

# **Westminster Democracy and the Separation of Powers: Can they Co-exist?**

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I am speaking today just one week after the launch of a campaign to make Australia a republic. I believe that the debate that the Prime Minister ignited on 7 June has added significance to the issues which I propose to discuss today. Anyone who has followed the republican debate cannot have failed to notice two intriguing facts. The first fact is that the main protagonists, the minimalist republicans and the monarchists, have great faith in the Westminster system of government and wish to preserve it in this country. The minimalists, such as the Prime Minister, propose to replace the monarch with a head of state chosen locally. According to the minimalist proposal, the only change from the monarchy will be that, instead of a foreign sovereign, we will have as our titular head 'one of us'.

Monarchists argue that such a change will damage the system, no matter how we select the Queen's replacement. That is the first fact. The second fact is that almost every opinion poll indicates that an overwhelming majority of Australians wish to elect directly their head of state if a republic is established. This is in stark contrast to the almost universal conviction among politicians, academics and media commentators that a republican president should not be popularly elected. The figures revealed by the latest opinion poll taken in Queensland indicates that a staggering eighty-one percent of those questioned wish to elect directly the president and only nineteen per cent favoured the Prime Minister's proposal to elect the president by two-thirds majority of the two Houses of Parliament. This, in spite of the fact that fifty-seven per cent actually favour the transition to a republic.<sup>1</sup>

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<sup>1</sup> Quadrant Poll reported in *Sunday Mail*, 11 June 1995.

There are two main objections to a popularly elected president. One is that such an election would politicise the office of the president. The Westminster system requires certain reserve

powers mainly concerned with the appointment and dismissal of the Prime Minister and the dissolution of Parliament to be exercised in a non-partisan way in accordance with constitutional conventions. It is thought that the person who wins office through an electoral contest may lack the necessary distance from party politics to be a credible repository of these powers. The second objection is that a popularly elected president may receive a kind of legitimacy which may rival the authority of the Prime Minister and the cabinet.

These two objections presuppose that the people wish to preserve the Westminster system in its current form. Perhaps they do. Then, again, they may be saying that they wish to elect directly a president even if it means changing the present system. One thing, though, is certain: we will never find out what the people think on this issue unless there is a wider public debate in which the case for retaining the present system is weighed against alternative models including those based on direct popular election of governments.

I am pessimistic about the prospects for such a debate as our political leaders seem to have no stomach for it. But there is no better time to discuss this issue than the present. I want to take this opportunity to provoke this debate. I do so because I believe that on this issue the people are right and the politicians wrong. I happen to believe that we can achieve the republican ideal only by replacing Westminster democracy with a system of representative government firmly grounded in the doctrine of the separation of powers, guaranteed fundamental freedoms and genuine federalism. This would involve the direct popular election of the executive government for a fixed term.

In the first part of this paper, I will explain my reasons for holding the view that the Westminster system should be abandoned. The kind of constitutional change that I am advocating places me perhaps within the republican camp. It seems to me that the institutional separation of the legislative and the executive branches and the direct election of the executive cannot be achieved within the framework of the hereditary monarchy. However, I also think that if we are not willing to change substantially our system of government, there is not much point in constitutional theory to sever our links with the monarchy. I say in 'constitutional theory' because I appreciate that many Australians have strong cultural and nationalistic reasons perhaps for breaking with the monarchy. For my part, there is little I can contribute on that side of the debate. Nationalism is not something that stirs me these days, having seen its darker side in the country of my birth, Sri Lanka. As much as I would like to see the Westminster system jettisoned, I do not rate the prospect for such a radical change very highly. Hence, I will proceed to argue in the final part of this paper that if we are to persist with this form of government we should seek urgently to impose upon it the discipline of the separation of powers.

*Why should we abandon the Westminster model?*

Westminster democracy is that system of government also known as responsible government and parliamentary government in which people do not directly elect their

government but leave it to the elected legislature to install, supervise, and remove the government. In this system, the government continues in office as long as it has the confidence of the lower house. Usually, that confidence is lost upon defeat at a general election. This system may be contrasted with the presidential system where the executive president is directly elected by the people and holds office for a fixed term regardless of the confidence of the legislature.

In a recent speech at this very forum, Professor Geoffrey Brennan, the Director of the Research School of Social Sciences at the Australian National University, made a spirited defence of Westminster democracy.<sup>2</sup> Being the true intellectual he is, Professor Brennan does not focus on the weakest arguments of his opponents but aims to criticise them in terms of their best arguments. Thus he concedes that Parliament today is neither a deliberative forum nor a representative body. Yet, he claims that the present system is defensible and, indeed, superior to alternative models such as the American system. I am of the view that Professor Brennan's arguments constitute the best case for the status quo, not the least because he deals with the strongest arguments against it. Hence, I intend to take a leaf out of his book and criticise the status quo in terms of its best justification, namely, Professor Brennan's own arguments. By focusing on his arguments, I am not picking on the good professor, but I am paying him my highest compliment.

Before I address Professor Brennan's defence of the status quo I must specify my own objections to it. In my view, Westminster democracy has two tragic flaws. The first is that the system often installs in power political parties which have been rejected by a majority of voters at the ballot box. I believe that this situation is completely unacceptable in any country which aspires to be a republic. The second flaw is that, owing to a profound and incurable contradiction within itself, responsible government reduces the legislature, or at least the more critical branch thereof, to the status of an instrument of the executive except in the unusual circumstances where the ministry constitutes the minority government. This situation too, I believe, is unacceptable in a republic.

#### *How responsible government defeats the people's choice of ruler*

In postwar Australia on no less than four occasions, the Westminster system handed the federal government to the party rejected by the majority of voters at the ballot box. In 1954, the ALP won 50.7 per cent of the votes on a two party preferred basis, but Mr Menzies formed the government with a working majority of five members.<sup>3</sup> In 1961, the ALP won 50.5 per cent of the vote but Mr Menzies won an equal number of seats and formed the government. In 1969, the ALP won 50.2 per cent of the vote but Mr Macmahon received the luxury of a seven seat majority. In 1990, the Liberal-National Coalition and an independent received 50.1 per cent of the vote but Mr Hawke won government with a handsome eight seat majority. This phenomenon occurs frequently at State level as well.

The distortion of the popular wish concerning who should rule us is aggravated by the requirement of compulsory voting and the requirement of indicating preferences at federal elections. The compulsion to indicate preferences is particularly insidious. It

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<sup>2</sup> *ibid.*

<sup>3</sup> The source of the election result statistics used in this lecture is from: G. Newman, *Federal Election Results 1949-1993*, Department of the Parliamentary Library, Canberra, 1993.

forces many voters to grant preferences to parties they have no wish to support simply in order to validate their primary vote.

*The parliamentary electoral college*

The reason the Westminster system cannot guarantee the government which is desired by a majority of the people is that the system does not allow us to choose our government directly.

Instead, we have to entrust the task to the House of Representatives which acts as an electoral college.

The idea of an electoral college is that it is not the people but their representatives who choose the ruler. The Holy Roman Empire provided an early example of an electoral college, with the Emperor being elected by the rulers of the kingdoms and principalities which constituted the Empire. The Founders of the American Constitution intended to separate the executive and legislative branches with respect to both powers and personnel. They provided for the separate election of the two branches. However, when it came to choosing the President, the Founders mistrusted the passions of the individual voters and installed what they thought was the precaution of an electoral college. Each state elects a number of delegates proportionate to its population on the 'winner takes all basis'. That is, the candidate who wins a state, however narrowly, wins all the delegates. The delegates (with rare exceptions) vote for their candidate. It is always possible that a candidate may be elected on the basis of a minority of the popular votes, although surprisingly, this has happened only thrice in American history. There is also the possibility that a third candidate may deprive the winner of a popular majority as happened when Bill Clinton won the presidency with much less than half the national vote in a three cornered contest with George Bush and Ross Perot. Despite these occasional aberrations, it could be said, that the American people usually get the President preferred by a majority among them.

In France, the President is directly elected without the intercession of an electoral college. However, the President must exercise the executive power through a Premier and a Council of Ministers who must resign when it loses the confidence of the National Assembly.<sup>4</sup> Hence, one could say that the electoral college concept is partially implemented in the French Constitution.

In the beginning, the Parliament at Westminster was by no means an electoral college. Even after the Glorious Revolution established parliament's legislative supremacy, the monarch remained the executive in name, in law and in fact. Parliament had little control over the composition of the ministry. To be a minister, one had to have the confidence of the monarch, not of the parliament. The monarch chose whomever he pleased. It was not until the whig administration of Sir Robert Walpole that ministers were even drawn from a single party. Lovell writes:

Control of patronage lay with the crown. The number of government posts, including many sinecures and government contracts was sufficiently large for their distribution to give the crown real power. The extent to which the ruler was willing to allow a politician to allocate jobs and

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<sup>4</sup> Articles 49 and 50 of the French Constitution.

contracts made all the difference in the world to the loyalty he could command from his supporters, to his power as a Parliamentary manager and hence as a minister. Without royal confidence, therefore, a politician had little hope of building a following in Parliament to support his claims to office.<sup>5</sup>

The criterion for political office was not the confidence of parliament but the control of parliament achieved through royal patronage.

The electorate had no control over parliament and was itself manipulated by politicians. Elections were by no means fair; there were many members who were in the House of Commons by virtue of office or nomination. They were called 'placemen'. The franchise was limited to men with property qualifications. There were many 'pocket boroughs' and 'rotten boroughs' with so few voters that the outcome was easily influenced by bribery. It was estimated that in 1780, out of 658 members of the House of Commons, 487 were virtually nominated and that the majority were elected by about 6,000 voters.<sup>6</sup>

The nineteenth century was the age of democratic reform. By the reform acts of 1832, 1867 and 1884, franchise was extended, electoral reforms were carried out and mass democracy was established with the important qualification, however, that women did not get their vote until well into this century.

The extent of the franchise meant that it was much more difficult to manipulate the electorate. There were just too many voters to bribe. The reforms brought about a tremendous change in the nature of parliamentary democracy. The vestiges of ministerial responsibility to the king disappeared; parliament became accountable to the people. Politicians needed mass support to get elected to government and hence, needed to promise people what they desired. This revolution led to the ministry replacing the monarch as the true executive. It meant that parliament became the electoral college which chose the executive.

The parliamentary electoral college often failed to produce a government that was preferred by a majority of the people at the ballot box. Yet, from the republican standpoint, it was a vast improvement on the hereditary principle. In fact, in one crucial respect, the parliamentary electoral college was superior to the direct election of the government by the people.

Unlike the American electoral college which disbands itself after electing the President, the House of Commons continues to preside over the destiny of the government, acting as an overseer of the government's responsibility to the electorate and as a sentinel of people's rights against official invasion. As Sir Walter Bagehot put it, the House of Commons remained 'in a state of perpetual choice; at any moment it could choose a ruler and dismiss a ruler'. It made a great deal of sense for the people to entrust their elected representatives with the task of installing and keeping under supervision their government. It made sense as long as Parliament was independent of the government.

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<sup>5</sup> C.R.Lovell, *English Constitutional History*, Oxford University Press, New York, 1962, p.419.

<sup>6</sup> G.B.Adams, *Constitutional History of England*, Jonathan Cape, London, 1938, p.397.

### *The fatal contradiction*

The nineteenth century has been described as the classical period of the British Constitution. Following the great reforms, it seems as though the electorate was supreme. The voters could count on their representatives to keep the government honest and to remove it when it misbehaved. This situation could not last. While the monarch was the real executive, parliament could chastise the ministry with impunity. Parliament could call ministers to account, impeach them or otherwise force them out of office without disruption to the administration of the realm. There was a real separation of power between the executive monarch and the legislature and each balanced the other. However, once real executive power was transferred to the ministry and the convention was established that the ministry which lost the confidence of the Commons had to resign, parliament, for the most part, could not express its lack of confidence in the ministry without actually ending the government's life and forcing a new general election.<sup>7</sup>

What occurred then was a classic case of Darwinian natural selection. The new reality meant that only political parties which could secure unquestioning obedience of their parliamentary group could form an effective government. The party whip was born and the independent member of parliament became vestigial. Henceforth, intramural debate would be tolerated in the backrooms but not on the floor of the house where it mattered. It is one of the tremendous ironies of political history that the growth of parliament's legal power to remove a government from office actually reduced its political power to hold a government to account. The institutional separation of the executive and legislative branches was obliterated and the executive regained its ascendancy over parliament, except in the unusual circumstances where no party secured a majority and the Prime Minister led a minority government.

Why did the electorate tolerate the subservience of its representatives to the will of government? Why did the people not insist on proper oversight of government? The reason is that it had no real choice. The system simply did not allow an undisciplined party to remain in power for any length of time. Hence no party allowed its members any freedom in parliament. The only alternatives to monolithic political parties were the independent candidates and they had no prospects of forming a government at all.

### *The Brennan case for the status quo: democracy as a marketplace*

There was another reason for the electorate's impotence in enforcing parliamentary discipline on government. After the great reforms, the electorate was clearly in a position to make demands which politicians could not ignore. Then something funny happened. Politicians discovered that they could turn the tables on the electorate by making offers which segments of the electorate would not ignore. They found a fertile marketplace where benefits and privileges could be traded for votes. Elections could be won through distributional coalition building, that is by putting together offers to a sufficiently large number of special interests. As Professor Brennan notes, parliament

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<sup>7</sup> If an alternative government having the confidence of the Commons was available, the general election could be avoided.

became ‘a prize awarded to the winner of the electoral competition’.<sup>8</sup> Brennan describes this view of parliamentary democracy as follows:

On this view, voters are rather like consumers in a marketplace; they desire policies from the government and they vote for those policy packages they prefer. Candidates or political parties are analogous to firms; they bid for custom by offering policies in competition with one another. In this way, electoral competition is analogous with market competition; politicians can be construed as offering alternative bids for office (like competitive tenders for a construction job) and the bid that is most preferred by the electorate is successful.<sup>9</sup>

I find myself in substantial agreement with Professor Brennan’s description of the current state of Westminster democracy. He finds that parliament today is ‘just a piece of theatre’ and the vote is ‘pointless ritual’<sup>10</sup> but he later makes the concession that this theatre plays an important part in the bidding process of the political marketplace which constitutes the main game.<sup>11</sup> Whether or not we put it as high as that, it seems reasonably clear that in the routine circumstances, the lower house is very much the servant of the executive. Unfortunately, my agreement with Professor Brennan ends there. Professor Brennan sees two main advantages in practising the Westminster system and I will consider them in turn.

*i) Political Parties as a brake on ‘Majoritarian cycling’.* Brennan sees the competition between disciplined political parties as a means of suppressing the phenomenon of ‘majoritarian cycling’. The term ‘majoritarian cycling’ is a micro-economist’s way of saying that among a group of equally selfish individuals seeking to obtain shares of an economic pie, there can be an endless process of shifting majorities. To use Brennan’s own example, in seeking to divide \$100 among three entirely selfish persons, there is clearly no outcome such that we cannot find another which is preferred by a majority.<sup>12</sup> Thus, an equal division between the three will be defeated by a 50:50 split between any two; which in turn is defeated by an appropriate 60:40 split in which one of the earlier coalition members gets 60 and the other nothing, and so on. Brennan says that ‘electoral competition between two rival parties under reasonable conditions will generate a stable equilibrium at the median of the preferred points of individual voters’.<sup>13</sup>

It is difficult to see how a bidding war between political parties can produce a stable equilibrium at the median. But it is clear enough that where people cannot engage in deal making directly but only through group representatives, the scope for

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<sup>8</sup> G. Brennan, ‘Australian Parliamentary Democracy: One Cheer for the Status Quo’, 11 (1), 1995, *Policy*. Professor Brennan’s paper was earlier published in *Views of Parliament Democracy, Papers on Parliament, No.22*, Department of the Senate, Parliament House, Canberra, February 1994.

<sup>9</sup> *ibid.*

<sup>10</sup> *ibid.*, p.17

<sup>11</sup> *ibid.*, pp.20, 21–22.

<sup>12</sup> *ibid.*, p.20.

<sup>13</sup> *ibid.*

majoritarian cycling is reduced as representatives are compelled to seek the most favourable synthesis of the individual members' desires.

This is essentially the point made in a non-economic way by James Madison when he wrote in *The Federalist*, No. 10, that the representative form of government has the tendency to 'refine and enlarge public views, by passing them through the medium of a chosen body of citizens'.<sup>14</sup> This kind of synthesising occurs in both the Westminster and American models. In the Westminster model, the deal making occurs in relation to a whole package or program to be pursued by the political party over the term of the parliament. In the United States, owing to the lack of party discipline, renegotiations and deal making can occur throughout the legislative term with respect to each proposed measure.

In real life, neither model works exactly like this. However, it is clear that under the US system, the people have much greater capacity to influence their delegates in relation to each measure proposed in the legislature. Hence, in my view, the American model is more democratic and hence, more republican than the system which we have. It must be mentioned that a democracy which functions mainly through deal making is seriously flawed and is a grave threat to the rule of law. However, the solution to this problem lies elsewhere and not in monolithic political parties.

*ii) Political parties as accountable agents.* Professor Brennan's second justification of Westminster democracy is that it permits governments to be judged by the electorate according to the extent that they have fulfilled their policy commitments. For this form of accountability to be effective, 'the winner of the election must be identified as the government with effective control over the legislative and policy making processes'.<sup>15</sup> Brennan explains:

The test is clearly met if the elected candidate is an all-powerful president; but it is also met if the elected candidate is a dominant party. However, the test is not met if the candidates are individual members of Parliament who are not held together by party ties. In that case, all that each winning candidate can credibly promise to do is to vote in a certain way in the Parliament, without any commitment to bring any policy into practice.<sup>16</sup>

Brennan prefers a dominant party to an absolute president because presidents come and go while parties endure. A president may have no incentive to heed the political market signals after he or she decides to quit or is defeated, whereas a party will continue to be a player.

I have three main problems with this argument. Firstly, I think it overestimates the capacity of the electorate to monitor and pass judgment on a government's term of office in the context of a bargaining democracy. In implementing its program over a term of office, most governments would disappoint the expectations of some groups and fulfil those of others. Although the record in office is an important factor, a government may still win with the aid of a new or modified coalition of interests. Except when major errors or abuses are committed, elections are decided by the

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<sup>14</sup> J. Cook (ed), *The Federalist*, Wesleyan University Press, Middletown, 1961, p.62.

<sup>15</sup> *ibid.*, p.21

<sup>16</sup> *ibid.*

ongoing bidding process which allows parties to recoup lost support by new promises to disaffected groups or to alternative groups. The accounting process is also undermined by the fact that a great deal of the governmental activity cannot be monitored as it happens outside parliament within bureaucratic structures which elude political and judicial scrutiny.

Secondly, the criticism of the Westminster system is not that it promotes the formation of political parties, but that it requires a degree of party discipline which destroys the principle of responsibility to parliament. Political parties are a naturally selected phenomenon in any large democracy. Candidates who band together can offer voters more things than those who remain independent. So, there will always be political parties. In the United States model, the degree of cohesion within political parties is dictated by voter sentiment. Obviously voters see advantages in their delegates being part of a powerful group. At the same time, they would like their delegates to break ranks when they think that the group is making a wrong decision. Therefore, the American system tends towards optimality in party discipline as representatives constantly fine tune their performances between solidarity and independence. In contrast, Westminster democracy leaves no room for the evolution of an optimal party system.

My third problem with Professor Brennan's argument concerns the price we pay for Westminster accountability. The 'Parliament as prize' model requires that we choose from among competing bids at election time. These bids constitute whole packages or programs to be pursued over several years. They contain things that we like and things that we do not like. We can only get the programs that we want by agreeing to the programs that we do not like. For example, I cannot say to a political party that I agree with its non-discriminatory immigration policy but vehemently disagree with its policy on racial vilification which I think is a destruction of the freedom of speech. Even if I say so, at the ballot box I cannot split my vote. If I take the one, I must take the other.

It is not an unreasonable assumption that the decisive issue at the last general election was the coalition's proposed Goods and Services Tax (GST). But, after the election there were many fringe groups who claimed that Labor had mandates on a range of issues which, by themselves, would never have received majority support. We cannot blame those groups for making the claims or the Labor party for implementing them regardless of majority wishes. Our political system invites such claims and legitimates them.

#### *An alternative form of government*

The clear alternative to Westminster democracy is a system where the executive and legislative branches are directly and separately elected for fixed terms. Under such a system, the executive cannot dismiss the legislature, nor the legislature dismiss the executive. The law-making power resides in the legislature, with the executive having the right to propose but not dispose of legislation. An independent judicature may enforce the separation of legislative and executive powers and safeguard the citizen's constitutional rights against invasion by either branch. Ideally, such constitutional rights would include the basic personal and political freedoms without which constitutional democracy will not operate.

What are the objections to such a system? The following may be considered.

i) *The first objection is that an independent executive will be too powerful.* As US presidents quickly find out, this is not true even when their own party controls Congress. The fact that the legislature does not have to prop up the executive means that the legislature can subject the executive to law far more effectively and act as a check on its power. In the Westminster system, the legislature is precluded from balancing and controlling the executive power owing to the fatal contradiction within that system.

ii) *The problem of the gridlock.* It has been pointed out that, under the American system, the executive's dependence for money and legal authorisation on a legislature that it does not control can produce ineffective government. It is said with some justification that the separation of executive and legislative branches can lead to excessive conflict between these branches and also between the two houses of parliament but I think it is easy to overstate these arguments.

By what yardstick do we pronounce a system of separated powers as ineffective? After all, it is the system under which the United States became the most technologically advanced and economically and militarily powerful nation the world has seen. Of course, it is also a system under which the great social ills of poverty and crime persist. I do not think that the system can take all the credit for America's successes. By the same token it cannot be tainted with all of America's failures.

The so-called gridlock actually has two faces. We can view it as conflict and deadlock but we can also see it as a situation which demands negotiation and compromise as opposed to dictatorial resolution. I think our fear of deadlock has something to do with the culture of soft authoritarianism which the system of cabinet government promotes. Negotiations and compromise do occur under the Westminster system but tend to happen in the backrooms at party conferences and during the electoral bidding process which precedes elections. Westminster democracy, public backdowns and compromises are viewed as weaknesses and may prove fatal to political careers, as we have seen from time to time. Under the system of separated government, public negotiation and compromise become the stuff of politics. It produces greater transparency and hence better accountability.

*Can separation of powers co-exist with Westminster democracy?*

My plea in this lecture is that the people of Australia be given an opportunity to consider whether they should retain the Westminster system or adopt a different republican form which would allow the people to choose directly their government. However, if we decide to keep the Westminster system, whether by choice or by default, we should think of ways to improve its operation. One of the ways is to reimpose the discipline of the separation of powers.

As we have seen, the Westminster system today fits Professor Brennan's model of 'Parliament as prize'. A key justification for maintaining the system is that it provides a system of accountability which enables the electorate to assess the extent to which a government has fulfilled its commitments to the electorate. How does the electorate monitor a government's performance? It is easy enough in economic matters. A political party may promise to increase employment, contain inflation, intensify productivity and decrease interest rates—they promise the moon. We can find out

whether these things have happened. But good government is not only about good economic figures. It is also about fairness in administration, the predictability of official actions, the morality of decisions affecting individuals and equality before the law. It is also about the liberty and security of the citizen. Westminster democracy not only fails in this regard but actually encourages arbitrariness in government.

Under the 'Parliament as prize' model, government gets what amounts to a blank cheque. Provided that it works within the liberally construed powers of the Commonwealth Parliament, it can do pretty much as it pleases. The government can enact legislation which empowers officials to pursue policy objectives free of the restraints of law. This is the consequence of the High Court's insistence that there is no real separation of powers between the executive and the legislative branches of government in Australia.

In Australia, the doctrine of the separation of powers has been implemented selectively. The High Court has sought to keep judicial and nonjudicial powers separate, while condoning the unification of legislative and executive powers in the hands of the executive branch of government. The Court regards the separation and independence of the judicature as essential to the maintenance of the federal distribution of powers and for the protection of the liberty of the citizen. However, the Court considers that the system of responsible government established by the Constitution dispenses with the need to limit the law-making power of the executive.<sup>17</sup>

The neglect of the legislative and executive division has harmed the integrity of the separation of powers doctrine in a manner which has seriously weakened the doctrine's capacity to serve its political ends. The grant of unfettered law-making powers to the executive enables that branch to make law at the point of its execution and deprives the courts of legal standards by which to judge the legality of official actions.

This impotence was dramatically highlighted by Barwick CJ's admission in the case of *Giris v Federal Commissioner of Taxation* that a legislative discretion conferred upon an official cannot be challenged on the grounds of 'width ... and the lack of discernible criteria by reference to which the propriety of its exercise could be tested'.<sup>18</sup> I think it is a very sad reflection on a constitution when the chief justice of the country says that the court is powerless to strike down an executive act done under power which is so totally absolute that there are no criteria by which to judge whether that act is legal or not.

This judicial impotence is self inflicted. This is the unfortunate part. It is true that in Westminster democracy members of government are also legislators. Hence, a complete institutional separation is impossible. But, it was possible to interpret the Australian Constitution to require that the primary law-making function, that is the function of determining the principles as opposed to the detail of legislation, should

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<sup>17</sup> *Victorian Stevedoring & General Contracting Co. And Meakes v Dignan* (1931) 46 CLR 73 73, 86-87, 114, 120.

<sup>18</sup> (1969) 119 CLR 365. See also *Murphyores Inc Pty Ltd v Commonwealth* (1976) CLR I, 19 per Mason J.

be confined to Parliament. It was possible to insist that the government be bound by laws declared beforehand, even if the government itself was the author of such laws. It was possible to insist that if the government wished to change the law, it should do so in Parliament and not in tribunals and government departments which actually administer the law.

The High Court has taken the view that without executive law-making of this sort, 'effective government would be impossible'.<sup>19</sup> There is no doubt that the executive has to be left with discretion to work out much of the detail of the law. However, this is a power which can be subjected to justiciable standards and principles. American and German courts, when confronted with an identical issue, reached this conclusion. The German precedent is particularly instructive as that country has a system of parliamentary government very similar to the Westminster model. The German Federal Constitutional Court has declared that 'a vague blanket provision which should permit the executive [branch] to determine in detail the limits of [the individual's] freedom, conflicts with the principle that an administrative agency must function according to law'.<sup>20</sup>

One may, of course, ask whether there is any point in consulting Parliament when Parliament is simply the mouthpiece of the executive. There are three good reasons why Parliament should be consulted. Firstly, parliamentary enactment of law reduces the capacity of officials to make the law to suit individual cases and therefore it lessens arbitrariness of government. Secondly, where Parliament lays down the legislative principles, the courts have substantial legal standards by which they could determine the lawfulness of official actions. Thirdly, parliamentary legislation attracts public attention and so assists the process of electoral assessment of the government's record in office.

If we continue to practise Westminster democracy, it is vital that we not only maintain an independent and separated judiciary, but that we also achieve a substantial separation of legislative and executive powers by upholding the rule against the unguided delegation of law-making power. No constitutional alteration is required to effect this change; no referendum is required. It is within the High Court's power to recognise this constitutional principle, which has been recognised elsewhere. If the High Court fails to do so, there is much that the Australian Senate could do to ensure that the law-making power of officials is properly circumscribed by justiciable standards. In opposing the conferment of arbitrary power on the officials and by ensuring that Parliament alone determines matters of legislative principle, the Senate will not be undermining Westminster democracy but will be strengthening it.

**Questioner** — I agree substantially with the comments you make about our representative institutions at the moment. Where I would have some disagreement is in the remedy that you prescribe for those defects. I look at the Australian Senate; I look at the Tasmanian House of Assembly; I look at the ACT Legislative Assembly

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<sup>19</sup> Dignan's Case (1931) 46 CLR 73, 117 per Evatt.

<sup>20</sup> Emergency Price Control Case (1958) 8 BVerfGE 274, quoted from D.P. Kommers, *The Constitutional Jurisprudence of the Republic of Germany*, Duke University Press, Durham, London, 1989, p.148.

and, as I understand it, the parliaments of Ireland, Malta and Israel, and I ask whether a more achievable or better remedy would be reform of the electoral system?

**Dr Ratnapala** — I understand that you are talking about the reform of the electoral system in so far as it concerns the House of Representatives.

**Questioner** — I am suggesting that multi-member electorates with proportional representation, particularly when they include Robson rotation as they do in the ACT and in Tasmania, could in fact remedy a lot of the defects that you have identified.

**Dr Ratnapala** — Certainly there is no constitutional objection to adopting proportional representation for elections to the House of Representatives. It would not get rid of the problem of the House being an electoral college which produces governments which do not have popular support at the general elections. On that score, it could actually promote more minority supported governments than the present system. I do admit, though, that on the other score it would improve parliament's capability or willingness to act as a supervisor or overseer of executive government. I certainly do concede that.

**Questioner** — What we see in the ACT with the Legislative Assembly, where we may well never see a majority government, is the building up of a set of conventions which do lead to very real supervision of the executive by the legislature. I think that is a very healthy thing.

**Dr Ratnapala** — Yes. Under the present conventions, the government will have to resign from office every time it is defeated on a money bill, on a vote of confidence or perhaps even on a major central plank of its legislative policy. We have to change that convention to accommodate the kind of situation that will improve oversight. Whether that would involve radically changing the Westminster system is the question. Perhaps we have to do that.

**Questioner** — You unfavourably compared the Westminster system with the American system of democracy. But it strikes me that there are two issues; one you did not address and the other you introduced almost by way of footnote at the end. The first thing is that in the American system you do not elect the executive. You elect the president. Once the president is elected, the individual has little, if no, control over what the executive does, except through their representatives in the legislature.

The second thing is that you seem to be opting for an executive presidency of the American form but admitted right at the end of your talk that the German system of government, which is similar to our own, appears to be very effective, at least in terms of the example that you gave. Yet it has a titular presidency, not an executive one. It does not seem as though a titular republic is necessarily inferior to an executive one.

**Dr Ratnapala** — The first point: the American President is also elected by electoral college. But most of the time the American people get the president they want, although at the last election the American people did not get the president they wanted because of a third candidate obtaining something like eighteen per cent of the vote. Clinton drew only about forty per cent of the vote. The American system consists of a

system of checks and balances. You elect your president who appoints the cabinet and they are separate from the Congress. The American president's freedom to act, is circumscribed by what Congress does in terms of passing laws and that is balanced in turn by the president's power to veto in which case a veto can be overridden by a two-thirds majority and so forth.

The German system is an improvement on our system because of the recognition of the separation of law-making power as between the executive and the legislature. Of course, in terms of economic performance, cultural performance and social performance it is difficult to say which is the better system. My own view is that the American system is better, because it allows people to bring their views to bear on each important question as it arises in the legislature—it is a more republican form of government. In the German system, you still have the party discipline in the Bundestag and people do not have the capacity to bring to bear their opinions on each individual measure as it comes up. I certainly do agree, however, that it is an improvement on the Australian system.

**Questioner** — Would you care to comment on the merits of the respective systems in protecting the interests of minorities?

**Dr Ratnapala** — In themselves, minorities can be equally vulnerable under both systems. It is possible under the Westminster system to put together a coalition of interests, appealing to different interest groups, which may have the effect of undermining or neglecting certain minority interests. The essential difference between the Westminster system and the American system is that the decisions are made in a package in the Westminster system. In the American system, the decisions tend to be made in relation to particular important measures.

Under each system, it is possible for a majority coalition to ignore a minority viewpoint and, in fact, minority fundamental freedoms. That is what is happening with the racial vilification law. I think there is a coalition of interests which is impinging on a certain fundamental right. I think the answer to that is to recognise basic freedoms in a constitutional system. To the extent that the American system promotes freer debate and freer discussion, perhaps the minorities may feel, more comfortable in that system than under this.

**Questioner** — What are these basic constitutional rights? Do they include economic rights or are they only political civil rights?

**Dr Ratnapala** — Basically, I believe that we could agree on some basic civil and political rights in a negative form such as the abstract equality before the law and the freedom from arbitrary arrest and punishment without trial. The right to vote, for example, is not recognised under the Australian Constitution. The High Court judges, in one case, have said that the Australian Parliament could limit the right to vote to white Anglo-Saxon Protestant males if it wanted. Those kinds of freedoms, certainly, I think we could agree on. But, when it comes to economic rights, you will be talking about positive rights such as the right to employment, the right to a minimum wage or the right to a certain standard of living. I have problems with that.

As a nonjusticiable set of policy objectives, it will do no harm in a constitution, but if you are going to put them down as obligatory provisions of a constitution, then how do you ensure that they are implemented? You can only ensure that everyone gets a job by controlling everyone's economic activity. You can only ensure that everyone has a certain standard of living by socialising the means of production — that would in turn impinge on certain other rights. So I have problems with positive economic rights. I think it is possible to have negative economic rights such as the right to engage in free association in trading and the right to hold property. I do see problems when people are given positive rights in the sense that the government has to deliver certain minimum standards of living. It is a very good ideal but I do not know whether it can possibly be implemented.

**Questioner** — I am a bit perplexed about your characterisation of the High Court in terms of one decision that I am not familiar with by Sir Garfield Barwick. I would have thought that the character of the High Court in the last several decades had changed markedly since that time, particularly in terms of some of the issues you are concerned about. Do you have a view about what has happened in the last twenty years, particularly with the growing strength of administrative law and the more recent judgments in the High Court?

**Dr Ratnapala** — I would say that the character of the High Court is changing, not so much in the last twenty years but perhaps in the last ten years or even in the last five years. Certainly there is a discernible change in attitude towards the Constitution. It is very clear from the recent judgments in the broadcasting cases and in the war crimes case where they recognised the ban on ex post facto law, due process decisions of one sort or another, and so forth.

I think the High Court's attitude has changed from one of deference to the legislature to one of vigilance against the legislature. Of course, many people are disturbed by that development thinking that the High Court has acquired more power than it actually should. I think the High Court's recent decisions have represented real constitutional gains in this country. I believe that that is a positive tendency but perhaps some decisions have gone overboard.

Unless the High Court looks at the Constitution as a living document which imposes limits on the political authorities of this country, there is no chance to develop a jurisprudence concerning what these limits are. The High Court has moved towards developing such a jurisprudence now. Perhaps we may disagree with some of the decisions but certainly the High Court has paved the way for a new debate on the limits of government.

**Questioner** — Would you comment on the proposition that in the American presidential system the power through finance of the group which can produce the most support for a presidential candidate fundamentally affects the nature of the executive, whereas, the parties under the present system in Australia have broadly equal power to determine the executive.

**Dr Ratnapala** — I think there is a problem at presidential elections in that not many people can actually aspire to the nomination of the political party or run as an independent. Therefore, the choices that the people have as regards the president are

limited. However, I think the merit of the American system is that it is a system of checks and balances. There are many congressmen and women and senators who do get elected without having to be millionaires. Those people have a closer nexus to their constituencies and are controlled by their constituencies to a much greater extent than our members of parliament and senators. So, in that sense, the elected president's powers are circumscribed and I think that is the way it has to be overcome. Of course, there may be reforms possible to allow more candidates and fairer elections at the presidential level.