Colonial Laws Validity Act 1865* shall not apply to any law made after the commencement of the Australia Acts by the Parliament of a State. This is relevant because, as we will see, arguments with respect to the independence of the courts of the State have been mounted based on s 5 of the *Colonial Laws Validity Act 1865*, which provides that:

¹ [(2002) 26 WAR 201.

Every colonial legislature shall have, and be deemed at all times to have had, full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provisions for the administration of justice therein.

Although, as we will see, those arguments have not been crowned with success, they remain theoretically available in respect of the Supreme Court, the District Court and the Family Court of Western Australia, all of which were created by legislation enacted prior to the Australia Acts, but any such argument would not be available in respect of the Magistrates Court which was created after the commencement of the Australia Acts.

Relevant also are section 6 of the Australia Acts which preserves the efficacy of any 'manner and form' provisions in State Constitutions, and section 11, which removed the right of appeal from courts of the States, including Western Australia, to Her Majesty in Council (ie, the Privy Council).

The Gaps in the Constitution Acts

The provisions in the Constitution Acts and the Australia Acts dealing with the constitutional position of the courts of Western Australia are few in number and limited in effect. What these constitutional instruments fail to provide in relation to the judicial branch of government is more significant than what they do provide. Significantly omitted are any express provisions on the following topics.

1. The preservation of the Supreme Court or any courts of the State

Although reference is made in section 54 of the 1889 Act to the continuation in office of the judges of the Supreme Court, it would be difficult to construe that section, in itself, as inhibiting the plenary power of the legislature created by the Act, especially when regard is had to section 58, which specifically empowers the legislature to legislate so as to abolish any of the courts of civil and criminal jurisdiction of the colony. There is no express provision in the Constitution Acts of Western Australia requiring the maintenance of a Supreme or any other court of the State or as to the manner of exercise of the judicial power of the State.

2. Separation of powers

There is no express provision in either the Constitution Acts or the Australia Acts separating or requiring the independent exercise of the legislative, executive and judicial branches of government. There is nothing in those constitutional instruments which would prevent the Parliament of the State investing legislative or executive functions in State courts, nor from investing the judicial power of the State in a body which is not a court². Nor is there anything in these instruments which prevents judges of the State courts from being invested with non-judicial powers as *persona designata*³

² *Clyne v East* (1967) 68 SR(NSW) 385, 395, 400; *Nicholas v State of Western Australia* [1972] WAR 168; *Gilbertson v South Australia* (1976) 15 SASR 66, 85; *Grace Bible Church v Reedman* (1984) 36 SASR 376; *Building Construction Employees and Builders Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Kable v Director Public Prosecutions for NSW* (1997) 189 CLR 51; *Collingwood v Victoria* [No 2] [1994] VR 652.

³ Unlike Commonwealth judges - see *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1997) 189 CLR 1.

3. Judicial independence

The only express provisions bearing upon the subject of judicial independence are sections 54 and 55 of the 1889 Act, which provide that judges of the Supreme Court are to remain in office while of good behaviour, unless and until they are removed upon the address of both Houses of Parliament. There is no similar provision in the Constitution Acts relating to the judges or magistrates of the other courts of the State, although there are provisions to similar effect in the legislation creating those courts⁴. However, those provisions are not protected by the manner and form requirements of s 73 of the 1889 Act.

There are no express provisions prohibiting legislative or executive interference with the independent exercise of the judicial power of the State, nor is there any equivalent to the provision of s 72 of the Commonwealth Constitution, which prevents any reduction in the terms and conditions of employment of judicial officers of the Commonwealth. Whether or not the Act of Settlement (1701) which has been construed as having a similar effect applies to judicial officers in Western Australia is a possibly contentious issue which has never been authoritatively resolved, as far as I am aware.

On their face, the Constitution Acts (read in the context of the Australia Acts) manifestly fail to contain the range of provisions necessary to protect and preserve the independence and integrity of the judicial branch of the government of the State. However, never fear, as the Constitution of the Commonwealth⁵ has come to the rescue.

⁴ *District Court of Western Australia Act 1969* (WA) s 11(1); *Family Court Act 1997* (WA) s 18(3); *Magistrates Court Act 2004* (WA) sch 1 cl 15.

⁵ Unless specifically indicated otherwise, hereafter references to 'the Constitution' are references to the Constitution of the Commonwealth.

Chapter III of the Commonwealth Constitution

Section 106 of the Constitution preserves the continuation of the Constitution of each of the States 'subject to this Constitution'. The subordination of the Constitutions of each of the States to the Constitution of the Commonwealth has enabled Ch III of that Constitution to fill many of the gaps left in the Constitutions of the States, including Western Australia, in relation to the role and constitutional position of the various courts of the States.

Chapter III of the Constitution is entitled 'The Judicature'. The separation of provisions of the Constitution into chapters entitled 'The Parliament', 'The Executive' and 'The Judicature' is one of the aspects of the Constitution which has resulted in it being construed as providing (very generally speaking), for the separate exercise of those powers of government. In this respect, the structures of the governmental powers of the Commonwealth are quite different from the structures applicable under the Constitutions of the States, which more closely resembled the structures in place in the United Kingdom where, despite the writings of John Locke, the principles enunciated by Baron Montesquieu and adopted by the American founding fathers had received little more than acknowledgement, and had not been acted upon.⁶

Section 71 - The Autochthonous Expedient

Section 71, which is the first section of Ch III, provides that the judicial power of the Commonwealth is to be vested in the High Court, such other Federal Courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The section embodies what has been

⁶ Although recent changes in the constitutional structure of the United Kingdom have introduced greater degrees of separation between the branches of government.

described as the 'autochthonous expedient'⁷ whereby Commonwealth judicial power could be vested by the Commonwealth Parliament in State courts, obviating the need for a separate system of Commonwealth courts (other than the High Court), until such time as the Commonwealth Parliament considered it appropriate to create such courts.

The terminology of s 71 clearly connotes that the judicial power of the Commonwealth can only be vested in the courts to which it refers. It was construed as having this effect as early as 1915.⁸ Accordingly, any attempt to confer Commonwealth judicial power on a body which is not a s 71 court is invalid.⁹

It took another 40 years or so for the converse principle to be recognised, whereby non-judicial power cannot be vested in Federal Courts unless incidental to the exercise of judicial power.¹⁰ Following recognition of that principle, the position in relation to the judicial power of the Commonwealth was relatively clear. The Commonwealth Parliament is to determine which courts are capable of exercising federal judicial power, but can only vest such power in the High Court, or federal courts which it creates, or the courts of the States. Further, it is not competent for the Commonwealth Parliament to confer non-judicial power upon any federal court, unless that power is incidental to the exercise of judicial power. More recently, it was established that the only jurisdiction which can be conferred upon a federal court is that specified in s 75 and s 76 of

⁷ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 269 (Dixon CJ, McTiernan, Fullagar and Kitto JJ.) ('*Boilermakers' case*').

⁸ *New South Wales v Commonwealth* (1915) 20 CLR 54 ('the *Wheat case*').

⁹ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹⁰ *Boilermakers' case*.

the Constitution (generally speaking, federal matters) and that it is not competent for the States to confer jurisdiction on a federal court.¹¹

However, the clarity of this position is somewhat diminished by the fact that there are many powers which are not peculiarly and distinctively legislative, executive or judicial. In the *Boilermakers'* case, the majority observed:

How absurd it is to speak as if the division of powers meant that the three organs of government were invested with separate powers which in all respects were mutually exclusive.¹²

Many examples can be given of powers that are sometimes exercised legislatively, sometimes administratively and sometimes judicially, without the infringement of any constitutional requirement for the separation of powers.¹³

Certainty is further reduced by the 'chameleon' principle, whereby characterisation of a power which is not peculiarly or distinctly legislative, executive or judicial may be influenced by the character of the body in which the power is reposed by the Parliament. So, a particular power may be characterised as judicial power because it has been conferred upon a court by the Parliament.¹⁴

In this context, it has been recognised that it is for the Parliament to determine which branch of government shall exercise a power which is not peculiarly and distinctly legislative, executive or judicial.¹⁵

¹¹ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511

¹² 278; see also *Thomas v Mowbray* (2007) 233 CLR 307, [10] - [12].

¹³ See *Thomas v Mowbray*, [12].

¹⁴ *R v Spicer; ExParte Australian Builders Labourers' Federation* (1957) 100 CLR 277, 305.

¹⁵ *Thomas v Mowbray*, [11].

The position with respect to State judicial power and the courts of the States is less clear. The position of those courts has been dramatically affected by ss 73, 77 and 79 of the Constitution, which will now be considered.

State Courts - Sections 73, 77 and 79

Section 73 of the Constitution provides that the High Court has jurisdiction to hear and determine appeals from, among others, 'the Supreme Court of any State'. It further provides that until the Parliament otherwise provides, the conditions and restrictions upon appeals from the Supreme Courts of the States to the Privy Council were to be applicable to appeals from those courts to the High Court. Consistently with s 71, s 77 provides that the Parliament of the Commonwealth may make laws investing any court of the State with federal jurisdiction and s 79 specifically provides that the Parliament may prescribe the number of judges who are to exercise federal jurisdiction.

Two questions arise from these provisions. First, to what extent does the express reference to the Supreme Courts of the States, and the empowerment of the Commonwealth Parliament to confer federal jurisdiction upon State courts entrench the existence of all or any of the courts of the States, thereby inhibiting the legislative powers of the Parliaments of the States? Second, does the creation of a structure whereby federal judicial power is shared between the courts of the States and federal courts created by the Commonwealth Parliament impose minimum standards of independence and integrity upon the courts created by the States, thereby restricting the legislative powers of the States, and if so, what are those standards?

Both of these questions have been addressed in the line of cases commencing with *Kable's* case.¹⁶

Kable's case

In *Kable's* case, three of the four members of the court who comprised the majority¹⁷ each answered the questions I have posed affirmatively thereby recognising that Ch III of the Constitution constrains the powers of the Parliaments of the States, by requiring the States to maintain at least some courts upon which federal jurisdiction can be conferred, and by requiring those courts to have characteristics which are compatible with their status as potential repositories of federal judicial power. However, because each member of the majority wrote separately, the limits imposed upon the legislative powers of the States by Ch III of the Constitution were not pellucidly clear following *Kable's* case. Subsequent decisions have both expanded and clarified the ambit of those constraints upon state legislative power.

Of the majority, the position adopted by Toohey J was the most confined. In his view the *ad hominem* character of the legislation was sufficient, of itself, to lead to the conclusion that the functions conferred upon the Supreme Court by the Act were incompatible with Ch III of the Constitution. Accordingly, it was unnecessary for him to rule upon the broader arguments presented in the case.

Gaudron J went significantly further. In her view, the 'autochthonous expedient' required that 'although it is for the States to determine the organisation and structure of their court systems, they must each maintain

¹⁶ *Kable v Director of Public Prosecutions* (NSW) (1997) 189 C LR 51.

¹⁷ Toohey, Gaudron, McHugh and Gummow JJ.

courts, or, at least, a court, for the exercise of the judicial power of the Commonwealth'.¹⁸ She also observed that there was nothing in Ch III which would suggest that the Constitution permitted different grades or qualities of justice depending upon whether federal judicial power was exercised by State courts or by Federal Courts created by the Parliament. This led her to the conclusion that Ch III 'requires that the Parliaments of the States not legislate to confer powers on States courts which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth'.¹⁹

McHugh J went further still, at least in some respects. In his view, s 73 of the Constitution implied the continued existence of the State Supreme Courts, thereby placing it beyond the legislative power of the States to abolish their Supreme Courts. Further, the convenient structure contemplated by Ch III of the Constitution, whereby federal jurisdiction could be conferred upon State courts created, in his view, an obligation upon the States to maintain systems of courts upon which federal jurisdiction could be conferred. That required a judicial system in each of the States with the Supreme Court at the apex of the system. Further, although noting that it was unnecessary to decide the point in the case at hand, McHugh J expressed the view that a State law that prevented a right of appeal to the Supreme Court from, or the review of a decision of an inferior State court, would seem inconsistent with the integrated system of State and Federal Courts envisaged by Ch III. So, in his Honour's view, not only were rights of appeal from the State Supreme Courts to the High Court entrenched by the Constitution, but so also, in all probability,

¹⁸ *Kable* [12].

¹⁹ *Ibid* [14].

were rights of appeal from the inferior courts of the States to the Supreme Court of that State.

On the other hand, McHugh J unequivocally acknowledged that it was within the legislative power of the States to confer non-judicial functions upon State courts, provided that they were not incompatible with, or repugnant to, the character and integrity of the State court as a potential repository of federal jurisdiction. So, in his view, there was no constitutional impediment to the Parliaments of the States conferring jurisdiction upon State courts to review administrative decisions on their merits.²⁰ However, a State could not legislate to abolish all other jurisdiction of the Supreme Court, thus leaving the court with only jurisdiction to review administrative decisions on their merits as 'to do so would make a mockery of the principles contained in Ch III of the Constitution'.²¹ McHugh J also observed that there was nothing in Ch III which prevented a State from conferring executive government functions on a State court judge as *persona designata*, provided that conferral of those functions did not create the appearance that the court as an institution was not independent of the executive government of the State. Accordingly, his Honour concluded that the traditional role of Chief Justices of the State acting as Lieutenant Governors and Acting Governors was not inconsistent with Ch III.²² Further, he expressed the view that appointment of a judge as a member of an Electoral Commission fixing the electoral boundaries of the State would not give

²⁰ Ibid [23].

²¹ Ibid [23].

²² Ibid [24].

rise to a suggestion that the court was not impartial and would not therefore infringe Ch III.²³

His Honour went on to observe that a State law which purported to appoint the Chief Justice of the Supreme Court as a member of the Cabinet might well be invalid because the appointment would undermine confidence in the impartiality of the court as an institution independent of executive government.²⁴ This observation is interesting for a number of reasons. First, until recent constitutional changes in the United Kingdom, the Lord Chancellor was both the head of the judiciary and a member of the government of the day. There does not appear, however, to be any evidence to the effect that this duality of roles undermined confidence in the courts of England and Wales. Second, there have been occasions upon which serving members of the High Court have undertaken appointments that fall quite squarely within the executive branch of government, such as diplomatic postings. It would seem to follow from the observations of McHugh J that such appointments are inconsistent with Ch III of the Constitution.

Like McHugh J, Gummow J considered that s 73 of the Constitution necessarily implied that there must be in each State a body answering the description of the Supreme Court of the State, although in his view, the question of whether a particular body met that description was a matter involving the interpretation of s 73 of the Constitution, not the nomenclature used by the Parliament of the relevant State. Further, he

²³ Ibid [24]. There may be room to doubt the continued applicability of this observation. Following my appointment as Chief Justice, and *ex officio* chair of the Electoral Distribution Commission of WA, I requested the government to amend the legislation to remove me from that position, which subsequently occurred. Irrespective of the question of constitutional validity, it is, in my view, highly desirable that serving judges not be placed in positions fraught with the risk of political controversy.

²⁴ *Kable* [24].

also considered that the structure contemplated by Ch III required that there be a system of State courts in which federal jurisdiction could be reposed by the Commonwealth Parliament. He observed that components of the State court system other than a court meeting the description of a Supreme Court may change from time to time, and Ch III should be read in an ambulatory fashion.²⁵ However, at least implicit in his Honour's reasons is the proposition that Ch III requires that in each State there must be, in addition to the Supreme Court of the State, a system of State courts with the characteristics of integrity and independence necessary to render them appropriate repositories of federal jurisdiction, should the Commonwealth Parliament so desire.

The decision in *Kable* established that what were previously thought to be plenary powers of the State legislatures with respect to State courts are subject to significant constraints imposed by Ch III of the Constitution. Following the decision different views were expressed as to its likely consequences. Justice McHugh wrote extracurially:

My own prediction is that constitutional practitioners will see a rich lode of constitutional ore in Ch III of the Constitution.²⁶

Conversely, in the same year (2004), Justice Kirby described *Kable* as a guard dog that barked but once.²⁷ However, since that metaphor was used, the guard dog has barked so loudly and so often as to regularly disturb the neighbours.

Detailed analysis of the precise ambit and effect of the *Kable* doctrine is beyond the scope of this paper. However, there is no doubt that the

²⁵ Ibid [65].

²⁶ M McHugh, 'Australian Constitutional Landmarks' [2004] 7 Constitutional Law and Policy Review 21, 24, cited by H P Lee in *State Constitutional Landmarks*, G Winterton, (ed) (Federation Press 2006) 400.

²⁷ *Baker v R* (2004) 210 ALR 1, 17 [54].

principles constrain the legislative powers of the States with respect to both the procedures and the jurisdiction of State courts. In *South Australia v Totani*²⁸ South Australian legislation which regulated the procedures to be adopted in the Magistrates Court of South Australia when exercising jurisdiction under legislation relating to organised crime was held to be invalid because it required the court to adopt procedures which were not consistent with the assumption of independence and impartiality. A similar conclusion was reached in relation to New South Wales legislation relating to the confiscation of the proceeds of crime in *International Finance Trust Company Ltd v New South Wales Crime Commission*.²⁹ Further, in *Kirk v Industrial Relations Commission*³⁰, the High Court held that jurisdiction to review administrative action on the ground of jurisdictional error was an indispensable characteristic of a system of State courts contemplated by Ch III of the Constitution. It followed that State legislation which purported to exclude review on the ground of jurisdictional error in relation to particular administrative decisions was incompatible with Ch III of the Constitution, and therefore invalid.

The foresight of a prophet would be required to predict the future direction and effect of the *Kable* principle. However, it is clear that it has filled a very large gap left in the Constitutions of the States, and provides minimum standards which must be met by all State legislatures in relation to the existence, procedures and jurisdiction of State courts.

²⁸ (2010) 242 CLR 1.

²⁹ (2009) 240 CLR 319.

³⁰ (2010) 239 CLR 531; see also *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* [2012] HCA 25

Interference in pending cases

Related to the maintenance of minimum standards of integrity and independence required of State courts by implications arising from Ch III of the Constitution is the body of jurisprudence relating to the extent to which legislative or executive powers can be constrained because of the impact which their exercise would have upon pending litigation. The issue became topical following the decision of the Privy Council in *Liyanage v The Queen*.³¹

Liyanage

Sixty people were charged with various criminal offences following an unsuccessful coup in the country formerly known as Ceylon on 27 January 1962. While they were awaiting trial, Parliament purported to pass a law amending the criminal procedure code retrospectively from a date just prior to the coup until 'after the conclusion of all legal proceedings connected with or incidental to any offence against the State committed on or about 27 January 1962', or for one year following the commencement of the Act, whichever is the later. The legislation was limited in its application to any offence against the State alleged to have been committed on or about 27 January 1962, and purported to legalise ex post facto the detention of any person suspected of having committed an offence against the State and also allowed arrest without warrant in relation to such offences. The legislation widened the class of offences for which trial without jury could be ordered, to include those with which the accused were charged, created a new offence to meet the circumstances of the coup, made admissible in evidence certain

³¹ (1967) 1 AC 259.

statements and admissions made to police which were otherwise inadmissible and altered the punishment which could be imposed.

The validity of the legislation was challenged on the basis that it constituted a legislative plan designed after the fact to facilitate, if not ensure, the conviction and punishment of those who had been charged, thereby usurping the judicial function of the court. The Privy Council placed reliance upon the *ad hominem* character of the legislation, not only as to the individuals it affected, but also with regard to the proceedings that were pending against them and the retrospective character of the legislation to conclude that the act was inconsistent with the written constitution of Ceylon which manifested an intention to secure judicial independence from political, legislative and executive control. However, the Privy Council rejected the proposition that legislation could be invalidated on the ground that it was contrary to fundamental principles of justice, or on the ground that it was repugnant to the laws of England. Rather, the decision rested entirely upon an implication to be drawn from the relevant constitutional documents.

Nicholas & Ors v The State of Western Australia

The decision in *Liyanage* was cited in support of the argument advanced on behalf of the plaintiffs in *Nicholas & Ors v The State of Western Australia*.³² They had commenced proceedings in the Supreme Court claiming certain rights in respect of mining tenements. While the proceedings were pending, the *Mining Act* was amended by the Parliament to add a new section which purported to extinguish rights such as those claimed by the plaintiffs. They argued that the amending legislation was beyond the power of the State Parliament because it

³² [1972] WAR 168.

involved an impermissible interference with the judicial function of the court, relying in part on s 5 of the *Colonial Law Validity Act 1865*³³ and the decision in *Liyanage*.

The argument advanced was put succinctly by Jackson CJ:

Counsel contended that the Parliament of Western Australia has no power to abolish the Supreme Court (except to reconstitute it) nor to interfere with the proper functioning of the judiciary (for this it was claimed is entrenched in the doctrine of separation of power); and from this it follows that Parliament cannot change the law in respect to a pending action so as to deprive a litigant of his cause of action.

The argument was roundly rejected in part because it was inconsistent with the plenary power of the Parliament, and in part because the effect of the legislation was not to impinge upon the authority or jurisdiction of the court but to effect substantive rights.³⁴ Since the decision in *Kable*, it seems clear that the first reason for rejecting the submission must now be regarded as erroneous. Chapter III of the Constitution has been construed in much the same way as the Constitution of Ceylon so as to guarantee the independence and integrity of the courts of Australia, both State and Federal. Accordingly, notwithstanding the observations in *Nicholas*, it seems clear that the principles enunciated by the Privy Council in *Liyanage* should now be regarded as applicable in Western Australia.

However, this does not mean that the plaintiffs in *Nicholas* should have succeeded. It does, however, focus attention upon the second reason why their claim was dismissed, which turns upon the distinction between legislative alteration of substantive rights and obligations which is permissible, notwithstanding the pendency of litigation, and an impermissible legislative direction to the court as to the way in which

³³ See page 5 above.

³⁴ *Nicholas*, 173 (Jackson CJ) and 175 (Burt J).

judicial power will be exercised in a particular case. That distinction has been drawn out in a number of cases which will now be considered.

Nelungaloo

The earliest decision of the High Court relating to the validity of legislation which was impugned on the basis that it usurped the judicial function in relation to pending litigation is *Nelungaloo Pty Ltd v Commonwealth*.³⁵ The plaintiff commenced proceedings challenging the validity of a ministerial order for the compulsory acquisition of wheat on the ground that it exceeded the powers conferred by the relevant regulation. While the litigation was pending, legislation was enacted which provided that the ministerial order was deemed to have been authorised by the relevant regulation and was also deemed to have had full force and effect according to its tenor. At first instance, Williams J held that any invalidity in the ministerial order was cured by the subsequent statute, and not by any prescription or direction to the court as to the outcome in the particular case. Put another way, the effect of the subsequent act was to clarify substantive rights, rather than direct the outcome of the pending case. Relevant also was the fact that the subsequent act was of general application, and not specific to the particular plaintiff or the particular pending case. While it is true that the legislation did not have the *ad hominem* characteristics of the legislation considered in *Liyanage*, the fact that it operated retrospectively to validate acquisitions previously completed might be thought to have strengthened the argument to the effect that the Act was, in substance, an improper interference with the exercise of judicial power. However, the retrospective effect of the provision does not appear to have been treated

³⁵ (1948) 75 CLR 495.

as significant either at first instance or on appeal where the decision at first instance was affirmed.

Humby

The next case in which the issue was raised in the High Court is *R v Humby; Ex parte Rooney*.³⁶

In *Knight v Knight*³⁷, the High Court held that only judges of the Supreme Courts of the State had jurisdiction to make orders that defined rights, liabilities and obligations under the *Matrimonial Causes Act 1959* (Cth), with the consequence that orders made by other officers of the courts, such as masters, were invalid. The *Matrimonial Causes Act* was then amended to provide that where such orders had been made by officers of the court other than a judge, the rights, liabilities and obligations of all persons were the same as if the order had been made by a judge of the court. The general effect of the amending legislation was to retrospectively validate orders made by court officers other than judges.

At the time the amending legislation came into force, proceedings had been brought against Mr Rooney for the enforcement of maintenance orders made by a master of the Supreme Court of South Australia. The effect of the amending legislation was to validate the orders, and thereby deprive Mr Rooney of a defence to the proceedings which had been brought against him. He challenged the validity of the amending legislation on a number of grounds, including an assertion that it usurped the function of the courts of the State.

³⁶ (1973) 129 CLR 231.

³⁷ (1971) 122 CLR 114.

The argument was rejected. Stephen and Mason JJ (Menzies and Gibbs JJ concurring) relied upon the fact that the amending legislation did not purport to retrospectively validate invalid orders, but rather declared the rights and obligations of parties to matrimonial proceedings. Accordingly, the legislation was of the kind found to be valid in *Nelungaloo*, on the basis that there was no impediment to the legislature validly declaring the substantive rights and obligations of parties defending proceedings. Implicit in the reasons given, however, is the proposition that if the legislation had purported to retrospectively validate invalid orders of the court, it may have amounted to impermissible interference with judicial proceedings. The distinction drawn by the court, between the declaration of the rights and obligations of the parties on the one hand and the retrospective validation of court orders on the other, is vulnerable to the criticism that it is a distinction in form rather than substance.

The BLF cases

Following the industrial disputation which characterised a large part of the 1980s, proceedings were brought against the union generally known as the Builders' Labourers' Federation or the BLF. In proceedings brought under the federal industrial relations legislation, the Australian Conciliation and Arbitration Commission made a declaration that the BLF had engaged in the type of improper conduct which permitted the relevant Minister to order its deregistration. The BLF commenced proceedings in the High Court challenging the validity of the declaration made by the Commission. Before those proceedings were determined, the Commonwealth Parliament passed legislation which had the effect of expressly providing that the registration of the BLF under the federal legislation was cancelled. The validity of the legislation was challenged

by the BLF on the ground that it was either an impermissible exercise of the judicial power of the Commonwealth or an impermissible interference with the exercise of that power.

The argument was rejected by the High Court. It held that there was nothing in the character of the deregistration of an industrial organisation which made it uniquely susceptible to judicial determination. To the contrary, just as Parliament could determine which organisations should be entitled to participate in the regulated system of industrial relations, so Parliament could decide whether an organisation should be excluded from that system³⁸. The court reaffirmed the proposition that Parliament may legislate so as to effect and alter rights in issue in pending litigation without interfering with the exercise of judicial power in a way that is inconsistent with the Constitution³⁹ provided that the legislation does not interfere with the judicial process itself. The fact that the legislation rendered proceedings in the High Court redundant did not constitute an impermissible interference with the judicial process, even if the subjective motive or purpose of the Parliament was to circumvent the proceedings.

So, if the decision in *Re Rooney* stands for the proposition that in this area, form trumps substance, the BLF decision stands for the proposition that legal effect trumps subjective purpose.

The BLF case in the New South Wales Court of Appeal

The BLF was also registered under the industrial relations legislation of New South Wales. The relevant Minister purported to cancel that

³⁸ *BLF* [95] (Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.)

³⁹ *Ibid* [96].

registration pursuant to his statutory powers. The union brought proceedings in the Supreme Court of New South Wales challenging the validity of the actions of the Minister. That challenge failed at first instance. The union appealed to the Court of Appeal of New South Wales. In the week before the appeal was due to be heard, the New South Wales Parliament enacted legislation which provided that the registration of the union 'shall, for all purposes, be taken to have been cancelled' by reason of the declaration made by the Minister. The legislation also provided that the Minister's certificate of deregistration was to be 'treated for all purposes, as having been validly given from the time it was given or purportedly given'. The legislation also provided that it was to have these consequences notwithstanding any decision in any court proceedings relating to the validity of the Minister's actions. It further provided that the costs in any such proceedings were to be borne by the party, and were not to be the subject of any contrary order of any court.

By the time the reasons of the Court of Appeal were published, the reasons of the High Court in the federal BLF case had become available. After referring to that decision, Street CJ observed:

The distinction between inference with the judicial process itself rather than with the substantive rights which are at issue is no idle pedantry. Fundamental to the rule of law and the administration of justice in our society is the convention that the judiciary is the arm of government charged with the responsibility of interpreting and applying the law as between litigants in individual cases. The built in protections of natural justice, absence of bias, appellate control, and the other concomitants that are the ordinary daily province of the courts, are fundamental safeguards of the democratic rights of individuals. For Parliament, uncontrolled as it is by any of the safeguards that are enshrined in the concept of due process of law, to trespass into this field of judging between parties by interfering with the judicial process is an affront to a society which prides itself on the quality of its justice. Under the

Commonwealth Constitution it would, as is implicit in the quoted extract from the recent High Court decision, attract a declaration of invalidity.⁴⁰

Street CJ and Kirby P each considered that, unlike the Commonwealth legislation, the New South Wales legislation amounted to the exercise of judicial power by the legislature, relying upon its retrospectivity, its *ad hominem* characteristics, and its direct interference with such matters as the costs of court proceedings. However, consistently with then established doctrine, they and the other three members of the court considered that there was no constitutional impediment to the exercise of judicial power by the Parliament of New South Wales, consistently with the lack of any doctrine of any separation of powers in the unwritten Constitution of the United Kingdom. In the unanimous view of the court, unlike the Constitution of Ceylon considered in *Liyanage*, the constitutional instruments of New South Wales provided no basis for the implication of the doctrine of separation of powers.

The decision in the New South Wales BLF case is consistent with the Western Australian decision of *Nicholas*. However, for the reasons I have given, both should be taken to have been overridden by the emergence of the *Kable* doctrine and the constraints upon the legislative powers of the Parliaments of the States imposed by Ch III of the Commonwealth Constitution.

Lim

It seems that the first Australian case in which legislation was found to be invalid by reason of usurpation of judicial power was *Lim v Minister for*

⁴⁰ *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372, 375-6.

*Immigration Local Government and Ethnic Affairs*⁴¹. In that case, Mr Lim and 35 other Cambodian nationals who had arrived illegally in Australia were being held in custody pending reconsideration of their applications for refugee status. They brought proceedings in the Federal Court challenging the validity of their detention, and seeking orders that they be released. Two days prior to the hearing of their case, the Commonwealth Parliament amended the *Migration Act 1958* (Cth) by including a number of sections, including s 54R, which provided that a court was not to order the release from custody of a 'designated person'. The expression 'designated person' was defined to mean illegal immigrants arriving by boat on Australian shores. Other sections were added to the Act requiring designated persons in custody to be kept in custody until either deported or granted an entry permit.

The High Court unanimously upheld the validity of the provisions which required designated persons to be kept in custody. However, by a majority, s 54R was struck down as unconstitutional, on the basis that it constituted a purported exercise of judicial power by the legislature, contrary to the constraints imposed upon legislative powers by the Constitution of the Commonwealth. The provisions requiring the detention of designated persons were upheld because they were considered to be laws relating generally to the executive power of detention of non-citizens. By contrast, s 54R purported to direct the courts as to the manner of exercise of judicial power and was therefore invalid. This case reinforces the vital distinction between legislation which creates or varies substantive rights and obligations, and which falls within the scope of legislative power notwithstanding the pendency of litigation which may be affected by the creation or variation of those

⁴¹ (1992) 176 CLR 1.

rights, and proscription or direction to the court which constitutes an improper interference with judicial power.

Nicholas

The subsequent decision of the High Court in *Nicholas v The Queen*⁴² indicates the very limited circumstances in which legislation will be found to constitute an invalid interference with the exercise of judicial power. In that case, Mr Nicholas was charged with possession of a prohibited import (heroin) contrary to the *Customs Act*. The heroin had been imported by law enforcement officers as part of a 'controlled operation'. In *Ridgeway v The Queen*⁴³, the High Court ruled evidence of the illegal importation of prohibited substances by law enforcement officers to be inadmissible. Relying upon that decision, Mr Nicholas obtained an order from the County Court excluding evidence of the importation of heroin, and permanently staying his trial for the charge under the *Customs Act* (although there were other charges pending against him).

Parliament then amended the *Crimes Act 1914* (Cth) by including a number of provisions effectively reversing the effect of the decision in *Ridgeway*, in terms which made it clear that it was intended to apply to offences allegedly committed prior to the amending legislation. Relevantly to Mr Nicholas, one of the provisions of the amending legislation provided that in determining whether evidence that narcotic goods had been imported into Australia in contravention of the *Customs Act* should be admitted, the fact that the narcotic may have been imported

⁴² (1998) 193 CLR 173.

⁴³ (1995) 184 CLR 19.

by a law enforcement officer in contravention of the law was to be disregarded.

Following the enactment of the amending legislation, the prosecution applied to vacate the orders previously made excluding the evidence of importation and staying the proceedings. In response to that application, Mr Nicholas challenged the validity of the amending legislation. By a majority of 5:2, the legislation was upheld.

Brennan CJ, Toohey and Hayne JJ considered that the relevant section was an evidentiary provision which did not affect the judicial function of fact finding, or the exercise of judicial powers relating to the determination of guilt. Gaudron J considered the legislation to be valid on the ground that it did not prevent independent determination of the question of whether or not evidence should be excluded, nor the independent determination of guilt or innocence. Gummow J upheld the validity of the legislation on the ground that it did not deem any ultimate fact to exist or to have been proved, nor did it alter the elements of the offence or the standard or burden of proof, with the consequence that it did not impugn the integrity of the judicial function. McHugh and Kirby JJ dissented on the ground that the legislation directed the court as to the manner in which it was to exercise its power with respect to the admission of evidence, by disregarding illegality, and to that extent improperly interfered with judicial power.

Bacharach

The most recent case on this topic in the High Court involved a conventional application of principle⁴⁴. In that case, a local authority approved the rezoning of land to permit the development of a shopping centre. The owner of another shopping centre in the vicinity appealed against that decision to the Planning and Environment Court of Queensland. The appeal was dismissed. A further appeal was brought before the Court of Appeal. While that appeal was pending, the Queensland Parliament passed legislation which had the effect of permitting the development of the land for shopping centre purposes. The High Court unanimously rejected an argument to the effect that the legislation improperly interfered with the exercise of judicial power, holding that the legislation was a law relating to the use and development of land, the character of which was not affected by the pendency of litigation which would be affected by the legislation.

Interference in pending cases - Summary

Following the emergence of the *Kable* doctrine, it can safely be assumed that it is not competent for the Parliaments of the States to legislate so as to interfere with or direct the exercise of the judicial power of the courts which they are required by Ch III of the Constitution to maintain.⁴⁵ However, the fact that legislation will have an impact, even a dramatic impact upon pending litigation does not, of itself, constitute interference with the exercise of judicial power. Legislation will only be regarded as having those impermissible characteristics if it constitutes a direction or proscription to the court as to the manner in which judicial power is to be exercised, and consistently with the decision in *Nicholas v The Queen*, in

⁴⁴ *H A Bacharach Pty Ltd v Queensland* (1998) 195 CLR 547.

⁴⁵ Notwithstanding the decisions in *Nicholas v State of Western Australia* and the BLF case in New South Wales to the contrary.

relation to the exercise of powers which are fundamental to the judicial process. Further, in assessing the characteristic of impugned legislation, form will triumph over substance, and legal effect will triumph over subjective motive or purpose, which is irrelevant.

Less clear is the extent to which it is constitutionally permissible for the Parliaments of the States to confer judicial power upon bodies or organisations which do not have the characteristics of a 'court' within the meaning of that word in Ch III of the Constitution. Prior to *Kable*, there was no reason to doubt the plenary power of the State Parliaments to vest power, including judicial power, in any body or entity they chose. However, since *Kable*, reinforced by *Kirk*, there is reason to think that any serious erosion or emasculation of the system of State courts presumed by Ch III, by reposing substantial areas of jurisdiction to exercise judicial power in bodies other than courts, could be found to so undermine the integrity of the judicial systems of the States as to be inconsistent with 'the autochthonous expedient' and therefore invalid.

Interference with Judicial Power by Delegated Legislation and Administrative Decisions

To this point I have only been addressing the plenary powers of the Parliaments of Australia. I will now address the slightly different considerations which arise when the exercise of delegated legislative powers, or administrative power is said to improperly interfere with the exercise of judicial power.

Plainly, the legislative powers of a delegate of a Parliament cannot be any broader in scope than the powers of the Parliament itself. Equally plainly, administrative powers conferred upon an official by legislation of

the Parliament cannot exceed the legislative power of the Parliament. Put another way, the exercise of a power to make delegated legislation, or an administrative decision must, ipso facto, be subject to all the constraints which I have identified in relation to the powers of the Parliaments.

However, the exercise of such powers may be subject to additional constraints arising from the construction of the legislation conferring those powers. Very often that legislation will be construed as confining the purposes for which such powers may be validly exercised, such that the exercise of the power for an improper purpose will fall outside the jurisdiction conferred by the legislation. If an issue of that character arises, the actual purpose of the delegate or administrative official may be of great significance, and the question will most likely be addressed as a matter of substance rather than form.⁴⁶

This issue arose in a case which I determined earlier this year.⁴⁷ In that case, proceedings had been commenced challenging the validity of development approval issued under planning legislation. Shortly before those proceedings were due to be heard, the Minister for Planning issued a legislative instrument declaring that if the development approval previously granted was invalid, development of land in accordance with the terms of the purported approval was nevertheless authorised. The effect of the instrument issued by the Minister, if valid, was to deprive the pending proceedings of any practical effect.

The validity of the instrument issued by the Minister was challenged on the ground that it was not issued for a purpose authorised by the

⁴⁶ *Long v Copmanhurst Shire Council* (1969) 2 NSW 641; *Nettheim v Minister for Planning and Local Government* (1988) 16 ALD 796

⁴⁷ *Hunter v Minister for Planning* [2012] WASC 247

legislation but was used for the purpose of rendering the pending proceedings futile. Interestingly, it was not argued that the instrument constituted an improper interference with the judicial power of the court, presumably because the instrument did not interfere in any way with the pending proceedings, or purport to direct the court as to the manner in which those proceedings should be determined but only came into effect if the proceedings were determined a particular way.

The difficulty with the argument based on improper purpose was that, on its face, the instrument issued by the Minister was directly concerned with the use and development of land. The fact that it would have an impact upon pending proceedings did not deprive it of that characteristic, consistently with the cases to which I have referred, and I ruled accordingly.

The Separation of Powers in Practice

The cases are replete with observations to the effect that any doctrine of separation of powers cannot be applied too rigidly. The lack of rigidity is perhaps most apparent in the chameleon principle to which I have referred. There are other examples of this lack of rigidity in the day-to-day operation of the courts of the States; some follow.

The Rule-making Powers of the Courts

Courts have long been recognised as having the power to make rules of practice and procedure. Such a power is expressly conferred by, for example, s 167 of the *Supreme Court Act 1935* (WA). That power is exercised by the judges who thereby perform an act of a legislative character. The legislative character of the rule-making power is

exemplified by the fact that the Rules of Court are instruments which can be disallowed by parliamentary motion.⁴⁸

The Appointment of Judges

In Western Australia, judges are appointed by the Governor on the advice of Executive Council. The identity of those who are to exercise the judicial power of the State is determined by executive government without any form of scrutiny or review. As far as I am aware, it has never been suggested that dependence upon the executive for appointment impugns the integrity of the court, nor has that suggestion been made, in legal terms at least, in those not uncommon instances in which judges are promoted to a higher court by a decision of the executive. The possibility of such promotion has not (yet at least) been suggested to impugn the independence of the judiciary in an impermissible way. Any argument to that effect would face a significant obstacle in the form of the decision of the High Court in *Forge v ASIC*.⁴⁹ In that case, a challenge to proceedings before an acting judge of the Supreme Court of New South Wales failed on the basis that the capacity to utilise acting judges did not, of itself, lead to the conclusion that a State court was not properly characterised as a 'court' within the meaning of Ch III of the Constitution. However, the court left open the possibility that the power could be exercised in such a way as to compromise the institutional integrity of the body in a manner which was inconsistent with Ch III of the Constitution if the informed observer may reasonably conclude that the institution no longer is, and no longer appears to be, independent and impartial as, for example, would be the case if a significant element of its membership

⁴⁸ Section 42, *Interpretation Act 1984* (WA).

⁴⁹ (2006) 288 CLR 45.

stood to gain or lose from the way in which the duties of office were executed.⁵⁰

It is also clear that a relatively liberal approach will be taken to the role of the executive in setting the terms and conditions of remuneration of the judiciary. In *North Australian Aboriginal Legal Aid Service Inc v Bradley*,⁵¹ the appointment of the Chief Magistrate of the Northern Territory was impugned on the basis that his remuneration was only fixed for a period of two years from the date of his appointment and could thereafter be determined by the Administrator of the Territory. The court held unanimously that the power of the executive to review the Chief Magistrate's terms of remuneration did not compromise or jeopardise the integrity of the judicial system of the Territory, in part because of the construction which it placed upon the manner in which the power to determine the Chief Magistrate's remuneration was to be exercised.

Judicial Accountability

There is an important distinction between judicial independence and accountability.⁵² Under current arrangements, the only sanction for misconduct on the part of the judiciary of Western Australia is removal from office by the Governor following an address of both Houses of Parliament. As far as I am aware, it has never been suggested that the power of the Parliament to remove a judge from office impugns the integrity of the judiciary. Rather, the fact that this is the only means by which a judge may be removed is seen to bolster independence, given the rarity with which the power is exercised.

⁵⁰ [93] (Gummow, Hayne and Crennan JJ.)

⁵¹ (2004) 218 CLR 146.

⁵² R D Nicholson, 'Judicial Independence and Accountability: Can they co-exist?' (1993) 67 ALJ 404.

In at least one Australian jurisdiction,⁵³ legislation has been passed providing for statutory mechanisms to investigate judicial misconduct and impose sanctions as a consequence of that misconduct. I am not aware of any suggestion to the effect that such legislation impugns the independence or integrity of the courts in that jurisdiction. To the contrary, it is generally thought that the existence of such mechanisms for the transparent and impartial investigation of complaints of misconduct on the part of the judiciary enhance and reinforce independence and integrity.

The Performance of Executive Functions by Judges

It is clear that some executive functions can be performed by judges without there being any credible suggestion of compromise to the integrity of the relevant court. Two examples are mentioned by McHugh J in *Kable* - namely, the role of Lieutenant Governor and Chair of an Electoral Distribution Commission. However, as his Honour pointed out, there will be some executive roles which will be so inconsistent with the independent exercise of judicial power as to impermissibly impugn the integrity of the State court as a repository of Commonwealth judicial power.

Court Administration and Budgets

In most States and Territories⁵⁴, court administration is undertaken by a department of executive government answerable to executive government, rather than to the judiciary. In all Australian jurisdictions, the extent of the resources made available for the exercise of the judicial power is determined by executive government.

⁵³ New South Wales.

⁵⁴ All other than South Australia.

There is a credible argument to the effect that a court which cannot determine when, where and how often it will sit, or which lacks the resources to apply to the proper discharge of the judicial function cannot be regarded as truly independent. However, that argument has never been translated into legal terms so as to require governance models under the control of the judiciary. In Canada, the Supreme Court has held that administration of the court by a government department did not infringe the independence and impartiality of the court.⁵⁵

These examples provide an illustration of the relative flexibility of the doctrine of separation of powers when applied to the courts of the States.

Possible Constitutional Constraints Upon the Powers of State Courts

Notwithstanding the relative flexibility of the doctrine of separation of powers at State level, the voluble barking of the guard dog in Ch III of the Constitution has established that there are at least some constitutional constraints upon the powers that may be given to, or removed from, State courts. Some have already been mentioned. They include the inability of a Parliament of a State to direct a State court to act in a way which is inconsistent with fundamental principles of procedural fairness⁵⁶ and the inability of a State Parliament to deprive State courts of jurisdiction which is an indispensable characteristic of a system of State courts.⁵⁷

It seems likely that future cases will identify other areas of constitutional constraint upon the legislative powers of the parliaments of the States

⁵⁵ *Valente v The Queen* (1985) 24 DLR (4th) 161.

⁵⁶ *Totani; International Finance Trust Company Ltd v New South Wales Crime Commission*.

⁵⁷ *Kirk; Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia*.

with respect to courts created by those parliaments. I will now attempt the difficult task of identifying some of the areas in which those constraints might be found.

Justiciability - Advisory Opinions

It is beyond the scope of this (or perhaps any) paper to provide an exhaustive definition of what constitutes a justiciable controversy. For present purposes it is sufficient to observe that the determination of existing rights and obligations arising from facts that are not hypothetical at the suit of parties with a sufficient interest in the subject matter of the dispute will involve a justiciable controversy falling readily within the scope of judicial power. By contrast, the High Court has consistently recoiled against the proposition that it has jurisdiction to provide advisory opinions, or to determine cases on the basis of hypothetical facts or future events which may or may not occur. Gummow J has observed that, 'the advisory opinion is alien to the federal judicial power'.⁵⁸

If the provision of advisory opinions is alien to the federal judicial power, there would seem good reason to suppose that it is alien to the powers legitimately conferred upon State courts which could be the repositories of the judicial power of the Commonwealth under Ch III. The provision of advice to the executive or to the Parliament on abstract questions of law, or the issue of rulings on facts which are hypothetical would appear to be so inconsistent with the institutional integrity of a court as to be incompatible with Ch III.

However, it has been held that the reference of a point of law to the court by a State Attorney General 'for its consideration and opinion' following

⁵⁸ *Grollo v Palmer* (1995) 184 CLR 348, 391.

the acquittal of an accused does not take the court beyond the boundaries of judicial power, notwithstanding that the ruling of the court will have no effect upon the acquittal.⁵⁹ A majority of the High Court did not consider such a reference to require the court to determine an abstract question on the basis of hypothetical facts, but rather conferred jurisdiction upon the court to correct an error of law which occurred during the course of a trial. In the view of the majority, proceedings of that kind bore the characteristic of judicial power.

Administrative Review on the Merits

Until the creation of the State Administrative Tribunal in 2005, it was quite common for legislation in Western Australia to confer jurisdiction upon State courts to review administrative decisions on their merits, sometimes by way of a hearing de novo. Such jurisdiction did not involve the determination of a justiciable controversy, in the sense in which I have used that term, as it did not involve the determination of existing rights and obligations, but involved the possible creation or extinguishment of rights and obligations through the exercise of the administrative power of decision. Prior to the decision in *Kable*, it had never been suggested that conferring jurisdiction of this kind upon the courts of the States was beyond the legislative competence of the State Parliaments, and indeed some decisions of the High Court had proceeded upon the assumption that decisions made in the exercise of that jurisdiction can properly be described as a judgment of a court for the purposes of the appellate jurisdiction of the High Court.⁶⁰ As I have noted, in *Kable*, McHugh J expressed the view that conferral of jurisdiction of this kind was not incompatible with Ch III of the

⁵⁹ *Mellifont v Attorney General (Queensland)* (1991) 173 CLR 289. Many States have provisions of this kind.

⁶⁰ See for example *Medical Board of Victoria v Meyer* (1937) 58 CLR 62.

Constitution because the character of the jurisdiction was not repugnant to the exercise of the judicial power of the Commonwealth by the court concerned.

However, no other member of the court expressed a similar view. Further, it would seem likely that there may be some practical limits upon the type of jurisdiction which could be validly conferred upon a State court consistently with Ch III. For example, if legislation conferred a power of decision upon a Minister of the Crown in an area fraught with political controversy or ripe with issues of public policy rather than law⁶¹, it is not hard to imagine a circumstance in which it might be held that conferring a power of review upon the court, in which the court stands in the shoes of the ministerial decision-maker, exercising administrative powers by reference to the merits of the issues at hand, could take the court so far away from the resolution of justiciable controversy and so far within the realm of executive government as to be inconsistent with the institutional integrity of the court.

Alternative Dispute Resolution

All the civil courts of Western Australia provide court-based mediation services. In the Supreme Court those services are provided by registrars in the main, but on occasion judges of the court act as mediators. When acting in this role, judges are not exercising judicial power, but this would not, of itself, appear to take the activity beyond constitutional bounds. That would only occur if participation by a judge in a mediation is inconsistent with the institutional integrity of the court. Assuming that the practices of the court preclude further participation by the judge in the case following the mediation, it is difficult to see any basis upon which it

⁶¹ One example which comes to mind is the area of environmental regulation.

could be concluded that judicial participation in this activity is so inconsistent with the integrity of the court as to exceed constitutional bounds. Justice Michael Moore, writing extracurially, and academic commentators have expressed a similar view.⁶²

Therapeutic Jurisprudence

A number of Western Australian courts operate by applying principles often described under the heading 'Therapeutic Jurisprudence'. Specialist courts such as the drug court and the family violence courts generally involve the magistrate overseeing the provision of counselling and other programmatic services to those awaiting sentence with the objective of encouraging rehabilitation prior to sentence. The functions performed by a judicial officer in this context are very different to the traditional functions of a court. Chief Justice French has warned that performance of such functions might result in the possible loss of the distinctive character of the judicial function, and its confusion with the provision of services by the executive branch of government.⁶³ However, that is different in character to the suggestion that the performance of such a role, prior to sentence, is so incompatible to the judicial function as to impugn the institutional integrity of the court. As far as I am aware, that proposition has never been advanced, and it is difficult to see that it would have any real prospect of acceptance, given that the encouragement of rehabilitation is one of the traditional and accepted principles of sentencing.

⁶² M F Moore, 'Judges as Mediators: A Chapter III Prohibition on Accommodation?' (2003) 14 ADRJ 188; I Field, 'Judicial Mediation, the Judicial Process in Chapter III of the Constitution' (2011) 22 ADRJ 72; T Sourdin, 'Five Reasons Why Judges Should Conduct Settlement Conferences' (2011) 137 Monash UL Rev 145.

⁶³ R S French, 'State of the Australian Judicature' (2010) 84 ALJ 310, 316.

Transparency

As I have noted, legislation which would require State courts to depart from fundamental principles of procedural fairness has been ruled invalid. Many decisions have recognised that public access and transparency is, like procedural fairness, a fundamental characteristic of curial proceedings. It is therefore reasonable to suggest that a legislative proscription requiring all proceedings involving the State to be heard behind closed doors to the exclusion of the public would be so inconsistent with the proper exercise of judicial power as to impermissibly impugn the institutional integrity of the court.⁶⁴ However, legislative restrictions upon public access in certain types of cases for apparent public policy purposes may be entirely consistent with the judicial function. Accordingly, legislation which required any appeal by the Attorney General on a question of law following an acquittal for contempt of court to be held *in camera*, and which prohibited publication of the submissions and of the identity of the respondent was found not to infringe Ch III.⁶⁵ Similarly, it could not be credibly suggested that the legislation which prohibits publication of the identity of children accused of criminal offences or the subject of care and control proceedings, or complainants in sexual offence cases, or parties to Family Court proceedings is inconsistent with the fundamental characteristics of the exercise of judicial power.

Appointment of a Judge *Persona Designata*

State and federal legislation not uncommonly provides that judges are qualified for appointment to non-judicial positions by reason of their

⁶⁴ *John Fairfax Publications Pty Ltd v Attorney General* (NSW) (2000) 181 ALR 694, [72] (Spigelman CJ).

⁶⁵ *Ibid.*

appointment as a judge (with the consent of the appointee). The constitutional validity of provisions in federal legislation providing for the appointment of federal judges to non-judicial positions has been upheld a number of times - for example, in relation to the position of President of the Administrative Appeals Tribunal⁶⁶, or the exercise of powers to issue warrants authorising the interception of telecommunications.⁶⁷ However, the validity of the non-judicial appointment depends upon the powers conferred by that appointment being compatible with the exercise of judicial power. The notion of incompatibility was explored in the reasons given in *Grollo v Palmer*. Examples given include the situation in which so permanent and complete a commitment to the performance of non-judicial functions was required as to exclude the further performance of substantial judicial functions by the judge, and the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution, or in the capacity of the individual judge to perform his or her judicial functions was diminished.

Following the decision in *Kable*, there is every reason to suppose that incompatibility as a result of diminution of public confidence in the integrity of the judiciary as an institution or in the capacity of the individual judge would apply equally to the appointment of a State judge to non-judicial positions as *persona designata*. *Grollo* also stands for the proposition that while judicial authorisation of particular forms of investigation involving interference with civil liberties is compatible with the judicial function, notwithstanding its clandestine character, judicial participation in, or oversight of criminal investigation would be

⁶⁶ See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

⁶⁷ *Hilton v Wells* (1985) 157 CLR 57.

incompatible with the judicial function.⁶⁸ It seems likely that the precise boundaries of the line between compatible and incompatible involvement by judges in criminal investigation remain to be drawn.

Incompatible Appointments

In addition to those instances in which judges are qualified for appointment to a non-judicial position because of their appointment as a judge, from time to time judges are appointed to non-judicial positions for which no particular prior qualification is required, although as a matter of fact, because they have the characteristics of independence and integrity associated with the judiciary. Since the decision in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*⁶⁹, it is clear that there are constitutional constraints upon this practice. In that case, the relevant minister appointed a person who was a judge of the Federal Court to prepare a report to enable him to decide whether to issue a declaration to preserve an area of land as an area of Aboriginal significance. The High Court, by majority, considered the role to be incompatible with her appointment as a federal judge because it placed her 'firmly in the echelons of administration ... in a position equivalent to a ministerial advisor'. In the view of the majority, the Constitution required the political branches of government to eschew the temptation to borrow the appearance of independence and integrity from the judicial branch by recruiting its officers to their cause.

Notwithstanding the decision in *Wilson*, it continues to be the practice to appoint State judges to conduct inquiries such as Royal Commissions.

⁶⁸ This of course is to be contrasted with civil law countries, where the oversight of criminal investigation falls squarely within the recognised scope of judicial power.

⁶⁹ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 ('the Hindmarsh Island case').

Since the decision in *Kable*, it is fairly arguable that there are no less constraints upon State judges than upon federal judges in this regard. The validity of any such appointment would therefore appear to depend upon an analysis of the precise functions to be undertaken by the appointee. If the power of inquiry and report is to be exercised independently of executive government, and with the characteristics of transparency and independence which often characterise the proceedings of a Royal Commission, it would appear cogently arguable that the appointment is not incompatible with the judicial function. On the other hand, the closer the functions of the appointee resemble those traditionally performed by the executive branch of government, the greater the risk of incompatibility.

Constraints upon State Courts - Summary

The foregoing analysis of the possible constraints upon the role and powers of State courts imposed by Ch III of the Constitution is not intended to be exhaustive, but merely identifies some of the likely areas of future controversy. Recent years have demonstrated the difficulty of accurately predicting the future direction of the cases in this area. Recent trends, however, would suggest that the likelihood of further controversy in this area is high, as is the elucidation of particular constraints upon the roles and powers of State courts.

Conclusion

This paper has attempted to address the role of the courts as the third branch of government within the constitutional framework of the State. That analysis has demonstrated that the Commonwealth Constitution is by far the most significant instrument bearing upon the role and powers

of the courts of the States. Ch III of that Constitution has emerged to fill a significant gap left by the constitutional instruments of the State.