THE HIGH COURT AS GATEKEEPER

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[The purpose of this article is to review the special leave to appeal procedure and the concept of justiciability as 'gatekeeper' mechanisms. The special leave procedure enables the Court to control the volume and nature of appeals which it hears. The procedure is directed mainly to the Court's law-making function, though that function is confined within the Court's adjudicative function. The volume of applications is now becoming oppressive. Justiciability is a complex concept embracing a number of strands. The various strands are associated with the exercise of judicial power and play an important role in ensuring that courts confine themselves to the exercise of judicial power, an expression which has proved elusive, at least in terms of definition.]

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I INTRODUCTION

Readers, like the author, will find the title enigmatic. It conjures up a vision of the High Court as a Cerberus, deterring litigants who wish to resort to it for relief, admitting only those who have impeccable credentials. The reality differs from the vision. This is because the requirement for special leave to appeal and the concept of justiciability (including the 'political questions' doctrine), which are the subject of this article, are also concerned as much with the capacity and the constitutional competence of the High Court and courts generally. The purpose of the discussion is to review these gatekeeping activities in the light of

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the litigant's right of access to the courts and the obligation of the courts to exercise the jurisdiction vested in them, the right and the obligation being core elements in the rule of law.

The requirement of special leave to appeal, the concepts of justiciability (including 'political questions') and *locus standi*, the grounds on which proceedings may be stayed (abuse of process, *forum non conveniens*), ouster or privative clauses, discretionary grounds for refusing leave, and certain immunities, may each fall under the gatekeeping umbrella. I shall, however, confine my attention to special leave to appeal and aspects of justiciability (including 'political questions') that do not specifically relate to judicial review of administrative action.

II SPECIAL LEAVE TO APPEAL

One purpose of the requirement for special leave as a condition of an appeal to the High Court is to ensure that the workload of the Court is of a character that is worthy of the Court's attention. The only justification for a second appeal is that some questions of law are of such fundamental importance that they require consideration by the highest court in the land. That is why s 35A of the *Judiciary Act 1903* (Cth) provides:

> In considering whether to grant an application for special leave to appeal ... the High Court may have regard to any matters that it considers relevant but shall have regard to:
>
> (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
>
> (i) that is of public importance, whether because of its general application or otherwise; or
>
> (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
>
> (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

The grant or refusal of special leave turns largely on the factor mentioned in sub-s (a)(i) of s 35A. Generally speaking, a question of law of public importance will arise if the case involves a question of legal principle rather than a question of the application of legal principle. There may, however, be exceptional situations in which the application of legal principle will generate a question of public importance. A question of statutory interpretation, if sufficiently important, will also generate such a question. There are many questions of statutory interpretation where the arguments are evenly balanced, no question of principle is involved or the statutory provision does not have a wide-ranging application.

The grant or refusal of special leave does not often turn on conflicting opinions on a question of law, the factor mentioned in sub-s (a)(ii). Even when such a

conflict arises, the court is inclined to view the case through the sub-s (a)(i) prism.

Sub-sections (a)(i) and (ii) are directed to the court's law-making function. The grant of special leave in relation to such questions of law enables the court to clarify the law by formulating the correct legal principle, there being a controversy as to how the principle should be stated. The formulation of the correct legal principle is incidental to the exercise of judicial power in adjudicating the controversy between the parties to the litigation. But it is the need to clarify the law — to formulate the correct principle — that is the decisive consideration in the grant of special leave.

Sub-section (b), though expressed in very general terms, commonly applies to two categories of case — one substantive, the other procedural — which fall under the rubric of miscarriage of justice. Under sub-s (b), special leave may be granted where the outcome of the case involves a miscarriage of justice. That occurs when any error results in such a miscarriage, even if the error is not one of legal principle. Criminal cases provide examples of substantive miscarriage of justice. Sub-section (b) also covers cases where there is procedural irregularity.

Special leave may be granted in the categories to which sub-s (b) applies even if the law does not call for clarification. This is because the judgment under challenge is inconsistent with the proper administration of justice. So the grant of special leave in these cases does not primarily engage the court's law-making role.

The grant of special leave to appeal on a question of fact is not prohibited. In order to enable an important question of law to be determined, it may be necessary to grant special leave to appeal on a question of fact, though, generally speaking, a strong case on the issue of fact would be required. The court is usually extremely reluctant to entertain an appeal on such an issue. It is an issue which is remote from the purpose justifying a second appeal.

The special leave requirement serves another important purpose in enabling the court to control its volume of work.[1] In an imperfect way, the court selects those cases which merit its attention. Since the court cannot grant all the special leave applications which are filed — they substantially exceed 400 per annum — the special leave mechanism provides the means by which they can be winnowed. In an ideal regime, the court would compare competing applications and select those with the strongest claims for special leave. But the method of hearing applications in batches on a regular basis precludes the making of an actual comparison. Understandably, there is no sign of a move towards such a comparative approach. It would not be easy to devise a satisfactory procedure, involving comparative argument, which would enable such a comparison to be undertaken.

While the special leave procedure enables the court to control the flow of work to a substantial extent, the large number of applications, and the necessity of reading the supporting material, imposes a heavy burden on the Justices. Just what a court can do about that situation is a problem. Fixing time limits on oral

[1] *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194, 218.

argument and sitting benches of two Justices to hear applications has had some effect, but the number of applications continues to mount, as does the percentage of applications by litigants in person. This trend is bound to continue. As the costs of making an unsuccessful application are insignificant compared with the costs of the proceedings in the courts below, there is little deterrent against making an application which, if successful, may bring great benefits to the applicant.

Time taken by the Justices in processing special leave applications consumes time which would otherwise be available for dealing with appeals or constitutional cases. The court is endeavouring to conserve time mainly by delivering joint judgments and delivering judgments expeditiously. This approach is commendable. Nevertheless, special leave applications encroach upon time which could otherwise be devoted to substantive cases. The burden of the High Court's role as gatekeeper disables it from discharging its primary responsibilities as effectively as it might otherwise do.

Is there a solution to this problem? The High Court itself is in a much better position than the courts below it to determine whether special leave should be granted. No other court can assess the intrinsic importance of a case in the light of other demands on the High Court's time and the state of the law as it stands elsewhere in Australia. Because the jurisdiction of Australian intermediate courts of appeal is limited either geographically or in terms of subject matter, they lack the panoramic perspective of the law which the High Court brings to bear.

Lurking behind the special leave procedure is another, potentially more fundamental, issue. Should the court deal with a limited number of cases in depth or should it seek to deal with more cases expeditiously by delivering shorter judgments, much in the fashion of an intermediate court of appeal, such as the English Court of Appeal? This is an important question. Ultimate common law courts of appeal, like the House of Lords, the Supreme Court of Canada and the Supreme Court of the United States (which is, of course, not a general court of appeal), pursue the first approach. But European courts deal with more cases. In conformity with the civil law tradition, they do not discuss earlier decisions and doctrines at such length as common law courts do. This comparison invites a number of questions. Is the extended discussion of authorities and methodology a justifiable expenditure of judicial time and resources? For whose benefit is the discussion undertaken? To what readership are the judgments addressed? These questions so far have received little attention.

III JUSTICIABILITY

Unlike the special leave mechanism, justiciability is a substantive rather than a procedural gateway. Justiciability is a controversial and difficult concept. It is difficult because — like its close relations, 'political questions', judicial power and judicial process (method) — so far it has not been susceptible to definition. In the absence of definition, it is not possible to identify a precise relationship between these concepts, though my preference would be to equate justiciability in its primary sense with judicial power, at least in the context of the *Australian Constitution*. In the context of State courts, subject to the impact of the *Austra-*

lian Constitution and to the nuances of *Kable v Director of Public Prosecutions (NSW)*,[2] jurisdiction may be given to those courts to decide questions which would extend beyond the legitimate content of federal judicial power. Justiciability may be seen as a concept which cuts across the fundamental obligation of any court to exercise the jurisdiction vested in it[3] and the principle that the 'right of access to the King's Court must not be lightly refused',[4] as well as the maintenance of the rule of law. If, however, justiciability is seen as a concept whose purpose is to confine courts to the exercise of judicial power in relation to issues not properly assignable to other branches of government under the separation of powers and otherwise within the institutional competence of the courts, that difficulty largely disappears.

Part of the problem is that the term 'non-justiciable' is commonly used in a number of different senses.[5] In its primary sense, the term signifies that an issue is not appropriate or fit for judicial determination. It is this aspect of justiciability with which I am presently concerned. Non-justiciability in its administrative law sense, signifying that a matter is not capable of, or susceptible to, *judicial review*, as well as non-justiciability in the sense of there being no jurisdiction to entertain an issue or to grant appropriate relief, raise other considerations.

The High Court has not had occasion to discuss justiciability or 'political questions' in a comprehensive fashion. There have been two fleeting references in the High Court to the 'political questions' doctrine as it was formulated in *Baker v Carr*[6] in the United States. McTiernan J (dissenting) in *Victoria v Commonwealth*[7] referred to Frankfurter J's comment in *Baker v Carr* that

> the courts are not fit instruments of decision where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of government are made and unmade.[8]

The other reference was in *Gerhardy v Brown*,[9] to be discussed later.[10]

A passage from the opinion of Brennan J in *Baker v Carr* dealing with political questions states comprehensively what I understand to be the primary sense of the concept of justiciability. Brennan J said:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and

[2] (1996) 189 CLR 51.

[3] See *Oceanic Sun Line Special Shipping Company Co Inc v Fay* (1988) 165 CLR 197, 232ff (Brennan J dissenting).

[4] *St Pierre v South American Stores (Gath and Chaves) Ltd* [1936] 1 KB 382, 398 (Scott LJ), cited in *Oceanic Sun Line Special Shipping Company Co Inc v Fay* (1988) 165 CLR 197, 209 (Wilson and Toohey JJ), 233 (Brennan J), 262 (Gaudron J).

[5] See Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 182–91.

[6] 369 US 186 (1962).

[7] (1975) 134 CLR 81, 135 ('*Petroleum and Minerals Authority Case*').

[8] 369 US 186, 287 (1962).

[9] (1985) 159 CLR 70, 138–43.

[10] See below nn 39–41 and accompanying text.

> manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[11]

The discussion which follows picks up the six categories identified in this passage, though I divide the first category into two categories.

A *Express Textual Commitment to a Non-Judicial Agency*

The resolution of the issue may be expressly committed by the text of the *Constitution* (or by the text of a valid statute) to a non-judicial agency, generally the legislature or the executive. An example of an express textual commitment to a non-judicial agency is to be found in s 102 of the *Australian Constitution*. The section commits to the Inter-State Commission a determination that a preference or discrimination is undue and unreasonable, or unjust to any State. If there is such an express commitment, then the issue is non-justiciable. In such a case, it is non-justiciable because the courts have no jurisdiction to entertain or determine the issue. It would make for a clearer understanding of 'justiciability' if this reason were recognised as jurisdictional.

B *Implied Commitment to a Non-Judicial Agency*

The resolution of the issue, though not expressly committed, may be impliedly committed to a non-judicial agency. Such an implication may be made from constitutional separation of powers considerations. To the extent that issues relating to international relations[12] (other than issues dealt with by judicial acceptance of executive statements) and national security[13] are considered to be non-justiciable, they fall within this category, if not within the first category. The problem here is one of identifying, in any particular case, the considerations that are relevant to making the implication. The problem is compounded by two matters. One is a tendency on the part of judges to speak of issues which ought not to be determined by a court. Such statements may be regarded as part of the reasons for concluding that the relevant function is not one for the courts according to a separation of powers allocation. The other matter is the judicial subjection of a decision of another branch of government to a low level of judicial scrutiny, even though it is acknowledged that the issue is a matter committed to that other branch of government.[14]

[11] 369 US 186, 217 (1962); see also *Goldwater v Carter*, 444 US 996, 998 (1979) (Powell J).

[12] 'In our constitutional system treaties are matters for the Executive, involving the exercise of prerogative power'; by virtue of a treaty alone no rights are conferred on a subject or an alien: *Simsek v McPhee* (1982) 148 CLR 636, 641, 642 (Stephen J). See also *Re Limbo* (1989) 92 ALR 81.

[13] Security is 'par excellence a non-justiciable issue': *Council of the Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 412 (Lord Diplock).

[14] See, eg, *Gerhardy v Brown* (1985) 159 CLR 70, 138–9 (Brennan J).

It would be a mistake to assume that all issues concerning international relations, national security and political matters are non-justiciable. As Gummow J has noted, the grant of executive power in s 61 of the *Australian Constitution* necessarily entails the imposition of enforceable limitations on the exercise of that power, whether it be in the field of international relations or elsewhere.[15]

In any event, if the issues do not raise genuine international relations or security concerns, they will, in general, be justiciable. In *Baker v Carr* Brennan J, with reference to suggestions that all questions touching international relations are political questions, said:

> Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases ... show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature ... and of the possible consequences of judicial action.[16]

So, to take an example from administrative law, non-justiciability may exclude some aspects only of judicial review of an administrative decision. Accordingly, in a case where a decision to remove an individual's positive security vetting due to his sexual proclivities was based on national security considerations and was unreviewable on substantive grounds, it was held that the decision was reviewable for denial of natural justice.[17] Review for denial of natural justice, being procedural, does not present the same difficulties as review on substantive grounds.

A similar comment must be made about political questions. In *Chandler v Director of Public Prosecutions*,[18] in rejecting an argument relating to an offence of entering a specified place for a 'purpose prejudicial to the safety or interests of the State' within the meaning of s 1 of the *Official Secrets Act 1911* (UK) 1 & 2 Geo 5, c 28, Viscount Radcliffe said:

> I do not think that a court of law can try that issue or ... admit evidence upon it. It is not debarred from doing so merely because the issue is what is ordinarily known as 'political'. Such issues may present themselves in courts of law if they take a triable form.[19]

Likewise, the Federal Court has said that '[t]here is no general principle tha. decisions which are made in the public interest and/or which are politically controversial are immune from judicial review.'[20]

[15] *Re Ditfort; Ex parte Deputy Commissioner of Taxation (NSW)* (1988) 19 FCR 347, 369ff.
[16] 369 US 186, 211 (1962).
[17] *R v Director of Government Communications Headquarters; Ex parte Hodges* [1988] COD 123.
[18] [1964] AC 763.
[19] Ibid 798.
[20] *Century Metals & Mining NL v Yeomans* (1989) 40 FCR 564, 587.

C *Absence of Legal Criteria and Standards*

Brennan J's reference to a 'lack of judicially discoverable and manageable standards' has its Australian counterpart in references to the need for some 'ascertainable' or 'objective test or standard' as distinct from an arbitrary discretion or subjective opinion.[21] In the context of the *Australian Constitution* the application of legal criteria or of such a test or standard is essential to the exercise of federal judicial power. So, if Parliament were to vest in a Chapter III court jurisdiction to grant relief by reference to what the court, in its unfettered discretion, considered to be in the public interest, the investment of jurisdiction would be invalid because it would not entail the exercise of federal judicial power. The position may perhaps be different in the State sphere, in the absence of a constitutional separation of powers, subject to nuances arising from *Kable v Director of Public Prosecutions (NSW)*.[22]

On the other hand, when the Parliament confers a discretion on a court in very general terms, the court, attempting to uphold the validity of the grant of jurisdiction, will endeavour to distil from statutory provisions and purposes, as well as the policy considerations underlying the statute, an ascertainable objective test and standard involving identifiable criteria. In other cases, the court will interpret a statute or apply a standard of review of a decision of a political branch of government that results in an exercise of jurisdiction and judicial power.

The view has been expressed that it is not possible to construct a 'single set of reasonably unambiguous criteria for calling a procedure "judicial"'.[23] That view has force, more particularly outside a constitutional separation of powers. But the view does not deny that some functions necessarily stand outside the judicial process.

The difficulty in distinguishing between 'judicial' procedure and 'non-judicial' procedure is illustrated by comparing a judicial discretion with an administrative discretion in the light of the principles governing an appeal from the exercise of a judicial discretion and judicial review of the exercise of an administrative discretion. In each case, criteria for the exercise of the discretion may be exercised leaving a residual core discretion.[24] Yet the substantive grounds of appeal and review are significantly similar.[25] So what is the essential difference in the exercise of the two discretions? Is it just a matter of degree in terms of the scope of the discretion?

[21] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 377 (Kitto J); *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 191.

[22] (1996) 189 CLR 51.

[23] Geoffrey Marshall, 'Justiciability' in A Guest (ed), *Oxford Essays in Jurisprudence* (1961) 265, 277.

[24] Compare Peter Cane, 'Merits Review and Judicial Review: The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 220–6 and Anthony Mason, 'Judicial Review: A View from Constitutional and Other Perspectives' (2000) 28 *Federal Law Review* 213, 331, 333–4. Though the authors are focussing on the difference between judicial review and merits review, the discussion is relevant to the difficulty identified in the text.

[25] Compare *House v The King* (1936) 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ) and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39–41 (Mason J).

The interesting question is, however, whether a court can characterise an issue as non-justiciable (or political) because it is not 'appropriate' for a court to consider or decide, and decline to deal with it, when it is possible to formulate legal criteria and standards for resolving it. The question is theoretical in the sense that the court may well avoid the question by holding that there is an absence of such criteria and standards. That may prove to be the preferable approach because, granted the existence of jurisdiction, criteria and appropriate standards, it is not easy to see how the courts can identify, in a principled way, by reference to subject matter alone, those issues which are inherently justiciable from those which are not. It is not enough to label an issue as one which concerns international relations, national security, politics or even to identify the dispute as polycentric.[26] The current focus of the courts on the precise issue for determination rather than the broad topic, for example, international relations and national security, suggests that this may be the way forward.

Even in the United States the 'political questions' doctrine has been tempered by the recognition that in some circumstances political questions are justiciable.[27] There has also emerged a doctrine of 'equitable' or 'remedial' discretion according to which relief is refused in inappropriate cases.[28] It is an uncertain doctrine, to say the least of it.

As a matter of both analysis and principle, it is legitimate to decline to deal with an issue on the ground that it does not involve an exercise of judicial power. Invocation of that ground involves no violation of an obligation to exercise jurisdiction and no interference with a right of access to the courts.

D *The Need for an Initial Policy Determination*

It is not infrequently said that policy determinations lie beyond the province of the courts. In a broad sense this is true but it would be a mistake to rely upon the statement as if it were an absolute proposition. The courts have historically given effect to certain policies, for example, freedom of contract, freedom of competition and freedom of expression. The judicial formulation of common law principles necessarily proceeds upon some policy choices.

It is tempting to say that some policy issues are so open-ended that they are alien to the judicial process and to the exercise of judicial power. If so, it is because they cannot be resolved by the application of legal criteria and standards and they are unrelated to the formulation of legal principle. This category of non-justiciable issues is a sub-class of category D.

[26] Cane, above n 24, 216–17.

[27] For example, in *Goldwater v Carter*, 444 US 996, 999–1002 (1979) Powell J considered that the court would be under a duty to decide the question if it became clear that the Senate as a body was opposed to the termination of a treaty by the President without the approval of the Senate.

[28] See *Vander Jagt v O'Neill*, 699 F 2d 1166 (DC Cir, 1983); *Moore v United States*, 733 F 2d 946 (DC Cir, 1984).

E *Resolution Which Involves Lack of Respect Due to Other Branches of Government*

The notion that jurisdiction can be denied on this ground *alone* strikes me as distinctly odd. It may be that, where the resolution of the issue is primarily reposed in another branch of government, respect for its decision will dictate acceptance. The judicial acceptance of executive statements on matters of international relations (to be discussed in a moment) may well fall within this category or the two succeeding categories. It may also be that in cases where resolution of the issue is primarily reposed in another branch of government, the court can apply a lower level of judicial scrutiny to the decision of that branch — a matter to be discussed later.

The juridical basis of the practice of the courts in accepting as conclusive statements made by the executive government as to matters of international relations (for example, foreign boundaries, the existence of a state of war or the existence of a foreign state)[29] is problematic. Although the acceptance of such statements is dealt with as a matter of evidence, at a deeper level the acceptance may be based on the proposition that the ascertainment of these matters, being matters of foreign affairs, falls constitutionally within the province of the executive.[30]

Alternatively, the courts' practice of accepting such statements may be based on the notion that the ascertainment of these matters lies outside the institutional competence of the courts or on the notion that the courts should not engage in second-guessing the executive on what are essentially 'political questions'. Once it is recognised that these matters have a political dimension to them, this in itself is a reason for questioning the courts' institutional competence to deal with them and to review the executive decision.

However, an explanation of the courts' practice must accommodate the courts' willingness and capacity to decide the issue if the executive does not provide an appropriate statement.[31] This exercise of jurisdiction indicates that, although the issues fall primarily within the province of the executive, they are not wholly outside the province of the courts. The residual determination of these issues indicates that the courts will respect the executive decision once made, but, in the absence of such a decision, will determine the issue. A qualified separation of powers allocation of function, rather than a jurisdictional foundation, seems to underlie the courts' practice.

What I have said assumes that the executive statements are conclusive. There is an argument that the courts should not accept as conclusive a statement which cannot be reasonably supported. If that argument were to prevail,[32] a low level of

[29] *Ffrost v Stevenson* (1937) 58 CLR 528, 549 (Latham CJ); *Bradley v Commonwealth* (1973) 128 CLR 557, 562 (Barwick CJ and Gibbs J).

[30] If this be correct, then they may be matters *expressly* committed by the *Constitution* to a non-judicial agency.

[31] See *Ffrost v Stevenson* (1937) 58 CLR 528, 549 (Latham CJ).

[32] Note that in *Horta v Commonwealth* (1994) 181 CLR 183, 195–6, the court said:

> [N]othing in this judgment should be understood as lending any support at all for the proposition that, in the absence of some real question of sham or circuitous device to attract legislative power, the propriety of the recognition by the Commonwealth Executive of the

judicial scrutiny of the executive statement would need to be based not on a jurisdictional foundation, but on a separation of powers argument that justifies limited judicial review of an administrative opinion.

Finally, an executive statement cannot incapacitate the court from exercising its duty to decide a constitutional question which is committed to it.[33]

F *An Unusual Need for Unquestioning Adherence to a Political Decision Already Made*

This category is a stronger version of the preceding category and may be a more appropriate category for acceptance of executive statements than category E. The Court's refusal in the *Tasmanian Dam Case*[34] to accept the 'international concern' test as a limitation on the external affairs power may also fall within this category. It may also include decisions made within the parliamentary process which are not ordinarily regarded as justiciable in the courts except to the extent that they are made so by the *Constitution* or statute.

G *The Potentiality of Embarrassment from Multifarious Pronouncements by Various Departments on the One Question*

This category appears to be an alternative to the two preceding categories. It differs from them in that embarrassment of the court is a critical factor in justifying denial of jurisdiction. If embarrassment is to amount to a justification, it must be because such embarrassment would prejudice public confidence in the administration of justice, a matter of which the High Court has taken account.[35] Whether it could ever justify a refusal to exercise jurisdiction is another matter.

H *Summary*

In *Baker v Carr* Brennan J thought that each of his categories had 'one or more elements which identify it as essentially a function of the separation of powers'.[36] As long as this comment is understood as saying no more than that separation of powers is *a* factor influencing the court's denial of jurisdiction, the comment may be accepted. In some of the categories, for example, E, F and G, an additional factor is clearly involved in persuading the court not to exercise a jurisdiction which it would otherwise exercise. Categories A, B and C are the clearest instances in which the separation of powers dictates the non-exercise of jurisdiction. In these instances, the court is not refusing to exercise jurisdiction; rather, on analysis, there is no jurisdiction to exercise.

sovereignty of a foreign nation over foreign territory can be raised in the courts of this country.

33 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

34 *Commonwealth v Tasmania* (1983) 158 CLR 1.

35 See, eg, *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

36 369 US 186, 217 (1962).

IV THE AUSTRALIAN TREATMENT OF *BAKER V CARR*

The one instance of Australian reliance on the *Baker v Carr* 'political questions' doctrine is to be found in the judgment of McTiernan J in the *Petroleum & Minerals Authority Case*.[37] He concluded that the question whether the Senate had rejected or failed to pass the Petroleum and Minerals Authority Bill 1973 (Cth) within the meaning of s 57 of the *Constitution* was a 'political question' not within the judicial power of the Commonwealth.[38]

Of more significance has been the use of the doctrine, not to justify an outright refusal to deal with an issue, but to generate a lower level of judicial scrutiny applicable to the acts of other branches of government which fall within the realm of 'political questions'. The first instance of this use of the doctrine was by Brennan J in *Gerhardy v Brown*.[39] The relevant question there was whether s 19 of the South Australian statute[40] was a 'special measure' taken

> for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be *necessary* in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms

within article 1(4) of the *International Convention on the Elimination of All Forms of Racial Discrimination*.[41] His Honour considered that the question whether the protection was 'necessary' was 'necessarily committed to another branch of government',[42] that is the political branches of government, and the court's function was simply to determine whether they had acted reasonably in making the assessment. In reaching this conclusion his Honour had regard to the fact that the question was a question which the court was ill-equipped to answer.

A like approach was taken by Mason CJ and Brennan J in *Richardson v Forestry Commission*,[43] where the validity of Parliament's establishment of an inquiry and a regime of interim protection of an area which could be proposed for inclusion in the World Heritage List was in question. The *Convention for the Protection of the World Cultural and Natural Heritage* imposes an obligation to protect and conserve properties accepted for World Heritage listing.[44] Mason CJ and Brennan J, after referring to the legislative judgment about the situation and the *Convention* obligation that might be proved to exist, said:

> It is enough that the legislative judgment could reasonably be made or that there is a reasonable basis for making it. Particularly is this so when the ulti-

[37] (1975) 134 CLR 81, 127ff.

[38] Ibid 135. For an analysis of the judgment, see Lindell, above n 5, 201–2.

[39] (1985) 159 CLR 70, 138–43. Other members of the court, without relying on the 'political questions' doctrine, reached a similar result: 87–8 (Gibbs CJ), 104–5 (Mason J), 106–7 (Murphy J), 113 (Wilson J), 153–4 (Deane J), 161–2 (Dawson J).

[40] *Pitjantjatjara Land Rights Act 1981* (SA).

[41] Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) (emphasis added).

[42] (1985) 159 CLR 70, 139.

[43] (1988) 164 CLR 261 ('*Lemonthyme Case*').

[44] Opened for signature 23 November 1972, 1037 UNTS 151, art 5 (entered into force 17 December 1975).

> mate decision to be made by the Executive Government, whether the area, or parts of it, should be proposed for inclusion in the World Heritage List, involves a calculus of factors, including factors which are cultural, economic and political.[45]

This approach is more closely linked to the level of judicial scrutiny in administrative law cases than to the 'political questions' doctrine, though the approach draws upon some strands of thinking that inform that doctrine. The approach has the advantage that it does not entail an outright refusal to exercise jurisdiction. Instead, it involves an exercise of jurisdiction by transforming the issue so that the court concedes to the political branches of government what might be described as a significant margin of appreciation on an issue falling within the province of those branches of government.

In passing, the comment may be made that international conventions should be generally understood as leaving to the ratifying state a margin of appreciation as to its implementation of its convention obligation.[46] The low level of judicial scrutiny applied in *Gerhardy v Brown* and the *Lemonthyme Case* accords with this understanding of international conventions. Nevertheless, there is a strong case for applying that level of judicial scrutiny to legislative and executive judgments which do not implement such conventions.

V COMMENT ON JUSTICIABILITY

In the context of justiciability, non-exercise of jurisdiction invested in a court should be confined to issues which, on analysis, do not involve the exercise of judicial power because the issue is committed exclusively to a non-judicial agency or because the issue is incapable of resolution by legal criteria or ascertainable objective standards. In cases where the issue is committed primarily, but not exclusively, to another branch of government, the judgment of that branch should be subjected to a low level of judicial scrutiny. By these means, the tensions between the 'political questions' doctrine and the obligation to exercise jurisdiction can be alleviated, if not eliminated.

[45] *Lemonthyme Case* (1988) 164 CLR 261, 296.

[46] Sir Anthony Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7 *Public Law Review* 20, 24.