

## THE RULE OF LAW AND THE SEPARATION OF POWERS

DENISE MEYERSON

The rule of law is the opposite of the rule of power. It stands for the supremacy of law over the supremacy of individual will. But to say this is to speak only in the most general of terms. As in the case of all abstract political ideals, the requirements of the rule of law are contested. The separation of powers doctrine is also a complex and contested notion, and the extent to which it supports the rule of law therefore depends, in part, on how its requirements are understood. This volume of the *Macquarie Law Journal* explores the meaning of the rule of law as well as the extent to which the separation of powers – the principles of dividing and balancing power – can be used to advance rule of law values.

Dicey, as is well-known, stressed three features of the rule of law: the need to curb the conferral of discretionary power on government officials in the interests of certainty and predictability; the ability to seek a remedy in independent courts should the government act illegally; and the importance of equality before the law.

The importance of controlling the conferral of wide and unguided powers on the executive is dealt with in the context of delegated legislation by Caroline Morris and Ryan Malone. It is obvious that, for reasons of practicality and convenience, the legislature must be able to delegate legislative power to the executive. At the same time, if the executive is given a blank cheque to determine the fundamental policy of the law, the ideal of government under law – government constrained by legal norms announced in advance – is threatened. This is one area in which the doctrine of the separation of powers serves the ends of the rule of law because the separation of powers speaks likewise against the unrestricted delegation of legislative power. No doubt there cannot be a total separation of legislature and executive in a parliamentary system of government, but the values served by the separation of powers suggest that there must be limits on the extent to which legislative power can be transferred to the executive. For one thing, the conferral of unfettered power on the executive to make law creates the danger of the concentration of power in one branch of government – a danger which it is a primary purpose of the separation of powers doctrine to guard against. Secondly, if those who are not our elected representatives are given the power to legislate on contentious policy matters, the legitimacy and authority of law are jeopardised. Morris and Malone discuss the dangers of unlimited delegation. They then go on to examine the role of parliamentary committees in New Zealand in scrutinising regulation-making

powers and recommending changes to bills which delegate overly-broad regulation-making powers or allow the executive to legislate on matters more suitable for primary legislation. They argue that the Regulations Review Committee has played an invaluable role as constitutional watchdog in New Zealand.

Dawn Oliver, by contrast, is more pessimistic about the ability of internal scrutiny processes in government to safeguard rule of law values, at any rate in the United Kingdom. She takes the view that the rule of law and various other fundamental moral and political principles and values are implicit in British constitutional arrangements. Yet, as she shows, the current intra-governmental and parliamentary processes for scrutiny of bills and draft bills in the United Kingdom have not been effective in preventing the enactment of legislation which is in conflict with these fundamental values. Oliver concludes that norms such as the rule of law operate most effectively in 'the shadow of the law' and especially where there is the prospect of judicial invalidation of legislation which conflicts with them.

If law is effectively to restrain power, it is not enough, as Dicey saw, that the exercise of power should be authorised by clear legal rules. Government officials must also obey the rules which Parliament has enacted and this can only be ensured if the courts have the jurisdiction to enforce the legal limits which govern the exercise of executive power. It follows that privative clauses – provisions which attempt to limit or exclude the ability of individuals to challenge the abuse of power by government officials in independent courts – are an assault on the rule of law. In *Church of Scientology v Woodward* Brennan J spoke in just such terms about the role played by judicial review in securing the rule of law, saying:

[j]udicial review is neither more nor less than the enforcement of the rule of law of executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.<sup>1</sup>

This aspect of the rule of law – the accountability aspect - is once again supported by the separation of powers. In this case it is the separation of judicial from executive power which is engaged. In providing that only the courts can exercise judicial power the doctrine prevents government officials from having the last word on whether they have acted illegally.<sup>2</sup> The separation of judicial power thereby provides for an effective check on the executive branch.

Geoff Airo-Farulla and Steven White discuss the way in which the separation of powers doctrine secures the rule of law interest in access to the courts for the purposes of judicial review. They then go on to investigate whether the High Court has made adequate use of the doctrine in the context of private self-regulatory bodies that exercise functions of public administration. The High Court has tended to be flexible about the functions that can be conferred on traditional administrative

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<sup>1</sup> *Church of Scientology v Woodward* (1982) 154 CLR 25, 70.

<sup>2</sup> See *Plaintiff S157/2002 v Commonwealth* (2003) 77ALJR 454, 473.

agencies provided that there is some mechanism for judicial oversight. Airo-Faurulla and White argue, however, that it has not been sufficiently attentive to the need for judicial oversight in the regulatory context and in the process has disregarded the underlying accountability rationale of the separation of powers.

Another key element of the rule of law is the principle that disputes should be and appear to be decided according to the law and nothing but the law.<sup>3</sup> If judges depart from the law on the basis of their personal moral and political views, we risk judicial lawlessness. And if the adjudication of disputes is influenced by external, political pressures, it becomes impossible to control the exercise of power by the political branches of government. Here, too, there is a connection between the separation of powers and the rule of law: in this case, the separation of powers serves the rule of law by insisting that only our elected representatives should make law and by confining the exercise of the judicial function to a branch of government which – in virtue of tenure and remuneration protections – is independent of domination or manipulation by the political branches. As Ralf Dahrendorf notes,

such independence of the ‘judicial department’ may indeed be regarded as the very definition of the ‘rule of law’: it is certainly an important part of it .... [T]he partisan administration of law is in fact the perversion of law, and the denial of the rule of law.<sup>4</sup>

Andrew Lynch’s article reveals a connection between the integrity of the judicial process as described above, the separation of judicial power and the practice of judicial dissent. His starting point is the way in which the separation of powers protects the essential features of the curial process. There are a number of suggestions in recent High Court cases to the effect that the legislature cannot require or authorise federal courts to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power. Any such attempt is seen as a breach of the separation of judicial power. Extrapolating from this, Lynch argues that to suppress the expression of dissent would be inconsistent with the essential requirements of a federal court and therefore a breach of the separation of judicial power. This is because it is essential to our conception of a court that its conclusions are based on legal reasoning and the presence of dissenting judgments provides evidence that judges are engaged in a reasoned dialogue in the service of a legal rather than a political enquiry. Lynch’s argument therefore suggests that the separation of judicial power guarantees a practice which safeguards the principled exercise of judicial power, in the process serving the rule of law.

Helen Irving discusses the desirability of the High Court being empowered to give advisory opinions regarding the constitutionality of legislation. She considers this question from the perspective of both the rule of law and the separation of powers.

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<sup>3</sup> Joseph Raz, ‘The Rule of Law and its Virtue’ (1977) 93 *Law Quarterly Review* 195, 201.

<sup>4</sup> Ralf Dahrendorf, ‘A Confusion of Powers: Politics and the Rule of Law’ (1977) 40 *Modern Law Review* 1, 9.

Many commentators argue that an advisory opinion jurisdiction would advance rule of law values because the prospect of constitutional invalidation creates uncertainty about the applicable law. They say – as Irving points out - that we have the right not to be faced with the choice of making arrangements on the basis that the law is valid, running the risk of prosecution for disregarding it, or challenging its validity at our own expense. In so far as the separation of powers is concerned, the arguments are more ambiguous. On the one hand, on a Madisonian view of the separation of powers, the aim is to promote individual liberty by providing for the mutual checking and control of the different branches of government. On this view, the doctrine insists merely that one branch should not possess *all* the power of another. It does not rule out the different branches having *partial* agency in and *some* control over the others. If the separation of powers is understood in this way, advisory opinions might not breach the doctrine. On the other hand, as Irving shows, there is the possibility that advisory opinions would involve the High Court too closely with the political branches of government, thereby undermining public confidence in its independence. If so, advisory opinions might well pose a threat to the separation of powers. Irving argues that much would depend on the details of the scheme. If, for instance, the opinions were to be compulsory and tendered directly to the executive in confidence, public confidence in the independence of the Court would be more likely to be put at risk. In the end, however, Irving's main objections to an advisory opinion jurisdiction are on the grounds that the potential contribution of advisory opinions to certainty (and therefore the rule of law) has been exaggerated and that there is a range of ways in which the effect of invalidation is minimised in practice.

All the elements of the rule of law canvassed so far are compatible with a 'formal' or 'thin' conception of the rule of law, meaning by this a conception of the rule of law which places no constraints on the content of law and is therefore compatible with great iniquity in the law.<sup>5</sup> There are many who defend such a minimalist conception – Dicey, Hayek and Raz are examples. By contrast, those who hold to a substantive conception of the rule of law believe that a commitment to the rule of law entails, in addition to the formal checks on power already mentioned, certain substantive moral constraints on the exercise of state power. Cameron Stewart explores this view in his article. On the substantive conception of the rule of law, the supremacy of law over will necessarily involves also the supremacy of law over *parliamentary* will: democratically elected majorities should also be subjected to the law. In effect, the rule of law is seen as a 'higher' law, capable of trumping parliamentary sovereignty – a notion with obvious roots in the natural law tradition. Trevor Allan, for instance, argues that legislation which seeks to override fundamental human rights, such as the rights to due process, equality and freedom of speech, is incompatible with the rule of law. He takes this view because he believes the rule of law is based on the ideal of consent to just laws. Since laws

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<sup>5</sup> Cheryl Saunders and Katherine Le Roy use the metaphor of 'thin' and 'thick' versions of the rule of law in 'Perspectives on the Rule of Law' in C Saunders and K Le Roy (eds), *The Rule of Law* (2003) 5-6.

which violate fundamental human rights would not command the free assent of citizens, they are, on his view, incompatible with the rule of law.

Lon Fuller is well-known for stressing the formal aspects of the ideal of legality. For Fuller, law should be general, public, prospective, clear, non-contradictory, able to be complied with and relatively stable. In addition, those who are charged with the administration of the law should not disregard it. Yet Fuller also believes that these formal characteristics have a substantive dimension. He argues that a system of rules which displays these virtues presupposes reciprocity between government and citizen – a tacit co-operation between them – which carries substantive moral commitments in its wake. Such a system is not an ‘amoral datum’ but an achievement worthy – at least to some extent – of moral respect. It is this view which Cameron Stewart ultimately defends against a number of critics. These include Marxists, feminists and critical legal scholars, who argue that the rule of law is an ideological doctrine which is incapable of delivering on its universal-seeming promises, as well as sociologists who argue that the rule of law is politically and socially outdated

Interestingly, it appears from Cora Hoexter’s article that the Constitutional Court of South Africa takes a substantive approach to the notion of the rule of law in the administrative law context. There are a number of features of South Africa’s administrative law environment which are troubling from the perspective of those who believe that the exercise of public power should meet normative standards of fair administration. Firstly, the courts have traditionally tried to limit the availability of judicial review of administrative action at common law and in the apartheid era did little to use the resources of administrative law to protect citizens from the invasion of their rights. Secondly, though s 33 of the South African Constitution grants ‘the right to administrative action that is lawful, reasonable and procedurally fair’, the phrase ‘administrative action’ cuts down on the reach of the s 33 guarantee. Thirdly, the post-apartheid statute providing for judicial review, the *Promotion of Administrative Justice Act*, again applies only to administrative action – which the Act then goes on to define in a peculiarly narrow way.

Yet the Constitutional Court of South Africa has said that the Constitution protects against the unlawful and unreasonable use of public power regardless of whether such use qualifies as administrative action. Furthermore, the Court has said that in terms of the Constitution any exercise of public power must be ‘objectively rational’. It justifies these conclusions on the basis that there is an unwritten principle of legality contained within the South African Constitution, which the Court describes as part of the doctrine of the rule of law. It seems that this foundational value of the constitutional order imposes normative constraints on the exercise of public power which go further than the Constitution’s written guarantee of administrative justice, entitling courts to quash the exercise of public power in circumstances where the Constitution is silent. Notwithstanding their omission from s 33, substantive unfairness and lack of proportionality could well be found to be grounds of review in terms of this argument.

Finally, Iain Stewart focuses on the internal flaws in the ideas of the separation of powers and the rule of law, and their ideological nature, via an exploration of the work of the writers to whom these ideas are normally attributed – that of Montesquieu, Dicey and, to some extent, Aristotle. Stewart exposes the way in which certain stereotypes about the views of these theorists have been perpetuated and calls attention to the social and economic interests which informed their beliefs. It is, for instance, striking, as he points out, that Dicey's fear of the arbitrary exercise of power did not extend to the judiciary: Dicey simply assumed that the judges of his day could be trusted to protect the nation's interests. Stewart discusses the danger of the abuse of judicial power, though, by contrast with the other contributors to this volume, he is more sceptical about the ability of the rule of law concept to curb this and other excesses of power. He suggests that the separation of powers doctrine should be replaced and that the idea of the rule of law should be rejected in favour of the more realistic debate on legality.