

12-1-1997

The Parliament, the Executive and the Courts: Roles and Immunities

Sir Gerard Brennan

Recommended Citation

Brennan, Sir Gerard (1997) "The Parliament, the Executive and the Courts: Roles and Immunities," *Bond Law Review*: Vol. 9: Iss. 2, Article 2.

Available at: <http://epublications.bond.edu.au/blr/vol9/iss2/2>

This Article is brought to you by the Faculty of Law at ePublications@bond. It has been accepted for inclusion in Bond Law Review by an authorized administrator of ePublications@bond. For more information, please contact [Bond University's Repository Coordinator](#).

The Parliament, the Executive and the Courts: Roles and Immunities

Abstract

After two centuries of constitutional development and one century of Federation, Australia is reconsidering its federal Constitution. We may choose to alter the preamble to our Constitution, or to distribute the powers of government in different ways, or to define new limits to the powers of government. Whatever changes are made to the Constitution, it must serve not only the present generation, but future generations in a future world dealing with problems that are presently unforeseen.

Keywords

Australian Constitution, constitutional change, Parliament, Executive Government, Judiciary

ARTICLES

**THE PARLIAMENT, THE EXECUTIVE AND THE COURTS:
ROLES AND IMMUNITIES**

*By THE HON SIR GERARD BRENNAN, AC KBE Former Chief Justice Of
Australia*

Constitutions are made for a people and for a time. They may be drawn in terms which reflect the history and aspirations of a people, as does the preamble to the Irish Constitution, in terms which prescribe the repositories of the powers of government, as does the Australian Constitution, and in terms which limit the powers of government in order to protect personal rights, privileges and immunities, as the United States Bill of Rights or the Canadian Charter of Rights and Freedoms are expressed to do.

After two centuries of constitutional development and one century of Federation, Australia is reconsidering its federal Constitution. We may choose to alter the preamble to our Constitution, or to distribute the powers of government in different ways, or to define new limits to the powers of government. Whatever changes are made to the Constitution, it must serve not only the present generation, but future generations in a future world dealing with problems that are presently unforeseen.

If those problems could be foreseen, it would be easier to fashion a Constitution that would best serve the Australian people. But the problems that can be foreseen provide only a tantalizing indication of the future while showing with certainty that the world in which we live will be vastly changed before another century has passed. Society will be transformed by technology, science and economics. Artificial intelligence will alter the patterns of employment and diminish the need for human agency in many activities; the influence of the mass media on human values and ways of thought may become even more powerful; interventions in human reproductivity and modifications of the natural span of life may radically affect familial, sexual and social relations; globalization of economies will see the growth of corporate States and a corresponding contraction of the nation State; international agreements will bind the nation States to action in an ever-enlarging variety of subjects; new sources of energy may affect the distribution of wealth and the possession of political and military power; climatic change may affect not only land but peoples; the speed and ease of movement and communication may either assist global peace or enhance the risk of conflict between peoples of different cultures, races and religions. Homogeneous electorates of the old democracies will become increasingly diverse with movements of people from their ancestral homelands. But throughout these changes, humankind will remain the same

THE PARLIAMENT, THE EXECUTIVE AND THE COURT'S ROLES AND IMMUNITIES

- with the same mystical spark that gives each a unique dignity and, as those who believe would hold, an eternal destiny; with the same basic concerns for life, liberty, property and human relationships that can be satisfied only in a society governed by law.

As we reach the end of the 20th century, it is helpful to draw on our experience of the institutions of government which have served us in the changing circumstances of our own times and to consider whether those institutions and functions are to be maintained or changed by a Constitution that must cope with the exigencies of the century to come. It is useful to reflect on the roles of the three branches of government under the Constitution of the Commonwealth and the extent to which each is or should be immune from external checks on the exercise of its powers. This is familiar territory but we need to identify the aspects of our Constitution that can serve us well and the aspects which need to be improved.

The Constitution of the Commonwealth brought the Australian nation into existence. It ordained a federal system of government with limited powers. The Constitutions of the erstwhile Colonies became the Constitutions of the States subject to the Constitution of the Commonwealth. Ultimately, with the passage of the *Statute of Westminster Adoption Act* in 1942 and the *Australia Act* in 1986, sovereign power came to be held wholly within Australia. The dual legal regimes of Commonwealth and States were adjusted by the Constitution¹ so that Commonwealth, State and Territorial laws are integrated, and the High Court, being a single apex of the hierarchies of the several court systems, is empowered to keep legal principle consistent throughout the Australian legal system. The division of powers between the Commonwealth and States has raised major constitutional issues for determination and still does so. Dispute over the taxation powers of the respective polities is a recent example². That is inevitable under a Constitution which distributes power in a Federation. But I do not pause to consider that division. There is a more basic question for consideration, namely, the suitability for the future of the Westminster system of government as adapted for use by the Commonwealth under our Constitution. It is a system which, with variations, defines the organs of government of the States and Territories and distributes their respective powers - legislative, executive and judicial - among those organs.

The common law spelt out the principles governing the exercise of power by the three branches of government under the Westminster system, the theory of which was expounded and the virtues of which were extolled by Professor Dicey.³ The Diceyan theory attributes political sovereignty to

¹ s 109.

² *Ha v New South Wales* (1997) 71 ALJR 1080; 146 ALR 355.

³ In his *Lectures Introductory to the Study of the Law of the Constitution*, 1st ed (1885), 8th ed Macmillan & Co, London (1915), and *Lectures on the Relation Between Law and Public Opinion in England*, 1st ed (1905), 2nd ed reprint Macmillan & Co, London, (1924).

(1997) 9 BOND LR

the people, or at least to the electors. The theory assumes that Parliament, being subject to popular election, must adhere to the wishes of the people and that the laws made by delegates of the people in Parliament will accord with the people's will. The Executive Government, being responsible to the Parliament for the exercise of executive powers, is accountable, albeit indirectly, to the people. Thus the political branches of government simply give expression to the popular will. The Courts apply the statutory expression of the people's will in individual cases. Thus Government by the people is effected through their elected delegates, democracy is secure and the beneficent sentiments of the people protect the life, liberty and property of the individual. Dicey acknowledged that the Courts also make law but make it under the constraints of logic and precedent, two factors which distinguish judicial legislation from parliamentary legislation.⁴

The Constitution substantially followed the Westminster practice described by Dicey. Popular election of the Parliament is required by ss 7 and 24; s 64 requires that every Minister of State be or become within three months a member of the Parliament. Representative and responsible government is the constitutional model, as the High Court pointed out in *Lange v Australian Broadcasting Corporation*.⁵

Our Constitution, influenced by the Constitution of the United States, assigned federal legislative, executive and judicial powers to different repositories: legislative power to the Parliament (s 1); executive power to the Governor-General (s 61) and judicial power to the Courts (s 71). But there is a radical difference between the two Constitutions.⁶ Our Constitution brings the repositories of legislative and executive power together in the Parliament in order to make the Executive Government responsible to the Parliament in conformity with the Westminster system. The American Constitution keeps the President, the repository of executive power, separate from the Congress, the repository of legislative power. Ministerial responsibility to the Parliament is at the heart of our system. Despite s 61 of the Constitution, which provides that the executive power of the Commonwealth should be 'vested in the Queen and ... exercisable by the Governor-General', executive power is reposed only nominally in the Governor-General. Leaving aside the reserve powers, executive power is exercised by the Governor-General in accordance with the advice of the Executive Council. Hamilton, writing in *The Federalist Papers*⁷ 200 years ago, spoke of the then-emerging Westminster system in England:

Nothing, therefore, can be wiser in that kingdom than to annex to the king a constitutional council, who may be responsible to the nation for the advice they give. Without this, there would be no

4 Dicey AV, *Law and Opinion in England*, London, (1924) at 370 note 1.

5 (1997) 71 ALJR 818 at 824-825; 145 ALR 96 at 104-106.

6 See Hamilton's comparison of the two systems in No 70 of *The Federalist Papers*, New American Library (ed) at 423.

7 No 70 of *The Federalist Papers*, New American Library (ed) 423 at 429.

THE PARLIAMENT, THE EXECUTIVE AND THE COURT'S ROLES AND IMMUNITIES

responsibility whatever in the executive department - an idea inadmissible in a free government.

Under the American system, the President acquires authority to exercise executive power not from the Congress but from direct election by the people.

Under both the Australian and the American Constitutions, the political branches of government are kept separate from the judicial branch. Montesquieu had pointed out that 'there is no liberty, if the power of judgment be not separated from the legislative and executive powers'⁸. Hamilton, following Montesquieu, described⁹ an independent Judiciary as 'the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws'.¹⁰ In this country, the separation of judicial from legislative and executive power and the separation of the judges from political activity have been rigorously maintained by the High Court.¹¹ The separation of the political powers from the judicial power and the repositories of those respective powers from one another guarantees not only the independence of the Judiciary but the appropriate responsibility for the exercise of those powers. Let me explain.

Responsibility for the state of the law and its implementation must rest with the branches of government that are politically accountable to the people. The people can bring influence to bear on the legislature and the executive to procure compliance with the popular will. But a clamour for a popular decision must fall on deaf judicial ears. The Judiciary are not politically accountable. The Courts cannot temper the true application of the law to satisfy popular sentiment.¹² The Courts are bound to a correct application of the law, whether or not that leads to a popular decision in a particular case and whether or not the decision accords with executive policy. In *Clunies-Ross v The Commonwealth*¹³ the High Court said:

It would be an abdication of the duty of this Court under the Constitution if we were to determine the important and general question of law ... according to whether we personally agreed or disagreed with the political and social objectives which the Minister sought to achieve. ... As a matter of constitutional duty, that question must be considered objectively and answered in this Court as a question of law and not as a matter to be determined by reference to the political or social merits of the particular case.

The rule of law would be a hollow phrase if the Courts were not bound to ignore popularity as an influence on a decision. Hamilton wrote.¹⁴

8 Montesquieu, *The Spirit of Laws*, Dublin, (1751), vol I, Bk XI, Ch 6, 185.

9 No 78 of *The Federalist Papers* at 464.

10 No 78 of *The Federalist Papers* at 465.

11 *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254; *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 70 ALJR 743; 138 ALR 220.

12 Dicey, *Law of the Constitution* at 71-72.

13 (1984) 155 CLR 193 at 204.

14 No 78 of *The Federalist Papers* at 470.

(1997) 9 BOND LR

Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.

Some critics of the Judiciary, and even some Judges, mistake public popularity for confidence. But if the Courts were to seek popular acclaim, they could not be faithful to the rule of law. Confidence is based on faithful adherence to the law by the Courts which are charged with its declaration¹⁵ and application. Our Constitution, rooted in the common law, does not need to express the proposition that the nation is under the rule of law and that the Courts are the organ of government responsible ultimately for the enforcing of the rule of law. That is the Constitution's fundamental postulate, inherent in its text, especially in Ch III. As Dixon J said in the *Communist Party Case*,¹⁶ the Constitution

is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.

Under our Constitution, the Courts apply the law not only as between private individuals but in proceedings for the control of the other branches of government. In some Constitutions, such as the Constitution of the People's Republic of China, the rule of law is differently understood. It is understood to require the several agencies of government to observe such rules as bind those agencies but the rule of law is not thought to confer any jurisdiction on Courts to compel obedience to laws binding other agencies.¹⁷ Under Ch III of our Constitution, all federal legislative and executive power is brought under the supervision of the judicial power in order to ensure conformity with the Constitution and the laws made under it. No exception is allowed. No immunity of a federal legislative or executive act from judicial review is possible. This is the constitutional guarantee of equality under the law for the minority as well as the majority in their relationship with government; for the underprivileged as well as the powerful, for the unpopular as well as the mainstream. Sir William Wade has written:¹⁸

... to exempt a public authority from the jurisdiction of the courts of

15 *Marbury v Madison* (1803) 1 Cranch 137; 5 US Reports 87.

16 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 at 193.

17 Chen, *An Introduction to the Legal System of the People's Republic of China*, Singapore, (1992) at 46.

18 Wade, 'Constitutional Fundamentals', *Hamlyn Lectures*, 32nd series (1980) at 83-84.

THE PARLIAMENT, THE EXECUTIVE AND THE COURT'S ROLES AND IMMUNITIES

law is, to that extent, to grant dictatorial power. ... The law's delay, together with its uncertainty and expense, tempts governments to take short cuts by elimination of the courts. But if the courts are prevented from enforcing the law, the remedy becomes worse than the disease.

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

The rule of law is the cement of the Westminster system in our federal Constitution. If the Diceyan theory holds, the legal regime emerging from that system must give effect to the popular will. Parliament is responsive to the popular will, and Parliament initiates the laws that the regime implements and enforces. But the theory of parliamentary initiative in setting the agenda of the regime does not now fit the reality, if ever it did.

Politically, the discipline of the party system, the policy initiatives undertaken by cabinets and shadow cabinets and the media focus on personalities have tied political fortunes to the performance of party political leaders. In government, the fortunes of the Executive and particularly of the Prime Minister determine the fortunes of the government back bench; the fortunes of the shadow Executive and particularly of the Opposition Party Leader determine the prospects of return of the Opposition to the government benches. Nowadays, one of the most important functions of members of Parliament is performed in the party rooms when the members caucus as an electoral college for the choice of a leader or leaders to whose fortunes their own fortunes are linked. And circumstances have enhanced the importance of Executive functions. The increasing complexity of society, the exigencies of war, the control of domestic economies and international trading relationships have all evoked the exercise of executive power to make speedy and nice adjustments to regulatory regimes. The welfare state has multiplied the range of administrative powers affecting our daily lives.

Executive policy has become the central feature of governmental activity and legislative power is oftentimes seen merely as an adjunct to the implementation of executive policy. The statute book now bulges with regulations, proclamations and orders in Council made not by the Parliament but in reality by Ministers or their departmental officers under parliamentary authority. In 1995, the Acts of the Parliament covered 5,626 pages and the Statutory Rules covered 3,893 pages. Ministers, faced with the difficult and complex problems of contemporary government, draw upon both legislative and executive powers as needed to implement their policies and to respond to situations requiring governmental action. Parliament's role as the master of governmental initiatives has been diminished. Dicey thought that 'a parliamentary executive [that is, the Ministry] must by the law of its nature follow, or tend to follow, the lead of

(1997) 9 BOND LR

the Parliament'.¹⁹ A century of change has inverted that proposition. Lord Hailsham of St Marylebone, a former Lord Chancellor, said²⁰ that the powers of government within Parliament are 'now largely in the hands of the government machine, so that the government controls Parliament and not Parliament the Government.' He concluded:

We live under an elective dictatorship, absolute in theory if hitherto thought tolerable in practice.

That is not a completely accurate description of our constitutional workings. Parliamentary committees and an elected Senate that is not necessarily of the same political complexion as the House of Representatives monitor the exercise of some powers by the Executive Government of the Commonwealth. However, Lord Hailsham's description is close to the mark. It is particularly close to the mark in those States where similar balancing mechanisms are not found.

The model of a powerful Executive, responsible to but in substantial control of the Parliament, is familiar to the Australian people. It ensures that any divergence between the policy of the Executive Government and statute law is kept to a minimum and it provides a concentration of powers to cope with problems of national importance and great urgency. Thus there is much to be said for retaining the present distribution of political power under the Westminster system. At least it provides a single line of political legitimacy, although the people's access to their local members is not assured of any effect upon the policy of government.

The rejection by the recent Constitutional Convention of the proposal to have the President of a republican Australia elected by popular vote seems to have been based on a concern that political authority should not be divided between a popularly-elected President on the one hand and the Executive Government responsible to and through the Parliament on the other. Of course, such a division could be avoided if a popularly-elected President were constitutionally constrained to exercise executive powers in accordance with ministerial advice. In essence, that is the way in which the Irish people kept the mass of political power in the hands of an Executive responsible to a Parliament while providing for a popularly-elected President.²¹ Special provision was made to govern the President's exercise of her powers to summon or dissolve Parliament²² and to appoint the Taoiseach (the Prime Minister).²³ The constitutionally significant issue is whether executive power (other than reserve powers) is to be exercised in fact solely by Ministers responsible to the people in and through the Parliament (the Westminster system) or whether executive power is to be

19 *Law of the Constitution*, Appendix at 484.

20 In the 1976 *Dimbelby Lecture*.

21 Irish Constitution, Arts 13.11, 12.2.

22 Irish Constitution, Art 13.2.

23 Irish Constitution, Art 13.1.

THE PARLIAMENT, THE EXECUTIVE AND THE COURT'S ROLES AND IMMUNITIES

exercised by a President responsible to the people by direct election (as in the American system).

If our Constitution continues to deny the Governor-General (or a republican President) executive power to be exercised independently of ministerial advice - leaving aside the reserve powers - the question we have to face is whether a concentration of such political power in the hands of a Parliamentary Executive is desirable to cope with the problems of the century to come. Efficiency in administration and a capacity to deal quickly and confidently with major domestic issues, with the economy, with national security, with foreign relations or with international trade, commerce and intercourse suggest that such a concentration of political power should be retained. But there are dangers in maintaining a structure which lends itself to the concentration of political power in the Executive Government. There is a risk of efficiency turning into tyranny.

The separation of powers is supposed to preserve freedom by providing checks and balances. It is here that one sees a weakness in the constitutional framework. The traditional checks and balances are inadequate to protect minorities and the interests of individuals. The traditional checks are supervision by Parliament and judicial review by the Courts.

The creation of Senate Committees and Committees of the House to examine particular aspects of the exercise of executive power - for example, subordinate legislation - strengthens Parliamentary machinery for supervising the exercise of executive power. But the political ascendancy of the Executive Government necessarily limits the capacity of the parliamentary committees to deny validity to executive actions that come within their remit. And *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan*²⁴ has thus far precluded a judicial invalidation of subordinate legislation on the ground of an impermissible delegation by the Parliament of legislative power.

It may be unrealistic to expect any further development of parliamentary supervision of executive action. Indeed, the capacity of a government to govern might be impaired if the political ascendancy of the Executive were too severely eroded by parliamentary assertiveness. The Executive Government of the day should be able to command the political support needed to preserve the national interest in a constantly changing world. The national interest may be endangered in the century to come not only by the military, diplomatic and economic hazards with which this century has been sadly familiar but by the ambitions of the emerging corporate states. Corporations that recognize no geographical boundaries that exist to serve their shareholders' interests and that command economic resources greater than those available to many nation States may pose a

24 (1931) 46 CLR 73.

(1997) 9 BOND LR

threat in the 21st century to the economies, lifestyles and systems of government which we and other parliamentary democracies will wish to preserve. Of course, a powerful Executive Government which fell captive to an adverse corporate influence would itself be a Quisling to the national interest. But we must surely place our faith in the strong democratic tradition of our nation and the ability of the electors to regard integrity and devotion to the national interest as the chief criteria for election to the Parliament.

Whatever be the further development of parliamentary supervision of the Executive, the other traditional check on executive power, namely, judicial review, is and will remain unqualified. In *Brown v West*,²⁵ the High Court said:

Whatever the scope of the executive power of the Commonwealth might otherwise be, it is susceptible of control by statute.

It is, of course, susceptible of control by the Constitution itself. The law and the Constitution must control all branches of government, else freedom is a mirage. So the Executive cannot be immune from judicial review.

The subjection of executive action to judicial review has given rise to some tension between these two branches of government. The tension reaches its height when the court sets aside a politically important decision of the Executive Government. It is the maintenance of the rule of law in politically charged cases that make it essential that the Judiciary be, be seen as, and see themselves as, independent of government and immune from its influence. Traditionally, tenure and irreducible conditions of engagement have been the props of judicial immunity. But inflation and the nominalist theory of money have exposed judicial conditions to executive influence and the provision of resources for the Courts remains an unresolved problem. This seems to me to be another area in need of constitutional repair to ensure both independence of the Judiciary and its ability to administer the law in a timely and efficient manner.

The tension between the two branches of government is fed sometimes from another source. If a court erroneously classifies a question of fact as a question of law or too readily stigmatizes a decision as unreasonable in the *Wednesbury*²⁶ sense of a decision that no reasonable repository of the power could make and the court thereby holds itself to have a jurisdiction to set aside an executive decision, the Executive Government may justifiably be aggrieved. These are cases on which minds may differ as to the true classification. The principle is clear, but this source of tension will remain.

25 (1990) 169 CLR 195 at 202.

26 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

THE PARLIAMENT, THE EXECUTIVE AND THE COURT'S ROLES AND IMMUNITIES

Although in recent times most attention has been given to the control of executive power, the Parliament remains the organ of government which is *constitutionally* central to our form of government. The Constitution made the Houses of Parliament the masters of their own powers, privileges and immunities and of the mode in which those powers, privileges and immunities might be exercised and upheld.²⁷ No change in these provisions would be consistent with the maintenance of the Westminster system. The powers, privileges and immunities of the Houses of Parliament are the constitutional underpinning of the system of responsible government for they ensure that the manner in which the people's forum exercises its constitutional functions is immune from interference by either the executive or the judicial branch of government.

Although more rigorous political control of the Executive Government is not to be expected and judicial supervision is limited to ensuring that executive action is lawful, the exercise of some administrative powers - notably those that affect individual interests - needs to be subject to external merits review.

Administrative decision-making affecting individual interests has become so complex and voluminous that it has outstripped parliamentary capacity for effective supervision. The technical procedure for seeking judicial review of administrative action at common law is cumbersome and, in any event, judicial review cannot alter a decision which, though valid, is not the correct or preferable decision that ought to be made in the particular case. Sir Anthony Mason pointed out²⁸ that administrative decisions were made by officers lacking independence from the Executive Government and subject to political or bureaucratic influence, that they were not usually made in public, that the reasons for decision were usually unstated, that the requirements of natural justice were not always observed and that the individual's claims of justice were often subordinated to public policy. Acknowledgment of these realities led the Commonwealth to introduce an integrated set of statutory provisions for the review of administrative decisions.²⁹ The Administrative Appeals Tribunal and the office of the Ombudsman were created, the procedures for judicial review were broadened and simplified and departmental records were opened up under freedom of information legislation.

It will come as no surprise when I say that, in my respectful opinion, a modern Westminster democracy requires an effective means of externally reviewing the merits of some administrative decisions. The model of an independent, highly qualified, AAT possessed of the skills needed to apply

27 Constitution of the Commonwealth, ss 49, 50. As to State Parliaments, see *Arena v Nader* (1997) 71 ALJR 1604.

28 'Administrative Review: The Experience of the First Twelve Years' (1989) 18 Federal Law Review 122 at 130.

29 The *Administrative Appeals Tribunal Act* 1975 (Cth), the *Ombudsman Act* 1976 (Cth), The *Administrative Decisions (Judicial Review) Act* 1977 (Cth), the *Freedom of Information Act* 1982 (Cth).

(1997) 9 BOND LR

the relevant law, to obtain evidence, to evaluate the relevant facts and to exercise the relevant discretions was an admirable advance in administrative law and practice. Constitutionally, the AAT straddles two branches of government: the executive branch, whose powers it exercises in reviewing decisions on the merits, and the judicial branch, which it emulates in its independence, impartiality, skilled application of the law and coercive power to obtain evidence. The tension between the securing of justice in the individual case by the making of the correct or preferable decision and the application of executive policy for which a Minister is politically responsible sometimes poses a difficult problem for the AAT. But that is precisely the problem that is created by the existence of a powerful and active Executive Government in a society that places great store by individual rights, privileges and freedoms. Again, it will come as no surprise that Executive Governments and, in particular, their bureaucracies sometimes regard the AAT as an irksome trespasser on their territory - a cuckoo in the administrative nest. And so it is. And, in my respectful opinion, so it should be. It should also be a constructive participant in the improvement of administration and the refinement of policy. In times of economic stringency, the cost of maintaining a system of external merits review may be more than an Executive Government (perhaps encouraged by its bureaucracy) wishes to bear, but it is hard to overstate the importance of allowing the citizen an opportunity to meet government on equal terms in matters that affect that citizen.

An important check on possible misuse of executive power – indeed, on the exercise of any power – is publicity. Misuse of power flourishes in the dark; it cannot survive the glare of publicity. It is partly for that reason that the Courts adopt the general rule that they must sit in the open and deliver their reasons for judgment in the open. In *Russell v Russell*,³⁰ Gibbs J wrote:

This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. ... The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for 'publicity is the authentic hallmark of judicial as distinct from administrative procedure'.

The *Freedom of Information Act* 1982 provided a mechanism for prizing open the files of Government and thus exposing the dealings of Government to publicity. Of course, there had to be some limits imposed. The great affairs of State cannot be transacted in a gold fish bowl and too free an access to those transactions could have a chilling effect on communications on subjects of national interest.

30 (1976) 134 CLR 495 at 520. See also the paper by Sir Frank Kitto, 'Why Write Judgments?', (1992) 66 ALJ 787.

THE PARLIAMENT, THE EXECUTIVE AND THE COURT'S ROLES AND IMMUNITIES

The FOI Act has arguably been a useful tool in political debate and has been availed of by the media. The glare of publicity focused by independent and careful media on the transactions of government in all of its branches is one of the most significant protections of a modern Westminster democracy. The safeguarding of the independence of the media must be one of the primary objects of any Government committed to democracy. That is not to say that engagement in media activities is beyond legal control. To the contrary. Control may be needed to safeguard independence from influences which might tend to corrupt the fair and accurate reporting of newsworthy events and situations and which might produce unfairness in emphasis or comment. These journalistic desiderata are themselves encouraged by the laws of defamation.

I have said little about the role of the Courts, but it is clear that the competent, independent and impartial application of the rule of law is fundamental to all constitutional government. This was seen by Alfred Deakin, an architect of the Federation who, as Attorney General speaking on the introduction of the *Judiciary Act*, said this:³¹

What are the three fundamental conditions to any federation authoritatively laid down? The first is the existence of a supreme Constitution; the next is a distribution of powers under that Constitution; and the third is an authority reposed in a judiciary to interpret that supreme Constitution and to decide as to the precise distribution of powers. ... The Constitution is to be the supreme law, but it is the High Court which is to determine how far and between what boundaries it is supreme. The federation is constituted by distribution of powers, and it is this court which decides the orbit and boundary of every power. Consequently, when we say that there are three fundamental conditions involved in federation, we really mean that there is one which is more essential than the others - the competent tribunal which is able to protect the Constitution, and to oversee its agencies. That body is the High Court. It is properly termed the 'keystone of the federal arch.'

So long as the fundamental postulate of the Constitution continues to be the rule of law in the hands of the Courts, the individual can be protected against an unlawful exercise of power. However, the Courts are subject to the statutory directions of the Parliament. The consequence is that, if the statute is oppressive, injustice must follow. There can be some amelioration of oppression by judicial interpretation of statutes³² and development of the common law³³ so as to preserve human rights and fundamental freedoms. But under our present Constitution, it would be impermissible to strike down laws simply because they offend human rights and fundamental freedoms. That may be the function of a court armed with a Bill of Rights.

31 *Hansard*, 18 March 1902 at 10966-10967.

32 See, for example, *Coco v The Queen* (1994) 179 CLR 427 at 436-438. Cf *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

33 See, for example, *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 41-42.

(1997) 9 BOND LR

Should we have a Bill of Rights?

A Bill of Rights is necessarily drawn in open-textured terms. In essence it requires the Courts to apply values rather than rules to the solution of concrete problems and to attribute to values that are in competition a priority as between themselves. Thus if liberty and equality were both proclaimed in a Bill of Rights, priority might have to be determined, for liberty is antipathetic to equality when the protagonists are of unequal strength. A Bill of Rights invites, indeed, compels the Courts to assume a degree of political power. This would require a radical change in the judicial mind set which currently prides itself on its apolitical function. To be sure, a jurisprudence develops to guide its exercise, but the United States and Canadian experience shows that a Bill of Rights transfers considerable power from the political branches of government to the Judiciary. A public expectation is fostered that the Courts, rather than the Parliament, will be the ultimate protector of the public good and of individual freedoms and interests. Does Parliament seek to pass that role to the Courts? Power which is exercised according to values rather than rules inevitably involves the making of decisions affected by personal predilection. And, as every member of the community has his or her own values, the validity of court judgments may be seen to be problematic. Curial impartiality may become suspect.

On the other hand, a Bill of Rights would require the Judiciary to protect individual freedoms and interests more fully than they can be protected under the existing Constitution. And that protection may be needed if the Parliament is unwilling or unable to provide it. A further consideration in favour of a Bill of Rights is the strengthening of the hands of government against any external attempt to require the adoption of domestic laws or policies antithetical to individual freedoms and interests. Thus far the debate about the desirability of a Bill of Rights has excited controversy as to whether the Parliament, which is responsible to the people at the ballot box, can alone be trusted to protect minorities and the human rights and fundamental freedoms of individuals. Or whether the Courts, which are independent of majoritarian support and which are focused on individual cases, should be enlisted to safeguard the individual against incursions on human rights and fundamental freedoms by the political branches of government. In the future, the debate may focus more on the need for a Constitution that, by its own force, forestalls incursions on human rights and fundamental freedoms from any source, governmental or non-governmental, domestic or foreign. The considerations are complex. The answer I must leave to others.

Our Constitution is the product of our national experience. It is stable because it has substantially answered the political and legal expectations of the people. And, whatever be the form of our Constitution in the future, its effect will depend on the values and the sentiments of the Australian people.

Democracy and freedom will survive if the people demand it; strong

THE PARLIAMENT, THE EXECUTIVE AND THE COURT'S ROLES AND IMMUNITIES

government will protect the national interest if the people support it; the rule of law will secure a peaceful and ordered society if the people have confidence in it. It cannot be taken for granted that the values and sentiments of the people that infuse and inform our Constitution will continue to do so. The Constitution of the future must be seen to satisfy the needs and aspirations of a widespread, multi-cultural population. But the peace and order which comes with constitutional stability will remain if the people see their government reflecting their aspirations. And so we look to a Parliament and an Executive Government which show their commitment to democracy and freedom, to the national interest, to the protection of individual rights and interests and to the securing of an independent media. And we look to an independent, impartial, fearless and competent Judiciary to maintain the rule of law. Constitutionally, we are a lucky country. It is for Australia's leaders and its people to determine whether our luck holds.