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PROTECTION OF JUDICIAL PROCESS AS AN IMPLIED CONSTITUTIONAL PRINCIPLE

INTRODUCTION

IT is commonly believed that the central issues in constitutional interpretation are beginning to revolve less around Commonwealth powers and State rights, and more around the implication of fundamental rights and freedoms.[1] The most infamous example of the new approach was the 1992 decision by the High Court of Australia to recognise the underlying constitutional doctrine of representative government and use it to imply a guarantee of freedom of discussion of political affairs into the Australian Constitution.[2] If the Court was willing to recognise that the Constitution enshrines some principles of representative democracy and to imply guarantees of individual freedoms from that, it ought also to consider what other principles of governance may be established by the Constitution and what fundamental rights and freedoms might be implied from them. A fertile area for consideration would be the federal jurisdiction of certain courts established by Chapter III of the Constitution. There is some support for the argument that Chapter III of the Constitution contains an underlying assumption that judicial process should be followed in courts exercising federal jurisdiction and a minority of the court have begun to champion this notion.

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1 For example see Doyle, "Constitutional Law: 'At the Eye of the Storm'" (1993) 23 *UWA L Rev* 15; Hanks, "Constitutional Guarantees" in Lee & Winterton, *Australian Constitutional Perspectives* (Law Book Co, North Ryde 1992) pp92-128; Lee, "The Australian High Court and Implied Fundamental Guarantees" [1993] *Public Law* 606 at 610; Toohey, "A Government of Laws and Not of Men" (1993) 4 *PLR* 158.

2 *Nationwide News v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth*, (the Political Advertising Case) (1992) 177 CLR 106.

In this paper I will argue that it is both logical and likely that the High Court will imply a guarantee of judicial process from Chapter III of the Australian Constitution. Firstly, it is consistent with the trend in constitutional interpretation for the Court to broaden the fundamental doctrine of the separation of judicial power in Chapter III to include implications of fundamental rights and freedoms. Secondly, I will review the suggestions that have been made in some recent cases by a minority of the Court for a guarantee of judicial process, and the reasons they were not accepted by the majority in each case. I will argue, following Gaudron J, that the concept of "judicial power" should be reinterpreted to include a process element. Thirdly, I will show that such a reinterpretation of judicial power would not only be consistent with the approach of the court in the *Political Advertising Case*, but also with the approach of the Court to constitutional interpretation shown in another recent case on s80, a Chapter III provision.

MAKING IMPLICATIONS OF RELEVANCE TO INDIVIDUALS: THE *POLITICAL ADVERTISING CASE*

In *Nationwide News*, Deane and Toohey JJ recognised:

> There are at least three main general doctrines of government which underlie the Constitution and are implemented by its provisions. One of them is the doctrine or concept of a federal system under which the content of legislative, executive and judicial powers is divided between a central (or Commonwealth) government and regional (or State) governments. Another is the doctrine of a separation of legislative, executive and judicial powers ... [T]he third of those general doctrines of government which underlie the Constitution and form part of its structure ... can conveniently be described as the doctrine of representative government[3]

In that case a majority of the High Court relied on the doctrine of representative government for the first time. The other two doctrines, of federalism and the separation of powers, had both already been utilised by the High Court for a long time. However they have never been used as a basis for the implication of guarantees of relevance to individuals, the way the doctrine of representative government was used in that case.

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3 *Nationwide News v Wills* at 69-70, per Deane and Toohey JJ. Gaudron J agreed with this identification of three underlying constitutional doctrines in the *Political Advertising Case* at 209-210.

The principle of federalism was the basis for implications from the earliest days of Australian constitutionalism. The first High Court invented the doctrine of reserve powers to give effect to the underlying federal structure of the Constitution, and interpreted the Commonwealth's powers in a way that would preserve State powers wherever possible.[4] Although the reserve powers doctrine was demolished in the *Engineers* decision of 1920,[5] the Court continued to recognise that federalism was such a fundamental part of the Constitution that Commonwealth actions which threatened Australia's federal structure would be unconstitutional and outside power.[6] The High Court has repeatedly indicated that at the least the Commonwealth should not legislate "in a way which discriminates against the States by imposing special burdens or disabilities upon them" nor should it legislate "in a way which curtails their capacity to exercise for themselves their constitutional functions".[7]

The doctrine of the separation of powers is also a well established part of the Australian Constitution.[8] While the structure of the Constitution suggests the separation of legislative, executive and judicial powers,[9] its adoption of Westminster style responsible government means that the legislature and executive cannot be kept strictly separate.[10] Nevertheless, Chapter III is said to enshrine the strict separation of judicial power from executive and legislative powers.[11] The High Court has made two implications from this principle. Firstly, federal judicial power can only be vested in the three types of court established in Chapter III and not in any

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4 For example *R v Barger* (1908) 6 CLR 41.

5 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

6 *Melbourne Corporation v Commonwealth* (The State Banking Case) (1947) 74 CLR 31.

7 Quoted from the reiteration of the principle in *Leeth v Commonwealth* (1992) 174 CLR 455 at 467, per Mason CJ, Dawson and McHugh JJ. See also *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192.

8 See especially *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

9 Chapter I of the Constitution vests the legislative power of the Commonwealth in the Parliament; Chapter II vests executive power in the Governor General;, and Chapter III vests judicial power in the courts.

10 See s44(iv) and proviso, and ss62; 64 of the Constitution.

11 *R v Kirby; Ex parte Boilermakers' Society of Australia.*

other person or body.[12] Secondly, only judicial powers, or powers incidental or ancillary to judicial powers can be vested in those courts.[13]

In the past, then, the High Court has acknowledged the doctrines of both federalism (because of the federal structure established by the Constitution) and the separation of judicial power (from the vesting of judicial power by Chapter III of the Constitution), and has been willing to draw implications from them. But in making these implications the High Court has been primarily concerned with institutional issues. The High Court is willing to protect the States as institutions from interference and discrimination. But the federal structure of Australia has not been used to imply guarantees protecting the equality of the people of the States.[14] Similarly in the past the High Court has spelled out the characteristics of Chapter III courts and the subject matter of the power they, and they alone, must exercise. But they have not considered whether the separation of judicial power contains any guarantees for individuals, and have even interpreted the one express guarantee of benefit to individuals included in Chapter III narrowly.[15]

In the *Political Advertising Case*, the High Court did not simply set down guidelines as to the characteristics of the institutions of representative democracy in Australia: the Senate and the House of Representatives. The High Court saw that the doctrine of representative government was embodied in these institutions and considered what else was necessary to make representative government effective. They defined representative government to involve accountability and responsibility of the representatives to the people and thought that this meant that the people of the Commonwealth were guaranteed the right to freely and publicly discuss political affairs. Freedom of communication for individuals was indispensable to representative government as defined.[16] Consistent with

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12 *New South Wales v Commonwealth* (the Wheat Case) (1915) 20 CLR 54, *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

13 *R v Kirby; Ex parte Boilermakers' Society of Australia.*

14 *Leeth v Commonwealth* (1992) 174 CLR 455 at 484, per Deane and Toohey JJ who argue that the principle of federalism should be used to protect the people of the States, not just the States which are simply artificial entities. This is consistent with Deane J's approach in *Breavington v Godleman* (1988) 169 CLR 41.

15 That is s80 which guarantees the right to a trial by jury for indictable offences. See *Spratt v Hermes* (1965) 114 CLR 226; *R v Archdall* (1928) 41 CLR 128; *Zarb v Kennedy* (1968) 121 CLR 283; *Kingswell v The Queen* (1985) 159 CLR 264.

16 See, for example, the Political Advertising Case at 138-140, per Mason CJ.

this approach, the Court should now also be willing to recognise that the people have certain other rights or freedoms by virtue of other institutions of government established by the Constitution.[17]

JUDICIAL PROCESS IMPLIED FROM CHAPTER III: THE MINORITY VIEW

Three High Court Justices - Deane, Toohey and Gaudron JJ - have recognised that implications concerning fundamental rights and freedoms can be made from Chapter III in recent minority judgments in the *Polyukhovich v Commonwealth*[18] and *Leeth v Commonwealth*.[19] Their reasoning in these cases could lay down the framework for the implication of a general principle guaranteeing individuals the protection of judicial process in Chapter III courts.

Polyukhovich

The most cogent arguments for the view that a principle protecting judicial process should be implied in the Constitution are probably found in the judgments of Deane and Gaudron JJ in *Polyukhovich*.[20] Both Deane and Gaudron JJ held that retrospective criminal laws were inconsistent with Chapter III of the Australian Constitution which describes the requirements for the vesting of the judicial power of the Commonwealth. The majority thought that the retrospective war crimes legislation in issue was valid, and rejected the notion that retrospective criminal laws were of themselves invalid.

Both Deane and Gaudron JJ start from the orthodox view that Chapter III gives effect to the underlying constitutional doctrine of the separation of judicial from executive and legislative powers. Deane J identifies the purpose of that doctrine of the separation of judicial power by referring to historical materials and the intent of the constitutional founders:

> The main objective of the sometimes inconvenient separation of judicial from executive and legislative power had long been recognised at the time of the federation. It is to ensure that "the life, liberty, and property of the subject [is not] in

17 See Williams, "Civil Liberties and the Constitution - A Question of Interpretation", (1994) 5(2) *PLR* 82, esp at 101-103.
18 (1991) 172 CLR 501.
19 (1992) 174 CLR 455.
20 At 606-629, per Deane J; at 703-708, per Gaudron J.

> the hands of arbitrary judges, whose decisions [are] then regulated only by their own opinions, and not by any fundamental principles of law". [21]

He says that it is obvious that this objective will only be achieved if "the judicial power so vested is exercised ... in accordance with the essential attributes of the curial process". He adds that, "the Constitution's intent and meaning were that the judicial power would be exercised by those courts acting as courts *with all that that notion essentially requires.*"[22]

To define the "essential attributes of the curial process", Deane J turns to history and principle. According to his exposition of the historical and common law materials:

> the whole focus of a criminal trial is the ascertainment of whether it is established that the accused in fact committed a past act which constituted a criminal contravention of the requirements of a valid law which was applicable to the act at the time the act was done. It is the determination of that question which lies at the heart of the exclusively judicial function of the adjudgment of criminal guilt.[23]

Retrospective criminal legislation of any type breaches these principles and is therefore invalid. The law does not have to state that a *particular* person is guilty of an offence for something they have done in the past. Even a retrospective criminal law of general application is invalid. The fact that the act was not criminal at the time it was committed is enough to make its retrospective criminalisation by the Parliament a usurpation of judicial power.[24]

Gaudron J followed a similar line of reasoning to Deane J. But the basis of her argument was a re-examination of the notion of "judicial power" rather than an exegesis of the historical purpose of the doctrine of the separation of

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21 *Polyukhovichh* at 606; citing Blackstone, *Commentaries* Vol I, (17th ed 1830), p269. Deane J engages in a similar exposition of the purpose of the separation of judicial power in *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 579-580.

22 At 607 (emphasis added).

23 At 610.

24 The authority of the Australian case of *R v Kidman* (1915) 20 CLR 425, in which a retrospective criminal law was upheld, is rejected mainly on the basis that in that case the Court's attention was not drawn to the matter of Ch III: *Polyukhovichh* at 626.

judicial power. It is well recognised that "judicial power" is difficult to define.[25] She quotes the "classic" definitions of judicial power such as:

> a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons.[26]

In two other judgments she had already argued that, while traditional definitions of judicial power concentrate on its subject matter,

> it is a power that, for complete definition, requires description of its dominant and essential characteristic, namely, that it is exercised in accordance with that process which is referred to as the "judicial process".[27]

Therefore she enlarges the definition of judicial power so that it includes not only a description of *what* decisions can be an exercise of judicial power, but also describes *how* a decision should be made in order to be an exercise of judicial power. According to her, features that are essential to the judicial process include that the power can only be exercised when the tribunal is called upon to take action, it must proceed by an open and public inquiry, apply the rules of natural justice and ascertain the law as it is and the facts as they are, and then apply that law to those facts.[28]

In *Polyukhovich* she gave three examples of when a Commonwealth law would breach the principle that judicial power must be exercised in accord with judicial process. The first was where a power is to be "exercised by the application of law to facts invented by Parliament or invented according to some statutory formula or prescription".[29] The second would be where a law conferred on a court a power "to determine legal consequences on the basis that a person is who he is not or on the basis that he did what he did

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25 The Court has often commented that "judicial power" cannot be defined with precision. See *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 394 per Windeyer J. See also *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357 per Griffith CJ.

26 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374, per Kitto J.

27 *Harris v Caladine* (1991) 172 CLR 84 at 150. Also, *Re Nolan; Ex parte Young* (1991) 172 CLR 461.

28 *Harris v Caladine* at 150; *Re Nolan* at 496.

29 *Polyukhovich* at 704.

not".[30] Both cases would not be in accord with judicial process since the Parliament would decide the facts of the case not the court. She thought that the retrospective war crimes legislation fell into the third category, where

> in proceedings to determine whether a person had committed an act proscribed by and punishable by law, the law proscribing and providing for punishment of that act were a law invented to fit the facts after they had become known.[31]

She adds, somewhat caustically, that in those circumstances rather then exercising judicial power the Court would be "ascertaining whether the Parliament had perfected its intention of declaring the act in question an act against the criminal law".[32]

Thus both Deane and Gaudron JJ broadened the constitutional vesting of judicial power in Chapter III courts to include a requirement that it be exercised in accord with external concepts of what the judicial process, or the court acting as a Court, essentially requires. They had regard to common law, policy and history to decide what that involved. In this case it meant that it was the Court's role to decide what (criminal) law applied to facts that had already occurred. The Parliament could not "judge" past conduct by passing a retrospective criminal law. The correct "process" was for the courts to decide.

The majority found it possible to ignore the notion of "judicial process" in their judgments because it was not strictly necessary to Deane and Gaudron JJ's reasoning. Rather their reasoning could be placed in the familiar terms of the traditional doctrine of the separation of judicial power. While the idea that even a retrospective criminal law of *general* application is a usurpation of judicial power goes further than the traditional formulation of that doctrine, it could easily be extended to prohibit "trial by legislature". Traditional separation of powers cases such as *Boilermakers* concerned the mixing of judicial and executive powers in one body. In *Polyukhovich* Deane and Gaudron JJ thought that legislative and judicial powers were being mixed in one body, the legislature.

Since Deane and Gaudron JJ's conclusions could be understood purely in the familiar terms of the traditional doctrine of the separation of powers, there was no compulsion for the majority to deal with the extraneous issue

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30 *Polyukhovich* at 704.
31 At 704-705.
32 At 705.

of judicial process. They accepted that certain laws could be invalid because they amounted to trial by legislature, the issue then became whether a general retrospective criminal law was invalid as trial by legislature. The majority thought trial by legislature would occur only where the law was specific, where it applied to a particular person, not where it was merely retrospective.

Other members of the Court were willing to look to common law history and principle to indicate that laws that amounted to a "bill of attainder"[33] would be unconstitutional as a usurpation of judicial power inconsistent with the doctrine of the separation of judicial power in Chapter III.[34] But they argued that there was not strong enough authority or principle for Deane J's proposition that all retrospective criminal laws are unconstitutional:

> I have not seen anything in the historical materials which would indicate that the framers of the Commonwealth Constitution believed or assumed that giving a criminal statute a retrospective operation was an exercise of, or an interference with the exercise of, judicial power.[35]

Toohey J continued to support the view he had espoused in *Leeth* that the grand design of the Constitution included an important role for the separation of powers. In particular he sees judicial process as linked to this.

> The provisions of Chapter III of the Constitution function to achieve the independence of the judiciary for two related ends. First, they ensure the institutional separation of the site of judicial power from those of executive and legislative powers so that the courts may operate as a check, through review, on the other arms of government. Secondly, the independence of the judiciary is protected so as to ensure that cases are decided free from domination by other branches of government and in accordance with judicial process: *Harris v Caladine*.[36]

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33 A law stating that a particular person is guilty of an offence.

34 *Polyukhovich* at 536, per Mason CJ; at 684-689, per Toohey J; at 721, per McHugh J. Dawson J was willing to countenance the idea that bills of attainder may be impliedly unconstitutional but he thought there were difficulties with it (at 646-648).

35 At 720, per McHugh J.

36 At 685.

Although there is no case where legislation has been struck down as a bill of attainder, it now seems clear that all seven members of the High Court think that if legislation does amount to a bill of attainder it is invalid.[37] But as I have already argued this fits quite comfortably into the traditional doctrine of the separation of judicial power rather than representing a new element protecting the judicial process.

Leeth v Commonwealth

In *Leeth v Commonwealth*, Toohey J joined Deane and Gaudron JJ in making an implication of a principle protecting judicial process from Chapter III of the Constitution. The three formed a minority holding that people convicted of the same Commonwealth offence in different states could not be sentenced non-parole periods according to different principles.

Leeth was tried and convicted of a Commonwealth drugs offence in Queensland. At his sentencing the Judge made a recommendation as to his non-parole period under Queensland law in accordance with the *Commonwealth Prisoners Act* (1967) Cth which provided that the setting of minimum sentences for Commonwealth offenders was to be done according to the law of the State where the trial took place. Since parole practices were quite different in the different states, this meant that people convicted of the same offence in different States could serve quite different custodial terms depending on where they were tried. Leeth appealed to the High Court arguing that this breached an implied guarantee of equality in the Constitution.

One basis for his argument was a constitutional implication of the equality of the people of the different States of the Commonwealth. Deane and Toohey JJ were willing broaden the implications from the underlying principle of federalism in the Constitution to include such an implication.[38] Deane and Toohey JJ also found that the Constitution contains a doctrine of general legal equality of the people of the Commonwealth which is not

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37 This was treated as a settled principle in *Leeth* at 470, Mason CJ, Dawson and McHugh JJ. Similarly in *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 26-28, per Brennan, Deane and Dawson JJ (with whom Mason CJ concurred) accepted the same principle but thought it did not apply to the facts before them. McHugh J also accepted the principle but thought it did not apply (at 72). See also at 50 per, Toohey J.

38 In *Leeth* Brennan J agreed that such an implication could have been made if the Act had prescribed different maximum penalties, rather than allowing different minimums (at 475).

confined to freedom from discrimination on State grounds and they made a number of broad statements relating to Chapter III of the Constitution in the course of this argument. They argued that the Constitutional doctrine of the separation of judicial power guarantees that people who appear before the courts will be treated equally.

> Those provisions (of Chapter III) not only identify the possible repositories of Commonwealth judicial power. They also control and dictate the manner of its exercise. They are not concerned with mere labels or superficialities. They are concerned with matters of substance. Thus in Chapter III's exclusive vesting of the judicial power of the Commonwealth in the "courts" which it designates, there is implicit a requirement that those "courts" exhibit the essential attributes of a court and observe, in the exercise of that judicial power, the essential requirements of curial process, including the obligation to act judicially. At the heart of that obligation is the duty of a court to extend to the parties before it equal justice, that is to say, to treat them fairly and impartially as equals before the law and to refrain from discrimination on irrelevant or irrational grounds.[39]

Here Deane and Toohey JJ thought the Commonwealth law which authorised differing parole practices made an unnecessary differentiation of treatment between people of different states and was therefore invalid. But they did not think the law was invalid because it required the courts to exercise non-judicial power.[40] They did not think the law required the courts to act in a discriminatory way.

A second basis for Leeth's argument was a general constitutional implication from Chapter III and the doctrine of the separation of judicial power that courts should not treat people in a discriminatory way, a process right of benefit to individuals. Deane and Toohey JJ said they would not deal with this argument.[41] But Gaudron J based her judgment on it. Her Honour reaffirmed her argument that in defining "judicial power", regard should be had not only to its content but also to the "manner in and the

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39 *Leeth* at 486-487.

40 At 493. Mason CJ, Dawson and McHugh JJ make the same distinction between looking at the validity of the law and the validity of court processes, but they can find no constitutional basis for holding that a law is invalid for being discriminatory in the sense Deane and Toohey JJ find it discriminatory.

41 At 493.

processes by which the power is or is to be exercised".[42] It is therefore "an essential feature of judicial power that it should be exercised in accordance with the judicial process".[43]

In this case she thought that

> all are equal before the law. And the concept of equal justice - a concept which requires the like treatment of like persons in like circumstances, but also requires that genuine differences be treated as such - is fundamental to the judicial process.[44]

The Commonwealth law required State courts to

> exercise a general power in different ways according to a factual matter, namely, the State or Territory in which the accused person stood trial. ... As such, and in the ordinary course of events, the exercise of that power would involve a failure to treat like offences against the laws of the Commonwealth in a like manner.[45]

It was therefore invalid as contrary to the principle of judicial process and in particular the guarantee of legal equality.

The majority agreed with Deane and Toohey JJ that the law did not require the courts to act in a discriminatory way. The problem, if any, was not that judicial process was being perverted, but that the Commonwealth law was discriminatory. However, the same law applied to everyone and each particular court treated all the people who came before it the same way. Therefore the majority thought the law was justified and even if it was discriminatory, there was no constitutional basis for challenging it.

But they did indicate that they might be willing to imply certain judicial process guarantees into the Constitution in another case. They rejected Deane and Toohey JJ's argument that a discriminatory law would be invalid on the basis of some guarantee of equality implied from federalism,[46] and while they admitted that Chapter III may include extra guarantees with

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42 *Leeth* at 502.
43 As above.
44 As above.
45 As above.
46 At 467.

respect to the judicial process, they argued that judicial process was not what was at issue. In their view, the issue was not judicial process but the validity of a Commonwealth law. They admitted that the law treated people unequally but they did not think it required a court to exercise a non-judicial function. With respect, this is a difficult distinction to draw. It is true that each court applied the same general law. But the effect of the law was that different courts exercising the same jurisdiction had to treat people unequally in a significant matter. The majority distinguished between the law a court had to apply and the procedure of that court. They did not think they could find the law unconstitutional unless it amounted to a usurpation of judicial power like a bill of attainder.[47] But they did suggest Chapter III imported certain procedural guarantees into the Constitution:

> It may well be that any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power, but the rules of natural justice are essentially functional or procedural and, as the Privy Council observed in the *Boilermakers' Case*, a fundamental principle which lies behind the concept of natural justice is not remote from the principle which inspires the theory of separation of powers.[48]

Mason, Dawson and McHugh JJ, then, were willing to see the principle of natural justice as "fundamental". This is consistent with Gaudron J's view that the requirement that only judicial power be vested in Chapter III courts carries with it a requirement that Chapter III courts have to act in accordance with the "judicial process", where one of the requirements of judicial process is compliance with the rules of natural justice.

But Mason, Dawson and McHugh JJ part company with Gaudron J in her *application* of this principle in *Leeth*. They see any judicial process principle as essentially and narrowly procedural and argue that Gaudron J is trying to make it too substantive.

Dietrich v R

Deane and Gaudron JJ both mentioned the judicial process guarantee in one further case, *Dietrich v R*.[49] In that case the High Court held that a person

47 *Leeth* at 470.
48 As above.
49 (1992) 177 CLR 292.

accused of a serious offence would be entitled to legal representation as a matter of a fair trial by virtue of general administrative law. Since it was an appeal from a State criminal trial, Chapter III of the Australian Constitution was not relevant, but both Deane and Gaudron JJ said that the fundamental principle of fair trial was entrenched in the Constitution for Commonwealth offences.[50] Neither Judge gave any further explanation or authority for this view.

The Doctrine of the Separation of Judicial Power and the Meaning of Judicial Power

Thus Deane, Gaudron and Toohey JJ have pushed Chapter III of the Constitution beyond mere instructions as to *which* powers certain government bodies can exercise. They argue it also impliedly lays down a principle about *how* the courts should exercise their power. However the precise basis of that implication is not entirely clear. In Deane J's judgment in the *Polyukhovich*, it seems to come from the general policy of the doctrine of the separation of judicial power: he argues that the very purpose of separating judicial power into Chapter III courts is so that the power can be exercised in accord with judicial process.[51] In Deane and Toohey JJ's judgment in *Leeth,* the implication seems to come from the language of Chapter III: the term "courts" must be interpreted to include a requirement that Chapter III courts "exhibit the essential attributes of a court and observe ... the essential requirements of the curial process".[52] The clearest exposition of the basis and nature of the implication is in Gaudron J's judgments. She recognises that the fundamental question is what Chapter III of the Constitution means when it vests the "judicial power" of the Commonwealth in the courts it authorises. She re-interprets the term "judicial power" in Chapter III to include a requirement of judicial process. This makes it clear that she is also seeking to expand the traditional doctrine of the separation of judicial power by including an entirely new element in it that guarantees judicial process to individuals. Thus in order for Chapter III to be fulfilled and judicial power to be vested in the specified courts, two conditions must be fulfilled. First all Commonwealth power of a judicial nature must be vested in the courts and the courts alone (the traditional doctrine of the separation of judicial power). Secondly, the power vested in the courts must not only be judicial in nature by virtue of its subject matter, but must be exercised in a judicial manner (judicial process). By recognising that there are subject matter and process elements to the notion

50 *Leeth* at 408, per Deane J; at 436 per Gaudron J.
51 *Polyukhovich* at 606.
52 *Leeth* at 486-487.

of judicial power the traditional implication from Chapter III of the doctrine of the separation of judicial power would be considerably expanded. Deane J's judgment in *Polyukhovich* shows that this is consistent with the historic purpose of the doctrine.

THE MAJORITY AND JUDICIAL PROCESS

The majority have not yet accepted the implication of a guarantee of judicial process. I have already argued that the *Political Advertising Case* shows the court's willingness to start looking at some of the institutions established by the Constitution and to imply guarantees of relevance to individuals from the provisions establishing those institutions. Another recent case concerning the guarantee to trial by jury in s80 shows how the Court is willing to reconsider particular provisions of the Constitution in the light of history and policy and give them new dimensions. In *Cheatle v R*[53] a unanimous High Court held that a jury trial under s80 had to be consistent with the "essential aspects" of jury trial as understood at common law. This provides a parallel for arguing that the judicial power of the Commonwealth must be consistent with the essential aspects of the judicial process at common law.

Mr and Mrs Cheatle were charged with the Commonwealth offence of conspiracy to defraud the Commonwealth, under s86A of the *Crimes Act* 1914 (Cth). They were tried and convicted in South Australia by a majority jury verdict, which the *Juries Act* 1927 (SA) permits in certain circumstances. After an unsuccessful appeal to the South Australian Court of Criminal Appeal, the Cheatles appealed to the High Court of Australia on the single ground that s80 of the *Constitution* requires that jury verdicts in Commonwealth cases be unanimous.

Section 80 of the *Constitution* provides:

> The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State, the trial shall be held at such place or places as the Parliament prescribes.

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53 (1993) 177 CLR 541.

The High Court, in a single unanimous judgment, upheld the Cheatles' argument. Their main reason for judgment is summarised in their reference to the judgment of Griffith CJ in *R v Snow*:

> Section 80's requirement that the trial on indictment of any offence against any law of the Commonwealth shall be by jury represents a "fundamental law of the Commonwealth" which "ought prima facie to be construed as an adoption of the institution of 'trial by jury' with all that was connoted by that phrase in constitutional law and in the common law of England".[54]

The High Court found that "the common law has, since the fourteenth century, consistently and unequivocally insisted upon the requirement of unanimity".[55] This was carried into the Australian colonies. They conclude that it is well settled that the Constitution is to be interpreted in the light of the common law and its history and it can therefore be assumed that s80 "was intended to encompass that requirement of unanimity".[56] The court was also willing to identify and articulate the reasons for, and policy behind the institution of trial by jury at common law, which they found supported unanimity.[57] Having identified this fundamental policy behind trial by jury, the Court was willing to read it into the constitutional provision of s80, and interpret s80 in accordance with it.

In *Cheatle* then, the High Court was willing to construe s80 by reference to the historical common law institution of trial by jury and the principle or policy behind that institution. It seems logical, then, to interpret the vesting of judicial power exclusively in Chapter III courts by reference to the common law doctrine of the separation of powers as well as other matters of history and policy including the notion of judicial process. In *Chu Keng Lim v Minister for Immigration*, a majority consisting of Brennan, Deane and Dawson JJ in a joint judgment (with Mason CJ concurring) affirmed that "the Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers".[58] They treated it as self evident that they would refer to historical consideration and the essential nature of certain functions to determine what matters should

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54 *Cheatle* at 549; refering to *R v Snow*(1915) 20 CLR 315 at 323.
55 At 550.
56 At 552.
57 At 552-554.
58 *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26.

and should not be the subject of judicial power.[59] In the same way that unanimous verdicts were held to be an essential part of trial by jury in s80, "judicial process" should be held to be part of the judicial power vested exclusively in the courts set up by Chapter III.

CONCLUSION

There seems little doubt that the doctrine of the separation of judicial power has now been widened to include at least a guarantee that individuals will be judged guilty of offences only by a court and not by the Parliament. All members of the present High Court have accepted that a law that amounts to a bill of attainder is a usurpation of judicial power contrary to Chapter III of the Constitution and the doctrine of the separation of judicial power. The Court is willing to refer to historical, policy and common law considerations to determine what the *subject matter* of "judicial power" as opposed to "legislative power" should be.

The pressing question is whether a majority of the High Court will be willing to make implications about *the manner* in which the Chapter III courts should exercise the judicial power of the Commonwealth. There are some indications that the Court will be willing to make such implications in a suitable case. Five of seven Judges have stated that they think the Constitution requires that federal judicial power be exercised in accordance with the rules of natural justice.[60] According to Deane, Toohey and Gaudron JJ this would be part of a larger principle that judicial power must be exercised in accordance with the judicial process. To make such an implication would require a reconsideration of what the concept of "judicial power" requires. In *Cheatle* the Court was willing to refer to extrinsic materials and common law considerations to determine what the essential requirements of "trial by jury" are. In the *Political Advertising Case* the High Court was willing to look again at the institution of Parliamentary democracy and make new implication of guarantees of relevance to individuals. The High Court may be willing to take a similar approach to decide what the essential requirements of the exercise of judicial power.

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59 *Chu Keng Lim v Minister for Immigration* at 27. See also at 67 per McHugh J.

60 *Leeth*, per Mason CJ, Dawson and McHugh JJ; *Dietrich*, per Gaudron and Deane JJ.