

THE IDEA OF JUDICIAL POWER,

WITH SPECIAL REFERENCE TO

AUSTRALIAN LAW

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Abstract

The aim of this thesis is to contribute to analytical jurisprudence by studying in depth a concept that is characteristically legal and, at the same time, both a traditional term of descriptive political analyses and familiar in ordinary non-technical usage. The concept selected for study is "judicial power".

The intended point of the study is fourfold: (1) to illustrate a useful method of analytical jurisprudential enquiry; (2) to discover and illustrate the types of features, problems and lessons connected with the use of legal concepts, or of theoretical or commonsense concepts in a legal context; (3) to compare the approaches of descriptive theorists and of lawyers to those problems and features, and (4) to provide thereby some concrete evidence of the distinction (or absence of distinction) between legal thought, method and system, and the thought, method and system of commonsense and the purified commonsense of descriptive theory.

A long introductory chapter seeks to explicate these particular aims, and to place them in the context of contemporary analytical jurisprudence. In the first place, it argues that the sharp distinction, drawn by Prof. H. L. A. Hart, between descriptive statements or "statements of fact", and legal statements or "conclusions from rules", is misleading and ought to be abandoned as a solution for the puzzle it was put forward to resolve. This argument, if correct, clears the ground for a more-or-less straightforward comparison between the "descriptive" use of the term "judicial power" by political analysts from Aristotle to modern times, and the use of the

same term in "conclusions of law" arrived at by Justices of the High Court of Australia in interpreting the Australian federal Constitution. Moreover, in the course of the argument it is suggested that the general criterion of the correctness of statements, legal or otherwise, is the absence of further relevant questions that would lead to a revision of the statement, so that an analysis of the special features of legal language should not rely on the simple distinction put forward by Hart, but should seek to identify the general and special conditions surrounding the making of correct statements in legal as compared with other realms of discourse. Several such conditions are suggested a priori; legal discourse is distinguished from commonsense discourse by (1) the desire for a system in affairs; (2) the need to resolve disputes by giving final answers; (3) the consequent definition of terms, and limitation on further questions; (4) the consequent possibility of authority and precedent, further limiting questions, and providing (5) an actual system of definite terms and relations on which to base a transition to more abstract concepts expressing generically various systematic relationships possible between definite terms. A conclusion of the whole thesis is that such features or conditions of legal discourse may readily be identified in the history of the Australian discussions of judicial power.

In the second place, the introductory chapter introduces the notion of analytical jurisprudence sought to be illustrated by the thesis. It argues that analytical jurisprudence is not restricted to an examination of meanings, in the sense of "what current users happen to mean". The analyst can go behind current meanings to the sources of such meaning; such sources are not necessarily discernible directly in current usage, since they may not be

present to the minds of current users. But terms such as "judicial power" stand in a definite relationship (which Chapters One and Four seek to explain) with institutions and their assigned tasks and procedures. Such institutions, tasks and procedures are in fact realizations of certain human purposes and intentions (called in this thesis, values); these values are, in many respects, peculiarly appropriate objects of historical knowledge, and a study of them is an indispensable part of an analysis of the terms inasmuch as their meaning may be expected to reflect those same values. Purely legal thought is prevented, by its systematic limitation on further questions, from systematically pursuing the study of the values realized in legal institutions; hence analytical jurisprudence is a distinct discipline. But the same argument establishes the dependence of analytical jurisprudence on legal history, from which it is distinguished only by a lack of interest in narrative, chronology, and non-conceptual factors affecting the development of legal institutions and language.

In accordance with the programme and method thus announced, the body of <sup>the</sup>thesis consists of two parts. The first, made up of Chapters Two, Three and Four, studies a representative selection of theorists who have employed the term "judicial power" in their analyses of government and society, or who have explicitly argued against the inclusion of that term in any schema of basic governmental powers. The second part, made up of Chapters Five to Twelve, studies the history of the term "judicial power" in the Australian Constitution, seeking to place it in the context of the intentions and values of the founders as to the new governmental system and institutions they planned, and demonstrating how the methods and habits of mind of the Justices of the High Court, while presenting many of the features familiar

from the preceding study of pure theorists, have presented also certain features that go far to explain the radical divergence between the intentions of the founders and the established judicial interpretations of the Constitution. In both parts, the notion of analytical jurisprudence sought to be illustrated dictates the method of inquiry adopted: namely, the historical approach to more-or-less self-contained bodies of thought, the limitation of the inquiry to conceptual components, and the search, not for a "history of ideas", but for an accurate reconstruction of each of those bodies of thought, for a reproduction of the actual premises, methods, tendencies and blind spots of each.

Chapter Two, then, offers a detailed examination of Aristotle's thought on fundamental governmental powers, including a study of the Rhetoric (ordinarily disregarded in this context). It shows that Aristotle's formal discussions of governmental powers, in the Politics, present the triad that has become familiar: viz. legislative, executive and judicial; but that little or no satisfactory explanation of these terms and their interrelationships is advanced. From the Rhetoric, however, may be gleaned a considerable set of distinctions between legislative and judicial power, and a list of "judicial" features shows how closely Aristotle's notion corresponds with modern notions of judicial power.

Chapter Three begins by showing how eighteenth century theorists employed schemas at least terminologically similar to that offered by Aristotle, while differing widely as to the relative status of various elements, especially judicial power. It then conducts an extensive survey of the method and content of Bentham's analytical jurisprudence, to

discover why Bentham attempted to discredit the familiar triadic schema and to replace it with distinctions derived directly from his theory of law as command. A link is demonstrated, between the presuppositions of Bentham's method and those of Hart's distinction between "factual" and "legal" discourse. The remainder of the chapter shows how Bentham, in putting his analytical jurisprudence to work in the construction of an ideal Constitutional Code, was unable to do without the familiar triadic schema; and how his frequent informal use of the term "judicial" reveals the values implicit in the term though excluded from his consideration by his formal analytical method.

Chapter Four conducts a more wide-ranging examination of modern analyses of powers, in pursuance of the second of the particular aims enumerated at the head of this Abstract. From a study of Kelsen four lessons are derived: (1) as to the significance of assertions that such-and-such are "true", "essential" or "real" distinctions between powers; (2) as to the importance of general theories of law as controlling contexts for most analyses of powers; (3) as to the fascination of vague but apparently exhaustive terms, and (4) as to the difficulty and importance of the various types of element specified in definitions of, and distinctions between, powers. It is suggested that these lessons are of general application, and each is illustrated at some length from the writings of contemporary theorists. It is concluded, first, that theories of law (and hence of powers) purporting to be of quite general application are unlikely to be other than misleading in the analysis of particular systems, and rely on dubious (because unhistorical) criteria of validity; second, that the types of element relevant to distinctions between powers can, perhaps, be reduced

to four - "agent", "issue", "procedure", "values" - but certainly cannot be further reduced; third, that the terms in any analysis of powers are "analogical", in that their meaning shifts systematically because it embraces a set of elements or features which may all be present in one central case (the analogate) but need not all be present in other cases that can still be usefully indicated by the same term; fourth, that analytical jurisprudence has no tools of its own for drawing definite lines between one term and another, but can only indicate the relevant sets of values realized in particular systems, which values have a priority in characterisations of powers since its utility or "point" is the only test of a distinction between such terms.

Chapter Five provides an introduction to the second part of the thesis. It indicates the relevance and importance of discussions of "judicial power" under the Australian Constitution, and outlines the constitutional, historical and judicial context in which those discussions have taken place. Two outstanding problems are identified: (1) whether the Constitution embodies, as a controlling context for all definitions of powers, a triadic schema; (2) what, given such a schema, are to be the definitions distinguishing these three powers from one another, or at least judicial power from the others. The prevailing solution to the first problem, arrived at in the Wheat Case (1915) is set out at length, following the introduction of an important theoretical distinction between "Institutional" and "Abstract" doctrines of separation of powers. It is shown that the Wheat Case implies the dominance of the Abstract doctrine. The prevailing solution to the second problem, as arrived at in Alexander's Case, is also set out, and the opposition revealed between tests centred on the "issue", or criteria

for the judicial decision itself, and tests centred on the character of the "agent" (or tribunal) and its "procedure" as sovereign arbiter inter partes. This opposition continues throughout the history of judicial discussions of judicial power; one of the conclusions of the thesis is that the terms of the opposition correspond to the first two a priori conditions of legal discourse suggested in Chapter One, viz. the desire for system in affairs, and the need to opt definitely as between parties to disputes.

Chapters Six and Seven provide a proof, necessarily elaborate in view of the paucity of legally critical historical studies of the Australian Constitution, that both the Wheat Case and Alexander's Case represent clear reversals of the intentions of the founders. Chapter Six, supplemented by Appendix A on powers in the American Constitution, sets out the general features of the founders' method, language and intentions in relation to fundamental powers, and suggests that the final form of the Constitution was due to draftsmen's desire for verbal symmetries and lawyerlike habits of mind. Chapter Seven shows that the minority Justices in both the Wheat Case and Alexander's Case correctly interpreted the mind of the founders on the particular sections and institutions in question in those cases. It is noted that the leader of the majority in those cases, Isaacs J., was presenting views that he had unsuccessfully advanced as a founder, while the leader of the minority, Barton J., was presenting views that had been substantially accepted when put forward by him as official Leader of the Constitutional Conventions.

Chapters Eight and Nine trace the development of judicial discussion between the establishment of the Constitution and the decisions in the

Wheat Case and Alexander's Case. Chapter Eight shows that, where questions as to the balance of State and Federal powers did not arise, agreement as to the meaning of "judicial power" was general. Chapter Nine shows that where such "federal" questions were in issue, disagreement as to the meaning of "judicial power" was general, acute, and clearly connected with disagreement as to the proper answers to the federal questions. It concludes with a long section demonstrating the parallelism between the problems and lessons identified in Chapter Four and those identifiable in the Australian judicial discussions.

Chapters Ten, Eleven and Twelve divide subsequent judicial discussions into three further phases (1920-1930; 1930-1952; and 1952-1964) and study each in turn. These chapters demonstrate, more amply and more particularly, how general theories of law and of (Australian) federalism provide a controlling (if unrecognised) context for those discussions; how failure to acknowledge the complex analogical structure of such terms as "judicial power" has led to insoluble problems and contradictions; and how rival selections and grading of values is implicit, but often unacknowledged, in rival characterisations of powers.

A concluding chapter sets the second part of the thesis within the context established in Chapter One and elaborated in the first part. It is concluded that judicial reasoning about "judicial power" displays the same characteristics as non-judicial reasoning in descriptive political analysis. At the same time, it is recognised that a specially legal and judicial cast of mind has been introduced as an essential explanatory postulate in the analytical history offered in the second part. This cast of mind is

specifically a habit of abstraction, and the set of features indicated by this term is summarised. The correspondence between these features and the a priori conditions suggested in Chapter One is noted, and seems to confirm both the a priori argument of that chapter and the concrete hypotheses of both the general parts.

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Penton v. Australian Journalists' Association (1947) 73 C.L.R. 549: 11.16, 11.33-11.35, 11.37, 12.35

Pickard v. John Heine and Son Ltd. (1924) 35 C.L.R. 1: 5.32, 10.31

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- Powell v. Apollo Candle Co. (1885) 10 App. Cas. 282: 12.7
- Prentis v. Atlantic Coast Line (1908) 211 U.S. 210: 8.24, 9.22, 9.23, 12.28-12.29
- Proprietors of the Daily News Ltd. v. Australian Journalists' Association (1920) 27 C.L.R. 532: 10.5
- Queen Victoria Memorial Hospital v. Thornton (1953) 87 C.L.R. 144: 12.24-12.26, 12.27, 12.39-12.41
- Railway Servants' Case: see Federated Amalgamated...
- Randall v. Northcote Corporation (1910) 11 C.L.R. 100: 8.13-8.16, 9.62
- R. v. Archdall and Roskrige (1924) 41 C.L.R. 128: 11.10
- R. v. Arndel, ex p. Freeman (1906) 3 C.L.R. 557: 8.4-8.6
- R. v. Australian Stevedoring Industry Board (1953) 88 C.L.R. 100: 12.44
- R. v. Bernasconi (1915) 19 C.L.R. 629: 5.21, 5.41
- R. v. Bevan, ex p. Elias and Gordon (1942) 66 C.L.R. 452: 11.11
- R. v. Burah (1878) 3 App. Cas. 889: 12.7
- R. v. Commissioner of Patents, ex p. Weiss (1939) 61 C.L.R. 240: 11.23, 11.29
- R. v. Commonwealth Court of Conciliation and Arbitration, ex p. Barrett (1945) 70 C.L.R. 141: 11.31-11.38, 12.15, 12.33, 12.34
- R. v. Commonwealth Court of Conciliation and Arbitration, ex p. Ellis (1953-1954) 90 C.L.R. 55: 12.15, 12.34, 12.44
- R. v. Commonwealth Court of Conciliation and Arbitration, ex p. G. F. Jones, (Builders' Labourers' Case) (1914) 18 C.L.R. 224: 9.45-9.47, 9.50, 9.51
- R. v. Commonwealth Court of Conciliation and Arbitration and the Merchant Service Guild (1912) 15 C.L.R. 586: 9.43
- R. v. Commonwealth Court of Conciliation and Arbitration, ex p. Victoria (1944) 68 C.L.R. 485: 11.36
- R. v. Commonwealth Court of Conciliation and Arbitration, ex p. Whybrow (1910) 11 C.L.R. 1: 9.27-9.33, 9.35
- R. v. Commonwealth Industrial Court, ex p. Amalgamated Engineering Union (1960) 103 C.L.R. 368: 12.39, 12.46-12.50
- R. v. Connell, ex p. Hetton Bellbird Collieries Ltd. (1944) 69 C.L.R. 407: 11.36
- R. v. Cox, ex p. Smith (1945) 71 C.L.R. 1: 11.11

- R. v. Davison (1954) 90 C.L.R. 353: 5.46, 11.24, 11.25, 12.13, 12.20, 12.26-12.31, 12.32, 12.33, 12.54
- R. v. Federal Court of Bankruptcy, ex p. Lowenstein (1937-1938) 59 C.L.R. 556: 11.5-11.11, 12.5, 12.8, 12.9, 12.12
- R. v. Foster, ex p. Commonwealth Life (Amalgamated) Assurance Ltd. (1951-1952) 85 C.L.R. 138: 12.2
- R. v. Hibble, ex p. Broken Hill Proprietary Co. Ltd., (Hibble's Case [No. 1]) (1920) 28 C.L.R. 456: 10.14-10.15, 10.19, 10.26, 10.27, 10.30, 10.37, 11.29
- R. v. Kelly, ex p. A.R.U. (1953) 89 C.L.R. 461: 12.33
- R. v. Kelly, ex p. Victoria (1950) 81 C.L.R. 64: 9.32
- R. v. Kidman (1915) 20 C.L.R. 425: 8.33
- R. v. Kirby, ex p. Boilermakers' Society of Australia, (The Boilermakers' Case) (1955-1956) 94 C.L.R. 254: 5.47, 6.9, 10.8, 10.19, 12.5, 12.6-12.22, 12.33, 12.34, 12.38, 12.39, 12.43, 13.9
- R. v. Local Government Board [1902] 2 I.R. 349: 8.25, 10.26, 11.25
- R. v. Lydon, ex p. Cessnock Collieries Ltd. (1960) 103 C.L.R. 15: 10.31, 12.34
- R. v. Macfarlane, ex p. O'Flanagan and O'Kelly (1923) 32 C.L.R. 518: 10.14, 10.15, 10.21, 10.26, 10.27, 10.29, 10.34, 10.35
- R. v. President of the Commonwealth Court of Conciliation and Arbitration, ex p. Australian Agricultural Co. Ltd. (1916) 22 C.L.R. 261: 9.48
- R. v. Richards, ex p. Fitzpatrick and Browne (1954) 92 C.L.R. 157: 12.3-12.5
- R. v. Spicer, ex p. Builders' Labourers' Federation (1957) 100 C.L.R. 277: 12.35-12.39, 12.42, 12.44, 12.45, 12.46, 12.47, 12.48
- R. v. Spicer, ex p. Waterside Workers' Federation of Australia (1957) 100 C.L.R. 312: 12.34, 12.39, 12.42-12.46
- R. v. Thom Sing (1911) 13 C.L.R. 32: 8.32
- R. v. Taylor, ex p. Roach (1951) 82 C.L.R. 587: 12.15
- R. v. Turner, ex p. Marine Board of Hobart (1927) 39 C.L.R. 411: 10.14, 10.22
- R. v. Woodhouse [1906] 2 K.B. 501: 8.7-8.8

- R. v. Wright, ex p. Waterside Workers' Federation of Australia (1955) 93 C.L.R. 528: 12.2-12.3
- Richardson v. Federal Commissioner of Taxation (1931-1932) 48 C.L.R. 192: 11.26
- Riverina Transport Pty. Ltd. v. Victoria (1937) 57 C.L.R. 327: 11.36
- Roche v. Kronheimer (1921) 29 C.L.R. 329: 6.13, 10.8, 10.29, 11.2, 11.3, 12.51
- Rola Co. (Australia) Pty. Ltd. v. Commonwealth (1944) 69 C.L.R. 185: 11.9, 11.14-11.28, 11.29
- Ross v. R. (1922) 30 C.L.R. 246: 10.5
- Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson [1892] 1 Q.B. 431: 12.9
- Sachter v. Attorney-General for the Commonwealth (1954) 94 C.L.R. 86:12.5
- Saffron v. R. (1953) 88 C.L.R. 523: 10.29
- Sawmillers' Case: see Federated Saw Mill...
- Seamen's Union of Australia v. Matthews (1957) 96 C.L.R. 529: 12.23, 12.34
- Second Uniform Tax Case (1957) 99 C.L.R. 575: 5.10
- Sharp v. Wakefield [1891] A.C. 173: 8.14
- Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation, (Shell Case) (1930) 44 C.L.R. 530: 5.46, 10.10, 10.25, 10.30, 10.35-10.36, 11.19, 11.21, 11.22, 11.24, 12.32
- Silk Bros. v. State Electricity Commission of Victoria (1943) 67 C.L.R. 1: 11.26, 11.27
- South Australia v. Victoria (1911) 12 C.L.R. 667: 8.27-8.32
- South Australian Land Mortgage and Agency Co. v. R. (1922) 30 C.L.R. 523: 10.29
- Spackman v. Plumstead District Board of Works (1885) 10 App.Cas. 229: 9.19, 9.43
- Steele v. Defence Forces Retirement Benefits Board (1955) 92 C.L.R. 177: 12.39, 12.41-12.42, 12.45
- Steel Rails Case: see A.-G. (N.S.W.) v. Collector of Customs (N.S.W.)
- Tasmania v. Commonwealth (1904) 1 C.L.R. 329: 5.10

Thornton's Case: see Queen Victoria...

Tonking's Case: see Australian Apple...

Tramways Case [No. 1] (1914) 18 C.L.R. 54: 5.44, 9.40-9.45, 9.50, 10.16

Tramways Case [No. 2] (1914) 19 C.L.R. 43: 9.39

Transport Publishing Co. Ltd. v. Literature Board of Review (1956) 99 C.L.R. 111: 12.46

Trautwein v. Federal Commissioner of Taxation (1935-1936) 56 C.L.R. 196: 11.26

Victorian Chamber of Manufactures v. Commonwealth (Industrial Lighting Regulations) (1943) 67 C.L.R. 413: 11.26

Victorian Stevedoring and General Contracting Co. Pty. Ltd. v. Dignan (Dignan's Case) (1931) 46 C.L.R. 73: 5.8, 5.26, 5.40, 10.6, 10.8, 11.2-11.8, 12.2, 12.5, 12.8, 12.12

Walsh and Johnson, ex p., (1925) 37 C.L.R. 36: 6.13, 10.6, 10.19-10.23, 11.26

Waterside Workers' Federation of Australia, ex p. (ex p. W. W. F.): see R. v. Spicer...

Waterside Workers' Federation of Australia v. Gilchrist, Watt and Sanderson Ltd. (1924) 34 C.L.R. 482: 10.16-10.19, 10.26, 10.28, 10.29, 10.30, 10.34, 10.35, 10.37, 11.29, 11.30, 12.13

Waterside Workers' Federation of Australia v. J. W. Alexander Ltd. (1918) 25 C. L. R. 434: 5.36-55.55, 6.36, 7.7, 7.23, 7.48, 8.1, 8.3, 8.29, 9.23, 9.41, 9.48, 9.50, 9.51-9.53, 9.59, 9.62, 10.2, 10.7, 10.9, 10.12, 10.13, 10.17, 10.18, 10.24, 10.27, 10.28, 10.30, 10.31, 10.32, 10.34, 10.35, 10.36, 11.3, 11.13, 11.17, 11.18, 11.22, 11.25, 11.33, 11.34, 11.36, 11.37, 12.1, 12.10, 12.13, 12.14, 12.17, 12.33, 13.8, 13.9

Wayman v. Southard (1825) 10 Wheat. 1: 5.20, 6.1

Webb v. Hanlon (1939) 61 C.L.R. 313: 11.36

Weiss, ex p.: see R. v. Commissioner of Patents

West v. Commissioner of Taxation (N.S.W.) (1936-1937) 56 C.L.R. 657: 10.8

Western Australian Sawmillers' Case (1929) 43 C.L.R. 185: 10.24, 10.35

Wheat Case: see New South Wales v. Commonwealth.

Whybrow's Case: see R. v. Commonwealth Court...

Wilkinson v. Osborne (1915) 21 C.L.R. 89: 8.33

Woodworkers' Case: see Federated Saw Mill...

TABLE OF ABBREVIATIONS

1891 D	Official Report of the National Australasian Convention Debates, Sydney, 1891.
1897 D	Official Report of the National Australasian Convention Debates, 1897 (first session: Adelaide).
1898 D	Official Record of the Debates of the Australasian Federal Convention, Third Session, Melbourne, 1898.
A. C.	Appeal Cases
A. L. J.	Australian Law Journal
C. L. R.	Commonwealth Law Reports
I. R.	Irish Reports
L. Q. R.	Law Quarterly Review
R. J.	Res Judicatae (Melbourne University)
Syd. L. R.	Sydney (University) Law Review
U. Q. L. J.	University of Queensland Law Journal
W. A. Ann. L. R.	West Australian Annual Law Review

## CHAPTER ONE

### General aims, methods and terms

This study of the idea of judicial power is intended as a work of analytical jurisprudence. But the term "analytical jurisprudence" is not self-explanatory. The present introductory chapter, then, seeks to explain the general intention of the whole work, by showing how the relevant aims and methods of analytical jurisprudence are conceived in this study, and by introducing in outline the terms and relations that constitute the principal tools of the analysis and define its concrete aims and conclusions. Since, moreover, there is to be included a detailed consideration of the Australian federal law of judicial power, in both its genesis and its present state, it is of first importance to demarcate this study from works of legal history and critical textbooks that might be written on the same law.

That analytical jurisprudence is distinguished from legal history and from the writing of critical textbooks by nothing more than a pedagogic convention is the general conclusion that A.W.B. Simpson too rapidly draws from his penetrating discussion, "The Analysis of Legal Concepts".<sup>1</sup>

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1. (1964) 80 L.Q.R. 535, 558.

What he does seem to establish is the error of assuming that a technical ("legal") vocabulary must be linked to a special logical function.<sup>1</sup> What he does effectively criticize<sup>2</sup> is the programme, announced by Prof. H.L.A. Hart a decade ago,<sup>3</sup> of elucidating "legal concepts" by reference to a supposed special function of legal expressions. What he does himself usefully propose is an investigation of how, when, why and with what consequences the meaning of words in legal use diverges from and is related to the meaning of the same words in "ordinary" use.<sup>4</sup> But three outstanding questions remain to be answered before Simpson's criticisms of Hart, his proposal and his general conclusion could be adopted. (1) If Hart's thesis is held to have been mistaken, what is to be said about the problems and perplexities he was seeking to resolve? (2) Is the investigation of the meaning of words in use really the whole legitimate task of what pedagogues call analytical jurisprudence? (3) Are the two so-called disciplines of analytical jurisprudence and legal history co-extensive, and if not, what is the basis of a demarcation between them? The three following sections of this chapter

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1. Ibid., 549.

2. Ibid., 557.

3. Definition and Theory in Jurisprudence (1953) (also in 70 L.Q.R. 37).

4. Simpson, op.cit., 80 L.Q.R. 535, 546, 557.

deal with these three questions respectively.

## I

"Fact" system and legal concepts

Simpson's answer to Hart concentrates on showing that it is not a real or relevant peculiarity of legal concepts that they characteristically occur in conclusions of law as opposed to statements of fact.<sup>1</sup> Now the dichotomy between statements of fact and conclusions from rules is indeed at the heart of Definition and Theory in Jurisprudence; the anomalous or special function<sup>2</sup> of legal statements so frequently there referred to is consistently identified as being to draw conclusions from (legal) rules, and grasp of this anomalous feature is frequently said to be essential to the only fruitful method of elucidating fundamental legal notions. And Simpson's counter, up to a point, seems to be effective; what makes a word or concept legal is not that it is used to draw conclusions from rules as opposed to stating facts, for the plain fact is that facts may be rule-defined. Hart's paradigms are all liable to be turned inside out; just as "he is out" can be said to report a plain fact, so "the ball has struck the wicket" can be said to appeal to rules, make a claim, or draw a conclusion from the rules of cricket, and vice versa.<sup>3</sup>

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1. Ibid., 543.

2. Hart, op.cit., 7-8, 14, 21.

3. Cf. Hart, op.cit., 21.

But Simpson's thesis is weakened by his failure to distinguish between rules of correct speech and rules of (non-linguistic) behaviour. If it was the latter sort of rule that Hart had in mind when he spoke of "conclusions from rules", Simpson's criticisms might seem to be avoided. Moreover, although for Simpson the root problem is that "of putting one's finger on precisely what is meant by saying that a concept is a legal concept",<sup>1</sup> it seems that this was not really the puzzle that Hart was seeking to resolve.

The fundamental theses of Definition and Theory in Jurisprudence are well-known. One ought not to attempt to define fundamental legal terms; one is to elucidate the legal statements in which they occur.<sup>2</sup> Legal statements are to be elucidated by specifying, firstly, the conditions under which they are true and, secondly, the manner in which they are used, that is, their special or anomalous function.<sup>3</sup> The special function of legal statements is to draw conclusions from legal rules; it never is to stand for or describe facts.<sup>4</sup> Now it seems that neither the puzzle that prompted these theses nor the reasoning that connects them have been sufficient-

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1. Simpson, *op.cit.*, 80 L.Q.R. 535, 545.
  2. Hart, *op.cit.*, 14.
  3. Hart, *op.cit.*, 14, 22, 28.
  4. *Ibid.*, 5, 8, 10, 12.

ly understood by subsequent commentators. Simpson, at least, does not seem to have inquired just why Hart ascribed such importance to the special character of legal statements as conclusions of law. If this inquiry is made, it soon appears that it is this special character that, in Hart's view, both generates the puzzle he seeks to resolve and justifies his injunction not to try to define legal terms.

As a preliminary to stating the precise nature of the puzzle Hart seeks to resolve, it is important to see in greater detail what Hart means by the special function of legal expressions. It is notable that the phrases "to draw conclusions from legal rules" and "conclusions of law" are given scarcely any direct explanation, beyond a hint that they are equivalent to such phrases as "to record a result"<sup>1</sup> and "to appeal to rules, to make claims, or to give decisions under them".<sup>2</sup> For Hart the cardinal principle is the sharp distinction he draws between these functions and the functions of "ordinary" (non-legal) expressions; the explications he offers for these latter functions are very numerous.

Unlike ordinary expressions, legal expressions never stand for or describe facts;<sup>3</sup> indeed, never stand for or

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1. Ibid., 10.
  2. Ibid., 9.
  3. Ibid., 5, 8, 10, 12.

describe anything;<sup>1</sup> are not statements of fact;<sup>2</sup> have no straightforward factual counterparts;<sup>3</sup> cannot be defined in terms of fact;<sup>4</sup> etc. The pivotal concept is, manifestly, the concept of "fact" with its correlative, "factual statement".<sup>5</sup> An immediate problem for the interpreter of this concept concerns the relation between "standing for or describing" and "facts"; for legal statements are sometimes said by Hart not to stand for or describe facts, and at other times not to stand for or describe anything. The obvious answer is that, in Hart's view, "facts" are anything which words or statements may "stand for or describe". But in fact Hart offers further indications of what he understands by "the world of fact".<sup>6</sup> A fact is often implied by him to be something in time, some entity, person, thing, quality, event or process, material or physical or psychological.<sup>7</sup> A fact is emphatically not whatever is affirmed in a true or correct statement, for legal statements often are true but never are statements of fact.<sup>8</sup> It is not that legal terms have no

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1. Ibid., 5, 13, 18, 23, 23n.

2. Ibid., 15, 21.

3. Ibid., 8, 12.

4. Ibid., 12.

5. In Hart's The Concept of Law (1961), substantially the same dichotomy appears in the form of "external" and "internal" statements: cf. 56, 86-88, 96, 99, 101, 104, 108, 114, 116, 198-199, 244.

6. Definition and Theory in Jurisprudence, 5.

7. Ibid., 5, 12, 14, 16. See also Hart, "The Description of Responsibility and Rights" in A.G.N. Flew (ed.) "Logic and  
(continued on next page)

counterparts in the world of fact; such terms may perhaps have a complex connection with that world;<sup>1</sup> what they have not is factual counterparts in terms of which they may be defined.

Here, then, is the link with Hart's injunction not to define legal terms. A request for definition is a request, not for an elucidation but for a paraphrase,<sup>2</sup> translation<sup>3</sup> or synonym,<sup>4</sup> and characteristically is expressed by a question of the form "What is X?"<sup>5</sup> Such a question is answered by indicating a counterpart in the world of fact, some corresponding thing, person, quality, event or process, material, physical or psychological, which the word "X" stands for or describes.<sup>6</sup> Hence, since legal terms do not stand for or describe anything (or anything in the nature of a fact), such an answer is not available.

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Language" (First Series, 1951), 159, 162; but note that in various other important respects, Definition and Theory in Jurisprudence represents a considerable change of view with respect to the earlier article. As to "fact" see also A. Ross, On Law and Justice (1958), 173.

8. Definition and Theory in Jurisprudence, 14, 16, 20, 21, 28. The doctrine that legal statements may be true or false represents one of the considerable shifts of view as between "The Ascription of Responsibility and Rights" and Definition and Theory in Jurisprudence: cf. Hart in Flew (ed.), *op.cit.*, 155, 156.
1. Definition and Theory in Jurisprudence, 26.
2. *Ibid.*, 26.
3. *Ibid.*, 21, 22.
4. *Ibid.*, 13.
5. *Ibid.*, 3, 4, 7, 14, 18, 23.
6. *Ibid.*, 8, 12, 14.

This is why, in Hart's view, requests for definitions of fundamental legal terms resulted in a "forbidding jungle of theory".<sup>1</sup> Definition and Theory. For requests for definition were simply the form in which the fundamental puzzle was manifested and expressed. A definition of a term indicates the counterpart in the world of fact which that term stands for or describes; and the puzzle with which Hart's lecture grapples is "how some general type of expression (scil. legal) relates to fact",<sup>2</sup> (where the relation is presumed to be direct "straightforward connexion"<sup>3</sup> and not merely some complex and indirect connection).

On this interpretation, the fundamental unity of Hart's theses is evident. A puzzle is identified; it is the relation between legal expressions and fact. Its manifestations are revealed; they are the recurrent requests for definitions, since definitions are meant to disclose a factual counterpart of a physical or psychological kind which the definiendum stands for or describes. Such a counterpart, if found, would solve the puzzle. But this puzzle is not to be solved by definitions, since legal expressions anomalously have no factual

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1. Ibid., 3.  
 2. Ibid., 13.  
 3. Ibid., 5.

counterpart which they stand for or describe, but only draw conclusions of law. Hence the puzzle is rather to be dissolved by showing that both the request for definition, and the answering theories identifying facts which the definienda described, were misconceived - the root of the misconception being the failure to realise the special character of legal expressions.

The foregoing analysis of Definition and Theory in Jurisprudence has been necessary for three reasons. Firstly, it shows that Simpson did not really get to the bottom of either the puzzle or Hart's response to it. Secondly, if the puzzle were genuine and Hart's response were found to be inadequate, it would be necessary to deal with the puzzle in the course of an analytical study of "judicial power". Thirdly, if the puzzle were genuine and Hart's response the true solution, considerable doubt would be cast on the fundamental programme of this thesis: for if there were a radical logical distinction between statements of fact and conclusions of law, it would seem inappropriate to institute any simple comparison between descriptive ("factual") analyses of society that employ the term "judicial power" and judicial and legal interpretations ("conclusions of law") that employ

the same term.

But in fact, as we shall argue, the puzzle rests on a simpler and more radical confusion than Hart perceived. The real objection to Definition and Theory in Jurisprudence is that instead of revealing and dissipating this more general confusion, Hart simply consents to it and seeks to avoid its particular consequences in jurisprudence by pleading the special character and anomalous function of legal expressions.

The confusion of those who have been perplexed by the puzzle becomes apparent as soon as that puzzle is clearly articulated. We have said that it concerns the relation of expressions to fact, where "fact" is understood as we have seen Hart understands it, and where the relation is presumed to be direct, and not merely some complex or indirect connection. This is why the theories generated by the puzzle are, as Hart says, united in contriving facts - "the future facts, the complex facts or the psychological facts"<sup>1</sup> - which legal expressions can be said to stand for or describe. This is the reason, too, why the puzzle manifests itself in requests for definition that take the form "What is X?"<sup>2</sup> Now since

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1. Definition and Theory in Jurisprudence, 12.

2. Ibid., 3, 23, 24, 28.

Hart condemns requests of this form, it is clear that he regards his own form of elucidation - specifying the conditions under which legal statements are true - as inappropriate to answering such requests. Hence it is important to discover precisely what is the force and meaning of the "What...?" in requests of this form, given that this "What...?" does not anticipate the content of one of Hart's elucidations.

The answer is not far to seek. It is implicit (in Hart's account) in the content of the theoretical responses to the requests, for these responses indicate facts to which the legal expressions directly correspond, where "facts" are physical or material or psychological - already out there now in the past, present or future - and where correspondence is a "straightforward" matter of standing for or describing. It is explicit in the following revealing passage:<sup>1</sup>

At what point then would the need be felt for a theory? Would it not be when someone asked "When it is true that Smith owes Black £10, here is the name Smith and there is the man Smith, but when Smith and Co. owes £10 to Black what is there that corresponds to Smith and Co. as the man Smith corresponds to the man [sic: scil. name] Smith? What is Smith and Co. Ltd? What is it, which has the right? Surely it can only be a collection of individuals or a real individual or a fictitious individual?"...

To give an adequate critique of this passage and Hart's use of it, it is necessary to introduce the idea of analogical

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1. Ibid., 18.

terms. This idea will form an important tool throughout the present thesis. In one form, it is a subordinate second strand of argument throughout Definition and Theory in Jurisprudence. We can introduce it by observing this second strand as applied by Hart to demands for definition and theory of the sort reported in the passage just quoted. For, although Hart deals with this particular demand in the way already elaborately set out, he later indicates a rather different response in terms of the idea of analogy:<sup>1</sup>

Even in the simplest case of all when we say "X is a servant of Y and Co." the facts which justify the use of the words "X is a servant" are not just the same as the facts which support "Smith is a servant of Brown". Hence any ordinary words or phrases when conjoined with the names of corporations take on a special legal use, for the words are now correlated with the facts, not solely by the rules of ordinary English but also by the rules of English law much as when we extend words like "take" or "lose" by using them of tricks in a game they become correlated with facts by the rules of that game....

...the word "will" shifts its meaning when we use it of a Company: the sense in which a Company has a will is not that it wants to do legal or illegal actions but that certain expressions used to describe the voluntary actions of individuals may be used of it under conditions prescribed by legal rules.... Analogy with a living person and shift of meaning are therefore of the essence of the mode of legal statement which refers to corporate bodies....Analogy is not identity....

Now it will be noticed that the account of "fact" seems to have been modified in this passage. For to speak of express-

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1. Ibid., 26-27.

ions being "correlated" with the facts which "justify" or "support" their use is by no means identical with talk of expressions "standing for or describing" the facts that are their "straightforward counterparts". Correlations and justifications may be more or less complex. The correlation between "Smith's servant" and Smith's servant is one thing; between "Smith and Co.'s servant" and Smith and Co.'s servant it is perhaps another thing; between the conductivity of a metal and its temperature, correlation is certainly yet another thing. But if these "correlations" are not all of an identical mode, neither are they so dissimilar that we should be surprised that the same term, "correlation", is used in each area of usage. As Hart says, in another connection, "...we have the conviction that...there is some principle and not an arbitrary convention underlying the surface differences".<sup>1</sup> And when there is some principle, so that the meaning of a term shifts systematically as one moves from one area of usage to another, the term can be said to be analogical.<sup>2</sup>

So Hart is correct when he stated that the terms "servant" and "will" are analogical when applied in talk of individuals and corporations, just as the terms "take" and "lose" are

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1. Ibid., 5.

2. Cf. S. Hampshire, Thought and Action (1960), 223; B.J.F. Lonergan, Insight (1957), 361.

analogical when used in talk of beleaguered strongholds and games of cards. But Hart fails to generalise his insight. For it seems that, if "servant", "will", "take" and "lose" are analogical terms, so also are such terms as "correlation", "justification" and, far more significant for us, so equally are such terms as "is", "it" and "fact".<sup>1</sup> Missing this, Hart misses the opportunity for a far more radical and final dissipation of the puzzle than is in fact achieved in Definition and Theory in Jurisprudence.

We are now in a position to comment on Hart's case of the man who is puzzled by "Smith and Co.". Someone who says: "Here is 'Smith' and there is Smith; but what is to correspond to 'Smith and Co.'?" seems, if he is perplexed, to be assuming that all correspondence is a simple matter of pointing to some visible or quasi-visible<sup>2</sup> object; and he is assuming that the concept "correspondence" is not complex, multiform and analogical but simple, straightforward and univocal. Likewise, someone who says: "Here is Smith; what is Smith and Co.?" seems, if he is perplexed, to be assuming that all forms of the verb "to be" are, subject to the mere matter of tenses, not analogical but univocal; he is assuming that being is a simple matter of being the object of some

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1. Hampshire, loc.cit.

2. If "quasi-visible" is vague and mysterious, so is the assumption it seeks to report.

kind of looking and pointing. Someone who says: "Here is Smith who has a right to £10; but when Smith and Co. is owed £10, what is it that has the right?" seems, if he is perplexed, to be assuming that all subjects are constituted possible subjects by being, as Smith is conceived to be, already out there, the object of a possible looking or pointing; he ignores the possibility that the reference of the term "it" varies systematically as one moves from one area of usage to another.<sup>1</sup> Finally, someone who looks for answers to the foregoing questions in terms of facts, and who is at a loss when he finds difficulty in specifying any person or material or psychological thing, quality, event or process to be "described" by "Smith and Co.", is evidently assuming that "fact" always is a straightforward matter of being "already out there" in the past, present or future and available as the object of a simple (even if verbal) pointing.<sup>2</sup> But no reason can be advanced in favour of these assumptions other than the frequency with which they commonly are made.

In short, the argument implicitly put by Hart in the form of the questions raised by the puzzled observer of Smith

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1. In using the term "reference", it is not suggested that the reference and meaning of the term "it" can differ in any relevant sense. S.Hampshire seems to use "conventions of reference" and "rules of meaning" interchangeably: see Thought and Action, 16, 216. It is true that, as R.M. Hare points out, the word "it" has a referential function, rather than a descriptive meaning of its own: see Freedom and

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and Co. proves nothing about legal concepts because it proves too much. For exactly the same pedantic and confused questions could be raised about a great number of abstract concepts, if not all abstract concepts, that have no special relationship with the alleged anomalous character of legal concepts. To find examples, one need go no further than the previous sentence: "When X. has a relationship to Y, what is it that X has?"; "I can see X, but where is X's character?"; etc., etc. But if a closer analogy is required, one can refer to the elementary laws postulated by the theory of mechanics: for the trajectory or velocity of an object is visible or at least empirically appreciable in a very straightforward way, but the laws of mechanics postulate various "vectors" or "components" of this trajectory or velocity, and as to these "components", it seems, the same "puzzlement" could arise.

In fact, the muddle of those who are puzzled in such ways by the relation between legal expressions and fact seems to be a puzzle not so much about the special character of legal expressions, as about the character both of meaningful

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Reason (1963), 9. But we are not speaking of "it" otherwise than in the context of a full proposition, and it is not true that there can be bare reference without meaning: see T. McDermott, (ed.) in St. Thomas Aquinas; Summa Theologiae, Vol. II (1964), 178-179.

2. For some hints about the complex relations between seeing, describing and "facts", see J. Wisdom, "Gods", in Flew (ed.), Logic and Language (1951), 190-197; cf. Wisdom, Interpretation and Analysis in relation to Bentham's Theory of Definition (1931), passim.

relations and expressions in general and of fact itself. It is not so much the mistake of trying to force anomalous legal expressions into the ordinary mould, as of supposing that there is a single simple "ordinary" mould of the sort that is reported in Hart's account of the puzzle and affirmed in Hart's own account of the world of fact. So in the remainder of this section we shall try to sketch one resolution or dissolution of this puzzle. In effect, this sketch provides one possible explanation of the notion of "conclusions of law", but without resort to the chimerical opposition between such "conclusions" and "statements of fact".

What we have argued does not imply that the notion of "fact" is completely equivocal. It seems coherent with the facts about man's complex and multiform intellectual life to say that expressions that express (whether adequately or inadequately) correct judgments are statements of fact. A fact, on this view,<sup>1</sup> is whatever is affirmed in correct judgments (and mistakenly affirmed in incorrect judgments). The principle linking or systematising the diverse applications of the analogical term "fact" is that a correct judgment

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1. The theory advanced here is proposed and exhaustively worked out by Lonergan in Insight (1957), 1 - 594.

is made when one's suppositions and conceptions answer all the questions that reasonably and relevantly arise from, ultimately, the relevant field of sensible, imagined or remembered experience.<sup>1</sup> Hence the world of fact is as multiform and complex as the totality of correct judgments from every field in which such judgments are possible.

One can defend the foregoing assertions by pointing to ordinary usage of the term "fact"; but the general form of a defence must, consistently with the assertions themselves, be this: that this explanation of the term "fact" is coherent with man's complex ways of knowing, and, negatively, that there is no other principle by which at once to link the vast range of facts and at the same time to distinguish the realm of fact, or factual discourse, from whatever other realm one chooses to consider. For example, the principle, or notion of "fact", implicit in Hart's pivotal distinction between fact and law seems to be incoherent with the claim of Definition and Theory in Jurisprudence to be a

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1. It is necessary to refer ultimately, to "experience" in order to preserve the distinction which all would want to make between factual propositions and "correct" but analytic propositions such as  $a=b \supset b=a$ . The correctness of the latter is guaranteed by the rules of meaning governing the use of the signs "=" and " $\supset$ " (or the notions of "equality" and "implication"). But rules of meaning and in particular the rules governing the use of these signs may be multiplied, amended and legislated for more or less at will and indefinitely, and thus are not, in themselves, subject to the criterion of correctness. In propositions such as  $a=b \supset b=a$ , the neutrality  
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contribution to knowledge. For if one is inclined to accept Hart's view as correct, one can ask oneself what are the "facts", in Hart's sense, which the propositions in Definition and Theory in Jurisprudence "stand for" or "describe" in any "straightforward way". The putting of such a question forces a revision of Hart's conception of "fact".

What we are suggesting, then, is a transposition of the problem of distinguishing realms of discourse, from the misleadingly posed distinction between "factual statements" and "conclusions from rules", to the perhaps less mysterious investigation of the varying conditions for the making of correct judgments. Such a general investigation can here be made in only preliminary fashion; but what emerges is related in such a way to the features which emerge from our particular study of the concept of "judicial power", that it may both illuminate, and be illuminated by, that particular study. Still, the point and limit of the following account must be carefully borne in mind; in particular, the absence of reference to "rules of behaviour" is not to be taken to imply that a complete account of law can be given without reference to so obviously central an element.

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of the terms a and b preserves the merely legislative character of "=" and "⇒": See Lonergan, op.cit., 304-315.

We can begin with an example of the sort of distinction sought after.<sup>1</sup> From the point of view of empirical science, it is a fact that "the planets move in approximately elliptical orbits with the sun at their focus". From the point of view of plain commonsense, it is a fact that "the earth is at rest and the sun rises and sets". Now both the foregoing propositions can be affirmed as correct, since empirical science and plain commonsense have different criteria of relevance in the application of the principle that a judgment is correct when there remain no further relevant questions that might lead to its revision. From the viewpoint of common human concerns it is quite sufficient to know that the earth on which we build ordinarily does not shift and that the sun rose this morning. Hence the commonsense concepts of motion, rising and setting can be affirmed by commonsense as correct; and each time the relevant data is experienced, a man of plain commonsense can affirm as an unquestionable fact that the sun is setting. For empirical science, however, such a proposition is by no means unquestionable, for the terms and relations "motion", "rising" and "setting" are ill-fitted to play a part in a complete and verifiable explanation of data in which terms

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1. The example is taken from Lonergan, op.cit., 293-299; see also Hampshire, op.cit., 14-15, 21.

are ideally defined, not by their relations to us, but by their relations to each other. Thus it is possible to distinguish between two distinct (though not separate) domains of discourse, and this distinction is not to be controverted by pointing out that empirical science can interest itself in commonsense concerns, such as when the sun will rise in Oxford tomorrow, nor by referring to the fact that empirical scientists also are men of plain commonsense.

Before locating legal expressions on the map of human discourse, it is necessary to make explicit a distinction that is implicit in Definition and Theory in Jurisprudence. Some legal expressions are obviously non-factual, in no way state what is the case, and hence could not be mistaken;<sup>1</sup> the expression "no corporation shall consist of less than seven persons" is adapted, in most contexts, not to affirming what is or will be the case, but to inducing certain courses of action and restraining others. Such expressions, whatever their source, we can call legislative, and they are not the subject of the present discussion. Other legal expressions affirm and deny what, in some sense yet to be defined, is or is not the case, and are apt to be

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1. See A. Kenny, Action, Emotion and Will (1963), 216-218.

pronounced correct or incorrect according as there are not, or are, further relevant questions that would lead to their revision. Unless otherwise indicated, the term "legal expressions" in this discussion is to be understood in the latter sense. Between the two foregoing types of legal expression there is, as is well known, a spectrum of expressions whose status as essentially legislative, or not, is a matter of controversy; but this controversy, and the expressions to which it relates, are complications best left until the solution to the present controversy is outlined.<sup>1</sup>

Clearly, legal expressions do not pertain to the domain/<sup>of</sup>empirical science. The relevance of the questions that would test the correctness of some legal affirmation is not determined by the ideal of a complete and verified explanation of all data, but rather obviously, like the affirmations of plain commonsense, is limited by a variety of other human concerns and interests, desires and needs. But equally, legal expressions do not form part of plain

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1. Notice also the legislative or optative aspects of many legal expressions: their force as precedent, their suasion as claims, etc. But this need not affect their meaning or logical status; cf. "He did it". In other words, the case where assertions may have legislative force or may influence others in predictable ways is not to be assimilated to the case where a different modal operator attached to the same sentence-radical effects a change in the logic of the sentence: see Kenny, op.cit., 222-228.

commonsense. It may be worthwhile to suggest some fundamental bases of a distinction between commonsense and legal discourse.

In the first place, the existence of a legal system witnesses the fact that among the human concerns and interests, needs and desires is the quite special desire for the establishment of an intelligible and operable order and system among human desires, actions and affairs.

But, in the second place, unresolved disputes run counter to all orders and systems, and the need for a definite resolution of disputes involves a special limitation on the relevance of further questions. For where plain commonsense, unconcerned with this special need, might be content with terms and expressions that remained vague and undefined, and might have been unwilling to answer, Yes, or, No, to the question as posed, the legal judge ordinarily is obliged to answer, Yes, or, No, to the question as posed, and hence to give a determinacy to the principal terms of the question sufficient to enable him to assert with reason that the situation does or does not, quite definitely, correspond to those principal terms.<sup>1</sup> Thus, where plain

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1. Cf. Ch. Perelman, The Idea of Justice and the Problem of Argument (1963), 90, 100.

commonsense, faced with the question "Has A got Whiteacre?" , might be content to answer "Yes, in one sense and No, in another", a judge ordinarily will have to go further, and say (for example) "Yes [or No], since 'having Whiteacre' includes having 'possession' of Whiteacre, and here A indeed possesses Whiteacre".

In the third place, given the definition or determinacy of terms and relations resulting from this fact that the judge has to give a definite answer (and hence a definite meaning) to questions that may have been vague, authority and precedent (as lawyers understand those terms) become attainable. To follow an authoritative precedent it is not sufficient to make an obeisance to its distinguished author; one must be able to grasp that the content of his judgment meets the question one is seeking to answer, and such a grasp cannot reasonably be affirmed as even probably correct if the meaning of that judgment is sheerly vague. Nor does it help that one's own vague question may be expressed in exactly the same way as the question with which the former judge was faced; for vagueness in expression implies a spectrum of possible meanings, and one's own anticipated answer may well lie at one end of the spectrum while the former answer lay (if the truth were known) at the other. In such a situation there can be no following

of precedent but only blundering about with words.

In the fourth place, authority and precedent combine with determinacy in legal expressions to permit that systematisation of affairs which is, as we said, a common enough but noteworthy human interest and desire. Correspondingly, this desire underlies authority and precedent, and reinforces the demand for determinacy, if disputes are to be solved, with a demand for still further determinacy, if disputes are to be solved systematically.

In the fifth place, such a system constitutes a further datum on which intelligence, which has arrived at the determinate terms already postulated, can base such further notions as right, duty, liability, corporation, responsibility, contract, State, power, title, estate.... In plain commonsense, for example,<sup>1</sup> A has as much land as he habitually controls - where by land is meant the subject of possible lookings, pointings, walkings over, diggings, fencings and grazings; where controlling is an elementary matter of shouting and shooting, fencing and fearing; and where having expresses the recognition by everyone of commonsense that control has a number of further consequences that

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1. With the following account, contrast Hart in Flew (ed.), op.cit., 161.

need not, and in plain commonsense cannot, be specified too closely. But in law a pattern of authoritative pronouncements about persons and land has effected a systematic redefinition and determination of terms. A now has as much land as he has title to - where land now is the subject of wills and deeds and other recognized expressions within the system, and further questions about its visibility, accessibility, stability or utility are liable to be summarily pronounced irrelevant; where having a title to land now expresses the fact that the system of terms and relations with which this expression is coherent permits the supposition that there is a defined relationship between the defined terms A and Whiteacre;<sup>1</sup> while further questions about whether A does or will or could ever control the land (in any sense that commonsense would bother to consider), are now liable to be summarily pronounced quite irrelevant to the correctness of that supposition; where, finally, having land now is a residual link expressing, not directly a fact within the system, but rather the further fact that the abstract system (which originated in commonsense questions) still has to answer the vaguely expressed but concretely imagined questions

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1. Cf. D. Derham, "Theories of Legal Personality", in L.C. Webb (ed.), Legal Personality and Political Pluralism (1958), 5-6.

of the men of commonsense whose affairs it is attempting to systematise.

In short, the legal concepts of land and land-holders are reached by an authoritatively systematic redefinition of terms that prescind from many questions that plain commonsense would regard as relevant, in that terms and relations within the resulting system need bear no assignable relationship to what in commonsense can be predicted or imaginatively pictured as occurring. And the concepts of estates, titles, rights, etc., are reached by grasping the fact that this redefinition has been accomplished. When one can grasp both that there is a system in which, given some prior data, the terms "A" and "Whiteacre", and a meaningful relationship between them, have been defined and may be affirmed, and what these definitions of terms and relationships are, then one can conceive and affirm that "A has a right to Whiteacre".

Now it may be asked whether commonsense is really as plain and primitive as it has been made out to be; and further, whether it is not the case that commonsense asserts and denies rights, duties, responsibilities, etc., that have <sup>here</sup> been explained as derivatives of determinate (legal) systems. The first

answer is that "plain commonsense" is, in our explanation, an explanatory postulate. There are few, if any, people who have no grasp at all of the fact of legal system, and who can make no use of the vocabulary associated with that system. The second answer is that, apart from such leakage between the domains of discourse, commonsense is capable of basing its own insights on its own system to arrive at its own conceptions of rights, duties, responsibilities, etc. We have argued, in effect, that the judge abstracts from the data of sense, memory and imagination to reach determinate terms and relations. But the fact is that all thought and language represents, in this sense, an abstraction from data, and the difference to be assigned between legal and commonsense abstractions is merely that the former attain a relative determinacy by being performed with an eye to the need for definitive decision, and subject to authoritative precedent and the desire for explicit and explicable system. It cannot be stressed too much that commonsense, as a stock of notions shared in varying measure among "men of commonsense", is itself a system of classification, identification, and differentiation, adapted like legal system to the

controlling of experience and action. As Hampshire has said:<sup>1</sup>

Reality and experience cannot be thought about unless we have rules that correlate particular groups of signs with particular recurrent elements in reality and experience....Reality is not divided into units that are identifiable apart from some particular system of classification....After the early experiments of Russell and Wittgentstein, most contemporary philosophers are probably convinced that the idea of "the facts", which are already individuated in reality independently of our forms of reference to them, is an illusion that cannot be given a sense. We divide and redivide reality into its segments along the lines of our practical interests, which are reflected in our conventions of reference.

Commonsense is a domain of discourse, or group of similar domains of discourse, roughly delimited by practical interests that differ from the interests of empirical scientists as scientists, lawyers as lawyers, philosophers as philosophers. The language of commonsense, like other languages, is made up of terms, available for definition, and of the rules of meaning (or syntax or grammar) that govern the coalescence of the terms into intelligible propositions; these rules of definition and syntax are what Hampshire calls its "conventions of reference", and constitute a "system of classification". Hence, if we could imagine a world of commonsense without legal system, there could still be talk of rights and duties, etc., in as much as there was already, in commonsense and its language, a system and more or less

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1. Hampshire, *op.cit.*, 11, 223, 216; see also 56, 65, 92, 150. See also F. Waismann, "Verifiability", in Flew (ed.), *op.cit.*, 140-141.

determinate terms and relations within that system, ready to be grasped together in the single abstractive insight that conceives the notion that A has a right to Whiteacre.

However, if commonsense apart from any contact with the added determinacy and self-consciousness of legal thought is capable of making such abstractions from the fact of its own less determinate system, it also is rarely interested in making them on its own behalf. Commonsense is plain commonsense to the extent that it fails to concern itself with systems, reflections, speculations and theoretically coherent explanations. Hence, plain commonsense ordinarily does not advert to the fact that "ordinary factual statements" are, in an important sense, conclusions from rules;<sup>1</sup> and the puzzle we have been trying to unravel stems largely from an unwillingness to shift from commonsense distinctions, such as that between "factual" and "rule-governed" discourse, that are sufficient for many practical purposes but ill-adapted to play a part in a coherent explication of the logic of legal and non-legal thought. This is why the term "rules" did not figure in our first account of the special characteristics of legal system and legal discourse; for the unselfconscious

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1. In "The Ascription of Responsibility and Rights" (Flew, op.cit., 156), Hart says that "rules of law are not linguistic or logical rules, but to a great extent rules for deciding". But what is not specified is in what sense linguistic rules are not rules for deciding.

commonsense that we all share, backed up by the ad hoc terminology of the common law,<sup>1</sup> is only too ready to leap to the conclusion that it is its content of rules that marks out legal system and discourse, and that confers on it a special logical function. It is only when philosophical reflection reveals the rule-governed nature of all discourse that the importance emerges of a further effort to identify and characterise the special conditions governing the genesis and affirmation of legal rules, legal system and legal expressions.

Of course, it is true that, as we said, the aim of the legal system is the establishment of an order in human affairs; a great part of the legal system is constituted by, and must be described in terms of, rules of conduct or behaviour; and allowance must be made for what we have called "legislative expressions". It is possible that when he spoke of "conclusions of law", Hart was thinking of such "rules of behaviour" as opposed to the rules of correct legal expression (linguistic behaviour) that Simpson refers to in his critique of Hart. If

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1. Viz. "question of law" - "question of fact". It seems that this distinction cannot be explicated in other than historical terms - the former being the questions that happen to be left to the judge, the latter to the jury. See R. Cross, Precedent in English Law (1961), 243. Cf. Hart, in Flew (op.cit.), 154.

so, as we have suggested, many of Simpson's criticisms do not touch Hart. But, at the same time, it is quite unclear how the circumstance that many rules in the legal system are guides to non-linguistic conduct (however important that circumstance may be in a complete account of law) can be regarded as the ground or cause of the puzzle stated by Hart or relevant to its dissolution. Legal rules, whether of definition, linguistic or non-linguistic behaviour, establish a defined and systematic relationship between terms, and the leap to new and more abstract terms such as "right", "duty", "power", "corporation", etc., is made, not by noticing that certain expressions offer to guide non-linguistic conduct, but by reflecting on the systematic relationship postulated. It must be said that many and doubtless valuable distinctions may be drawn between different types of rule constituting or existing within any legal system; nor are we denying that Hart's account in Definition and Theory in Jurisprudence has its uses and merits; nor, finally, are we asserting that an account of the meaning of "rights" and "duties" could be given without reference to rules of behaviour. Our argument, however, is designed to resolve a general puzzle that does not seem soluble by appealing either to "rules" or to distinctions between different types of rule within the system.

There are many further questions to be answered before the solution here advanced could be affirmed without qualification, but there seems little reason to doubt that such questions can be answered coherently with the foregoing outline. For to be a good lawyer is to have the art of hitting upon the correct answers, or the probably correct answers, to legal questions. But learning to be a good lawyer is not primarily a matter of learning various legislative expressions, of studying the orders issued by courts and legislatures. Primarily it is a matter of learning to locate the sources of authoritative precedent, to think in terms of the system that is constituted by the affirmations and actions of authoritative sources, to grasp with ease and confidence the fact of system and the fact of the system's determinate interpretations of particular types of data, and finally to limit one's questions to the legally relevant (ignoring or firmly subordinating the many rival concrete criteria of correctness). And it<sup>is</sup> these features, as we shall see, that go furthest to explain the course of judicial interpretation of judicial power in Australia.

## II

### Sources, values and meaning in jurisprudential analysis

There is a second question that awaits an answer if Simpson's view on the analysis of legal concepts are to<sup>be</sup> accept-

ed. For Simpson, too, identified the main problem as the effective discrimination between legal and non-legal system. By way of solution he proposed as investigation into the meaning of words in use, a comparison of legal with non-legal meanings; and this, he suggested, was a task common to "analytical jurisprudence" and "legal history". Still, prescindng for the moment from the alleged identity of the latter types of study, we ask in this section: Is the investigation, comparative or otherwise, of the meaning of expressions in present (or past) use the whole task of analytical jurisprudence? In answering this, we can consider, by way of example, the expression "judicial power".

Any proposal to examine "the meaning of words " is affected by a certain ambiguity. A parallel ambiguity appears when it is said by modern philosophers that "the proper concern of philosophy is with concepts, which implies a concern with the uses of words", and that at the same time "philosophical problems are not 'about language' but about knowledge, memory, truth and other things".<sup>1</sup> In both cases, the question arises: Is the investigation to stop at what people happen or happened to mean, at the concepts people

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1. G. Warnock, English Philosophy since 1900 (1958), 153, 89.

happen or happened to have?

For example, the expression "judicial power" is one familiar at least to lawyers and legal theorists, and it will be assumed that readers of this thesis could use the expression with ease and confidence in a variety of contexts. It will be assumed, moreover, that these readers could even, given a little time, compose an article on "judicial power" for a dictionary of current usage. In short, these readers will be assumed to have a concept of judicial power that is quite adequate for ordinary purposes, to know the meaning of "judicial power", and in general to know what judicial power is. Still, it is in the same sense that we know what dogs are, and there remains another sense in which most of us do not know what dogs are, if biologists and vets are not to be declared redundant. The difference can be explained by distinguishing nominal (whether lexical or stipulative) from explanatory definitions;<sup>1</sup> by returning to sources. More particularly, by refusing to accept the "practical" limitations commonsense ordinarily imposes on the relevance of further questions, as well as the systematic limitations imposed on judges by the need for determinacy and by respect<sup>for</sup> authority and precedent, it may be possible to provide an explanatory

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1. See R. Robinson, Definition (1954), Chaps. III, IV and VI; Lonergan, *op.cit.*, 10-12.

definition of judicial power which represents an advance in understanding and knowledge analogous to the advance from commonsense to biological notions of the dog.

Of course, analogy is not identity, and there are special problems associated with the definition of legal concepts, as will later appear.<sup>1</sup> In particular, the notion of "sources", and hence of "return to sources" (straightforward enough in the case of the biology of dogs), can hardly be explicated without postulating a certain isomorphism between historical institutions and the terms historically employed in connection with those institutions. The remaining pages of this chapter seek to explain what might be the nature of such an isomorphism, and how it can be investigated. In particular, the brief analysis that follows may serve the two-fold purpose of calling to mind some of the elementary data that are sources for any explanatory definition of judicial power, and of indicating some of the sorts of terms and relations that might go to make up a jurisprudential account of the idea.

(1) "Power": the shift, through system, from ability to authority.

First, it seems that the power exercised by a judge shares the logical characteristics of rights, duties, liability-

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1. See infra, especially Ch.IV.

ies, responsibilities, etc., as analysed in the preceding section. It is true that, in Definition and Theory in Jurisprudence, Hart uses the expression "power" to refer to a "fact" (like an expectation) rather than a "conclusion of law".<sup>1</sup> This perhaps discloses an ambiguity in the expression which may be dispelled by saying that the judicial power discussed herein could be termed "judicial authority" without any relevant change in meaning.

The analysis can now proceed on familiar lines. Consider a family in which the father frequently gives orders which ordinarily are obeyed, decides and thereby resolves disputes, and punishes his sons for what he considers misdemeanours. Anyone, father, son or observer, might say that this father judged his children, and it would require no new insight but only a shift quite normal in our language to say that the father was the judge in the family. "But why, at any given moment, can he be called the judge? Is it because he is, at that moment, engaged in judging?" "No; it is because he, and only he, can judge in that family". "But what if he is sick, or asleep or absent; surely judging is just what he can't do then?" "It doesn't matter whether he can or he can't judge, in that sense, at any particular time; the important thing is

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1. Op.cit., 10.

that he is father, and as father is the judge; and he remains father when he is sick or asleep or absent". This final remark takes one as far as it is possible to go without actually conceiving "judicial power" in some explicit form. Ability has been distinguished from authority. More important, the affirmation that to be "father" is to be "judge" (or, in the case of sons, to be "Father" is to be "the judge") implies that a pattern or rule of naming has been grasped and affirmed, together with its contents. No more than another shift, not in understanding, but only in expression, is required to affirm that "father has a right to judge". More precisely, what is no longer in question is father's authority to judge, and that right and authority, as opposed to ability, is what is meant in this thesis by "judicial power", as opposed to the power that Hart named a psychological or physical fact.

(ii) Judicial power as a value

Secondly, the formula "to be father is to be the judge" is apt, not only for giving an account of matters as they stand in their present pattern, but also for postulating and affirming a state of affairs that might be the case in the future. Insofar as it affirms what is the case, it states a fact; insofar as it affirms what might be the case if people chose to have things so, it affirms a value. The same is true of all insights into pattern in human affairs, and to this extent

our account of the logic of notions of rights, duties, responsibilities, etc., must be supplemented. The expression "value" here means simply some pattern of terms and relations considered as a possible object of choice. It is to be distinguished from mere wants insofar as it relates to wants only as subsumed under some pattern in which one value is linked intelligibly with others, and in which all are regarded as appropriate objects of choice for other persons in like situation.

Thus, in the mouth of a father, the formula "to be father is to be the judge" may express simply a fact that, since it is a fact about his affairs that he might have chosen to have otherwise, is also a realized value; or it may, and ordinarily will, express both a fact and a value, both the pattern as chosen and realized, and the pattern as an option and prospect; in short, the pattern or system as an ongoing process in which what was merely value is in the course of becoming the kind of fact that essentially is a realized value. But what of the formula in the mouth of an observer who, as observer, has not the options that this father has? The definition value just proposed prescind from differences of viewpoint, and considers patterns, orders and systems simply as possible objects of choice. An observer has no choice; but this does not preclude him from

discovering that others, such as fathers, have choices, and from discovering what are the realized, present and possible objects of those choices. Such values for him (as for fathers who reflect on their own achievements) are matters of fact.

There is thus a parallel between investigation into meanings and investigation into realized values. Both the meaning of expressions and the values realized in institutions are facts, and as such are to be known only at the end of an intellectual process that starts from data, proceeds by way of questions and insights to conceptions and suppositions, and thence proceeds by way of reflection and further questions to affirmation and judgment. In both cases, this process has a special claim to be called interpretation, since in both cases the fact to be determined is a fact about human conceptions and intentions. Finally, the parallelism must not obscure the overlapping of meanings and values; for language is an institution, and like other institutions is a realization, explicitly and implicitly, of values.<sup>1</sup> Hence the investigation of meanings and the investigation of institutions as realizations and expressions of values are complementary.

(iii) "Judicial" as an analogical term embracing a set of values

Thirdly, the word "judicial" is often used to express a

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1. See infra, p.4.37. Also J. Cohen, The Varieties of Meaning, (1962), 54.

value in a way that itself manifests a choice of the further value of praising or blaming, as the following sentences will call to mind:

He is very judicious  
 He acted throughout in a most judicial manner.<sup>1</sup>  
 He showed no real judgment.  
 He is as sober as a judge.

But it is also the case that the word "judicial" is often used with reference, not to these praiseworthy qualities of mind and conduct, but simply to certain institutions and social processes: "the courts", "judges (good, bad and indifferent)", "the judiciary", "the judicial process", "judicial power"...

Nevertheless, these institutions and social processes are a large part of the data for a jurisprudential account of the idea of judicial power, and an inquiry into this data quickly reveals the values that are realized and in process in the exercise of judicial power. To grasp some of these values in outline, it is not necessary to undertake a historical inquiry into origins and development; it is sufficient to look to the rules lawyers know as governing the day-to-day judicial process. For legal rules not only

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1. It is not suggested here that "judicial" and "judicious" are synonyms: see, for example, the intelligible distinction between them in R. v. Manchester Legal Aid Committee, ex p. Brand (R.A.) and Co. [1952] 2 Q.B. 413, 431.

are intelligible, like physical laws and the biology of dogs, but also are expressions of human intelligence. Hence it is always in order to ask "What is the point of this rule or set of rules?" - and such an inquiry necessarily will bring to light values.

Thus, for example, judicial power is one of the primary expressions of the desire for a system of ordering human affairs. In traditional terms, it is a manifestation of sovereignty, and as such is obviously a value. The realization and protection of this value is clearly reflected in the law relating to contempt of court, in the absolute privilege of judges and witnesses, in the compellability of witnesses and the rules for the discovery of documents, in the public policy against ouster of jurisdiction, in the discretionary rectification of contracts, in the execution of judgments, and in a host of other rules and principles of judicial action.

But judicial power is not the only manifestation of sovereignty; there is a value in limiting the scope of judicial power to make room for legislative and executive and other powers. In short, some separation of powers is a value, and as such is the point of many of the rules of statutory

interpretation,<sup>1</sup> of the principles of precedent and of legal development within the common law, of the doctrine of justiciability, of the restrictions on judicial review of executive discretion or legislative policy and bona fides, etc.

Perhaps analysis can distinguish, too, between the value expressed in a doctrine of separation of powers, and the value of the autonomy of the judiciary. This would explain the otherwise more or less anomalous power of the courts to make rules of court.

One of the values that effectively distinguish judicial power from other forms of sovereign power is the solution of disputes between determinate parties. So far as this regards in particular the determinateness of parties, it is reflected in rules of locus standi, in the doctrine that courts cannot lay down a common rule,<sup>2</sup> in the limitations on the technical effect of declarations of unconstitutionality, in the extraordinary status of Royal Commissions, etc. So far

1. For example, the rule requiring the courts to seek the intention of Parliament, and the rule forbidding the courts to "fill in gaps".
2. The Commonwealth Conciliation and Arbitration Act 1904 attempted to empower the Court of Conciliation and Arbitration to declare a common rule as to wages and conditions in any one industry, binding on parties other than the parties to the dispute before the Court. See, p.9.29. infra.

as it regards in particular the requirement of a definite solution, it is reflected in the rules limiting the number and nature of appeals, in the rules against vexatious litigation and abuse of process, and in many rules of evidence facilitating decisions as to the "facts".

Closely related to this are the further values of impartiality, fairness as between parties, and a relative equality of the parties before the tribunal. These too are realized in many rules of evidence (notably those subordinating the claims of truth to the avoidance of prejudice), in the doctrines of judicial notice and the limitations on extrinsic evidence, and, of course, in the rules of natural justice.

Many of the rules mentioned under the above headings can also be referred, by way of explanation, to the distinct value of finality in decision, and to these may be added the law of res judicata, autrefois acquit, and issue estoppel, the limitations on new trials and the relevance of fresh evidence, the principle of "no miscarriage of justice", some rules for issue of Certiorari and Prohibition, the restriction on going behind judicial decisions even for fraud, the accepted functions of appellate courts, etc.

Moreover, there are many rules and principles of judicial action which should be accounted for, in whole or in part, by the values of convenience and utility (as those terms are commonly understood outside the context of theory). For example, there are the rules of pleading, the distribution of functions between judge and jury, the office of the judge in chambers, the limitation of actions, procedural fictions, etc.

Still, when all is said and done, the discovery and official certification of truth remains a value of notable explanatory power. It is perhaps the fundamental motivation of the rules of evidence, and is a dominant rationale in the trial of offences and the principles of judicial punishment.

Above all, analytical preoccupations must not be allowed to obscure the plain fact that judges commit themselves, on taking office, to the administration of justice according to law - a value that, adequately understood, might serve as a summary of a full analysis of the rules relating to judicial power.

The limitations of the foregoing analytical sketch are not to be overlooked. Many of the rules or families of rules

mentioned can, and in a fuller analysis should, be accounted for in terms not of one but of several of the values adduced. Nor do these values constitute a complete or satisfactory list; their own value here is threefold: as illustrations of a method, as indications of a complexity in the sources of meaning that is not always wholly reproduced in the consciousness of language users, and as reminders of some of the data for a study of judicial power. It is to be noticed, moreover, that all the rules, features and values cited concerned the ordinary courts of law: in other words, these ordinary courts were treated as the central analogate to which all species of judicial power bear a more or less systematic relationship. This relationship is often discernible only by analysis; but to the extent that it can be usefully asserted, the particular power being analysed can be said to be analogous to the power of the ordinary courts of law. "Judicial power" is thus an analogical term; its meaning shifts systematically as one moves from one area of application to another, and the shift is accomplished by removing or emphasising one or more of the features and values discernible in the central analogate.<sup>1</sup>

Finally, it is not to be assumed either that every

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1. See infra, pp.435.- 4.40.

feature of social process is to be explained as the expression of conscious deliberation and choice, or that the identification of some feature as a realized value is itself a choice or recommendation or even evaluation of it as a true value.

### III

#### Analytical jurisprudence and legal history

Analytical jurisprudence, then, profits from a grasp of the values realized and expressed in legal institutions and language. Indeed, such an analysis is limited to what is past or in process, and its proper sphere is what is already the case. How, then, is analytical jurisprudence to be distinguished from legal history? Simpson, of course, is only the latest among many who have complained that "there is something essentially wrong in the segregation of analytical from historical inquiries".<sup>1</sup> This is neither the time nor the place to attempt a definitive statement on the merits of this complaint. But what has already been said seems to indicate that legal history and analytical jurisprudence do indeed start from the same data. It follows that, since the weighing and testing of data concerning the past is

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1. Cf. Hart, in Austin, The Province of Jurisprudence Determined (ed. Hart, 1954), xv.

the special province of history, analytical jurisprudence is essentially ancillary to legal history, upon which it relies for its material.

Moreover, legal analysis is of concepts, schemes, systems and orders in human affairs, and this is a province in which history is strong. The strength of history in this field is overlooked by those, like Stone, who think of history as the "recording and recounting of events" (upon which speculative "theories of history" may supervene for purposes of "interpretation" and "generalization").<sup>1</sup> Conversely, this strength is exaggerated by those who have regarded the only true history as the history of thought. Still, the exaggeration is to be preferred to the oversight, and Simpson's views on jurisprudential analysis to Stone's. As Collingwood said:<sup>2</sup>

individual acts and persons appear in history not in virtue of their individuality as such, but because that individuality is the vehicle of a thought which, because it was actually theirs, is potentially everyone's.... An act is more than a mere unique individual; it is something having a universal character; and in the case of a reflective or deliberate act (an act which we not only do, but intend to do before doing it) this universal character is the plan or idea of the act which we conceive in our thought before doing the act itself, and the criterion by reference to which, when we have done it, we know that we have done what we meant to do.

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1. J. Stone, The Province and Function of Law, (1946), 26-27.
  2. R.G. Collingwood, The Idea of History (1946), 303, 309.

Thus, argued Collingwood, politics, warfare, economics and morals are subjects of historical study par excellence;<sup>1</sup> it is clear that law might have been added to his list as another example of "practical activities which are not merely as a matter of fact pursued on purpose, but could not be what they are unless they were so pursued". There is no need to follow Collingwood in banning from history everything past that was not the expression of thought; it is sufficient to assert with Vico that human thought and works are pre-eminently knowable objects of human inquiry. It was no accident that Vico, the great philosopher of history, was a student of law.<sup>2</sup>

Still, though legal history and analytical jurisprudence are both seeking insight into the same sources, their respective interests and questions and hence their conclusions need not be identical. For legal history, the first interest will always be what happened, and why it happened as it happened. Narrative and chronology are never superseded, and explanations need not be in terms of the questions, insights, conceptions and judgments of the human actors in the story. But analytical jurisprudence, at least as it is conceived in this thesis, limits its field and deepens its inquiry. Its field is not

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1. Ibid., 310.

2. See M.C. D'Arcy, The Meaning and Matter of History (1961), 121-131.

everything legal that happened, but rather the movement and interrelationships of legal insights, conceptions and judgments, as expressed in language and realized in institutions. Its interest is not in the why and the full wherefore of legal developments, but rather in the logic and rationale of the development insofar as that development is reflected in insights, conceptions and judgments.

The historical character of analytical jurisprudence has been obscured by the practice of the great "analysts", Bentham, Austin and Kelsen. Each of these purported to base his analyses on the actual legal systems of different times and places, but failed to overcome the reductive implications of his philosophy and method. Each claimed to have discovered the "essence" of law and the "essential" terms and relations that constituted the "legal system"; each denied the "reality" of terms and distinctions that could not be reduced into his schema of essences, whether or not such terms and distinctions were to be found existing (historically) in widely varying contexts. To mention one example among many, these three thinkers all denied the "essential reality" of judicial power as a distinct category or term, and their method precluded them from inquiring into the insights (correct or misguided) which have led men to postulate, in both theory and practice,

the term "judicial power". In short, as we shall see in detail in our study of Bentham, the aim of the great analysts of the past was not to discover the meaning of legal concepts by analysing historical conceptions or by adverting to remote sources and interpreting the values realized in historical institutions; rather it was to reduce the manifold of legal experience to an order of concepts that was produced by the insights of the analyst himself into that experience so far as he knew it, and that purported to represent the unchanging reality that other thinkers and planners only imperfectly or impurely understood.<sup>1</sup>

In very recent times the historical character of analytical jurisprudence has been further overlaid by the practice of analysts such as Prof. Hart, whose primary aim is not the elaboration of a systematic body of knowledge styled "analytical jurisprudence" but rather the resolution of perplexities deemed to arise from the characteristics of current language itself. When, however, analysts of this school state that such perplexities are not merely current but also recurrent, and when further they add to their primary aim a claim to have discovered the central elements of a legal

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1. See infra, Chaps. III and IV.

system and the key to the science of jurisprudence,<sup>1</sup> it seems that they cannot avoid further questions as to the historical basis of their analyses.<sup>2</sup>

#### IV

#### Applications to the present thesis

A first purpose of this long introductory chapter has been to introduce, ambulando, the general aims, methods and terms of the present thesis. The aim of the thesis is not to define judicial power for any theoretical or practical purpose, but to study in depth a concept that is characteristically legal and at the same time a well-known term of descriptive analysis. The intended point of the study is fourfold: (1) to illustrate a useful method of jurisprudential enquiry; (2) to discover and illustrate the types of features, problems and lessons connected with the use of legal concepts, or of theoretical or commonsense concepts in a legal context; (3) to compare the approaches of descriptive theorists and of lawyers (notably judges) to those problems and features, and (4) to provide thereby some concrete evidence of the distinction (or absence of distinction) between legal thought, system and method, and the thought, method and conceptual system of commonsense and the purified commonsense of descriptive theory.

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1. Hart, The Concept of Law, 79, 95.

2. See also infra, pp.4.22- 4.23.

In the present chapter, a conception of "fact" has been introduced and elaborated, in order to secure the possibility of comparing theoretical with judicial analyses of expressions such as "judicial power". For if it were true that there is a radical logical distinction between "statements of fact" and "conclusions of law", it would be doubtful how far one could compare, say, Aristotle's concept of judicial power with the concepts elaborated, legally, by (say) the High Court of Australia.

Secondly, a conception of value has been introduced, and it will be a contention of the first part of this thesis that the oversight of this conception is central to the failure of previous analysts to explicate, without explaining away, the idea of judicial power. The multiplicity of values relevant to the judicial power of a central analogate (the power of "ordinary courts of law") involves that "judicial power" be regarded as an analogical term: a contention of the second part of this thesis will be that insufficient recognition of this by the High Court of Australia has aggravated the problems of employing the term in legal rules, reasoning and conclusions.

Thirdly, the historical basis of analytical jurisprudence has been asserted; it will be a further contention of the first part of the work that the essentialist and anti-historical character of many former analyses is both a consequence of their mistaken notions of "fact" and "value", and a cause of their reductive and unhelpful character. The second part of the thesis will attempt to outline one historical example of the development and interaction of legal insights and conceptions by way of a detailed study of the idea of judicial power under the Australian Federal Constitution.

Incidentally, certain problems arising from modern notions in analytical jurisprudence have been set aside. If the notion of fact elaborated in the first section of this chapter is correct, it follows that Hart's ban on definitions in jurisprudence and, more relevantly, his further ban on the explication of isolated terms need not be taken to invalidate the present analysis of judicial power; for both bans were shown to have been imposed in view only of the curious doctrines of those who were puzzled by the nature of certain legal concepts.

Moreover, the suggestion that analytical jurisprudence concerns only the meaning of words in current use has been

rebutted by showing the dual sources of meaning; for the proximate sources are the insights and conceptions of current users, but the remote sources are the historical experiences, intentions, plans and institutions that are available for the independent questions and insights of the analyst whenever he wishes to go behind the terms of meaning that happen to be current. Hence the second part of this thesis may claim to be as much a contribution to analytical jurisprudence as the studies examined in the first. But a distinction has been drawn between, on the one hand, pure legal history and, on the other hand, an analysis of res gestae that is not dominated by chronological and narrative considerations and that does not seek to inquire beyond the logic and rationale of the conceptions in terms of which legal development occurs.

Lastly, what has been said provides the material for a distinction between the enterprise of analytical jurisprudence and the writing of critical textbooks. For analytical jurisprudence studies the order and disorder in existing systems and has no need either to postulate a degree of order that does not exist, or to attempt a reconciliation of all existing rules and principles, or to venture a prediction of the future by extrapolation from the present. Plainly, such a distinction, like that between analytical jurisprudence and legal history,

does not amount to a rigid demarcation between disciplines - though perhaps it is more than a mere pedagogic convenience. Indeed, it is hoped that the present analytical study will be found of interest to both legal historians and the authors of the long-awaited critical textbook on Australian Federal Constitutional Law.

## CHAPTER TWO

### Aristotle and the triad of governmental powers

One might start a study of judicial power with anthropological inquiries. But there is a limit to what can be covered in one treatise; moreover, a primary concern of this thesis is the comparison of the analyses of theorists with the analyses of judges, a comparison which should cast light not only on judicial methods, but also on the distinctive qualities of "legal" thought and the various types of "elucidation" or analysis. Hence it seems best to turn immediately to the analyses of the early theorists, of whom the most important and influential, in this field, is certainly Aristotle.

Seemingly speculative attempts to define judicial power are often motivated by such practical concerns as the effort to separate the personnel and tasks of various governmental institutions. Now Aristotle certainly never subscribed to the doctrine of separation of powers in its modern sense as a norm demanding that the personnel and tasks of institutions be kept from overlapping. Indeed, he always regarded government less as a juridical form or problem than as a power shaping the whole of social life. Still, his study of 158 Greek constitutions and various non-Greek institutions<sup>1</sup>

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1. E. Barker, The Politics of Aristotle (1948), xxxiii.

inclined him to regard both "the government" and the processes we call "government" as relatively determinate compounds or complexes that might be elucidated by analysis. Moreover, Aristotle had theoretical and practical concerns of his own, in the pursuit of which it was convenient to draw attention to a schema of terms and relations very similar to the well-known modern distinctions between legislative, executive and judicial powers of government. Aristotle can claim the authorship of a definite triadic schema which, in one form or another, is a recurrent theme of Western political and legal thought. It was a theme that, in his own thought, recurred in an instrumental fashion as a tool of analysis in at least three apparently widely differing contexts: the classification of constitutions in his Politics, the elucidation of practical wisdom in his Ethics, and the framework of his treatise on Rhetoric.

## I

The Politics

Towards the end of Book IV of the Politics, Aristotle sets out to analyse the state in terms of constitutional institutions of government. In his model state - here presented not as an ideal, or true value, but as a generalisation from actual institutions<sup>1</sup> - Aristotle discerns three species of persons in authority<sup>2</sup>. The citizens may be

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1. Cf. Politics, IV,1, 1288 b10 - 1289a25.

2. 1297b37ff.

distributed among these three species or elements in the state in different ways, according as the constitution is aristocratic, oligarchic, democratic or what we may call republican; this distribution will determine whether the constitution is a good one, adapted to the prevention of civil troubles and constitutional innovation. The three elements (moria)<sup>1</sup> are the deliberative (or body that deliberates about general or communal affairs: to bouleuomenon peri tōn koinōn), the magistracies (to peri tes archas), and the judicial element (to dikazon or to dikastikon). Some translations obscure the fact that these moria are specified as institutions, not as powers or functions such as inhere in institutions; the word "deliberative", for instance, is here to be understood as a substantive, not as an adjective. Only thus can we make sense at all of Aristotle's various ascriptions of multiple and overlapping powers and functions to each of the moria.

Now the deliberative is said to be the dominant (kyrios) element in the constitution<sup>2</sup>. In particular, it is dominant in its decisions (krisis)<sup>3</sup> to do with war and peace, with the conclusion of alliances, with punishment of certain serious

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1. Throughout this Chapter, Greek words are rendered in the grammatical form in which they appear in the passage being cited.
  2. 1299a1; 1316b32; Barker, op. cit., lxviii. Kyrios is often translated "sovereign"; but this seems misleading; see the discussion of nomothetike architektonike, infra p.2.19
  3. 1298a8.

crimes, with the making of laws (nomoi), and with the election and control of magistrates. Its functions are summed up as deliberation (bouleuesthai) and decision (krisis).

Next, the title of magistracy is not to be applied to all functionaries, but only to those officers of state who have to deliberate about certain matters (bouleusasthai te peri tinōn), or to make decisions (krinai), or, more particularly, to issue orders (epitaxai)<sup>1</sup>. In fact, says Aristotle, it is epitaxis that is the hall-mark of magistracy. But we do not fail to notice that Aristotle ascribes to magistrates those very functions which might have been thought peculiar to the other constitutional institutions. For like the deliberative or assembly, the magistrate is bouleutikos; like the judicial element, as we shall see, he is kritikos; and even epitaxis turns out to be common property. Discussing his ideal state in Book VII, and employing the framework concepts introduced in the analytical Books, Aristotle defines the work of a ruler to be epitaxis kai krisis? the context shows not only that krisis here means the judging of law-suits (peri tōn dikaiōn)<sup>3</sup>, but also that epitaxis includes the electing of magistrates. In other words, epitaxis, the power to order or direct, belongs to the persons who elect magist-

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1. 1299a27.

2. 1326b13.

3. W.L. Newman, The Politics of Aristotle (1887-1902), Vol. III, 347.

rates as well as to the magistrates themselves. But it is the deliberative that elects magistrates. Thus, just as the magistrates, whose special note is epitaxis, are bouleutikoi, so the bouleuomenon has epitaxis; and, moreover, all three moria are said to be kritike. So far as Aristotle's explanation goes here, all that can be said to be peculiar to the magistrate is that he deliberates and decides peri tinōn - about certain matters - which can be interpreted to mean that he has a definite or limited sphere of competence.<sup>1</sup>

Unfortunately, the chapter of Book IV in which Aristotle treats of the judicial element is little more than a collection of disjointed notes.<sup>2</sup> No attempt is made to isolate the defining characteristics of this element in the constitution, and the discussion simply enumerates the features by which one sort of judiciary is distinguished from another: viz., from whom the judges (dikastes) or courts (dikasteria) are chosen, how they are chosen, and in what causes they have jurisdiction.

Yet Aristotle evidently considered this element in the constitution very important. In Book III he defines the citizen as one with the right to participate in decision-making (kriseōs) and office (arches)<sup>3</sup>, where "office", he says<sup>4</sup>,

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1. Newman, op.cit., Vol.IV, 258.
  2. 1300b14 - 1301a15
  3. 1275a23 ff.
  4. 1275a31.

simply comprehends in a single word the functions of a judge (dikastes) and an assemblyman (ekklesiastes). Again, the functions of the citizen are "deliberative" (bouleutike) and "judicial" (dikazo). In Book VII, Aristotle comes to the matter from a different angle while trying to isolate the occupational classes necessary to the polity. Six classes are mentioned here<sup>1</sup>: farmers, craftsmen, soldiers, capitalists, priests and, "sixth in number and most necessary of all", judges of questions of necessity and interests (kritas tōn anagkaion kai sympherontōn)<sup>2</sup>. For the polity needs above all, says Aristotle, provision for deciding questions of interests and rights (krisis peri tōn sympherontōn kai tōn dikaiōn)<sup>3</sup>. But later in the same passage the same class is referred to as that which "deliberates about questions of interests and judges questions of justice" (bouleuomenon peri tōn sympherontōn kai krinon peri tōn dikaiōn)<sup>4</sup>. This class and the class of soldiers (to hoplitikon) are "parts" of the state in a "special sense"<sup>5</sup>;

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1. 1328b2 ff. In Book IV, 1290b40-1291a40, Aristotle makes a similar classification, distinguishing eight classes: farmers, artisans, traders, manual labourers, soldiers, judges (to metechon dikaiosynes dikastes), deliberators (to bouleuomenon), capitalists, and magistrates (to peritarchas).
  2. 1328b23. See Newman, op. cit., Vol. III, 376 "Judges are probably included under kritas tōn anagkaion, the broad term ta anagkaia comprising ta dikaia ta pros allelous".
  3. 1328b14.
  4. 1329 a 2.
  5. 1329 a 4.

farmers, craftsmen et al. are "necessary appurtenances of states", but the "military and deliberative" classes (to hoplitikon kai to bouleutikon) are parts of the state.<sup>1</sup> Again, the citizen body "is divided into two parts, the military class and the deliberative class" (to te hoplitikon kai to bouleutikon)<sup>2</sup>. Thus, within a few lines, "members of the deliberative and judges" (bouleuomenous kai dikazontas)<sup>3</sup>, have been merged into "the deliberative class" simpliciter,<sup>4</sup> although it has only just been asserted that the "most necessary" requirement of the state is "a provision for

1. 1329 a 38: there are doubts as to the authenticity of this particular passage, but it does no more than summarize the argument. Aristotle's meaning here is enlarged upon in Book IV, 1291 a 25-28: "Inasmuch therefore as one would count the soul of an animal to be more a part of it than the body, so also the factors in states corresponding to the soul must be deemed to be parts of them more than those factors which contribute to necessary utility - the former being the military class and the class that pays a part in judicial justice (to metechon dikaiosynes dikastikes), and in addition to these the deliberative class (to bouleuomenon), deliberation being a function of political intelligence (syneseōs politikēs)" (Rackham).
2. 1329 a 32.
3. 1329b27. The use here of dikazontas, which in the Politics is used to denote the judiciary (i.e. judges of particular justice as distinct from "judges" of general justice or of questions of expediency), tells against the thesis that in Book VII peri tōn dikaiōn is a reference only to decisions, by the bouleuomenon, concerning general justice. That thesis would acquit Aristotle of the charge of blurring at 1329a32; but it cannot be maintained in the face of 1328b27 and 1291a28, while all translators are agreed that in Books IV and VII peri tōn dikaiōn refers primarily to "judicial decisions", i.e. of particular justice. Of course, the phrase is not without overtones of general justice, especially at 1253a37; but one must be cautious in ascribing to the bouleuomenon functions of general justice, since Ethics Book V speaks of general justice as the work of the

deciding questions of interests and of rights between the citizens" (kai tōn dikaiōn).<sup>1</sup>

This tendency to blur the postulated distinction between the deliberative and the judiciary, to use krisis primarily for one and then primarily for the other, to elevate first krisis and then, in the next breath, bouleutikos to the first rank of importance in government - all this is really inevitable in view of the generality of the crucial terms, bouleutikos, krisis and epitaxis. For one would normally take it for granted that governmental decisions (which, qua governmental, are inherently likely to issue in orders - epitaxai) are preceded by deliberation; conversely, one

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3. (continued from previous page)

nomothetes: 1129b13. On the distinction between nomothetes and bouleuomenon, see *infra* p.2.19.

4. This blurring is avoided in the passage in Book IV; see for example the passage quoted supra p.2.6n.1; and 1291a28.

1. See also 1291a22, 1253a37, 1322a5; and Newman, *op.cit.* Vol.III, 131. On the supreme importance of the judicial power in the minds of Greek political theorists see R.J. Bonner, and G. Smith, The Administration of Justice from Homer to Aristotle (1930-1938), Vol.1, 222, 324, 378.

equally hopes that governmental deliberations will result in a decision (sooner or later). At this level of generality, there is no question of a distinction between types of governmental activity - all must involve deliberation, decision, orders. Nor can it be usefully suggested that the deliberation preceding a judicial decision is any the less deliberation, or the decision of an ekklesia any the less decision, simply by asserting that deliberation is particularly the role of the ekklesia and decision the role of the courts. The plausibility of such an assertion can only come from some prior tacit understanding about the nature of courts and ekklesiai. In short, it is the institutions with which his audience are already familiar that give content to Aristotle's use of the terms krisis, bouleutikos and epitaxis to explicate the three morai of his state. We are not to expect illumination about the role of the institutions from the use of these terms alone.

## II

### The Ethics

The problem recurs when the same terms are employed in the famous analysis of practical wisdom in Book VI of the Ethics.<sup>1</sup> According to Aristotle, one and the same state of mind,<sup>2</sup> practical wisdom (phronesis), has various special

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1. Nicomachean Ethics, 1141b23ff.

2. "State of mind" is Ross's translation.

applications, in that it may concern the individual, or the household, or the state. Likewise, wisdom concerning the state has various applications; its controlling application is legislative wisdom (phronesis nomothetike) or constitution-making (nomothesia); more directly related to the ultimate issuing of wisdom in action is that political wisdom (politike) that has to do with action and deliberation (praktike kai bouleutike). Finally, this politike has two aspects, the one specifically deliberative (bouleutike), the other specifically judicial (dikastike).<sup>1</sup>

The problem, of course, is to see what Aristotle's distinction can really be, as between deliberative and judicial wisdom, granted that both are applications of the same state of mind and that both have to do with action and deliberation. To solve this problem, some recent commentators have suggested that Aristotle's vocabulary at this point is institutional in tone and reference.<sup>2</sup> Thus, what might appear, on a casual reading, to be a characterisation of political arts in psychological terms is interpreted as really a categorisation of the institutional forms in which practical wisdom is manifested in

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1. In this context, the expression politike may also be used to comprehend nomothetike: see J.A.K. Thomson's translation (1953) of this passage: see also 1180b30.
  2. R.A. Gauthier, and J.Y. Jolif, L'Ethique à Nicomaque (1958), Vol.II, 500.

the state. "Toute cette division de la sagesse est en effet calquée sur la constitution athénienne".<sup>1</sup> That would explain why Aristotle explicates praktike kai bouleutike by reference to decrees (psephismata), and why he uses the word dikastike, with its institutional connotations of judges (dikastai) and law-courts (dikasteria) in preference to the more abstract word krisis.

But once again, to say that Aristotle's analysis of practical wisdom, like his schema of moria in the Politics, is grounded on and tacitly invokes an understanding of certain historical institutions of government, leaves open the further question: How are these institutions understood? This further question is quite inescapable, for the simple reason that the Athenian constitution, as expounded by Aristotle himself in his Constitution of Athens, contained more, and more complex, institutions than Aristotle expressly refers to in sketching his constitutional model in the Ethics and Politics. Thus

1. Id: "Cette division de la sagesse peut se resumer dans le tableau suivant:

Plan de l'universel

Sagesse des maîtres d'oeuvres

(Sagesse législative = position de la loi morale et de la loi constitutionnelle).

Plan du singulier

Sagesse des manoeuvres

Assemblées délibératives Sagesse délibérative Sagesse politique	Assemblées judiciaires Sagesse judiciaire	Familles Economie domestique	Soi-même Sagesse individuelle"
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his sketch must involve implicit definitions and distinctions whereby the various functions of Areopagus, Boulē, archons, Ekklesia, Dikasteria, et alia could all be subsumed under a basically triadic schema. As we have seen, what might be taken for definitions in the Politics are parasitic upon their definienda.

### III

#### The Rhetoric

From one point of view, Aristotle's Rhetoric can be regarded as a sustained elaboration of the distinction between the work of assemblymen (ekklestai) and the work of judges (dikastai). For Aristotle is concerned to elaborate the rhetorical techniques appropriate to three fundamental contexts, of which one is the bouleuomenon and another the dikasteria. He distinguishes, in other words, between deliberative and forensic rhetoric (dikanika)<sup>1</sup>; and although he frequently uses the abstract word symbouleutikon to denote the deliberative kind, these categories are firmly linked throughout to the ekklesia and the dikasteria, the two types of constitutional institution that provide audiences for a speaker and whose respective characteristics and roles govern rhetorical strategy and tactics.

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1. Rhetoric, 1354b23.

As in his analysis of practical wisdom in the Ethics, so Aristotle in the Rhetoric begins by marking off legislation (nomothesia) from political concerns strictly so called (politikois).<sup>1</sup> The legislator, like the ekklesiastes and the dikastes, makes judgments or decisions (nomotheton krisis); but his judgments differ from theirs in that his do not apply to particular cases but are prospective and universal,<sup>2</sup> whereas the ekklesiastes and dikastes have to decide "present and definite issues".<sup>3</sup> In this sense, the method of both deliberative and forensic rhetoric is the same.<sup>4</sup> In both cases it is a matter of persuasion,<sup>5</sup> takes place under the substantively controlling framework of legislation, and is aimed at judgment or decision (krisis) in respect of a definite issue,<sup>6</sup> the scope of this krisis ideally being limited as far as possible by the legislation.

But, unlike deliberative rhetoric, forensic rhetoric is limited to transactions between parties,<sup>7</sup> concerns interests other than those of the people who have to make the krisis, and is of less general interest altogether.<sup>8</sup> In sum, the first

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1. 1391b18.

2. 1354b5.

3. 1354b6. Cf. 1391b18, "the state of the case". (Freese).

4. 1354b22.

5. 1391b7.

6. 1377b22.

7. 1354b25. Aristotle uses the word "citizen" here; but he does not, it seems, mean to restrict judicial power to private disputes; the state may equally well be a party: 1373b24.

8. 1354b30ff.

distinguishing feature of judicial power is that it operates inter partes. But Aristotle's treatment of the rubric, inter partes, from the three angles just enumerated reveals a complexity which that summary expression must not be allowed to obscure. For, not content with pointing to the formal note that judicial decision is made between two parties, Aristotle draws out from this the further notes that the judges are impartial as between the parties, and that the decision is binding only on the parties and is thus in itself of little concern to the polity at large.

Next, ekklesiastai are ordinarily judges of things to come,<sup>1</sup> whereas dikastai are judges of things past.<sup>2</sup> Deliberative rhetoric properly relates to the future, forensic to the past.<sup>3</sup> Thus, deliberative rhetoric is said to be hortatory or dissuasive, while forensic rhetoric is accusatory or defensive.<sup>4</sup>

Closely associated in Aristotle's mind with this second complex distinguishing feature is a third, which pertains to the respective ends or values of deliberative and judicial

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1. 1358b4.
2. Also 1392a6.
3. 1392a6; 1417b13; 1418a2.
4. 1358b8; 1414b3.

## rhetoric and decision:

The end of the deliberative speaker is the expedient or harmful; for he who exhorts recommends a course of action as better, and he who dissuades advises against it as worse; all other considerations, such as justice and injustice, honour and disgrace, are included as accessory in reference to this. The end of the forensic speaker is the just or the unjust; in this case also all other considerations are included as accessory....<sup>1</sup>

In fact, this third feature is also closely linked with the first (inter partes). For in Book V of the Ethics, when he is treating of justice insofar as it rectifies inequalities between parties introduced in transactions between those parties, Aristotle remarks that "when people dispute, they take refuge in the judge; and to go to the judge is to go to justice; for the nature of the judge is to be a sort of animate justice ... The just, then, is an intermediate, since the judge is so".<sup>2</sup>

Now in the Rhetoric, Aristotle gives a further account of justice.<sup>3</sup> In general, he says, to do justice is to assign to everyone his due according to law. Laws may be called general, insofar as they are based upon nature; or particular, insofar as they are established by this or that people for

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1. 1358b21. (Freese).  
 2. 1132a20. (Ross).  
 3. 1373b1.

their own state. Particular laws may then be subdivided into written and unwritten, and equity is that species of justice which goes beyond the written law to supplement it.<sup>1</sup> To do equity is proper to arbitrators, but not to judges strictly so called (though there are, he says, arguments to be made both ways on the basis of the Athenian dicast's oath).<sup>2</sup> Though the dicast can decide by reference to considerations of justice (as distinct, here, from law) where the legislator has not ruled, his discretion should so far as possible be limited by law, and ideally only questions of historical fact should be left to him.<sup>3</sup> His starting-point in reasoning is always the law, and in the first place the written law.

The ekklesiastes, by contrast, deliberates about the courses of action best fitted to secure in the future the existing ends of the law,<sup>4</sup> the safety of the state,<sup>5</sup> the embarrassment of enemies, and the general good of the common weal. He regards justice primarily in its aspect as good for the common weal as a whole.<sup>6</sup> Ideally, Aristotle would have his discretion limited as far as possible by law laid down by

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1. 1374a25; see also Nic. Eth. 1137b.
  2. 1375a27-b25. See also Barker, *op. cit.*, lxx.
  3. 1354b15
  4. 1362a16; 1354a32.
  5. 1362b33.
  6. 1362b27.

the nomothetes; Aristotle put a high value on stability, and envisaged the construction by the nomothetes of a more or less complete and permanently valid code. A set-up in which the psephismata of the deliberative could override the nomoi he regarded as the very negation of constitutionality.<sup>1</sup> Nevertheless, in both the Politics and the Rhetoric he assigns, in a summary and unspecific way, the making of laws to the deliberative ekklesia.<sup>2</sup> This is not surprising, in view of the deliberative's concern, in Aristotle's schema, for future governmental activity, of general interest and aimed at the expedient good of the state. Yet it demonstrates again how Aristotle's definitions of deliberative and judicial power are an abstraction from the actual Athenian constitution, in which (though Aristotle does not mention the fact) the ekklesia was, in the business of law-making, effectively subordinate to a special commission classed as a dicastery.<sup>3</sup> But, more significantly for the present study, Aristotle's assignation of law-making functions to the deliberative puts in question the relationship of his conception of deliberation to the modern conception of legislation.

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1. Pol. 1292a32.

2. E.g. Pol. 1298a6; Rhet. 1359b23.

3. See Barker, *op.cit.*, 128; E. Barker, The Political Thought of Plato and Aristotle (1906), 456; G. Gilbert, The Constitutional Antiquities of Sparta and Athens, (1895), 300.

## IV

Legislation in Aristotle's and in modern triadic schemas

Barker, Newman and Zeller have said that Aristotle's distinctions "do not coincide with the legislative, executive and judicial powers of modern theorists";<sup>1</sup> for Barker, especially, the Greek framework is "essentially different".<sup>2</sup> But the justification advanced for this view in fact shows no more than that Aristotle was not interested in a separation of powers between institutions: "Aristotle's deliberative is indeed charged with legislative functions, but it is also charged with executive functions ...and with judicial functions".

Newman's summary seems just:

The deliberative in Greek states was not so called because it had a monopoly of deliberation, for the magistrates also deliberated ... but because certain specially important subjects of deliberation were made over to it....<sup>3</sup>

So the question still remains how far Aristotle's "subjects of deliberation" can be equated with the modern notion of "legislation". Burnet, for one, is clear about this. Commenting on phronesis bouleutike kai dikastike in the Ethics, he says;

We should say "executive and judicial", the functions of the ekklesia and the dikasteria. The "legislative function" was not exercised by the demos, but by the nomothetes.... We must always remember that the Athenian ekklesia was not a legislature, and that its

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1. Barker, Politics..., 193; Newman, op.cit., Vol.IV, 236. Zeller, Aristotle and the earlier Peripatetics, Eng.trans. (1897), Vol.II, 83.
  2. Barker, loc. cit.
  3. Newman, loc. cit.

psephismata were executive acts applicable to particular cases...<sup>1</sup>

This is perhaps a little overdrawn. Aristotle's discussions of the deliberative ekklesia do not restrict its functions to the issuing of psephismata as opposed to nomoi; indeed, in this context, nomoi are more often indicated as being within the range of the deliberative's decisions than are psephismata. Moreover, Burnet's comment seems insensitive to a distinction which Aristotle may have been feeling for, but which the Greek language and his own (Greek) conservatism alike obscured; viz., the distinction between making a constitution, and making laws within the framework of a pre-existing constitution.

The word nomos blurs the distinction between the controlling (architektonike) power of the nomothetes to make rules for government (nomoi), and the dominant (kyrios) power of the bouleuomenon to make rules (nomoi) within the framework already established by nomothesia. Aristotle never worked out the implications of the distinction that he drew between establishing codes of laws (nomoi) and establishing constitutions (politeiai),<sup>2</sup> and that he might be regarded as feeling for in using (sometimes) two words (architektonike and kyrios) where English ambiguously uses one ("sovereign"). There certainly seems to be a notable functional distinction between a rule-

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1. J. Burnet, (ed.), The Nicomachean Ethics (1900), 270, 271.  
 2. E.g. Pol. 1273b33; 1274b15,18 Constitution of Athens, 7,1.

making power to bring into being, more or less unhampered by pre-existing rules, a legal system, and a rule-making power within that system - between the powers of the Australian constitutional Conventions of 1891-1899 and the powers of the Federal Parliament. (Powers of amending the constitution seem to fall in between, and a populace with such occasional powers is not referred to as sovereign in either sense). In the minds of English theorists, such as Austin, the difference of form and function between the two sorts of "sovereignty" was obscured by the shape of the British constitution, which does not, in any obvious way, draw such distinctions with respect to the continuing powers of Parliament. In the mind of the Greek theorist, the difference was obscured by the all-embracing character of, say, Solonian once-for-all nomothesia, which went far beyond a mere matter of establishing "constitutional rules" for the conduct of government, and in fact laid down much criminal and civil law. <sup>1</sup> We moderns draw the line between, on the one hand, constitution-making, and on the other hand, legislation (in which we want to include, at least, both orders which are "universal and apply to the future" and orders concerning "present and definite issues" related to the expedient general good).<sup>2</sup> But Aristotle, insofar

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1. See Pol. 1266b8ff; 1327b38; Gauthier and Jolif, loc.cit. supra p.2.11n.1.

2. The position is more complex, and nearer to Aristotle's, in the context of modern constitutions that have a detailed and efficacious "Bill of Rights" incorporated into the Constitution itself.

as he thought juridically at all, drew the line between, on the one hand, constitution-making and the making of all sorts of laws that could be called "controlling" or "universal and applying to the future", and on the other hand, orders directed to present and definite issues related to the expedient general good. For Aristotle, a deliberative ekklesia which made a practice of dealing with matters of the former class was upsetting the state and negating constitutionality;<sup>1</sup> we do not ordinarily think so. In short, it seems that at this point Aristotle's view that the most relevant true value is the prevention of constitutional innovation has had a definite effect on his analysis.

## V

Some features of Aristotle's method

The conclusion just reached invites further reflection on Aristotle's analytical method.

First, despite occasional lapses, Aristotle normally keeps his analysis of actual political schemes, realized values and existing constitutional forms separate from his own political schemes and values. His triad of governmental powers, despite its other defects, is kept relatively free from the

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1. See J.W. Jones, The Law and Legal Theory of the Greeks (1956), 46.

distorting influence of opinions as to the ideal, best or true value by its instrumental status as a more or less incidental or subordinate analytical tool in the Ethics and Politics, and as a framework concept in the harshly realistic Rhetoric.

Secondly, in drawing his distinctions, Aristotle believes he has detected "distinct species" and "real differences";<sup>1</sup> otherwise, he remarks in the Rhetoric, the adoption of different names would be silly and empty.<sup>2</sup> But at the same time, he recognises clearly enough that his method cannot draw hard and fast lines. For example, he says that "accusation and defence" are characteristic of forensic rhetoric, whereas "exhortation and dissuasion" are characteristic of deliberative. But he goes on to say that this is not to deny that "both accusation and defence are often found in deliberative" speeches, but is simply to predicate that accusation and defence are not found in deliberative speeches "qua deliberative".<sup>3</sup> In other words, one might say, it is salient characteristics, not invariable and exclusive peculiarities, that are being identified; the insight into the "real differences" between the species is to be gained not by looking for simple antitheses,

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1. Rhet. 1414b15.

2. Id.

3. 1414b4 (Freese): i.e. "they form no essential part of a [deliberative] speech" (Roberts).

but by grasping a set of terms and relations unifying a whole manifold of characteristics which, as a whole, generally obtain in one species and not in the other.<sup>1</sup> It must, however, be admitted that Aristotle's style is misleading, in that he frequently appears to found his distinctions between categories on simple antitheses that, if taken in isolation as invariable and exclusive peculiarities of the respective categories, quickly prove quite illusory. We found this in the analysis of the moris of the state in the Politics; but the Rhetoric shows plainly that Aristotle's thought is not simpliste in these matters.

Thirdly, it is possible to ask whether the functional account of judicial power as oriented towards justice as opposed to expediency, is in any way primary in Aristotle's thinking. Does he regard this orientation as the principal feature of judicial power? It is tempting to suppose that he does; for then one could say that the other two complex features are simply consequential on this one, in that, if justice consists in giving to everyone his due according to law, the call to do justice must arise from some particular act of injustice that will necessarily be inter partes and past. But this is specious, since it is in fact quite possible

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1. See also the definition of "citizen", Pol. 1274b32-1275b34; Aquinas, In Lib. Pol. Aris. exp. III, i.

to conceive of justice being done by a "deliberative" act, done according to law but of general interest and not by a process of accusation and defence nor inter partes either in procedure or in determination: for example, an act of general compensation, or a large-scale distribution of "prize". In any case, Aristotle does not sponsor the suggested interpretation of his analysis. In fact, in the Ethics he ventures a (false) etymological argument which would just as well licence the view that judicial power and the concept of justice alike are consequential on the notion of dispute and settlement inter partes.<sup>1</sup> Taking everything into account, one must conclude that in Aristotle's account of judicial power no one of the complex features he specifies as characteristic and distinctive can be said to be primary. Fully expanded and collated, these features may be set out as follows:

The doing of justice according to law  
by decision,  
subject to law and legislation,  
and impartially,  
of present and definite issues  
relating to res gestae,  
and not of general public interest  
but as between parties  
(and binding only on them).

Thus Aristotle discerned that the paradigm case of judicial power presents various aspects both of form and of function or value, and while distinguishing between these aspects, he

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1. Nic. Eth. 1132a32.

declined to separate them from each other or to grade them in order of centrality or importance. He did not feel called upon to deal with borderline cases; he was not interested in a practical doctrine of separation of powers. His concern was simply to sketch certain inevitable or recurring features of human society, and to throw light on these features from a number of different angles and for a variety of purposes. No one facet of a crystal is more essential to the crystal than the others, though it may be added that it is only by ignoring borderline cases that one can deal with terms like "judicial power" and "deliberative power" as if they had the sharp definition of the faces of crystal.

The nearest Aristotle comes to dealing with borderline cases is his treatment of the three institutional morai; for none of these three has any claim to a crystalline clarity of form or function. The most that can be said of the deliberative as treated in Book IV of the Politics is that its functions are predominantly of the complex type analysed as ecclesial or deliberative in the Rhetoric. The same, mutatis mutandis, can presumably be said of the dikazon referred to in Book IV. As for the magistracy,<sup>1</sup> no functional definition, in any of the

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1. As employed in this Chapter, the word "magistracy" denotes, not the minor judges now called "magistrates", but the class of officials which Aristotle distinguishes from the deliberative and judicial elements.

terms employed by Aristotle, could give it an independent status as a morion; that status must come from some purely institutional circumstance, such as that magistracies are not multiple in the way that judicial and deliberative bodies are (though Aristotle perhaps thinks that he can base a distinction on the limited scope of the magistrate's jurisdiction; but this seems illusory).

## VI

A note on the subsequent use of Aristotelean terminology

Separated from the Greek institutions and preoccupations on which they were founded, the distinctions between deliberative and judicial functions advanced in the Rhetoric proved insufficiently coherent and decisive to determine political analysis during the subsequent two thousand years. Aristotle's political terminology in the Politics survived along with the analysis of practical virtues in the Ethics; but the famous terms, "deliberation" (bouleutikon; consilium), "judgment" (krisis; judicium) and "command" (epitaxis; praeceptum), proved better suited to the elaboration of a philosophical psychology of action than to the effective fixing of types of governmental function. In truth, the expressions were so broad that almost any combination and variety of institutions, actual or proposed, could be (and were) accommodated to their meaning. The classical mediaeval

thinkers, meditating on empire, papacy and monarchy, read together the nomothetes and the bouleuomenon as a legislator who was both judge of what the natural law required and interpreter and judge of his own commands;<sup>1</sup> the execution of law consisted in the obedience of the subject to the law.<sup>2</sup> In turn, a rebellious thinker such as Marsilius, dwelling on his Italian city state and contesting the papal claims, postulated the people as legislator, exercising judgment (judicare) and command (praecipere) with the advice of the deliberative experts (consiliiari), and a magistracy or "ruler" whose function was to judge (judicare) the conformity of actions to legislation and to command (praecipere) sanctions or rewards accordingly, which in turn would be executed (exequi) by the military on behalf of the ruling magistracy.<sup>3</sup> In both analyses, no doubt, government is regarded primarily as a broadly judicial function;<sup>4</sup> this only serves to emphasise the breadth and juridical indeterminacy of the idea of "judging". In short, it seems that, for the purposes of this thesis, the otherwise vast wealth of mediaeval political thought should be passed over with the observation that the further development of a distinct theoretical notion

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1. Aquinas, Summa Theologiae, II-II, 60,6; I-II, 104, 1; II-II, 47, 8.
  2. Summa Theol. II-II, 58, 1 ad 5.
  3. A. Gewirth, Marsilius of Padua (1951-1956), Vol. I, 167-175, 226-236.
  4. Summa Theol. I-II, 104, 1; 95, 1 ad 2. Marsilius of Padua, Defensor Pacis, I, v, 7.

of "judicial power" had to await the historical development of a new "power in the land", the independent judiciary.

In all, the genesis and subsequent fortunes of the idea of a distinct judicial function, as member of a triadic schema of governmental functions, prompts (while it does not prove) the reflection that it is natural for man to have institutions and to have certain particular institutions, just as it is natural for him to build and to build houses; and further, that it no more follows from this that there are natural styles of institution, than that there are natural styles of architecture. Richard Robinson, commenting on Aristotle's Politics, remarked that any number of constitutional "triads" might be devised<sup>1</sup> - as if they were architectural styles. But the teasing question remains after Aristotle: why triads, and whence the plausibility of the three terms that Aristotle fixed upon? Perhaps we have, in the terms and relations of some such triadic schema, not a mere matter of architectural styles, but the "walls" and "roof" of constitutional theory.

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1. R. Robinson, Aristotle's Politics, Books III and IV (1962), 117.

## CHAPTER THREE

### Bentham's critique of the triad of powers

As Bentham observed in the last years of the eighteenth century, the triadic schema of legislative, executive and judicial powers had by then been "adopted into the vocabulary of all the nations of Europe".<sup>1</sup> It would be a delicate task, and one that remains to be performed, to trace exactly the origins and development of this modern form of the schema. Here it will be sufficient to indicate something of the verbal consensus of theorists that Bentham set about attacking when he declared that the schema was "far from representing the true elements of political powers".<sup>2</sup>

#### I

### The triad in the eighteenth century

It seems unlikely that scholarship will challenge the traditional ascription to Montesquieu of authorship of modern expositions of governmental powers.<sup>3</sup> Gierke, in the notes to his great works on Althusius and on the German law of associations, traces Montesquieu's antecedents as far back as Buchanan, a Scottish jurist of the late sixteenth century.

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1. The Works of Jeremy Bentham (ed. J. Bowring, 1843), III, 198.
  2. Id.
  3. See R. Carné de Malberg, Contribution à la Théorie Générale de l'Etat (1922) Vol. II, 3.

Buchanan, like Hooker a few years later, distinguishes between legislative and executive power, "but also is the first to assert with energy the independence of the judicial power".<sup>1</sup> But it seems impossible to say with assurance that Buchanan's work was a significant influence on later thinkers.<sup>2</sup> The influence of Hooker, on the other hand, may readily be traced; it bears much fruit in the work of Locke nearly a century later,<sup>3</sup> and in Locke we find the primary source of Montesquieu's celebrated chapter on the Constitution of England, liberty and the separation of powers. Still, neither Hooker nor Locke include judicial power in their central schemas. It has been argued that for Locke, in particular, all governmental power is fundamentally judicial, at least in origin:<sup>3a</sup>

Man...hath by nature a power...to judge of and punish the breaches of [the law of nature] in others....there, and there only, is political society, where every one of the members hath quitted this natural power, resigned it up into the hands of the community....And thus all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules; indifferent and the same to all parties....Those who are united into one body, and have a common established law and judicature to appeal to, with authority to decide controversies between them and punish offenders, are in civil society one with another....<sup>4</sup>

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1. O. von Gierke, The Development of Political Theory (trans. B. Freyd, 1939), 205 (Pt.II, c.3, n.102.)
  2. Lawson, in his Politica Sacra (1660) recognizes the modern triad, and insists on the independence of the judiciary. But the scope of his influence, too, is doubtful. See P. Laslett (ed.) Locke's Two Treatises of Government (1960), 383n.
  3. See Laslett, op.cit., passim. 3a. See Laslett's discussion, op.cit. 106-107.
  4. Locke, op.cit., II, sec. 87.

Indeed, though Locke adverts to the need for an indifferent, upright, known and authorized judiciary,<sup>1</sup> he seems to have regarded the judges as in some sense an executive arm of the legislative power,<sup>2</sup> and the triadic schema he offers has as its third term, not judicial power, but the "federative power" to deal with matters "without the commonwealth".<sup>3</sup>

Montesquieu, free from Locke's preoccupation with the logical or historical origins of powers, accomplishes a decisive shift of the terms and relations of the schema. Locke's federative power becomes a primary element in Montesquieu's purely executive power, and the judicial or judiciary power appears as an independent member of the triad (though initially labelled an executive power).<sup>4</sup> Here at last is the analysis that has had such an undeniable fascination for subsequent thought; nor is it to be forgotten that Aristotle's Politics is cited scores of times in the Esprit des Lois. But anachronisms are to be avoided: in Montesquieu's view, there was in England, or at least ought to be, no visible or independent judiciary.<sup>5</sup> In this sense, the judicial power, though "terrible to mankind", was for him en quelque façon nulle.

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1. Locke, op.cit., II, secs. 131, 136; Laslett, op.cit., 118.
  2. Locke, loc. cit. and secs. 144, 147.
  3. Locke, op.cit., II.c.12.
  4. Montesquieu, The Spirit of the Laws, (trans. T. Nugent, 1750), XI, 6.
  5. Montesquieu visualised popular juries, after the manner of Athenian dicasteries, as an ideal "rooted in the nature of things": id. and VI, 6.

His analysis of judicial power does not go beyond the assertion that it is a species of executive power "in respect to things that depend on the civil law", and that judicial judgments should be "fixed" and "ever conformable to the letter of the law".

Twenty years later, Hume begins his essay On the Origin of Government with the remark that kings, parliaments, ministers and all other governmental parts, persons and institutions have ultimately no other purpose but to support the judges - or, more especially, the juries.<sup>1</sup>

Blackstone, at the middle of the century, is considerably influenced by Montesquieu,<sup>2</sup> and hardly improves the confused terminology of the Esprit des Lois. Still, he is not prey to Montesquieu's illusions about the English constitution: on the one hand, the judicial power is not placed along with legislative and executive power on the topmost level of sovereignty;<sup>3</sup> on the other hand, a permanent and independent judiciary is recognised.<sup>4</sup> Nevertheless, expressions whose vagueness hampered Aristotle were not to be clarified by the first Vinerian Professor; we find it asserted that since "the sole executive power of the laws is vested in the person of

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1. D. Hume, Essays, Moral, Political and Literary (1742), V.  
 2. Commentaries, I, 1 fin.  
 3. Ibid., I, 11 init.  
 4. Ibid., I, vii, 3.

the king, it will follow that all courts of justice, which are the medium by which he administers the laws, are derived from the power of the crown";<sup>1</sup> and at the same time that the "main preservative of public liberty" in England is "the distinct and separate existence of the judicial power", the separation of the "administration of common justice both from the legislative and also from the executive power".<sup>2</sup>

Paley and Burke carry the matter no further; the judicature is not "part" of the constitution along with King, Lords and Commons, but for Paley it is "the first maxim of a free State" that "the legislative and judicial characters be kept separate" and that there be a division of the legislative and judicial functions",<sup>3</sup> while for Burke "whatever is supreme in a State ought to have as much as possible its judicial authority so constituted, as not only not to depend on it, but in some sort to balance it".<sup>4</sup>

Thus, when Bentham first began to do jurisprudential analysis, terminology was becoming settled, but theory remained in flux. Both these features are apparent in the work of Kant, where the triadic schema appears in its modern terminology

1. *Ibid.*, III, iii; I, vii, 3.

2. *Ibid.*, I, vii, 3.

3. Principles of Moral and Political Philosophy (1785), VI, c.8.

4. Works (Bohn edition), I, 476. Cited by E. Barker (ed.) in Gierke's Natural Law and the Theory of Society, 1500-1800 (trans. 1934), 359.

as a sort of a priori of constitutional theory, but still is not precisely the triad we know today. Perhaps it is too strong to say, with Gierke, that Kant "derives division of powers directly from the rules of logic".<sup>1</sup> But it is quite clear that for Kant no true state can exist<sup>2</sup> without an unimpeachable legislative power, an irresistible executive power, and a judicial power whose sentences are irreversible; and further that:

these three powers may be compared to the three propositions in a practical syllogism: the major as the sumption laying down the universal law of a will, the minor presenting the command applicable to an action according to the law as the principle of the subsumption, and the conclusion containing the sentence or judgment of right in the particular case under consideration.<sup>3</sup>

The difficulty of Kant's analysis lies in the distinction between executive and judicial power, and it gives rise to some very confusing discussion by Kant. It is sufficient here to note that judicial power is regarded by Kant as having the function of (a) settling disputes peaceably,<sup>4</sup> (b) assigning to each what is his own according to law,<sup>5</sup> and (c) administering the law by determining issues in causes;<sup>6</sup> and as a special prerogative of the people, who may appoint special courts for every process or cause.<sup>7</sup>

1. Gierke, *op.cit.*, 159.
2. Kant, Perpetual Peace (1794-5), II, 1 & 11. Gierke, The Development... 239, (Pt.II, c.3.n.234).
3. Kant's Philosophy of Law, trans. W. Hastie (1887), 165 (1796-7).
4. Perpetual Peace, II,ii.
5. Philosophy of Law 166.
6. Ibid. 173.

More important than all theories, in the fixing of modern notions of powers, was the Constitution of the new United States of America, which Kant may have admired,<sup>1</sup> but perhaps did not fully understand, and which Bentham certainly admired,<sup>2</sup> but certainly did not regard as grounded on a true analysis of political powers. How far Bentham, the planner of constitutions, was able to transcend the American model is, however, another matter.

## II

### An apparent contradiction in Bentham

Now it was Bentham's particular interest in conceptual analysis that led him to doubt whether, for example, judicial power could as such be properly or usefully distinguished from other sorts of governmental power. His interest in codification and legal reform led him to employ and elaborate just such a distinction in his constitutional plans. Yet these two interests of his co-existed throughout a long life; the appearance of contradiction cannot be resolved by pointing to any simple change of ideas through time. Bentham's ideas about powers are integral to his analytical schema, and it is clear that this no more underwent any fundamental revision after The Limits of Jurisprudence Defined of 1782 than the guiding principles of his reformative prescriptions underwent

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1. Cf. Körner, S., Kant (1955), 221.  
 2. Bentham, Works, I X, 98.

any significant change after the contemporaneous Introduction to the Principles of Morals and Legislation;<sup>1</sup> in the Equity Dispatch Court Proposal of 1829-1830 there is to be found the original analytical schema, and in the great Constitutional Code, which occupied the twelve years before his death in 1832, the original guiding principles. Moreover, the announced intention of Bentham's analyses was "to lay the foundation for the complete body of laws supposing it to be constructed ab origine"<sup>2</sup> - in short, to provide the framework for his Code. So it seems that either his method of analysis, or else the substantive principles required to give body to his work of synthesis and codification, must have led Bentham astray. We shall argue that in fact it was his mistakes about the methods of jurisprudential analysis that led him to do his best to eliminate the notion of judicial power. But there is no point in disguising the fact, of more historical than jurisprudential interest, that Bentham saw rather little virtue in the achievements of England's independent judiciary. Just as Aristotle's analysis of powers seems to have been influenced by a fundamental social conservatism, so the energies that Bentham expended, decade after decade, on vilifying the works of "Judge and Co." may well have spilled over into his analytical considerations and distorted them in subtle ways.

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1. See Mack, M., Jeremy Bentham, 1748-1792 (1962), 5, 22, 199.
  2. Bentham, J., The Limits of Jurisprudence Defined (ed. C.W. Everett, 1945), 329.

The effects in the two cases are different, but the causes are oddly similar; for Bentham's objections to judicial power as he saw it in action were grounded on his basal premise that "the grand utility of law is certainty".<sup>1</sup> Still, Bentham amply rewards the study of the jurist; the industry, ingenuity and fertility of his speculations and plans are not to be gainsaid, and his faults are exemplars.

### III

#### Bentham's early analysis: the general part

In a letter to Lord Ashburton, announcing the work now known as The Limits of Jurisprudence Defined, Bentham introduces the themes to be considered here:

Ch.19. A law defined and distinguished. Here the difficulties are stated which occur in common speech from the want of any settled distinction between acts of legislation, acts of administration, and acts of judicial authority. Ch.20. Source of a law, or of the person of whose will it is the expression. In what manner...judicial orders, [and] orders of the executive magistrates...connect with those permanent laws which ensue directly from the sovereign legislature.... Ch.27. Of the modifications a law may admit in point of generality...In the course of this and the 24th chapter I found it necessary to give an analytical view of the several simple modifications of which the powers of government, public as well as private are susceptible: for the indefiniteness expressed by the common division into legislative and executive, or legislative, executive and judicial, I found to be very complex in themselves [sic] and very ill distinguished from one another.<sup>2</sup>

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1. Works, III, 206.
  2. Limits, 8 (Letter of 3 June, 1782).

It is not too much to say that the substance of the present chapter can be regarded as a commentary on this passage. For the moment, it is sufficient to note that there are here two references to the difficulties in the common division of powers; it is made plain that both this common division, and the "simple modifications of powers" which an "analytical view" will reveal, are intimately related to the generality and source of laws - indeed, to the very definition of law itself. What, then, is this definition of law?

For Bentham:

A law may be defined as an assemblage of signs declarative of a volition conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power: such volition trusting for its accomplishment to the expectation of certain events which it is intended such declaration should upon occasion be a means of bringing to pass, and the prospect of which it is intended should act as a motive upon those whose conduct is in question.<sup>1</sup>

As Bentham admits without reluctance, this definition "outstretches the idea which common usage has annexed to" the word "law".<sup>2</sup> For it includes many "expressions of will" which would not commonly be termed "a law".<sup>3</sup> The term "a law", he says, is ordinarily taken to denote an act of legislation,<sup>4</sup>

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1. Ibid., 89.
  2. Ibid., 96.
  3. Id.
  4. Ibid., 90.

while the proposed definition embraces any "judicial order, a military or any other kind of executive order, or even the most trivial or momentary order of a domestic kind" not issued in contravention of some other law.<sup>1</sup> Bentham does not shrink from the conclusion that judicial and executive orders have "in every point except that of the manner of their appertaining to the sovereign, in every point in short except their immediate source, the same nature"<sup>2</sup> as a legislative enactment or anything else generally accepted as a species of law. What is this "nature" that he speaks of? It consists in being an "expression of will...referable ultimately to one common source, the sovereign".<sup>3</sup>

Here, in fact, is the governing concept in Bentham's legal analysis. For such expressions of will necessarily admit distinctions between

1. superiors and subordinates;
2. making and executing (and here are involved the modes of sign and sanction);
3. local and geographically universal application;
4. permanence and transience;<sup>4</sup>
5. particular and general application to persons and subject-matter.<sup>5,6.</sup>

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1. Id.  
 2. Ibid., 96.  
 3. Id.  
 4. Ibid., 96, 343.  
 5. "subjects and objects" in his usage.  
 6. Ibid., 96.

It is not too blunt to say that Bentham's interest in analysis led him to project a general jurisprudence employing little or nothing beyond these sets of logical distinctions inherent in the idea of "command"<sup>1</sup> (or "order",<sup>2</sup> or "expression of will",<sup>3</sup> or "signs declarative of a volition",<sup>4</sup> or "mandate"<sup>5</sup>). It seems that he regarded the logical permutations and combinations of these simple formal modifications of a single clear and distinct idea as the begin-all and virtually the end-all of scientific jurisprudence.

That this does not misrepresent Bentham's project will seem more probable if it is understood that he took the notion of analysis quite literally. Faced with apparently confused and indefinite ideas, Bentham set out to replace them with clear and distinct ideas.<sup>6</sup> But, he thought, ideas are annexed to terms,<sup>7</sup> and though terms can where necessary be invented, most terms are already given, by current language.<sup>8</sup> The problem, in short, is one of clarifying, by recasting, the ideas annexed to terms. The method is to find the elements of which complex ideas are constituted; these elements, because simple, will necessarily be clear and distinct. Likewise, the complex idea annexed to a general term will itself

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1. "Pannomial Fragments" in Works, III, 223.
  2. Limits, 90
  3. Ibid., 96.
  4. Ibid., 89.
  5. Ibid., 112.
  6. "A General View of a Complete Code of Laws", Works, III, 199.
  7. Limits, 95, 96, 330.
  8. Ibid., 152n at 153; 167.

become clear if its elements or parts<sup>1</sup> are correctly identified and regularly arranged.<sup>2</sup> This process of identification and arrangement, of recasting and selection, Bentham calls "fixing an idea".<sup>3</sup> An idea, when fixed, is complete<sup>4</sup> and (relative to more general ideas) simple, and to this simple and complete "model, if properly delineated, every other less regular specimen may be reduced and made conformable: if imperfect by completion, if complex by decomposition or resolution".<sup>5</sup> Of course, the search for clear elemental ideas and regular arrangements presupposes that such ideas and arrangements are in some way already there to be found by analysts more clear-sighted than the ordinary user of language;<sup>6</sup> and Bentham does not attempt to disguise this premise.<sup>7</sup>

Jurisprudence, then, is a science<sup>8</sup> in which the object of consideration is law - in the first place, the law (that is, the legal system), but secondly and necessarily, a law (because the legal system is nothing other than "the complete body of laws",<sup>9</sup> and because Bentham's definition of "a law" contains an implicit definition of the legal system as a hierarchy of commands). In any case, "law" is a general term to which, there-

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1. Hence "parts of a law", *ibid.*, 275n.
  2. *Ibid.*, 87.
  3. *Ibid.*, 275n, 304. Cf. "fixing common language", Mack, *op.cit.*, 176.
  4. Hence "No Customary Law Complete", *ibid.*, c.XVII.
  5. *Ibid.*, 304; Works, III, 196.
  6. Works, III, 199.
  7. Limits, 57-58.
  8. *Ibid.*, 57.
  9. *Ibid.*, 329; 57-58.

fore, is annexed a complex of ideas. So jurisprudence involves identifying and naming all the ideas which constitute the idea of law. But since even elemental terms, not being proper names, denote classes of particulars, Bentham can say that:

in a natural arrangement the denominating character of each class should be such as indicates the relation which the particulars comprised under it bear to that object of consideration which is the end of the Science.<sup>1</sup>

Jurisprudence, in other words, is to proceed by the division and decomposition of general terms and complex ideas, and the identification and arrangement of simple terms and elementary ideas, all according to "natural and universal principles".<sup>2</sup>

Such a programme of analysis has several corollaries. In the first place, while it starts from ordinary usage, it is in essence a programme for reforming that usage by recasting the "ideas" commonly "annexed to" words. As already remarked, Bentham recognised this clearly, and detailed the divergences between his definitional proposals and "common usage". In the second place, more particularly, if something commonly called "X" lacks all the elementary "parts" or components of the newly clarified "X", it can be said not to exist (that is, qua "X"), to be fictitious (in so far as it purports to be "X"). or, more precisely, to be "incomplete". This enables Bentham

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1. Ibid., 98; 58.

2. Ibid., 329.

to denounce customary law, for example, as "non-existent",<sup>1</sup> "a fiction from beginning to end",<sup>2</sup> for the simple reason that he has defined (that is, discerned) law to be "an assemblage of signs declarative of a volition"; but the word "signs" in this definition is to be understood in a purely tangible and visible sense, as denoting something written;<sup>3</sup> hence "customary law", having emanated from verbal discourse, lacks the element of "sign", and is "incomplete", with the drastic consequence predicated above.<sup>4</sup> In the third place, more particularly, Bentham's programme expressly requires (and predicts) that every element and every arrangement in the analysed system of law be clearly related to "that object of consideration which is the end of the science". In short, every item in the analysis is to be plainly referable to the definition of law. This definition, then, may be expected to

1. Limits, 275n.

2. Ibid., 282.

3. Ibid., 243, 244.

4. Bentham, manifesting an understandable unease about this unpalatable amputation of all unwritten law from the class of "laws", attempts to reinforce his position with a further argument which sometimes seems primary, sometimes secondary. Its first premise is that whatever is law "must be general, applicable to an indefinite multitude of individuals not then assignable". Its second premise is that verbal discourse "is in point of extent particular, being confined to the assignable individuals to whom it is addressed". The conclusion, then, is that customary law, originating in verbal discourse, can not be law. The first premise is, of course, inconsistent with Bentham's own definition of law; the second premise is quite arbitrary if it seeks to contrast "verbal discourse" with "writing" since, if publication is what is at stake, the one may in some circumstances be as effective as the other. The conclusion is all that Bentham was really interested in, for motives to be mentioned later (infra, sec. VIII).

govern, or at least influence (if not distort) Bentham's analysis of every element and arrangement in the "complete body of laws".

#### IV

##### Bentham's early analysis: judicial power

Bentham, then, expounds every feature of the legal system in such a way as to demonstrate its dependence on the concept of law as command plus sanction (or reward). His theory of governmental powers reveals the consequences of this method rather strikingly. We shall here look first at four analyses that can be collated from The Limits of Jurisprudence Defined.

(a) Judicial power as an impressive accensative power of commanding de singulis.

This first analysis notes that commands may be either general or particular in respect of the persons to whom they are addressed and in respect of the objects they affect.<sup>1</sup> It follows that there are two different sorts of powers, one of commanding de classibus (that is, of enacting general laws affecting whole classes of persons, things, etc.),<sup>2</sup> the other of commanding de singulis (that is, of enacting particular laws affecting only specified members of classes of persons, things,

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1. Limits, 162.

2. Ibid., 165.

etc.).<sup>1</sup> Then legislation is commanding de classibus, and it is evident that the power of legislating does not embrace the whole power of command.<sup>2</sup> Distinct from legislation is the power of classifying specified persons, things, acts, places or times - by which Bentham means moving them from one class to another; this is the accensitive power.<sup>3</sup> For example, the accensitive power in personam is exercised to invest men with a condition. If this condition is accompanied by a right, then the power may be called jurisdative, or the power of making conveyances; and this, when the right thus conferred is of a public<sup>4</sup> character, is "one of the grand divisions of the powers of government".<sup>5,6</sup> If, on the other hand, the condition with which the man is invested is membership of the class of delinquents from whom rights have been taken away, then the relevant accensitive power may be called "impressive"; and this is a "part" of the power of issuing judicial commands.<sup>7</sup>

What, then, is the whole judicial power? This first analysis does not provide an answer. For when Bentham turns

1. Ibid., 165, 255.

2. Ibid., 168.

3. Ibid., 169-170. All accensitive power is, by definition, de singulis; but, it seems, the converse does not hold.

4. A law is "public" if it is "general in respect of the persons favoured in the last instance": *ibid.*, 162.

5. It is an axiom of Bentham's jurisprudence that "public powers (constitutional powers) differ no otherwise from private fiduciary powers than in respect of the scale on which they are exercisable: they are the same powers exercisable on a greater scale": *ibid.*, 171, 298-299; see also Mack, *op.cit.*, 125-126.

to consider generally the nature of commanding de singulis (of which accensitive command seems to be only a part) he contents himself with the observation that such "particular" commands will be either public or domestic, and if public will be either legislative or (are usually) executive, and if executive will be either judicial or non-judicial.<sup>1</sup> But since "particularity" is thus admittedly neither a necessary nor a sufficient reason for calling a command "executive" rather than "judicial", and since the grounds for classifying executive commands as judicial or non-judicial are not here divulged, it is plain that the clear ideas presumably to be annexed to the term "judicial" are assumed, rather than brought to light, by an analysis in terms of the particularity and generality of commands.

(b) Judicial power as a subordinate command on the occasion of a suit

A second analysis notes that all legal commands are issued directly by the sovereign, or indirectly by a subordinate authority with the approval of the sovereign.<sup>2</sup> Where the authority is subordinate, the command either will be issued on the occasion of a suit or it will not. If it is not,

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(continued from previous page)

6. Ibid., 173.

7. Id.

1. Ibid., 162.

2. Ibid., 112.

then it will be either perpetual or transient; if it is permanent, the authority issuing it will be a sub-legislature, and if it is transient, the authority will be executive. But if the command is litis causa, or propter quid - that is, on the occasion of a suit - then it will be judicial.<sup>1</sup>

(c) Judicial power as a power of punishing, immediately preliminary to contractation, and authorised by subsidiary commands.

A third analysis notes that, while both sovereign and judge have powers of command, commanding is not the whole of power.<sup>2</sup> For command is directed to man's self-moving or active faculties, and produces its effects by influencing his will; but man's body, too, is subject to influence, and power may be exercised over his passive faculties.<sup>3</sup> Such power as the public executioner wields may, then, be called contractation. Command and contractation together make up the whole of power and dominion,<sup>4</sup> and all power of command rests ultimately on power of contractation.<sup>5</sup> For punishment of offences is an exercise of the power of contractation, and all powers of command are "identical with the power of creating offences".<sup>6</sup> "Whatever is done in the way of law has reference to delin-

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1. Ibid., 112, 172.  
 2. Ibid., 229n, 301-302.  
 3. Ibid., 64, 228n.  
 4. Ibid., 228n.  
 5. Ibid., 229n.  
 6. Ibid., 229n.

quency",<sup>1</sup> and "everything that comes under the head of law" has a "necessary reference" to punishment.<sup>2</sup> As the definition of law first announced, the legislator both declares his will and threatens and predicts the punishment of non-compliance. But to carry out such threats and "verify such predictions" is to exercise a different sort of power,<sup>3</sup> and since for want of time and opportunity the legislator cannot do everything in the way of government, he must authorise subordinates to exercise this power of punishing. Such authorisation is effected by a law, "subsidiary" to the "principal" law which declared the legislator's primary will; the subsidiary command may be addressed to anyone save him to whom the principal command was addressed, since no-one can punish himself.<sup>4</sup> In fact, the subsidiary law is addressed to someone appointed or disposed to execute such commands, and this person is commonly a judge (which is not to say that this is all that a judge is).

(d) Judicial power as a power of creating offences by investing the plaintiff in a regular suit with rights.

A fourth analysis gathers together strands of the foregoing three. For while all law has reference to offences,

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1. Ibid., 300, also 305.
2. Ibid., 56, also 55, 57.
3. Ibid., 228.
4. Ibid., 233.

offences may be either past or prospective.<sup>1</sup> Where an offence has already been committed, a suit will be penal, and the judicial command will invest the defendant with membership of the class of delinquents, in virtue of the impressive branch of the accensitive power granted to the judge by a subsidiary law.<sup>2</sup> But where an offence is merely prospective, this is because the relevant non-compliance which will attract punishment is not with a legislative command but with a subordinate command of a judge; and such a command is issued, not to invest the defendant with an immediate liability to punishment as a delinquent, but to invest the plaintiff with a right as against the defendant;<sup>3</sup> so here the suit is civil or non-penal. In other words, the nature of a suit depends on the way in which the interest of the defendant is affected by the judgment;<sup>4</sup> a suit is penal if the judgment commands that the defendant be punished, and civil if it orders the defendant to do something and only then accompanies this order with a threat and prediction of punishment on non-compliance.<sup>5</sup> Civil judgments, then, create offences,<sup>6</sup> and this is no surprise, since "a judgment in the sense in which it is an expression of will is a kind of occasional law".<sup>7</sup> A judgment, moreover, "although by its name it should be nothing but an act of the understanding,

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1. Ibid., 300.
  2. Ibid., 173.
  3. Ibid., 302.
  4. Ibid., 200.
  5. Ibid., 300, 301, 305.
  6. Ibid., 305.
  7. Ibid., 301.

yet before it can have any effect must be understood as having been transformed into...an act of the will".<sup>1</sup> Finally, the complete, regular and relatively simple idea of a suit or cause is of two parties, plaintiff and defendant, and judge and judgment. Suits for contempt of court involve an "incomplete idea" of a suit; but this idea may be made conformable to the regular idea by "completion", that is by regarding the judge as plaintiff as well as judge.<sup>2</sup> Suits such as those involving cross-claims involve a relatively complex idea which may be "decomposed" into two or more parts each consisting of the relatively simple idea of the regular suit.

V

Bentham's later analysis: the rejection of the triad.

To set out the four analyses above is to run the risk of misleading. For Bentham did not attempt, in The Limits of Jurisprudence Defined, to analyse judicial power in this orderly fashion, and his views have to be gleaned from his discussions of other matters. It could hardly have been otherwise, since it should by now be apparent that the idea of judicial power does not fit very readily into the framework of his jurisprudence, and is by no means one of the clear, simple or regular ideas from which alone he hoped to construct that framework. The short way to confirm this incompatibility is to

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1. Ibid., 306.  
2. Ibid., 304.

call in aid Bentham's own direct discussion of the problem in A General View of a Complete Code of Laws. This work, written within twenty years of the Limits, displays conceptions of law, the legal system and jurisprudential analysis almost wholly identical with those of the earlier work. It also contains a vigorous polemic against the common division of powers into legislative, executive and judicial.<sup>1</sup> The terms employed in such divisions are denounced as vague and obscure, because they do not rest on an accurate "decomposition" of powers and offices into their "primordial elements".<sup>2</sup> Bentham undertakes such a decomposition, by directing attention to the "modes of operation" employed in the exercise of governmental powers. This method of analysis results in a schema similar to that in the Limits, but rather more detailed.

First of all, a new definition of power is proposed, which sets that idea as firmly as possible within the definition of law as command:

powers are constituted by exceptions to imperative laws... Every imperative is in its own nature coercive or discoercive. The coercive law demands, or prohibits: it creates an offence....The discoercive law creates an exception: it takes away the offence; it authorises a certain person to do a thing contrary to the first law: "the judge shall cause such an individual to be put to death"... Duties are created by imperative laws addressed to those who possess powers: "the judge shall impose a certain punishment, according to certain prescribed forms".<sup>3</sup>

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1. Works Vol.III, 198.
  2. Ibid., 196.
  3. Ibid., 195.

Power, it is said, may be exercised in respect of persons or of things. Thus, the category of contrivance appears here in the form of "immediate powers over persons", "immediate power over the things of another", and "immediate power over public things".<sup>1</sup> The power of command is once again divided into power over persons individually and power over classes. The accensitive power appears under the title of "power of classification" (with regard to persons, things, places and times), and a new power is added to the list, to cover the granting or refusing of rewards (which, with sanctions proper, make up the motive referred to in the definition of law). These, then, are the elementary powers.

Just as in the Limits he remarked on the "difficulties which occur in common speech from want of any settled distinction between acts of legislation, acts of administration and acts of judicial authority", so Bentham here remarks that "the divisions most generally adopted at present leave all these powers in a state of confusion and disorder".<sup>2</sup> The first section of the present chapter reveals the justice of these observations. Everyone, Bentham goes on, agrees that legislative power is the power of commanding and is free from the restraints characterising judicial power; yet it is un-

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1. Ibid., 197.

2. Ibid., 198.

certain whether it is restricted to power over classes, whether it must be exercised by orders capable of perpetual duration, and whether it must be exercised by a political body rather than by an individual. As for judicial power, "among the authors who have considered this power as distinct from legislative power, I have not found one who has appeared to understand the difference".<sup>1</sup> It is not that the judge commands de singulis, for he may judge communities and provinces. (So much for the first analysis in the Limits: supra, sec.IV(a)). It is not that the judge's commands are incapable of perpetual duration; and it is not that the legislator's commands are incapable of relating to specified individuals. It is simply that for an order to be judicial, it must have been issued in circumstances by which the judge, unlike the legislature, is restricted. Firstly, an interested party must have required the judge to issue the order (save where the judge himself is interested, as in protecting his court against contempt). Secondly, anybody to be prejudiced by the proposed order must have the power of opposing it. Thirdly, allegations must be proved, and opportunity given for contrary proofs. Finally, the order must be conformable to the written law. These four requirements of Bentham's include, but go beyond, that notion of the suit that was central to the second and final analyses of judicial power in the Limits (supra, secs. IV(b) and (c) ).

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1. Id.

The new element is, of course, the value realized by proving allegations and, in short, by ensuring that the procedure is governed by a degree of reasonableness.

Now this new requirement seems extrinsic to the characterisation of elementary powers as previously elaborated; but so also does the whole complex idea of the suit as the context unifying under the rubric "judicial power" diverse and intermingled elementary powers of command de singulis and de classibus, perpetual and transient, local and geographically universal, accensitive powers of classification of all sorts, and powers immediately preliminary to the contractative power of the executioner and the bailiff. Bentham himself saw clearly enough that his analysis of elementary powers at no point coincides with even his own refined version of the commonly accepted triadic analysis of governmental powers and so entirely fails to illuminate it or account for it. The extrinsic elements are obviously indispensable.

Bentham was a thinker sufficiently acute to provide, in the fourfold characterisation just noted, an account of judicial power that is in substance identical with that advanced by the Committee on Ministers' Powers well over a

century later.<sup>1</sup> But because he was in the grip of his assumption that only clear and simple ideas are real, and that all clear ideas about law must be plainly referable to the idea of command, he was satisfied that his own analysis was true and the accepted analysis correspondingly mistaken. As he remarked with some complacency:

It is not absolutely necessary to exclude these terms adopted into the vocabulary of all the nations of Europe; but it was necessary to show how far they were from representing the true elements of political powers.<sup>2</sup>

The obvious question was: Why did all the nations of Europe adopt these terms? This in turn provokes the further question: What is the point of, say, judicial power, as distinct from, say, legislative power? It is true, of course, that political theorists have achieved little more than a terminological

1. "A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) the presentation...of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required, a ruling upon any disputed question of law" Report of the Committee on Ministers' Powers, (1932), 73.
2. Works, III, 198. To be perfectly fair to Bentham, one must point out that he does not unambiguously claim to have discovered the "primordial elements" which are "the key to every given political system". He leaves open the door for his readers to suppose the work of discovery and "decomposition" as yet undone; hence, for example, the sadly misguided effort of W.W. Lucas, The Primordial Functions of Government (1938).

consensus; and it is impossible not to sympathise with Bentham's impatience. However, the nations of Europe were made up, not of political theorists and analytical jurists, but of practical people, who purposed to get things done, to avoid strife, to order and systematise the solutions and sources of solutions to a multitude of problems of action and decision arising from a multitude of human wants, interests and activities. So it was at least worth asking whether, perhaps, the accepted terminology of powers represented not so much a confused attempt to describe sets of actions in physical or psychological terms as an attempt to explain whole families of acts, actions and activities by reference to their role, function, purpose or point in the practical man's scheme of government. Or rather, since Bentham was fully capable of appreciating the values thus realized in the various types of powers, he might have asked whether a "true" analysis must inevitably ignore such an appreciation.

But Bentham never put these questions to himself. Sometimes,<sup>1</sup> indeed, he seems to have perceived that as well as his own analysis by description of "modes of operation", there was another possible method of analysis that would include explanation of the ends and purposes, in short the values, towards which powers in human systems are directed. But he

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1. E.g. Works, III, 196, 346.

eschewed this method, apparently because he regarded it as no more than a supplement showing how the true abstract powers might, as it were contingently, be applied. He seems never to have considered the question whether values might be involved in the very idea, the meaning or definition of the powers and their divisions and relations as traditionally expressed. Why did Bentham systematically ignore this possibility? This raises a difficult question, and the account which follows is offered rather tentatively as merely a not un-plausible explanation, though it is conceivable that other explanations could be given, and even that there is no explanation other than mere oversight on Bentham's part. But our account is not so much an exploration of Bentham's intellectual biography for its own sake, as a further contribution to the examination of method instituted in the first chapter.

## VI

### Some features of Bentham's analytical method

It has already been shown that Bentham regarded jurisprudence as a science that would make clear and regular the simple ideas annexed to the word "law" in its two aspects as "legal system" (or "body of laws") and as "a law". But now it must be pointed out that Bentham had a clear and fixed idea of what a clear idea is, not only in the context of jurisprudence but in general. To have clear ideas is to have pierced through a veil of "fictitious entities" woven

by the "ingenuity of the first masters of language compelled by necessity", and so to have attained to a "clear perception of the real state of things".<sup>1</sup>

Power, right, prohibition, duty, obligation.... all these with a multitude of others...are so many fictitious entities which the law upon one occasion or another is spoken of in common speech as creating or disposing of. Not an operation does it ever perform, but it is considered as creating or in some manner or other disposing of these its imaginary productions. All this it is plain is the mere work of the fancy: a kind of allegory: a riddle of which the solution is not otherwise to be given than by the history of the operations which the law performs in that case with regard to certain real entities....<sup>2</sup>

The "real state of things", then, consists of "things" and persons, their acts and operations; clear ideas are "copied immediately from the impressions made by these real entities",<sup>3</sup> or are "copies of the sensible affectations of determinable real entities".<sup>4</sup> It follows, according to Bentham, that such words as "prohibition", "power", "right", "duty", etc., all denote fictitious entities, precisely because they are not "the names of real entities or of the sensible affectations of determinable real entities". This, incidentally, is why Bentham, as noted in section III above, proposed a science of jurisprudence founded on "natural and universal principles", in which all the particular elements would be manifestly referable to "the object of consideration of the Science",

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1. Limits, 57.                      2. Id.                      3. Id.  
 4. Id. Cf. Locke, Essay concerning Human Understanding, II, viii, 15; Hume, Treatise of Human Nature, I, i, 1.

viz., the idea of law. For the reduction of the foregoing fictions to the clear ideas of those real entities signified by the words "command" and "prohibition"<sup>1</sup> (but notice that "prohibition" has already appeared in the above list of fictitious names, taken from the previous page of Bentham's text) will "serve as a key to the import" of those words, and "while it lays open the import of each will lay open the connection between every one of them and that of every other".

Stripped of the excited thought and exaggerated language that opposes to "real entities" a mixed bag of "fictitious entities", "fancies", "allegories", "riddles", "phantastic denominations" and even "nonsense", Bentham's thesis is essentially the same as the thesis of Hart's that was disputed at length in the first chapter of the present study. Corresponding to Hart's "facts" are Bentham's "real entities"; corresponding to Hart's "straightforward connexion" between "ordinary words" and "the world of fact" are Bentham's "ideas copied immediately from the impressions made by real entities"; corresponding to Hart's rights, duties, etc., that are "conclusions of law" on the basis of certain "facts", are Bentham's fictitious, etc., entities, that are explained only "by the history of the operations which the law performs in

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1. Limits, 58.

that case with regard to certain real entities". Read soberly, then, and allowing for the apparatus of Humean and Lockean terminology, Bentham's basic theory of jurisprudence is open to all the objections already raised against Hart's Definition and Theory in Jurisprudence;<sup>1</sup> the objections need not all be rehearsed again here.

Suffice it to say that, for Bentham, understanding and knowing, in jurisprudence and in general, are matters of taking a look<sup>2</sup> at the "already out there now". The terms of a science are all to be names of sensible (though not necessarily spatial) entities or of relations that are purely experiential connections. But there seem to be no cogent grounds for such a view, and the programme of reduction that is based on it seems to be quite incoherent.<sup>3</sup> For to pretend to a knowledge that knowledge is only of sensible entities and experiential connections is rather conspicuously self-stultifying. If one is to be satisfied with nothing less than clear ideas, and if clear ideas are specified to be copies of impressions made by sensible entities, then it is plain that either Bentham must, according to his own specifications, fail to provide a clear idea of clear ideas, or, more plausibly, his specification must

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1. It does not follow, of course, that Hart's theory is open to all the objections that might be raised against Bentham's
  2. "Taking a look" here includes the "inward look" which is the empiricist conception of introspection.
  3. Cf. J. Wisdom, Interpretation and Analysis in relation to Bentham's Theory of Definition (1931).

itself be mistaken. From the incoherence of his programme, it follows that Bentham's views as to what things, in detail, are "real" and what "fictitious" were more or less arbitrary, as was rapidly shown by the muddle about the "reality" of prohibitions.

In particular, Bentham was unable to see clearly that there might be some significant pattern of human purposes involved in the physical and psychological operations and manifestations upon which alone his theory of knowledge licensed him to build. This is, of course, in one sense a very paradoxical and confusing result, in view of Bentham's life-long concern for a "logic of the will",<sup>1</sup> and in view also of his own vast and not unintelligent schemes for future orders of things arranged according to certain defined ideal values. But specifically human purposes, or values, are the work of intelligence grasping possible future orders of things and realizing those possibilities in the light of the practical knowledge<sup>2</sup> constituted by that intelligent grasp. As such, values and purposes are to be discerned, not by just looking a bit harder (whether "outwards" or "inwards") in order to get more (outward or inward) sense impressions of human activity, but by asking such questions about that activity as will (or

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1. Cf. such works as "A Table of the Springs of Action", Works I, 195.
  2. See G.E.M. Anscombe, Intention (1957).

may) elicit in the inquiring observer the insights that will enable him to formulate hypotheses as to the (possible) intelligible patterning of the observable manifold of physical and psychological operations by choices and values. Bentham systematically restricted the questions he would ask about his materials. However, since the system was incoherent and his own insights irrepressibly more abundant, subtle and fruitful than the copies of impressions he claimed them to be, his restrictions were arbitrary and inconsistent, and intelligent questions did keep arising which his basic assumptions would not allow him to answer fully and openly.

So when, for example, Bentham inquired to what end powers might be directed, his preoccupation with the physical and the "psychological"<sup>1</sup> at the expense of the specifically intelligent limited his answer to a brief recital of such primitive objectives, shared by man with other animals ("all sentient beings"),<sup>2</sup> as security against internal and external attacks and calamities.<sup>3</sup> Objectives like these obviously

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1. It is difficult, of course, to find words to express in summary form the empiricist doctrine of mind, since common language is not empiricist. Hence "psychological" here must be understood according to the curious empiricist notion of the psyche.
  2. Limits, 64.
  3. Works, III, 196.

provide scant ground for discriminating between varieties of governmental power. Thus, when he spoke of the "objects" or "purposes" or "functions" of a law or power, Bentham more usually meant no more than "the acts enjoined by the law, as characterized by the circumstances to which the law or power may apply":<sup>1</sup> he did no more, in other words, than display more fully the relations between the various working parts of a complex law, legal system or power which had been already defined in terms of manifest acts and operations and their sources, extent, signs and those other simple (e.g. temporal) modifications tabulated in section III above.<sup>2</sup> As Bentham himself insisted, his descriptions of such modifications of powers do not go very far towards an explanation of the scope, significance or meaning of legislative, executive or judicial power. These three powers remain in his analysis only as unwelcome and (doctrinally) unexplained categories; the proper and useful distinctions between powers are located by Bentham quite elsewhere. His methodology seems to go far to account for this conclusion.

## VII

### The return of judicial power: Bentham's Public Opinion Tribunal

#### The framework of Bentham's Constitutional Code (c.1820-1832)

1. As to "objects", see *id.* and Limits, 88; as to "purposes" and "ends" see Works, III, 346-7; as to "functions" see infra p.3.47. Thus the powers of the Equity Dispatch Court, as characterised by "end" and "purpose" are, e.g., "stopping ulterior proceedings in the existing Courts", making rules of court, extending jurisdiction, etc: *ibid.* III, 347.
2. Supra, p.3.11.

is plainly conformable with his analysis of law as an aggregate of principal and subsidiary commands, though the terminology has once again undergone change. All law is divisible into substantive and adjective, in that some (principal) commands lay down what is to be done, without reference to the officials whose business it is to see that the command is obeyed, while other (subsidiary) commands "describe" how those officials are to go about their business.<sup>1</sup> The latter commands make up adjective law, and this is in fact the law of judiciary procedure, since the officials referred to are judges and ministers of justice.<sup>2</sup> Thus, it will be noticed, judicial power is now linked even more firmly to subsidiary commands than it was in the Limits (supra, Sec. IV (c) ); for that concluded only that such officials are "commonly" judges.

Constitutional law, however, straddles the categories of substantive and adjective law, and to define it Bentham is obliged to shift momentarily, and without such advertisement, from his notion of law as the command of, or by leave of, the sovereign to a notion of law as a "political rule of action".<sup>3</sup> For constitutional law is the branch that defines who the sovereign is to be. The sovereign exercises supreme power,

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1. Works, IX, 8.  
 2. Ibid., 8, 25.  
 3. Ibid., 4, 8.

and of this power there are two branches<sup>1</sup> - the operative,<sup>2</sup> by which the whole supreme power is exercised, save that other branch of it, the constitutive,<sup>3</sup> by which those (de singulis)<sup>4</sup> who are to exercise the operative power are designated.<sup>5</sup> Since constitutional law defines both who (de classibus) is to exercise the operative power<sup>6</sup> and who is to exercise the constitutive power,<sup>7</sup> it is clear that it cannot itself (without vicious circularity) be ab origine a command. Bentham does not advert explicitly to this problem, but passes on to say that a constitutional code would be complete, in a certain sense, if it did no more than provide for the constitutive power. In the ordinary case, it also divides subordinate power amongst various authorities, but there is no necessity, he says, for it to do so. Thus defined, constitutional law forms one of the three parts of the whole body of laws (the Pannomion), in which the other parts are the civil (right-conferring) and the penal (wrong-repressing). The precise relation between this tri-lateral classification, and the cross-classification in terms of substantive and

1. Ibid., 9.
2. Viz., the power of the Legislature.
3. Viz., the power of the electorate.
4. Viz., the elected members of the Legislature.
5. Later a broader meaning is given to constitutive power, as "that by the exercise of which, operative power is created and conferred": 127.
6. Viz., by reference to eligibility for, and modes of election to, the Legislature, etc.
7. Viz., who is to be eligible to vote.

adjective law, is very obscurely sketched,<sup>1</sup> but need not detain us here.

Now if a constitutional code would be formally complete though it did no more than define the constitutive powers and their holders, it is reasonable to inquire about the principles on which Bentham spends six hundred pages in outlining a complete code of constitutional law. Bentham professes two substantive principles (which he here does not seriously purport to prove): first, that the object of every branch of the law ought to be the greatest happiness of the greatest number ("greatest happiness principle"); and second, that the actual and inevitable object of government is the greatest happiness of the governors ("self-preference principle").<sup>2</sup> The aim of Bentham's code is to reconcile these two principles by providing that the powers of government be shared by the largest possible number of people. His procedure in this project, elsewhere announced as the "Duty and Interest junction principle",<sup>3</sup> is grounded on the assumption that the greater the number who are empowered to act politically for their own happiness, the greater the number made happy by such activity. In formulating this assumption or principle thus, one must not be misled by the ambiguous distribution of the words "their

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1. Works, IX, 25.

2. Ibid., 5-8.

3. E.g. "Tracts on Poor Laws and Pauper Management", Works VIII, 380.

own": if one were to say, "where every citizen has the power to act, and acts in his own interests, the interests of everyone will be maximised", the dubious character of Bentham's assumption would be plainer.<sup>1</sup>

For present purposes, the interesting consequence of these principles is that Bentham's attempt to reconcile them led him to propose and define a "public opinion tribunal". For there are, in his scheme, two branches of supreme power, the constitutive and the operative, and since the object of the Code was to share governmental power among the greatest possible number, it seemed insufficient to provide merely that the (constitutive) power of electing the Legislature be vested in the body of the people; a desire, perhaps,<sup>2</sup> for structural symmetry led Bentham to grant to the people an operative power that would preserve the appearance of popular (and ipso facto happiness-maximising) control, while avoiding the anarchy that would ensue if the people exercised the ordinary legislative, administrative and judicial powers of the state.<sup>3</sup> In fact,

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1. In fact, Bentham comes no nearer to discussing the compatibility of his two fundamental principles than this: "Even at the present stage in the career of civilization the dictates of public opinion coincide, on most points, with those of the greatest happiness principle; on some, however, it still deviates from them; but, as its deviations have all along been less and less numerous, and less wide, sooner or later they will cease to be discernible; aberration will vanish, coincidence will be complete". Works, IX, 158. It is the authentic voice of the eighteenth century philosophe.

this apparent grant of power amounts to little more than labelling as the "judgment" of an "unofficial judicatory"<sup>1</sup> (called the public opinion tribunal) all public opinion on matters of government conduct, whether that opinion be expressed in the inchoate form of private comments, in the form of voting in elections for the Legislature, or in the shape of pronouncement by such distinct bodies ("sub-committees") of the public as juries.<sup>2</sup>

The members of the public opinion tribunal in a community, are the members of that same community, the whole number of them, considered in respect of their capacity of taking cognizance of each other's conduct, sitting in judgment on it, and causing their judgments in the several cases to be made known.<sup>3</sup>

In forming their opinions, members of the public opinion tribunal exercise "the judicial faculty", and in making them known they are "delivering verdicts":<sup>4</sup>

In his quality of member of the public opinion tribunal, every member of the constitutive body in giving expression to a sentiment of disapprobation so grounded, exercises a judicial function.<sup>5</sup>

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(continued from previous page)

2. But Bentham also used this notion of the "judicatory" constituted by opinion in other than constitutional contexts: see, e.g., his letter to Dumont of 28th October, 1821, quoted in Works, I, 14n. ("Principles of Morals and Legislation", Ch. III).
3. Ibid., 96.
4. "Judicatory" is Bentham's deliberately chosen synonym for "court", throughout.
2. Ibid., 41, 45.
3. Ibid., 41.
4. Id.
5. Ibid., 42.

Criticism of an official in public is in effect " a motion made for censure of the functionary in question", and a vote "in disfavour of such functionary" is "an act done for the purpose of giving execution and effect to the condemnatory judgment". Bentham does not shrink from calling this whole procedure "judicial", even when he is faced with the objection that "on the occasion of an ordinary suit...any such union of functions of accuser, judge and executioner,<sup>1</sup> would be incompatible with justice": his reply simply notes that in so doing the member of the public opinion tribunal "takes the only course which the nature of the case admits of".<sup>2</sup>

It might be objected that the public opinion tribunal is nothing but a rather ridiculous flight of fancy, an insignificant aberration from which no indications for the interpretation of Bentham's mind can or ought to be drawn. But the plain fact is that Bentham puts the public opinion tribunal in the forefront of the work over which he laboured for more than a decade.

Hence it is legitimate to point out that his proposal and discussion of this novel institution display a conception

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1. And members of the public who happened also to be militiamen were "judges with arms in their hands, prepared, in case of necessity, to give execution to their own judgments": *ibid.*, 59.
2. *Ibid.*, 42.

of "judicial function" rather far removed from his analyses of "judicial power" in the works previously examined in this Chapter. For now the "judge" is not commanding, either de classibus or de singulis, nor is he executing a principal law in obedience to a subsidiary law, nor is his judgment issued on the occasion of a suit as hitherto defined. So the present problem is to define exactly the relation between the two uses of the word "judicial", the new and the old. This problem can be tackled as one internal to the Code itself, since the formal framework of the Code, as already remarked, firmly situates the "judge" within the context of subsidiary or adjective law, and furthermore, Bentham feared anarchy where the "judicial power" was in the hands of the people or constitutive. Yet, as members of the public opinion tribunal, the constitutive people are at the same time "judges" exercising "judicial functions". To understand this dichotomy we must look more closely at Bentham's detailed and explicit treatment of judicial power in the Code, before we turn finally to some interesting and revealing obiter dicta scattered in the body of the work.

### VIII

#### The return of the traditional schema of powers

As has been hinted already, Bentham makes a four-way division of governmental power in the Code. In Bentham's

usage, "power" is ordinarily intended as an attribute of persons or institutions, "authority" as the person or institution thus empowered.<sup>1</sup> Thus there are four authorities, the constitutive, the legislative, the administrative and the judiciary,<sup>2</sup> and it is clear that Bentham regarded each authority as exercising a species of power in some sense distinct and different from the other three.<sup>3</sup> The similarity with Aristotle's analysis - indeed, with the whole tradition - will not escape notice.

Of course, Bentham's discussion of these powers begins confidently enough with the assertion that the exercise of the powers of government "consists in the giving of directions or commands, positive or prohibitive; and incidentally in securing

1. This is explicitly stated, *ibid.*, at 96. Bentham had originally noted the distinction, in other terminology, in his Fragment on Government (ed. Montague, 1891), at 203. But despite his strictures there on the inconsistency of Blackstone's usage, his own usage was not invariable: e.g. "In times of original inexperience and simplicity, all the authorities in the state were, in the supreme grade exercised by one hand. By degrees, the judicial authority - the Monarch not having time for the exercise of it - was transferred to subordinate hands": Works, IX, 458; also 121, 122.
2. *Ibid.*, 154.
3. *Ibid.*, 160: "Only by unalterable physical impotence, is the Supreme Legislature prevented from being its own executive, or from being the sole Legislature. The Supreme Legislature will not, to the neglect of its own duties, take upon itself any of those functions, for the apt exercise of which, when taken in the aggregate, those subordinate authorities alone can, in respect of disposable time, appropriate knowledge, judgment, and active aptitude, have been provided with sufficient means".

compliance through the application of rewards and punishments".<sup>1</sup> Thus there is a hierarchy, with the constitutive supreme and sovereign over all, and the legislative supreme over the administrative and judicial authorities.<sup>2</sup> The latter two authorities are in fact essentially executive<sup>3</sup> and subordinate. In a passage that mixes a mistaken analytical formalism with a valid (if not unchallengeable) prescriptive proposal, Bentham claims that their subordinate status entails that the courts cannot pronounce on the validity of legislation. This, he says, would be "manifestly self-contradictory" and impossible (quite apart from being undesirable),<sup>4</sup> in that it would be to give to a subordinate authority a power superior to that of the supreme power.<sup>5</sup> Such a conclusion, one may well think, reveals the pressures always exerted on his "analysis" by Bentham's aims and beliefs as a reformer. Indeed, as was observed at the end of the second section of this chapter, Bentham's own private values contributed to the narrowness of the delineations of judicial power in the formal analyses, in so far as his emphasis on the merely executive and subordinate character of that power, to the virtual exclusion of all other features, was motivated in part by his profound hatred of the powers of the judges in England. Likewise, this hatred helps explain the

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1. Ibid., 95.
  2. Ibid., 96, 97.
  3. Ibid., 122, 160.
  4. Ibid., 122.
  5. Ibid., 121.

otherwise feebly substantiated relegation of unwritten law to the class of "non-existence";<sup>1</sup> for unwritten law was judge-made law, and all the works of "Judge and Co." were the works of corruption and sinister influence. In any event, the Code's "analytical" argument against judicial review of legislation is not made any the less remarkable by the fact that Bentham was wont to appeal to the "uninterrupted and most notorious experience of the United States",<sup>2</sup> which had by this time digested the doctrine of judicial review in Marbury v. Madison.<sup>3</sup>

Be all that as it may, judicial power is defined as an "appropriately executive"<sup>4</sup> power exercised by a judge in order to give effect to the codes of law. A judge is "a functionary to whose principal and characteristic functions exercise is given by his giving, by means of the appropriate decrees - opinative and imperative - and the mandates thereto conducive, execution and effect to the ordinances of the Legislature, that is to say, in all cases, those excepted in which the obligation of so doing belongs to Legislative or Administrative functionaries".<sup>5</sup> Putting on one side for the moment the problem of the executive character of a purely opinative decree, one can see that this definition leaves quite open the principles on which

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1. See Section III supra, at p.315.

2. Ibid., 98.

3. (1803) 1 Cranch 137; also Fletcher v. Peck (1810) 6 Cranch 87.

4. Ibid., 430, 479, 481, 482; see also the "Judges' Inaugural Declaration", 533.

5. Ibid., 465.

the judge's executive functions are distinguishable from the legislator's and administrator's. What, then, is the executive function distinctively appropriate to the judge? It is the function:

by the exercise of which, by means of the elementary functions therein contained....in pursuance of the application made to him, for the commencement of a suit or otherwise, mandates and decrees are issued, for the purpose of giving execution and effect to this or that ordinance of the Legislature, or of this or that sublegislature: that is to say in so far as contestation has place, whether as to the question of law, or as to the question of facts.... [and] in like manner, the function by the exercise of which execution and effect is given to any alleged rule of so styled unwritten law... so long, and in so far, as any part of the rule of action, and basis of judicature, has been left still floating, or rather tottering, upon that imaginary, purely fictitious, nebulous, and perpetually delusive, and uncertainty-and-insecurity-perpetuating ground.<sup>1</sup>

Now the references to unwritten law in this definition make grudging but interesting concessions to a "rule of action" as distinct from a "command" theory of law,<sup>2</sup> and implicitly suggest, too, that Bentham's expository discussions in the Constitutional Code are partly analytical in intent, descriptive of things as they are as opposed to things as he would have them be. And this definition also is the point at which the notion "judicial" begins to break the bounds of the formal class of "adjective" or "subsidiary" law within which Bentham hoped to confine it.

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1. Ibid., 479, 480.

2. Cf supra, sec. VII, p336 .

## IX

The breakdown of the "elementary" account of judicial power

The radical development in Bentham's explicit notion of judicial power is not immediately apparent. Most of Bentham's discussion proceeds on the familiar assumption, displayed in the forefront of the definition set out in the last section above, that the judicial function is a complex activity which, as complex, is an aggregate of elementary acts<sup>1</sup> and, as an activity, can be adequately accounted for by taking a good look and describing in detail what is to be seen going on. As remarked before, for Bentham the word "function" has few if any connotations of "purpose" or "role" in the ordinary sense of those words. So the lists he offers of "functions of a judicial nature"<sup>2</sup> and of the "elementary functions belonging to a judge"<sup>3</sup> can only be understood as providing, as it were, a description of the functioning or moving parts, as opposed to the function or point, of a piece of machinery. Judges, he says, summon persons before them, order searches, seize things, return things, etc., etc.: that is, they exercise accensitive, scrutative, prehensive and restitutive functions, etc., etc.<sup>4</sup> Judges listen, read, examine, inquire, comment: that is, they exercise

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1. Ibid., 456.
  2. Ibid., 480.
  3. Ibid., 481.
  4. Ibid., 480.

the elementary auditive, lective, inspective, interrogative and commentative functions, etc., etc.<sup>1</sup>

But the programme of reducing human systems to such "elements" as these fails in the end. Sooner rather than later, account has to be taken of unities and relations between the "elements", and these unities and relationships are to be discerned not by taking a look and describing elements which then can be simply "aggregated", but only by inquiring after, understanding and explaining the point of the whole complex scheme, its function (as we should say), the values it realizes. The unstructured list of "elementary functions" ("modes of functioning", as we should say) obscures the fact, which Bentham himself is constrained to hint at,<sup>2</sup> that some of the elements are more important and others less, some principal and others subordinate, some centrally significant and others merely concomitant in the ordinary case. Buried in the list of fourteen elementary functions are the "declaratively-decretive or say opinative function" and the "imperatively-decretive function". Now, just as anyone at all can listen, read, examine, inquire, comment, so can anyone state his opinions as to the meaning of the law and his wishes as to the

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1. Ibid., 481.

2. Id.

execution of the law. But not everyone can do so authoritatively; and while it makes only limited sense to speak of an authoritative listening, reading, examining, etc., it makes very good sense to speak of an authoritative opinion and an authoritative order (and it is only with implicit reference to these latter, or to some given authority, that one can speak of authoritative examining, inquiring, commenting, etc.). In short, as Bentham admits, the opinative and imperative functions are central to the notion of judicial authority of power; they are in fact essential elements of "the executive function, that being the one to the exercise of which the exercise of all the other [elementary] judicial functions is subservient".<sup>1</sup>

What, then, is the point of conferring authority on "judges" to give authoritative opinions and issue authoritative orders? It will be best to approach this question indirectly, by pointing out first of all that not even the two central elements just identified, let alone any others of the "elementary" judicial functions, meet the need to indicate the differentiae of judicial power within the genus of executive power. The principal definition had met this need by pointing to "litis-contestation", and had evoked the idea of the suit by its

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1. Id.

reference to "application made to the judge".<sup>1</sup> Now Bentham's explicit treatment of the idea of a suit in the Code does not go any further than in the Limits; there are still "completely" and "incompletely" constituted suits<sup>2</sup> (though by now he has dropped his odd talk about complete and incomplete ideas of a suit).<sup>3</sup> But implicitly Bentham has relaxed and broadened his conception of a suit - so much so that his talk of "elements" of a suit (accuser, defender, judge) becomes misleading. For the public opinion tribunal, as already noticed, exercises a judicial power in an extraordinary kind of "suit" in which there is no application to the judge, and the roles of accuser, judge and executioner are combined.

The question comes to this: Is Bentham taking the central element in judicial action to be a decision, between competing considerations relative to the past activity of some person (who can be presumed to wish to defend his conduct), issuing potentially in a change in the legal position of that person? Or, instead of emphasising that the decision is between competing considerations, would Bentham prefer to say that it was essentially a measuring of past conduct against some given

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1. Ibid., 154; supra sec. VIII.

2. Ibid., 460, 271.

3. Cf Limits, 304; supra sec. IV, p.3.22.

(even if inchoate) standard of action? Either interpretation seems capable of rescuing Bentham from contradiction or mere equivocation. But perhaps he would want to retain both the suggested features as central - that is, both the analogy with the suit and the analogy with execution of laws, rules or standards. His express comparison of the activity of the public opinion tribunal with the "ordinary suit" suggests that the analogy with the suit must be retained in any account of his meaning. Thus the stress of analogical use reveals the superficiality of the old analysis into conceptual elements; if what is central is the decision between competing considerations, the "ordinary suit" with accuser, judge and defender is just one concrete application of the central model.

Here, then, is the answer, such as it is, to the problem posed by Bentham's two uses of the expression "judicial", the one in the Code's formal analyses (which reproduce the analyses of earlier days), the other in relation to the public opinion tribunal (an informal use, no doubt, but seriously meant). The answer is that in the Code the idea of judicial power is relaxed and broadened to incorporate two elements, either one of which may from time to time govern the extension of the essentially analogical expression "judicial". But the account is not to be closed without a final inquiry into the

consequences, in the Code, of taking seriously the value or point of "litis-contestation" thus broadly understood.

## X

The values recognised by Bentham's informal use of the word "judicial"

From scattered remarks in the Code one can build up a conception of the significance of "litis-contestation" that goes well beyond the lonely value of proving allegations in court, which Bentham rather tentatively associated with the idea of judicial power in the analyses of his middle period.<sup>1</sup> In the first place, impartiality is an "essential and indispensable attribute" of the judge as distinct from other executive officials;<sup>2</sup> the reason of this is simply that the judge has to deal with contestation between parties "with regard to the right". Indeed, the "only" purpose of the judicial office is the termination of contestation.<sup>3</sup> Thus to the bare idea of executing the law, Bentham adds the notion of settling disputes, and to this he adds the requirement that the settlement be impartial. This requirement is so important to the notion of "judicial" action that Bentham is able to say that, insofar as, in an executive activity, "reason, not favour or disfavour, is taken for the guide", to that extent the activity can be regarded as judicial;<sup>4</sup> and that,

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1. Works, III, 198; supra sec. V, p.3.26.

2. Works, IX, 531.

3. Id.

4. Ibid., 559.

insofar as a legislator is inflexibly impartial, to that extent he, too, is a judge.<sup>1</sup> In just this sense, too, an executive action can be said to be "judicial, in contradistinction to arbitrary",<sup>2</sup> and reference can be made to a "system of judicial control...in preference to that of arbitrary will".<sup>3</sup> Judicial procedure is opposed to "purely arbitrary procedure" in being oriented to the elicitation, through evidence, of "truth";<sup>4</sup> judicial procedure is "the best adapted means of coming at the truth, in regard to the relevant facts".<sup>5</sup> Bentham advances so far beyond both execution of law and solution of disputes that he can appropriately ascribe to the judges a "non-contestational-evidence-elicitation function" - "the sort of judicial service rendered by reception and registration given to ...evidence, to whatsoever legal purposes eventually applicable".<sup>6</sup> This is, of course, a very subsidiary judicial function; but that it can be called judicial at all is an indication that the notion of judicial power is an analogical notion and rich in values. Not any execution of the rules, not any solution of disputes, will do, but only a procedure governed by "reason", heading towards "truth", and seeking to give "satisfaction and redress" to the citizen.<sup>7</sup> Finally,

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1. Ibid., 203.
  2. Ibid., 295.
  3. Ibid., 323.
  4. Ibid., 181.
  5. Ibid., 457, 642.
  6. Ibid., 514.
  7. Ibid., 201, 306.

Bentham remarks that justice should be the object of the system of judicature, and that this justice "consists in the affording to every man alike, in so far as may be, the protection of the law, by means of the appropriate services of the functionaries of justice employed for that purpose".<sup>1</sup> It is this, one might say, that distinguishes judicial action from some game or other (like "Diplomacy") in which disputes are to be settled by the manipulation of the rules. The welfare - one might say, the happiness - of persons is at stake; the human capacity for choice is fully engaged; there are important values to be realized, and it is these, as much as anything, that give judicial action its distinctive, if varying, character.

But isn't all this just prescription, just a consequence of Bentham's greatest-happiness principle, and rather far removed from descriptive or analytical jurisprudence? The objection is out of place. For firstly, none of the uses to which Bentham puts the word "judicial" could be said to be uncommon or novel; not only are these uses scattered in his work but also they are casual and never deemed worthy of special attention or justification. So it is unlikely that these uses can be dismissed as mere consequences of the greatest-happiness principle, except in as much as, in some form or other, that is

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1. *Ibid.*, 455 (emphasis added).

a principle behind ordinary usage. Bentham's remark, for example, that insofar as a legislator is inflexibly impartial he is a judge, cannot be explained as an inference from the greatest-happiness principle; rather, it simply trades on one of the elements in the common or ordinary understanding of the word "judge", and amounts to a tacit recognition of the realized values implicit in the corresponding term of meaning (for who will be found to assert that common speech and understanding seriously distorts the point of judicial power in the practical man's scheme of government?).

And secondly, it seems that, as was argued in the first chapter of this thesis, any sharp distinction between "prescriptions" for the "good" use of judicial power and "descriptive" jurisprudence is misconceived. For if it is true that a legal system is more than a set of rules for a particularly idle sort of game, then some account may properly be given of those features of the system that respond to the serious human import of the law and its operations. Such features may well include the orientation of judicial action towards the values of truth, impartiality, and a just satisfaction and redress for every citizen in the solution of disputed questions by a technique of reason. Exclusion of such features from a full jurisprudential account is not to be justified by appeal to the fact that we should call some

activities "judicial" even though they were "bad" in that they disregarded values and satisfied only certain "visible" or formal criteria. For equally we, like Bentham in even his most strongly analytical moments, can call something a "suit" although it lacks most of the normal formal criteria of a suit, or "judicial" even when it is "opinative" without being also "imperative". To make use of the convenient terminology of the mediaeval philosophers and jurists - a full jurisprudential analysis may arrive at a definition of judicial power simpliciter, while "bad" judges and "formally abnormal" judges alike exercise that judicial power only secundum quid. "Judicial power", like "suit" and "law" itself, is an analogical expression, and there is no reason why analytical jurisprudence should be content to isolate a supposed lowest common denominator, label it the true idea of judicial power, and dismiss the remaining terms and relations in the analogical web or family as "prescriptive" or "ideological". This, however, is to go far beyond what Bentham and his successors would consciously admit.

## CHAPTER FOUR

### Problems in modern analyses of governmental powers

We have shown how Aristotle's analysis of governmental powers was hampered by the breadth and vagueness of the concepts that he employed. We have shown, too, how Bentham (not to mention other eighteenth century thinkers) considered the concept of judicial power peculiarly vulnerable to absorption within either "executive" or "subordinate" power; and how, nevertheless, "judicial power" resisted such absorption or reduction, and made its appearance by way both of the irreducible notion of the suit inter partes and of various values, such as the impartiality and justice that Aristotle himself had thought distinctively judicial. The present chapter seeks to show how modern analyses often are hampered by the same difficulties as Aristotle, and often (partly as a consequence of those difficulties) deny with Bentham that judicial power has an independent place in a "true analysis" of powers. By way of introduction to the historical analysis of the Australian law on judicial power, this chapter seeks to explore the interaction between the terminology of analyses, the "controlling context" or basic premises of analyses, and the various elements that, whatever the terminology or the premises, are commonly (if implicitly) agreed to be irreducible in any analysis of governmental power.

## I

Some successors to Bentham

Austin, in this respect as in others, reproduces Bentham's views without the wealth of ingenuity and nuance. The only "precise" division of powers, he thinks, is that between supreme and subordinate;<sup>1</sup> and it is clear that he regards the distinction between legislative and executive power as both imprecise and generally unsatisfactory. For legislative powers are "powers of establishing laws, and of issuing other commands", whilst executive powers are "powers of administering, or of carrying into operation, laws or other commands, already established or issued".<sup>2</sup> This command theory of law involves the consequence that Austin in fact draws:

of all the instruments or means by which laws and other commands are administered or executed, laws and other commands are incomparably the most frequent....<sup>3</sup>

Austin's view of judicial power is introduced in the course of providing evidence for the above assertion:

As administered or executed by courts of justice, laws are mainly administered through judgments or decrees: that is to say, through commands issued in particular cases by supreme or subordinate tribunals.<sup>4</sup>

The truth is that Austin is not really concerned to analyse judicial power; it is sufficient for him that it is "commonly esteemed executive or administrative",<sup>5</sup> but that it has

1. J. Austin, The Province of Jurisprudence Determined (ed. H.L.A. Hart, 1954), 237.
2. Ibid., 234.
3. Id.
4. Id.
5. Ibid., 235.

legislative aspects in the form of "legislation in the judicial mode" by way of "that measureless system of judge-made rules..." For him, the rules determining the practices of courts are all "subservient to" the purpose of administering the law well: "all laws or rules determining judicial procedure are purely subsidiary to the due execution of others".<sup>1</sup>

More interesting for us than Austin is Kelsen, whose analysis of powers shares similar premises but grapples more resolutely with the consequences of those premises. Kelsen's nomodynamics or Stufentheorie is well-known, and need not be elaborated here; taken together with the view that the State is nothing other than the legal order,<sup>2</sup> it sufficiently explains the main lines of Kelsen's analysis of powers. The fundamental terms of the analysis are "creation" and "application" of law. Just as, for Austin, most laws are executed by other laws, so for Kelsen "the legal order is a system of general and individual norms connected with each other according to the principle that the law regulates its own creation.... A norm regulating the creation of another norm is 'applied' in the creation of the other norm".<sup>3</sup> Thus most acts of State are necessarily "at the same time law-creating and law-applying acts".<sup>4</sup> The distinction between creation and application of

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1. Ibid., 234-235.

2. H. Kelsen, General Theory of Law and State (1945), 181ff., 258.

3. Ibid., 132-133; 258.

4. Ibid., 269. Kelsen admits two exceptions which he calls, oddly, "borderline cases" (133-134): these are the "execution of sanction in a concrete case" and (apparently) the presupposition of the basic norm in "juristic thinking".

law is a difference "in degree only",<sup>1</sup> and has "only a relative character";<sup>2</sup> but it remains nevertheless a "real", "factual", "fundamental" and "essential" distinction and underlies "the dualism of legislative and executive power". Hence "a dichotomy is in reality the basis for the usual trichotomy"<sup>3</sup> of State powers or functions.

The judicial function is in fact executive in exactly the same sense as the function which is ordinarily described by this word [executive] .... One identical function is distributed among different bureaucratic machines, the existence and different denominations of which can be explained only on historical grounds....<sup>4</sup>

The one identical executive function shared by these bureaucratic machines or institutions (in Kelsen's Continental terminology, "organs") is simply "to create individual norms on the basis of the general norms which are created by legislation and custom, and to put into effect the sanctions stipulated by these general and individual norms".<sup>5</sup> Hence, even where there is a "historically developed bureaucratic machinery... usually designated as the 'judiciary'",<sup>6</sup> an independent<sup>7</sup> machinery which gives a "stronger guarantee of legality"<sup>8</sup> than other administrative organs, it nevertheless

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1. Ibid., 134.
  2. Ibid., 269, 132.
  3. Ibid., 255.
  4. Ibid., 273, 275.
  5. Ibid., 258.
  6. Ibid., 276.
  7. Ibid., 275.
  8. Ibid., 278.

must be insisted that these "differences in the respective positions of the organs and their procedures...are not derived from any difference of function but permit only of an historical explanation".<sup>1</sup>

The difficulties begin, or become obvious, when it appears that, despite the foregoing analysis, there is a "specific"<sup>2</sup> judicial power or function, with a "specific" and "essential"<sup>3</sup> nature of its own which is of "an essentially different nature"<sup>4</sup> from at least some "administrative" functions, and "entirely distinct"<sup>5</sup> from certain other administrative functions. For Kelsen, the essential nature of the judicial function is to establish that a delict has in fact been committed and to order a sanction;<sup>6</sup> this is the "primary" characteristic of judicial power, since "from the point of view of the general norm which has to be executed by the judicial function, the controversial character of the judicial procedure is of secondary importance", as is the circumstance that "obligations and rights of the parties are determined thereby".<sup>7</sup>

Of course, like Austin, Kelsen has no difficulty in showing that the historically developed bureaumatic institutions called

- 
1. Ibid., 275.
  2. Ibid., 273, 276.
  3. Ibid., 273.
  4. Ibid., 280.
  5. Ibid., 276.
  6. Ibid., 273, 276.
  7. Ibid., 273.

"courts" exercise both legislative functions and specifically administrative functions along with their specifically judicial functions, if only in the sense that specifically judicial functions have legislative and executive aspects.<sup>1</sup> Moreover, he shows that "there is nothing to prevent us from giving the public administration, insofar as it exercises a judicial function, the same organization and procedure as have the courts".<sup>2</sup> But none of this disguises the difficulty in his analysis, namely, the contradictions apparently involved in asserting (1) that "in reality",<sup>3</sup> "at bottom" and "in fact",<sup>4</sup> "there are not three but two basic functions of the State: creation and application (execution) of law";<sup>5</sup> (2) that this dichotomy is nonetheless only "relative" and a matter of "degree only"; (3) that there is an "essentially distinct" judicial function, the committal of which to independent organs is, nevertheless, (4) explicable "only" in "historical terms".

The explanation of these four propositions lies in Kelsen's use of the concept of essence. What, in the eyes of the pure theory of law, is essential is what is an irreducible term in a theory of law as a unified order or hierarchy of norms<sup>6</sup>

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1. Ibid., 272.
  2. Ibid., 278.
  3. Ibid., 255.
  4. cf. *ibid.*, 269.
  5. *Id.*
  6. *Ibid.*, 3, 110.

individuated from other social orders by, and only by, its provision for sanctions.<sup>1</sup> Insofar as the theory postulates a hierarchy, creation of lower, more concrete norms is required. Insofar as the hierarchy is postulated to be a unified order, every lower norm is an application of a higher norm. Insofar as sanctions must be applied, there must be<sup>2</sup> a completely concretized norm ordering the application of sanction in a particular case of delict. Hence there are three essential functions - legislative, executive and judicial: but the last is only a particular case of the first two,<sup>3</sup> and more especially of the second; so "a dichotomy is in reality the basis for the usual trichotomy".<sup>4</sup>

Over against the "essential", then, are the "relative", the "specific" and the "only historical". As to the first, the distinction between creation and application is real, essential, but merely relative. It is quite unclear why Kelsen does not admit that all creation can be regarded as "in reality" merely an aspect of application. Conversely, as to the second, it is unclear why he is unwilling to allow that a specific function - that is, one that can be specified or distinguished by the terms of his system - is just as "essentially" distinct (even if only

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1. Ibid., 25, 45.
  2. Ibid., 135-136.
  3. Ibid., 134.
  4. Ibid., 255.

"relatively" so) as creation is from application. It certainly is insufficient to point out that administrative organs may perform judicial functions according to judicial procedures; for it equally is possible for one organ to exercise both executive and legislative power; and, furthermore, if a radical confusion of "specific" functions between organs is possible, it remains to be shown why a radical separation should not be equally possible. As to the third, Kelsen ascribes the distinction of organs, particularly the independence of the judges from the administration, to "only historical grounds". Such grounds, to speak plainly, are simply those that cannot be specified in the terms of his system. Kelsen recognises, in passing, that the courts are the historical realization of certain values - he mentions the "ideal of 'due process of law'" and "guarantees of legality" - but the truth is that only one value is admitted by the pure theory of law, namely, the "promotion of peace" by restriction of the use of force to the application of sanctions authorized by legal norms.<sup>1</sup>

It would be possible, no doubt, to offer a general critique of Kelsen's pure theory of law on the ground that, contrary to its explicit claims, it does not really "result from a

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1. Ibid., 21-22. It is necessary for Kelsen to postulate at least one value in order to postulate any nomodynamics, since he acknowledges that "the social behaviour of individuals is always accompanied by a judgment of value..."; *ibid.*, 15-16.

comparative analysis of the different positive legal orders"<sup>1</sup> - or, at least, does not "furnish the fundamental concepts by which the positive law of a definite legal community can be described"<sup>2</sup> in any full or satisfying manner - but instead merely accomplishes a reduction of legal phenomena to four or five terms whose peculiarly privileged status is assumed rather than justified. Moreover, we have already argued that analytical jurisprudence has no need to postulate a degree of order that does not exist in actual systems,<sup>3</sup> and, on the other hand, need not restrict its field to supposed lowest common denominators while dismissing other terms and relations that are realised in actual systems as prescriptive or ideological or, in Kelsen's expression, "only historical".<sup>4</sup> Furthermore, the distortion that is the price paid by the pure theory in exchange for its "pleasing uniformity"<sup>5</sup> has been well shown by Hart in his discussion of Kelsen's formulation of norms as directions to officials to apply sanctions;<sup>6</sup> a similar criticism would easily demonstrate that Kelsen's doctrine of concretization and "application" of norms obscures the significant distinction between acting by the authority of a rule and applying a rule as a guide to decision.<sup>7</sup>

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1. Ibid., xiii.

2. Id.

3. Supra, Chapter One, ad fin., p.1.55.

4. Supra, Chapter Three, ad fin., p.3. 56.

5. Hart, The Concept of Law (1961), 38.

6. Ibid., 38-39.

7. This distinction is discussed in later chapters: see Ch.11, sec.III, and Ch.12, secs.I and II infra. But the

But to all such criticisms Kelsen could reply that these alleged defects are the virtues of purity, a purity which reaps its rewards in the form of a set of clear terms and relations that can be applied without difficulty to any legal system whatsoever. Hence the point to be made here is more restricted, and is this: the essential reality referred to by Kelsen in his analysis of governmental powers is nothing other than the (very restricted) set of terms or relations admitted into the pure theory. Thus the view that judicial power does not really exist as a distinct category is not the consequence of an especially profound analysis of the proximate and remote sources of meaning of the expression "judicial power", but is quite simply an immediate consequence of the methodical restriction of terms that Kelsen insists upon in the name of methodological purity. There may, indeed, be a value in remaining within this magic circle of terms and relations; but the claim of the present thesis is that there is certainly a value in admitting the relevance of the further questions that arise out of the material of actual legal systems, and that such further questions are not to be headed off, in the case

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distinction may be briefly indicated by pointing out that if a judge makes a mistake as to his authority, what he decides may be unimpeachable, but his deciding it is wrong; whereas, if a judge makes a mistake as to the rules guiding his decision, then what he decides is wrong. Still, it must also be noticed that in order to comply with a rule specifying his authority, the judge must decide what that rule means—in short, he must use it as a guide to deciding what his authority is.

of "judicial power", by the fundamentally a priori claim that that term has no (or only a tenuous) "essential reality". Nor need these further questions override the canons of analytical jurisprudence by inviting "a psychological or economic explanation of [law's] conditions, or a moral or political evaluation of its ends";<sup>1</sup> it is just that they do not remain within a description of law that recognises only one value or end as realized in actual systems. For such a description does not adequately fulfil the aim of analytical jurisprudence "to enable the jurist concerned with a particular legal order...to understand and to describe as exactly as possible his own positive law".<sup>2</sup>

Four important and interrelated lessons are to be learned from the treatment of governmental powers in Bentham, Austin and Kelsen. The first lesson is that what a theorist speaks of as the "true", "essential" or "real" distinctions between powers are often to be regarded (for purposes of translation) as those distinctions which can be stated or explicated in the established terms of his general theory of law. The second lesson, then, is that general theories of law provide a controlling context for many analyses of powers. The third lesson is that theorists are prone to a certain fascination

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1. Kelsen, *op.cit.*, xiv.

2. *Ibid.*, xiii.

with terms which, by their breadth and apparently unique ability to combine with other terms to form an exhaustive general account, constitute a framework from which the theorist never escapes because the need to escape is always disguised from him by that same breadth and exhaustiveness. Such a word is "application" in Kelsen's theory; and the word "execution" has performed a similarly delusive role in almost every other theory of separation of powers. Finally, the fourth lesson concerns the place of the organs or institutions that exercise powers and functions in analyses of those powers and functions: it is that theorists often, on the one hand, distinguish too sharply or too readily between the "essential function" of an institution and the "mere procedures" of that organ, and on the other hand, are needlessly impressed by the fact or possibility that otherwise distinguishable functions may be mixed or confused between different organs. These four lessons correspond to four main problems that afflict the treatment of governmental powers in modern jurisprudence. Their importance and interrelationship may be shown by discussing each in turn more fully.

## II

### On "real" or "essential" distinctions

Since the end of the nineteenth century, jurists in Germany and France have argued the question whether or not the

separation of powers in their respective constitutions is material or formal. Nor have English jurists remained unaffected by these disputes; Sir Ivor Jennings cites the contributions of Carré de Malberg and Bonnard, and himself attempts to analyse the British constitution and the work of English theorists in terms of material and formal conceptions of powers or the separation of powers. It is not difficult to show that these two terms disguise and confuse a multitude of different antitheses and problems, notably the problems corresponding to the four lessons just drawn from the work of Bentham and his successors. It will be worthwhile to unpack these terms here, not least because the same or similar terminology is to be found throughout the judicial analyses of powers in Australia.

The first meaning that can be unpacked from the antithesis of material and formal, as these terms appear throughout the large and influential work of Carré de Malberg, is that a power or function materially conceived is one that can be identified in the terms of an established general theory of law, while a power formally conceived must be identified and described in terms appropriate only to a particular legal system. This clearly appears from a tabulation of Carré de Malberg's usage:

Table A

<u>Material conception</u>	<u>Formal conception</u>
Ia fundamental nature -	1a formal conditions
Ib fundamental distinction -	1b external characterisation
II nature of function -	2a conditions of its exercise
-	2b function organically conceived
III function abstractly defined -	3 function regarded according to the activity of the organs exercising it
IV definition by reference to intrinsic nature -	4a definition according to external import
-	4aa definition of an external character
-	4b purely formal definition
-	4bb definition according to form and organ
-	4c definition according to legal effects
-	4d definition from the <u>point de vue juridique</u>
-	4e definition according to the system of positive law in force
Va objective definition -	5a purely formal definition
Vb objective distinction between functions -	5b distribution of organs.
Vc definition according to reason -	5c definition from the <u>point de vue juridique</u>
-	5cc definition according to French law

Material conceptionFormal conception

VI role strictly so called	-	6 organ
VII <sup>a</sup> content of a function	-	7 organic or formal conditions of its exercise
VIIb very substance of a function	-	
VIII irreducible distinction	-	8 legal and formal distinction. <sup>1</sup>

We shall return to this table in later sections of the present chapter. The repetition of terms on the right-hand side of the table establishes that all the terms on each side of the table, respectively, are used by Carré de Malberg as synonyms. The multiplicity of antitheses establishes, at the same time, that there are several layers of meaning to be uncovered. Here it is sufficient to notice that an important feature of material conceptions of powers or functions is taken to be their objective, rational and fundamental character as grasping the very substance and nature of functions and the distinctions between functions. Evidently, this feature corresponds to Bentham's "true elements of political powers" or Kelsen's real, factual, fundamental and essential distinction between

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1. Table A is compiled so that antitheses explicitly employed by Carré de Malberg are given the same number, but in Roman and Arabic numerals respectively. For example, Ia and ia are to be found linked in the text, as are also, for example, IV and 4d. Synonyms employed in one and the same sentence or passage are, on the left-hand side, prefixed by the same Roman numeral (e.g. Ia and Ib); on the right-hand side they are prefixed by the same Arabic numeral and the same letter (e.g. 4a and 4aa). The passages on which  
(continued on next page)

legislative and executive powers. Carré de Malberg's usage confirms the suggestion already made, that in this context "real", "objective", etc., are to be taken as characterising terms established in a general theory of law as opposed to a particular legal system - in Table A, compare for example IV with 4d, 4e, 5c, and 5d. Indeed, some such interpretation is necessary if Carré de Malberg is to be saved from contradiction. For the basic thesis of his whole work is that French law, viewed strictly from the point de vue juridique (cf. 5c and Vc), embodies three distinct powers or functions formally conceived, that these functions do not correspond to any material conception of powers, and that, nevertheless, these formal distinctions are definitely real and by no means merely apparent<sup>1</sup>. It will be evident, even from this alone, that Carré de Malberg's discussion of the material-formal distinction is very misleading.

Bonnard's attack on Carré de Malberg accepts the material-formal terminology without comment, and without any attempt to unravel its ambiguities. However, it is clear that Bonnard takes material to mean, above all, essential.<sup>2</sup> As a necessary<sup>3</sup>

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the table is based are from Carré de Malberg, op.cit., 259, 260, 268, 275-276, 693-694, 698, 749-753, 763, 766, 810-814.

1. Ibid., 811, 814.
2. R. Bonnard, Le Contrôle Juridictionnel de l'Administration (1934), 10.
3. Ibid., 11.

and sufficient proof of essential distinctions between three material functions, he advances a general theory of "the world of law"<sup>1</sup> in which the fundamental terms are (1) formation du droit, (2) réalisation<sup>2</sup> du droit, and (3) contestation or le phénomène contentieux. In short, he explicitly adopts Kelsen's Stufentheorie,<sup>3</sup> but considers it incomplete because it ignores a phenomenon that, while incidental to the legal phenomena of creation and application, is a reality demanding recognition. This phenomenon, contestation, is the ground of judicial power, which is thus constituted one of the three material functions embodied in all legal systems.

If this explanation of one of the meanings of "real", "essential", etc., is accepted it becomes clear why Kelsen could regard judicial power not only as "essentially distinct" (because constituted by an uniquely concrete case of "creation" and "application" of norms) but also as not "essentially distinct" (because not constituted by a single unique term in his general theory); why Carré de Malberg regarded the three powers in French law as not "objective" (because not coincident with the terms of any general theory) but "real" (because clearly and distinctly separable and definable in

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1. Ibid., 11, 12.
  2. Or exécution...
  3. Ibid., 21n.

terms of a theory designed only to meet the special case of French law); and finally, why Bonnard wanted to attack Carré de Malberg (because he believed, unlike the latter, that distinctions derived from a general theory could, if not must, precede or coincide with distinctions operative in particular legal systems).

### III

#### On general theories of law and definitions of powers

The converse of the foregoing interpretation is that very often definitions of powers are elaborated under the direct influence, and indeed within the logic, of quite general theories of law. So much is already established in the case of Bentham, Austin, Kelsen and Bonnard. As a corollary, moreover, it is possible to establish that new theories of law do, or might, give rise to new theories of powers.

For example, it would not be difficult to state a theory of governmental powers in terms derived from Hart's general theory of law as a union of primary and secondary rules. Hart postulates a simple regime of "primary rules of obligation",<sup>1</sup> and notes that such a system would suffer from three defects, namely, its uncertainty, its static character, and the inefficiency of its diffused social pressure for conformity.<sup>2</sup>

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1. Hart, *op.cit.*, 89.

2. *Ibid.*, 90-91.

The remedy for the first defect is some rule of recognition, enabling conclusive identification of the primary rules of obligation;<sup>1</sup> for the second, rules of change, enabling new primary rules to be introduced and old rules eliminated;<sup>2</sup> for the third, rules of adjudication, "empowering individuals to make authoritative determinations of the question whether on a particular occasion, a primary rule has been broken".<sup>3</sup> Now rules of change confer legislative powers, and, as Hart says, rules of adjudication confer judicial powers, while the rule of recognition per se does not confer powers at all. Here, then, is a basis for a distinction between powers that some people would, as we have seen, want to call "fundamental" or "essential" or "real".

It will be noticed that, so far, this analysis does not provide a basis for "executive power" (or, if the term "executive" is deprecated,<sup>4</sup> for "administrative" power). Such a basis can, perhaps, be found in Hart's further statement that the legal system will require an official monopoly on sanctions;<sup>5</sup> hence the judicial power will consist not only of

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1. Ibid., 92.

2. Ibid., 93.

3. Ibid., 94.

4. As it is by various Italian theorists: see A. I. Jennings, The Law and the Constitution (4th ed. 1952), 265n. It is arguable, too, that English law does not use the term "executive" in this sense, but prefers to identify two distinct executive functions, viz: administrative power and ministerial power: see S. A. de Smith, Judicial Review of Administrative Action, (1959), 29. but cf. S. C. S. Wade and  
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the power to determine authoritatively and conclusively the fact of violation of a primary rule,<sup>1</sup> but also of the power to direct the application of penalties by other officials<sup>2</sup> - and such other officials might be called executive or administrative. This account of the relative status of legislative, judicial and executive power would then closely resemble that offered by Sidgwick in The Elements of Politics,<sup>3</sup> but would conflict with the account of Kelsen, who regards the execution of sanctions as an organic part of the judicial power.<sup>4</sup> Of course, "executive power", so far, has only a subordinate role in Hart's account, but would perhaps be capable of development along the lines suggested by Sidgwick. For Sidgwick, having postulated officials to execute sanctions, confers on the same officials the function of discovering and prosecuting offences, and of organising the foregoing executive functions.<sup>5</sup> The organising ability thus required of these officials then provides "strong prima facie reason" for conferring on them

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G.G. Phillips, Constitutional Law, (5th ed. 1955), 14;  
 H.W.R. Wade, Administrative Law (1961), 37, 166, 249 and  
passim; Report of the Committee on Administrative Tribunals  
and Enquiries (1957, Cm d.218), 60; Report of the Committee  
on Ministers' Powers (1932, Cm d.4060), 19, 94, and passim.

5. Hart, *op.cit.*, 95.
1. *Ibid.*, 91, 92, 94, 95.
2. *Ibid.*, 95.
3. H. Sidgwick, The Elements of Politics (2nd ed. 1897), 20.
4. Kelsen, *op.cit.*, 280.
5. Sidgwick, *op.cit.*, 333.

the conduct of foreign relations.<sup>1</sup> Finally, "for the adequate performance of all the various functions above described, kinds and amounts of labour are required which cannot...be obtained gratuitously".<sup>2</sup> Sidgwick therefore adds a taxation and financial department, whose operation calls for more officials of the executive class.

However, such a development of the notion of executive power is stopped short only by Sidgwick's relatively restricted conception of State functions; if the fiscal functions of the State are to be included in the schema, there seem equally good grounds for including the welfare and cultural and defensive functions as also in some sense "executive". But by now it is clear that such a procedure conflicts with the warning of Carré de Malberg that the theory of legal functions or powers must not be confused with the theory of the province or tasks ("functions") of the State.<sup>3</sup> Such tasks Carré de Malberg describes as threefold: external security, internal peace and justice, and culture; but other lists are certainly possible.<sup>4</sup> In any event, the powers or functions identified in legal schemes are evidently the instrumental forms in which the "tasks" of the State are carried out. But the foregoing discussion

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1. Ibid., 334.

2. Ibid., 335.

3. Carré de Malberg, *op.cit.*, 260.

4. See, e.g., the list offered by a contemporary natural law theorist: J. Messner, *Social Ethics*, (1949), 581-620. But cf. *Pacem in Terris* (1963), C.T.S. trans. (rev. ed.), para. 68.

reveals the difficulty of avoiding the confusion against which Carré de Malberg warned.

The difficulty stems in part from the fact that Hart and, to an even more pronounced degree, Sidgwick both offer explanations or rationales of the powers they identify; and it is difficult to keep these rationales distinct from the question of the functions (tasks, rationales) of State activity. The rationales or values advanced by Hart relate to the maintenance of a postulated system of primary rules of obligation. Now this form of explanation gives rise to further considerable problems, above all as to the historical character of the values said to be realized in the respective forms of secondary rules. Hart goes so far as to say that the secondary rules of adjudication are "intended to remedy the inefficiency"<sup>1</sup> of the primary rules. But even when he restricts himself to observing that such secondary rules enable the inefficiency to be remedied,<sup>2</sup> the question remains whether the explanation is historically validated or merely an "explanatory postulate".<sup>3</sup>

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1. Hart, op.cit., 94 (emphasis added).
  2. E.g. *ibid.*, 41.
  3. The same problem arises concerning Robson's first definition of judicial power in Justice and Administrative Law, on the basis of a (quasi-?) historical appeal to the origins of civilization: see 1,3. Cf. Robson's talk of the "essential", "true", "peculiar", "fundamental", "inherent" characteristics of judicial as opposed to legislative and administrative functions: op.cit., 5,73,74,83,15,72,77,82,366,20.

As we remarked in our first chapter, there seems to be a gap between the general aim of resolving perplexities deemed to arise from the characteristics of current language, and the claim to have discovered the central elements of a [any?] legal system. Corresponding to this gap is the persistent ambiguity as to whether the postulated simple regimes of primary rules, the postulated additions of secondary rules, and the postulated explanation of the additions, are historically verified or pure postulates on the basis of some ("minimum") conception of human nature. In short, certainty, flexibility and efficient maintenance of primary rules are indeed values insofar as they certainly are possible and reasonable objects of human choice; but the question whether these values actually are realized, as primary or central or defining, in given institutions and systems is one that can be answered only by an analytical but historical jurisprudence of the sort already sketched in the first chapter. More important still, a jurisprudential analysis of judicial power in a given system or systems can offer no guarantees in advance that it will come up with answers conformable, or bearing any predictable relation, to any general theory of law.

#### IV

#### On the irreducibility and utility of general terms

The problem of general terms has been touched upon in our discussions of Aristotle, Blackstone, Bentham and Kelsen.

It has many aspects and takes many forms; it is at its most acute in the problem of discussing governmental powers and their division and separation. In broadest terms, it is the problem of when to distinguish and when to unite; in broadest terms, the solution already suggested appeals to the criterion of further questions. Of course, if relevance and the actual existence of further relevant questions were subjects of simple intuition, an end to all theoretical problems would be in sight. As things are, however, one must be satisfied with inquiries whose aims are sufficiently specific to permit reasonably concrete judgments to be made as to the specific relevance of further questions. Our criticism of general ("analytical") theories of law is that their aims are insufficiently specified for such judgments to be made.

More particularly, however, it is possible to see that some sets of general terms and relations are liable to be radically revised in response to almost any conceivable further questions. One such unsatisfactory set we found employed by Aristotle, and another by Kelsen. But Kelsen's creation-application dichotomy, as opposed to Aristotle's deliberation-decision-orders, has a hypnotic effect on very many modern analysts.<sup>1</sup> At the root of this fascination is the

1. See, e.g., H. Finer's exhaustive classification: "resolution-execution", The Theory and Practice of Modern Government (1932), Vol. I, 171. See also Robson, *op.cit.*, 14: "judicial administration is merely a specialised form of general administration, which has acquired an air of detachment".

breadth and vagueness of the term "application" or "execution" of law. It is not the object of the present thesis to analyse this term for its own sake; but its importance in discussions of judicial power is not to be minimised. Take, for example, an important move in G. Marshall's argument that the characterization of powers as judicial or non-judicial is necessarily arbitrary, and hence a "legislative job":

An administrator to whom a law gives a wide discretion is determining legal rights and is applying a pre-existing rule to a given situation. These phrases cannot in themselves adequately set off judicial decision from policy decisions made under an empowering rule....discretionary decisions always apply some pre-existing rule to the facts of a situation....<sup>1</sup>

Now this is no doubt true in a sense, though it does not do full justice to those who have used "applying the law", as opposed to "policy decision", as a criterion of judicial action. The temptation which Marshall does not entirely avoid is that of being too much impressed by the inclusiveness of the term "applying the law", and too little interested in discovering the more precise point that the term has when it is used along with a counterpart such as "policy decision". The truth is that any general term is, by itself, insufficiently determinate to constitute a useful characterisation of a governmental or function. But this truth is the beginning, not the end, of

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1. "Justiciability", in Oxford Essays in Jurisprudence (ed. A.G. Guest, 1961), 273, 279.

wisdom in this matter.

Carré de Malberg, like Kelsen after him, succumbs to the fascination of creation-application as an exhaustive dichotomy. As Table A shows (compare VIII with its synonyms I to VII) essential or material distinctions are held to be "irreducible"; and despite his professed intention to remain within a strictly juridical (formal) sphere of discourse, Carré de Malberg expends a good deal of time demonstrating that, in an important sense, there are only two essential functions of the State, legislation and execution.<sup>1</sup> Of course, he goes on to show how, in any theory basing itself on French law, there must be recognised to be three irreducibly distinct powers. His concession to the view that there are "materially" only two irreducible powers is unnecessary and misleading. It is unnecessary, because there are no sufficient reasons for accepting the claim that there is a useful "material" or general theory to be set over against the analysis of any any given system. It is misleading because "legislation" and

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1. Carré de Malberg, op.cit., 753, 810. Thus, "la juridiction n'est pas en soi une fonction irréductiblement distincte de l'administration, mais seulement une partie de la fonction administrative, soumise à un régime et à des formes spéciales": 810 (emphasis added).

"execution" are not irreducible terms. For, on the one hand, once "execution" is understood so broadly as to include everything that is not "legislation", there is no ground for denying that legislation itself is a case of execution (of the basic norm, or of the rule of recognition...). On the other hand, both terms can be usefully analysed into a multitude of sub-classes of powers and functions.

One can discern, perhaps, a more useful and less vulnerable use for the terms "creation" and "application" than the staking out of claims to have discovered the "true", "essential" and "irreducible" divisions of powers. In the previous section of this chapter we raised, without solving, the problem of distinguishing between the theory of legal powers and functions and a general theory of the tasks and province of the State. Now it seems that one way of making the distinction between these two types of theory would be to point out that the legal theory concerned the "creation and application of law". In short, these terms could be used to mark out a legal task or province of State action, without pre-judging the divisions of powers and functions that might be made, by the theory of legal powers, within that particular province. But if the criterion of "creation and application of law" would successfully demarcate a legal province of State

action from the provinces of welfare, culture, defence, etc., would it not also pre-judge the definition of judicial power in favour of "application or concretization of law" as opposed to, say, "resolution of disputes inter partes"? The question is significant but out of place; the answer to it is that the definition of judicial power would be prejudiced in the suggested fashion only if it were approached in the traditional misleading way - that is, as the search for a single, all-embracing yet irreducible (and hence "real" and "essential") term in a small set of like terms.

## V

On the status of institutions in the analysis of powers

The fourth lesson we drew from Kelsen's analysis concerned the place of the organs or institutions that exercise powers or functions in analyses of those powers or functions. This lesson corresponds to a critical problem in the interpretation of the material - formal distinction as set out in Table A. So far we have discussed the antithesis of essential definitions and definitions from a legal viewpoint on the basis of an actual system. But terms 2b, 3, 4bb, 5b, 6 and 7 of Table A show clearly that the latter form of definition is equated by Carré de Malberg with a definition in institutional or organic terms - that is, by way of a comparison and characterization of the institutions that exercise the powers

and functions. (The terms "institution" and "organ" include, of course, even a single official). Carré de Malberg insists that "in legal matters, one can say that the institution creates the function",<sup>1</sup> and this enables him to assert the "reality" of the trilateral division of powers that he finds in French law. But at the same time he insists<sup>2</sup> that two official acts may have an "identical content" and yet be specifically distinct by reason of their institutional form or context.

Jennings quite fails to distinguish these distinct strands of meaning in the material - formal terminology. Hence he asserts that the definition of judicial power offered by the Committee on Ministers' Powers is "based on a formal theory of separation of powers".<sup>3</sup> But though he frequently cites Bonnard and Carré de Malberg in this same context, and recognises that Bonnard's definition of judicial power is virtually identical with the foregoing Committee's, he forgets that Bonnard's definition, in terms of resolution of disputes inter partes as to rights and duties, is advanced as a material definition, in opposition to Carré de Malberg's formal definition in terms of the values of impartiality and legality

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1. Carré de Malberg, op.cit., 814.
  2. Id.
  3. Jennings, op.cit., 281.

secured by judicial forms and procedures. There is thus a drastic and unheralded shift of meaning in Jennings's own use of the material - formal distinction, confusing an analysis already confused, as we shall see, by shifts in the meaning of the basal term, "function".

Marshall usefully suggests that criteria for judicial power can be reduced to three categories: viz., those that refer to the character of the agent or institution exercising the function, those that refer to the issue in connection with which the function is exercised, and those that refer to the procedure by which the institution exercises its functions in dealing with the issue.<sup>1</sup> For Marshall, these three can be reduced to one fundamental criterion, namely, "procedure".<sup>2</sup> But this seems to be a counsel of despair, another case of fascination with the generality of a term when unpacking its strands of meaning would have been more useful. Still, Marshall's essay rightly points up the ambiguity of the terms "agent" and "issue", and the impossibility of defining either, in any concrete case, without reference to "the way in which" the agent deals with the issue. The substantial objection to the essay is its failure to get to the bottom of the

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1. Marshall, op.cit., 269.

2. Ibid., 270, 277, 278.

difficulty, to uncover all the ambiguities in the terms commonly employed in analyses of governmental powers. Marshall himself slides into a use of "procedure" foreign to his own definition,<sup>1</sup> and covertly introduces a fourth criterion over and above "agent, issue and procedure", namely, "result".<sup>2</sup>

Another table of terms may help to demonstrate the ambiguities which meet all analysts of powers but which seem never to have been faced systematically. The Table sets out sets of synonyms, or near synonyms, used in analyses of powers. The central core of meaning of each set can be discerned only by reference to all the members of that set, since in each case, many of the terms appear in other sets (as the table is, indeed, designed to show).

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1. Ibid., 272.

2. Ibid., 276.

Table B<sup>1</sup>

I	II	III	IV	V
power	<u>nature</u>	<u>activity</u>	<u>agent</u>	<u>issue</u>
function	matter	function	institution	matter
act	essence	power	organ	function
	intrinsic	process	form	end
	character	act	power	type of
solution				dispute
capacity	abstract	procedure	department	act
	definition	decision-	authority	question
	inner workings	process	outward	subject
	content	methods	features	object
	substance	authority	conditions	
	quality		of exercise	
	.	.	trappings	.
	.	.	.	.
	.	.	.	.
	.	.	.	.
	.	.	.	.

  

VI	VII	VIII	IX
<u>procedure</u>	<u>value</u>	<u>result</u>	<u>inner workings</u>
form	aim	solution	content
process	end	.	matter
outward	function	.	.
features	result	.	.
ways of	.	.	.
deciding	.	.	.
conditions	.	.	.
act	.	.	.
methods	.	.	.
trappings	.	.	.
.	.	.	.

In this table, set I sketches some general terms that are the subject-matter of all relevant analyses and hence are used, as they have been thus far in this thesis, without

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1. The terms in this table are taken from the works discussed or cited in the present chapter, and could be supplemented without difficulty.

prejudice to any particular analysis or method of analysis. Set II consists of terms corresponding to the first column of Table A, as used by those who adhere to divisions of powers derived from general theories of law. Many of its terms reappear in set IX, where their meaning, unless it can be assimilated to the meaning of set III, is wholly mysterious.<sup>1</sup> The argument of the present chapter has been that sets II and IX are useless and misleading unless carefully restricted to the context of a given system in which analysis has revealed an analogical concept of judicial power, in terms explained at the end of the present section. Sets III to VII consist of more useful tools for such an analysis, but reveal the confusion awaiting those who, like Jennings,<sup>2</sup> fail to advert to the fact that such words as "function" may appear in as many as four different sets (I, III, V, VII). Thus the terms that appeared in the second column of Table A now appear not only in set II, but also in sets III, IV, and VI.<sup>3</sup>

Now, unless some special purpose is in hand and a special context of discourse is established, it seems impossible to

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1. Note that in Robson, *op.cit.*, "inner workings" has a specifically psychological reference to the judicial "mind" or "spirit", and hence signifies, after a fashion, the values of set VII: see 88, 39, 361, 368, 399-405.
  2. Thus compare Jennings's definition of "function" on pp. xii-xiii of the 4th ed. with the use of "function" on pp. 266-267, 277, 281, 24-25.
  3. Carré de Malberg's actual "formal" definition of judicial power appeals to terms in set VII also.

give an adequate description of any action without specifying (to some extent)

- (1) the agent (cf. set IV);
  - (2) "what the agent did" (cf. set III), both in terms of "what he tried to do" (cf. set V) and "what he in fact did" (cf. set VIII);
  - (3) the circumstances of the action: e.g. where, when, by what means, how (cf. set VI);
- and (4) why he did it (cf. set VII).

Of course, all these formulae contain ambiguities, corresponding to the ambiguities of the terms or formulae in sets III to VIII of Table B. Nevertheless, it does not follow that the four questions answered by the formulae are reducible, other than in the weak and inconsequential sense that the question "What happened?" covers them all. At any rate, moral philosophers have found these the principal questions to be considered in relation to human acts, and it is useful to see that the sets of terms used by jurists in analysing governmental powers correspond quite precisely with the sets of terms implied in common-sense questions about human acts and employed by the moral philosophers who answer those questions.

It follows that, unless some special purpose is in hand and a special context of discourse is established, any account

of judicial power will have to specify features indicated generically in sets IV, V, VI and VII of Table B (assuming that sets I and III are equivalent, and that set VIII can be regarded as a sub-class of set VII). For "judicial power", according to the theory expounded in the first and second sections of Chapter One, is nothing other than the authority to act as a judge; it is a term originating in the abstraction that grasps in a single insight a systematic relation between data; and there can be no doubt that in the present case that data include agents or actors, what they are trying to do, why they are trying to do it, the way they do it, and why they do it the way they do. Judicial power is simply a system of human action, considered as a system rather than as actually in action.

But if "judicial power" implies a whole set of different sorts of features, this whole set may be made up of varying combinations of such features. There must always be an agent with authority to do something in a certain way for certain reasons; but there can be different sorts of agents, different things done in different ways for different reasons. But how different? At what point does it become pointless to assert that this or that is judicial power? In one sense, the question is wrongly put, since it assumes that there is such a definite point. But in another sense, the question

is valuable, for it recognises that pointlessness (in the other sense of "point") is the criterion.<sup>1</sup> And this is crucial for analytical jurisprudence; the argument of this thesis is that when jurisprudence imports its own special criteria of pointlessness, it ceases to be analytical jurisprudence. Not that the criteria need be identical with the criteria implicit in ordinary talk about judicial power; on the contrary, analytical jurisprudence goes behind ordinary expressions to their remote sources. Nor, on the other hand, need analytical jurisprudence conform its criteria to those of the courts, whose criteria of judicial power may vary according to the circumstances (though of course, this sort of variance, when systematic, provides analytical jurisprudence

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1. Cf. "special purpose" in Wittgenstein's Philosophical Investigations (1953), para. 69, and generally paras. 65-79. But Wittgenstein's account has its limitations. It does not consider the question here raised, how far the purposes according to which boundary lines are drawn around a concept coincide with or derive from the purposes for which "games" (in his example) themselves are played. Furthermore, the notion of "family resemblance" (para. 67) is open to misunderstanding on two grounds: (1) from "overlapping and criss-crossing resemblances" of "build, features, colour of eyes, gait, temperament, etc., etc." between given persons one is not entitled to conclude that those persons are members of the same family; (2) conversely, what constitutes a family is not a set of resemblances, but a set of relationships of a more or less complex character. Hence the term "analogical" is to be preferred to "family resemblance" with its misleading connotations of visible criteria. See H. Hervey "The Problem of the Model Language Game in Wittgenstein's Later Philosophy" (1961) Philosophy, 333; M. Charlesworth, Philosophy and Linguistic Analysis (1959), 121-125; T. McDermott (ed.) St. Thomas Aquinas, Summa Theologiae (1964) Vol. II appendix 3, p. 183; Hart, op.cit., 234.

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with evidence of the values which judicial officials of the system hope to see realized and to protect by judicial review). No, the criteria of point and pointlessness in analytical jurisprudence correspond with the values (point) realized by the actual system of judicial action. In other words, the set of values (set VII) has a kind of priority in characterisations of judicial power. Of course, because not one value but a set of values is at stake, the judicialness of an activity or system is a matter of degree. Nevertheless, special purposes and contexts aside, to the extent that the agent or institution, or the procedure followed, or the issue dealt with, contradict or derogate from the values in the set, to that extent it is pointless, and thus misleading, to call the power or activity "judicial". It is useful to have the word "judicial" precisely because it is thought to be useful to have the system of activity so named.

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2. For discussion of this more or less systematic variance, see S.A. de Smith, *op.cit.*, 35-37, 45, 289-290, 115-116. Note that judicial interpretations of "judicial power" may have also a constitutive effect, insofar as they may bring a body within the scope of the prerogative writs and hence oblige it to perform its functions in a judicial manner. This being so, it is doubtful how far it can be legitimate to describe judicial characterisations of power as judicial as "an abuse of language", as H.W.R. Wade does in Administrative Law (1961), 100.

It is important to see that the relevant judicial values, such as those listed in the second section of Chapter One, are not something over and above the power, agent, issue and procedure, but are distinguishable only by analysis of the agents, issues and procedures in which they are realized and to which they are adapted.<sup>1</sup> Moreover, because agents, issues and procedures are all alike adaptable to realizing a distinguishable set of ends, all alike may tend to be adapted to one another. In other words, agents or institutions tend to be adapted to dealing with particular types of issues according to particular types of procedures (viz., those types of procedures that are specially related to the realization of the relevant set of values); particular types of issues tend to be entrusted to particular types of agents to be dealt with according to their particular procedures; particular

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1. This view approximates to Carré de Malberg's characterisation of judicial power, without his doctrine of material definitions or his doctrine of "administration": thus, "pour qu'il y ait juridiction, il ne suffit pas qu'il soit pris une décision portant sur un point de droit, contesté ou non, et consistant à dire le droit, mais il faut et, même en absence de tout litige, il suffit que cette décision soit prise par une autorité juridictionnelle, c'est-à-dire par une autorité spécialement affectée à l'exercice de la juridiction, cette autorité statuant dans des formes qui fournissent la garantie que le sentence sera exempte de tout arbitraire, conformément à l'ordre juridique en vigueur, déterminé par des motifs de pure légalité ou d'équité idéale à l'exclusion de toute considération de buts administratifs ou d'intérêt général": op.cit., 810.

types of procedure tend to become the prerogative of particular types of institution dealing with particular types of issue. Thus agent, issue and procedure can only be disentangled with delicacy and with a full appreciation of the fact that, in any going system, each can only be defined by relation to the others and thus to the set of values that is the point of the whole. Thus understood, but not otherwise, it may be useful on occasion to speak of this analogical "whole" as the "nature" of judicial power in the given system (cf. Table B, set II). Finally, in speaking of a "set of values" that mould institutions, issues and procedures, we have not been postulating some "absolute" or "natural" set over and above all or any actual systems of government; we have been relying on the fact that, within any given system of government, a set of values is realized, and can be distinguished by analysis, not only at one particular moment of time but also over a period. Agents, issues and procedures become adapted to one another because the realization of values is not a once-for-all datum, but a process.

The foregoing represents a rather full explanation of the fourth lesson we derived from Kelsen's analysis: namely, that it is a mistake to distinguish too sharply between the

"essential function" of an institution and the "mere procedures" of that institution, just as, conversely, it is a mistake to be too impressed by the fact or possibility that otherwise distinguishable functions may be exercised by the same organ, or mixed indiscriminately among different organs. The first is a mistake to the extent that it ignores both the ambiguity of "function" and, more important, the sense in which institutions, issues and procedures must be defined in terms of one another and of the set of values which they are adapted to realizing. The second is a mistake, very common among those who wish to deny the utility of all characterisations of powers, to the extent that it ignores the possibility of discerning a distinguishable set of values that may be realized in particular sorts of procedures for dealing with particular sorts of issues even if the realization does not extend to the establishment of a particular sort of agent or institution.

## VI

Conclusion

Since this thesis does not directly concern the doctrine of the separation of powers, there is no need to identify the types of governmental power from which judicial power, assuming that it is an analogical and not merely equivocal term, may be distinguished. Moreover, the argument of this

chapter has sought to establish that an exhaustive identification of "basic" powers can hardly be undertaken without the aid of some general theory of law and, conversely, that the historical validity (and hence the analytical utility) of general theories of law is dubious. (The argument about general theories has, of course, prescind<sup>a</sup>ed entirely from the possibility of natural law theories purporting to found themselves on the nature of man and on the working out, for purposes of recommendation, of/hierarchy of true values).

The judges of the High Court of Australia, however, are obliged to work with a doctrine of the separation of powers. The premise of this doctrine is, of course, a schema of "basic" powers, purporting to exhaust the whole range of governmental powers and functions (at least from the legal point of view). The work of the foregoing chapters has been to establish some of the themes, and to reveal some of the problems, that prove to be important not only in theoretical jurisprudence but also, in one form or another, in the judicial analyses of governmental powers in Australia. The chapters on Aristotle and Bentham established the recurrent themes - the historical significance of triadic schemas, the varying elements in those schemas, the inconclusive attempts to establish radically different schemas on a priori grounds, the values that lay,

often unnoticed, behind the terms and relations of the analyses. The present chapter has identified the main problems afflicting more recent analyses - the delusive and misleading terminology of essences, the dubious context of general theories, the fascination with almost empty terms, the ambiguities in even the most basic tools of the analyses. Subsequent chapters will show, among other things, how the Australian judges have found themselves inescapably involved in the "controlling context" of general theories, though of a more complex and difficult character both in origin and content; how the terminology of essences and the fascination of empty terms have added to these complexities and difficulties; and how the slow development of judicial doctrine in a variety of particular contexts has required a clarification of the analytical terms and tools similar (if implicitly and imperfectly so) to that attempted in the last section of the present chapter.

## CHAPTER FIVE

### Introduction to the problems of defining judicial power under the Australian Constitution

From the foregoing chapters emerge two distinct, though not unrelated, lessons. The first concerns the complexities of determining a schema of basic powers or functions of government, and shows that solutions tend to be varied but not radically disparate. The second concerns the complexities of determining a definition of judicial power, whether or not this definition is to be subsumed into a schema of basic powers. To these two lessons correspond the two great problems that underlie discussions of judicial power under the Australian Constitution - namely, (1) whether the Constitution embodies, as a controlling context for all definitions of powers, a triadic schema of powers or functions; (2) what, given such a schema, are to be the definitions distinguishing these three powers from one another.

The purpose of the present chapter is to provide a brief introduction to our study of Australian constitutional law, and then to launch in medias res by analysing the two great cases that decisively determined, if perhaps not finally

settled, the judicial answers to the two problems enumerated above. Subsequent chapters will analyse the conceptual context and antecedents of these two cases, and will reveal their considerable significance for any account of the workings of the legal or judicial mind.

## I

### The special relevance of the Australian law on judicial power

Australian federal constitutional law provides a very favourable field for jurisprudential inquiry into the idea of judicial power. The Commonwealth of Australia Constitution Act 1900, an Act of the Imperial Parliament generally referred to as the Federal Constitution, employs the phrase "judicial power" in marking out the jurisdiction and functions of the Federal Judicature. From almost the earliest days of the federation, the High Court of Australia, the highest court of the Federal Judicature, has been called upon to interpret the phrase, in cases that are widely varied in character and often of great significance for the working of the federal compact. There has grown up a coherent body of careful judicial exegesis, by no means monolithic or static in its lines of interpretation, but, on the contrary, embodying much judicial controversy and diverse doctrinal developments, reversals and refinements.

Oddly enough, the development of Australian federal

constitutional doctrine has never<sup>1</sup> been the subject of a legally critical historical study.<sup>2</sup> Certainly, the constitutional concept of judicial power has, despite its admitted importance, attracted nothing<sup>3</sup> beyond a single unpublished thesis,<sup>4</sup> a few articles, and some passages in textbooks, all essaying a systematic exposition of the concept as interpreted at the time of their writing. Such exposition, which we have called "textbook", is necessary and difficult in itself; but, because of its limited and more practical aim, its synthetic method, and its static point of view, it provides the jurist with little more than further evidence to be itself subjected to his wider and more speculative purpose, his

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1. That is, since the publication in 1901 of Quick and Garran's Annotated Constitution of the Australian Commonwealth. On some reasons for this lack, see C.L. Pennam, "Judicial Biography - a preliminary obstacle", (1961) 4 U.C.L.J. 57; G. Sewer, "The record of judicial review" in Sewer (ed), Federation (1952), 211-219.
2. See the general bibliography in Federalism in the Commonwealth (ed. W.S. Livingston, 1963), 29-38.
3. T.C. Brennan's "politico-legal essay", Interpreting the Constitution (1935), is marred by a polemical hostility to Isaacs J., and rooted in the belief that "the principle of compulsory arbitration as in operation amongst us must lead to the institution of the servile or communistic or socialistic state, and to the overthrow of the system of individualism" (315). Moreover, it lacks both a historical and analytically critical approach to problems which it treats in the manner of counsel.
4. T. Simos, Federal Judicial Power in Australia, Oxford, 1958.

analytic method, his moving viewpoint. The present study of judicial power under Australian law is novel precisely because it shares the aims neither of "textbook" writers nor of those historians who seek a chronological account of the occasions and effects of legal determinations; it is concerned to isolate and follow the rational considerations operating on the minds of those who employed the concept of judicial power in their determinations. The basic question here always is: what were the factors that, at any given time, made it seem intelligent and reasonable to employ a certain concept, in exactly the way it was employed, in promulgating a certain determination?

It is tempting to contrast the paucity of legal historical scholarship with the abundance of it in the United States of America.<sup>1</sup> In fact, at first glance, the American constitutional concept of judicial power seems a more profitable mine for the jurist. For the Constitution of the United States, too, uses the words "judicial power" in marking out the jurisdiction and functions of the Federal Judicature, and these words have, of course, given rise to an extensive judicial exegesis. But

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1. To mention only three major studies among many: C.G. Haines, The Role of the Supreme Court in American Government and Politics (Vol. I, 1944; Vol. II - with F.H. Sherwood 1957); W.W. Crosskey, Politics and the Constitution (1953); C.B. Swisher, American Constitutional Development (2nd ed., 1954).

the jurisprudential interest of this exegesis is qualified by the form of the constitutional grant of power. While vesting the judicial power in Federal Courts, the Constitution employs a number of categories of cases or controversies in order to define just what that power shall incorporate.<sup>1</sup> In Australia, however, any such definition is absent. Thus, in exploring the idea of judicial power, the High Court of Australia has been obliged, rather more directly and immediately than the Supreme Court of the United States, to grapple with enigmatic and elusive material, and has had to draw more proximately upon those intellectual resources that are of most interest to the jurist. In short, the Australian judicial mind has had to be concerned with the same source of problems as concerns the jurist: namely, the expression "judicial power", unclothed by any particular articulated qualification or elucidation.

## II

### The elementary context of Australian constitutional interpretation

The Australian Constitution is called federal because it provides for the indissoluble union of more or less sovereign States, and the establishment of a new governmental system which,

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1. On the significance of this, see per Isaacs J. in Huddart Parker v. Moorehead (1909) 8 C.L.R. 330; W. Harrison Moore, The Constitution of the Commonwealth of Australia (2nd ed., 1910), 314.

while embracing all those States within its territorial sovereignty, is empowered to carry out a specified number of functions formerly carried out by each State in its own right. Thus every citizen of the Australian Commonwealth is subject to two co-existing systems of government. More precisely, he is subject both to the Crown in right of his State and to the Crown in right of the Commonwealth, to the two respective sets of Ministers of the Crown, to the jurisdiction of State and Federal courts, and to the laws and enactments of the State and of the Commonwealth. In a federation, powers of legislation are divided between the State and Federal Parliaments, and in the Australian federation it is the Federal Parliament to which the Constitution grants a determinate set of legislative powers enumerated according to subject-matter. Some of these powers are exclusive to the Federal Parliament, while some may be exercised by both State and Federal Parliaments. In the event of inconsistency between State and Federal laws, the latter prevail; but all residual powers are reserved to the States. In short, there is a distribution of powers between States and Commonwealth, and this distribution is supervised by the State and, more especially, the Federal courts. Australian courts have always assumed the right and duty to disregard as invalid any State or Federal legislation which they find to be, by virtue of this constitutional distribution,

beyond the power of the enacting legislature.<sup>1</sup>

The problem of distribution of powers seems intrinsic to federalism. Whether the same can be said of the separation of powers is rather more open to debate.<sup>2</sup> As we shall shortly see, the rubric "separation of powers" is in any case fundamentally equivocal. It is sufficient here to remark that the text of the Constitution apparently invites a discrimination between "legislative", "executive" and "judicial" powers, and a separation between the institutions to which those powers are committed. This invitation has been variously construed as, on the one hand, a mere "draftsman's literary arrangement", and on the other hand, a "controlling context", a "dominant principle of demarcation". The features of the text that occasion this controversy are as follows.

The formal Constitution of the Commonwealth is contained in s.9 of the Commonwealth of Australia Constitution Act 1900, and is divided into eight Chapters. Of these the last five

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1. The function of judicial review, so far as it turns on the distribution of powers, is for the most part committed to the High Court, since in all questions "as to the limits inter se" of the powers of the Commonwealth and those of the States the general right of appeal to the Privy Council is subject to the grant of a certificate by the High Court; such grant has only been made once, in 1917, and is unlikely to be made again: Constitution, s.74; Judiciary Act 1903-1959, ss. 38A-40A.
  2. This use of the terms "distribution" and "separation" is standard in discussions of federalism, but is not

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(ss. 81 to 128) are made up of miscellaneous rules relating to such matters as financial arrangements, the rights and powers of the States, the admission of new States to the federation, the seat of government, and the alteration of the Constitution. It is the first three Chapters that create the new governmental system and, in so doing, establish at least the form and vocabulary of a demarcation of powers within that system. Chapter I is entitled "The Parliament", and s.1 provides:

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate and a House of Representatives....

Chapter II is entitled "the Executive Government", and its first section, s.51, provides:

51. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Chapter III is entitled "The Judicature", and its first section, s.71, provides:

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction....

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universally adopted: see, e.g., Kerr, The Law of the Australian Constitution (1925), Ch.V; per Dixon J. in Dignan's Case (1931), 46 C.L.R. 73, 90-92.

These formulations are manifestly inspired by Articles I, II and III of the Constitution of the United States. Now the American Supreme Court has always upheld a thorough-going doctrine of separation of powers, requiring the "legislative" powers and functions of the Union to be entrusted to persons other than those entrusted with "executive" powers and functions, and these two arms of government to be separate from the judiciary entrusted with the judicial power of the United States. But such an interpretation is hardly open to the High Court of Australia, since the Australian Constitution undoubtedly embodies the British doctrine of responsible government. Thus s.62 provides that the Governor-General shall be advised in the government of the Commonwealth by an Executive Council which includes, by virtue of s.64, all the Ministers of State. But s.64 further provides that all the Ministers of State are to be members of one or other of the Houses of Parliament. Hence, at the outset, the Australian Constitution departs from any strict principle of a fully triadic separation of powers and institutions. The courts have sought to determine how far the judicial powers and institutions are distinguishable from the other powers and institutions of the Commonwealth without the aid of such an all-embracing major premise as would be supplied by a more thorough-going principle of separation of powers.

Those features of the Constitution that we have sketched were never very controversial. There were, broadly, three draft constitutions, prepared by inter-State contentions in 1891, 1897 and 1898, and these drafts may be the subject of submissions in argument in cases involving the interpretation of the Constitution. On the other hand, the courts have almost invariably refused to hear discussion of the convention debates, have refused to admit them as evidence, and have almost always refrained from reference to them in judgment.<sup>1</sup> The jurist, however, subjects himself to no such self-denying ordinance, for his search is for understanding rather than, for example, ease and simplicity of decision. We shall later examine the debates that shaped the Constitution; for the moment it is sufficient to say that the draft of 1891 displays in one form or another all the principles so far sketched.

Finally, it is important to observe that the draft of 1891

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1. See Municipal Council of Sydney v. Commonwealth (1904) 1 C.L.R. 208, 213-214; Tasmania v. Commonwealth (1904) 1 C.L.R. 329, 333; Baxter v. Commissioners of Taxation (N.S.W.) (1907) 4 C.L.R. 1087, 1114, 1115, 1148; cf. Newcastle and Hunter River Steamship Co. Ltd. v. A.-G. for Commonwealth (1921) 29 C.L.R. 357, 363; Bank of N.S.W. v. Commonwealth (1948) 76 C.L.R. 1, 363-367; Second Uniform Tax Case (1957) 99 C.L.R. 575, 603, per Dixon C.J. See generally, P. Brazil, "Legislative History and the sure and true interpretation of statutes in general and the Constitution in particular" (1961) 4 U.Q.L.J. 1, 16-21.

was largely the work of Samuel Griffith, who in 1903 became the first Chief Justice of the High Court of Australia. Moreover, the later drafting was, if anything, the work of men who became his brother justices on the first High Court, Edmund Barton and Richard O'Connor, both members of the three-men Drafting Committee in 1897 and 1898. Of the other members of the conventions few, if any, were more prominent than the two men who became judges on the High Court when its establishment was raised to five in 1906, namely Isaac Isaacs and Henry Higgins. That those most influential in the creation of the Constitution should also have been its first interpreters adds a notable dimension to the elementary context of judicial interpretation that we have been outlining in this section.

### III

#### The underlying problem in the Wheat Case<sup>1</sup> - the Abstract doctrine of demarcation

We have said that the phrase "separation of powers" disguises a radical ambiguity. At a verbal level, this stems from an ambiguity in the word "power", rather similar to the ambiguity of the word "moria" in Aristotle's Politics. Just as the three elements (moria) in Aristotle's constitution might be taken to be either the institutions that each exercise a function, or the functions themselves, so here the word "power"

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1. N.S.W. v. Commonwealth (1915) 20 C.L.R. 54.

may refer either to an institution (cf. "a power in the land") or to the powers of that institution. In Appendix A we show how this verbal ambiguity was exacerbated by the eighteenth century usage of such words as "judiciary" indifferently as substantives ("the judiciary") or as adjectives ("the judiciary power").

But the ambiguity goes beyond the verbal level. There are in fact two different ways of conceiving and working with any theory or doctrine of separation of powers. On the one hand, one may postulate a number of governmental institutions, and require that no person be a member of more than one of these, that none of these institutions do any of the jobs assigned to the others, and in general that their organization, personnel and tasks be kept entirely separate. For example, one might plan a constitution in which there would be a bicameral legislature, a body of officials from which all members of the legislature were excluded, and a Supreme Court and a regular hierarchy of specified courts in which membership of the legislature or employment in any other official capacity was a disqualification for office. One could delimit more or less exactly the respective tasks of these three institutions (for it would not be implausible to regard the hierarchy of officials as an institution set over against the other two, even though it lacked some of their organizational characteristics). Then,

if one left it at that, one would be thinking about the separation of these three "powers-in-the-land" in a way which we shall call Institutional. In particular, one's demand for separation would extend only to the three institutions, their personnel and their jobs; it would have no necessary further implications. Thus, if it were later, or collaterally, decided to establish a new institution to deal with a special social problem, no implication would necessarily arise concerning the staffing or work of this new body; for the doctrine of separation concerned itself - one might say, exhausted its concern - with the effective separation from one another of the three concrete institutions named and defined.

On the other hand, one may postulate a conceptual system of governmental functions, and require that these functions be exercised so entirely separately that no institution of government should exercise more than one of them. For example, one might conceive a constitution in which there would be three functions or powers of government: legislative, executive, and judicial. Then there might be any number of institutions set up to exercise these powers or functions, but all of them subject to the overriding requirement that no person or body should exercise more than one such function. Then one would be thinking about the separation of these three powers of government in a way which we shall call Abstract. Here the

doctrine of separation is logically prior to every particular institution, whereas in the Institutional way of thinking the "doctrine" of separation can really be spoken of only as a sort of shorthand, very circumscribed in reference, derived from the planned separation of certain particular institutions. Hence, according to the Abstract doctrine, all proposed institutions would be required, like all existing institutions, to conform to the requirement that only one of the (say, three) postulated types of work be done by any one person or body.

There will be special legal problems for any constitution embodying either form of the doctrine. There will always, for example, have to be some effective principle of ultra vires, to restrain one institution from trespassing on the ground of another. Where the Institutional doctrine is ruling, the problem of ultra vires arises only in connection with the particular institutions required to be kept separate, and is soluble by reference to the respective definitions of the powers of these institutions. Of course, these definitions may be more or less general, and at the extreme of generality may do no more than invoke such a schema of functions as in any case grounds the Abstract doctrine. But in the Institutional scheme, even in this extreme case, the need for an explication of these functions arises only in connection with certain nominated institutions, and the demand for separation of

functions will tend to be subordinate to any other purposes or principles discernibly inherent in those institutions and in the constitution as a whole. In the Abstract scheme, by contrast, the functions of the institutions will be understood very generally; for it is the functions (in their exercise, of course, by persons or institutions) that are to be kept separate. Moreover, all persons and institutions (unless specifically exempted) have to conform to a requirement which overrides any particular purposes or principles that, as embodied in offices or institutions, might conflict with its quite general application. So the problem of explicating general terms, which may arise in a more or less subordinate way in the context of an Institutional doctrine, will certainly be paramount in the context of any Abstract doctrine of separation of powers.

This, then, is the problem underlying, though never expressly identified in, the Wheat Case (1915).<sup>1</sup> For in this case, the question arose whether an institution provided for in the Constitution, but falling outside the explicit provisions of Chapters I, II and III for the Parliament (or legislative power), Executive (or executive power) and Judiciary (or judicial power), must conform to a doctrine of separation of powers conceived precisely in the Abstract

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1. 20 C.L.R. 54.

fashion. Not all the judges faced this issue; but most did, and the clash between Institutional and Abstract doctrines was in fact direct. That this was the real problem in the Wheat Case has never been noticed, partly because the language of the judgments of the High Court appears at first glance to reflect only the Abstract doctrine that has prevailed unchallenged since 1915. But first impressions are misleading; as we have pointed out, it is possible, in the extreme case (as here), for the definition of the nominated institutions in an Institutional scheme to invoke the same schema of powers and functions as in any case grounds the Abstract doctrine. What is in question is not the language employed to define the powers of institutions, but whether a schema of powers is invoked as basic, prior to all institutions, and hence as both exhaustive and controlling.

#### IV

##### The Wheat Case

The special institution whose powers were in issue in the Wheat Case was the Inter-State Commission, a body provided for, in mandatory fashion, by the Constitution in Chapter IV ("Finance and Trade"):

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws

made thereunder.

By ss.102 and 104 of the Constitution, this Commission was further empowered with executive authority to "adjudge" and declare preferential or discriminatory railway rates undue and unreasonable, or unjust to any State, and to declare any railway rate to be "necessary for the development of" a State. The conditions of appointment, tenure and remuneration of the Commissioners were specified in terms identical with those concerning the federal judiciary (s.72),<sup>1</sup> save that the tenure of the Commissioners was limited to seven years (s.103).<sup>2</sup> By s.73 the High Court was empowered to hear appeals from all "judgments, decrees, orders and sentences...(iii) of the Inter-State Commission, but as to questions of law only".

In 1912 the Commonwealth Parliament brought the Commission into being by the Inter-State Commission Act 1912. In view of the provisions of s.101 and s.72(iii) of the Constitution, it

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1. "72. The Justices of the High Court and of the other courts created by the Parliament - (i) Shall be appointed by the Governor-General in Council: (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity: (iii) Shall receive such remuneration as the Parliament shall fix; but the remuneration shall not be diminished during their continuance in office."
  2. "103. The members of the Inter-State Commission - (i) Shall be appointed by the Governor-General in Council: (ii) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground  
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is no surprise to find Part V of the Act entitled "Judicial Powers of the Commission". In this part it was enacted that the Commission, in the exercise of its powers for the hearing and determination of any complaint, dispute or question, or for the adjudication of any matter, should be a Court of record (s.23), with power to grant relief (s.29), to award damages (s.30), to issue injunctions (s.31), to declare State regulations invalid (ss.32 and 33), and to fix penalties for disobedience to its orders (s.34) made within its jurisdiction as laid down in s.24. It was in fact to have the powers and privileges of the High Court (s.36), though only one of its three members need be a lawyer.

In 1915, at the suit of the Commonwealth, the Commission declared the Wheat Acquisition Act 1914 (N.S.W.) invalid as an infringement of the freedom of inter-State trade guaranteed by s.92 of the Constitution; and an injunction and costs were awarded against the State of New South Wales. The defendant State appealed to the High Court by way of case stated, arguing, inter alia, that the Commission had no power to make the order appealed from, on the ground that Part V of the Inter-State Commission Act was itself invalid. The High Court, Barton and

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of proved misbehaviour or incapacity: (iii) Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office."

Gavan Duffy J. dissenting, upheld this argument.

There can be little doubt that it was the opinion of Isaacs J. that was decisive; the judgments of Griffith C.J. and Powers and Rich JJ. have a perfunctoriness that would, in so important a case, be remarkable (especially for Griffith C.J.), were it not that the majority view was so exhaustively argued by Isaacs J. The judgment of Isaacs J., in fact, is seminal in the history of the Australian Constitution; it provides the major premise for almost every significant development in the law of separation of powers, and its implications are not yet exhausted.

For Isaacs J. the first question came to this:

Has the Commonwealth Parliament power under s.101 of the Constitution to create the Inter-State Commission a Court of Justice, that is, a federal Court in the strict sense, and to invest it with judicial powers on that basis?<sup>1</sup>

The first step towards an answer was to establish that the word "adjudication" was, in 1900, ambiguous; six English cases were cited to show that it was "extensively used to denote decisions of a quasi-judicial character".<sup>2</sup> Administrative bodies were increasingly being invested with quasi-

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1. (1915) 20 C.L.R. 54, 83 (emphasis added).

2. Ibid., at 84.

judicial functions, relating to law or fact or both; decisions of such bodies were enforceable by application to a court of law; apart from the prerogative writs, they were "unchallengeable in a Court of law".<sup>1</sup> Arlidge's Case<sup>2</sup> showed that power to make an adjudication as effective and binding as a judicial adjudication need not convert an executive body into a strictly judicial body. "The nature of the power conferred does not alter the character of the body exercising it".<sup>3</sup> Thus the use of the word "adjudication" in s.101 did not necessarily imply that Parliament could erect the Commission into a Court; and in fact such an implication was definitely excluded by several considerations. The primary consideration was "the general frame of the Constitution". The fundamental principle was the "separation of powers", the "dominant principle of demarcation",<sup>4</sup>

we find delimited with scrupulous care, the great branches of Government. To use the words of Marshall C.J. in Wayman v. Southard:<sup>5</sup> "the difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law". That describes the primary function of each department, though there may be incidents to each power which resemble the other main powers, but are incidents only.

It would require "very explicit and unmistakable words to undo the effect of the dominant principle of demarcation".

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1. Ibid., at 84.
2. [1915] A.C. 120.
3. 20. C.L.R. 54, 87.
4. Ibid., at 90.
5. (1825) 10 Wheat 1.

But what was the precise effect of the principle on the Inter-State Commission? From this point, Isaacs J.'s argument developed along more than one line. The Commission could not be a federal court within the meaning of s.71, since the tenure of its members departed from s.72. And it could not be an "additional" or "excrecent" <sup>1</sup> court outside Chapter III. Why not? one asks (for we shall see that this, rather precisely, was just the intention of the founders). Isaacs J. adduced three reasons. Firstly, and of "supreme importance", there was s.80 of the Constitution, guaranteeing trial by jury for every indictable offence against Commonwealth law. It had recently been held (by himself) in Bernasconi's Case<sup>2</sup> that s.80 was a limitation "applicable only to the judicial power vested in Courts of Justice by Chapter III". Thus if s.101 empowered Parliament to create a Court of Justice outside Chapter III, s.80 would be inapplicable to such a Court:

This would lead to a most astounding result. Parliament by virtue of its alleged unlimited power under s.101 could confer both criminal and civil jurisdiction on a body presumably in the main consisting of non-lawyers, could enable it to try offences even on indictment without the security of s.80 in relation to a jury. Not only so, even Parliament could not enable this Court to re-examine the facts in case of errors, or the sentence, however severe, unless absolutely illegal.<sup>3</sup>

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1. Ibid. at 94.
  2. (1915) 19 C.L.R. 629.
  3. 20 C.L.R. 54, 94.

The second reason advanced by Isaac J. for holding that the Inter-State Commission could not be established as a Court outside Chapter III was derived from the presumed intention of s.101 itself. The raison d'être of the Commission was the execution and maintenance of the provisions of the Constitution relating to trade and commerce, and of laws made thereunder.<sup>1</sup> One such provision was s.102, whereby the Commission was empowered to make an authoritative report as to the condition precedent to parliamentary action forbidding preferences or discrimination on State railways. The "adjudication" contemplated by s.102 was not that of a Court; it was rather a discretion or judgment in the sense of a well-considered statesmanlike opinion, not measurable by any legal standard. The power to make such a quasi-judicial investigation (which might result in a binding conclusion) as an incident in administrative and consultative functions left the Commission in no respect different in inherent character from the American Inter-State Commission, which was an administrative body only. Nor was the character of the Commission altered simply because its powers were, by s.101, extended beyond the ambit of the State railways (s.102) to cover all the commerce provisions of constitutional and Commonwealth law:

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1. Ibid. at 91.

The extension would in no respect alter the character of the Commission, or convert it from an executive to a judicial branch...<sup>1</sup> Courts do not execute or maintain laws relating to trade or commerce. These words imply a duty to actively watch the observance of those laws, to insist on obedience to their mandates, and to take steps to vindicate them if need be. But a Court has no such active duty: its essential feature as an impartial tribunal would be gone, and the manifest aim of the constitutional separation of powers would be frustrated....There has not been found any difficulty in arming the American Inter-State Commerce Commission with ample quasi-judicial powers, while leaving the body as it must be left an executive organization.<sup>2</sup>

Thus the linchpin of Issacs J.'s argument in the Wheat Case was, precisely, that there could be no "fourth branch" of the Constitution; that every institution must conform itself to one or other of the three exhaustive categories of power, but never to more than one; that the "federal courts" referred to in Chapter III were the sole repositories of every judicial power that was not merely quasi-judicial and subordinate.

Historically speaking, to show that the Constitution was intended to embody a three-way "dominant principle of demarcation", one would have first to show that s.101, as intended, was not inconsistent with the postulation of such a principle. In the Wheat Case, Issacs J. sought to demonstrate the true intention of s.101 by postulsting as primary and self-evident

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1. Ibid. at 92.
  2. Ibid. at 93-94.

the very principle whose validity (as a matter of real intentions) is dependent on a prior judgment as to the intended meaning of s.101. By adhering to this reasoning of Isaacs J. ever since, the High Court has absolved itself from further inquiry into actual intentions; the legal principle of demarcation in the Australian Constitution prescind from, and is superior and prior to, both provisions as to particular institutions and establishments and questions of what historically was intended by the arrangements of the Constitution.<sup>1</sup> To put the matter very shortly, since the Wheat Case it has been possible for the High Court to hold that any institution established or authorized to be established by the Constitution must conform to the triadic demarcation of powers, regardless of whether the founders intended it to be conformed or not.

The judgment of the Chief Justice is perhaps more often cited, but has been far less influential. It is notable for the casual postulation of its major premise, without argument or further exposition:<sup>2</sup>

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1. This is not to deny that the High Court has not sometimes admitted exceptions to the principle, such as powers conferred under s.122 of the Constitution with respect to Commonwealth territories, the judicial powers of Parliament under ss. 47 and 49 of the Constitution, and the powers of courts-martial under s.51(vi).
  2. Ibid., at 62.

It is plain from the provisions of s.103 of the Constitution as to the term of office of the Inter-State Commission that they were not to be a federal Court within the meaning of s.72. But it is contended that s.102 should be read as an exception from, or as a supplement to, the provisions of s.72. I am unable to accept this argument. In my judgment the provisions of s.71 are complete and exclusive, and there cannot be a third class of Courts which are neither federal Courts nor State Courts invested with federal jurisdiction.

The Commission could not be a federal Court, since the tenure of the Commissioners conflicted with the provisions of s.72.

Though the Commission might be invested with quasi-judicial powers for adjudging whether alleged inter-State preferences were undue or unreasonable or for adjudicating upon other matters involving mixed questions of law and fact, neither this nor the provision in s.73(iii) of the Constitution for appeal to the High Court required or implied that the Commission was a Court, even of an exceptional kind.

"Adjudication" was not confined to Courts; the word was more apt to describe the function of an administrative body entrusted with quasi-judicial powers.<sup>1</sup> The powers of adjudication intended by s.101 were such powers of determining questions of fact as might be necessary for the performance of its executive or administrative functions, to which functions the powers of adjudication were merely incidental or ancillary.

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1. Ibid., at 64.

Thus, the Commission could determine whether the provisions of relevant Commonwealth laws had been observed "in point of fact", and, if they had not, could order, for example, the abolition of structures or appliances contravening the law, and could invoke the aid of a Court of law to ensure obedience to its order. But it could not be a Court of Justice itself; s.23 of the Act, constituting it a Court of record, was thus invalid; but s.23 was not severable from the rest of Part V, which was thus altogether invalid.

It has not always been noticed that the major premise of this judgment is, in our terminology, Institutional rather than Abstract.<sup>1</sup> The remark that "the provisions of s.71 are complete and exclusive" was really, as the context clearly shows, only an introduction to the (Institutional) proposition that the requirements as to tenure in s.72 apply to all courts created by Parliament. The reasoning of the Chief Justice was not based on the use of the words "judicial power" in s.71; the terminus ad quem of his argument was not that the judicial powers of the Commission were invalid because "judicial power" could be exercised only within Chapter III, but the much

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1. But see per Dixon J. in Victorian Stevedoring and General Contracting Co.Pty.Ltd. v. Dignan (1931) 46 C.L.R. 73, 97.

narrower finding that the use of the word "adjudication" in s.101 did not (because of its intrinsic ambiguity, its conventional use, and its subordination in s.101 to the primary ends of execution and administration) supplant the presumption that any court established by Parliament must conform to s.72 (so that any body not conforming must be something other than a court). This presumption followed not from any Abstract doctrine, requiring all "judicial power" to be exercised by specified institutions, but simply from the broad wording of s.72: "The Justices of the High Court and of the other courts created by the Parliament - (ii) shall not be removed except..." His argument directly invalidated only that section of the Act which constituted the Commission a "Court of record"; the general invalidity of Part V then followed simply from the ordinary principles of severability, namely, that the statute with its invalid sections excised must not be "substantially a different law" from that originally passed by Parliament; and

it is impossible to say that a law conferring executive powers upon an instrumentality of the Government with incidental powers of adjudication for the purposes of administration is not substantially a different law from a law creating a Court of Justice and defining its jurisdiction.<sup>1</sup>

Thus the judgment of Griffith C.J., strictly construed, involves no large principles of constitutional interpretation;

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1. 20 C.L.R. 54, 65 .

it turns on a construction of s.72 and, more especially, of the emphasis of s.101 of the Constitution. It is, of course, permissible to speculate whether so odd and limiting a construction of s.101 must not have had some more abstract premise, such as Isaacs J. articulated; but the judgment of the Chief Justice does not justify any settled conclusions beyond those already given. Hence there was no clear majority in favour of Isaacs J.'s Abstract doctrine,<sup>1</sup> though the point is academic in view of subsequent judicial attitudes to the case.

The short judgment of Rich J. was in most respects a further version of the view expressed by Isaacs J. The Constitution drew "a clear distinction - well known in all British communities - between the legislative, executive and judicial functions of Government of the Commonwealth".<sup>2</sup> By s.61 all necessary powers for executing the Constitution were vested in the Executive, which, in performing such a function, was often called upon to "adjudicate" upon various matters. There was no reason to suppose that the powers of the Inter-State Commission should be any wider: indeed, the Commission

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1. Powers J. agreed with the reasoning of both Griffith C.J. and Isaacs J.; his own judgment added nothing to the analyses made by those two judges.
  2. 20 C.L.R. 54, 108.

simply took over the functions of the Executive with respect to trade and commerce.<sup>1</sup> There was no reason, therefore, to suppose that s.101 authorised the creation of a "curiously anomalous body" at once executive and curial, combining the prosecuting authority, the Court and the sheriff's department.<sup>2</sup>

By contrast, finally, there are Barton and Gavan Duffy JJ. in dissent, whose views, (though, as we shall see,<sup>3</sup> in all respects in conformity with the historically discoverable intention of s.101) have been rejected beyond recall. In their view, the word "adjudication" embraced both administrative and judicial functions,<sup>4</sup> and there were no grounds for saying that the judicial must be subordinate to the administrative;<sup>5</sup> it was for Parliament to grant such powers as it considered necessary:

The Parliament, in giving the Commission the status and some of the powers of a Court, has acted in exercise of a discretion expressly committed to it, an exercise which this Court cannot dispute or frustrate except in obedience to some controlling context. The opposite contention amounts to this, that Parliament was bound to withhold any status or power of a Court from a body which was to perform the extremely important functions which the framers of the Constitution declared that this Commission was to exercise, the nature of those functions being such that many of them could only be exercised inter partes.<sup>6</sup>

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1. Ibid. at 109.
  2. Cf. Quick & Garran, Annotated Constitution (1901), 900: "The Commission is intended to be policeman as well as judge".
  3. Infra, Ch.7.; see also Quick & Garran, op. cit., 896-900.
  4. 20 C.L.R. 54, 101-102, per Gavan Duffy J.
  5. Ibid. at 70, per Barton J.; 102, per Gavan Duffy J.
  6. Ibid. at 71, per Barton J. (emphasis added).

The last words of this passage indicate, incidentally, that Barton J. was thinking of the solution of disputes inter partes as the central element in the notion of "judicial" functions,<sup>1</sup> while it is clear that the concept of "judicial" in Isaacs J.'s judgment was grounded on decision according to measurable legal standards.<sup>2</sup> (The dichotomy will become a familiar one.) But what is to be noticed here is that the reasoning of the dissenting Justices was founded on an Institutional approach to the interpretation of the whole Constitution. They would not admit that a "controlling context" could be deduced from the arrangement of the first three Chapters of the Constitution, or from the apparent exhaustiveness of s.71 read apart, or in abstraction, from Chapter IV.<sup>3</sup> They insisted that Chapter III was concerned only with the "general Judicature" of the Commonwealth;<sup>4</sup> it did not prevent the establishment of other institutions:

Under this Chapter the general judiciary system of the Commonwealth is provided for, and it has no relation

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1. See also, at 75: "The power to hear and determine controversies inter partes and to grant consequent relief is... validly given to the Commission as a Court." - per Barton J.
  2. Ibid. at 91.
  3. Ibid. at 103.
  4. Ibid. at 72-73, per Barton J.; 103, per Gavan Duffy J. (emphasis added).

to tribunals instituted or appointed for special purposes and confined in their jurisdiction to the enforcement and upholding of any special and limited class of laws.<sup>1</sup>

Thus there was no Abstract principle of demarcation which was to be assumed to be superior and prior to such special purposes and institutions as might be found otherwise unambiguously in, for example, the last five Chapters of the Constitution.<sup>2</sup> It might well be that the words "execution and maintenance", as used in both s.101 and s.61, connoted "executive" rather than "judicial". But the powers conferred by ss.101 and 61 were:

not directed to perform the same functions but to attain the same end. Powers entirely different in their nature may be exercised for the purpose of bringing about the same result, and the exercise of judicial functions may appear to Parliament to be as necessary for the prescribed purposes as the exercise of administrative functions.<sup>3</sup>

There was thus no rule that every institution established under the Constitution must always and necessarily be confined to the performance of one type of function to which other functions could only be ancillary; particular intentions and purposes were prior and superior to questions of types of power or function:

It is true that a Court usually confines itself to the performance of strictly judicial duties and that many of the duties of the Commission must be purely executive, and it is equally true that a "corporation" (s.4) discharging judicial duties as a Court and

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1. Ibid. at 73, per Barton J.
  2. Ibid. at 75, per Barton J.
  3. Ibid. at 102, per Gavan Duffy J.

executive duties which require none of the special powers of a Court, must look ugly and anomalous in the eyes of a lawyer, but that does not determine the question at issue. It may well be that those who framed the Constitution were impressed with the necessity of giving to the Inter-State Commission in Australia such an anomalous character because they recognised that in the United States the Inter-State Commission was enfeebled and impeded in the performance of its duties by its want of judicial power and by the inability of Congress to give it such power.<sup>1</sup>

In brief, the Constitution was to be regarded as primarily a disposition of institutions established for their own particular ends, and only secondarily and subordinately as a demarcation of functions; it was not to be interpreted simply by reference to a principle, by prescind- ing from the possibility of anomalous or special institutions; it was not to be interpreted by prescind- ing from the historically deter- minable intentions of the founders.

## V

### The problems underlying Alexander's Case

The case just examined constitutes, at least in effect, the decisive Australian answer to the first of the two great problems identified at the beginning of this chapter. There is established, as a controlling context and dominant principle for all examinations of powers, an exhaustive<sup>2</sup> triadic schema;

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1. Ibid. at 102-103, per Gavan Duffy J.

2. See Pickard v. John Heine and Son Ltd. (1924) 35 C.L.R. 1, 7 per Isaacs J.

"legislative", "executive", and "judicial". Alexander's Case (1918) implicitly confirms this Abstract schema. For while the Inter-State Commission's powers were stated in language which hardly went beyond the vocabulary of the triad, the institution examined in the later case was (at least in a popular acceptation) endowed with a distinctively named "arbitral power"; the reduction of this to the terms of the schema is thus a radical confirmation of the Wheat Case.

But, inversely, the judgment of Isaacs J. in the Wheat Case provides the essential principles which carried the day in Alexander's Case and which constitute one of the decisive Australian answers to the second great problem identified in section I. For Isaacs J.'s seminal statement of the dominant principle of demarcation also incorporates definitions of each of the three powers in the schema:<sup>1</sup>

the difference between the departments undoubtedly is that the legislature makes, the executive executes, and the judiciary construes the law.

The validity of this definition, at least as regards the judicial and legislative powers, is the main issue in Alexander's Case, and confirmation of its validity the main result.

Now the foregoing characterisation of governmental powers

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1. 20 C.L.R. 54, 90.

bears on its face many of the features discussed in Chapter Four. It manifestly involves and is dependent upon a general theory of law. It clearly makes bold use of broad general terms, in such a way that their meaning must be parasitic upon tacit prior understanding of the institutions they purport to define. It evidently implies, but concedes, an option for some, (for example, "construction of pre-existing law"), rather than others, (for example, the solution of controversies inter partes), among the set of values that we have been calling "judicial". To complete the parallel, it is necessary only to point out that the two judgments radically opposed to the foregoing characterisation in Alexander's Case appeal to postulated historical "origins of civilised society" in order to sustain their opposing general theories and rival (concealed) selections of values.

But while the parallelism is significant, the special problems facing the judges of the High Court must not be overlooked. As we remarked at the end of the preceding chapter, the judges were obliged to work with a doctrine of separation of powers; that the obligation was, as we now see, self-imposed does not affect the matter. Arbitral power had, therefore, to be assigned definitely to one basic power or another, whereas the analytical jurist is under no obligation to "solve" border-

line cases once he has isolated the main analogical terms and relations in a system.

Still, what was at stake in Alexander's Case was not only what characterization of legislative, judicial and arbitral powers was to prevail, but also what methodology was to be authoritatively employed in that characterization. As we have just remarked, the methodology on both sides of the judicial contest was deficient in familiar ways; in short, lines were too crudely and harshly drawn, and the idea of analogical concepts was suppressed in favour of three simple concepts and the disarming explanation that all borderline cases or features were really examples of one or both of the other two concepts, but only appended as "incidents". As a consequence, simplistic approaches to the whole problem of governmental powers have not been lacking among Australian lawyers, and judicial and academic theory has only gradually attained to a consciousness of the complexities. Such definitions as the following, taken from the first general constitutional study published after Alexander's Case, have been too common:

The distinction between a legislative and a judicial act is that the former establishes a rule regulating and governing matters in futuro, whilst the latter determines rights or obligations concerning matters or transactions which have already transpired.<sup>1</sup>

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1. D. Kerr, Law of the Constitution (1925), 31.

Finally, in observing the rival concealed selections of primary or distinguishing values in Alexander's Case, it is not to be forgotten that the controlling context of general theories of law was complicated by the possibility (or as we shall see, the fact) of further (rival) general theories of Australian federalism itself. In reading the judgments it is not difficult to transpose the explicit arguments to implicit solutions offered on all sides to the problem of balancing the roles of Parliament and Court in the federation.

## VI

Alexander's Case

Among the enumerated powers granted to the Federal Parliament by s.51 of the Constitution is the power "to make laws for the peace, order, and good government of the Commonwealth with respect to...(xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". In pursuance of this power, the Parliament in 1904 passed the Conciliation and Arbitration Act, establishing complicated machinery for a far-reaching scheme of compulsory industrial conciliation and arbitration administered by a tribunal called officially the Commonwealth Court of Conciliation and Arbitration, and known generally as the Arbitration Court. By s.11 of the Act this tribunal was constituted a Court of Record, consisting of a

President appointed (s.12) for a term of seven years (quamdiu se bene gesserit), from among the Justices of the High Court. By s.38, the Arbitration Court, as regards every industrial dispute of which it had cognizance, was to have power "(a) to hear and determine the dispute in manner prescribed; (b) to make any order or award or give any direction in pursuance of the hearing or determination"; (d) to impose penalties for "breach or non-observance of any term of an order or award"; "(da) to order compliance with any term of an order or award;"<sup>1</sup> (e) to enjoin against contraventions of the Act; (i) to order a party to a suit to pay another party's costs; (j) to hear and determine a dispute in the absence of any party summoned to appear; (s) to summon parties and witnesses and to compel discovery of documents. By s.46, penalties imposed by the Arbitration Court were to be enforceable in the manner of final judgments of Federal or State Courts having civil jurisdiction. The duties and functions of the Arbitration Court thus empowered encompassed (s.23) the careful and expeditious hearing of, inquiry into, and investigation of every industrial dispute certified by the Registrar of the Court as proper to be dealt with in the public interest or submitted by a registered organization of employers or employees or otherwise within the cognizance of the Court by virtue of s.19 of the Act read with

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1. s.38 (da) was added in 1914.

s.51 (xxxv) of the Constitution; and (s.25), in default of a certified agreement between the parties, the hearing and determination of such disputes, "according to equity, good conscience and the substantial merits of the case, without regard to legal technicalities or legal forms", and informing its mind on any matter in such manner as it might think fit.

In 1918 a novel and successful attack was mounted on the powers of the Arbitration Court. At the suit of J.W. Alexander Ltd., the Arbitration Court, acting under s.38(d) of the Conciliation and Arbitration Act, had imposed a penalty on the Waterside Workers' Federation of Australia for breach of an award of the Court made under s.38(b). The Waterside Workers' Federation thereupon appealed to the High Court,<sup>1</sup> by way of a case stated in the form of a number of questions concerning the power of the Arbitration Court to enforce the award by such penalty. Owen Dixon, for the appellants, argued that the powers of the Arbitration Court were of two kinds, arbitral and judicial. The judicial powers were the powers (contained in s.38(d), (da) and (e), and s.48) of enforcing an award - powers, he argued, for enforcing legal rights already in existence by virtue of the award. All other powers of the Court were arbitral in character - that is, "in a sense legislative" - since they were

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1. Waterside Workers' Federation of Australia v. J.W. Alexander Ltd. (1918) 25 C.L.R. 434.

powers for bringing legal rights and obligations into existence. The arbitral powers were thus intrinsically separable from the judicial powers; but the latter were invalidly conferred on a tribunal which was not constituted as a court within the meaning of Chapter III of the Constitution. For Chapter III governed the exercise of all the judicial power of the Commonwealth and required, by s.72, that where such power was vested in a court created by Parliament, the Justices of that court should be appointed for life. The President of the Arbitration Court was appointed for a term of years only; that court was thus not a court capable of exercising the judicial power of the Commonwealth, and the enforcement provisions of the Conciliation and Arbitration Act were invalid as involving the exercise of just such judicial power.

Now s.72 of the Constitution is not, on its face, without ambiguity, since it does not provide in so many words for life tenure. Two of the Justices of the High Court were thus enabled to reject the argument for the appellants, simply by holding that s.72 neither expressed nor implied any requirement that the Justices of a court created by the Federal Parliament be appointed for life.<sup>1</sup> One of these two, Gevan Duffy J., made no further remarks; but the other, Higgins J. (on whose motion placitum (xxxv) had been introduced into s.51 of the Constitution

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1. 25 C.L.R. 434, 475-476.

at the 1898 Convention, and who had been since 1908 the President of the Arbitration Court), expressed some incidental doubts as to whether the powers of the President, if they could be called "judicial" at all, were part of the "judicial power of the Commonwealth" within the meaning of s.71. It was not clear that the President was in any respect "administering or determining the law as Judges do":<sup>1</sup>

He has no general jurisdiction for the determination of either civil or criminal controversies. All his duties are referable to the Act made in pursuance of s.51 (xxxv), and matters incidental to that power vested in the Parliament. In enforcing awards, as well as in making awards, he is merely carrying out the object of securing such conditions in industrial matters as will conduce to industrial peace.<sup>2</sup>

There is nothing in the judgment of Higgins J. to suggest that he accepted the radical distinction between the "arbitral" provisions, as quasi-legislative, and the enforcement provisions, as judicial in character.<sup>3</sup> Indeed, he seems to have been concerned, not with the meaning of "arbitral", "legislative" and "judicial" powers as such, but simply with the contrast between "the limited and special duties" of the Arbitration Court and "general jurisdiction for the determination of either

1. Ibid., 475.

2. Ibid., 476.

3. Contra, G. Sawyer, Cases on the Constitution of the Commonwealth of Australia (2nd ed. 1957), 449; also per Dixon J. in Dignan's Case (1931) 46 C.L.R. 73, 97.

civil or criminal controversies".<sup>1</sup> For him, the provisions of Chapter III of the Constitution, and the "judicial power" therein referred to, were limited to the foressaid general jurisdiction; the position of the Arbitration Court seemed to him "similar" to that of the courts of the Commonwealth territories, which, as the High Court had already held, were not comprehended within the federation in such a way as to be subject to <sup>the</sup> requirements of Chapter III.<sup>2</sup> In short, Higgins J.'s discussion in Alexander's Case was institutional in character, and quite similar to the approach of the dissenting judges in the Wheat Case.<sup>3</sup>

By contrast with the limited approach of these two dissenting Justices, the remaining five Justices, including the third dissident, Griffith C.J., all essayed a definition-al characterisation of the functions of the Arbitration Court as judicial or legislative or both. As in the Wheat Case,

1. 25 C.L.R. 434, 476.

2. R. v. Bernasconi (1915) 19 C.L.R. 629.

3. Thus it may be that Higgins J., had he sat on the case, would have dissented in the Wheat Case. In support of this view, it may be noted that Higgins J. later rejected the view that Chapter III implied that only judicial powers could be vested in the High Court; in other words, he rejected one of the significant implications, if not the central doctrine itself, of the "dominant principle of demarcation": see In re Judiciary and Navigation Acts (1921) 29 C.L.R. 257, 271. As against this possibility, however, see Higgins's support of Kease's views on the Inter-State Commission in the Conventions: infra p.7.38.ff.

there was no clear majority for any one characterisation; but the effective majority, whose characterisation has since been accepted as the ratio of the case, consisted of Isaacs and Rich JJ., who wrote a joint judgment, and Powers J., who wrote a concurring opinion. Barton J. agreed in upholding the appeal; but his reasoning was foreign to that of the foregoing three Justices and was, in the matter of characterising "arbitration", quite close to that of Griffith C.J. The clash of these contrasting formulations of "judicial power", and the decisive success of one as against the other, constitute a watershed in Australian constitutional history and a firm base for most subsequent discussion of judicial power.

The judgment of Isaacs and Rich JJ., which bears the marks of Isaacs J.'s authorship, accepted the reasoning advanced by Owen Dixon for the appellants. It predicated two "entirely separate" branches of government, the "legislative function" and the "judicial function".<sup>1</sup> Arbitration was not, precisely speaking, legislation; it was not the declaration of the arbitrator's opinion that made law, but rather the Conciliation and Arbitration/<sup>Act</sup> itself operating upon that decision and declaration, as upon a factum, to stamp it with the character of a legal right or obligation. Yet industrial arbitration,

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1. 25 C.L.R. 434, 462-464.

for all that it presupposed, like the judicial power, a dispute, a hearing and a decision, pertained essentially to the legislative function, since it concerned the claim and concession (or refusal) of new rights, and the alteration of existing legal relationships. An industrial arbitration tribunal ascertained and declared, but did not enforce, what in its own opinion ought to be the respective rights and liabilities of the parties. A court of law, properly so called, could give effect, on the other hand, only to rights recognised by law. It exercised the judicial function because it ascertained, enforced and gave effect, not to mere moral obligations, but to the legal rights and liabilities of the parties as they were deemed to exist at the moment the proceedings were instituted. While arbitration had to do only with the creation of a right, the judicial power concerned, where necessary, the enforcement of that right; and "enforcement is in its nature an entirely separate process from the creation of the right".<sup>1</sup> Powers of enforcement, being judicial, could arise - except in the case of the territories<sup>2</sup> - only under Chapter III of the Constitution. Since that Chapter required that the judges of a court created by Parliament be appointed for life, the enforcement provisions of the Conciliation and Arbitration Act contravened the

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1. Ibid. at 465.

2. See Constitution, s.122.

Constitution and were invalid. But the remaining provisions of the Act, being arbitral in character, arose under s.51 (xxxv), were within the powers of that placitum, were severable from the invalid provisions, and should be upheld.

Powers J. approached the case in a similar manner. Like all his brother Justices, he took it for granted that the power to enforce awards by penalties was judicial power.<sup>1</sup> He then held that s.51 (xxxv) gave only those powers necessary for preventing and settling disputes, and that power to enforce "after the disputes had been prevented and settled"<sup>2</sup> was an entirely different matter. He was, he said, fortified in his opinion that the power of enforcement was not necessary to the purposes of s.51 (xxxv) by his four years of experience as a Deputy President of the Arbitration Court. He agreed with the opinion expressed by Griffith C.J. in the Tramways Case [No. 1] (1914),<sup>3</sup> to the effect that "the so-called Court of Arbitration when performing its arbitral functions is not acting as a Court properly so called". A distinction was to be drawn between two different classes of Courts, "namely, Courts of judicature to settle existing rights between parties,

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1. 25 C.L.R. at 481. This common assumption is noteworthy: Quick & Garran seem to have regarded powers of enforcement rather as "executive": Annotated Constitution (1901), 896.
  2. Emphasis by Powers J.
  3. 18 C.L.R. 54, 62-63.

and Courts of compulsory arbitration with legislative power to fix new rates of wages and new conditions.... and not to settle existing rights".<sup>1</sup> This distinction, with its rationale, was repeated almost verbatim two pages later, though on this occasion Powers J. described the powers of an arbitration court, more guardedly, as "more legislative than judicial". It further seemed to him (as it seemed also to Isaacs and Rich JJ.) that Parliament had indeed not intended to make the Arbitration Court a Court of judicature; the Court had no power to punish for any breach of the Act per se; it was to act according to good conscience without regard to legal forms; it had no power of execution to enforce even the powers to impose penalties for breaches of its awards. These latter powers, which the Parliament had presumably regarded as incidental to the power to make awards, in fact pertained only to courts of judicature established under Chapter III and in accordance with s.72 of the Constitution; as attached to a court of compulsory arbitration they were invalid, but severable.

These two majority judgments display a distinctive conception, not only of the place of "judicial power" in the Australian Constitution, but also of the "essential" nature of judicial power per se. In the Australian Constitution, federal

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1. 25 C.L.R. at 483.

judicial power (that is to say, prescinding from the power of the Commonwealth over its territories under s.122 in Chapter VI of the Constitution) is to be found and exercised only within, and by virtue of, Chapter III, and is subject to the limiting conditions of that Chapter. And the definition of that power, a definition required by the silence of Chapter III as to the content of "judicial power", turns on the notions of ascertaining existing legal rights, and of enforcing those rights. Because of the circumstance that in this particular case the challenged powers were, specifically, powers of enforcement, it is uncertain where the emphasis in this definition was intended to lie. Was a power of enforcement thought to be essential to the judicial function? At least, it is clear that a power of enforcement is, in this view, necessarily founded on judicial power and is an important feature of judicial power; what is unclear is whether there can be judicial power without the power of enforcement, that is to say, whether a power of enforcement is an indispensable feature of judicial power.<sup>1</sup>

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1. Sawyer, (1948), 1 W.A. Ann. L.R. 29, 36, says that the B.I.O. Case (1925) and the Shell Case (1926-1931) "got rid of the simple and satisfactory rule that power of enforcement is necessary to judicial function...." But he cites no authority for this rule, and it is doubtful whether it was ever adhered to by the High Court. In Davison's Case (1954) 90 C.L.R. 353, 373, Webb J. (diss.) contended that power of enforcement was essential to a tribunal's having judicial power; but this met with no support in that case, and his interpretations of precedent are unconvincing.

But it is the contrast between the ascertainment of existing rights and the creation of new rights, rather than the matter of enforcement, that occupies the foreground in these two characterisations of judicial power. For the whole drive of those judgments was to maintain that a declaration of rights and obligations, even when made by a tribunal on the hearing of a dispute between parties and even when limited to the relations of those particular parties, is wholly foreign to "judicial power" if those rights do not exist in ascertainable law prior to the decision but have rather to be created in the light of considerations of justice and expediency.

The judgments of the two senior Justices proceeded on quite other lines. Barton J. held that the powers of the Arbitration Court were all inseparably judicial in character,<sup>1</sup> and that, since the Court was constituted in contravention of s.72, the whole Act was invalid and the appeal should be upheld.<sup>2</sup>

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1. The majority judgment in the Boilermakers' Case (1955-1956) 94 C.L.R. 254, 284 asserts that in Alexander's Case, Isaacs, Rich, Powers and Barton JJ. all "regarded the Arbitration Court as a body whose creation, form, constitution and status were referable to s.51(xxxv). They did not ascribe to the legislature any purpose of exercising the legislative power contained in s.71. The failure of the provisions for the president's tenure to comply with s.72...was used by their Honours as a ground for supposing that no intention to rely on s.71 existed." But this interpretation seems wholly mistaken. The conclusion of the relevant argument of Isaacs and Rich JJ. is: "it follows that any law passed under s.71 which says that a Justice so appointed shall be displaced or removed from his office in seven years - which is what s.12 of the Arbitration Act says - is contrary to the Constitution.....", 25 C.L.R. 434, 469 (emphasis added). Similarly,

Griffith C.J. held, likewise, that the Arbitration Court exercised only judicial powers, but that, since the Act committed these powers to a President who, as a Justice of the High Court, had a life tenure sufficient to satisfy s.72, the whole Act was valid and the appeal should be dismissed.

Barton J.'s analysis of judicial power lies somewhere (but not half-way) between the radically opposed analyses of Isaacs, Rich and Powers JJ., on the one hand, and Griffith C.J. on the other. Like the former Justices, Barton J. held that judicial power was "never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law".<sup>1</sup> But his definition of the power, unlike theirs, does not hinge on this feature. Looking back to the origin of "settled communities", he saw the adoption of rules of conduct as the alternative to anarchy; the making of such rules was legislation, and the enforcing of them was intrinsically the function of Courts.<sup>2</sup> "Enforceable decision by an authority

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(continued from previous page)

Barton concluded: "I am thus of the opinion that the tribunal erected by the Act is a court in the strict sense, that part of the judicial power of the Commonwealth is reposed in it, and that this Act creating it must be held to be referable to, and must be interpreted in the light of, Chapter III of the Constitution": 457 (emphasis added).

2. In short, Barton J. accepted, what he had rejected in the Wheat Case, that Ch.III was an exhaustive disposition of "judicial power"; see 25 C.L.R. at 450; cf. 20 C.L.R. at 72-73.

1. 25 C.L.R. 434, 451.

2. Id.

constituted by law at the suit of a party submitting a case to it for decision is in character a judicial function".<sup>1</sup> Any tribunal whose proceedings were devoid of compulsive force at all stages could not be exercising judicial power in any relevant sense, even if its work was "judicial in the sense of bringing to bear the judicial faculty".<sup>2</sup> Judicial power, then, seems to have been for Barton J. the exercise of state power upon parties disputing as to their legal rights; it was unnecessary<sup>3</sup> for him to say positively whether power of enforcement consequent upon the adjudicatory determination was an indispensable ingredient, or whether any power of compulsory adjudication, as opposed to voluntary submission to private arbitration, would suffice to constitute judicial power.<sup>4</sup> In any event, the Arbitration Court was entrusted with powers of compulsory adjudication and enforcement which together amounted to a grant of the "complete judicial power"; he could not "for a moment say that an attempt to separate its functions into two parts would not alter the character of the Act. The functions which... are called 'arbitral' and those which are called 'enforcing'

1. Id.
2. 25 C.L.R. 434, 452.
3. Ibid. at 451.
4. But there are suggestions that the latter alone would suffice: "in the Commonwealth Court of Conciliation and Arbitration the Legislature has reposed part of the judicial power as a created Federal Court within the meaning of sections 71 and 72 of the Constitution. It has reposed that power both in the so-called 'arbitral' and in the enforcing provisions. As to both the powers are compulsory": 456-457.

are collectively one set of powers in respect of a collective set of functions".<sup>1</sup> Where Barton J. differed from the three majority Justices was in declining to assume that what is not judicial is (in this context) legislative in character, and also in laying little stress on the distinction between "ascertainment" and "creation". True, it was for him essential to judicial power that it should "give effect to the will of the Legislature".<sup>2</sup> But

if a law allows anything to be claimed by one person against another and grants it to him as a right against that other, the legislature means by its law that that right exists, whether it existed as a right declared by law before the claim, or whether, on the other hand, the claim of it, when substantiated is regarded by the law as a right.<sup>3</sup>

In short, the dominant element in Barton J.'s conception of judicial power was the coercive resolution of disputes inter partes; and if such a summary is ambiguous, the same may be said of his judgment as a whole.

Griffith C.J., though his remarks on the matter were perhaps not necessary to his decision, undertook a fuller examination of the "source and nature"<sup>4</sup> of judicial power than any of his brother Justices. This examination seemed at first

1. 25 C.L.R. 434, 455.
2. *Ibid.*, at 451.
3. *Ibid.*, at 452-453. And see his leading citation of Miller J.'s Lectures on the American Constitution, 25 C.L.R. 434, 450-451.
4. 25 C.L.R. 434, 441.

to be going the same way as Barton J.'s; it referred to the original formation of "settled communities",<sup>1</sup> the need for rules to regulate conduct, and the consequent necessity of provisions for enforcing these rules and settling private controversies. Thus far even the language of the two judgments was almost identical, and in the Chief Justice's first characterisation of judicial power the similarity was unimpaired:

Without attempting any exhaustive definition of the term 'judicial power', it may be said that it includes the power to compel the appearance of persons before the tribunal in which it is vested, to adjudicate between adverse parties as to legal claims, rights and obligations, whatever their origin, and to order right to be done in the matter.<sup>2</sup>

But from this point, Griffith C.J. proceeded so to sharpen and stress what Barton J. left imprecise and incidental that his judgment can only be read as an extended and vehement denial of the basal conceptual premises of the argument for the appellants and the judgments of the effective majority. That premise, as we have seen, implied a crucial distinction between the arbitrator who examines only his own opinions as to justice and expediency, and the judge who searches common law and statutes for an existing legal relationship between the parties who come before him. Griffith C.J. rejected this model as the basis of any relevant distinction. It mattered nothing to him whether or not the Arbitration Court sought merely to effect its own autocratic

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1. Ibid., at 442.

2. Ibid., at 442.

will, independently of "any known principles of law".<sup>1</sup> What did matter was that there was a "declaration of or giving effect to a controverted matter of legal right":<sup>2</sup>

The basis of industrial arbitration, so called, is the recognition of the doctrine that employers and workers engaged in an industry have mutual rights and obligations. These rights and obligations must either be incidental to the membership of a civilised community, or based upon positive law. Whether the obligation is regarded as (a) created by the Statute, or (b) - which I think is the better view - implied by the Statute which authorizes its declaration and enforcement, or (c) imposed for the first time by the tribunal appointed to declare and give effect to the claims, such giving effect to by declaration and order is equally a matter which falls within any possible meaning of the term "judicial power".<sup>3</sup>

On this view, it seems, any authorised declaration of right as between parties would be an exercise of judicial power:

a law which allows a right to be claimed and at the same time to be declared and ordered to have effect is, in any view, conclusive as to the existence of the right from the moment of declaration. It must therefore be prior, if only momentarily, to the exercise of the judicial power in respect of it, whether the declaration itself be (as I think it is) or be not a judicial act.... The creation of a new legal right of general obligation appears to me to be a matter for legislation. In the case of an award, however, between disputants, the order is not legislative, for it does not lay down any such rule but merely deals with a particular case.<sup>4</sup>

Because of the nature of the statutory tribunal in Alexander's Case, it was strictly unnecessary to decide whether a power of enforcement was an indispensable element of judicial power; it

1. Ibid., at 443.

2. Id.

3. 25 G.L.R. 434, 443.

4. Ibid., at 442-443.

was sufficient for Griffith C.J., like Barton J., to observe that powers both of declaration and of enforcement were together committed to the Arbitration Court, which thus was invested with an indivisible grant of judicial power. The truth is that Griffith C.J. did not need to distinguish at all precisely between "declaration", "authoritative decision", "giving effect to", "settlement", "order" and "enforcement". All or any of these might be comprehended within his conception of judicial power.<sup>1</sup>

That conception, when reconstructed in summary form, is founded on the model of a public tribunal giving an authoritative decision inter partes as to disputed questions of conduct.<sup>2</sup> Such decisions, because "authoritative" expressions of "sovereignty",<sup>3</sup> concerned legal rights and obligations which, because "legal", were enforceable. But it was no necessary part of this model that the tribunal should have its own powers of enforcement, nor that the rights and obligations should have existed in any ascertainable sense before the declaration of the tribunal's decision.

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1. Moreover, for Griffith C.J. to have admitted that functions to any extent judicial could fall into a category outside the legislative - executive - judicial classification would have ridden uneasily with his earlier opinion in the Wheat Case; but cf. Saver, Cases, 449.
  2. 25 C.L.R. 434, 444, 446.
  3. 25 C.L.R. 434, 441.

This model, of course, was opposed at almost every point to the model of judicial power implicit in the judgments of the effective majority. Not for nothing did Griffith C.J. explicitly deny the relevance of the origin (or pre-existing status) of rights at no less than six points in his judgment. For the whole drive of that judgment was to maintain that a declaration of rights and obligations, even if those rights do not exist in law prior to the decision but have rather to be created in the light of justice or expediency or any other consideration recommending itself to the will of the tribunal, is a characteristic exercise of judicial power if that declaration is made by a tribunal on the hearing of a dispute between parties and is limited to the relations between those particular parties. And that, rather precisely, reversed the drive of the majority judgments. The contradiction could hardly have been more striking.

## VII

### Conclusion

We began this chapter by stating two problems that derived from purely theoretical analyses of powers and that could be discerned as problems under the Australian Constitution. We have now outlined the fundamental solutions offered by the High Court of Australia, solutions that have stood almost unchallenged, if not in all respects unqualified, since 1918. But more

important than the actual solutions are, for us, both the more precise features of the problems as they appeared to the judges and the conceptual sources of their solutions. For, although our first chapter was designed to ensure that purely theoretical problems and analyses could be compared with judicial analyses of the same data, it was also designed to show that the conceptual resources and methods of judicial analyses might differ from those of pure theorists, and that the exigencies of legal system would be both a cause and a consequence of peculiarly judicial ("legal") solutions. We discounted the suggestion that "rules for deciding" provided the ground and criterion of judicial or legal (as opposed to common-sense or theoretical) analyses, and it is now clear enough that it would be unprofitable to search for the "rules" from which the analyses in the Wheat Case and Alexander's Case derived as "conclusions of law". The succeeding chapters investigate the explanatory factors which should, in the case of this legal concept in this legal system, take the place of "rules for deciding" or "rules of conduct".

## CHAPTER SIX

### Language and intention in the establishment of powers in the Australian Constitution

It is possible to exaggerate the significance of the High Court's refusal, ever since its foundation in 1904, to refer to the vast bulk of the Constitution's travaux preparatoires. The American experience does not suggest that either judicial unanimity or historical accuracy is a necessary consequence of allowing such references. Still, the consequences of the radical limitation on further questions involved in the Australian refusal are not to be overlooked. The judges of the High Court are thrown back upon two acknowledged sources for decision: authority, and language and linguistic ("formal") arrangement. In the Wheat Case, the central passage of Isaacs J.'s judgment reflects both these sources equally:

we find delimited with scrupulous care, the three great branches of Government. To use the words of Marshall C.J. in Wayman v. Southard....<sup>1</sup>

Nor is this link between linguistic arrangement and American precedent surprising, in view of the formal parallelism of the two federal constitutions, noted in the preceding chapter.

Now there is no denying that when the Australian Constitut-

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1. Supra, p.5.20.

ion was drafted, the United States Supreme Court maintained a more or less strictly Abstract doctrine of separation of powers; nor that the language of the first three Articles, like the language of their later Australian counterparts, invited such an interpretation. But a close study of the constitutional antecedents and the drafting of the American Constitution permit the view, at least as a plausible hypothesis, that its Abstract language and arrangement were the consequence of a lawyer's regard for symmetry and control, and consistency at a high level of abstraction, rather than the reflection of a doctrinaire ideal of Abstract separation of powers on the part of the delegates. The evidence for this view is discussed in Appendix A. The fundamental hypothesis is a distinction between the Institutional preoccupations of politicians, which here certainly extended to the vehement desire for separation of the three basic institutions of the Union, and the preoccupations of the legal draftsmen, trained in a profession where the interrelationships of general and abstract terms are the principal means of argument, decision and control. For this hypothesis the premise is the observable fact that terminology displays a gradual shift from Institutional ("the Legislature", "the Executive", "the Judiciary") to Abstract ("legislative power", "executive power", "judicial power") - a shift through time that appears to correspond with the shift in influence from the politicians and planners, seeking to found a new government, to the lawyers and draftsmen, seeking a pattern of dispositions that, at the level of language, would

leave no gaps or asymmetries.

With this in mind, the present chapter seeks to explore, from a historical point of view, both the influence of the American Constitution, as then understood, on the founders and draftsmen of the Australian Constitution, and the origins and intentions of the linguistic arrangements they adopted and approved in ss.1, 61 and 71.

## I

### The American influence - general introduction

It has become a platitude that, in the words of Sir Owen Dixon,<sup>1</sup>

the framers of our own Federal Commonwealth Constitution (who were for the most part lawyers) found the American instrument of government an incomparable model. They could not escape from its fascination. Its contemplation damped the smouldering fires of their originality.

But since, as all admit, the Australian Constitution is not a mere copy, a more nuanced appreciation of the attitude to the American Constitution in the Australian Conventions is required before inferences can be drawn in regard to any particular section or problem. Such an appreciation, unfortunately, is hardly to be gained by anything short of reading the thousands

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1. Dixon, "The Law and the Constitution" (1935) 51 L.Q.R. 590, 597. See Cowen, Federal Jurisdiction in Australia (1959), v; T. Simos, Federal Judicial Power in Australia (1958-B.Lit thesis, Oxon.), 9; generally, Quick and Garran, (1901), passim.

of pages of verbatim reports of the Conventions; in the absence of scholarly historical studies oriented towards solution of legal problems arising since 1900, this and the next two chapters seek to establish their conclusions by representative quotation from the Convention Debates.

There is no doubt that the American experience was present to the minds of the Australian founders,<sup>1</sup> above all by way of Hamilton, Madison and Jay's The Federalist and of James Bryce's then recently published American Commonwealth. In the earliest hours of the 1891 Convention, Sir Samuel Griffith spoke of "those admirable papers which we have all read, written for the purpose of inducing the American States, and the state of New York, in particular, to adopt the federal constitution of America".<sup>2</sup> A few days later, another member remarked, "I dare say honorable gentlemen have nearly all of them very carefully read the admirable work of Mr. Bryce.... [A]nd that is the same idea which was present to the mind of Alexander Hamilton when he wrote some of those admirable papers for The Federalist".<sup>3</sup> Throughout the Convention, no one was heard

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1. See generally the works cited p.6.4. above, and also E.M. Hunt, American Precedents in the Australian Constitution (1939), esp. Ch.II, 3 and Ch.V; O.Dixon, "Marshall and the Australian Constitution" (1955) 29A.L.J. 420.
  2. Official Report of the National Australasian Convention Debates (1891) (hereinafter cited as 1891 D), 31.
  3. 1891 D, 147, 151. Some other significant references to Bryce in 1891 appear in 1891 D, 147, 194 and 893. In 1897 Deakin (later to be the third Prime Minister of the Common-

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to contradict Deakin's quite general reference, on the second day, to the "superb Constitution of the United States",<sup>1</sup> or Cockburn's, a few days later, to "the American Constitution, which we all admire so much".<sup>2</sup> References to specific features of the American Constitution outnumbered all the references to the British, Canadian and Swiss Constitutions put together.<sup>3</sup> As Richard Baker pointed out after a fortnight of the 1891 Convention, at least five of the seven basal resolutions put to the Convention on the first day by Sir Henry Parkes,<sup>4</sup> and passed with small modification, were "taken from the American

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wealth) referred to "an authority, to whom we have often referred since 1891, an authority to whom our indebtedness is almost incalculable... the Hon. Mr. Bryce", (Official Report of the National Australasian Convention Debates 1897 (Adelaide), hereinafter referred to as 1897 D), 288; see also 1897 D, 243). As to the influence of Bryce, see also J.A. Cockburn, Australian Federation (1901) 44; R.R. Garran, "The Making and Working of the Constitution", Australian Quarterly, June-September 1932, 10. The language and thought of Bryce's book can also be seen in other sources used by the founders, such as R.R. Garran's The Coming Commonwealth (1897); on the influence of Garran's book, see Deakin, 1897 D, 288. In 1897 Symon (chairman of the Judiciary Committee), while discussing the place of the High Court in a federal system, read from "one of those articles in The Federalist, which are even at this day wonders of constitutional learning and foresight upon this", (1897 D, 956; see also 1891 D, 151).

1. 1891 D, 70.
2. 1891 D, 203.
3. See 1891 D, 70, 100, 175, 198, 203, 272, 279, 282, 393, 464, 585, 600, 629, 730, 731, 783, 893; 587, 612, 644; 1897 D, 950, 936.
4. These resolutions were in large part drafted by Griffith: A. Deakin, The Federal Story (1944-written in 1900), 45.

## Constitution" -

Of the first series, resolution No. 1, which gives the central government certain specified and defined powers, comes from the United States, and so do resolutions Nos. 2 and 3, which give the federal government the power to impose a federal tariff, with free trade between the states, and resolution No.4, which puts the federal forces under the one command of the federal government. Of the second series of resolutions, No.1, providing for the election of a senate composed of an equal number of members from each province, with periodical retirements, constituting a body with continuity and perpetual existence, comes from America...<sup>1</sup>

Of the other two resolutions in the second series, one concerned the establishment of a federal judiciary in the American manner; only the last resolution of the seven in the two series departed from the American scheme by providing for an Executive responsible directly to the Parliament. Baker himself had written a handbook of constitutional theory and practice for the use of the delegates,<sup>2</sup> which was evidently much consulted. His testimony in the middle of the Convention is thus not without interest:

When I first came to the Convention, I was of opinion, and I placed that opinion on record before I came here, that it would be advisable for us to adopt the British form of constitutional government. I came here with that preconceived notion; but I also came here to listen to argument, and I have learnt that my preconceived notion has entirely disappeared upon further consideration, and upon listening to the arguments of the honorable member, Sir Samuel Griffith, and others....<sup>3</sup>

Indeed, the formative speeches were those of Griffith, on the

1. 1891 D, 464.
2. R.C. Baker, A Manual of Reference to Authorities for the use of the members of the National Australasian Convention (1891)
3. 1891 D, 465.

first day of the 1891 Convention,<sup>1</sup> and of Barton, on the third.<sup>2</sup> We have cited Griffith's reference to The Federalist; it must now be shown, more precisely, how the American system was regarded by these two founders and future Justices. We notice first that their attitude was by no means uncritical. Griffith said:<sup>3</sup>

the framers of the American Constitution had been frightened by the tendency then lately exhibited in the United Kingdom of ministers to overawe Parliament, and they thought it extremely desirable to separate the executive and legislative branches of government, following the arguments of a great writer - I should rather say a celebrated writer - of those days, Montesquieu, the wisdom of whose observations and the accuracy of whose deductions and assumption of principles may be, I submit with great respect, very open to doubt. But the Americans adopted that system - that the executive shall be entirely dissociated from Parliament, and therefore may not sit in Parliament. As I believe that the history of the American Constitution has shown the wisdom of having two houses of equal and coordinate authority, so also has it shown the unwisdom of the system there adopted of having ministers dissociated, and the executive government entirely dissociated, from the legislature.....

Barton was later to say, in quite another connection:<sup>4</sup>

I do not see why the honorable member Mr. Donaldson should assume that a Parliament elected on a uniform basis as prescribed by the commonwealth would be more likely to interfere with the interests of the states than would one elected on a totally uneven basis. What is the reason for the fear?

Donaldson: The states of America never insisted on this!

Barton: What have I to do with that? Are we building an American constitution?

1. See Deakin, The Federal Story 31, 45.
2. Ibid., 32.
3. 1891D, 35; see also Hackett, 1891D, 279.
4. 1891 D, 629; see also 1891 D, 740.

Donaldson: We are taking a copy from it where advisable!

Barton: We are taking a copy from it where advisable, but we are exercising our own judgment as to what is advisable. It is no argument to say that a certain provision is in the Constitution of the United States; but if I find that it is applicable to the condition of this country I have no hesitation in taking the form of words, if they are fit words, in which it is embodied in the Constitution of the United States.

Furthermore, we notice that even the American doctrine of separation of powers was discussed in the Institutional terminology: "the executive"; "Parliament"; "the legislature", etc. To the passage from Griffith just quoted, we may add, by way of further illustration, passages from Barton in 1891 and Higgins (who also was to become a Justice of the High Court, in 1898.

Barton said:<sup>1</sup>

the executive, legislature, and judiciary, constituting the great arms of state, if every one of them does not rest upon and reach the individuality of each citizen, then as far as one of them falls short, the constitution will be imperfect on one side....

Higgins said:<sup>2</sup>

As one of the Judiciary Committee, I think it will not be amiss for me to say that....it is even more important to preserve the independence of this Federal Court in the Australian Constitution than it was in the American Constitution. In the American Constitution we have three authorities - the Executive, the Legislature, and the Judicature - all distinct. The Executive is not controlled by the Legislature; but here under responsible government... the Executive and the Legislature must pull together,...and therefore we have two great powers - the Executive and the Legislature - under the Australian Constitution having a great interest to pull one way....

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1. 1891 D, 95. See also 1891 D, 293 (Clark); 1891 D, 279 (Hackett) 1891 D, 688 (Griffith).
  2. Official Record of the Debates of the Australasian Federal

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One could illustrate at greater length. But it is safe to say that no-one has produced any evidence<sup>1</sup> that the Australian founders accepted the Abstract doctrine or ideal as it was stated in article XXX of the Massachusetts Declaration of Rights (1780)<sup>2</sup>; applied by the American Supreme Court to the Constitution of 1789, and conveniently restated by Sir Owen Dixon when claiming that it was, indeed, the plan adopted by the Australian founders:<sup>3</sup>

There can be no doubt that the plan of the American instrument of government was to make a mutually exclusive division of the functions of government among the executive, the legislature and the judiciary.

Nor can it be argued, in favour of Dixon's contention, that the matter was so obvious that it was accepted without discussion,

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Convention, Third Session, 1898 (hereinafter cited as 1898 D), 279; also 1897 D, 243.

1. In asserting that the Abstract doctrine, at least as consummated in the Boilermakers' Case (see infra, p.12.6), "beyond question" corresponds "to the expectations of the Founders", G. Sawyer cites the writings of Inglis Clark (1901), Harrison Moore (1910) and Quick and Garraan (1901): see Sawyer, "The Separation of Powers in Australian Federalism" (1961) 35 A.L.J. 177, 178-179. But (1) no legal writings purporting to interpret the Constitution are acceptable as evidence, for the present work amply demonstrates the difference between legal and historical method, and hence between legal and historical conclusions; (2) Inglis Clark is in any event an unreliable witness as to the intentions of the Founders, because of his special devotion to American constitutional doctrines (see infra, p.6.16); (3) Harrison Moore was a Professor of Constitutional law offering a legal interpretation, not a Founder; (4) the passage from Quick and Garraan's Annotated Constitution, 720, must be read in the light of their exposition of the powers of the Inter-State Commission at pp.900 ff.

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by a universal tacit consent.<sup>1</sup> It remains to be seen just what was the conception of governmental powers that the Australians intended to convey by the shape and wording of their Constitution. But already it is clear that, in general, the American scheme was looked to as a help in wording rather than as a definitive source of wisdom and authority. As one of the delegates to the 1891 Convention afterwards wrote of it:<sup>2</sup>

Scissors and paste were laid entirely aside; even the voice of eminent federal authorities, so potent in the early stages, grew feeble in their ears.

And even where the legal draftsmen to the Conventions, following

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2. See Appendix A infra, p.A. 8 . This declaration is the leading motto of H.S. Nicholas, The Australian Constitution (2nd ed., 1952).
3. Op. cit., 51 L.Q.R. 590, 605 (emphasis added).
1. See also "Comment: R v. Kirby...", 7 Res Judicatae 434, 436. The authors of this seem confused. They attribute to the founders a clear intention to import an Abstract doctrine of separation of powers, but remark in a footnote (434n) that "the High Court has been more confident in discovering the intention of the Founding Fathers to so introduce the doctrine than were the framers themselves". Unfortunately, the citations from the Convention Debates which they make to support this proposition are scanty and largely inconsequential.
2. Cockburn, Australian Federation (1901), 42.

their leader Barton's already quoted policy, adopted "fit words" from the American Constitution, there seems no reason to doubt that Sir John Downer expressed the ideas of his two fellow draftsmen of 1897 and 1898 when he said:<sup>1</sup>

We have heard too much of American decisions. I should prefer saying what we mean, and supposing that we might have our meaning interpreted in accordance with our intentions, and not in accordance with the American decisions....It is not necessary to suppose that, because we use the same words as are used in the American Constitution, we intend them to be interpreted in precisely the same way.

Certainly, as we shall later see, the American idea of an independent judiciary supervising the Constitution was admired and consciously adopted in Australia. But it is one thing to adopt from a foreign system a certain successful institution, and even to adopt it as supposedly suited to one's own conceptions of "the nature of federalism"; it is quite another thing to be animated by the more general ideas and ideals which underlie, or are supposed to underlie, that other system.

## II

### The problem of the shift from Institutional to Abstract Formulations

The Australian Constitution was framed in Conventions largely made up of the leading politicians of the several States. Political negotiations have to do as much with "powers in the land", with the establishment, organization and control of quite determinate institutions, as with Abstract schemas of powers and

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1. 1898 D, 1335.

functions. But the end product of the Australian Federal Conventions was framed primarily in language appropriate to, and suggestive of, the Abstract doctrine of separation of powers. So it is reasonable to ask whether, and to what extent, that language expressed the deliberate intentions and preoccupations of the founders of the Constitution. Was the "separation of powers" thought of (if at all) primarily as a problem concerning the practical disposition and control of certain particular institutions and branches of the government, or as an exhaustive characterisation of forms and types of power, a characterisation prior to all questions of particular institutions and establishments? Did the founders, like their American predecessors, display any tendency to move from Institutional to Abstract conceptions or, at any rate, formulations? Was there a movement in their thought from models constructed of institutional units (Parliament, the Executive Council, the High Court) to models constructed of abstract roles and relationships, capacities and functions (legislative power, executive power, judicial power)? Insofar as there is an intelligible consensus to be discovered, what precisely was its conceptual framework, and how far was it accurately reproduced in the language of the final draft?

Certainly the challenge to ask these questions is plain enough. For has not Sir Robert Garran, the Secretary to the final Drafting Committee, himself said that the Abstract lan-

guage of forms of "powers" was introduced, in s.71, only "as a draftsman's neat arrangement, without any hint of further significance"?<sup>1</sup>

The short answer to these questions is that the evidence confirms Garran's statement. In confirmation of the hypothesis suggested by the evidence of the American Convention, there can be detected in the Australian debates a movement from Institutional to apparently Abstract language, a movement which reflects nothing deeper than lawyerlike concern for terminological symmetries bolstered by a natural tendency, among the rest of the founders, to employ the language of the draft texts under discussion.

### III

#### Powers in the Convention of 1891

The Convention at Sydney in 1891 was dominated by Sir Samuel Griffith.<sup>2</sup> Nearly one tenth of the index to the speeches

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1. R.R. Garran, Prosper the Commonwealth (1958), 194, Cf. Dixon, op.cit., 51 L.Q.R. 590, 606: "...the Australian Courts ignored or were unaware of the full consequences of the plan we had adopted....What otherwise might have been treated as a rigid requirement of the supreme law has been given the appearance of the mere categories of a draftsman". It is fair to remark that Garran's testimony is not absolutely unimpeachable, since it reproduces as history the legal arguments he had to make as Attorney-General and counsel for the Commonwealth in Roche v. Kronheimer (1921) 29 C.L.R. 329, 334-335; cf. also his submissions in ex.p. Walsh and Johnson (1925) 37 C.L.R. 36, 45.
  2. Deskin, op.cit., 31, 45.

of the 46 delegates is devoted to those of Griffith. He was chairman of the select Committee on Constitutional Machinery which took upon itself the functions of a drafting committee, and it seems certain that the Draft Bill which that Committee produced was almost entirely his own work.<sup>1</sup> A week after Griffith's pace-making speech on the first day of the Convention, one of the delegates observed:<sup>2</sup>

The speech to which most of the other speeches have been replies, more or less, whether comments of censure or comments of approval, has been that of the hon. member, Sir Samuel Griffith.

So far as they concern us here, the puzzles of the 1891 Convention are puzzles about his thought.

What are those puzzles? The most interesting of them shows itself in the very form of the Draft Bill. The first three Chapters of the Bill were entitled "The Parliament", "The Executive Government", and "The Judicature". Sec. 1 of Chapter I began: "The legislative powers of the Commonwealth shall be vested in a Federal Parliament." Sec. 1 of Chapter II began: "The executive power and authority of the Commonwealth shall be vested in the Queen...." Thus far the verbal model was obviously the Constitution of the United States. But Chapter

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1. See Parkes, 1891 D, 911; F.R. Beasley, "Sir Samuel Griffith" (1951) 25 A.L.J. 8,9; Garran, Prosper the Commonwealth, 194; B.R. Wise, The Making of the Australian Commonwealth (1913), 230, 127; Deakin, Federal Story, 47-48. Contra, semble, M.H. Clark, Select Documents in Australian History (1955), 482.
  2. 1891 D, 275.

III reverted suddenly to an Institutional form similar to that adopted in the original pre-Union constitutions of (say) Pennsylvania (a State in which the doctrine of separation of powers had been deliberately avoided).<sup>1</sup> For Chapter III began:

1. The Parliament of the Commonwealth shall have power to establish a Court, which shall be called the Supreme Court of Australia, and shall consist of a Chief Justice, and so many other Justices, not less than four, as the Parliament from time to time prescribes. The Parliament may also from time to time, subject to the provisions of this Constitution, establish other Courts.
7. The Parliament of the Commonwealth may from time to time define the jurisdiction of the Courts of the Commonwealth, other than the Supreme Court of Australia ....But jurisdiction shall not be conferred on a Court except in respect of the following matters....

There followed a list of those heads of jurisdiction which are now embodied in ss.75 and 76 of the Constitution Act 1900. The marginal note to s.7 of the Bill read: "Extent of power of Federal Courts". The Chapter continued:

8. In all cases affecting Public Ministers, Consuls or other Representatives of other countries, or where any person suing or being sued on behalf of the Commonwealth, is a party, or in which a writ of Mandamus or Prohibition is sought against an Officer of the Commonwealth, and in all cases of controversies between States, the Supreme Court of Australia shall have original as well as appellate jurisdiction. The Parliament may confer original jurisdiction on the Supreme Court of Australia in such other of the cases enumerated in the last preceding section as it thinks fit.

A general appellate jurisdiction from Federal and State Courts had been established in the Supreme Court by s.4.

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1. Haines, Role of the Supreme Court, 57; Appendix A infra p.A. 6 .

Here, then, was an entirely Institutional Chapter, which to lawyers well acquainted with the American Constitution could hardly fail to seem other than asymmetrical to the point of anomaly. A lawyer who framed such a Chapter, with the American Constitution clearly in his mind's eye, if not actually before him on the table, must have had some appreciable reason or motive for his change in formulation. But this draft has more puzzles yet. When he was introducing the Bill to the Convention as a whole, Griffith said laconically:<sup>1</sup>

The third chapter deals with the federal judicature. The report of the Committee on Constitutional Machinery embodies in substance, though not in form, the recommendations of the Judiciary Committee.

Now the recommendations of the Judiciary Committee could almost, if it were necessary, be reconstructed from circumstantial evidence. The first circumstance is that the Chairman (and certainly the moving spirit) of the Judiciary Committee was Dr. A.I. Clark. The second is that Clark was notoriously an admirer of the American Constitution.<sup>2</sup> The third is that Clark had a very clear and particular conception of how the Judiciary Chapter of the Constitution should be framed. He had in fact prepared a complete draft Constitution before the Convention began, and it cannot be doubted that this was in great part inspired by the forms of the American Constitution.<sup>3</sup> Shortly

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1. 1891 D, 527.

2. See Hunt, *op.cit.*, 260; Deakin, *op.cit.*, 30.

3. Clark's draft Constitution is reprinted in J. Reynolds, "A.I. Clark's American Sympathies and his Influence on Australian Federalism" (1958) 32 *A.L.J.* 62, 67.

before the Convention adjourned to allow its select committees to work towards a draft Bill, Clark put the motion that:<sup>1</sup>

"The judicial power of the federation shall be vested in one supreme court and such inferior courts as the federal parliament shall from time to time establish..." I want a whole system of federal judiciary, and if it is understood that the [Drafting] committee will deal with that question, and make such recommendations as they think fit on the subject, I will leave the resolution as it stands and withdraw my amendment.

As a result of this, and at Deakin's suggestion, a Judiciary Committee was established, under Clark, to supplement the Committees on Constitutional Machinery and Finance. The resolution referred to by Clark towards the end of the above quotation was the last of the original Parkes resolutions to be considered; like all the others, it was quite concrete and Institutional in form, proposing the establishment of:

A judiciary, consisting of a federal supreme court, which shall constitute a high court of appeal for Australia, under the direct authority of the Sovereign, whose decisions as such shall be final.

The Abstract form of Clark's proposed amendment was thus, in the context, quite noticeable. In fact it was the form of an equivalent section in his own draft Constitution.<sup>2</sup> It proved, moreover, to be the form of the leading section of the Judiciary Committee's report when that was delivered to the Committee on Constitutional Machinery for incorporation into the Draft Bill. For the report of the Judiciary Committee is in fact

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1. 1891 D, 473.

2. See Reynolds, op.cit., 32 A.L.J. 62, 72 (cl.59).

extant, and does not belie our circumstantial expectations.

It suggested:<sup>1</sup>

that provisions to the following effect be inserted in the Federal Constitution:-

1. The Judicial power of the Union shall be vested in one High Court, to be called the High Court of Australia, and in such inferior Courts as the Federal Parliament may from time to time create and establish.
4. The Judicial power of the Union shall extend - there follow eight classes of case, now embodied as heads of jurisdiction in ss.75 and 76 of the Constitution Act 1900 .

Not only, then, did Griffith almost certainly have the American Constitution present to his mind when he came to draft Chapter III; he had also a suggested judiciary clause, of a form virtually identical with the American, before him in the shape of a firm committee recommendation. Above all, he had beside him, as one of the other three members of his committee, none other than Clark himself.<sup>2</sup> Did Clark, Barton and Kingston all believe, like Griffith, that the shift away from the obvious and recommended American example was a mere matter of form, not touching substance?<sup>3</sup> Then, as they must have, they asked Griffith why he proposed the shift, what did he reply?

These are questions which cannot now be satisfactorily

1. National Australasian Convention 1891, Proceedings, foolscap edition, clxiii.
2. Quick and Garran, op.cit., 130. Cf. Reynolds, op.cit., 66.
3. Cf. also Quick and Garran: "The form of the judiciary clauses was somewhat different from what it is now; but the only important difference of substance was with regard to appeals": op.cit., 133.

answered, for the men concerned left few records behind them. But nowhere in the debates or the Draft Bill of 1891 is there any indication that a disposition of powers, as opposed to an establishing of institutions, was the dominant intention of the work. On the contrary, there is evidence that any such principle as was later to ground the decision in the Wheat Case (and as may well have inspired Clark in 1891) was consciously rejected by the moving minds of the first Convention.

## IV

The shift to Abstract formulations - the later Conventions

The data is, henceforward, richer; the debates of 1897 and 1898 exhibit a fuller dialogue between legal politicians; the challenge is now not so much to trace the relatively inscrutable movements of one man's thought as to reconstruct a consensus and to ponder the draftsmen's interpretation of that consensus. Sir Samuel Griffith had retired from politics to become Chief Justice of Queensland, and his State was unrepresented at the Conventions. The leadership of the Convention, in name and in fact,<sup>1</sup> devolved to his colleague on the 1891 Drafting Committee, Edmund Barton. The other members of the new Drafting Committee were R.E.O'Connor (who was, like Barton, to become a Justice of the first High Court) and Sir John Downer. The other moving minds, at least in debates relevant here, were Isaac Isaacs and Henry Higgins (the temper of whose thought as Justices of the

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1. See Deakin, Federal Story, 32, 84.

second generation of the High Court was already showing itself in opposition to the Drafting Committee's conceptions of federalism), and the Chairman of the Judiciary Committee, Josiah Symon Q.C. (who, unlike the others, was hardly a professional politician).

The substantive business in Adelaide in 1897 began on 23rd March, when Barton moved a number of resolutions very similar to those with which Parkes had launched the Convention of 1891. He moved that the Convention approve the framing of a Federal Constitution which should establish:<sup>1</sup>

- (a) A Parliament...
  - (b) an Executive, consisting of a Governor-General, to be appointed by the Queen, and of such persons as from time to time may be appointed his advisers.
  - (c) a Supreme Federal Court, which shall also be the High Court of Appeal for each colony in the Federation
- ....

These unambiguously Institutional resolutions were duly passed, and the Convention adjourned to allow its three select Committees on Finance, Judiciary and Drafting to go to work. On 12th April Barton presented a new Draft Bill to the Convention. In the course of his speech he said:<sup>2</sup>

Coming to the chapter relating to the judicature, I may say that, while the clauses referring to the judicature have been redrafted by the Judicature Committee, in the main or to a large extent they correspond with the

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1. 1897 D, 17.  
2. 1897 D, 445.

provisions in that behalf contained in the Bill of 1891.....

This remark neatly complements Griffith's assertion in 1891, that his Draft embodied the "substance", though not the "form", of the then Judiciary Committee's recommendations.<sup>1</sup> For the Judiciary Committee of 1897 had in fact returned to the Abstract language of the American Constitution; Symon's schema was in fact almost identical with Clark's, and this time there was no Griffith to reject it. So the Draft Bill read:<sup>2</sup>

### Chapter III The Judicature

69. The judicial power of the Commonwealth shall be vested in one Supreme Court, to be called the High Court of Australia, and in such other courts as the Parliament may from time to time create or invest with federal jurisdiction.
71. The judicial power shall extend to all matters [there follow nine heads, now embodied in ss.75 and 76 of the Constitution Act 1900].

Now Garran, the Secretary to the Drafting Committee, said shortly before he died in 1956 that their shift away from the form of the Draft Bill of 1891 was made simply "as a draftsman's neat arrangement". But Garran was not Secretary to the Judiciary Committee, and the fact is that the crucial shift was made in the Judiciary Committee, not the Drafting Committee. Thus it is still possible to ask what was the reason for the shift. One obvious answer would be that the Judiciary Committee was

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1. Cf. also Quick & Garran: "The judiciary clauses, though re-arranged, were not seriously altered"; op.cit., 169.  
2. 1897 D, 934.

anxious to secure an independent High Court by writing the Court "into the bedrock of the Constitution" (as one of the Convention's slogans went),<sup>1</sup> rather than leaving it in the hands of the Parliament, as the 1891 Draft had left it. Thus the shift would have been from "the Parliament shall have power to establish a Court" to "the judicial power of the Commonwealth shall be vested in one Supreme Court". As B.R. Wise, a member of the Judiciary Committee, remarked in Convention on 19th April:<sup>2</sup>

The whole object of the Judicature Committee in drafting these clauses in regard to the High Court has been to make the High Court in all essential respects independent of Parliament.... that is to say, it comes into existence by the Constitution and not by Act of Parliament.

But even with this testimony in its support, the answer is incomplete; its explanation must be supplemented by reference to direct contemporary evidence of the proceedings of the Judiciary Committee. This evidence consists of reports published in the "Sydney Morning Herald" between 2nd and 7th April. On 2nd April the newspaper said:<sup>3</sup>

The members of the judiciary committee got to work at 2 o'clock today and sat for nearly six hours. Mr. J.H. Symon M.C. presided, and a discussion at once arose on clause 1, chapter 3, of the Commonwealth Bill of 1891, which gives the Commonwealth Parliament power to establish a Supreme Court of Australia... This clause... was thoroughly threshed out from beginning to end, and

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1. See Reid, Barton & Wise, 1897, D, 272; also Reid, 1898 D, 1385.
  2. 1897 D, 935.
  3. Sydney Morning Herald 2 April 1897, 5 col.7. (emphasis added).

the arguments by the legal section of the Convention when the subject was discussed under cover of Mr. Barton's resolutions were amplified to a considerable extent. At the outset of the discussion on the previous afternoon there was a disposition on the part of the legal members of the committee to magnify the offices... Today better counsels prevailed and the legal members set to work to consider in what way they could cheapen litigation. After a long discussion it was decided so to frame the clause as to provide that the power of the Commonwealth should be vested in a Supreme Court....

The "comments by the legal section of the Convention" were evidently those of Reid and Barton, already cited, and also the arguments of Barton, in particular, on 31st March, to the effect that the federal Court must not be made up of Judges from the State Supreme Courts.<sup>1</sup> The reported desire to cheapen litigation no doubt had to do with the decision to allow the vesting of federal jurisdiction in existing State Courts, something not provided for in the Draft Bill of 1891. In any event, it seems that the decisive shift to an Abstract formulation, apparently reported in the last sentence quoted above, cannot be explained solely in terms of "embedding the High Court in the Constitution" in order to protect the Court and the federal system from the Parliament. For the report continues:<sup>2</sup>

There are two difficulties yet to be faced. One is whether the original appointment of the High Court should be placed in the hands of the Federal Parliament. Several members held that this would make the Courts subservient to the Federal Parliament, which would, therefore, have power to abolish the Court. The other difficulty is as to whether or not it should be made obligatory upon the federal Parliament to appoint inferior courts. Many

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1. 1897 D, 369.

2. Sydney Morning Herald 2 April 1897, 5 col. 7 (emphasis added).

American authorities were quoted, and a discussion more or less learned took place. The general tendency of the debate went to show that members desired to simplify the terms of the Draft Bill of 1891, to lessen the expense of the judicature establishment, and by this means reduce the cost of law to litigants appealing to the High Court.

From this it appears that the members of the Committee were concerned, though to differing degrees and with differing emphases, with limiting the discretion of Parliament and with securing the position of the High Court in the Constitution; that they were concerned with terminological simplicities, and were under considerable influence from American forms and precedents; and that they were anxious to minimise the expense of establishing and maintaining a federal judiciary. Apart from this last, the relevance of all these factors to the adoption of the Abstract formulation now embodied in s.71 is sufficiently plain. We should not be justified in nominating any one of these factors as more decisive than the others.

Even in the Conventions, the shift had its consequences. The Australian founders, once the terminology had been served up to them with the authority of two select Committees, began, as we shall see, to fit their speeches into the new frame of discourse. Still, they did not immediately see it as a considerable shift, as a new framework. Just as Griffith in 1891, and Barton in 1897, treated it as a mere matter of "form",

so the "Sydney Morning Herald" completed its report of 2nd April by observing:

It will be seen from the above that so far the committee of detail has followed the provisions of the Commonwealth Bill [of 1891], with the exception that it proposes that the Court of Appeal should be called the High Court of Australasia<sup>1</sup> instead of the Supreme Court of Australia.

No member of the Convention was ever heard to dissent from the remark which the same newspaper made the following day, to the effect that the Judiciary Committee had "practically adopted" clause 1 of Chapter 3 of the Draft Bill of 1891.

Potentially, of course, the adoption of the new formula was in fact of immense significance. For the first time, it became possible to suppose that the consensus of Australian founders was dominated by an Abstract classification of all "governmental power" into "legislative power", "executive power" and "judicial power", a classification under which all particular institutions must be subsumed and to which all grants of power to institutions and persons must conform. We know that the courts were later to make that very supposition; the jurist, less concerned than constitutional lawyers about whether that supposition was legally "valid", wants to know whether it was historically correct - for his aim is to understand the origin, the course, the drive of legal development, to go behind

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1. This error was corrected on 3rd April, 10 col. 1.

particular and changing conceptions of legal validity, to uncover the conceptual sources of such conceptions and of their flux. So the question now concerns the extent and relevance of the new talk of "powers" in the Convention. How far were the three primary forms or types of governmental power conceived of as exhaustive and mutually exclusive?

## V

The stage of incompletely Abstract formulations

In April 1897 the relevant sections of the Draft had not yet taken on their final shape. In particular, the judiciary Chapter was still in the American form; the term "judicial power" was not in its present state, that is to say, undefined and, as it were, floating; the meaning of the term in the then clause 69<sup>1</sup> (now s.71) was rather regarded as being defined, as well as delimited, in the then clause 71,<sup>2</sup> by the nine subject-matters of jurisdiction now embodied in ss.75 and 76 of the enacted Constitution. So far as the "nature" or type of the judicial power was regarded as relevant, it was taken to be simply the power of the particular institution established or authorised by the leading section of Chapter III, and otherwise to be subject to parliamentary regulation in the Judiciary Acts that would presumably control these institutions. So much, at least, seems to be the preferable interpretation of the highly confused debates of 1897 and 1898 on chapter 73 (in 1898,

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1. See supra, p.6. .

2. See supra, p.6. .

clause 73; now ss. 75 and 76).<sup>1</sup> In short, the term was still incompletely Abstract. In the understanding of the founders at that time, it was still thought of in relation to the institutions mentioned in clause 69 and limited by reference to the particular and, as it were, concrete subject-matters of jurisdiction in clause 71. This being so, it was both logically possible and, more important, quite natural to suppose that there might be species of adjudicatory operation which fell outside Chapter III. More generally, it was natural to suppose that there might be species of governmental power which could be vested, without anomaly, in the Commonwealth, and yet which fell outside the triadic classification implicit in the first three Chapters. The legislative power of the Commonwealth had to be strictly delimited in order to maintain that distribution of powers between State and Commonwealth which grounds federations. The principal forms of executive power (and the founders, as political architects, thought in terms of principal functions rather than of borderline cases; and the modern problem of "administrative power" had hardly begun to bother legal statesmen) were defined by the common law as to the royal prerogative and, beyond that, were dependent on authorising legislation within the legislative power. But there was no obvious and compelling reason why the Commonwealth should not be empowered to conduct other activities of a broadly "administrative" type -

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1. See Appendix B.

nothing in the theory of federalism imperatively required that such activities should be closely defined or delimited in the way that legislative powers must be. So if, as was thought to be the case in 1897, Chapter III contained a "defined" and limited grant of power, it was easy to suppose further that other grants relating to the broad "administrative" type might be contained in others of the eight Chapters. Whereas if, as is the case now, Chapter III contains a floating grant of power characterised only as "judicial", it is easier (though still not logically necessary) to suppose that this third category of power contains and limits by its own immanent definition (that is, by its nature, as an Abstract type in a triad of types) the whole residue of Commonwealth powers and activities after the legislative power has been disposed explicitly in Chapter I and the executive power implicitly by reference to the common law of the royal prerogative.

## VI

Problems treated as bearing on "the separation of powers".

The next thing to notice is that the problems of "separation of powers" which exercised the members of the Convention were in fact all Institutional problems.

By 1897 the lines of discussion were becoming settled; delegates were not haunted by immediate memories of the American

theory, for their own polity was taking on a shape of its own, requiring its own treatment, and giving rise to its own explanatory and formative theory. So on all sides one began to hear talk of "the true principle of federation", "the very principle of the Federal Constitution", "the very essence of the Federation";<sup>1</sup> and, after the manner of lawyers everywhere, the developing Australian theory of federation was endowed with such a settled status that any alternative theory was liable to be labelled "mistaken", the product of a mere "misapprehension" of the "true" theory.

This may be noticed particularly in the debate on the questions whether a Judge should be allowed to be Governor-General, and whether Judges should be removable by the Parliament only for incapacity or misbehaviour. In the former debate, on 14th April, Symon said:<sup>2</sup>

It is a serious question whether the judiciary should be brought into that position, particularly in relation to the Governor-General of Australia - involving a Chief Justice acting as Governor-General. I have a strong repugnance to judicial officers being mixed up with the Executive. It is exceedingly undesirable in any respects, and particularly, as my hon. friend Barton says, in a Federation.... It is inconsistent with the High Court we are going to establish.

The debate on the removal of federal judges ran as follows (and every aspect of these passages is significant, not least the identity of the speakers):

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1. 1897 D, 379 (Isaacs and Barton); 1897 D, 591 (O'Connor).
  2. 1897D, 634.

Isaacs:...Now, I think if we take the position that the judges are not to be removed on the vote of the two Houses of Parliament...we shall be making a very great mistake, because it will then always be a matter in dispute between the judge in the particular case and the governing power....<sup>1</sup>

Symon: [My hon. friend, Mr. Isaacs,] does not sufficiently discriminate between a Constitution in the unified state and a Federation.... The Federal High Court is placed in a position to safeguard the liberties of the subject and the rights of the individual States against the encroachment of the Legislature.... [The High Court's] functions are enormous and are of the most critical and serious character in the interests of the Constitution...; and therefore their independence should be placed above the interference of Parliament....<sup>2</sup>

Barton: I would point out that the Constitution of Canada seems to show a misapprehension which we should avoid in a true federal union. It expresses this in clause 99, and in expressing it carries out the view held by Mr. Isaacs, which is applicable to a unified or separate State.... The United States Constitution may put the power of removal in the hands of one of the Houses, but it must be recollected that that House [the Senate] is not like the House under this Constitution which it is proposed to establish, but it is one which from the very beginning has been invested with certain executive and certain judicial powers. Besides, there is the great difference that that House in the United States cannot remove anyone except by trial at law.... [This Constitution is the supreme law of the land]. Whatever we do in this Constitution, I hope we shall be able to arrive at some mode of putting this principle in such a way that the judicature will be saved, because upon the safety of the judicature rests the safety of the Constitution.<sup>3</sup>

On 22nd April, Symon returned to the debate of 14th April by moving that "no person holding any judicial office shall be appointed to or hold the office of Governor-General, Lieutenant-Governor, Chief Executive Officer, or Administrator of the

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1. 1897D, 947.
  2. 1897D, 950-951.
  3. 1897D, 952-953.

Government, or any other executive office".<sup>1</sup> He repeated his earlier arguments, and Isaacs said:<sup>2</sup>

We will leave ourselves open to ridicule if we pass the provision.

Symon: My hon. friend does not seem to appreciate the position of a judge in a Federation. He seems to have forgotten that we are establishing a Federation.

Isaacs: The word "Federation" is an answer to everything; it is like the word "Mesopotamia".

Symon's motion was passed, and became clause 80 of the Draft Bill of 1897. On 1st February 1898, the clause came up for re-examination in Committee of the whole Convention in Melbourne. Once again, the debate serves to reveal more precisely the relation of the Convention's thought to the doctrine of "separation of powers", and the degree to which the Australian theory, while increasingly taking on the aspect of Abstract "principle", and, concomitantly, the language of "functions", yet remained predominantly Institutional in its re-occupations.

McMillan:... We have implanted in this Constitution this great high Supreme Court, which practically marks the Judiciary off from the other branches of Government, except that the executive has to make the appointments to the bench.... It is not a question of persons. It is a question of principle as to whether a person should combine executive with judicial functions.<sup>3</sup>

Isaacs: Why mention judges any more than the President of the Council or the speaker of the House of Assembly?

...Downer:.... even abstract principle, I do not think there are many members of this House who would say that, if you can possibly avoid it, the executive and the Judiciary should never be filled by the same person.... I believe in largely trusting the Federal Parliament, but we have to fix the relative positions of the Commonwealth and the

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1. 1897D, 1174.  
 2. 1897D, 1175.  
 3. 1898D, 359-361.

states....<sup>1</sup>

Symon:....So far as the Commonwealth is concerned, it [clause 80] is a mere indication that one of the three parts of the Constitution which we are seeking to establish - the Judiciary - which to a certain extent is coequal with the other two, and is intended to be kept absolutely apart from the other two, shall be so kept absolutely apart....<sup>2</sup>

Wise: There are, I believe, certain broad principles that ought to be clearly defined in the Federal Constitution, and one of these, and by no means the least important, is the absolute independence of the Judiciary.<sup>3</sup>

....Barton:....As I take it, what we have to consider is, is this a matter of absolute constitutional principle? If it is, should it be left to be dealt with by the Parliament or implanted in the Constitution? I believe that it ought to be implanted in the Constitution.... If you appoint the President of the Senate [to the office of Governor-General] you are appointing to the performance of certain executive and legislative functions a person who is already in a branch of the Legislature, whereas if you appoint a member of the High Court, you are appointing a person whom it should be our desire to keep separated by every safeguard we can possibly devise from interference with executive and legislative business.<sup>4</sup>

The clause was upheld by 25 votes to 20, with Downer, O'Connor, Symon and Barton ranged in the majority against Isaacs and Higgins. Thereupon a South Australian, Holder, immediately moved an amendment to ensure, further, that no person holding parliamentary office could be appointed to any of the executive positions which Symon's clause 80 barred to holders of judicial office. "The great argument", he said, "is that we must keep distinct the executive, legislative and judicial functions".<sup>5</sup>

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1. 1898D, 362.
  2. 1898D, 363.
  3. 1898D, 365.
  4. 1898D, 368.
  5. 1898D, 370.

The supporters of clause 80 were quick to point out that this was a misapprehension of the principle on which they had proceeded;<sup>1</sup>

McMillan:... there is no analogy between the two positions. Under responsible government, as we have it -- not on the American basis -- under responsible government there is a direct link between the Executive and the Legislature, but we purposely follow the American rule by absolutely isolating the Judiciary from either the Executive or the Legislature....

Indeed, it is hard to know how seriously Holder and his supporters intended their amendment, and how far it was motivated by pique at the retention of clause 80 and by a desire to force a reductio ad absurdum for tactical purposes.

Isaacs: I think that, accepting the vote which has just been taken, we ought at least to be consistent.

Symon: The ground on which we have proceeded is a ground of principle....

Isaacs: And I want to maintain the principle of separating the legislative, executive and judicial offices.

Symon: The only reason for our retaining the clause is that we consider that the Judiciary should be kept absolutely apart from everything in relation to the Executive....<sup>2</sup>

Holder's amendment was rejected by 20 votes to 17, with Barton, O'Connor and Symon ranged in the majority against Isaacs and Higgins. But perhaps it is not easy to hold for very long the devotion of politicians to even those abstract principles that have emerged in the course of their own deliberations. In any

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1. 1898D, 371.  
2. 1898 D, 372.

case, on 11th March, without debate, clause 80 was deleted from the Bill by 25 votes to 7; this time it was Isaacs and Higgins who were in the majority, and Downer, O'Connor, Symon and Barton who were the greater part of the minority.

## VII

### The final shift to the present formulations

The final shift to a completely Abstract Chapter III was made as a "mere draftsman's arrangement" in the very last days of the 1898 Convention. On 11th March the Drafting Committee retired for final revisions, taking with them Chapter III in the form discussed in sec. V above; a form adopted from the American Constitution; a form in which the expression "judicial power" could be, and was, regarded as "defined"<sup>1</sup> by the then clause 73 (clause 71 of 1897) with its nine classes of "matters", and by its relation to the institutions established, under the then clause 69, to exercise it; a form which it was therefore natural to regard as allowing activities of an abstractly "judicial" type to be carried on by institutions set up outside Chapter III. The Drafting Committee returned on 16th March, bringing with them Chapter III in the form which it has today (questions of appeal to the Privy Council aside); a form which went beyond even the degree of schematic abstraction in the American Constitution; a form in which the phrase "judicial power" was undefined, and thus controlled, where once it had been controlled

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1. 1898 D, 348 (Isaacs); 1898 D, 1882 (Barton); 1898D, 1656, (Symon).

by, Chapter III; a form which rode uneasily with the apparent grants of judicial power, outside Chapter III, in ss.51 (xxxv) and 101-104, since the force of the phrase "judicial power" knew now no explicit limits in the Constitution itself, but only (it might be argued) those of its own autonomous definition. For the old clause 73 [clause 71 of 1897] was swept away, and the nine matters which before had been regarded as controlling the meaning of "judicial power" were now no more than matters in which the High Court had, or might be endowed with, original jurisdiction, and potential heads of jurisdiction for other federal courts.

Barton, indeed, observed that there had been "very serious alterations in drafting, as for instance, in the Judiciary clauses". But the new draft was adopted without anybody commenting on any of the alterations which now concern us. What account, then, are we to give of the change? Why did the Drafting Committee simply drop what Barton and the other influential lawyers had all regarded as the "definition" of Commonwealth judicial power? Only conjecture is possible, and the most plausible conjecture turns on what was done with the old clause 73. It was split up between ss. 75 and 76, and used to define the original jurisdiction of the High Court and, by reference in s.77(i), of other federal courts. It is natural to assume that this change was thought of as a re-arrangement

- drastic, no doubt, but still a re-arrangement and not a change in meaning. The implication is thus that the "judicial power" was thought of, to the last, as a concept bound up with and, as it were, dependent on certain institutions - namely, the federal courts with judges appointed under s.72: what O'Connor called "your ordinary courts",<sup>1</sup> what Barton and Gavan Duffy JJ. were to call the "general Judicature",<sup>2</sup> and Higgins J. a "general jurisdiction".<sup>3</sup> The courts established under ss.71 and 72, and their jurisdiction as established by future Judiciary Acts within ss.75 to 77, would determine the scope and meaning of "the judicial power". The phrase had no real life of its own, because it was still understood institutionally, in terms of these particular courts and their defined jurisdictions. So there was no question of it reaching out to swallow up the powers of arbitration courts and of the Inter-State Commission, for these were other institutions established in other Chapters of the Constitution.

The truth seems to be that the language of principles and schemas had run ahead of the actual pre-occupations of the founders, which concerned institutions set up to deal with problems of a quite concrete nature, springing not from any

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1. 1898 D, 2284.

2. Wheat Case (1915) 20 C.L.R. 54, 72-73, 103.

3. Alexander's Case (1918) 25 C.L.R. 434, 476.

schema of government, but from the political drive to establish a fully independent new governing power in the land, and to deal with inter-State industrial disputes, and to administer the laws on inter-State trade. Even when the 1897 Convention fell to talking in terms of principles of federalism, no-one really apprehended that the institutions established under s.51 (xxxv) and ss.101-104 might not fit within an abstract triadic division of "the powers of the Commonwealth". The best explanation of this is simply that such a scheme was not present to the minds of the founders. They all wanted an independent High Court, and some of them wanted to carry this to the length of excluding judges from all offices in the Executive. But even this desire was motivated primarily by their wish to preserve the distribution of powers between States and Commonwealth from interference on the part of the Commonwealth; and, as we have seen, certain attempts to relate it to an abstract principle eventually came to nothing (though it must be remembered that all the members of therafting Committee had been in favour of enshrining what they called an "abstract principle" in Symon's old clause 80).

On every occasion when the founders fell to talking abstractly of "proper" dispositions of "powers of legislation and adjudication", it proves, on closer examination, that their concern in fact went no further than the distribution and

separation of the powers as between the Parliament and the High Court, or, alternatively, between the Parliament, the High Court and the Inter-State Commission. There is no evidence of a concern that all power of the type "judicial" should be schematically disposed of in Chapter III. A speech by Barton, three days before the Drafting Committee retired for the final revision, shows clearly the state of his thought, at least:

I might go so far as to say that the Inter-State Commission might deal with this question [of the navigability of rivers]; but unless there is some inconsistency there, I believe, as I have believed all along, that a question of that kind is most fit for the determination of the High Court, and much more fit for its determination, and even for determination of the Inter-State Commission, than for determination of Parliament.... Surely we are here for the purpose of distributing the powers of legislation and adjudication to the proper authorities.... The legislation is for the Parliament; but the adjudication of rights should be left to the courts.<sup>1</sup>

Taken alone, the last two sentences might be thought to show a concern for a proper distribution of powers abstractly conceived; but taken in the context of the foregoing sentences, it is clear that what was at stake, to Barton's way of thinking, was the proper delimitation of institutions.<sup>2</sup> Thus "legis-

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1. 1898D, 1984; (emphasis added).

2. This interpretation of Barton's thought is confirmed by a closely related passage in a speech of his delivered a few days earlier, when he said: "To take the adjudication of matters of this sort [i.e. inter-State preferences and discriminations] out of the control of the High Court, and to vest it in the Federal Parliament, is a proposal which I have a rooted objection to, and I shall be found, as I have been found from the beginning of the proceeding-

lative power" in s.1 would mean the power defined in terms of the specific grants of powers to the Parliament in all Chapters of the Constitution; "judicial power" in s.71 would mean the power defined in terms of the specific grants of jurisdiction in ss.75-77 and the Judiciary Acts thereunder; the power of "adjudication" in s.101 would be defined in terms of what the "Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of the Constitution relating to trade and commerce, and of all laws made thereunder". In all this there is no appreciable sense that the three types of governmental power bestowed upon particular institutions in ss.1, 61 and 71 were thought of as exhausting the categories of Commonwealth power - for were not the categories of Commonwealth power defined in terms of particular institutions and the grants of power to those institutions, and were there not institutions other than those dealt with in those three leading sections? In short, these three leading "powers" were mutually exclusive, for one primary institution was not to trespass upon

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(continued from previous page.)

ings of this Convention, objecting to every provision which seeks to take away from the High Court of the Commonwealth, which we have appointed arbiter of the Constitution, the consideration of matters which should be matters of adjudication by the court, and the placing of them within the jurisdiction of the Parliament, by that means keeping down and restricting the authority of the High Court as the protector of the Constitution". (1898D, 1373; emphasis added). See also, for a further striking example of the severely institutional level of the founders' thought, O'Connor's equation of the Judiciary of the Commonwealth with the High Court itself: "The only authority for deciding such a question will be the Supreme Court -- the Judiciary of the Commonwealth". (1898D, 356.)

the ground of the other two; but they were not exhaustive, for there were other institutions that existed, or might exist, with powers bestowed regardless of their place in any triadic schema.

If this be a correct reading of the debates, then the shift to the new and final form of Chapter III can be ascribed to nothing more momentous, in intention, than a wish to tidy up a Chapter which, needlessly, as it seemed, contained in one and the same section [cl.73] both a "definition" in terms of heads of jurisdiction and certain grants of jurisdiction. What could be more natural, assuming that the "definition" was regarded simply as a definition of the powers of certain institutions constituted in a certain way under (the new) ss.71 and 72 and not as a definition of a certain "type" of power, than to <sup>make</sup> the grant of jurisdiction to those same institutions do the work of the definition? It would be no more than a matter of neatness and economy of language. This, then, is our account of the final change in the form of Chapter III. It contains, too, our answer to the earlier question how far the three primary forms or types of governmental power were conceived of as exhaustive and mutually exclusive.

## VIII

### Conclusion

We can now summarise our answer to the question how far

the founders tended to move from Institutional to Abstract conceptions of the Federation. The short answer must be that a distinction is to be drawn between, on the one hand, the "thought", in terms of preoccupations and intentions, and, on the other hand, the "language", in terms of natural inferences and reasonably imputable meanings. The language of the founders clearly became more abstract and schematic, under the influence of American usage and a lawyerlike desire for symmetries and generalisations. To construct a federation, it is necessary to talk about legislative "powers", for these must be distributed between governments; thence it is a natural shift to speaking of "powers" as fragments of "power", and of "legislation" as a species of "power", and finally of speaking of other such species, and arranging them schematically. And to a certain extent, this shift in language induced a shift of thought, into the realm of abstract conceptions and principles of "federalism". For, unlike the American founders, the Australians could not escape a settled aura of connotations whenever they used words that had been more or less "fixed" by the form the American Constitution finally took. But, in general, the founders remained sceptical of such conceptions and principles; their thought, to the end, always gravitated to the plane of institutions. Their constructions were motivated by practical purposes, political drives, negotiating

compromises, and while their language tended to become the language of abstract roles and relationships, capacities and functions, the model they worked with and argued about was a model constructed of institutional units. So, if we are talking in terms of real intentions, so far as these are historically traceable, we must conclude that the dominant intention of the Constitution was not a disposition of powers but an establishing or authorisation of institutions.

## CHAPTER SEVEN

### The specific antecedents of the Wheat Case and Alexander's Case in the Conventions

The previous chapter showed how unjustified is the leap from the premise that secs. 1, 61 and 71 fit an Abstract doctrine of separation of powers, to the conclusion that such a doctrine was intended or contemplated by the founders of the Australian Constitution. The present chapter seeks to prove that that conclusion not only is unsupported by its premise, but also is actually false. For it seems certain that the founders intended to establish the Inter-State Commission as a "fourth organ of the Constitution", endowed with executive and judicial powers for purposes of administration. But if this is so, the suggestion that Chapter III is intended as an exhaustive and exclusive disposition of all "judicial power" cannot stand, and the further suggestion that powers, in the abstract sense, are always to be kept separate is shown to be, not merely unproven, but also untenable.

This chapter also seeks to show that arbitration was always regarded as in some sense judicial in its general character; as certainly involving powers of enforcement (most probably thought of as inherent in the arbitral tribunal itself); and as possibly not an exercise of that "judicial power of the

Commonwealth" which was granted to the general judiciary, or ordinary courts, established by Chapter III.

The chapter looks forward, moreover, to disputes about the arbitral power that will be discussed in Chapter Nine, and seeks to show that certain rival conceptions of "true (Australian) federalism" grounded the rival characterisations of arbitration. Further, these rival conceptions of federalism are shown to ground parallel disputes about judicial powers and institutions and their place in the Constitution.

Finally, the triumph of Issacs J.'s conceptions in the Wheat Case and Alexander's Case, and the rejection of Barton J.'s opposed conceptions, is shown to be a reversal of the intentions of the founders.

## I

### The origins of s.51 (xxxv)

The power to legislate with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State was always associated with judicial power. The first hint of the matter was given quite early in the Convention of 1891, when Kingston remarked:

There is one other matter in connection with the establishment of a federal judiciary of which we ought not to lose sight. I should be glad indeed to see a federal tribunal establishment for the settlement of industrial disputes....<sup>1</sup>

In Committee of the whole Convention, Kingston said:

I desire to propose a new clause, to follow sub-clause 22 [of the then s.52, now s.51], as follows:- "the establishment of courts of conciliation and arbitration, having jurisdiction throughout the commonwealth, for the settlement of industrial disputes"....The adoption of the amendment which I now indicate will not in the slightest degree interfere with the powers which are at present possessed by the various state legislatures to legislate within their state limits....It is impossible, having regard to the disastrous effects which are occasioned to society generally, to leave the contending parties to fight the matter out to the bitter end, and the only means which occur to me by which some good can be done is the appointment of a tribunal qualified to investigate the matters in dispute, to reconcile the parties if possible, or, if such a course be impossible, to pronounce an award which will fix what, according to the decision of the court is right and proper to be done, and will carry with its pronouncement the means of enforcement....<sup>2</sup>

Kingston had thus, in effect, sketched the essential outlines of the arbitration system as it was to be considered in Alexander's Case. Griffith's reply contains, likewise, the germs of his own judgment in that case:

If the court is to have jurisdiction throughout the commonwealth, surely it will be a federal court. That being so, the amendment ought to be inserted in that part of the bill which deals with the federal judiciary ....We could have provided for all the judicial powers in this section [the then s.52] if we had wished to do so. If it is desired that the commonwealth should have power to establish such a court as the hon. member suggests, upon which I do not now express any

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1. 1891 D, 164 (emphasis added).
  2. 1891 D, 688.

opinion, provision ought to be made for it in the part of the bill which deals with the judiciary.<sup>1</sup>

So Kingston bowed to Griffith's wishes, and withdrew the amendment for consideration at a later stage. He did not, however, accept all the implications of Griffith's remarks, for, as he said:

in the natural order of things, it will hardly be proposed to confer upon the ordinary federal judicature the powers which could be only properly exercisable by a commercial tribunal such as that which it is proposed by the amendment to establish.... that will not be a federal court in the ordinary acceptation of the provisions contained in the subsequent portions of the act dealing with the establishment of a federal judicature.<sup>2</sup>

A few days later Kingston again moved his amendment, this time with regard to the leading section of Chapter III, then clause 69, now s.71:

I propose to move now the addition of words to this particular clause, which will give the federal parliament power to establish federal courts of conciliation and arbitration for the settlement of industrial disputes. The amendment I desire to make consists in the addition to the clause [69, now s.71] of the following words:- "including courts of conciliation and arbitration for the settlement of industrial disputes".... The first duty of the proposed tribunal would no doubt be to endeavour to reconcile the parties. The second would be, in default of success in the endeavour to bring about a reconciliation between the contending parties, to pronounce a decision according to the [substantial] justice of the case, which decision should bind the contending parties for a limited period, and which should be capable of enforcement.<sup>3</sup>

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1. 1891 D, 688-689 (emphasis added).
  2. 1891 D, 689 (emphasis added).
  3. 1891 D, 780-781.

We have quoted Kingston at some length because his two speeches of proposal straddle the arguments used in Alexander's Case. On the one hand, he seems to have intended the element of decision according to "substantial justice" and what the court considers "right and proper", stressed by the majority in Alexander's Case; and, on the other hand, he seems (though this is perhaps a little less clear) to have intended the arbitration court to have the powers of enforcement so stressed by the minority - the court was to "carry with its pronouncement the means of enforcement" (which is not necessarily the same thing as saying that the court's decision "should be capable of enforcement").

In any event, Griffith was now obliged to state his views on the substantive question. He went straight to the root of future difficulties; the ensuing interchange of views contains all the elements of that decade of controversy<sup>1</sup> in the High Court that preceded Alexander's Case:

I should like for my own satisfaction, before voting on this question, to know how the hon. gentleman makes out that his amendment is not an interference with property and civil rights? That is the difficulty I feel. If courts of conciliation can be established, if anything can be done to settle labour disputes, I think it is a power the federal parliament might very well have. But I have been trying for the last three months to see how it could be put within their function without interfering with the proper function of the states.

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1. As to which, see Ch. 9, infra.

Kingston: Does the hon. delegate object to it on the ground that state matters should be regulated by the states themselves?

Griffith: Certainly; property and civil rights are left to the states.

...Fitzgerald: Suppose the federal court gave a decision which was at variance with that of the courts of the various states, which would rule?

Griffith: The question which the hon. member, Mr. Fitzgerald, asks is a rather difficult one to answer. In America the supreme court in each state is supreme in its own limits, and so is the federal court supreme in its limits, and the same point might be decided in two different ways, and both decisions be executed in the same state.... That leads me to another question - how would the decision of a court of conciliation be carried out?.... I confess I feel very great doubt whether the provision should or should not be put in here. I do not think that the hon. member, Mr. Kingston, has removed the difficulty that I feel as to it being an interference with property and civil rights. Does the hon. member mean that a court of conciliation might direct that the wages of workmen might be raised?

Kingston: That is a question of detail.

Griffith: It is a question of principle. Does the hon. member mean matters of principle like that, because that might entirely depreciate the value of property in a state, or drive an industry out of a state? From that point of view, my vote will be determined in the matter. I think, much as I desire to get this power for the federal parliament, that we ought to hold fast by the principle that we are not going to interfere with the rights of property in the states.<sup>1</sup>

Kingston's amendment was thereupon rejected by 15 votes to 12, both Griffith and Barton voting with the majority.

Perhaps it was Griffith's insistence that the rights of

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1. 1891D, 781-784.

the States were not to be interfered with that induced Higgins, who rescuscitated the motion in 1897, to give the power an inter-State character. Higgins seems to have been anxious to avoid the awkward questions which had been raised concerning the status of arbitration courts in the Federal Judiciary. He said:<sup>1</sup>

Now I want to add as a sub-clause [of the then cl.52, now s.51] the words: "Industrial disputes extending beyond the limits of any one State"....Of course the object is to enable the Federal Parliament, if it thinks fit, to create Courts of Conciliation and Arbitration. We cannot tell what is in futurity, and I want simply to give the Federal Parliament a power to establish those courts if it think fit. Therefore there will have to be an incidental alteration in the judicature part of the Bill, so as to enable the Federal Parliament to create a court for the purpose.

The last sentence of this passage, when taken together with Higgins's failure actually ever to propose any such alteration of Chapter III, foreshadows the ambiguities of his judgment in Alexander's Case - his willingness, perhaps, to believe that the arbitral power might be judicial, but his unwillingness to comit himself on the matter. But his shifts and expedients did not save his clause in 1897. The old arguments against it were revived, and new ones were used to attack the "inter-State" character of the clause. Nor did these criticisms lack a certain foresight of the difficulties and consequences in which future years were to be so prolific.<sup>2</sup> Symon seems to have thought

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1. 1897D, 782.

2. See, for example, McMillan, 1897D, 783.

that the proposed tribunals would not be federal courts within Chapter III:<sup>1</sup>

Symon: It would be impossible to say at what time the overflow into the adjoining State begins and ends. If the Federal Parliament is to decide -

Fraser: The judiciary.

Symon: I do not think it would be the judiciary. We lawyers do pour oil on troubled waters, but that is rather in a tribunal of contest than a tribunal of conciliation.

In answer to this, Kingston suggested, in a perhaps designedly vague manner, that legal problems might possibly be dealt with separately from the proposed work of the arbitral tribunals:<sup>2</sup>

I sympathise with the remark which fell from Mr. Fraser, who suggested that a matter of this sort might come under the Federal Judiciary. We do not ask so much as that. We do not ask that there should be, as part of the Constitution, an elaborate and highly-paid court permanently constituted for the purpose of contesting to the bitter end any issues placed before it by a noble and much maligned profession. We do, however, ask that in the interests of the State the Federal Parliament should be clothed with the authority if it sees fit, to call into existence tribunals which will prevent industrial disputes of the highest magnitude, which will conciliate the parties at the earliest possible stage, preventing huge loss to the parties concerned, and even greater loss to the community.

There are, of course, possible interpretations of this passage other than the one we have suggested; it is difficult to know whether Kingston's emphasis was on the system of tribunals as not being written into the Constitution, or as not being courts, or as not being elaborate and highly paid courts. Perhaps a

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1. 1897D, 790.  
2. 1897D, 790.

more enlightening part of the speech is that which stressed that the system was "in the interests of the state"; and there can be little doubt that the arbitration system was always envisaged by its supporters in the Conventions as a protection of state (i.e. communal or public) interests rather than of the private rights of employers and employees. But for the moment, the supporters of the motion were not to have their way, and it was rejected by 22 votes to 12, with Barton and O'Connor ranged against Isaacs and Higgins.

That, however, was but a battle; the war was won early in 1898, with Higgins again leading the campaign, successfully at last. The new clause proposed to be added to the then s.52 [now s.51] was substantially of the form it has today: "Conciliation and arbitration for the prevention or settlement of industrial disputes extending beyond the limits of any one State". The supporters of the motion seem to have been confident of victory on this occasion, and their speeches were by no means as ambiguous as in former years. They left no doubt that the courts they envisaged should have powers of enforcement:

Quick:....It will be for the Federal Parliament to devise some means of giving jurisdiction to a competent tribunal, and of conferring upon that tribunal power to enforce its decisions.<sup>1</sup>

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1. 1898D, 182 (emphasis added).

Kingston:....it seems to me preferable to provide against the necessity for police interference at all. I think we can do that, not by arranging for the arbitrary interference of the Government in matters of this sort, but by giving power to a competent authority to provide facilities which will enable the parties to a dispute to agree by the establishment of courts of conciliation, and, if they desire it, of courts of arbitration, which should have the power to enforce their award upon those who invoke their interference.<sup>1</sup>

On both sides the old arguments were repeated with force and clarity by the old contestants:

Isaacs:....I desire very strongly to support the amendment of my honorable and learned friend (Mr. Higgins) in this respect. I do not agree with the proposition that providing a remedy for a known evil invites a recurrence of that evil....<sup>2</sup>

Symon:....you will hand over to the Federal Parliament one of the most pregnant sources of heat and passion that ever was invented....<sup>3</sup>

Barton: We do not propose to hand over contracts and civil rights to the Federation, and they are intimately allied to this question.<sup>4</sup>

O'Connor:....We base our opposition to the insertion of this clause in the Federal Constitution upon this ground only - that the matter is a matter not for federal control but for state control....I hope the result of this discussion will be that, however much we may feel in sympathy with this social experiment, we shall say that it is one to be conducted in our own States, and that we shall not add this further power to those quite sufficiently large which have been vested in the Commonwealth.<sup>5</sup>

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1. 1898D, 185.
  2. 1898D, 188.
  3. 1898D, 191.
  4. 1898D, 199.
  5. 1898D, 202.

Some of the members who opposed the clause on this ground of State rights were, nodoubt, motivated also by more or less "party political" beliefs; in 1897 McMillan had rested his opposition on State rights, but in 1898 he said:<sup>1</sup>

I hold - and every year of my political life has made it a more sacred principle to me - that the less the Government do, except in acting as policemen in trade disputes, the better for the community.

It was this remark which drew from Kingston his retort that arbitration would make "police interference" unnecessary.

Kingston, no doubt, was politically a radical, and McMillan a conservative;<sup>2</sup> but it would be merely dogmatic to assert that party political motivations were primary on either side of the question. The primary pre-occupation which can be inferred from the evidence - prescindng from all doctrinaire pre-conceptions about the role of "politics" in legal statesmanship - was with the proper distribution of powers as between Commonwealth and States. The clinching argument was Deakin's:<sup>3</sup>

We should provide in advance for all conceivable federal contingencies, strengthen the Federal Government, and trust the Federal Parliament to use its powers wisely.

"Trust the Federal Parliament" was a slogan we shall hear more of. It won that particular battle, and that was the last of the series. The clause is with us to this day.

1. 1898D, 184.
2. See Deakin, op. cit., 37.
3. 1898D, 203.

## II

The two conceptions of federalism

Two strands of thought run through the controversy about inserting s.51 (xxxv). The present section seeks to draw them out at greater length, for they are woven into the greater web of the Conventions' whole work.

The first is the notion that federation was a matter of States rather than of individuals, that priority in the making and working of the federation was to be given to the interests of the States, and that these interests were, in fact, rights superior to the interests of individuals or of the people considered as a whole or as a majority of the whole. In part, this notion expressed no more than the political prerequisite for any uniting of the six independent and rather jealous colonies at the end of the nineteenth century. As such, it was inevitably the first of the Parkes resolutions, laying down the ground-rules and guide-lines for the first and the succeeding Conventions:

1. That the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect of such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government.<sup>1</sup>

rights

But the notion of States/went beyond the merely limiting matter of political practicality; the crux of the problem was precisely

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1. 1891D, 24.

to determine what ought to be "agreed upon as necessary and incidental to the power and authority of the National Federal Government"; and the priority of States rights was the basis of one solution to that problem. It was a solution which was, as we have come to expect, regarded more and more explicitly as an "essential principle of true federation", as something "proper" to a general conception of "federal government". The alternative solution postulated as a basic principle that common social issues should be dealt with by the central government, and was willing to recognise the interests of States qua States only so far as political exigencies made a more or less unitary commonwealth unacceptable to the voters. But the States rights solution was grounded on the principle stated by Griffith in his first speech to the 1891 Convention:<sup>1</sup>

And here let me insist upon the essential condition - the preliminary condition - that the separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary for the establishment of a general government to do for them collectively what they cannot do as a collective body for themselves.

This emphasis on the continuing rights of the States underlay the pre-occupation of the early Conventions with the composition and powers of the Senate; for this House of Parliament was conceived of as a States House, in which every State was equally represented. So Griffith said, at the end of his speech on the same occasion:<sup>2</sup>

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1. 1891D, 31.
  2. 1891D, 38. See also 1891D, 277. See also the Report of the National Federal Convention, 1897 (Sydney), passim.

The relative constitution and powers of the two houses of the legislature underlie the whole of what we have to do.

Hence, too, arose many of the references to the American Constitution, for this served as a rallying point for the supporters of States rights, just as the British system served as a rallying point for the supporters of a more unitary system. And with States rights was associated the ideal of a strong and inflexible Constitution, while with the other position was associated a certain emphasis on nationalism and popular democracy.

Let us observe the two positions as they were expounded on diverse occasions in all three Conventions; it is important to notice who were the speakers on each side. We can begin with Barton's first speech in 1891:<sup>1</sup>

...before sitting down I should like to read a few words which struck me on looking into a well-known authority last night as to the advantage of a federal union and the division of power. I find this in Story's "Commentaries on the Constitution of the United States", s.291 - a book, as I said, that is of the highest authority; and I think the passage is calculated to give a clear indication in a very few words of the result that will follow upon the exercise of proper caution in the maintenance, on the one hand, of the executive, parliamentary, and judicial strength of a general government within the powers assigned to it, and, on the other hand, the maintenance of state rights in all matters which it is not considered necessary to hand over to the federal authority.

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1. 1891 D, 97. See also Barton's first speech in 1897: 1897 D, 21.

As we already know, men like Barton and Griffith had a firm grasp of the American Constitution; other men, like Parkes, had more enthusiasm for a passionately desired but vaguely conceived national government, than understanding of what "federation" might really involve, or of what sort of constitution was both politically attainable and legally coherent.<sup>1</sup> But there was, especially in the Conventions of 1897 and 1898, a third class of delegates who were never confused, who had a firm grasp of the American and British constitutions, and who opted, by and large, for the British model. These were men like Isaacs and Higgins. The important thing about these delegates is that, though their views were almost always rejected, they never tired of putting them, nor of applying them to every clause in which they were at all at stake.<sup>2</sup> Indeed,

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1. See, e.g., the interchanges between Griffith and Parkes, 1891 D, 450, 456-457.
  2. Cf. the remarks of Leakin on the place of Isaacs and Higgins in 1897: "Isaacs was still more unfortunate in the impression he created, for though his acuteness and research soon won remark, his endeavour to command attention by force and his constant appeal to the general principles of democracy fell flat upon his hearers. He thus drifted hopelessly out of touch with the Convention and of the Constitutional Committee where in a positive manner and with a warmth which appeared to be dictation, he laid down the law to his hearers that [sic] they retorted upon him bitterly and rose against him in revolt. Astonished at this unexpected development but not deterred, and too proud to seek sympathy from friend or foe, he took his way alone along a very unpleasant path.... So far as Higgins took any action, it was in opposition to the rest of his colleagues and to the rest of the Convention so that he began to be reckoned a mere irreconcilable....": Federal Story, 78. But on Isaacs in 1898, cf. 85, 88: and on Higgins, 88. On the antagonisms aroused by Isaacs's "domineering" attitudes as Commonwealth Attorney-General in 1905, see

(continued on next page)

when the final Draft Bill was submitted to the decisive referendum of 1899, Isaacs was the secret mastermind of an abortive government and newspaper campaign against it in Victoria,<sup>1</sup> while Higgins led a public campaign against it with a series of essays and addresses collected and published as a book in 1900. In the preface to this work, Higgins wrote:

The object is to put on record the principal grounds on which the bill was opposed by so many thousands of voters in Victoria and New South Wales, and to show the gallant, uphill fight - which was to a great extent successful - for a constitution more flexible, for a Federal Parliament more amenable to the will of the people who are to live under the federal laws...Even more would have been achieved by the Convention but for a certain pedantic tendency to imitate the United States constitution, in faults as well as in merits.<sup>2</sup>

The body of the book railed against "this vicious system of giving a separate voice to state interests as against Australian interests".<sup>3</sup> There was a boisterous vehemence about men of like opinion; many of their expressions of opinion in the debates of the Conventions took the form of interventions and exclamations:

Holder:....we are assembled to obtain a Constitution which will give us a true Federation, and I should like to add that what I think we want is a democratic Federation.

Isaacs: Hear, hear.<sup>4</sup>

(continued from previous page)

H.G. Turner, The First Decade of the Australian Commonwealth (1911), 110.

1. Deakin, op.cit., 90-94.

2. H.B. Higgins, Essays and Addresses on the Australian Commonwealth Bill (1900), Preface.

3. Higgins, op.cit., Preface.

4. 1897 D., 144.

...Reid:....What model are we substantially to follow - not on every detail, not to the length of every adjustment or compromise, but what historical model, amongst all the historical models, will we prefer to take as the one that must be followed more closely than any other?

Isaacs: The British.

Reid:....Then, if we take the British Constitution as our model, the Executive must be responsible to one House.

Isaacs: Hear, hear.<sup>1</sup>

...Douglas: They have no Constitution in England except custom.

Reid: They have the best in the world.

Isaacs: Hear, hear. The nearer we get to it the better it will be for us.<sup>2</sup>

There is no doubt that, in general terms, the views of Isaacs and Higgins on these matters were the same. In opposition to Griffith's principle that only those matters were to be committed to the central government which could not be dealt with by the States, even collectively, they argued as follows:<sup>3</sup>

Isaacs: Is not the true principle of federation this: that you first select such matters as are all admittedly collective interests, distinctly from purely local interests, and then in legislation in regard to these matters you endeavour as far as possible to obliterate what are, after all, merely arbitrary lines.

1. 1897 D, 274-275.

2. 1898D, 2030.

3. 1897D, 379; and see Higgins, op.cit., 121. The passage from Isaacs was an interjection in the middle of a speech by Barton. In the heat of debate Barton replied "I think my friend has stated the principle with correctness"; but this amounted to little more than a space for thought, and was immediately qualified out of meaningful existence. The apparent admission does not affect Barton's general position in the States rights camp.

This principle was stated even more forcefully, if less precisely, by Isaacs after the select Committees had reported back to the 1897 Convention:<sup>1</sup>

We say there is henceforth to be no distinction between us; let us blot out of our future history and of our future politics the arbitrary fact that we are residents of different colonies.

The exhortation - though its echoes were never to grow faint in the ears of Isaacs himself - was lost on the greater part of the Convention. The more efficacious view was that expressed in 1897 by Trenwith:<sup>2</sup>

The Constitution is the guardian of the state rights.... if we have a proper Federal Parliament with a proper Federal Supreme Court the Constitution will be the guardian of the state rights.

Or in 1898 by Downer:<sup>3</sup>

The very essence of this Constitution is the establishment of a Commonwealth which is not to interfere with the rights conferred on the states, and a tribunal to declare when those rights are imperilled. To provide that the Parliament - the very tribunal whose jurisdiction is intended to be questioned, or over the exercise of whose jurisdiction there is to be a supervising power - should be the authority to decide what the tribunal should be that is to sit in judgment on itself, in disputes between it and the states, is to make an attack on the very cardinal principles on which Federal Constitutions are established.

It was no accident that the states rights position involved a certain emphasis on the independence and security of the High Court. Just as the States House, the Senate, was con-

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1. 1897D, 543.  
2. 1897D, 336.  
3. 1898D, 279.

ceived as a check on the lower House, in which State lines were to have no part, so the High Court was conceived as a further check on the Parliament and on the threat that federal legislation might impose upon the States. Granted the premises of the States rights view, this double check was not groundless, for was it not to be a principle of the federation that "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid"?<sup>1</sup> So the same men who talked of State rights in the context of s.51(xxxv), talked also of the independence of the High Court in the context of Symon's proposed clause 80.<sup>2</sup>

Of course, certain precisions are necessary. In the first place, the views of these men on both s.51(xxxv) and Symon's clause 80 were eventually rejected; though on almost every other matter of consequence it was the States rights position that prevailed. In the second place, it is not to be supposed that Isaacs and Higgins were indifferent to the independence of the High Court. They rejected the extreme form of separation of powers embodied in Symon's clause 80, and, as we shall see, they had a more restrictive view than Barton and O'Connor on the functions of the High Court; but full weight must nevertheless be given to the words of Higgins:

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1. Const. s.109; see Reid's reference to s.109, 1898D, 1385.  
 2. See supra, pp.6.29-6.34.

...it is even more imperative to preserve the independence of this Federal Court in the Australian Constitution. In the American Constitution we have the three authorities -- the Executive, the Legislature, and the Judiciary -- all distinct. The Executive is not controlled by the Legislature; but here under responsible government...the Executive and the Legislature must pull together. So long as the Executive is the creature of the Legislature, so long the Legislature and it must be in harmony, and therefore we have two great powers -- the Executive and the Legislature -- under the Australian Constitution having a great interest to pull one way, and having every temptation so to mould the character of the High Court as to get it to adopt their views....I sincerely hope that we will give [the Judges] the strongest tenure, and make them as independent of any man's favour and any man's hate as we possibly can.<sup>1</sup>

This statement is not by any means to be discounted. But it is remarkable in that it might have been taken from a speech in the British Parliament concerning the independence of British Judges; there is nothing peculiarly "federal" about it, still less any hint that it is the rights of the States that are at stake.<sup>2</sup> Furthermore, it is to be read in conjunction with a debate in 1897. The present s.72, then clause 70, as first submitted to the Convention by the Drafting Committee, ran:

70. The Justices of the High Court and of the other courts created by the Parliament:

I Shall hold their offices during good behaviour:...  
 III May be removed by the Governor-General with [the advice of the Federal Executive Council], but only upon an address from both Houses of Parliament in the same session praying for such removal....<sup>3</sup>

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1. 1898D, 279-280.

2. Note also that Higgins, as a member of the first Federal Parliament, opposed the establishment of the High Court as an unnecessary luxury: see Sawyer, Australian Federal Politics and Law, Vol.I (1956), 24.

3. 1897D, 936.

Of this Symon observed:<sup>1</sup>

Here we are introducing into the Constitution and in relation to the judiciary that which belongs properly to a unified Government, namely, the power of removal of the judges, which does not exist where the system is most perfect, in the United States....

To which it was Higgins who replied:<sup>2</sup>

I think we must trust the Federal Parliament in this thing. I find that in this House, as soon as it suits an hon. member to trust the Federal Parliament he does so, and as soon as it does not suit him, he says, do not trust them.

And on the following day it was Isaacs who said:<sup>3</sup>

Now, I think if we take the position that the judges are not to be removed on the vote of the two Houses of Parliament [that is, without there necessarily being grounds of incapacity or misbehaviour] ... we shall be making a very great mistake, because it will then always be a matter in dispute between the judge in the particular case and the governing power.

It was this that drew from Symon in 1901 the remark that Isaacs did not "sufficiently discriminate between a Constitution in the unified state and a Federation".<sup>4</sup> In 1901, Isaacs and Higgins did not carry the day. On the same occasion, too, they were defeated on a closely related issue, when they supported a motion to delete the requirement in the then clause 69 that there should be a fixed minimum number of puisne Justices on the High Court.<sup>5</sup> And what were these both, but defeats for

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1. 1897D, 936.
  2. 1897D, 939.
  3. 1897D, 947.
  4. 1897D, 950, 951; and see supra, p.6.30.
  5. 1897D, 943.

the slogan "trust the Federal Parliament"?

For the second strand running through the controversy about inserting s.51(xxxv), was the slogan (rather than notion strictu sensu) that the Federal Parliament was to be trusted to act in the best interests of Australia, and so could safely be entrusted with wide powers. Sometimes used by the representatives of the larger States simply in their own interests, in the mouths of men like Isaacs and Higgins the single phrase, "trust the Federal Parliament", was inevitably laden with connotations of nationalism, popular democracy, and of unitary and flexible, as opposed to federal and rigid, conceptions of the Australian commonwealth.

The two strands of thought were thus in fact the same thread, seized at different ends and sewn in opposite directions by men with rival patterns for the one new tapestry of governmental dispositions. The same men who stressed the judicial character of arbitration were those opposed to adding s.51(xxxv) to the powers of the Parliament on the ground that it was a power proper to the States. Throughout the conventions, they were upholders of the States, of the High Court as the protector of State rights enshrined in the Constitution against the Parliament, and of a rigid separation of the High Court from the Commonwealth Executive and Legislature. On the other

hand, the same men who stressed the character of arbitration as both discretionary and a matter of public interest rather than private right, were those who proposed adding s.51(xxxv) to the powers of the Federal Parliament, whose powers the leaders (and future Justices) among them sought always to increase, as against the residual powers of the states which they regarded as merely arbitrary territorial divisions standing in the way of the greater national interests of the Australian people.

Certain correspondences between the personalities on each side and the personalities concerned in the Wheat Case and Alexander's Case will not have gone unnoticed, though the precise significance of these correspondences cannot be evaluated until the developments of the intervening years have been analysed. But already a fairly clear idea is emerging, about what any such analysis is likely to reveal. For, given the way that human minds work, would it be surprising if what, in these test cases, had seemed simply a contrast between independent conceptions of "the judicial power of the Commonwealth", proved to be in fact a manifestation of contrasting conceptions, or webs of interlocking conceptions, of the whole federal system and of the proper working of all its parts? In Chapter Nine it will be demonstrated that this presumption is strikingly confirmed by the ten years of judicial controversy about s.51 (xxxv) that preceded Alexander's Case.

The origins of the Inter-State Commission

What did the founders actually say or think about the meaning of the word "judicial"? This is a question that emerges naturally in connection with the Inter-State Commission. For the powers authorized to be granted to this body include powers of "adjudication", and the question arises whether the founders gave consideration to the meaning of that word, or to its possible relation to the powers of the High Court and other federal courts established under Chapter III.

It seems to have been O'Connor, early in 1897, who introduced the Convention to the suggestion that there be an inter-State tribunal after the American manner, having power to examine the goods rates charged on the State railways and to prohibit rates that effectively gave preference to or from a particular State.<sup>1</sup> Symon was not slow to object to this suggestion:<sup>2</sup>

If you gave power to the federal judiciary, or to a branch of the federal judiciary, or to a Commission in the nature of a judicial body to interfere with these rates, you would immediately constitute a continual source of irritation and discontent on the part of the States who were being interfered with.

Perhaps hardly anyone ever really dissented from this opinion; the Commission was generally regarded as essentially an im-

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1. 1897 D, 61.  
2. 1897D, 139.

perfect but inescapable solution<sup>1</sup> of otherwise irreconcilable clashes of State interest, particularly between New South Wales and her southern neighbour, Victoria. The railways of the two States sought to attract the goods of the Riverina district of New South Wales to Melbourne in preference to Sydney by "preferential" rates, and to Sydney in preference to Melbourne by "differential" rates. Here was a political problem which was to find an essentially pragmatic answer by way of compromise. The first concrete advance on the problem was made by the Finance Committee of the 1897 Convention. On 10th April the "Sydney Morning Herald" reported:<sup>2</sup>

It was resolved [by the Finance Committee] ....2. That there shall be established by the Federal Parliament an inter-State commerce commission in order to deal effectively with all railway matters arising between States and to enforce the principles of equality of trade laid down in the constitution. 3. That the inter-State commission shall have power to regulate all trade on such rivers with their tributaries as flow through two or more States.....

In the Draft Bill which Barton laid before the Convention on 12th April, these resolutions were translated as follows:<sup>3</sup>

96. The Parliament may make laws constituting an Inter-State Commission to execute and maintain upon railways within the Commonwealth, and upon rivers flowing through, in, or between two or more States, the provisions of this Constitution relating to trade and commerce.

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1. See Pysh, 1897D, 235; emphasis added.  
 2. Sydney Morning Herald, 10th April 1897, 10 col.1.  
 3. 1897D, 452.

97. The Commission shall have such powers of adjudication and administration as may be necessary for its purposes, and as Parliament may from time to time determine.

The wording and arrangement of these clauses leaves little doubt that the Commission was intended as a body with powers, inter alia, of execution and enforcement. The meaning of clause 96 was explained by Barton thus:<sup>1</sup>

Let Victoria and New South Wales each make preferential rates within their own boundaries and for purposes of their own internal traffic; but the moment these regulations of traffic are so conducted that they have the effect of preference and the Inter-States Commission can see that they are made for the purpose of drawing trade to either State from a neighbouring State, they are interdicted by the Inter-State Commission.

What did Barton mean by the word "interdicted"? Perhaps the best direct clue to his meaning is provided by his remark in the 1898 Convention, that both the present s.51(i) (giving the Federal Parliament power to legislate with respect to trade and commerce among the States) and s.92 (guaranteeing the absolute freedom of inter-State trade, commerce and intercourse):<sup>2</sup>

enable the High Court to interdict any traffic regulation made by a state which usurps the inter-state authority of the Commonwealth....

The presumption, then, is that Barton intended the Inter-State Commission's powers to extend, if Parliament so desired, to such powers of order and enforcement as would be exercised by the High Court. We shall see that this presumption is effectively

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1. 1897D, 1108.  
2. 1898D, 1375.

confirmed by the later history of these clauses. Barton, indeed, showed clearly enough, in 1897, that he regarded the Commission as a species of court when he observed:<sup>1</sup>

It must not be forgotten that the Inter-State Commission would have no power to adjudicate unless a complaint was brought before them.

O'Connor's conception seems to have been wider, but to have included the powers normally associated with legal process.<sup>2</sup>

In America, for many years until 1878, the railways endeavoured to work under the general provisions of the Constitution, but it was found that it was a simple mockery to refer to the Constitution, because there were so many ways of evading it, as the only mode of bringing evasion to book, was the process of law. It was necessary not only to do that, but to have a tribunal to fix the rate. That can only be done by some body such as this, and it was, therefore, thought well that the body should have the power not only to adjudicate on this question of rates, but should have the power to fix rates, and alter them where they are an infringement of the Constitution.

It was this example, said O'Connor, that had been followed by the Finance Committee in its recommendations. Whether he was right or wrong in his estimate of the powers of the American tribunal was to become a matter of dispute; but, in any event, O'Connor took the word "adjudication" to include the notion of bringing evasions of the Constitution to book, by process of law. As Sir George Turner, the Premier of Victoria, said further in support of the clause:<sup>3</sup>

Our energies should be bent on investing the Parliament with the full authority to give this Commission the fullest possible powers and authority by which justice would be done to all parts of the Commonwealth.

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1. 1897D, 1125.
  2. 1897D, 1116.
  3. 1897D, 1130.

The powers of the Commission were also associated with another clause of the first Draft of 1897, clause 92, which became clause 95 in the final Draft of 1897 and a battleground in 1898:

92. [95] Preference shall not be given by any law or regulation of commerce or revenue to the parts of one State over the parts of another State, and any law or regulation made by the Commonwealth, or by any State, having the effect of derogating from freedom of trade or commerce between the different parts of the Commonwealth shall be null and void.

Of the relation of clause 97 to this clause, Symon said:<sup>1</sup>

The earlier words of the clause [97] would give the Commission the amplest possible jurisdiction for the purpose of regulating this equality of trade.

And Barton said:<sup>2</sup>

I thought I had made myself clear on the legal position. As regards traffic north of the Murray [i.e. in the riverina], it seems to me that a Commission called into existence for executing mandatory powers such as relate to trade and commerce will have to decide within its mandate and within the provisions of clause 92 as to what is equality of trade and commerce; and if it does, and there is a rate which is repugnant to equality of trade and commerce between the States, between the different parts of the Commonwealth, this Commission will abrogate that rate or declare it null and void.

So it is certain that no a priori limits were intended to be imposed on the powers of the Commission and that, had the Convention been thinking then in terms of "types" of power, no limitations as to the type which the Commission might exer-

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1. 1897D, 1136. (emphasis added).  
2. 1897D, 1133. (emphasis added).

cise would have been envisaged. The only doubt cast on this consensus was expressed by Isaacs:<sup>1</sup>

I wish to say, and in the shortest possible terms, that I have serious doubts whether the Inter-State Commission will, under the terms of the sections as expressed, have all the powers that it is fondly hoped and expected it will have.

As will be readily observed, this remark could hardly have been more cryptic. Certainly, it reads like a legal opinion;<sup>2</sup> if Isaacs never explained the basis of the opinion, this was, perhaps, because he had already decided to contest the powers of the commission in the political arena, on a more auspicious occasion.

The opportunity arose in the latter part of the 1898 Convention. The attack on the powers of the Commission as conceived in 1897 was oblique rather than direct. Turner, in whose State cabinet Isaacs was Attorney-General, had by now gone back altogether on his support of the Commission in 1897; he moved to replace clause 95 with a new clause;<sup>3</sup>

95B. The Parliament may make laws to provide for the execution and maintenance upon railways within the Commonwealth of the provisions of this Constitution relating to trade and commerce, and particularly to forbid such preferences and discriminations as it may deem to be undue or unreasonable, or to be unjust to any state.

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1. 1897D, 1139.

2. Perhaps, at this particular time of day on 22nd April 1897, Isaacs was in a reflectively legal mood, for a few minutes later he did what no-one else ever really did, namely, forecast the actual legal difficulties which would be involved in the present s.92, then clause 89. See 1141-1142.

(continued on next page)

Now this essay in "trusting the federal parliament" seems to have made men like Barton react, almost instinctively, to defend, not the Inter-State Commission, but the High Court. For it was then that Barton made his notable statement about his policy of always "objecting to every provision which seeks to take away from the High Court... the consideration of matters which should be matters of adjudication by the court, and the placing of them within the jurisdiction of the Parliament".<sup>1</sup>

On the matter in hand he said forcefully:<sup>2</sup>

To take the control of matters of this sort out of the control of the High Court, and to vest it in the Parliament, is a proposal which I have a rooted objection to....

In answering this objection, Isaacs began to display, perhaps for the first time, the conceptions of judicial and legislative power that carried the day in Alexander's Case:<sup>3</sup>

Is it a mere question of dry law? Is it a mere question of construction of an Act of Parliament or of a regulation? If it were, I should say, undoubtedly, leave it to the Supreme Court. But what is the position? You will have to inquire into the political and commercial position of a country, and into the competitive claims made on the various lines, and you will have to look into a thousand and one considerations wholly foreign to the province and ordinary jurisdiction of a court of law. The Judges should not be asked to decide matters which extend into the political arena, and which might land them in very awkward entanglements, and make the Supreme Court a centre of terrible political conflicts and controversies that might go to the very existence of the states.

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(continued from previous page)

See also F.R. Beasley, "The Commonwealth Constitution: Section 92—its history in the Federal Conventions", (1948-50), Ann.L.R. 97-103.

3. 1898D, 1372.
1. 1898D, 1373. Supra, p.6.38n2.
2. Id.
3. 1898D, 1377.(emphasis added).

O'Connor: Would not that apply to almost any question arising under the Constitution?

Isaacs: No, because an ordinary constitutional question would be determined by a consideration of the document before the court. This is a totally different thing. The considerations which relate to what is a just railway rate between different states should be determined by independent men in Parliament, and not on questions of dry law.

The attack mounted by Isaacs and Turner, therefore, was to be three-pronged.<sup>1</sup> First, the Commission was not to be (as in fact it still was not) embedded in the constitution, but was (if it existed at all) to be the creature of the Parliament. Secondly, the Parliament, rather than any court or Commission, was the proper body to deal with the issues involved. Thirdly, if the Commission was to be deputed to deal with these issues, it was to be in a purely delegated and ministerial capacity, and a matter of investigation and advice rather than of adjudication, enforcement and determinative rate-fixing in its own right. Any ultimate powers of enforcement would rest with the High Court, as in the case of any ordinary federal legislation. But the motive for the whole attack was as stated by Isaacs:<sup>2</sup>

All we desire to do is to raise the one simple question whether it shall be the High Court or the Parliament.

Matters of inter-state preference were matters of policy for Parliament; in such a view the Inter-State Commission was

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1. See 1898D, 1379.  
2. 1898D, 1495.

necessarily no more than an adjunct of Parliament. If the Commission were allowed powers of independent determination and enforcement, after the manner of a court, Parliament's role would be superseded either by the Commission itself, or, more effectively, by the High Court to which appeal from the Commission might lie.

This attack was opposed at every point by O'Connor, Reid and Barton (who all happened to be representatives of New South Wales). Thus they objected that the solution of disputes affecting the Commonwealth and the States was peculiarly the function of the High Court, "deliberately put in the bed-rock of the Constitution" for the purpose.<sup>1</sup> When they were defeated, and Turner's clause 95B was passed, by 25 votes to 16, on 23rd February, they did not give up. Barton and Reid lost little time in letting it be known that New South Wales would never consent to the Draft as it now stood.<sup>2</sup>

The basis of the objection was stated by O'Connor as follows:<sup>3</sup>

The strongest objection which we have to handing over this power to the Federal Parliament is that we are handing it over to a body which, however honest it may be in its intentions, is interested in the deepest possible degree in the determination of the question.

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1. See Reid, 1898D, 1385; O'Connor, 1898D, 1499.
  2. 1898D, 1412-1417, 1467, 1479.
  3. 1898D, 1479. As Reid was wont to say, Parliament would be a "tainted tribunal".

Manifestly, the only road to compromise between the two parties was by way of a body that would be subject to the Parliament yet independent of it, and in some sense analogous to the High Court. This was the road that was in fact to be taken; the determination of the precise nature of the analogy with the High Court was to be held over for a time when tempers should have cooled. The first steps towards finding a middle road by way of the Commission can be observed in a speech by a South Australian representative on 24th February,<sup>1</sup> and a few minutes later the crucial shift away from the rationale of clause 95B was publicly made:<sup>2</sup>

Barton: We have been talking a very long time about this matter, but no time is too long to avert disaster, and nothing but disaster will follow unless some means are taken to bring more closely together those who hold such very doubtful opinions on the subject.

Lobson: Suppose the whole thing could be decided by the High Court or an Inter-State Commission?

Barton: If the matter could be decided by the High Court it would have a very different aspect. But instead of leaving it to the High Court we have left it to the Parliament which might vary as time went on, and might be the scene of combinations for the purpose of expressing what otherwise Parliament would not express.

Turner: Would you accept an Inter-State Commission?

Barton:....If Sir George Turner will consent to submit a proposition in reference to an Inter-State Commission... and if we could accept that proposition, his clause would no longer be necessary.

Turner: I am trying to meet you by departing from my own idea.

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1. Howe, 1898D, 1475.  
2. 1898D, 1478.

About a half an hour later, Isaacs indicated that he, too, was willing to accept an Inter-State Commission "if it is a necessary part of any bargain".<sup>1</sup> Within the space of a further half-hour a clause had been passed, taking advantage of the spirit of compromise. Grant of Tasmania moved:

95C. Nothing in this Constitution shall prevent the imposition of such railway rates by any state as may be necessary for the development of its territory, if such rates apply equally to goods from other states.

Turner and Isaacs, indeed, tried to insert the words "in the opinion of Parliament" after the word "may", but the tide had just turned against them; instead, the words "in the opinion of the Inter-State Commission" were inserted on the motion of one of the members who had, the day before, supported Turner's clause 95B. This amendment was inserted in the motion without division and the whole clause was passed by 22 votes to 21.<sup>2</sup>

#### IV

#### The powers of the Inter-State Commission

But what sort of Inter-State Commission was meant? The Commission as conceived in 1897; or the Commission as conceived by Isaacs? The Convention wisely left the answer to these questions to emerge gradually over the following fortnight.

The first step was to reconsider clause 96. First thing

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1. 1898D, 1494.  
2. 1898D, 1510.

next morning, Kingston argued that the form of clause 95C "necessitates, if effect is to be given to it, the appointment of an Inter-State Commission, because it provides for certain powers to be exercised by that body".<sup>1</sup> Barton - who had admitted two days earlier that he had "always had an attachment to the idea of an Inter-State Commission.... this has been one of my pet ideas"<sup>2</sup> - was not slow to seize his opportunity. The feeling of the Convention at the time was probably expressed, not by Isaacs with his learned citation of American difficulties with the United States Commerce Commission,<sup>3</sup> but by McMillan and Kingston:

McMillan:...If I understand the object of this tribunal aright, it is to be practically a non-political tribunal of a judicial character to interpret the Constitution.... I understand that one of its chief functions will be to interpret and adjudicate upon matters arising out of the trade and commerce provision ...and if we are going to have a tribunal of this kind - and I assume that we have practically carried the principle, by arrangement at any rate - then we ought to decide that it shall be as nearly as possible -

Kingston: An independent body.

McMillan: Yes, an independent body, introduced into the Constitution very much as we have introduced the Supreme Court....<sup>4</sup>

Kingston: I will ask honorable members of this Convention: If the Inter-State Commission is to have power to abrogate, if it thinks necessary, federal legislation, is it not absolutely necessary, as pointed out by Mr. McMillan, that this body should be independent of the Parliament, and should be as secure within the realm of its jurisdiction

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1. 1898D, 1513.
  2. 1898D, 1323.
  3. 1898D, 1515.
  4. Id.(emphasis added).

as the Judges of the High Court?<sup>1</sup>

Even Turner agreed with this.<sup>2</sup> Kingston then moved a motion to implement these ideas; his amendment, replacing the words "Parliament may make laws constituting" with the words "There shall be", was agreed to without division.<sup>3</sup> Quick then moved two motions to give effect to Barton's suggestion<sup>4</sup> that the restriction to railways and rivers should disappear. Only one voice was heard in protest:<sup>5</sup>

Isaacs:....Well, it seems to me that a body of railway experts are having a duty cast upon them that will not only supersede the powers of Parliament altogether, but will be contrary to what we desire.

Barton: They need not be railway experts necessarily. Their powers would be defined by the Parliament, and there would be an appeal to the High Court.

Isaacs: It seems to me to be superseding the powers of the Parliament. I am afraid of it.

The motions were thereupon agreed to without division,<sup>6</sup> and the

1. 1898D, 1517 (emphasis added): see Kingston: "I voted with Mr. Isaacs against giving power to the Inter-State Commission to protect state railways against federal legislation. We were beaten on that division. I was very sorry for it, but I am bound to loyally abide by that decision of the Convention, and to do what I can to give effect to it. It seems to me that...if you are going to allow the Constitution to remain in this shape, that the Federal Parliament can either appoint that commission or hold its hand, you run a very great risk of the Federal Parliament refusing to do anything, or delaying to do anything, to call into existence a body which will in the slightest degree review the Parliament's decisions": 1898D, 1516.
2. 1898D, 1524.
3. 1898D, 1536.
4. 1898D, 1525.
5. Id.
6. Id.

Chairman read the new clause:<sup>1</sup>

96. There shall be an Inter-state Commission to execute and maintain within the Commonwealth the provisions of this Constitution relating to trade and commerce.

Reading over the hectic debates of the previous two days, it is impossible to doubt that the resulting consensus envisaged not a weakening of the Commission of the 1897 Draft Bill, but a strengthening. As Symon said:<sup>2</sup>

The Inter-State Commission will have a function similar to that possessed by the High Court, but in regard to other matters.

The views of Isaacs about the proper potential status and functions of the Commission had been rejected, no doubt, simply in pursuit of the compromise necessitated by his own State's attempt to commit everything to the Parliament: and they were rejected hastily, no doubt, in a mood of exhaustion and impatience; but they could hardly have been more decisively rejected.

Isaacs never tired of protesting against the revived conception of the Commission's powers; but he never received much support; Glynn remained hostile to the Commission, and Turner's views sometimes wavered from the compromise he had allowed himself to promote. Higgins, too, persisted in advancing a narrow

1. 1898D, 1536.

2. 1898D, 1521.

interpretation of the Commission's functions. But these few were hardly a force to fear in the remaining relevant debates, of which the first concerned clause 74, as it then was:<sup>1</sup>

74. The High Court shall have jurisdiction...to hear and determine appeals from all judgments, decrees, orders, and sentences:

I Of any other federal court....

II Of the Inter-State Commission.

When this clause came up for discussion early in March, Turner moved that sub-clause II be omitted, pointing out with some plausibility that it went back on the bargain whereby neither Parliament nor the High Court should control railway rates. O'Connor agreed that appeal to the High Court from the Inter-State Commission should be restricted to matters of law only. But such an appeal, he said, was necessary:

How will this body exercise its powers? It may exercise them by judicial acts, by decisions in regard to rights, and a number of other matters. If in those decisions it goes beyond the limits of the Constitution as assigned to it, surely there must be power in the High Court to review those decisions....<sup>2</sup>

Higgins: It is not a court; it is a jury of experts, like our railway Commissioners.<sup>3</sup>

O'Connor: The honorable member says it is not a court. It may or may not be a court in the technical sense of the word; but if it has power to give decisions, surely that is the first essential of a court; and if it gives decisions which are not in accordance with the Constitution there should be some power of reviewing them.... Considering the powers of adjudication which you give to the Inter-

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1. 1898D, 2276.
  2. 1898D, 2277. (emphasis added).
  3. 1898D, 2278; see also Higgins at 1898D, 1265, 1268.

State Commission, unless you provide that the decisions which you give it the power to make are to be altogether irresponsible there must be a power of appeal from such decisions...

Higgins: Would you allow an appeal from the directors of a company?<sup>1</sup>

O'Connor: I hope the honorable member will ask something relevant and analogous....

Isaacs:....I cannot see why you are to put in clause 74 the Inter-State Commission, when you have given the judicial power of the Commonwealth [under the then clause 73] extension to all cases under this Constitution or involving its interpretation.... Why will not that include any decision of the Inter-State Commission which is contrary to this Constitution?...

O'Connor: For this reason....You have given power to the High Court to entertain appeals from federal courts and courts invested with federal jurisdiction, and if you want to include the Inter-State Commission, which is not a federal court, and is not invested with federal jurisdiction, you must mention it specially.

Isaacs:....I base my objection to this provision not only on the ground which has been urged by my right honorable friend (Sir George Turner), but also on this ground, that I want to eliminate the constitutional creation of the Inter-State Commission. I think it is a great mistake that we should erect this body - a fourth branch of the Constitution - when it ought to be a matter for consideration of the people of the Commonwealth hereafter, through the Federal Parliament, to say what they will or will not have.

O'Connor: Surely that was decided in clause 96. The proper place to reconsider that question is when we come to that clause.<sup>2</sup>

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1. 1898D, 2279. (emphasis added).
  2. 1898D, 2279. (emphasis added).

Glynn, a long standing opponent of the Inter-State Commission,<sup>1</sup> took up the discussion on behalf of Turner's amendment by pointing out that in America the Inter-State Commission (contrary to what O'Connor had represented in 1897) was not a judicial body:<sup>2</sup> This, the Chairman said, was irrelevant. But Higgins sought to put Glynn's point in another way:

Higgins:....The Inter-State Commission is not a body that acts. It is a body that simply decides upon facts - "Is a rate good?" "Is a charge an infringement of the Constitution?".... That is all the Inter-State Commission has to decide, and I understood Mr. Symon to say that it is a court, and that there should be an appeal.<sup>3</sup>

Symon: Oh no. I understood you to say that if the Commission did not act; and I say that if the Commission has to decide, there has to be an appeal.

Higgins: They have to decide but not as a court.

Reid: The commission is to be "charged with the execution and maintenance within the Commonwealth of the provisions of this Constitution, and of all laws made thereunder relating to trade and commerce".

Higgins: It is clumsily expressed, but at the same time I should take that with the other clauses about adjudication, and I should take the intention to be that they are to see by their decisions about rates and the rest that the laws are executed; but they will not execute the laws.

Reid: It is an idle tribunal if it simply meets and expresses an opinion and cannot enforce its decisions.

Higgins: In America -

Reid: I do not mind that; the American conditions are not parallel.

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1. Cf. 1898D, 1379.
  2. 1898D, 2280, 2281.
  3. 1898D, 2282.

... Higgins:....It is not an executive body in the sense that it has to do a thing, but it simply has to follow the analogy of the United States of America....I interjected, and I think relevantly, when Mr. O'Connor was speaking, that it is not usual to allow an appeal from directors of a company if they are acting within the purview of their by-laws....

Reid: If your understanding of the Commission is right I quite see the force of what you say; but we differ as to what the Commission is to be.

Higgins:....I am trusting the Drafting Committee to put this language right.

Holder: It is right now; it will be wrong if it is altered.

Higgins: I do not think it is the intention of this committee [of the whole Convention] to put the Inter-State Commission in Australia in a different position to what a similar body is in America.

O'Connor: It has been done already in clause 96.... You have given power to the Parliament to give power to the Inter-State Commission to adjudicate for the purpose of the maintenance and execution of the provisions of the Constitution. That enables the Parliament to constitute the commission in such a way as to get rid of the difficulty that has occurred in America; and it may give power, not only to decide that a rate is illegal, but to enforce that decision, and also to award damages or compensation to persons who have been injured by the rate ....If powers of adjudication of that kind are given, surely you will have a court with a power of adjudication which will deal with matters of infinitely larger concern than your ordinary courts will have to deal with. If you constitute a body of this kind, surely you are not going to put such a body in an absolutely irresponsible position.<sup>1</sup>

Two minutes later Turner's amendment was negatived without division, and within a further two or three minutes sub-clause II of clause 74 was amended by adding the words "on questions

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1. 1898D, 2284, (emphasis added).

of law only". It cannot be doubted that O'Connor and Reid had been speaking for the effective consensus.

Later in the morning of the same day, the final reconsideration of the Inter-State Commission's general powers took place. On Barton's motion clause 95B was struck out, and a new clause 95F was brought forward to replace clause 95C. Now was the last opportunity for Turner and Isaacs to revise the compromise which they regarded as a defeat:

Turner: I now propose to test the feeling of the Convention as to whether we are to allow these great powers to be in the hands of this Inter-State Commission, or whether we will reserve them for Parliament....<sup>1</sup> I fail to see why we cannot intrust to the Parliament the power to deal with these matters, which appear to me to be purely political.

Reid: I should call them judicial.

Turner: Then they ought to go before the High Court. That is practically the decision which my right honorable friend has brought about. He wanted these questions to go to the High Court straight away, while we wanted them to go to the Parliament.

Reid: We met you half-way by establishing the Inter-State Commission.

Turner:....I move "That the words 'Inter-State Commission' be struck out, with a view to the insertion of the word 'Parliament'".

O'Connor:....We agreed that the only fair way of dealing with the question was to hand it over to the Inter-State Commission....

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1. 1898D, 2390.

Issacs: There are a little over a dozen members present to decide a matter of utmost importance - the creation of a fourth organ - in this Constitution.

O'Connor: The question has been pretty well thrashed out already.

Issacs: We have the Parliament, the Executive, and the High Court, and now a fourth organ is created independent of all the rest - the Inter-State Commission.

Reid: One you cannot get at - one that is thoroughly independent.<sup>1</sup>

A few minutes later, Turner's amendment was rejected by 22 votes to 15, the new clause 95F was agreed to, and clause 95C was struck out. A further new clause 95 G was forthwith inserted by a similar majority,<sup>2</sup> and the two clauses, 95F and 95G, now stand as sections 102 and 104 of the Constitution. The final step was to confirm that the Inter-State Commission would be "embedded in the Constitution". To clause 96, Turner moved an amendment: "That the words 'There shall be' be omitted with view to the insertion of the words 'Parliament may constitute'.<sup>3</sup> This amendment, too, was rejected by 23 votes to 13.<sup>4</sup> The scheme was complete; it remained only for the Drafting Committee to polish it into the form of the present ss.101, 102, 103 and 104.

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1. 1898D, 2391, (emphasis added).
  2. 1898D, 2393.
  3. 1898D, 2394.
  4. 1898D, 2395.

In the light of all that had happened, no-one could have disputed Deskin's remark in his closing speech to the Convention, a week later;

[The Inter-State Commission] will feel that they are, by appointment and function, a truly federal court.....

By all this we vindicate the claim made in Section IV of Chapter Five, that the dissent of Barton and Gavan Duffy JJ. in the Wheat Case was in all respects in conformity with the historically discoverable intention of s.101 in the present Constitution.<sup>2</sup>

#### V

#### "Judicial power" in the debates on the Inter-State Commission

We have emphasised that the Commission, as it emerged from the 1898 Convention, was the creature of a compromise necessitated by Victoria's essay in "trusting the Federal Parliament". But its roots go deeper than that, for even in 1897 the powers of the Commission as designed by Barton and O'Connor were so broad as to transcend any Abstract distinction between such "types" of power as "legislative" or "judicial". Evidently, then, there were differences, more basic than political manoeuvres, about what powers might properly assigned to the tribunal. O'Connor and Symon (once he had recognised the need for it as a compromise) regarded its powers, as we

1. 1898D, 2503. See also Kingston and Barton, 1898D, 2458.

2. Quick and Gavan, op. cit., 202: "it was thus contemplated that the Commission should have judicial functions".

have seen, as proper to a court, on the ground that what was involved was a process of "decision". Barton apparently had an analogous conception of how powers should be disposed as between the various institutions set up by the Constitution. For, in regard to a parallel issue, the question of the "navigability" of rivers and "reasonable" use of the river waters for irrigation, he observed, in 1898:

I believe, as I have believed all along, that a question of that kind is most fit for the determination of the High Court, and much more fit for its determination, and even for the determination of the Inter-State Commission, than for the determination of Parliament.... What I say is that the Federal Parliament ought to deal with the making of laws within the powers intrusted to it, and ought not to deal with legal rights existing at the time of the establishment of the Commonwealth.... Therefore, the rational decision in that regard is to leave a competent tribunal to decide legal rights which ought to be within the determination not of the Federal Parliament, but of the tribunal we constitute for the purpose of deciding legal rights.... The legislation is for the Parliament; but the adjudication of rights should be left to the courts.

For Barton, therefore, decisions as to rights were not proper to the Legislature, even where the right was so much a matter of creative discretion as a right to a "reasonable use of waters", and even where the content of the right would change through time under the surveillance of the courts.<sup>2</sup> The comments of Isaacs on this view were characteristically direct:

The fallacy of that argument lies in this consideration: That this is not a question of legal rights to be measured by some legal standard or statutory provision, but of the

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1. 1898D, 1984, (emphasis added).  
 2. 1898D, 1984.

requirement of the states in relation to their development.... We should not bring the Supreme Court into political discussions under any consideration.<sup>1</sup>

Commenting further on what is now s.100, Isaacs remarked:

I am not clear, certainly not as clear as Mr. Barton is, in thinking that the High Court will have to decide what is reasonable or not, because reasonableness in political matters is a question that is generally left to the Legislature....It is put that it is a "matter" [within the then clause 73]. Now, if that is a matter, I do not know what is a matter....I understand that the word "matter" means a question of ordinary judicial interpretation in a controversy that is known as an action or suit...<sup>2</sup>

Earlier in 1898, Isaacs had sought to make the same point:

I presume that when we come to questions arising under the Constitution the term ["matters"] will be restricted to such subjects as are really judicial matters. In the United States Constitution the words used are "judicial cases". The question may arise as to whether the term "matters" may not include matters partaking of a political nature....

Barton: It is a good thing to have a wide expression.

...O'Connor: The court can only adjudicate according to fixed principles of law.<sup>3</sup>

We have already seen how O'Connor's notion of the scope of decision "according to fixed principles of law" differed from Isaacs's notion of "mere questions of dry law" and "mere questions of construction"; the following dialogue, early in the 1898 debates on the railway rates, shows the differences of approach even more clearly:

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1. 1898D, 1985-1986.
  2. 1898D, 2275, (emphasis added).
  3. 1898D, 319.

Isaacs: Therefore, if the court has to consider whether it would be beneficial from a railway point of view and injurious from an agricultural point of view...and to weigh all the advantages and to sum up all the difficulties, and then come to its conclusion as to whether, on the whole, it is calculated to develop the resources of the state, it is idle to put it on the plane of the High Court or to refer the question to a judicial power at all....<sup>1</sup>

O'Connor:....Does the hon. gentleman [Isaacs] forget that there are scores of matters in the Constitution to be determined by the High Court, and which must depend on the finding of that court, on questions of fact? If the High Court is to be of any value in the Constitution it must be prepared to decide all questions involving disputes between states, and all questions involving the assumption by the state or by the Commonwealth of some power which the Constitution has not given it. I am perfectly willing to hand over to the Inter-State Commission the determination of those questions... if those questions are restricted to matters arising on inter-state commerce.<sup>2</sup>

So yet once again we find Isaacs divided from his future judicial colleagues, Barton and O'Connor, in a matter of fundamental conceptions, of working models of a right polity. Yet once again we find that, if anyone did, it was Barton and O'Connor who spoke for the effective consensus of the Convention. And once again we seem to see a real fore-shadowing, in Isaacs's Convention speeches, of the majority judgment in Alexander's Case, and, in Barton and O'Connor's speeches, a like indication of the later approach of Barton and Griffith to the subject of "judicial power". For in the speeches of Isaacs we find the

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1. 1898D, 1493.

2. 1898D, 1499.

emphasis on the character and criteria of the act of decision itself, while in the speeches of Barton and O'Connor we find the more institutional emphasis on the status of the court or commission as independent and potent arbiters on matters in dispute.

Thus the rival conceptions of judicial power were intimately associated with the general federal question of the proper extent of the Parliament's powers. Someone like Isaacs, who sought wide powers for Parliament, extended the area of the "political", and narrowed the area of the "judicial" by reference to questions of "dry law" and "mere construction". Men like Barton and O'Connor preferred to entrust the final decision of disputes as to constitutional powers to an independent institution, a court, regardless of the precise "nature" of the act of decision required, and regardless of the precise origin or status of the rights being determined.

Reflecting on this history, and on its apparently extraordinary outcome in the Wheat Case and Alexander's Case, one may be permitted to remark that there is a certain unconscious irony in Isaac Isaacs's view that the judicial function essentially is a matter of mere construction of pre-existing, dry law.

## CHAPTER EIGHT

### The first phase of judicial analysis (1904 - 1918) - the uncontroversial part

This chapter and the next investigate the judicial discussions of judicial power that preceded the watershed of the Wheat Case and Alexander's Case. They constitute a proof of the influence of general theories of law and of federalism on these judicial discussions. The proof is two-fold; (1) where questions of federalism were not at stake, agreement on questions of judicial power was general; (2) where questions of federalism were at stake, disagreement on questions of judicial power was constant and demonstrably (if not logically) determined by the rival attitudes to federalism. This chapter undertakes the first part of the proof, the next chapter the second.

Problems and features of the discussions are introduced that will become prominent in subsequent chapters on later phases of the Australian judicial analysis of judicial power. These problems and features are of a now predictable character - the tension between historical intentions and formal symmetries; the employment of restricted sets of a few vague terms, and of simple models, and even of postulated "origins of human society", in the pursuit of "essences" that contain but obscure

a choosing and grading of values; the consequent fumbling of borderline cases and failure to advert to degrees of judicialness and to the relevance of changing contexts; and the development of equivocal but convenient doctrines of "ancillary" or "incidental" functions. What these two chapters seek to show is the special pressure, in judicial discussion, to succumb to these analytical deficiencies.

## I

The first case

In Ah Yick v. Lehnert (1905)<sup>1</sup> it was argued that s.77 of the Constitution, empowering Parliament to invest State courts with federal jurisdiction, was restricted to original jurisdiction, since it was part and parcel of ss.75 and 76, which dealt only with original jurisdiction and were separate and distinct from s.73 dealing with appellate jurisdiction. In the course of this argument, Griffith C.J. interrupted to observe that s.71 of the Constitution authorised the vesting of judicial power in such courts as the Parliament invested with federal jurisdiction; and judicial power "must include appellate as well as original jurisdiction".<sup>2</sup> The judgment of the Chief Justice elaborated these observations:<sup>3</sup>

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1. (1905) 2 C.L.R. 593.  
 2. Ibid., at 597.  
 3. Ibid., at 603.

judicial power is an attribute of sovereignty which must of necessity be exercised by some tribunal.... that tribunal must be constituted by the sovereign power, and...the limits within which the judicial power is to be exercised by the tribunal must be defined....The term "federal jurisdiction" means authority to exercise the judicial power of the Commonwealth, and again that must be within the limits prescribed. Then "federal jurisdiction" must include appellate jurisdiction as well as original jurisdiction. The whole scheme of the Constitution assumes that the judicial power includes both in the case of the High Court, and from the history of the Constitution and the practice in English-speaking countries, it must be taken for granted that the judicial power was known by the framers of the Constitution to include both, and that those framers intended that the judicial power might be exercised by Courts of original jurisdiction and by Courts of appellate jurisdiction.

From the vantage-point of Alexander's Case, hindsight discerns many nuances in this passage. In the first place, it is framed in abstract terms; judicial power is an "attribute". But, in the second place, it is the first occurrence of the dictum of which Griffith C.J. proved to be so fond: "judicial power is an attribute of sovereignty". The force of this dictum seems to be to focus attention on the fact that judicial power has to do with government; taking it together with the succeeding sentence, which adverts to the "necessity" of a tribunal, we can see how it fits in with the tribunal-centred analysis which Griffith C.J. was to oppose to Isaacs J.'s act-centred analysis in Alexander's Case. Then, in the third place, we have the interesting suggestion that "the history of the Constitution and the practice in English-speaking

countries" provide the proper elucidation of "judicial power"; and the recognition, shown by the word "known", that the phrase, as used in s.71, has its own autonomous definition, independent both of further definition in Chapter III and even, to some extent, of the circumstances of its use there.

## II

### "Judicial" in non-constitutional contexts - the first cases

In R. v. Arndel, ex parte Freeman<sup>1</sup>(1906) an application was made for Mandamus or Certiorari to issue to the Commonwealth Post Master-General to quash an order made by him under s.57(1)(e) of the Post and Telegraph Act 1901 (Cth):

- 57(1) If the Post Master-General has reasonable ground to suppose any person to be engaged in receiving money or any valuable thing - (e) in connexion with a fraudulent obscene indecent or immoral business or undertaking; he may by order under his hand published in the Gazette direct that any postal article received at a post office addressed to such person...shall not be registered or transmitted or delivered to such person.

Griffith C.J., Barton J., and O'Connor J agreed in rejecting the application. Griffith C.J. (citing American authorities) held that the duty of the Post Master-General was not a mere ministerial duty, since it involved the exercise of a discretion and the formation of an independent judgment one way or the other: the Court could not issue Mandamus to revise

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1. (1906) 3 C.L.R. 557.

such an independent and discretionary judgment. On the other hand, Certiorari would not lie, even though a party had been prejudiced unheard, for the Post Master-General's act was neither judicial nor quasi-judicial. The mere fact that the statute required the Post Master-General to form his judgment upon evidence did not imply that an action prima facie executive in character was to be regarded as judicial or even quasi-judicial in any relevant sense. "The act is only quasi-judicial in this sense, that it is required to be made upon evidence".<sup>1</sup> Barton J., too, refused to be confined within the two-way ministerial-judicial classification proposed by the applicant. What Griffith C.J. had called "executive", he called "administrative"; the functions of the Post Master-General under s.57(i) were prima facie administrative, and this inference was materially strengthened by the circumstance that s.57, in contrast to ss.29 and 43, had no provision for appeal.<sup>2</sup> O'Connor J. rather inverted one of the emphases in Griffith C.J.'s judgment by remarking that an obligation to hear evidence was "one of the marks of a judicial proceeding".<sup>3</sup> But in this case there was no obligation on the Post Master-General to hear evidence; it was essential to the practical working of the

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1. Ibid., at 572.  
 2. Ibid., at 575.  
 3. Ibid., at 582.

section that he be able to act from his own knowledge or from departmental reports, as well as from full proof. Hence action under s.57(i) did not involve any judicial proceeding.

In Newcastle Coal Co. Ltd. v. Firemen's Union (1908)<sup>1</sup>

the application to the High Court was for Prohibition restraining the New South Wales Industrial Court and the Firemen's Union from further proceeding in the matter of a recommendation to the Governor of New South Wales to appoint a local Wages Board under s.17 of the Industrial Disputes Act 1908 (N.S.W.). Griffith C.J., Barton, Isaacs and Higgins JJ. concurred in holding, without stating reasons, that the proceeding sought to be restrained, being merely a recommendation by the Industrial Court to the Governor, could not be regarded as a judicial proceeding. The decisive element may have been the absence of any final determination between the parties contending the application to the Industrial Court. Or it may have been the fact that the proceedings before the Industrial Court affected no-one's legal rights adversely. For in the following year, in Evans v. Donaldson<sup>2</sup> (1909), Griffith C.J. (with whom Barton J. simply concurred) stated that Certiorari would lie "to review the act of any body of persons

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1. (1908) 6 C.L.R. 466.  
2. (1909) 9 C.L.R. 140.

like justices which has the effect of depriving a man of his legal right".<sup>1</sup>

In Evans v. Donaldson the High Court<sup>2</sup> issued Certiorari to bring up an order made by Justices in Petty Sessions removing an inspector appointed by them under s.7 of the Weights and Measures Act 1853 (N.S.W.) (the Act making no provision for the removal of such an inspector). Griffith C.J. did not explicitly suggest that he was laying down a definition of the word "judicial". He accepted that the law on the subject of Certiorari was laid down by the Court of Appeal in R. v. Woodhouse<sup>3</sup> (1906), and quoted Fletcher-Moulton L.J.'s judgment in that case at some length. Fletcher Moulton L.J. had said:<sup>4</sup>

The writ of certiorari is a very ancient remedy, and is the ordinary process by which the High Court [of Justice] brings up for examination the acts of bodies of inferior jurisdiction....It is frequently spoken of as being applicable only to "judicial acts", but the cases by which this limitation is supposed to be established show that the phrase "judicial act" must be taken in a very wide sense, including many acts that would not ordinarily be termed "judicial". For instance, it is certainly not limited to bringing up the acts of bodies that are ordinarily considered to be Courts....The true view of the limitation would seem to be that the term "judicial act" is used in contrast with purely ministerial acts....In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law.

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1. Ibid., at 151.

2. Griffith C.J., Barton and O'Connor JJ.

3. [1906] 2 K.B. 501.

4. Ibid., at 534-535.

Thus Fletcher-Moulton L.J. had, to say the least, abstained from suggesting that in determining the scope of Certiorari he was determining the meaning of "judicial" in any universally applicable sense. On the other hand, Vaughan Williams L.J. (with whom Stirling L.J. concurred) omitted qualifications about the special meaning of the word in the context of Certiorari. Thus there is some uncertainty about the true interpretation of R. v. Woodhouse; this might have been of less relevance had Griffith C.J. limited himself to a citation of Fletcher-Moulton L.J.'s opinion. As it was, however, he went on to remark that "Vaughan Williams L.J. expressed himself to the same effect".<sup>1</sup> So it may be that Griffith C.J. was indifferent to the question whether or not his rule concerning the issue of Certiorari also amounted to an elucidation of a general notion of "judicial" acts. O'Connor J., on the other hand, was careful to limit his discussion of "judicial" to "the sense in which the law understands the expression in applications for certiorari".<sup>2</sup> He adopted as the test Fletcher-Moulton L.J.'s dictum that "there must be the exercise of some right or duty to decide". But the confusing state of terminology is shown by Fletcher-Moulton L.J.'s treating the test as one

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1. 9 C.L.R. 140, 151.
2. Ibid., at 157.

for distinguishing a duty to act "judicially" (for purposes of Certiorari) from, at one point in his judgment, matters of "pure discretion", and, at another point in his judgment, from actions "merely ministerial".

A succession of somewhat similar cases in 1909 and 1910 elicited some clarifications from the High Court. Deshwood v. Maslin (1909)<sup>1</sup> was an appeal from an order made by the South Australian Supreme Court in the exercise of its power, under s.28 of the Matrimonial Causes Act 1867 (S.A.), to appoint, "if it thinks fit", a practitioner of the Court to act as Crown Proctor. Griffith C.J., Barton, O'Connor and Isaacs JJ. agreed in holding that the order of the Supreme Court was judicial and thus could be reviewed on appeal. Griffith C.J. observed that the power of the Supreme Court was discretionary, but regarded this as no bar to its being also a judicial power.<sup>2</sup> Barton J. discussed the question using both the phrase "judicial act" and the phrase "judicial power". He distinguished a "discretionary" from an "arbitrary power".<sup>3</sup> For him, an important step in showing that a power was to be exercised judicially, was to show that the Court did not act simply "ex mero motu"<sup>4</sup> ("purely on its own volition"),<sup>5</sup>

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1. (1909) 9 C.L.R. 451.
  2. Ibid., at 455.
  3. Ibid., at 460.
  4. Ibid., at 460.
  5. Ibid., at 459.

but rather "upon a proper application".<sup>1</sup> O'Connor J. based his opinion on the fact that the Crown Proctor could not, in the light of the Matrimonial Causes Act, be regarded as an official of the Supreme Court.<sup>2</sup> Thus his appointment was not an "official or ministerial act, just as the appointment of a registrar would be".<sup>3</sup> Isaacs J. expressed the antinomy as one between "judicial action" and "executive action".<sup>4</sup> The appointment of the Crown Proctor was "judicial action", for Isaacs J., largely because it was associated in the Act, in time and in the matter of ordering security for the Proctor's costs, with other indubitably judicial acts.

Incorporated Law Institute of New South Wales v. Meagher<sup>5</sup>

(1909) displays certain differences of approach, between Griffith C.J. and Isaacs J., that will not come as a complete surprise. This was an appeal against an order of the New South Wales Supreme Court, reinstating a legal practitioner to the roll, from which he had been struck off by the same Court some years previously. It was urged in limine that the High Court had no jurisdiction to entertain such an appeal because the Supreme Court in admitting a solicitor acted

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1. Ibid., at 460.
  2. Ibid., at 465.
  3. Ibid., at 465.
  4. Ibid., at 469.
  5. (1909) 9 C.L.R. 655.

ministerially and not judicially. Griffith C.J. and Isaacs J., together with Higgins J., rejected this submission of the respondent's. The Chief Justice was content to observe that the order by which the respondent had been struck off was indisputably judicial:<sup>1</sup>

and I fail to understand how the operation of a judicial order can be varied except by a like order. Apart from that point, I think that the universal practice of the Courts in Great Britain shows that an application for the admission, removal, suspension or re-instatement of a practitioner has always been regarded as a judicial proceeding.

Isaacs J., on the other hand, having observed that the order appealed from presented all the formal indicia of a judicial order, proceeded to stress the fact that the order of the Supreme Court affected positive legal rights and was made in discharge of a legal obligation.<sup>2</sup> The New South Wales Charter of Justice imposed on the Supreme Court a legal obligation to admit none but fit and proper persons. The force of Isaacs J.'s argument appears to have been that such an obligation must entail a correlative legal right, and that decisions affecting legal rights would be "judicial" where decisions with the same indicia but not affecting legal rights would not be "judicial".

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1. Ibid., at 661.
  2. Ibid., at 682. Cf also per Isaacs J. in Commonwealth v. Limerick Steamship Co. Ltd. and Kidman (1924) 35 C.L.R. 69, 98.

But despite the difference between the approaches of Isaacs J. and the Chief Justice in this case, and the hints of Isaacs J.'s concern for the existing legal right as the key to the meaning of "judicial", we must not stress the distinction. For in 1910 we find Isaacs J. concurring in a judgment by Griffith C.J. which employed the notion, very similar to that used by Isaacs J. in Meagher's Case, that "a power conferred upon a judicial officer eo nomine to make an order to the prejudice of another is prima facie judicial" and thus not "dictatorial or unappealable".<sup>1</sup> This was in the case of Owners of s.s. Kalibia v. Wilson, an appeal from a court order for the detention of a ship under s.13 of the Seamen's Compensation Act 1909 (Cth), which provided that, if it were alleged that the owner of a ship within the territorial waters of Australia was liable to pay compensation under the Act, a Justice of the High Court or a Judge of the Supreme Court might, upon the applicant showing that the owner was probably liable to pay compensation and did not reside in Australia, order the detention of the ship until security had been given for the payment of any compensation that might be awarded. The respondent argued<sup>2</sup> that the powers conferred by s.13 were not judicial and

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1. (1910) 11 C.L.R. 689, 694.

2. Basing his argument on Moses v. Parker [1896] A.C. 245.

thus not appealable. The full High Court rejected this preliminary point, for the reason just reproduced from Griffith C.J.'s judgment, a reason very similar to one of the grounds on which, as we surmised, Newcastle Coal Co. Ltd. v. Firemen's Union had proceeded. The Chief Justice's repeated use of the notion of "adversely affecting legal rights" outside the context of Certiorari lends weight to the view that in Evans v. Donaldson he had not intended that his rule, about "acts of any body of persons like justices which have the effect of depriving a man of his legal right", should be restricted to uses of the word "judicial" in the context only of Certiorari.

Finally, in this series of cases, there was Randall v. Northcote Corporation (1910).<sup>1</sup> The Local Government Act 1903 (Vic.) empowered a District Council, on the application of the occupier of a sports ground, to grant a licence for the ground "if they see fit". Griffith C.J., O'Connor, Isaacs and Higgins JJ. agreed in refusing to issue Mandamus; the Council had a discretion, and a Mandamus could do no more than order it to exercise that discretion. There was here no ground for holding that the Council had failed or refused to exercise their discretion or had proceeded on some extraneous or arbitrary principle. A distinction, (quite absent from, for example, Barton J.'s judgment in Dashwood v. Maslin) was drawn between

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1. (1910) 11 C.L.R. 100.

bodies exercising judicial functions and bodies not exercising such functions but having a duty to "act judicially". O'Connor J. said:<sup>1</sup>

Confusion I think has been caused in some statements of the law by use of the word "judicial". The Council are not for the purposes of the application a judicial tribunal, nor are they exercising judicial functions, and many restrictions on the exercise of discretion by the Courts and safeguards against bias in judicial tribunals have no application to cases such as this. But the discretion conferred on public bodies in discharge of merely administrative functions must in many cases be exercised in what some Judges have described as "a judicial spirit". What is meant by that phrase is explained by Lord Halsbury L.C. in Sharp v. Wakefield<sup>2</sup>....

Griffith C.J., while not explicitly adverting to this distinction between "judicial functions" and "acting judicially", adopted the same language of Lord Halsbury, as an explication of the meaning of the discretion to be exercised by persons granting registration licences and performing analogous functions: the power was to be exercised "judicially".<sup>3</sup> Isaacs J. adopted

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1. Ibid., at 110.

2. [1891] A.C. 173, 179: "an extensive power is confided to the justices in their capacity as justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that that something has to be done according to the rule of reason and justice, not according to private opinion, according to law and not humour; it is to be, not arbitrary, vague and fanciful, but legal and regular".

3. Ibid., at 105.

the distinction drawn by O'Connor J.; he held that the function of the Council was certainly not "in the strict sense judicial",<sup>1</sup> but that:<sup>2</sup>

it need not be denied that the Council are bound to approach the consideration of the question in a judicial spirit, if by that is meant a fair spirit, a desire to act justly and to look at all the circumstances of the application, regarding alike the private interests of the applicant, and the interests of the public corporate body of which they are representatives and not acting capriciously.

Higgins J. was more careful to define in what sense the Council was not exercising a judicial function. He said:<sup>3</sup>

I am of opinion that there is not imposed on the Council the duty to hear and determine, in the judicial sense, at all. It is the duty of the Council to consider the application, and to decide whether it ought to be granted. There is no duty to "hear" the applicant and his evidence, or any opponents and their evidence. The Council is in a position analogous to that of trustees... [for the public] ....

Thus, whereas Isaacs J. had seemed to regard "judicial functions" as being specifically opposed to "discretionary powers", Higgins J. seemed to regard "judicial functions" as distinguished by determination by a tribunal after hearing and controversial procedure. Isaacs J. was probably making his characteristic distinction between decision according to existing rules and decision according to discretion; Higgins J. was adopting an

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1. Ibid., at 116.  
 2. Ibid., at 116-117.  
 3. Ibid., at 119.

approach rather closer to that adopted by Griffith C.J. in Alexander's Case. O'Connor J. did not make the grounds of his distinction clear.

### III

#### Judicial power and the Abstract separation of powers - the problem circumvented

In 1909, the High Court was called upon to make its first substantial exegesis of the phrase "judicial power" in s.71 of the Constitution. S. 15B of the Australian Industries Preservation Act 1906 (Cth) provided that if the Comptroller-General appointed under the Act believed that an offence had been committed against Part II of the Act, or if a complaint was made to him in writing that such an offence had been committed, and he so believed, he might, by writing under his hand, require any person whom he believed to be capable of giving any information in relation to the alleged offence to answer questions and produce documents in relation to the alleged offence, and it imposed a penalty of £50 on any person failing to do so. In the case of Huddart, Parker and Co. Pty. Ltd. v. Moorehead<sup>1</sup> (1909) the appellant defendant, seeking to have the whole Act declared beyond the power of the Commonwealth Parliament, impugned the validity of s. 15B on the ground that it entrusted judicial power to a non-judicial authority. It was argued for the appellant that the legis-

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1. (1909) 8 C.L.R. 330.

lative, executive and judicial powers of the Commonwealth were not only separate but were mutually exclusive, so that a power found to be an example of judicial power could not be invested in any authority other than a judicial authority.<sup>1</sup> This argument, the first overt appeal to an Abstract doctrine of demarcation, was placed on two bases. First, it was said that the procedure under s.15B was in effect discovery in aid of criminal proceedings,<sup>2</sup> and as such a part of the judicial power, exercisable only by a court of justice (apart from a faint suggestion that it might also be regarded as a power exercisable by the Inter-State Commission "whose power of adjudication is an exception out of the judicial power").<sup>3</sup> Secondly, each of the three Departments of Government had certain inherent and necessary powers, among them the ancillary power of informing itself of things necessary to the carrying out of its functions. But since powers must be kept distinct, it was the duty of the Courts in every case to ensure that such powers, which could be ancillary to either the judicial or executive power, were kept separate; an ancillary power in substance judicial was not to be attached to an executive authority.<sup>4</sup> But the function of the Comptroller under s.15B was to obtain evidence, and that was as ancillary to the judicial power as a proceeding to perpetuate testimony or as a bill for discovery

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1. Ibid., at 337.  
2. Ibid., at 334.  
3. Ibid., at 337.  
4. Ibid., at 338.

in Equity; there was in fact no executive power given to the Comptroller to which the power in s.15B could be ancillary, since even the power of the Attorney-General to institute proceedings as a result of the Comptroller's investigations was in aid of the judicial power. This portion of the appellant's argument, as reported, seems to have been in large part circular and unclear; it is worth summarising here because it represents the first of many attempts to develop a coherent doctrine of "ancillary" powers and functions.

The argument for the respondent was quite simple. In the first place, it was said, it was essential to a judicial proceeding that rights of some sort be determined, or that the Court be in a position to determine something. In the second place, an act, which if done by a judicial authority would be an exercise of the judicial power, was not necessarily an exercise of judicial power when done by an executive authority. This latter argument is in fact another version of the appellant's argument from ancillary functions common to two or more of the Departments of Government; it is a more logical version, since it recognises the intrinsic ambiguity of such common functions, and seeks to resolve the ambiguity by reference to the primary function to which the ancillary function is subordinate, and not by reference to a supposed

"substantial" character of a function that ex hypothesi has no "substantial" character. It is an argument we shall meet many times again, in later phases of judicial analysis.

All five Justices of the High Court agreed in dismissing the appeal as to s.15B. In the course of the appellant's argument, Griffith C.J. had remarked:<sup>1</sup>

There are three Departments of Government, executive, administrative and judicial [sic]. If an act is for the purpose of carrying out the executive or administrative Departments, it is not part of the judicial power, but if it is in aid of the judicial power, it may be part of the judicial power.

This remark seems to have determined the phrasing of the latter portion of the appellant's argument; but the actual judgment of the Chief Justice proceeded on quite other, indeed almost opposite, lines. The major premise of his opinion was that the powers of the Comptroller under s.15B were analogous to the powers of examining justices. The functions of examining justices had sometimes, recently, been spoken of as "judicial", but their true nature was to be judged from their origins. As to these, the judgments in Cox v. Coleridge<sup>2</sup> (1822) were governing. All the functions of the justices of the peace were originally, and at common law, entirely executive, and all their judicial functions were subsequent

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1. Ibid., at 336.  
2. (1822) 1 B.&C. 37.

and statutory. The power of examining witnesses with a view to commitment for trial was statutory; but the object of the power was not to institute a judicial inquiry, but to obtain information to be placed before the Justices of Gaol Delivery. Thus, the inquiry by the Comptroller, whether regarded as a substitute for, or as a preliminary to, an inquiry by justices, could not be regarded as a judicial function. This historical argument of Griffith C.J.'s is not immediately convincing, since it leaves open the question why an inquiry preliminary to a judicial inquiry should not be, or have been in Cox v. Coleridge, regarded as itself judicial. Perhaps the answer to this question is to be found in a famous passage in a later part of his judgment:<sup>1</sup>

Apart from these considerations [including the argument from Cox v. Coleridge], I am of opinion that the words "judicial power" as used in s.71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

This paragraph seems to have been intended as a rather belated statement of the necessary minor premise of the

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1. 8 C.L.R. 330, 357.

argument from Cox v. Coleridge (unless that argument were to rest on assertion and authority alone).<sup>1</sup> Thus the rationale of the judgment was that an inquiry preliminary to a judicial determination was not itself judicial because it did not form part of the binding and authoritative decision of a controversy. In developing this view, Griffith C.J. might well have felt some uneasiness about his interlocutory dictum that proceedings "in aid of the judicial power" may be part of the judicial power. He came no nearer to adverting to this difficulty than his final observations that the practice of entrusting the interrogation of witnesses to judicial tribunals was not universal, and that in the most nearly analogous case the function, although entrusted to persons who for other purposes exercised judicial functions, was not itself regarded as an exercise of such functions.<sup>2</sup> Barton J. likewise considered the inference from Cox v. Coleridge "too strong to be withstood"; he declared his full agreement with the Chief Justice's opinions on the

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1. Cf. J.D. Merralls, "Judicial Power since the Boilermakers' Case: Statutory Discretion and the Quest for Legal Standards" (1959) 32 A.L.J. 283, 287: "The words of Griffith C.J., which have been seized upon by the High Court and the Judicial Committee of the Privy Council, were spoken after the Chief Justice had determined their point, as if as an afterthought". But only "as if"...
  2. Ibid., at 358.

matter.<sup>1</sup>

O'Connor J. found that the powers of the Comptroller, though perhaps "quasi-judicial", were not "judicial powers in the sense in which that word is used in the Constitution"<sup>2</sup> (a careful qualification consistent with his expressions in Evans v. Donaldson and Randall v. Northcote Corporation). He adopted the argument for the appellants insofar as it postulated certain powers inherent or "necessarily included" in the executive functions of Government. Indeed, in every grant of power by the Constitution to the Parliament there was necessarily included the right of enacting such provisions as might be necessary to render the power effective. He cited several cases in which official inquiries involving the ascertainment of facts or values were "essential to the ripening of matters for executive action". Conversely, he also relied upon the ruling of Cox v. Coleridge that the inquiry of an examining magistrate was not a judicial but a "ministerial" function. A similar case was that of the United States Inter-State Commerce Commission. The case of a

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1. Notice Barton's statement in the 1898 Convention: (1898D, 1895): "Primarily a justice of the peace was a ministerial officer who inquired into indictable offences, and committed or not, as there might be a prima facie case. But a justice of the peace has since been invested by statute with summary jurisdiction. I question whether that makes the office of justice of the peace a judicial office".
  2. 8 C.L.R. 330, 377.

Commissioner appointed by a court to take evidence de bene esse was distinguishable, as part of a judicial proceeding already instituted. In the end, O'Connor J. abandoned his previous qualifications and said that the proceedings under s.15B had none of the characteristics of the exercise of judicial power "no matter how widely that expression may be construed";<sup>1</sup> in particular, the Comptroller was not bound to apply his mind nor to pay regard to information in forming a belief that an offence had been committed, nor was he bound to act when he had arrived at such a belief.

Isaacs J. wrote a judgment of great general interest. He began by noting that the "question of what is judicial power" could not arise in a unitary state in the form that it could under a constitution which limited the powers of the legislature.<sup>2</sup> English precedents thus could not be strictly decisive. On the other hand, he agreed with the appellants<sup>3</sup> that the problem of "judicial power" was not the same in Australia as it was in the United States, where the judicial power "is not only vested in the Courts, but is limited in extent to the ten descriptions of cases specified in the Constitution, so that the test of what is 'judicial power',

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1. Ibid., at 380.
2. Ibid., at 381.
3. Ibid., at 335.

is not to be found by merely ascertaining the ambit of the judicial power which the Courts there possess". The only American case recognising some sort of general test was Prentis v. Atlantic Coast Line, (1908), where Holmes J. had said, "the nature of the final act determines the nature of the previous inquiry".<sup>1</sup> Nevertheless, the term "judicial power" was essentially British, and British jurisprudence could elucidate the problem.<sup>2</sup> Behind the American Constitution stood Blackstone's "Commentaries", with a three-fold division of legislative, executive and judicial power. Blackstone always used the phrase "judicial power" to indicate "the administration of common justice":

This is shown by one sentence (p.269): "Where it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would then be regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe".<sup>3</sup>

Blackstone had also pointed out that the judicial power was by constitutional usage and law vested in the judicature:

In Vol.III, p.25 he indicates directly what is an exercise of the judicial power:- "In every Court there must be at least three constituent parts, the actor, reus and judex: the actor, or plaintiff, who complains of an injury done; the reus, or defendant, who is called upon to make some satisfaction for it; and the judex, or judicial power, which is to examine the truth of the

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1. (1908) 211 U.S. 210, 227.  
 2. 8 C.L.R. 330, 382.  
 3. Ibid., at 383.

fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain, and by its officers to apply the remedy".<sup>1</sup>

Not only were these passages to be regarded as "plainly the inspiration of the American Constitution in regard to the separation of the three departments of State", but they were "the key" to the meaning of the terms to be considered in the present case. <sup>1</sup> The word "judicial" by itself was ambiguous, but the expression "judicial power", understood as the power which the state exercised in the administration of public justice as against its power to make and to execute laws, was 'not in the least ambiguous'. Apart from Blackstone, the true explication of the term was in the judgment of Palles C.B. in The Queen v. Local Government Board (1902);<sup>2</sup>

"to erect a tribunal into a 'Court' or 'jurisdiction' so as to make its determinations judicial, the essential element is that it should have power, by its determination within jurisdiction, to impose liability or affect rights". "By this", said the learned Chief Baron, "I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depends upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought

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1. Ibid., at 383.

2. (1902) 2 I.R. 349, 373.

to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorising it is judicial". There we get a modern use of the term "judicial power".<sup>1</sup>

The federal Constitution, continued Isaacs J., expressly required that judicial powers be exercised by judicial instruments, regardless of whom they were exercised by prior to the Constitution.<sup>2</sup> But powers such as s.15B, which had an analogue in almost every Customs Act, were in fact ministerial, since no liabilities were imposed and no rights affected by the determination of the Comptroller-General; his action in no sense amounted to Blackstone's "administration of public justice", nor did it regulate by any determination the life, liberty or property of the person interrogated.

In summary, then, we may say that Isaacs J.'s judgment proceeded on the same lines (and almost in the same words) as that of the Chief Justice. It accepted the test proposed by the respondent, namely, the "determination of rights". The quotation of the passage from Blackstone contrasting decision according to arbitrary opinion with decision according to fundamental principles of law seems to have had no further consequences for the general reasoning of the judgment, despite the fact that it was this criterion that was

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1. 8 C.L.R. 330, 383-384.  
2. Id.

to become central to Isaacs J's analysis in later cases.

Since the judgments of Griffith C.J. (and thus Barton J.) and Isaacs J., at least, proceeded on almost identical grounds, there was no absurdity in Higgins J.'s statement that, as to s.15B, he concurred with the reasons of all his colleagues.

#### IV

#### Judicial power and political issues

In 1911 the High Court was called upon to consider the question of judicial power from a different point of view. South Australia v. Victoria<sup>1</sup> (1911) was a suit between States, in which the High Court prima facie, by virtue of s.75(iv)<sup>2</sup> of the Constitution, had original jurisdiction. The plaintiff State contended that its boundary with the defendant State had been declared by the Imperial Act 4 & 5 Will. IV c.95 to be the 141st meridian; that a line on the ground (Wade's Line) agreed upon between the States in 1847, was in fact, as had been discovered in 1869, two miles west of that meridian; that Wade's Line ought thus to be declared, as against the defendant State, to be not the true boundary, and appropriate relief awarded. The full High Court, Higgins J. dissenting, dismissed the claim.

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1. (1911) 12 C.L.R. 667.

2. "75. In all matters ....(iv) Between States, or between residents of different States, or between a State and a resident of another State:... the High Court shall have original jurisdiction."

Griffith C.J. (with whom Barton J. simply concurred) first considered the justiciability of the issue. The jurisdiction of the High Court was judicial and not political;<sup>1</sup> a controversy requiring for its settlement the application of political as distinguished from judicial considerations was not justiciable under the Constitution. The word "matters" in ss.75 and 76 of the Constitution was limited to controversies that might come before a court of justice; in particular, a "matter between States", to be justiciable, had to be such that a controversy of like nature could arise between individual persons, and had to be such that it could be determined upon principles of law. The High Court had jurisdiction in this case, since it was a complaint as to wrongful invasion of territory contrary to the Imperial Law governing the relationships between the neighbouring territories.<sup>2</sup> However, the line laid down in 1847 was valid until set aside by competent authority.<sup>3</sup> In 1847 the competent authority was the Sovereign,<sup>4</sup> by virtue of the Royal Prerogative,<sup>5</sup> But:

in the exercise of the Prerogative in such cases the Sovereign was guided by general rules of justice and good conscience, and not by any rules of law such as can be invoked by a suitor who has a right to redress recognised by law. It follows, in my judgment, that

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1. Ibid., at 674.
  2. Ibid., at 706, 676.
  3. Ibid., at 706.
  4. Ibid., at 702.
  5. Ibid., at 703.

the jurisdiction exercised by the Sovereign was political and not judicial, and that the Dependency petitioning for redress did not invoke the exercise of the judicial power of the realm. The principle stated in the case of Moses v. Parker is, I think, conclusive on the point.... The plaintiff State had not, therefore, any right to invoke the judicial power of the realm in order to revise the settlement of 1847.... It follows that... since the claim to have [the] boundary rectified is not a cause of action capable of judicial decision, the plaintiff State has no right of which this Court can take cognizance.<sup>1</sup>

The reference to the decision of the Privy Council in Moses v. Parker (1896)<sup>2</sup> makes it doubly certain that Griffith C.J.'s distinguishing of "judicial proceedings" from "political" turned on the distinction between a hearing and decision according to settled legal rules, and decision according to merely the tribunal's conceptions of justice and equity. One may well ask how such a criterion conforms with his criterion in Alexander's Case.

O'Connor J.'s judgment proceeded on somewhat similar lines. In s.75 of the Constitution, "matters" was to be read as "matters capable of judicial determination".<sup>3</sup> The true test of justiciability in this sense was that laid down by the Privy Council in Dominion of Canada v. Province of Ontario (1910):<sup>4</sup> could the claim "be ascertained on any

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1. Ibid., at 705-706.
  2. [1896] A.C. 245-248.
  3. 12 C.L.R. 667, 708.
  4. [1910] A.C. 637, 645.

principle of law that could be regarded as applicable"? The distinction was between (judicial) determinations "on some recognised principle of law" and (political) determinations founded on "considerations of fair dealing, public convenience or political expediency". The present claim for possession of disputed territory called for a judicial determination, since it was founded simply on the interpretation of a statute (4&5 Will.IV. c.95) and its application to the facts in evidence.<sup>1</sup> Thus the High Court had jurisdiction. The claim should, however, be dismissed on other grounds.<sup>2</sup>

In Isaacs J.'s opinion, likewise, the jurisdiction of the High Court was confined to "matters" within the meaning of s.75, that is, to claims "resting upon an alleged violation of some positive law to which the parties are alike subject, and which governs their relations, and constitutes the measure of their respective rights and duties".<sup>3</sup> The mere fact of a dispute was insufficient; there must be some "standard of right"<sup>3</sup> or "paramount law"<sup>4</sup> as distinct from "political and administrative action and discretion". However, the Court always had jurisdiction to determine in the first

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1. 12 C.L.R. 667, 710.  
2. Ibid., at 714.  
3. Ibid., at 715.  
4. Ibid., at 721.

place whether the standard was political or legal. Here there was "a question of law determinable by reference to legal considerations only, and justiciable by this Court".<sup>1</sup> As a matter of legal history and constitutional principle, Isaacs J. entirely disagreed with the argument of the defendants, accepted by Griffith C.J. and O'Connor J.,<sup>2</sup> that the jurisdiction of the Sovereign in boundary disputes had been political in character; the Council in Penn v. Lord Baltimore<sup>3</sup> had evidently regarded itself as acting as a court; furthermore, such a prerogative authority as the argument postulated would be inconsistent with parliamentary declarations of territorial limits and thus with the supremacy of Parliament.<sup>4</sup> The only prerogative (at all events, the only surviving prerogative) must be of a judicial nature. However, South Australia's claim was to be rejected on other grounds.

Higgins J. dissented, on grounds not material here.

He did, however, remark that:<sup>5</sup>

under the Constitution, it is our duty to give relief as between States in cases where, if the facts had occurred as between private persons, we could give relief on principles of law; but not otherwise...

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1. Ibid., at 716.
  2. Ibid., at 714.
  3. 1 Ves. 444.
  4. 12 C.L.R. 667, 720.
  5. Ibid., at 743.

Thus all the Justices agreed that the true test of "judicial power", insofar as that marked the limits of the High Court's power of determining disputes inter partes, was the presence of settled, positive, ascertainable rules of law as distinct from considerations merely of justice, equity, fair-dealing, expediency or political or administrative discretion.

## V

Conclusion

The last few cases that discuss judicial power or activity before the Wheat Case, in contexts in which federalism was not in issue, manifest no development of doctrine and no overt judicial disagreement. In Donohoe v. Chew Ying (1913), Barton, Isaacs, and Gavan Duffy J. all concurred with Griffith C.J.'s distinction between exercising jurisdiction judicially and exercising it ministerially.<sup>1</sup> In Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth (1912) only Isaacs J. found it necessary to deal with an argument that judicial powers were being illicitly conferred on a non-judicial functionary; he simply referred back to his exposition in Huddart Parker v. Moorehead of the views of Blackstone and of Palles C.B.<sup>2</sup> Finally, in

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1. (1913) 16 C.L.R. 366, 369. Cf. also R. v. Thom Sing (1911) 13 C.L.R. 32, per Griffith C.J.
  2. (1912) 15 C.L.R. 182, 217.

R. v. Kidman (1915), Isaacs J. and Griffith C.J. agreed in holding that the judicial power of the High Court extended to the exercise of original criminal jurisdiction. The judgment of the Chief Justice contained his characteristic references to the sovereign character of judicial proceedings, to the origins of primitive law, and to the concept in British law.<sup>1</sup> Isaacs J. characteristically emphasised decisions according to "a settled legal standard" as distinctive of judicial action.<sup>2</sup>

But by 1915, such different emphases in discussion are surprising only insofar as they led to no disagreement in conclusions. For by this time attitudes and analyses were being decisively shaped by rival doctrines of federalism that had emerged, or at least been hardened and sharpened, over years of acute controversy about the arbitral power in s.51 (xxxv) of the Constitution. To this controversy we now turn.

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1. (1915) 20 C.L.R. 425, 437-438.
  2. Ibid., at 444-445. See also his opinion in Wilkinson v. Osborne (1915) 21 C.L.R. 89, 97.

## CHAPTER NINE

### The first phase of judicial analysis - the controversial part

The foregoing chapter presented the first, and negative, part of a two-fold proof of the special influence of theories of federalism on judicial discussions of judicial power in Australia. That part was negative in that it showed the absence of serious controversy about judicial power in contexts where theories of federalism were not at stake. The present chapter constitutes the second, and positive, part by showing the intimate connection between rival theories of federalism and the development of rival theories of judicial power. It shows, moreover, how these disputes exacerbated drastically the normal tendency of the judicial mind to identify sharply (but vaguely!) defined "essences".

This chapter brings together all the strands of the preceding four chapters. Those chapters should, in fact, be regarded as necessary prolegomena to an analytical history that, like the prolegomena themselves, has never been related before - and that, therefore, is here related in full detail.

#### I

### First hints

The question of the true nature of the Arbitration Court was raised, very directly, within a few years of the passing

of the Conciliation and Arbitration Act in 1904. Jumbunna Coal Mine No Liability v. Victorian Coal Miner's Association (1908)<sup>1</sup> was an appeal from a decision of the President of the Arbitration Court. There was a preliminary objection<sup>2</sup> to the appeal, on the ground that the Arbitration Court was not a federal court within the meaning of s.73(ii) of the Constitution:<sup>3</sup>

nor is the President of that Court on the hearing of an appeal such as that in the present case. Neither that Court nor its President exercises any functions inter partes....The Arbitration Court exercises no judicial power. The determination of the President is not a judgment, decree, order or sentence within the meaning of s.73 [of the Constitution].

It will be noticed that the criterion of "judicial power" advanced in this submission was determination inter partes: the contrast tacitly posed was between judicial and administrative powers, rather than between judicial and legislative. The Court dismissed the objection. Griffith C.J., with whom Barton and O'Connor J.J. simply concurred, said briefly that s.73(ii) gave an appeal to the High Court from orders of any other federal Court, and the Arbitration Court was such a Court. Isaacs J. made the significant reservation that he proceeded solely according to the decision in the railway servants' case (1906)<sup>4</sup> - decided before Isaacs J. was appointed to the High

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1. (1908) 6 C.L.R. 309.

2. Argued by Gaven Duffy K.C.

3. *Ibid.*, at 323.

4. (1906) 4 C.L.R. 488, 493 per Griffith C.J., 495, 496 per O'Connor J.

Court - whereby the President of the Arbitration Court, on a preliminary point in a similar action, was held to be acting as a Court, and not merely ministerially or personally.

The substantial issue, as opposed to the preliminary objection, in the Jumbunna Case is not material here. But two dicta are worthy of note. Firstly, O'Connor J. remarked:<sup>1</sup>

if the judicial power of the Commonwealth is to be effectively exercised by way of conciliation and arbitration in the settlement of industrial disputes, it must be by bringing it to bear on representative bodies standing for groups of workmen.

None of the three senior Justices doubted that the Arbitration Court exercised the judicial power of the Commonwealth; the problem that was to arise from, or be manufactured out of, s.72 was not yet conceived. Secondly, Isaacs J. remarked of both s.51(xxxv) and the Act:<sup>2</sup>

the governing idea is primarily the preservation of peace in the industry generally, and its uninterrupted progress, and not the settlement of individual quarrels as such.

This principle was the logical ground of Isaacs J.'s conception of arbitration as legislative in character, and the cause of almost all subsequent disputes about s.51(xxxv).

1. 6 C.L.R. 309, 360.

2. Ibid., at 373.

## II

First conflicts - the doctrines of the senior Justices

The first of these judicial disputes to concern us occurred in the Woodworkers' Case (1909).<sup>1</sup> This came to the High Court by way of case stated by the President of the Arbitration Court, Higgins J., who put a series of questions as to, inter alia, the power of the Arbitration Court to make enforceable awards inconsistent with the awards of State arbitration tribunals, or with industrial agreements registered under State arbitration Acts, or with unregistered industrial agreements, or with the determinations of State Industrial or Wages Boards as to the conditions of employment and minimum wages in an industry. Griffith C.J. thought these questions hypothetical, and said his judgment was "more of the character of an essay or treatise than of a judicial pronouncement", doubting whether he was "performing a judicial duty in delivering it".<sup>2</sup> Isaacs J., however, considered the Court's decision a "regular judicial determination".<sup>3</sup>

As to the questions put, the Court divided equally. Griffith C.J. and O'Connor J. held that the awards of the Arbitration Court were superior to the awards of State Arbitration Courts and to all species of industrial agreements, but

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1. Federated Saw Mill Employees of Australasia v. James Moore and Son Pty. Ltd. (1909) 8 C.L.R. 465 (sometimes called the Sawmillers' Case).
  2. *Ibid.*, at 485, 500.
  3. *Ibid.*, at 513. (continued on next page)

not to the determinations of "subordinate legislative bodies" such as State Wages Boards. Isaacs and Higgins JJ. were of opinion that the Commonwealth awards overrode all State laws and all agreements, determinations and awards made under State law.

A first premise of Griffith C.J.'s judgment was:

the doctrine repeatedly laid down by this Court that any invasion by the Commonwealth of the sphere of the domestic concerns of the States appertaining to trade and commerce is forbidden except so far as the invasion is authorized by some power conferred in express terms or by necessary implication.<sup>1</sup>

This doctrine is nothing more nor less than a judicial re-statement of the grounds on which Griffith and O'Connor opposed the inclusion of s.51(xxxv) in the Constitution in 1891 and 1898.<sup>2</sup> Moreover, it contains the whole doctrine of States rights espoused by Griffith and Barton in their first speeches to the 1891 Convention,<sup>3</sup> and opposed so vigorously by Isaacs and Higgins during and after 1897.<sup>4</sup>

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(continued from previous page)

Cf. Isaacs J. in Amalgamated Engineering Union v. Alderdice Pty Ltd., In re Metropolitan Gas Co. (1928) 41 C.L.R. 402, 411: "...anything beyond that question would be hypothetical and on a well-established principles not a proper subject for judicial decision...."

1. Ibid., at 492.
2. 1891D, 781-784, p.7.6. supra; 1898D, 202, p.7.10 supra.
3. 1891D, 31, 97, pp. 7.13, 7.14 supra.
4. Pp. 7.15-7.22 supra.

A second premise in his argument noted that s.51 (xxxv) was limited to the settlement of disputes by arbitration:

The term "arbitration" connotes a judicial tribunal by whatever name it is called and however constituted, and, although the functions of the tribunal differ from those of ordinary tribunals in that they are not limited to determining existing causes of action, but extend to prescribing conditions to be observed in future contracts of employment, the tribunal is no less a tribunal. To my mind the obligation to decide in accordance with law is implied in the notion of the creation of a tribunal. Otherwise the members of the tribunal would not be judicial persons at all, but dictators exercising the power of legislation, not of adjudication.<sup>1</sup>

Thus, since a judicial tribunal was, of its nature, bound to conform to law, the Commonwealth Arbitration Court was bound to conform to State law. However, the awards of State Arbitration Courts were to be regarded as judgments inter partes, even when made the common rule of an industry (i.e. when extended beyond the parties to the action). As such they stood on the same footing as agreements, but were not to be considered as State laws.

This argument had weak points which were better handled by O'Connor J.<sup>2</sup> For it was common ground that an industrial arbitrator might abrogate the existing contractual rights of the parties. But such contractual rights were made binding by

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1. 8 C.L.R. 465, 492 (emphasis added).  
2. Ibid., at 510-511.

State law, as were the awards of State arbitration Courts; and in both cases the State law must yield. How, then, was a line to be drawn between State laws which bound the Commonwealth Arbitration Court, and State laws which that Court's awards might override?

O'Connor sought a solution to this unstated dilemma in a principle of necessity: the federal power could not be exercised effectually at all unless the federal tribunal had power to override the State laws as to contracts and State awards. But this principle did not authorize the federal tribunal to:

disregard the State laws whenever they are inconsistent with the terms of its award whatever those terms may be . Its authority is to act judicially in the settlement of the industrial dispute. It is empowered to do everything within the law necessary to accomplish that end effectually. But outside that it is, in respect of any matter beyond the ambit of federal power, as much bound by State laws as the tribunals of the State are bound.<sup>1</sup>

This leaves open the inter-related questions, What is

"necessary"? and: What is the "ambit of federal power"?

The implied counterweight to the principle of necessity in

O'Connor J.'s judgment was the doctrine that the control of industries was primarily a function of the States. Perhaps the tacit consequence of the interaction of the principle of

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1. Ibid., at 511-512 (emphasis added).

necessity and the doctrine of State rights was that State laws or subordinate legislation (such as a determination by a State Wages Board, "binding, not only on certain parties, but on the public generally")<sup>1</sup> regulating industry directly, and not simply indirectly by way of ordinary contract law or of State-authorized awards inter partes, were to have priority over Commonwealth awards. Such a conclusion, of course, would not be without ambiguities in practice.

The immediate problem, however, is to understand precisely the conception and role of "judicial power" in the judgments of Griffith C.J. and O'Connor J. For both Justices, the Arbitration Court was a tribunal with a duty "confined to the judicial determination of matters in dispute".<sup>2</sup> Every such tribunal, moreover, must "act within the law",<sup>3</sup> "decide in accordance with the law".<sup>4</sup> So much was connoted by the word "arbitration". But industrial arbitration equally connoted power to abrogate certain existing rights conferred by law - but not all such rights. Even if this last qualification was derived, not from the general notions of "arbitration" and "judicial" functions, but from the balance of State and federal powers in the Australian Constitution, there remained the difficulty that a judicial tribunal was,

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1. Ibid., at 512, per O'Connor J.

2. Ibid., at 510, per O'Connor J; 492, per Griffith C.J.

3. Ibid., at 508, per O'Connor J.

4. Ibid., at 492, per Griffith C.J.

in this account, permitted to abrogate legal rights while at the same time the obligation to decide in accordance with law was "implied in the notion of the creation of a tribunal"<sup>1</sup> (since "otherwise the members of the tribunal would not be judicial persons at all, but dictators exercising the power of legislation, not of adjudication").<sup>1</sup> This logical ungainliness gives rise to a suspicion that, perhaps unconsciously, the ostensible centrality of "decision according to law" in this analysis of judicial power was an ad hoc emphasis, a rather clumsy prop for the States rights (laws) which the two Justices wanted to uphold against the incursions of federal power.

Looking behind declarations to the working reasoning of the judgments we can see, perhaps, that the central element in their concept of "judicial" functions was (authoritative) decision inter partes as contrasted with "the making of a general law by a law-making authority constituted for that purpose"<sup>2</sup> - that is, a law binding, not only certain parties, but the public at large. Such a contrast would lend coherence to the distinction drawn between, on the one hand, contractual rights (intrinsically inter partes, even though founded on general State law if not common law), and industrial agreements

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1. Ibid., at 492, per Griffith C.J.

2. Ibid., at 512, per O'Connor J. (emphasis added).

and awards (intrinsically inter partes, even though supported by general State law, and even when, incidentally, extended by common rule), and, on the other hand, general State industrial legislation for the regulation of whole industries or of the public at large.

This exegesis is confirmed by the 'Bootmakers' Case [No. 1] (1910),<sup>1</sup> in which the same question came up, but in concrete rather than abstract form. This time the presence of Barton J. resulted in a three-two majority for ruling that the Commonwealth Arbitration Court could not make an award inconsistent with a State law, and that the determination of a Wages Board empowered by a State statute to fix a minimum wage might be such a law.

Griffith C.J. quoted<sup>2</sup> his remarks in the Woodworkers' Case.<sup>3</sup> The essentially judicial nature of arbitration was not affected by the fact that industrial arbitration involved the prescription of rules for the future.<sup>4</sup> It was inconceivable that any legislature should set up a person or set of persons with authority to supersede or abrogate any law of which he did not approve.<sup>5</sup> Nor could it be said that the awards of the federal Arbitration

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1. (1910) 10 C.L.R. 266.
  2. Ibid., at 280.
  3. 8 C.L.R. 465, 492.
  4. 10 C.L.R. 266, 282.
  5. Ibid., at 283.

Court prevailed over inconsistent State laws by virtue of s.109 of the Constitution, for the award of the Court was not a federal law:

The function of a tribunal, of whatever kind, is to declare and administer the law, not to make it - dicere non dare leges. Nothing could be more unfortunate than that an idea should arise that this Court, or any other Court, Federal or State, has a legislative authority. The legislative and judicial powers of a sovereign State are exercised by different agencies, whose operations are in different planes, and cannot come in conflict with one another.<sup>1</sup>

Thus, once again, the emphasis in Griffith C.J.'s judgment was entirely on the distinction between legislative and judicial as a distinction between making and declaring and administering law. As we have seen, such a distinction, by itself, could not support the conclusions purporting to derive from it.

The necessary further premises were offered by Barton J. and, more explicitly, by O'Connor J. Both began with Griffith C.J.'s premise that an arbitral award was a judicial determination and, as such, a matter of declaring, not of making law.<sup>2</sup> But it was one thing for a tribunal to impair the obligation of a law or to attempt to make a new one, and another thing for a party to waive his legal rights.<sup>2</sup> Here was the essential further premise, a development of doctrine since the Woodworkers' Case. Arbitration in its original meaning connoted, it was said, a process of voluntary submission by parties to a tribunal

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1. Ibid., at 284. For s.109 see infra, p.9.17n.1.  
2. Ibid., at 294, per Barton J.

on terms agreed to by the parties.<sup>1</sup> But the parties could agree to waive their rights under ordinary State laws of contract or under other (e.g. State) arbitral awards between them, and an arbitrator had the powers of the parties.<sup>2</sup> But an arbitral tribunal, in this original sense, was also bound to apply legislation that bound the parties; this essentially judicial character of arbitration could not be diminished, nor any legislative character added, merely by making arbitration compulsory, or by including among the matters for settlement the future as well as the existing contractual relations of the parties, as under s.51(xxxv).<sup>3</sup>

O'Connor J. was content to rest his argument there; there was no meaning of the word "arbitration" in English which could justify its being applied to a tribunal determining rights judicially and yet emancipated from every law which could stand in the way of imposing its absolute will upon the disputants.<sup>4</sup> Barton J. added to this linguistic or definitional consideration a constitutional principle.<sup>5</sup>

The Australian Constitution is no less careful than are other fundamental laws to clearly separate the judicial from the legislative authority and to define their respective functions, and it is too much to ask us to believe that, by the words used in this power,<sup>6</sup> it has sanctioned their collocation in one and the same authority, and that primarily a judicial one.

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1. Ibid., at 301, per O'Connor J.
  2. Ibid., at 302-303, per O'Connor J.
  3. Ibid., at 295, per Barton J.
  4. Ibid., at 305, per O'Connor J.
  5. Ibid., at 297. per Barton J.

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This Abstract principle of demarcation was similar to that sketched by Griffith C.J., as a feature of a (any?) "sovereign State".

The general argument common to all three senior Justices turned, therefore, on the idea of proceedings inter partes. This "inter partes" idea was central to their opinion that Wages Boards were to be regarded as legislative, rather than arbitral and judicial, simply because the Boards' determinations were obligatory "not merely on parties or organizations at variance, but on all citizens within their range".<sup>1</sup> But the idea was also central to the distinction between rights which arbitral tribunals could abrogate and rights which they could not; for this distinction was founded on the idea that arbitrators ordinarily had the powers of the parties to the arbitration, and so could abrogate such rights as the parties themselves could abrogate. It was in precisely this sense that to go beyond these powers of the parties (admittedly hypothetical powers in the case of industrial arbitration under s.51(xxxv) ) was to go beyond the realm of judicial functions and to assume legislative power.

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6. This qualification just leaves open the position adopted by Barton J. in the Wheat Case.

1. 10 C.L.R. 266, 289, per Barton J.

Hence "judicial" functions in all these judgments were equated with determinations inter partes; such determinations were to be carried out, broadly speaking, within the framework of existing law; thus they were not to be legislative in the sense of making new rules as if in the exercise of a power of making or abrogating new rules of general application; but they could, it was said, establish certain new rules as between the parties without impairing their essentially judicial character.

In short, the conclusion arrived at in all these judgments demanded that two different features of "judicial power" - binding determination inter partes; and decision according to existing rules - be held in a definite inter-relationship by appeal to the principle that an arbitrator could do whatever the parties could agree to do, a principle itself analogically related to the inter partes idea. The point of appealing to this principle, and the point of the definite inter-relationship thereby established, was to cut across the normal distinction between proceeding by the authority of the law and using the law as a guide to decision. Finally, it is not to be forgotten that the very conclusion so reached, as if by analysis of the essential notions of "judicial" and "arbitral" functions, in abstraction from the Australian Constitution, was also reached by recourse to a purely constitutional balancing of the

"necessary" power of the States against the "necessary" power of the Commonwealth.<sup>1</sup> Was the coincidence of these two trains of reasoning in one conclusion entirely coincidental?

### III

#### The doctrine of the junior Justices

Since Isaacs and Higgins JJ. attacked both the foregoing trains of reasoning, the same question must be asked about their own judgments. Can it have been merely coincidental that their conception of "arbitration" conformed with their conception of the proper balance of federal and State powers?

First of all, it must be noted that ever since they had been appointed to the High Court in 1905, the two junior Justices had dissented from the prevailing doctrine of mutual non-interference between Commonwealth and States. In D'Emden v. Pedder<sup>2</sup> (1904), the High Court had declared invalid any legislative or executive action by a State which would have the effect of fettering, controlling or interfering with the free exercise of the legislative or executive powers of the Common-

1. The most penetrating criticism Isaacs J. ever made of the doctrine of the senior Justices is to found, years later, in Slyde Engineering Co. Ltd. v. Cowburn (1926) 37 C.L.R. 466, 496: "The proposition was from the first unstable, because O'Connor J. agreed that in some respects State laws must be disregarded. The two points of union of the majority opinion were the theory of residual powers in the Commonwealth...and the theory that the arbitration mentioned in pl.xxxv of s.51 is attributable to the judicial department of Government and not to the legislative department".
2. (1904) 1 C.L.R. 91.

wealth. This decision was subsequently approved of by Isaacs and Higgins JJ. But they would not approve the enunciation, by the senior Justices in the Railway Servants' Case<sup>1</sup> (1906), of the converse principle in favour of the States as against the Commonwealth. The senior Justices founded their doctrine of mutual non-interference or reciprocal immunity on a "necessary" implication of the Constitution as a whole,<sup>2</sup> on the necessity that both States and Commonwealth should be free from control if one was not to be at the mercy of the other. This doctrine of necessity was very like that expounded by O'Connor J. in the Woodworkers' Case; thus, in 1908, O'Connor J. had said:<sup>3</sup>

Whenever it is necessary for an effective exercise of a Commonwealth power that a State power should be restricted, it must be taken that the Constitution intended that it should be reserved to the State in that restricted form.

But Isaacs and Higgins JJ. at all times held that Commonwealth powers were to be given their "full and natural" (not merely "effectual" or "necessary" in any minimising sense) ambit, and within that ambit were supreme. The principle of D'Emden v. Pedder, in their view, properly rested on the superiority of Commonwealth powers, as manifested, for example, by covering

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1. (1906) 4 CL.R. 488.
  2. See, e.g., A.-G. (Q'ld) v. A.-G. (Cth) (1915) 20 C.L.R. 148, 163, per Griffith C.J.
  3. Steel Rails Case, (1908) 5 C.L.R. 818, 842.

clause V and s.109 of the Constitution<sup>1</sup> (whereby laws of the Commonwealth prevail over inconsistent State laws). Consistently with this, their judgments in the Woodworkers' and Bootmakers' [No.1] cases emphasised that inter-State disputes came:<sup>2</sup>

within the sole and supreme cognizance of the Commonwealth, to be settled by the Commonwealth tribunal according to federal law and constitutional direction, but, on the principles laid down in D'Emden v. Pedder, unhampered and unimpeded by State interference, whether legislative, judicial or executive.

This was in fact the precise converse of Griffith C.J.'s premise that s.51(xxxv) was to be interpreted in the light of the doctrine (laid down in the Railway Servants' Case) that any "invasion" by the Commonwealth of the sphere of the domestic concerns of the States appertaining to trade and commerce was forbidden except so far as the "invasion" was authorized by some power conferred in express terms or by necessary implication. To O'Connor J.'s fear that, if his view were not adopted, there would be "no State law relating to the industries of a State which might not...by the terms of a federal award be made

1. Covering clause V is s.5 of the Commonwealth of Australia Constitution Act (1900): "This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State...."  
S.109 of the Constitution reads: "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid."
2. 8 C.L.R. 465, 521, per Isaacs J.

inoperative",<sup>1</sup> Isaacs J. opposed the fear<sup>2</sup> that any contention contrary to his view "would prostrate...the Government and its laws at the feet of every State in the union". This all-important difference was underscored by one of the major arguments advanced in Isaacs J.'s dissenting judgment in the Bootmakers' Case [No. 1]:<sup>3</sup>

The Imperial Parliament might have empowered the Commonwealth Parliament in general terms to legislate for the settlement of Inter-State industrial disputes. If it had, the Commonwealth Parliament could at its discretion adopt any one of the numerous methods which might from time to time suggest themselves. It might in that event have voluntarily selected arbitration. Could anyone then have doubted the supremacy of such a law? [Here he referred to covering clause V of the Commonwealth of Australia Constitution Act]. Can it make any difference, can it render the Commonwealth Act less potent, because the Imperial Parliament has not granted a general power, but has itself selected one particular method - namely, arbitration - which the Commonwealth Parliament has faithfully followed?<sup>4</sup>

Higgins J. put the same point another way when he observed that "this power as to two-State disputes is a special power that, as it were, cuts - like the Inter-State commerce power - across all the reserved powers of the States".<sup>5</sup> And the consequences for the question at issue were very clearly stated by Isaacs J.:<sup>6</sup>

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1. Ibid., at 511, per O'Connor J.
  2. Ibid., at 533, per Isaacs J.
  3. 10 C.L.R. 266, 312-313, per Isaacs J; 332-333 per Higgins J.
  4. We need not consider here the attractive arguments, from authority and by reductio ad absurdum, by which Isaacs and Higgins JJ. demonstrated that a decree of the Arbitration Court was to be regarded as a "law of the Commonwealth" for purposes of clause V and s.109 of the Constitution: see 10 C.L.R. 266, 313, 332-333.
  5. 10 C.L.R. 266, 336, per Higgins J.
  6. Ibid., at 316, per Isaacs J.

No limits are assigned in sub-section xxxv unless by the inherent meaning of the word "arbitration". It therefore becomes important to ascertain whether federal "arbitration" under Imperial authority necessarily, from the mere use of the word unqualified, connotes subjection to State law. It is of course idle to predict, to begin with, that so much is reserved to the States.....

What, then, was inherently connoted by the word "arbitration"?

Arbitration does not inherently connote a judicial determination in the sense that the determination is controlled by statute or by any law. It denotes simply that the arbitrator in his actual decision of the matter referred to him, whatever its nature may be, is to be guided by his own personal opinion of what is right or wrong, just or unjust.....<sup>1</sup>

This opinion both Isaacs and Higgins JJ.<sup>2</sup> sought to support by reference to various maxims of Roman law. It did not imply, of course, that the arbitrator was not bound by the law empowering him to act or by any superior law.<sup>3</sup> Nor did it imply that "the substantial requirements of justice"<sup>1</sup> could be violated; the parties must be given an opportunity of being heard, and the arbitrator must act without being subject to undue influence; "there must be no malversation of any kind".<sup>4</sup> In this limited sense, and in this sense only, an award could, "in its inherent nature", be called a judicial act.

Such, according to Isaacs and Higgins JJ., was the inherent nature of arbitration - a process (prescinding from any special

1. Ibid., at 316, per Isaacs J.
2. See per Higgins J., ibid., at 334.
3. Ibid., at 317, per Isaacs J.; 334, per Higgins J.
4. Ibid., at 317, per Isaacs J., quoting Lord Selborne L.C. in Spackman v. Plumstead District Board of Works 10 App.Cas. 229, 236, 240.

regulations of the empowering law or of the "terms of submission") free from all rules save those of procedural justice. A qualification had, however, to be introduced, which might be regarded as contradictory, but which they insisted was merely "extraneous", to their general analysis of the term "arbitration". For in some circumstances an arbitrator might be required to proceed according to rule, "whether law or domestic regulation".<sup>1</sup> Thus some arbitral awards might be judgments "in the ordinary sense". In recognizing this, Isaacs J. tacitly shifted his ground from the assertion that arbitration inherently denoted freedom from all legal rules to the narrower assertion that the word "arbitration" of itself did not necessarily indicate that the decision was a judgment in the ordinary sense. There were thus two varieties of arbitration, the one involving "judicial" and the other "legislative" action.<sup>2</sup> Isaacs J. proceeded to examine the question of how these two varieties could be ascertained and differentiated.

Of course, all that was strictly necessary was to show that "it is impossible to predicate from the mere use of the word "arbitration" what the nature of the award must be"<sup>3</sup> and that "arbitration" could connote freedom from rules; this would

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1. 10 C.L.R. 266, 317, per Isaacs J.
  2. Ibid., at 317, per Isaacs J.
  3. Ibid., at 321.

have been sufficient (granted the supremacy of Commonwealth law) to refute the majority view that the federal awards must, in the nature of "arbitration", be subject to State law. Indeed, in the Woodworkers' Case, Isaacs J. was (for the most part) content to show<sup>1</sup> that, when the Constitution was drawn up, industrial arbitration was widely understood to involve, not subjection to existing rules and arrangements, but "influencing and deciding issues on no ground whatever but moral and economic fair play and justice".<sup>2</sup> For this point of view the argument was simple:<sup>3</sup>

apart from the presence of the State Act, the unqualified fixation of wages and hours is within the legitimate and necessary power of the arbitration tribunal acting under the authority of the Commonwealth Act. Therefore, if on that field it meets an inconsistent State law, otherwise valid, the Federal Act must dominate the field. The contrary contention, as Marshall C.J. said in Cohens v. Virginia,<sup>4</sup> "would prostrate....the Government and its laws at the feet of every State in the union".

But even in the Woodworkers' Case Isaacs J. had at the back of his mind some sort of abstract distinction between "judicial" and "legislative". There was a cryptic reference<sup>5</sup> to Moses v. Larker, which could otherwise be hardly relevant; and there was the holding (contradicted, it rather appears, in the Bootmakers' Case (No.1))<sup>6</sup> that the State Wages Boards exercised "no legis-

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1. 8 C.L.R. 465, 521-526, per Isaacs J.
  2. Ibid., at 526.
  3. Ibid., at 533.
  4. 6 Wheat. 264, 385.
  5. 8 C.L.R. 465, 525.
  6. 10 C.L.R. 266, 319.

lative power".<sup>1</sup> This concern to classify arbitration as either "judicial" or "legislative" becomes central to Isaacs J.'s judgment in the Bootmakers' Case (No.1).<sup>2</sup>

What, then was the "clear and decisive principle"<sup>3</sup> that Isaacs J. sought in order to classify industrial arbitration as either "judicial" or "legislative" in essence? The test, he said, could not be the parties' capacity to agree to the terms in dispute, for that, pace the senior Justices, was extraneous to the inherent nature of arbitration, and "to erect it into a vital test is to mistake a concomitant circumstance arising from extraneous considerations into an indispensable and essential attribute"<sup>4</sup> Nor was it sufficient to point, with Griffith C.J., to the character of the body as a tribunal to conclude that its determinations could not be of a legislative nature. The question, as Holmes J. had said,<sup>5</sup> depended not upon the character of the body, but upon the character of the proceedings, and this in turn was determined by the nature of the final act. He quoted Holmes J.:<sup>6</sup>

1. 8 C.L.R. 465, 528.

2. Perhaps Huddart Parker v. Moorehead, which was decided between the Woodworkers' Case and the Bootmakers' Case (No.1) had had some influence. His judgment in the Bootmakers' Case (No.1) did contain two oblique references (not by name) to Huddart Parker v. Moorehead. See 10 C.L.R. 266, 318, 319.

3. 10 C.L.R. 266, 317.

4. *Id.* at 317.

5. Prentis v. Atlantic Coast Line Co. (1908) 211 U.S. 210, 226.

6. 10 C.L.R. 266, 318.

A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power.<sup>1</sup>

His own formulation was as follows:<sup>2</sup>

If the dispute is as to the relative rights of parties as they rest on past or present circumstances, the award is in the nature of a judgment, which might have been the decree of an ordinary judicial tribunal acting under the ordinary judicial power. There the law applicable to the case must be observed. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties - that is, if no present rights are asserted or denied, but a future rule of conduct is to be prescribed, thus creating new rights and obligations, with sanctions for non-conformity - then the determination that so prescribes, call it an award, or arbitrament, determination or decision or what you will, is essentially of a legislative character, and limited only by the law which authorizes it. If, again, there are neither present rights asserted, nor a future rule of conduct prescribed but merely a fact ascertained necessary for the practical effectuation of admitted rights, the proceeding, though called an arbitration, is rather in the nature of an appraisal or ministerial act.

(This passage shows clearly that Issacs J.'s "test" of judicial power selects as primary what we have called "issue" as distinct from the "agent" or "procedure"<sup>3</sup> of Griffith C.J.'s tribunal-centred test in Alexander's Case). The decision of a State Wages Board was thus of a "legislative character";<sup>4</sup> and who would say that the award of the federal Arbitration Court was

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1. Prentis v. Atlantic Coast Line Co. (1908) 211 U.S. 210, 226.
  2. 10 C.L.R. 266, 318.
  3. Cf. supra, p.4. 33.
  4. Ibid., at 319.

"less of the nature of legislation"? The existence of a dispute was immateral to the eventual character of the result. (A more vigorous assertion of a "matter-form" doctrine,<sup>1</sup> in most of its senses, can hardly be imagined). An industrial dispute necessarily looked to the future rights and liabilities of the parties; hence it was not legally possible to say that all disputes led to an ordinary judicial decree and that every settlement of every dispute was necessarily an ordinary judicial decree.<sup>2</sup> There was not, and never could be, "any resemblance" between an ordinary judgment and a federal award, except in the mere procedure by which they were arrived at; for a federal award prescribing industrial conditions expounded nothing and interpreted nothing, but introduced new obligations:<sup>3</sup>

This is legislation by means of a subordinate body acting under the Imperial authority, and a State law laying down a different rule is necessarily antagonistic to the award itself.

Higgins J.<sup>4</sup> was more cautious in relying on such sharply (but vaguely) defined essences:

It would probably be incorrect to say that the Wages Board makes laws, or that the Arbitration Court makes laws. It is the State Act that gives the character of a law to whatever the Wages Board prescribes, and it is the Federal Act that gives the character of a law to whatever the Arbitration Court prescribes.

The result was, however, the same.

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1. Cf. Supra, p.4.14 .
  2. Ibid., at 320.
  3. Ibid., at 321.
  4. Ibid., at 332.

Such was the distinction to be drawn between "judicial" and "legislative" species of arbitration. It was now necessary only to show that s.51(xxxv) was intended to allow arbitration of the legislative species. Several lines of response to this problem are to be found in the judgments of Isaacs and Higgins JJ. First, it was sought to show that industrial arbitration was so understood at the time when the Constitution was drafted.<sup>1</sup> Secondly, it was sought to show that this understanding was indirectly reflected in other Imperial enactments.<sup>2</sup> Thirdly, an actual intention was imputed to the Imperial Parliament in passing the Commonwealth of Australia Constitution Act. Isaacs J. said:

The Imperial Parliament might have directly legislated or empowered the Commonwealth Parliament to directly legislate so as to fix future rates of wages, or number of hours, etc., for the prevention or settlement of disputes. It preferred not to do so directly, but to do so by the method of arbitration, when and in the manner selected and with any limitations imposed by the Commonwealth Parliament. It evidently thought that indirect directions of that nature are more fittingly issued after due inquiry into particular facts depending upon evidence, an investigation for which Parliament is manifestly unfitted, and it therefore entrusted the power - if exercised at all - not to Parliament, but to a special organ for the purpose, one or more arbitrators.<sup>3</sup>

At another point in his judgment in the Bootmakers' Case [No.1], Isaacs J., having referred to the rules of procedural justice

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1. 8 C.L.R. 465, 521-525, per Isaacs J.
  2. 10 C.L.R. 266, 321-325, per Isaacs J.
  3. Ibid., at 319.

to which all arbitrators were subject, said:

It is because this mode of procedure is inherent in the subject, it is because this differentiates the method of arbitration from that of Parliamentary legislation, that arbitration was selected by the Imperial Parliament as the one and only means of exercising the Commonwealth power in this regard.<sup>1</sup>

Reading "Conventions" for "Imperial Parliament" (which had no actual intentions in the matter), the historian must frankly recognise both these imputed motives and explanations as quite fictitious.

The fourth, and perhaps most fundamental, reason advanced by Isaacson Higgins JJ. for holding that s.51(xxxv) allowed arbitration in the legislative sense was found in the general national interest as reflected in the presumed general intention of s.51(xxxv):

the animating spirit, as well as the natural signification of the words of sub-section xxxv, is the preservation or restoration of industrial peace, and the sub-section authorizes federal intervention, not simply to determine private differences between an employer and his employees and make a scale of rights and liabilities to operate merely for their exclusive benefit, but in the interest of the whole general population to avert or end disastrous industrial disorganization.<sup>2</sup>

This presumed intention to give priority to the interest of the Australian community was and was to be at the root of most of

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1. Ibid., at 317. 336,  
 2. Ibid., at 325-326, per Isaacs J.;/per Higgins J.;  
 8 C.L.R. 465, 546, per Higgins J.

the judgments that Isaacs and Higgins JJ. ever made on s.51(xxxv), just as it had showed itself as a fundamental concern of theirs in the Convention debates on the matter. In the present cases, it evidently underlay, or at least was intimately related to, the two central postulates of their judgments - that industrial arbitration was not judicial because it looked beyond the (present) rights of the parties towards the (future) benefit of the community; and that federal laws overrode the (merely regional) laws and powers of the States. So it was hardly coincidental that Isaacs and Higgins JJ.'s conception of "arbitration" (and thence of the essence of "judicial" and "legislative" functions) conformed with their conception of the proper balance of federal and State powers.

## IV

The Abstract triad as an analytical tool

Not long after the decision in the Bootmakers' Case [No.1], litigants sought to take advantage of the prevailing reasoning to have the whole Conciliation and Arbitration Act declared invalid as going beyond the meaning of "arbitration" intended by s.51(xxxv). Thus, in Whybrow's Case (1910),<sup>1</sup> it was argued that the word "arbitration" denoted four essential features - voluntary submission; choice or partial choice of tribunal;

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1. R. v. Commonwealth Court of Conciliation and Arbitration, ex parte Whybrow (1910) 11 C.L.R. 1.

extension of the tribunal's function to all matters (including rules of conduct for the future) not actually forbidden by law, or, in short, anything that the parties themselves might have agreed to do; and exercise of judicial functions, between only the parties to the dispute, and only after giving the parties an opportunity of being heard. The four Justices hearing the case agreed that the first two of these features were accidental and dispensable, rather than essential. O'Connor J.<sup>1</sup> agreed with Griffith C.J.'s statement:<sup>2</sup>

The series of Statutes mentioned by my brother Isaacs indicate to my mind conclusively that for a long time before 1900 the words "arbitrator" and "arbitration" had been used by the English Parliament to denote a tribunal with respect to which the essential element of the concept was absolute discretionary power, only fettered by the limits of the dispute submitted to arbitration and the law of the land.

This statement virtually adopted the propositions of Isaacs and Higgins JJ., as to the "inherent nature" of arbitration, in the Bootmakers' Case [No.1]. However, Griffith C.J. did not draw from this the same conclusions; he insisted that the word "arbitration" connoted that the function of an arbitrator was a judicial function which could only be exercised between the parties to a dispute, and after hearing them:

It follows that the only power which the Parliament can confer upon the arbitrator is a judicial or arbitral power to be exercised on these principles, and that it cannot confer upon him any legislative functions. In

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1. Ibid., at 44.  
2. Ibid., at 24.

[the Bootmakers' Case [No.1]] this Court denied to the Commonwealth Court of Arbitration any legislative authority.<sup>1</sup>

This characterisation of arbitration as "judicial" in explicit contrast to "legislative" was in fact extraneous to Griffith C.J.'s reasoning; as he himself said, the objection to the validity of the Act was founded on the meaning of the word "arbitration"; to refute the objection it was necessary only to show that the "voluntariness and choice" denied by the Act were in no way essential to "arbitration".<sup>2</sup> But the Chief Justice persisted in translating his arguments into the form of a judicial-legislative dichotomy, as if on the unspoken assumption that no constitutional institution could combine judicial with legislative functions.

This transation was especially notable in Griffith C.J.'s treatment of the second objection to the validity of the Act, namely, that seeking to show that s.38(f) of the Act was invalid. That section purported to authorize the Arbitration Court:

to declare any award or order that any practice, regulation, rule, custom, term of agreement, condition of employment or dealing whatsoever determined by an award in relation to any industrial matters shall be a common rule of any industry in connection with which the dispute [which gives rise to the award] arises.

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1. Ibid., at 25.
  2. Ibid., at 23.

As reproduced by Griffith C.J. in Whybrow's Case, the challenge to s.38(f) was as follows:

The objection taken to the provisions of the Commonwealth Conciliation and Arbitration Act 1904 as to the common rule is that they purport either to confer a legislative authority, properly so called, or at least to authorize the arbitrator to make an award binding upon persons not parties to the dispute before him, which, it is said, is in substance, if not in form, an act of legislation, and not an act of a judicial nature.<sup>1</sup>

In Whybrow's Case, Griffith C.J., together with O'Connor and Isaacs JJ., held that s.38(f) was severable; so he did not have to pronounce on the merits of the argument just expounded. Only Barton J. gave his opinion on the validity of s.38(f). He, too, made some use of the "judicial - legislative" dichotomy. In the light of his refusal, in the Wheat Case four years later, to accept this dichotomy as part of a dominant constitutional principle of demarcation, it is necessary to evaluate his position in Whybrow's Case very carefully. The question he there set himself to answer was, what in 1900 was connoted by arbitration to settle industrial disputes? The answer he gave was as follows:

Clearly it did not include a power to the arbitrator to regulate the particular trade. That would be giving the tribunal a power to legislate, which no torture of words can twist into arbitration. The arbitral tribunal must at any rate be judicial and not legislative. It must, therefore, act on the ordinary principles of justice involved in the necessity of allowing a hearing to all parties to the difference...and of abstaining from

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1. Ibid., at 25.

involving in its decision interests of others than the parties to the difference....If that which purports to be a settlement affects to bind others than the disputants, the function there performed by the tribunal is not arbitration, any more than such a decision by a Court would be a judgment.<sup>1</sup>

When this passage is carefully examined, it appears that the real source, in Barton J.'s mind, of the dichotomy he posited between judicial and legislative was not a constitutional principle of separation but the meaning of the word "arbitration" itself. He was not putting a strict syllogism of the form: "Arbitration is judicial (as opposed to legislative); but all judicial tribunals limit their decisions to the parties; therefore arbitral decisions cannot be made a (common) rule extending beyond the parties". His argument was of a much more informal character; the terms "legislative" and "judicial" were being used as pointers, to draw attention to, to highlight, features of the word "arbitration"; the argument took all its force from the meaning of "arbitration"; it was this inherent meaning, rather than any constitutional principle, which precluded any legislative power from the arbitral sphere (which happened rather to be "judicial"). This exegesis is confirmed by the remainder of the judgment, which sought<sup>2</sup> to deduce the invalidity of the common rule provisions from the principle that arbitral functions were "necessarily limited to matters which the

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1. Ibid., at 36-37.

2. Ibid., at 37. But cf. supra p.9.13, infra p.9.35.

parties might or could lawfully give the tribunal power to settle' and, further, from the fact that no Act prior to 1900 gave any arbitral tribunal powers analogous to s.38(f). This portion of the argument followed on without break from the previous portion; thus we can say that the emphasis at all times was on elucidating the true scope of the word "arbitration" in itself, and not on placing that one word in one or other abstract category of power supposed by the Constitution to be kept separate from other such categories. The fact remains, however, that the increasing judicial use of Abstract terminology was paving the way for the subsequent leap to an Abstract doctrine of demarcation.

On close examination, what has been said of Barton J.'s can also be said of Griffith C.J.'s use of "judicial" and "legislative" as counters in the analysis of "arbitration". Hence the remarks of the Court in R. v. Kelly, ex p. Victoria (1950) are correct: "...the comparison in the [Bootmakers' Case No.2] between the arbitral power and judicial power was only intended to illustrate and emphasize the fact that s.51(xxxv) does not enable the Parliament to legislate, or to authorize another body to legislate, on the general subject of industrial conditions".<sup>1</sup> We have already quoted Griffith C.J.'s objection

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1. 81 CL.R. 64,81.

to s.38(f) in Whybrow's Case; we can now turn to his final pronouncement on the objection, later in 1910, in the Bootmakers' Case [No.2].<sup>1</sup> It is to be noted that in this case the argument for the objection, as addressed to the Court, was explicitly that the power conferred by s.51(xxxv) only authorised Parliament to confer judicial power on the tribunal it created.<sup>2</sup> This argument, therefore, while using the "legislative - executive" dichotomy, was appealing not to an Abstract constitutional principle but to the inherent meaning of s.51(xxxv); it was, in fact, a reproduction of Barton J.'s opinion in Whybrow's Case. Griffith C.J.'s translation of the argument is interesting:<sup>3</sup>

It is objected...that pl. xxxv of s.51 of the Constitution does not confer upon the Parliament a general power to regulate industries...and it is contended that the provision now in question purports to confer a general regulative power which is in the nature of legislation and is certainly not arbitration.

This was in fact the argument that Griffith C.J. accepted as decisive. Unlike the power of those States which had arbitration legislation embodying common rule provisions, the power of the Commonwealth Parliament over industries was not plenary - it did not extend to legislative power.<sup>4</sup> Why not? Was it because it was restricted to conferring judicial power which, in accordance with constitutional principle, was never to be confused with legislative power? Or because s.51(xxxv) limited

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1. Australian Boot Trade Employees' Federation v. Whybrow (1910) 11 C.L.R. 311. (Sometimes also called Whybrow's Case).
  2. Ibid., at 312.
  3. Ibid., at 316 (emphasis added).
  4. See also Whybrow's Case 11 C.L.R. 1, 25.

the power of Parliament to "arbitration", and the idea of "arbitration" itself, and its use in s.51(xxxv), excluded the idea of legislation? It seems fairly clear that the latter answer was the one adopted by the Chief Justice (though it is not certain that the former answer was not at the back of his mind):

I adhere to the opinion which I expressed in the Woodworkers' Case<sup>1</sup> that the term "dispute" connotes the existence of parties taking opposite sides, to which I would only add that the term "arbitration" connotes the same idea....The only means by which the relations of persons lawfully associated in harmony can be lawfully effected are mutual agreements and legislative enactments. Where an authority is empowered to prescribe general rules for the governance of the community or any part of it the power conferred is in its essence legislative. Sec. 38(f) is then...an attempted delegation of legislative authority to the Court to deal with matters over which... the Parliament itself had no jurisdiction.<sup>2</sup>

The attitude of the senior Justices was probably expressed most pithily by O'Connor J. in the Bootmakers' Case (No.2):

True it is that an arbitral tribunal makes the declaration [of a common rule], and makes it after inquiry, but the declaration has in it no quality of arbitral adjudication. It is not a judicial settlement of matters in difference between parties to a dispute, it need have no other basis than the determination of the learned President, that in order to secure the fair working of the award between the parties bound by its provisions, and the maintenance of industrial peace throughout the trade, it is necessary to impose, on all persons engaged in the industry, the conditions of employment settled by the award. Whether or not the Commonwealth Parliament had authority to invest the Federal Arbitration Court with such a power depends entirely upon what is the right interpretation of sub-sec. of s.51...<sup>3</sup>

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1. 8 C.L.R. 465, 488.
  2. 11 C.L.R. 311, 317-318.
  3. Ibid., at 326.

This passage contains no hint that the argument proceeded on any demarcation of "judicial" and "legislative" powers derived, not from the concept of "arbitration", but from the framework and object of the Constitution. It must be admitted that the habit of Griffith C.J. and Barton J. of using a "judicial - legislative" dichotomy, even as an elucidation of "arbitration", was unconsciously preparing the way for the reception of the doctrine that <sup>that</sup> dichotomy is of overriding significance in the interpretation of the whole Constitution. But, for the moment, the senior Justices had gone no further towards accepting a dominant principle of demarcation than in the Bootmakers' Case [No.1], when Barton J. revealed the latent ambiguity in their thought:

The use of ["arbitration"] as it occurs in this power is an assertion of the judicial, and therefore, without more, a denial of the legislative, capacity of the tribunal authorized.<sup>1</sup>

It would be difficult to conceive a phrase more equivocal, in this context, than "without more". Barton J. was, of course, to reject the Abstract principle of demarcation, as the supreme and overriding principle of interpretation, in the Wheat Case; but, as we saw he had almost accepted it as such in the Bootmakers' Case [No.1]. What, after all, is significant is that the senior Justices became so much more cautious about adverting to any such principle in Whybrow's Case, and,

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1. 10 C.L.R. 266, 297.

particularly, the second Bootmakers' Case.

Perhaps the senior Justices were influenced by the restraint of Isaacs and Higgins JJ. in the Bootmakers' Case [No.2]. This restraint was made necessary by the doctrinal position already arrived at by these two Justices, a position which emphasised that arbitration was in any case legislative and, moreover, oriented not towards "the immediate combatants in an industrial struggle"<sup>1</sup> but towards "the undisturbed continuance of national industries, affecting the general population".<sup>2</sup> Furthermore, the junior Justices were committed to a distinction, reaffirmed in the Bootmakers' Case [No.2],<sup>3</sup> between the "innate characteristics" of arbitration and such mere "usual accompaniments" as precise definition of the issue in dispute, or enforcement of existing rights. Thus they could not exclude the common rule provisions on the ground that they were essentially legislative, or non-judicial, nor because they looked beyond the interests and rights of the parties to a dispute. They took instead the only ground open to them, namely, that "arbitration" was "not an intelligible conception except where some difference can be perceived, and expressed in terms, however general, between the parties who are to

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1. 11 C.L.R. 311, 332 per Isaacs J.
  2. 11 C.L.R. 311, 332, per Isaacs J.
  3. Ibid., at 333, per Isaacs J.

be affected by the decision".<sup>1</sup> Higgins J. sought to support this definition of the "elemental nature of arbitration" by relying, like Barton J., on the fact that in 1900 no legislative provisions existed anywhere conferring common rule powers on arbitral tribunals. This plea has a somewhat ad hoc or special air, since common rule provisions appeared in the New South Wales Arbitration Act, not, admittedly, in 1900, but in 1901. This rather discriminating chronological approach to the "elemental" connotations of arbitration lends some force to Higgins J.'s reflection, at another point in his judgment:

Conciliation and arbitration are not to be treated as physical objects, whose class boundaries are fixed by physical nature; they are artificial products of society, and dependent as to their area and character upon the will of society.<sup>2</sup>

Or the will of the High Court, as the case may be.

## V

### Cross-currents

In 1912 O'Connor J. died, and soon three new Justices, Gavan Duffy, Powers and Rich JJ., were appointed to the High Court. They joined a bench which had for seven years been divided against itself not only on the paramount issue of the proper distribution of State and Commonwealth powers and the theory of mutual non-interference or implied immunities, but also on the demonstrably related issue of s.51(xxxv) itself.

1. Ibid., at 335, per Isaacs J.  
 2. Ibid., at 339, per Higgins J.

Apart from the question of inconsistent State laws and awards the main area of disagreement about s.51(xxxv) concerned the words "industrial dispute". This latter disagreement was the source of those appeals to general principles of Australian federalism that, as we have seen, became integral to the analysis of "arbitration" in cases such as the Bootmakers' Case (No.1). The years of disagreement had done nothing to soften the sharpness of debate; in 1914 we find Griffith C.J. describing (equivalently) the view of Isaacs and Higgins JJ. as a "fraud upon the Constitution",<sup>1</sup> while Isaacs J. declared the interpretation of "dispute" advanced by the senior Justices to be unworthy of comment. It may be as well to set out the definitive statements of these opposing positions, which in themselves hardly changed over a decade:

the dispute must be something more than a claim to have the conduct of an industry regulated. It must be a real dispute of such a nature as to indicate a real danger of dislocation of industry if it is not settled....although the term "industrial dispute" may be used and has been used in legislation in a sense wide enough to include any claim of request made or preferred by a single employee to his employer or vice versa, yet, having regard to the fact that the general control of industrial matters is by the Constitution reserved to the States, and to the governing words "extending beyond the limits of any one State", it was plain that in pl.xxxv of sec.51 the phrase did not bear that wider meaning.<sup>2</sup>

Such was the view of Griffith C.J., with which Barton J. explicitly concurred.<sup>3</sup> With it is to be compared the view of

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1. The Felt Hatters' Case (1914) 18 C.L.R. 88, 94.  
 2. 18 C.L.R. 88, 92-94 (emphasis added).  
 3. Ibid., at 106.

Isaacs J.:<sup>1</sup>

the governing consideration in construing sub-sec. xxxv of s.51 of the Constitution, the real key in fact to its proper interpretation, is the public welfare....This central and dominating principle, if given its proper influence in this case, would, as I think, entirely free the matter from difficulty. So long as such cases as the present are considered on the narrow platform of mere individual right and wrong...so long will there be a danger that strikes and lock-outs will be still resorted to as a means of enforcing industrial claims, because the broad significance of the constitutional provision will be missed...

The object of trade combinations and trade disputes is not merely to redress grievances; it is to improve conditions. The presence of a grievance, real or fancied...has never been considered an indispensable circumstance.

The root of the matter is plain...that the thing to be settled is a demand persisted in on one side, and determinedly denied on the other, irrespective of any...discontent at all other than that manifested by the determination to get the demand conceded.

And the same considerations of "public welfare" which gave the federal arbitral power its "broad significance" as a legislative, and not judicial, power not restricted to "mere individual right and wrong", gave it also, in Isaacs J.'s view, a status superior to the interests of the States in the management of their own industrial affairs.

The new Justices for a long time avoided committing themselves decisively to the premise either of reserved State power

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1. The Tramways' Case [No.2] (1914) 19 C.L.R. 43, 85, 111,113.

or of overriding public (and national) interest. Indeed, for three or four years the decisions on the arbitral power reflect an uncertainty not entirely restricted to the new junior Justices.

Thus, in 1914, Griffith C.J. inexplicably wavered in his conviction that arbitration was essentially judicial in character, s.31(i) of the Commonwealth Conciliation and Arbitration Act 1904 purported to take away from the High Court the power to issue Prohibition in respect of any award or order of the Arbitration Court. However, s.75(v) of the Constitution conferred original jurisdiction on the High Court in all cases in which Prohibition was sought against "an officer of the Commonwealth"; and in the Tramways' Case [No.1]<sup>1</sup> the validity of s.31(i) of the Act was put in question. One of the arguments by which s.31(i) was sought to be supported was to the effect that s.75(v) applied only to officers whose authority was non-judicial but who possessed or assumed subordinate or incidental judicial powers. Thus the President of the Arbitration Court, being, it was said, a principally or essentially judicial officer, was not an "officer of the Commonwealth" within s.75(v), and s.31(i) of the Act was consistent with that section. The Court rejected the argument by declining to distinguish, here,

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1. (1914) 18 C.L.R. 54.

between judicial officers and non-judicial officers exercising judicial functions. However, Griffith C.J. ventured the long obiter dictum that Powers J. was to use against him in Alexander's Case.<sup>1</sup> The functions adverted to in s.51(xxxv), he said, were "arbitral":

and in so far as an award was made in the exercise of arbitral functions it would not, even without s.31 of the Arbitration Act, be appealable under s.73 [of the Constitution]. See National Telephone Company's Case.<sup>1a</sup> The test whether an appeal would lie in such a case would, as pointed out by Lord Moulton, be whether the tribunal in giving the decision in question was exercising arbitral powers or acting as a Court. It is true that the Arbitration Act calls the Arbitration Court a "Court" and a "Court of Record", but nomenclature does not alter the nature of the functions. In the discharge of his arbitral functions the President is not bound by rules of evidence, but may form his own mind in any manner he thinks fit. A Court of Appeal would have no means of reviewing a decision so arrived at (Moses v. Parker).<sup>2</sup> I am strongly disposed to think that the so-called Court of Arbitration when performing its arbitral functions is not acting as a Court properly so-called. But the President is undoubtedly, in any view of the case, an officer of the Commonwealth, so that quacunque via, the case is within s.75(v).<sup>3</sup>

This passage contradicted its author's long-standing opinion that arbitration was essentially judicial in character (an opinion which grounded the majority judgments in the Woodworkers' and Bootmakers' Cases), and that the Arbitration Court was a true court. It also contradicted the view that was to ground his judgment in Alexander's Case, namely, that the functions

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1. See supra, p.5.44.  
 1. [1913] A.C. 546, 559.  
 2. [1896] A.C. 245.  
 3. 18 C.L.R. 54, 62.

of the Arbitration Court were indivisible.<sup>1</sup> Moreover, these remarks about the award-making power were substantially irrelevant; as Isaacs J.<sup>2</sup> and Gavan Duffy and Rich JJ. pointed out, the application in the case in hand was to prohibit the Arbitration Court from enforcing an award already made and completed; it was not an application to prevent the President from proceeding to make an award. So Gavan Duffy and Rich JJ., not to mention Powers J., were able to avoid expressing any opinion on the validity of the distinction between the award-making ("arbitral") and the award-enforcing powers of the Court.

Isaacs J., however, was so enthusiastic about this distinction that he took care to elaborate and justify it, despite its admittedly tenuous connection with the decision in the Tragways' Case (No. 1). The Act, he insisted, in effect created two tribunals, the one the President acting as arbitrator in making an award, the other the Court sitting to interpret or enforce the award so made:<sup>3</sup>

The fact that the arbitrator happens to be personally

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1. It appears from remarks in the joint judgment of Gavan Duffy and Rich JJ. that the opinion expressed by the Chief Justice in the passage quoted in fact reproduced one of the principal arguments of counsel against the validity of s.31(i) of the Act: *ibid.*, at 81.
  2. *Ibid.*, at 70.
  3. *Ibid.*, at 70-71.

identical with the individual who presides in the Court is irrelevant. The tribunals are distinct; and the question is whether "a Court" can be prohibited under s.75(v).... No doubt the nature of the function of the arbitrator in actually determining the dispute is quasi-judicial, in the sense<sup>1</sup> indicated by Lord Selborne in Speckman v. Plumstead Board of Works.<sup>2</sup> That would be sufficient according to the established authorities to attract prohibition in a proper case.... But in the sense that constitutes a judicial tribunal a Court of justice, one of the kind of Courts in which the Constitution vests the judicial power, the arbitrator is not a "Court" in my view - reasons for which appear in the [Woodworkers' Case]<sup>3</sup> and in the [Bootmakers' Case [No.1]].<sup>4</sup>

So far, indeed, this statement by Isaacs J. can be regarded as little more than a sharpened re-statement of his views in the earlier cases there mentioned. But the explicit distinction between the functions of the Arbitration Court was novel. Its potentially radical consequences were not long hidden - for the first time a judicial opinion was casting doubt on the validity of the general scheme of the Conciliation and Arbitration Act:

The legislature has assumed to create a Court of Record for all purposes preliminary and consequent, as well as for the actual settlement of the dispute.... [The legislature cannot convert [the President as arbitrator] into a "Court" within the meaning of the Judicature provisions of the Constitution. So much of the Arbitration Act as assumes to do so may, in my opinion, be simply disregarded.]<sup>5</sup>

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1. This is evidently the sense in which Isaacs J. (dissenting) described the settling of a dispute by the Arbitration Court as "the determination of the judicial tribunal", in R. v. Commonwealth Court of Conciliation and Arbitration and the Merchant Service Guild (1912) 15 C.L.R. 586, 606.
  2. 10 App. Cas. 229, 240.
  3. 8 C.L.R. 465, 522.
  4. 10 C.L.R. 266, 316ff.
  5. Ibid., at 71.

As yet, however, the doubt was still in its incipient stages; even Isaacs J. was unprepared for the root and branch objections which he was to sustain four years later:

But in respect of the enforcement of an award, the position is entirely different. The award, when made, creates and settles rights, and those rights may be judicially enforced in the manner prescribed by the legislature, by any recognised Court, and in my opinion by no other, because such enforcement, including interpretation, is properly within the judicial power. In this domain the Court is well-constituted, and none the less by reason of the wide provisions of s.25 of the Act. That section should be read as a procedure section, and it does not except "rules of law", as was the case in Moses v. Parker, a circumstance that seems to me to have been the real point of the judgment of the Privy Council....The legislature, so far from contemplating the Court being free from any rules of law, clearly intends that the rights of the parties shall be fixed by the award, and that these rights are to be enforced by the methods prescribed....<sup>1</sup>

It is clear that all that was lacking in 1914, for Isaacs J. to be able then to reach the decision arrived at in 1918, was the premise supplied by the Wheat Case (1915) - namely, that s.72 required life tenure for all judges in federal courts. That premise was unforeseen in 1914; even so, this forcing of the Arbitration Act into an Abstractly partitioned mould was sufficiently radical to inspire caution in all save Griffith C.J. (whose lack of caution, amounting almost to inadvertence, appears all the more striking). For Powers J. did not refer to the postulated partition of functions, Gavan Duffy and Rich JJ., as we have noted, declined to express any opinion on it, and

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1. Ibid., at 71-72.

Barton J. rather more positively refused to discuss it.

The Builders Labourers' Case,<sup>1</sup> determined in 1914, very shortly after the Tramways' Case [No.1], did little to clarify the situation. Once again, Isaacs J. enthusiastically affirmed his new position,<sup>2</sup> while the new Justices avoided discussing it.<sup>3</sup> Griffith C.J., however, recoiled from the position he had seemed to adopt in the earlier case, and Barton J. joined with him in decisively rejecting the suggested distinction between the President as arbitrator and the President as judge:

the Act provides (s.11) that "there shall be a... Court.... which shall be a Court of Record, and shall consist of a President". It is impossible to contend that his personality can be divided into two parts, one that which makes the award, the other that which has large powers to enforce obedience to it.<sup>4</sup>

As in the Tramways' Case [No.1], all the judges agreed that Prohibition could issue to the Arbitration Court at any stage of its proceedings. But now all except Isaacs J. were proceeding on the principle that "prohibition may be applied for so long as anything remains to be done under the judgment impeached".<sup>5</sup> This principle Isaacs J. regarded as irrelevant,<sup>6</sup> since in his

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1. (1914) 18 C.L.R. 224.

2. Ibid., at 238-239.

3. "We are glad to be relieved from the necessity of expressing any opinion with respect to it", per Gavan Duffy and Rich JJ., ibid., at 241.

4. Ibid., at 236.

5. Ibid., at 236, per Griffith C.J.; 272, per Powers J.

6. 18 C.L.R. 54, 71.

view there was not one tribunal, but two, and thus no one judgment under which "something remained to be done".

As before, Isaacs J.'s expressions about the partition of functions were obiter, since, as he himself said, Prohibition would in any event issue.<sup>1</sup> This did not restrain him from adding at the very end of his judgment the sybilline dictum that "extreme care is necessary to adapt the Act to the arbitral power".<sup>2</sup>

At this stage, Isaacs J. might well have felt some disappointment at the unwillingness of the junior Justices to commit themselves to his views. Very shortly after their appointment, Gavan Duffy and Rich JJ. had adopted his test of "industrial dispute", and rejected that for so long advanced by Griffith C.J. and Barton J.<sup>3</sup> Moreover, in the Builders' Labourers' Case, Gavan Duffy and Rich JJ. had commented scornfully<sup>4</sup> on attempts

to interpret s.51(xxxv) by first arbitrarily fixing the power of the State and then giving what remains to the Commonwealth, or, as has been said in homely phrase, by making the tail wag the dog instead of letting the dog wag its tail.

But Gavan Duffy and Rich JJ., while accepting one or other of the major premises of Isaacs J.'s position, no more committed

1. 18 C.L.R. 224, 239.
2. Ibid., at 253.
3. E.g. Woodworkers' Case (1909) 8 C.L.R. 465, 488-489, per Griffith C.J.
4. 18 C.L.R. 224, 255.

themselves to his whole position that Powers J. committed himself to all the views of the senior Justices as to the distribution of powers and the nature of arbitration when he observed, in the Builders' Labourers' Case, that he agreed "for the most part" with the law laid down by Griffith C.J. as to the existence of a "dispute".<sup>1</sup> Still more immediately relevant was the unwillingness of Gavan Duffy and Rich JJ. to follow up a hint they had themselves thrown out in 1913, when dissenting in the Merchant Service Guild of Australasia v. Newcastle and Hunter River Steamship Co. Ltd.<sup>2</sup> - that, while nothing in the Constitution forbade the Commonwealth Parliament to vest in the High Court some part of the power of settlement by arbitration, the Parliament could not "change the nature of the power from arbitral to judicial".<sup>3</sup> But the leap to the conclusion that what was not judicial must be legislative (or executive) had not yet been made by these two Justices.

Still, there was always inchoate support by the new Justices for the views of Isaacs J. (Higgins J., as ever, went his own way, which more often than not brought him to agreement with the conclusions of Isaacs J.). At least, after 1912 the

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1. (1913) 16 C.L.R. 591.  
 2. (1913) 16 C.L.R. 591.  
 3. Ibid., at 647.

two senior Justices become more and more isolated from the consensus of the Court, not so much in their conclusions as in their reasons.<sup>1</sup>

## VI

Alexander's Case and the ripeness of time

The first of the cases we have discussed, in the milieu of the arbitral power, was the Jumbunna Case, in which O'Connor J. spoke of "the exercise of the judicial power of the Commonwealth...by way of conciliation and arbitration in the settlement of industrial disputes";<sup>2</sup> the last before Alexander's Case was ex parte Australian Agricultural Co. (1916), in which Isaacs J. spoke of the Arbitration Court as "not a tribunal created under the judicial power of the Commonwealth at all".<sup>3</sup> Here was the essential conflict to be resolved by Alexander's Case. The resolution of the conflict can no longer be regarded as surprising.

It is not surprising that Gavan Duffy J. took the narrow ground he did, for, as to the nature of arbitration, he had always been unwilling to commit himself to either Isaacs J. or

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1. In the context of judicial power, see especially Federated Engine-Drivers and Firemen's Association of Australia v. Colonial Sugar Refining Co. Ltd. (1916) 22 C.L.R. 103, 115, per Isaacs, Gavan Duffy and Rich JJ. R v. President of the Commonwealth Court of Conciliation and Arbitration, ex p. Australian Agricultural Co. Ltd. (1916) 22 C.L.R. 261.
  2. 6 C.L.R. 309, 360; supra, p.9.3.
  3. 22 C.L.R. 261, 265.

to the senior Justices. And, as to the meaning of s.72, he had shown himself, in the Wheat Case, to be unwilling to commit himself to the view that it stipulated life tenure.

It is no surprise that Higgins J.'s obiter dicta concerning the powers of the President of the Arbitration Court contained no indication that he accepted Isaacs J.'s distinction between the arbitral and the enforcing functions of the Court; he had never committed himself to such a distinction; he had never committed himself to any principle of demarcation of powers so overriding as to require the sacrifice of an efficacious system of arbitration.

It is no surprise that Rich J., whose judgment in the Wheat Case was in most respects a further version of the views expressed by Isaacs J.,<sup>1</sup> should have joined with Isaacs J. in affirming again the "clear distinction"<sup>2</sup> drawn by the Constitution between legislative and judicial functions of government. Like Gavan Duffy J., Rich J. had held that arbitral power was not judicial,<sup>3</sup> but unlike Gavan Duffy J. he had committed himself to a rigid trilateral separation of powers, in which arbitral power, of course, could only be either judicial or legislative; so when it came to the point, he was, unlike

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1. Supra, p.5.28.
  2. Supra, p.5.28.
  3. Supra, p.9.47.

Gavan Duffy J., bound to assign arbitration to the legislative category (though he might with that other Justice have avoided the point by restricting the operation of s.72, as to which he had said nothing in the Wheat Case.)

It is no surprise that Isaacs J. was willing to strike down some of the powers of the Arbitration Court whose establishment he had supported in the Conventions and whose full and free operation he had always sought to vindicate as against State laws and the opinions of his senior colleagues. For in the Wheat Case he had not only committed himself to the wide implications of s.72, but had also irrevocably elevated the Abstract principle of demarcation (of judicial functions, at least) to a position of dominance over all particular institutional arrangements. And in the Tramways' Case [No.1] and the Builders' Labourers' Case he had drawn the distinctions which would enable the arbitral provisions of the Conciliation and Arbitration Act to go unscathed; the roots of this distinction can be traced back to his characterisation of "judicial" functions in the Conventions,<sup>1</sup> and to his defence of Commonwealth power against State "reserved powers" in the Woodworkers' and other early cases. Moreover, Alexander's Case for him involved no new decisions of principle; all that was required was a conjunction of the characterisation of the enforcement

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1. Supra, p.7.30.

provisions already made in the Builders' Labourers' Case with the interpretation of s.72 made in the Wheat Case.

It is no surprise that Powers J. agreed with Isaacs and Rich JJ., for he had agreed in the Wheat Case to the principle of demarcation and to the wide implications of s.72. His view that the power to enforce was not necessary to the purposes of s.51(xxxv) was not merely an opinion derived from service as Deputy President of the Arbitration Court, but was also consistent with the opinion (more conservative than that of Higgins J.) as to the scope of the Court that he had confessed to in the Builders' Labourers' Case.<sup>1</sup>

It is no surprise that Barton J. found the whole Act invalid. His dissent in the Wheat Case had not turned on any interpretation of s.72; he was free to follow the majority interpretation in Alexander's Case. Neither as founder nor as judge had he shown himself a friend of the Arbitration system. He had never accepted the distinction between the powers of the President of the Arbitration Court. He had never wavered in his characterisation of arbitration as judicial, a characterisation which not only represented the only chance of saving State control of industry from the predominance of Commonwealth power, but also can be traced back to his discussions in the Convention

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1. Supra, p.9.47.

of the nature of curial powers.<sup>1</sup> He had never irrevocably committed himself to the dominance of the Abstract principle of demarcation to which he had adverted in the Bootmakers' Case [No.1].<sup>2</sup>

Finally, it is no surprise that Griffith C.J. upheld the Act. Even someone who wanted to look behind the technical interpretation of the office of President of the Arbitration Court by means of which the Chief Justice escaped the consequences of his interpretation of s.72 would have to admit that weight is to be given to both halves of Griffith's statement in the 1891 Convention:

I think, much as I desire to get this power for the federal parliament, that we ought to hold fast by the principle that we are not going to interfere with the rights of property in the States.<sup>3</sup>

The first half of this statement could be said to be worked out in Griffith C.J.'s support for the whole system of the Arbitration Act in the crisis of Alexander's Case; the second half in his characterisation of arbitral power as judicial, with all the consequences, vis-à-vis State laws, thereby implied according to his judgment in the Woodworkers' Case and the Bootmakers' Case [No.1].

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1. Supra, p.7.45.
  2. Supra, 9.13.
  3. Supra, p.7.6.

## VII

Conclusions

The themes of the four foregoing chapters can now be brought together, and interim conclusions drawn, before proceeding to later phases of the Australian discussion. There have been three main themes.

(a) History and Interpretation

First, there has been the problem of history and interpretation. History reveals that the dominant intention of the founders of the Australian Constitution was not an Abstract disposition of powers but the establishment or authorisation of particular institutions and agencies. So much emerges from the general debates, and is confirmed by the clear intention to establish two institutions - the Arbitration Courts and the Inter-State Commission - which cut across the apparently Abstract triadic formulations of Chapters I, II and III, and which, in themselves, mixed and confused what would under an Abstract schema be regarded as legislative, executive and judicial powers. But the interpretations permanently established by the Wheat Case and Alexander's Case reverse these intentions and insist upon an analytical and actual demarcation between the Abstract types of the triad of powers - or at least between the judicial and the other types. Moreover, it is true that these interpretations were demonstrably congenial to some of the pre- and extra-judicial predilections and antipathies of the judges, and

were supported by manifest special pleading and even obviously erroneous history. But these facts are less interesting than the further fact that the established interpretations are both invited by the formulations of the Constitution, and undoubtedly attractive to legal minds unaffected by the memories and concerns of Isaacs J. It is important to distinguish the special pleading in the Wheat Case and the "history" we denounced in the Bootmakers' Case [No.1], from the arguments grounded on formulations and presumptions. For the pure historian, perhaps, all are equally false to the intentions of the founders, and that is that. But the jurist will observe that the proposed distinction, and the complex relation between intention and interpretation it implies, reinforces the account of the special characteristics of legal thought and expression, offered in Chapter One. The great imperative in legal thinking is the attainment of a system of terms and relations that will enable control of human conduct. In the pursuit of such system, the demand for definite answers to definite questions imposes determinacy of terms and expressions, and this makes room for precedent. To the extent that such system is established, a new and higher level of abstraction from data can be accomplished, and this in turn permits a new ease and generality of control. But the new level is attained by insight, not into all relevant data, but into the data constituted by the established terms and relations of the system; hence the normal

human tendency to simplification is reinforced by a tendency to understand all data as if it were already a determinate term or relation within the system, and to prescind from all further questions that might upset this presumption. In Australia, such further questions concerning the data of the constitutional text were more or less systematically excluded by the additional rule that the Convention Debates could not be regarded in the High Court. But this rule no more than canonised an inherent orientation of legal thought, an orientation discernible in the development of abstract terminology within the Conventions, and manifest in the universally abstract language of all the Justices and the eventual arrival of the majority at fully Abstract principles. Since it was inevitable, and intended,<sup>1</sup> that the Constitution would be interpreted by lawyers, it is possible to say that the formulations of the Constitution invited the reversal of their draftsmen's intentions.

(b) General theories of law and of Australian federalism

Then there has been the profound influence of general theories of law and of Australian federalism. The present, with the preceding, chapter shows how emphases and conceptions in the discussions of types of power indubitably were related to such general theories. Moreover, it is clear that, for example, Isaacs J.'s general theory of law, with its insistence that

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1. Cf. Downer, 1898 D, 275: "With the judges rests the interpretation of intentions which we may have in our mind, but which have not occurred to us at the present time".

the judicial power was no more than a power of construing existing law, conformed precisely with his theory of Australian federalism, with its insistence that Parliament must be trusted as the exponent of the whole legislative will of the Australian people. Conversely, the conception of judicial power as that of the arbiter between contestants, and of legislation as merely the power to issue more general determinations, conformed neatly with the federal theories of those Justices who regarded the High Court as essentially the arbiter between States and Commonwealth. Thus general theories of law influenced or were influenced by theories of federalism, and all alike and together influenced the discussion of powers.

(c) Methods of judicial analysis

Finally, there have been the actual discussions of judicial power itself, and to end this chapter something must be said about their method.

It is clear enough, as we showed in Chapter Four, that the term "judicial power" implies a whole set of different sorts of features, and that judicial power itself realizes not one value but a set of values. Doctrines of the "essences" of powers are delusive precisely to the extent that they obscure this analogical character. But it is now clear that the Australian Justices all subscribed to doctrines of essences. Of course, it was recognised that powers or functions might be

judicial for some purposes, or in some senses, but not for, or in, others. But even the discussions in which these distinctions between "judicial power" in the "strict sense" and "acting judicially" were drawn, did not face the fact that they were being drawn in order to safeguard or realize some values at the expense, or in the absence, <sup>of</sup> others of the broadly "judicial" set. The discussions proceeded quite without overt reference to the purposes and value of the distinctions being drawn; it was as if there were a changelessly essential "strict judicial power" and an equally changelessly essential "quasi-judicial power" or (quasi-) "judicial act"

Of course, it is part of the high technique of the common law to disguise its choices of value as discoveries of definite and pre-existing meanings; and this technique has proven merits. An Abstract doctrine of separation of powers is thus attractive to the common lawyer. But the method of reasoning by essences, without reference to realized or recognized values, meets its nemesis in the attempt to work with such an Abstract doctrine of demarcation. For the whole point of the Abstract doctrine is that the postulated types of powers must be determined prior to the recognition of values and purposes in the constitution. Thus the choices of value implicit in demarcating one type of power from another must be made, as it were, blind - or, at best, according to general theories of law (whose usefulness

we have shown to be dubious), or necessarily a priori theories of the "true nature" of the constitution. Moreover, the Abstract theory demands that the lines between powers be sharply drawn, since every concrete institution must be found on one side of the line or the other. But since the equipment for drawing such lines does not exist, the only way to disguise the fact that the various "powers" are analogical, is to elevate one feature or value from among the set, pronounce it "essential" and draw the required line where this feature or value is deemed to be absent. (There is no disguising the vagueness of one term or feature thus isolated - for example, "decision according to pre-existing law"). Notions of "incidental" or "ancillary" powers confirm, rather than deny, the essentialist premises and method of the Abstract doctrine, but seek to avoid its worst consequences at the level of its application to particular constitutional schemes and institutions.

The sign, and perhaps a cause, of these methods, both in common law and in the Australian Abstract doctrine, is the notion of the criterion or the test. To search for the criterion of judicial power, without adverting to the significance of context, is (unless one is merely following precedent) to accept one or all of these essentialist premises. Neither incoherence nor an undesirable application need immediately ensue; but since the premises partly ignore and partly deny a plain fact about

the terms they employ, incoherence and undesirable conclusions are always likely. These results emerge from the foregoing accounts of the analysis of Griffith C.J. and Barton J.

We noted originally that Griffith C.J.'s analysis of judicial power in Alexander's Case was founded on the model of a public tribunal giving authoritative decision inter partes as to disputed questions of conduct.<sup>1</sup> But this was the model he generally employed in all manner of contexts. In Ah Yick v. Lehmert there is the emphasis on both the tribunal and its public character as "constituted by the sovereign power".<sup>2</sup> In Newcastle Coal Co. v. Firemen's Union, his emphasis may have been on authoritative decision inter partes, or it may have been on the closely related rubric of adverse effect on legal rights.<sup>3</sup> In Evans v. Donaldson it was certainly the latter,<sup>4</sup> associated with the notion of "a duty to decide", a criterion for cases on Certiorari but probably intended by the Chief Justice as a general criterion of "judicial" action (Owners of ss. Kalibia v. Wilson).<sup>5</sup> The inter-relation of all these elements was emphasised in Huddart Parker v. Moorehead, where judicial power was defined as a power to decide controversies

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1. Supra, p.5.53.
  2. Supra, p.8.3.
  3. Supra, p.8.6.
  4. Supra, p.8.7.
  5. Supra, p.8.13.

as to rights by way of binding and authoritative decision.<sup>1</sup> Thus Griffith C.J.'s analysis did not differ significantly according as the context was one of ordinary statutory interpretation, of the prerogative writs, or of the Constitution and the arbitral power, nor according as the required distinction was between "ministerial" and "judicial", or "legislative" and "judicial". Judicial power was not ministerial, because it involved judgment and decision;<sup>2</sup> it was not legislative, because it was authoritative only inter partes.<sup>3</sup>

The difficulty for the Chief Justice's analysis lay in distinguishing, by some simple and "essential" principle, "judicial" from "administrative" (or "executive") as well as from "political". The solution adopted was that "judicial" excluded the idea of arbitrariness,<sup>4</sup> of absolute or "dictatorial" discretion.<sup>5</sup> Thus, whereas political power involved no more than decision according to justice and good conscience, judicial power connoted decision according to formal or settled rules of law. This solution was unsatisfactory. It was extraneous to the general definition. It failed to explain the distinction between "executive" and "judicial", a distinction the grounds of which were never made clear by Griffith C.J.<sup>6</sup>

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1. Supra, p.8.16 - 8.21.
  2. Supra, pp.8.5 , 8.32. (Donohoe v. Chew Ying).
  3. Supra, pp.5.51- 5.52 , 9.9.
  4. Supra, pp.8.9 , 8.12 , 8.15.
  5. Supra, p.9.6, 9.8.
  6. Cf., supra, pp.8.5 , 5.25 - 5.26.

Granted the desire to characterise arbitration in Abstract or essential terms, it led straight to the tension between rival criteria for such characterisation in the majority judgments in the Woodworkers' Case and the Bootmakers' Case [No. 1].<sup>1</sup>

This tension required for its own resolution appeal to further extraneous principles ("necessity" and "an arbitrator can do only what the parties could do");<sup>2</sup> but these principles, while allowing the desired conclusions to be reached, could not clarify the confusion about characterising "arbitration" in terms of the Abstract triad. In the end, Griffith C.J. was forced to destroy his own solution by maintaining that arbitration was judicial even though it involved "absolute discretionary power" within the law of the land, and gave effect to the autocratic will of the arbitrator, independently of "any known principles of law".

Barton J. sought a different solution to the problem of distinguishing "executive" from "judicial", by appealing to the consideration that a judicial tribunal could not act ex mero motu.<sup>3</sup> But this consideration, in itself extraneous to the general definition, could do nothing to distinguish "political" from "judicial", and could not disguise the incoherence of of maintaining two quite different criteria for characterising

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1. Supra, pp.9.6 - 9.10.  
 2. Supra, p.9.14.  
 3. Supra, p.8.9.

arbitral functions; Barton J.'s judgment in Alexander's Case was (on its essentialist premises) even less satisfactory than the Chief Justice's, since it refused to abandon the attempt to tack onto a tribunal- or procedure-centred test the requirement that judicial power "give effect to the will of the law".<sup>1</sup>

The truth is that no tribunal- or procedure-centred criterion of judicial power can of itself exclude the category of "political" decision from the range of decision open to a tribunal; and any further criterion introduced in order to exclude that category must confound any attempt to count industrial arbitration as essentially judicial. The attempt in the Woodworkers' Case and the Bootmakers Case [No.1] (made especially by O'Connor J.)<sup>2</sup> to harness a second extraneous principle ("an arbitrator can do only what the parties could do") to the first extraneous principle ("decision according to settled legal rules") seems to have been abandoned by Griffith C.J. in Alexander's Case; it was never convincing, for, although it might usefully mark the limits of arbitral action granted that such action was in any case judicial, it could do nothing to show that arbitral action was not in fact legislative, or sui generis, rather than judicial.

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1. Supra, p.5.48 - 5.50.

2. Supra, pp.9.6 - 9.14.

Isaacs J., of course, was able to distinguish both "legislative" or "arbitral", and "political" or "administrative", from judicial action by employing the issue-centred criterion of the nature or end or purpose of the act of decision.<sup>1</sup> Unlike legislation, arbitration or political action, judicial power was oriented towards the declaration of rights and obligations which ascertainably existed in law prior to the act of decision.<sup>2</sup> This criterion was sufficient for all the cases arising in the milieu of s.51(xxxv); with it went the stipulation that an arbitrator was to act "judicially" in the sense that he was to be fair, non-capricious, without "malversation".<sup>3</sup> This analogous and secondary use of the term "judicial" sufficed to attain agreement with the conclusions of the other Justices in such cases, outside the milieu of the Conciliation and Arbitration Act, as Randall v. Northcote Corp.<sup>4</sup> The principal test adopted by Isaacs J. in Huddart Parker v. Moorehead - "binding determination of rights"<sup>5</sup> - is accounted for by the need for a test distinguishing "judicial power", not from "legislative power", nor from "administrative power" in the sense of "political power", but from "administrative power" in the sense of "ministerial" or "executive" power. This test was not "extraneous" to his other test, "decision according to rule",

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1. Supra, pp.8.24 , 9.22 - 9.23.

2. Supra, pp.8.10 , 8.30 , 5.23 , 9.19 - 9.20.

3. Supra, pp.9.20 , 9.26.

4. Supra, p.8.13.

5. Supra, pp.8.26.

since it was a criterion for quite other contexts and, indeed, for circumstances (s.15B of the Australian Industries Preservation Act) in which it would in any case be irrelevant to ask whether or not the decision was to be according to rule or according to discretion and considerations of fair play.

Thus we can say that Isaacs J. used several tests for discriminating between judicial power and other varieties of power, but used these tests coherently and consistently, each one for its particular proper purpose. On the other hand, the attempt of Griffith C.J. and Barton J. to use one test for all circumstances issued in incoherence, contradictions and shifts. But in the next chapter, the similar instability of Isaacs J.'s Abstract doctrine and essentialist method will emerge.

## CHAPTER TEN

### The second phase of judicial analysis (1920 - 1930)

The next three chapters complete the study of Australian federal judicial material on the problem of judicial power. Their method is less chronological than that of the foregoing chapters, though their division into phases remains temporal because intellectual problems and analyses have their authors, their day and their conditioning circumstances. The main problems have already emerged from the history of the Conventions and of the first phase of judicial analysis, and the coming chapters concentrate more on particular topics of interest to the jurist, and prescind more from the chronology and collaterals of development of doctrine.

Nevertheless, the phase studied in the present chapter has a distinct unity and theme. This concerns the vicissitudes of Isaacs J.'s Abstract doctrine of demarcation in the face of its own ascendancy, and of his simple issue-centred test of judicial power in the face of new problems not amenable to solution by reference to the one value selected as distinctive by that test.

#### I

### Problems of the Abstract doctrine of demarcation

The first phase of judicial interpretation ended with the

triumph of an abstract doctrine of demarcation in the Wheat Case, and of an issue-centred test of judicial power - for long associated with a nationalist interpretation of Australian federalism - in Alexander's Case. The second phase opens with the decisively explicit triumph of the nationalist interpretation of Australian federalism, and rejection of the States rights interpretation, in the Engineers' Case (1920).<sup>1</sup> But soon the incompatibility of the Abstract doctrine with the newly established approach to interpretation begins to emerge, and the phase ends with Isaacs J. protesting, in dissent, against undesired results of the Abstract formalism he had enshrined in the Wheat Case.

The judgment of Knox C.J., Isaacs, Rich and Starke JJ. in the Engineers' Case was written and delivered by Isaacs J. Its principal aim and effect was to overthrow the doctrine of the reciprocity of non-interference between Commonwealth and States, and to subject State instrumentalities, such as State-owned railways, to Commonwealth laws and awards made under s.51(xxxv). The Railway Servants' Case<sup>2</sup> was overruled. The drive of the argument was to attack the notion of "necessity" on which the old doctrine of reciprocal immunity was grounded. This "necessity" was accounted "political", and it was said to be

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1. (1920) 28 C.L.R. 129.  
 2. See supra, at p.9.16.

"inappropriate" for the judicial branch of government to determine political necessities.<sup>1</sup> No constitutional implications were to be admitted, save those "necessarily implied" by the "actual terms"<sup>2</sup> or "specific language"<sup>3</sup> of the Constitution, construed according to ordinary rules of statutory interpretation, or by some "recognized principle of the common law underlying" those expressed terms.<sup>4</sup>

It is clear that this reasoning can be used against the arguments of Isaacs J. in the Wheat Case, at least insofar as it requires the Abstract doctrine to be presented as a necessary implication from the terms of the Constitution. Moreover, there are certain other themes of the majority judgment in the Engineers' Case that run counter to the drift of the Wheat Case. The use of American authorities is denounced,<sup>5</sup> on the ground that the Australian Constitution embodies a cardinal principle of responsible government<sup>6</sup> and is akin to the United States Constitution in only "its most superficial features".<sup>7</sup> But in the Wheat Case,<sup>8</sup> Isaacs J. had cited half a dozen American cases to establish the definitions of powers and the doctrine of ancillary functions incidental to the "main and paramount

1. Ibid., at 151.
2. Ibid., at 155.
3. Ibid., at 145.
4. Ibid., at 142.
5. Ibid., at 146-148.
6. Ibid., at 146.
7. Ibid., at 147, quoting (Lord) Haldane in the House of Commons.
8. See 20 C.L.R. 54, 90, 92, 94.

purposes" of institutions.<sup>1</sup> More important, the Wheat Case had made no attempt to relate the "fundamental principle of the separation of powers as marked out in the Australian Constitution"<sup>2</sup> with the "cardinal principle" of responsible government and the consequent mixing of executive and legislative powers and personnel. Again, the Engineers' Case contains a vigorous polemic against distrust of the Commonwealth legislature:<sup>3</sup>

possible abuse of powers is no reason in British law for limiting the natural force of the language creating them.... the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts....

This would make short work of Isaacs J.'s argument from the "supreme importance" of s.80 of the Constitution in the Wheat Case:<sup>4</sup>

if it be a strict Court...then its proceedings are free from any protective influence of s.80....This would lead to a most astounding result. Parliament by virtue of its alleged unlimited power under s.101 could confer both criminal and civil jurisdiction on a body presumably in the main consisting of non-lawyers, and could enable it to try offences even on indictment without the security of s.80 in relation to a jury.

But more fundamentally antagonistic to the conceptualism of the Abstract doctrine of the Wheat Case than any of these explicit arguments was a tacit premise of Isaacs J.'s judgment in the Engineers' Case. This was the premise opposed by Gavan Duffy J.

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1. 20 C.L.R. 54, 94.
  2. 20 C.L.R. 54, 88.
  3. 28 C.L.R. 129, 151-152.
  4. 20 C.L.R. 54, 90, 94.

in his dissent, when he observed:<sup>1</sup>

The fundamental conception of the Federation...is that the people of Australia, who had theretofore existed in several distinct communities under distinct polities, should thence forward unite for certain specific purposes in one Federal Commonwealth, but for all other purposes should remain precisely as they had been before Federation.

Now the converse of this does not appear on the face of the majority judgment, and might not have been assented to by Knox C.J. and Starke J. if it had. But it appears clearly enough in Isaacs J.'s judgment in Federal Commissioner of Taxation v. Munro (1926): it is "the requirements of a progressive people". In one form or another, this principle occurs frequently in the judgments of Isaacs J. at this period. In Proprietors of the Daily News Ltd. v. Australian Journalists' Association (1920), we find Isaacs J. refusing to "burn down the whole social edifice for the sake of roasting [the appellants'] egg"<sup>3</sup> - the edifice in question being the arbitration system. In Ross v. The King (1922), Isaacs J., dissenting, insisted that criminal appeals to the High Court should be as of right not as of grace as if to the Privy Council: for "we are sitting as an Appellate Court of Criminal Appeal constituted by the will of the Australian people".<sup>4</sup> In the Commonwealth v. Colonial Combing, Spinning and Weaving Co. (1922), he went out of his way<sup>5</sup> to

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1. 28 C.L.R. 129, 174, (emphasis added).
  2. Munro's Case (1926) 38 C.L.R. 153, 178.
  3. 27 C.L.R. 532, 540.
  4. 30 C.L.R. 246, 259, (emphasis added).
  5. 31 C.L.R. 421, 451.

praise the Privy Council<sup>1</sup> for rendering "a signal service to the cause of self-government by assuring to the people the effective control of the public purse". Indeed, he went so far as to assert that recognition of the Nation's progressive requirements by the judiciary was a "common law principle".<sup>2</sup> In the Commonwealth v. New South Wales (1923), Isaacs, Rich and Starke JJ. referred to the Engineers' Case alongside their remark that the High Court was "a tribunal specially created by the united will of the Australian people, as a Federal Court and as a national Court"<sup>3</sup> (and therefore endowed with jurisdiction to hear actions for tort brought against States without their consent). Most striking of all, there is finally Isaacs J.'s affirmation in ex p. Walsh and Johnson (1925):<sup>4</sup>

[Deportation] is no doubt an extreme step to be judged of by the legislative and executive departments, but I cannot doubt that a Court must hold it to be a competent step.... If, for instance, one man were thought by the whole of the rest of Australia, to be so great a danger in relation to defence that nothing short of expulsion...would be an adequate protection to the community, it would be absurd to say that his single will to remain could prevail over that of six millions of people to the contrary.

It was in Munro's Case, above all, that Isaacs J. found this general principle, which we have called the nationalist principle

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1. In Commercial Cable Co. v. Government of Newfoundland [1916] 2 A.C. 610.
  2. 31 C.L.R. 421, 439. See also the passage cited by Evatt J. in Dignan's Case (1931) 46 C.L.R. 73, 114-115: "It is the duty of the Judiciary to recognise the development of the Nation and to apply established principles to the new position which the Nation in its progress from time to time assumes. The judicial organ would otherwise separate itself from the progressive life of the community..." (31 C.L.R. 421, 438-439).
  3. 32 C.L.R. 200, 209.

to be in conflict with a strict Abstract doctrine. By 1926, the Abstract doctrine of demarcation had gained in strength and refinement. In In re Judiciary and Navigation Acts (1921), Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ. had concurred that:<sup>1</sup>

the Constitution of the Commonwealth is based upon a separation of the functions of government, and the powers which it confers are divided into three classes - legislative, executive and judicial [the Wheat Case]. In each case the Constitution first grants the power and then delimits the scope of its operation (Alexander's Case...<sup>2</sup>).

Only Higgins J., dissenting, was to be found protesting against the full rigours of the Abstract doctrine:<sup>3</sup>

the Constitution does not expressly forbid the vesting of other powers in the Court, and...there is no necessary implication to that effect....The separation of the legislative, executive and judicial powers under the Constitution leaves those arms of the Commonwealth interdependent.

In Porter v. The King, ex p. Yee (1926),<sup>4</sup> Knox C.J. and Gavan Duffy J. went as far as to hold that the High Court existed only for the performance of the functions described in Chapter III (a point which, as to non-judicial powers, had been explicitly left open in In re Judiciary and Navigation Acts); but the majority agreed that judicial powers could be conferred on the Court in virtue of the plenary powers of the Parliament over the

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1. 29 C.L.R. 257, 264.

2. Citing Griffith C.J., 25 C.L.R. 434, 441.

3. 29 C.L.R. 257, 272, 274.

4. 37 C.L.R. 432.

territories, under s.122 in Chapter VI of the Constitution.<sup>1</sup> Meanwhile, the theoretically more stringent problems raised for an Abstract doctrine by responsible government and the delegation of legislative powers to the Executive had been solved, or circumvented, in Roche v. Kronheimer (1921), by simply ignoring the argument that Owen Dixon, for the defendant, had put as follows:<sup>2</sup>

The Constitution, by dividing the powers of the Commonwealth into the legislative, the executive and the judicial powers and vesting each of those powers in a distinct body, impliedly prohibits<sup>3</sup> the vesting of each of those powers in any other body than that in which it is specifically vested.

It was to be left to Dixon himself, when later a Justice, to reply as best he could to this argument (Dignan's Case (1931) );<sup>4</sup> a whole generation later he was to put his submissions of 1921 into partial but strict effect (Boilermakers' Case (1956) ).<sup>5</sup> Meanwhile, the Abstract doctrine could be applied with confidence to demarcate at least judicial power, and no-one inquired how this limitation of the doctrine could be justified as a necessary implication from the express words of the Constitution. So it was this expressly and tacitly qualified Abstract doctrine of demarcation that Isaacs J. came up against in Munro's Case.

1. Ibid., at 440-441 per Isaacs J., 449 per Starke J.; also Rich and Higgins JJ.
2. 29 C.L.R. 329, 335.
3. See also Dixon's reference to "implied prohibition" in In re Judiciary and Navigation Acts, 29 C.L.R. 257, 259. See also Dixon J.'s remarks on constitutional implications in West v. Commissioner of Taxation (N.S.W.) (1936-1937) 56 C.L.R. 657, 681.
4. See infra, at p. 11.2ff.
5. See infra, at p. 12.2ff.

This case arose directly from an application of the doctrine in Alexander's Case that all tribunals exercising the judicial power of the Commonwealth must be constituted in conformity with s.72 of the Constitution. In the B.I.O. Case (1925),<sup>1</sup> five Justices of the High Court agreed in holding that the Federal Taxation Board of Appeal exercised part of that judicial power, and hence was invalidly constituted. To meet this situation, Parliament made various changes in the description of the tribunal and in the formulations of the Income Tax Assessment Act.<sup>2</sup> These changes Knox C.J. and Higgins J., in Munro's Case, regarded as ineffective to alter the character of the tribunal; but Higgins J. preferred to reject the B.I.O. Case, and agreed with the majority that the new Board of Review was substantially non-judicial.<sup>3</sup> The leading judgment was delivered by Isaacs J. and, like his opinions in the Wheat Case and Alexander's Case, forms an unchallenged part of subsequent doctrine.

The method of the judgment will be further discussed in the next section; its explicit motivations are what concern us here. In the forefront is put the consideration that:<sup>4</sup>

when Parliament has shown so unmistakably its resolve to steer clear of the judicial rocks plainly charted in the earlier case, it would be a serious matter to impute an intention which would wreck the legislation and confuse the finances.

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1. British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation (1925) 35 C.L.R. 422. (sometimes referred to as the Shell Case).
  2. Income Tax Assessment Act 1925. See the summary of its provisions in the judgment of Knox C.J. in Munro's Case

(continued on next page)

Supporting this is the familiar nationalist premise that must be set over against the Abstract doctrine of demarcation:<sup>1</sup>

The Constitution, it is true, has broadly, and to a certain extent, imperatively separated the three great branches of government, and has assigned to each, by its own authority, the appropriate organ. But the Constitution is for the advancement of representative government, and contains no word to alter the fundamental features of that institution.

The final appeal was still more frankly to notions of political necessity:<sup>2</sup>

I would say, speaking with considerable experience in each of the three departments of government, that, if a legislative provision of the present nature be forbidden, then a very vast and at present growing page of necessary constitutional means by which Parliament may in its discretion meet...the requirements of a progressive people must...be considered as substantially obliterated.

Such were the embarrassments which, in the view of its author, flowed from the Abstract doctrine and necessitated its modification by the two-fold doctrine of essential powers and the essences of institutions, to be expounded in the next section. The modification was successfully accomplished in Junro's Case, and approved on appeal to the Privy Council (sub.nom. the Shell Case (1930) ).<sup>3</sup> But the period ends with the accession to the

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38 C.L.R. 153.

3. 38 C.L.R. 153, 201.

4. Ibid., at 175.

1. Ibid., at 178.

2. Id.

3. (1930) 44 C.L.R. 530.

High Court of Dixon J., who shared the formalist and Abstract doctrines of Isaacs J. without his tempering nationalism. In Le Mesurier v. Connor (1929), Isaacs J. is to be found, in dissent, appealing to "an occasionally forgotten case"<sup>1</sup> - the Engineers' Case - and insisting that:<sup>2</sup>

It is altogether a mistaken notion that because the Constitution distinguishes between the legislative and the executive and the judicial departments of the Commonwealth, there can ever in the practical working of the Constitution be a rigid demarcation placing each class of acts in one exclusive section.

## II

### Essential powers and the essences of institutions

The idea that all institutions not merely must but in any case do possess an "inherent character",<sup>3</sup> capable of description by one of the three terms of an abstract triad, appears already in Isaacs J.'s judgment in the Wheat Case. This essence of the institution is there variously described as its "raison d'être", its "main and paramount purpose", its "character".<sup>4</sup> Recognition of this essence permits the further recognition that:<sup>5</sup>

The nature of the power conferred does not alter the character of the body exercising it and convert an executive body into a strictly judicial body.

But in the Wheat Case, Isaacs J. had not yet finally settled the relationship, in his Abstract doctrine, between these essen-

1. (1929) 42 C.L.R. 481, 512.

2. 42 C.L.R. 481, 519. Note also that in 1930 Rich, Starke and Dixon JJ. make first use of the doctrine of separation of powers to nullify the obvious intent of s.15A of the Acts Interpretation Act 1901-1930: A.R.U. Case (1930) 44 C.L.R. 319, 386. Isaacs C.J. dissented.

ces of institutions and the essences of powers. Much of his argument seems to assert that the Inter-State Commission's valid powers of adjudication were, in themselves, not strictly judicial, but merely "quasi-judicial";<sup>1</sup> but other passages seem to allow that powers in themselves (i.e. intrinsically) strictly judicial could be assigned to an institution without affecting its pre-existing essence: "though an 'adjudication' in the true sense - and as effective and binding as if made by a Court of Justice, it does not become the adjudication of a Court of Justice".<sup>2</sup>

However, given Isaacs J.'s principal test of judicial power, centred on "the nature of the final act" (i.e. on the issue as opposed to the agent and his procedure), and given the canonisation of this test in Alexander's Case, it was inevitable that the ambivalence in the Wheat Case be resolved in favour of the strictly Abstract view that there were powers that had an indelible essence, independently of the institution to which they were assigned, just as, conversely, all institutions had an

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3. 20 C.L.R. 54, 90.
4. Ibid., at 91, 94.
5. Ibid., at 87.
1. Ibid., at 84, 88. Thus (88): "...that contention appears to me to confuse the 'powers' that may be granted with the nature of the instrument which is to exercise them. The powers are to be conferable, but consistently with the Constitution, including the portion exclusively vesting true judicial power in Courts of Justice" (emphasis added).
2. Ibid., at 87.

indelible essence independently of powers that happened "incidentally" to be assigned to them. The present section explores this hardening of doctrine so far as it concerned the essences of powers, and the resistance it inspired, eventually even in Isaacs J. himself.

As we said at the end of the last chapter, the danger of the Abstract Doctrine is that it will lead to explicit or implicit denials of the complex analogical structure of the general terms it employs to make its demarcations. It is clear that Isaacs and Rich JJ. succumbed to this danger in the years following Alexander's Case. For, having there established that arbitral power was not the sort of strictly judicial power connoted by s.71 of the Constitution, they leapt to the conclusion that therefore it was not judicial, or even quasi-judicial, power of the sort that attracts Prohibition or Certiorari.<sup>1</sup>

A full proof of this leap would be a little complex, since it is not entirely certain how far Isaacs and Rich JJ., at this time, subscribed to unorthodox and restrictive views as to the

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1. Cf. also J. Quick, The Legislative Powers of the Commonwealth and the States of Australia (1919), 665: "Mr. Justice Isaacs has held that some awards of the Arbitration Court were in the nature of legislation: [Bootmakers' Case (No. 1)]. Important consequences would flow from the recognition of Federal industrial awards operative in future as legislative rules. High Court could not review such awards...by prohibition..."

general law of Prohibition or Certiorari. But since there is no evidence that at any other time they held such restrictive views, and since there is positive evidence that in 1923 Isaacs J. accepted that Certiorari would extend to "judicial acts in a wider sense",<sup>1</sup> the account here can proceed without complication.

In Hibble's Case [No. 1] (1920),<sup>2</sup> Prohibition was sought against a special industrial tribunal constituted with the award-making powers of the Arbitration Court. It was argued that, in any event, Prohibition would not issue because, the award having been made, the tribunal was functus officio. Knox C.J., Gavan Duffy and Starke JJ. rejected this argument, over the dissent of Isaacs, Higgins and Rich JJ. Now the majority all stated, without argument, that the tribunal, like the Arbitration Court, exercised "powers of a judicial or quasi-judicial character".<sup>3</sup> Higgins J., as always taking the narrow ground, restricted his dissent to the view that, since the tribunal had no powers of enforcement, it was functus officio.<sup>4</sup> But Isaacs and Rich JJ. went further. Having stated that "by far the most

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1. R. v. Macfarlane, ex p. O'Flanagan and O'Kelly (1923) 32 C.L.R. 518, 537.
  2. R. v. Hibble, ex p. Broken Hill Proprietary Co. Ltd. (1920) 28 C.L.R. 456.
  3. 28 C.L.R. 456, 491 per Starke J.; 463, per Knox C.J. and Gavan Duffy J.
  4. But it seems that Higgins J. accepted that the Arbitration Court exercised powers judicial in the sense appropriate to Prohibition: see R. v. Turner, ex p. Marine Board of Hobart (1927) 39 C.L.R. 411, 443. Cf. also per Higgins J. in In re Judiciary and Navigation Acts (1921) 29 C.L.R. 257, 274.

important feature" of the case was the policy of Parliament ("the supreme interpreter of the will of the Australian people") to eliminate litigation after awards,<sup>1</sup> they proceeded to observe that an award was "not an exercise of the judicial power of the Commonwealth, but...an act in aid of legislation".<sup>2</sup> Expanding on this, they asserted that:<sup>3</sup>

it is not like an order of a Court, as to which...the Court is not functus officio until the order is fully obeyed. It is a part, and a necessary part of the method of legislation by s.51(xxxv), and when the Arbitrator's opinion (for that is all the award amounts to) as to the dispute is announced, the statute takes it up...and stamps it with legislative force as a legal obligation....an award is of a "legislative" nature because it is a "factum" on which the law operates.

Now, it is true that these remarks were addressed, not to the general question of judicialness in relation to Prohibition, but to the special limitation on issue of Prohibition where the tribunal was functus officio. But it is equally true that the argument hinged on the premise that, being legislative, the functions of the tribunal were not judicial, and hence were not "like" those of a Court. If such an argument is not to suffer from an undistributed middle, it must involve the claim that since arbitration is not part of the judicial power of the Commonwealth, it is not judicial in any other relevant sense.<sup>4</sup>

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1. 28 C.L.R. 456, 466.

2. *Ibid.*, at 467.

3. *Ibid.*, at 475.

4. The converse proposition, that what is not in any sense judicial is ipso facto not part of the judicial power of the Commonwealth is, of course, quite uncontroversial. See per curiam, Cornell v. Deputy Federal Commissioner of Taxation (S.A.) (1920) 29 C.L.R. 39, 47. Also ex p. O'Flanagan and

The latter claim emerges much more forcefully in Waterside Workers' Federation of Australia v. Gilchrist, Watt and Sanderson Ltd. (1924),<sup>1</sup> where the question of Prohibition and Certiorari arose in relation to the Arbitration Court itself. Once again, Knox C.J. and Gavan Duffy J. refused to accept the argument that after issue of award, the Arbitration Court was functus officio,<sup>2</sup> and they accepted that the Arbitration Court was a Court or judicial tribunal whose awards conferred rights and imposed obligations.<sup>3</sup> Starke J. agreed, addressing himself more directly to the argument that Prohibition would not issue because the Arbitration Court was legislative and not judicial in character.<sup>4</sup> This argument he rejected, on grounds of authority, pointing out that Isaacs J. himself, in the Tramways' Case [No. 1],<sup>5</sup> had accepted the relevant distinction between strict courts, connoted by s.71, and courts in the sense relevant to Prohibition.<sup>6</sup> It is this distinction that the dissenting judgment of Isaacs and Rich JJ. seems to deny. For it denies, inter alia, that the "so-called Court of Arbitration" was "ever

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O'Kelly (1923) 32 C.L.R. 518, 530 per Knox C.J.

1. 34 C.L.R. 482.
2. Ibid., at 496.
3. Ibid., at 497.
4. Ibid., at 552.
5. Ibid., at 554.
6. Ibid., at 556.

amenable to prohibition".

Among several distinct (though not distinguished) lines of argument towards this conclusion, Isaacs and Rich JJ. put the consideration<sup>1</sup> that an award was:

simply a "factum" which, unlike a judicial decree, of itself imposes no obligation and effects no rights.... And this is a decisive consideration. It shows that an "industrial award" is, in its essential nature, not a judicial decision, but a step in legislation.

Thus, "judicial dicta to the effect that the nature of the functions of the arbitral tribunal are judicial or quasi-judicial, in the sense of constitutional judicial power or of attracting prohibition" were to be regarded "with reference to Alexander's Case", which had "definitely ascertained" the "nature" of arbitral functions.<sup>2</sup> This unmistakable indication that Isaacs and Rich JJ. were thinking of the "essential nature" of judicial power as something to be definitely ascertained once-for-all and for all purposes, reappears in the summary of the argument:<sup>3</sup>

A function that is substantially executive or legislative in its nature is not judicial in the necessary sense.... Federal arbitration is, in its nature, legislative and not judicial in the necessary sense.... the Commonwealth Constitution requires ["judicial" functions in the requisite sense<sup>4</sup>] to be vested in Courts strictly so

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1. Ibid., at 500.
  2. Ibid., at 507 (emphasis added).
  3. Ibid., at 515 (emphasis added).
  4. Scil. "requisite for Prohibition".

called (s.71 and Alexander's Case)....It follows that it is legally impossible that the arbitral functions of the so-called Court of Conciliation and Arbitration are of a character amenable to either prohibition or certiorari.

Thus it is clear that the verbal recognition of various "senses" of "judicial power" had no effect in an argument which pivoted on notions of a univocal essence of judicial power that had been definitely ascertained, for all purposes, in Alexander's Case.<sup>1</sup> Many years later it was to be accepted by the High Court and the Privy Council that:<sup>2</sup>

One thing that Alexander's Case did decide once and for all is that the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order.

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1. The other strands of argument complicate the matter, as we have said. One strand asserts that: "(a) The functions of a tribunal amenable to prohibition or certiorari must be judicial in the same sense that the function of a strict Court is judicial, whatever the constitution or the appropriate procedure of the tribunal may be...(b) That sense is that the determination of the tribunal must itself, and of its own force, instantly impose an obligation or affect the rights of the parties concerned...(c) A function that is substantially executive or legislative in its nature is not judicial in the necessary sense...(d) Federal arbitration is, in its nature, legislative and not judicial in the necessary sense" (515). This strand stresses that an arbitral award is a mere factum which creates "no enforceable instant obligations" (512). This argument might seem to avoid the stricture of essentialism. But in fact it is simply another and more complex variety of essentialism. For (i) proposition (c) above is as it stands obviously false, in that legislation does of its own force instantly impose an obligation; (ii) if proposition (d) above is founded on the doctrine of the factum, it is not what is established as "the essential difference" between judicial and arbitral power in Alexander's Case. For though the idea of the factum is there employed by Isaacs and Rich JJ., it is not asserted to be "of the essence", and is not used in

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But it seems to be just this sort of proposition that Isaacs and Rich JJ. attempted to establish in Hibble's Case [No.1] and W.W.P. v. Gilchrist, Watt and Sanderson, without success.

In the foregoing cases, what Isaacs J. conceived to be the will of the Australian people reinforced his arguments for a rigorously Abstract demarcation. The ultimate qualifications and refinements of the doctrine of demarcation were accomplished precisely when the nationalist principle demanded them.

The Immigration Act 1901-1925, by s.8AA, provided that the relevant Minister might deport any person born outside Australia whom he was satisfied had been concerned in acts obstructive of operations directed towards inter-State commerce, and whose presence in Australia he was satisfied would be injurious to peace, order and good government in respect of any matter as to which the Minister was satisfied that Parliament had power to legislate. The deportation was subject to the recommendation of a Board, before whom the person might show cause why he should not be deported. In ex p. Walsh and Johnson (1925)<sup>1</sup> it was argued that s.8AA was invalid on the grounds, inter alia,

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any sense that excludes instantly enforceable obligations:  
see (1918) 25 C.L.R. 434, 462-463.

2. Boilermakers' Case (1956) 94 C.L.R. 254, 281; 95 C.L.R. 529, 535 (P.C.), (emphasis added).

1. 37 C.L.R. 36.

that (1) it conferred judicial power on persons (scil. the Board) who were not a Court (scil. within s.72 of the Constitution);<sup>1</sup> (2) that deportation was a punishment, and hence reserved to the judicial power of the Commonwealth under Chapter III;<sup>2</sup> and (3) that power to interpret the Constitution was conferred on the Minister, and that such power was invalid either (a) because it was reserved to the judicial power of the Commonwealth under Chapter III, or else because (b) it indicated that the law was really a law, not with respect to the subject-matter of legislative power, but with respect to the opinion of the Minister as to that subject-matter, and hence that the law was itself outside the heads of Commonwealth legislative power.<sup>3</sup>

Not all these arguments had to be considered independently, since the whole Court agreed that, in any event, the particular application for Habeas Corpus against a deportation order must succeed. Knox C.J. appears to have acceded to ground (3) above, without distinguishing between parts (a) and (b) of that ground.<sup>4</sup> Higgins J., while reserving final judgment on the point, left little doubt that he did not regard a power to interpret the

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1. Ibid., at 43 per Watt K.C.  
 2. Ibid., at 49 per Watt K.C.  
 3. Ibid., at 50, 51 per Evatt.  
 4. Ibid., at 67-68.

Constitution or an Act in particular cases, where the interpretation would not be binding in other cases or on other officials, as a judicial power.<sup>1</sup> Rich J. offered no reasons for his conclusions on the arguments here relevant.<sup>2</sup> Starke J. briefly rejected ground (1) above,<sup>3</sup> and argued further<sup>4</sup> that the power of deportation might be either prohibitive and punitive in character - in which case it would involve the judicial power of the Commonwealth - or preventive and protective, in which case it was executive in character, and incidental to the legislative power over aliens.<sup>5</sup>

The latter argument was more fully expounded by Isaacs J., who did not advert to ground (1), but concentrated on, without sharply distinguishing between, grounds (2) and (3). The nationalist premises of the judgment were sufficiently revealed; we have already quoted<sup>6</sup> its reference to the absurdity of a "single will" prevailing over "that of six millions of people to the contrary". It appealed, moreover, to the importance<sup>7</sup> of reading down provisions in order not to "nullify the legislative will of a Parliament":<sup>8</sup>

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1. Ibid., at 122-123.
  2. Ibid., at 127.
  3. Ibid., at 133.
  4. Ibid., at 132.
  5. Scil. over "immigration and emigration": s.51(xxvii).
  6. Supra, at p.10.6 . Cf., by contrast, per Isaacs J. in ex p. O'Flanagan and O'Kelly (1923) 32 C.L.R. 518, 540.
  7. "The key to the problem" (96).
  8. Ibid., at 97.

Such legislation on admitted subjects of power might be considered arbitrary or even dangerous; but those are elements entrusted to the wisdom of Parliament when weighing in its own scales of social justice the comparative claims of individuals and the nation. If it says Yes, no Court can say Nay.

Thus, the Act must be read as entrusting the Minister with "the function of finding pro hac vice facts only, leaving their legal character for determination, if necessary, by the Courts" - he had no authority to determine problems of constitutional law, and hence no judicial power of the sort suggested in ground (3)(a) and (b) above.<sup>1</sup> But, above all, deportation was essentially a matter that could be "made exercisable according to the nature of the case by either the judicial or the executive organ of the Commonwealth".<sup>2</sup>

There is nothing in the written Constitution to require the power of deportation always to be exercised through the medium of the Judiciary. If it is enacted as a punishment for crime, it necessarily falls to the judicial department....If it is enacted not as a punishment for crime, but as a political precaution, it must be exercised by the political department - the Executive - and possibly on considerations not susceptible of definite proof but demanding prevention or otherwise dependent on national policy.<sup>3</sup>

In this way Isaacs J. introduced the category of essentially ambiguous powers or functions.<sup>4</sup> It is important to observe that

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1. Ibid., at 96.

2. Ibid., at 108.

3. Ibid., at 95.

4. See also per Isaacs J. in Australian Commonwealth Shipping Board v. Federated Seamen's Union of Australasia (1925) 36 C.L.R. 442, 453, 454. Also per Isaacs J. (dissenting, but again upholding legislation) in R v. Turner, ex p. Marine Board of Hobart (1927) 39 C.L.R. 411, 441.

the characterisation of the ambiguous function of deportation as executive (preventive) or judicial (punitive) was not attempted in the legislation itself, otherwise than by the very fact of assignation of the function to an essentially executive agent. Thus the operation and effect of Isaacs J.'s doctrine was to create a presumption in favour of the legislature's dispositions of powers and functions.

It was this presumption, in effect, that Knox C.J. refused to accept in his dissent in Munro's Case. He refused to temper the essential characterisation of the function by reference to the essence of the institution to which it was committed by the Parliament. A tribunal with powers of such-and-such a nature could not possibly be regarded as "a mere administrative body or as a mere adjunct to, or agent or instrument of, the Executive Government".<sup>1</sup>

We have already noticed the vehement expressions of "necessity" and "legislative will" that reveal the basic workings of Isaacs J.'s judgment in Munro's Case. His conclusion is that "the difference in point of status and nature of function between the new Board of Review and the original Board of Appeal is the difference between daylight and dark"<sup>2</sup>-

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1. 38 C.L.R. 153, 165.  
2. Ibid., at 175.

a difference "toto coelo".<sup>1</sup> The nature of an institution or tribunal, and of its functions, may be discerned from the institutional arrangements themselves and the legislative intent they reveal.<sup>2</sup> Or the essence of the institution may appear "simply from the nature of the functions assigned, where they are appropriate exclusively to judicial action, as punishment for crime..."<sup>3</sup> or where they are "inconsistent" with strictly judicial action, "as the arbitration functions in Alexander's Case".<sup>4</sup> The basis of the argument is that some functions are ambiguous in nature - "consistent with either strict judicial or executive action"<sup>5</sup> - and in such cases "the matter must be examined further".<sup>6</sup> Such a function is a "secondary and

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1. Ibid., at 182. Cf. the similar exaggerations in Isaacs J.'s judgment in the Western Australian Sawmillers' Case (1929) 43 C.L.R. 185, 199-200.
  2. "And it matters not how that intention appears. So long as on a proper construction it does appear. It may appear, for example, where the new tribunal is created expressly as a 'Court' and the functions assigned to it are appropriate to judicial action. That is exemplified in Alexander's Case": ibid., at 176. This passage is confused, since in Alexander's Case the powers held to be judicial were of the class that, in Isaacs J.'s own doctrine, could be assigned only to judicial authorities - viz., the powers of enforcement. Alexander's Case actually exemplifies the precise opposite to what Isaacs J. here seems to assert - viz. the overriding of legislative intent and of institutional arrangements in favour of an a priori doctrine of the essential nature of industrial arbitration. See, however, 25 C.L.R. 434, 466-467.
  3. 38 C.L.R. 153, 175.
  4. Id.
  5. Id.
  6. Id.: "some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. An appropriation of public money, a trial for murder, and the appointment of a Federal Judge are instances. Other matters may be subject to no a priori exclusive de-

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incidental function attached to and taking its dominant character from the main purpose" <sup>1</sup> or "primary character of the functionary".<sup>2</sup> In discovering this main purpose or primary character, the discretionary intention of the Legislature is the only specific controlling factor adverted to by Isaacs J.,<sup>3</sup> apart from the "requirements of a progressive people" and other like considerations before mentioned. The Privy Council, while canonising Isaacs J.'s doctrine of exclusive and ambiguous functions, carried its explanation no further.<sup>4</sup> The remainder of the argument is given over to showing that none of the powers of the Board were exclusively judicial in essence. The resulting limitation of the essence of strictly judicial power will be noted in the next section.

Thus Munro's Case, while setting out the full and final Abstract doctrine as revealed by Isaacs J., marks the clear and distinct revival of the category of quasi-judicial<sup>5</sup>

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limitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government. Deny that proposition, and you seriously affect the recognized working of representative government."

1. Ibid., at 175.
2. Ibid., at 177.
3. See, e.g., *ibid.*, at 178, 182, 183.
4. Shell Case (1930) 44 C.L.R. 530, 544-545.
5. See 38 C.L.R. 153, 177; also *per* Isaacs J. (dissenting) in Le Mesurier v. Connor (1929) 42 C.L.R. 481, 515. But note that this sense of "quasi-judicial" is obviously not the sense in which Isaacs C.J. later said that "the concept [of industrial arbitration] includes an implication that the arbitration shall be conducted impartially and in a quasi-

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powers, which had largely disappeared from even the language of his judgments in Hibble's Case [No.1] and R.W.F. v. Gilchrist, Watt and Sanderson. It thus represents a certain modification of the doctrine as it might, in strictness, have developed and did appear to be developing. But the modification softens only the effects; in itself the Abstract doctrine of demarcation is now hardened in recognition of (1) indelible essences of institutions, (2) indelible essences of powers, and (3) quasi-(ambiguous, or non-indelible) essences of powers that may be assigned to institutions in loosely defined "circumstances" at the discretion of the Legislature.

### III

#### Tests of judicial power

Although all the judges, except perhaps Higgins J., were now agreed that sharp distinctions were to be made between Abstract types of powers and institutions, the tests used to make the distinctions were all almost equally vague.

The word "determination" was a favourite word,<sup>1</sup> and

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 judicial manner": A.R.U. v. V.R.C. (1930) 44 C.L.R. 319, 354, 367. Note that, to this day, the High Court maintains the view that a power that is in no sense judicial or quasi-judicial may nevertheless involve an obligation ("at all events to the Crown") fairly and honestly to inquire and report and act....: See Associated Dominions Assurance Society Pty.Ltd. v. Balmford (1951) 84 C.L.R. 249, 263 per Curiam; see also election Importing Co.Ltd. v. Courtice (1949) 80 C.L.R. 657, 660 per Williams J.

1. See ex p. O'Flanagan and O'Kelly (1923) 32 C.L.R. 518, 527 per Knox C.J., citing R. v. Local Government Board (1902) 2 I.R. 349, per Falles C.B.; 537 per Isaacs J.; R.W.F. v. Gilchrist, Watt and Sanderson (1924) 34 C.L.R. 482, 512.

retained its systematic ambiguity as between authoritative declaration of what the rights of the parties were to be, and discovery of what the rights of the parties already were in law.<sup>1</sup> (The word was also frequently used to indicate legal settlement of controversy).<sup>2</sup> The words "decision", "establish"<sup>3</sup> and "finding" were used equivalently with the foregoing and with each other. In fact, however, the ambiguity was more than verbal, and represented (or rather, disguised) a continuation of the rival analyses of judicial power in Alexander's Case.

These differences came to the surface in the B.I.O. Case and Munro's Case. It is notable that in the former case, Knox C.J. explicitly employed,<sup>4</sup> as the test of judicial power, the analysis advanced in Alexander's Case by Griffith C.J. - an analysis in which the source of the rights declared enforceably as between the parties is systematically ignored. What is more important in such an analysis is that a dispute is settled by an authoritative declaration of what rights are to hold as between

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1. E.g. Commonwealth v. Limerick S.S. Co. Ltd. (1924) 35 C.L.R. 69, 112 per Starke J.
  2. In re Judiciary and Navigation Acts (1921) 29 C.L.R. 257, 268.
  3. ex p. O'Flanagan and O'Kelly 32 C.L.R. 518, 569, per Higgins J.
  4. (1925) 35 C.L.R. 422, 432.

parties who have submitted their claims to a tribunal. Since all these elements persisted in the revised Taxation Board of Review,<sup>1</sup> Knox C.J. insisted in Munro's Case that the Board remained judicial. A similar analysis, though of quasi-judicial power for the purposes of Prohibition, had animated the majority opinion in Hibble's Case [No.1] and W.W.F. v. Gilchrist, Watt and Sanderson.<sup>2</sup> However, this analysis did not exclude the same Justices holding that a court's authoritative interpretation of a law, even in abstraction from any suit, would be a judicial function (though not a judicial "matter" within s.73 of the Constitution): In re Judiciary and Navigation Acts.<sup>3</sup>

To resist this analysis in Alexander's Case, it had been sufficient for Isaacs and Rich JJ. to point out that the relevant "determination" of rights was made without reference to a pre-existing legal standard, but merely according to the arbitrator's opinions of justice and fairness. From this, it was concluded that an award was part of a legislative process, and should be regarded as a factum which the Act "stamped" with legal or legislative consequences.<sup>4</sup> But in the case of tribunals

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1. (1926) 38 C.L.R. 153, 165, 166.
  2. 34 C.L.R. 482, 497.
  3. 29 C.L.R. 257, 264, 266.
  4. 25 C.L.R. 434, 463-465.

such as the Taxation Board of Review, the premise of absence of pre-existing legal standard could not be postulated. So, in order to limit the essence of judicial power, Isaacs J. made use of the factum concept as a premise in its own right. This deserves close study.

Now, it was agreed on all sides that a mere recommendation could never constitute a judicial decision.<sup>1</sup> It is the implied contrast with recommendations that gives meaning to otherwise empty invocations of the terms "adjudication", "decision", "judicial decision"<sup>2</sup> and "finding"<sup>3</sup> in various cases where judicial power was in question. In other words, it was agreed that the decision in question must, if it were to be accounted "judicial", effect of itself<sup>4</sup> the rights of the parties. This was, moreover, a connotation of the words "binding", "conclusive", "enforceable", "final", "determine", etc., frequently employed

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1. This has remained unchallenged doctrine: see, e.g., McGuineas v. Attorney-General (Vic) (1940) 63 C.L.R. 73, 83, 90, 102; Fraser Henleins v. Cody (1945) 70 C.L.R. 100, 120, 121, 124, 132; Saffron v. R. (1953) 88 C.L.R. 523, 528; Lockwood v. Commonwealth (1953) 90 C.L.R. 177, 180; Medical Board of Queensland v. Byrne (1958) 100 C.L.R. 582, 594.
  2. S.A. Land Mortgage and Agency Co. v. R. (1922) 30 C.L.R. 523, 549 per Isaacs J.; ex p. O'Flanagan and O'Kelly 32 C.L.R. 518, 537 per Isaacs J.: 577 per Rich J.
  3. Roche v. Kronheimer (1921) 29 C.L.R. 329, 340 per Higgins J.
  4. "Of its own direct force": per Isaacs and Rich JJ. in W.W.F. v. Gilchrist, Watt and Sanderson 34, C.L.R. 482, 515.

by all the judges as criteria of judicial action.<sup>1</sup> But the foregoing phrase, "of itself", is vague and undefined, and offered Isaacs J. his principal tool in the task of narrowing the essence of judicial power. For the doctrine of the factum is simply the notion that decisions or findings which are mere facts do not, of themselves, create or determine liabilities and hence are non-judicial.

Already in Hibble's Case [No. 1] and W.W.F. v. Gilchrist, Watt and Sanderson, the notion of the factum in the judgments of Isaacs J. had almost come adrift from the notion of pre-existing legal standards that was its premise in Alexander's Case. For all the many references to the factum in these two cases, there is only one passing reference to the absence of a pre-existing legal standard.<sup>2</sup> This separation of premise and conclusion was relatively harmless in the context of industrial arbitration, where Alexander's Case had in any case settled the primary strict legal character of the function in question. But in subsequent cases, and other contexts, the absence of the premise ensured that the notion of the factum was a quite uncontrolled tool for exploiting, rather than resolving, the ambiguity

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1. See particularly, the Privy Council's opinion in the Shell Case (1930) 44 C.L.R. 530, 543. Also Caledonian Collieries Ltd. v. Australian Coal and Shale Employees' Federation [No. 1] (1930) 42 C.L.R. 527, 546 per Isaacs J.
  2. W.W.F. v. Gilchrist, Watt and Sanderson 34 C.L.R. 482, 512; cf. 515, 512, 500, 507. See also Le Mesurier v. Connor 42 C.L.R. 481, 516 per Isaacs J. In the W.W.F. Case the notion of the pre-existing legal standard makes an appearance in another context, that of "judicial" as opposed to "arbitral"

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already identified. The ambiguity had, indeed, been mentioned by Isaacs and Rich JJ. in Alexander's Case, when they observed that both judicial and arbitral power "rest for their ultimate validity and efficacy on the legislative power".<sup>1</sup> Thus, in a sense, both judicial and arbitral determinations were facta "upon which the law operates to create the right and duty"<sup>2</sup> - what makes the arbitral award a mere factum is thus its participation in legislative power, a participation that must therefore be determined on independent grounds.

Hence, in the B.I.O. Case and Munro's Case the use of the notion of the mere factum, by Isaacs J., disguised the fact that in both cases his characterisation of the powers of the Board hinged on the circumstance, by itself quite unconvincing, that appeal from the Board lay to the High Court, in the first case, in its appellate jurisdiction, and in the second case, in its original jurisdiction. This technical consideration, eked out with a presumption as to Parliament's intentions, and in any case far removed from the essentialist analyses on which Isaacs J. was wont to insist, provided the only independent ground

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interpretations of awards: see at 528 per Isaacs and Rich JJ.; 543 per Starke J. See also Pickard v. John Heine and Sons Ltd. (1924) 35 C.L.R. 1, 6-7. See now R. v. Lydon, ex p. Cessnock Collieries Ltd. (1960) 103 C.L.R. 15, 22.

1. 25 C.L.R. 434, 463.
2. Ibid., at 464.

on which these applications of the doctrine of the factum could rest. But in the B.I.O. Case the contrast is frequently stated, as if it stood on its own ground, between decisions "determining existing rights and duties as they stand" and decisions "merely ascertaining a fact which the legislature adopt [s] as the standard upon which its will operate [s] to create rights and duties".<sup>1</sup> And in Munro's Case the contrast is stated to opposite effect, between "the dispensing of royal justice" and the "merely...incidental or ancillary determination of circumstances as a factum for the operation of the legislative will".<sup>2</sup>

It is important to identify the inherently empty character of Isaacs J.'s notion of the factum, and the necessary but obscured dependence of that notion on independent grounds of a merely technical or really political nature. Failure to recognise this fact has been important in subsequent debates about the characterisation of final and conclusive decisions as to "fact". It seems never to have been noticed that the "final decisions as to matters of fact" that play a central part in Isaacs J.'s seminal judgment in Munro's Case are nothing other than his "mere facta" under another name. That a given decision is "as to matters of fact" is not, in the relevant contexts,

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1. 35 C.L.R. 422, 435, 436, 439.  
 2. 38 C.L.R. 153, 176.

a plain fact but a conclusion analogous to the conclusion in Alexander's Case that awards were mere facta. In short, it is important to observe that in Munro's Case, Isaacs J. used the following expressions as synonymous:

- (1) power of finally determining matters of fact and discretion;<sup>1</sup>
- (2) final decision, the governing factum fixing liability;<sup>2</sup>
- (3) function of deciding between contestants questions of fact and discretion with the effect in some way of binding rights.<sup>3</sup>

Of course, a factum constituted by a decision as to facts is not identical to a factum constituted by an arbitrator's opinion as to justice and fairness in future industrial relations. Isaacs J.'s use of the one term, factum, succeeds in obscuring this difference, just as it also obscures the difference between a pure recommendation (or advice) by a Board to a Minister, and a finding endowed with the automatic legal consequences of the Taxation Board's decisions. Moreover, as Isaacs J. himself pointed out in the B.I.O. Case, a finding of facts by the Taxation Board would ordinarily "require, so to speak, a 'direction' in law. If a Judge were trying such cases with a jury, he would be bound to direct them as to the law".<sup>4</sup> Hence it is clear that the activities of any tribunal whatsoever could, if it were desired, be split up as Isaacs J. had split up the functions of the Arbitration Court; in all cases it

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1. Ibid., at 176, 177.  
 2. Ibid., at 177.  
 3. Ibid., at 179.  
 4. 35 C.L.R. 422, 438.

would be possible to find a decision or opinion that constituted a mere factum to be "stamped" with "legislative consequences"; and any powers of enforcement in the tribunal could then be declared to be extrinsic.<sup>1</sup> What, then, is the counterweight offered by Isaacs J. as a brake on so potent a tool of "analysis"? In Munro's Case, as we have noted, the counterweight offered is the "dispensing of royal justice by means of the King's judicial power";<sup>2</sup> indeed, this unhelpful category is advanced by Isaacs J. as the analytical counterpart of both mere-factum-decisions and mere recommendations alike in ex p. O'Flanagan and O'Kelly,<sup>3</sup> W.W.F. v. Gilchrist, Watt and Sanderson<sup>4</sup> and later in Le Mesurier v. Connor.<sup>5</sup> So far as any clear meaning

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1. Of course, in Munro's Case, Isaacs J. says (at 176) that if the tribunal had its own powers of enforcement, then the whole power of the tribunal would be judicial. But this must mean, "in the absence of other factors", since otherwise Alexander's Case would fall. Hence, one is thrown back on the "other factors" that really control the whole analysis. And note that the tribunal found to be judicial by Isaacs J. in the B.I.O. Case had no powers of enforcement. Thus if a tribunal's having its own powers of enforcement were the essential brake on the factum analysis, Isaacs J. would be forced to agree with Higgins J. (for whom powers of enforcement were avowedly crucial) that the B.I.O. Case was wrong. Cf. also per Isaacs J. in Commonwealth v. Kreglinger and Fernau Ltd. (1926) 37 C.L.R. 393, 408.
  2. 38 C.L.R. 153, 176.
  3. 32 C.L.R. 518, 536.
  4. 34 C.L.R. 482, 508.
  5. 42 C.L.R. 481, 510. See also per Isaacs J. in Huddart Parker v. Moorehead (1909) 8 C.L.R. 330, 383: "the administration of public justice"; and see supra, at p.8.24.

can be assigned to this notion, it is equivalent to the idea of the general judiciary advanced by Barton and Gavan Duffy JJ. in the Wheat Case and by Higgins J. in Alexander's Case, ex p. O'Flanagan and O'Kelly and Munro's Case. But Isaacs J. had really disentitled himself from reliance on any such notion. Still, its vague air of restriction to the traditional "King's Courts"<sup>1</sup> made plausible a drastic limitation of the scope of essentially judicial action, and thus of embarrassing consequences of the Abstract doctrine of demarcation.

In all, the notion of the factum<sup>2</sup> must be regarded as a cover for confusion and a tool, not so much for an analysis of the powers of tribunals, as for their relegation to one or another Abstract category as the occasion demanded on independent premises derived sometimes from a general theory of law, sometimes from a general theory of Australian federalism, and in either case from a doctrine of essences of institutions. So perhaps it is small wonder that, in the Shell Case,<sup>3</sup> the Privy Council first espoused the definition of judicial power offered by Griffith C.J. in

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1. In W.W.F. v. Gilchrist, Watt and Sanderson, Isaacs and Rich JJ. went about and about to assert that it was not limited to "the old strict form of Courts", but merely to the "true" and "legal" and "central" concept of "curial" action - notions which they gave no further content.
  2. A late use of the concept by Isaacs J. may be seen in the W.A. Sawmillers' Case (1929) 43 C.L.R. 185, 199.
  3. (1930) 44 C.L.R. 530 (Munro's Case on appeal).

Huddart Parker v. Moorehead (a definition identical in substance with his definition in Alexander's Case and Knox C.J.'s in Munro's Case),<sup>1</sup> then announced (in effect) that even the presence of all the elements in that definition ("mere externals") was not sufficient to ensure that a power be strictly judicial,<sup>2</sup> and finally adopted Isaacs J.'s doctrine of the two-fold essences of powers and institutions in order to announce without further ado that the power of the Board was administrative and unexceptionable.<sup>3</sup> The evident confusion was not restricted to the Privy Council. But the failure to grapple with the problems of definition and selection posed by the Abstract doctrine of demarcation could hardly have been more complete.

## IV

Conclusions

It is not too much to conclude that the attempt of Isaacs J. to work with an Abstract doctrine of demarcation, and to work out a constituent essence of judicial power, ended in thinly veiled confusion and the adoption of more or less pragmatic solutions. There was no other Justice to propose an acceptable counter-solution. In the context of industrial arbitration, in which Isaacs J.'s main doctrines of judicial

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1. Ibid., at 542-543.
  2. Ibid., at 543-544.
  3. Ibid., at 545.

power had evolved, the selection of one value (adherence to a pre-existing legal standard) tempted him to ignore the existence and relevance of other judicial values (Hibble's Case [No. 1]; W.W.F. v. Gilchrist, Watt and Sanderson). In other contexts, where the presence or absence of the foregoing definitive value was incapable of providing a solution that would avoid embarrassing consequences, Isaacs J. really abandoned the attempt to make his characterisations by reasoned selection of other values from the judicial set. Instead, he relied increasingly on extrinsic presumptions of necessity, legislative and national will, or on unconvincing technical considerations. Apart from an isolated remark in the Wheat Case, about the inconsistency of action ex mero motu with the impartiality that is an essential judicial value,<sup>1</sup> there is no attempt to explicate the sense in which a "strictly judicial" power is inconsistent with the activity of administrative or legislative institutions, or the intrinsic sense in which "quasi-" judicial action of the sort in Munro's Case differs from "strictly" judicial action - where by "inconsistent" we mean opposed to one of the set of judicial values, and by "intrinsic" we mean drawn from that set.

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1. 20 C.L.J. 54, 93-94; supra, at p.5. 23 .

In short, contrary to all the professions of the Engineers' Case, the high technique of the common law was the servant, not the guide or master, of an a priori doctrine of Australian federalism with its attendant presumptions and "necessities".

## CHAPTER ELEVEN

### The third phase of judicial analysis (1930-1952)

This phase begins with the retirement of Isaacs C.J. in 1930, and ends with the accession of Sir Owen Dixon to the Chief Justiceship in 1952. In some ways, the story of Dixon J.'s opinions and influence during this period resembles that of Isaacs J.'s during the early years of the first phase, and (as we shall see in the next chapter) the dénouement is similar: what was rejected became the cornerstone. But the story differs in that there was lacking, in this field, a counterpart of the firmly held and vigorously argued majority views of the senior Justices of the first phase. In short, this third phase is rather deficient in thorough analysis of the problems of characterising governmental powers, and consequently in clear and tenable solutions to those problems.

#### I

### Separation of powers - cross-currents of opinion

As we have said, the years following the retirement of Isaacs C.J. are lacking in the firmly marked doctrines, axioms and approaches of earlier years. It is possible to discern the beginnings of that rigorous doctrine of demarcation that was to prevail, in the final or latest phase, under the firm leadership of Dixon C.J. (1952-1964). But in general, the

opinion of the Court was as unsympathetic to the formalism or conceptualism that took its stand on the Wheat Case as to the driving nationalism that Isaacs J. had used to temper the consequences of his own interpretations.

So far as they were founded on history, we have already noted the opinions of Dixon J. on the separation of powers in the Australian Constitution.<sup>1</sup> But in Dignan's Case (1931),<sup>2</sup> where Dixon J. first expressed his views on the matter judicially, the emphasis is not on history so much as on presumptions of intention founded explicitly on language and arrangement.<sup>3</sup>

The arrangement of the Constitution and the emphatic words in which the three powers are vested by sections 1, 61 and 71 combine with the careful and elaborate provisions constituting or defining the repositories of the respective powers to provide evidence of the intention with which the powers were apportioned and the organs of government separated and described.

Now in Dignan's Case what was in issue was the correctness of the terse ruling in Roche v. Kronheimer (1921)<sup>4</sup> that subordinate legislative powers might be vested in executive officers. But the conclusions drawn by Dixon J. in the course of his argument were much wider:<sup>5</sup>

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1. See supra, at pp.6.3, 6.9 - 6.10.
  2. Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan (1931) 46 C.L.R. 73.
  3. Ibid., at 96.
  4. (1921) 29 C.L.R. 329.
  5. 46 C.L.R. 73, 97 (emphasis added).

...because of the distribution of the functions of government and of the manner in which the Constitution describes the tribunals to be invested with the judicial power of the Commonwealth, and defines the judicial power to be invested in them, the Parliament is restrained from reposing any power essentially judicial in any other organ or body, and from reposing any other than that judicial power in such tribunals.

Here, then, was the announcement of the widest possible doctrine of Abstract demarcation, at least of judicial powers and institutions, that Dixon had argued for as counsel in In re Judiciary and Navigation Acts<sup>1</sup> and Roche v. Kronheimer,<sup>2</sup> that the Court in those cases had rejected or explicitly shrunk from asserting,<sup>3</sup> and that Dixon had nevertheless asserted as true constitutional doctrine before the Constitutional Commission of 1927.<sup>4</sup> In Dignan's Case Dixon J. claimed<sup>5</sup> that it was a conclusion drawn from the authority of the Wheat Case, Alexander's Case and In re Judiciary and Navigation Acts; it was, strictly speaking, a personal conclusion nevertheless. The whole Court concurred in upholding Roche v. Kronheimer, though no-one could offer a convincing rationale for what Dixon J. frankly stated to be "an inconsistency or, at least, an asymmetry",<sup>6</sup> "logically or theoretically" inexplicable,

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1. (1921) 29 C.L.R. 257, 259.

2. (1921) 29 C.L.R. 329, 335; supra, at p.10.8.

3. 29 C.L.R. 257, 264.

4. Royal Commission on the Constitution of the Commonwealth (Minutes of Evidence) (1927), 782. See infra, p.12.2.

5. 46 C.L.R. 73, 97.

6. Ibid., at 101.

depending "less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law".<sup>1</sup> But the drift of Dixon J.'s judgment emphasised this want of rationale and embarrassing asymmetry; his leading citation was from Isaacs J.'s judgment in the Wheat Case. Evatt J., on the other hand, sought to soften the apparent difficulty; his leading citations were from judgments in which, as we showed in the last chapter, Isaacs J. was pressed by undesirable consequences of the Abstract "dominant principle of demarcation", and was proclaiming the need to "recognise the development of the Nation" and "the progressive life of the community".<sup>2</sup> In short, Evatt J.'s stress was on Munro's Case<sup>3</sup> as against the Wheat Case. And, so far from agreeing with Dixon J.'s unprecedentedly rigorous application of the Abstract doctrine, Evatt J. was clear that "it is not possible to predicate of all lawful Commonwealth action that it must be an exercise either of legislative or judicial or executive functions".<sup>4</sup> This, in turn, was a wide and relatively novel view; but Evatt J. pressed his disagreement with Dixon J. more precisely:<sup>5</sup>

1. Ibid., at 101-102.
2. Commonwealth v. Colonial Combing, Spinning and Weaving Co. (1922) 31 C.L.R. 421, 438-439 per Isaacs J.; cited by Evatt J., 46 C.L.R. 73, 114-115. See supra, pp.10.5.
3. Cited by Evatt J. twice at 46 C.L.R. 73, 116, and again on 117.
4. Ibid., at 115.
5. Ibid., at 117.

it is not possible to infer from the fact that an organ for the exercise of one of the three Commonwealth powers is lawfully acting, that it must be exercising the power associated with it as an organ in ss.1, 61 and 71 of the Constitution. In particular, it does not follow, because one of the three agencies by which the judicial power of the Commonwealth is exercised is lawfully acting, that it must be exercising either judicial power or even judicial functions.<sup>1</sup>

Though the other three Justices in Dignan's Case hardly ventured on these discussions, it appears from later cases that Evatt J.'s general views on the separation of powers were far closer than those of Dixon J. to the mind of the Court. Remarkably enough, this emerges most clearly from Lowenstein's Case (1937),<sup>2</sup> in which Dixon and Evatt JJ. wrote a joint dissenting judgment.

The Commonwealth Bankruptcy Act 1924-1933, by s.217, gave the Federal Court of Bankruptcy power to charge a bankrupt with an offence against the Act and imprison him, or alternatively to commit him for trial before any court of competent jurisdiction. The validity of this section was attacked in Lowenstein's Case. The argument for the applicant

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1. Of course, this proposition, too, was wider than Evatt J.'s judgment strictly required, since Evatt J. agreed with Gavan Duffy C.J. and Starke J. (*ibid.*, at 84) that "questions of judicial power occupy a place apart under the Constitution" (*ibid.*, at 117). It is remarkable that Dixon J. drew the distinction by pleading the special character, not of judicial power, but of legislative power (*ibid.*, at 101-102).
  2. R. v. Federal Court of Bankruptcy, ex p. Lowenstein (1937-1938) 59 C.L.R. 556. Also 57 C.L.R. 765.

by Garfield Barwick neatly displays the ambiguities in the Abstract doctrine as crystallised in Munro's Case. These ambiguities are summed up in the word "inconsistent"; no court may exercise a power inconsistent with judicial power<sup>1</sup> - but does "inconsistent" here mean clearly outside a sharply defined concept of judicial power, or does it mean actually opposed to the realisation of important judicial values? The same ambiguity inheres in Barwick's submission that for a court to be both prosecutor and judge is "repugnant to the judicial function".<sup>2</sup> In fact, Barwick took care to argue both possible senses of the doctrine fairly explicitly but without clearly distinguishing between them: s.217 conferred a function that was "peculiarly executive" and hence "foreign to the concept of the judicial function"<sup>3</sup> and hence (or also) repugnant to this function.

Now, Dixon J.'s argument in Dignan's Case accepts that what is essentially (say) executive power is thereby constitutionally inconsistent (i.e. to be kept separate from) judicial power; Evatt J.'s argument, on the other hand, rejects that proposition, while leaving room for a doctrine that powers

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1. 59 C.L.R. 556, 559.  
 2. 57 C.L.R. 765, 769.  
 3. 59 C.L.R. 556, 559.

opposed or deleterious to the exercise of another power are to be kept separate from that power. This is confirmed by the fact that the joint judgment of Dixon and Evatt JJ. in Lowenstein's Case retains the ambiguities of Barwick's argument. Every central affirmation of the judgment manifests, often by the duplication of phrases, this ambivalence. Thus, "it is not incidental to or consistent with the exercise of judicial power to undertake the two functions of actor and judex ....";<sup>1</sup> "if the inherent character of the function reposed in the courts is at variance with the conception of judicial power, then...it must fail...";<sup>2</sup> hence, "to impose such duties cannot be to legislate upon a matter ancillary to the judicial power or incidental to its exercise".<sup>3</sup> Thus it is not necessary to suppose that Evatt J. had changed his mind since Dignan's Case;<sup>4</sup> in this connection one may observe, further, that the joint judgment makes no mention of the separation of powers, but is grounded on want of legislative authority to confer the relevant functions under Chapter III of the Constitution.<sup>5</sup>

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1. Ibid., at 580 (emphasis added).
  2. Ibid., at 588 (emphasis added); cf. also 589.
  3. Ibid., at 589 (emphasis added).
  4. See also Medical Board of Victoria v. Meyer (1937) 58 C.L.R. 62, 104-105 per Evatt J., for further evidence that Evatt J. quite apart from the separation of powers, had a strict conception of judicial power.
  5. See especially 59 C.L.R. 556, 585, 586, 587 (re s.51(xxxix)), 588-589.

The majority judgments, however, show that Evatt J.'s views on the separation of powers, as expressed in Dignan's Case, were in fact the prevailing doctrine of the High Court. McTiernan J.'s brief remarks indicate that he would require nothing less than a power "inconsistent with the due exercise" of a court's power, before finding an infringement of s.71 of the Constitution.<sup>1</sup> More important, the judgments of Latham C.J. and Starke J. discussed the separation of powers directly. Latham C.J., in particular, put at the forefront of his opinion a rejection of Dixon J.'s view that "there is a separation of powers embodied in the Constitution which makes it impossible to confer upon any court other than strictly judicial functions".<sup>2</sup> To this rejection, which Latham C.J. established quite elaborately, there were no limits short of deleterious effect on the exercise of an established power: "if a power or duty were in its nature such<sup>as</sup> to be inconsistent with the coexistence of judicial power, it might well be held that a statutory provision purporting to confer or impose such a power or duty could not stand with the creation of a judicial tribunal....".<sup>3</sup> But the powers conferred

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1. Ibid., at 590, 591.
  2. Ibid., at 564.
  3. Ibid., at 567 (emphasis added).

by s.217 were not inconsistent in this sense. Latham C.J. also addressed himself to the alternative sense of Barwick's ambivalent argument, by rejecting the proposition that prosecutions are essentially an executive function.<sup>1</sup>

Starke J. made the first of his many attacks<sup>2</sup> on the doctrine of separation of powers "in this absolute sense" according to which "each department has its own powers which are not and cannot be conferred upon any other department".<sup>3</sup> It was true that each department had "its own appropriate functions";<sup>4</sup> but further powers, whatever their "essential nature", could be conferred so long as they were "connected with or incidental to the performance of" such "appropriate functions":<sup>5</sup>

there is not and never was any clear line of demarcation between legislative, executive and judicial powers, nor can there be if efficient and practical government is to be maintained.

Hence, even if Rich J.'s equivocal endorsement<sup>6</sup> of the Chief Justice's judgment be limited to the mere conclusions of that judgment, Lowenstein's Case is a clear indication that Dixon J.'s strict Abstract doctrine found little favour in this phase of judicial interpretation.

1. Ibid., at 567-568.
2. See also, e.g., Johnstone Fear and Kingham v. Commonwealth (1943) 67 C.L.R. 314, 326; Rola Case (1944) 69 C.L.R. 185, 210.
3. 59 C.L.R. 556, 576.
4. Ibid., at 577 (quoting Willoughby, Constitution of the United States, 2nd ed. (1929), Vol.III, 1619).
5. 59 C.L.R. 556, 577.
6. Ibid., at 573.

Before leaving Lowenstein's Case, it should be noted how far the interpretations of Dixon and Evatt JJ. (in many other respects the most historically learned of all Australian Justices) diverged from verifiably historical fact. Their judgment ventured a long aside about s.80 of the Constitution, which prescribes trial by jury for all trials on indictment for offences against the laws of the Commonwealth. It will be recalled that Isaacs J. had, in the Wheat Case,<sup>1</sup> ascribed "supreme importance" to this apparent guarantee. But in 1928, Isaacs J. himself, with the rest of the High Court, had held that the Parliament was free to specify what offences should be indictable and what summary.<sup>2</sup> For Dixon and Evatt JJ., however, such an interpretation seemed "but to mock at the provision....to treat such a constitutional provision as producing no substantial effect seems rather to defeat than to ascertain its intention".<sup>3</sup> In fact, nevertheless, it was Dixon and Evatt JJ. that were far from the real intentions of the founders, who realised clearly enough that s.80 would not substantially control the Parliament. Indeed, in 1898 the founders took care to amend the clause so as to ensure that it would not apply to summary offences, and knowingly left Parliament full freedom to prescribe what should be indictable

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1. Supra, at p.5.21 .

2. R. v. Archdall and Roskrige (1924) 41 C.L.R. 128.

3. 59 C.L.R. 556, 583-584.

and what summary. No-one was perturbed<sup>1</sup> when Isaacs J. remarked:<sup>2</sup>

When the clause was before us previously I pointed out that I did not think it would have any real effect at all, because it is within the powers of the Parliament to say what shall be an indictable offence and what not...

The point is a small one, but the light it throws on the divergence between legal and historical method considerable.

To revert to the separation of powers, it must finally be noted that the war that broke out not long after Lowenstein's Case occasioned further inroads on the strict Abstract doctrine sponsored by Dixon J. In R. v. Bevan, ex p. Elias and Gordon (1942)<sup>3</sup> and again in R. v. Cox, ex p. Smith (1945),<sup>4</sup> the validity of courts-martial in the Commonwealth forces was challenged on the ground that they exercised the judicial power of the Commonwealth without conforming to s.72 of the Constitution. In both cases the High Court lost no time in rejecting the challenge. In the first, only Starke J. addressed himself to the reasons of the matter; he was clear that courts-martial exercised judicial power, but that they stood "outside the judicial system established under the Constitution".<sup>5</sup> the High

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1. See Barton and Douglas, 1898 D, 1895.

2. Id.

3. (1942) 66 C.L.R. 452.

4. (1945) 71 C.L.R. 1.

5. Sawyer wrongly says that "in King v. Bevan, the Court held that...this was a permitted exception to the concept of judicial function": Australian Federal Politics and Law 1929-1949 (1963), 153.

Court must "incline towards a construction of the Constitution that is necessary, not only from a practical, but also from an administrative point of view". The reference to the "judicial system" shows as clearly as could be desired that the conclusion sought to be reached required a reversion from the Abstract to the Institutional doctrine of demarcation. In the later case, it was only Dixon J. who faced the objection, and he, too, could say no more than that courts-martial "do not form part of the judicial system administering the law of the land".<sup>1</sup> These references to "the judicial system" should be compared with the references, by the dissenting Justices in the Wheat Case, to the "general Judicature", and to Isaacs J.'s later invocations of "the King's judicial power"; in each case the intention is to escape the embarrassing consequences of an Abstract doctrine.

## II

### Criteria of the "exclusive" judicial power of the Commonwealth

In section II of the previous chapter, we saw how Munro's Case established both a doctrine that the essences of institutions would establish the nature of ambiguous functions (with a consequent presumption in favour of actual dispositions of powers), and a further doctrine of the factum stamped with

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1. 71 C.L.R. 1, 23. Note that Dixon J. admitted no more than that courts-martial acted judicially; he did not say that they exercised judicial power, though it is not clear that he could have escaped such an admission on analytical grounds if the question had arisen directly.

legal consequences (according to which the functions of any institution whatever could be found to be mere factum-finding ancillary to legislation or administration). It is clear that the combined effect of these internally uncontrolled doctrines could be to nullify any Abstract doctrine of separation of powers, even as applied only to Chapter III of the Constitution; only the "general Judicature" would be immune from a legislative redefinition buttressed by the two doctrines established in Munro's Case. But such a nullification of the Abstract doctrine would itself make nonsense of unchallenged cases, such as the Wheat Case and Alexander's Case. Moreover, the motive for wielding the factum tool as Isaacs J. had wielded it would ordinarily be to save legislation from undesired restrictive effects of the Abstract doctrine, and in the absence of such motivation some special reason would have to be found for dividing up apparently unified sets of functions. Now it is clear that, during the third phase of judicial interpretation now under study, the High Court lacked strong attachment to either the Abstract doctrine or the nationalist principle of federalism with its presumption in favour of federal legislation. Furthermore, it seems that none of the Court grasped the implications of the second phase of interpretation as we have revealed them. The inevitable consequence, in the absence of any new tests for judicial power, was a real confusion of reasoning and results - a confusion that has often been

recognised, but never satisfactorily explained.

The central examination of judicial power, in this third phase, is in the Rola Case (1944)<sup>1</sup> - perhaps the most widely discussed, and misunderstood, of Australian cases on judicial power. Wartime Commonwealth regulations had established Women's Employment Boards and Committees of Reference. The function of the Boards was to decide whether certain jobs were (inter alia) usually performed by males and, if so, whether females might be employed on such work. The Boards' decisions were to be binding on persons specified in their awards, and were to have the effect and enforceability of awards of the Arbitration Court.<sup>2</sup> The function of the Committees of Reference was to determine, on a reference by the Minister, the Attorney-General or the Chairman of a Board, what females were employed on work of a sort specified in a decision of a Board, and "any questions as to the nature of the work on which the females, who are or were employed on work specified in the decision, are or were respectively employed".<sup>3</sup> The determinations of Committees were to be "binding on the employer and females specified in the determination"

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1. Rola Company (Australia) Pty. Ltd. v. Commonwealth (1944) 69 C.L.R. 185.
  2. Ibid., at 194.
  3. Ibid., at 195.

and were to be "evidence of any matters of fact so specified".<sup>1</sup> In the Rols Case, the majority of the High Court (Latham C.J. with McTiernan J., and Starke J.; Rich and Williams JJ. dissenting) held that the Committees of References did not exercise the judicial power of the Commonwealth.

Contrary to the opinion of subsequent commentators,<sup>2</sup> it seems that the majority had much the easier task in establishing their view. It was agreed on all sides that the decisions or awards of Boards were not judicial. Moreover, it could not be claimed that the determinations of Committees created or declared, of themselves, an immediately enforceable liability: at most their findings of fact were conclusive evidence, playing "an important part in the determination of the incidence and enforcement of existing rights and obligations".<sup>3</sup> It was clear that the Parliament intended the Committees as supplementary to the general administrative regulation of women's employment, and it would be absurd to assume that Parliament intended to confer judicial powers on a body in derogation from Chapter III and its notorious implications.

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1. Id.
  2. Sawyer, Australian Constitutional Cases (2nd ed., 1957), 528; Wynes, Legislative, Executive and Judicial Powers in Australia (3rd ed., 1962), 560.
  3. Per Williams J., 69 C.L.R. 185, 217 (emphasis added); also 218.

The difficulty of the dissenting judges is plain from the disparity of the arguments they employed. Commentators speak of the judgments of Rich and Williams JJ. in one breath, as embodying "the view", "the reasoning"<sup>1</sup> of the minority judges, or as "agreeing in substance".<sup>2</sup> But in fact Rich J. chose one of the traditional criteria of non-judicial power, while Williams J. emphasised the traditionally opposing criterion.<sup>3</sup> For Rich J., the heart of the matter was that the Board created new rights and duties in a complete and sufficient manner requiring no supplementary action by the Committees to vest such rights effectually in individuals. Thus:<sup>4</sup>

the function of a Committee of Reference...is not to vest in individuals new legal rights which they did not possess until conferred upon them by the Committee, but to determine, with respect to particular individuals or individuals of a particular class, a fact the determination of which decides whether they are entitled to legal rights which, if they have them at all, they possess because these rights have already been conferred upon them independently by another body. This is essentially a judicial function, and involves the exercise of judicial power.

In short, Rich J.'s argument leaps from the premise that the function is not legislative (because not imposing new legal duties<sup>5</sup>), to the conclusion that therefore the function must be judicial. It is not at all clear how such a conclusion can be

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1. Sawyer, op.cit., 528; Wynes, loc. cit.; Barwick in the Communist Party Case (1950) 83 C.L.R. 1, 111-112.

2. Sawyer, op.cit., 527.

3. It is true, however, that there is a common factor, displayed in the joint dissent of Rich and Williams JJ. in Penton's Case (1947) 73 C.L.R. 549, 561.

4. 69 C.L.R. 185, 207.

5. Cf. *ibid.*, at 203.

reconciled with Munro's Case, for the determinations of the Commissioner of Taxation and of the Board of Review in that case did not vest new liabilities, did conclusively determine facts which decided the incidence of the pre-existing liabilities, and yet were not "essentially" judicial, and did not involve the exercise of judicial power. But inconsistency with some former decision or other was inevitable in view of Rich J.'s restriction of his discussion throughout the judgment,<sup>1</sup> to the dichotomy of creation of new rights as against application of a pre-existing legal standard.<sup>2</sup>

If Rich J. tried to solve the problem by using the successful test in Alexander's Case, Williams J. emphasised its rival. For him, the "true meaning"<sup>3</sup> of judicial power was "determination of a controversy whether one person has an enforceable legal right against another person":<sup>4</sup>

It is immaterial...whether the controversy as to whether one person is entitled to enforce a legal right against another person turns upon questions of fact or of mixed fact and law or of law. In each case the determination of the controversy is an exercise of judicial power.<sup>5</sup>

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1. Ibid., at 203, 205, 206-208: cf. 204, where Rich J. recognises that "it is not necessary, in order that power may be judicial, that it should be concerned with the ascertainment and determination of existing legal rights and liabilities as between litigants".
  2. Rich J. in fact restricted himself to the analytical equipment he had used in Jacka v. Lewis (1944) 68 C.L.R. 455, 460 - a case concerning the distinction between arbitral and judicial power.
  3. 69 C.L.R. 185, 217.
  4. Id.; also 216, 218.
  5. Ibid., at 217.

Of course, Williams J. did not use the inter partes test as a direct or explicit counter to the pre-existing legal standard test; indeed, towards the end of his judgment he slipped into saying that the relevant criterion was "a binding determination made for the purpose of enforcing existing rights and obligations".<sup>1</sup> Still, his emphasis on binding determination of controversy brought him into direct conflict with Munro's Case, which he sought to distinguish by saying that in that case the determination of the Board of Review was not in invitum, since the subject could choose to appeal instead to a Court.<sup>2</sup> But,

1. However, the following passage from Peacock's Case (1943) 67 C.L.R. 25, 54, shows how far Williams J. was prepared to go along the path taken by the senior Justices in Alexander's Case: "It was said that this statement of Griffith C.J. [in Huddart Parker v. Moorehead] related to the declaration and enforcement of existing rights and that the essence of judicial power is to declare and enforce such rights. But existing rights include rights and obligations compulsorily added by legislation to legal relationships. A right to vary an existing obligation is an existing enforceable right which can become the subject-matter of a controversy relating to property just as much as any other right relating to property.... The court in enforcing these rights is determining controversial questions of fact and the legal results that should flow from these facts, however great its discretion, in exactly the same manner as it determines facts and their application to legal rights and obligations that are fixed and definite". Cf. also Williams J.'s use of the concept of lis inter partes in A.P.U. v. Bowen [No.2] (1948) 77 C.L.R. 601, 640.
2. But, of course, the same is true of the Board of Appeal held to be judicial in the E.I.C. Case.

even so, Williams J. immediately carried his own principle far beyond the possibility of reconciliation with Munro's Case, when he said:<sup>1</sup>

no attempt to fetter the right of the court effectively to determine every question of fact and law necessary to decide the controversy could be valid.

The fact is, however, that the Income Tax Acts allowed no appeal to a court on matters of fact. The substantial differences of attitude between Isaacs J. and Williams J. are pointed up by the latter's scornful comments on an amendment of the Women's Employment Regulations, which purported to assimilate the decision of a Committee to the decision of a Board, much as the legislation after the B.I.O. Case purported to assimilate the decision of the Board of Review to the decision of the Commissioner of Taxation. Where Isaacs J. and the Privy Council had found this sort of verbal amendment significant, Williams J. said:<sup>2</sup>

Modern legislators have adopted with enthusiasm the practice of deeming things to be that which they are not.... But upon a constitutional question the court must consider the real substance and operation of the legislation....

The fundamental consideration in Williams J.'s argument is, in fact, a desire to find some limits to the circumvention of Chapter III by the establishment of "administrative tribunals".

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1. 69 C.L.R. 185, 218 (emphasis added).  
 2. Ibid., at 219.

Munro's Case had established, of course, that binding determinations as to facts need not involve judicial power if made by "administrative tribunals". But, as Williams J. pointed out:<sup>1</sup>

If such tribunals can be appointed, then, since in many cases, there is no dispute as to the law, and the whole controversy turns on questions of fact, all that would be left for a court to do would be to give a formal judgment, and, as an entirely ancillary and subordinate body, to enforce rights and obligations, the controversy as to which had, in every substantial sense, been predetermined by a tribunal that is not a court. That is not, in my opinion, the true meaning of judicial power, or even a remote approach to the true meaning of judicial power.

In this light, Williams J.'s attempt to use compulsoriness to distinguish Munro's Case makes sense; there is an implicit appeal throughout his judgment to the value of restricting to the regular courts the function of compulsorily determining controversies as to rights of property.

This is confirmed by Williams J.'s particular insistence, in Tonking's Case (1942),<sup>2</sup> that the assessment of just compensation for sequestered property was a judicial function that must be committed to a court. Even more strikingly, in the Jehovah's Witnesses Case (1943), Williams J. had dissented from the rest of the Court, in holding that it was "as clear...

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1. Ibid., at 217.

2. Australian Apple and Pear Marketing Board v. Tonking (1942) 66 C.L.R. 77, 83-84. See also per Rich J. at 105-108.

'as burning daylight' that the determination by police officers or the Attorney-General of...controversies...as to whether property belonged to an unlawful body or to innocent third parties would be an exercise of judicial power, so that these sub-regulations would be invalid on this ground".<sup>1</sup> The rest of the Court did not share Williams J.'s desire to ensure, constitutionally, that compulsory acquisition be hedged about so stringently with judicial safeguards and procedures.<sup>2</sup>

In the Rola Case, Starke J. faced up to the foregoing fundamental motivation of Williams J.'s judgment, and returned an answer that is, as we have seen, the basis of Munro's Case:<sup>3</sup>

it is a matter for the consideration of the legislative body how and to what extent facts should be submitted to administrative tribunals in aid of or to supplement judicial power.

Likewise, Latham C.J. cited the Privy Council's approval in the Shell Case of Isaacs J.'s dictum in Munro's Case:<sup>4</sup>

unless...it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Commonwealth, it must be allowed to stand as the true expression of the national will.

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1. Adelaide Company of Jehovah's Witnesses Inc. v. Commonwealth (1943) 67 C.L.R. 116, 168.
  2. See the comments of Starke J. in Johnstone Fear and Kingham v. Commonwealth (1943) 67 C.L.R. 314, 326-327.
  3. 69 C.L.R. 185, 211.
  4. *Ibid.*, at 200-201.

Both Latham C.J. and Starke J. emphasised that the "binding" or conclusive character of the Committees' decisions did not render them judicial; as Starke J. said:<sup>1</sup>

The phrase ['shall be binding'] is devoid of any significance in relation to the exercise of judicial power, for it is as appropriate to the determinations of administrative tribunals as to determinations of tribunals in which judicial power of the Commonwealth is vested.

This, too, was in accord with the Shell Case and Munro's Case; but beyond this point, the judgments of the majority diverge from one another. Neither Latham C.J. nor Starke J. appears to have been really happy with the limitless extension of non-judicial jurisdiction that thorough-going application of the

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1. Ibid., at 212; also 195-197 per Latham C.J. Prof. Sawyer's often-expressed view that Rich and Williams JJ held "clearly" and "firmly" that "conclusive decision is judicial power" (Essays on the Australian Constitution, ed. R. Else-Mitchell, 2nd ed. 1961, 74; Cases, 528; "The Judicial Power of the Commonwealth" (1949) 1 W.A. Ann.L.R. 29, 33) seems impossible. In Tonking's Case (1942) 66 C.L.R. 77, 84, Williams J. quoted with approval the opinion of Griffith C.J. in Alexander's Case (25 C.L.R. 434, 443-444) that "if the only powers conferred upon a so-called tribunal are in the nature of calculation, or the mere ascertainment of some physical fact or facts, and not the declaration of or giving effect to a controverted matter of legal right, it may be that they do not appertain, except incidentally, to the judicial power". This seems identical with Starke J.'s view, below. Moreover, it is clear that the Boards in the Rola Case had power to make conclusive decisions of fact; yet no-one contended that that power was judicial. The key to the dissenting judgments in the Rola Case is not the conclusiveness of the decision, as Sawyer suggests, (but which Rich J. never adverts to), but the view of Rich J. that the whole point of the Committees was non-legislative-and-thus-judicial, and of Williams J. that the whole point of the Committees was the resolution of controversies as to legal rights. A more accurate version of these judgments than that offered by

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fore-going principles would permit. Starke J.'s unease manifested itself in an attempt to show that the determinations of Committees of Reference involved no interpretation of the Boards' awards, but were mere "matters of identification rather than of interpretation".<sup>1</sup> Further, he drew an even more dubious distinction:<sup>2</sup>

And the question whether persons were employed on such work looks to the work upon which the females were engaged rather than to the relationship subsisting between their employees and themselves.

Hence, "the determination of the Committee of Reference is not an adjudication of legal rights or obligations but of facts necessary or relevant to establish such rights or obligations".<sup>3</sup> Such distinctions would, of course, nullify the B.I.O. Case. Latham C.J. chose a more ambitious argument to refuse the plaintiff's suggestion that, at least outside the context of rule-creating activities, an authoritative determination of

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- Sawer is to be found in the argument of Barwick K.C. in the Communist Party Case (1950-1951) 83 C.L.R. 1, 111-112.
1. 69 C.L.R. 185, 212-213.
  2. *Ibid.*, at 212-213. See also R. v. Commissioner of Patents, ex p. Weiss (1939) 61 C.L.R. 240, 255-256 per Starke J.
  3. "The true function of judicial power is...to investigate, declare and enforce rights and obligations on present and past facts... and under laws supposed already to exist", *ibid.*, at 211 per Starke J. Nevertheless, a criticism of Starke J. must take into account (as Sawer's does not: Essays on the Australian Constitution, 74) that his judgment accords very closely with the full-dress analysis of legislative, "ministerial" and judicial power by Isaacs J. in the curiously forgotten case, the Bootmakers' Case [No.1] (1910) 10 C.L.R. 266, 318; supra, at p.9. 19

controverted questions is necessarily judicial. It is often said<sup>1</sup> that Latham C.J.'s conclusion rested on the premise that the Committees' determinations were not authoritative, conclusive or binding. But this is a mistake; there is no evidence in Latham C.J.'s judgment that he sought to avoid the force of the plaintiff's suggestion; he sought to refute it. His first step was to deny that Griffith C.J.'s dictum in Huddart Parker v. Moorehead meant that "a power to make binding and authoritative decisions as to facts is necessarily judicial power".<sup>2</sup> Whatever one may think of Latham C.J.'s interpretation of that dictum,<sup>3</sup> his conclusion was simply that of Isaacs J. in Munro's Case, and of the Privy Council in the Shell Case: that in the absence of powers of enforcement of its own, a tribunal with powers of final decision as to facts need not be judicial. The Chief Justice's next step was bold; he attempted in effect to provide the positive criteria of judicial power that the Privy Council had, in the Shell Case, avoided stating. To do this, he sought to link the two apparently disparate criteria employed by Isaacs J: the requirement of

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1. Sawyer, op.cit., 1 W.A. Ann.L.R.29, 33-34; Cases, 528; Essays, 74-75; Wynes, op.cit., 560.
  2. 69 C.L.R. 185, 198-199 (emphasis added).
  3. See supra, p.8.20; Latham C.J.'s interpretation is made hardly more plausible by its espousal by Webb J. (diss.) in Davison's Case (1954) 90 C.L.R. 353, 373.

Huddart Parker v. Moorehead that judicial determinations create instant liability,<sup>1</sup> and the requirement of Alexander's Case that judicial power avoid "laying down a rule or standard of conduct for the future". This attempt involved an extraordinary retranslation<sup>2</sup> of Palles C.B.'s distinction, in R. v. Local Government Board,<sup>3</sup> between judicial and ministerial (administrative) power, into a distinction between judicial and legislative power (if not between judicial and all other sorts of power!). Then:<sup>4</sup>

The decision of an ordinary court that B is bound to pay money applies a pre-existing standard of rights and duties not created by the court itself, with the result that there is an immediately enforceable liability of B to pay to A the sum of money in question.

As Latham C.J. pointed out, a determination of the Committee of Reference "would not in itself create" an immediately enforceable liability.<sup>5</sup> This criterion is similar, though not identical, to Isaacs J.'s doctrine of the factum; it narrows the field of strictly judicial power almost as much. It amounts to the view that a determination need not be judicial (or rather,

1. Supra, p.8.26.

2. The fact that the same translation is offered by Dixon C.J. and McTiernan J. in Davison's Case, 90 C.L.R. 353, 368, makes it none the less extraordinary.

3. (1902) 2 IR. 349, 373; cited by Isaacs J. in Huddart Parker v. Moorehead, 8 C.L.R. at 383-384; supra, p.8.25.

4. 69 C.L.R. 185, 199-200 (emphasis added).

5. Ibid., at 200.

part of the judicial power of the Commonwealth) unless it be enforceable without further judicial proceedings.<sup>1</sup> As against such a use of the term "enforcement" as Starke J. had made in Peacock's Case (1943),<sup>2</sup> Latham C.J.'s argument involves dividing up what Williams J., at least, regarded in the Rola Case as one process of enforcement. Altogether, the argument is a genuine development of doctrine.<sup>3</sup> But the explanation offered, in terms of pre-existing legal standard, seems little more than a tour de force, grounded on the familiar judicial desire to identify a single feature that would explain a few

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1. Thus, in Victorian Chamber of Manufactures v. Commonwealth (Industrial Lighting Regulations) (1943) 67 C.L.R. 413, 416-417, 422, Latham C.J. and McTiernan J., and Starke J., had no hesitation in holding that regulations, empowering a Minister to form an opinion that a person had committed an offence by contravening regulations and to impose a penalty by closing his premises, involved strictly (exclusively) judicial power. No reference was made to ex v. Walsh and Johnson (supra, p.10.19), nor to the Taxation Commissioner's power to penalise for tax evasion: Jolly v. Federal Commissioner of Taxation (1935) 53 C.L.R. 206, 211 per Rich and Dixon JJ; Richardson v. F.C.T. (1931-32) 48 C.L.R. 192; Trautwein v. F.C.T. (1935-36) 56 C.L.R. 196, 209 per Evatt J.
  2. See 67 C.L.R. 25, 46.
  3. Perhaps foreshadowed by the judgment of Latham C.J. in Silk Bros. v. State Electricity Commission of Victoria (1943) 67 C.L.R. 1, 8-9, holding that the power of a Fair Rents Board to decide controversies between landlords and tenants by making binding and authoritative decisions and orders that might be enforced in the same manner as if the order had been made by a court, was judicial.

simple distinctions between governmental powers. In this respect, the judgments of Latham C.J. and Rich J. are perhaps more alike than those of Rich and Williams JJ., while there is a certain affinity, in emphasis on adjudication between parties, between the judgments of Williams and Starke JJ.<sup>1</sup>

But in summarising the Rola Case, it is more to the point to say that the four judgments constitute a decisive proof of the inability of the current judicial tools and techniques of analysis either to explain and reconcile the body of precedent or to produce even a measure of agreement on analytical questions among the judges themselves. The effective determinant of results remained the weight given to the will of Parliament and to administrative practicality. The consideration that prevailed was succinctly expressed by Latham C.J. in the Communist Party Case (1950-1951):<sup>2</sup>

The contention of the plaintiffs really is that every determination of a question of law and every determination of fact where the determination produces any legal consequences is a matter for a court....The acceptance of such a consideration would make administration impracticable. Every day administrative officers apply and interpret laws and make decisions as to facts. The position stands as they determine it, with the results which follow according to law from their determination. The position validly so stands unless for some reason it is set aside

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1. See also Starke J.'s judgment in Silk Bros. v. State Electricity Commission of Victoria (1943) 67 C.L.R. 1, 21. Note that Williams J. concurred with those remarks rather than with those of Latham C.J.: cf. *ibid.*, at 23.
  2. 83 C.L.R. 1, 170-171, per Latham C.J. (dissenting).

by superior authority or is determined by a court to have been made without authority....The Parliament might have remitted to a court, if it had thought proper to do so, the decision of the question....But, as I have said, it was not bound to do so....

### III

#### The range of possibly judicial powers

It is clear from the foregoing section that, in the absence of clearly thought-out methods of analysis, the characterisation of strict, exclusive or unambiguous judicial power was subject to the distorting pressures of theories of constitutional balance. For the few simple but disputed features selected for the purposes of characterisation were not, and could not be, effectively integrated with those theories in order to produce a general theory of the proper scope and limits of administrative non-curial action in the Commonwealth. Since Munro's Case, the checks on Parliament's discretion in the creation of administrative tribunals could hardly be other than non-existent or haphazard.

However, the language of "tests" or "criteria" of "judicial power" must not be allowed to obscure the fact that, at least since Munro's Case, a power may be capable of conferment on a court and hence judicial while not being strictly, necessarily, indelibly, exclusively or (in this sense) essent-

ially judicial. Moreover, these ambiguously judicial powers may, or may not, be co-extensive with the powers accounted judicial for purposes of the prerogative writs; at any rate, the latter provide yet another object of characterisation and yet another set of tests or criteria of judicial power.

Sometimes the judges did not keep these questions distinct.<sup>1</sup> But in general the lessons of Hibble's Case [No. 1] and W.E.P. v. Gilchrist, Watt and Sanderson were well learned, and, indeed, were nowhere more clearly and sharply stated than by Rich J., in the Gola Case:<sup>2</sup> strictly judicial power was one thing, and administrative power with a duty to act judicially another. The most interesting cases, however, arose where the question concerned, not the validity of a grant of power outside Chapter III, not a mere duty to act judicially, nor an ambiguous power committed to an institution with an unambiguous essence, but a power committed to an institution with a two-fold essence. In such a case, the problem could not be solved by appeal to legislative intent or to a notion of balance of powers in the federation, nor by reference to the "modern extension of the scope of the prerogative writs".<sup>3</sup>

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1. See Medical Board of Victoria v. Meyer (1937) 58 C.L.R. 62, 105-106 per Evatt J.; R. v. Commissioner of Patents, ex p. Weiss (1939) 61 C.L.R. 240, 253-255 per Starke J.; 258-259 per Dixon J.
  2. (1944) 69 C.L.R. 185, 203-205. See also per Rich J. in Jacka v. Lewis (1944) 68 C.L.R. 455, 460-461.
  3. Cf. per Latham C.J. and Dixon J. in ex p. Weiss (1939) 61 C.L.R. 240, 251-252, 258.

Accordingly, as one must now expect, there was considerable disagreement about the proper characterisation of such powers.

These questions arose in relation to appeals from the Arbitration Court to the High Court, since the latter court could deal only with judicial matters. The relevant appeals lay, if at all,<sup>1</sup> to the appellate jurisdiction of the High Court, and so could not be treated like the "appeals", to the High Court in its original jurisdiction, from administrative bodies such as the Taxation Board of Review.<sup>2</sup> Since 1926, the Arbitration Court had validly exercised both arbitral and judicial functions, its members being appointed in accordance with s.72 of the Constitution.<sup>3</sup> It was generally agreed that it was not only the "enforcement" powers of the Arbitration Court that were judicial; as Isaacs and Rich JJ. and Starke J. had held in R.M.F. v. Gilchrist, Watt and Sanderson, the Court's power to interpret awards was in many cases judicial.<sup>4</sup> There were further powers in the Court that were arguably judicial. One such was conferred by s.58E of the Act:

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1. Later, in 1947, the appellate jurisdiction of the High Court was excluded by s.32 of the Conciliation and Arbitration Act 1904-1947.
  2. Cf. Munro's Case (1926) 38 C.L.R. 153; Medical Board of Victoria v. Meyer (1937) 58 C.L.R. 62, 92 per Dixon J.
  3. Act No.22 of 1926.
  4. 34 C.L.R. 1,6,7; Harrison v. Goodland (1944) 69 C.L.R. 509, 515 per Latham C.J.

- 58E (1) The Court may, upon complaint by any member of an organization and after giving any person against whom an order is sought an opportunity of being heard, make an order giving directions for the performance or observance of any of the rules of an organization by any person who is under an obligation to perform or observe those rules.
- (2) Any person who fails to comply with such directions is guilty of an offence. Penalty: £50.

In Jacka v. Lewis (1944),<sup>1</sup> the question arose whether an order made under s.58E was judicial, in the sense of being appealable to the High Court under s.73(ii) of the Constitution. All four members of the High Court assumed that it was, though only Rich and Starke JJ. offered any reasons.<sup>2</sup> Rich J. said that the order determined the rights of parties under the rules of an organization and was "curial in character".<sup>3</sup> Starke J. said that it was judicial because "it determines the rights of parties under the rules of the organization...and s.58E itself subjects the parties...to a penalty...".<sup>4</sup> In ex p. Barrett (1945),<sup>5</sup> Latham C.J., Starke and McTiernan J. reaffirmed this decision, but Dixon J. expressed doubts.

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1. (1944) 68 C.L.R. 455.  
 2. McTiernan J. dissented on the main issue, whether or not the Arbitration Act had taken away the right of appeal to the High Court.  
 3. 68 C.L.R. 455, 462.  
 4. *Ibid.*, at 462.  
 5. R. v. Commonwealth Court of Conciliation and Arbitration, ex p. Barrett (1945) 70 C.L.R. 141.

Starke J. was emphatic that Jacka v. Lewis was right, since the purpose of s.58E was "to enforce the performance and observance of the existing rules of an organization and not to prescribe further or new rules....".<sup>1</sup> But for Dixon J. this seemed simplistic. The Arbitration Court was empowered by s.58E to impose, upon persons already under obligation to observe the rules of an organization, "an expanded or transmuted duty or set of duties enforceable by new and penal sanctions".<sup>2</sup> Moreover, the power of the Court was discretionary.<sup>3</sup> Above all, its purpose was not the protection of the civil rights of individuals nor the enforcing of social contracts, but "to further the ends of the Arbitration Act as an industrial measure....",<sup>4</sup> as a "discretionary authority ancillary or auxiliary to the settlement of industrial disputes by arbitration or conciliation".<sup>5</sup> These three reasons deserve closer study.

First, that s.58E empowered the Arbitration Court to impose an expanded or transmuted duty. This suggestion seeks to bring the power within the analytical framework by which

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1. Ibid., at 159.
  2. Ibid., at 164.
  3. Id.
  4. Ibid., at 164.
  5. Ibid., at 164.

arbitral power is distinguished from judicial power since Alexander's Case: the creation of new rights as opposed to the enforcement of existing rights. Taken alone, the suggestion is not convincing; it obscures the difference between a duty that is new as requiring novel courses of action, and a duty that is new as requiring already obligatory courses of action by virtue of a novel authority and/or sanction. In fact, s.58E authorised no new contents of obligation, but only the conferring of new status on existing contents of obligation. The point is important, since in a strict analysis, every judicial act of enforcement accomplishes a change in the status of obligations; not could it be contended that the change of status authorised by s.58E was from merely moral to actually legal obligation - the change was a change in legal status, not a creation of legal status. It seems that in Penton's Case (1947),<sup>1</sup> Rich and Williams JJ. (dissenting) made a similar equivocation, to opposite effect. Penton's Case concerned the characterisation of s.58D of the Conciliation and Arbitration Act, which empowered the Arbitration Court to disallow any rule of an organization which in the opinion of the Court was contrary to law or to an award,

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1. Penton v. Australian Journalists' Association (1947) 73 C.L.R. 549 (also sub. nom. Consolidated Press Ltd. v. A.J.A.).

or was tyrannical or oppressive, or hindered the operation of an award, or imposed unreasonable conditions of membership. Rich and Williams JJ. pointed out that s.58D gave a statutory right to a member of an organization to apply to the Arbitration Court for disallowance of a rule; they then simply said:<sup>1</sup>

A controversy between a person and an organization whether he is a member of an organization and therefore entitled to apply to the Court under the section, and a controversy between a member and an organization whether a rule should be disallowed, relate to the interpretation and enforcement of existing rights. Such controversies fall within the well-known definition of judicial power given by Griffith C.J. in Huddart Parker v. Moorehead....

Now it is clear that such an analysis would apply equally well to all controversies under the Act, and thus would effectively reverse Alexander's Case. It will be recalled that in Alexander's Case both Griffith C.J. and Barton J. pointed out the senses in which the arbitral activities of the Arbitration Court involved the enforcement of existing rights.<sup>2</sup> Given these senses, the distinction drawn by Isaacs and Rich JJ. in Alexander's Case involved an examination, not merely of the status of the right within the legal system, but of the question how its content was determined by the Arbitration Court. If this content depended on the mere discretionary will

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1. Ibid., at 561.

2. See per Barton J., 25 C.L.R. 434, 452-453; per Griffith C.J. at 442-443; supra, pp. 5.50, 5.52.

of the Court, the right would be accounted newly created by the Court, and the process of creation would be non-judicial. The failure of Rich and Williams JJ. in Penton's Case even to advert to this problem shows how easily the shorthand formulae employed by the judges could lead to, and obscure the effective reversal of their own authors' original meaning and intention.<sup>1</sup>

Hence, to turn to the second of the reasons advanced by Dixon J. in ex p. Barrett, the importance is evident of his adverting to the discretionary character of s.58E of the Conciliation and Arbitration Act. Since even judicial orders lay down a regimen for the future conduct of the parties, and since even non-judicial orders made on application of parties under enabling statutes in some sense "enforce" "existing" "rights" (for example, the right to apply to the tribunal), it is clear that the factors to which the tribunal must and may address its mind in making its orders constitute an essential

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1. Starke J. saw the problem in Penton's Case, but slid away from clinching the analysis, by proceeding to the unnecessary further premise that the powers of the triad were undefined: "In a sense, associations of persons have a right to be registered as organizations if certain rules are complied with and a right also to maintain their registration and their rules subject to the discretion and opinion of the Court in certain cases. But, as I have said before, 'the limits of the legislative, the executive and the judicial powers of the Commonwealth are nowhere defined'....": 73 C.L.R. 549, 563.

discrimen between judicial and non-judicial orders, on the theory enshrined in Alexander's Case. Indeed, the controversy between the senior and junior Justices in the years before Alexander's Case was, as we showed, a controversy about those factors; it would be fair to say that the free discretion of the Arbitration Court was not only an essential discrimen in Alexander's Case, but was the whole point of the majority judgment; the freedom won for the Court tacitly, but essentially, included a freedom to override inconsistent State laws and awards. Yet it will have been noticed that this point was virtually lost sight of in the controversies about judicial power in the later phases of judicial interpretation discussed in this and the preceding chapter.<sup>1</sup> True, there were occasional references to "policy" or "discretion" as features of non-judicial functions,<sup>2</sup> but save in a few judgments of Dixon and Evatt JJ., the importance and nature of discretion either was ignored in the Court's full-dress discussions of

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1. A typical analysis of arbitral power in these phases is to be found in the judgment of Latham C.J. in R. v. Connell, ex p. Hetton Bellbird Collieries Ltd. (1944) 69 C.L.R. 407, 428; the main discrimen there used is "rules for future conduct".
  2. See, e.g., per Latham C.J. in Riverina Transport Pty. Ltd. v. Victoria (1937) 57 C.L.R. 327, 349; R. v. Commonwealth Court of Conciliation and Arbitration, ex p. Victoria (1944) 68 C.L.R. 485, 494 per Latham C.J.; Medical Board of Victoria v. Meyer (1937) 58 C.L.R. 62, 91-92 per Dixon J.; 104-106 per Evatt J.; Webb v. Hanlon (1939) 61 C.L.R. 313, 330 per Evatt J.; Kahn v. Board of Examiners (Vic.) (1939) 62 C.L.R. 422, 437 per Starke J.; B.M.A. v. Commonwealth (1949) 79 C.L.R. 201, 258 per Dixon J.

judicial power, or else was noticed only to be discounted.<sup>1</sup> The return of Dixon J. in 1945, after several years' absence from the Court, marks the beginning of a firmer grasp of the full range and complexity of analysis required to maintain the established doctrines of the Court; but, as Penton's Case (1947) reveals, this new subtlety was not immediately evident in the judgments of the other Justices.

The third reason advanced by Dixon J. for his preferred characterization of s.58E was substantially that later advanced by the majority in Penton's Case: namely, that the purpose of the power was not the protection of the civil rights of individuals but the furthering of the ends of the Conciliation and Arbitration Act as an industrial measure.<sup>2</sup> Once again, this reason could not stand on its own, for the foregoing disjunction is not self-evidently of contraries. Still, the contrariety of arbitral and judicial powers, whatever their respective precise analyses, is a main implication of Alexander's Case, and one that Dixon J. was to stress and sharpen. Nor was this, for Dixon J., a merely technical matter; the distinction seemed to him a requirement of public policy.

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1. As in Peacock v. Newtown Marrickville and General Cooperative Building Society (No.4) Ltd. (1943) 67 C.L.R. 25, 36, 55, 56.
  2. (1949) 73 C.L.R. 549, 560 per Latham C.J. and McTiernan J.; 564 per Starke J.

In his revealing address at his swearing-in as Chief Justice of the High Court in 1952, he said:<sup>1</sup>

There is in Australia a large number of jurisdictions and a confusion in the public mind as to the functions the jurisdictions possess. The character of the functions is misunderstood and the public do not maintain the distinction between the administration of justice according to law and the very important functions of industrial tribunals....

With this declaration of interest, the third phase of judicial interpretation was brought to an end and the latest phase, to which we turn in the next chapter, began.

#### IV

#### Conclusion

The third of the broad phases of judicial analysis that we have isolated presents, in retrospect, the appearance of a rather confused interlude. Those Justices with relatively clear or firm ideas on judicial power were unable to persuade their colleagues, unable to reconcile their views with precedent, or unable to sit on the most important cases touching judicial power. For the rest, little attempt was made to evolve a coherent theory of the place of judicial power in the constitutional scheme, of the precise nature of exclusively judicial power and the reason for its exclusivity, or of the range of powers that might be held to be judicial

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1. 85 C.L.R. xi, xvi.

for particular purposes and that might be assigned to courts established under Chapter III. The tools of analysis, in the hands of most of the Justices, became progressively more a matter of a few brief formulae selected from the mass of precedents with little, or faltering, regard for the problems of reconciling those precedents and for the implications as to values in the various possible selections.

The plain fact is that almost nothing from this period survives as a currently formative influence on the law of judicial power in Australia. The causes of this result are two-fold: the subsequent dominance of the thought of Sir Owen Dixon, which in this phase commanded little support; and, more significantly, the failure of the judges in this period to face or meet the complexities necessarily involved in drawing sharp lines, for a variety of purposes, through and around an intrinsically analogical term.

## CHAPTER TWELVE

### The latest phase of judicial analysis (1952 - 1964)

This last part of our study of Australian federal judicial analyses of judicial power deals with Sir Owen Dixon's Chief Justiceship, and the adoption of all his views as to the separation and characterisation of governmental powers under the Australian Constitution. Once again, we divide the chapter into three principal sections, relating to the general doctrine of separation of powers, the working out of this doctrine in the light of Parliament's intentions as expressed by the committal of powers to institutions of clearly marked purpose and character ("essence"), and the methods of characterising judicial power itself. A concluding section comments briefly on the position finally attained in Australia, which may be indicated by saying that it represents the thorough-going adoption of all the theories advanced by Isaacs J. in the Wheat Case, Alexander's Case and Munro's Case, excepting only those applications that can be traced directly to a presumption in favour of legislative intention.

#### I

### The consummation of the Abstract doctrine of separation of powers

Almost the last decision handed down by Sir Owen Dixon before he became Chief Justice raised a question as to the propriety of vesting in the Arbitration Court both judicial

and arbitral functions:<sup>1</sup>

Whether and how far judicial and arbitral powers may be mixed up is another question, one which fortunately the Court has never been called upon to examine.

The appearance of reluctance should not be misunderstood. As we have seen, Dixon C.J.'s answer to the question was explicitly (if without emphasis) stated in Dignan's Case.<sup>2</sup> Indeed, as far back as 1927, in evidence before the Royal Commission on the Constitution, Owen Dixon K.C. had raised this doubt about the admixture of functions in the Arbitration Court, adding that as yet no-one had been sufficiently "courageous" to argue the matter in court.<sup>3</sup> He added:<sup>4</sup>

Whether it is possible or not to confer non-judicial power upon the High Court or any other Federal Court created pursuant to s.71 or s.72 is by no means clear, but we are of opinion that it should not be possible to confer such power. We think it is of importance, however inconvenient Parliament or the administration may on some occasions regard it, to confine the judiciary to the exercise of judicial functions. Any impairment of the principle that the judiciary should be completely and wholly independent and secure in its tenure, and should confine itself to judicial functions, seems to us to be calculated to weaken both the actual administration of justice and the confidence and respect of the people in those who administer it.

In 1955, the matter arose twice,<sup>5</sup> and on the second of these occasions the whole Court<sup>6</sup> commented upon the conferring on

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1. R. v. Foster, ex p. Commonwealth Life (Amalgamated) Assurance Ltd. (1951-1952) 85 C.L.R. 138, 155 (in a joint judgment with Fullagar and Kitto JJ.).

2. Supra, at p. 11.3.

3. Royal Commission on the Constitution of the Commonwealth (Minutes of Evidence) (1927), 782.

4. Id.

5. Collins v. Charles Marshall Pty. Ltd. (1955) 92 C.L.R. 529, 546; R. v. Wright, ex p. Waterside Workers' Federation of

the Arbitration Court of an entirely non-judicial power, under s.34 of the Stevedoring Industry Act 1949, to regulate stevedoring operations related to trade and commerce with other countries or among the States (under s.51(i) of the Constitution<sup>1</sup>):

The implications of the conclusion that in no sense is the power given by s.34 to the Arbitration Court judicial, but that it is legislative in its nature, were most carefully avoided in the argument made on behalf of the prosecutor federation. In a constitution which separates judicial from legislative and executive power and places the respective powers in organs of government sharply distinguished and elaborately constituted, those implications are sufficiently apparent.<sup>2</sup>

Not that the Court actually decided that "the separation of powers" made the combination of the "industrial" and "judicial" functions invalid; the question was avoidable because, in any event, it would be the judicial powers of the Arbitration Court that would be regarded as invalidly conferred.

It is clear enough that ex p. Fitzpatrick and Browne (1954),<sup>3</sup> decided by the same full Court a few months earlier, had not provoked any deep consideration of the issues raised

(continued from previous page)

Australia (1955) 93 C.L.R. 528.

6. Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

1. Constitution, s.51(i): "The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:-(i) Trade and commerce with other countries, and among the States".

2. 93 C.L.R. 528, 542.

3. R. v. Richards, ex p. Fitzpatrick and Browne (1954) 92 C.L.R. 157.

in the argument of the applicants for Habeas Corpus in that case. These contended that their trial at the bar of the House of Representatives for breach of the privileges of that House was an exercise of judicial power contrary to Chapter III of the Constitution and the "division of the functions of government".<sup>1</sup> Against this, the Constitution, by s.49, allowed that:

49. The powers, privileges and immunities of the Senate and of the House of Representatives... shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom...at the establishment of the Commonwealth.

It was not disputed that the trial and imprisonment of the applicants would have been within the powers of the Commons in 1900. Thus the fundamental issue was the same as that in Isaacs J.'s judgment in the Wheat Case: whether an Abstract doctrine of demarcation was to prevail over words that in themselves allowed, though not explicitly, a commingling of functions. But Dixon C.J. delivered the ex tempore judgment of the Court:<sup>2</sup>

it was argued that this is a constitution which adopts the theory of the separation of powers....It is correct that the Constitution is based in its structure upon the separation of powers. It is true that the judicial power of the Commonwealth is reposed

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1. Ibid., at 160.  
2. Ibid., at 166-167.

exclusively in the courts contemplated by Chapter III. It is further correct that it is a general principle of construction that the legislative powers should not be interpreted as allowing of the creation of judicial powers or authorities in any body except the courts which are described by Chapter III of the Constitution....But our decision is based upon the ground that a general view of the Constitution and the separation of powers is not a sufficient reason for giving the words, which appear to us to be so clear, a restrictive or secondary meaning which they do not properly bear.

Plainly, what was said by Isaacs J. in the Wheat Case, to opposite effect, might without loss of plausibility have been said here. Conversely, what was said here might have been said, with equal force, in the Wheat Case. In short, the concepts involved in the doctrine of the "dominant principle of demarcation" as a "general principle of construction" have in themselves only the often inconclusive weight of the well-known principles of general statutory interpretation in common law.

Still, the affirmation of the "theory of separation of powers" in ex p. Fitzpatrick and Browne, qualified as it is, is very far from the spirit of Evatt J.'s judgment in Dignan's Case or of Latham C.J.'s and Starke J.'s in Lowenstein's Case.<sup>1</sup>

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1. Note that not long before the Boilermakers' Case, the High Court refused to reconsider Lowenstein's Case: Sachter v. A.-G. for the Commonwealth (1954) 94 C.L.R. 86, 88.

Indeed, when at last the commingling of functions in the Arbitration Court was formally challenged, in the Boilermakers' Case (1955-1956),<sup>1</sup> only one Justice was to be found adopting the whole spirit and reasoning of those representative judgments of the preceding phase. This was Williams J.; the other two dissentients, Webb and Taylor JJ., each adopted from the bulk of precedent rather different, though not the less authentic, premises and concepts. The judgments in the Boilermakers' Case have been subjected to many analyses, and it is not intended to traverse the whole ground again. But there are still significant observations to be made, in regard firstly to the fate of the various conceptual strands in the confused pattern of precedent facing the Court in 1955, and secondly to the concepts that prevailed, when examined in the light of our own general pattern of investigation and the particular conclusions we arrived at in Chapter Four.

First, we may dispose briefly of Webb J.'s judgment, which relied, in effect, on the principle in the Engineers' Case<sup>2</sup> that "if the text says nothing expressly then it is to be taken for granted that the power is bestowed [on the

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1. R. v. Kirby, ex p. Boilermakers' Society of Australia (1955-1956) 94 C.L.R. 254.

2. Supra, p.10.2.

Commonwealth], unless it is clearly repugnant to the sense of the text".<sup>1</sup> His judgment serves as a reminder of the incompatibility of constitutional rigidity, and fully Abstract doctrines of separation, with the flexibility implicit in "trust the Federal Parliament". But none of the other Justices referred to this aspect of the matter; the general assumption on both sides was quite unsympathetic to the aspect of Isaacs J.'s legacy that Webb J. uncovered.

One of the strands of precedent drawn out by Williams J. reached back as far as the Wheat Case (though this was not here adverted to). For in Williams J.'s view, the doctrine of separation of powers in English constitutional history meant "little more than that effective government requires that there should be a Parliament to make the laws, an executive responsible to Parliament to execute them, and an independent judiciary to interpret and enforce them".<sup>2</sup> In short, the English constitutional doctrine was Institutional, to the extent that it existed at all. Nor should Abstract inferences be drawn from the arrangement of Chapters I, II and III in the

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1. 94 C.L.R. 254, 328, citing R. v. Burah (1878) 3 App.Cas. 889; Hodge v. R. (1883) 9 App.Cas. 117; Powell v. Apollo Candle Co. (1885) 10 App.Cas. 282; A.-G. for Ontario v. A.-G. for Canada [1912] A.C. 571. These were cases cited on many occasions by Isaacs J., and all save the third were explicitly relied on in the Engineers' Case (1920) 28 C.L.R. 129, 149-150, 153.
  2. 94 C.L.R. 254, 301.

Australian Constitution: "the Constitution could hardly have been conveniently framed otherwise when its purpose was to create a new statutory political entity".<sup>1</sup> But, of course, Williams J. had no intention of reversing the Sheat Case; so he allowed that in Australia the doctrine requires (Abstractly) "that in a broad sense the legislative, executive and judicial functions of government should be kept separate and distinct".<sup>2</sup> His principal citations were from judgments of Isaacs J., from the period at the end of the second phase, when the embarrassments of the Abstract doctrine were pressing Isaacs J.<sup>3</sup> As Williams J. accurately said: "Dignan's Case and Lowenstein's Case are quite antipathetic to the idea that the doctrine of the separation of powers, so far as it is implicit in the Australian Constitution, means that there is a rigid demarcation of powers between the legislative, executive and judicial organs of government".<sup>4</sup> In all:<sup>5</sup>

In relation to Chapter III the doctrine means that only courts can exercise the judicial power of the Commonwealth, and that nothing can be done which is likely to detract from their complete ability to perform their judicial functions. The Parliament

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1. Ibid., at 302.
  2. Ibid., at 301.
  3. See citations of Le Mesurier v. Connor, *ibid.*, at 301, and Munro's Case, *per* Isaacs J., *ibid.*, at 314.
  4. *Ibid.*, at 314.
  5. *Id.* (emphasis added).

cannot...impose on the courts duties which would be at variance with the exercise of these functions or duties which could not be undertaken without a departure from the normal manner in which courts are accustomed to discharge those functions (...their "fixed and dignified course of procedure"<sup>1</sup>).

Thus Williams J. interpreted the judgments of Latham C.J. and McTiernan J. in Lowenstein's Case in the way adopted in Chapter Eleven, section I, above. "Inconsistent" with judicial power, for him, meant "at variance with",<sup>2</sup> "incompatible with the court functioning as a court",<sup>3</sup> "likely to detract from complete ability to perform judicial functions"<sup>4</sup> - what we rendered as "deleterious effect on the exercise of an established power".<sup>5</sup> Unhappily, Williams J. also included a gloss on these conceptions:<sup>6</sup>

The functions must not be functions which courts are not capable of performing consistently with the judicial process. Purely administrative discretions governed by nothing but standards of convenience and general fairness could not be imposed upon them. Discretionary judgments are not beyond the pale but there must be some standards applicable to a set of facts not altogether undefined before a court can hear and determine a matter.

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1. Quoting Fry L.J. in Royal Aquarium and Summer and Winter Garden Society Ltd. v. Parkinson [1892] 1 Q.B. 431, 447.
  2. 94 C.L.R. 254, 313, 317.
  3. *Ibid.*, at 313.
  4. *Ibid.*, at 314.
  5. *Supra*, p.11.8.
  6. *Ibid.*, at 315.

In the judgment on the appeal from the High Court, the Privy Council seized on this passage to illustrate the difficulty of determining when precisely the vesting of one power would be inconsistent with another. For, as the Privy Council pointed out, there is a sense in which arbitration is a matter of "purely administrative discretions...."<sup>1</sup> They did not point out that Williams J. himself had elsewhere in his judgment observed that arbitral proceedings "should be conducted with that fairness and impartiality which should characterise proceedings in courts of justice".<sup>2</sup> The distinction, admittedly, is slight, at least at the verbal or conceptual level; but it was perhaps intended as the distinction between purely administrative powers and "quasi-judicial administrative"<sup>3</sup> functions of the sort amenable to prohibition. What does not seem to have been noticed about Williams J.'s judgment is that it confuses the foregoing sort of "quasi-judicial" power with the sort of "quasi-judicial" power which, when bestowed on a court, becomes judicial power, according to the doctrine of

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1. Attorney-General for the Commonwealth v. R. (1957) 95 C.L.R. 529, 542.
  2. 94 C.L.R. 254, 317.
  3. "If it be necessary to classify such proceedings as legislative, executive or judicial I would prefer to classify them as quasi-judicial administrative proceedings": 94 C.L.R. 254, 306. Cf. also Williams J.'s reference to Barton J.'s analysis of arbitration in Alexander's Case: *ibid.*, at 317.

essences of institutions and ambiguous powers arrived at in Munro's Case. Williams J. discussed the latter sort of power, describing it as "proper to the functions of a judge" and recognising that when bestowed on a court, it "must form part of the judicial power of the Commonwealth under s.71".<sup>1</sup> But at the end of his judgment, he maintained that arbitral power, too, was "proper to the function of a judge"<sup>2</sup> - so there is here either a confusion, or (per impossible) a desire to go back on the fundamental principle in Alexander's Case.

As the Privy Council also observed, the dissenting judgment of Taylor J. adopted a rather different approach; the reason for this is that Taylor J. selected a different strand from the web of precedents. This was the doctrine of Abstract essences of powers as finally stated by Isaacs J. in Munro's Case:<sup>3</sup> some functions are exclusive to one branch of government, a priori; but others are "subject to no a priori exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government".<sup>4</sup> Thus:<sup>5</sup>

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1. Ibid., at 307.
  2. Ibid., at 317.
  3. (1926) 38 C.L.R. 153, 178-179.
  4. 94 C.L.R. 254, 333-334.
  5. Ibid., at 336-337.

though the Constitution effects a broad and fundamental distribution of powers among the organs of government, it is not such a distribution as precludes overlapping in the case of powers or functions the inherent features of which are not such as to enable them to be assigned, a priori, to one organ rather than to another.

This view is much closer to the essentialist approach of Dixon J. in Dignan's Case and Lowenstein's Case, whereby it is the abstract essence or description of the power that makes it inconsistent with other powers, prescinding from all questions of deleterious effect on, or hampering of, the exercise of either.<sup>1</sup> As Taylor J. said, Parliament may not "confer upon courts powers and functions which are essentially legislative or executive in character except insofar as they are strictly incidental to the performance of their judicial functions".<sup>2</sup> It was thus sufficient for him to point out that "'arbitral' functions of the kind in question do not bear the indelible imprint of legislative or executive character; on the contrary an examination of the provisions of s.51(xxxv) may lead to the conclusion that they are of a special character".<sup>3</sup> At least, they bore "little, if any, resemblance to executive or legislative functions as

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1. That is, prescinding from the question whether any "actual inconsistency had been experienced", to use the phrase of the majority in the Boilermakers' Case (ibid., at 281) in a slightly different context.

2. Ibid., at 341.

3. Id.

generally conceived; on the contrary, both in their nature and exercise they present a number of features which are characteristic of judicial functions" - notably, compulsory hearing and determination of disputes inter partes according to the ordinary principles of justice, and without noticing the interests of persons other than the parties.<sup>1</sup>

(The "matter - form" doctrine implicit in Taylor J.'s distinction between "nature" and "exercise" should not pass unnoticed; it is shared by the other Justices).

Very different was the fundamental minor premise of the majority judgment:<sup>2,3</sup>

One thing that Alexander's Case did decide once and for all is that the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order.

Now this passage contains an equivocation similar to that which confuses Williams J.'s judgment, but to opposite effect. As we showed in discussing W.L.F. v. Gilchrist, Watt and Sanderson in Chapter Ten,<sup>4</sup> it is untrue that arbitral powers are in no sense quasi-judicial; they are subject to Prohibition.

1. Ibid., at 342-343.
2. Dixon C.J., McTiernan, Fullagar and Kitto JJ. Dixon C.J.'s previous opinions are well-known; the adherence of Fullagar and Kitto JJ. to these opinions is foreshadowed in Insurance Commissioner v. Associated Dominions Assurance Society Pty. Ltd. (1953) 89 C.L.R. 78, 85 per Fullagar J., and Devison's Case (1954) 90 C.L.R. 353, 382 per Kitto J.
3. 94 C.L.R. 254, 281.
4. Supra, p.10.18.

It is arguable that arbitral powers are not quasi-judicial in the sense according to which, if conferred on an essentially judicial institution, they would become judicial within the meaning of s.71. But it is not true that Alexander's Case settled even the latter question, since the "essence" of the Arbitration Court was not, in the relevant sense, in question in that case; all that was necessary for Isaacs and Rich JJ. was to determine whether the arbitral powers were severable. It is true that Isaacs and Rich JJ. held that the Arbitration Court was not constituted in pursuance of or "in reliance on" Chapter III;<sup>1</sup> but it is equally true that, in the various reconstitutions of the Court after Alexander's Case, notably that of 1926, the Parliament did act "in reliance on" Chapter III. It is true that the majority in the Boilermakers' Case conducted their own examination of the historical essence of the Arbitration Court, and concluded that its judicial powers were no more than "consequential, accessory or incidental authorities annexed to the powers and functions in the performance of which the Arbitration Court finds the real or dominant purpose of its being".<sup>2</sup> But this examination was prefaced by the fallacious interpretation of Alexander's Case,<sup>3</sup>

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1. 25 C.L.R. 434, 467.

2. 94 C.L.R. 254, 288-289.

3. Another, not unrelated misinterpretation of Alexander's Case by the majority in the Boilermakers' Case, is noted supra, p.5.47.

and consequently never alluded to the possibility that the institution might have a double essence. For if the Parliament had determined that the annexation of judicial powers to the Court was a sine qua non for the accomplishment of settlement by arbitration of industrial disputes, on what ground could the High Court declare that these judicial powers were not "essential"? It seems that failure to face this question was a direct result of the over-simplification and equivocations which always threaten to accompany essentialist language and method.

Still, as we showed at the end of the preceding chapter, Dixon C.J. had always<sup>1</sup> regarded arbitral (or "industrial") powers as "of an altogether different order",<sup>2</sup> "foreign to the judicial power",<sup>3</sup> in the sense (presumably) that such powers, even if conferred on an essentially judicial institution, would not become judicial.<sup>4</sup> Hence, it is mistaken to argue, as some have, that:<sup>5</sup>

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1. Cf. ex p. Barrett, supra, p.11.37 ; also ex p. Ellis (1953-1954) 90 C.L.R. 55, 63 per Dixon C.J.
  2. 94 C.L.R. 254, 286.
  3. Ibid. at 296.
  4. Also "entirely different" (267), "foreign to the character and purpose of the judicature" (272), "of another order" (278). Cf. also "an entirely different character...falling outside the judicial power of the Commonwealth and derived under an exercise of the legislative power": R. v. Taylor, (1951) 82 C.L.R. 587, 599 per Dixon, Webb, Fullagar and Kitto JJ.
  5. D.C. Thompson, "The Separation of Powers Doctrine in the

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The view of the High Court and the Privy Council to the effect that "courts" must be the only organs of government to exercise "judicial" powers, and that they must exercise no powers but these and powers incidental to or compatible with them, involves reasoning that is clearly circuitous.

For this would be so, only if, according to the doctrine of the majority, powers were characterised as judicial or non-judicial according to features of the type we have listed under the heads of "agent" and/or "procedure". But the method of characterization established by Isaacs J., and followed by Dixon C.J., looks not to the "agent" or the "procedure"<sup>1</sup> but to the "end or purpose" of the function, in accordance with a simple triad of making - executing - construing law. Of course, it might then be asked how an agent or institution could be characterized as a court; but in the established doctrine this is answered by appealing to the notion that all institutions have an essence, and that this essence is determined by reference to the dominant issues facing the institution and the procedures by which it ordinarily resolves them. As we shall see, there are further qualifications and refinements in the doctrine; but circularity need not be accounted one of the vices of the central theory.

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Commonwealth Constitution: "The Boilermakers' Case" (1957)  
2 Syd.L.R. 480, 492, 499.

1. Thus the majority judgment in the Boilermakers' Case specifically allows that s.51 (xxxv) gives legislative power to confer on the arbitral institution "the description and many of the characteristics of a Court" (94 C.L.R. 254, 289).

Given the foregoing minor premise that arbitral and judicial powers have such different essences that neither can take on the nature of the other when conferred on an institution essentially "other" in nature, we may now turn to the two alternative major premises of the majority judgment.

The first of these major premises is, in effect, that judicial powers may not be attached to a body whose essence is non-judicial.<sup>1</sup> Manifestly, the judicial powers here referred to must be such that they cannot be coloured by the essence of the institution to which they are attached.<sup>2</sup> In the Boilermakers' Case the powers under challenge were, for the most part, the same powers as had been successfully challenged in Alexander's Case.<sup>3</sup>

The foregoing premise was itself explicitly grounded on a more "basal reason",<sup>4</sup> namely, that essentially non-judicial

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1. 94 C.L.R. 254, 267, 271, 289, 296.

2. But it should be noticed that the majority did not exclude the possibility that "the policy or principle" of the provisions conferring the "judicial powers" on the Arbitration Court might be "carried into effect under s.51(xxxv) without invoking Chapter III...": *ibid.*, at 283.

3. *Ibid.*, at 283, 287. See Supra, p.5.37 - 5.38.

4. *Ibid.*, at 289.

powers may not be vested in essentially judicial institutions.

These two principles were linked a fortiori:<sup>1</sup>

There is, of course, a wide difference - and probably it is more than one of degree - between a denial on the one hand of the possibility of attaching judicial powers accompanied by the necessary curial and judicial character to a body whose principal purpose is non-judicial in order that it may better accomplish or effect that non-judicial purpose and, on the other hand, a denial of the possibility of adding to the judicial powers of a court set up as part of the national judicature some non-judicial powers that are not ancillary but are directed towards a non-judicial purpose. But if the latter cannot be done clearly the former must be then completely out of the question.

In the judgment of the Privy Council, these two premises were run together to produce the single general principle that it is not "permissible under the Constitution of the Commonwealth of Australia for the Parliament to enact that upon one body of persons, call it tribunal or Court, arbitral and judicial functions shall be together conferred".<sup>2</sup> But since the Privy Council's judgment is substantially a less nuanced version of the majority judgment in the High Court, we shall henceforward restrict our attention to the latter.

There is little need to discuss exhaustively the proof advanced for the basal proposition that "the Constitution does

1. Ibid., at 271.

2. 95 C.L.R. 529, 536; also 539.

not allow the use of courts established by or under Chapter III for the discharge of functions which are not in themselves part of the judicial power and are not auxiliary thereto".<sup>1</sup> The elements of the proof have all been indicated in our discussions of the adherence of Isaac and Dixon JJ. to the Abstract doctrine of demarcation,<sup>2</sup> and of Dixon C.J.'s longstanding historical views about the intention of the founders to import that doctrine. Much reliance was placed on the arrangement of Chapters I, II, and III considered wholly in isolation from the rest of the Constitution:<sup>3</sup>

If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inference from Chaps. I, II and III and the form and contents of ss.1, 61 and 71. It would be difficult to treat it as a mere draftsman's arrangement....This cannot all be treated as meaningless and of no legal consequence.

The historical suggestion is, as we have argued elaborately, mistaken.<sup>4</sup> The logic is curious, since no relevant legal consequences flow from the arrangement of ss.1 and 61. The

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1. 94 C.L.R. 254, 271.
  2. Supra, pp.5.20, 6.1, 6.9, 6.13n, 11.2.
  3. 94 C.L.R. 254, 275.
  4. Supra, Chaps. 6 and 7.

conclusion is, one may think, typically judicial; it implicitly refuses to contemplate any conclusion midway between "meaningless and of no legal consequence" and the very radical consequences sought to be deduced. So the argument is assisted by an explicit and repeated appeal to a fundamental principle of federalism:<sup>1</sup>

The position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed. This would be enough in itself, were there no other reasons, to account for the fact that the Australian Constitution was framed so closely to correspond with its American model in the classical division of powers between the three organs of government....But, whether it was necessary or not, it could hardly be clearer on the face of the Constitution that it was done.

This special position of the judicature, that the argument for the prosecutor and the judgment of the Privy Council alike referred to as a fundamental and vital "constitutional safeguard",<sup>2</sup> must be accounted a substantially new principle in Australian constitutional interpretation. Though it is not overtly accorded that position in the judgment of the majority in the High Court, it appears to be the strongest argument in

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1. Ibid., at 276; also 267-268. Cf. the view of Kitto J. in Davison's Case (1954) 90 C.L.R. 353, 379, 381, that the purpose of the separation of powers in Australian federalism is "the protection of the individual liberty of the citizen". See also the remarks of Dixon C.J., Williams, Webb, and Fullagar JJ. on the special nature and problems of federalism in O'Sullivan v. Noarlunga Meat Ltd. No.2 (1955-1956) 94 C.L.R. 367, 375.

2. 94 C.L.R. 254, 259; 95 C.L.R. 529, 540-541.

favour of the major premise of that judgment. But what is important to notice is that the argument really supports only the Institutional conclusion that the High Court (or at most, the general federal judicature) must be kept free for purely judicial activities.<sup>1</sup> For s.75(v), as traditionally

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1. That is, if it supports any relevant conclusion at all - for it might be thought that the demands of s.72 for life tenure of all persons exercising federal judicial power already provided a sufficient guarantee of the independence of the judiciary. And after all, nothing in the Constitution can prevent the Executive packing even the High Court with its creatures. Oversight of this fact vitiates, too, the argument of Isaacs J. in the Wheat Case to the effect that the Inter-State Commission could not be allowed to exercise judicial powers because its members might be non-lawyers: 20 C.L.R. 54, 94, supra, p.5.21. For where is the provision that Justices of the High Court shall be lawyers?

Notice that the objection raised in the text above was put to Owen Dixon in cross-examination on his evidence before the Royal Commission on the Constitution in 1927 (Minutes of Evidence, 729):

Dixon: I am very much in favour of hedging the judiciary with the greatest possible safeguards. They have an extremely difficult function to perform. The independence of the judiciary is worth a great deal more than, perhaps, people fully realize, and the tendency to interfere with the independence of the judiciary is necessarily great, because everyone who has power of his own naturally resents being overruled by the judiciary. It is the judiciary's function to overrule those who have the power, and, I think the less it is possible for <sup>the</sup> judiciary to be interfered with, the better. That is what independence is given to them for.

Counsel: That is in regard to the High Court and a major Court?

Dixon: I think it is true of all courts. It crops up in the most unexpected ways and in the most inferior tribunals....

interpreted by the High Court,<sup>1</sup> ensures, even if s.73(ii) gives only a partial guarantee,<sup>2</sup> that the High Court retains an overall judicial control of the Constitution; no other tribunal could supplant its "ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power [may] be exercised".<sup>3</sup> The Abstract conclusion that no tribunal exercising any federal judicial power may exercise any other power is attained by a slide from the institutional "judicature" to the Abstract "judicial power". But that is, perhaps, a slide we should by now have expected.

The general result of the Boilermakers' Case may be shortly stated: any body exercising essentially (that is, strictly or exclusively) judicial power must exercise no other power save judicial power or what is incidental or ancillary to judicial power. Some powers may never be incidental or ancillary to judicial power, not because they are empirically

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1. Sec.75(v) "In all matters - ... (v) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth: the High Court shall have original jurisdiction". See Hynes, Legislative, Executive and Judicial Powers in Australia, 604-607.
  2. Sec.73(ii) "The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders and sentences... (ii) Of any other federal court, or court exercising federal jurisdiction...". See Hynes, *op.cit.*, 648-653. Cf. also Owen Dixon in 1927: "It is competent to Parliament, (by a combined exercise of the power to create new courts and the power given under the words 'with such exceptions'), to

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deleterious to the realization of judicial values by the institution, but because their essence is intrinsically foreign to judicial power<sup>1</sup> - because they "fall outside the conception of federal judicial power".<sup>2</sup> Other powers are ambiguous, or not irredeemably foreign, and may take on a judicial or incidental character from the essence of the institution. Plainly, then, the Boilermakers' Case is the consummation of the Abstract doctrine of demarcation as announced by Isaacs J. in the Wheat Case, and preserves at least the essentialist formulations crystallised by Isaacs J. in Munro's Case. The doctrine is effectively limited to the demarcation of judicial from other forms of power.<sup>3</sup> Finally, it remains to be seen how the essentialist formulae of "strict", "incidental" and "foreign" powers are employed by the High Court in this latest phase, and whether they allow Parliament the effective initiative it won by Isaacs J.'s use of them

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create a new tribunal without appeal to the High Court, and to confide to a single person the decision of any question, however momentous": Minutes of Evidence, op.cit., 782.

3. 94 C.L.R. 254, 276.

1. Ibid., at 278.

2. Seamen's Union of Australia v. Matthews (1957) 96 C.L.R. 529, 532.

3. Note that the Privy Council, while making full use of the triadic implications from ss.1, 61 and 71, left open the question whether there are only three types of power: 95 C.L.R. 529, 544. Note also that in Aston v. Irvins (1955) 92 C.L.R. 353, the High Court identified an "independent responsibility", conferred by Federal legislation on State judicial and administrative officials, that was explicitly stated to be neither federal executive nor judicial power. The general implications of this escape from a particular dilemma are unclear.

in Munro's Case.

## II

### Powers and the essences of institutions

As we argued in section II of Chapter Ten,<sup>1</sup> the doctrine that all but strictly judicial (or legislative, or executive) powers will take their description from the essence of the institution to which they are committed, is a doctrine in favour of federal parliamentary power, since it is the Parliament that commits the power to the institution of its choice. Hence it is not surprising, perhaps, that a generation of judges less favourably disposed than Isaacs J. to trusting the Federal Parliament, should have employed the doctrine of the essences of institutions to different effect.

A first sign of this change is Thornton's Case (1953).<sup>2</sup> As Latham C.J. had pointed out in British Medical Association v. Commonwealth (1949), "there is no provision in the Constitution which enables the Commonwealth Parliament to require State courts to exercise any form of non-judicial power".<sup>3</sup> Hence, one would presume that, where Parliament

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1. Supra, p.10.23.  
 2. 87 C.L.R. 144.  
 3. 79 C.L.R. 201, 236.

confers a power on a State court, it intends the power to be judicial; and this presumption only reinforces the notion that powers take their colour from the institutions on which they are conferred. This, in effect, is what the High Court held in Peacock's Case (1943).<sup>1</sup> But in Thornton's Case a power conferred upon State courts<sup>2</sup> of summary jurisdiction was held to be non-judicial and hence beyond s.77(iii). The whole Court said:<sup>3</sup>

Many functions perhaps may be committed to a court which are not themselves exclusively judicial, that is to say which conceived independently might belong to an administrator. But that is because they are not independent functions but form incidents in the exercise of strictly judicial powers. Here there is nothing but an authority which clearly is administrative.

We shall examine in the next section the grounds on which the Court considered the function clearly administrative. But, as we shall show, the function could hardly be regarded as wholly unambiguous. Hence, it is sufficient to say here that the case constitutes a clear warning that the double presumption in favour of the judicial nature of the power would not end the matter in favour of the disposition actually made. In fact, read strictly, the quoted passage appears to

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1. 67 C.L.R. 25.
  2. Sec. 28 of the Re-establishment and Employment Act 1945-1952.
  3. 87 C.L.R. 144, 151 per Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.

narrow considerably the extent to which powers might take their character from the essence of the institution; for the requirement is that they be "incidental to" the exercise of other powers of the institution. Davison's Case (1954)<sup>1</sup> provides a correction to this limitation.

Davison's Case is indeed the central case, in this phase, on the problem of characterising ambiguous powers.<sup>2</sup> It upheld a challenge to the power of registrars in bankruptcy to issue sequestration orders upon voluntary (debtors') petitions. Now the peculiar circumstances of the case are that (1) as a result of a holding in Le Mesurier v. Connor (1929),<sup>3</sup> federal registrars in bankruptcy were (as was admitted on all sides)<sup>4</sup> administrative officials deemed to be entirely separate from the structure of the Bankruptcy Courts which (together with the Attorney-General) controlled them; and (2) a voluntary petition for sequestration can hardly, in itself, involve a lis inter partes. Nevertheless, the whole Court (Webb J. dissenting) held that there was an attempt to confer on a non-judicial officer a judicial power, contrary to ss.71 and 72 of the Constitution.

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1. (1954) 90 C.L.R. 353.

2. The reasoning and result in Davison's Case are duplicated to invalidate other powers of the Registrar in Bankruptcy in James v. Deputy Commissioner of Taxation (1957) 97 C.L.R. 23.

3. 42 C.L.R. 481.

4. Since it had been so held in Bond v. George A. Bond and  
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The judgment of Dixon C.J. and McTiernan J., with which Fullagar J. "generally agreed", neatly employs the methods of Isaacs J.'s judgment in Munro's Case to reach the converse result. The first move is to establish that the power to issue a sequestration order, considered as a whole and in general, is not necessarily non-judicial (i.e. not "foreign" to judicial power); this is proved by appealing to the fact that such powers historically have been exercised by the ordinary courts in British law. The absence of a lis inter partes, of controversy and adjudication, is not decisive against this.<sup>1</sup> The next move is to observe that:<sup>2</sup>

there are many functions or duties that are not necessarily of a judicial character but may be performed judicially, whether because they are incidental to the exercise of the power or because they are proper subjects of its exercise. How a particular act or thing is treated by legislation may determine its character.

It will be noted that the phrase we have emphasised provides a correction to the narrow formulation in Thornton's Case.<sup>3</sup>

The next move in the Chief Justice's judgment is odd, and perhaps unnecessary. It is the assertion that, to characterize

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Co. Ltd. (1930) 44 C.L.R. 11.

1. 90 C.L.R. 353, 367-368.
2. *Ibid.*, at 369-370 (emphasis added).
3. Quoted in Davison's Case, 90 C.L.R. 353, 368.

an ambiguous function, one ought to look to the final act (or issue); and this assertion is proved by quotation of the well-known passage of Holmes J.'s judgment in Prentis v. Atlantic Coast Line Co.<sup>1</sup> The purpose of the move seems to be to enable attention to be concentrated on the sequestration order itself; but this purpose is obscured by the confusing terminology:<sup>2</sup>

How a particular act or thing of this kind is treated by legislation may determine its character. If the legislature prescribes a judicial process, it may mean that an exercise of judicial power is indispensable. It is at this point that the character of the proceeding or of the thing to be done becomes all important. Where the difficulty is to distinguish between a legislative and a judicial proceeding, the end accomplished may be decisive....this test...may usefully be applied by analogy to ascertain whether a thing is done administratively or as an exercise of judicial power.

It seems that in this passage the meaning of "act" and "thing" shifts from the whole "function", "duty", "proceeding" or "X" whose character is in question, to the particular "issue", "end" or "result" of the proceeding; "proceeding" is not to be equated with "process", nor with the "procedure" set (VI) in our Table B in Chapter Four<sup>3</sup> (to which Dixon C.J.'s "process" does appear to belong). In any event, the whole elaborate citation of Holmes J.'s rubric on characterisation

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1. (1908) 211 U.S. 210, 226-227; supra, p.9.22  
 2. 90 C.L.R. 355, 370 (emphasis added).  
 3. Supra, p.4.32.

seems misleading, since its upshot is not a characterisation of the registrar's powers by means of Holmes J.'s pre-existing - or - new - rule test, but simply is the contention that "the primary power to make the order is entrusted to the [bankruptcy] court....The power of the registrar is secondary and in a sense derivative".<sup>1</sup> In short, the real ground for Dixon C.J.'s characterisation of the registrar's power, once it was established that the power is in itself ambiguous, is that the power "is also exercisable by the court and...[is] to be exercised by him in the same way and by the same form of instrument as would be used by the judge".<sup>2</sup> The form of the argument is the same as Isaacs J.'s appeal, in Munro's Case, to the technical considerations that the Board of Review's decisions were assimilated by the legislation to those of the (admittedly administrative) Commissioner of Taxation and were appealable to the High Court in its original jurisdiction. The conclusion is that "it is the intention of the legislature that the registrar should make an order operating as an order of the court".<sup>3</sup>

This conclusion obviously gives little weight to the

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1. Ibid., at 370.
  2. Ibid., at 370-371.
  3. Ibid., at 371.

consideration that Parliament can hardly be presumed to intend to confer a power contrary to notorious constitutional requirements. Nor does it face up fully to the doctrine established in Munro's Case, that "the very same process" may be either judicial or administrative.<sup>1</sup> Finally, it does not really inquire whether the function or power of the Bankruptcy Court to issue a sequestration order on voluntary petition is judicial only because it "takes its colour largely from the primary judicial character of the functionary"<sup>2</sup> - in this case, the Court. The judgments of Fullagar, Kitto and Taylor JJ. are perhaps more insistent on the really judicial nature of the Court's powers on voluntary petition - that is, as against the possibility that the powers are really administrative but incidental to essentially judicial powers - but pay no attention at all to the other difficulties mentioned, as to the intention of Parliament and the relevance of the administrative essence of the registrar as opposed to the Court. These judgments leap from the premise that the Court's powers are judicial to the conclusion, that being "the same", the powers of the registrar must equally be judicial. Such a leap, once again, manifests clearly the rigidity and over-simplification so often induced by essent-

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1. (1926) 38 C.L.R. 153, 176 per Isaacs J.; supra, p.10.24ff.  
 2. 38 C.L.R. 153, 177.

ialist method; for it amounts to the assumption that the characterisation of "one and the same process" must be one and the same. This assumption is, perhaps, obscured from the judges and from previous commentators by the fact that, at one stage, the argument of the majority in Davison's Case does explicitly recognise the complexities of characterisation, and the impossibility and inappropriateness of once-for-all characterisations by reference only to schemas of powers<sup>1</sup> in abstraction from historical, legislative and institutional context.

Still, the Court is nothing if not flexible in its approach to these problems. In the Bayer Case (1959)<sup>2</sup> the Court refused to be caught in the sort of dilemma that arises from the once-for-all method of characterising displayed in parts of Davison's Case. The process of granting registration of a trade mark is admittedly administrative. By the Trade Marks Act 1905-1948:

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1. Note that Kitto J. doubts whether the Abstract demarcation of powers in the Constitution reflects "fundamental functional differences between powers"; in support of this doubt he quotes a Kelsenite passage, by C.H. Wilson, from Chambers' Encyclopaedia (1950) Vol.XI, 153-155 (90 C.L.R. 353, 384): "legislation, administration and judicial decision are different stages of the same power or function, namely the making of rules...." etc. (cf. supra, p.4.4 - 4.11). But Kitto J. has his cake and eats it, since he grants that the constitutional demarcation is between "classes of powers requiring different 'skills and professional habits' in the authorities entrusted with

- 43(1) Any party aggrieved by the decision of the Registrar may...appeal to the Law Officer.
- (2) The Law Officer shall hear the applicant and the opponent, and may determine whether the application ought to be refused or ought to be granted with or without any modifications or conditions.
- 44(1) Any party aggrieved by the decision of the Law Officer may...appeal to the [High] Court.
- (2) The Court shall hear the applicant and the opponent, and determine whether the application ought to be granted with or without any modifications or conditions.

Not surprisingly, in the light of Lavison's Case, it was contended in the Bayer Case that one or other of these provisions must be bad, since the power to hear the appeal must have the same character in each case, so that either an administrative power was being conferred on the High Court, or a judicial power on the Law Officer (contrary to s.72 of the Constitution). But having noted that the power was ambiguous, in the sense that it might be either administrative or judicial, the Court refused to allow any invalidating inferences to be drawn from the strict verbal parallelism of the two sections; it was content to observe that:<sup>1</sup>

the decision of the Privy Council as well as of this Court in the case of the Shell Oil Co... is enough to show that words which might otherwise be sufficient to confer judicial power may be governed by the context as well as by the character of the body or person upon whom the power is conferred....

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their exercise" (90 C.L.R. 353, 382): cf. supra, pp.3.45. ff. for our comments on a similar view of Bentham's.

2. Farbenfabriken Bayer Aktiengesellschaft v. Bayer Pharma Ltd. (1959) 101 C.L.R. 652.

1. Ibid., at 659-660.

## III

The modern version of the test for strictly non-judicial power

The test for strictly non-judicial power<sup>1</sup> established by Alexander's Case looked to the creation of new rules or rights as opposed to the construction and enforcement of pre-existing rules or rights. Davison's Case confirms this test to the extent that it still further discounts the relevance of lis inter partes. But the latest phase of judicial interpretation displays a clear shift in emphasis in the use of the established test. The problem, even in relation to arbitral power, is seen less and less as one of distinguishing judicial from legislative power, and more and more as one of distinguishing judicial from administrative power. Not that the Court has abandoned the notion that arbitral power is, in an important sense, a part of the legislative power of the Commonwealth;<sup>2</sup> but the habit of referring to it as "industrial" is significant, and the "administrative" connotations of this term are not far under the surface.<sup>3</sup> Our commentary on Dixon J.'s judgment in ex p. Barrett serves as an introduction to the present further examination of these trends.<sup>4</sup>

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1. Note that, of course, "strictly non-judicial power" in this sense may be "judicial" for the purposes of the prerogative writs.
  2. See the quotation from Isaacs and Rich JJ. in the Boiler makers' Case at 281, 282. See, on the other hand, the Court's comments on the "common rule" provisions of the Conciliation and Arbitration Act, R. v. Kelly, ex p. A.R.U. (1953) 89 C.L.R. 461, 475 per Dixon C.J.

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The new emphasis, and the solution it has called forth, are to be seen in the cases following the Boilermakers' Case. As a result of that case, the powers of the old Arbitration Court were divided between an Arbitration Commission, to exercise the arbitral powers, and an Industrial Court, to exercise the judicial powers of the old tribunal.<sup>1</sup> The general validity of this scheme was upheld in Seamen's Union of Australia v. Matthews (1957).<sup>2</sup> In Re MacSween (1956),<sup>3</sup> the validity in particular was upheld of the power challenged in Jacks v. Lewis and ex p. Barrett, namely, the power of the Industrial Court to order performance of the rules of an organization. The judgment of the High Court simply observed that since the legislature had acted in reliance on the characterisation established in the earlier cases, the new section "should be treated as vesting part of the judicial power".<sup>4</sup> In argument, Dixon C.J. applied the doctrine of the essences of institutions that he had used to opposite effect in ex p. Barrett;<sup>5</sup>

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3. See, e.g., ex p. Ellis (1953-1954) 90 C.L.R. 55, 63 per Dixon C.J.; R. v. Spicer, ex p. N.W.F. (1957) 100 C.L.R. 312, 320 per Dixon C.J., Williams, Kitto and Taylor JJ.; R. v. Lydon, ex p. Cessnock Collieries Ltd. (1960) 103 C.L.R. 15, 22 per Curiam.
4. Supra, p.11.31ff.
1. Conciliation and Arbitration Act 1904 - 1956 (Act No. 44 of 1956).
2. 96 C.L.R. 529.
3. 100 C.L.R. 273.
4. Ibid., at 276.
5. Ibid., at 275.

Does not the fact that the power in s.141 has been conferred on a judicial tribunal tend rather against the views I expressed in [ex p. Barrett]?

But the same doctrine failed, a year later, to save the power of disallowing rules of organizations that in Penton's Case had been held to be arbitral and non-judicial, but that had been conferred, nevertheless, on the new Industrial Court. As in Penton's Case, so in R. v. Spicer, ex p. Builders' Labourers' Federation (1957)<sup>1</sup> Williams J. dissented,<sup>2</sup> arguing that even if the former case were rightly decided there was no reason why the powers concerned should not be classed as judicial when entrusted to a court:<sup>3</sup>

The determination of the question whether a rule of an organization is tyrannical or oppressive or imposes unreasonable conditions upon the membership of any member...is not so undefined as to be incapable of solution by judicial process.

The test of defined standards of decision is central to the majority judgments, too, and is the new emphasis and solution that we have already mentioned as characteristic of this latest phase. Dixon C.J.'s judgment relies on presumptions, very similar to those rejected in the Bayer Case, arising from

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1. 100 C.L.R. 277.
  2. So did Webb J.; but he regarded the power as non-judicial, and thought that it should be read down in accordance with s.15A of the Acts Interpretation Act 1901-1950.
  3. 100 C.L.R. 277, 300.

the formulation of the empowering sections of the Act; the draftsman had "not approached his task as if he were giving jurisdiction over a 'matter' in accordance with s.76(ii) of the Constitution"; the Court was authorised to act of its own motion; the word "may" instead of "shall" was employed in conferring the power.<sup>1</sup> But the consideration that summarised all the foregoing "indications" of legislative "intent" (a self-stultifying intent!)<sup>2</sup> was that the criteria for decision were:<sup>3</sup>

vague and general and give much more the impression of an attempt to afford some guidance in the exercise of what one may call an industrial discretion than to provide a legal standard governing a judicial decision.

Still, there was no reason why the same power should not be conferred upon the Court, provided that the empowering legislation were in a form appropriate to s.76(ii); for the existence of a discretion did not necessarily make a power non-judicial, so long as it was a "judicial discretion proceeding upon grounds that are defined or definable, ascertained or ascertainable, and governed accordingly".<sup>4</sup>

The judgment of Kitto J. clearly states the general

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1. 100 C.L.R. 277, 289-290.
  2. See also G. Sawyer's remark that the presumption of constitutional validity "may have disappeared from the jurisprudence of the High Court...": "Separation of Judicial Powers in the Australian Constitution" (1957) Public Law 198, 199.
  3. Ibid., at 290.
  4. 100 C.L.R. 277, 291.

position reached by the High Court. The presumption in favour of Parliament's intentions, when ambiguous powers are granted to an institution, has entirely disappeared from view:<sup>1</sup>

The reason for concluding in some such cases that the judicial character of the repository imparts a judicial character to the power is simply that the former provides a ground for an inference, which in those cases there is nothing or not enough in other considerations to preclude, that the power is intended or required to be exercised in accordance with methods and with a strict adherence to the standards which characterise judicial activities. That is not a necessary inference, however, in every case of this kind.

Thus the formula in Munro's Case that "the very same power" may be either judicial or administrative according to Parliament's dispositions is retained; but its force is evacuated by distinguishing between, on the one hand, "the act" (or issue: here, "the disallowing of a rule")<sup>2</sup> and, on the other hand, "technique", "manner", "purpose"<sup>3</sup> - in short, we may say, by the values that ought to govern the agent's understanding of the issue and procedure in solving it. In Kitto J.'s judgment there is a suggestion that "the act" (of disallowance) is, though ambiguous, "by nature more appropriate for administrative performance";<sup>4</sup> there is no argument in favour of this suggest-

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1. 100 C.L.R. 277, 305. Notice also that in Taylor J.'s judgment, the "character and history of the section" - that is, the intentions of former Parliaments! - play the decisive part against the presumption that the current legislation is not self-stultifying: *ibid.*, at 310.

2. *Ibid.*, at 305.

3. *Ibid.*, at 306.

4. *Ibid.*, at 306.

ion (which is even more pronounced, as we shall see, in some of the other judgments), but it seems to be crucial, since it apparently puts some sort of onus on the legislature to indicate, not merely by way of its choice of agent or institution empowered, but also by the form, or on the face, of the empowering legislation, which is the relevant set of values it intends to govern the act, power or function.

Clearly, this line of argument in effect narrows the range of genuinely ambiguous powers and widens the range of essentially judicial and essentially non-judicial powers. Less and less attempt is made to determine the character of the power in the light of the character of the agent, just as less and less attempt is made to read down ambiguous provisions in favour of validity.<sup>1</sup> This increasingly essentialist rigidity, within a framework still verbally and ostensibly recognising the existence of ambiguous powers, is manifested in Taylor J.'s judgment by the remark that "the provision travels outside any concept of judicial power";<sup>2</sup> similar expressions occur in the judgments of Dixon C.J.<sup>3</sup> and McTiernan J.,<sup>4</sup> and this

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1. Cf. the quotation from Willoughby (Constitutional Law of the United States, 2nd ed., (1929), 1620) in the Boiler-makers' Case (majority judgment): "...Generally speaking, it may be said that when a power is not peculiarly and distinctively legislative, executive or judicial, it lies within the authority of the legislature to determine where its exercise shall be vested": 94 C.L.R. 254, 279 (emphasis added).
  2. 100 C.L.R. 277, 310.
  3. Ibid., at 287.
  4. Ibid., at 294.

is significant since in the Boilermakers' Case "outside the conception of judicial power" is used to mean "foreign to" judicial power - that is, outside the range of both essentially judicial and ambiguous powers.

It remains to consider the practical problems involved in the appeal to "ascertained standards" as criteria of judicial and non-judicial power. We shall examine the powers characterised as non-judicial in Thornton's Case (1953),<sup>1</sup> and R. v. Spicer, ex p. Waterside Workers' Federation of Australia (1957),<sup>2</sup> and compare them with the powers characterised as judicial in Steele v. Defence Forces Retirement Benefits Board (1955)<sup>3</sup> and R. v. Commonwealth Industrial Court, ex p. Amalgamated Engineering Union (1960).<sup>4</sup> There seems to be no better way of appreciating the difficulty of drawing the lines the High Court has set itself to draw.

In Thornton's Case, the provisions in question<sup>5</sup> were as follows:

27(1) An employer shall...engage...a person entitled to preference, unless he has reasonable and substantial cause for not doing so.

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1. 87 C.L.R. 144.
  2. 100 C.L.R. 312.
  3. 92 C.L.R. 177.
  4. 103 C.L.R. 368.
  5. Re-establishment and Employment Act 1945-1952.

- (3) In determining whether reasonable and substantial cause exists...the employer shall consider -
- (a) the length, locality and nature of the [war] service of that person;
  - (b) the comparative qualification of that person and of other applicants...
  - (c) the qualifications required for the performance of the duties of the position....
  - (e) any other relevant matters.

Any person aggrieved by failure to secure employment might apply to a court for an order under s.28:

- 28(2) On the hearing of the application the court shall have regard to the matters specified in sub-sec.(3) [of s.27] and shall make such order as it thinks just and reasonable in the circumstances.
- (3) The court shall not...make an order...if the court is satisfied that that person -
- (a) would be unable to perform the duties of the position by reason of lack of skill or a reasonable degree of efficiency;
  - (b) is physically or mentally unfit to perform the duties of the position; or
  - (c) has, since the termination of his service, been convicted of an offence of such a nature that he is unsuitable for engagement in that employment.
- (4)...the decision of the court shall be final and conclusive.

These provisions the Court in Thornton's Case summarised as conferring a power "of making an appointment in substitution for the appointment made by an employer".<sup>1</sup> The function of the court under s.28 differed "in no respect" from that of the employer himself.<sup>2</sup> Provided that the matters specified

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1. 87 C.L.R. 144, 150.  
 2. Ibid., at 151.

in s.27(3) were taken into account, the discretion was "complete".<sup>1</sup> Hence (so the argument seems to run), there were no antecedent rights for ascertainment, examination or enforcement, and no "issue" for "decision".<sup>2</sup>

The foregoing provisions and analysis should be contrasted with those in Steele v. Defence Forces Retirement Benefits Board (1955).<sup>3</sup> The Defence Forces Retirement Benefits Act 1948 provided for pensions for members of the armed forces retired for incapacity, according to a scale related to the "percentage of total incapacity of the member in relation to civil employment"<sup>4</sup> as determined by the Board administering the scheme.

53(1) The Board may, from time to time, if it is satisfied that the percentage of incapacity of a pensioner...has altered, or, because of the nature of his employment, should be varied, reclassify him in accordance with the altered percentage of incapacity.

83(1)...any person aggrieved by a decision of the Board may appeal to the High Court.

(2) The decision of the High Court shall be final and conclusive.

As the High Court pointed out, the Board's functions involved two sorts of decisions: (1) whether the percentage of incapacity had altered - which was an "objective matter of fact";<sup>5</sup>

1. *Id.*

2. Of course, in the High Court's jurisprudence, not all decisions on the basis of defined standards are judicial; see, e.g. Federated Ironworkers' Association of Australia v. Commonwealth (1951) 84 C.L.R. 265, 281 *per Curiam*.

3. 92 C.L.R. 177.

4. Sec. 51.

5. 92 C.L.R. 177, 187.

(2) whether, given the nature of the employment (which could be ascertained and considered judicially), it was "fair, right or proper to alter the assessment of the extent of incapacity as mistaken".<sup>1</sup> The latter decision involved "a discretionary judgment":<sup>2</sup>

But it is a judgment based upon an ascertainment of facts and governed by standards which if indefinite are not undefined and are by no means foreign to the judicial function.

Moreover, the Court distinguished between the discretion involved in the foregoing decision, and the further discretion that might be involved in the actual reclassification. The latter discretion might well go beyond judicial power; but the High Court was capable, under s.83, of reviewing the Board's discretion (scil. as to either of the two enumerated sorts of issue) in order to see whether it had "miscarried in point of law", without itself exercising this latter discretion anew, and the Act could be read down to this effect.

In turn, Steele's Case must be contrasted with R. v. Spicer, ex p. N.W.F. (1957),<sup>3</sup> which corresponds closely in time, argument and result with R. v. Spicer, ex p. Builders Labourers' Federation.<sup>4</sup> The Stevedoring Industry Act 1956

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1. Id.  
 2. Ibid., at 188.  
 3. 100 C.L.R. 312 (December 1957).  
 4. 100 C.L.R. 277 (November 1957).

provided for the registration, by the Australian Stevedoring Industry Authority, of waterside workers, and s.36 provided for their de-registration:

- 36(1) Where, after such inquiry as it thinks fit, the Authority is satisfied that a registered waterside worker -
- (a) is, by reason of misconduct in or about an employment bureau, or a wharf or ship, unfit to be a waterside worker;
  - (b) is, by reason of his physical or mental condition or his incompetence or inefficiency, not capable of properly carrying out the duties of a waterside worker or may be a danger to others;
  - (c) has acted in a manner whereby the expeditious, safe or efficient performance of stevedoring operations has been prejudiced or interfered with;
  - (d) has not attended regularly for employment as a waterside worker;
  - (e) has failed (i) to offer for or accept employment as a waterside worker; (ii) to commence, continue or complete an engagement for employment as a waterside worker; or (iii) to perform any stevedoring operation which he was lawfully required to perform;
  - (f) has been convicted of an offence against this Act; or
  - (g) has failed to comply with an order or direction of the Authority under this Act or an award of the Commission, the Authority may cancel or suspend the registration of the waterside worker.

- 37(1) Where the registration of a person as a waterside worker is cancelled or suspended...that person may...appeal to the [Industrial] Court... and upon consideration of any such appeal, the Court may confirm, vary or set aside the cancellation or suspension.

Now, before the Boilermakers' Case, almost identical provisions for an appeal to the Arbitration Court had been held to

be non-judicial, and industrial or administrative in character: ex p. Ellis (1954).<sup>1</sup> As in ex p. Builders' Labourers' Federation so in ex p. Waterside Workers' Federation the majority relied considerably on the presumption that similar formulations must lead to similar characterisations of powers, even when those powers are conferred on institutions with dissimilar essences. However, the majority in ex p. W.W.F. indicated that, even apart from the history of the provisions, the powers conferred were non-judicial. The crucial factor, from this point of view, was the discretion to de-register, or not, the exercise of which discretion was "governed by considerations not only of the specific matters set out in [s.36]...but also of all matters which might seem relevant to a sound and wise administrative control over the stevedoring industry".<sup>2</sup> It seems that the judgment does not suggest that the standards set out in s.36(1) are not "defined or definable, ascertained or ascertainable". Indeed, it suggests that "a discretion...to remove or reduce the suspension or cancellation if the real merits appeared so to require, notwithstanding that an infringement" of such conditions or standards "had occurred...would not necessarily"

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1. 90 C.L.R. 55. But note that the old Stevedoring Industry Board was (quasi-) judicial for the purposes of Prohibition; R. v. Australian Stevedoring Industry Board (1953) 88 C.L.R. 100, 118 per Dixon C.J., Williams, Webb and Fullagar JJ.

2. 100 C.L.R. 312, 320.

be "inconsistent with a grant of judicial power".<sup>1</sup> It would be sufficient that the "discretion to apply or withhold the appointed legal remedy" were not "of an arbitrary kind" and were "governed or bounded by some ascertainable tests or standards". Thus, in this view, the existence of discretions is in no way inconsistent with judicial action; but the requirement of defined standards embraces both the pre-conditions of the remedy and the discretionary granting of the remedy itself.<sup>2</sup>

McTiernan and Webb JJ. discussed the question whether the power of the Industrial Court could be read down (as the power of the High Court under s.83 of the Defence Forces Retirement Benefits Act had been read down in Steele's Case). Webb J. recalled his dissent in ex p. Builders' Labourers' Federation, and said that he was "not warranted in persisting in dissenting as to the effect of s.15A" of the Acts Interpretation Act, which, he said, had been held in that case to be "not available for the purpose of converting a non-judicial power into a judicial power".<sup>3</sup> The latter proposition seems too wide, in view of Steele's Case. McTiernan J. simply said

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1. Ibid., at 319.

2. Ibid., at 317. See also ex p. Builders' Labourers' Federation, per Dixon C.J., 100 C.L.R. 277, 291.

3. 100 C.L.R. 312, 322.

that to apply s.15A of the Acts Interpretation Act here would "not be consistent with the intention which s.37 manifests" - viz. that the Industrial Court should have power to review the discretion of the Authority as well as the Authority's finding as to the conditions precedent under s.36(1). In all, it is difficult to resist the impression that the High Court has set more stringent conditions for validating the powers of the Industrial Court than it has set for appeals from administrative bodies to itself.<sup>1</sup>

Finally, in R. v. Commonwealth Industrial Court, ex p. Amalgamated Engineering Union (1960),<sup>2</sup> the High Court had to consider s.140 of the Conciliation and Arbitration Act 1904-1959, the revised version of the provision it had invalidated in ex p. Builders' Labourers' Federation.

- 140(1) A rule of an organization -
- (a) shall not be contrary to a provision of this Act, the regulations or an award....
  - (b) shall not be such as to prevent or hinder members of the organization from observing the law or the provisions of an award; and
  - (c) shall not impose upon applicants for membership, or members, of the organization, conditions, obligations or restrictions which, having regard to the objects of this Act and the purposes of the registration of organizations under this Act, are oppressive, unreasonable or unjust.

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1. Cf. Medical Board of Victoria v. Meyer (supra, p.11.29.); Transport Publishing Co. Ltd. v. Literature Board of Review (1956) 99 C.L.R. 111, 114, 131.

2. 103 C.L.R. 368.

- (2) A member of an organization may apply to this [Industrial] Court for an order declaring that the whole or a part of a rule of the organization contravenes the last preceding sub-section.
- ...(4) An organization in respect of which an application is made under this section shall be given an opportunity of being heard by the Court.
- (5) An order under this section may declare that the whole or a part of a rule contravenes sub-sec.(1) ...and, where such an order is made, the rule, or that part of the rule, as the case may be, shall be deemed to be void from the date of the order.
- (6) The Court may...adjourn proceedings...for such a period and upon such terms and conditions as it thinks fit for the purpose of giving the organization an opportunity to alter its rules.

Now in ex p. Builders' Labourers' Federation, both Dixon C.J. and Kitto J. had held that the function of disallowing or quashing rules was not in itself foreign to judicial power.<sup>1</sup> Nevertheless, in ex p. Amalgamated Engineering Union, Kitto J., in whose judgment Dixon C.J. concurred, hesitated to admit that the real issue ("result" or "subject") before the Industrial Court was still the disallowance of a rule.<sup>2</sup> Sec. 140(1) did not nullify rules that contravened its provisions; so an order of the Court under sub-s.(5) was a "condition which the section prescribes for the statutory avoidance of the rule for the future".<sup>3</sup> But what was significant in Kitto J.'s view, was that s.140 was now free from the legislative history

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1.100 C.L.R. 277, 291 per Dixon C.J.; 305 per Kitto J.

2.103 C.L.R. 368, 381.

3.Id. (emphasis added).

that had helped to infect the previous section with invalidity. Moreover, the new section removed the old power of the Court to act of its own motion, eliminated the merely permissive implications of the word "may" in the grant of power, and laid down a typical judicial procedure, using terms appropriate for empowering a judicial tribunal to adjudicate upon a justiciable issue.<sup>1</sup>

If Kitto J.'s judgment lays some stress on the fact that the new function of the Industrial Court was purely declaratory and did not "purport to effect any change in the legal situation",<sup>2</sup> the latter feature is crucial in the other judgments. In the case of McTiernan J. this is not surprising, since in ex p. Builders' Labourers' Federation he had refused to admit that the function of disallowance could be judicial.<sup>3</sup> In ex p. Amalgamated Engineering Union, McTiernan, Fullagar, Taylor and Menzies JJ. all argued that the effect of s.140(1) was to nullify, of its own legislative force, all rules contravening its provisions. In their view, sub-s.(5) provided that the order of the Industrial Court should constitute a mere factum on which sub-s(5) would act to nullify the rule in such an additional fashion that the question of its future

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1. Ibid., at 382.

2. Ibid., at 383; also 382.

3. 100 C.L.R. 277, 294.

validity would no longer be a question open in any proceedings before any Court (whether or not the order had been correctly made).<sup>1</sup> The judgments of Fullagar and Menzies JJ. therefore, though they do not explicitly raise the question, lend further colour to the view of McTiernan J. as to the non-judicial character of disallowance. Faced with the objection that their view proved too much (so that, being a mere factum, the Court's order was "nothing but a step in the legislative nullification of rules and [had] of itself no force or effect"),<sup>2</sup> these Justices argued that sub-s.(5) did have a binding effect inter partes, while "the extension by sub-s. (5) of the effect of a declaratory order does not affect the character of the process which leads to the making of the order, or the character of the order".<sup>3</sup>

All the judgments in ex p. Amalgamated Engineering Union lay some stress on the relative determinacy of the standards laid down in s.140(1). But even in Kitto J.'s judgment, this determinacy of standards is regarded as a sine qua non rather than as the decisive factor. Ex p. Amalgamated Engineering

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1. 103 C.L.R. 368, 388 per Menzies J. (with Taylor J.), 379 per Fullagar J., 374 per McTiernan J.
  2. *Ibid.*, at 387 per Menzies J., 377 per Fullagar J.
  3. *Ibid.*, at 379 per Fullagar J.; 388 per Menzies J.

Union thus represents a consolidation of the emphasis on definable standards, and, perhaps, a new shift of emphasis that it is still too early to evaluate. Insofar as all the judgments state, imply or allow that disallowance of rules is, in itself, foreign to judicial power, we must recognize, too, a further narrowing of the category of ambiguous functions, and widening of the category of strictly non-judicial powers.<sup>1</sup>

## IV

Conclusions

The suggestion that disallowance of rules is per se "foreign to" judicial power raises questions that go to the root of the ruling judicial theory. According to this theory, as we have seen, some powers are essentially or indelibly per se judicial; others are essentially or indelibly per se non-judicial. The specimen of the former ordinarily cited is punishment for crime; of the latter, the appointment of a federal judge. At the same time, the basic schema of powers is "legislative", "executive" and "judicial", where these three terms correspond to making, executing and construing law.

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1. Another example of the narrowing of the category of ambiguous functions may be the deportation power: as we showed (supra, p.10.19 - 10.23) this used to be regarded as ambiguous, but in Chu Shao Hung v. R. (1953) it was stated to be essentially executive, and "of a radically different nature" from imprisonment ("judicial"): 87 C.L.R. 575, 583, 585.

Now it is clear that the latter triad of activities with respect to law or rules is, like Aristotle's triad of moria, incapable of standing on its own feet. For a criminal trial will ordinarily be far more a mere execution of law than a construing of rules, while functions such as "disallowance of rules" may be regarded with equal plausibility as the making of a new regimen, the executing of legal powers of disallowance, or the construing of pre-existing and superior legal standards contravened by the rules disallowed. And if it is true, as Chu Shao Hung v. R. (1959)<sup>1</sup> suggests, that deportation is now to be regarded, not as an ambiguous function, but as essentially executive, while punishment by imprisonment is essentially a judicial matter, it becomes obvious that characterisation, even of non-ambiguous powers is proceeding according to criteria that cannot be reduced to, or explained in terms of, the offered triad of basic functions. Nor does it help to add that judicial power involves enforcement as well as construing, for deportation, compulsory acquisition of land and the powers of confiscation held to be non-judicial in Roche v. Kronheimer all equally involve the construing and enforcement of pre-existing rules. And if "construing law" is glossed by an appeal to "defined or definable, ascertained or ascertainable

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1. 87 C.L.R. 575, 583, 585.

standards", the problem is in danger of being compounded with a paradox; for the cases show how undefined and difficult to ascertain is the standard by which the High Court has measured the definability of standards.

The problem is that which faced Aristotle. The only tenable solutions seem to be those advanced by Aristotle himself in the Rhetoric (the specification of a central set of features of judicial institutions and activity) or by Bentham (the appeal to specialised aptitudes for types of action realizing certain values) or by Carré de Malberg (the specification of values secured by judicial forms and procedures). As the foregoing five chapters have shown, a rather complete list of typically judicial features, values, aptitudes, issues, forms and procedures could be drawn from the abundant Australian discussions, and even from the cases of any one phase alone. It may be useful to tabulate, without regard to differences of emphasis between features, the features regarded as belonging to the judicial set in the first phase (1904-1918) and the latest phase (1952-1964).

Table C.

<u>First phase</u>	-	<u>Latest phase</u>
exercise of sovereignty	-	one of three basic powers fundamental to federalism
power to hear and determine	-	power to hear and determine issues defined with precision
binding and enforceable <u>determination of rights inter partes</u>	-	conclusive determination of rights, with immediate legal consequences and enforceable (ordinarily by <u>lis inter partes</u> )
not <u>ex mero motu</u>	-	not usually <u>ex mero motu</u>
involving an exercise of discretion and independent judgment	-	involving an exercise of dis- cretion and independent judg- ment
by a decision according to law	-	by a decision according to purely legal criteria
affecting <u>existing</u> legal rights	-	ascertaining, examining and enforcing antecedently existing legal rights
according to a non- arbitrary, legal, regular and fair discretion	-	according to non-arbitrary dis- cretion, governed by ascertain- able tests or standards, not according to expediency nor with an eye to consequences, by a restrained and relatively inelastic technique.
in the light of evidence	-	on the basis of ascertained facts
or otherwise in accord- ance with the practice of British courts	-	or otherwise in accordance with traditional British conceptions of judicial power.

Having set out such a list, one is obliged to say that there has been, on the High Court, little more than verbal recognition<sup>1</sup> of the difficulties of drawing lines by means of terms which can only be explicated by setting out lists of features, all of which features coincide in only the central cases and many of which would appear in lists explicating the "contrary" terms in a schema of powers. To narrow the range of "ambiguous" functions is to exacerbate the problem and to make its explicit recognition more urgent.

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1. See, e.g., per Dixon C.J. and Taylor J. in Davison's Case (1954) 90 C.L.R. 353, 368, 387.

## CHAPTER THIRTEEN

### Conclusion

The aim of this thesis has been, not to define judicial power for any theoretical or practical purpose, but to study in depth a concept that is characteristically legal and at the same time a traditional term of descriptive political theory or analysis. The intended point of the study is fourfold: (1) to illustrate a useful method of analytical jurisprudential enquiry; (2) to discover and illustrate the types of features, problems and lessons connected with the use of legal concepts, or of theoretical or commonsense concepts in a legal context; (3) to compare the approaches of descriptive theorists and of lawyers to those problems and features, and (4) to provide thereby some concrete evidence of the distinction (or absence of distinction) between legal thought, method and system, and the thought, method and system of commonsense and the purified commonsense of descriptive theory. The notion of analytical jurisprudence sought to be illustrated dictated the method of inquiry adopted: namely, the historical approach to several more-or-less self-contained bodies of thought, the limitation of historical inquiry to conceptual components,

and the search, not for a "history of ideas", but for an accurate reconstruction of each of the foregoing bodies of thought, for a reproduction of the actual premises, methods, tendencies and blind spots of each.

The present situation in analytical jurisprudence demanded an introductory chapter to justify and explicate this programme. More important, the situation in Australian federal constitutional studies demanded a lengthy excursus. For the main elements in that situation were the existence of a highly developed judicial exegesis of the chosen concept, the consequent prevalence of firmly held views as to the "true nature" of this concept and of its integral context, and the almost total lack of a soundly based history of the intended meaning of both concept and context.

Thus our first conclusion must be to point out a by-product of our programme, namely, the radical reconstruction of the intellectual history of the Australian Constitution in several important aspects. In the absence of serious historical study of the origins of the Constitution with an eye to subsequent problems, it has been widely assumed that the intentions of the founders broadly corresponded with the

now received judicial interpretation of the disposition of powers as between institutions, and that the methods and preoccupations of the founders corresponded (with a few obvious exceptions such as s.92) with the legal methods and preoccupations that have grounded that received judicial interpretation. Both suppositions seem to be mistaken, though it would be bold for the first worker in the field to proclaim definitive solutions.

The foregoing conclusion grounds a further conclusion which, if not so much a mere by-product, is a reflexive implication of the whole study. For if the exercise of judicial power in Australia has issued in solutions radically (though more or less unconsciously) at variance with the intentions of the lawmakers, it can hardly be maintained that judicial power primarily connotes the application of pre-existing law to defined facts. If the choice lies between such a contention, and the traditionally rival contention that judicial power has to do above all with the solution of controversies inter partes, then the implications of this thesis favour the latter contention. At least, it is necessary to say that our own use of the word "judicial" in chapter headings such as "the first phase of judicial analysis..." cannot connote that the Justices of the High Court were simply "apply-

ing the pre-existing law" as to judicial power. The fact is that the High Court has reared a vast body of substantially novel law on the foundation of a phrase, "the judicial power of the Commonwealth", which was virtually undefined but probably did not mean what it has been made to mean. It seems best to say, if a definition is demanded, that judicial power is, for many purposes, best understood as the official power to resolve controversies arising in the context of a legal system of rules or concepts, by a fairly distinctive technique of thought, in the context of various forms and procedures, and with a finality and official certification subject only to explicitly authorized appeal.

However, a definition is far from being the aim of this study, and the abstract demand for definition has been, as we showed, at the root of many of the problems we have uncovered. The real conclusions of the thesis concern the inescapability of these problems in employing distinctions between types of governmental power, and the distinctive aspects of legal thought and legal system mentioned in the foregoing "definition".

The apparently inescapable problems of identifying distinct types of governmental power already emerge in

Aristotle. The proof of Aristotle's competence and relevance (if it were needed) is provided by comparing the list of "judicial" features identified by him with similar lists drawn from later descriptive and judicial analyses. But the list is, for the most part, one that must be drawn out from Aristotle's work, for like most of his successors Aristotle preferred to make his desired distinctions with a very limited set of vague terms really parasitic upon prior tacit understandings as to the class of institution implicitly designated. The triadic schema identified by Aristotle is (subject to minor differences of emphasis) the schema that has come down to the present day. Bentham attempted to shake off this schema with a thoroughness never rivalled. The failure of his attempt suggests that the persistence of the triad is not to be explained away by appeal to any "history of ideas" postulating direct succession or dependence of modern from Aristotelean thought.

Still, examination of the methods and terminology of modern analysts of powers revealed the difficulty of postulating any definite schema of basic types of powers outside the context of an actual legal system. It was shown that attempts to do so depend on the systematic emphasising of certain general features of law to the unexplained exclusion or minimisation of others, or on questionable

postulates about the "origins" of powers. It was suggested that the analysis of powers can more usefully attempt an explanation of the data of one historical system, and further that it would be found that the usage of terms to designate powers within such a system corresponded with the values realized by the exercise of those powers within that system. Moreover, it was argued that the multiplicity and complexity of the features presented and the values realized by the exercise of powers, and the possibility of selecting or emphasising some values from a set in one circumstance and others in another, demanded a concept of analogical terms. A term is analogical when its meaning shifts systematically as one moves from one area of usage to another. A term like "judicial power" is analogical because it embraces a set of features and values, of which all may be present in one case of judicial power (which may be called the central analogate), but of which only some may be present in other cases that can still be usefully called cases of judicial power. This set of features and values constitutes a system because of the more or less definite place of the central analogate or model, and because (as we argued) a link between this central case and the other (that is, analogous) cases is provided by the values that are more or less common to all cases of "judicial power" and that should have, therefore, a

certain priority in characterisation of that power. Finally, we insisted that, though values ("why the agent did what he did the way he did") have a priority, there are three other broad types of feature that must be specified in characterizations of governmental powers: namely, the agent, the issue and the procedure followed by the agent in dealing with the issue. Of course, the terms "value", "agent", "issue" and "procedure" are all themselves analogical, as Table B in Chapter Four clearly showed. The consequent overlap and confusion of analytical terms has obscured an area already sufficiently obscured by notions of "real", "essential" and "true" powers.

Now, the Australian judicial discussions very amply illustrate these theses. A triadic schema has been the basis of almost all discussions, and apparently anomalous terms such as "ministerial" and "administrative" have been more or less forcibly assimilated to the term "executive". This triad has been regarded as "real", "essential", "true", etc., and has been defined by appeal to such vague triads of terms as "making - executing - construing law". It has also been explained by appeal to hypothetical origins of law and society. At various times, but never all at one time, all the relevant features and values of the broadly "judicial" set have been referred and appealed to for purposes of characterisation.

But sometimes the character of the agent has been accounted primary, sometimes that of the issue, sometimes that of the procedure. Rather little explicit attention has been given to the values realized by judicial process, perhaps partly because of the absence of a legal notion of "due process of law". Particular consequences of this confused and haphazard analytical procedure have been noted from time to time in the foregoing chapters. But it should be noticed that the Court has held firm to a central analogate (manifested as "the enforcing powers" in the Wheat Case and Alexander's Case), and has even allowed a fuller, historically conditioned and in fact Institutional version of that analogate (viz. "the King's Courts") to influence its reasoning as a substitute for consistently and coherently Abstract analysis.

Thus, an important conclusion of this thesis must be that, to a very considerable extent, judicial reasoning about this concept, "judicial power", displays the same characteristics - as it were, the same logic and the same rhetoric - as non-judicial (and even non-"legal") reasoning in the shape of descriptive political analysis. To express this conclusion in the terms of the second and third of our four particular aims, it is necessary only to say that one can discover and illustrate the types of features, problems and lessons connected with the use of this concept with equal

ease and aptness in the judgments of the High Court of Australia or the writings of Aristotle, Bentham, Kelsen, and the other theorists discussed in Chapter Four; and that the approaches of descriptive theorists and of lawyers to this concept are closely comparable.

However, it would be wrong to maintain that there was no manifestation, in the Australian judicial materials, of a specially legal and judicial cast of mind. The work of the Conventions was marked by a tendency to abstraction which we found good reason to ascribe to legal habits of thought. The history of the subsequent judicial interpretation, at least of the concept judicial power, has been one of increasing abstractness. At the great cruxes of interpretation, the view favouring the maximum degree of abstractness combined with the maximum degree of sharpness and rigour in drawing lines has almost always prevailed - the Wheat Case, Alexander's Case, the Boilermakers' Case...

What does abstraction or abstractness mean in this context? It means a presupposition of the systematic nature of the relevant data. It means a prescindendo from, or elimination of, further questions (as to history, intention, practicality, etc.) that would tend to undermine the fore-

going presupposition. It means systematising the data by reference to principles of the greatest possible generality and scope of application, (to which, if need be, exceptions can be admitted) in preference to the enunciation of a greater number of less general principles that might require fewer unexplained exceptions but that would fail to present a comparable appearance of symmetry and "principle". It means preferring distinctions between apparently sharply defined "concepts" to distinctions between "greater and lesser", "partly and partly", "more or less", "in one sense and in another sense", etc., within the same concept. It means using the notion of "the criterion" with an apparent unselfconsciousness hardly consistent with firm recognition of the analogical character of most of the concepts in a legal system. It means (though the connection is not analytic, and the phenomenon is partly explicable by other causes) never or rarely acknowledging in judgments the difficulties of decision, of reconciling precedents, of defining principles and of selecting definitions, but always or normally presenting the conclusion as an apodeictic consequence of principles and definitions whose scope and place in the system is undoubted. In our case, it means in particular, the radical tendency to prefer the Abstract to the Institutional interpretation of the separation of powers in the Australian Constitution, and to employ the essentialist method of once-for-all characteris-

ation in the application of that Abstract doctrine.

All these features of legal thought and method can be observed in the portion of Australian legal history that we have examined. But it may be noticed that they correspond to the fundamental grounds of a distinction between common-sense and legal discourse suggested a priori in Chapter One. The terms of that distinction were (1) the desire for a system in affairs; (2) the need to resolve disputes by giving final answers; (3) the consequent definition of terms, and limitation on further questions; (4) the consequent possibility of authority and precedent, further limiting questions, and providing (5) an actual system of definite terms and relations on which to base a transition to more abstract concepts, such as right, duty, power, etc., that express the various systematic relationships possible between definite terms. This correspondence between the foregoing very general a priori considerations and the characteristics of legal and judicial thought observable in the last eight chapters makes it possible to assert that legal thought and system is characterised almost inescapably by the features we have summed up in the word "abstraction".

Why inescapably? The reasons we have advanced are the desire for system in affairs and the need to opt definitely

as between parties to disputes. The first can be attained only by, and the second demands, the definition of terms, restriction on further questions and reliance on authority and precedent. Obviously, "once-for-all characterisation" is to a considerable extent simply the reverse of the coin. But the mind has habits and acquired dispositions as well as needs and capacities, and our discussion of the Australian cases suggests that the legal mind tends to carry the desire for determinacy and the presumption of simple system to a degree that can only be described as optional and habitual rather than necessary or always and everywhere desirable.

It will be noticed, lastly, that the two basal reasons advanced in the preceding paragraph correspond to the two principal features of judicial power that have emerged from our study: interpretation or application of pre-existing law, and resolution of disputes inter partes. This correspondence was not pre-determined by us; it emerges naturally, and explains why the problem of defining judicial power for legal purposes will always be to find a balance that will not eliminate either feature. (The problem of finding a balance in analysis between features relative to "agent" and "procedure" as against "issue" is the same problem in another guise). As we have suggested, the answer to this problem necessarily

involves a choice of values. We have suggested that the High Court of Australia has been more successful at resolving disputes than at strictly applying actually pre-existing law. But this must not disguise the conscious option made by that Court, implicit in its definitions of the "judicial power" in s.71, and expressed extra-judicially (that is, outside the context of a dispute!) by Sir Owen Dixon:<sup>1</sup>

It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism....Lawyers are often criticised because their work is not constructive. It is not their business to contribute to the constructive activities of the community, but to keep the foundations and framework steady.

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1. Swearing-in as Chief Justice (1952) 85 C.L.R. xi.

## APPENDIX A

### Intentions and the language of powers in the American Constitution

The influence of Locke, Montesquieu and Blackstone on the founders of the American Constitution is generally admitted.<sup>1</sup> The sketchy records of the Federal Convention of 1787 contain only two specific references to Locke and one to Blackstone; Montesquieu's name, on the other hand, appears eight times, and it may be conjectured that the political circumstances of the time favoured reference in general debate to French rather than English authorities.<sup>2</sup> Nevertheless, no one doubts that the works of the three theorists helped mould the structure and language of the Constitution, both directly and by way of the State constitutions of which the founders, as architects and as draftsmen, made considerable use.

With this in mind, it is important to notice that in all these works the language of "powers" and "authorities"

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1. See C.E. Stevens, Sources of the Constitution of the United States (1927), 46-49, 185; M. Farrand., The Framing of the Constitution of the United States (1913), 49; A.H. Kelly, and W.A. Harbison, The American Constitution (1948), 97; Montesquieu, The Spirit of the Laws, ed. F. Neumann (1949), lix-lxi and works there cited. Cf. also per Isaacs J. in Huddart Parker and Co.Pty.Ltd. v. Moorehead (1909) 8 C.L.R. 330, 383.
  2. Cf. H. Maine, Popular Government (3rd ed. 1885), 206,207; Stevens, op.cit. 52,53.

was fluid and unsettled. All three authors were indifferent to the ambivalences discussed in Chapter Five, section III, above; indeed, these ambivalences were present in related words which nowadays are unequivocal. Blackstone, for example, used the word "legislature" to refer both to the Parliament and to the Parliament's activity in legislation:

For legislature...is the greatest act of superiority that can be exercised by one being over another.<sup>1</sup>

In the same section of the Commentaries, and in the space of one sentence, the word "power" is used indifferently and apparently indiscriminately to denote the capacity to act, the activity, and the body so acting or endowed with such capacity:

By the sovereign power...is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it... and all the other powers of the state must obey the legislative power in the exercise of their several functions.<sup>2</sup>

Similarly, the words "legislative" and "judiciary" are used both as nouns and as adjectives.<sup>3</sup> In all this, Blackstone simply displayed the fluidity of language characteristic of his own and the immediately preceding age. Thomas Nugent, who translated Montesquieu's De L'Esprit des Loix into English in 1750,

1. Commentaries, Introduction s.2. See also I,2,11.
2. Comm. Intro.s.2; I,2,11; I,3.
3. Comm. Intro. s.2. See also the use of the words "authority" and "magistracy" in I,2.

was content to translate the phrase puissance de juger as "judiciary power" and "judicial power" in consecutive sentences. He used the word "legislature" to render both puissance législative and législation. And Montesquieu himself, though his famous chapter on the separation of powers was framed largely in the Abstract terminology of powers as vested in institutions and persons, nevertheless shifted, on occasion, from la puissance législative as vested in le corps législatif to la puissance législative as the concrete institution itself, granting permission to the concrete puissance exécutive to act.<sup>1</sup> Nor had Locke's language, a source for both Montesquieu and Blackstone, been any more settled. The first words of Chapter XII of Locke's treatise "Of Civil Government" are "the legislative power", meant as the subject of rights and as a body which need not "be always in being".<sup>2</sup> Within a dozen lines "the legislative power" is being "put into the hands of divers persons", and by the end of the Chapter the discussion is more consistently framed in Abstract terms.

Though, as I said, the executive and federative power of every community be really distinct in themselves, yet they are hardly to be separated and placed at the same time in the hands of distinct persons...<sup>3</sup>

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1. Montesquieu, The Spirit of the Laws (trans. T. Nugent LL.D., 1750) XI, ch.6.
  2. Of Civil Government, XII, s.143.
  3. Ibid., s.148.

None of these authors, of course, were composing legal instruments, within which one would expect at least formal consistency in terminology. The constitutions of the American States, drafted between 1776 and the Federal Convention in 1787, do, on the whole, attain such an internal consistency. But as between each other, they display once again the dichotomy between Abstract and Institutional,<sup>1</sup> and if we study the chronology of their respective promulgations we can discern a shift towards styles or fashions of Abstract formulation.

The first State Constitution was New Hampshire's, completed on 5th January 1776; but that tersely contented itself with establishing a legislative Council and House of Representatives to which was entrusted "the general management of affairs". The next in the field, and the first of the more complex and exhaustive schemes of government on which the Constitution of the United States was modelled, was South Carolina's, completed in March 1776. In this the shift towards Abstract formulations was so clear that two of the crucial clauses needed no amendment when the model of the Federal Constitution was, in turn, adopted in South Carolina in 1790. For in the document of 1776, "the

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1. Thus Haines, The Role of the Supreme Court...1789-1835 (1944) 55-56: "... the claim that all of the state constitutions included a separation of powers theory and that an attempt was made to carry the theory into effect is not supported by concrete evidence. The theory of the separation of powers was not included in some constitutions which made a tripartite division of government agencies".

legislative authority" was "vested in" the president, the general assembly and the legislative council,<sup>1</sup> while "the executive authority" was specifically "vested in" the president.<sup>2</sup> But the shift was incomplete; though courts were provided for in a number of clauses, there was no mention of "judicial power" or "judicial authority".<sup>3</sup> And the immediately succeeding constitutions show no signs of a similar shift. Between May and June, a convention in Virginia produced a Bill of Rights and a "Constitution or Form of Government" - a conjunction which was to be reproduced in most of the later State constitutions. Both these instruments provided specifically for a separation of powers; but the language is unmistakably Institutional.

Section 5 of the Bill of Rights provided:

That the legislative and executive powers of the State should be separate and distinct from the judiciary; and that the members of the first two may be restrained from oppression, by feeling and participating the burdens of the people, they should, at fixed periods, be reduced to a private station....

In the body of the Constitution<sup>4</sup> it was provided further that:

the legislative, executive and judiciary department [sic], shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time....

The constitutions of New Jersey and Delaware, completed in July and September respectively, showed little sign of influence from

1. Cl. VII.
2. Cl. XXX.
3. Notice, however, that the word "judicial" does appear as an adjective in cl. XX - "judicial officers".
4. The Constitution was not divided into articles or sections.

either South Carolina or Virginia; their framing was entirely Institutional. Delaware's ventured no general characterisations of "departments", let alone of "powers"; New Jersey's essayed a solitary reference to "the legislative department".<sup>1</sup>

From speaking of "powers properly belonging to" a department of government, it is not a far cry to lump all such powers under one head and call them collectively by the name of the department in which they are vested and to which they are "proper". So it is not surprising that the Constitution of Maryland, which appeared in November 1776, should have closely followed the Virginian example in its general form and principles, and yet should have contained, as article VI of its Declaration of Rights, the following:

That the legislative, executive and judicial powers of government ought to be forever separate and distinct from each other.

Still, the Constitution proper of Maryland was purely Institutional. The Constitution of Pennsylvania which had been issued in September 1776 remained<sup>2</sup> at just the same level as that of South Carolina; that is to say, it isolated "supreme legislative power",<sup>3</sup> vested in a house of representatives, and

1. Sec. XX
2. For political reasons summarized in Haines, Role of the Supreme Court, 57.
3. Sec. 2.

"supreme executive power",<sup>1</sup> vested in a president and council, but established "courts of justice"<sup>2</sup> without further generalization or ado. The last constitution of 1776, that of North Carolina, took over article VI of the Maryland Declaration of Rights verbatim in article IV of its own Declaration; but the body of the Constitution went no further than South Carolina's had gone at the beginning of the year. Georgia's Constitution, which appeared at the beginning of the next year, harked back, in article I, to the Virginian example, which was still very recent when Georgia's convention first met in October 1776:

The legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other.

An obscure reference to "the executive power" in article XXXI seems to have been more Institutional than Abstract. There was no such ambiguity, however, in John Jay's drafting<sup>3</sup> of the preamble to the Constitution of New York, promulgated, after ten months of meetings, in April 1777:

And whereas many and great inconveniences attend the said mode of government by congress and committees, as of necessity, in many instances, legislative, executive and judicial powers have been vested therein, especially since the dissolution of the former government....

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1. Sec. 3.

2. Sec. 4.

3. F.N. Thorpe, The Federal and State Constitutions (1909) Vol. V, 2624.

the  
Two years later/shift to Abstract formulations was much advanced  
by the Constitution of the Commonwealth of Massachusetts.

Article V of the Declaration of Rights provided:

All power residing originally in the people, and being derived from them, the several magistrates and officers of government, vested with authority, whether legislative, executive or judicial, are their substitutes or agents, and are at all times accountable to them.

Article XXX of the Declaration provided:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative or judicial powers, or either of them: the judicial department shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

The first three chapters of the Frame of Government itself were entitled "The Legislative Power", "The Executive Power" and "The Judiciary Power". The "Department of Legislation", oddly enough, was called "The General Court"; the Governor was called "The Supreme Executive Magistrate", and the highest court was called the "supreme judicial court". There was obviously room for further clarification and definition in the distinctions between powers; some of this was achieved in the Constitution of New Hampshire of 1784. This was quite evidently based on the Massachusetts instrument, but was even more precise and Abstract in its terminological separation of powers.

Article XXXVII of the Bill of Rights provided:

In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.

The legislature was still called the general court,<sup>1</sup> but it was further provided that "the supreme legislative power within this state shall be vested in the senate and house of representatives" which together made up the general court. The provisions as to the executive power and the judiciary power, as in the Constitution of Massachusetts, were Institutional in their language. The final settled symmetry of the Abstract doctrine, the explicit vesting of three "powers" in three "departments", was to wait until 1787 and the foundation of the United States itself.

At this point an interesting problem arises. We have seen how Locke, Montesquieu and Blackstone gave currency, albeit ambivalently, to the language of "powers"; how this language began to take on quite a settled usage in the Constitutions of ten of the founding States of the Union; and how this usage was, by and large, increasingly Abstract. But when we come to the debates in the Federal Convention, we find an

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1. Part II.

appreciable reversion to Institutional conceptions and expressions of the idea of separation of powers. The problem is to account for this reversion, and it is interesting because one of the possible solutions is of general jurisprudential significance.

One of the possible solutions turns on the circumstance that the relevant Convention debates were concerned with the Virginia Plan. This Plan consisted of the resolutions moved by Governor Randolph of Virginia on 29th May 1787, the first day of substantive business in the Convention; so far as here concerns us, they read as follows:

3. That the National Legislature ought to consist of two branches.
7. that a National Executive be instituted.....
9. that a National Judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature.....
14. that the Legislative, Executive and Judiciary powers within the several States ought to be bound by oath to support the articles.<sup>1</sup>

On the following day, Randolph further moved, inter alia:

to

that a national Government ought/be established consisting of a supreme Legislative, Executive and Judiciary.<sup>2</sup>

Now these and the related resolutions were before the Convention

1. M. Farrand, Records of the Federal Convention (1937) (hereinafter cited as Records) I, 21-2, 28; II, 131-133. (Madison's Notes).
2. Records I, 33.

almost continuously until, having been adopted in a form unaltered so far as we are concerned, they were passed over to the Committee of Detail on 26th July, to be moulded into a draft Constitution. It is sufficiently evident that the language of the Virginia Plan was taken over quite directly from the Institutional language of the Virginian Constitution. Perhaps, then, it was simply this accident, that the initial and conceptually most influential resolutions came from the delegates of the one State with a "powers" doctrine written into its constitution in explicitly Institutional terms, that determined the terminology of the ensuing two months of debate. Such a solution of our problem would be attractively simple, but of little general interest to the jurist.

There is, however, an alternative solution possible. This accepts the Virginia Constitution as evidently a factor contributing to the usage current in the debates; but it suggests that perhaps that usage would have occurred in any case, given the nature and purpose of any such gathering of planners and founders. This solution looks forward to the Australian experience for corroboration of this suggestion. But it points also to the detailed evidence of the American Convention.

In the first place, we observe that on 29th May 1787, after Randolph had presented the Virginia Plan to the Convention, Charles Pinckney of Pennsylvania "laid before the house the draught of a federal Government".<sup>1</sup> As reconstructed at the beginning of this century by Jameson, McLaughlin and Farrand,<sup>2</sup> this plan appears to have been framed in language admittedly ambivalent, but, on the more probable interpretation, no more abstract than Randolph's. It had been framed entirely independently of, and almost certainly earlier than, the Virginia Plan. The relevant article is article I, as follows:

The stile of this government shall be The United States of America, and the legislative, executive and judiciary powers shall be separate and distinct.

This language was very close to the Virginian Constitution,<sup>3</sup> and we may well ask why a Pennsylvanian chose that institutional formulation as his model in expressing his demand for a separation of powers, in preference to the more recent, more orderly and more comprehensive models available in Massachusetts and New Hampshire.

In the second place, we observe that the language of the founders displayed all the fluidity that we noticed earlier

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1. Records III, 595; I, 23.

2. Ibid., III, 604-609.

3. Pinckney is said to have relied particularly on the New York Constitution. See Farrand, Framing..., 129.

in Blackstone. Sometimes the delegates used the relevant terms as we would use them today.<sup>1</sup> Thus, according to McHenry's notes, on 30th May Gouverneur Morris remarked:

The federal government has no such compelling capacities, whether considered in their legislative, judicial or executive qualities.<sup>2</sup>

But more often than not, the word "judiciary" was used as an adjective. Particularly in Madison's notes, which were by far the fullest records of the debates, the word "judicial" infrequently appears as an adjective: "judiciary" was used instead.<sup>3</sup>

Mr. Dickenson...went into a discourse of some length, the sum of which was, that the Legislative, Executive and Judiciary departments ought to be made as independent as possible....<sup>4</sup>

And when the word "judiciary" was used as a noun it served to indicate the preoccupation of the founders with institutions and departments:

If the Legislative, Executive and Judiciary ought to be distinct and independent, the Executive ought to have an absolute negative....<sup>5</sup>

Very often, instead, it was "judicial" which was used as the noun where we would say "judiciary":

Madison: The Judicial ought to be introduced in the business of Legislation....Wilson moves the addition of the Judiciary.<sup>6</sup>

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1. See McHenry's version of Randolph's resolution of 30th May: Records I, 40.
  2. Ibid., I, 43.
  3. Cf. Pierce's notes, ibid., I, 147.
  4. 2nd June, ibid. I, 86; also 6th June, I, 138 (Madison); 19th July, II, 56 (Madison); 20th July, II, 66 (King).
  5. 4th June, I, 98, Wilson (Madison's notes).
  6. 4th June, I, 108 (King); see also Pierce's notes at I, 109; Hamilton's at I, 145; King's at I, 144.

The word "power", which does not appear at all as often as one might expect in this context, was often Institutional rather than Abstract in its use; thus the version of the seventh Randolph Resolution, in Paterson's notes, was followed by:

Checks upon the Legislative and Executive Powers -

1. A council of Revision to be selected out of the executive and judiciary Departments, etc.
2. A national Judiciary to be elected by the national Legislature....<sup>1</sup>

And on 6th June Madison reported Mason as saying:

The Executive power ought to be well secured against Legislative usurpation on it....<sup>2</sup>

It was, of course, the other use of the word "power" that was to prevail and be enshrined in the three structural sections of the Constitution. But, despite all the flexibility of language, the phrase "judicial power" in that modern Abstract sense never appeared in Madison's notes before 27th August,<sup>3</sup> by which time the Constitution had taken on its final shape in this respect. The first consistent use of the word "power" in just this sense and context appears in Hamilton's plan of 18th June:

- s.1. The Supreme Legislative power of the United States of America to be vested in two different bodies of men....
- s.2. The supreme Executive authority of the United States to be vested in a Governour....
- s.3. The Supreme Judicial authority to be vested in Judges to hold their offices during good behaviour....<sup>4</sup>

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1. Records, I, 28.  
 2. Ibid., I, 139; see also Resolution 14 of the Virginia Plan, and the final resolutions in III, 133.  
 3. Ibid., II, 428.  
 4. Ibid., I, 291.

It has always been said that Hamilton's ideas were "too radical to meet with any general approval".<sup>1</sup> So they were; but it is permissible to conjecture that his choice of words was not wholly without consequence.<sup>2</sup> For s. 1 of his plan, which had no verbal equivalent in the resolutions committed to the Committee of Detail with the Convention's approval, appears in that Committee's first surviving full draft of the Constitution:

2. The supreme legislative power shall be vested in a Congress to consist of two separate and distinct Bodies of Men.<sup>3</sup>

It was in fact in this draft that the final steps had been taken towards a settled symmetry of Abstract terminology. For s. 2 was complemented by ss. 12 and 14:

12. The Executive Power of the United States shall be vested in a single person....<sup>4</sup>

14. The Judicial Power of the United States shall be vested in one Supreme (National) Court, and in such other inferior Courts as shall, from time to time, be constituted by the Legislature of the United States....<sup>5</sup>

The crucial shift, perhaps, had come when Wilson, in the Committee of Detail, faced with the resolution that:

1. Farrand, Framing...., 89.
2. The likelihood that Hamilton's plan was before the Committee of Detail when the crucial steps were made is increased by the evidence of the alternative draft of Hamilton's plan in Records III, 619.
3. Ibid., II, 163.
4. Ibid., II, 171.
5. Ibid., II, 172.

the Government of the United States ought to consist of a Supreme Legislative, Judiciary and Executive,<sup>1</sup>

wrote as clauses 2 and 3 of an incompletely preserved draft:

2. The Government shall consist of supreme legislative, executive and judicial powers.
3. The Supreme legislative power shall be vested in a Congress to consist of two separate and distinct Bodies of Men....<sup>2</sup>

At that moment, if not before, the modern terminology of powers and the separation of powers was fixed.

Our problem has been to understand why it had not been fixed before, granted the developing styles or fashions in the formulations of the Constitutions of the States and the presumable pressures for symmetry of expression. One answer is that the shift towards Abstract formulations was side-tracked in the Convention by the accident that the fundamental resolutions came from the structure of the Virginian Constitution. Another answer, which we have just been developing, is that, granted the unsettled language of contemporary theory, it was natural that verbal usage, as well as underlying thought, in the Convention would conform to the dominant interest of the Convention. The debates in May, June and July were connected with the establishment of a new government, not as a subject of theoretical analysis or of discussion in courts of law, but

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1. Ibid., II, 129.

2. Ibid., II, 152.

as a visible power in the land. The questions before the Convention were, one may say, political, institutional and concrete, rather than legal, schematic and abstract. What institutions were to be established? How were those institutions to be defined, established, controlled? It is no matter for surprise that the discussion should have concerned the departments of the government, rather than "powers of government". It is little wonder that even Pinckney's plan had been couched in this Institutional language of departments; the problem facing the Convention from the beginning was to make a feeble Confederation into an operative national power, not as a matter of law but as a matter of fact. Only when that problem had been substantially overcome, in intention, by the consensus, could Wilson and the other lawyers on the Committee of Detail shift into the language of the Abstract doctrine and engage in a conscious search for symmetry and consistency (a search that was virtually a matter of creating a symmetry and consistency which never had been perfected previously). Such, at any rate, is a possible answer.

It is, nevertheless, an answer founded partly on conjecture; it postulates certain general distinctions between political negotiations and legal formulations. These distinctions had best be tested with regard to the much fuller records

of the formation of the Australian Constitution. For the present, however, our concern is to decide, in the light of the foregoing discussion of "powers" in the eighteenth century American context, just how far the American founders were moved by a doctrinaire Abstract ideal of "separation of powers". We have already said enough to show in detail how cautiously that phrase must be approached. We have suggested, implicitly, that the concern of the founders (so far as a consensus can now be judged) was for checks and balances between the concrete institutions of Congress, Presidency and Supreme Court, rather than for any comprehensive classification of, or ideal distinction between, "powers" Abstractly understood. Indeed, they did not hesitate to endow the Senate with some of the powers of an executive and a judiciary. As much as anybody, it was their legal draftsmen who, late in the Convention, imported the postulated "ideal" into the drafts - whether consciously or unconsciously, whether as a mere matter of "language" and "form" or as a dominant principle of sound politics, we cannot know. The evidence does not really enable us to do more than issue a warning against loose talk of "theories of the separation of powers", and raise a hypothesis for investigation in the context of the Australian Constitution.

APPENDIX B.

A difficult debate in the 1897 Convention

Clause 71<sup>1</sup> of the 1897 Draft ran:

the judicial power shall extend to all matters:  
[there followed the heads of matters now  
embodied in ss.75 and 76 of the enacted Constitution].

Mr. Glynn proposed the addition of a tenth subject-matter, namely "Any matters that the Parliament may prescribe".<sup>2</sup> At the suggestion of Barton and Symon, the amendment was rejected by the Convention.<sup>3</sup> Barton's objection turned on his opinion that the amending clause would/a "fruitful source" of litigation on the question whether "a matter prescribed by Parliament is a matter within their power so to deal with under the Constitution";<sup>4</sup> in other words, he seems to have been unwilling to leave to the Commonwealth any floating grant of power that would be limited only by its dependence on the defined legislative powers of Parliament. This attitude of Barton's will be worth bearing in mind when we come to consider the final shift to the present form of Chapter III. But it is Symon's objection which is more to the point here. Symon said:

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1. In 1898, clause 73.
  2. 1897D, 962.
  3. In Committee of the whole.
  4. 1897D, 963.

[Mr. Glynn's] amendment is directed to one point, and that is to enable matters to be dealt with and constitutional questions raised by the High Court and dealt with without suit. If this is the point he has in view, it deals with the procedure or jurisdiction of the High Court and not its judicial power. It has nothing to do with the judicial power, which is distinguished from the executive and legislative power of the Constitution. There are three elements in the Constitution. One is the legislative power, the second is the executive, and the third is the judicial power, and that judicial power exists quite irrespective of the procedure under which it is exercised. My friend is moving the amendment with a view to enable questions to be submitted to the Federal Judiciary without the intervention of a party or suit. It may or may not be a good object. The Canadian Act [the British North America Act 1867] has secured it. Our provisions do not secure it. The Home Rule Bill of 1886, introduced into the Imperial Parliament, provided for it, but it is not a question of judicial power....Judicial power is one thing, and it is sufficient to embrace what is desired provided the machinery is good, and what my honorable friend desires is to provide machinery. I suggest, if he desires to see it carried into effect, that he should introduce it in a separate section, to be inserted in a more appropriate place.<sup>1</sup>

In interpreting this difficult passage, it must not be forgotten that the first two defining heads of matters in the then clause 71 were "(1) Arising under this Constitution or involving its interpretation; (2) Arising under a law of the Commonwealth...." Now these are obviously very broad categories. Symon, moreover, is known to have understood the

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1. 1897 D, 965 (emphasis added).

word "matters" in a wide sense. He was to say, shortly after the beginning of the 1898 Convention:

We want the very widest word we can procure in order to embrace everything which can possibly arise within the ambit of what are comprehended under the subsection [then clause 71].<sup>1</sup> As my hon. and learned friend [Isacs] will see it would be of no use to adopt the word "case" or "controversy".

Higgins: It may be held that there must be a plaintiff and a defendant.

Symon: Yes; I was going to indicate that. In the United States Constitution the words "cases and controversies" are used. Is the word "matters" used there?

Isacs: No. I think "cases" is used in one place and "controversies" in another.

Symon: I think we are using the best word here. The word "matters" merely indicates the scope within which the judicial power is to be exercised, but no matter can be dealt with until it comes up before the authorities in the form of a case or some judicial process which will be regulated by the Judiciary Acts. It does not strike me that the word is too wide.

Quick: ....The United States court has no jurisdiction except where there is a plaintiff and a defendant.... The words here...might give the court jurisdiction in matters which were not cases.

Symon: It could not.

...Glynn: I do not think there is any danger of the Supreme Court being asked to decide upon a political matter. In the Privy Council Act the word "matters" is used, but it has been decided that matters of policy cannot be referred to the council. The word

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1. In 1898 this was clause 73.

"matters"<sup>was</sup> decided upon by the Judiciary Committee after a long discussion.<sup>1</sup>

Allowing that Symon had an at all coherent view, a probable interpretation is as follows. Despite his talk of the "three elements in the Constitution", Symon was still thinking of Chapter III in an Institutional sense, as establishing a judiciary, the extent of whose power would include all the matters referred to in the then clause 71, but the nature of whose power was not a relevant problem and could be left to Parliament to define, in the Judiciary Acts, within the limits of clause 71. Some such idea seems to recur in a speech in March 1898, when Symon said that that clause defined the limitations of judicial power, but would be inoperative "until the Commonwealth Parliament passed its jurisdiction".<sup>2</sup> The phrase "judicial power" thus had little force of its own in the then Chapter III; it was not taken to denote an Abstractly characteristic "nature"; it was tied to particular institutions that were or might be established under the leading section of Chapter III; it took its meaning from the defined or definable powers of these "courts" and not vice versa; it was limited by the then clause 71 to only

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1. 1898D, 319.

2. 1898D, 1656.

a number of matters normally dealt with by superior courts of justice. More than this, clause 71 was regarded not merely as a limiting clause, but as, in a sense, a defining clause.<sup>1</sup> The judicial power was taken to be defined as the power of the institutions, the federal courts, provided for in the leading clauses of Chapter III. So there was little reason to conclude that any and every tribunal with judicial characteristics must fall within "the judicial power" controlled by Chapter III. "Judicial power" was not yet such an embracing and limiting term. True, for Symon it was a concept "sufficient to embrace what is desired provided the machinery is good". But it was sufficient because it had been defined in sufficiently broad terms in the then clause 71, and it could be shaped and directed into whatever forms and procedures might be stipulated by the Constitution or by Parliament. There was no autonomous definition of "judicial power".

We must not push this interpretation too far, nor try to find coherent and consistent views where originally there was no more than thinly veiled confusion. Other inter-

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1. 1898D, 1882. As Barton said in March 1898: "[The power to issue writs of mandamus and prohibition against officers of the Commonwealth] would not [unless mentioned] be matters within the judicial power, and therefore would have to come into this clause [73]".: id.

pretations of these passages are possible. It might well be argued, for example, that Symon was thinking in terms of a model very similar to that of the effective majority in the Wheat Case; that is to say, a model in which Institutional characteristics are subordinate to "essential" characteristics in terms of Abstract, schematic and exhaustive classifications of governmental power by reference to quasi-logical distinctions between (say) "making" and "construing" law. This would explain Symon's reference in apparently Abstract terms to "the three elements", and his insistence that "judicial power exists quite irrespective of the procedure under which it is exercised". But it would make very bad sense of his part in the way the Convention went about providing for courts of conciliation and arbitration in s.51(xxxv), and setting up an Inter-State Commission, outside Chapter III, with powers of "adjudication" that Symon himself regarded as differing from the powers of the High Court only in the subject-matter of its jurisdiction.<sup>1</sup> It is more economical to suggest that Symon's and the Convention's thought was simply not moving on a fully Abstract plane, than to suggest that it was working within a fully Abstract schema, to the implications of which it was quite blind. The phrase "judicial power" was still a tool, not a master. At most, it excluded the category of the "political" from the purview of the Courts.

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1. 1898D,1521.

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