

Separation of Powers: Contrasting the British and Australian Experiences

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Abstract

The great British constitutional theorist Dr Geoffrey Marshall, remarking on the principle of the separation of powers, noted that “[it] is infected with so much imprecision and inconsistency that it may be counted as little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds.”¹

In this paper, the author examines Marshall’s statement, in light of the history of the so called ‘doctrine’ of Separation of Powers in western society, and shows that such separation is a consequence arising from more fundamental doctrines. The author also comments on the role that such principles have played in shaping and interpreting the Australian Constitution.

Introduction – the modern doctrine of Separation of Powers

The doctrine of the separation of powers is often assumed to be one of the cornerstones of fair government². It apparently evolved from the desire to limit the concentration of power within any one branch of government, a problem most famously articulated by Lord Acton³:

“Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men.”

The principles of separation of power have existed as philosophical constructs since the times of Aristotle⁴, and later expounded upon and articulated by John Locke and Barron Montesquieu during the 17th and 18th Centuries. Ironically it was Montesquieu’s idealistic regard for the British parliamentary system that was used by the writers of the American Constitution to justify the concept of the separation of powers in their revolutionary fight against the British. Within the British schools of

¹ G. Marshall, *Constitutional Theory* (1971), 124

² de Smith and Brazier., *Constitutional and Administrative Law*, 6th ed, (London, Penguin Books, 1989), p.19

³ Robbins, J.W., *Acton on the Papacy*, The Trinity Foundation [Online], World Wide Web, URL: <http://trinity2.envescent.com/journal.php?id=66> (accessed 10 September 2005)

⁴ Aristotle., *Politics – Book 5*, Written 350 B.C.E, Translated by Benjamin Jowett, [Online], available World Wide Web, URL: <http://classics.mit.edu/Aristotle/politics.5.five.html>, (accessed 7 September 2005)

legal philosophy, the concept was further evolved by Blackstone, who particularly advocated the separation of the judiciary from the state⁵.

Strictly speaking, the modern 'doctrine of separation of powers' proposes that the three functions of government, legislative (making the law), executive (enacting the law) and judicial (interpreting the law), be enacted by three autonomous and independent branches of government. Further, that no member of any one branch should be a member of any other. Early idealistic attempts to realise this doctrine appeared in the 18th Century, within some of the rising colonies of the Americas and the early French Republic (see the 1789 *Declaration of the Rights of Man and Citizen*), but both failed to produce coherent systems of government⁶. Today, the Constitution of the USA is the only structure that tries to fully adhere to this doctrine. Critics of the system point out both practical and conceptual difficulties in realising such a separation. For instance, is it really possible to succinctly classify all the functions of modern government into these three areas? Additionally, providing a coherent structure of government whilst keeping such functional areas totally separate, can lead to unnecessary complications and gamesmanship, with a myriad of checks and counter-checks being imposed between the three branches⁷.

Separation of powers within the Westminster System

Despite Montesquieu's interpretation, under the British Westminster system a full separation of powers is not realised, as primacy is given to the concept of both responsible government and parliamentary sovereignty. Unlike the US approach, the executive and legislative branches are closely tied. Ministers of the government are members of the elected legislative branch. This is ostensibly to enforce responsibility in government, but a side-effect is the loss of clear separation between these branches. The Australian Constitution draws from both the American concept of federalism and the British concept of responsible government (colloquially termed "Washminster"). In similarity to the British system, the executive and legislative arms are tied together⁸; however, as in the USA, a strict distinction between the judiciary and the other two branches is maintained (in the UK this distinction is blurred within the post of the Lord Chancellor and the Privy Council).

⁵ Williams, Daryl., Attorney-General. June 2001, *Separation of Powers – a comparison of the Australian and UK experiences*, [Online], available World Wide Web, URL: http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Speeches_2001_Speeches_Separation_of_powers_-_a_comparison_of_the_Australian_and_UK_experiences, (accessed 5 September 2005)

⁶ Palmer, Bryan., 1996-2005, 'Separation of Powers', Palmer's Oz Politics [Online], available World Wide Web, URL: <http://www.ozpolitics.info/rules/sep.htm> (accessed 5 September 2005)

⁶ Aristotle., *Politics – Book 5*, Written 350 B.C.E, Translated by Benjamin Jowett, [Online], available World Wide Web, URL: <http://classics.mit.edu/Aristotle/politics.5.five.html>, (accessed 7 September 2005)

⁷ Spindler, G., 2000, *Separation of Powers: Doctrine and Practice*, in Legal Date, [Online], available World Wide Web, URL: <http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0...> (accessed 5 September 2005)

⁸ The Australian Constitution, 1901, Chapter I, Part IV – Both Houses of Parliament, s44, Chapter II – The Executive Government, ss62, 64

Dr Geoffrey Marshall's observations noted above, on the practicality of the 'separation of powers', are made in relation to the British experience. Within this system there is some concept of separation, and one can point to evidence of the practice of such (parliamentary sovereignty is one example). However, as Marshall pointed out, there is no strict adherence to such policy, and he believed that the reality of such strict compartmentalising of powers was more of an idealistic myth.

In the modern, highly connected world, Marshall's criticism of trying to adhere to such a doctrine certainly has some relevance. As he later noted⁹, there have been recent attempts to integrate international standards of human rights and civil liberties, driven by the philosophies of natural law and the rights the citizen, (as espoused by Dworkin and others¹⁰). This has occasionally led to the courts deferring to Acts of the European Parliament, which has led to a further blurring of the lines of demarcation between the legislature and the judiciary¹¹; judicial review of legislature being a foreign concept in the UK. The devolution of power within the UK (eg the Scottish and Welsh parliaments), has been another example of reform that owes little to concepts such as the separation of powers and more to policies such as decentralisation, despite public appeals to the former¹².

It is interesting to note that many critics of the 'separation of powers' doctrine (such as Marshall himself) point out that Montesquieu never specifically detailed the complete separation of powers, and believe that he was misinterpreted¹³. In this view, Montesquieu was more concerned with the distribution of power (or lack thereof) and the checks and balances that could be imposed upon the various branches of government¹⁴. In light of this interpretation, Marshall's statement regarding the effectiveness of such doctrines makes perfect sense, especially in the case of the UK.

The Australian Experience

In practice, most modern "Westminster-based" systems ignore the doctrine of separation of powers, to varying extents. Most do not enforce a separation between executive and legislature, due to the constraints placed by adhering to the more fundamental doctrine of responsible government. In the Australian example, despite the explicit structuring of the first three chapters of the Constitution into descriptions of the executive, legislative and judicial branches of government, there is little general enforcement of separation between the first two. The High Court, in

⁹ Marshall, Geoffrey., 2000, *Re-Making the British Constitution*, Lecture, McGill University, Montreal, Quebec, 5 October, [online], available World Wide Web, URL:

http://canada.justice.gc.ca/en/dept/pub/tait/marshall_lecture.html, (accessed 5 September 2005)

¹⁰ Ibid

¹¹ Ibid

¹² Ibid

¹³ Riklin, A., 2000, *Montesquieu's So-Called 'Separation of Powers' in the Context of the History of Ideas*, Discussion Paper Series 61, Institute of Advanced Studies, Collegium Budapest, [Online], available World Wide Web, URL: <http://www.colbud.hu/main/PubArchive/DP/DP61-Riklin.pdf>, (accessed 8 September 2005)

¹⁴ Ibid

*Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan*¹⁵, upheld that a strict division of powers between the executive and legislature was not practical, and re-affirmed that the Australian Constitution allows for the conferring of legislative power on the executive under special conditions, determined by the legislative branch. It has been noted that such a lack of separation, particularly within Australia, gives rise to little more than an 'elected dictatorship'¹⁶. Executive power, although nominally invested in the monarch or a representative, is practically held by the ministers of the Commonwealth. As such, the Executive is responsible directly to a party caucus, not to the Australian electorate¹⁷, and within Australia the strong party system means that in reality, effective scrutiny of the executive by the legislature is missing, and the decisions of the Lower House are merely reflections of executive decision¹⁸. The introduction of proportional voting to the Senate in 1949 has tended to hold the power that this affords the Executive somewhat in check. However, when the government of the day also holds power in the upper house, (as is currently the case¹⁹), this check is significantly weakened²⁰.

There is, however, a specific instance where the doctrine of separation between the executive and the legislature is upheld in the Constitution. Section 44 details certain conditions under which membership to the legislative branch can be withheld. Part IV of the section stipulates that any person who holds an office of profit under the Crown is excluded from such membership²¹. This has been interpreted as an attempt to remove executive influence over the legislature²². But given the general lack of enforcement of separation between executive and legislature within Australia, it would seem that ensuring checks such as judicial interpretation of legislation and a legislative ability to scrutinise executive actions, are more fundamental requirements than the enforcement of arbitrary and absolute divisions of power. In this respect, Marshall's commentary applies very well to the Australian Commonwealth situation. The applicability of his comments is doubtful however, when the Australian judiciary branch is considered.

¹⁵ *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan* (1931) 46 CLR 73, in Hanks, P. et al, *Australian Constitutional Law – Materials and Commentary*, 7th ed, (Chatswood, NSW: Butterworths, 2004), 114

¹⁶ Kelly, Jackie., 2003, *Constitutional debate: section 57* [Online], available World Wide Web, URL: <http://www.jackiekelly.net/dynamic.asp?id=110>, (accessed 10 September 2005).

¹⁷ Ibid

¹⁸ Spindler, G., 2000, *Separation of Powers: Doctrine and Practice*, in Legal Date, [Online], available World Wide Web, URL: <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0...> (accessed 5 September 2005)

¹⁹ In the 2004 elections the [current] Howard Liberal government won control of the Senate for the first time since 1981, winning 39 of the 76 seats. [Online], available World Wide Web, URL: http://en.wikipedia.org/wiki/Australian_legislative_election,_2004

²⁰ Ibid

²¹ The Australian Constitution, 1901, Chapter I Part IV – Both Houses of Parliament, s44

²² *Sykes v Cleary* (No 2) (1992) 176 CLR 77, in Hanks, P. et al, *Australian Constitutional Law – Materials and Commentary*, 7th ed, (Chatswood, NSW: Butterworths, 2004), 224

The Australian Judiciary Branch

In the Australian experience, the High Court has been quite vocal in upholding the necessity for independence of the judiciary from other branches of government²³. The basis of such a distinction would seem to be (in part) the requirement that the workings of the judiciary be publicly seen as independent from the rest of government. Such a requirement ensures that the public perception of judicial proclamations is one of an impartial, non-partisan analysis. As Attorney General Daryl Williams noted in 2000²⁴;

“... (if) the ideal of the neutrality of the law declines, the authority of the law must decline with it.”²⁵

This separation of the judiciary was enforced quite early on in Australian constitutional history, in what has become known as the *Wheat Case*²⁶, and further extended in *Waterside Workers' Federation of Australia v JW Alexander Ltd*, where the distinction between judicial and arbitrational functions was elucidated. It was famously refined in the landmark *Boilermakers' Case*²⁷. The so-called "first principle" established in this case, was that the judicial power of the Commonwealth could only be wielded by courts established as per Chapter III of the Constitution. The "second principle" was more controversial: *only* judicial powers could be primarily exercised by such courts²⁸. This case firmly established the separation of the judiciary as a fundamental characteristic of the constitutional landscape.

Does the Australian judiciary contravene the Separation of Powers?

It should be noted that the upholding of the separation of the judiciary from the other branches of government is certainly a two-way street. The judiciary is free to carry out its function unencumbered by legislative or executive interference, but reciprocally, the judiciary is expected to restrict itself to *only* such functions, and not interfere in the functions of legislature or the executive. This was noted by the Court

²³ *R v Kirby; Ex parte boilermakers' Society of Australia (The Boilermakers' case)* (1956) 94 CLR 254, and *New South Wales v Commonwealth (The Wheat case)* (1915) 20 CLR 54, [Online], available World Wide Web <http://www.austlii.edu.au/>, (accessed 7 September 2005)

²⁴ Williams, Daryl., Attorney-General. June 2001, *Separation of Powers – a comparison of the Australian and UK experiences*, [Online], available World Wide Web, URL: http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Speeches_2001_Speeches_Separation_of_powers_-_a_comparison_of_the_Australian_and_UK_experiences, (accessed 5 September 2005)

http://www.ag.gov.au/agd/WWW/attorneygeneralHome.nsf/Page/Speeches_2001_Speeches_Separation_of_powers_-_a_comparison_of_the_Australian_and_UK_experiences, (accessed 5 September 2005)

²⁵ Note that the post of Attorney General is an executive one. Unlike the Lord Chancellor in the UK system - also an executive post - the Attorney General cannot speak for the judiciary.

²⁶ *New South Wales v Commonwealth (The Wheat Case)* (1915) 20 CLR 54, [Online], available World Wide Web <http://www.austlii.edu.au/>, (accessed 7 September 2005)

²⁷ *The Queen v. Kirby; Ex parte Boilermakers' Society of Australia* [1956] HCA 10; (1956) 94 CLR 254 (2 March 1956), [Online], available World Wide Web <http://www.austlii.edu.au/>, (accessed 7 September 2005)

²⁸ *Ibid*

in *Drake (No 2)*²⁹, and in *Kable*³⁰ it was upheld that investing *any* non-judicial power in a court contravened the meaning of Chapter III of the Constitution. Some observers and critics though, have tried to argue that, especially in the case of the High Court, some constitutional *interpretations* of the law, and the reading of *implications* into the Constitution, have been akin to *making law*³¹. It is certainly true that the Australian courts tend to align with the Canadian judiciary in their construction of constitutional law, whereby there is greater leeway for interpretation. Unlike the American system (which some members of the Canadian judiciary have likened to a form of ancestral worship), the Australian judiciary today does not practice the concept of *original intent*, that is divining the meaning of the law in the context of the original proponents of the Constitution³². It could be argued that in the early days of the High Court, such a doctrine *was* followed, but one must remember that the then High Court judges were *ad idem* with the original proponents. Today, the Constitution is understood to be an evolving document that should be interpreted within the current social context, as exemplified by the decision regarding television and radio in the *Brislan* case³³. Such criticisms mentioned above of the role of the courts fail to account for the combined needs of an evolving society and a “just and fair” judicial system³⁴.

One should also note that parliamentary sovereignty as practised in the UK, is not a part of the Australian Constitution. It is the nature of the Australian system to allow, even enforce, judicial review of the legislature. But this is *not* a breach of the separation of powers doctrine. In Australia, the powers of Parliament are restricted by the written Constitution, and any dispute with regard to those limits is rightfully determined by the High Court. In contrast, the concept of parliamentary sovereignty within the UK arises from the fact that there is no written constitution. This sovereignty makes alien concepts such as judicial review.

Conclusion

Total separation of powers is more a myth than reality for most democratic systems of government. Rather than itself being a rigid doctrine incorporated by ‘Westminster’ systems, the separation that does exist arises as a natural consequence of upholding the more fundamental doctrines of responsible government and parliamentary sovereignty. The Australian Constitution only *partially* realises the principles of separation of powers, specifically the separation of the

²⁹ *Drake v Minister for Immigration and Ethnic Affairs (no2)* (1979) 2 ALD 634 at 645, [Online], available World Wide Web <http://www.austlii.edu.au/>, (accessed 7 September 2005)

³⁰ *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51; [1996] HCA 24 (12 September 1996), [Online], available World Wide Web, <http://www.austlii.edu.au/>, (accessed 10 September 2005)

³¹ Lee, H.P., *Constitutional Implications*, in Australian Press Council News (Aug 1995), Vol 7 No 3, [Online], available World Wide Web, [URL: http://www.presscouncil.org.au/pcsite/apcnews/aug95/lee.html](http://www.presscouncil.org.au/pcsite/apcnews/aug95/lee.html), (accessed 10 September 2005)

³² Kirby, A., 1999, *Constitutional Interpretation and Original Intent*, Lecture, 1999 Sir Anthony Mason Lecture, University of Melbourne, 9 September., Murdoch University, WebCt, http://online.murdoch.edu.au/SCRIPT/LAW259s2/scripts/serve_home, (accessed 2 August 2005)

³³ *R v Brislan; Ex parte Williams* (1935) 54 CLR 262, [Online], available World Wide Web, <http://www.austlii.edu.au/>, (accessed 11 September 2005)

³⁴ Lee, H.P., *Constitutional Implications*, in Australian Press Council News (Aug 1995), Vol 7 No 3, [Online], available World Wide Web, [URL: http://www.presscouncil.org.au/pcsite/apcnews/aug95/lee.html](http://www.presscouncil.org.au/pcsite/apcnews/aug95/lee.html), (accessed 10 September 2005)

judiciary from the other branches of government. However, the High Court has historically highlighted and maintained this separation, which is made necessary through the construction of the written Constitution.

The full breadth of Marshall's original comments therefore, whilst quite applicable to the UK experience, where there is no real enforcement of *any* separation, are perhaps not quite so applicable to the Australian case. However, Marshall himself seems to have modified his views over his final years. He acknowledges the necessity of at least judicial separation, when arguing for the superiority of judicial protection of democratic rights over legislative protection³⁵.

³⁵ Marshall, Geoffrey., 2000, *Re-Making the British Constitution*, Lecture, McGill University, Montreal, Quebec, 5 October, [online], available World Wide Web, URL: http://canada.justice.gc.ca/en/dept/pub/tait/marshall_lecture.html. (accessed 5 September 2005)

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