

Essential and Defining Characteristics of Courts in an Age of Institutional Change

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To call anything 'essential to' or 'defining of' anything else in the law is to invite raised eyebrows and sceptical enquiry. That is not surprising. Philosophers disagree about whether it can be said of anything that it has essential properties.¹ In 1993, the late Justice Graham Hill and I sat on a Full Court of the Federal Court in a sales tax appeal wrestling with the question whether chairs produced by a manufacturer of office furniture could answer the description 'goods of a kind ordinarily used for household purposes'.² The problem was that the taxpayer, a manufacturer of office chairs, sold some of its products to people who used them for household purposes. Very similar chairs were sold for household use by large retail chains. The case law invited us to enquire into the 'essential' character of household chairs. The metaphysical question was side-stepped. Hill J observed, with masterful understatement, that 'the phrase "essential character" may be thought itself to suffer some lack of precision'.³

Chairs come in all shapes and sizes with many design variations and accessories and special features which have developed over time. Nevertheless, it remains an essential characteristic of a chair that it can be sat on. The equivalent characteristic of the courts of the common law world is that they make decisions. But the courts, like chairs, are caught up in a process of constant change. The way they are constructed and composed, the kinds of decisions they make and how they make them, and their constitutional relationships to legislatures and executive governments, have evolved over centuries. The evolutionary process continues. Courts face pressures to change the way they do things and sometimes to do things which they

¹ Teresa Robertson, 'Essentials vs Accidental Properties', in Edward Zalta (ed) *The Stanford Encyclopaedia of Philosophy* (Stanford University, Fall ed, 2008).

<<http://plato.stanford.edu/archives/fall2008/entries/essential-accidental/>>.

² *Sales Tax (Exemptions and Classifications) Act 1935* (Cth), sch 3 item 1.

³ *Diethelm Manufacturing Pty Ltd v Commissioner of Taxation* (1993) 44 FCR 450, 470.

have not done before. Answers to the question — what should be regarded as the 'essential and defining characteristics of courts?' — may be contested and contestable. Those adjectives themselves have been criticised as conclusionary rather than explicative.⁴ In recent constitutional discourse they have been used to denote constitutionally protected characteristics. That use has not been informed by any complete theory of what are the things that make a court a court. The High Court has eschewed any attempt to construct such a theory. In *Forge v Australian Securities and Investments Commission*⁵ Gummow, Hayne and Crennan JJ said:

It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so.⁶

Despite the lack of a complete theory and some ongoing debate about State tribunals Australian judges and lawyers, generally speaking, know a court when they see one. Much of their knowledge is inherited from the common law which is part of Australia's constitutional foundation. The courts of the Australian colonies, as Bruce McPherson has written, exercised their powers 'in the manner of their judicial counterparts in the place of the law's origin'.⁷ Sir Victor Windeyer pointed out in *Kotsis v Kotsis* that the nature of courts was a matter well-known in England long before the Australian colonies began and that:

The meaning of the word 'court' has thus come to us through a long history; and it is by the light of that that it is to be understood in ss 71, 72 and 73 of the Constitution.⁸

That understanding extended to the requirements of fairness and impartiality.⁹ It included the notion that courts sit in public.¹⁰ The provision of reasons for decision as

⁴ Brendan Lim, 'Attributes and Attribution of State Courts - Federalism and the Kable Principle' (2012) 40 *Federal Law Review* 31, 46-47.

⁵ (2006) 228 CLR 45.

⁶ Ibid 76 [64].

⁷ Bruce McPherson, *The Reception of English Law Abroad*, (Supreme Court of Queensland Library, 2007) 405.

⁸ *Kotsis v Kotsis* (1970) 122 CLR 69, 91.

⁹ *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, 447 (Fry LJ).

¹⁰ *Daubney v Cooper* (1829) 10 B & C 237, 240; 109 ER 438, 440; *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50; *Russell v Russell* (1976) 134 CLR 495, 520.

an aspect of the judicial function was enunciated in the first edition of *Broome's Constitutional Law*, published in 1866:

A public statement of the reasons for a judgment is due to the suitors and the community at large ...¹¹

The want of a complete theory of what is a court has led to different views about whether certain tribunals created by State law are courts of the States for federal constitutional purposes. Tribunals which have been the subject of such consideration are the Anti-Discrimination Board of Tasmania¹², the Administrative Decisions Tribunal of New South Wales¹³ and the Queensland Civil and Administrative Tribunal.¹⁴

The task of defining courts and distinguishing them from other decision making bodies will always be incomplete. Nevertheless the endeavour to identify defining attributes is important for at least two reasons:

- First — In Australia the definition of characteristics of courts is relevant to the constitutional limits upon what they can be asked or required to do;
- Second — Even within those constitutional limits, which at State level allow for a good deal of institutional flexibility, the changes being imposed upon courts and which courts are themselves introducing affect in important ways the perceptions of their distinctive status as the third branch of government and in particular of their independence of the executive branch.

The first reason — the proposition that the defining characteristics of courts are of constitutional significance, has a long history particularly with respect to the position of federal courts under the Constitution and the doctrine of separation of

¹¹ Quoted in *De Iacovo v Lacanale* [1957] VR 553, 557–558 (Monahan J); *Wainohu v New South Wales* (2011) 243 CLR 181, 213 [54] (French CJ and Kiefel J).

¹² *Commonwealth v Wood* (2006) 148 FCR 276 which held the Tribunal to be a court but was overruled on other grounds in *Commonwealth v Anti-Discrimination Tribunal* (Tas) (2008) 169 FCR 85. Justice Kenny in the latter case also disagreed with Heerey J's conclusion in *Wood* that the Tribunal was a court for federal constitutional purposes.

¹³ *Trust Co of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77 which held that the Tribunal was not a court.

¹⁴ *Owen v Menzies* (2012) 293 ALR 571 which held that the Queensland Civil and Administrative Tribunal was a court for federal constitutional purposes.

powers enunciated in the *Boilermakers' Case*.¹⁵ With respect to State courts it has emerged most obviously from the line of decisions of the High Court beginning with *Kable v Director of Public Prosecutions (NSW)*.¹⁶ Those decisions stand for the general proposition that neither the courts of a State nor their members can validly be given functions which are repugnant to or incompatible with the institutional integrity of those courts. The concept of institutional integrity was explained in terms of the defining characteristics of courts by Gummow, Hayne and Crennan JJ in *Forge*:

if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.¹⁷

The importance of defining characteristics is evident in periods in which legislatures seek to shape the way courts operate in order to meet the perceived exigencies of the day. Those exigencies may relate to the prevention and punishment of crime. They may be reflected in attempts to make executive decisions final. The urgency of the pressures on governments and legislatures can sometimes lead to the enactment of laws without adequate reflection upon their unintended consequences and constitutional difficulties. Those circumstances can also lead to tensions between the courts and the other branches of government when legislative or executive action of political significance is found to exceed constitutional or other legal limits.

The second reason, that identification of essential or defining characteristics of courts is important, is what can be called a small 'c' constitutional reason. That is the need to maintain the distinctiveness of the public function of courts as the third branch of government. There have been creative endeavours to develop alternative dispute resolution processes linked to judicial processes in order to provide a kind of one stop shop for dispute resolution. There has also been much written and spoken and done about what is called broadly 'therapeutic jurisprudence'. It is no part of my task to deny the importance or utility of these developments. But the institutional arrangements under which they operate require careful consideration. Courts are not and should not be seen to be providers of a spectrum of consensual and non-

¹⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

¹⁶ (1996) 189 CLR 51.

¹⁷ (2006) 228 CLR 45, 76 [63]–[64]; see also *Wainohu v New South Wales* (2011) 243 CLR 181, 208–209 [44] (French CJ and Kiefel J).

consensual dispute resolution services. Nor should they be seen as providers of a range of social services. To the extent that they evolve in those directions there is a risk that they will be regarded, particularly by the executive branch of government, as just another kind of administrative agency.

These observations do not simply reflect a concern about the position of the courts in a governmental pecking order. There are important issues of principle and the practical delivery of justice involved. Professor Owen Fiss made the point in a paper published in the *Yale Law Journal* in 1984 entitled 'Against Settlement' when he described the task of courts in adjudication:

Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and Statutes: to interpret those values and to bring reality into accord with them.¹⁸

The point which Fiss made about the special character of public adjudication rewards reflection and indicates a need for careful consideration of the long term consequences of devaluing that function.

There is a practical dimension to adjudication by courts which flows from Professor Fiss' comment and was pointed out by former Chief Justice Murray Gleeson in a paper delivered in 1998. As the former Chief Justice observed in the imperative that is now attached to dispute resolution, the significance of dispute prevention is sometimes overlooked:

Especially in the area of commercial law, there is utility in both parties to a potential dispute receiving similar advice as to what the outcome of a dispute, if litigation results, is likely to be. That is the most common and effective form of dispute prevention.¹⁹

¹⁸ Owen Fiss, 'Against Settlement' (1983–1984) 93 *Yale Law Journal* 1073, 1085.

¹⁹ Chief Justice Murray Gleeson, 'The Future of Civil Justice — Adjudication or Dispute Resolution?' (Paper presented at the Australasian Law Teachers Association Conference, Dunedin, 7 July 1988). Published in (1999) 9 *Otago Law Review* 449, 455.

His Honour referred to an observation by Judge Richard Posner contrasting the services provided by the arbitrator or private judge hired by parties to a dispute to resolve it and what he called the full range of judicial services. Posner said:

The full range includes rule making through the issuance of opinions that interpret statutes, common law principles, rules and regulations, and constitutional provisions;²⁰

There has been over the past half century or so a tidal wave of enthusiasm in the United States and later in Australia for 'alternative', that is to say non-judicial, dispute resolution mechanisms. That enthusiasm is understandably driven by concerns about the costs, delays and stresses associated with court proceedings as well as undesired publicity which they may attract to the parties. But consistently with Professor Fiss' statement and the observations by former Chief Justice Gleeson, there have also been concerns about 'power imbalances, the privatised nature of alternative dispute resolution and the ensuing lack of precedent'.²¹ As one United States academic observed two years before Professor Fiss:

informal institutions deprive a grievant of substantive rights. They are antinormative and urge the parties to compromise; ... although this appears even handed, it works to the detriment of the party who is advancing a claim — typically the individual grievant.²²

The importance of maintaining the distinctive character and thereby the authority of courts and the judicial function is also relevant to the question whether and to what extent serving judges should undertake executive functions *persona designata* not related to the work of their courts. Constitutional limits have been defined by reference to a compatibility criterion affecting the kind of non-judicial work which federal judges can undertake. That criterion was enunciated in *Grollo v Palmer*²³ which concerned the use of federal judges to issue warrants under the *Telecommunications (Interception) Act 1979* (Cth). The Court held that no function could be conferred on a federal judge that was incompatible with the judge's

²⁰ Richard A Posner, *Overcoming the Law* (Harvard University Press, 1995) 114.

²¹ Mary Anne Noone, 'ADR, Public Interest and Access to Justice: The Need for Vigilance' (2011) 37 *Monash University Law Review* 57, 65.

²² Richard L Abel, 'The Contradictions of Informal Justice' in Richard L Abel (ed), *The Politics of Informal Justice* (Academic Press, New York, 1982) 267, 298.

²³ (1995) 184 CLR 348.

performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power. Markers of incompatibility included:

- A commitment to the performance of the non-judicial function that was 'so permanent and complete' that further performance by the judge of his or her judicial function would not be practicable.
- The non-judicial function being of such a nature that the capacity of the judge to perform his or her judicial functions with integrity would be compromised.
- The non-judicial function being of such a nature that public confidence in the integrity of the judiciary as an institution or in the capacity of the judge to perform his or her judicial function with integrity could be diminished.²⁴

The criteria for the validity of non-judicial functions conferred on State judges, acting as *persona designata*, were considered in the recent decision of the High Court in *Wainohu*.²⁵ The criteria of compatibility of non-judicial functions exercised by federal judges acting *persona designata* are relevant to that consideration. The criteria considered in *Grollo* derived from the doctrine of separation of powers which, at least in theory, applies more stringent criteria in the case of federal judges than the *Kable* principles do in respect of State judges. If a non-judicial appointment conferred upon a State judge does not transgress the federal criteria of incompatibility there should not be a difficulty about validity under the *Kable* principle.²⁶ The principles derived from *Kable* and *Wainohu*²⁷, would suggest that a State legislature cannot enact a law conferring on a State judge a non-judicial function which is substantially incompatible with the functions of the court of which that judge is a member. Questions about a State judge exercising a non-judicial function under a federal law are yet to be explored.

²⁴ (1995) 184 CLR 348, 365.

²⁵ (2011) 243 CLR 181.

²⁶ *Baker v The Queen* (2004) 223 CLR 513; 534 [5] (Gleeson CJ).

²⁷ (2011) 243 CLR 181, 210 [47] (French CJ and Kiefel J).

The significance of the acceptance by judges of non-judicial appointments unrelated to the work of their courts extends beyond issues of constitutional validity. Such appointments are made because of the authority of the judicial office and the assumed possession of the relevant competencies by the judicial office holder. Sometimes such appointments trade on the social capital attaching to the judicial office. The circumstances in which such appointments are appropriate, those in which they are debateable, and those in which they are a bad idea, like most things in the law, cannot be neatly classified and listed.

Some thirty–five years ago, in 1978, a leading Australian political scientist, Professor Gordon Reid, wrote about the use of judges in executive roles and said:

Modern developments in Australian national government give the impression that the conventional political institutions — Parliament, Executive and Judiciary — are being treated by policy-makers as inconvenient differentiations of a single activity — government.²⁸

In the same year, Sir Gerard Brennan, then a judge of the Federal Court of Australia and President of the Administrative Appeals Tribunal, acknowledged the risk of a loss of public confidence in the judiciary related to the disparity between non-judicial functions which might be performed by a judge and functions traditionally performed by the courts. He said:

But the risks must be run, or the institution of the judiciary may lose its relevance or, at the least, fall short of discharging fully the functions which the community would commit to it.²⁹

There are many examples of State and Federal judges occupying non-judicial offices which involve significant commitments of time out of court. Those functions have included the leadership or membership of administrative tribunals, law reform commissions and of course royal commissions some of which have been of substantial duration and involved politically contentious issues. In making these observations I do not speak critically. Outside the limits imposed by the Constitution on such appointments there is much room for reasonable people to have different

²⁸ Gordon Reid, 'The Changing Political Framework' (January-February 1980) 24 *Quadrant* 1,14.

²⁹ Gerard Brennan, 'Limits on the Use of Judges' (1978) 9 *Federal Law Review* 1, 14.

points of view. In my own case, while a serving judge of the Federal Court I accepted appointment for a total of nearly five years between 1994 and 1998 as President of the National Native Title Tribunal (the NNTT). It was not a judicial office. The NNTT was largely a mediation and arbitral body although its processes were linked by statute to the adjudicative processes of the Federal Court in relation to native title claims.

Under the *Native Title Act 1993* (Cth) the President had to be a judge of the Federal Court or a former judge. One small success which I had in that office was to persuade the Government to change the qualifications so that a legal practitioner of five years or more standing could be appointed. The role was not one which required a judge serving or retired. The change was made but not without significant opposition from indigenous groups who regarded it as a downgrading of the importance of the NNTT. Commissioner Mick Dodson wrote in his 1996 Native Title Report:

With the significant and unusual functions of the NNTT, it is vital that it be perceived as credible and impartial. This perception would be undermined if the President and the Deputy President of the NNTT were not required to have judicial experience. I therefore believe that the proposed amendment is inappropriate.³⁰

In debate in the Senate in 1997 a number of points were made against the amendment. They included:

- a concern that the Government might appoint members who would be the Government's bidding;
- a belief that to change the qualifications would 'lower' the stature of the NNTT;

³⁰ Commonwealth, *Native Title Report 1995–1996*, Report of Mick Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission (1996). Quoted in Commonwealth, *Parliamentary Debates*, Senate, 1 December 1997, 9902 (Dee Margetts).

- judges were less likely to be influenced by the government which had appointed them than a lawyer.³¹

The opposition to the amendment tended to demonstrate the way in which social capital attached to judicial office was seen as enhancing the status and effectiveness of a non-judicial function.

History shows a number of oddities in the assumption of significant non-judicial roles by serving judges which have nothing to do with the application of judicial skills. History apart, it is difficult to fathom any contemporary rationale for the appointment of State Chief Justices as Lieutenant-Governors of their States, given that in that role Chief Justices may be required to preside over meetings of the Executive Council and sign into law Acts enacted by the Parliament or proclaim Regulations made under those Acts. Our judicial history is replete with such anomalous occurrences. Sir Owen Dixon and Sir John Latham both accepted ambassadorial appointments in the early 1940s while serving Justices of the High Court. There is a certain irony in the title of a paper which Sir Owen Dixon delivered to the American Foreign Law Association in 1942 while occupying the office of Ambassador to the United States. The paper was delivered under the formal designation which His Honour then enjoyed of 'Australian Minister to the United States' and was entitled 'The Separation of Powers in the Australian Constitution'. Many years later he said 'I do not wish it to be thought that, looking in retrospect, I altogether approve of what I myself did'.³² The clarity of long rearward vision should not be justification for criticism about such occurrences but rather for reflection upon the characteristic untidiness of the evolution of legal institutions and principles.

The doctrine of separation of powers under the Constitution of which Sir Owen Dixon spoke in 1942 applies to federal courts and federal judges. The *Kable* principles apply to State and Territory courts. Both the *Boilermakers'* and *Kable* decisions and decisions which flowed from them have implications for the acceptance of non-judicial appointments by serving judges. All of this directs our attention back

³¹ Commonwealth, *Parliamentary Debates*, Senate, 1 December 1997, 9902 (Dee Margetts).

³² Sir Owen Dixon commenting on John Dashwood Holmes 'Royal Commissions' (Paper presented at the Ninth Legal Convention of the Law Council of Australia, Brisbane, 22 July 1955) reproduced in (1955) 29 *Australian Law Journal* 253, 272.

to the most important thing which courts and judges do, which is to exercise judicial power.

Judicial power

At the heart of all judicial power, as Griffiths CJ observed in *Huddart Parker & Co Pty Ltd v Moorehead*, is:

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.³³

That description is not exhaustive. As Dixon CJ and McTiernan J said in *R v Davison*³⁴ there were many proceedings falling within the jurisdiction of various courts of justice in English law in which the elements of controversy between subjects and the determination of existing rights and liabilities were 'entirely lacking'. Historically, courts gave directions as to the administration of trusts, made orders relating to the maintenance and guardianship of infants and made declarations of legitimacy. They also exercised administrative functions as an incident of, or ancillary to, judicial power. And as was stated in a joint judgment of six Justices in *Dalton v New South Wales Crime Commission*:

From a time well before federation the courts of the Australian colonies, like those in England and elsewhere in the Empire, exercised a range of administrative and investigative functions. Provisions for the examination of judgment debtors, bankrupts, and officers of failed corporations are in point.³⁵

In *Thomas v Mowbray*³⁶ a majority of the High Court held that s 104.4 of the *Criminal Code Act 1995* (Cth) ('the Criminal Code'), which provides for the making of control orders, was valid as conferring judicial power. Their Honours referred to similar functions exercised historically by courts. One such function, referred to in the judgment of Gleeson CJ, was the 'ancient power of justices and judges to bind

³³ (1909) 8 CLR 330, 357. See also *R v Trade Practices Tribunal; Ex Parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Kitto J); 394–395 (Windeyer J).

³⁴ (1954) 90 CLR 353, 368.

³⁵ (2006) 227 CLR 490, 507–508 [45] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ) (citations omitted).

³⁶ (2007) 233 CLR 307, 334 [29] (Gleeson CJ); 341 [59]; 351 [93] (Gummow and Crennan JJ); 508 [599] (Callinan J); 526 [651] (Heydon J).

persons over to keep the peace'.³⁷ This was what Gummow and Crennan JJ described as 'preventive measures imposed by court order, but falling short of detention in the custody of the State'.³⁸

In September last year the High Court refused special leave to appeal from the decision of the Court of Appeal of Western Australia in *Saraceni v Jones*.³⁹ The case concerned the validity of provisions of the *Corporations Act 2001* (Cth) under which a receiver could apply to a court for mandatory examination of a person about the examinable affairs of a corporation. Their Honours observed:

The making on application of a receiver of a mandatory examination order is an action of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system.⁴⁰

The reluctance to formulate a comprehensive list of the essential and defining characteristics of courts can be related to the reluctance to formulate a comprehensive definition of judicial power. The finding of facts and the making of value judgments, the formation of opinions as to legal rights and obligations, and the exercise of discretion are common ingredients of judicial power but may also be elements of the exercise of administrative and legislative power.⁴¹ As the plurality said in *Brandy v Human Rights and Equal Opportunity Commission*:

Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic. Moreover, there are functions which, when performed by a court, constitute the exercise of judicial power but, when performed by some other body, do not.⁴²

Much has been written about the scope and limits of the judicial power of the Commonwealth exercised by federal courts and courts upon which federal jurisdiction

³⁷ Ibid 329 [16].

³⁸ Ibid 357 [121].

³⁹ (2012) 86 ALJR 1181; 291 ALR 188.

⁴⁰ (2012) 86 ALJR 1181, 1182 [3].

⁴¹ *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 188–189.

⁴² (1995) 183 CLR 245, 267 (citations omitted). See also *Pasini v United Mexican States* (2002) 209 CLR 246, 254; *H A Bacharach Pty Ltd v Queensland* (1998) 195 CLR 547, 562 [15]; *Sue v Hill* (1999) 199 CLR 462, 481–481 [32].

is conferred. That power is defined in terms of jurisdiction conferred or invested with respect to the 'matters' set out in ss 75, 76 and 77 of the Constitution. The proposition that Commonwealth judicial power is not exhaustive of judicial power was touched upon in *Re Judiciary and Navigation Acts*.⁴³ In 1921, s 88 of the *Judiciary Act 1903* (Cth) purported to confer upon the High Court jurisdiction to make determinations about the validity of Acts of Parliament if the Court were asked to do so by the Governor-General. The Court held s 88 itself to be invalid. While the section conferred judicial power on the Court it was not the judicial power of the Commonwealth.⁴⁴ That was because in proceedings under s 88 there was no 'matter', that is to say no 'immediate right, duty or liability to be established by the determination of the Court'.⁴⁵ However, in the *Boilermakers' Case*⁴⁶ the Court questioned the reasoning of the majority in *Re Judiciary and Navigation Acts*. Their Honours said:

With reference to the federal judicature, the true contrast in federal powers is not between judicial powers lying within Chap III and judicial power lying outside Chap III. That is tenuous and unreal. It is between judicial power within Chap III and other powers.⁴⁷

The courts of the States are not confined to the exercise of judicial power as they are not subject to the strictures of the doctrine of separation of powers. However, the question whether or not a function conferred upon a State court involves the exercise of judicial power may be relevant to whether any appeal lies to the High Court in respect of a decision made in the exercise of that function. In that connection there was discussion in *Momcilovic v The Queen*⁴⁸ about whether a declaration of incompatibility under the *Charter of Human Rights and Responsibilities Act (2006)* (Vic) was incidental to the exercise of judicial power by the Supreme Court of Victoria.

⁴³ (1921) 29 CLR 251.

⁴⁴ Ibid 264 (Knott CJ, Gavan, Duffy, Powers, Bridge and Stark JJ).

⁴⁵ Ibid 265. See also *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511, 542 [10]; *Kable* (1996) 189 CLR 51, 136–137 (Gummow J).

⁴⁶ (1956) 94 CLR 254.

⁴⁷ Ibid 274. See also James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113, 118.

⁴⁸ (2011) 245 CLR 1.

Against that background some reference should be made to the doctrine of separation of powers in relation to State courts.

Separation of powers

The doctrine of separation of powers has not been found to have a general application to State courts. There have been over the years a number of unsuccessful challenges to State laws on the basis that they offended against the doctrine. Professor Carney⁴⁹ observed that they have failed for two principal reasons:

- The inability to derive any intent from the relevant State Constitutions to vest the judicial power of the state exclusively in its courts; and
- The lack of entrenchment of those provisions which concern the judicial branch.

In *Kable* a majority of the Court held that the New South Wales Constitution does not embody a doctrine of the separation powers.⁵⁰ As a general proposition, reiterated by four Justices of the High Court in a judgment delivered in December 2012,⁵¹ the doctrine of separation of powers as developed and applied in the *Boilermakers' Case* in respect of the Commonwealth Court of Conciliation and Arbitration does not apply to the States.⁵²

The absence of formal separation of powers doctrines applicable to State courts may be mitigated or qualified, depending on your point of view, by the effects of *Kable* and subsequent decisions. McHugh J pointed out in *Kable* that the effects of

⁴⁹ Gerard Carney, *The Constitutional Systems of the Australian States and Territories*, (Cambridge University Press, 2006) 344-5; *Clyne v East* (1967) 68 SR(NSW) 385; *Nicholas v Western Australia* [1972] WAR 168; *Gilbertson v South Australia* (1976) 15 SASR 66; *Building Construction Employees and Builder's Labourers Federation of New South Wales v Minister for Industrial Relations (NSW)* (1986) 7 NSWLR 372; *Collingwood v Victoria (No 2)* [1994] 1 VR 652.

⁵⁰ (1996) 189 CLR 51, 65 (Brennan CJ), 79 (Dawson J), 92-94 (Toohey J), 103-104 (Gaudron J), 109-110 (McHugh J).

⁵¹ *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 87 ALJR 162; (2012) 293 ALR 450.

⁵² *Ibid* 175, [57] (Hayne, Crennan, Kiefel and Bell JJ); *Kable* (1996) 189 CLR 51, 78-80 (Dawson J), 92-94 (Toohey J), 109, 118 (McHugh J); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573 [69].

Ch III of the Constitution may in some situations lead to the same result as if the State had an enforceable doctrine of separation of powers. The limits upon the power of State legislatures to make laws affecting State courts and their decisions as enunciated in *Kable* are however not adequately described as effecting a de facto separation of powers. Those limits are embodied in the following propositions:

- State legislatures cannot abolish State Supreme Courts⁵³ nor impose upon them functions incompatible with their essential characteristics as courts nor subject them in their judicial decision making to direction by the executive.⁵⁴
- A State legislature cannot authorise the executive to enlist a court of the State to implement decisions of the executive in a manner incompatible with the courts institutional integrity.⁵⁵
- A State legislature cannot enact a law conferring upon a judge of a State court a non-judicial function which is substantially incompatible with the functions of the court of which the judge is a member.⁵⁶
- State legislatures cannot immunise statutory decision makers from judicial review by the Supreme Court of the State for jurisdictional error⁵⁷.

There are some elements of those propositions which, as McHugh J predicted in *Kable*, produce outcomes similar to those flowing from the doctrine of separation of powers. However, putting to one side the inability of State legislatures to abolish Supreme Courts or to deprive them of their traditional supervisory jurisdiction, a key concept underpinning the stated limits is that of institutional integrity. That concept has been developed in terms of essential or defining characteristics which mark courts apart from other decision-making bodies. The identification of such characteristics in the case law has been a step-wise process since *Kable*.

⁵³ *Kable* (1996) 189 CLR 51, 103 (Gaudron J), 111 (McHugh J), 139 (Gummow J), *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 543–544 [151]–[153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

⁵⁴ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319.

⁵⁵ *South Australia v Totani* (2010) 242 CLR 1, 52 [82] (French CJ), 67 [149] (Gummow J), 92–93 [236] (Hayne J), 160 [436] (Crennan and Bell JJ), 173 [481] (Kiefel J) (*Totani*).

⁵⁶ *Wainohu* (2011) 243 CLR 81, 210 [47] (French CJ and Kiefel J).

⁵⁷ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

A list of defining characteristics

When judges and lawyers make lists they are typically stated to be non-exhaustive. That is so whether they are factors relevant to a discretion or to the exercise of evaluative judgments or to some process of characterisation under the Constitution, a statute, or the common law. Any list of essential or defining characteristics of courts is necessarily non-exhaustive. Characteristics commonly regarded as essential are:

- The conferring upon the court of judicial power — that is to say the authority and duty to decide controversies and to discharge functions traditionally regarded as a subject of judicial power or analogous to such functions.
- The reality and appearance of decisional independence from the executive and from the legislature.
- Adherence to procedural fairness effected by:
 - (i) Impartiality, in reality and appearance;
 - (ii) Observance of the hearing rule.
- Adherence to the open court principle.
- Accountability for decisions effected by publication of reasons.

Other characteristics have been debated or are debatable. They include:

- The ability on the part of the tribunal to enforce its own orders. This was held not essential in *Brandy v Human Rights and Equal Opportunities Commission*.⁵⁸
- That a court is a body composed of judges whose terms and conditions of appointment are not inconsistent with decisional independence.

⁵⁸ (1995) 183 CLR 245, 269.

- That a court is a body whose members enjoy decisional independence from each other. The significance of decisional independence in multi-member courts at intermediate or final appellate level would no doubt arise for consideration if a law were passed requiring such courts to produce only one majority judgment and prohibiting the publication of dissenting judgments. I hasten to add that is not a suggestion, but rather a thought experiment for reflection upon what is and is not essential to the characterisation of a decision-making body as a court.

Perhaps the most important of the characteristics of a court is its decisional independence from the executive and from other external influences. It is important that that concept retain its clarity and sharpness lest it lose its power. It should not lightly be deployed in aid of special pleading by judges relating to such incidental matters as the content of particular terms and conditions of judicial remuneration.

Decisional independence

The characteristic of decisional independence from the executive government and the appearance of such independence was considered by the High Court in *State of South Australia v Totani*.⁵⁹ That case involved a successful attack upon the validity of s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA). Under s 14(1) the Magistrates Court was required, on application by the Commissioner of Police, to make a control order against a person if the Court was satisfied that the person was a member of a declared organisation. The power of declaring an organisation for the purposes of the Act reposed in the Attorney-General. The High Court, dismissing an appeal from the Full Court of the Supreme Court of South Australia, held s 14 (1) to be invalid on the basis that it authorised the Executive to enlist the Magistrates Court to implement decisions of the Executive in a manner which was incompatible with the proper discharge of that Court's federal judicial responsibilities and its institutional integrity. It represented a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process and gave the neutral colour of a judicial decision to what would be to the most part in

⁵⁹ (2010) 242 CLR 1.

most cases the result of executive action which involved findings about a number of factual matters including the commission of criminal offences.⁶⁰

In distinguishing the legislation in *Totani* from s 104.4 of the Criminal Code which provided for the issue of control orders and was upheld in *Thomas v Mowbray*, Gummow J observed that in the latter case there had been no anterior determination by the Executive branch which was an essential element in the curial decision.⁶¹ Hayne J who also held the provision invalid pointed out that it required the Court to act at the behest of the Executive:

It is the Executive which chooses whether to apply for an order, and the Executive which chooses the members of a declared organisation that are to be made subject to a control order. So long as the person named as a defendant falls within the definition of "member" the Court cannot refuse the Executive's application; the Court must make a control order.⁶²

Crennan and Bell JJ found that the legislation deprived the court of the characteristics of an independent and impartial tribunal 'those defining characteristics which mark a court apart from other decision-making bodies'.⁶³ Kiefel J wrote to similar effect and referred to the statement of the United States Supreme Court in *Mistretta v United States*⁶⁴ that the reputation of the judicial branch may not be borrowed by the legislative and executive branch 'to cloak their work in neutral colors of judicial action'.⁶⁵

A challenge to legislative action said to impinge indirectly upon the decisional independence of a court was made in *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment*,⁶⁶ judgment in which was delivered on 12 December 2012. The impugned provision was s 146C of the *Industrial Relations Act 1996* (NSW). The section requires the Industrial Relations Commission of New South Wales when making or varying an award or order to give effect to any policy on the conditions of employment of public

⁶⁰ Ibid 52 [81] (French CJ).

⁶¹ Ibid 65 [140] (Gummow J).

⁶² Ibid 89 [229].

⁶³ Ibid 157 [428].

⁶⁴ (1989) 488 US 361, 407.

⁶⁵ *Totani* (2010) 242 CLR 1, 172 [479].

⁶⁶ (2012) 87 ALJR 162; (2012) 293 ALR 450.

sector employees that is declared by regulation to be an aspect of government policy to be given effect to by the Commission. The Public Service Association challenged the validity of the law on the basis that it imposed a requirement upon judicial members of the non-judicial Commission who are also members of the Industrial Court to give effect to government policy when sitting as the Commission other than in Court Session. It was submitted that the section undermined the institutional integrity of the Industrial Court having regard to the overlapping composition and the proximate operations and functions of the Commission and that Court. The challenge was rejected. As was stated succinctly in the joint judgment of Hayne, Crennan, Kiefel and Bell JJ:

In performing its functions, the Commission must act according to law. That s 146C and the Regulation refer to the rules and principles which may be, or have been, made by regulation as statements of "policy" or 'government policy' does not deny that those rules and principles form a part of the body of law which governs the Commission's performance of its arbitral functions. The institutional integrity of the Industrial Court is not, and cannot be said to be, affected by its members applying the law when performing non-judicial functions.⁶⁷

Courts must apply the law. The laws enacted by the legislature are frequently initiated by the executive government to give effect to policies agreed upon by that branch of government. In applying such laws the courts do no more than they are required to do consistently with the rule of law.

Sometimes difficult questions can arise when it is said that legislation is framed so as to direct a court on the outcome of a particular case as distinct from making a rule of law applicable to that case. Such contentions require careful consideration of the legal effect of the legislation. Beyond the constitutional framework contentious questions of public policy can arise when judicial discretion is reduced or removed as in the case of so called mandatory minimum sentences which can produce unintended injustices because they do not allow, as justice requires, different cases to be treated differently. However, judicial discretion and decisional independence are rather different concepts and it is important not to invoke one inappropriately in aid of the other.

⁶⁷

Ibid 175 [58].

Conclusion

Questions about the essential and defining characteristics of courts will continue to be asked. Questions about the utility of those questions will continue to be asked. They will be asked in an environment in which courts and judges are given functions or invited to assume functions some of which, in the words of Professor Gordon Reid, are calculated to overcome the inconvenient differentiations of the activity of government reflected in the institutions of Parliament, the Executive and the judiciary.⁶⁸ And as Justice Brennan remarked in responding to those impositions or invitations, courts and judges will bear in mind the risk of loss of institutional relevance to the needs of the community.⁶⁹ In balancing up those factors a strong working hypothesis of what are the essential and defining characteristics of courts, of things upon which there should be no compromise, should be maintained.

⁶⁸ Reid, above n 28.

⁶⁹ Brennan, above n 29.