Here, Do This For Me: The Impact of Delegated Legislative Power on Separation of Powers and the Rule of Law

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Abstract

In their book, *Australian Constitutional Law: Commentary and Cases* Ratnapala, John, Karean and Koch observed that:

Excessive delegation of legislative power to the executive defeats the purpose of the separation of powers doctrine and may threaten the rule of law by allowing the executive branch to subject the law to its capricious will.

Except for the judiciary's independence, separation of powers in Australia has not been upheld strongly for both practical and political purposes. The danger highlighted in the quote has thus become very real, leading to a significant question: To what extent does the Commonwealth Parliament's capacity to delegate its legislative power undermine the separation of powers doctrine and threaten the rule of law? In answering this question, this essay defines the rule of law and separation of powers; examines the reasons behind delegation and its negative impact; identifies and analyses three main ways through which the impact is lessened; and finally evaluates the ultimate effect of delegation after these restraints have been implemented. It concludes by arguing that the delegation of legislative power does not necessarily threaten the rule of law and separation of powers doctrine, and has not done so in practice.

The doctrine of the separation of powers and the rule of law has long been considered intrinsic to the Australian Commonwealth Constitution. However, the increasing delegation of legislative power to the executive has created concern that these two doctrines are being weakened. This essay seeks to examine the validity of that concern. It will begin by defining the rule of law and separation of powers, outlining the rationale behind these concepts and the link between them. It then proceeds to examine the reasons behind the

delegation of legislative power and the problems caused by such delegations to the aforementioned concepts. Following this, it will examine and analyse the effectiveness of the measures taken to combat these problems. There are three general measures: firstly, the limits the High Court of Australia has placed on the Commonwealth Parliament's capacity for delegation; secondly, parliamentary scrutiny of the delegated legislation; and thirdly, the constraining of delegated legislation through judicial review. Finally, it concludes by identifying the overall impact these measures have, and to what extent they are capable of preventing the delegation of legislation from undermining the separation of powers and threatening the rule of law.

The rule of law has itself been the subject of many discussions and disputes over its precise definition. For instance, Dicey regards it as simply dictating that the law binds each person within the state,¹ while Lord Bingham perceives it to go beyond Dicey's 'thin' definition to include issues such as human rights and how public officials should behave.² For the purposes of this essay, Dicey's definition will be preferred as being sufficient to clarify the link between the rule of law and separation of powers, while 'thick' definitions such as Lord Bingham's would import normative concepts beyond the scope of this essay. Dicey proffers three defining qualities: the obviating of discretionary law-making; equality before the law; and the availability of judicial remedy if the government flouts the law of the land.³ Moreover, it creates a 'certainty and predictability'⁴ that allows people to plan their affairs. This principle was upheld in *A v Hayden*, in which government officials were found guilty of breaking and entering despite the fact that they were merely following orders,⁵ a clear illustration that citizens may rely on the fact that the government is not above the law.

The separation of powers refers to the strict division of the government into three branches: judicial, executive, and legislative. The executive must adhere to and enforce the legislative's rules while the courts have jurisdiction to implement legal boundaries, thus upholding the rule of law against arbitrary law-making.⁶ Intended to create a system of checks and balances between the branches,⁷ it thereby prevents the concentration and therefore the potential for abuse of power in one branch.⁸

1 David Clark, *Principles of Australia Public Law* (LexisNexis Butterworths, 3rd ed, 2010) 18.

2 Michael Kirby, 'The Rule of Law Beyond the Law of Rules' (2010) 33 *Australian Bar Review* 195-210, 198.

3 Denise Meyerson, 'The Rule of Law and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 1-6.

4 Alexander Reilly, Gabrielle Appleby, Laura Grenfell and Wendy Lacey, *Australian Public Law* (Oxford University Press, 2011) 19.

5 *A v Hayden* (1984) 156 CLR 532.

6 Meyerson, above n 2.

7 M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford University Press, 1967) 13.

8 Matt Harvey, Michael Longo, Julian Ligertwood and David Babovic, *Constitutional Law* (LexisNexis Butterworths, 2010) 101.

Ratnapala frames two ways in which the doctrine of separation of powers serves the rule of law. Firstly, the separation between the legislature and the executive subjects the executive government to the law and prevents capricious law-making.⁹ Secondly, the independence of the judicial branch from the others prevents legislation, after having been passed, from being manipulated by the executive government to suit itself.¹⁰ In practice, however, the separation of powers is often practised in a less drastic form in which overlaps between the branches are permissible. While the judiciary zealously guards its independence in order to maintain its impartiality and therefore its legitimacy,¹¹ the legislative and executive are intermingled to a great extent.

Although influenced by the American concept of separation of powers,¹² Australia has never implemented a strict separation between the legislative and executive branches.¹³ Aside from the unfeasibility of implementing a strict separation,¹⁴ this is due to the requirement that the two branches be closely linked¹⁵ under the system of responsible government, which dictates that there should be 'individual and collective ministerial accountability'.¹⁶ The intertwining of the executive within the legislative ensures that the government acts with the approval of Parliament,¹⁷ Cheryl Saunders mentioning that it is generally assumed that the Commonwealth legislature controls executive power.¹⁸ This is arguably acceptable as this intertwining is necessitated by responsible government, one of the core principles of the Australian political system. Of more concern is the increasing delegation of legislative power to the executive government since the 1920s.¹⁹ There are several reasons for this delegation. Parliament lacks the capacity to attend to the smaller details of the law in terms of both time and technical expertise,²⁰ exacerbated by the fact that Australian parliamentary sittings are generally of a shorter duration than the parliaments of other countries.²¹ Delegated legislation has regard more to the minutiae rather than the policy of the law, which remains under Parliament's

9 Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2nd ed, 2007) 109.

10 Ibid.

11 Clark, above n 1, 91.

12 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (The Federation Press, 5th ed, 2010) 11.

13 Clark, above n 1, 93.

14 Blackshield and Williams, above n 11, 10.

15 Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis Butterworths, 3rd ed, 2012) 556.

16 Reilly, Appleby, Grenfell and Lacey, above n 3, 139.

17 Ibid 101.

18 Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing Ltd, 2011) 131.

19 Ibid 132.

20 Ratnapala, above n 8, 95.

21 Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (LexisNexis Butterworths, 3rd ed, 2005) 6.

control.²² Moreover, the executive branch is better equipped to react promptly to emergencies or quickly changing circumstances,²³ such as enforcing quarantine measures in case of an epidemic, and is also able to pass amendments within a short frame of time.²⁴

Necessary though it may be, the delegation of legislative power produces several problems. The executive may establish provisions that infringe the rights of individuals.²⁵ The delegation further undermines the concept of separation of powers previously weakened by the fact that the executive already has a significant role in enacting legislation by reason of the embedding of the executive within the legislative branch,²⁶ as specified in s 64 of the Commonwealth Constitution. This results in the executive branch being able to delegate substantial legislative power to itself, which has indeed occurred.²⁷ Too much delegation could result in the concentration of power in a single branch of government,²⁸ leaving open the possibility of misuse or arbitrariness. This in turn leads to a lack of the 'certainty and predictability' that Friedrich Hayek considered indispensable to the rule of law.²⁹ Ratnapala also notes that '[w]hen officials can both legislate and execute their legislation, they have the potential to place themselves above the law – for the law is what they command.'³⁰ Arguably, this does not necessarily flout the rule of law insofar as the delegation remains lawful. Nonetheless, in practice this enables officials to simply create loopholes that they could utilise, or to pass laws enabling them to pursue criminal activities without restraint, for example. Officials are therefore in essence placed above the law. This clearly contravenes the rule of law which states that everyone must be subject to the law of the land. More fundamentally, the consequences of too much delegation may include jeopardising the authority and legitimacy of the law if the elected Parliament allows its legislative power to pass from its hands.³¹ In short, massive delegation of legislative power to the executive blurs the separating lines between the legislative and executive branches, allows for an imbalance between the branches by reposing too much power in the executive, and hence creates the potential for the executive to place itself above the law, undermining the rule of law.

However, steps have been implemented and remedies made available to counteract these problems. The High Court of Australia has placed limits on the

22 Ratnapala, above n 8, 95.

23 Pearce and Argument, above n 20.

24 Reilly, Appleby, Grenfell and Lacey, above n 3, 120.

25 Pearce and Argument, above n 20, 16.

26 Ratnapala, above n 8, 105.

27 Ibid.

28 Meyerson, above n 2.

29 Reilly, Appleby, Grenfell and Lacey, above n 3, 19.

30 Ratnapala, above n 8, 105-106.

31 Meyerson, above n 2.

delegation of legislative power of the Commonwealth Parliament to the federal government. The most fundamental limit is that delegated legislation must come under a constitutional grant of power.³² Further limits were established in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*.³³ In *Dignan*, Dixon J expounded on the first limit, stating that a law made with 'such a width or such an uncertainty of the subject matter to be handed over'³⁴ may be broad enough that it is incapable of being classified, and thus cannot be referred to any legislative power granted to the Commonwealth in the Constitution.³⁵ Evatt J ruled that to restrain the Commonwealth Parliament from delegating legislation would be to contradict the supremacy of Parliament.³⁶ Hence, the Commonwealth Parliament should have the power to delegate legislation. Nonetheless, a blanket delegation of its power would qualify as an abdication, and would be declared invalid.³⁷ This was affirmed in *Giris Pty Ltd v Commissioner of Taxation*³⁸ and *Crowe v The Commonwealth*.³⁹

Upon analysis, the delegations excluded by these limits are unlikely to occur in practice, as demonstrated by neither limit having been judicially applied in the past seventy years or so.⁴⁰ These limits have been termed 'more cosmetic than useful',⁴¹ Ratnapala even going so far as to say that *Dignan* established that there were no significant limits on the delegation of legislative power to the executive government.⁴² The second limitation was further tested in *Wishart v Fraser*⁴³ when essentially all legislation relating to defence was delegated to the Governor-General and upheld as being constitutionally valid.⁴⁴ Unless restricted to wartime conditions, this effectually abrogates the 'abdication' limitation.⁴⁵ The High Court will evidently only decide against the delegation of legislative power in the most extreme circumstances, making their limits rather ineffectual and granting the Commonwealth Parliament near unlimited capacity to delegate its power, resulting in a weakening of the separation of powers.

A second way of controlling delegated legislation is through parliamentary scrutiny. Obiter in *Dignan* stated that political and not judicial remedy would be

32 Reilly, Appleby, Grenfell and Lacey, above n 3, 121.

33 (1931) 46 CLR 73.

34 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 101.

35 Suri Ratnapala, Thomas John, Vanitha Karean and Cornelia Koch, *Australian Constitutional Law: Commentary and Cases* (Oxford University Press, 2007) 46.

36 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 119.

37 Ibid 121.

38 (1969) 119 CLR 365.

39 (1935) 54 CLR 69.

40 Ratnapala, John, Karean and Koch, above n 34, 49.

41 Ratnapala, above n 8, 107.

42 Ibid 106.

43 (1941) 64 CLR 470.

44 Ratnapala, above n 8, 108.

45 Ibid.

relevant to the misuse of delegated power,⁴⁶ indicating the link with responsible government and the executive's accountability to the legislature.⁴⁷ This accountability is achieved mainly through two mechanisms: Question Time and parliamentary committees,⁴⁸ instead of repealing the empowering statute as was suggested in *Dignan*.⁴⁹ Question Time is a daily event which allows Parliament to ask questions of executive ministers concerning their programs and policy decisions.⁵⁰ Ministers are obliged to answer, although complaints as to the avoidance of answering questions have been made.⁵¹ They must also present the relevant documents. In *Egan v Chadwick*,⁵² Egan failed to table requested documents and was disciplined for it; the same procedure may be instituted by the Commonwealth Parliament against a federal minister.⁵³ Concurrently, parliamentary committees examine proposed laws, 'consider issues of policy and scrutinise the conduct of the [e]xecutive'.⁵⁴ For instance, the Senate Standing Committee on Regulations and Ordinances (SSCRO) ensures each delegated instrument adheres to the original statute; respects individuals' rights; and does not encroach upon the territory of parliamentary enactment, to name a few criteria.⁵⁵ It is further capable of recommending that a provision be disallowed, which, although rarely used, has been followed by the Senate. However, the SSCRO does not consider the policy merits, concentrating more on the form and quality of the legislation.⁵⁶ Despite this, committees in general have enforced limits on the executive's discretionary law-making.⁵⁷ The Commonwealth Parliament has also enacted the *Legislative Instruments Act 2003* (Cth) requiring delegated legislation to be reviewed.⁵⁸ Such legislation will not be effective until it has received parliamentary approval, or remains effective until disallowed by the Parliament.⁵⁹ However, the sheer volume of delegated legislation reduces the effectiveness of parliamentary scrutiny,⁶⁰ while committee reports are often given limited attention.⁶¹

On the whole, the committees do implement protective measures against uncontrolled and overly discretionary delegated legislation while Question

46 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 84.

47 Ratnapala, above n 8, 107.

48 Reilly, Appleby, Grenfell and Lacey, above n 3, 136.

49 Saunders, above n 17, 132.

50 Reilly, Appleby, Grenfell and Lacey, above n 3, 103.

51 *Ibid.*

52 *Egan v Chadwick* (1999) 46 NSWLR 563.

53 Reilly, Appleby, Grenfell and Lacey, above n 3, 101.

54 *Ibid.* 104.

55 Pearce and Argument, above n 20, 27.

56 *Ibid.* 28.

57 *Ibid.* 15.

58 Ratnapala, John, Kerean and Koch, above n 34, 51.

59 Pearce and Argument, above n 20, 17.

60 Ratnapala, above n 8, 95.

61 Reilly, Appleby, Grenfell and Lacey, above n 3, 107.

Time allows for some scrutiny. Yet it should be noted that Parliament may be incapable of impartially judging the executive's actions due to the politics of mega-parties,⁶² seriously undermining the effectiveness of parliamentary scrutiny. Ultimately, however, the executive is still subject to legislative control. This element of control upholds the rationale behind the separation of powers, which intended for the legislature to be capable of restraining abuse of power – such as arbitrary law-making – by the executive branch.

The third mechanism for controlling delegated legislation is by judicial review. A distinction must be drawn between the High Court's invalidating legislation based on too substantial a delegation of legislative power and its invalidation of legislation due to bad law. While the High Court has clearly demonstrated a reluctance to strike out legislation because of the former rationale, it is willing to do so on the latter grounds. *McEldowney v Forde*⁶³ established a test for determining the validity of delegated legislation: the court must establish the meaning of the words used in the delegating Act to describe the legislative power delegated; the meaning of the delegated legislation; and lastly determine whether the former corresponds with the latter. This was affirmed in *Esmonds Motors Pty Ltd v Commonwealth*,⁶⁴ in which the delegated legislation was voided. Apart from invalidating legislation, the judiciary may also import limits into the delegated legislative power, the limits being determined from the scope and purposes of the Act,⁶⁵ thus giving it the capacity to restrain arbitrary law-making should it occur. However, the courts are fettered by their ability to only hold the executive to the legal standards which the executive has created.⁶⁶

In conclusion, the delegation of legislative power by the Commonwealth Parliament to the executive government blurs the separation of powers, creating the potential to allow for arbitrariness in law-making which in turn undermines the rule of law. The safeguards put into place (such as parliamentary scrutiny, judicial limitations on the extent of delegation, and judicial review) each have weaknesses, their ability to constrain the abuse of delegated legislative power rather ineffective. However, while the potential for abuse is little abated, actual abuse has not yet taken place⁶⁷ in terms of infringement on human rights or a lack of stability and certainty in the law, for example. Should it do so, the Commonwealth Parliament still retains the power to withdraw legislative power from the executive⁶⁸ while the judiciary is capable of striking out bad law via judicial review. Thus, while the delegation of legislative power does pose a

62 Ratnapala, above n 8, 110.

63 [1969] 2 All ER 1039, 1068.

64 (1970) 120 CLR 463, 366.

65 *New South Wales v The Commonwealth* (2003) 211 CLR 476.

66 Ratnapala, above n 8, 109.

67 Pearce and Argument, above n 20, 14.

68 Ibid 7.

potential threat to the rule of law and the separation of powers, such a threat has not yet been realised and is capable of being nullified if and when it does materialise.

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