Contemporary Challenges and the Strengthening of Executive Power: An Australian Case Study

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One of the particularly manifest features of globalisation, indeed perhaps the most apparent evidence of our increasingly 'globalised' existence, is that the major issues facing today's national governments are rarely confined to their own borders. Be the challenge one of security (terrorism); health (the recent 'swine flu' pandemic); finance (the 'Global Financial Crisis') or environmental (the threat of climate change), it is clear that domestic responses cannot be devised or implemented without regard for developments elsewhere.

This interconnectedness has two immediately recognisable, and yet, at first glance, seemingly contradictory consequences. First, it obviously supports, if not actively requires, the growing internationalisation of governance strategies and the increased participation of governments in multi-country deliberations and decision-making. This may be through traditional structures such as the United Nations or the European Union or rather more recent and somewhat looser arrangements such as the G-20. However, it would seem a mistake to view the trend for attempting consensus amongst the international community in response to shared problems as a threat to the autonomy and strength of executive power in nation states. For the second effect of the global nature of key contemporary challenges is that in inevitably demanding greater leadership from the executive arm of government, they assist it to further secure what is already a strong platform for its dominance in the domestic context.[1] This is especially so when the problem is cloaked in urgency – as all those identified above have been to some degree. It seems fair to surmise that the executive's long-recognised capacity to react swiftly to emergencies[2] and the necessity that it represents the national interest in relations with other countries ensures that the more we internationalise both problems and their solution, the greater the power which the executive arm will enjoy at home. This is sure to be particularly acute in countries where power is shared federally. In those places, the globalisation of challenges must operate to enhance the position of the national executive not simply relative to the other arms of government, but also as against the authority of the states. Even when state or provincial co-operation is sought in order to advance a solution, it should hardly surprise us that internationalisation has a basically centralising effect on constitutional systems of this ilk.

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[1] I would agree with Kumm's assessment that, even leaving international developments aside, 'parliament as the traditional legislative forum has lost significant ground in the twentieth century': Mattias Kumm, 'Democratic constitutionalism encounters international law: terms of engagement' in Sujit Choudry (ed), *The Migration of Constitutional Ideas* (2006) 256, 269.

[2] Clinton L Rossiter, *Constitutional Dictatorship* (1948) 12.

The Commonwealth of Australia provides a worthwhile, though perhaps somewhat extreme, case study of these trends. Situated as it is within a Westminster system defined by the doctrine of responsible government and not subject to even the modest limitations imposed by a statutory Human Rights Act, such as that of the United Kingdom or New Zealand, Australia's national government is rarely subject to serious challenge over the use of its powers. In addition to the lack of a human rights instrument, the relatively unconstrained nature of Commonwealth power is a product of a steady course of constitutional interpretation which has favoured the national government at the expense of the States, despite the intention of the Constitution's framers to avoid this very result. In this context, the existence of several global policy challenges serves to further intensify the concentration of power in the national executive in Australia's federal system.

In Australia, urgent and shared regional or global problems have tended to bolster the executive by creating both the case, and frequently an accompanying mechanism, for action which the domestic legislature and the judiciary find difficult to challenge. Use of blocking tactics by the opposition parties in the legislature understandably are made more difficult when the imperative for the executive's course comes from a substantial and respected quarter of the international community (perhaps reflecting something about Australia's status as a mid-sized power). Somewhat different considerations, but a rather similar effect, underpin judicial deference to political judgments about the best way forward in a crisis and constitutional constraints are unlikely to be applied with great strictness to government efforts to quell or contain harm to the community. In federal systems, a clear absence of power in the national government to achieve its desired response may need to be overcome through use of intergovernmental agreements with the states – but this often has the effect merely of distancing the action of both executives from, not one, but two forums of legislative scrutiny and accountability.

Undoubtedly the easiest area in which examples are offered of this phenomenon is in responses to the threat of terrorism. Anti-terrorism laws were largely unknown in Australia prior to 9/11, although politically motivated violence was not. But in the last decade the Commonwealth Parliament has, at the behest of the executive, enacted over 45 new laws directed at domestic security from terrorism. There are a number of striking features to this experience. First, the lack of a successful domestic attack did not staunch the hyperactivity of the government in insisting on new laws – indeed incidents overseas frequently provided the impetus for further significant measures.[3] In part, this reflected the Australian government's embrace of the rhetoric of a global 'war on terror'. Second, doubts about the Commonwealth's power to enact domestic criminal laws and other special measures addressing political violence were overcome by the Commonwealth and State executives reaching agreement over the referral of the legislative capacities of the latter.[4] Additionally, State and Territory governments

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[3] Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia 2001-2005' (2007) 10 *Flinders Journal of Law Reform* 81.

[4] Although the State governments attempted to retain a degree of control over the Commonwealth's use of these ceded powers by requiring that the approval of a majority of their number support any fresh

were requested to enact laws which carried on from the operation of Commonwealth ones where some immovable constitutional obstacles could not otherwise be overcome (eg. to extend the period of preventative detention). In this way the Commonwealth government set the agenda at all levels of the federation. Third, at its worst the creation of anti-terrorism laws followed a particularly executive-driven process: new counter-terrorism initiatives tended to be announced by the Commonwealth executive, before tabling at the Council of Australian Governments (COAG) for the support (rarely withheld) of the State and Territory governments, and only then would the federal government introduce its bill, using its numbers in the Parliament to foreclose meaningful debate and rush enactment.[5] Fourth, the impact of parliamentary committees and independent inquiries, even when commissioned by the government itself as a legislative tactic, was largely negligible in impacting upon the content of the laws. In short, while the creation of a substantial legislative framework was a central pillar of the Commonwealth response to the terrorism threat,[6] the executive surrendered very little control over its agenda to other actors – either the Parliament or the administrations of the States and Territories.

The same challenge elicited a notable deference from the Australian judiciary – not just to the powers claimed by the Commonwealth to fight terrorism at home and abroad, but also to the rather novel roles cast upon the courts themselves as part of this endeavour. On the first score, the fear that the Commonwealth lacked constitutional power alone to criminalise terrorism and so required the co-operation of the States was confirmed by the High Court as misplaced. The Court took an expansive reading of the Commonwealth Constitution's power with respect to 'naval and military defence' which, in departing from earlier more limited precedents, gives the Commonwealth a remarkably free hand in responding to civil disturbances.[7] Additionally, the government has increasingly obliged the judiciary to perform a variety of new functions and responsibilities in the area of national security. For example, courts are required to prioritise, over the right of an accused to a fair trial, the opinion of a member of the executive that certain evidence has the capacity to prejudice national security and should be used only subject to restrictions.[8] Another example is the use of courts to issue preventative orders restricting the liberty of terrorism suspects not charged with any crime and based on intelligence only.[9]

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amendments, members of the High Court have, unsurprisingly, viewed that political arrangement as a legal irrelevancy so far as it purports to fetter the legislative powers of the Commonwealth.

5 As an example, see Greg Carne, 'Prevent, Detain, Control and Order?: Legislative Process and Executive Outcomes in Enacting the *Anti-Terrorism Act (No 2) 2005* (Cth) (2007) 10 FJLR 17, 26-32; 43-64

6 The reliance on law 'as an instrument of counter-terrorism' is, of course, not insignificant: Victor V Ramraj, 'No doctrine more pernicious? Emergencies and the limits of legality' in *Emergencies and the Limits of Legality* (2008) 3. The decision to tackle a problem through legislation indicates a willingness on behalf of any government to subject itself to even just a measure more scrutiny and control than it might otherwise suffer.

7 *Thomas v Mowbray* (2007) 233 CLR 307. The decision not only affirms the validity of much of the Commonwealth's anti-terrorism legislation but also the related but nevertheless distinct laws introduced since 2000 for military call-outs in peacetime to address 'domestic violence': Michael Head, *Calling out the Troops – The Australian Military and Civil Unrest* (2009), 14-15.

8 *National Security Information Act 2004* (Cth), s 22.

9 *Criminal Code 1995* (Cth), Divs 104 and 105.

Constitutional challenges to both these developments have been rejected by the courts,[10] undoubtedly reflecting the narrow options for judicial review in Australia generally but also, I suspect, indicating the unwillingness of the judiciary to interfere with the government-led strategy for public security.

It is tempting to think that such judicial deference is merely the traditional reception which national security issues meet in the courts, or that such an approach manifests a soberly appropriate attitude to the role of the administrative state in challenging times.[11] However, indulgence of the executive by the Australian judiciary has been readily apparent in several other areas also. Most notably, the Federal Court of Australia upheld drastic steps taken by the government of the day to intercept and commandeer a foreign shipping vessel bringing to Australia asylum-seekers that it had rescued from the ocean.[12] The decision was seen as surprising in two respects. First, the Commonwealth's power to do so was determined by the appeal judges as derived not simply from the inherited prerogative powers of the English Crown but arising inherently from the Constitution's recognition of executive power. This suggested the possibility, arguably confirmed by the facts of the case itself, for rather broader executive powers than previously attributed to the government. Second, the existence of comprehensive legislation detailing the immigration law of Australia was not seen to have supplanted the executive's independent constitutional authority to act. As Winterton, in criticising the decision, made clear: the latter result on the extent of legislative control was not unrelated to the Court's decision on the source of the executive's authority.[13]

Moving away from security of borders or the public, the High Court has continued to accord great latitude to the Commonwealth executive in financial matters. There is quite a tradition of this given the Court's acquiescence from the time of World War II in allowing the Commonwealth to use financial grants so as to render the States compliant to its will[14] – or even to use the States as a mere conduit in distributing monies to non-government actors as part of some policy which would be otherwise constitutionally problematic for the national government to achieve. But even against that history, the decision in *Combet v Commonwealth* drew consternation. The Court, 5:2, upheld expenditure by the government of $22 million on political advertising without requiring that this be demonstrably connected to a purpose stated, even at the broadest level, in the legislation making the appropriation from Consolidated Revenue.[15] The scope of the constitutional expression 'purposes of the Commonwealth' as a possible limitation on the use of public monies by the executive has since received further attention from the Court. Just this year, the government's plan to stimulate the national economy in response to the GFC by distributing $42 million in cheques to households was

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[10] Respectively, *Lodhi v R* [2007] NSWCCA 360; *Thomas v Mowbray* (2007) 233 CLR 307.

[11] David Dyzenhaus & Rayner Thwaites 'Legality and Emergency – The Judiciary in a Time of Terror' in Andrew Lynch, Edwina MacDonald & George Williams, *Law and Liberty in the War on Terror* (2007) 9, 24.

[12] *Ruddock v Vadarlis* (2001) 110 FCR 491.

[13] George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 37.

[14] *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373.

[15] (2005) 224 CLR 494.

challenged as an unconstitutional appropriation. The government publicly stressed the necessity for the cash injection via consumers if the effects of the global recession were to be averted or cushioned, and continued printing the cheques as the matter was brought forward. A majority of the Court declared its finding in favour of the Commonwealth but at the time of writing, reasons have not been released.

Lest I paint a rather too distorted picture, it is necessary to add a qualification to the central argument pursued here that contemporary challenges have tended to promote executive power over other forms. In some areas, notably the determination of refugee applications, attempts by the Commonwealth government to restrict judicial review through use of privative clauses were fiercely rejected by the Australian judiciary, albeit with only limited success.[16] Additionally, Australia is further protected from a truly rampant and unaccountable executive by the quality of its sub-constitutional checks, such as the Commonwealth Ombudsman and other statutory office-holders of the administrative state.

But when focused on the three arms of government themselves, the overwhelming experience of recent times in Australia has been one of executive strength – conducted through, rather than contained by, our system of parliamentary governance and rarely meeting judicial resistance.

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[16] See Mary Crock, 'Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law' (2004) 26 *Sydney Law Review* 51.