

Parliament and the Judiciary: What is the proper relationship?

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Opening

When asked by Senior Council Michael Ford QC in cross examination: What do you understand by the separation of powers under the Westminster system?

Then Premier of Queensland Sir Joh Bjelke Petersen replied: The Westminster system? The stock?

Forde pushed on: What do you understand by the doctrine of the separation of powers?

Bjelke Petersen was blank: I don't know which doctrine you refer to.

Frustrated, Forde stated: There is only one doctrine. Tell me what you understand.

Bjelke Petersen responded: You tell me. I'll tell you whether you're right.¹

This is an excerpt from cross examination of then Premier of Queensland, the Hon. Sir Joh Bjelke Petersen in the 1989 *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, commonly known as the *Fitzgerald Inquiry*.²

Despite serving as Premier for almost 20 years, Bjelke Petersen could not answer this simple question.

A question that defines the structure of our constitutional democracy.

The *Fitzgerald Inquiry* unearthed entrenched corruption in the Queensland Government Police Force and elements of the Judiciary. It was a catalyst that

¹ *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, 1989. [The *Fitzgerald Inquiry*].

² Transcript of Proceedings, *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, (Criminal Justice Commission Archives) 1989.

changed Australia's political landscape and, over thirty years later, remains a pillar of the standards of good governance demanded from all three arms of Government.

Introduction

Good morning distinguished guests, colleagues and friends.

It is a privilege to join you all at the 24th Commonwealth Law Conference and share my personal perspective and opinion about this enduring dilemma - Parliament and the Judiciary: What is the Proper Relationship?

This question continues to trouble law makers, judges, and everyday citizens.

As we examine the unique relationship between the Parliament and the Judiciary, I urge us look to the tried-and-true principles that shaped democratic societies across our Commonwealth - the Separation of Powers and Rule of Law.

Doctrines just as vital to maintaining our societies today, as they were at foundation.

These comments are my opinion and not the view or position of the NSW Government.

Definitions of the Separation of Powers

The Separation of judicial powers from legislative and executive power is fundamental to the system of checks and balances designed to achieve a stable democracy.³

Surmised by French CJ, during his tenure as Chief Justice of the High Court of Australia – we require three arms of government, as individual and coexisting pillars;

- The Legislature – to make the laws;
- The Executive – to carry out, and enforce the laws; and
- The Judiciary – to resolve disputes according to law.⁴

³ The Fitzgerald Inquiry, 328.

⁴ French CJ, 'The Boundaries of the Judicial Role' (Speech, LAWASIA Conference 2009 Ho Chi Minh City, Vietnam Judicial Activism –10 November 2009).

Role of Chief Justice and the Judiciary

At the crux of the Separation of Powers, is the independence of the judiciary.⁵

Although judges are servants of the public, they are not public servants.⁶ It is not the duty of a judge to give effect to policies of the government of the day, but to administer justice according to law, without fear or favour.

The Judiciary protects individuals from potential abuses of governmental power by ensuring power, and those who wield it, are kept within legal bounds imposed by Parliament, and constrained by principles of natural justice.⁷

The Chief Justice represents the judiciary as an institution. At functions, in the media, and within the profession - the Chief Justice is a symbol.

At the heart of their duty, the Chief Justice must ensure relations with the other arms of government are appropriate and cordial.⁸

In Australia, at both a Federal and State Government level, a Chief Justice is appointed at the discretion of the executive government, with Cabinet acting on advice of the Attorney-General.

In the aftermath of the *Fitzgerald Inquiry*, the State Governments adopted a Protocol for Judicial Appointment to ensure appointment on merit and not political favour.

The protocol raised a question; whether greater regulations are required to guard the efficacy of judicial appointments?

In all jurisdictions, we remain vigilant in ensuring judges are appointed based on legal expertise, not political loyalty.

⁵ Moore, J, '*Judicial Independence – Breaking free from the Executive Branch*' (Speech, 19th Pacific Regional Judicial Conference, Tumon Guam, 7-10 November 2010).

⁶ Gleeson CJ, '*The Role of a Judge and Becoming a Judge*' (Speech, National Judicial Orientation Programme, Sydney, 16 August 1998).

⁷ The Fitzgerald Inquiry, 128.

⁸ Gleeson CJ, '*The Role of a Judge and Becoming a Judge*' (Speech, National Judicial Orientation Programme, Sydney, 16 August 1998).

Role of Attorney General of NSW

The Attorney General role is perhaps one of the most controversial for balancing political and legal spheres. As chief legal officer and a member of Parliament, the Attorney General represents a dual role.

Primarily a politician, the Attorney-General also has extensive powers and discretions, outside of Cabinet control.

Concerns have been raised surrounding impartiality of this role, but the fact that this responsibility is entrusted to a senior law officer, who is actually democratically elected, forces greater accountability. Far greater than an appointed public servant or in fact, a member of the judiciary.

Duality of the Attorney General's role requires a step beyond political party machinery to ensure courts are effectively resourced and supported.⁹

As core guardian of the integrity of the administration of justice, it is not just tradition, but an imperative safeguard, that the Attorney General is accountable to all arms of Government and the public.

Role of Elected Members of Parliament in the debate

Elected Members of Parliament play a key role in the relationship between law and politics.

Parliament provides the forum where necessity and worth of laws are debated, ensuring legislation is fair, just, equal and representative.¹⁰

In modern society, law is shaped outside Parliament. Ministers present bills to Parliament from resolutions of Cabinet or the party room. These resolutions derive from events and public need.

No Government has all the answers on any particular topic. An unsuccessful Government assumes they know best. A good government listens to others, and knows the best result is the product of rational debate of opposing views.¹¹

¹⁰ Fitzgerald Inquiry, 123.

¹¹ Ibid, 128.

Judicial Activism

In my opinion, judicial activism presents a contention to the Separation of Powers. When judges step beyond interpreting law, to actively shaping policy, it allows the unelected judiciary to drive policy.¹²

The term “judicial activism” was first reported before the United States Supreme Court in 1947 - Roosevelt’s Supreme Court¹³ – when judges entered the realm of policymaking.

In my opinion, judicial activism, or hero-judging, challenges democracy.

It allows unelected leaders to govern and presents an opportunity for elected leaders to skirt their responsibilities. Politically sensitive issues are transformed into legal questions of right and wrong, to be determined by the judiciary.¹⁴

This transformation compromises integrity of the legislature, and diminishes judicial impartiality. As well as public perceptions of the independence of the judiciary.

Policymaking should not bypass public adjudication. To allow judicial activism erodes the foundations of democracy.

It is not in every country that one can face a judge without concern for his or her political links with the government.¹⁵ Citizens in the Commonwealth have this right – and we owe this to the rule of law.

Examples of Parliament vs Judiciary

In recent years, a number of thinly veiled remarks from senior Australian judges have shaken the stable relationship between the Parliament and the Judiciary.

Industrial Relations Court

For example, in 2023, the NSW State Government introduced the *Industrial Relations Amendment Bill*, seeking to reintroduce the Industrial Relations court.

In her Second Reading Speech, the Industrial Relations Minister noted that restoring this focused Court would encourage quick, cheap and practical resolutions for industrial issues, as opposed to the “legalistic, slow and costly”

¹² *State Government Insurance Commission v Trigwell* [1979] HCA 40; (1979) 142 CLR 617 at 633 Mason J

¹³ French CJ, ‘The Boundaries of the Judicial Role’ (LAWASIA Conference 2009 Ho Chi Minh City, Vietnam Judicial Activism –10 November 2009).

¹⁴ John Gava, ‘The Rise of the Hero Judge’ (2001) 24(3) *UNSW Law Journal* 747.

¹⁵ George Orwell, *The Lion and the Unicorn* (Penguin Books, 2018).

process to commence proceedings before the Supreme Court.¹⁶ A statement made under Parliamentary privilege.

In Response, the Chief Justice of the NSW Supreme Court made an extraordinary intervention, releasing a media statement attacking the Minister and the policy establishing the court.

The Chief Justice remanded the Minister, saying her comments were “not accurate and could not go uncorrected as a matter of public record.”¹⁷

In my opinion, by intervening in the debate, the Chief Justice overstepped, inciting a battle between the judiciary and the Cabinet, and shaping the debate on this legislation before the Parliament.

Law Society Dinner

Another example, at the opening of the legal year dinner for the Law Society of NSW this year, the Chief Justice again commented on political events. This time, events transpiring in the United States, under the Trump Administration. The Chief Justice addressed the pardons issued for the January 6 Capitol rioters.

The Chief Justice crossed the threshold into political commentary - a space traditionally reserved for elected officials.

His Honour justified speaking about this topic, with a quote from Lord Hodge of the United Kingdom Supreme Court, “democratically elected governments have a vital interest in the maintenance of the rule of law. It is a bastion against those who would use chaos as a ladder.”¹⁸

This quote held a significant degree of irony. *Democratically elected governments... Those who use chaos as a ladder...*

The Chief Justice then went on and linked events in the US to abhorrent incidents of antisemitism in NSW.

The erosion of the rule of law that we are glimpsing in the US is detestable. However, to link these foreign executive decisions to state issues, at such an impressionable forum was inappropriate for a member of the judiciary.

¹⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, Chamber, 23 November 2023 (Sophie Cotsis).

¹⁷ Supreme Court of NSW, ‘Industrial Relationship Amendment Bill’ (Media Statement, 30 November 2023).

¹⁸ Bell CJ, ‘Present and Future Challenges to the Rule of Law’ (Address, Law Society Of New South Wales, Opening Of Law Term Dinner, 6 February 2025).

Good example – Indefinite Detention HCA Ruling

Now we've considered recent challenges, I'd like to explore an effective example of the separation of powers.

In the landmark decision of *NZYQ*¹⁹, a unanimous judgment of the High Court ruled it unconstitutional and unlawful for the Australian Government to detain people indefinitely in immigration detention. This effected a momentous change to immigration law, reversing the decision in *Al-Kateb v Goodwin*.²⁰ *NZYQ* found that detention is a form of punishment and can only be inflicted upon a person guilty of crime.

This judgment effected orders for the release of 140 people from immigration detention.

Despite delivering a constitutional watershed, the HCA did not give opinion on what should happen to the people released, nor criticise the Government. The Court gave judgment, affirmed guidelines, and stood out of the debate.

In response, the Federal Government implemented Operation AEGIS, an ongoing monitoring regime, and legislated a new visa category.

In *NZYQ*, the judiciary handed down a decision.

The legislature created a legal framework to manage these changes.

And the executive affected the framework.

The three arms of government worked together, and independently, for the common good.

This is an example to learn from.

Legislation and Court decisions do not work in a vacuum

These examples highlight that though the arms of Government are independent, they must each work in step with the other, to ensure an effective system of law and order.

¹⁹ *NZYQ* [2023] HCA 37

²⁰ *Al-Kateb v Goodwin* [2004] HCA 37

Courts do not exist in a vacuum. Nor does Parliament legislate in a vacuum. The branches of government exist in relationship to each other, and in response to the needs of the people.

When a legislature decides to change the law, it does so prospectively.²¹

But judicial decision can only be retrospective.

The legislature changes the law responsively.

But upon assent, the Executive must apply the law practically.

Whether lead by the judiciary, the legislature or the executive – it requires a three-pronged approach.

When courts effect judicial change, it is impossible for the judiciary to effect consequential amendments to public institutions or governmental financial arrangements.

Conclusions

Politicians spend our lives attending barbeques, school presentations, and local football games. We're trained – rigorously - to understand the role of legislation to satisfy, safeguard and support requirements of the community.²² Having collected an immense experience of life through years of engagement, politicians learn the viewpoints of the community - to advocate for them. Our careers rest upon understanding these needs and wants.

Our judiciary, on the other hand, are experienced legal practitioners equipped to approach challenges through the lens of the law. Our judiciary know how to apply complex legal principles as a yard stick, but they don't face the same pressures of the "pub test".

²¹ The Hon. Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) Otago Law Review, Quadrant Magazine, 10(2).

²² The Hon. Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) Otago Law Review, Quadrant Magazine, 10(2).

It is a misnomer to embolden a divide between the arms of Government, as if they were opponents.

As a lawyer, a politician and a Parliamentary Secretary - I know that neither arm can function without the other – nor can our community, and the people we represent.

The Westminster system of parliamentary democracy is based on the proposition that elected Governments answerable to the people decide policy, public servants implement that policy, and judges uphold or overturn it.²³

It is up to us—lawyers, judges, politicians —to safeguard the rule of law, protect judicial independence, and ensure democracy remains strong and resilient.

We need to be good guardians of our democratic institutions.

I look forward to the comments of my colleagues as we continue this important discussion.

²³ Fitzgerald Inquiry, 128.