



**AUSTRALASIAN STUDY OF
PARLIAMENT GROUP**
(Queensland Chapter)

*Separation of Powers
in the
Westminster System*

Associate Professor GERARD CARNEY
(Bond University)

13 SEPTEMBER 1993
Parliament House
Brisbane

Separation of Powers in the Westminster System

A paper presented by Gerard Carney, Associate Professor of Law, Bond University to A.S.P.G. Queensland Chapter on Monday 13 September 1993

INTRODUCTION

This paper is intended to outline the extent to which the doctrine of Separation of Powers operates within the Westminster system of government in Queensland. It needs to be appreciated at the outset that as a doctrine, it is essentially a theory of government the objectives of which are the protection of liberty and the facilitation of good government by appropriate specialisation. Hence, the doctrine of separation of powers may be adopted to varying degrees by any system of government whether it be Westminster, presidential, etc. The form in which it is adopted may be by way of political practice, convention, or legal principle. It stands alongside that other great principle, representative government, which is similarly provided for in a variety of ways in different constitutional systems.

In Queensland, the doctrine of separation of powers appears not to operate as a legal restriction on power but it provides the basis for important principles which the law protects, such as the independence of the judiciary, and for certain political conventions. Because it is not a legal restriction in Queensland, serious consideration has to be given to other controls on power, such as a committee system for parliamentary review of executive action. Moreover, there are other areas within the constitutional and political system of Queensland where it would seem desirable that the doctrine be put into effect even as a matter of political practice. These areas will be explored towards the end of this paper.

What I hope this paper achieves, is to put the doctrine of separation of powers into its proper context as an *ideal* of good government and to demonstrate that it provides a basis for the adoption of structures, processes and controls which protect liberty now and in the future. As our system of government evolves, new conventions, political practices and even at times new legal rules, will need to be devised to protect the liberty of the people. The doctrine of separation of powers provides the justification for these measures and helps to determine their nature and scope. There is a need to monitor our political system, be vigilant about liberty and advocate new measures when this liberty is threatened. The doctrine of separation of powers is the key to this whole process.

The following aspects will be considered:

1. Definition of the Doctrine of Separation of Powers
2. Origins and philosophical development of the Doctrine of Separation of Powers
3. The position in Queensland
4. The position at the Commonwealth level
5. Issues for Queensland

1. DEFINITION OF DOCTRINE OF SEPARATION OF POWERS

Probably the leading modern work on separation of powers is by Professor Vile, published in England in 1967: "Constitutionalism and the Separation of Powers" where the following definition is given:

A 'pure doctrine' of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way

each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State. (p13)

2. ORIGINS AND PHILOSOPHICAL DEVELOPMENT

The doctrine is founded upon the need to preserve and maintain the *liberty* of the individual. The mechanism it adopts is to divide and distribute the power of government to prevent tyranny, arbitrary rule and so on. The essence of the doctrine is therefore one of constitutionalism or limited government. As the above definition states, the basic control adopted is to vest the three types of governmental power, legislative, executive and judicial in three separate and independent institutions, the legislature, the executive and the courts, with the personnel of each being different and independent of each other.

There is a complete separation as regards powers, institutions and personnel. Yet, there seems to be no current constitutional system which adopts this complete separation of powers. Some of the early American States and the French constitution of 1791 tried to strictly give effect to this doctrine but failed. The strict doctrine is only a theory and it has to give way to the realities of government where some overlap is inevitable. But while permitting this overlap to occur, a system of checks and balances has developed (and needs to continue to develop).

The **United States Constitution of 1787** incorporates the doctrine of separation of powers with a system of checks and balances as the following table illustrates:

Institution	Power	Personnel	Control
Congress	Power to make laws	Elected representatives	Presidential veto; Supreme Court review of validity
President	Executive power	Elected. Cannot be a Member of Congress	Senate ratification necessary for cabinet and diplomatic appointments, and treaties; Judicial review; Impeachment by removal by Congress.
Supreme Court	Judicial power including judicial review of legislative and executive activity	Appointed by President with Senate ratification	Impeachment by Congress

The **Westminster system** effects only a *partial* separation of powers:

Institution	Power	Personnel	Control
Parliament	Make laws	Representatives elected to lower House. Elected or appointed to upper House.	(Royal Assent) Supervision and/or expulsion by the House
Executive Council (Cabinet)	Executive power	Ministers appointed by the Crown with the support of the lower House. Must be Members of the Parliament	Maintain support of the lower House. Parliamentary and Judicial Review.
The Courts	Judicial power	Judges appointed by the Executive	Superior Court justices removal by the Crown an address from both Houses on certain grounds.

Central to the modern development of separation of powers as a theory of government is Baron de Montesquieu (1689- 1755). Montesquieu is synonymous with the doctrine of separation of powers which was first formulated in his magnum opus, *De L'Esprit des Loix (The Spirit of the Laws)*, published in Paris in 1748, which had such a profound influence on the drafters of the United States Constitution and the evolution of the French republic.

Who was Montesquieu? He was a native of Bordeaux, of an aristocratic family, who after receiving the traditional classical education studied law and inherited the title and office as President a Mortier of his uncle who died in 1716. He became bored with his office and so in 1726 sold it and travelled extensively in Europe before visiting England in 1729 to study their political institutions. In 1731, he was elected a Member of the Royal Society. He later returned to live in his chateau la Bréde near Bordeaux and wrote several works, his most famous being *De L'Esprit des Loix*.

De L'Esprit des Loix is regarded as the first general treatise on politics which, instead of considering who wielded power, examined how power was wielded. The title of his work reflects this different approach, for as Vile puts it, Montesquieu looked to "the informing principle or spirit, the tone or mood, the habits or values ... which made [the law] work ill or well".

His support for the doctrine of separation of powers is found in Book XI Chapter 6 entitled "Of the Constitution of England" which he based on the writings of John Locke ("Two Treatises of Government" and "The Second Treatise of Civil Government") and of Bolingbroke. He identified as a key element in the successful protection of liberty in England, the separation of powers effected by the English Constitution does not correlate exactly with the position at that time and according to Vile, was not intended to. It is rather an imaginary account to illustrate the ideal of separation of powers. Nevertheless, there was at that time at least a partial separation of powers in England between the King, the Lords, and the Commons. In this respect, the English Constitutional system in the eighteenth century was a model for balanced and limited government, albeit in still the early stages of its evolution to the modern Westminster system.

While there has been debate about whether Montesquieu advocated only a strict and complete separation of powers, the better view is that he did accept that in practice only a partial separation of powers would be workable, complemented by further controls. The development of this partial separation of powers in England provided the model for Montesquieu's discussion which was so influential in the further implementation of the doctrine in the United States and France. Montesquieu is attributed with being the first to use "executive" in juxtaposition with legislative and judicial. Also, he emphasised the importance of judicial independence.

The definition above of the pure doctrine of separation of powers classifies governmental power into the traditional three powers: legislative, executive and judicial. Although Montesquieu is generally credited with using these labels, this tripartite classification of power had earlier origins which may even have relied upon the religious notion of "the trinity". However, the legislative and executive powers were viewed as part of the judicial power at least up until the early eighteenth century.

This tripartite classification of power is not, however, without its difficulties. Not all government powers can be neatly slotted into just one of these categories as the pure doctrine assumes to be the case. The inadequacy of this classification has become more obvious in recent times in relation to at least two areas of government activity: rule making and policy making. Both these processes occur in all three branches of government and how they fit into the doctrine of separation of powers is still being resolved. They certainly challenge the applicability of the pure doctrine today but it is the theory of limited government by division of powers and controls thereon, which helps to determine the appropriate relationship between rule makers and policy makers in the three branches- of government. Here, Vile asserts that an informal rule needs to be recognised by the principals of the three branches, namely, Members of Parliament, Ministers and their officials, and judges, that each recognise the difference between their own respective primary functions and the primary functions of the others.

3. The Queensland Position

The doctrine of separation of powers is reflected in the **structure** of the Queensland constitutional system:

- { the Legislative Assembly - legislative power
- { the Executive Council (Cabinet) - executive power
- { the State Courts - judicial power

The **personnel** of the Legislative Assembly overlap with that of the Executive and must do so as the principal feature of the Westminster system: responsible government. The Ministers of the Crown including the Premier must by convention be Members of the Parliament in order for them to have the confidence of the Lower House to form the Executive Government. Hence, they are *responsible* to the Lower House.

On the other hand, a strict separation of personnel is maintained in Queensland between the State Courts and the other two branches. In England, this is not the case with the position of the Lord Chancellor who is a member of Cabinet and presides over the House of Lords in both its legislative and judicial capacities.

While the **powers** of each of these three branches of government are essentially different, there are grey areas where it is difficult to characterise the power as legislative or judicial. These difficulties have had to be resolved at the Commonwealth level by the High Court (see below), but do not pose a legal difficulty at the State level. As stated earlier, the doctrine is not a legal restriction in Queensland. Although this has not been declared by the Queensland Supreme Court, it has been so held in **New South Wales**, (*Clyne v East* (1967) 68 SR (NSW) 385; *BLF V Minister for Industrial Relations* (1986) 7 NSWLR 372), in **South Australia** (*Gilbertson v South Australia* (1976) 15 SASR 66), and in **Western Australia** (J.D. & W.G. *Nicholas v Western Australia* [1972] WAR 168).

The reasons given in the various cases for the doctrine not applying as a legal restriction in those States may be summed up as follows:

- I. no reference in the State Constitution to the vesting of the judicial power of the State in any particular institution or court;
- II. no entrenchment in the State constitution of the Supreme Court or of its judicial power;
- III. no clear division of powers in the State Constitution;
- IV. the past practice of Colonial and State Parliaments of delegating legislative and judicial functions to administrative bodies;
- V. Colonial and State Parliaments have in the past exercised judicial power by way of impeachment and bills of attainder.

The consequence of the doctrine not being a legal restriction at the State level is that Parliament can enact a law which constitutes an exercise of judicial power or interferes in the judicial process; a State Court or judge may be vested with powers of a legislative nature; the Executive or a Minister or public official may be vested with legislative or judicial power.

In other words, while the Westminster system in Queensland reflects the doctrine in terms of structure, and less so as regards personnel, there is a capacity for the powers of each to be shared to some extent. This may be desirable in many cases but there are dangers as well.

Separation between Legislative and Executive Powers

The most significant transfer of power occurs between the legislature and the executive in the Westminster system by the former vesting in the latter substantial powers to make delegated legislation principally in the form of regulations. The complexity of government necessitates delegated legislation but safeguards need to be put in place. Even at the Commonwealth level where the doctrine of separation of powers operates as a legal restriction, the High Court approved in *Dignan's Case* (1931) 46 CLR 73 the delegation of law-making power by Parliament to the Executive provided it was not too wide a delegation of power. This proviso means little in practice (see below).

There are few legal limits and controls on the power of the Parliament to delegate its law-making function to the Executive. At present the only **legal** limitation is that Parliament must always retain the capacity to revoke the delegated power and assume the power to itself. This limitation is based upon the legal principle that Parliament cannot abdicate its powers (see *Cobb & Co Ltd v Kropp* [1967] 1 AC 141). A further legal limitation which might be considered is a prohibition on the use of Henry VIII clauses, i.e. subordinate legislation incapable of amending statutes (cf *Legislative Standards Act* 1922 (Qld) s.4(4)(c)). EARC has just recommended in its *Report on Consolidation and Review of the Queensland Constitution* (August 1993) that the proposed Constitutional Convention consider the desirability of adopting this prohibition (para 8.24).

The controls currently in place on the exercise of a delegated power include:

- the ultra vires rule, that is, if the exercise of a delegated power falls outside the scope of the power, the exercise of the power is invalid;

- the *Statutory Instruments Act 1992* (Qld) which requires subordinate legislation (such as regulations) to be notified in the Government Gazette, tabled in the Legislative Assembly, and subject to disallowance;
- the Parliamentary Committee of Subordinate Legislation scrutinises subordinate legislation to see if it meets certain standards and advises Parliament whether it ought to be disallowed.

Judicial Power: separation from legislative and executive power

A most important feature of the Westminster system is the principle of judicial independence. Given prominent mention in Montesquieu's account of the "English Constitution", it is really a fundamental component of the doctrine of separation of powers.

It is beyond the scope of this paper to undertake a detailed analysis of the various mechanisms which support judicial independence. There is, however, the issue: to what extent is there a strict separation between judicial power and non-judicial (legislative and executive) power.

The Westminster system clearly contemplates that the courts will exercise the judicial power subject to well recognised exceptions in the case of Parliament's power of contempt and control of its Members, and courts martial conducted by the military. But there is no constitutional legal restriction on Parliament which prevents it (i) from vesting judicial power in tribunals or even officials outside the court system, or (ii) from directly exercising judicial power itself.

As regards (i), the State Parliaments are not hampered in the same way as the Commonwealth Parliament is and so can establish quasi-judicial tribunals to exercise powers which are of a judicial nature.

As regards (ii), probably the most significant danger of not having the doctrine as a legal restriction in Queensland is the capacity of Parliament to directly exercise judicial power, i.e. usurp the judicial process, either (i) by determining the guilt of a person by a bill of attainder, or (ii) by interfering in the judicial process.

- I. A bill of attainder is a law which adjudges a person or a class of persons to be guilty of punishable conduct which at the time it occurred was not prescribed by the general law as an offence or as punishable conduct, and thereupon prescribes the punishment for that conduct.

Bills of attainder are offensive to the doctrine of separation of powers and to the rule of law for they render what was at the time lawful conduct, retrospectively unlawful and they bypass the process of determining criminal guilt by way of a criminal trial.

At present, there is no constitutional impediment to bills of attainder enacted by the States, but by virtue of the doctrine of separation of powers operating at the Commonwealth level, the Commonwealth Parliament is precluded from enacting them (see *Polyvkhovich v Commonwealth* (1991) 101 ALR 545).

- II. Laws which interfere in the judicial process have also been enacted from time to time by State Parliaments and while upheld as valid laws they have provoked considerable criticism from the court. In the *BLF V NSW Minister for Industrial Relations* (1986) 7 NSWLR 374, the NSW Court of Appeal upheld NSW legislation which was enacted just before an appeal was to be heard, which effectively directed the court to dismiss the appeal and make no order as to costs. Street CJ clearly disapproved of this legislation:

...it is contrary both to modern constitutional convention, and to the public interest in the due administration of justice, for Parliament to exercise that power by legislation interfering with the judicial process in a particular case pending before the Court. (381)

4. THE COMMONWEALTH POSITION

A. Separation of Legislative and Executive Power

The State position outlined above in relation to the separation between legislative and executive power applies equally at the Commonwealth level. The Westminster system here again blurs the separation between the personnel of the Parliament and of the Executive. Section 64 of the Commonwealth Constitution gives effect to this position by requiring Ministers to be Members of either House at least within three months of their appointment.

The delegation of law-making power to the Executive is also permitted: *Dignan's Case* (1931) 46 CLR 73. Extremely wide delegations of power to the Governor-General or a Minister have been upheld by the High Court eg a power to make regulations with respect to the employment of transport workers (*Dignan's Case*); a power to prohibit the importation of goods (*Radio Corp v Cth*) (1937) 59 CLR 170).

The legal limitations on the power to delegate are: (i) Parliament must retain the capacity to revoke the delegation of power (as noted above for State Parliaments) and (ii) the delegation cannot be so wide as to fail the characterisation test, ie, it is a law with respect to a Commonwealth legislative power. These limitations impose no practical restrictions on the Commonwealth Parliament, evidenced by the fact neither has been breached. Only if the Commonwealth delegated one of its entire powers such as its power in s.51(i) with respect to interstate and overseas trade and commerce, would the delegation be too wide.

The controls on the exercise of the delegated power are similar to those in Queensland.

B. Separation of Judicial and Non-Judicial Power

The High Court has given legal effect to the doctrine of separation of powers in relation to the judicial power of the Commonwealth. It is in this respect that the position at the Commonwealth level differs markedly from that at the State level. The reasons given by the High Court for the recognition of the doctrine as a legal restriction under the Commonwealth Constitution are: the constitutional entrenchment of the judicial power in the High Court and the other federal courts (s.71); the prescription of the content of the judicial power in Chapter III of the Constitution; and the critical need to maintain judicial independence in a federal system.

The doctrine has been adopted by way of two related legal principles inferred by the High Court from Chapter III of the Constitution, and strangely they were established fifty years apart!

First, judicial power can only be vested in s.71 courts (High Court, federal courts, State courts). No other body may be vested with judicial power (the *Wheat Case* (1915) 20 CLR 54). Isaacs J at 88-90 of the *Wheat Case* explains how the structure of the Constitution effects a strict separation of judicial and non-judicial power:

When the fundamental principle of the separation of powers as marked out in the Australian Constitution is observed and borne in mind, it relieves the question of much of its obscurity... By the first Chapter, the legislative power of the Commonwealth is vested in a Parliament ... By Chapter II ... the executive power of the Commonwealth is vested in the Sovereign ... Chapter III vests the judicial power of the Commonwealth ... in specific organs, namely, Courts strictly so called ... that exhausts the judicature ... And the distinct command of the Constitution is that whatever judicial power ... is to be exerted in the name of the Commonwealth, must be exercised by these strictly so called judicial tribunals.

Second, non-judicial power cannot be vested in s.71 courts. This is the principle from the famous *Boilermakers' Case* (1956) 94 CLR 254 where the High Court (affirmed by the Privy Council) held that the vesting of both non-judicial power (making of industrial awards) and judicial power (enforcement of awards by injunctions etc) in the Commonwealth Court of Conciliation and Arbitration was invalid for it breached the doctrine of separation of powers. The Parliament quickly remedied the situation by establishing the Commonwealth Conciliation and Arbitration Commission to exercise the non-judicial power of making awards, leaving to a federal court the judicial power of enforcement of those awards.

In the High Court, the joint majority (4-3) led by Dixon CJ relied on the special role of the federal judicature as the guardian of the Constitution and of the federal system, being charged with "the ultimate responsibility of deciding upon the limits of the respective powers of the Governments in the system ... From which it followed... that the Federal judicature must be ... at once paramount and limited" (p276). Hence, the majority derived from Chapter III this *negative* principle that non-judicial power cannot be vested in a s.71 court.

The minority justices appreciated that it is not always clear whether a power is judicial or non-judicial, so provided it was not incompatible to vest the power which was capable of being either judicial or non-judicial in a s.71 court, no breach of the doctrine would occur.

The Privy Council on appeal affirmed the majority's decision and is often quoted for saying:

In a federal system the absolute independence of the judiciary is the bulwark of the Constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard. (540)

Criticism & Erosion of the Boilermakers' Principle

The effect of both of the principles outlined above is that the Commonwealth must be careful in which body it vests those powers which can be both judicial and non-judicial.

This has led, to quote Barwick CJ in *R v Joske; ex parte Australian Building Construction Employees & BLF* (1974) 130 CLR 87 to 90, to "excessive subtlety and technicality".

For example, in *R v Joske*, a challenge was brought to the power of the Commonwealth Industrial Court to direct the Registrar to cancel the registration of a registered organisation upon various prescribed grounds. The High Court upheld the validity of this power vested in a s.71 court because "the exercise of the power depends on finding the existence of present facts or circumstances and the exercise of a discretion suitably limited as a judicial discretion" (per Barwick CJ at 95).

While legal challenges may be mounted, the likelihood of success is slight in view of the flexibility with which the High Court has viewed the nature of powers within this grey zone. The same power can be vested in both a s.71 court and a non-judicial body or person, and provided "the trappings" of the power in each case are appropriate to that repository of power, no infringement of the doctrine of separation of powers is likely to arise.

Erosion of the *Boilermakers' principle* has occurred in at least two respects:

- I. A federal judge may be appointed in a personal capacity to a non-judicial office.

In *Drake v Minister for Immigration & Ethnic Affairs* (1979) 24 ALR 577, the appointment of a federal court judge as Deputy President of the Administrative Appeals Tribunal was upheld because it was a personal appointment, and not the conferring of a non-judicial function on the Federal Court.

- II. Non-judicial power can be conferred on a federal judge in his or her personal capacity. This differs from (i) in that the federal judge is not a member of a non-judicial body but simply is vested with non-judicial power as a federal judge. In *Hilton v Wells* (1985) 157 CLR 57, a federal judge was empowered to issue a warrant for tapping telephones for the purposes of narcotic investigations. It was agreed that the issue of a warrant is an administrative function. A majority of the High Court (per Gibbs CJ, Wilson & Dawson JJ) upheld the vesting of such a power in a federal judge in his or her personal capacity.

5. Issues for Queensland

Since the doctrine of separation of powers is not a legal restriction in Queensland, other controls may be desirable from time to time to prevent abuse of power. The following issues seem to involve some consideration of the doctrine and the formulation of appropriate controls:

- Re-introduction of an upper House in Queensland (Montesquieu approved of two houses).
- The appropriate powers of the Governor in a republic.
- The function of policy determination in all three branches of government.
- The independence of Parliament:
 - * funding and
 - * review of the Executive by a parliamentary committee system
- Review of proposed legislation by Parliamentary Committee (as occurs currently with subordinate legislation).
- The relationship between Cabinet and Public Administration:
 - * implementation of policy
 - * appointments, dismissals
 - * police force
- Judicial Independence:
 - * tenure of judges *entrenchment funding * accountability; self regulation