Justice for those who wield the sword: the constitutional basis for military discipline in the Australian Defence Force

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The purpose of this article is critically to examine the three distinct and seemingly incompatible views that have emerged concerning the constitutional basis of courts martial. In a line of cases beginning with *R v Bevan; Ex parte Elias and Gordon*[1] ('*Bevan*'), the High Court found military tribunals exercise judicial power but not 'the judicial power of the Commonwealth' within the meaning of s 71 of the *Constitution*. In *Lane v Morrison*[2] ('*Lane*'), the High Court found that, within the context of a military tribunal, the executive is acting judicially but not exercising judicial power. A third view has emerged lending support to a third view — a so-called 'military exception' to Ch III of the *Constitution*, which suggests that the first two views are irreconcilable within a broader constitutional context. Through an analysis of the historical context in which military discipline has developed, the article argues that the view enunciated in *Lane* should be the preferred interpretation, both pragmatically and on a constitutional basis.

The article argues that military discipline in the Australian Defence Force ('ADF') has always been a function of executive power, albeit exercised in a judicial manner, and that it ought to remain so. In some ways, disciplinary proceedings in the ADF bear many similarities to their criminal counterparts in courts across the country. This is hardly surprising, given the historical context in which military discipline has come into being. The modern concept of military discipline from a common law perspective draws its roots from the necessity of administering justice during the English Civil War, where discipline in the army required an enforcement mechanism but judicial action by civilian authorities was either impractical or inappropriate. The constitutional basis for military discipline can be inferred from ss 51(vi) and 68 of the *Constitution*[3] as a function of military command rather than a judicial power. This unique feature of the military discipline system sets it apart from civil courts that are established under Ch III of the *Constitution*. However, an alternative view has been proposed — the view that military discipline in the ADF should be considered as an exercise of judicial power.[4]

Before proceeding to assess the merits of the competing views, the terms 'military discipline' and 'judicial power' ought to be defined. From this foundation, two distinct approaches to reconciling the constitutional basis for military discipline in the ADF will be explored.

One of these approaches that will clearly emerge — as the most logical and most fundamentally supported by law, history, and necessity — asserts that military discipline is quite simply an application of executive power exercised in a judicial manner. From here, attention will turn to the importance of context and history when it comes to the administration of military discipline,

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1 (1942) 66 CLR 452 ('*Bevan*').

2 (2009) 239 CLR 230; [2009] HCA 29 ('*Lane*').

3 *Australian Constitution.*

4 Jonathan Crowe and Suri Ratnapala, 'Military Justice and Chapter III: The Constitutional Basis of Courts Martial' (2012) 40 *Federal Law Review*.

paying particular attention to military discipline's birth out of necessity. The remainder of the article will briefly consider the interaction between the *Constitution*, the *Defence Act 1903* (Cth) and command of the ADF, before finally turning to the matters of juries, the punishment of imprisonment and the distinction between service and criminal offences. The history, purpose and fundamental tenets of military discipline in the ADF are at odds with those of judicial power. Executive power and the prerogative have clearly envisaged military discipline as something altogether different from, and separate to, judicial power. Nevertheless, this article seeks to provide a meaningful analysis of the issues in question to demonstrate why military discipline should be viewed as a function of executive power.

Military discipline

The term 'military discipline' can encapsulate many facets of fairness, discipline and command in an armed force. For the purposes of this article, it is important not to confuse the term 'military discipline' with the term 'military justice' (which would generally include a much broader range of mechanisms and procedures within the ADF, extending beyond that of military discipline alone). The most important aspects of military discipline are the basis for 'service offences' and the procedures which follow once such charges are laid against a member of the ADF. Administrative arrangements, such as sanctions provided for under the *Military Personnel Policy Manual* or under the *Defence Regulation 2016* (Cth), are not aspects of military discipline for the purposes of this article. At a fundamental level, military discipline is rooted in concepts such as service at the pleasure of the Crown and Crown prerogative. Today the *Defence Force Discipline Act 1982* (Cth) ('DFDA') is the primary piece of legislation which deals with military discipline in the ADF. What has always been at the heart of military discipline is the requirement for extraterritorial application, expeditious application and the requirement for good order and discipline in an armed force. For the purposes of this article, 'military discipline' refers specifically to discipline law as it applies to the ADF, exercised pursuant to the DFDA.

Judicial power

A clear understanding of what is meant by the term 'judicial power' is fundamental to understanding why military discipline is not a judicial function. The use of the term has been further complicated by the terms 'judicial power of the Commonwealth' and 'exercised judicially'. It is fundamental that clarity here is established in order to articulate the reason that military discipline does not fall into the category of judicial power. For the purposes of this article, the term 'judicial power' refers to judicial functions (under the doctrine of separation of powers) carried out pursuant to Ch III of the *Constitution*. The distinction between 'judicial power' and the 'judicial power of the Commonwealth' as espoused by Starke J in *Bevan*[5] appears to have long since slipped into obscurity.[6] Ever since *Lane*,[7] the High Court has held that 'the only judicial power which the *Constitution* recognises is that exercised by the branch of government identified in Ch III'.[8] As such, in this article there will be no attempt to revisit

5 *Bevan* (n 1) 466–7.
6 Jeffrey Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from non-Criminal Detention' (2021) 36 *Melbourne University Law Review* 91.
7 *Lane* (n 2).
8 Ibid 247−8 (French CJ and Gummow J).

the issue or provide further analysis of that 'supposed distinction'.[9] Suffice to say that judicial power exercised by a Commonwealth entity *is* the judicial power of the Commonwealth for the purposes of the *Constitution*.

What is clear is that judicial power is exercised by a *court*, properly constituted pursuant to Ch III. This, as pointed out by French CJ and Gummow J (citing McHugh JA) in *Lane*, excludes courts such as the Coroner's Court.[10] This is a useful starting point, but it then raises the question: what is a court? This question was dealt with in detail in *Lane*, where the plaintiff argued that the Australian Military Court ('AMC') was a federal court established inconsistently with Ch III. Some of the indicia of such a court are that it is permanent, it is established as a court of record,[11] it can determine criminal guilt,[12] it has the power of contempt of court[13] and its judges enjoy tenure.[14] These factors were fundamental issues which led to the demise of the AMC in *Lane*. Judicial power for the purposes of this article is therefore defined as power exercised by a court 'administering the law of the land'[15] pursuant to the separation of powers, legitimately constituted consistent with Ch III, which is established as a permanent court of record, with the power to determine criminal guilt.

A tribunal acting judicially, then, is not synonymous with judicial power. The mere appearance of acting judicially is done for many reasons which can include fairness, transparency and rigour but does not automatically trigger an assumption that the tribunal is exercising judicial power for constitutional purposes.

The three (two) approaches

Various views attempting to define the constitutional basis for military discipline in the ADF have been offered, and one article[16] identifies three approaches which have emerged over time. The first view is that military tribunals in the ADF exercise judicial power but not the judicial power of the Commonwealth.[17] For reasons already stated above, this approach was effectively dismissed in *Lane* and can be safely discounted from the outset. The second approach is that ADF tribunals do not exercise judicial power at all for the purposes of the *Constitution*; rather, they are an exercise of executive power (the executive power argument). The third approach is that ADF tribunals do exercise judicial power but as an exception to Ch III of the *Constitution*. The latter two approaches will now be analysed, in order to demonstrate why the first of these two should be preferred.

9 *White v Director of Military Prosecutions* [2007] HCA 29, 123 (Kirby J).
10 *Australian Postal Commission v Dao (No 2)* (1986) 6 NSWLR 497, 515.
11 *Lane* (n 2) 105−8 (Hayne, Heydon, Crennan, Kiefel and Bell JJ).
12 Ibid.
13 These indicia (in addition to others) were outlined by the plaintiff in *Lane* as detailed by K Cochrane in '*Lane v Morrison* [2009] HCA 29' (2010) *AIAL Forum* 61, 70.
14 *Australian Constitution* s 71.
15 *R v Cox; Ex parte Smith* [1945] HCA 18 ('*Cox*') 23 (Dixon J).
16 Crowe and Ratnapala (n 4).
17 Ibid 161, 163.

The executive power argument

From the outset, this approach enjoys legitimacy as a result of the High Court's judgment in *R v Kirby; Ex parte Boilermakers' Society of Australia*[18] ('*Boilermakers*'), in which it was declared that Ch III 'is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested … [N]o part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap III'.[19] By not claiming to be a court exercising judicial power, the executive power justification of ADF military tribunals is consistent with *Boilermakers*. This view was more recently reinforced by French CJ and Gummow J, who stated that 'the only judicial power which the *Constitution* recognises is that exercised by the branch of government identified in Ch III'.[20] As a result of the absence of any pretence of masquerading as a court wielding judicial power, the basis for military justice as accepted by the High Court is the defence power. Section 51(vi)[21] allows Parliament the power to legislate regarding 'the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth'. Section 68[22] provides that the Governor-General is the Commander-in-Chief of the naval and military forces of the Commonwealth. Taken together, these sections have long formed the constitutional justification for military discipline in the ADF on the understanding that the '[m]aintenance of an effective defence force can be viewed as a constitutional imperative'.[23] Writing from a US perspective, Maurer states, '[t]he military's function as an organ of government responsible for executing national defense relies on the good order and discipline of its members'[24] and that this fact is 'uncontroversial'.[25] Necessity forms an important aspect of the executive power argument, as was highlighted in *Re Tracey*; *Ex parte Ryan*[26] ('*Tracey*'):

> [T]he defence power is different because the proper organization of a defence force requires a system of discipline which is administered judicially, not as part of the judicature erected under Ch III, but as a part of the organization of the force itself. Thus the power to make laws with respect to the defence of the Commonwealth contains within it the power to enact a disciplinary code standing outside Ch III and to impose on those administering that code the duty to act judicially.[27]

In *Bevan*, Williams J justified military discipline as a legitimate exercise of executive power outside of judicial power because of its necessity in assisting 'the Governor-General, and Commander-in-Chief of the Naval and Military Forces of the Commonwealth, to control the forces and thereby maintain discipline'.[28] It should not be forgotten that military discipline is fundamentally an exercise and responsibility of command. Kennett highlights that, in *White*

18 (1956) 94 CLR 254 ('*Boilermakers*').
19 Ibid 270.
20 *Lane* (n 2) 48.
21 *Australian Constitution*.
22 Ibid.
23 Geoffrey Kennett, 'The Constitution and Military Justice after *White v Director of Military Prosecutions*' (2008) 38(2) *Federal Law Review* 231.
24 Dan Maurer, 'Are Military Courts Really Just Like Civilian Criminal Courts?' *Lawfare* (Blog Post, 13 July 2018), <https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts>.
25 Ibid.
26 [1989] HCA 12 ('*Tracey*').
27 Ibid 17 (Mason CJ, Wilson and Dawson JJ).
28 *Bevan* (n 1) 481 (Williams J).

v Director of Military Prosecutions[29] ('*White*'), Callinan J recalled that matters of command (which necessarily includes military discipline) are vested in the executive[30] and that discipline is a function of command that might not be subject to judicial supervision under Ch III of the *Constitution*.[31] This approach to s 68 is consistent with the reasoning provided by Gleeson CJ in *White* in dealing with the defence power:

> history and necessity combine to compel the conclusion, as a matter of construction of the *Constitution*, that the defence power authorises parliament to grant disciplinary powers to be exercised judicially by officers of the armed forces and, when that jurisdiction is exercised, the power which is exercised is not the judicial power of the Commonwealth.[32]

As will be further discussed below, the historical development of military discipline and the de jure position held by military discipline at the time the *Constitution* was drafted are both highly influential in the understanding of military discipline as an executive function: 'At the time of federation, legislatively based military justice tribunals were a "well-recognised exception" to the judicial system for determining guilt.'[33] The fact that the exercise of military discipline demands judicial-like procedures in nature is necessitated by the concept of fairness due to an obligation to exercise the power in a 'proper and judicial way'.[34] White helpfully notes that it is not uncommon for many 'strictly administrative bodies' to do this.[35]

In *Lane*, the entire bench was 'inclined to the view that traditional courts martial … did not exercise judicial power at all for constitutional purposes'.[36] The view that military discipline in the ADF is a matter for the executive pursuant to s 51(vi) enjoys wide support in academic[37] and judicial[38] circles.

The exception to the Chapter III argument

Any approach which suggests that the authority of ADF military discipline is judicial in nature must overcome the prohibition laid out in *Boilermakers*, outlined above. This is the first major hurdle, over which it is submitted that the 'exception to Ch III' argument cannot successfully negotiate. The 'exception to Ch III' argument asserts that military discipline is an exercise of judicial power, which is an exception to Ch III of the *Constitution* and therefore an exception to *Boilermakers*. The problem with this approach is that there is little persuasive or authoritative legal basis to support it. There are several issues. First, to adopt it would incur the inference that (since it is judicial power) it must be exercised by a court (which DFDA tribunals are not).

29 *White v Director of Military Prosecutions* [2007] HCA 29 ('*White*').
30 Ibid 240 (Callinan J); also see Kennett (n 23) 247.
31 Ibid 241, 242 (Callinan J) cited by Kennett (n 23) 247.
32 *White* (n 29) 14 (Gleeson CJ).
33 Kennett (n 23) 245−6.
34 *White* (n 29) 240 (Callinan J).
35 M White, 'Military Justice and Chapter III: The Constitutional basis of Courts Martial — Commentary on Article' (Seminar Paper, Australian Association of Constitutional Lawyers Seminar, Sydney, 8 May 2013).
36 Crowe and Ratnapala (n 4) 167.
37 James Stellios, 'Military Justice and the Constitution' in Robin Creyke et al (eds), *Military Law in Australia* (The Federation Press, 2019) 56.
38 *Lane* (n 2); Michael Burnett, 'Does the ADF require a Chapter III Military Court?' (Speech, Federal Circuit Court of Australia, Judge Advocate General's Conference, 28 October 2013) <http://www.federalcircuitcourt.gov.au.wps/wcm/connect/fceweb./reports-and-publications/speeches-conference-papers/2013/paper-Burnet-military-court>.

Second, it is not supported by the relevant history and context in which military discipline has developed and is inconsistent with the legal realities of military discipline at the time when the *Constitution* and the Defence Act were drafted. Third, it would require an exception to the strict separation of powers.[39] Fourth, it would be inconsistent with the recently decided High Court unanimous judgment in *Lane* and invite the possibility that the AMC should have been found to be legitimate.[40]

As a basis for this approach, an argument can be made regarding the availability of imprisonment as a punishment under the DFDA, which is generally a punishment only available pursuant to judicial power. For example, in *Chu Kheng Lim v Minister for Immigration*, *Local Government and Ethnic Affairs*[41] it was held that the involuntary detention of aliens for any other purpose than was strictly necessary to enable assessment of their case or deportation (such as for punitive purposes) would contravene Ch III. It can be argued, therefore, that, since imprisonment under the DFDA is possible, ADF tribunals must be exercising the judicial power of the Commonwealth. Ratnapala and Crowe point to *Al-Kateb v Godwin*[42] — another case involving aliens and deportation — as authority for this argument. However, it is important to note that, first, neither of these cases took place in the context of military discipline — these cases can be distinguished on the basis that the detention of aliens was not exercised pursuant to the defence power; second, the matter of dealing with aliens is not subject to military command pursuant to s 68 of the *Constitution*, whereas military discipline is so subject; and, third, imprisonment under the DFDA is imposed as a punishment in respect of guilt for 'service offences', not criminal offences. These cases, which involve immigration and deportation of aliens, support the proposition that involuntary detention for anything other than legitimate executive functions must rely on judicial power. However, it should be noted that the application of military discipline *is* a legitimate executive function. The relevance of these cases to the question of the constitutional basis for military discipline in the ADF is therefore limited.

This 'exception to Ch III' argument draws on the previously dismissed distinction between 'judicial power' and the 'judicial power of the Commonwealth'. While differing opinions continue to be presented,[43] there is ample support[44] to conclude that the distinction can be discarded and that the only judicial power of the Commonwealth must be executed pursuant to a strict interpretation of Ch III of the *Constitution* and that the distinction should be discarded. Nevertheless, an important passage relied upon to form the basis of this argument is taken from Kirby J in *White*:

> The supposed point of distinction, propounded to permit service tribunals to escape from this characterisation in s 71 of the *Constitution*, is that, whilst they exercise 'judicial powers', it is not 'the judicial power of the Commonwealth under Ch III of the *Constitution*' As a matter of language, logic, constitutional object and policy, this supposed distinction should be rejected. It has never hitherto commanded endorsement of a majority of this Court. It should not do so now.[45]

39 Which was established in *Boilermakers* which permits no flexibility in the separation of powers.
40 Paul Brereton, 'Military Justice and Chapter III: The Constitutional Basis of Courts Martial — Commentary' (Seminar Paper, Australian Association of Constitutional Lawyers Seminar, Sydney, 8 May 2013).
41 (1992) 176 CLR 1, 33.
42 (2004) 219 CLR 562.
43 Both Edelman J and Gageler J made some interesting comments pertaining to s 68, Ch III of the *Constitution* and the maintenance of military discipline in *Private R v Cowan* [2020] HCA 31.
44 Gordon (n 6) 91; *Lane* (n 2) 48 (French CJ and Gummow J), 114 (Hayne, Heydon Crennan, Kiefel and Bell JJ); *White* (n 29) 123 (Kirby J).
45 *White* (n 29) 123 (Kirby J).

Ratnapala and Crowe conclude that the power 'exercised by military tribunals is both judicial power and judicial power of the Commonwealth … Kirby J concedes that a limited exception to this rule (*Boilermakers*) is necessary in order to support the historical jurisdiction of courts martial'.[46] This article suggests that a preferable interpretation of Kirby's reasoning above is that the power exercised by military tribunals is neither 'judicial power' nor the 'judicial power of the Commonwealth' and that the distinction should be discarded.

In summary, the 'exception to Ch III' argument demands acceptance of the conclusion that military discipline is an exercise of judicial power, mainly on the basis that the standard of proof required to determine guilt for a service offence is the criminal standard and that the punishment of imprisonment is possible. Ergo, an exception to the separation of powers mandated by *Boilermakers* must be allowed. The 'exception to Ch III' argument may be convenient in a broader constitutional context. It may lead to a point where questions about the judicial-like nature of military discipline proceedings become irrelevant — ergo, if it looks like a court and acts like a court, it must be exercising judicial power. It is also elegant in its simplicity. Notwithstanding these strengths, it does not automatically follow that it would make good law. For the reasons addressed in this section, combined with insufficient regard for the historical context in which military discipline developed, it is asserted that an exception to *Boilermakers* does not allow for the role of command (s 68), does not acknowledge the role of executive power in maintaining good order and discipline in the ADF (s 51(vi)), is inconsistent with the unanimous decision in *Lane*, and is therefore problematic.

Historical background

The historical development of military discipline shows that to consider the exercise of military discipline law as an exercise of judicial power under Ch III is problematic.

The role of command maintaining and enforcing discipline is clearly articulated in the following passage:

> In the long history of warfare it has come to be regarded as a truism that any effective and successful military force must be well disciplined. That discipline is to be *maintained and enforced by commanders* at all levels.[47]

The fact that the ADF is often called upon to deploy outside of Australian sovereign territory necessitates the requirement of a swift and fair system to administer military discipline by the ADF itself. The realities of operational service will often necessitate that military discipline be carried out in a theatre where no Australian court exercising judicial power can sit. For example, during the Second World War the Australian military forces conducted 47,141 courts martial proceedings.[48]

Although *Tracey* was decided some time ago, the historical analysis provided in the case

46 Crowe and Ratnapala (n 4) 175.

47 Richard Tracey, 'The Constitution and Military Justice' (2005) 28(2) *University of New South Wales Law Journal* 426 (emphasis added); Richard Tracey, 'Military Discipline Law' in Robin Creyke et al (eds), *Military Law in Australia* (The Federation Press, 2019) 80.

48 L Mead, 'Not Exactly Heroic But Still Moderately Useful: Army Legal Work During the Second World War 1939–1945' in Bruce Oswald et al (eds), *Justice in Arms: Military Lawyers in the Australian Army's First Hundred Years* (Big Sky Publishing, 2014) 136.

remains particularly insightful. It is helpful to recall that, when the *Constitution* came into being, the previous law which applied to the military and naval forces of the colonies continued to apply, and this fact was acknowledged by the Defence Act.[49] What is even more relevant is the history behind those previous legislative arrangements. Brennan and Toohey JJ reach further back in history by outlining the basis for military command in its most undiluted form — that which was exercised by a sovereign monarch in person, as and when armies were raised as required. Under such circumstances, it should come as no surprise that the discipline and good order of such forces was purely a matter for the Crown to determine as it saw fit, 'which came to be known as the Articles of War'.[50] As far back as 1792, the difficulty of achieving a balance between maintaining a strong military and a strong parliament (to which the military, particularly the army, was subservient) was recognised:

> The army being established by the authority of the Legislature, it is an indispensable requisite of that establishment that there should be order and discipline kept up in it, and that the persons who compose the army, for all offences in their military capacity, should be subject to trial by their officers. That has induced the absolute necessity of a mutiny act accompanying the army … It is one object of that act to provide for the army; but there is a much greater cause … the preservation of the peace and safety of the kingdom: for there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army.[51]

The effect of the *Mutiny Act 1689* (Imp) was to acknowledge the Crown's authority to make Articles of War, but those articles were bound by restrictions imposed by the Act.[52] As Brennan and Toohey JJ point out, 'the prerogative authority to make Articles of War was eventually superseded by a statutory power'.[53] The *Army Discipline and Regulation Act 1879* (Imp) attempted to merge many operative aspects of the previous Mutiny Act and Articles of War as they existed from time to time. The *Army Act 1881* (Imp) was merely another step in the direction of covering the field. However, it is important to note that the Crown's ability to proclaim Articles of War was retained, but only insofar as those articles were consistent with the Act.

In 1903 the Defence Act[54] (ss 55 and 56) effectively adopted the *Army Act 1881* (Imp) to provide the basis for maintaining good order and discipline of the forces of the Commonwealth.[55] The significance of this should not be understated. Not only does this fact reliably inform us of the historical background and context in which the application of discipline law was based but it also provides an insight into how s 51(vi) of the *Constitution* should be interpreted. It is abundantly clear from the detailed history of military discipline law provided by their Honours in *Tracey* that the application of military discipline was never considered as based on a notion of judicial power. The head of power was originally the Sovereign as Commander-in-Chief and, later, executive power was exercised through commanders pursuant to legislation (or Articles of War in certain circumstances). As such,

49 *Tracey* (n 26) 18 (Brennan and Toohey JJ). The following legislation existed prior to federation: *Military and Naval Forces Regulation Act 1871* (NSW); *Defences and Discipline Act 1890* (Vic); *The Defence Act 1884* (Qld); *The Defences Act 1895* (SA); *The Defence Forces Act 1894* (WA); *The Defence Act 1895* (Tas), all of which (according to their honours) closely mirrored the development of their counterparts in the United Kingdom.

50 *Tracey* (n 26) 6 (Brennan and Toohey JJ).

51 *Grant v Gould* (1792) 2 HBL 69, 99 (Lord Loughborough), cited by Brennan and Toohey JJ in *Tracey* (n 26) 9.

52 C Moore, *Crown and Sword: Executive Power and the Use of Force by the Australian Defence Force* (ANU Press, 2017) 86.

53 *Tracey* (n 26) (Brennan and Toohey JJ).

54 Act No 20 of 1903 <https://www.legislation.gov.au/Details/C1903A00020>.

55 *Tracey* (n 26) 18 (Brennan and Toohey JJ).

the defence power for raising and maintaining military and naval forces of the Commonwealth was clearly intended to allow for the creation of a system to enforce military discipline which was outside Ch III of the *Constitution*. Such was the accepted norm at federation, and such was clearly the interpretation when the Defence Act was drafted and promulgated (only two years after federation). While debate existed as to what could legitimately be considered a 'service offence', and concern of encroachment on the ordinary criminal law by military law during times of 'peace within the Realm',[56] there does not appear to be any controversy surrounding the assertion that the head of power for military discipline was executive in nature, not judicial.

These arrangements eventually gave way to the DFDA. Since the matter of military discipline was subjected to statute by Parliament, the exercise of those powers pursuant to statute has remained an executive function exercised by command: 'The [DFDA] is a good example of a field in which statute has replaced regulation by prerogative almost completely.'[57] As will be detailed later, this involvement of command in the system remains paramount to the viability of courts martial from a constitutional perspective and to their categorisation as an exercise of executive power rather than judicial power.

Legislation, the *Constitution* and command

The executive power to maintain and enforce military discipline pursuant to s 51(vi) of the *Constitution* is informed by both historical development and the application of s 68 of the *Constitution*. The following sections of the Defence Act,[58] as it applied at federation, clearly demonstrate that s 51(vi) was to be inferred as acknowledging executive power to maintain good order and discipline of the naval and military forces of the Commonwealth and reinforced the role of command in the execution of military discipline:

> 86. The Governor General may —
>
> (a) Convene courts-martial;
>
> (b) Appoint officers to constitute courts-martial; and
>
> (c) Approve, confirm, mitigate or remit the sentence of any court-martial.
>
> 88. Except so far as inconsistent with this Act, the laws and regulations for the time being in force in relation to the composition, mode of procedure, and powers of courts-martial in the King's Regular Forces shall apply to courts-martial under this Act in relation to the Military Forces, and the laws and regulations for the time being in force in relation to the composition, mode of procedure, and powers of courts-martial in the King's Regular Naval Forces shall apply to courts-martial under this Act in relation to the Naval Forces.

Although these sections no longer appear in the Defence Act as it applies today,[59] there are numerous references to the nature of command and particular provisions which reinforce the continuing prevalence of the 'command' of the ADF. Nothing in the Defence Act amends

56 Ibid 8 (Brennan and Toohey JJ).
57 Moore (n 52) 56; Logan J made a similar observation of the notion of service at the Crown's pleasure in *Millar v Bornholt* [2009] FCA 637 [72].
58 Act No 20 of 1903 <https://www.legislation.gov.au/Details/C1903A00020>.
59 Compilation n 77 of 18 December 2020.

or interferes with the nature of command in the ADF laid out in s 68 of the *Constitution*. It is useful here to take special note of the fact that in 1903 'the Army Act 1881 (Imp) and the *Naval Discipline Act 1866* (Imp) … were given full effect in respect of Australian Forces in wartime'.[60] Starke J commented that:

> the scope of the defence power is extensive … and although the power contained in s 51 (vi) is subject to the *Constitution*, still the words 'naval and military defence of the Commonwealth and control of the forces to execute and maintain the laws of the Commonwealth', coupled with s 69 [sic] and the incidental power (s 51 (xxxix)) indicate legislative provisions special and peculiar to those forces in the way of discipline and otherwise, and indeed the Court should incline towards a construction that is necessary, not only from a practical, but also from an administrative point of view.[61]

Justice Logan made the pithy observation that there is no constitutional basis for the judiciary to command and control the ADF, stating that the judiciary is neither trained nor resourced to carry out that function.[62] He concludes his paper by further reinforcing the history of warfighting and the necessity that military discipline be left alone as an execution of executive power as a function of command '[w]ithin the bounds of constitutional legislative competence: the choice of means [of military discipline] is a matter for the legislature, not the judiciary'.[63] He finishes by inferring that defining military discipline as an exercise of judicial power or 'civilianising' would largely equate to a 'contradiction not just in terms but also in thinking'.[64]

Ultimately, military discipline should be viewed as an exercise of executive power because without input from command throughout the entire process — which informs the context and judgment of the trial of service offences — the offences and any subsequent convictions would risk losing much of their meaning. Military discipline proceedings under the DFDA are meaningless without approval of conviction and punishment by the appropriate level of command. This fact was articulately summed up by Platt J in 1821, who stated:

> The proceedings of the CourtMartial were not definitive, but merely in the nature of an inquest, to inform the conscience of the commanding officer. He, alone, could not condemn or punish, without the judgment of a CourtMartial; and, it is equally clear, that the Court could not punish without his order of confirmation.[65]

This insight into the complementary relationship between military discipline proceedings and the role of command in approving those proceedings is as relevant today as it was in 1821.

60 Tracey, 'The Constitution and Military Justice' (n 47) 426–7; also expressed by Jim Waddell, 'From Federation to Armistice: The Earliest Army Legal Officers' in Bruce Oswald et al (eds), *Justice in Arms: Military Lawyers in the Australian Army's First Hundred Years* (Big Sky Publishing, 2014) 2; and Henry Burmester, 'The Rise, Fall and Proposed Rebirth of the Australian Military Court' (2011) 39 *Federal Law Review* 196.

61 *Bevan* (n 1) 468.

62 John Logan, 'Military Court Systems: Can They Still Be Justified In This Age?' (Conference Paper, Specialist Subjects Session 4B, Commonwealth Magistrates and Judges Association 18th Triennial Conference, Brisbane, 10 September 2018).

63 Ibid.

64 Ibid.

65 *Mills v Martin* 19 Johns 7, 30 (1821), cited in *Lane* (n 2) 85.

Acting judicially

With sound constitutional, legislative, historical, practical and logical basis for the categorisation of military discipline as an exercise of executive power, this article will now address some of the contentious features of military discipline which give it the *appearance* of a judicial function.

A court of record and power of contempt of court

One of the key criticisms of the AMC was that it purported to be a court of record which had the ability to enforce its own decisions and had the power of contempt of court. In *Lane*, French CJ and Gummow J identified a court of record as having the power to 'both make its determinations and enforce them'.[66] They found that the AMC was so constituted, and this was one of the grounds upon which it was subsequently struck down as unconstitutional. They also noted that the AMC 'goes beyond what as a matter of history was encompassed by the administration of military justice by a hierarchical command structure'.[67] It is worth noting that as far as the 'contempt of court' aspect of the argument goes, the original iteration of the Defence Act provided the following:

> 89. Any person who wilfully interrupts or disturbs the proceedings of a court-martial, or uses insulting language towards the court or the members thereof, or who by writing or speech uses words calculated to improperly influence the court or the members thereof or the witnesses before the court, shall be guilty of contempt of court, whether the act committed was committed in the court or outside the court.
>
> 91. Contempt of court shall be punishable as follows: —
>
> (a) On conviction before a court-martial or court of summary jurisdiction by fine not exceeding Twenty pounds or by imprisonment not exceeding two months;
>
> (b) On conviction before the High Court or a Justice thereof or a Supreme Court or a Judge thereof by fine or imprisonment in the discretion of the court.

Therefore, in 1903, when the Defence Act first received royal assent, courts martial did have a power of contempt of court, albeit created by statute. It must be noted that this power granted by the Defence Act was not an inherent power enjoyed by a court of record at common law. The result of this is that the 'contempt of court' argument alone, raised in *Lane*, relies on a clear (and accurate) distinction between the power of contempt of court held by a court of record on one hand and a statutory power similar to contempt of court, such as that provided for under s 53 of the DFDA and s 89 of the current compilation of the Defence Act, on the other.[68] The court of record argument in respect of *Lane* stands, as long as it is accepted that AMC's ability to enforce its own decisions absent of command input alone meant that it was illegitimately exercising judicial power.

66 *Lane* (n 2) 33.
67 Ibid 37.
68 Compilation No 77 of 18 December 2020.

The most fatal aspect of the AMC could perhaps be summed up as the removal of a command review process which implied that the AMC was capable of making and enforcing its own decisions, which has always been such an important aspect of military discipline proceedings.[69] The exercise of military justice in the ADF, both before the AMC and post *Lane*, ensures that command exercises its powers of review with respect to summary and superior tribunals as provided for under the DFDA. As stated by Dixon J, '[t]o ensure that discipline is just, tribunals acting judicially are essential to the organisation of an army, navy or air force. But they do not form part of the judicial system administering the law of the land'.[70]

Imprisonment

It has been argued[71] that military discipline in the ADF should be framed as an exercise of judicial power because the punishment of imprisonment can be imposed in respect of a conviction for some service offences. There are two important issues which this argument overlooks. First is the principle that deprivation of liberty as a punitive measure for criminal guilt can only be imposed pursuant to judicial power. This principle must be applied literally — military discipline proceedings in the ADF do not (and have no power to) determine criminal guilt; rather, they determine guilt of a 'service offence' (which is not brought on indictment). The fact that the standard of proof required to convict is the same as that required in criminal proceedings is irrelevant — that fact alone does not lead to a conclusion that criminal guilt is determined under military discipline proceedings. Secondly, French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ have succinctly summed up the justification for a special exemption for military discipline in this regard:

> It is to be borne … that this Court has repeatedly upheld the validity of legislation permitting the imposition by a service tribunal that is not a Ch III court of punishment on a service member for a service offence … Punishment of a member of the defence force for a service offence, even by deprivation of liberty can be imposed without exercising the judicial power of the Commonwealth. Because the decisions made by … service tribunals are amenable to intervention from within the chain of command, the steps taken to punish service members are taken only for the purpose of, and constitute no more than, the imposition and maintenance of discipline within the defence force.[72]

Therefore, the availability of imprisonment for the purpose of maintaining military discipline should not lead to a conclusion that military discipline in the ADF is an exercise of judicial power. On the contrary: it has long been accepted that the punishment of a member of the ADF for a service offence, including a punishment involving a deprivation of liberty, can be imposed outside the judicial power of the Commonwealth.

Juries and the distinction between crimes and service offences

The right granted by s 80 of the *Constitution* to trial by jury (which is not observed in military discipline proceedings in the ADF) is the final matter to be addressed. However, the explanation as to why this is the case is remarkably simple. The *Constitution* provides that '[t]he trial on *indictment* of any offence against any law of the Commonwealth shall be by

69 Waddell (n 60) 13.
70 *Cox* (n 15) 23 (Dixon J).
71 Crowe and Ratnapala (n 4) 172.
72 *Haskins v Commonwealth* [2011] HCA 28, 21.

jury'.[73] Service offences pursued under the DFDA are not brought on indictment because they do not allege criminal offences. Further, a jury is not required by law for the trial of a service offence because a service offence is not indictable. All that s 80 requires is that the trial on indictment of an offence against a law of the Commonwealth will be by jury.[74] This is possible because the DFDA avoids the application of s 80 of the *Constitution*.[75] Even when a service offence is constituted by substantially the same conduct as a criminal offence, the offences themselves can always be distinguished from each other.

Although *R v Stillman*[76] ('*Stillman*') is a decision of the Supreme Court of Canada which has its own unique constitutional arrangements, there are important similarities between the Canadian Armed Forces and the ADF. Both jurisdictions share a common law background in which military law originated from England. The Canadian *National Defence Act*[77] ('NDA') and the DFDA share numerous similarities, including a provision to charge criminal offences as 'service offences'.[78] Both states have constitutional rights to trial by jury (and exceptions to this right — constructed somewhat differently).[79] The majority in *Stillman* held that the exception to the right of a trial by jury under the Canadian constitution was valid in respect of charges based on service offences.

The decision to deny a right to a jury trial in *Stillman* demonstrates an international perspective that offences charged pursuant to military discipline framework should not be subject to a trial by jury. Military discipline determines guilt in respect of service offences which are not crimes, and service offences are not brought on indictment.

The way forward: further research

The principles set in *Lane* are now firmly established and the AMC is no longer. It may be that a permanent military court of any sort outside of command may be impermissible due to s 68 of the *Constitution*.[80] Although there was further thought to the establishment of a federal court to try serious service offences (in the guise of a 'Military Court of Australia' established under Ch III, as opposed to the unconstitutional AMC) which would be compatible with the decision in *Lane*, that Bill[81] has now lapsed and the current system of military discipline in the ADF appears to the operating satisfactorily. The more recent High Court judgment in *Private R v Cowan*[82] has clear implications pertaining to the jurisdiction of tribunals under the DFDA. It also has consequences for the nature and character of 'service offences' imported by virtue of s 61 of the DFDA. The question of whether a tribunal under the DFDA

73 *Australian Constitution* s 80 (emphasis added).
74 *Kingswell v The Queen* [1985] HCA 72 (Gibbs CJ, Wilson and Dawson JJ).
75 Stellios (n 37) 55.
76 2019 SCC 40.
77 RSC 1985 (Canada).
78 *Defence Force Discipline Act 1982* (Cth) s 61; *National Defence Act* RSC 1985 (Canada) s 130.
79 The right in Canada is explicitly exempt from application to 'offences under military law'. In Australia the right to jury trial exists only for offences brought on 'indictment' — services offences are not brought by way of indictment; rather, they are 'charged'.
80 However, it should be noted that both Edelman J and Gageler J made some interesting comments pertaining to s 68, Ch III, of the *Constitution* and the maintenance of military discipline in *Private R v Cowan* [2020] HCA 31.
81 Military Court of Australia Bill 2012.
82 *Private R v Cowan* [2020] HCA 31.

— during peace time in Australia, where a conviction could rest on the decision of a panel of three out of five ADF officers — is an appropriate forum to determine guilt for allegations which essentially amount to serious criminal offences requires careful analysis. Time will tell whether this issue is considered in the future and what the implications might be for military justice in the ADF and the jurisdiction to try imported 'service offences' which effectively amount to serious criminal offences.

Conclusion

A sound executive and legislative basis, constitutional interpretation, history, the nature of command, 'operational needs'[83] and the High Court judgment in *Lane* combine to lead to the conclusion that military discipline is not an exercise of judicial power which is an exception to Ch III of the *Constitution* but, rather, is executive power exercised in a judicial way. This article has shown that this view is preferable over other approaches for several reasons. First, a historical analysis of the development of military discipline and how military discipline was considered at the time the *Constitution* was drafted clearly shows that it was originally based on Crown prerogative and later defined as an exercise of executive power, eventually administered by way of statute.[84] Second, ss 51(vi) and 68 of the *Constitution* provide a sound constitutional basis to support the argument that military discipline is a function of executive power, through command of the military and naval forces of the Commonwealth. And, third, the administration of military discipline does not exercise, and does not purport to exercise, judicial power. While it may be administered in a judicial manner, that alone does not amount to an exercise of judicial power. The High Court has long recognised that the *Constitution* makes particular allowance for imprisonment for service offences pursuant to military discipline, without triggering a requirement to exercise judicial power. To avoid risking a jurisdictional void in respect of service offences committed outside of Australian territory, and to allow for the expeditious prosecution of alleged service offences, it could hardly have come to an alternative conclusion without grappling with serious practical ramifications. The 'end to be achieved by martial law, consistently with s 51(vi) of the *Constitution*, is the promotion of the efficiency, good order and discipline of the defence forces'[85] and, as such, military discipline is firmly a matter for the executive.

83 Stellios (n 37) 56.
84 Burmester (n 60) 196.
85 *Tracey* (n 26) 13 (Mason CJ, Wilson and Dawson JJ).