CHAPTER 9

OVERSEAS PERSPECTIVES AND DEVELOPMENTS: USA

Problems concerning administrative accountability have come to the fore in the United States. There, White remarked, an expectation exists that government activity will be guided significantly by the public or its elected representatives. Yet neither the constitutional framework nor its seventeenth and eighteenth century theoretical underpinnings, having predated the emergence of modern, large-scale bureaucracies, offer much assistance regarding the latter's reconciliation with that expectation.(1) White did not view accountability, responsiveness and responsibility as synonymous. He favoured a definition of bureaucratic accountability which placed four requirements on 'elected chief executives' and public servants. Three of those requirements are identical with Thomas's essential steps for Canada outlined in the previous chapter, that is, efficient operation of laws, lawful and sound use of administrative discretions, and the reinforcement of public confidence in administrative institutions. The fourth requirement favoured by White is to suggest new policies and propose alterations in current policies and programs as needed.(2) Put this way, it is too bald to fit comfortably within traditional understandings of Westminster-related public administration, with their emphasis on a barely stated or "behind-the-scenes" policy-making role for public servants. But then, in the USA, as noted at the beginning of Chapter 1, public administrators have always been answerable to the courts. They have also been answerable to the Congress. This is due to the particular separation of powers in the US Constitution.

Put simply, the separation of powers 'permits, indeed encourages, the legislature to probe the actions of the executive branch'.[3] A fuller understanding of the implications of this for America's constitutional arrangements and political culture was provided by Galligan, in recalling that the US Constitution, in marked contrast to those of Westminster-related systems, 'deliberately fragmented power and broke up the ruling majority will by dispersing it into diverse and conflicting channels'. This meant that

> [a]t the highest political level, ambition was to be pitted against ambition and institution against institution. The tyranny of rulers was to be controlled, not by restricting passions and inculcating virtue, but by designing a system of competing and offsetting power clusters: the president against the Congress; the Court over the Congress; the Senate vying with the House of Representatives; the power of the federal government offset by the combined strength of the states. The will of the people would be sovereign but their rule would be filtered and refined through a system of institutional checks and balances.[4]

Hence, as opposed to Westminster-related political cultures, American political culture is overtly populist, pluralist and 'conflict-oriented', admitting the 'possibility of different interests and of conflict between individuals and the state'.[5] The press, for example, is an 'adversary of government',[6] its position bolstered by the First Amendment to the Constitution. This explicitly safeguards the freedom of the press and implicitly places the 'onus on the government to persuade the courts that the publication of certain information is prejudicial to the national interest'.[7]

In American terminology, the executive government is referred to as 'the Administration'.[8] 'Administrative pluralism' accounts for

the requirement that administrators should overtly recommend new or alternative policies, since it mirrors political pluralism. In Thompson's opinion, one effect of pluralism in the US is to allow the political process to handle a much greater degree of 'open conflict at policy levels',[9] bearing in mind that political parties there do not reflect clearly delineated ideologies, nor are they centralised and programmatic to the extent that they are in Australia.[10]

Another effect of the American separation of powers is that the judicial or legal process is perceived as 'one of the [competing] policy processes',[11] and the Supreme Court as one of the departments, one of the political institutions, of American government. Indeed, according to Dworkin, when the Court concluded in 1954 that no state could segregate public schools by race, it took the US 'into a social revolution more profound than any other political institution has, or could have, begun'.[12] To Dworkin, law is society's 'most structured and revealing social institution'.[13] Judges interpret the 'community's political order';[14] American jurisprudence has long stressed that 'political conviction ... [is] important ... in adjudication and that the shape of the law at any time reflects ideology and power as well as what is wrongly called "logic"'.[15]

In the US, therefore, in keeping with these sentiments, legal control of public administration has come to be a vital element in the 'constitutional, democratic State'.[16] The courts can be relied upon as a source of authority to question government operations. Under the principle of "due process" required by the Constitution, the courts can be called upon to verify, not only that the government

has the legal authority to take certain decisions, but also that it has adhered to legal procedures in arriving at them.[17] The Constitution contains a "due process" clause, and the Fifth and Fourteenth Amendments demand "due process of law" before federal and state governments can remove from the citizen "life, liberty or property". The principal components of due process have been said to be:

> The right to notice, including an adequate formulation of the subjects and issues involved in the case;
>
> The right to present evidence (both testimonial and documentary) and argument;
>
> The right to refute adverse evidence, through cross-examination and other appropriate means;
>
> The right to appear with legal counsel;
>
> The right to have the decision based only upon evidence introduced into the record of the hearing;
>
> The right to have a written record which consists of a transcript of the testimony and arguments, together with the documentary evidence and all other papers filed in the proceedings.[18]

The US judiciary, then, interpret the Constitution and lay down procedures to ensure "fair" decisions by administrators. Again in marked contrast to Westminster-related political cultures, the judiciary can also 'deny to the executive the sole right of definition' of the public interest.[19]

Law, however, is not simply the means by which Americans obtain redress; the enactment of new laws has always been viewed as the principal means of 'enforcing the "will of the people"'.[20] The people have a 'widely shared suspicion of government itself',[21] and 'a strong public consciousness' of the separation of powers.[22] They

probably cherish many of their liberties 'the more' because they are enshrined in the Bill of Rights '- public opinion is effectively mobilised in their defence'.[23]

Some American commentators, however, have noted problems with the growing scope of judicial review or moves towards, in Galligan's words, 'broad-brush judicial policy making'.[24] Horowitz believed that the US has reached the stage of 'active judicial oversight of bureaucratic performance', where some courts have spoken about "supervision" of, or "partnership" with administrative agencies.[25] Rabkin, too, felt that the American judiciary had changed from a 'guardian of private rights and representative government to a managing partner in the modern administrative state'.[26]

Rabkin traced this development from the fifties against the background of the expanding administrative state, as federal courts, spurred on by Brown v. Board of Education, became more activist in their oversight of administrative activity.[27] In the seventies, administrative law came to the fore. It was left to the courts rather than Congress to determine what fair treatment or due process increasingly regulated entities were entitled to receive; administrative decisions were to be based on 'procedural safeguards' and 'reasoned consistency'.[28] Horowitz considered that judicial review had moved beyond matters of procedure to concern itself with both procedure and substance or merits, and to a greater insistence on judicial scrutiny of documents related to administrative decision-making. This enlarged scope of judicial review was contributed to by developments in the operation of the Administrative Procedure Act (APA) 1946.[29] This Act

built upon Constitutional due process in enabling review of rules made by regulatory agencies. The rationale was that, provided a rule drawn up by an agency can be justified as being in the public interest, 'then it is considered that the making of the said rule is within its authority'. The emphasis is on procedure, in that the APA demands that all "adjudications" - agency hearings resulting in formal rulings - be based upon a written record which is available to the litigants.(30)

In reaching this prominent as opposed to interstitial place in the definition of the public interest in the US, federal courts have been aided also by the 'avowedly different assumptions' of the legal process as that element of the policy processes 'formally most programmed for "rational" decision-making'. As Horowitz pointed out, the legal process seeks the "right result" in a decision resting on evidence, opinions couched in terms of reasons, in an atmosphere isolated from 'extraneous influences' such as those produced by the 'clash of opposing interests and the process of "give-and-take" that are supposed to constitute integral parts of the other governmental processes'. Due to these different assumptions, American courts have traditionally been attractive as alternative arenas in which the pursuit of interests can proceed on appeal following failure in other arenas.(31) Indeed, as Galligan wrote in respect of the Supreme Court, major political and social reforms other than desegregation flowing from the Brown case, such as correction of malapportionment in electoral districts and a woman's private right to an abortion, were brought about by 'judicial fiat'. All these reforms were not achievable at the time in the 'more cumbersome process of democratic politics that has to build a majority coalition, surmounting mass inertia and entrenched

pockets of elite resistance'.[32]

Now, however, courts in the US are finding themselves more involved in cases which raise policy issues that strain their ability to 'ascertain the relevant facts, gauge the consequences of a decision one way or another, and reason to a conclusion', as they can in traditional 'rational' cases.[33] At the same time, obstacles to pursuing policy problems in the courts have been overcome by, for example, changes in requirements of standing and jurisdiction, and a decrease in defences available to government agencies once litigation has commenced. Non-profit organisations and groups of individuals are increasingly important and are more likely to challenge policies as a whole and the assumptions on which they are based.[34]

Horowitz claimed that, while there had been general acceptance in the US of this state of affairs,[35] there are difficulties in the resultant blurring of the distinction between administrative and judicial processes.[36] These emanate from a number of factors, including the background of judges, that is, their rationalist inclinations and suspicion of specialised expertise, flexibility and the political process itself.[37] Allied with judicial background, Horowitz detailed three main restrictions on reasonable expectations of legal solutions to administrative disputes, echoing comments in the last two chapters.

Firstly, courts do not 'self-start'.[38] Consequently, judges are not likely to sustain an informed focus on any policy area; spasmodic reviews result in intermittent decisions bearing upon those agencies which happen to have been taken to court, and those decisions 'cannot aspire to anything approaching the status of a coherent policy'. Also,

courts cannot plan; their own process is 'fundamentally passive and piecemeal'. They do not handle 'anything resembling a random sample' of agencies' work.(39)

Secondly - since courts decide specific cases in a specific way - to settle disputes, 'the facts of the single case are highlighted, the facts of all cases slighted'. This inherent stress of the legal process on 'the particular and against the recurrent', coupled with strict standards of relevance which militate against broad considerations of policy context and administrative behaviour, impels courts towards a narrow concentration on the case before them.(40) Furthermore, the sources of legal reasoning reside in general principles which stem from yet more specific cases often far removed from the administrative decision under challenge. There is no direct or symmetrical relationship between those principles and the functional divisions underlying agency organisation and policy formulation.(41) Moreover, some questions lend themselves to modes of decision-taking other than the legal process's sole resort to reason, 'particularly to negotiation and compromise'. Horowitz warned here that sometimes this is 'the only way to satisfy conflicting interests and keep them from turning against the political system'. At times, reason is unable to provide suitable answers due to inadequacies in knowledge or resources needed to seek rapid answers at a reasonable cost.(42)

Thirdly, Horowitz contended that the 'ultimate hazard' in relying on the courts to protect the public interest is that their decisions could well be 'ineffective or effective in ways not intended'. A series of cases rejecting the legality of agency policy results in a series of concessions to individual litigants but no alteration to

policy.[43] Litigants able to challenge may force a change in policy applicable only to their circumstances, but, with cases being settled one at a time, and agencies displaying differing degrees of responsiveness to judicial decision, the courts find it difficult to force policy change acting alone.[44] This difficulty is compounded by unanticipated consequences of policies which the courts are not in a position to monitor. On the contrary, the characteristics of the legal process encourage insulation of the decision-maker from the environment in which his or her decisions must operate.[45]

Taking all these factors into consideration, Horowitz argued that courts in the US have a limited 'constructive impact' on administrative performance. Their 'exposing function', however, has largely been overlooked, and Horowitz thought its 'moral evaluation' as perhaps the most important judicial function. He argued further that the courts cannot reconstruct themselves because the 'customary modes of judicial reasoning are not adequate for this'. The complexities of policy design and change should be left to administrators; courts should continue to restrict 'the discretion of others', rather than becoming involved in 'choosing among multiple, competing alternatives'.[46] But, while their old equipment might limit the courts' effectiveness as partners in the process of determining the public interest, Horowitz saw 'something to be celebrated' in the legal process's 'outstanding' feature: 'the way in which it generalizes from the particular instance'. For courts are totally committed to resolving individual cases. In terms of policy-making, this is a weakness. Any 'retooling' of the legal process beyond the level of 'marginal improvements' to take account of this weakness would most probably

have a deleterious effect on traditional concerns with the individual case. Moreover, there is a danger that courts, in attempting to improve other institutions, will grow more like them. To Horowitz, the distinctiveness of the legal process, which renders it unsuited to much of the key work of government, resides in its 'willingness to expend social resources on individual complaints one at a time'. He wanted that distinctiveness preserved.(47)

Galligan would say that, at the level of the US Supreme Court, 'judicially-imposed reform bypass[es] elected governments', and 'binds them by entrenching the reform in the constitution'.(48) Horowitz showed that this is an accepted aspect of the American political tradition. In line with his conclusions about the inadequacies of the legal process to control policy areas, other commentators voiced doubts about the new judicialisation or 'proceduralization' of public policy in the US.(49)

Kirp and Jensen recalled that the procedural fairness of due process aims to distinguish 'the deserving from the charlatan', supposedly functioning 'as a legal analog to the scientific method', hence ensuring the public accountability of officials for their actions, and keeping government in check.(50) Examining public education, Kirp and Jensen found that the reformers' dream of "appropriate" education 'has proved well beyond the reach of due process', as schools adapted to the new rules of the game without much changing the ways in which they function.(51)

This came about in the area of special education despite reliance on legally-rooted uniformity in decision-making,(52) and the

establishment of internal and external appeals procedures to handle parents' grievances.[53] For adherence to the 'norms of the school' rather than individualised program design remained paramount, and "appropriate" education was equated with what is administratively achievable, that is, cost and program availability.[54] Due process hearings became 'highly individualized disputes'.[55] Federal officials came to view due process and non-formalism as mutually exclusive.[56] 'Law-like review' did not provide policy guidance; it was unable to settle differences within and among interested professionals and did not succeed in securing policy consistency.[57]

To Kirp and Jensen, and reminiscent of Horowitz's findings, the real problem is that procedural safeguards in educational administration are being looked to for answers to questions 'to which, in truth, there are no answers - or at least no answers that an adversarial hearing is likely to turn up'. While policy decrees emphasise rights, hearings and appeals are dependent on cost and administrative considerations, balancing rights and resources in a manner not usually apparent in judicial opinions. This may be sound policy, but it is not what reformers anticipated.[58]

Again echoing Horowitz, Kirp and Jensen warned that if reliance on courts became commonplace for leading policy questions, the administrative due process system would frequently be superseded, with only the most 'mundane' subjects left for decision at the level of hearings.[59] They differed slightly from Horowitz, however, in writing that, where courts can order remedies for 'entire classes, not just for individuals', there are 'powerful implications' for the viability

of a policy regime.[60] Thus, the 'cumulative effect' of judicial activity can be 'profound'. Judicial opinions can influence the nature and scope of a policy decree, giving a new direction to a system such as special education.[61] Nonetheless, while the expectation was that due process hearings would radically alter public education, in reality it is middle-class parents who have availed themselves of the opportunities they offer to influence policy.[62] At the same time, an obsession with process carries with it the danger of the 'trivialization of substantive rights'.[63]

As in Australia, Britain and Canada, the niceties of the US constitutional matrix brought to light thus far flow around the approach to FOI. Hence, side by side with their review of the legal authority and procedures of government decisions, American courts had, for many years before the adoption of FOI legislation, a role in ensuring that those decisions were based on the record and that the record is available to an individual in dispute with the government, since a decision taken in secret or using secret information is 'contrary to the principle of "due process" required under the Constitution'.[64] In contrast to Westminster-related political systems, there is in the US a divided responsibility for supervision of the federal public service.[65] In keeping with the fragmented and competing power clusters established by the US Constitution, the enactments which control the conduct of public servants are made by those who have no direct responsibility for administering those laws, and those who are responsible for administration have 'limited positive control' over the legislature. Consequently, the executive and the legislature can blame each other for government shortcomings which may come to be known.[66]

There is then a presumption against claims to secrecy in the American media and courts, and 'an instinct for publicity which percolates even through' the public service.[67] These dispositions stem from widely-held convictions that 'in America the governed have rights, not the government';[68] that 'government information is public information' [emphasis supplied][69] possessing 'social value',[70] in turn grounded in the US democratic tradition: 'the sovereignty of the people, the accountability of government, the old republican distrust of official secrecy and bureaucratic caprice'.[71] Yet the constitutional disperson of power, with its unclear lines of responsibility, in effect fragments rights in the FOI context. Robertson drew attention to the problem of ascertaining the relationships between the 'public's right to know, the congressional right to know, the presidency's right to independence as a separate power', the control by the presidency of the public service, and the requirement that 'certain activities by their very nature' must be secret, when there exists a congressional right of 'oversight' and Congress and President are responsible to overlapping 'publics'.[72]

The lack of a clearly-discernible, ultimate, political responsibility means that, again unlike Westminster-related systems, no branch of the US government has a strong incentive to shield the public service from continuous public scrutiny, since its mistakes are not 'immediately or directly' attributable to any elected representative. Where, however, responsibility can be more clearly traced, for example to the President in the area of foreign policy, then, according to Robertson, a much greater effort to maintain secrecy can be expected. This is not because national security of itself necessitates a

high degree of secrecy. It requires some, but the actual degree cannot be explained on 'rational' grounds alone; it is, 'as always, a matter of power and interest'.[73] The Reagan Administration has limited the effectiveness of the FOI Act on national security grounds, although, as Abrams noted - bearing in mind the drive by those in power to stay there - 'presidents rarely have sought to expand the Act, only to constrict it'.[74]

The US FOI Act came into force in 1966, but it was not until 1974 that it was amended to enable the judiciary to rule on the question of whether the documents which government claimed were classified (or otherwise not subject to release under the Act) had been lawfully classified.[75] Originally the Act contained nine exemptions: national defence and foreign policy; internal personnel rules and practices; information defined as secret by other enactments; trade secrets and commercial and financial information; inter-agency or intra-agency memoranda and letters; personnel privacy; investigatory files; reports by any agency responsible for the supervision of financial institutions, and geological information relating to wells. The main amendments in 1974 related to indexing; the imposition of time limits; uniform fees; disciplinary action; in camera inspections; awarding of fees; revision of exemptions 1 and 7; breakdown of records; and a requirement that an annual report be submitted to congress.[76]

Abrams acknowledged that there were 'sound reasons' for limiting the scope of the Act to protect certain information concerning activities of the FBI and CIA, and 'genuine trade secrets' in the business community.[77] A number of commentators have written on, and expressed

misgivings about, changes to the right to know and information policy wrought by the Reagan Administration.(78) As in Australia, 'fiscal austerity' figured in debate. During recent years the cost of administering the FOI Act has been about $US50 million annually. There was some disquiet, 'justifiably', in Relyea's opinion, that FOI might be sacrificed on the altar of 'efficiency, economy, and budget balance'.(79)

As in Britain, controversy has surrounded the issue of national security and FOI. Relyea found that, beyond its concern with the security of the nation,(80) 'national security' is a nebulous concept, 'often appearing but otherwise undefined in Federal statutes, given considerable deference and latitude by the judiciary, and affording the executive enormous power and broad discretion regarding its application'.(81) Indeed, in cases where members of the public have challenged under the FOI Act the classified status of sought documents, federal judges have been loath to scrutinise contested records and the courts have 'ultimately upheld Executive Branch claims of official secrecy'.(82) Katz asserted that the American judiciary has come to play a major role in national security controls on information. While the FOI Act increased litigation in the pursuit of appeal rights, the courts have also enlarged the power of the executive to manage the flow of information.(83)

Katz agreed with other observers that 'the warning signs of a national security state' are apparent in the US,(84) for the stage has been reached where

> [n]ational security controls on information and communications ... exist within a variegated framework

> of Executive Branch measures, statutes, and court decisions. These controls have a wide-ranging application to activities inside and outside of the Federal government. Access to information by citizens and by elected officials is carefully proscribed; Federal employees are subject to strict employment contracts requiring compliance with government censors and submission to polygraph testing; and university-based scientists are subject to prepublication review of papers, speeches, and publications. In addition, espionage law is being increasingly invoked to prosecute lapsed government employees who violate their secrecy obligations, and threats of prosecuting newspapers and magazines under espionage laws have occurred.(85)

By mid-1987, one Congressman described the present state of information policy as 'a morass and a partial vacuum', and had counted up to 267 enactments which somehow relate to information.(86)

A variety of means has been employed to reach this state of affairs. Katz showed that since 1940 each President has used the device of the executive order to lay down a centralised classification policy.(87) These orders are the prerogative of the President, and are probably now predominant among national security controls on information flow.(88) There is no US law which grants authority to the executive to classify information. Presidents have based their authority to establish a classification system on the fact that the Constitution confers executive authority in their office and makes the President Commander of the Armed Forces.(89)

The current executive order, no. 12356, was issued by President Reagan in 1982 and is more restrictive than those of his predecessors.(90) It narrowed the stress on public disclosure and declassification, and increased the opportunity for not only classification, but also over-classification, by directing that, in the event of uncertainty, a

higher rather than lower level should be set. It also allowed for reclassification of information previously declassified and released, and for classification after a request for records is received.(91) The tightening of the secrecy obligations of past and present government employees involved devices including an "administrative form", Executive Order 12356 and two National Security Decision Directives.(92)

With regard to the FOI Act, the 1974 amendments permitted the in camera review and disclosure of separable portions of even classified records. The courts were instructed to determine de novo whether or not classification accorded with procedures and criteria of the relevant executive order.(93) There are two exemptions in the Act related to national security. Exemption 1 protects information about national defence or foreign relations provided that it properly meets the classification requirements of the prevailing executive order. Exemption 3 allows for withholding information explicitly protected by other statutes. Hence the 'changing winds of the presidency' buffet the FOI Act. Congress, although aware of the impact of security classification executive orders on the Act, 'specifically declined' in 1974 to legislate classification policy and has not sought to do so in subsequent proposals.(94)

Katz mentioned that some members of Congress, legal scholars and others in the US believe that Executive Order 12356 raises questions about the separation of powers. They are concerned that, 'if the Executive can take the initiative in the absence of some clear congressional statement to the contrary, it can treat legislative inertia as empowering rather than power-limiting'.(95) On the other hand, the lack of a statutory basis for the classification system typifies the

American attitude towards official secrecy: 'only specifically named types of information should be given the protection of the criminal law', so that the President is not provided with the freedom of action to protect whole classes of information.(96)

Robertson pointed out that under the FOI Act the Presidency is not an 'agency of Congress' and is not, therefore, subject to its provisions. Recalling that much of the rhetoric to justify the Act focused on the public right to know, Robertson claimed that 'it can hardly succeed in that objective, given that the Presidency, a powerful source of influence in government, is altogether excluded'.(97) He also referred to two other features of the US FOI Act which are often overlooked by reformers in other countries who seek to emulate it within their particular constitutional matrices. For example, the press is not a major user of the Act, although it benefits from its existence, in that an agency's refusal to disclose information can be challenged in court with resultant unfavourable publicity. Also, the Act has not altered the 'nature of the political decision-making process'. It has assisted individuals to detect the records of administration, and interest groups to find out more about government and about each other. This latter effect accords with American expectations of pluralist democracy, since it broadens consultation and participation, although primarily at the level of implementation.(98)

The FOI Act excludes internal records, access to which would facilitate participation at the formative stage of decision-making.(99) Nor does it produce information about the political considerations of cabinet or President, what advice was offered by immediate aides or

senior public servants, 'what meetings the senior political figures have had or what was discussed at them'. The major type of information released is the 'record of administrative acts and the factual and legal basis of them'.(100) The same can be said about the Commonwealth's FOI Act.

It must be remembered, too, that the US FOI Act is one of a number of enactments relating to access to government-held information. These include the APA with its emphasis on the legality of rule-making by regulatory agencies, and the Federal Advisory Committee Act of 1972 which set out procedures for the conduct of all federal advisory committees, brought them under the FOI Act and required public attendance at all meetings and access to all papers, unless the subject matter is related to any FOI Act exemptions.(101)

The Privacy Act 1974 is concerned with government-held information about private citizens and provides individuals with access to personal information in federal files and the right to correct or amend such information. It is not concerned with safeguarding a civil right to privacy against other citizens; it built upon the Fourth Amendment which protects citizens from 'improper conduct' by law enforcement officers and ensures their 'freedom from unreasonable searches and seizures of their person, houses and papers'. There is a conflict between openness in the FOI Act and privacy in the sense that others should not gain access to documents containing personal information about oneself. Courts have tended towards a strict interpretation of "unwarranted invasion" of privacy before allowing that a certain file is exempt from release.(102)

The "Government in the Sunshine Act" 1975 complements the FOI Act. It requires independent federal agencies - that is, those whose members are appointed with the advice and consent of the Senate and are not subject to 'summary presidential dismissal' - to meet in public unless a majority vote decides otherwise, and to maintain publicly available records. The grounds for not meeting in public follow 'very closely' the FOI Act exemptions, that is, national security, personnel rules and practices, law enforcement and commercial matters. Court supervision of these provisions is allowed, together with penalties aimed at preventing agencies from being partisan in their decisions and from becoming clients of special interests rather than their supervisors.(103) This Act does not apply to executive departments.(104)

It can be seen that, it line with White's comments at the beginning of this chapter, all these moves to open up the public service add up to the American polity's attempt to render present-day public administration more accountable in the absence of firm constitutional and theoretical guidance on how to reconcile the sovereign will of the people with the modern administrative state. As Robertson revealed, a fear of bureaucratic power permeates the mechanisms of accountability or openness.(105) At the same time, the moves fit unequivocally within the constitutional matrix, most notably its separation of powers and resultant deliberate conflict between the components of the polity, coupled with the inherent legalism of the Constitution and its emphasis on due process or legal procedure, on written rules and documents. The right of Americans to judicial review, as Robertson noted, can only be pursued 'if there is some way of discovering

how the decision was arrived at, and this requires a written record'. In this respect, 'legalism ... forced openness ...',[106] which is, in turn, 'a replacement of clear lines of political responsibility by legal means of control',[107] contributing to a seemingly-inevitable judicialisation of American public administration.

It should also be remembered that, for all its supposed openness, the US Constitution 'provides the means for officials to shield misdemeanours from legislative inspection', since there is a 'limited right to "executive privilege", which can permit members of the Administration to withhold information about private conversations and deliberations'. American public administration has its 'Irangates'; the Fifth Amendment permits officials, 'in courts and before congressional committees, not to answer questions which are potentially incriminating'.[108]

This survey shows that, even in the US, the model looked to most enthusiastically by those who have sought to, and would further reform Commonwealth administrative law, problems abound in the relationship between law and politics. It shows, too, that Canadian activists have been on the whole more aware of the differences between their Westminster-related system of government and its constitutional matrix and the American system and matrix than were Australian reformers - not unexpectedly, given North American geographic and other propinquities. This awareness was displayed in thoughtful Canadian work on the Westminster inheritance, FOI and judicial review by commentators with both "legal" and "non-legal" backgrounds. It is best exemplified, perhaps, in the more honest title of their "FOI" law as the Access to

Information Act - a subtle but important change from the Freedom of Information Act favoured in Australia, with its evocation of a full-blooded, American-style FOI concept bound to disappoint in the Australian context, and facing difficulties, moreover, in its homeland.

Canadian appreciation of the US constitutional matrix was displayed also in reasoning by the Canadian Supreme Court when adjudicating the Charter of Rights and Freedoms, where US influence was found to be more scholarly rather than substantive. The US Supreme Court is itself undergoing change, as the Reagan Administration is presented with its third opportunity to alter the 'political balance' of the bench, in the process perhaps affecting Americans and their Constitution for many years, since Supreme Court judges 'cannot be fired' and do not face compulsory retirement,(109) unlike their counterparts in Australia's High Court.

Reagan's latest appointment, Justice Scalia, and his first nomination for the current vacancy, Judge Bork, occasioned illuminating comment on judicial restraint and judge-made law in the role of the Supreme Court. Scalia has been labelled an advocate of judicial restraint: of executive rather than legislative powers, of a more 'subordinate role' for the Court, of a legalistic approach to the interpretation of statutes, that is, 'according to their words and original meaning', of not deciding broad policy issues which are viewed as the province of the legislature. Advocates of judicial activism, by contrast, believe that interpretation 'necessarily involves some value judgment, which has to be made by judges in administering justice'.(110)

Scalia has defined judicial restraint as '"consulting the

traditions of society and the text of the Constitution" in the decision-making process'. The results can be conservative or liberal, whereas activist judges 'tend to produce one kind of result or the other'. Both the conservative Supreme Court of the 1920s and the liberal Court of the fifties and sixties were activist courts. A belief in judicial restraint means that ideological labels are unimportant because decision is 'extraneous to ... personal philosophy'. Scalia was critical of the public's focus on results rather than the judicial process [emphasis supplied].(111) He seemed to be 'equivocal' on the value of a Bill of Rights, saying that such a Bill 'is neither a sufficient nor necessary condition for a free society'. He pointed out that the Soviet Union's Bill of Rights 'is much better' than that of the US, going into greater detail on a number of rights, but maintained that, without an institutional structure, preserved by a constitution, a Bill of Rights is worthless.(112)

A defender of Bork wrote about the latter's dislike of judge-made law and how this can conflict with his 'conservative belief that precedent - even excessive past use of the Constitution's commerce power - should not be lightly overturned'.(113) In the face of White House claims that Bork was committed to judicial restraint, his detractors labelled him an extreme, radically conservative activist, who has, as a member of the Court of Appeals, upheld denials of access to government information, and would 'seek a narrow court role in protecting civil liberties, shielding 'few rights ... from the majority's judgments'.(114)

According to Scalia, minority rights 'against the excesses of the

government of the day' are safeguarded by the independence of the Supreme Court, which is in turn guaranteed by the separation of powers in the US Constitution. While he conceded that, 'at one level', this protection of minority rights is an 'anti-democratic use of power', Scalia said that the objective of the Constitutional safeguards 'is to prevent what the people's representatives at that time want to do'. That is, bearing in mind his perception of the Constitution as representing the 'profoundly held views of the society over time', the Supreme Court is being more 'broadly democratic than a particular legislature which for the moment forgets or disregards some of the deeply held beliefs held [sic] in society'.(115) In the same vein, Court correction of an inventive or creative ruling on the Constitution is '"restoring the intention of the people"'.(116)

The main point to emerge from this survey is the dissimilarity of the Australian and American constitutional matrices, and the way in which important differences appear to have been overlooked in the design of the Commonwealth's administrative law package. For it seems that the package was expected by its proponents to function here according to somewhat inadequate knowledge of how apparently similar enactments operate in the US. The separation of powers is a salient difference; furthermore, the deliberate fragmentation of competing power clusters established by the US Constitution is not without its modern-day critics. Waldo, for example, has claimed that the basic 'tripartite scheme' suffers from the shortcoming of carrying with it 'the idea of division, of dissimilarity, of antagonism'.(117) Moreover, debate about 'how far judges may properly go in interpreting

the original text and intent of the Constitution' stems back, in Gerry's opinion, to Marshall's landmark decision in 1803 (mentioned in Chapter 8) which laid the foundations of judicial review in the US.(118)

Perhaps the major differences have come to light through examining the administrative environment of the FOI Acts in both systems. In rhetorical terms, the variations are epitomised by a statement made in the Australian Senate by an American-born Senator, when debating FOI amendments, that governmental information is 'the people's information; it is not the Minister's'.(119) Since, in the Australian experience, "the will of the people" becomes "the will of parliament", it would be difficult for someone nurtured by its tradition to make such a statement.

In reality, of course, it must not be forgotten that all executives wish to maintain power, and control of the flow of information is a key factor in this. Hence the use of administrative devices such as executive orders by American presidents. In this regard, it should also be remembered that one of the most oft-quoted sayings in debate about FOI in Australia and the US - Madison's call for the people at the core of a 'popular government' to 'arm themselves' with 'popular information'(120) - was coined by the same man who was convinced of the necessity for secrecy at the Constitutional Convention of 1787. Fifty-three years elapsed before those debates became public.(121)

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CHAPTER 10

CONCLUSIONS

This thesis argues that, in the second half of the 1980s, the Commonwealth's package of "new" administrative law reforms - intended to elevate the relationship between the individual and the modern administrative state to new constitutional heights - is functioning in accordance with its constitutional matrix, most notably in respect of the retention of executive power, to the disappointment of some of its "consumers" and well-wishers. This state of affairs is due to the fact that, as Hughes warned in the early 80s, the wider implications of constitutional change occasioned by the new laws were not considered.[1] In short, the resilience and potency of the "Westminster connection", which infuses the spirit of the Australian Constitution, set the scene for the operation of those laws. Thus, in an era of increasingly complex government with burgeoning and influential 'departments, boards, commissions and tribunals',[2] a sizeable public service and 'disciplined party politics',[3] the Commonwealth has sought to improve the quality of its administration by reinforcing ministerial responsibility over the whole policy cycle or process and operating an administrative law package which is geared in reality to 'the retrospective resolution of individual grievances ...'.[4] The latter is based on the 'ideal' of procedural fairness,[5] both within the public service and, particularly, where the 'immediate impact of administrative decisions on the individual citizen' is felt, at the lower levels of government.[6] The newly codified means in the AD(JR) Act of reaching that ideal rest in turn on ancient procedural rights attached to the redress of grievances. In the case of the FOI Act,

large client-oriented agencies dealing with, for example, veterans' affairs, taxation and social security have been able, as Hazell found, to draw closer to their clients,[7] while numerous statutory discretions flowing from enactments in certain policy areas have been regularised through the AAT.

On the other hand, because wider constitutional concerns bound up with the 'profoundly held views of the society over time'[8] were neglected, the FOI concept was acculturated by and assimilated into the Commonwealth matrix, rather than bringing about radical change in the practice of governmental policy-making, as distinct from regularising lower order decision-making which affects individuals. This means that the FOI Act is perhaps most useful in pursuing appeals by 'those subject to administrative acts to ensure that the decisions are impartial and follow the requirements of ... natural justice'.[9] For this thesis also argues, following on from a number of commentators,[10] that concepts and theories - plucked from little-understood constitutional matrices at that - should not be imported without a thoroughgoing attempt to think through the possible consequences such as required congruent changes in the recipient matrix. Needless to say, that constitutional matrix itself should be thoroughly understood.

Acculturation means that the FOI Act is used in party-political terms in the context of Government versus Opposition, as the latter tries to embarrass the former, hoping to gain mileage on the road to the Treasury benches. At the same time, in the interests of a unitary conception of power and conflict-avoidance, the Opposition supports the Government in its attempts to stiffen ministerial responsibility and control over public service behaviour. There is also

a hint of connivance by the Opposition at Government measures to rein in FOI costs. The FOI Act, then, has proved to be of largely symbolic value. Goldberg has said that this could be important,[11] but assessment here must depend on further evidence regarding usage. Symbols can affect attitudes, however, and the question needs to be asked whether an elaborate FOI structure had to be erected in order to allow individuals access to personal records, for the most part held by large client-based agencies. The answer is "probably yes", and due to the inherent confidentiality of the "Westminster connection". In Britain, a directive issued in 1977 to facilitate public access to departmental information did not produce very positive results.[12]

The Ombudsman has also suffered the effects of assimilation. Kirby remarked that, in establishing this office, English-speaking polities had shifted from English-style tribunals based on the adversarial judicial model towards 'a distinctly European institution, operating by inquisitorial procedures', likely to be more effective and cheaper.[13] The stage has been reached, however, where some of the Commonwealth Ombudsman's recommendations for compensation have been refused by the Minister for Finance, re-asserting his firm belief - in true "Westminster" fashion - that 'the power over such ... payments should remain with the elected representatives of government'.[14]

It should be remembered, moreover, that administrative law is concerned with what Drewry termed, in relation to judicial review, 'only the pathology of government';[15] or, as Blom-Cooper wrote, the workload of administrative law cases does not fully reflect the 'health' of public administration.[16] While the Commonwealth's

package focuses on the retrospective redress of grievances, "quality" here has been gained, in Cane's opinion, 'at the expense of improving administrative processes so as to prevent grievances arising in the first place', although he acknowledged that it is 'unrealistic to think that a system of administration could ever be so well run as to generate no reasonable complaints'.[17] Under these circumstances alone, it is unreasonable to expect administrative law to do more than concentrate on procedural fairness.

All this is not to suggest that change should not be attempted. Modern government is carried on in complex and fast-moving times. Blom-Cooper listed four 'novel' and 'highly interdependent' features of present-day society: one, the 'technological revolution'; two, 'economic development on a scale that is not just incremental, but involves diversification of economic functions'; three, 'the political environment' (here he included, admittedly for Britain, but with echoes in Australia, 'constitutional change with a Bill of Rights a distinct possibility'); and four, 'cultural changes (racial discrimination and sexual inequality)'.[18] Since "government" must try to cope with aspects of all these features, facing problems which 'tax not only reason for their solution', but also 'the imagination even to grasp their extent',[19] perhaps the time has come to revive an idea put forward fifty years ago, and speak of "public services" rather than one, monolithic "public service".[20] For this thesis has brought home the vast range and diversity of Commonwealth public administration:

> . management of the national economy - e.g. fiscal and monetary policy, prices and income policy, taxation, banking and foreign investment

- regulation and control - e.g. immigration, quarantine, police, censorship, drugs and therapeutic goods, restrictive trade practices
- income maintenance, health and welfare - e.g. pensions, allowances and other income benefits, student assistance, employee assistance, health care benefits, migrant and refugee settlement
- industry assistance - e.g. customs tariff, by-law and anti-dumping schemes to protect domestic industry from foreign competition, primary production marketing schemes, export promotion
- specialist services - e.g. defence, foreign affairs, communications, education, national heritage, mapping
- law and justice - e.g. human rights, civil liberties, family law, bankruptcy and insolvency.(21)

Following on from and related to the above patterns of complexity, it could be worthwhile considering another old belief, that there are 'five "powers" or "functions" of government in a modern democracy: the executive, the legislative, the judicial, the administrative, and the electoral'; the time-honoured threefold scheme being, in Willoughby's opinion, 'a confusing oversimplification'.(22)

Willoughby was writing in the American context, where there is a more formal separation in the threefold scheme than in Westminster-related constitutions. In those, it has been shown that, broadly speaking, the executive has the upper hand, save for the extent of judicial independence which changing groups of the judiciary are prepared over time to practise. In examining Westminster-related polities, therefore, it is no doubt more productive to draw upon Griffith's contention, that

> [a]t the heart of every working constitution is the interplay between the Executive, the Parliament and the Judiciary. The nature of the relationships between

> these bodies determines the nature of the working constitution.

In other words, 'the constitution is what happens', since

> [e]ach of these organs of the State is in the business of decision-making within its own sphere and the decisions taken by each have their impact on the decision-making powers of the others. The three organs, as it were, lean on one another and the powers of each are defined (... whatever written documents may say) by the powers of the others.[23]

Considering the hefty weight of the monarchic tradition which bolsters the position and authority of Westminster-related executives, it seems that reformers should be concerned, above all, with 'what limits should be put on the powers of the executive'[24] in modern government with its myriad public services, the more so when that executive can call upon 'an unexamined reservoir of prerogative powers'[25] in leaning on the other decision-making spheres. This is what administrative law is and should be about: whether to direct or restrain 'expressions of power',[26] somewhat like Yardley's 'applied constitutional law',[27] but going beyond that to the realm of constitutionalism. For it is here that the two realms of discourse, the legal and the political-administrative, can meet. Constitutionalism, the rule of law and the exercise of power should, after all, be familiar to law, political science, public administration and constitutional history, if in varying respects.

The development of Commonwealth administrative law has faltered because the push for and debate about it has been conducted, for the most part, in the realm of legal discourse, and has therefore tilted towards the formal workings of Australia's constitutional settlement. This is understandable, given that, 'to the lawyer, the ad hoc,

discretionary nature of ... personalised service without formalised procedure seems arbitrary in comparison with courts and tribunals'; given also the 'continuing strength of the law-politics divide', and 'the lawyer's persistent inclination to look backwards to precedent rather than forward to solving contemporary social problems'.(29)

The legal penchant for formalism was reflected in the ARC's Report on its Review of Migration Decisions. There it was acknowledged that, as in other policy areas, migration decisions are frequently the subject of traditional, informal representations from parliamentarians 'and others seeking ministerial or departmental review of those decisions'. The ARC felt that this is 'a less than effective means of review on the merits', since it displays 'procedural weaknesses', not being 'independent of the original decision maker', and taking place 'wholly in private'.(30) While not dismissing the importance of ministerial representations,(31) the ARC recommended that ministers disregard approaches on matters already considered by the formal review mechanisms.(32)

Again, while such a stance is understandable in formal, legal terms, it flies in the face of Australia's inherited and continuing constitutional practice outlined in preceding chapters, in particular the reliance on political forms of redress, resting on, inter alia, '"the inalienable [though uncodified] right of every man, woman and child ..." to approach their Member for help ...'.(33) This help is free; furthermore, 'personal grievances which people want to raise do not always have a convenient formal [i.e. public] outlet'.(34) Yet, in its Ninth Annual Report, the ARC stated that the AAT reviews decisions 'affecting the public relationship between the government and

individuals in the community' [emphasis added].[35]

As Miliband pointed out, '[i]t is possible to exercise civic and political rights [again uncodified] (-voting, speaking, publishing, attending meetings -) on one's own, individually',[36] as well as engaging in collective 'activism'.[37] Either form could include pursuing the "redress of grievances", and either can be undertaken formally (in public) or informally (in private). The traditional style of Westminster-related public administration favours the latter. It will be recalled that senior officials 'regularly share confidential information with concerned pressure groups, the media, members of the government and opposition caucuses, and colleagues in other levels of government'.[38] Policy formulation 'is a high level activity normally involving ministers and senior officials. It is generally carried out with great care and after considering representations from those who will be affected'.[39] The FOI Act, for example, is not about information gained informally, just as 'it is hard to see why further entertaining of representations should be mandatory as a matter of law'.[40] Indeed, to try and formalise these activities would be tantamount to, in Robertson's phraseology, 'the replacement of politics by law';[41] to the virtual transposition of the complexity across the range of public services encompassed by the Guidelines on Official Conduct of Commonwealth Public Servants - with its nineteen chapters under five headings plus five appended codes of conduct - to something approaching Appendices A and B of this thesis, if the FOI Act is taken to resemble closely the whole process of administrative review.

It is not suggested that administrative law reformers ever envisaged law replacing politics. This would be a complete turnaround in

Australia's constitutional development and practice, severely damaging, at the very least, parliament, ministerial responsibility and judicial independence. But they do appear to have overlooked the fundamental importance of ministerial responsibility in the fact that it embraces with equal force both the informal and formal workings of public administration. This could help to explain the continued problems some enthusiasts have with the relationship between policy and external review.(42) It seems that this is being discussed according to the old division between law and politics, as if there is, flowing from that, a dichotomy between, on the one hand, the legal/formal and, on the other, the policy/informal. This is a vast oversimplification of Australia's constitutional settlement and the interplay between the legal and the political, the formal and the informal, the public and the private, the particular and the general, the individual and the collectivity; between, indeed, policy and administration. To pursue this line of argument to its strict, logical conclusion means that "external" review in Westminster-related polities is impossible, even in terms of drawing an artificial distinction between policy and administration so that "external" individual administrative justice can be accommodated by ministerial responsibility. Due to the centrality of ministerial responsibility and party in Australia's constitutional matrix, the public service or services can only be accountable to the wider community via elected ministers, that is, politically, not via unelected judicial or quasi-judicial bodies in an administrative sense. Those bodies themselves may be accountable publicly through functioning and reasoning in public, but they are accountable to elected ministers in the sense that it is ministers who allocate

the resources of legal review out of the wider public budget.

Even so, administrative law can itself pose dangers to the health of the polity. A right of appeal to the AAT, for example, would encourage 'the development of incremental policies which focus on the interests of the individual'. That is, in reviewing a statutory power, unless the AAT is obliged by statute to choose a particular approach, its decisions 'will tend to shape' the power 'in the direction of "individual" rather than "distributive" justice'. J.M. Sharpe claimed that this 'could have a significant impact on the overall administration of that statutory power'.(43) Her comments tie in with Goldring's concern, that the components of the Canberra package can be viewed as 'instruments by which established interests in Australian society can exercise their power to restrain exercises of government power'. That is, government policies which may have been mandated electorally, particularly

> those which limit the exercise of non-governmental power or seek to redistribute wealth and power within Australian society, can be limited or totally frustrated, especially where the legal tools available are wielded by a judiciary or quasi-judiciary whose socialisation (perhaps, more properly, "acculturation") is predominantly legal.(44)

From another perspective, and referring specifically to judicial review, H.F. Rawlings wrote that the latter can be regarded as 'relevant to the mass of governmental power that ought to exist', because it 'can serve as a legitimating device for the expansion of governmental power'. That is,

> far from judicial review serving to limit the excessive growth of the total mass of governmental power, its very existence facilitates that growth because governments seeking to take new powers can point to the

> availability of judicial review as a potential controlling device.

At the same time, of course, government is corrected just as much as it wishes to be corrected', if necessary by resorting to 'legislative nullification'[45] or modification, in the way the Commonwealth government appears to be approaching the Canberra package.

It can be seen that these matters are far too important to be considered in terms of a sterile law/politics divide. They are constitutional issues. Also, they involve the wider community which does not figure per se in the threefold separation of powers, elements of its interests and powers, in Australia, being subsumed by and channelled into the executive, the parliament and the judiciary. Yet it was, according to some observers, due to inadequacies in traditional, parliamentary avenues of redress, when confronted by the modern administrative state, that calls were made for enhanced administrative law mechanisms. Jinks mentioned this;[46] so, too, did Harrison, who wrote that, by the early seventies, the public sought to play a 'more central role in the political process' beyond that of passing judgement on government decisions by voting in elections.[47] Mallory pointed towards a greater role for legal bodies due to failure in the political system.[48] Jinks had doubts about the rationale for the new package.[49] Reid criticised the lack of 'empirical evidence to substantiate the serious claims' made about the state of ministerial responsibility.[50]

The thrust of these concerns was, again, towards the formal workings of government. While it would be even more difficult to gather evidence about the informal workings, let alone to codify or formalise them - due to their very nature - they are obviously taken

for granted by all who participate in them, since they are ingrained in Australia's constitutional matrix. Perhaps this is why so little reference has been made to them in Australia by both legal and political-administrative realms of discourse. To some insiders, however, informal networks made the formal structures work. In other words, conflict-avoidance in policy formulation takes place "behind the scenes"; participation occurs here individually and collectively as representations are made and positions arrived at within and between members of the community, agencies and ministers, etc. But continued operation, or health, demands a high degree of trust on the part of all participants, and it could be that by the seventies that trust was under stress, placing strain in turn on the traditional, largely informal style of Commonwealth public administration. The Governor-General alluded to this in remarking upon, in relation to the call for FOI, 'a distrust of government and a disinclination to leave government to those who govern'.(51)

In respect of the new administrative law being examined here, this distrust, or, perhaps, scepticism, manifested itself in demands for rights - listed by Harrison as the right 'to know what ... government was doing', 'to question government about its reasons for certain actions and decisions', and 'to participate in the government's decision-making process'.(52) Sir Ninian Stephen noted that the 'well-spring' of the demand for FOI stemmed from 'notions of participatory democracy'.(53) Hughes had pointed out that the arguments for open government were founded on a model of government 'antithetical' to Australia's constitutional settlement, being 'supportive of pluralistic and individualistic ideals better manifested in other

governmental forms'.[54] Thompson warned that attempts to inject 'a participatory view of democracy' into Australian public administration would necessitate corresponding change in its deeply-held conflict-avoidance values.[55]

Change would need to occur in both political-administrative and legal realms of discourse. With regard to the former, Minogue affirmed that '[t]he rhetoric of rights ... belongs to an assertive, indeed quarrelsome, idiom of democratic politics'.[56] Whereas the uncodified, classical, abstract rights were 'procedural' and 'preconditions of politics', newer, more modern rights are 'substantive' in that they can become the 'very substance' of politics, having resource implications and paving the way 'for a limitless redescription of desirabilities in the persuasive language of rights'.[57] Once rights become 'inescapably political, ... there must be public discussion of the spending of public money', since substantive rights 'determine outcomes'.[58] Echoing Goldring and H.F. Rawlings on the possibility of enhanced executive power through administrative law, Minogue claimed that this more dogmatic political rhetoric encourages the proliferation of groups who, 'based on interest or principle, seek to impose their will upon a government for whom every submission to these suppliants offers the prospect of greater power for itself'.[59] As rights spread, so does 'the propensity of the state to regulate every corner of social life' until, paradoxically, 'an idea which began as essentially individualistic has developed into an instrument of social homogenisation'.[60]

Minogue pointed out that 'determining a right is not the end of

deliberation',[61] and it is here that the legal realm of discourse must be brought into consideration, since it is in this area of further deliberation that the judiciary - using that word and its offshoots in the generic sense to cover all "legal" bodies - has a role to play. Minogue perceived an important difference between the interpretation by judges of 'relatively precisely demarcated [legal] rules', such as those of an established legal system, and the requirement placed on judges by 'imprecise moral assertions' that they

> should do what seems to them just on the basis of the facts, a form of palm tree justice opening them to the charge that they are covert legislators and damaging the predictability which is one of the law's main virtues.[62]

In making his claims, Minogue acknowledged the 'realistic doctrine' that 'judges bring much more social and evaluative equipment to their judgments' than the doctrine of legalism allowed.[63] He maintained, nevertheless, that a Bill of Rights, for example, can amount to '"a broad authorization for judges to do as they see fit to secure certain results"'; '[r]ights in the law thus become a new version of an old corruption: power without (financial or democratic) responsibility'.[64]

Yet the law and judges are being urged to assume a greater role in the workings of the present-day polity. Dworkin wanted 'law's empire' defined by 'an interpretive, self-reflective attitude addressed to politics in the broadest sense'.[65] In the face of profound social change, Blom-Cooper saw judges 'increasingly being asked to make policy choices' and argued that '[j]udicial activism in every aspect of government (in its widest sense) is an indispensable element

for the formulation of the legal order of a modern, industrialised democratic society'.[66] To Harlow, the 'political duties of the judiciary have changed in scope and style'.[67] In Australia, Galligan has called for the High Court to be recognised as a 'powerful political institution'.[68] Kirby observed that the 'function of judicial discretion is constantly being enlarged'.[69] In his opinion, this is due to the decline in the role of the jury, which meant that 'matters of evaluation and general policy came increasingly to be heaped upon the Judge himself', coupled with growing awareness that 'all decision-making is a highly complex process', which resulted in the notion of 'policy free' resolution of legal problems being queried.[70]

Kirby was anxious about judicial independence under these circumstances. He believed that the judiciary is the 'last fully trusted branch of government',[71] that the 'passive and mechanical view' of the judicial function 'is deeply embedded in the community's consciousness'.[72] Harlow considered judicial independence to be one of the values of modern democracies,[73] but said that it 'has served the judiciary well in protecting them from outside scrutiny'.[74] On judicial accountability, Justice McHugh responded to objections that judicial law-making is anti-democratic by saying that it '"is surely not as undemocratic as legislative inaction which fails to meet the need for law reform"'.[75] In looking at the lack of formal democratic accountability of the High Court when exercising judicial review, Galligan discovered a range of constraints: the Court can decide only the cases that come before it; its decisions can be overturned by constitutional amendment, although this is a 'cumbersome' process; the power of appointment which can ensure, 'in line with the demands

of ruling national coalitions', that a variety of 'judicial types' is represented on the bench, acceptability to large sections of the community being of major importance in this respect. Galligan considered that judges are constrained, above all, by 'less formal institutional and professional' checks that 'shape judicial behaviour', and the 'dynamic political ones' that in practice determine how far they can go in exercising judicial review.(76) In similar vein to Griffith on the impact of decision-making within and between the three separated branches of government, he claimed that, ultimately, possessing 'only the power of its own judgment', the High Court's authority rests on the 'recognition and acceptance of others'. The legitimacy of judicial power and the parameters of judicial review are in practice, therefore, determined not by judicial preferences or formal pronouncements, 'but by what the rest of the political system tolerates'.(77) In other words, as McHugh noted, critics and advocates of judicial law-making are concerned 'not so much with the question of the appropriate scope of judges' law-making function as with the content of judge-made law affecting their interests',(78) which is both understandable and in keeping with the realities of the dynamics of acceptability and toleration.

Thus there will always be tension between the powers and branches of government, at both formal and informal levels, particularly when new institutions appear on the scene and seek to establish their acceptability. This thesis argues that the degree of toleration settled on by the Commonwealth's new administrative law was determined in reality by the weight of legal and political-administrative tradition surrounding the executive, in keeping with

Australia's constitutional matrix.

But the executive cannot afford to neglect its own legitimacy, and, in relation to the wider community, this has come to depend, to varying extents, on benefits; especially, to sections of that community, on financial benefits. One view of the maintenance of state legitimacy is that the state provides benefits 'in order to "pacify" the poorer parts of the nations, maintaining itself by quietening material discontent'.(79) It is not necessary to restrict consideration of benefits to the poorer sections of the community to realise their importance to other sections. As far as the Commonwealth's new package is concerned, this thesis shows that its mechanisms have been used overwhelmingly and have occasioned closest scrutiny in relation to the pursuit of personal benefits, not only in the areas of financial welfare associated with transfers of wealth, but also in areas connected with commercial benefits, such as customs, and migration, to gain the more general benefit of residence in Australia. In a modern polity such as that of Australia, such transfers of benefits most often take place through a mass of statutory discretions. The political-administrative realm of discourse appears to have overlooked this accretion of practices, what Blom-Cooper has described as the continual penetration by the law since 1945 of the polity's 'total social institutions', which has altered the 'quality of the law, not just of the legal system but also of the human relations affected by the law seeping into every facet of the citizen's life'.(80)

In neglecting the legalistic basis of the modern administrative

state, so tellingly brought to the fore by the ARC in its studies of customs and migration policy areas, and revealed by the AAT's jurisdiction, the political-administrative realm of discourse did itself a disservice, just as it has in largely keeping hidden the "hidden politics" of public administration. Ironically, it has taken the advent of the new administrative law to uncover these in order to better appreciate that constitutional matrix which has assimilated it.

The legal realm of discourse, however, did itself a disservice by concentrating on the formal aspects of politics in public administration; by overlooking the fact that policy decisions are political decisions; the fact that policy is essentially about the future, or a party-preferred version of it; the fact that ministerial responsibility applies to all levels of policy, to the formal and informal workings of public administration. By discussing the external review of discretions as legal entitlements or, in more powerful terminology, as rights, the legal realm of discourse fostered the impression that these were available beyond the reach of ministerial responsibility and, hence, executive preference, allowing itself to be caught out by executive compression of the new package; by a Minister for Finance ready to affirm the elected executive's power to withhold the payment of benefits recommended by the Ombudsman.

This thesis argues that the political-administrative realm of discourse has, in effect, been able to assert superiority over the legal realm because the administrative law reforms were developed for the most part by the latter, seeking, however inadvertently, to

inject little-understood pluralist values into a constitutional matrix itself not fully understood, due to the one-sidedness of debate. This has meant that the reforms have, as Thompson warned, served 'to further bolster the present situation by giving the appearance of change without any substance, change without innovation in the values by which our political system operates'.(81) For this thesis argues that the new administrative law is entirely in keeping with administrative tradition in revivifying and codifying those aspects of the ancient right to seek redress of grievances which have, in any case, operated in a largely formal but less "user-friendly" manner.

Under these circumstances, the executive needs to worry about its own legitimacy only if there is a groundswell of general community concern about its withholding of benefits. This is where the traditional parliamentary avenues of redress must come into their own. For, if Australia is to carry on as a parliamentary democracy, the informal and formal political workings entailed by that must be kept nourished. It would, indeed, be a 'distortion' of the system, if, as Mallory wrote, the courts and formal mechanisms of redress were aggrandised at the expense of those workings.(82) There may well be, as Reid maintained, a predilection in Australia 'for decisive and professional-style initiatives over less tidy and less quick parliamentary-political solutions',(83) for vesting 'more trust in appointed officials than in elected politicians'.(84) He was in no doubt, however, that, for those members of the Australian community at the receiving end of governmental benefits, services and directives, it is elected parliamentarians who provide the 'ultimate

means' for the redress of individual grievances against the administrative state. To neglect parliament '- and the values of ministerial responsibility that support it -' would be to 'negate the sole power' of the governed over the governors, 'namely the power of the vote'. Neglect of parliament may lead to short term gains; but, in the longer term, parliament will decline and what Australians know 'as civilised life will decline with it' [emphasis added].(85)

These issues and others connected with them demand consideration. Further research beyond the scope of this thesis is warranted on a number of interrelated themes, at least: the respective roles of parliament, its committees and appointed officials in limiting executive power; the separation of powers in Australia; the accountability of the judiciary; access to legal bodies in the face of a restrictive law of standing and punitive costs;(86) conflict-avoidance, the rhetoric of rights and its application in Australia; the relationships between the individual, the wider community and the state; how much of the "private" individuals and groups are prepared now to make "public"; the dangers of administrative law in enabling, on the one hand, greater executive power, and, on the other, its use by established interests to thwart widely-accepted exercises of governmental power; above all, the constraints on executive power, both formal and informal.

Perhaps, as Waldo would say, no definitive answers will be forthcoming to questions raised by these issues;(87) indeed, it may be that solutions are not achievable, since a democratic polity, in its progress towards becoming a more equitable society, must engage in 'a ceaseless tinkering with the institutions and procedures of

government'.[88] Real progress will not come about, however, unless attempts are made to reconcile the realms of legal and political-administrative discourse under the rubric of constitutionalism. There must be room to manoeuvre in the dynamics of acceptability and toleration between the three separated powers and branches of government. The health of Australian democracy depends on it.

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