Welfare State or Constitutional State?

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To Rusri and Adrian

Foreword

Michael James

The constitutional dimension of public policy is not easy to bring into focus in countries that enjoy the parliamentary system of government. This is for two related reasons. First, the distinction between the executive and the legislative functions of government has been almost obliterated by the growth of delegated legislation, which in effect allows the executive to make the law as it goes along. Second, parliamentary systems enjoy a very high level of legitimacy: governments are thought, by their opponents no less than their supporters, to have the right to do virtually as they please in the economic and social areas so long as they submit themselves regularly to the judgment of the voters. To most people, the question of whether a piece of legislation observes objective constitutional standards, most crucially the principles of the rule of law, simply never arises.

Yet the analysis of political processes undertaken by modern public choice theorists reveals that legislation cannot be a truly democratic reflection of public opinion unless it operates by way of general and impersonal rules. The more open-ended a law is, the more it has to operate by way of administrative regulation that must escape the will of the legislature, and the more remote it must therefore be from public opinion. And if parliament is empowered to delegate its own proper functions, it is highly vulnerable to the influence of special interests lobbies that offer to support the government in exchange for having the law framed in their favour.

Nowhere is this constitutional weakness of modern democracy clearer than in welfare legislation. Over the last 20 years Australian politicians have adopted several different approaches to social security. In the 1970s, means tests were out of favour and several benefits became universally available. In the 1980s, the tax costs of universalism forced governments to reintroduce means tests and to become more selective. Most recently, the Liberal Party has proposed tax rebates for families, to be financed by a time limit on eligibility for unemployment benefits. These changes do not reflect underlying shifts in public opinion; rather, they demonstrate how our present constitutional arrangements facilitate the formation and dissolution of temporary majority coalitions of the special interests that struggle to redistribute

among themselves the benefits and the burdens of the welfare state, to the ultimate detriment of the community as a whole.

In this contribution to the CIS Social Welfare Research Program, Suri Ratnapala draws on his background in jurisprudence to trace the decline of constitutionalism in modern times and the emergence of the Australian welfare state into the constitutional vacuum that was heralded by the *Dignan* case of 1931. Suri Ratnapala shows that the effect of *Dignan* was to overturn 'the rule against the delegation of unlimited law-making power that lies at the foundation of constitutionalism'. He also shows that 'New Administrative Law' and its chief instrument, the Administrative Appeals Tribunal, have so far, whatever their other virtues, done little to control the inherent arbitrariness of the welfare state's regulatory mechanisms.

The erosion of what James Buchanan has called 'the constitutional attitude' is a crucial factor in the rise not just of the welfare state but of the Leviathan state as a whole. But it is in the endless and insoluble nature of the distributional struggles embodied in the welfare state that we can perceive most clearly the constitutional decay from which this Leviathan has sprung. This study is a major step towards achieving a new intellectual and political consensus on the need for a constitutional restoration.

Executive Summary

1. The existence of a legal 'constitution' does not guarantee constitutional government, i.e. government whose powers are limited by law. Literal interpretation of Australia's Constitution has eroded the constitutional principles that limit government's powers.

2. Democratic government is constitutional if it operates by way of general rules of law that reflect public opinion. But the redistributional aims of the welfare state can be achieved only by way of open-ended legislation that violates the rule of law because it (a) delegates substantial law-making power to the executive, so removing it from parliamentary scrutiny, and (b) deprives the courts of the criteria by which the legality of executive actions can be judged.

3. In the 1931 case of *Dignan* the High Court validated the Transport Workers' Act 1928-29, which gave the executive unrestricted power to make laws relating to the employment of transport workers. This judgment violated the fundamental constitutional principle that forbids the delegation of unlimited law-making power. But its defenders argued that the reception in Australia of the Westminster model of responsible government meant that the separation of legislative and executive power was not envisaged in the Australian Constitution.

4. The Westminster model rests on a 'deterrent' theory of democracy according to which governments that do not rule according to popular wishes risk electoral defeat. But public choice theory has demonstrated that unlimited government can easily become captured by coalitions of minority interests that override popular opinion and preferences.

5. The decline of constitutionalism that made possible the rise of the welfare state can be attributed to the impact of certain influential but erroneous constitutional doctrines. In Britain, A.V. Dicey's defence of the rule of law as a principle of the British Constitution was undermined by Sir Ivor Jennings's arguments that executive discretion was not limited to the application of general principles embodied in Acts of parliament, and that individual liberty was adequately protected from arbitrary government by periodic elections. In Australia, the doctrine of the 'separation of powers' has been widely misconstrued as a system of 'checks and balances' that full democracy renders unnecessary, whereas

in fact its purpose is to keep alive the distinction between law and government, without which true democracy is impossible.

6. The vast regulatory apparatus of the welfare state violates the constitutional order in three ways: The proliferation of authorities with wide discretion undermines the certainty and predictability of the law; the widespread conferment of statutory discretion on those authorities has nullified the system of responsible government; and wide discretionary powers decrease the capacity for judicial review.

7. The 'New Administrative Law' introduced in Australia in the late 1970s has improved administrative review processes. But it fails to overcome the central constitutional problem of non-accountable power because it does not provide standards for structuring discretions and making them amenable to effective constitutional review. It weakens democratic processes by shifting accountability away from the community and towards the individual.

8. Economic and political pressures are prompting a fundamental re-evaluation of the ends and means of the welfare state. These could lead to a general restoration of constitutional order involving (a) a proper constitutional role for the judiciary and possibly (b) the entrenchment of a consensus on basic welfare rights within the Constitution itself.

Author's Note

The thesis of this monograph evolved through research done at the Law Schools of Macquarie University and the University of Queensland. I am indebted to the Heads of these Schools, Professor John Goldring and Dr Dennis Ong of Macquarie and Professor Geoffrey de Q. Walker of Queensland, for the institutional support I received.

The philosophical dimensions of this study originated in my response to challenges made by Professor Goldring to what was initially a legal-technical thesis on delegated legislation. The technical facet of the study benefited significantly from the intense scrutiny of Dr Ong and Dr Mark Cooray. Specific intellectual debts are owed to these scholars.

I thank Michael James and the anonymous referees whose constructive criticisms led to major improvements of this book, particularly in relation to its specifically Australian content. I gratefully acknowledge the contribution of Greg Lindsay, whose generosity facilitated my exposure to contemporary thought in the classical liberal tradition and whose support and encouragement sustained me through personal adversities that threatened this work.

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About the Author

Suri Ratnapala is a Lecturer in the Department of Law at the University of Queensland, where he teaches jurisprudence and comparative law. Previously, he has taught law at the University of Colombo, Sri Lanka, and the Macquarie University in Sydney. Before migrating to Australia, he served as a Senior State Counsel in the Attorney-General's Department of Sri Lanka, specialising in constitutional litigation and drafting. He obtained a master's degree in law from Macquarie University, by research described by Professor Lauchlan Chipman as 'a contribution to Australian constitutional jurisprudence which is original, significant and, in the best sense of the term, provocative'. Suri Ratnapala has published articles on constitutional law, legal philosophy and public law theory. He is Co-editor of the *Queensland University Law Journal.* Prior to joining the Sri Lankan Bar, he was a journalist with the *Ceylon Daily News.* Currently, he is engaged in PhD research on judicial power.

Chapter 1

Introduction

The aim of this monograph is to explain the impact of the welfare state on the Australian constitutional order and to examine some of the factors that led to certain key constitutional principles being undermined by the pursuit of welfare ideals. This undertaking involves three main tasks. The first is to establish that the Australian constitutional order has been substantially superseded by a form of government dictated by the legal ideology of the welfare state. The second is to identify some of the errors in constitutional theory that contributed to this development. The third is to assess recent attempts in Australia to arrest the growing arbitrariness and non-accountability of government. These endeavours are associated with the creation of the so called 'New Administrative Law'.

Some Widespread Beliefs about the Constitution and the Welfare State

It is a common perception that the Australian Constitution has remained largely intact since federation, apart from formal alterations approved by popular referendums. Legal scholars generally recognise that the High Court's interpretation of the Constitution has brought about a substantial shift of power from the States to the Commonwealth. Despite this recognition, many scholars, administrators and politicians believe that the Constitution has been unduly resistant to change and that its unyielding character has been a barrier to the achievement of goals associated with the welfare state. This belief is expressed or implied in most textbooks on the Australian Constitution. It also lies behind a series of recommendations for the expansion of Commonwealth powers made recently by committees advising

the Constitutional Commission. (For a summary of these recommendations, see Constitutional Commission, 1987:25-38).

The belief is also widespread that welfare goals in Australia have so far been achieved without violence to the fundamental character of the Constitution. This belief is encouraged by two factors. First, the Constitution appears unchanged when it is comprehended in its literal as opposed to its constitutional sense. That is to say, the Constitution seems intact if no account is taken of its unwritten doctrines. Second, the institution of representative democracy, which is central to the constitutional order, appears to function with exceptional vigour. However, this study argues that, contrary to appearances, the tendency to divest the Constitution of its unwritten doctrines has seriously undermined its basic objectives, especially that of subordinating government to a meaningful form of democracy.

Constitutional Government vs 'Having a Constitution'

The classical idea of a constitution is that of an order that limits the powers of rulers. Except in the modern era, constitutions were rarely found in written form. They consisted mainly of limiting principles expressed in the customs of the realm. This at any rate was the idea of a constitution that persisted through the middle ages and was transmitted to the modern era through the Ancient Constitution of England (Kern, 1968:87; McIlwain, 1947:85-6). The doctrines grounded in this tradition inspired the written constitutions of modern democratic states. This is a trite historical observation, but one that is widely disregarded in the interpretation of modern constitutions.

For this reason we need to remind ourselves that some of the principal limitations on power are expressed in constitutional doctrines that are not explicitly stated in the modern constitutions they have inspired. In other words, we need to remember that some of the most important provisions of written constitutions derive their constitutional meaning from unwritten doctrines. The literal reading of a constitution is likely to deprive it of some of its key attributes. But this is precisely the juristic technique that the High Court of Australia has adopted for the interpretation of key provisions of the Constitution.

The tendency to sever constitutions from their historical and philosophical traditions is closely linked to the developments in constitutional theory that ushered in the welfare state. In England, this tendency produced the idea of parliamentary sovereignty in the absolute sense. In Australia (as in the United States) it led to the revision of constitutional doctrines such as the rule of law and the separation of powers with, as this study argues, profound consequences for democracy itself.

It is not always appreciated that a 'constitution' which reposes supreme

power in an authority is not a constitution in the strict sense. Such a 'constitution' is one that exists at the pleasure of the authority. It is alterable at will. There is a difference between 'having a constitution' in this sense and having constitutional government. In many countries the power of the ruling authority is limited only by 'manner and form' requirements: these enjoin the repositories of power from exercising their authority except in accordance with prescribed formal procedures. These requirements do not constitute substantive limitations on power. In countries where power belongs to 'supreme commanders', juntas or ruling parties, they have no practical significance. But it is widely believed that where the government is democratically elected, the only constitutional limitations needed are the 'manner and form' stipulations that ensure that laws are made by a majority of duly elected legislators.

It is argued here that this form of limitation, although sufficient to ensure that laws are passed by parliamentary majorities, is wholly inadequate for securing the more fundamental concerns of democracy. These are to guarantee that laws of the community reflect the opinions of its members or at least of a majority amongst them, and to guarantee that such laws alone can be enforced against the citizen. It will be argued that whilst 'manner and form' requirements may ensure the rule by a majority of elected officials, government according to majority wishes can be secured only by the observance of other principles of constitutionalism. It is not claimed that Australia has moved from its status as a nation with constitutional government to the status of a nation that merely 'has a constitution'. But it will be argued that the developments in constitutional law and theory that have accompanied the growth of the welfare state have taken the nation much further down the road to the latter status than is commonly recognised.

The Dangers of Literalism

The theoretical task of demonstrating the extent to which the Australian constitutional order has been superseded by the legal-administrative order of the welfare state requires us to identify the elements of the constitutional order that were displaced or undermined by the emergence of the welfare state. In other words, it is necessary to show that certain doctrines and limiting principles subverted by the welfare order were in fact parts of the constitutional order. This need arises because lawyers and judges have adopted the fundamentally erroneous attitude of seeking to confine the Constitution to its literally construed provisions.

One of the arguments used to justify the literal interpretation of written constitutions is that it is unsafe to presume the intentions of the drafters of constitutions in the absence of clear textual evidence. However, this

argument is sound only with regard to the detailed provisions of a constitution, and has little relevance to those ideas that are integral to the chosen form of government. Thus, the argument has no application to those principles whose observance is essential to the system of government envisaged in the constitution. But the supporters of the welfare state argue that the democratic, responsible and accountable form of government envisaged in the Constitution can be maintained without the aid of doctrines such as the separation of powers and the rule of law. They suggest that any loss of these qualities is remediable without recourse to doctrines (Winterton, 1983:92; Goldring, 1980:381-5). Alternatively, they assert that such loss is the necessary cost of achieving the compelling goals of the welfare state (Jennings, 1959:308-11).

Welfare state theorists do not deny that the positive state has caused the growth of governmental power. What they deny is that this growth is unconstitutional or harmful. They see no parallel between the present growth of power and past movements towards absolutism. The welfare state is indeed in many ways a unique development in Western political history. Unlike previous centralisations of power, it was not mainly a product of the personal ambitions of rulers. It was a product of republicanism. Its growth is associated with the spread of the franchise, responsible government, the organised expression of public opinion, and the emergence of political parties and pressure groups. Philosophically, the welfare state was inspired by conceptions of public good and of liberty that did not necessarily coincide with the personal interests of rulers. Yet although, generally speaking, the welfare state has not perpetuated the political power of individual rulers, it has increased, and continues to increase, the powers of government instrumentalities.

Democracy and the Welfare State

How then can the growth of power in the welfare state be distinguished **structurally** from other movements towards absolutism, both past and present? Defenders of the welfare state claim that the loss of individual liberty that it entails is compensated by its promotion of the individual's capacity to enjoy his liberties. In other words, although there is a curtailment of the 'negative' attributes of freedom, there is a net gain in 'positive' freedom. However, this cannot by itself set the modern welfare state apart from the earlier autocratic tradition. Some autocracies both past and present could make similar claims. It could be said of some benevolent despotisms that they improved the capacity of citizens to enjoy their liberties even though

this involved limiting the scope of those liberties. In modern times, countries such as the Soviet Union, Singapore, Taiwan and South Korea have achieved significant improvements in living standards while curtailing more or less severely civil and political liberties.

What really distinguishes the modern democratic welfare state, according to its supporters, is that it is founded on a conception of liberty derived from popular wishes. The modern welfare state promotes the 'positive' elements of liberty at the expense of its 'negative' elements on the assumption that its judgment of the proper 'mix' of liberty coincides with the views held by at least the greater part of the community it governs. However, it will be argued in this monograph that, to the extent it has displaced constitutionalism, the welfare state has, in reality, freed itself from the constraints of democracy.

Sensible theoretical discussion of the welfare state is seriously impeded by the present confusion of its claimed moral justification with its constitutional legitimacy. The philosophical desirability of welfare state goals is widely taken as evidence of their popular acceptance. Much of this confusion has stemmed from treating judgments of particular persons or groups as genuine collective choices. This in turn has been possible only because the determination of genuine collective choices has been made difficult by what F.A. Hayek (1979:98-104) calls 'the miscarriage of the democratic ideal' brought about by the revision or rejection of the limiting principles of constitutionalism.

Any attempt to show that the welfare state has substantially superseded the Australian constitutional order must therefore involve demonstrating that these limiting principles are part of that order. This can be undertaken within constitutional theory by showing that, on structural grounds, democracy cannot work properly without the aid of such principles. It can also be shown that these principles are central to the constitutional tradition within which the Australian Constitution was conceived. This monograph incorporates both these approaches. The arguments based on the structural factors are particularly important in view of the need to expose Australian public law to the advances in 'evolutionary' liberal theory (expounded by Hayek, for example) and the dramatic substantiation of these understandings by the work of public choice theorists. The approach of locating the Australian Constitution in the relevant tradition serves to rebut the common view that the Constitution was adopted in a theoretical vacuum and hence can be literally construed or pliantly applied as the situation demands. This approach also accomplishes the groundwork for exposing the theoretical errors that led to the decline of the constitutional order.

The Scope and the Limits of this Study

This study argues that the conflict between the constitutional state and the welfare state is unavoidable. Ironically, the welfare state has established itself mainly in countries whose forms of government were inspired by constitutionalism. The welfare state has tended to supersede the constitutional state whenever the two have met. Australia has been no exception.

Some of the major causes for the decline of constitutionalism in Australia are traceable to constitutional doctrines and practice that were frequently followed elsewhere and unavoidably influenced Australian jurisprudence. We need to understand in particular the key events and trends of British constitutional history and the theoretical debates that have surrounded them. This is not only because Britain is widely regarded as the cradle of modern constitutional government, but also because Britain provided Australia with a specific constitutional heritage in the form of the institution of responsible government. But it doesn't follow from this that we can neglect the important contributory factors that have been the peculiar product of Australian law and politics.

This monograph focuses on three developments in constitutional law and theory that brought about the decline of Australian constitutionalism. These developments are interrelated, but as they involve distinct theoretical errors they need to be treated separately. The developments to be considered are: first, the redefining of democracy in such a way as to obscure the link between democracy and the rule of law; second, the rejection by some and the drastic revision by others of the rule of law ideal, in order to legitimise the coercive-administrative machinery of the welfare state; and third, the emasculation of the separation of powers doctrine as a result of misapprehensions about its history and its essential function.

The growth of government power beyond constitutional control has not gone unnoticed in Australia. On the contrary, amongst Commonwealth countries, Australia is regarded as having pioneered attempts to set up new and more effective mechanisms to oversee administrative decision-making. This reputation is founded on the emergence in Australia of a 'New Administrative Law' (NAL). It has been suggested that the NAL is providing a new 'interstitial constitutional law' to meet the changed circumstances brought about by the welfare state (Goldring, 1982:93). This monograph assesses the potential of NAL to arrest the decline of constitutionalism in Australia.

There remains to mention certain limitations on the scope of this monograph. It does not attempt to identify all the major factors contributing to the emergence of the form of government associated with the welfare state. It identifies only the major causes related to constitutional theory. In his recent work *Crisis and Leviathan* (1987), Robert Higgs surveys the major

hypotheses including his own 'crisis hypothesis' regarding the transformation of American political, legal and economic institutions. These hypotheses offer insights into the forces that contributed to the decline of the constitutional order in Australia. As Higgs points out, these hypotheses are not mutually exclusive, and a monocausal explanation of constitutional supersession is unwarranted (Higgs, 1987:4). This monograph does not dispute the fact that many of the forces that subverted key features of the Constitution originated outside constitutional theory. What it seeks to establish is that the subversion was facilitated by certain intellectual errors occurring within constitutional theory.

There are, however, two reasons why an inquiry of this type is especially important. First, the Constitution is the shield against the forces that tend to subvert the chosen system of government: its erosion is therefore of critical interest to those who seek a fuller understanding of the establishment of the welfare state. Second, any attempt at constitutional restoration must proceed on a sound understanding of the theoretical errors that led to constitutional decline.

This monograph also makes no attempt to itemise exhaustively all the constitutional principles and provisions that have been compromised in the promotion of the welfare state. Rather, it seeks to examine the impact of the welfare state on the three most fundamental concepts of constitutionalism, namely, the rule of law, the separation of powers, and democracy. It is argued that these concepts are inextricably linked and that together they form the indispensable foundation of constitutional government.

There are many important constitutional issues that are not fully discussed in this study. Among them is the effect of the welfare state on Australian federalism. In Australia, the issue of geographical centralisation of power has dominated the debate about constitutional change. The opposition to this type of centralisation is based mainly on the historical, moral and legal-textual claims of the States. I have supported these claims elsewhere (Cooray & Ratnapala, 1986:203). But this work will touch only on a less discussed aspect of the issue, namely, the relevance of territorial fragmentation of power to the maintenance of the rule of law.

Chapter 2

The Constitutional State and the Welfare State: An Overview of the Conflict

Before we can sensibly consider the crisis of the constitutional order precipitated by the welfare state, we must gain a working understanding of constitutionalism.

The Use and Abuse of 'Constitution'

The term 'constitution' is one of the most misused expressions in the legal-political vocabulary. There is no country in the world that does not boast a 'constitution'. Yet in only a minority of countries do these constitutions place significant limitations on the power of rulers. Clearly there is more than one meaning attached to the term 'constitution'. Frequently, it denotes instruments that do no more than formally legitimise successfully asserted power and equate the law with the effective will of the ruler. A constitution in this sense is a redundancy, since it is co-extensive with the ruler's will. The antithesis of such a constitution is a constitutional order that subordinates all authority to limiting principles whose effectiveness is secured by the manner in which the state is organised and its powers distributed. Between these extremes there exists a spectrum of governmental systems that approximate in varying degrees to either the despotic or the constitutional model. Many of the types in this spectrum shade imperceptibly into one another and at places form a continuum. However, it is possible to discern two broad

categories or paradigms amongst them that represent important stages in the regression of systems from the constitutional to the despotic.

Authoritarian and Democratic Regressions

In both the authoritarian and the democratic paradigms, power is reposed in authorities subject only to procedural requirements regarding its exercise. But in the case of the 'democratic' paradigm, the procedures include the election and participation of representatives of the community. This category comprises the modern democracies where power is exercised by elected assemblies or by those who effectively command them, subject only to 'manner and form' requirements. The British Constitution is the foremost example of one that has regressed to this stage. In this monograph, it will be argued that the Australian Constitution, despite its written injunctions, has slipped into this broad category.

The other paradigm, which we shall call 'authoritarian', is characterised by the absence of any genuinely democratic element in the procedure for exercising powers. What is more, the procedures are themselves vulnerable to the overriding will of the supreme authority, owing to the lack of effective democratic control and the absence of competent and independent adjudication of the transgressions of authorities.

It is not difficult to see how authoritarian states constrained only by formal procedures can, as happened in Germany, degenerate into forms of despotism where the constitution is nothing but an unqualified licence for the exercise of power. The Nazi regime achieved a total destruction of procedural justice by means such as retroactive statutes, secret enactments, subordination of judgments to policy directions, and the immunity of the secret police from all legal process (Stern, 1975:116-29). The formal provisions of the Soviet Constitution were similarly debased by Josef Stalin. Contemporary events in many parts of the world provide further telling illustrations of such regressions into official lawlessness.

But while it is easy to demonstrate the tendency of authoritarian states to regress into wholly despotic forms, it is difficult to persuade observers that democratic states, as described above, are themselves drifting in authoritarian directions. This is because the two safeguards thought to prevent such regression seem to be working well. Democracy is vigorously practised and the courts are largely competent and independent. But these two seemingly effective precautions have in fact been severely undermined by the demands made on the democratic state by welfare ideology and politics. As Hayek hypothesised and the public choice theorists have demonstrated, democracy has degenerated into distributional struggles and compromises amongst special interest groups that introduce a new source of arbitrariness and

partiality and produce results inconsistent with the moral principles of the majority (Hayek, 1979:3). This type of accommodation directly corrupts the democratic ideal of a government according to genuine majority opinion. It also indirectly subverts both parliamentary and judicial safeguards against absolutist tendencies.

The problem arises in this way. The distributional aims of the welfare state cannot be achieved by the enactment of general laws. These aims call for measures such as the distribution of largesse, the creation of public goods, the adjustment of legal relations held to be inequitable, and state intervention in the economy by regulation and participation. These measures in turn require managerial methods, purpose-oriented actions and frequently individualised responses to social problems. This is made possible only by leaving wide and unfettered discretions in the hands of officials. Such discretions are conferred by open-ended legislation.

How Open-Ended Legislation Undermines Constitutionalism

Open-ended legislation has two major harmful effects on a constitution. First, it leaves substantial law-making powers with the executive, which can escape effective public scrutiny. Parliament loses much of its effectiveness as a sentinel of the people's rights and liberties. Second, it deprives courts of the pre-established criteria of the legality of coercive executive actions. In the absence of controlling principles that govern the exercise of delegated authority, courts become increasingly powerless to prevent arbitrary action on the part of government. Under open-ended legislation the law is effectively what officials decide it ought to be. Law is made at the point of its implementation. Officials validate their own actions by simply exercising their discretion, and the courts have little choice but to uphold their decisions.

Faced with diminishing authority to question coercive actions on substantive grounds, common law courts have devised a range of procedural grounds for reviewing executive conduct. They have extended the requirements of natural justice to new situations and set new standards of procedural fairness in relation to administration. Procedural justice, however, cannot ensure that executive action accords with or is limited by democratically established principles.

Courts have of course insisted that there is no such thing as an absolute discretion. But by this they have usually meant that where a statute fails to offer guidance, a discretion should nevertheless be exercised reasonably, in good faith and in accordance with the policy that the statute is intended to serve. Contrary to prevalent opinion amongst public law theorists, this approach does not adequately address the problem of constitutional regression. The approach is sufficient to deal with those who seek private ends

under the cover of authority. But, as most public law **practitioners** would point out, it is not one that can make a difference in the vast majority of cases where official actions are justified on policy grounds. In these cases, the court may do one of two things. It may defer to executive judgment as regards the policy of the statute and what coercive measures are reasonably required to implement the policy. Alternatively (and this appears increasingly to be the case), the court may embroil itself in such issues, transposing its own judgment on matters of policy and administrative convenience.

In either case the court fails to perform a constitutional role. In the first case, the court concedes that, in the absence of guiding principles, it has no jurisdiction to question the executive action. In the second case, the court duplicates the executive function, thereby depriving itself of a judicial role. As Unger remarks, 'courts begin to resemble openly first administrative, then other political institutions' (1976:200). Whether the final decision remains that of the executive or becomes that of a court guided only by policy, it is effectively removed from parliamentary control. Parliament can control discretion only by providing guidelines that can be identified and enforced by courts. Yet the goals of the welfare state are unattainable without the range and flexibility of authority that only open-ended legislation can provide. Open-ended legislation undermines parliamentary and judicial controls, the devices that welfare theorists say are sufficient in themselves to prevent the welfare state from sliding into authoritarianism.

The failure to recognise the intrinsic tendency of the welfare state to gravitate towards irresponsibility and hence to authoritarianism is a major error in constitutional theory. This failure was occasioned by illusions created by the politics of democracy and by the evident success of courts in enforcing procedural justice against officials.

How Subordinate Legislation Escapes Parliamentary Scrutiny

In recent times the growing irresponsibility of the welfare bureaucracy has impressed itself on some academic minds sympathetic to the welfare state. It has been suggested that the trend can be arrested by greater parliamentary scrutiny of rules, regulations, orders, etc. made by officials under powers conferred by statute (Winterton, 1983:92). The proposal is to use more frequently the well-known but notoriously ineffective device of requiring subordinate legislation to be approved by parliament. There are four main problems with this method of scrutiny.

First, the approval or disapproval of subordinate legislative acts takes place through the 'resolution' procedure. In comparison with the method of enacting primary legislation (Acts of parliament) this procedure attracts little public notice or debate. It is the glare of publicity that significantly inhibits

parliamentary majorities from making determinations that offend the values and sensibilities of the community. The resolution procedure is an inadequate means of bringing to public attention and debate the decrees made by officials.

Second, the proposed solution is simply impractical. It is relatively simple for a legislature to lay down in advance the principles that control the executive. It is a practical form of control that makes executive actions under statute justiciable on substantive grounds at the instance of an aggrieved person. But it is wholly impractical to leave unguided discretionary authority in officials and then to supervise each instance of its exercise. Given the proliferation of such grants of power, it is not a task that a parliament can effectively perform.

Third, not only is it impractical for the legislature to attend to the detailed application of the law in particular situations, but it is constitutionally inappropriate that it should do so. From the constitutional point of view, the most damaging consequence of delegating unbridled authority is its tendency to dissolve the distinction between laws and executive actions. This distinction has lain at the heart of European constitutionalism since its origins in antiquity. Unfettered discretionary authority enables officials to give their own actions the force of law. In other words, an official act is validated by its conformity with the official's own will. In addition, officials invested with this type of power have no compulsion to lay down rules by which their subsequent actions can be adjudged. They become increasingly prone to direct their legislative acts to the attainment of desired results in specific cases. They display a growing reluctance to commit themselves to general rules except those required by purely managerial considerations. Even when a rule is made, the official is likely to reserve to himself the power to dispense with the rule or to modify its operation in particular instances. In short, officials begin to rule by decree rather than in accordance with known and stable laws.

The evil of this type of government was clearly perceived in classical thought. The belief was that:

> There is no constitution, where there is no law; and here there are no laws, enacting general principles to be applied in detail by the executive; there are only decrees themselves dealing with detail. There is nothing fixed or determined; life is a chaos in which anything may happen, but nothing can be foreseen. The essence of a State is that men should live by known rules, which will enable them to recognise in advance the results of their actions. (Barker, 1959:453)

We see here the most persistent objection to government by decree: it deprives the citizen of a stable area of personal autonomy. This problem is not cured by parliamentary endorsement of decrees that aim at specific outcomes.

Fourth, as Aristotle observed in the Greek democracies and as Hayek persuasively argues in relation to modern ones, the more legislation becomes concerned with detail, the less likely it is to reflect consensus. In practical terms, a large community can reach agreement on particular issues only through the constructive means of agreeing on general principles by which the issues are to be resolved. But the community is deprived of this means to the extent that the legislature abdicates its function of enacting general principles and limits itself to the scrutiny of particular decisions made by officials to whom it has delegated unguided legislative power. In this way, such delegations cause the progressive loss of the community's capacity to make official actions conform to its collective wishes.

The contradiction that appears from a rigorous legal-theoretical analysis of the welfare state is that its establishment and maintenance require coercive methods that necessarily corrode the foundations of constitutional government; constitutional regression is inevitably caused by the inner dynamic of the welfare state.

The Legitimacy of the Welfare State: Philosophy vs Consensus

What then is the legitimacy of the welfare state? History has thrown up a diversity of criteria of the legitimacy of governments. They include kinship, divine right, feudal contract, social contract, consensus, moral right and (as logically inferred from Hans Kelsen's 'pure theory') even effective force. What confuses the legal-constitutional discourse about the welfare state is the fact that its defenders often seem unsure of the basis of its legitimacy. It is often unclear whether the welfare state is proposed on factual-philosophical or factual-consensual grounds.

The philosophical justifications of the welfare state relate directly or indirectly to theories of human nature and human needs. A basic philosophical theme of welfare theorists is positive liberty, with its insistence that individual autonomy requires not only freedom from formal constraints but also freedom from need. As neither the market nor private charity provides this freedom universally, so the argument goes, it is the duty of the state to do so by compelling citizens to contribute to the welfare of one another. A variant of this theme is that the state, by coercing an individual to help others, is in fact benefiting that individual, since self-realisation is possible only in

a community where individuals help themselves by way of helping others (Bell, 1985:180). However, this compulsory altruistic (or self-interested) behaviour can be justified only if individual needs are objectively ascertainable, something that welfare theory has yet to establish (McInnes, 1977:229). Even if these 'needs' can be philosophically identified, they may not coincide with what the individual wants, or what the individual thinks he needs. In the absence of such consensus the assumption of power to compulsorily satisfy 'needs' recalls Plato's proposal to grant political power to omniscient philosophers (Plato, 1966:233).

However, those who advocate and implement welfare policy understandably do not want to wear the mantle of philosopher-kings. For this reason the moral arguments for the welfare state are sometimes combined, but are more often confused, with consensus-based arguments. For example, Wolfgang Friedmann, one of the foremost jurisprudential apologists of the welfare state, writes in his book *Law in a Changing Society*:

> In a democracy the interplay between social opinions and the law moulding activities of the state is a more obvious and articulate one. Public opinion on vital social issues constantly expresses itself not only through the elected representatives in legislative assemblies, but through public discussion in press, radio, public lectures, pressure groups and on a more sophisticated level, through scientific and professional associations, universities and a multitude of other channels. (Friedmann, 1972:24-5)

The confusion of philosophy and consensus in this passage is clear. It is brought about by giving public opinion (or 'social' opinion) a definition that encompasses not only actual public opinion but also 'sophisticated' views coming from learned quarters that often directly seek to influence public policy. Social justice talk, for the most part, is characterised by this kind of confusion of what is considered good for the people with what the people actually say they want.

There are, however, some who ground the legitimacy of the welfare state unequivocally in consensus. H.W.R. Wade sees the welfare state as the natural consequence of the enfranchisement of the population in the 19th century (Wade, 1982:3). This is essentially the argument advanced by Peltzman through his econometrically-tested model explaining the growth of government (Peltzman, 1980:285). But Higgs (1987:13) points out that Peltzman's model is flawed by its unrealistic specifications. Peltzman's hypothesis is based on a purely passive or reactive view of government in which it merely responds to electorally generated demands. This view of government represents the democratic ideal so long as it means that govern-

ment responds only to those demands on which there is genuine agreement. But often this is not the case in the modern positive state.

Public Opinion vs Coalitions of Interests

Elected governments that are unrestrained by limiting principles of constitutionalism can and do corrupt the democratic ideal through their ability to manipulate electorates. As Hayek puts it, a group of elected representatives whose power is unlimited (and therefore to whom sectional demands can be addressed) 'must be guided by the exigencies of a bargaining process in which they bribe a sufficient number of voters to support an organised group of themselves numerous enough to outvote the rest' (Hayek, 1979:4-5). In other words, political parties attempt through promises to put together coalitions of interests that they rely on to produce electoral success. The important question is whether the discretionary and selective actions of government that are required to implement promises of this kind are legitimised by the fact of electoral success. The answer seems clearly negative.

A coalition of interests that produces electoral success represents a clear majority on only one question, that is, which group or political party ought to constitute the government. It does not follow either logically or factually from this that there is also majority agreement on the particular ends of policy that the successful party proposed or accepted. What is more, even if the ends of policy were generally agreed upon, it is highly improbable that there would be majority agreement on the means of achieving those ends or the apportionment of the costs involved. As Unger states, 'no matter how substantive justice is defined it can be achieved only by treating different situations differently' and by determining 'priorities among groups [that] in turn shade imperceptibly into preferences among individuals and individual situations' (Unger, 1976:198). These preferences are not determinable by reference to democratically-established principles. They depend on what is 'socially just' in particular situations and in relation to particular groups or individuals. Such ad hoc decisions can be said to be democratically mandated only in the artificial sense that they are made by, or under the authority of, an elected government.

Whereas it is increasingly difficult to ground the legitimacy of the welfare state in a meaningful form of democracy, it has been proposed that the welfare state may be legitimising itself through a system of barter. According to this view 'the welfare state tends to legitimate itself by offering advantages in exchange for consensus; obedience is bartered for benefits' (Urso, 1985:213). There is no doubt that the welfare state has secured obedience. But, as the arguments herein suggest, it is misleading to say that

the advantages offered produce consensus. 'Barter' is thus also an inappropriate term for describing the manner in which the welfare state maintains itself. The idea of barter implies voluntary exchange. However, the element of voluntariness in the relation between citizen and state diminishes as the state progressively assumes the role of provider to the community. It is an indisputable general proposition that beneficiaries become dependent on benefactors. In the case of the welfare state, such dependence is intensified by the fact that benefits are provided (and indeed can only be provided) by measures that actively curtail the economic independence of the beneficiaries. As dependence on welfare grows, consensus becomes increasingly fictitious. The political power of the community declines as the economic power of the state increases. It is this condition that led Dean Roscoe Pound to remark that society is moving back to a new feudalism in which the state is the benefactor (Tay, 1978:14).

The Welfare State and Legal Positivism

Further possible criteria of the welfare state's legitimacy are suggested by theories of legal positivism. These theories inspired two related developments in constitutional theory without which the welfare state as we know it could not have been introduced in democratic societies. One development was the emergence of the idea of parliamentary sovereignty. This is the idea that elected governments should not be restrained by constitutional concepts that were initially intended as safeguards against unelected rulers. The second development produced a reversal of the rule of law ideal by radically transforming the meaning of 'law'. The law became what the ruler commanded and not what the ruler was subject to along with the ruled.

Both the major theories of legal positivism provided the welfare state with criteria of legitimacy. The cruder version of positivism, formulated by Jeremy Bentham but popularised by John Austin, held that the law is the command of the authority that is habitually obeyed. The welfare state secures habitual obedience by making the community economically dependent on it. To that extent coercive actions taken by or under its authority acquire legitimacy. The other main theory of legal positivism is embodied in Hans Kelsen's 'pure theory of law'. Kelsen regarded the coercive actions of the state as legitimate in so far as they conformed to the politically-established normative order. An action that conforms to the established order cannot be invalidated without politically overturning the very foundation (*grundnorm*) of the order. It could be claimed that the normative order of the welfare state is politically established as it is actually in operation and has been accepted by judges.

The 'pure theory of law' provides a more plausible basis for legitimising

the welfare state than the 'command theory'. In Austin's theory, legality attaches only to the commands of a determinate superior. In the welfare state the legislature, through processes of delegation, creates centres of power with their own legislative, executive and sometimes even judicial authority. Consequently, the ultimate political responsibility becomes increasingly indeterminate. The centres of power fall under the direct control of special interests and come to be driven by bureaucratic rationality: a situation that has attracted the epithet, 'faceless fascism'. In Kelsen's theory the coercive actions of the bureaucracy would be legitimate so long as they conformed to the established normative order. Thus coercive bureaucratic actions, however arbitrary, would be legitimate if mandated by legislation that is effectively in force.

However, in both versions of legal positivism the legitimacy of the welfare state rests on notions of 'law' and 'legality' that are fundamentally at odds with the constitutional state. In positivist theory, the will of politically established authorities produces law. In the constitutional state the law regulates the actions of authorities. As Urso puts it, in the constitutional state 'law is a measure', whereas in positivist theory 'it is only an exterior form empty enough to be able to contain any arbitrariness, only an expression of the decision taken and not also a modality of the decision-making process' (Urso, 1985:212).

The Welfare State vs the Constitutional State

The welfare state and the constitutional state are thus in fundamental conflict. Yet in every Western country constitutional lawyers played key roles in the gradual abrogation of the constitutional state. Like other intellectuals, lawyers were caught in the excitement that gripped the Western world as it awakened to its new economic and technological potential. This awareness produced the conviction that only the lack of political power impeded solutions to social ills. It produced a powerful inducement to overturn constitutional limitations. But at least in the case of the lawyers this would not have been sufficiently persuasive had it not coincided with errors in constitutional theory that led to the belief that limitations on power were unnecessary where governments were elected and removed through the ballot.

The welfare state is in the throes of a reassessment at the hands of both its defenders and its detractors. Its continued existence has been questioned on three major grounds. The first and most widely recognised (even by the Australian Labor Party) concerns the economic cost of the welfare state. There is a growing awareness that the welfare state works against itself in seeking to redistribute wealth whilst penalising its creation, and so is

economically unsustainable without substantial modification of its goals. The second ground, unearthed by modern microeconomics, concerns the failure of the welfare state to realise its objectives even when its prohibitive economic costs are met. As Wilhelm Ropke puts it, the welfare state has degenerated 'into an absurd two-way pumping of money when the State robs nearly everybody and pays nearly everybody, so that no one knows in the end whether he has gained or lost in the game' (Ropke, 1971:164-5).

The third ground, and perhaps the least understood, concerns the political cost of the welfare state. It concerns the extent to which the people have become substantially (although not formally) disenfranchised as a result of government becoming irresponsible and arbitrary. If the latter consequences were foreseen, the welfare state as we know it may not have materialised in democratic societies. Likewise, if the desired diminution of the welfare state is to result in a more permanent state of economic and political liberty, it is important that we truly understand the constitutional tradition and the theoretical errors that caused it to be superseded.

Chapter 3

The Redefining of Democracy

In the previous chapters, it was asserted, first, that the rule of law, the separation of powers and democracy supply the indispensable elements of constitutional government, and second, that these concepts are inextricably linked inasmuch as the practical operation of each is secured by the others. But modern constitutional theory has tended to extol democracy whilst rejecting or fundamentally revising the other two concepts. Many modern theorists find the rule of law and the separation of powers to be irrelevant if not obstructionist and undemocratic. This failure to appreciate that the separation of powers is principally concerned with maintaining the rule of law, and that meaningful democracy prevails only where the law takes the form of general principles and regulates the actions of authorities, constitutes the most serious error to have occurred in the history of constitutional theory.

The Welfare State, Democracy and the Rule of Law

The virtue traditionally attributed to the classical idea of the rule of law is its capacity to secure areas of individual autonomy. The rule of law in this sense secured the generality and stability of laws by denying rulers the capacity to legislate at will. In John Locke's renowned formulation, the ideal was that 'the legislative or supreme authority cannot assume to itself a power to rule by extemporary arbitrary decrees, but is bound to dispense justice and decide the rights of the subject by promulgating **standing laws**, and known authorised judges' (Laslett, 1970:376; emphasis added). The stability of the law provided the citizen with a province of settled expectations upon which he could order his life. The rule of law is therefore the foundation of what Isaiah

Berlin identified as 'negative' freedom, or freedom **from** certain interferences.

As noted in the previous chapter, the ideal of negative freedom was systematically attacked by welfare theory. In doing so, welfare theory also discredited the rule of law. But the rule of law, as argued here, is the foundation of democracy, in the name of which the welfare state was ushered in. A community cannot collectively oversee the particular actions of government, whenever and wherever they occur. It can compel government to act according to its collective wishes only by laying down agreed general principles that control the conduct of government. But this rather incontestable proposition was obscured by the vibrancy of the electoral game that became the hallmark of the welfare state. Democracy became equated to the bargaining processes by which political parties obtained and kept office. Most actions of elected governments were, by a political fiction, deemed to be mandated by the fact of election. The ideal of democracy was itself transformed by the politics that created the welfare state.

John Stuart Mill was one of the first to discern this development. In his essay *On Liberty*, he wrote of the emerging opinion that:

> The nation did not need to be protected against its own will. There was no fear of its tyrannising over itself. Let the rulers be effectively responsible to it, promptly removable by it, and it could afford to trust them with power of which it could itself dictate the use to be made. Their power was but the nation's own power, concentrated, and in a form convenient for exercise. (Mill, 1975:4)

As Mill foresaw, this idea became the overriding constitutional doctrine in welfare theory. In the heyday of the welfare state, the British constitutional lawyer Sir Ivor Jennings wrote

> If [the rule of law] is merely a phrase for distinguishing democratic or constitutional government from dictatorships, it is wise to say so. For democracy rests not on any particular form of executive government, nor on the limitations of the powers of the legislature, nor upon anything implicit in the character of its penal laws, but on the fact that political power rests in the last analysis on free elections, carried out in a State where criticism of the Government is not only permissible but a positive merit and where parties based on competing policies or interests are not only allowed but encouraged. Where this is so, government must necessarily be carried on in such a manner as to secure the active and willing cooperation of the people; for a government that fails to persuade

> public opinion will be overthrown at the next election. (Jennings, 1959:60-1)

Jennings, like many of his peers, rejected the classical constitutional limitations in favour of the single safeguard of periodic elections. He asserted that the prospective loss of office at an election was an effective deterrent against governing without regard to popular wishes. This idea was judicially incorporated into Australian constitutional law in *Dignan's* case (1931) 46 CLR 73.

The *Dignan* case, the Separation of Powers and the Westminster Model

In *Dignan*, the High Court was called upon to determine the validity of s. 3 of the Transport Workers' Act 1928-1929, which gave the executive branch of government unrestricted power to make laws with respect to the employment of transport workers. The legislative power was so vast that the Governor-General in Council could, by regulations, determine the persons or classes of persons who should be permitted to work in the transport industry and the conditions under which they could be employed. The executive could achieve these purposes even by setting aside the provisions of other Acts of parliament.

As Justice Owen Dixon conceded in *Dignan's* case,

> It gives the Governor-General in Council complete, although of course, a subordinate power, over a large and by no means unimportant subject, in the exercise of which he is free to determine from time to time the ends to be achieved and the policy to be adopted. Within the limits of the subject matter, his will is unregulated and his discretion unguided. Moreover power may be exercised in disregard of other existing statutes, the provisions of which concerning the same subject matter may be overridden. (*Dignan* [1931] 46 CLR 43, 100)

The government of the day used this power to make regulations that in effect prohibited the employment at Australian ports of any person (other than a war veteran) who did not belong to the Waterside Workers' Federation (regulation 3 of the Waterside Employment Regulations made under the Transport Workers' Act 1928-1929). The High Court upheld the validity of this regulation as well as the validity of the Act of parliament that conferred the power to make the regulation. In P.H. Lane's view, the necessary implication of the decision is that 'because the Executive thus legislates, the

Executive and the legislative are not separate in function' (Lane, 1979:405). Similar though less specific conclusions have been drawn by other text writers (e.g. Howard, 1972:137-42). Mainly as a result of this decision, a High Court judge was able to later remark that, as far as Australia was concerned, the 'so-called separation of powers under the Constitution does not preclude the Parliament from authorising in the widest and most general terms subordinate legislation under any of the heads of its legislative powers' (*Australian Communist Party* v. *The Commonwealth* [1951] 83 CLR 1, 257 per Fullgar J).

The decision in *Dignan* overturned the rule against the delegation of unlimited law-making power that lies at the foundation of constitutionalism. The judges gave many reasons for this extraordinary decision. But a consistent theme in the several written judgments was that the reception of British parliamentary usages and the Westminster model of responsible government meant that the separation of legislative and executive power was not envisaged in the Australian Constitution (see, for example, Gavan Duffy C J and Starke J at pages 83-4; Dixon J at pages 101-2; Evatt J at page 114). Elsewhere I have documented the serious technical errors involved in this reasoning (Ratnapala, 1986:8-55). What needs to be stressed here is that the reasoning clearly proceeded from the notion of democracy by deterrence as articulated by Jennings.

In theory, the Westminster model of responsible government renders the executive responsible to the legislature through the convention that an executive that loses majority support in the legislature must resign. The legislature is in turn responsible to the people, since it must account for its actions or inactions at regular elections. This is a form of deterrence exercised by the people through the legislators. But in practice, the Westminster model, devoid of auxiliary precautions, renders the legislator anything but a free agent. Normally, if a government is defeated in parliament every legislator who belongs to the governing party is also defeated. He must either move to the opposition benches or, more likely, face an immediate election with an uncertain outcome. What is more, if the legislator helped to precipitate the governments' downfall, he is unlikely to be reselected by his party.

Untramelled Westminster democracy thus compels legislators to link their destinies to that of the governments they keep in power. It is the executive that controls the purse strings and it is through executive action that legislators seek to appease the electorate. The result is that legislators are structurally dependent on the governments that they help form. The contention that under the Westminster system *simpliciter* the people can control the government through their representatives in parliament is fallacious in

practice. The people's only practical remedy is to await the election and throw out the government.

Jennings postulates that the possibility of being so thrown out will for the most part ensure that governments rule according to popular wishes. It is clear that the judges in *Dignan* placed faith in this form of democracy when they declared that responsible government and British usage dispensed with the need for a separation between legislative and executive powers. Yet a recent study shows that the Court was clearly mistaken in surmising that British constitutional practice had discarded the rule against delegating primary legislative power. In a report described by H.W.R. Wade (1982:733) as a classic survey on the subject, the British Parliamentary Committee on Ministers' Powers (the Donoughmore Committee) found that British constitutional practice did not sanction the delegation of power to legislate **in matters of principle** other than in exceptional instances. The Committee reported that when parliament had resorted to such delegation 'it has generally been on account of the special subject matter without the intention of establishing a precedent' (1932 Cmnd 4060:31). However, the Australian High Court's decision, although at variance with contemporary British practice, reflected the new trends in public law theory which were sweeping the Western world. The technical error of the Court was that it sought to support on legal grounds ideas that at the time were sustainable only on policy considerations. This is not, however, the point that will be pursued in this chapter. Rather, the complaint is that the policy that led to the enthronement of a form of democracy free of constitutional restraints was fundamentally flawed and self-defeating.

Democracy, Collective Choice, and Special Interests

The theory that the single safeguard of periodic elections is an effective deterrent against non-consensual government presupposes that the electorate can make genuine collective decisions unaided by constitutional principles. To put it differently, this theory of democracy holds true only if the process of vote gathering by political parties or by individual politicians (as in the US) is capable of yielding commitments to genuine consensus. But as Hayek points out, in an unrestrained democracy, such an outcome is impossible.

> It is at least conceivable though unlikely, that an autocratic government will exercise self-restraint. But an omnipotent democratic government simply cannot confine itself to servicing the agreed views of the majority of the electorate. It will be forced to bring together and keep together a majority by satisfying the demands of a multitude of special interests,

each of which will consent to the special benefits granted to other groups only at the price of their own special interests being equally considered. Such a bargaining democracy has nothing to do with the conceptions used to justify the principle of democracy. (Hayek, 1979:99)

Hayek's contention is substantiated by microeconomic analyses of collective choice processes undertaken by Downs (1957), Buchanan (1962,1975), Tullock (1962, 1976), Olson (1965, 1982) and others. These studies have also seriously undermined the contention that the welfare state was founded on democratic demand and that it 'was the natural consequence of the great constitutional reforms of the nineteenth century' (Wade,1982:3).

The studies cast doubt on the genuineness of collective choices pertaining to the interventionist activity of government by their exposure of the way in which majority coalitions are formed under simple majority voting systems. They have shown that majority coalitions tend to grow out of distributional struggles for shares of the social pie, which often produce bargains among interest groups pursuing separate ends. These 'distributional coalitions', as Olson (1982:44) calls them, represent collective choice only in the crude sense of producing legislative majorities. The reality is that majorities are often created by processes of vote trading, or in American parlance, 'logrolling'. Buchanan and Tullock explain the phenomenon as follows:

Logrolling seems to occur in many of the institutions of political choice-making in Western democracies. It may occur in two separate and distinct ways. In all of those cases where a reasonably small number of individuals vote openly on each measure in a continuing sequence of measures, the phenomenon seems pervasive. This is normally characteristic of representative assemblies, and it may also be present in very small governmental units employing 'direct democracy' ... Under the rules within which such assemblies operate, exchanges of votes are easy to arrange and to observe. Such exchanges significantly affect the results of the political process ... Logrolling may occur in a second way, which we shall call implicit logrolling. Large bodies of voters may be called on to decide on complex issues, such as which party will rule or which set of issues will be approved in a referendum vote. Here there is no formal trading of votes, but an analogous process takes place. The political 'entrepreneurs' who offer candidates or programs to voters make up a complex mixture of policies designed to attract support. In doing so they keep firmly in mind the fact that the single voter may be so interested in the outcome of a particular issue that he will vote for the

> one party that supports this issue, although he may be opposed to the party stand on all other issues. Institutions described by this implicit logrolling are characteristic of much of the modern democratic procedure. (1962:134-5)

Direct logrolling among legislators is most visible in US legislatures. The fact that American administrations do not depend on legislators' confidence to stay in office gives legislators greater autonomy from party platforms, and hence greater freedom to exchange votes. In systems where responsible government requires legislative majorities to maintain governments in office, legislators have less scope for direct logrolling. Instead, party policies themselves become critically influenced by special interest constituencies, which deliver electoral support in exchange for the right to dictate particular planks of the party platform.

In Australia, this type of bargaining shows signs of becoming institutionalised. The various 'summits' among interest groups on major policy issues such as wages, industrial relations and taxation have been thinly disguised attempts to formalise the bargaining processes and to create more enduring commitments of support.

In one significant respect, greater distortion of democracy seems possible where the fates of the executive branches and legislative majorities are constitutionally linked. In these systems, groups such as organised labour can not only threaten to withdraw electoral support but can also threaten disruptive action such as industrial strife, which, by its impact on the government's programs and credibility, can cause it wider electoral losses. Indeed, it is not unreasonable to postulate that unions have greater capacity to cause indirect electoral losses than directly to harm governments by dictating the way in which members vote at secret ballots. This type of bargaining power is reduced where the executive and the legislature are independent of each other and, consequently, there is a greater dispersal of responsibility for policy between the executive and the legislature on the one hand and among individual legislators on the other.

The conventional theory, that the demand for public goods and services and its attendant requirement of discretionary government has been the result of genuine collective choice, is further undermined by Olson's work on group behaviour. In his incisive study *The Logic of Collective Action* (1965) Olson confirms that smaller, homogeneous groups tend to prevail in the distributional struggle. Even more significantly, Olson demonstrates by reference to a theory of individual rationality that larger interest groups emerge not because of a fundamental human propensity to form and join unions, but because of the application of 'selective incentives', such as union

compulsion (negative) and the provision of private or non-collective benefits (positive) as inducements for joining and sharing the cost of lobbying enterprises (1965:133-4). Olson argues with impressive logic that in a large group where an individual's contribution makes no perceptible difference to the group as a whole, or to the burden or benefit of any single member, there will be no cooperative effort to pursue a common interest unless selective incentives are applied (1965:44).

In a more recent work, *The Rise and Decline of Nations* (1982), Olson summarises the implications of this finding for democracy:

> a society that would achieve either efficiency or equity through comprehensive bargaining is out of the question. Some groups such as consumers, taxpayers, the unemployed, and the poor do not have either the selective incentive or the small numbers needed to organize, so they would be left out of the bargaining. It would be in the interest of those groups that are organized to increase their own gains by whatever means possible. This would include choosing policies that, though inefficient for the society as a whole, were advantageous for the organized groups because the costs of the policies fell disproportionately on the unorganized ... With some groups left out of the bargaining, there is also no reason to suppose that the results have any appeal on grounds of fairness. (1982:37)

The general impact of the findings of Buchanan, Tullock, Olson and others on democratic theory may be summarised in another way. Even if it is assumed that a legislative majority on a particular question represents a national majority on a question of policy directed to serve particular interests, such a national majority is likely to include large numbers who dislike the policy but nevertheless support it as the price for obtaining a collusive majority on some other policy which is of greater importance to them. Thus, in respect of measures aimed at producing collective goods or material outcomes, there is little likelihood of genuine majority agreement except in the rare instances where individuals, or the community as a whole, receives a roughly equal net gain without costs accruing disproportionately to particular classes. The conclusion that Hayek reaches is that 'majority government does not produce what the majority wants but what each of the groups making up the majority must concede to the others to get their support for what it wants itself' (1979:11). The fact that in this century few governments have succeeded in perpetuating their power by building strategic coalitions of support among interest groups shows that even this type of collusive majority is rarely sustainable after the benefits and costs are

actually felt by the coalescing groups. But that has not discouraged politicians from attempting to rebuild coalitions or put together new ones.

(The fact that genuine agreement is unlikely on particular measures does not mean that democracy is illusory at all levels. For whereas individuals or groups may not genuinely agree on particular allocations and impositions, they can and do agree on general principles of conduct that do not aim at particular outcomes, but lay down rules subject to which individuals or groups may seek their own ends. This was as evident to Aristotle as it was to Madison.)

The knowledge that we now possess regarding the ways in which unrestrained democracy functions contradicts the theory that the welfare state is the result of a grown consensus, or the natural consequence of the advent of full democracy. Rather, that knowledge indicates that the welfare state was established through the corruption of the democratic ideal, in turn made possible by the removal of constitutional limitations on power, notably those implicit in the rule of law. The rule of law serves democracy by its insistence that government be conducted according to principles on which genuine consensus is possible. By conceding to governments the power to satisfy particular interests on which there can be no such agreement, we have brought about not only the decline of the rule of law but also the perversion of democracy.

Chapter 4

The Decline of the Rule of Law and the Emergence of Sovereignty

The previous chapter dealt primarily with the redefining of the democratic ideal. In this chapter we further consider the ways in which the rule of law ideal was discredited or drastically revised in order to facilitate the form of democracy that characterises the welfare state.

The decline of the rule of law vaguely resembles the puzzle of the chicken and the egg. The question is whether the contemporary form of democracy abrogated the rule of law or whether the abrogation of the rule of law made the present form of democracy possible. Fortunately, the answer, although complex, is intellectually comprehensible. It is beyond doubt that democracy provided or secured the freedoms under which separate interests could effectively be advocated. Yet the accommodation of these special interests in governmental activity required the prior removal of limitations on power which confined governments to a regime controlled by general principles of law. It needed a reinterpretation of the constitution so as to legitimise the new form of democracy, and this could not have been achieved on the basis of the demands alone. Governments elected on promises to sectional interests needed wide powers to honour their pledges. The grant of these powers to the executive became acceptable practice, chiefly as a result of the work of constitutional lawyers who successfully argued that the principle of non-delegation of arbitrary powers was not a part of British constitutionalism. The unprecedented clamour for collective and sectarian goods, and the moral terms in which such demands were advanced, created the political climate needed to abandon established constitutional doctrines.

Yet the actual departures from constitutional principle required intellectual effort.

In his influential book, *Law in Modern Society,* Roberto Unger articulates with exceptional clarity the impact of the welfare state on the rule of law. He identifies two principal ways in which the welfare state undermines the rule of law. One is the escalating use of 'open-ended standards and general clauses in legislation'. The other is the 'swing away from formalistic legal reasoning and formal justice and towards purposive legal reasoning and procedural or substantive approaches to justice' (Unger, 1976:194, 195). General and impersonal laws are consistent with a political order that secures relative autonomy to the individual and restricts the state to the execution of laws and the carrying out of functions within limits set by law. General laws are not aimed at particular outcomes, but are intended to serve as ground rules for the conduct of interpersonal relations. As Hayek points out, 'there can be no set of such rules, no principles by which the individuals could so govern their conduct that in a Great Society the joint effect of their activities would be a distribution of benefits which could be described as materially just, or any other specific and intended allocation of advantages and disadvantages among particular people or groups' (1976:85). A government subject to general laws finds it difficult to create particular outcomes except within the range of its residuary authority. The welfare state, however, is meant by definition to provide particular goods, services and facilities and to correct what are perceived to be the undesirable effects of a system of general and impersonal laws, such as the unequal distribution of wealth. As the state becomes more committed to substantive justice, it finds it increasingly difficult to achieve its goals through administrative powers and its own resources. The inequalities that result from the autonomy provided by general laws cannot be eliminated without particularising the effect of the law through discretions and measures directed at substantive results. Unger explains:

> The quest for substantive justice corrupts legal generality to an even greater degree. When the range of impermissible inequalities among social situations expands, the need for individualised treatment grows correspondingly. No matter how substantive justice is defined, it can be achieved only by treating different situations differently. Thus, for example, it may become necessary to compensate for an existing inequality with a reverse preference afforded by the legal order to the disadvantaged group. Priorities among groups in turn shade imperceptibly into preferences among individuals and individual situations. (1976:198; cf Hayek 1976:85).

If the law is to produce particular results, its interpretation and application must be governed by the considerations most conducive to the attainment of the desired end with respect to the case in hand. Thus there can be 'little if any requirement of consistency or adherence to precedent, and the agency may, instead of promulgating rules of general application, make and change its policies in the process of case to case adjudication' (Reich, 1964:750).

English Constitutional Theory and Parliamentary Sovereignty

The question that needs to be considered is how the rule of law in Australia was corrupted to permit the levels of discretionary government involved in the administration of the welfare state. It is quite evident that the decline of the rule of law ideal in Australia is inextricably linked to developments in English constitutional theory. This is clearly established in the *Dignan* case. Dixon J in that case ascribed parliament's 'claimed power to authorise executive lawmaking, to a conception which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law' (*Dignan* [1931] 46 CLR 73, 101-2). The clear suggestion was that the English idea of a sovereign parliament having the right to do what it willed applied equally to the Commonwealth legislature. Evatt J was more explicit when he stated that the notion of legislative power 'contains within itself the power to deposit or delegate legislative power, because this is implied in the idea of Parliamentary sovereignty itself' (*Dignan*, 118).

There is no doubt that neither judge meant to ascribe to the Commonwealth parliament sovereign powers with respect to subject matters excluded from its purview by the Constitution. But it is evident that they considered parliament to be sovereign within its specified heads of legislative power. In other words, so long as it stayed within its legislative province, the Australian parliament enjoyed the type of sovereignty attributed to the British parliament.

The British parliament is considered by most constitutional writers as sovereign in the absolute sense. The idea of the absolute sovereignty of parliament was itself a result of the redefining of democracy. Absolute sovereignty can only be reconciled with democracy if democracy is reduced to the simple right of periodically electing or dismissing governments. Speaking of this type of democracy, Professor Goodhart has written that

> a majority in a democratic state may be as tyrannical as any individual despot if there is no effective constitution to control the exercise of its

> power. This was one of the cardinal errors made by some of the political philosophers in the nineteenth century, for they suggested that by the establishment of democracies all other political problems could be solved. Bitter experience has taught us that this may not be true. (1958:944).

True or not, the welfare state could not have been established without this form of democracy and without the absolute legislative powers that such democracy made possible. Since at least 1688, there has been no doubt about the supremacy of the British parliament. But that only meant the **King in parliament** was superior to the **King**, and that there was no political superior to parliament properly constituted. It did not mean that parliament possessed absolute power. Parliament did not possess such power, simply because parliament did not claim it even when it had the political capacity to sustain such a claim. Instead it observed, in substance and spirit, the limitations on power expressed in the ideal of the rule of law. The confusion between the British parliament's political capacity and its constitutional practice was a major cause of the re-emergence of the idea of sovereignty: an idea that could advance only by corrupting the rule of law and by redefining democracy itself. By understanding how sovereignty re-emerged we can also better understand the supersession of the constitutional state by the welfare state.

The Re-emergence of Sovereignty

The Revolution of 1688 marked the culmination of a struggle in which parliament, in alliance with the common law courts, successfully strove to deprive the king of all prerogatives of a legislative kind. The object of the struggle was to deny the king's sovereignty, not to establish parliament's own sovereignty. The aim was to defend the common law rights of the people against royal invasion, not to set up parliament above those rights. But, as the struggle proceeded, it was evident that the king's actions could be met only by the extension of parliament's own power. And in the political outcome, parliament was left with no rival to impede its progression to sovereignty. McIlwain observes:

> In the beginning Parliament represents the claims of the 'subjects', and therefore denies the pretensions, including the claim of sovereignty. In the death struggle that ensues 'Parliament is forced to make new claims and by degrees to grasp at supremacy, lest it should lose old rights or even forfeit equality.' With the successful issue of the struggle, Parliament assumes as of right those very powers it formerly denounced. (1910:373)

The medieval parliament represented the supremacy of the law. Whilst parliament could supply a rule where none existed, or correct the errors of inferior courts and officers, it could not itself set aside the principles of the common law or 'the common right and reason'. Not only was this evident from the precedents cited by Coke in the *Dr Bonham* case (8 Reports 118), but it was implicit in the language of some amending statutes. McIlwain mentions two statutes of Edward III that refer to previous enactments as having been made 'contrary to the Laws and Customs of our Realm of England' and as 'sinfully and wrongfully made and granted, against Reason and common Right' (1910:299). A statute could supplement the law by providing for its better administration, but could not violate the law itself. McIlwain concludes from a penetrating survey of precedents and statutes that:

> In fact, it is clear that [Coke] and his contemporaries retained the old distinction between law and enactment. Statutes were not ordinarily to be disregarded, 'there being no greater assurance of jurisdiction than an Act of Parliament, where there be no ... presidents' [*sic*] to the contrary; but statutes, made by the High Court of Parliament, and orders of other courts correcting errors in judicial proceedings and 'other errors and misdemeanors extra-judicial,' which might make changes in the working or the administration of the law, could never affect the sacred principles of the common law created by immemorial tradition and founded upon the unalterable principles of reason and revelation. As for the judges of Henry II, the assizes were not 'law' neither was a statute 'law' to Coke. The idea that law can be 'made' is very modern. (1910:299-300).

Whether McIlwain's view is accepted or the opposing views of Frederick Pollock (1904:262 n 1) and William Holdsworth (1936[vol ii]:442) are accepted, two things seem certain. One is that parliament, whether or not it was technically supreme, was rarely engaged in defeating the common law, but rather intervened occasionally when 'the development of common law rules has failed to keep pace with changes in social and economical conditions' or 'when a too servile adherence to precedents has forced those rules into a wrong groove' (Holdsworth, 1936[vol ii]:446-7). The other is that whether or not parliament had technical supremacy, its **deliberate** assertion came only with the necessity to defeat the king's claims to prerogatives based on ancient law which the courts recognised in opposition to parliamentary interests. When the king claimed powers by right of common law and the

courts would not deny him these, there was no other course open to parliament than to assert the supremacy of its legislation over those laws and judges. Common law judges who regarded the king's prerogative as a greater threat to the law than parliament's supremacy lent their support to the parliamentary cause. That alliance proved so successful that it eventually destroyed judicial capacity to question parliament's claim to omnipotence (Holdsworth, 1936[vol ii]:442, 443). Thus, parliamentary sovereignty as a general proposition emerged as a by-product of an exercise directed at the more particular object of denying royal sovereignty. As McIlwain comments:

> Whatever defects may be seen in (the English theory of parliamentary omnipotence), it accomplished its purpose. It disposed forever of the King *legibus solutus*, even if it did bring into being a Parliament *legibus solutum*. The protection of the rights of individuals in the seventeenth century demanded a power able to cope on equal terms with the King. The result was the omnipotent Parliament ... We must admit the probable necessity of a doctrine of parliamentary sovereignty in the seventeenth century. To say, however, that it was inevitable, even to say that in its age it was a necessity and a benefit, is not to justify the conditions which made it necessary, or the circumstances from which it arose. Above all, a recognition of the services it performed in its day should not lead us to think that this theory is fit to become a political formula of universal validity.
>
> Abuses usually get themselves tolerated because they are sheltered under institutions whose past services render them immune from attack. (1910:375-6)

The supremacy of parliament did not mean an immediate end to the supremacy of the law. In fact its immediate consequence was the establishment of the rule of law in areas where the prerogative previously ruled. On the other hand, in the century following the defeat of the king (which Keir terms the Classical Age of the Constitution) there was no effort by parliament actively to alter the law or to assert its sovereignty in the realm of private rights. What was more, as Keir observes,

> Theoretically, neither lawyers nor political theorists were quite prepared to accept the full implications of its sovereignty, the first being inclined to regard the Common Law, the second natural human rights, assumed as an element in the fashionable contractualist theory of government, as being in some way fundamental. (1969:295)

The Whig doctrine, as Marshall points out, 'whether aimed at divine right or Leviathan, is inevitably the exercising of an option for limited government' (1957:51). Whether this doctrine imposed constitutional limitations in a moral or a legal sense is, as Marshall observes, a difficult question (1957:51). On the other hand, the question is of no great importance in relation to the English constitution, as many of its rules and conventions grew out of demands and convictions of a moral order. The more salient question is how the perceived limitations failed to endure as rules in the evolution of the constitution into the present form. That question will be considered presently.

The Role of Parliament

It is evident that, initially, the sovereign parliament did little more than attend to the improvement of government and the administration of the law. Courtney Ilbert states:

> The eighteenth century was a great age of Parliamentary oratory, but it was not an age of great legislation. The territorial magnates who, or whose nominees, as knights of the shires or members for pocket boroughs, constituted the house of commons, contented themselves in the main with formulating as Acts of Parliament rules for the guidance of landowners as justices of the peace. (1911:29-30)

Even in the ensuing period of reform accompanying the rise of laissez faire policy, much that was accomplished could be regarded as 'the removal of antiquated and useless institutional lumber' (Keir, 1969:371). However, with the rapid growth of industry and urbanisation, the government set about providing infrastructure development, education and an extent of regulation of working conditions in factories. Parliament created new departments and ad hoc authorities for these purposes. But on the whole, although there was a concern to deal with the novel problems, there was no conscious design to alter the law of the land. The inclination was rather to reform government and to empower it to undertake the tasks that were thought to have befallen it by the rapid industrial and social transformation of the society. But parliament's involvement in these tasks invariably produced marginal changes in the common law.

Parliament's involvement in administration grew out of two factors. First, although much could have been accomplished through the administrative powers of government, there was always a likelihood that private rights may obstruct the performance of the extended and increasingly complex

tasks undertaken by government. Ideally, such conflicts between public purposes and private rights should have been resolved by parliament after they had arisen and after due deliberation. Parliament would then have been the arbiter of such questions, constrained to reach its decisions by laying down considered principles of law. But efficiency demanded that such conflicts be avoided beforehand by clothing the government with powers sufficient to overreach private rights wherever these posed obstacles. Thus, although parliament showed no desire generally to alter the law of the land, it became willing to grant the government powers which, in their exercise, could incidentally abrogate private rights in particular cases.

Second, after the executive became responsible to parliament rather than to the king, parliament itself became a principal source of policy. Policies initiated by parliament were expressed in the form of legislation, often enacted without specific consideration of their impact on rights. Nevertheless, it was generally true that the 19th-century parliament did not seek to assert its supremacy over the law, but that in directing government it unavoidably modified the law at the points at which the law came into conflict with its own will. Hayek describes what occurred as follows:

> Because the chief activity of all legislatures has always been the direction of government, it was generally true that 'for lawyer's law Parliament has neither time nor taste'. It would not have mattered if this had led only to lawyer's law being neglected by the legislatures and its development left to the courts. But it often led to the lawyer's law being changed incidentally and even inadvertently in the course of decisions on governmental measures and therefore in the service of particular purposes. Any decision of the legislature which touches on matters regulated by the *nomos* will, at least for the case in hand, alter and supersede that law. As a governing body the legislature is not bound by any law, and what it says concerning particular matters has the same force as a general rule and will supersede any such existing rule. (1973:126-7)

In the previous era, there was great resentment when the king's measures interfered with common law rights, so parliament set itself as the protector of those rights. In the 19th century, when parliamentary measures infringed rights, they caused no conflict as the people had no institution but parliament itself to represent their grievances. Besides, at least in the short term, parliamentary measures that tended to promote the dominant interests in parliament were seen in an altogether different light from the designs of Stuart royalty. Impositions that parliamentary measures entailed were

regarded as mandated by consent. Above all, the fact that for the most part parliamentary measures did not affect rights generally, but only in particular cases, meant that there was no general resentment, in the short term.

The medieval conception of the rule of law was that all authority including that of parliament was subject to the law, which in England meant the fundamental principles of the common law. There is compelling evidence to suggest that even after parliamentary supremacy was established, there was little deliberate interference with these principles. For the most part parliament legislated on matters of government. As J.C. Carter wrote in 1907:

> We find in the numerous volumes of statute books vast masses of matter which, though in the form of laws, are not laws in the proper sense. These consist in the making of provisions for the maintenance of public works of the State, for the building of asylums, hospitals, school houses and a great variety of similar matters. This is but the record of the actions of the State in relation to the business in which it is engaged ... it is substantially true that the whole vast body of legislation is confined to Public Law and that its operation on Private Law is remote and indirect and aimed only to make the unwritten law of custom more easily and certainly enforced. (1907:116; cf Bagehot, 1978:10; Ilbert, 1901:6)

Although the rule of law in England had been historically associated with the supremacy of the common law, theoretically the idea was consistent with the existence of a supreme law-making body such as parliament. What the ideal required was that actions pertaining to government be subject to laws in the sense of general rules formulated after due consideration. Parliament's legislative involvement with the organisation and administration of government was reconcilable with this ideal, provided the following conditions were met:

1. That in providing for matters of government, parliament took care to avoid abrogating the rights of the subject or the general laws of the land.
2. That where such abrogation was unavoidable, parliament did so by general rules enacted after full consideration of the issues pertaining to rights.

A.V. Dicey, whom some regard as the chief contributor to the 20th-century notions of parliamentary sovereignty, nevertheless maintained that the sovereignty of parliament was conducive to the rule of law in that the

commands of parliament can only be uttered through the combined action of its three constituent parts, and must therefore always take the shape of formal and deliberate legislation. He stated:

> This is no mere matter of form; it has most important practical effects. It prevents those inroads upon the law of the land which a despotic monarch, such as Louis XIV, Napoleon I, or Napoleon III, might effect by ordinances or decrees, or which the different constituent assemblies of France above all the famous Convention, carried out by sudden resolutions. (1959:407)

Dicey devoted a chapter of his *Law of the Constitution* to explaining what seems an irreconcilable contradiction between the sovereignty of parliament and the rule of law. Apart from his assertion that the formality associated with sovereign acts militates against impulsive legislation, Dicey pointed to the fact that parliament, except at periods of revolution, never directly exercised executive power. These were substantial limitations on parliament's capacity to determine particulars as opposed to general principles. They were eventually overcome by the expedient of delegating lawmaking powers to the executive, which negated the requirement of the participation of the three estates in lawmaking and unified legislative and executive powers in a committee of the two Houses. However, long before this happened, the rule of law came under the pressure of parliamentary activism.

Initial Departure from the Rule of Law

The rule of law ideal required parliament to differentiate its concerns and to subject the executive measures to its own jurisdiction as the supreme lawmaking body. In other words, as Locke envisaged, it should have kept its legislative and executive roles separate by exercising the two powers differently. This situation was by no means the best for the rule of law, for it required enormous discipline and commitment to maintain such a distinction without internal or external checks. But as Hayek points out, the alternative of restricting parliament to lawmaking in the narrow sense was bound to fail as it would have constituted an attempt to limit the only existing representative body to the laying down of general rules, and to deprive it of control over most of the activities of government (Hayek, 1973:129-30). In any case, it was impossible to place a substantive limitation as it involved the questioning of parliament's sovereignty, a prospect already foreclosed by history. What the Constitution clearly required was that a modification of the

law should be referable to a command of parliament expressed in the legislative form. However imperfect, this procedural limitation was meant to ensure that the rights of the subject would not be infringed without due deliberation by parliament. Such deliberations, when undertaken in public by members accountable to the electorate, were expected to produce just determinations.

For the better part of the 19th century, parliament was content to leave the development of the law in the strict sense to the courts, and concerned itself with the tasks of government. Nevertheless, it showed a willingness to effect administrative reforms and to initiate policy through legislation with the object of ensuring that measures were not defeated by conflicting rights and obligations under the common law. This attitude caused the initial departure from the ideal of the rule of law. In permitting the abrogation of rights incidentally, or consequentially, rather than after specific deliberation, parliament showed its willingness to subordinate the law to the aims of government. In these instances, the actual departure from the rule of law occurred in two respects. First, to the extent that legislation aimed at executive purposes was permitted incidentally to overreach rights, the standards of deliberation and formal amendment were compromised. Second, as a consequence of legislation being primarily concerned with particular executive purposes, there was no general modification of the law but only vitiations of rights in particular cases where rights conflicted with legislative aims. Accordingly, such legislation tended to undermine the ideal, which, as Daniel Webster put it, required that 'every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society' (quoted in *Hurtado* v. *People of California* 110 US 516, 535-536).

Despite these developments, the rule of law continued to be acknowledged as a cardinal principle of the Constitution. The important mitigating circumstance from the point of view of that ideal was the fact that executive measures required parliamentary consideration and formal enactment in order to prevail over the law, and consequently the more deliberate or visible modifications of the law were likely to receive the attention of the supreme law-constituting body and of the people. In other words, it was recognised that any change of the law had to proceed from an Act expressing the will of parliament itself, and that it was constitutionally improper to leave such power in the hands of the executive. Even when parliament resorted to delegation in cases of emergency, it took care not to establish a precedent by explaining in recitals the exceptional nature of the grants. Acts of 1832, 1846 and 1848 (dealing with epidemics) justified the delegation of power to make rules and regulations on the ground that 'it may be impossible to establish such rules and regulations by the authority of parliament with sufficient

promptitude to meet the exigency of any such case as it may occur' (Carr, 1952:232). The reaction of the *Saturday Review* to a proposal to give rule-making power to the Privy Council expressed the popular perceptions regarding delegated legislation:

> There are some practical conveniences, no doubt, in giving to the Crown the power of legislation, subject only to a possible veto of the legislature after a project of law has been laid complete upon the tables of the two Houses of Parliament. But such advantages are wholly inconsistent with constitutional government and must be reserved for countries whose highest ideal of liberty is absolutism tempered by a plebiscite. No modern innovation ... needs to be watched with more jealousy than the practice of delegating the authority of Parliament — even in small and local matters — with no better check than the chance that some unusually vigilant legislature may move an address to reject the scheme of law before it had time to mature into an indefensible enactment.' (Carr 1952:237)

However, towards the end of the 19th century, the activities of government increased dramatically with parliament providing it the necessary powers by the frequent delegation of discretionary authority. In the period 1894-1913 the average annual total of legislative enactments made by government under general Acts increased from a negligible number to 210. During the First World War this number understandably increased to as much as 1200, much of it made under the Defence of the Realm Act. After normal conditions were restored, the number remained at an average of about 400 until 1931, when the whole issue was considered by the Committee on Ministers' Powers (Carr, 1952:241). Yet despite this proliferation of legislative discretions it is apparent that the executive, except in the times of emergency, received very little by way of lawmaking power in the strict sense. Indeed, even as regards primary legislation enacted by parliament, it was apparent early in this century that 'nine-tenths of each annual volume of statutes are concerned with what may be called administrative law' (Ilbert, 1901:6), and that the statute book contained 'vast masses of matter which, though in the form of laws, are not laws in the proper sense' (Carter, 1907:116).

Dicey on Executive Power and the Rule of Law

The nature of the powers delegated to the executive received its most systematic examination in the work of the Committee on Ministers' Powers

appointed in 1929. In its report (1932 Cmnd 4060) the Committee drew a distinction between the 'normal' type of delegated power and the 'exceptional' type. The normal type was characterised by clearly defined limits and the incapacity to legislate on matters of principle, to impose taxes or to amend Acts of parliament. As regards the exceptional powers, which lacked such limitations, the Committee made it plain that 'when Parliament has resorted to any of them, it has generally been **on account of the special subject matter and without the intention of establishing a precedent'** (1932 Cmnd 4060:31; emphasis added). In so far as powers concerned matters of administrative detail, their delegation was not merely consistent with the rule of law but was actually conducive to it. Such detail was never the proper concern of the legislator, and here it is worthwhile recalling Aristotle's complaint against popular assemblies which sought to decide everything and thereby made themselves susceptible to domination by particular interests dictated by demagogues (Jowett, 1916:157). The essence of the traditional rule of law was realised not by the legislator undertaking the tasks of government but by his laying down general principles which the government would be obliged to carry out in detail. This was something that A.V. Dicey clearly recognised in his famous enunciation of the rule of law in England. Dicey considered the first and the most important meaning of the rule of law to be 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and ... the absence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government' (Dicey, 1959:202). However he considered that Acts of parliament should only lay down the general principles and should enable the executive government 'by means of decrees, ordinances, or proclamations having the force of law, [to] work out the detailed application of the general principles embodied in the Acts of the legislature' (1959:52-3).

There was no contradiction in Dicey's position. Dicey considered that 'every law ought to be, statements of general principles' (Dicey, 1959:52 n. 2). This was essentially the traditional notion of the law, which left its application to the executive. The detailed application of general principles did not constitute law-making. Conversely, the laws should be concerned with general principles and not with details. The authority to work out detail did not include the discretion to decide matters of principle, and hence it excluded the power to act arbitrarily in relation to rights. Dicey considered the power regarding details to be inherently executive. He even considered it undesirable that such power should depend on specific authorisation by the statute. 'In this, as in some other instances, restrictions wisely placed by our forefathers on the growth of royal power, are at the present day the cause of unnecessary restraints on the action of the executive government' (1959:53).

Dicey decried parliament's efforts to engage in 'futile endeavours [to] work out the details of large legislative changes' and stated that the practice of empowering the executive to make rules in that behalf is 'only an awkward mitigation of an acknowledged evil'. He argued that the detailed application of laws, being properly an executive task, should be capable of being performed by means of decrees, ordinances or proclamations (1959:52). He did not consider the discretion involved in the detailed applications of law to be wide or arbitrary, as it was controlled by the general principles of the Act.

One class of discretion, however, did cause Dicey concern. This was the type of discretion granted to the executive in times of emergency, which enables it to take actions affecting the liberties of the subject. As he put it:

> Under the complex conditions of modern life no government can in times of disorder, or of war, keep the peace at home, or perform its duties towards foreign powers, without occasional use of arbitrary authority. (1959:411)

Dicey was contemplating powers such as those which enable the government to arrest, detain or deport persons in times of war or to prevent subjects from dealing with the enemy or from violating the nation's neutrality. In such situations the executive must obtain aid from parliament or 'break the law and trust for protection to an Act of Indemnity' (1959:413). Dicey was considering a problem which, in his words, had

> perplexed the statemanship of the sixteenth and seventeenth centuries, how to combine the maintenance of law and the authority of the Houses of Parliament with the free exercise of that kind of discretionary power or prerogative which, under some shape or other must at critical junctures be wielded by the executive government of every civilized country. (1959:413)

Dicey could have, as John Locke did, treated the recourse to such powers as an exceptional departure from the rule of law which is sanctioned by the Constitution (Laslett, 1970:393). But he chose instead to give an elastic interpretation to the rule of law which would accommodate such executive arbitrariness. He argued:

> The fact that the most arbitrary powers of the English executive must always be exercised under Act of parliament places the government, even when armed with the widest authority, under the supervision so to speak of the courts. Powers, however extraordinary, which are con-

> ferred or sanctioned by statute, are never really unlimited for they are confined by the words of the Act itself, and, what is more, by the interpretation put upon the statute by the judges. Parliament is supreme legislator, but from the moment parliament has uttered its will as law giver, that will becomes subject to the interpretation put upon it by the judges of the land and the judges, who are influenced by the feelings of magistrates no less than by the general spirit of the common law, are disposed to construe statutory exceptions to common law principles in a mode which would not commend itself either to a body of officials, or to the Houses of parliament if the Houses were called upon to interpret their own enactments. (1959:413-4)

In effect, Dicey argued that the presence of independent judges with a predisposition towards reading down statutes in favour of traditional liberty and the common law spirit was a sufficient condition for the prevalence of the rule of law. Generally applied, this argument results in a drastic dilution of the rule of law ideal, which in the traditional sense prohibited the grant of legislative powers to the executive. Dicey could not have been unaware that when the executive vested with wide discretion can make its own law, there is little that a judge could do by way of judicial review to challenge the exercise of such discretion. In fact, there is no textual evidence to suggest that Dicey meant this argument to represent the rule of law in a general sense, as the consistent theme of his writings had been the assertion that the rule of law, as prevalent in England, precluded the grant of arbitrary discretion by parliament to the executive. Rather, it suggests Dicey's anxiety to repudiate any argument that might seek to deny the rule of law as a principle of the English Constitution on the narrow grounds of the occasional use of arbitrary power by the executive.

Nevertheless, Dicey's choice of argument in relation to emergency powers was unfortunate, in that it seems to have inspired later generations of writers to generally revise the rule of law ideal along the lines suggested by that argument. Holdsworth, for example restates the rule of law as follows:

> I think that in so far as the jurisdiction of the courts is ousted, and officials are given a purely administrative discretion over questions of a justiciable kind, the rule of law is abrogated. But I do not think that is abrogated if these officials are given judicial or quasi judicial powers. No doubt these powers are not exercised by the courts; but because their exercise is strictly controlled by the courts, it is true to say that the principle of the rule of law is not infringed. Fortunately it is still operative — fortunately because as Lord Sankey has said: 'Amid the

> cross-currents and shifting sands of public life the law is like a great rock upon which a man may set his feet and be safe, while the inevitable inequalities of private life are not so dangerous in a country where every citizen knows that in the Law Courts, at any rate, he can get justice'. (1964[vol xiv]:203)

According to this reformulation, the desideratum of the rule of law is the capacity of the courts to review executive actions even if such capacity is limited by the very width of the powers granted to the executive. Many English writers continued to recognise that the rule of law demands something more than the principle of legality 'for otherwise it would be satisfied by giving the government unrestricted discretionary powers, so that everything that they did was within the law' (Wade, 1982:22). But they deemed the requirements of the rule of law to be satisfied by the principles of administrative law developed by courts for the purpose of supervising executive actions. To Professor Wade, this requirement was satisfied by a particular judicial attitude that can be impartially applied to any kind of legislation. He said, 'without these rules all kinds of abuses would be possible and the rule of law would be replaced by the rule of arbitrary power' (1982:23).

It is impossible to belittle the efforts of English judges who constructed with courage and flair the system of restraints which is now associated with English law. By their doctrinal jealousy of encroachments on personal liberty and by their relentless insistence on natural justice, due process and administrative fairness, the English courts have often frustrated parliamentary designs aimed at securing the subservience of the law to policy. But it is equally impossible to treat this judicial method as having upheld the rule of law except in an unacceptably truncated sense. There are three major reasons for this view.

First, even as judicial resolve and creativity increased, the substantive scope for judicial action has diminished as a consequence of the widening of executive discretion. It might even be said that the increasing judicial vigilance has had the unintended consequence of diminishing the legislature's responsibility to determine the principles of the law.

Second, the courts' vigilance regarding the deprivation of physical freedom contrasts with its sharply reduced concern regarding civil deprivations. Judges have offered far greater latitude for discretions affecting property than they have for discretions affecting persons (Goodhart, 1958:957-8; Tribe, 1978:474). In doing so they have partly repudiated the original aim of the rule of law, which was the protection of life, liberty and property from arbitrary interference.

Finally, and this is the most important reason, judicial intervention in England is primarily directed at ensuring the procedural regularity and the sufficiency of authority in respect of decisions affecting particular cases or persons. English courts have had little capacity to elevate executive discretions to the level of generality at which the rule of law aims. Whilst English judges have compelled discretionary authorities to observe substantive and procedural limitations on power, they have had little success in mitigating the powers themselves in order to ensure that a person is not deprived of his life, liberty or property except under a general rule governing society. While judges can ensure that rules are observed, they cannot prevent rules from being directed to particular purposes or to particular persons. In England, the generality of the rules governing society is not something that can be secured by a particular judicial attitude, as Professor Wade suggests, but only by a particular legislative attitude. The important question is: what led to the loss of this legislative attitude? This question will be examined further in the following chapter.

Chapter 5

Decline of the Rule of Law: Some Theoretical Mistakes

It was argued in the previous chapters that the decline of the rule of law was not a necessary consequence of the spread of democracy. Democracy facilitated the organisation of interest groups and the articulation of their demands. However, the power of government to satisfy such demands by selective or discretionary action was not something that demands alone could create in a constitutional order characterised by the absence of wide discretion. In that sense, the type of bargaining democracy discussed in Chapter 3 was more the result than the cause of the abrogation of the rule of law. The rule of law in England was abrogated through intellectual effort. Typical of such effort is the work of Dicey's severest critic, Ivor Jennings.

Jennings rejected the rule of law as a juridical principle governing the actual distribution of powers. He argued that the rule of law, in the sense that public authorities ought not have wide powers, 'is a rule of action for Whigs and may be ignored by others' (1959:308). The moral, philosophical and emotional reasons that motivated Jennings to reject the rule of law ideal are clear. He accuses Dicey of being concerned with the liberty of the subject and not 'with the clearing up of the nasty industrial sections of the towns' (1959:311). He condemns the Whig Party for not interfering with profits even when 'profits involved child labour, wholesale factory accidents, the pollution of rivers, of the air, and of the water supply, jerry-built houses, low wages, and other incidents of nineteenth-century industrialism' (1959:309). Whilst these sentiments explain Jennings's motivation, they hardly mitigate the intellectual errors he commits in repudiating the rule of law as a constitutional doctrine.

Jennings's Misconstruction of Discretionary Powers

First, Jennings denies that the English Constitution prohibited the vesting of wide discretionary powers in the executive even in Dicey's time. In doing so he makes the manifestly false assertion that Dicey never considered, or even knew much about, discretionary powers (1959:55, 310). Dicey had explicitly considered executive discretions, and in fact proposed that certain discretionary powers should be available to the executive independent of statutory authorisation (1959:52; see the discussion of Dicey's views on executive discretion, above, pp. 39-42). Dicey's position was not that the executive should have no discretion, but that executive discretion be limited to working out the detailed application of the general principles embodied in the Acts of parliament (1959:52-3). In this sense he saw an absence of wide discretion in the public authorities of England. Dicey's observation was found by the Committee of Ministers to be empirically sound (1932 Cmnd 4060:31; see discussion above, p. 40). It was this limitation that enabled the courts effectively to control executive action, by insisting that every rule, regulation or order be referable to and be sanctioned by a general principle of law settled by parliament. The position is wholly different where parliament grants open-ended discretions to the executive, which enables it to determine its own principles or to act in pursuance of a general policy without regard to any principle. In such cases, the executive will becomes the law and the courts become powerless to question measures affecting rights except upon the limited grounds evolved through judicial ingenuity. As argued in the previous chapter, these grounds are mainly relevant to procedural justice, and hence are incapable of securing the conformity of executive action with any pre-established principle or rule where none is required to be observed. Excess of jurisdiction, the presence of bad faith, and errors on the face of the record also become difficult to establish where discretions are open-ended and policy considerations predominate the range of factors relevant to the exercise of power.

Clearly it is this type of discretion that Dicey considered impermissible in 1885, and that the Donoughmore Committee in 1932 found to be involved in the exceptional type of delegation practised by the British parliament. The Committee concluded that 'when Parliament has resorted to any of them it has generally been on account of the special subject matter and without the intention of establishing a precedent' (1932 Cmnd 4060:31). Jennings's failure to distinguish wide discretions of an administrative kind from those involving the power to create law flowed from the familiar misconception that all rules of a binding character constituted law. It was observed in the previous chapter that much of parliamentary legislation concerned the organisation of government and the activities of its departments. Subordi-

nate legislation made under such statutes was also directed to this end. When the delegated powers concerned the rights of subjects, they were usually referable to and controlled by a principle laid down by parliament. This was essentially the Committee's finding. By the classical notions of the law, determination of detail properly belonged to the executive, one of whose functions was the application of the general principles of the law to particular circumstances. The ancient two-fold division of powers drew no distinction between executive and judicial powers in so far as they concerned the application or enforcement of laws. The law had to be administered in accordance with its principles whether the function was exercised by judges or by other officers of the state. The ancient ideal required the executive to exercise powers affecting rights in much the same way as the courts of the land. The supervisory jurisdiction of the courts developed in later times tended to ensure that the executive so acted in relation to the administration of laws. The position was different in relation to legislation that concerned purely administrative activity, where the executive enjoyed greater latitude and greater immunity from judicial control. In the welfare state, there is a confusion of these two kinds of discretion which undermines the legislative-executive distinction and hence the rule according to established laws. But as herein argued, the practical confusion was facilitated by the type of intellectual confusion typified by Jennings.

It is not contended, nor has it ever been as far as I am aware, that the rule of law in the classical sense was unfailingly observed in Dicey's time or at any other time. But this is not to assert that the rule of law was not a governing axiom of the British Constitution which, in its essential import, was regularly observed. Infractions of constitutional principle occur and sometimes remain unchecked even where courts possess the power to question legislative action on constitutional grounds. The fact that no comparable authority was claimed or recognised in modern England did not mean an absence of constitutional limitations on power.

Jennings's second intellectual error was the failure to give proper consideration to the nature of the British Constitution. In drawing conclusions from what he regarded were infringements of its alleged doctrines, Jennings failed to take account of the Constitution's customary character. This brings to mind Professor Goodhart's comment about the absence, in England, of written guarantees of fundamental rights. He states:

> To deny that they are obligatory under the British Constitution, while recognizing their legal nature under the American one, is to place all the emphasis on form and none on substance. It is to disregard the character of English constitutional history with its great landmarks that have established those fundamental rights which no Parliament can reject

> except in time of war. I believe that it is true to say that the legislative powers of Parliament are limited by certain fundamental principles which are universally accepted even though there is no other body in the Constitution which can prevent Parliament from exceeding these limitations. It is in defence of such principles that men have been prepared to die, in the past and will be prepared to die in the future. (1958:954)

Dicey regarded the rule of law as a binding principle of the British Constitution, which required parliament to lay down general principles and the executive to work out their detailed application. This essentially was the position even in 1932. Jennings says that 'to a constitutional lawyer of 1870, or even 1880, it might have seemed that the British Constitution was essentially based on an individualist rule of law, and that the British State was a *Rechtsstaat* of individualist political and legal theory [as the] Constitution frowned on "discretionary" powers, unless they were exercised by judges' (1959:310). Jennings's complaint is that even in Dicey's time that type of discretion was granted to the executive and therefore the rule of law in England was a false impression. Contrary to Jennings's suggestion, the rule of law was concerned more with the question of what type of discretion could be granted than with the question to whom it should be granted. The rule of law enjoined the delegation of discretionary authority to whomsoever without an established guiding principle. As Goodhart points out, even judicial discretion under the rule of law did not mean that 'judges were not bound by established rules, but were free to reach any conclusion which they regarded as in accord with the public interest' (1958:959). When discretion is controlled by principle, it does not so much matter to whom it is granted, for the courts then have ultimate authority to decide whether the principle is violated. Jennings was hard put to give examples of unguided discretions whether in the hands of the executive or of the judiciary, except in relation to emergency powers (1959:55-6).

Alternatively, Jennings argued that the rule of law was unreal as 'the powers of the legislature are not limited at all [and] the law is that the law may at any moment be changed' (1959:57). Once again, Jennings's examples of sudden legislative changes are limited to war-time Acts and the abolition of the 'gold standard' in 1931, which also required expedition to be effective. There are two essential points overlooked in this argument. First, even in the present day, suspension of standing orders and passage of legislation without due notice and deliberation are considered constitutionally unacceptable practices except in extraordinary circumstances. Infractions of this principle have occurred and will occur in the future. But they do not disprove the rule. Second, Jennings overlooks the point that it is chiefly by means of delegated powers that governments have acquired the ability to make the law coincide

with its momentary will. A representative body that is compelled to conduct its business in public is more likely to produce, through deliberations, laws rather than decrees. The rule against delegation does not prevent a legislature on occasions taking measures directed to particular ends, or from making laws without due deliberation. But in doing so in the glare of publicity, legislators take calculated risks that are potentially disastrous. Delegation enables legislative majorities to avoid such direct risks. The insistence that the legislature alone should make laws does not ensure that the legislature will always make laws in the strict sense. But the evidence is that so long as the rule was accepted, any decision calculated to alter the rights of the subject was likely to be expressed in the form of a general principle of law. To reject a principle of the British Constitution on account of its imperfect observance is to ignore the nature of the British Constitution, in particular its traditional character. British liberties and British justice (as indeed those of any other liberal society) were not the products of a complete and strict adherence to constitutional doctrines. They were the results of general attitudes, which the customs of the Constitution demanded and received. Ironically, critics of the British system of formal justice had to resort to formalistic legal reasoning to disavow key elements of the British Constitution.

The 'Safeguard' of Free Elections

Jennings's third intellectual error is one that widely prevails. It is the belief that the liberty of the subject is adequately protected by the single safeguard of free elections held periodically (see above, p. 20). This is precisely the notion that has been challenged by the work of Buchanan, Tullock, Olson and others. They have demonstrated that governments, elected and removed by the playball of special interests advocacy, represent majorities only in the formal sense. It is unnecessary to repeat what has already been discussed in this regard. It need only be emphasised that this form of democracy has served to legitimise rather than contain arbitrary power. As Berlin reminds, 'democracy as such is logically uncommitted to liberty, and historically has at times failed to protect it, while remaining faithful to its own principles' (1969:165). Bargaining democracy, on the other hand, is structurally hostile to liberty, in that the distributional demands it generates can be satisfied only at the expense of negative freedoms.

Jennings's theory was that British freedoms were secured not by the absence of arbitrary power but by the deterrent to abuse of power provided by regular, fair and free elections. As argued, this theory was factually incorrect on both counts. But it served to legitimise the type of democracy under which particular interests could be pursued through the processes of electoral bargaining.

Judicial Supervision

Not all constitutional theorists were content to rest British freedoms on periodic general elections, although almost all of them shared the view that the British Constitution did not prohibit the grant of wide discretionary powers to the executive. These theorists continued to believe that the rule of law and the absence of arbitrariness of government were features of the Constitution, but considered them to be secured by judicial supervision rather than by limitations placed on legislative power. The rule of law thus became 'a judicial attitude'. It meant, 'So far, provided that the tribunals operate in accordance with established judicial impartiality, there is nothing in their existence which conflicts with the rule of law' (Wade, 1959:cxxv). There is a profound contradiction in this notion. Whether a tribunal or a court supervising a tribunal can or cannot act with judicial impartiality depends on the extent to which the power in question is defined by principle. The more open-ended and policy-oriented the power, the less relevant the judicial method becomes. The essence of the judicial treatment of an individual is that the individual be granted an opportunity to persuade an authority (or a court supervising such authority) that contemplates taking action prejudicial to his life, liberty or property, that his situation does not fall within a previously known rule or standard which the authority is required to observe. When no such standard is prescribed, there can only be an appeal to the vaguest notions of fairness, which can rarely override considerations of policy; and these the courts find difficult to interpret or apply. Courts have been willing to question the exercise of end-oriented powers when they have been directed at demonstrably extraneous ends or when the means chosen to achieve the stated end is shown not to have been within the contemplation of the legislature. But when both the ends and the means are referable to the statute, there are no principles of justice by which the exercise of the power can be judicially controlled.

The reliance on a 'judicial attitude' to sustain the rule of law has, in one respect, had an ironic repercussion on the ideal. As the only institutional counterpoise to arbitrary power, the courts have become increasingly anxious to mitigate individual hardships resulting from the exercise of end-oriented powers and have continually sought to extend their authority over the penumbral situations resulting from the legislature's failure to unequivocally exclude the jurisdiction of courts. Legislatures have, in turn, responded to these judicial incursions by continually expanding executive discretions in terms calculated to defeat judicial control. The panoply of procedural safeguards upon which the courts have insisted for the exercise of discretionary powers cannot obscure the fact that the courts have been rapidly divested

of substantive powers needed to safeguard individuals from governmental oppression.

A major reason for the decline of the rule of law was the evident success of lawyers in convincing the public that constitutional government was compatible with the vesting of arbitrary power in government. The success of this argument is ultimately traceable to the confusion that set in regarding the difference between laws in the strict and traditional sense and legislation encompassing matters of administration. As a consequence of this confusion, the British Constitution was seen to permit the delegation of law-making powers to the executive, although in fact much of what was delegated were powers to implement in particular cases the general principles laid down by parliament or powers to organise the activities of government without major invasions of the domains of private right. So long as this was the case the courts retained the power to ensure that a subject would not be deprived of his life, liberty and property except upon a principle agreed to by the community. The logical consequence of the confusion between law and legislation was the loss of the conviction that British constitutional practice precluded the delegation of law-making powers to the executive. Once invested with such power, the executive steadily placed itself beyond the reach of judicial supervision and of effective political oversight.

Chapter 6

The Collapse of the Separation of Powers

The central theme of this monograph is that the welfare state is incompatible with the constitutional state. This thesis is founded on an insistence that the ideals of the rule of law, the separation of powers, and democracy, together constitute the indivisible foundation of constitutional government. The previous chapters discussed the ways in which democracy was redefined and the rule of law revised. This chapter investigates some of the causes that led to the rejection in substance of the separation of powers doctrine.

The Australian Constitution and Separation of Powers

Courts have emphatically declared that the Australian Constitution is based on the doctrine of the separation of powers. In the case of the *Attorney-General of the Commonwealth* v. *The Queen*, the Privy Council made the following remark:

> [Their Lordships] must bear in mind how often it has been stated in the High Court that the Constitution is based upon a separation of the functions of Government. One of among many examples may be found in *New South Wales* v. *The Commonwealth*. But first and last, the question is one of construction and they doubt whether, had Locke and Montesquieu never lived nor the Constitution of the United States ever been framed, a different interpretation of the Constitution of the Commonwealth could validly have been reached. ([1957] 95 CLR 529, 539-40)

Yet it is remarkably ironic that the very decisions that proclaimed the separation of powers in the Commonwealth were, more than any others, instrumental in negating that doctrine as a guiding principle of the Constitution. In the judgment quoted above, the Privy Council expressed approval of the High Court decision (in *Dignan*) to permit the granting of law-making powers to the executive (see p.543). The Privy Council endorsed the High Court's view that the division implemented in the Australian Constitution required a separation of judicial and other functions but not a separation of legislative and executive functions.

The legal debate about the separation of powers in Australia has been confined to three relatively sterile questions, namely:

1. What is meant by the 'judicial power of the Commonwealth' within s. 71 of the Constitution?
2. Can judicial power be vested in a body which is not a 'court' within s. 71?
3. Can non-judicial powers be vested in courts to which s. 71 applies?

Textbooks tell us that the High Court maintains a separation of judicial and other powers by prohibiting the exercise of non-judicial powers by the courts referred to in s. 71 and the exercise of judicial power by bodies which do not constitute courts under s. 71. But as Professor Zines suggests, even this modest claim is suspect.

> Administrative bodies exercise functions which seem indistinguishable from those exercisable by a court ... At times tribunals make determinations of law and fact that cannot be challenged in court proceedings for enforcement of the tribunal's determinations ... On the other hand, courts have been given the task of applying standards that are so broad that they look like those appropriate to legislative or administrative discretion based on policy; these include such standards as 'reasonable', 'just' and 'oppressive'. (Zines, 1987:163)

Professor Zines is pointing to the fact that parliament has, with High Court approval, successfully unified legislative, executive and judicial powers. But even if we ignore these instances, it can be established that the High Court has wittingly or otherwise destroyed the premises of the separation doctrine. The High Court (with Privy Council approval) demanded the separation of judicial and non-judicial power mainly on the ground that a federation of States cannot be maintained without an independent judiciary.

But as Zines points out, such a separation could also be justified by the notion of 'freedom under law' (1987:190), which I prefer to term 'freedom secured by the rule of law'. The fact that a federal division of powers cannot be maintained without an independent judiciary is self-evident. But this reason pales when one considers the true historical reason for the insistence on a separate and independent judiciary. This reason lies in the ancient belief that freedom is secure where laws are stable in the sense that they do not take the shape of the ruler's unilateral will. This condition is achieved by separating the function of making or recognising the law from the function of governing, or more precisely, of conducting the affairs of the state. It was the Stuart royalty's efforts to dissolve this division, and the judiciary's inability to prevent royal incursions into the province of law, that led to the demands for judicial independence, culminating in the enactment of the Act of Settlement in 1701. Yet, as Zines notes, the High Court and the Privy Council explained the need for separating the judiciary only in terms of the peculiar needs of a federation. This enabled the two courts to justify the fusion of legislative and executive powers. (See the Privy Council judgment in *Attorney General of the Commonwealth* v. *The Queen* [1957] 95 CLR 529, 540-1.) The High Court in *Boilermakers'* case (1956) 94 CLR 254, and the Privy Council in the appeal from that case, were at pains to ensure that their decision to enforce judicial separation would not affect the High Court's long-standing approval of executive law-making.

This monograph aims to demonstrate that the reinterpretation of the separation doctrine proceeds from a profound misapprehension of the classical ideal. However it is clear that this misapprehension was not the sole cause of the judicial rejection of the ideal in so far as it concerned the separation of legislative and executive powers. On the contrary it can hardly be doubted that the judicial approach was crucially influenced by policy considerations relevant to the administration of the welfare state.

The High Court's judicial method did not permit the discussion of explicit policy considerations, although its decisions were often critically affected by them (see generally Zines, 1987:282-323). There is no doubt that in *Dignan,* these considerations formed (to use the language of Oliver Wendell Holmes) the 'inarticulate major premiss' of the decision. In fact two of the judges who decided this case could not avoid alluding to the underlying policy factors. Dixon J stated:

> But it is one thing to adopt and enunciate a basic rule involving a classification and distribution of powers of such an order, and it is another to face and overcome ... the practical and political conse-

> quences of an inflexible application of their delimitation. (*Dignan* [1931] 46 CLR 73, 91)

And Evatt J, in upholding parliaments' right to authorise executive lawmaking, said 'unless the legislative power of Parliament extends this far, effective government would be impossible' (*Dignan*, 117).

These statements suggest that the prohibition of executive lawmaking is unacceptable from the political and administrative standpoints. The statements were made in a political context dominated by the welfare ideology. Accordingly they strongly imply that the claims of the welfare state are entitled precedence on policy grounds. The readiness of judges to sacrifice constitutional principle for expediency is ultimately traceable to the influence of contemporary politics. But Australian judges, like their British counterparts, are not in the juristic habit of explicitly founding decisions on policy. They consider themselves formally constrained by legal doctrine. Hence in order to break free of doctrines they need to reinterpret them. It is unfortunate that in reinterpreting constitutional doctrines, judges have sacrificed key elements of constitutional government. The inarticulate premiss in *Dignan*, that the separation of legislative and executive powers was an impediment to the realisation of praiseworthy political and administrative goals, was itself based on another misconstruction of the separation doctrine, namely that it was solely concerned with providing checks and balances against the abuse of power. In what follows, this view of the separation doctrine is questioned. It will be argued that despite its superficial attraction, the 'checks and balances' interpretation of the separation doctrine served to obscure its theoretical foundation, thereby exposing it to attacks based on transient policy considerations. The separation of powers ideal can be restored to constitutional status only if its theoretical foundation is re-established.

The Ancient and the Modern

Ever since Montesquieu's description of the British Constitution, the ancient distinction between the making of law and the conduct of government has been linked to the theory of the tripartite division of powers. The modern doctrine of the tripartite division refers to the separation of legislative, executive and judicial powers, which, in ideal theory, ought to be exercised by distinct individuals or organs. In its absolute sense, the theory prohibits one organ from exercising the functions of any other, although in the exercise of its own functions, an organ may, and in fact should, act as a check or

balance against the excesses or abuses of the other organs (Madison, *The Federalist* No. 51).

The ancient distinction is logically and structurally accommodated within the modern doctrine of the tripartite division of powers. The existence of a separate and independent judicial power within the modern scheme complements the ancient distinction to the extent that the judiciary is given the power to confine other branches to their proper functions and to enforce government according to law. The modern doctrine could, therefore, have become the entrenchment of the ancient principle. But this, as we know, was not to be the case.

The reason for that outcome lies in the intellectual confusion regarding the philosophical and historical foundations of the modern doctrine. Partly as a result of impressions created by Montesquieu's language, and partly as a result of misreadings of the revolutionary literature concerning the adoption of the US Constitution, the modern doctrine came to be considered as a system of purely practical devices directed against the emergence of despotism. However, it is demonstrable, contrary to this view, that, historically and rationally, the modern doctrine was the consummation of the ancient ideal of the rule of law and the distinction it implied between the functions of legislating and governing.

The ancient concern was to ensure the liberty of the subject by requiring the ruler to govern according to standing laws. The main concern was not to deprive the ruler of any share of the legislative power or the legislature of any part of the executive power. Rather, it was to ensure that the function of legislating should remain distinct from that of governing, with the latter subject to the former. In practical terms this meant the rejection of *voluntas principis*, the absolute will of a sovereign authority. But this did not mean that powers should not be shared, so long as they were recognised as distinct and accordingly exercised differently. The concern was to ensure (whether or not the prince played a part in their making) that laws remained general and impersonal and that the prince in his executive capacity observed them.

The modern theory of the tripartite separation has come to be understood as more concerned with the practical safeguards of liberty than with abstract principles. This understanding is sound to the extent that the modern theory seeks safety in institutional limitations on power rather than in jurisprudential concepts unsupported by practical sanctions. In that sense, the modern theory is truly constitutional whereas the ancient was largely philosophical. But as I hope to demonstrate in this chapter, its ultimate justification is yet the ancient ideal of the rule of law, and it was in the pursuit of this ideal that the doctrine was formulated and implemented by the founders of the American Republic.

It was not that the modern theory lacked a philosophical foundation but that its popular appeal mainly rested on its practical use in fulfilling the political needs of its time. It was seen as a product of practical wisdom, a strategem of pitting power against power in order to neutralise the potentialities for oppression. This perception gave the modern theory its initial powerful appeal. But it also obscured the more deep-seated reasons for its observance. Once the threat of tyranny had receded and democracy enabled people to demand of government active measures for the satisfaction of particular interests, the doctrine of the separation of powers began to appear as divisive, obstructionist and undemocratic. The practical wisdom of the doctrine was challenged by counter claims of practical wisdom.

The idea that the making of law and the conduct of government should be kept separate in order to secure the rule of law has a long history. The idea was current in Greek thought when Aristotle posed the celebrated question whether it is more advantageous to be governed by the best man or by the best laws (*Politics* Bk III Ch 15; Jowett, 1916:136). It was clearly present in the Roman republic, about which Loewenstein states:

> Beyond the impact radiating from Rome's political institutions, her indelible bequest to the government of man lies in the spiritual values that were imbedded in the practice of constitutional government; to wit, that the legality of the exercise of political power is conditioned on the observance of general rules binding power holders and power addressees alike. To avoid the emergence of absolute and arbitrary power, each of the various organs of government was constitutionally endowed with specific jurisdictions that no other organ can perform. The legitimate will of the state results, as constitutionally prescribed, only from the cooperation of these organs. (1973:488)

In the middle ages the ancient ideal was manifest in the organisation of Frankish and Germanic communities under feudal kingship. As Archbishop Hincmar reminded Lewis III in 879, the King was allowed to rule the kingdom only on the condition that he kept the law (Carlyle & Carlyle, 1903-1936 [vol i]:244, 172). The idea was that the law belonged to the people and the king's *voluntas* was in itself insufficient to create law (Ullmann, 1966:150-1; see generally Kern, 1968). The traditional constitutionalism of the feudal communities was destroyed by the rise of absolute monarchies based on divine right. But the ancient idea of separating the province of law from that of government survived in England in the form of the distinction between *gubernaculum*, the government of the realm, and *jurisdictio*, the capacity to define the rights of the subjects (McIlwain, 1947:85-6). In fact the Ancient

Constitution of England served as the great bridge between medieval and modern constitutionalism. It saved medieval constitutionalism from extinction and preserved, albeit in an approximate form, the ancient ideal of separating the function of government from that of laying down the law.

John Locke

The reinterpretation of the separation doctrine as purely a system of checks and balances resulted from demonstrable misconstructions of the literature on the subject, particularly the work of Locke, Montesquieu and Madison. This reinterpretation also enabled the doctrine's detractors to deny that it was ever a part of the English Constitution. The denial had a disastrous effect on the operation of the doctrine in Australia when the High Court (in *Dignan*) elected to be guided by supposed British usage rather than constitutional theory.

The scope of this monograph does not permit a full account of the history of the separation doctrine. Yet any case for restoring the separation doctrine as a means of revitalising the rule of law and democracy in Australia must involve the task of rectifying the major misconceptions regarding the history and the literature pertaining to the doctrine. To do so, we need to take a brief look at the writings of the major contributors to the modern doctrine.

As long ago as 1836, the German writer Carl Ernst accused Locke of being 'the creator of the false theory of the English State' (Gough, 1973:104). This reputation has persisted since. Locke did not purport to describe the English Constitution. His classic, the *Second Treatise of Civil Government* (ST), was actually written before the Glorious Revolution (Laslett, 1970:37). In the *Second Treatise* Locke sought to formulate a theory of the free state, by which he hoped to influence the thinking of his age and possibly that of the future. The work was received as the outstanding apology for the Glorious Revolution and became the celebrated vindication of Whig political ideas, which were to dominate constitutional doctrine for the next two centuries. Although the *Second Treatise* did not describe the English Constitution as it then was, it foreshadowed the shape the Constitution was to take after the Revolution.

Whilst some writers accuse Locke of having attributed to the English Constitution a separation of powers that it did not possess, others have said that Locke considered the separation of powers as only a matter of convenience and not something vitally important (Gough, 1973:108; Vile, 1967:61; Laslett, 1970:118; Plamenatz, 1963[vol i]:283). The latter opinion like the former can be demonstrated to be erroneous.

If Locke's theory is considered in the light of his own first principles,

there can be no doubt that the separation of powers is an indispensable and vital element of it. Unlike all other proponents of separation of powers, Locke begins not by considering the consequences of concentrating power in a ruler, but by considering its concentration in individuals. He said that in the state of nature, the citizen had power 'not only to preserve his Property, that is, his Life, Liberty and Estate, against Injuries and Attempts of other Men; but to judge of and punish the breaches of Law in others, as he is persuaded the Offence deserves' (ST VII, 87; Laslett, 1970:341-2). Locke saw three things wanting in this situation.

First, there is no 'established settled, known Law, received and allowed by common consent to be the Standard of Right and Wrong, ... for though the Law of Nature be plain and intelligible to all rational Creatures; yet Men, being biassed in their Interest, as well as ignorant for want of study of it, are not apt to allow of it as a Law binding to them in the application of it to their particular Cases' (ST IX, 124; Laslett, 1970:369). The deficiency Locke sees is none other than the lack of generality and regularity in the making of law, which has been an immemorial concern of philosophers. 'Secondly, in the State of Nature there wants a known and indifferent Judge, with Authority to determine all differences according to established Law' (ST IX, 125; Laslett, 1970:369). This is the fundamental objection to a man being the judge of his own cause. 'Thirdly, in the State of Nature, there often wants Power to back and support the sentence when right, and to give it due execution. They who by any Injustice offended, will seldom fail, where they are able to force to make good their Injustice ...' (ST IX, 126; Laslett, 1970:369). Thus, the three deficiencies of the state of nature that Locke outlines correspond closely to the lack of differentiation between legislative, judicial and executive powers in absolutist states.

The main cause for confusion regarding Locke's position on the separation of powers is his assertion that men escaped the state of nature by giving all powers to one authority. Locke wrote that political society is established 'wherever any number of Men, in the State of Nature, enter into society to make one people, one Body Politik, under one Supreme Government (ST VII, 89; Laslett, 1970:343). It is perhaps this passage that leads Laslett to assert that the 'proper functioning and just exercise' of powers were provided for by Locke 'not by any doctrine of necessary separation ... [but] by the concept of trust, which applies to the legislative in its fullest force, but also to the executive and federative' (Laslett, 1970:118). Laslett, like many others, has made two mistakes with regard to the Lockean thesis. First, he seems to lose sight of the terms of the 'trust' or 'social contract'. Second, he fails to appreciate the distinction between the separation of powers and the

mechanics of separating powers.

In the concluding paragraph of his chapter on the 'Ends of Political Society and Government', Locke recapitulates the terms of the social contract. The paragraph is so crucial to the understanding of Locke's theory of the separation of powers that it must be quoted in full.

> But though Men when they enter into Society, give up the Equality, Liberty and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislative as the good of the Society shall require; yet it being only with an intention in every one the better to preserve himself, his Liberty and Property; (For no rational creature can be supposed to change his condition with an intention to be worse) the power of the Society or *Legislative* constituted by them, *can never be suppos'd to extend further than the common good;* but is obliged to secure every ones Property by *providing against those three defects above-mentioned that made the State of nature so unsafe and uneasie.* And so whoever has the Legislative or Supream Power of any Common-wealth is bound to govern by establish'd *standing Laws,* by promulgated and known to the People, and not by Extemporary Decrees; by *indifferent* and upright Judges, who are to decide Controversies by those Laws; And to imploy the force of the Community at home, *only in the execution of such Laws,* or abroad to prevent or redress Foreign Injuries, and secure the Community from Inroads and Invasion. And all this to be directed to no other *end,* but the *Peace, Safety,* and *publick good* of the People. (Laslett, 1970:371)

In this paragraph, Locke brilliantly reconciles the elements of trust, supremacy and limitation of power. Men give their individual powers to the society for a purpose, which is the preservation of lives, liberties and estates. They do so more particularly in order that the condition which threatened lives, liberties and estates, namely the non-differentiation of law, adjudication and execution, be remedied. Thus, the duty to effect this differentiation is the key term of the trust upon which power is surrendered to the community as a whole. The reason for men 'quitting' the state of nature is fundamentally this. The establishment and maintenance of this differentiation becomes the very essence of the duty of the state.

Laslett's second mistake is shared by many modern writers. The fact that Locke did not stipulate the separation of powers in distinct bodies does not detract from his position that the making of the law should be kept separate from its execution and the process of adjudication. Although Locke did not purport to describe the English Constitution, he was nevertheless construct-

ing a theory that could be adopted within the realities of contemporary English politics. Locke was aware that in England, the king and placemen were an inextricable part of the legislature. Applied to the English situation, his theory meant not that the king should have no part in the making of laws, but that the king could not legislate in his own right and could exclusively exercise only the executive and federative powers. Locke was similarly conscious of the fact that the highest court in the land was parliament itself, but he felt that it need not prevent the adjudication of disputes by indifferent and upright judges. Locke 'separated' the legislative function from executive and judicial functions by placing two limitations on legislative power. First, he stated that 'The Legislative or Supreme Authority, cannot assume to itself a power to Rule by Extemporary Arbitrary Decrees but is bound to dispense Justice, and decide the Rights of the Subject by promulgated standing Laws and known Authoris'd Judges' (ST XI, 136; Laslett, 1970:376). Second, Locke maintained that 'The Legislative cannot transfer the Power of making Laws to any other hands' (ST XI, 141; Laslett, 1970:380).

It is true that Locke did not propose the constitutional mechanisms that form the modern separation doctrine. But Locke was categorical in his insistence that power should be separately exercised. His declared faith in reposing all powers in a supreme government was a concession to English history. In the context of the struggle between king and parliament, the ideals that he proposed could have been achieved only by establishing the supremacy of parliament. But his theory clearly demanded that the supreme body preserve the distinctions among powers by the manner of their exercise. Indeed such a separation was achieved in England during Locke's lifetime and was maintained until the establishment of the welfare state. Makers of modern constitutions were not subject to the constraints that history imposed on Locke. They were at liberty to entrench Locke's ideal by providing constitutional mechanisms for separating powers. But these mechanisms are now being subverted through the reinterpretation of the theories that inspired them.

Montesquieu

John Locke, writing at the climactic stages of the constitutional struggle, advanced, by his theory, the Whig vision of the future Constitution. Several decades later, Montesquieu observed and recorded the result of that struggle in his classic work, *The Spirit of the Laws*. Both Locke and Montesquieu have been accused of misrepresenting the English Constitution to the world. More so than Locke, Montesquieu purported to describe that Constitution. But like Locke, he was primarily concerned to set down his own theory of the

constitution of liberty. Even so, Montesquieu's account substantially coincided with the spirit of the Constitution as felt at the time, even if it did not reflect some of its actual practices or its potential to evolve into the present form.

Montesquieu made serious errors in his observations. For instance he suggests that the English judicial system consisted of ad hoc tribunals drawn from the body of the people. He clearly confuses judge and jury (*Spirit* XI, 6; Nugent, 1949:153). But the observation that, perhaps more than any other, provoked later criticism of his theory was in relation to the composition of the English executive. Having observed that the executive power was in the hands of the monarch, Montesquieu proceeded to state:

> But if there was no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both. (*Spirit* XI, 6; Nugent, 1949:153)

At the time he wrote these words, most of the king's ministers were members of either House. The clause in the Act of Settlement that excluded placemen from parliament had been repealed in 1706. And in 1717 Robert Walpole had made his indirect challenge to the king's authority to choose his ministers by his resignation over the king's dismissal of Townshend as Lord Lieutenant of Ireland. In retrospect Walpole's action seems epochal in the movement towards responsible government. Did Montesquieu, therefore, rest his theory on a false assumption? Did he misunderstand the formula of English liberty?

Montesquieu obviously failed to anticipate the direction in which the English Constitution was to develop. To the extent that parliamentarians were also the king's ministers, they held a share of both powers and any suggestion that they did not was inaccurate even in his own time. But the nature of the share of executive power held by the king's ministers was clearly different from that of the present day British cabinet. As Plamenatz says,

> Presumably Montesquieu, like his English hosts, believed that the King's ministers, even though most of them were members of one or other of the two houses, were responsible primarily to the King. They were the King's ministers and not the agents of the legislature. The King exercised the executive power through them and they were not the less

> his ministers because in practice it was advisable for the King to govern through men enjoying the confidence of Parliament ... nobody then imagined that, because most ministers belonged to one or other of the Houses, the executive and legislative powers were not in separate hands. It seemed obvious that they were, and Montesquieu probably took for granted what nobody was concerned to deny. (1963[vol. i]:286)

Even after George I quarrelled with the Prince of Wales in 1717 and ceased to attend Cabinet meetings, he continued to control policy from the closet. 'If a minister were not to be a mere tool he needed skill, address, and patience in persuading his royal master against some injudicious or unpopular policy while still retaining his favour' (Marshall, 1962:126). When Montesquieu arrived in England in 1729, the position was much the same. If the ultimate test of real executive power is taken as a minister's capacity to continue in office when his conduct of government displeases the king, the ministers were by no means the real executives. The king's pleasure was the sole determinant of ministerial office. 'It was still truer to say that the King's ministers could get the support of the House of Commons because they were his ministers than that they became ministers because they enjoyed that support' (Plamenatz, 1963[vol. 1]:286). English constitutional practice permitted persons to occupy a position from which they could simultaneously influence the legislature and the executive. In that sense, the Constitution fell short of Montesquieu's principle. His principle was true of the English Constitution only in the sense that the ultimate and overriding executive authority belonged to a person who had ceased, in practical terms, to be a part of the legislature. Yet there was little doubt in contemporary minds that the king was the real executive and that the legislature as such had no share of the executive power (Plamenatz, 1963[vol. 1]:287).

Montesquieu is widely credited with the first clear formulation of the threefold separation of powers. The greatest attraction of Montesquieu's theory was its presentation as a practical device for securing liberty. In Locke's theory all powers are entrusted to the supreme body and their separate exercise depends on the fiduciary obligation of those who constitute it. Montesquieu, on the contrary, was concerned to discover how government could be organised so as to minimise the threat to liberty. Montesquieu's survey of past and present constitutions led him to the conclusion that liberty was secured to the extent of the actual separation of powers achieved within a constitution. In England, he found the greatest extent of separation of his time and described that country as one nation that has political liberty as the direct end of its Constitution (*Spirit* XI, 5; Nugent, 1949:151). Montesquieu's practical arguments for separating powers had

enormous appeal to all who sought escape from oppression. Unfortunately, this appeal obscured other parts of his treatise where he set out the theoretical basis of the separation doctrine. This led to the later attacks on his theory by those who questioned the practical utility of the doctrine (e.g. Neumann, 1949:viii). Contrary to popular belief, Montesquieu shows a keen appreciation of the theoretical foundation of the doctrine, although he failed to express it in the chapters that proved to be most influential. Montesquieu believed that the nearer a form of government approaches that of a republic, the more the manner of judging becomes settled and fixed; and that in despotic government there are no laws, the judge himself being his own rule (*Spirit* VI, 3; Nugent, 1949:75). He asserted that monarchy is distinguishable from despotism only because of the presence of intermediate channels through which power flows (*Spirit* II, 4; Nugent, 1949:16). Monarchy is destroyed when the prince, 'directing everything entirely to himself, calls the state to his capital, the capital to his court and the court to his own person' (*Spirit* VIII, 6; Nugent, 1949:113).

Montesquieu's theoretical exposition is overshadowed by his enthusiasm for the more visible benefits of separating powers. This had one unfortunate consequence. Ever since Montesquieu's account of the English Constitution, discussion about the doctrine's utility has tended to take place in a theoretical vacuum whereas the doctrine's function can fully be appreciated only in the light of its theory.

James Madison

The idea of dividing powers as a protection against tyranny, and the idea of a government subject to law, received Montesquieu's separate attention but were not integrated by him. The convergence of the two ideas occurred instead in the political thought that guided the framing of the American Constitution. In the hands of the Founders, the rule of law became linked not to the threefold separation of powers, but to a larger and more complex distribution of powers in which the threefold separation played a crucial but not an exclusive part. The American distribution was a far-reaching scheme involving, in addition to a system of tripartite separation, federalism, representation and institutional checks and balances among and within the great departments of government. By these means, the Founders sought to minimise the capacity of individuals or groups to pursue their separate ends, and thereby to compel government to conform to rules that represent general interests. The idea of a government of laws achieved through the dispersal of power is the recurrent theme of the *Federalist Papers*.

Madison diagnosed the great mischief that the Constitution was in-

tended to remedy as the pursuit by factions of their separate interests. Faction is inimical to justice as it amounts to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community (Fairfield, 1966:17). Madison considered the proper concern of the legislators to be 'the permanent and aggregate interests of the community' and not the transient and particular purposes of factions.

Madison's view of the constitutional problem is intimately connected with his ideas of the law and of the nature of legislation. 'What are many of the most important acts of legislation', he asked, 'but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens?' (Fairfield, 1966:18-9). Thus, the principle that no man should be a judge in his own cause applies with greater reason to a body of men. 'What are different classes of legislators but advocates and parties to the causes they determine?' (1966:18-9). This is the profound dilemma for the polity, and the manner in which this problem is solved is the 'great desideratum' by which this form of government can be rescued from disapprobrium (Fairfield, 1966:20). The function of the legislators is 'to adjust these clashing interests and render them all subservient to the public good'. Such adjustment requires the taking into view of 'indirect and remote considerations'. The problem of democracy is that these considerations 'rarely prevail over the immediate interest which one party may find in disregarding the rights of another or the good of the whole'. Thus, whilst on the one hand the legislative function is required to be exercised with a judicial temper, on the other hand it requires the consideration of the community's broader and more general interests, for it is within broader principles that conflicting interests can be reconciled. Madison implied here a distinctive science of legislation reminiscent of Aristotle's differentiation of legislative and political sciences. Legislation must be concerned with general propositions (which serve the permanent and aggregate interest of the community), whereas it is the function of the executive and the judiciary to apply the general norms to particular situations. Madison hoped that representative (as opposed to direct or pure) democracy would serve to 'refine and enlarge the public views, by passing them through the medium of a chosen body of citizens whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations' (Fairfield, 1966:21). But although this was Madison's hope, it was not his belief. He envisaged the likelihood that 'men of fractious tempers' may get elected and then betray the interests of the people. That was the reason that necessitated the incorporation of 'auxiliary precautions' in the Consti-

tution. The two great 'auxiliary precautions' were to be the horizontal division of powers effected by the separation of legislative, executive and judicial powers, and the vertical division effected by federalism (Fairfield, 1966:161).

The constitutions of Virginia and Pennsylvania had ordained the separation of legislative, executive and judicial powers, but had provided no check against the usurpation by one branch of the power of others. According to Madison, their experience showed that 'a mere demarcation on parchment of the constitutional limits of the several departments, is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all powers in the same hands' (Fairfield, 1966:150-7). Both Madison and Hamilton regarded the legislature as posing the greatest threat to public rights and hence requiring the greatest containment. The executive and the judiciary are subject to law. The legislature alone makes law and hence alone can seek private or factious ends under the colour of law (Fairfield, 1966:148). Hence the Constitution, having the tripartite division, provided three checks on legislative power, one internal to Congress and two external to it. The internal check consists of a Senate to share legislative power. The external checks are the Presidential veto and judicial review.

The second great precaution was federalism. Clearly inspired by David Hume's essay on the 'Idea of a Perfect Commonwealth', Madison wrote in *Federalist* No.10,

> Extend the sphere, and you take in greater varieties of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. (Fairfield, 1966:22)

Madison considered 'the most palpable advantage' of a union to be its creation of 'greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority' (Fairfield, 1966:23).

The relevance of the *Federalist* message to the present crisis of the constitutional order is quite remarkable. The consistent theme of the *Federalist* argument is the need to prevent the kind of distributional coalition-building which has become the feature of democracy in the welfare state. This type of democracy was intended to be prevented by the constitutional model of divided powers.

But does the Australian constitutional order owe any debt to the

philosophy and mechanisms of the American Constitution? Eminent Australian scholars seem to think so (Sawer, 1961:179; La Nauze, 1972:273-5; cf Fairfield, 1966:x, 282 n 32). The *Federalist* itself has been judicially recognised as the 'complete commentary on the constitution which is appealed to by all parties in the questions to which that instrument gave birth' (*Cohens* v. *Virginia* 6 Wheat 264). Thomas Jefferson considered it 'the best commentary on the principles of government ever written'. References to the *Federalist* have become the exceptions to the rule against using constituent history in the interpretation of constitutions (Nicholas, 1948:222).

Conclusion

It is commonly understood that the modern welfare state could not have been developed without the assumption by government of very wide discretionary power. The main impediment to the assumption of such power was the doctrine of the separation of powers. Those who sought these powers were able effectively to set aside the doctrine by portraying it purely as a system of checks and balances which had become redundant in the age of full democracy. This occurred because the doctrine, through misinterpretation of its history, became dissociated with its fundamental concerns of maintaining the rule of law and of supplying the mechanism for meaningful democracy.

It is now widely conceded that arbitrariness of government has reached unacceptable levels in the welfare states of Western nations. Many Western democracies have initiated inquiries into this problem and some have put in place measures to combat this arbitrariness. Australia has been in the forefront in recognising the growth of non-accountable government and seeking ways to reverse this trend. Thus any assessment of the impact of the welfare state on Australia's constitutional order must take careful account of these efforts. But first it is advisable to gain some idea of the scale of regulation involved in the implementation of the welfare state in Australia.

Chapter 7

The Welfare State in Australia: The Regulatory Dimensions

Examining the regulatory dimensions of the Australian welfare state is relatively simple if by the welfare state we mean the 'potpourri of specific services' (Galper, 1975:15) provided by government. However it is quite clear that only a very limited account of the welfare state can be given by itemising specific services. The size of government in Australia has been measured with many yardsticks. The size of government has some relation to government regulation, but they are not co-extensive. Nor is government regulation invariably connected with the welfare state in a direct sense.

This chapter is not concerned with the size of government or with government regulation generally. It aims to provide some idea of the regulatory regime that has grown mainly in consequence of the aims of the welfare state. The evidence on this question is largely anecdotal, as no systematic inquiry on the subject has been undertaken in Australia. However, an attempt is made in what follows to identify some of the indicators that point to the extent of regulation connected with the administration of the welfare state. One of the more helpful indicators of the extent of discretionary powers in the hands of officials is the numbers of inquiries and determinations made by innumerable statutory authorities. However there is no reliable source of these statistics.

The Concerns of the Welfare State

In 1973 the OECD attempted to develop a 'Set of Social Indicators' by which to measure 'well-being' (see Table 1). Even this list may not be exhaustive

Table 1
Fundamental Social Concerns

Health
- The probability of a healthy life through all states of the life cycle.
- The impact of health impairments on individuals.

Individual Development Through Learning
- The acquisition by children of the basic knowledge, skills and values necessary for their individual development and their successful functioning as citizens in their society.
- The availability of opportunities for continuing self-development and the propensity of individuals to use them.
- The maintenance and development by individuals of the knowledge, skills and flexibility required to fulfil their economic potential and to enable them to integrate themselves in the economic process if they wish to do so.
- The individual's satisfaction with the process of individual development through learning, while he is in the process.
- The maintenance and development of the cultural heritage in relation to its positive contribution to the well being of the members of various social groups.

Employment and Quality of Working Life
- The availability of gainful employment for those who desire it.
- The quality of working life.
- Individual satisfaction with the experience of working life.

Time and Leisure
- The availability of effective choices for the use of time.

Command Over Goods and Services
- The personal command over goods and services.
- The number of individuals experiencing material deprivation.
- The extent of equity in the distribution of command over goods and services.
- The quality, range of choice and accessibility of private and public goods and services.
- The protection of individuals and families against economic hazards.

Physical Environment
- Housing conditions.
- Population exposure to harmful and/or unpleasant pollutants.
- The benefit derived by the population from the use and management of the environment.

Personal Safety and the Administration of Justice
- Violence, victimization and harassment suffered by individuals.
- Fairness and humanity of the administration of justice.
- The extent of confidence in the administration of justice.

Social Opportunity and Inequality
- The degree of social inequality.
- The extent of opportunity for participation in community life, institutions and decision making.

Sources: How to Measure Well-Being: OECD's Programme to Develop a Set of Social Indicators: OECD Observer No.64: June 1973:37.

of the concerns of the welfare state in Australia in the 1980s. For example, federal and State agencies have been generously funding peace movements, which pursue goals qualitatively different to those tabulated by the OECD (the peace movement's objectives are wider than the concern relating to personal safety specified by the OECD). However the OECD list is a fairly accurate reflection of the present-day concerns of governments committed to the maintenance of the welfare state. In fact it is most unlikely that the present Labor Party governments in Canberra and in several State capitals would disown any one of the 'Fundamental Social Concerns' identified by the OECD.

Even a cursory examination of the OECD list reveals that many of the specified concerns demand active regulatory or interventionist measures to re-align economic relations within the community on a general scale. This is the case with regard to the 'extent of equity in the distribution of command over goods and services'. There are other concerns which call for regulation on the microeconomic plane. These include concerns relating to

- the quality of working life and individual satisfaction with the experience of working life (generally sought through industrial relations regulation including wage fixing);
- housing conditions;
- population exposure to harmful and/or unpleasant pollutants;
- the benefit derived by the population from the use and management of the environment;
- the quality, range of choice and accessibility of private and public goods and services, generally sought through trade practice regulation, price controls and state participation in production and services sectors; and
- the degree of social inequality and the extent of opportunity for participation in community life, institutions and decision-making, generally sought through antidiscrimination laws including affirmative action programs (for Australian law in this regard, see generally Moens, 1985).

At the practical level, even the remaining concerns require a great deal of regulatory activity by government. For example, Australian governments for their part have substantially regulated the delivery of health care and educational services by both private and public sectors.

Social democratic supporters of the welfare state usually frame their case on alleged market inefficiency to provide needed human services. They believe 'that the market is not self-regulating; that it is wasteful and

inefficient, and misallocates resources; that it will not of itself abolish injustice and poverty; and that it leads to dominant economic interests being identified as the national interests' (Graycar, 1979:181). Thus social democrats generally view the welfare state as one that actively intervenes and rearranges the economic and social relations through the use of regulatory power. Social democrats tend to support universalism in welfare policy.

Non-socialist parties in Australia have historically supported the welfare state albeit with a different emphasis. They have supported a residual or selective form of welfare that seeks to identify and support those sections of the community that are deemed to be in genuine need. Exceptionally, the non-socialist parties have initiated welfare measures in pursuance of broader social policy objectives. A recent example is the Fraser Government's support of 'multicultural' programs including the establishment of 'ethnic' television and radio. Non-socialist parties have also shown reluctance to dismantle regulatory regimes established by socialist governments.

The extent of legal regulation involved in the administration of the welfare state cannot be measured with precision. But it is generally conceded by observers of all ideological persuasions that regulation is a pervasive feature of the welfare state. The need for regulation is clear when one looks at the concerns of the welfare state. These needs may be broadly classified as follows:

1. With respect to direct transfers of benefits such as pensions and subsidies, the need to
    - set criteria of eligibility;
    - determine individual eligibility;
    - prevent fraud.
2. With respect to the control of economic and social activity, the need to
    - set standards;
    - adjudicate breaches;
    - otherwise enforce standards.
3. With respect to 1 and 2 above, the need to finance through taxation, charges, contribution schemes, cross-subsidies and such like.

In Australia, transportation services, education, health care, postal and telecommunication services, television and radio broadcasting are heavily regulated. Australian business is comprehensively regulated. Alan J. Moran, the Director of the Commonwealth government's Business Regulation Review Unit (BRRU), classifies Australian business regulation under the following heads:

Economic regulations, which

- promote competition;
- prevent monopolistic exploitations;
- ration scarce goods;
- foster economics of scale and community-wide gains that transactions fail to recognise;
- confer advantages on certain sections of the local community through tariff advantages or subsidies.

Social regulations, which

- set standards for safety;
- promote desirable environmental characteristics;
- foster greater equality for certain groups;
- mandate health protection measures;
- specify remuneration practices, working hours, etc. (Moran, 1987:137-8).

With the exception perhaps of antimonopoly measures, the above classes of regulation are directly or indirectly linked to social welfare objectives.

Thus, the impressionistic picture of the welfare state in Australia is one that is comprehensively regulated by law. It is a view shared by the present Prime Minister R.J. Hawke, who recently told the Business Council of Australia that he was 'convinced that after 84 years of federation, we have accumulated an excessive and often irrelevant body of laws and regulations' (quoted in Moran, 1987:137). We can gain a more concrete although still very approximate measure of this regulatory regime if we consider some of the available rough indicators.

Regulatory Laws

No one has done an accurate count of the number of laws that have welfare-related regulatory effects. Australian law libraries allocate up to a third of their shelf space for holding statutory instruments originating from the Commonwealth and State legislatures and from other authorities such as local bodies, tribunals, ministers and designated bureaucrats.

Most of these instruments have been enacted in the second half of this century, in the heyday of the interventionist state. Moran estimates that there are of the order of 55 000 laws regulating Australian business activity alone. He points out that the average milk bar needs as many as 16 to 20 separate regulatory approvals to open its doors and that several dozen regulations may be involved in the production and sale of an egg and mayonnaise sandwich

(Moran, 1987:136)! These would include regulations governing the production of bread, butter, mayonnaise, and eggs.

Regulatory Bodies Authorised by Statute

One of the most noticeable trends in the evolution of Australian bureaucracy is the proliferation of authorities empowered by law to make regulatory decisions outside the effective purview of parliament. In 1977, the Commonwealth Senate asked the Standing Committee on Finance and Government Operations (Commonwealth of Australia) to investigate and report on the authorities created under Commonwealth law. As a first step, the Committee set out to identify existing Commonwealth statutory authorities. It found that no one had kept count of them and hence proceeded to make its own survey. A preliminary count revealed 241 authorities in existence in addition to a large number of subsidiary authorities (Commonwealth of Australia, 1979:93-4). It is likely that there are at least twice as many statutory authorities created under State laws. In a subsequent report published in 1980, the Committee attempted to classify statutory authorities by their functions (Commonwealth of Australia, 1980:23-6). The categorisation was based on the dominant function or profile of each authority. The classification divided authorities into the following groups:

1. Business authorities
2. Primary industry authorities
3. Executive authorities
4. Regulatory authorities
5. Government servicing agencies
6. Research authorities
7. Advisory authorities
8. Adjudicative authorities/Boards of Review
9. Courts
10. International organisations

According to this classification, as of 5 May 1980 there were only 73 mainly regulatory agencies set up under Commonwealth law, 58 of them being ACT authorities set up by Ordinances.

This is clearly a very misleading picture of the Commonwealth regulatory regime. Most of the authorities described as 'Adjudicative authorities/ Boards of Review' and 'Adjudicative/Licensing authorities' are engaged in the regulation, through discretionary orders, of the rights and duties of citizens in the context of social welfare. The many remuneration tribunals,

the pensions tribunals, the Administrative Appeals Tribunal, the Australian Broadcasting Tribunal, the Insurance Commissioner, and the ACT Fair Rents Board are all examples of authorities classified under the above heads which are strongly regulatory in character. Most of the 'Marketing authorities' listed by the Committee directly or indirectly control sectors of industry at their discretion. So do some of the 'Business authorities' such as the Australian Postal Commission, the Australian Telecommunications Commission, the Australian Film Commission, and the several Aboriginal Funds and Councils (see the classification in Commonwealth of Australia, 1980:27-63).

In fact if one meticulously examines the statutes that create or authorise the bodies listed by the Committee, it is hard to find ones that have no regulatory impact on social or economic relations. Sometimes even formal courts are invested with discretions that may be exercised in accordance with current social policy rather than with pre-existing legal standards (Zines, 1987:163).

Non-Statutory Regulatory Bodies

Statutorily authorised governmental agencies inside and outside ministerial departments constitute the major centres of regulatory power in the welfare state. However, in recent times political and academic attention has been drawn to a little-noticed and ill-defined administrative element that plays an increasingly important role in the regulation of the welfare state. These are the non-statutory bodies, which the Royal Commission on Australian Government Administration (RCAGA) identified as important not only because they consume unknown but by no means insignificant amounts of government funds, but also because they act on occasions as alternative, semi-independent, unscrutinised, and unheralded sources of policy and administrative advice (RCAGA, 1976 [Appendix vol i]:375).

These non-statutory bodies (NSBs) have no adjudicatory, regulatory or coercive powers in the **formal-legal sense.** But the reality is that the NSBs provide a crucial and often decisive input into decisions affecting citizens' rights and duties made by others under statutory authority. The creation of some NSBs are referable to statutory provisions such as those stating that a 'Minister may set up such advisory committees as he deems necessary'. Such provisions do not give these NSBs any real statutory powers. The Minister in fact does not need statutory authorisation to solicit and receive advice on any matter from any source. Most NSBs have been set up by executive direction. The members of these bodies have no tenure and are hired and fired at executive pleasure.

NSBs supply a very important link in the welfare state apparatus. They provide avenues for special interest advocacy at the power centres of the bureaucracy. As the RCAGA's consultant Dr Thomas B. Smith sympathetically observes, 'many advisory committees serve as a safety valve or forum for diverse community interests or may be a device for co-opting "outsiders" into the policy process' (Smith, 1976:382). Smith notes that some NSBs were probably established for this reason rather than to provide sound, expert advice (1976:393). In the RCAGA survey, members of advisory committees were asked to name an entity or interest toward which they felt responsible. As Table 2 shows, only a minority of respondees named the public interest in general or the parliament as entities to which they felt responsible. A significantly high proportion of respondents stated that they felt highly responsible towards an interest group or organisation, or a professional association. The RCAGA survey revealed that in 1974, there were 245 NSBs operating in the Commonwealth bureaucracy alone.

Regulatory Staff

In March 1986, public sector civilian employment amounted to just over 1.7 million or almost 31 per cent of all civilian employees (Saunders, 1987:21-4.) Not all these employees were directly concerned with the regulatory functions of the welfare state. There is no reliable study on this question. But some idea of this dimension can be gathered from a study conducted by the Business Regulation Review Unit (BRRU) to estimate Commonwealth staff engaged in the regulation of Australian business. The BRRU found that in 1985-86, 16 400 public servants were involved in the regulation of business activities. A later estimate, which included staff in the Australian Bureau of Statistics, the Australian Tax Office and certain Commonwealth research agencies, doubled this figure. Saunders estimates that when State and local government business regulatory personnel are added, the public sector regulatory employment might be as large as 80 000 or about 7 per cent of general government employment (Saunders, 1987:42).

Regulatory Discretions

The number of laws, authorities and persons involved in the regulation of social and economic activity does not give a complete picture of the present regulatory regime. The reason is that the scope of regulation is vastly extended by the most commonplace bureaucratic device of the welfare state, the adjudicative discretion. In the Western constitutional tradition rulers were always allowed absolute discretion in the conduct of the affairs of the

Table 2
Perceptions of Responsibility by Advisory Committee Members

In terms of your service on your advisory committee, what degree of responsibility do you feel toward the following institutions or persons? (Circle the appropriate number.)

	High responsibility	Low responsibility	No responsibility
1. The minister	95	44	44
2. An interest group or organisation	64	36	83
3. A professional association	31	33	119
4. The Australian government department administering the committee	101	53	29
5. An Australian government department not administering the committee	20	46	117
6. A state government	50	41	92
7. My home state or region	43	37	103
8. Parliament	46	41	96
9. The public interest in general	46	98	50
10. Other (specify)			

Source: RCAGA, Appendix I to Report Vol 1, p. 405.

realm so long as their actions did not infringe on the rights and liberties of the citizen (McIlwain, 1947:77). This allowance created no great difficulty when the regime of administration and the province of private right rarely collided. But the welfare state by its very nature extends its concern into the field of private right, making material allocations and causing material deprivations in its quest to bring about fairer or more equitable conditions for all citizens. Consequently the welfare state applies administrative methods to determine the material condition of citizens. The principal device in the administrative armoury is the discretion. As Whitmore points out, statutory authorisation does not mean that the decisions of bureaucrats are directed by legislation. 'In some cases they may be, but the more common practice is to leave enormous areas of discretion open to the administrator so that regulation may be achieved by a flow of decisions which should theoretically be within guidelines established by legislation' (Whitmore, 1980:231-2). The problem is that in many cases there are no effective guidelines in empowering legislation.

It is impossible precisely to quantify the full extent of discretions bestowed on administrators. The Bland Committee on Administrative Discretions identified tens of thousands of discretionary powers at Commonwealth level (Sharpe, 1986:1). Even a precise count of discretions will not accurately reflect their total impact on the lives of citizens. The qualitative range of administrative discretions is vast. The Bland Committee reported:

> There are powers to admit or accept and to refuse or reject claims; powers to grant less than the maximum of a prescribed benefit; powers to determine degrees of disablement; powers to select beneficiaries for benefits; powers to seize and forfeit goods; powers to remit and make rebates; powers to authorise what is otherwise explicitly prohibited by legislation; powers whose exercise can advance or prejudice a career, a livelihood or a cherished ambition; and there are powers whose exercise may impinge deeply on property rights, with sometimes no redress for the person affected. (Commonwealth of Australia, 1973:5-6)

The Total Picture

The total picture, as Whitmore remarks, is a rather frightening one (Whitmore, 1980:232). It is one of pervasive regulation by an increasingly non-accountable bureaucracy. The regulatory regime threatens the constitutional order in three ways.

Predictability. The proliferation of authorities with wide discretions to take decisions affecting rights undermines the certainty and predictability of

the law. This happens in two ways. Often, the sheer volume of regulation makes it difficult for the citizen to ascertain his or her status in a specific situation. Sometimes relevant provisions, even when identified, are unhelpful as they merely validate current policy. The citizen must then seek to establish the parameters of relevant policy, which again may be fluid enough to sanction a wide range of official preferences. Again, unguided discretions allow officials to form policy at the point of decision-making. This leads to the unpredictability of official actions, with the consequent instability of private rights and personal liberties (Galligan, 1986:128).

The certainty and predictability of the law as a value has often been dismissed as an anachronism from the liberal past. Yet it is a value that is regaining currency amongst those wishing to establish rights to welfare benefits. Carney and Hanks state:

> Lawyers prefer social security provisions to be written in the language of legal entitlement rather than in that of a discretionary privilege. This aversion to discretion reflects a distrust of the capacity of administrators to make sound and responsible decisions, a fear of uncontrolled arbitrariness in decision-making, and more fundamentally, a concern that discretionary processes lock claimants into a subordinate, dependent relationship with decision-makers, where they can only have a mendicant status, reliant on the favourable exercise of discretion. In short it is argued that low quality, arbitrary and demeaning decision processes are integral to discretion; and that clear, precise rules, which specify objective eligibility criteria and confer a right or benefit are to be preferred. (Carney & Hanks, 1986:240-1)

For their part, Carney and Hanks consider discretion as unavoidable and needed to modify an otherwise harsh and inflexible welfare system. They advocate the structuring of discretion by the enunciation of policy objectives, the insistence on open and reasoned decisions and by prompt and informed review on the merits (Carney & Hanks, 1986:141). They do not make a sustained inquiry on whether such structuring is achievable without substantially sacrificing welfare effectiveness.

Accountability. The regulatory regime of the welfare state by its nature tends to remove policy-making from democratic control. It is now generally conceded by most Australian public lawyers that the widespread conferment of statutory discretions on officials and bodies has nullified one of the principal mechanisms of democratic accountability, namely, the system of responsible government. The model of responsible government requires the minister to control and be accountable for the actions of his ministerial

department. This accountability is in the form of his answerability and responsibility to the elected representatives of the people assembled in parliament (see generally Goldring, 1980:353). On the contrary, statutory authorities are often invested with independent decision-making power, which removes them from the ambit of ministerial responsibility. As the RCAGA report noted, independence is often given

> to avoid political control or full political responsibility, as when the function is quasi-judicial, regulatory, involves grants or subsidies or entails higher educational opinion-forming or research activities ... (RCAGA, 1976:84)

The objection that the delegation of independent statutory authority offends responsible government is not a substantial argument as responsible government today has only a notional presence. In the context of practical politics the Ministry controls the ruling party in parliamentary decision-making. Ministerial responsibility to parliament is therefore mythic. The argument developed in this monograph is different. It is that the only means by which administration could be democratically controlled is by subjecting all authority to controlling principles that are democratically established. The prospects for such control recede as officials acquire authority to create law at the point of decision-making.

Judicial oversight. Wide discretionary powers decrease the capacity for judicial oversight. Administrative lawyers often claim that power is always controlled by the policies that underlie the legislative grant. It is often difficult to establish such policies except in terms of abstract notions such as justice, equity and public interest. And, as Goldring notes, 'much policy is made incrementally, by the disposition of particular cases' (Goldring, 1982:93). The emergence of a 'New Administrative Law' in Australia is largely the result of widespread realisation that judicial review is proving unequal to the task of supervising the burgeoning bureaucracy increasingly vested with power to make its own policy.

In the next chapter I will assess the success of this New Administrative Law in responding to these threats to the constitutional order.

Chapter 8

The New Administrative Law: The Australian Response to Uncontrolled Power

The growth of bureaucratic power beyond the limits of conventional legislative and judicial control has caused great concern in most democratic societies. Some countries have had official parliamentary investigations into this development. (For the UK, see Reports of the Committee on Ministers' Powers [1932] and the Committee on Administrative Tribunals and Enquiries [1969]. For Canada, see Fourth Report of the Standing Joint Committee of the Senate and of the House of Commons on Regulations and other Statutory Instruments [1980].) In the US this problem has precipitated in constitutional disputation based on Bill of Rights guarantees. In Australia a package of far-reaching reforms to the administrative review system was introduced in the late 1970s 'as a response to the increase in the extent to which the rights and obligations of individuals in society have come to depend upon the exercise of powers and discretions by the executive and its officers' (Administrative Review Council 12th Annual Report 1987-88:1). This legislative package together with the jurisprudence it has engendered is commonly referred to as the New Administrative Law (NAL).

NAL has aroused great interest and comment in academic and law reform circles throughout the Commonwealth. At the time of its adoption, the Canadian Law Reform Commission described it as 'an awesome leap' (Law Reform Commission of Canada, 7th Annual Report, 1977-78:14). Recently, the Administrative Review Council described the package as 'a major and distinctive feature of our system of government which establishes

Australia as a leader amongst common law countries in adjusting the relationship between the individual and the State to changing needs' (Administrative Review Council 12th Annual Report, 1987-88:1). Goldring states that the NAL gives to 'public law' in Australia a political and social role apparently different from the role expected of rules of law in other states where the prevailing tradition is that of the Anglo-American common law (Goldring, 1985:1). NAL is regarded by the mainstream of the Australian public law community as the great new hope for reconciling the welfare state with the fundamentals of democratic government.

This is high praise for a body of law that has existed only for a dozen or so years. Despite the praise there is a need to assess the performance of the new administrative review system and its prospects for the future in relation to the issues raised in this monograph. Before evaluating any legal reform one must do two things. First, it is necessary to discover the precise nature and extent of the changes effected by the reform. Second, one must determine the substantive values against which the performance of the new order is to be measured. The first task is a relatively simple one. It calls for the identification of the pre-existing state of law and practice and the ways in which the reform brings about material change. The second task is controversial as values differ markedly according to the ideological predispositions of the evaluator. Most published commentaries on NAL proceed from one basic assumption: that the welfare state in its present regulatory and interventionist form and scale is irreversible owing to practical and/or ideological reasons. Given this assumption some writers have examined the capacity of NAL to secure due process and individual justice in a largely discretionary system of regulation (Goldring, 1982:92). Others have considered the capacity of the new system to deliver better distributional justice even at the expense of individual justice (Sharpe, 1986:197-8).

By contrast, the evaluation of NAL attempted in this chapter proceeds on the assumption that a substantial scaling down of the regulatory regime of the welfare state is both realisable and desirable. It is beyond the scope of this monograph to enter this part of the debate. Other titles in the series to which this monograph belongs specifically address these issues. Once we are released from the constraint of assuming that current levels of regulation are unavoidable, we can proceed to evaluate the new system of administrative review against certain other important values implicit in the constitutional order, such as the rule of law and democracy in their classical sense.

In this chapter, I will evaluate NAL in relation to its capacity to arrest the following threats to the constitutional order:

(a) The uncertainty and unpredictability of official actions, which are progressively eroding the areas of stable expectations enjoyed by the citizen.

(b) The undermining of the value that demands that decisions affecting

the rights and liberties of the people should be made in accordance with principles established through democratic means.

(c) The failure of parliamentary and judicial processes to have a significant impact on the arbitrariness of regulatory decision-making.

The Old Administrative Law

We cannot rationally discuss the merits of NAL unless we know something of the pre-existing state of the law relating to the review of administrative action. The pre-existing law consists of the body of principles developed by common law courts in their endeavors to ensure that inferior courts and tribunals did not exceed their powers or exercise them in contravention of the principles of natural justice or in conflict with the law.

The whole body of law relating to the judicial review of administrative action is shaped and delimited by one fundamental principle derived from legal positivism and its chief practical manifestation, the notion of parliamentary sovereignty. The principle is that if parliament has designated a specific authority to determine a particular question, it is for that authority and not the courts to determine that question. This principle expresses itself in the basic rule that a court will not interfere with the decision of a statutorily authorised person or body on the ground that the decision is **wrong according to the merits of the case** unless the statute gives a party affected by the decision a general right of appeal to such court. Common law courts have shown extraordinary inventiveness in expanding the range of circumstances within which they would set aside a quasi judicial or administrative decision affecting citizens. But their power remains crucially circumscribed by the principle of non-interference on the merits of such decisions. The position was reiterated as recently as 1982 by the House of Lords. In comments endorsed by other members of the court, Lord Hailsham of St Marylebone, L.C., declared:

> This remedy, (of judicial review) vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi judicial, and as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner ... it is

> important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. (*Chief Constable of the North Wales Police* v. *Evans* [1982] 3 All ER 141, 143).

Thus, under the 'old administrative law', the court's capacity to redress injustices caused by statute or prerogative-based action is fundamentally circumscribed by the principle of non-interference on merits. This principle effectively limited judicial interventions to the following situations.

Review of decision by way of appeal. Statutes rarely confer a general right of appeal from a bureaucratic decision. Some statutes grant rights of appeals only on questions of law as opposed to questions of fact. Courts have expanded their appellate powers under such grants by adopting elastic interpretations of the term 'question of law'. Courts have frequently said that a finding of fact unsupported by any evidence or material is in essence an error of law. Courts have also treated as errors of law decisions that run counter to the only reasonable conclusion warranted by evidence. Yet this approach falls well short of full review of official action on its merits. Courts will not interfere with official action on its merits. They will not interfere with official determinations on the grounds that a fact has not been proved beyond reasonable doubt (as in criminal cases) or even on a preponderance of probabilities (as in a civil case). Rather, it seems a court will set aside a statutorily authorised official determination on its merits only where the decision is **wrong** beyond a reasonable doubt. Thus if there is some evidence to support a determination, the court will not question the weight which the official has chosen to place on the evidence (*Collins* v. *Minister for Immigration and Ethnic Affairs* [1981] 36 ALR 598 at 601).

Jurisdictional error exceeding authority. Quite apart from any appellate jurisdiction, superior courts have historically exercised a power to supervise inferior courts and tribunals to ensure that they do not exceed their statutory authority or otherwise act in contravention of the law or contrary to the principles of natural justice.

A jurisdictional error occurs where a tribunal misconceives its own authority. The clear case is where a tribunal thinks it has power in a particular situation, whereas on a proper construction of the empowering statute its power does not extend to that situation. Jurisdictional error also occurs where the authority fails to observe mandatory procedural requirements for the exercise of power. The concept of jurisdictional error has been extended by courts, among others, to the following situations:

(a) where the authority abuses or improperly exercises its powers;
(b) where the authority, in making its decision, takes irrelevant matters into account or fails to consider relevant matters;
(c) where the authority is required by law to exercise its own discretion, but decides a question by the automatic application of a policy or a directive of a superior.

Error of law. Even in the absence of a right of appeal on a question of law, superior courts have asserted the right to correct the errors of law committed by statutory authorities. What is an error of law was briefly considered above in relation to appeals. An important common law limitation of this ground is that the error should be apparent on the face of the record.

Violation of natural justice. A great deal of judicial intervention in statutory determinations occurs on the grounds of the failure to observe one or the other of the two basic requirements of natural justice namely, (a) to grant adequate hearing to parties affected by the decision; and (b) to be, and to be seen to be, impartial.

Initially natural justice requirements were thought to apply only to decisions of a judicial or quasi-judicial nature. Courts have progressively extended the application of natural justice to decisions of administrative character and in the process developed a notion of fairness in administration. It is however open to the legislatures in the UK and Australia to deny natural justice by explicit provision.

The above is an extremely brief outline of the grounds upon which administrative action could be reviewed under common law principles. It is intended only as a setting in which the reader can appreciate better the nature of the changes effected by the NAL. Readers who wish to examine this highly interesting and complex branch of the law may find De Smith (1980), Whitmore & Aronson (1978), Hotop (1985) and Enright (1985) extremely useful. A study of this jurisprudence shows that courts have been particularly creative in limiting excesses and abuses of power, in ensuring procedural fairness, and in setting aside erroneous decisions where the criteria for decision-making are ascertainable from statutory provisions. The number of cases where applicants have gained relief on these grounds may be minuscule compared to the numbers actually aggrieved by wrongful or unfair administrative decisions. But it may be presumed that the principles established in these cases have beneficially influenced administrative procedures and practices.

Yet despite these judicial successes the threats to the constitutional order have not diminished significantly. The reason is that substantive decision-

making power remains in the hands of officials with unreviewable discretionary authority. Courts in the UK and Australia have never assumed power to interfere with widely granted discretions on the ground that the grant is flawed for want of democratically determined guidelines. In fact the High Court of Australia, at times, has enthusiastically endorsed unguided discretions. In *Murphyores Inc Pty* v. *Commonwealth* (1976) 136 CLR 1, the Court considered the Minister's unfettered discretion under the Customs Act to permit exportation of prohibited goods. Mason J said that the 'discretion which is not expressed to be subject to any limitation, was intended to be wide enough to embrace every consideration reflecting advantage or disadvantage, benefit or prejudice to Australia flowing from the approval or refusal of an application' (at 24).

Murphyores illustrates the difficulty of devising criteria to limit wide regulatory power (Enright, 1985:596). The small number of reported cases on unreviewable discretions does not indicate that such discretions occur infrequently. More likely, it reflects the fact that large numbers of aggrieved persons are shut out of court for want of reviewable grounds.

The Apparatus of the New Administrative Law

The genesis of NAL is found in the work of the Administrative Review Committee (the Kerr Committee) appointed in 1968. The Committee was appointed by the Commonwealth Attorney-General following mounting concern over the incapacity of existing judicial procedures to adequately supervise the burgeoning bureaucracy. The Committee was asked to consider all aspects of the review of administrative action, and in particular the need to vest review jurisdiction in a new Commonwealth superior court or other federal court.

The Kerr Committee's work led to the establishment of the Federal Court, the Administrative Appeals Tribunal and the Administrative Review Council. These, together with the Commonwealth Ombudsman, constitute the institutional framework of NAL. It is convenient to consider this law in relation to the powers and functions of each of these institutions.

The Administrative Review Council. The Administrative Review Council (ARC) was established as part of the package of reforms that constitutes the institutional framework of the NAL. The ARC's role is to monitor the operation of the administrative review package and to provide advice thereon to the government. Specifically it works to ensure the cohesion of the different elements, to eliminate duplication, and to promote the efficiency of the system. The ARC has no adjudicative or coercive powers and hence has little direct bearing on the quality of administrative decision-making.

The Federal Court. The Administrative Decisions (Judicial Review) Act 1977 (Cth) was intended to remove many of the technical and procedural obstacles that impeded applicants seeking judicial review at common law. It sought to do this through the instrumentality of the Federal Court of Australia established under the Federal Court of Australia Act 1976.

The traditional means by which judicial review of administrative action was sought involved the invocation of the power of superior courts to make orders in the nature of 'Prerogative Writs'. These were orders made outside the courts' appellate jurisdiction on extraordinary grounds. They were restricted in scope and involved specific conditions precedent. The litigant had to choose an appropriate prerogative remedy according to the grounds for complaint. A person having a good cause for complaint could be denied relief for not seeking the right remedy.

The Administrative Decisions (Judicial Review) Act was intended to reform the common law procedures for relief in relation to administrative actions taken under federal law (s. 3). The Act codified, with slight reforms, the grounds for review recognised at common law (ss. 5, 6 and 7). One of the reforms is the recognition of errors of law that do not appear on the face of the record as grounds for review. The more significant changes are:

(a) the consolidation of the several distinct prerogative remedies into a simplified remedy of judicial review to be obtained from the Federal Court; and
(b) the enabling of applicants to change the ground of review or to set up new grounds for review when such grounds are discovered after the commencement of proceedings (s. 11(6)).

These changes helped to eliminate the major technical impediments that obstructed relief at common law. But they do little to change the substantive limitations on judicial review that render administrative law incapable of arresting the growth of arbitrary power. In fact the Court's powers do not extend to the review of administrative decisions on their merits. The Administrative Decisions (Judicial Review) Act has limited application in that it applies only at federal level to classes of decisions that are not excluded by regulations under s. 19. At State level judicial review continues to be governed wholly by common law, although in Victoria some procedural reforms were enacted by the Administrative Law Act 1978 (Vic).

Ombudsman. The office of the Commonwealth Ombudsman was established by the Commonwealth Ombudsman Act of 1976. All the States as well as the Northern Territory have appointed Ombudsmen under local law. The functions and powers of all these Ombudsmen are substantially the same. The Ombudsman in the final analysis is only a grievance officer. He

may hear complaints, investigate and advise. But he cannot enforce his own decisions; nor are they binding on anyone. His only coercive weapon is the power to report unremedied grievances to government and to cause them to be publicised in parliament.

The grounds on which the Ombudsman can review administrative action are much wider than those recognised for judicial review. Importantly, the Ombudsman can not only investigate the merits of a decision but may review the reason, propriety or fairness of the laws that authorise the administrative decisions (see s. 15(1) of the Commonwealth Ombudsman Act). Yet the Ombudsman is unlikely to have significant or lasting impact on administration owing to the inconclusive nature of the orders.

The Administrative Appeals Tribunal. The Administrative Appeals Tribunal (AAT) is the centrepiece of NAL. Much of the academic acclaim for NAL rests on the expectations raised by this institution and its powers. The AAT has no general supervisory power over administration. It has jurisdiction only with respect to decisions that are specifically made reviewable by the AAT Act or by some other legislative enactment. At present it has power over only a relatively narrow field of Commonwealth administrative action. But many entertain hopes that its jurisdiction will progressively extend to most areas of Commonwealth decision-making.

With respect to decisions it can oversee, the AAT's powers substantially exceed the supervisory powers granted to courts. The AAT has the power to review decisions on all the grounds recognised at common law. It can ensure that authorities make decisions according to legal principle, although its findings on questions of law are subject to correction by the Federal Court (ss. 44(1) and 45(1) of the AAT Act). It can also intervene on other grounds of administrative impropriety. But the power that has most excited Australian and international academic minds is the one that enables the AAT to review decisions on their merits. Under s. 43(1) of the Act, the AAT may not only set aside a decision but may vary the decision or may 'make a decision in substitution for the decision so set aside or remit the matter for reconsideration in accordance with any directions or recommendations of the Tribunal'. This power may be modified by the legislation conferring review power on the AAT. Despite that possibility it constitutes a potent new instrument of administrative oversight. The AAT has other salutary features. The standing required to invoke its power is broadly defined to include any person 'whose interests are affected by the decision' (s. 37(1) of the AAT Act). There are few formal requirements governing applications. The AAT is required to give reasons for its decisions either orally or in writing (s. 43(2A)).

The AAT has greater potential than courts to curb the excesses and abuses of administrative officers. The extent to which this potential will be realised and the long-term impact it will have on arbitrariness in government

cannot be predicted with accuracy. But we are in a position to examine whether the AAT by virtue of its composition, powers and statutory role can make official actions more predictable and make them better conform to democratically established principles.

The power to review administrative decisions on their merits is, upon examination, a double-edged sword. On the one hand, it gives the AAT the power to review hitherto unreviewable decisions. On the other hand, when the AAT substitutes its own administrative decision for that of an official the AAT itself becomes a part of the administration and hence loses its distinctive and independent character. In the case of *Collector of Customs (NSW)* v. *Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307, Smithers J described the AAT as follows:

> In essence the Tribunal is an instrument of government administration and designed to act where decisions have been made in the course of government administration but which are in the view of the Tribunal not acceptable when tested against the requirements of good government. (at 335)

This decision confirms the position that in reviewing administrative decisions, the AAT must step into the shoes of the decision maker, thus itself becoming a part of the administrative hierarchy. As I will presently discuss, this makes the task of independent inquiry structurally more difficult. But the more important question is: in the absence of guidelines laid down by law, how does the AAT determine what satisfies 'the requirements of good government'? The AAT itself considers that its duty is to make 'the correct or preferable decision in each case on the material before it' (*Re Drake and Minister for Immigration and Ethnic Affairs* [No.2] [1979] 2 ALD 634 at 642). Two problems face the AAT in discharging these duties. First, it must not only be able to decide whether administrative decisions are taken in accordance with established policies, but it must also be able to question, and if needed modify or replace, such policies. Second, the criteria that the AAT employ in the reformulation of policy should not themselves be arbitrary but should be referable in some meaningful way to democratically established principles. The first problem has been addressed by the judiciary but not fully resolved. The second problem has been generally ignored.

AAT's power to review policy. The AAT's power to review established policy was asserted in a series of decisions in which the AAT overrode a ministerial policy on deporting non-citizens convicted of drug offences without regard to extenuating circumstances. This power was upheld by the Federal Court, which in doing so explained one of the key differences between the AAT and judicial bodies. Bowen C J and Deane J said:

> Except in a case where only one decision can lawfully be made, it is not ordinarily part of the function of a court either to determine what decision should be made in the exercise of an administrative discretion in a given case or, where a decision has been lawfully made in pursuance of a permissible policy, to adjudicate upon the merits of the decision or the propriety of the policy. That is primarily an administrative rather than a judicial function. It is the function which has been entrusted to the Tribunal. (*Drake* v. *Minister for Immigration and Ethnic Affairs* [1979] 24 ALR 577, 589)

The power to set aside executive policy runs counter to the theory of responsible government. In theory responsible government requires ministers to be answerable in parliament for both policy and administration of policy within their purview. The AAT's power to set aside departmental policy without itself being accountable to parliament fractures the chain of responsibility, which, in theory, brings executive actions within the reach of popular judgment. As Goldring states, the AAT 'represents an unprecedented attempt to establish a means for the exercise of executive power ... in a way in which it is difficult to envisage parliamentary scrutiny or control, except in extreme cases. It does not seem to fit at all within Chapter II of the Constitution' (Goldring, 1982:192).

Despite its technical competence to review policy, the AAT has adopted a largely deferential attitude to policies that are determined at political level. In the early cases of *Re Becker* and *Re Drake*, Brennan J sought to rationalise this attitude. In *Re Becker*, Brennan J drew a distinction between basic policies intended to provide the guideline for the general exercise of the power; and other policies or procedural practices that are intended to implement a basic policy. He said that more substantial reasons may have to be shown why basic policies — which might frequently be forged at the political level — should be reviewed. 'There may, of course, be particular cases where the indefinable yet cogent demands of justice require a review of basic, even political policies, but those should be exceptional cases ...' (*Re Becker* [1977] 1 ALD 158, 163). In *Re Drake (No. 2)*, Brennan J distinguished policy developed through deciding individual cases from ministerial declarations of broad policy relating to the generality of cases. He concluded that whilst the Tribunal may refine it, 'the laying down of broad policy is essentially a political function to be performed by the Minister who is responsible to the Parliament for the policy he adopts' ([1979] 2 ALD 634). Brennan J pointed out that the political function of formulating broad policy is incompatible with the independent, therefore apolitical status of the AAT (at 644).

It would seem, therefore, that despite technical competence to question

broad policy, the AAT mainly concerns itself with 'implementary policy' relating to the application of general policy to individual cases (Sharpe, 1986:72). As Peiris notes, 'The vital concession has now been made that where a policy has been properly formulated in a political context and constitutes in substance the exercise of political power, it is desirable, *ceteris paribus*, that the policy should be applied by the Tribunal especially in the interest of consistency and cohesion in the decision-making process' (Peiris, 1986:312). This retreat makes the AAT's work less distinguishable in actual substance from the work of courts administering the 'old administrative law'.

Is the AAT Less Arbitrary?

With respect to the core values of constitutionalism, the problem is not that the AAT lacks power but that it resembles too closely the authorities it must supervise.

In institutional respects, the AAT resembles a court. It has formally guaranteed independence and qualified judges as presidential members. It has the coercive powers of a court. It has the power of a superior court in enforcing the 'old administrative law'. (It is subject to the overriding opinion of courts on questions of law.) In these respects the AAT basically duplicates (perhaps more efficiently) judicial functions relating to the review of administrative action. But unlike courts the AAT is competent to question and if necessary redraw policy. The question is whether in these respects the AAT adopts a truly constitutional posture or merely duplicates the executive function.

Contrary to popular perception, the major causes of arbitrariness in administrative decisions affecting citizens are not the caprice and malice of officials. For the most part arbitrariness results from subjective judgment of what is required by the ill-defined values or goals that supply the criteria of decision-making. Hence, the AAT can address this problem only if it adopts and consistently applies principles that limit its own subjectivity of judgment. The Tribunal has declared that its function is to arrive at the 'correct or preferable decision in each case on the material before it'. But in the absence of more tangible guidance the Tribunal itself is compelled to make subjective policy decisions in order to decide what is 'correct or preferable in the individual case'. Peiris illustrates this problem with reference to the AAT's interventions in the deportation policy of the Minister of Immigration:

> This basic criterion (of the right decision on material before it), combined with the extreme fluidity of the applicable guidelines, has given

> the Tribunal access to a lever to supplant administrative adjudication over an extensive area on grounds no more substantial than differing approaches to questions of weight, context and priority. In ascertaining the content of the public interest, the Tribunal has invoked such amorphous criteria as 'a liberal outlook appropriate to a free and confident nation' and suitable 'in the exercise of good government'. These infinitely resilient standards, encapsulated in the use of formulae so inconclusive as 'community attitudes' and 'best interests of Australia' augment the jurisdiction of the Tribunal perhaps beyond acceptable limits, by enabling the reversal of policy formulated at Ministerial level on the basis of an inconsistent subjective judgment involving the assessment of factual material. (Peiris, 1986:310-11)

The AAT has done much better when provided with explicit and recognisable standards. In 1981, the AAT was empowered by an amendment to the Social Security Act 1947 to hear appeals from the decisions of the Social Security Appeals Tribunal (SSAT), which originally reviews decisions made by the Secretary of the Department of Social Security. In other words the AAT was made the forum of a second appeal from the Secretary's decisions. Amongst the Secretary's discretions is one that allows him to grant (or refuse to grant) a 'special benefit' to persons who are not in receipt of pensions or other specified welfare payments. But this discretion is limited by the requirement that the Secretary should be first 'satisfied that by reason of age, physical or mental disability or domestic circumstances, or any other reason, that a person is unable to earn a sufficient livelihood' (s. 124(1)(c) of the Social Security Act 1947). In a series of decisions the AAT interpreted this provision and also determined factors that are relevant or irrelevant to the proper exercise of the discretion. Similarly the AAT has interpreted and applied the provisions of s. 140(1) of the Social Security Act, which permits recovery of social security overpayments made as a result of a 'false statement or representation, or in consequence of a failure or omission to comply with any provision' of the Act (see discussion of cases in Sharpe, 1986:131-52). It is generally acknowledged that the AAT has made significant jurisprudential contributions to the understanding and implementation of these provisions (Peiris, 1986:315).

But it is crucial to remember that in making this contribution, the AAT is, broadly speaking, practising the 'old administrative law'. In other words the Tribunal is interpreting defined discretions and determining jurisdictional and decisional errors in much the same way as a superior court would in the exercise of its prerogative review jurisdiction. There is of course a difference between judicial review decisions and AAT decisions. A court

will ordinarily set aside an order and give reasons for so doing, in the expectation that the administrative authority will re-exercise its discretion in the proper manner. In most cases, this will indeed happen. The AAT on the other hand will set aside an order and substitute its own order in accordance with what it considers are the applicable legal principles. This competence shortens and makes more certain the process of rectifying administrative errors.

The AAT's most notable successes have been in the area of fact finding. Peiris, after a meticulous survey of cases, concludes that in the overwhelming majority of cases where the Tribunal reversed the decision below, it did so not on the basis that it drew a different inference from facts found by the administrator to exist, but because the Tribunal determined that the factual situation was different. It is able to do so because it has the use of fact finding methods not available to administrators (taking evidence on oath) or to courts (inquisitorial techniques) (Peiris, 1986:316, 321-2).

A close examination of decisions is likely to reveal that the AAT's performance is most positive where: (a) it duplicates curial functions by applying the 'old administrative law' or principles analogous to such law; or (b) it engages in fact-finding as opposed to policy-making at macro or micro levels. In this case the AAT functions as a 'super board of review' with extensive investigatory powers.

The AAT's contribution in the above respects strengthens the supervision of administrative action by reinforcing its traditional dimensions. But has the Tribunal added any new dimension to supervision which warrants the extravagant claims made on its behalf? Its fact-finding role is an important development but should not be overemphasised. The AAT has bought its investigative effectiveness at the price of less expedition and more cost. This painstaking approach to fact-finding cannot become an everyday feature of administration in the welfare state. Peiris states that 'the Tribunal's impact will be substantial only if the ripples generated by its intense and fastidious methods gradually spread across a large segment of the administrative decision-making process'. But the sheer volume of orders involved in the administration of the welfare state is likely to stop the ripples before they spread very far.

Besides, the major problem with administrative adjudication is not official misjudgment of facts in relation to the criteria of decision-making. Of greater concern is the fact that the criteria of adjudication are often so fluid that the process of determining relevant facts becomes correspondingly difficult. Where the criterion is broadly expressed in terms such as the 'public interest' or 'as deemed fit and proper by the Minister', relevance becomes almost limitless. Admittedly the broad policy of the enactment would place some limitations and in particular would exclude clearly collateral matters.

But the breadth of policy would still leave large areas of factual material potentially relevant to the decision. In these situations relevance becomes subjective and decisions become constructively arbitrary.

The AAT has not adequately responded to this problem. It is submitted that the Tribunal is incapable of remedying it. As noted above, in practice the AAT rarely questions basic policy determined at the political level. At the implementary level the absence of guidelines renders its policy-making intrinsically indistinguishable from the policy-making of officials. In fact, as Goldring points out, the Tribunal itself and the courts have interpreted the Administrative Appeal Tribunal Act in such a way as to require that the Tribunal should, in effect, become the administrative decision-maker (Goldring, 1982:90). The quality of an administrative decision that suffers for want of pre-established guidelines improves little by change of decision-maker. The main reason why decisions of formal courts are qualitatively different is not the superior training of judges or the sophistication of juristic technique. It is because, to use Lord Devlin's words, judges define their role as being essentially 'the disinterested application of known law' (Devlin, 1976:1). In other words, law, not policy, mainly governs judicial decision-making. When entitlements and deprivations are determined by policy, there is no place for judicial methods whether by officials, tribunals or judges.

It is not my intention to belittle the contribution of the 'New Administrative Law'. My object rather is to pinpoint the danger of regarding NAL as having the potential to arrest by itself the constitutional regression. If it does nothing else, NAL would still have strengthened an important constitutional value. The value is expressed in the due process right of a citizen to participate in the deliberative process which leads to a decision that materially affects the citizen (cf Tribe, 1978:503). As Goldring states, 'The Tribunal provides a means whereby decision-makers can be made accountable to the person affected by the decision, rather than to the community as a whole through its representatives in Parliament' (1982:92). This responsibility inhibits overtly capricious or malicious decisions and improves the probative standard in relation to the determination of facts.

But this is not the only constitutional value at stake. The more fundamental value which NAL is unable to protect is the assurance that deprivations, allocations and other governmental decisions materially affecting citizens are made upon criteria that are in some meaningful way referable to popular choice. In the context of the American Constitution, this value has been expressed as follows:

> In general, limits on congressional capacity to delegate responsibility derive from the implicit constitutional requirements of consensual government under law. Under any theory that finds legitimacy in the

> supposed consent of the governed within a framework of constitutional limitations, the cooperative exercise of accountable power pre-supposes the possibility of tracing every such exercise to a choice made by one of the 'representative' branches, a choice for which someone can be held both politically and legally responsible. ... thus the valid exercise of congressionally delegated power depends upon the prior adoption of a declared policy and its definition of the circumstances in which its command is to be effective. (Tribe, 1978:286-7; *Opp Cotton Mill Inc.* v. *Administrator* 312 US 126, 144)

As Goldring points out, the AAT is not a means of making decision-makers accountable to the community as a whole but rather to the individual affected by the decision. As argued herein, this accountability to the individual is mainly limited to the assurance of procedural fairness and the enhancement of the accuracy of fact finding. It does not help affected individuals to overcome substantially the arbitrariness that results from the uncertainty of decisional criteria.

Accountability to the individual alone means that the process fails to address one very important requirement of justice. It is that justice must be done not only in relation to the individual but also in relation to the community. This requirement applies whether one talks of commutative justice or distributive justice. In the case of commutative justice, it expresses the need to ensure that the established rules of conduct are upheld and their breaches remedied. In the case of distributive justice, the requirement translates as the need to assure that the benefits and privileges conferred from public wealth are distributed according to rules and criteria agreed to by the public. Hence, despite the accountability to the individual, which the AAT laudably promotes, the AAT's decisions often lack one of the essential attributes of justice in a democratic society.

Conclusion

NAL is a significant development in the review of administrative action. It has strengthened existing review processes and has put in place some new processes. It has intensified the scrutiny of decisions with regard to the proof of facts. In these respects, NAL has improved the quality of administrative review within the relatively narrow province of its authority.

However, it is a dangerous illusion to think that NAL provides the answers to the widespread arbitrariness of the administrative machinery of the welfare state, and hence arrests the decline of constitutional government in Australia. NAL does not address the central problem of non-accountable power because it does not supply the substantive standards for decision-

making that can structure discretions and make them amenable to effective review. NAL in fact weakens rather than strengthens democratic processes by formalising the shift of administrative accountability away from the community and towards the individual. In doing so it formally deprives the individual of the security of popularly established law.

The arbitrariness complained of in this monograph is inherent to the type of discretion considered as indispensable to the welfare state. Contrary to mainstream opinion amongst public lawyers, the solution to this problem cannot be found through immanent criticism of the welfare state. Public lawyers can address this problem only if they agree that the existence of the welfare state in its present character and scale is a negotiable issue. Such a position would enable public lawyers to see more readily that there are unavoidable costs to liberty and democracy involved in maintaining the welfare state in its present form. Once this is acknowledged a meaningful dialogue can commence on the question whether this cost is sustainable or tolerable in a free society and, if not, to what extent that cost should be reduced by trimming parts of the welfare state or ridding it of some of the more intrusive functions.

It will indeed be tragic if the New Administrative Law, which has made an important contribution to the review of administrative action, becomes instrumental in perpetuating a delusion that stands in the way of dialogue on the real issues concerning constitutional regression.

Chapter 9

Restoring the Constitutional Order

NAL operates within a narrow province of administrative action. This is not a fundamental weakness as it is capable of being extended progressively through simple legislative orders. Even whilst operating within its present jurisdiction it can have some exemplary impact on the ways of the bureaucracy. Yet, NAL does little to eliminate the inherent arbitrariness of the welfare state that results from the proliferation of discretions. NAL seeks to reduce this arbitrariness by subjecting discretions to the presumably superior but nonetheless still subjective judgment of the AAT. In changing policy or supplying policy where none exists, the AAT substitutes its own inherently arbitrary judgment for that of the official. The AAT does not and indeed cannot appeal to notions of the public good that are consensually determined. Instead, it appeals to its own judgment of the public good. Thus, it fails to perform a constitutional role.

Restoring the Role of the Judiciary

The task of constitutional restoration requires as a priority the re-establishment of a truly constitutional role for the judiciary. Despite appearances, the AAT performs no such function. NAL, like the 'old administrative law', is concerned with limiting the arbitrary uses of power by officials to whom power has been granted without significant limits. A constitutional approach on the contrary must lead to the recognition of limitations on parliament's powers to create authorities with unguided powers. As argued in this monograph, these limitations can be derived from the theoretical and practical requirements of a government that is subject to law and democratic

control. The recognition and enforcement of such limitations is beyond the scope of NAL.

The Australian High Court, which exercises ultimate constitutional jurisdiction, mainly has been concerned with the constitutional distribution of legislative powers between the Commonwealth and the States. Within the boundaries of their respective legislative provinces, the Court has placed no significant constitutional limitations. As demonstrated in this monograph, the High Court's approach to constitutional questions has been guided by a public law theory founded on revised notions of democracy, and government under the law. This theory continues to supply the 'inarticulate major premisses' from which the Court's constitutional positions are drawn.

Recent decisions provide no evidence of any philosophical shift in High Court's attitude to the Constitution. The philosophy that underlies the Court's constitutional jurisprudence was defined by the groundswell of intellectual opinion that paved the way for the arrival of the welfare state in its present coercive form (see generally Cooray & Ratnapala, 1986:203). It is highly improbable that that the Court will change its approach to constitutional issues except in the context of a widespread political and intellectual re-appraisal of the ends and means of the welfare state. Buchanan feels that this type of re-appraisal may be thrust upon the establishment by grass roots opinion. He writes:

> By sharp contrast the non-articulated philosophical understanding of those outside the ivied walls of the establishment-media circuits, contains significant residues of classical liberalism. It is this residual carryover of classically liberal ideas that has provided the basis for the potential political reception of the work of the [liberal] scientists and philosophers. (Buchanan, 1985:19)

The Dependence-Creating Quality of Welfare

A countervailing factor is the degree to which the electorate has become economically dependent on the welfare state in the present form. At about the time *Dignan* was decided, it was apparent to the American jurist Dean Roscoe Pound that society, having moved from status to contract, was moving back to a system of status or a new feudalism in which the state was the grantor of benefits (Tay, 1978:14). In 1964, Charles Reich published his article on 'The New Property', which drew attention to the extent to which Pound's prophecy was actualised in the United States (1964:733). Reich brought to light the ways in which direct payments, public jobs, occupational licences, franchises, public contracts, state subsidies, access to public re-

sources and the proliferation of public services had created a new form of wealth on which the people had become dependent for their well-being and in many cases for their very livelihoods. Reich examined the direct accretion of power to the government resulting from the people's dependence on largesse as well as the magnification of such power by discretions that are necessary to administer largesse. Above all, he observed the growth of a penumbral power that recipients of largesse themselves create by their efforts to please authorities in order to gain favours. Reich wrote:

> This penumbral government power is, indeed, likely to be greater than the sum of the granted powers. Seeking to stay on the side of an uncertain and often unknowable line, people dependent on largesse are likely to eschew any activities that might incur official displeasure. Beneficiaries of government bounty fear to offend, lest ways and means be found, in the obscure corners of discretion, to deny these favours in the future. (1964:751)

The thrust of Reich's article is directed at demonstrating the dependence-creating quality of welfare, and the failure of courts to mitigate this dependence by recognising and enforcing rights in welfare goods. Reich argues for urgent application of the concept of rights to a range of welfare benefits with the aim of preserving the self-sufficiency of the individual, of rehabilitating him where necessary, and of allowing him to be a valuable member of a family and a community (1964:785). He concludes:

> Just as the Homestead Act was a deliberate effort to foster individual values at an earlier time, so we must try to build an economic basis for liberty today — a Homestead Act for rootless twentieth century man. We must create a new property. (1964:787)

The dependence-creating quality of welfare has never really been recognised by the courts. Whilst insisting on certain levels of procedural regularity in the dispensation of welfare, the courts have found no basis for recognising rights in welfare goods and have continued to regard welfare as gratuity remaining within the grantor's control. Hence it is said that the state can withhold, grant, or revoke the largesse at its pleasure (*Lynch* v. *United States* [1934] 292 US 571, 577).

Despite Reich's important contribution to the understanding of the effects of welfare on the autonomy of the individual, his thesis, like that of Professor Harry Jones (1958:143, 154-5), is irremediably flawed by the lack of appreciation of the fundamental contradiction between the concept of right

and the idea of state-provided welfare. Neither Reich nor Jones (who argued that the welfare state must be regarded as a source of new rights) took account of the manner in which welfare claims have necessarily to be met, namely, by expropriations of individual wealth and by regulation of the social and economic order. If claims to welfare are to become enforceable rights, the state must be conceded the powers necessary to satisfy them whether or not others are willing to suffer deprivations on that behalf. This precisely is the contradiction that creates the tension between the welfare ideal and democracy.

Reich observes the ways in which dependence on largesse compels individuals to stay on the right side of authorities. He does not consider whether such dependence is self-perpetuating at a community level, in that it deprives the electorate of the capacity to affect policy changes involving the loss of benefits on which large numbers of voters rely for their well-being. One of the ironies of the quest for welfare rights is that they ultimately depend on the incapacity of people to place limitations on power. Whether this incapacity has already set in owing to the dependence of people on public goods and services is a question to which only history can provide a firm answer. Electoral dissatisfaction with welfare-oriented governments need not mean disenchantment with the welfare state itself. Rather, it could reflect the normal dynamics of bargaining democracy where interest groups frequently transfer electoral support among political parties in search of more favourable conditions for themselves. In recent times, however, there have been notable increases in support for policies that are openly and firmly committed to the dismantling of the welfare state. Growth of support for these policies has raised prospects of a popularly implemented program of constitutional restoration.

The Economics of Welfare

However, in Australia, the strongest impetus for the re-appraisal of the welfare state appears to be generated not by legal or political thought but by the imperatives of economic circumstance. The welfare state in most countries shows signs of having reached the point of overload. Economic systems are failing under the financial burden of maintaining the welfare state in its gargantuan proportions. The progressive integration of the global economy has exacerbated the economic plight of the welfare state. It has brought different socioeconomic systems into competition with each other in a common marketplace, in a way that exposes the previously hidden costs of the welfare state. In Australia, as elsewhere, these economic pressures have forced socialist governments to reassess the concerns of the welfare state. In

particular, the Australian Labor Party appears to recognise the cost of income redistribution through wage regulation. The Labor leadership seems also to recognise the ill-affordable cost of the state's direct participation in productive sectors of the economy. These realisations are reflected in new policies such as those relating to wage award restructuring, privatisation and user-paid tertiary education.

How can these economic rationalisations help the cause of constitutional restoration? It is evident that any reduction of the size of the welfare state tends to reduce the area of social and economic activity that is subject to discretionary regulation. Where there is no discretionary control, social and economic relations tend to be governed by rules that citizens expect each other to observe in the course of their interactions, including the terms of private treaties. Hence the withdrawal of the state from economic and social regulation could have the direct consequence of restoring law to primacy in many social situations. However this primacy will remain uncertain until it is secured by constitutional principles. What is needed in the long term is a philosophical shift that would restore respectability to the political values that were sacrificed in the search for the materially just society. The present hope is that economic factors, by undermining the sacrosanctity of many institutions of the welfare state, may create an intellectual climate conducive to the regeneration of constitutionalism in Australia. As argued in this monograph, the High Court whittled down constitutional principles by rulings based on inarticulate major premisses supplied by the ideology of the welfare state. The apparent intellectual consensus on the desirability and/or unavoidability of the welfare state permeated judicial thought to the point where constitutional principles became subordinate concerns of the Court. It is at least conceivable that a reverse process might take place if an intellectual and political consensus can be reached on the need to restore the principles of constitutionalism.

There are indications that at least some members of the Hawke Government (including Hawke himself) are persuaded that, in its present form, the Australian welfare state is in the slow process of self-destruction. In fact the economic managers within the Hawke ministry have used economic imperatives as *faits accomplis* to thrust reforms on the Labor Party. In interpreting the Constitution, the High Court historically has taken its cues from the dominant political and intellectual perceptions regarding the national interest. There are signs that a new consensus may be emerging amongst Australian political parties regarding the need to restructure the welfare state. It is conceivable that the High Court may draw from such a consensus cues that will determine its future attitude to the Constitution.

Achieving Consensus

In recent years a few liberal scholars have focused attention on the practical task of promoting consensus on constitutional reform. The work of Brennan and Buchanan is of particular importance. In their book, *The Reason of Rules*, they look for the 'prospect of securing **general agreement** on changes in the basic rules of the political game, even on the part of persons and groups who seem to be relatively advantaged under existing institutional arrangements' (Brennan & Buchanan, 1985:135). Brennan and Buchanan proceed on the premiss, previously established by sustained public choice analyses, that a generalised social dilemma exists regarding the operation of the welfare state. They argue that given the existence of this dilemma, it is conceptually possible to make some change that all persons in the community could agree on. Such an agreement would involve a package of complex terms including 'various compromises, side payments, compensations, bribes, exchanges, trade offs — a network aimed precisely at off-setting the predictable adverse distributional properties of the proposed changes' (Brennan & Buchanan, 1985:140). In short, the authors suggest that beneficiaries under the present welfare state who are likely to oppose constitutional reform be bought off or be given the 'golden handshake'. (The economics of this 'buy back' is explored further by Buchanan in his later work, *Liberty, Market and State* [1986].)

Brennan and Buchanan raise the possibility of replacing the present system of distributional politics with a 'directly constitutional transfer arrangement'. In other words they suggest a new social contract under which 'transfer policy would cease to be a matter for in-period political determination; the pattern of government grants would, instead be part of the rules of the game' (Brennan & Buchanan, 1985:129). The proposal's most obvious virtue is its potential to remove questions of distributive justice from crudely majoritarian judgment. The proposal also can remove one of the principal sources of arbitrariness in the administration of the modern state.

Yet the welfare state is not solely concerned with direct transfers of benefits. It promotes the 'public good' in innumerable ways. It regulates the way persons deal with their property, their labour and their leisure. It places arbitrarily determined limitations on individual liberty. The restoration of constitutionalism requires the recognition of a rule that decisions affecting lives, liberties and property of persons should be taken in accordance with principles settled by genuine consensus. It requires the recognition of a demarcation between activities that governments may engage in according to administrative convenience, and activities that must be conducted subject

to pre-determined law. Any new social contract must seek to buy back these attributes of constitutional government.

Geoffrey de Q. Walker, in his comprehensive and outstanding work on *The Rule of Law* (1988), warns that the years remaining in this century will probably be our last chance to save the rule of law (hence also constitutional democracy) from destruction.

> Why the last chance? Because most of the social institutions that formerly buffered the impact of state power on individual life have been emasculated. These institutions can no longer set up against present constitutional and legal trends enough resistance to send the pendulum back in the other direction before those trends destroy the rule of law. (Walker, 1988:400)

Walker considers that the common law practitioner by virtue of his constitutional and legal tradition is uniquely placed to make a global contribution to the revival of the rule of law (1988:404). Constitutional restoration in Australia requires the re-assertion by the High Court of a genuinely constitutional role. The prospects for such a development depend on the rediscovery of this tradition by lawyers and judges. It is somewhat ironic that the modern revival of the constitutional tradition was pioneered not by lawyers but by economists. However, the translation of this conceptual revival into a program of action will necessarily involve a major effort by lawyers.

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David G. Green is currently the Director of the Health Unit at the Institute of Economic Affairs, London. He is the author of several articles on politics and social policy, and his latest book, *Everyone A Private Patient*, was published by the IEA in 1988.

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