

The separation of powers, and the Australian Electoral Commission

Abstract: This essay examines the doctrine of the separation of powers, and the way a recent decision in the Australian Administrative Appeals Tribunal, namely, *Davey and Australian Electoral Commission and Anor*, [2013] AATA 794 (11 November 2013), shines some light on this doctrine. It is suggested that doctrine of the separation of powers was conceived to safeguard against the despotism of tyrants, although in the modern era we need to be cautious of the despotism of bureaucracies. Note: Abstract not included in original publication.

Article: The separation of powers is one of the central doctrines of contemporary representative democracy. The doctrine owes much to the influence of French philosopher Montesquieu, and particularly his 1748 work *The Spirit of the Laws*. Montesquieu therein outlined the principle that the best form of government is where no person needs to be afraid of another, and the way to do this, according to Montesquieu, was a separation of the powers of government, between the legislature, the executive, and the judiciary. This was an essential safeguard against despotism, and a way to undergird the liberty upon which democracy relies.

You know that a political doctrine has influence when it is recognized in popular culture. In the 2007 movie, *National Treasure: Book of Secrets*, the hero, Ben (actor Nicholas Cage) is engaging a bicycle gendarme in conversation, on the Bir-Hakeim Bridge in Paris. Fortunately the gendarme speaks English. Ben comments: "You know how much our Constitution [the US Constitution] was influenced by your man Montesquieu?" After brief recognition by the gendarme, Ben commences to quote Montesquieu: "A government ought to be set up so that", and at this point the gendarme joins in, "so that no man need to be afraid of another".

But it was not merely the US Constitution which was influenced by the doctrine of the separation of powers – this finds expression in the Australian Constitution. The influence on the Australian Constitution came partly from the work of Montesquieu and partly from the high regard that the framers of the Australian Constitution held for the US Constitution. The separation of powers in the Australian Constitution is reflected in the first three chapters of the Constitution being "The Parliament", "The Executive Government", and "The Judicature".

A recent interlocutory decision made by Deputy President James Constance in the Australian Administrative Appeals Tribunal, namely, *Davey and Australian Electoral Commission and Anor*, [2013] AATA 794 (11 November 2013), shines some interesting light on the doctrine of separation of powers. This interlocutory decision concerned a joinder application, and the background was a request made to the Commission, that is, the AEC, to change the registered officer of a registered political party.

The change of registered officer application was initially refused by the Commission on 10 August 2013, and, at paragraph 4, Deputy President Constance indicates that "the reason given was that, in the view of the Commission, the meeting which purported to appoint [the replacement registered officer] was not a valid meeting of the National Executive of the Party".

However the interesting part of the interlocutory decision by Deputy President Constance comes later at paragraph 15, where he indicates "Although this was a finding of the Commission [that is, that a particular meeting was purportedly invalid], it does not bind the Party or the members of the National Executive. Such a question can only be decided in a legally binding manner by a Court".

It is interesting also that in the following paragraph, namely paragraph 16, Deputy President Constance finds support for his position in case law that it is "neither proper nor fair" that a government agency should be conducting a merits review of a decision, where such matters can be properly and fairly determined "in a court where the rules of evidence apply".

If the decision of the AEC regarding the internal workings of a political party is not binding, as Deputy President Constance suggests, it is useful to ask why? In other words, why was Deputy President Constance correct? I would suggest that the answer is to be found in the doctrine of the separation of powers. What the AEC was doing was undertaking a function that ought to be properly the function of the Courts.

If certain individuals are aggrieved by a decision within a registered political party and, for instance, they believe that a particular meeting was not valid, it is not appropriate for those individuals to attempt to use the AEC as a de facto court of appeal. And it is not appropriate for the AEC to allow itself to be used in this way. In this matter, the AEC made a jurisdictional error.

What makes the conduct of the AEC in this case even more egregious is that this matter did go before the National Disputes Committee of the particular registered party, with the agreement of all parties to the dispute. The National Disputes Committee undertook a detailed examination, taking and considering evidence from all parties, and found that the particular meeting was indeed valid. The Commission in effect overturned this decision of the National Disputes Committee of the particular party, finding that the meeting was invalid.

It is interesting to note that the case law, as cited by Deputy President Constance in paragraph 16 of his decision, specifically refers to the importance of the "rules of evidence". I would suggest that the history of this case shows that the AEC did not properly apply the rules of evidence. This is a further practical reason why government departments and agencies ought not usurp the role and function of the courts. Courts are set up and staffed precisely for this purpose - so that they can properly and fairly apply the rules of evidence.

The conduct of the AEC in this matter has wide ramifications. It potentially means that the AEC could intervene in any internal decision-making of any registered political party in Australia, under the guise of administrative considerations. It is true that the legislation does give the AEC, in considering an application to change a registered officer, the authority to consult with the existing registered officer. However such a process ought not to extend to usurping the role of the courts.

I return to Montesquieu. One of the motivations for Montesquieu's doctrine of the separation of powers was to prevent despotism, and in this Montesquieu was thinking of the despotism of tyrants. However in modern societies there can be a different kind of despotism, and one such modern despotism is the despotism of bureaucracies. The decision by Deputy President Constance is a timely reminder to government departments and agencies of the limits of their jurisdiction, and that they ought not be usurping the role of the courts.

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