

THE ASYMMETRY OF THE SEPARATION OF POWERS DOCTRINE IN AUSTRALIA

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I INTRODUCTION

The separation of powers doctrine is a fundamental principle of law that maintains that all three organs of government remain separate. This requires that the judiciary, the executive and the legislature all remain distinct from each other to ensure that the different arms of government do not encroach upon each other. The quote that this essay will be addressing is whether the separation of powers doctrine has been compromised to such an extent that it no longer exists. This essay will critically address this by firstly defining the separation of powers doctrine and examining the history of the separation of powers doctrine. Also this essay will show the degree to which the doctrine has been compromised. Although the doctrine has been compromised to an extent, it still upholds the vital and necessary principles that protect the rights of the people from an abuse of power by the government.

II DEFINITION

The doctrine of the separation of powers is a vital principle in constitutional law. The separation of the judiciary, executive and legislature is constructed through the *Commonwealth of Australia*

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Constitution Act ('the Constitution').¹ The separation of powers doctrine requires that each arm of government should be separate and not exercise the powers or functions of the others.² The Australian government does not strictly comply with the separation of powers doctrine because the legislature and the executive are not completely separated.³ Australia maintains a system of responsible government, which upholds the principle that the executive be responsible to the legislature,⁴ yet Ministers are members of both the legislature and the executive.⁵ Additionally, the legislature may confer power and delegate legislation to the executive government.⁶ The essential element of the doctrine is that the judiciary be completely separate from the executive and from the legislature.⁷ There are two key principles of the doctrine that are set out in the Constitution. Firstly, federal judicial power may only be vested in a Court that is defined as per Chapter III of the Constitution.⁸ Secondly, a court that is defined in Chapter III cannot be vested with non-judicial powers.⁹ A Ch III Court is described in the Constitution as the High Court of Australia and 'such other

¹ *Constitution* ss 1, 61, 71.

² Alexander Hamilton, James Madison and John Jay, *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed upon by the Federation Convention September 17, 1787* (J & A McLean, 1788).

³ *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 CLR 280.

⁴ *Constitution* ss 5, 58.

⁵ Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1.

⁶ *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 CLR 280; *Radio Corp Pty Ltd v Commonwealth* (1938) 59 CLR 170.

⁷ *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 540-1.

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

⁹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270.

federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction'.¹⁰ The two criteria that determine whether a court will be considered as a Ch III court are that the court maintains life tenure for its justices¹¹ and that the courts predominant function is judicial.¹²

III HISTORY

Baron de Montesquieu was one of the earliest and most prominent theorists to develop the separation of powers doctrine.¹³ Montesquieu advocated for a complete separation of powers as this would 'safeguard against the centralisation of power in the hands of a single individual or institution.'¹⁴ This doctrine aimed to protect individuals' rights from a tyrannical government exercising power that should be maintained in the separate organs of government.¹⁵ In the US there is a complete separation of the powers of government,¹⁶ while the UK has a compromised separation between the legislature and the executive.¹⁷ Although Australia has formed its government on the UK, the framers of the Constitution also looked to

¹⁰ Constitution s 71.

¹¹ Constitution s 72; *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434.

¹² *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

¹³ Baron de Montesquieu, Thomas Nugent (ed), *The Spirit of Laws* (A & G Ewing, 1752).

¹⁴ Above n 5, 2.

¹⁵ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1

¹⁶ *Springer v Government of the Philippine Islands* (1928) 277 U.S. 189, 277.

¹⁷ Above n 5, 2.

the US system when drafting the Constitution.¹⁸ At a Commonwealth level, the doctrine of the separation of powers is entrenched in the Constitution.¹⁹ However, at a state level there is no legislative inclusion of the separation of powers into state Constitutions.²⁰ Since the High Court decision of *Kable v Director of Public Prosecutions (NSW)*²¹ there has been an inclusion of the doctrine in the states. The High Court held that as a state court may exercise federal judicial power,²² there should be no distinction between federal courts exercising federal judicial power and state courts exercising federal judicial power.²³ A recent decision of the High Court has upheld this view of state courts conforming to the doctrine.²⁴ This will be discussed in more detail below in context of how the doctrine has been compromised. It should be noted that any court that does not exercise any federal judicial power is not subject to the separation of powers doctrine.²⁵

¹⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275; *Attorney-General v The Queen* (1957) 95 CLR 529, 540.

¹⁹ *Constitution* ss 1, 61, 71.

²⁰ *Building Construction Employees' and Builders Labourers' Federation (BLF) v Minister for Industrial Relations* (1896) 7 NSWLR 372; *Constitution Act 1902* (NSW); *Constitution of Queensland 2001* (Qld); *Constitution Act 1934* (SA); *Constitution Act 1934* (Tas); *Constitution Act 1975* (Vic); *Constitution Act 1889* (WA).

²¹ (1996) 189 CLR 51.

²² *Constitution* s 77(iii).

²³ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 115 (Gummow J).

²⁴ *South Australia v Totani* (2010) 242 CLR 1.

²⁵ *Love v Attorney-General (NSW)* (1990) 169 CLR 307.

IV HAS THE DOCTRINE BEEN COMPROMISED?

The two key principles of the separation of powers doctrine is that Ch III courts cannot be vested with non-judicial power and that federal judicial power can only be vested in a Ch III court.²⁶ It is these principles that, if compromised, can lead to an abuse of power.²⁷

A *Chapter III Courts exercising non-judicial power*

If a Ch III Court exercises non-judicial power then the separation of powers doctrine will be violated. The principle of ‘Judicial Independence’ states that if the judiciary starts exercising administrative functions then its independence will be negated.²⁸ The independence of both federal and state courts is an integral part of protecting and implementing the rule of law.²⁹ This essay will discuss the compromise of this principle in relation to state and federal courts.

Judicial power has been defined by a number of sources as a number of different functions.³⁰ However there are several common features that indicate that judicial power is being exercised. These are that the power exercised is directed at settling controversies,³¹ the power is exercised to

²⁶ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

²⁷ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, (Deane J).

²⁸ Hon Marilyn Warren, ‘Does Judicial Independence Matter?’ [2011] (150) *Victorian Bar News* 12, 14.

²⁹ *Ibid* 15.

³⁰ *Huddart Parker and Co v Moorehead* (1909) 8 CLR 330, 357 per Griffith C; *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361.

³¹ *Re Judiciary Act 1903-1920 and Navigation Act 1912-1920* (1921) 29 CLR 257.

determine rights, liberty or property,³² and the body that exercises the power reaches a conclusive decision.³³ If a Ch III court³⁴ exercises power that is non-judicial in nature then this will be in violation of the separation of powers doctrine and the Constitution.³⁵

The states do not have an explicit separation of powers in their respective Constitutions. The High Court decided there is now an inclusion of state courts that exercise federal judicial power into the doctrine,³⁶ as state courts are part of an integrated system of which the federal courts are the peak.³⁷ *Kable*³⁸ held that state courts that are vested with federal judicial power are not able to be given non-judicial power by the State Parliament that would be incompatible with their exercising of the federal judicial power. However since this decision the High Court has determined that there will only be an incompatibility between the state vesting power and a courts exercise of federal judicial power in a few select circumstances.³⁹ These circumstances are: where state legislation attempts to alter or interfere with the working of the federal judicial system established by Chapter III; or

³² *Re Cram; Ex parte Newcastle Wallsend Coal Pty Co Ltd* (1987) 163 CLR 117, 148149; *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (Tasmanian Breweries Case)* (1970) 123 CLR 361; *R v Quinn; Ex parte Consolidated Foods Corp* (1977) 138 CLR 1.

³³ *Shell Co of Australia Ltd v Federal Commissioner of Taxation (Shell Co Case)* (1930) 44 CLR 530; *Huddart Parker and Co v Moorehead* (1909) 8 CLR 330; *Brandy v Human Rights & Equal Opportunity Commission (Brandy's Case)* (1995) 183 CLR 254.

³⁴ See above Part II.

³⁵ *Constitution* s 71.

³⁶ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

³⁷ *Constitution* ss 77(iii), 73(ii); Hon Richard French, 'Executive toys: Judges and non-judicial functions' (2009) 19 *Journal of Judicial Administration* 5, 6.

³⁸ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

³⁹ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

where state legislation vests power on state courts that affects their capacity to exercise federal jurisdiction invested under Chapter III impartially and competently.⁴⁰ This decision has been upheld by a recent High Court case.⁴¹ Parliaments are able to vest the courts that are exercising federal judicial power with non-judicial powers so long as the powers do not undermine their institutional integrity.⁴² The state courts are still independent in their judicial decision making process as this principle requires that the courts maintain ‘substantial discretion’ when deciding a matter.⁴³

Federal courts have always been maintained with a stricter separation of powers principle.⁴⁴ This is expressly stated in the Constitution,⁴⁵ entrenched in common law⁴⁶ and has also been upheld on appeal by the Privy Council.⁴⁷ Yet, over the years some exceptions have arisen which have enabled Ch III courts to be vested with non-judicial power.⁴⁸ These exceptions are when a:

⁴⁰ Ibid, 5989.

⁴¹ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 338.

⁴² *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 592 (Gleeson CJ).

⁴³ Ibid.

⁴⁴ *R v Kirby; Ex parte Boilermakers’ Society of Australia (Boilermakers’ Case)* (1956) 94 CLR 254.

⁴⁵ *Constitution* ss 1, 61, 71.

⁴⁶ *R v Kirby; Ex parte Boilermakers’ Society of Australia (Boilermakers’ Case)* (1956) 94 CLR 254.

⁴⁷ *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529.

⁴⁸ *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144; *R v Davison* (1954) 90 CLR 353; *Hilton v Wells* (1985) 157 CLR 57.

1. Court exercises power that is incidental to the execution of judicial power;⁴⁹
2. Superior court enacts rules of procedures;⁵⁰ or
3. Justice of a federal court exercises non-judicial power in their personal capacity (*persona designata*).⁵¹

In *Queen Victoria Memorial Hospital v Thornton*⁵² the High Court held that non-judicial powers that were exercised not as independent functions, but as incidents in the exercise of judicial power, was an acceptable use of non-judicial power by a Ch III court.⁵³ Also, although it is predominantly a legislative function, the High Court has held that superior courts may use non-judicial power in order to establish rules of procedure to govern conduct.⁵⁴ Lastly the Commonwealth Parliament may vest non-judicial functions on a Justice of a Ch III court if the function is conferred on them as an individual rather than in their capacity as a Judge.⁵⁵ However no non-judicial function that is not incidental to a judicial function can be conferred without the judge's consent and no function can be conferred that is incompatible either with the judge's performance of his or her judicial functions or with the proper discharge by the judiciary of its responsibilities as an institution exercising judicial power.⁵⁶

⁴⁹ *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144.

⁵⁰ *R v Davison* (1954) 90 CLR 353.

⁵¹ *Hilton v Wells* (1985) 157 CLR 57.

⁵² (1953) 87 CLR 144.

⁵³ *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151.

⁵⁴ *R v Davison* (1954) 90 CLR 353, 369.

⁵⁵ *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348.

⁵⁶ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Grollo v Palmer* (1995) 184 CLR 348, 3645.

B *Federal Judicial Power exercised by a non-Chapter III Court*

This principle is expressly stated in s 71 of the Constitution and provides that only federal jurisdiction shall be given to Ch III courts. It provides that the High Court, federal courts and any other court the parliament vests with federal jurisdiction (for example state courts) shall be the only courts to exercise federal judicial power.⁵⁷ The purpose of this principle is to separate the exercising of judicial power from the exercising of non-judicial power.⁵⁸ Isaacs J stated that the defining feature of Ch III courts is that they exercise judicial power that is completely independent and impartial.⁵⁹ If the main functions of a court are non-judicial, then vesting that court with federal judicial power will be invalid even if the court is established on the same basis as that of a Ch III court.⁶⁰ The definition of a Ch III court is listed above.⁶¹ In 1915 the High Court determined that only Ch III courts could exercise federal judicial power when they found that the creation of the Interstate Commission was invalid due to the judges holding only a seven year tenure.⁶² The High Court again upheld this principle when they found that vesting federal judicial power in the Arbitration Court was unconstitutional.⁶³ In *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)*⁶⁴ and *Attorney-General (Cth) v The*

⁵⁷ Constitution s 71.

⁵⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254, 269.

⁵⁹ *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54.

⁶⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers' Case)* (1956) 94 CLR 254; *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529.

⁶¹ See above Part II.

⁶² *New South Wales v Commonwealth (Wheat Case)* (1915) 20 CLR 54.

⁶³ *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434.

⁶⁴ (1956) 94 CLR 254.

*Queen*⁶⁵ the High Court and Privy Council held that judicial power of the Commonwealth is invalid if it is not exercised in a Ch III court. This principle has been upheld on various occasions by the High Court over the past 50 years.⁶⁶

However there are several exceptions to this principle. Firstly the Federal Parliament can vest judicial power in a military tribunal that is not considered a Ch III court without those powers becoming unconstitutional.⁶⁷ This is due to the view that although the military tribunals are vested with judicial power, they are not exercising the judicial power of the Commonwealth.⁶⁸ Secondly courts may exercise minor administrative functions that are essentially administrative functions but quasi-judicial in nature.⁶⁹ These decisions are valid due to the requirement that they are subject to judicial control/review.⁷⁰ Lastly s49 of the Constitution provides that both houses of Parliament may determine whether contempt of parliament has been committed.⁷¹ This is to promote efficiency as it gives Parliament the power to govern its own affairs and

⁶⁵ (1957) 95 CLR 529.

⁶⁶ *Seamen's Union of Australia v Matthews* (1956) 96 CLR 529; *R v Spicer; Ex parte Builders Labourers' Federation* (1957) 100 CLR 277; *Western Australia v Commonwealth* (1995) 183 CLR 373; *Sue v Hill* (1999) 199 CLR 462.

⁶⁷ *Lane v Morrison* (2009) 239 CLR 230; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Nolan; Ex parte Young* (1991) 172 CLR 460; *Re Tyler; Ex parte Foley* (1994) 181 CLR 18.

⁶⁸ *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518.

⁶⁹ *Harris v Caladine* (1991) 172 CLR 84.

⁷⁰ *Ibid.*

⁷¹ *Constitution* s 49; Above n 5, 5.

establishes power to deal with persons who may interfere with the functioning of Parliament.⁷²

V CONCLUSION

The separation of powers doctrine is entrenched in the Constitution. It provides checks and balances on the Government of the day by ensuring that each arm of government remains separate and distinct from each other. In Australia the separation of powers doctrine is asymmetrical, with the legislative and executive arms of government becoming quite compromised. However the main principle of the separation of powers doctrine is that the judiciary remain completely distinct from the other two arms of government. In Australia the judiciary has to an extent been compromised, especially at a state level. The High Court has often protected the separation of powers doctrine from an encroachment by the government and has provided a long precedent of doing so. However even if compromised to a small extent, the separation of powers doctrine will always remain in acting force to protect individual rights and liberties as can be seen through many High Court decisions and, most importantly, because it is expressed in the Constitution.

⁷² *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.