

4. JUDICIARY

4.1 Commonwealth

4.1.1 Separation of powers

Judicial power of the Commonwealth can only be conferred on courts established under Ch III. Courts established under Ch III can only exercise judicial power, subject to exceptions (*Boilermaker*)

(A) **Is the institution a court?**

Factors include judicial tenure, reason of being, name and type of adjudication (*The Wheat Case*). It is not a court even when the person holding limited term also holds tenure (*Alexander's Case*).

(B) **Is the function an exercise of judicial power?**

- (1) Distinction between judicial and arbitral power (*Alexander's Case*)
 - (2) Chameleon doctrine: a power takes its character from the nature of the body upon which it has been conferred (*Tasmanian Breweries; Munro*)
 - (3) Historically practice (*Lim; Thomas*)
Power to restrict or interfere with a person's liberty on the basis of what they might do in the future rather than what they have done, is not intrinsically a power that may be exercised only legislatively or administratively. Courts has exercised such powers historically (*Thomas*)
 - (4) Factors
 - (a) Controversy (*Moorehead*)
 - (b) Determine law as it is and facts as it is, and apply law to facts (*Tasmanian Breweries; Morehead*)
 - (c) Deciding a question as to the existence of rights or obligations (*Tasmanian Breweries; Brandy*)
 - (d) The decision is binding and authoritative (*Moorehead; Mombilovic; Brandy*)
 - (e) The power to enforce its determinations (*Munro; Brandy*)
 - (f) Policy consideration: it is desirable that powers affecting liberty be exercised independently and judicially (*Thomas*)
 - (5) Incidental judicial power: if the power is to order or permit an inquiry or investigation for the purposes of supporting existing or potential judicial proceedings and quelling a controversy, then this will fall within the judicial power.
 - (6) Legal values advanced by system of independent impartial courts¹
- (C) If the act did confer judicial power on the court, is the manner in which it required that power to be exercised contrary to Ch III? (*Thomas*)

(D) **Exceptions**

- (1) Military tribunals may exercise judicial power within their command structure, outside of Ch III
- (2) The Houses of Parliament may punish persons for contempt
- (3) Courts may delegate judicial powers to court officers, such as masters and registrars, with limits:
 - (a) The judges must continue to bear the major responsibility of exercising judicial power
 - (b) The exercise of these powers remain under the real supervision and control of the justices of the court
 - (c) Their exercise is subject to review by a judge (preferably de novo)
 - (d) The delegation must be made by the court itself. It cannot be required by parliament.

¹ NB: *Kable* case on defining characteristics of court if necessary

9. THE ROYAL PREROGATIVE AND STATUTORY EXECUTIVE POWERS

9.1 Executive power

9.1.1 What is executive power

Executive power is described, but not defined, in s 61 of the Constitution.

61. Executive power

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

- (A) In negative terms, executive power can be described as power that is neither legislative nor judicial.
- (B) In positive terms, it is the power that is exercisable by the Governor-General, or Ministers, or other representatives of the Executive Government, such as public servants. This power may be derived from a number of sources.

9.1.2 Sources of executive power

Executive power may be derived from:

- (A) **The Constitution**
eg the power to dissolve Parliament, appoint ministers and judges, issue election writs and recommend appropriations.
It extends to the 'execution and maintenance' of the Constitution and the laws of the Commonwealth (s 61)
- (B) **Statute**
The main source. Most powers exercised by the government are conferred upon by statute.
eg the power to make regulations and ministerial powers to grant visas
- (C) **Royal prerogative**
eg the power to declare war, make treaties and grant pardons
- (D) **The capacities of a polity**
The powers that any legal person has.
eg the power to enter into contracts, own property, employ people and spend money
- (E) **Inherent powers (more controversially)**
eg the nationhood power
There is a good argument (made by Twomey) can be and should be redistributed in other existing categories.

9.2 The royal prerogative

9.2.1 What is royal prerogative

The royal prerogative involves rights, powers and immunities inherited by the Crown from medieval times (It precedes common law). The royal prerogative today is what survived from medieval times, not taken over by legislation.

- (A) Some, such as Blackstone, have regarded the prerogative as a closed list of powers which exclusively belong to the Crown. They can only come from history.
- (B) Others, such as Dicey have taken a broader view, regarding the prerogative as the 'residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown' (BW 366).
- (C) E.g. royal commission. It could be argued that it is a capacity because every person has the capacity to make inquiry. But when it is a royal commission, the difference is coercive powers, which makes it more exclusive to the Crown. However the coercive powers does not come from the prerogative, it comes from statute. The statute expressly preserves the prerogatives to establish the inquiry and gives various levels of coercive powers.

Prerogative powers are now considered to be part of the common law and to fall under the grant of power in s 61 of the Constitution. They can be abolished or altered by legislation.

9.2.2 Evatt's Categorisation of prerogative

(A) Executive prerogatives

e.g. international powers, such as the power to enter into treaties, declare war and make peace, command the armed forces and appoint diplomatic representatives.

It includes the power to coin money, incorporate bodies, pardon offenders, confer honours and hold inquiries, such as royal commissions.

(B) Immunities and preferences

e.g. the priority of Crown debts over other creditors, immunity from suit. [mostly abolished by legislation]

(C) Property rights

e.g. the ownership of royal metals (gold and silver), royal fish, royal swans, treasure trove, ownership of the foreshore, the sea bed and subsoil. Includes radical title to land – see *Mabo*.

9.2.3 Distribution of prerogatives in federation

How are the prerogatives distributed between the Commonwealth and the States?

- (A) After federation, the States continued to control their land, so most of the proprietary prerogatives rest with the States (except in Commonwealth territories and 'Commonwealth places' under s 52 of the Constitution).
- (B) The immunities and preferences attach to the Crown regardless of the level of government, so both the Commonwealth and the States have them. [subject to legislation, mostly abolished]
- (C) The Executive prerogatives tend to follow the distribution of legislative power.
 - (1) As the Commonwealth has power regarding external affairs, the international prerogatives belong to the Commonwealth.
 - (2) States predominantly have power over criminal law, so the power to pardon for most offences, because they are under State law, belongs to the States.

9.2.4 The relationship between statute and the prerogative

Statute may abrogate the prerogative (*A-G v De Keyser's Royal Hotel*).

(A) A-G v De Keyser's Royal Hotel Ltd (1920)

Facts: a hotel had been requisitioned during World War I as the headquarters of the Royal Flying Corps. Defence regulations provided that compensation must be paid. The Crown claimed prerogative power to requisition without having to compensate.

Held: The case is authority for the proposition that Parliament may abrogate or regulate the exercise of the prerogative. Once Parliament legislates to control a matter which was previously within the prerogative, the Executive derives its authority from Parliament rather than the prerogative, and is subject to any restrictions imposed by the Parliament.

Lord Dunedin said that 'if the whole ground of something which could be done by the prerogative is covered by the statute it is the statute that rules'. He pointed out that the Crown gives assent to legislation and in doing so subjects itself to the curtailment of its prerogative by legislation.

Lord Akinson noted that it would be absurd to construct the statute that limits executive power as permitting the executive to avoid those restrictions by relying on its prerogative.

Lord Parmoor said: 'The constitutional principle is, that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown, but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject.'