THE SEPARATION OF POWERS DOCTRINE AND THE CONSTITUTION OF WESTERN AUSTRALIA

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The doctrine of the separation of powers into legislative, executive and judicial branches predicates a system of mutual checks and balances so that one branch of government is incapable of arrogating power to itself at the expense of the other two. Preservation of that balance requires recognition by each arm of government that it is a legal impossibility to cross-delegate powers and functions. The system, and its integrity, is usually codified in a supreme or basic law, unalterable, except by the sovereign power.

American experience, particularly in the administrative law field, suggests that it is impossible to meet society's expectations of government and, simultaneously, to maintain the absolute integrity of the system. One need only look at the cases where the United States Supreme Court has had to determine whether Congress had delegated its legislative function to the chief executive to realize that rigid classification of function in a modern state no longer meets the requirements of effective administration. Some blurring of the edges is inevitable as attitudes towards how we are governed develop and gain currency. What is important is to trace the Supreme Court's skill in enabling the other two branches a degree of functional flexibility, with the Court casting itself in the roles of arbiter and arbitrator. An assessment of the Court's success in this task is mostly a matter of political judgment.

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I started by saying the separation of powers doctrine derives its strength from a basic law beyond the reach of the combined powers of the three arms. On that criterion, Western Australia would fail miserably. There is no basic law except perhaps that "The Constitution shall be seen, but not heard". However, the doctrine can be seen from a different perspective, shorn of its constitutional expression; a perspective that says that it is in the public interest not to concentrate the power of the state in one body and that the institutions of government are structured accordingly. It is on this basis that I discuss the Constitution of Western Australia.

What, precisely, does "The Constitution" mean in this State? The High Court, in *Western Australia v Wilsmore*,[1] managed to avoid defining the unidentifiable, but an attempt must nonetheless be made for the present purpose. I suggest that the Constitution is the aggregate of imperial and local enactments, the common law, and custom and usage that:

(a) constate and recognize the separate and legal existence of the State of Western Australia and its organs of government; and
(b) apportion powers, duties and functions and regulate their exercise among those organs,

but only to the extent that a claimed constituent part of the Constitution is recognised by those organs as having any of the characteristics just described. Let me illustrate this interpretation.

Nowhere in the Constitution is "responsible government" identified distinctly. Section 74 of the Western Australian Constitution Act 1889 ("Constitution Act") refers to "officers liable to retire from office on political grounds", and some idea that responsible government is part of the State's constitutional makeup is given by section 43 of the Western Australian Constitution Acts Amendment Act 1899, which creates 17 principal executive offices of the Government liable to be vacated on political grounds, one of which must be held by a member of the Legislative Council. The Letters Patent issued in 1986 are deafeningly silent on the subject; they merely empower the Governor to appoint ministers and other officials. There are oblique references to

1. (1982) 149 CLR 79.

the existence of responsible government in other instruments. Determinations of the Salaries and Allowances Tribunal proceed on the basis that ministers are also members of parliament. The standing orders of both Houses demand it. That the State has responsible government is undeniable and yet there is no single provision in our law that creates it and describes it.

Responsible government, by itself, is not fatal to an argument that separation of powers is part of the Constitution if the doctrine is viewed from a functional perspective. The Constitution Act recognizes the traditional three way split but establishes neither the executive government nor the Supreme Court. In other words, the Constitution Act, having created a legislature with power to make laws for the "peace, order and good government" of the State, leaves it to that body to create and regulate the other two branches of government.

To those familiar with Westminster forms of government, the nonexistence of a basic law apportioning and regulating state power is hardly surprising. The constitutional history of England is not so much about separation of powers, as a recital of the successes and failures of those competing for the same jurisdiction. I suggest that Western Australia, following English constitutional theory and practice, bases its Constitution on parliamentary omnipotence. Thus, it is Parliament, not the Constitution, that erects the Supreme Court and defines its jurisdiction and the tenure of its justices. Significantly, the presumption that judicial salaries cannot be diminished is nowhere found in any written law of the State. Nor, as the following quote from the Premier in 1983 shows, is that presumption seen as being implicit in the holding of office during good behaviour:

> As the committee [of the whole House] would know, the Law Society in a public statement raised a question as to the constitutionality of any effort to reduce judicial salaries. Our best advice was that it was entirely constitutional, and that if the Government wanted to, it could propose to this Parliament legislation to reduce the salaries of judicial officers.[2]

To avoid the resulting legislation, the judges volunteered to take a salary reduction, but I have no doubt that Parliament would have mandated the judicial salary reductions. May I suggest that what is legally permissible is not always constitutionally proper?

2. Western Australia, Legislative Assembly 1983 *Debates* vol 242, 1097 (B Burke).

What we tend to overlook or forget is that the English Constitution derives its genius from a *fusion*, and not a *separation* of powers. The monarch declared the law, administered that law, and adjudicated on competing claims under it. During the mediaeval period, the monarch's Council possessed and exercised judicial, executive and administrative functions. At first, parliaments were no more than augmented councils, and records speak of "the King in his Council in his Parliament". It can be demonstrated that the mediaeval parliament was primarily a court. Accordingly, the judges, as members of the Council, were also members of each parliament.

I have recently had cause to write about the historical antecedents of the State Parliament's privilege jurisdiction. In my submission, I said:

> I suggest that some of the confusion about the nature of parliamentary privilege arises from our being imbued with notions of "the separation of powers" and a consequent failure to appreciate the history and development of privilege as but an aspect of the law declared by, and applied to, the High Court of Parliament. Nevertheless, vestiges of the primarily judicial character of the medieval English Parliament persist as part and parcel of the traditions of what is now an almost wholly legislative institution. Without some appreciation of the history of Parliament as the supreme judicial body, the privilege jurisdiction of Commonwealth legislatures appears anomalous and devoid of real merit or purpose.

My point is that the constitutional framework derived from England by Western Australia was not concerned with any notion of separation of powers but was based squarely on parliamentary supremacy. The colonial legislature, in addition to making law, was expressly empowered, subject to manner and form provisions relating to the position of the Crown and the constitution of the legislature, to repeal or alter the Constitution Act by section 73 of that Act. Moreover, the grant of power in section 36 was used to enact the Western Australian Parliamentary Privileges Act 1891. Were the United States Congress to enact a similar statute, I have no doubt that the Supreme Court would rule it ultra vires the United States Constitution.

To demonstrate the absence of a separation of powers, I quote again from my submission:

> Sections 55-61 of the Criminal Code provide an optional procedure to that of trial at Bar.... The first point to be made is that the exclusive jurisdiction of Parliament has been ceded in part to the Supreme Court by virtue of the Code's provisions which translates a number of contempts into crimes. Either House's discretion to proceed against an offender is removed. Presumably the Police or the Crown Prosecutor would bring the prosecution and there is nothing in the

> Code obliging them to ascertain the view or the consent of Parliament before commencing proceedings.
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> The Code requires arrest on a warrant, but that warrant would not issue out of Parliament. It is possible that a House could invoke s 15 of the 1891 Act to direct the Attorney to prosecute under the Code but I express some doubt on this matter....
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> There is therefore in respect of certain matters of privilege a concurrent jurisdiction of Parliament and the Supreme Court with each capable of acting independently of the other in relation to the same facts. Additionally, inside that concurrent jurisdiction, Parliament may proceed either at common law or under the 1891 Act.

Take another example. The 1986 Letters Patent provide:

> XIII The Lieutenant-Governor shall be the Administrator, but if there is no Lieutenant-Governor or if the Lieutenant-Governor is unable to act as Administrator or is absent from the State then *the Chief Justice of Western Australia or the next most senior Judge* present in the State and able to act shall be the Administrator. (emphasis added)

There are numerous examples of Acts bearing the assent of the Chief Justice as the Lieutenant-Governor or Deputy Governor. Clearly, the separation of powers doctrine is violated if the head of the judiciary acts as a constituent of the legislature and chief executive.

Finally, in terms of examples, there is the matter of delegated legislation. Two points must be noted:

1. a delegation is confined to the purposes of the primary law; and
2. the exercise of delegated legislative power is subject to disallowance and judicial review.

It is the delegation of *legislative* power from the Crown in Parliament to the Crown in Council that presents the argument against the separation doctrine. The United States Supreme Court has been extremely reluctant to allow such a transfer under the United States Constitution. It has preferred to read such a transfer as ministerial assignment rather than outright delegation. The question that can be raised here is whether, absent a power of delegation by Parliament, the Governor can lawfully make regulations by order in Council in relation to an Act by use of the prerogative power. Is there a residual and independent power vested in the Crown to legislate so as to give purpose and effect to an Act of Parliament?

So far, I have sought to demonstrate that the State Constitution makes no provision for the separation of powers doctrine. To the

contrary, the Constitution results from a fusion of powers that are assigned to various organs of government by Parliament as the constitutional sovereign. I now wish to submit that the doctrine itself is flawed and could not reasonably describe the true constitutional position of Western Australia.

The doctrine in its pure form apportions and cross-regulates state power with the proviso that the sovereign power remains outside the reach of any or all of the organs of government. Purposefully, the doctrine divides state functions and the attendant exercise of power into three parts. Thus, we have the legislative, executive, and judicial branches of government. I want to suggest that there is a fourth power that vests, effectively, in the executive branch: the power of emergency.

It may be argued that the emergency power is but an aspect of the powers generally devolved under the doctrine. However, in its extreme form of exercise, perhaps it is capable of suspending the operation of the constitution and restricting the proper functioning of the other branches. What I am suggesting is that it would be stretching the separation of powers doctrine to say that it would allow for the grant of a prospective use of power that would be capable of upsetting the ordained balance, particularly if the power could undo the basic law. The questions are whether such a power exists within the Western Australian Constitution and, if so, in whom is it vested?

Not surprisingly, the answers cannot be clear-cut. This is one of the few areas remaining in which the delights of the prerogative power are displayed in their common law splendour. The Crown in Council has a power to intervene, but the Crown in Parliament has also been active, albeit with a lot of help from the Crown in Council. For example, the Joint Committee on Delegated Legislation, in its first report for 1988, drew attention to a strange exercise of power.

> The committee cannot say that the regulations [Emergency Provisions (Satellite Debris) Regulations 1988] make an unexpected use of the power conferred by s.15 of the Health Act 1911, ie, they are within the powers conferred by the Act on the Executive Director (Public Health). In light of what we say later on, whether the regulations should have been made on the Minister's recommendation rather than the Executive Director's is not important. Either way, the regulations were made by the Governor in Council and subject to disallowance....
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> Finally, the committee must consider whether this type of situation is better dealt with by Act. This is not a question that we propose to answer at this stage. Your committee intends to solicit opinions from other sources and report once

> it has had the benefit of advice. The regulations under review were the first promulgated under s.15 of the 1911 Act. Nevertheless, it seems to us that consideration needs to be given to the prospective and contemporaneous roles of Parliament and the Government within the framework of a civil emergency. For example, does the power vested effectively in the Executive Director under s.15 cut across accepted notions of responsible government? Should emergency regulations be subject to ratification by resolution of the Houses? Should they expire within a certain time unless continued by parliamentary resolution? What if Parliament is adjourned or in recess - should it be recalled? How would recall be effected? Who decides what facts or circumstances constitute grounds for invoking emergency powers?

I have quoted the committee at some length to illustrate some of the relevant issues. The committee recognized the existence of a power delegated by Parliament to the Governor in Council acting on the recommendation of either the Minister or the Executive Director (Public Health) but that an exercise of such power was subject to post hoc parliamentary scrutiny. In this case, the regulations, valid for 28 days, had expired before the committee commenced its investigation. In the event, the regulations were not required but there is no doubt that they conferred extensive coercive powers on named officials, including police of other states. What surprised the committee was that the innocuous wording of section 15 could give rise to draconic regulations. Earlier on, the committee had said:

> There is no doubt that the regulations trespassed on "... established rights, freedoms or liberties..." but we are asked to say whether they trespassed "unduly". We take this to mean that the abrogation of rights must be disproportionate to the mischief that the regulations seek to overcome or contain. The mischief was that radioactive debris, scattered down a corridor 1 000 kms long and 40 kms wide, posed an active danger to health if handled by unsuspecting persons, particularly children. *It is immaterial in this context for us to consider whether the emergency, had it occurred, could have been dealt with under existing laws, including use of the prerogative powers. The appropriate authorities chose the path provided by the health legislation and it is not for us to impeach that method. We are left with the impression that potential for encroachment on personal and property rights is significant but not disproportionate. Accordingly, your committee cannot say that there was an undue trespass.* (emphasis added)

The committee quite properly posed the question whether Parliament's involvement is desirable or necessary, but it could only raise that question because the avenue chosen was an exercise of delegated legislative power. Had prerogative powers been used, the committee would have had no jurisdiction because of the definition given to "regulation" in sections 5 and 42(8) of the Western Australian Interpretation Act 1984. Equally, neither House is capable, for the same reason,

of disallowing orders in council made under the prerogative and there must still be doubt as to the willingness or jurisdiction of the Supreme Court to review them.

In times of emergency, the Constitution of the Roman Republic sanctioned the appointment of a *Dictator* who wielded absolute power for six months. Elements of fusion and separation of powers are discernible in Rome's Constitution, but it acknowledged that in times of emergency the balance of powers, however imperfect their distribution, must give way to the need for national preservation. It is my submission that the emergency power transcends any notion of separation of powers and that its effective exercise is lodged with the executive branch, if only because it has the power to suspend a truculent legislature by prorogation.

In the course of this article, I have advanced a view that, if accepted and acted upon by an unscrupulous government, could lead to a dismantling of the State Constitution as we instinctively know it to be. In that context, I express the hope that Parliament will take the lead and provide an acceptable and workable framework that contains the power and the occasion and manner of its exercise.

I have also failed to comment on the courts' views and their likely involvement and reaction. The reported cases suggest that once judges have satisfied themselves that a state of emergency exists, they tend to recognize that there is an inherent jurisdiction to deal with it to the point where personal rights and freedoms are subjugated to the common interest. I hesitate to say that the courts make a political decision, but they tend to grant wide latitude where the emergency power is invoked.

The question on which this paper is based must be answered in the negative. Western Australia has inherited a system of pragmatic checks and balances. The system has its flaws and imbalances, and modern concepts and expressions of its structure and value will pass. In the end, what matters is not that there is a separation or a fusion of powers, but whether the popular sovereign remains free to determine how it shall be governed.

Q78609/11/90-800-L/5323