CURRENT CHALLENGES FOR THE DOCTRINE OF THE SEPARATION OF POWERS – THE GHOSTS IN THE MACHINERY OF GOVERNMENT

THE HON DEAN WELLS*

I INTRODUCTION

It is a great pleasure, not to mention a delicious irony, to come to the University of the Real World to talk to you about the misconceptions of a Frenchman who lived three hundred years ago. You see, when Montesquieu wrote *L'Esprit des Lois* and articulated the Doctrine of the Separation of Powers, he thought he was describing the British Constitution. He wasn't. He described what appeared to be its structure, and failed to notice the efficient secret of how the Westminster constitution operated in the real world. The American revolutionaries had read Montesquieu, and when they drew up the constitution of the USA they faithfully followed his constitutional prescription, thinking that it was a guarantee of long term good government. The end result was George W Bush, *C'est la vie*.

What Montesquieu taught us is that there are three functions of government, or three powers: the legislative, executive and judicial powers: in our terms, Parliament, Cabinet supported of course by the public service, and the courts.

The Parliament passes the laws, the Cabinet and public service administer them and make decisions the laws have given them the power to make, and the courts decide whether the laws have been correctly followed in cases brought before them. Let us look at some contrasts between these functions. The legislative function is essentially prospective, prescriptive and general. Legislation usually decrees that from a certain time, all persons in relevant circumstances will behave in the way the legislation stipulates. The judicial function is essentially retrospective, determinative and specific. The pronouncement of a court is typically that at a certain time in the past a person or group of persons behaved in a way that breached the law. Because legislation is prospective, prescriptive and general, while adjudication is retrospective, determinative and specific, our intuition is naturally drawn to the diametrically opposite functions, and attracts us to the thought that they should be performed by different people with a different mindset.

---

* Dean Wells MA, LLB, MP, Barrister and Solicitor of the High Court of New Zealand. Lecture given at Queensland University of Technology on 26 April 2006.

The executive function does not fit neatly into a third symmetrical position to complement this framework of a duality of opposites. The function is essentially to execute – so the executive appoints people to statutory posts, spends money appropriated by Parliament, implements legislation passed by Parliament and so on. Historically the executive, in the person of the King, was the unitary source of power from which the judicial and legislative powers were peeled off. Of course, in the 21st century with some exceptions, (for example the discretions of the Attorney-General and the Royal Prerogative of Mercy,) the executive performs functions delegated by Parliament.

Two conventions govern the day to day relationships between the legislature, the executive and the judiciary in a Westminster system. These are the sovereignty of Parliament and the independence of the courts. The rationale for Parliamentary sovereignty is in fact the democratic principle itself. The legislature is the only arm of government which the people directly choose. It has to be constitutionally supreme or democratic government will not exist. Thus the Cabinet is supposed to perform its delegated functions taking care not to usurp the functions of Parliament. For example the *Legislative Standards Act 1992* (Qld), which was introduced into the House by Premier Wayne Goss but which I had the honour to see through its final reading on 21 May 1992, adjures Ministers to avoid drafting legislation containing Henry VIII clauses, which are clauses that allow the making of regulations by the executive which have the effect of directly or indirectly amending the Act itself. Meanwhile, the second convention, the independence of the judiciary, is an essential prerequisite for fair trials, but the courts conduct their daily business knowing that while there will be no political interference in the case before them, the convention of the sovereignty of Parliament means that their decisions, or the law on which their decisions are based, may be reversed or altered by an Act of Parliament.

The existence of three functions does not, by itself, entail that there are, or ought to be, three different machines to perform them. The existence of radio, recorded music and timekeeping does not entail that my radio/cassette/alarm clock does not, or ought not to exist. Having separate institutions to perform the legislative executive and judicial functions, however desirable it may be, needs to be argued for rather than simply assumed. Therefore, it would not be enough to condemn a practice to point out that it breached the Separation of Powers. It is not self evident that all such practices are suboptimal. If, for example, Montesquieu had ever been hit by the blinding revelation that in Westminster systems the executive actually controls the legislative programme of the Parliament or that the Parliament has the ability to sack Cabinet, this would not be enough to found a plausible argument against the practise. You would need also to show that there was some detriment attached to this breach of the Separation of Powers. If it mitigated the sovereignty of Parliament, or derogated from the independence of the judiciary, that would be an argument. A symbiotic relationship between the architect and the builder is no threat to construction standards; but it would be a serious threat to have the builder altering the architect's designs, or for either the builder or the architect to be in a cosy relationship with the building tribunal.

The argument for independence of the judiciary is obvious, and regarded as conclusive in the Westminster world by intelligent MPs on both sides of politics. If the judicial function of interpreting the laws is performed by different people from those who legislate them, the laws are likely to be applied more objectively and impartially. In

other words, you are more likely to get a fair trial. History shows that if the people who prospectively enact the laws, deciding what thou shalt not do, are also the people who retrospectively determine whether thou hast done it, it is all too easy for them to confuse the question of whether they would like you to be in jail with the somewhat different question of whether you had actually committed a jailable offence. To put it simply, the legislators are, of necessity, partisan politicians; judges don't have to be.

Good reasons for an independent executive are harder to find. Why, after all, would you want the Cabinet to be beyond the scrutiny of your local Member? Montesquieu, who was followed by George Washington, Thomas Jefferson and that crew, wanted to have two separate mobs of elected politicians in order to provide 'checks and balances'. That phrase, 'checks and balances' is code for 'brake on radical reform' - that is to say a built-in conservative bias in the constitution. Walter Bagehot, the 19th century British jurist who debunked Montesquieu, said that the 'efficient secret' of the Westminster constitution was that the Executive and the Legislature are not really separate. The Parliament, or a majority of it selects the Cabinet and because they are therefore not at odds with one another they can comparatively easily despatch the business the public expected them to do when they voted to put them there.

The Doctrine of the Separation of Powers and its relevance to Westminster political theory became dinner table conversation in Queensland in 1988 when someone asked former Queensland Premier, Joh Bjelke Petersen, about it. It happened during the Fitzgerald Inquiry that uncovered widespread corruption in the Queensland government and Police Force and led to seven Ministers, a Police Commissioner and various other unjustly rich and deservedly famous persons being charged with offences of dishonesty and corruption. A young barrister, Michael Forde, (who inevitably became Judge Forde) was inspired to ask Bjelke Petersen, "What do you understand by the Doctrine of the Separation of Powers in the Westminster system?" Bjelke Petersen didn't have a clue. In that one moment of blithering incomprehension he did more for civics' education that he had done in nearly twenty years as Premier. From Coolangatta to Thursday Island, people were asking each other between gusts of laughter, for their thoughts on the Doctrine of the Separation of Powers in the Westminster system. If you wanted to have any political credibility it was also necessary to know the answer.

What Bjelke Petersen should have been able to tell the Commission of Inquiry was that in Westminster democracies the separation of powers is complete as far as the judiciary is concerned – judges have to be beyond political interference from Parliament or government – but the legislative and executive powers are not separate in the way they are in non Westminster systems. In Westminster systems the executive ie the Cabinet, is part of the legislature. The Ministers are all Members of Parliament, and they are accountable to Parliament and can be sacked by Parliament.

By contrast, in non Westminster systems, like the USA, the Executive i.e. the President, and whoever he chooses to appoint as Secretaries of State (ie Ministers), are not members of the legislature: they don't have to account to the legislature for what they do, and when the executive is one party and the majority of the legislature is another, life becomes interesting, and occasionally, though rarely, the business of government grinds to a halt. This happened in 1995/6 when a Republican Congress refused to pass President Clinton's money bills to stop him spending so much on social welfare. Many public service agencies closed, and 300,000 public servants stayed home for months.

The framers of the U.S. Constitution deliberately created the possibility of disunity of purpose between the legislature and the executive. This kind of scenario is one result of inserting such "checks and balances" into the constitution. Another was Watergate.

Gough Whitlam once remarked that a Watergate scenario could not occur in a country where the executive was responsible to the legislature, and subject to Question Time daily.

The lack of a complete separation between executive and legislature in Westminster constitutions means that a government that decides to grasp the nettle can actually do things. Because our Cabinets are chosen from Members of Parliament, the Cabinet has to be the group that has the numbers in the Parliament. Unlike an American President, an Australian or New Zealand Prime Minister or an Australian State Premier doesn't spend a lot of time wondering whether government policy is going to be knocked over in the Lower House. It does happen here, but very rarely. It usually takes that other check and balance, an Upper House, to deliver that sort of paralysis.

Just to summarise so far, we do not have a Montesquieu style or even an American style separation of powers in the Westminster system. The separation is most complete in respect of the judiciary, but even between the executive and the legislature, there are conventions, particularly the convention of the sovereignty of Parliament, which governs what is a matter for Cabinet and what is a matter for Parliament. The *modus vivendi* could easily be upset. For example, judges could, *en masse*, set out to make new law rather than simply to find the law. Or Cabinet could deliberately set out to use its subordinate legislation power to undercut the intentions of Parliament. Or the Legislature could go to town on the establishment of Commissions of Inquiry so as to undercut the judicial sphere. For the separation of powers to work in the Westminster system, there has to be a certain degree of restraint, and the executive, the legislature and the judiciary have to respect each other's territory. This is known as the Principle of Mutual Restraint. It is referred to, for example, in the speech of Lord Browne-Wilkinson in the Privy Council case of *Prebble v. Television New Zealand.*[1] His Lordship says, 'There is a long line of authority which supports a wider principle… that the Courts and Parliament are both astute to recognise their respective constitutional roles.' When the principle is being carefully observed the institutions of government tend to concentrate on what they do best and stay off each other's turf. Recently there have been some very significant incidents in which the Principle of Mutual Restraint has been disregarded. These incidents evoke ghosts from our unsavoury past. I will go on to identify three of these ghosts in the machinery of government.

II THE GHOST OF THE HIGH COURT OF PARLIAMENT

The independence of the judiciary is universally accepted in the sense that everyone agrees that there should be no interference with a Judge determining a case. However there is nothing in our Constitution, or in the statutory or constitutional environment of Westminster systems, or even other democracies, that prevents other parts of the Constitution from aping and purporting to exercise judicial functions.

[1] [1994] All E. R. 407, 413.

For example on 18 May 2004, in the Parliament of Zimbabwe, an incident occurred that shows how bad this can get. The Minister for Justice, the Honourable Patrick Chinamasa, was speaking to the *Stock Theft Amendment Bill*, when he launched a personal attack on the Member for Chimanimani, the Honourable Roy Bennet. The Minister said, 'Honourable Bennet has never forgiven this government for seeking to redistribute this land. He forgets that his forefathers were thieves and that what he owns – is an inheritance of stolen wealth accumulated over a century and a half.' In the deadpan style of Hansard everywhere, the Zimbabwe Hansard record notes, 'Hon Bennet charged towards Honourable Chinamasa and shoved him to the floor.'

The matter was referred to the Parliamentary Privileges Committee, which was constituted by two Government Members, two Opposition Members, and a nominee of the President, Robert Mugabe. Bennett was found to be in contempt by a predictable majority of three to two, and the House accepted the Committee's recommendation of 15 month's hard labour. Recourse to the courts did not assist him – it was after all a decision of the Parliament, which remains sovereign whether it is rorted or gerrymandered or not. There is no legal mechanism for an appeal against pseudo judicial decisions of Parliaments here either. To no avail Amnesty International campaigned hard to secure his release. I raised the issue in the Queensland Parliament on 9 March 2005. On that occasion I said, 'His parliamentary colleagues were his judge, jury and executioner and every one of them had a vested political interest in the outcome of the vote.' Eventually on 28 June 2005 he was released on parole, after serving a proportion of his sentence that would have entitled him to be released under Zimbabwe law even if the rest of the world had not protested.

Could this happen here? Yes, it could – except for New South Wales the Parliaments of Australia and New Zealand have the power to sit in judgement on and punish their own members, or their own constituents. Originally the colonial Parliaments, and in particular Queensland Parliament did not have such powers. Judicial powers were always part of the intrinsic jurisdiction of the British Parliament, which was once called, and archaically may still be referred to, as the High Court of Parliament. In Mediaeval times, when the King held Court, he made judicial decisions. Over the centuries those functions were delegated, and by the 1830s the separation of powers between legislature and judiciary was so much the *status quo* that the Privy Council held, that a colonial legislature did not have an inherent power to order the arrest of a stranger. In the case of *Kielley v Carson*[2] the Court held that while the House of Commons and the House of Lords used to be the High Court of Parliament, colonial legislatures had no such history, and therefore no inherent jurisdiction to punish, but only the power to deal with impediments to the 'due course of proceedings'. Significantly the Court held that,

> To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting by the principle of the common law. But the power of punishing anyone for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature.

The response of colonial MPs to this wise decision was, as you might expect, to reverse it. They hastened to give themselves power to sit in judgement on each other and on those they served. Often they have, for example in 1870 the South Australian

---

2 (1841-42) 1V Moo PC 63.

Parliament sent Sergeant Major Patrick McBride to jail for one week for sending a letter to a Member of Parliament alleging that he had lied. In 1994 the Western Australian Parliament imprisoned Brian Easton for one week for sending to Parliament a petition containing allegations against other private citizens. In 1955 the Australian Parliament sent Raymond Fitzpatrick and Frank Browne to jail for 90 days for alleging that a member had engaged in corrupt schemes relating to refugee migration.

In Queensland the power is now defined by the *Constitution Act* and the *Parliament of Queensland Act 2001* (Qld). What it comes to is that your elected representatives have the power to fine each other, or you, if the mood takes them, but probably not the power to put you in prison directly. To acquire that address however, you would only need to refuse to pay the fine, as any conscientious objector, whether an MP or a stranger to the House, would.

This is not a fanciful scenario. The pseudo-judicial power has not been used in Queensland for a long time, but it has not fallen into desuetude. On Wednesday 8 November 2005, the Speaker said,

> I do not believe the House can any longer tolerate the persistent and continued disrespect for and attacks on the authority of the Speaker… Therefore I have referred to the [Privileges] Committee… the numerous reported reflections on the Chair … In doing so, I note that reflections upon and disrespect to presiding officers on account of their actions in the House may constitute a contempt. Erskine May's 22nd edition at page 123 states – .reflections on the character of the Speaker or accusations of partiality in the discharge of his duties … have attracted the penal powers of the Commons.

The point of the Speaker's reference to the penal sanctions of the House of Commons is that when Queensland Standing Orders are silent on a point, Common's practices and precedents are followed. In the event, the Privileges Committee, in their infinite goodness and mercy, did not take the opportunity to jail dissidents. The point is that they could have. The matter is just so not hypothetical.

Westminster Parliaments ought to divest themselves of this power to deal punitively with their own citizens. There are a dozen arguments, all of them conclusive as to why we should abandon this dangerous and odious capacity. Firstly, MPs are elected with a mandate to implement a philosophy. They are voted in because the people of their electorate, having considered the ideas of the parties or candidates presented to them, preferred one programme to another. The people gave the Members no mandate to be a judge or a jury in a specific case. Indeed they never turned their mind to specific cases. Secondly, when MPs sit in judgement on a matter like the Roy Bennet case, or the Australian instances just mentioned, they all have a vested political interest in the result. The ghost of the High Court of Parliament, wherever it makes its apparition in the antipodes, will nearly always deliver a violation of the principles of natural justice. Members of Parliament, when sitting in judgement, will almost always find themselves judging matters that in a courtroom, a judicial officer so placed, would be disqualified from hearing. Thirdly, as we noted, the legislative function is prospective, prescriptive and general, while the judicial function is retrospective, determinative and specific. The mindset of one, whose vocation in life is to dream possible dreams and to get public servants to make them happen, is not generally apt for the performance of judicial functions. Not for no reason are the practices of our courts surrounded by thousands of rules of evidence and procedure designed to minimise error and protect the liberty of the citizen. When a matter is tried by parliamentarians rather than Judges, we throw away

all these safeguards. We forfeit the benefit of having an individual's liberty determined by the dispassionate, if not cynical, minds of people dedicated to determining accurately the facts, whose life's work is to decide what is rather than what ought to be, and expose that citizen's liberty to the momentary whims and inclinations of a mob of dreamers whose very job description requires them to paint with a broad brush, whose whole value to their society lies not in any pretence to specialist skill in matters particular, but rather in their capacity to articulate the competing ideas between which the voters will choose in the hope of fashioning a better world. Fourthly, in a democracy MPs are supposed to be the servants of the people. They cannot consistently be their judges. Fifthly anyone imprisoned by Parliament will be technically, but by definition, a prisoner of conscience (to use the language of international diplomacy) because nobody imprisoned by Parliament will have been charged and convicted of a specific breach of the criminal law. I could go on but the point is made. We ought to abolish this power now. The only reason we still have it is bone headed conservatism and the lack of a recent local abuse of the power to spark the necessary change.

III THE GHOST OF TORQUEMADA

The conclusion that you ought to extract confessions by torture from heretics and witches, and burn them to death on the stake is one that you can arrive at perfectly logically if you merely assume the insane first premise that you are the infallible possessor of the ultimately true view of the world.

Democracy however assumes that nobody is infallible, and that all views of the world are in principle capable of becoming government policy, subject only to democratic votes. Democracy requires that all points of view ought to be allowed to be expressed, albeit with safeguards to protect the reputation of citizens. This is the fundamental reason for the parliamentary privilege of free speech. In the case of *Prebble v. TV New Zealand*[3] the Privy Council held that a Member of Parliament could not waive parliamentary privilege because the parliamentary privilege of free speech is not primarily a privilege of the Members of Parliament who exercise it, but a privilege of the Parliament itself. It was the representative body, not the individual member who possessed the privilege.

Thus absolute privilege exists for the benefit of electors, not the elect. It is a safety valve which ensures that propositions someone in the community believes, whether true or false, and opinions someone in the community holds, whether popular or unpopular, can be expressed. It is for the people, not for the Grand Inquisitor, to judge whether these propositions are true or false, and it is for the people to make these opinions popular or unpopular. In a well functioning democracy the people are the arbiters of what is true or what will be popular. The parliamentary privilege of free speech is the privilege of the people to hear the truth or its opposite spoken, and to re-elect or sack those who speak it. The so-called cowards' castle is actually the people's crucible. It enables the people rather than the Grand Inquisitor to be the judge of the value of what is spoken.

In a case finalised the year before last, applying and extending Australian precedents, the New Zealand courts, in the case of *Buchanan v. Jennings*, gave themselves the power to determine litigation relating to certain proceedings of Parliament. Jennings

[3] [1994] All E. R. 407.

made allegations in the Parliament, to the effect that a member of the Wool Board had made certain corrupt deals to procure an international commercial benefit. Such things of course would never happen in Australia, but if they did, Australian courts would be under pressure to follow the precedent. Outside Parliament, Jennings[4] was questioned by the media as to what he said. He indicated that he wasn't going to repeat the allegations outside of Parliament but that he stood by what he had said inside the House. The court found that he had 'effectively repeated' what he had said inside Parliament.

The truth or otherwise of what he had said in the House was therefore capable of being determined by the court as if he had said it outside of the House. He was liable for damages and paid $50,000. The decision of the New Zealand Court of Appeal in this matter was upheld in the Privy Council. There is a rumour to the effect that this had nothing to do with the fact that the New Zealand Parliament has now abolished appeals to the Privy Council.

The Privileges Committee of the New Zealand Parliament reported on these events last year. It identified the following 'issues'. First the decision involves courts in assessing and adjudging parliamentary proceeding. This, the report says, breaks down the 'long standing principle of mutual restraint'. Second, it has an effect on free speech itself. Both MPs and witnesses before committees may avoid saying what they believe to be true, for fear of legal reprisal. Third, it has a chilling effect on public debate. Members of Parliament and private citizens who are witnesses to Parliamentary Committees will be reluctant to submit themselves to subsequent media interview for fear that a legal stratagem will be found to hold them accountable for things they said under absolute privilege. Fourth, it has an effect far beyond defamation. If the Doctrine of Effective Repetition justifies courts in probing into the proceedings of Parliament in respect of defamation proceedings, why not every crime and civil wrong that is committed by the use of words? For example, breach of confidentiality, sedition, incitement, obscenity, and contempt of court. Further what logical reason could there be to confine it to parliamentary proceedings? All those involved in court proceedings also have absolute privilege. Yet statements made in court are as capable of being effectively repeated as statements made in Parliament. The logical extension of the Doctrine of Effective Repetition would make our courts, as well as our Parliaments, unworkable. According to the Clerk of the New Zealand Parliament, and author of Parliamentary Practice in New Zealand, David McGee, the slide down the slippery slope to the logical conclusion of unworkability has already begun. As an example he points to Court of Appeal *obiter dicta* in the Jennings case to the effect that Judicial Review is an exception to parliamentary privilege (personal communication).

A new found capacity of the courts to come into Parliament and litigate the truth of what is said there constitutes not only an erosion of the separation of powers, but a threat to our democracy as well. The very notion of representative democracy requires that the people, through their elected representatives, not an unelected body, however benign, should have the final say over what can be said and done. It will be necessary for all Australasian jurisdictions to pay serious attention to the options available. These options include abolishing the Doctrine of Effective Repetition, which is what the New Zealand Privileges Committee recommends.

4

We should do that too. The Doctrine is a dangerous piece of judicial adventurism, and needs to be quashed.

IV THE GHOST OF THE DIVINE RIGHT OF KINGS

The sovereignty of Parliament was hard won. The early Stuart monarchs, King James I and King Charles I, believed that they governed by divine right. On 3 January 1642 King Charles I came with a large squad of soldiers to Parliament with the intention of arresting five of the Members. When he could not see them there, the King is said to have commented 'The birds have flown,' and to have asked the Speaker where they were. The Speaker is said to have replied, 'I have neither eyes to see, nor voice to speak in this place but as the House is pleased to direct me'. The King and the Speaker both walked away from this encounter, but the King had signed his own death warrant. Two revolutions and a regicide later, in 1688, the *Bill of Rights* was passed. Article 9 of that bill said that the proceedings of Parliament could not be impeached outside of Parliament.

Three centuries and 16,000 kilometres away from those events, in a Westminster system that had preserved Article 9 of the *Bill of Rights*, a Member of Parliament was put in peril of his liberty on an allegation that something that he said to a Parliamentary committee was untrue. Gordon Nuttall, the Member for Sandgate, and at the time the Minister for Health, was alleged to have lied to the Parliamentary Estimates Committee, thereby breaching section 57 of the *Criminal Code* which reads:

> **57 False evidence before Parliament**
> (1) Any person who in the course of an examination before the Legislative Assembly, or before a committee of the Legislative Assembly, knowingly gives a false answer to any lawful and relevant question put to the person in the course of the examination is guilty of a crime, and is liable to imprisonment for 7 years.

The rest of the statutory environment is of interest because the Member for Sandgate could only be seen as a possible target for investigation for the commission of an offence under section 57 if other provisions were overridden by section 57. Section 8 of the *Parliament of Queensland Act 2001* (Qld) reads:

> **8 Assembly proceeding can not be impeached or questioned**
> (1) The freedom of speech and debates or proceeding in the Assembly can not be impeached or questioned in any court or place out of the Assembly. (2) To remove doubt, it is declared the subsection (1) is intended to have the same effect as Article 9 of the Bill of Rights (1688).

Meanwhile section 13B of the *Acts Interpretation Act 1954* (Qld) says:

> **13B Acts not to effect powers, rights or immunities of Legislative Assembly except by express provision**
> (1) An Act enacted after the commencement of the section affects the powers, rights or immunities of the Legislative Assembly or of its members or committees only so far as the Act expressly provides.

The questions of law here, particularly the question of whether section 57 can in this context been seen as overriding other statutes and conventions is an interesting one. So,

of course, is the question of fact. If a prosecution were to be brought it would necessary to show that beyond all reasonable doubt the statement made by the then Minister was knowingly false. In its report the Crime and Misconduct Commission ("**CMC**") rehearses considerable material that might be adduced as evident that the statement was false. But when it comes to the question of whether it was knowingly false, little is said in the report. In the penultimate paragraph of its report dated December 2005 the CMC writes, 'There is, however, clearly a question appropriate to resolution by a tribunal of fact whether the Minister's answers to the crucial questions by Mr Copeland were knowingly false.' If this statement indicates that the CMC regarded the absence of evidence as a reason for going to court to try to find some rather than as a reason for dropping the case, let us hope that our prosecutors are not attracted to this novel idea.

Interesting as the issues of fact and law are in this matter, the jurisprudential questions it raises are even more fascinating.

Had the matter proceeded to trial, it would have been dealt with by a Court. The central issue of fact would have been whether what the Minister said was false. In other words it would have involved the same issues as we canvassed in the discussion of the issue of republication above. The Parliament, and therefore the people, would have lost the capacity to make the determination as to what would be received as true. That decision would have been made by experts – much more benign experts that Torquemada, but playing like him the role of arbiter of what may be received as true. Even more interesting than the potential involvement of the judiciary in the legislative process, is the actual involvement of the executive. The investigation was undertaken by the CMC, which is part of the executive arm of Government. There were, of course, many differences between the intervention of King Charles I in 1642, and the intervention of the CMC in 2005. The main difference was that the CMC was wielding a statute rather than a sword. The other differences related mainly to costume, dramatisation and choreography. The issue was the same – whether a person elected by the people to speak for them in Parliament was to lose his liberty as a result only of the manner in which he did so.

There is not in Queensland a great reservoir of sympathy for politicians who get themselves into trouble. What else would you expect from a society that evolved from a convict colony where the jailers were the government? The healthy and robust cynicism which Queenslanders have about those who govern them was exemplified by a constituent of mine recently. On being told that the CMC had activated a little known section of the *Criminal Code* which made it a crime to tell lies within the Parliament, and that the most likely casualties of this section were going to be Members of Parliament themselves, he was heard to respond, 'well it couldn't happen to a nicer pack of bastards'. People who divert themselves with such thoughts however might well pause to reflect that this process involves the passing of power from people they control to people they do not control. When Members of Parliament are able to speak freely then the only worthwhile judgement that can be made of the truth of what is said are the judgements that the electors make at election time.

However, when Members of Parliament are having the truth or otherwise of their utterances determined by the executive or by the courts, it is clear that the people no longer are in control. Nightmare scenarios of how an unscrupulous executive might use the recently discovered power it has to investigate the truth of what is said in Parliament

can be left to fiction writers to come up with. You could however make a pretty good political thriller out of this material.

Let us note however that section 57 does not address itself only to politicians. Any person who addresses a Parliamentary Committee and fails to tell the truth is liable for a penal sanction. This is a rather embarrassing provision to have on the statute books for a government that is committed to encouraging participation in the processes of representative government. Our panoply of Community Cabinet meetings, regional sittings of the Parliament, consultative programs, and frequent invitations to large numbers of people to give evidence before Parliamentary Committees, indicates a degree of welcome which is belied by the statutory environment into which these willing participants in our democratic processes come. Perhaps we should tell people who come to give evidence at a Parliamentary Committee meeting that they are putting their liberty at risk.

It's not hard to imagine the scenario in which somebody could become a victim of this section. Say there was a meeting of the Public Accounts Committee in some regional part of the State. Say it was investigating the most efficient way of doing something and representatives of a particular company gave evidence that it could be done in such and such a way. Say that representatives of some rival company, in order to gain an economic advantage, or publicity, or simply out of spite, alleged that they had told the Committee something that was false, and that it was wilfully so, then the whole process would start rolling. Maybe so long as we have section 57 of the *Criminal Code* on our statute books we should give invitees to hearings of Parliamentary Committees a piece of paper to sign saying that they note that they are there at peril of their liberty. Or perhaps we could put a sign over the portals of our nationally applauded participatory Parliament 'Abandon hope all ye who enter here'.

The fact is that we don't need section 57 of the *Criminal Code*. There is a well recognised and well understood means of placing pressure on people to tell the truth. That is to ask them to swear an oath. If people in a democracy choose to put themselves at risk of their liberty by swearing an oath that is a matter of their personal choice; but it is outrageous that they should automatically be put at peril of their liberty by simply participating in democratic processes. Whether a private citizen takes an oath inside a Parliamentary Committee or elsewhere, doing so allows the investigative arms of the executive, and the deliberative tribunals of the judiciary to operate within their appropriate sphere. There should be no risk of sanction attendant simply on partaking in the processes of our democracy. A sanction incurred by swearing an oath, a sanction that can apply anywhere, is much more appropriate.

It is interesting to note why it is that we have this section in our *Criminal Code*. The paradox is that the Member for Sandgate was put in peril of this liberty in respect of a provision the Parliament voted, without controversy to abolish in 1995. In the first half of the 1990s the Goss government undertook a root and branch re-examination of the *Criminal Code*. That was done with the assistance of the Criminal Code Review Committee consisting of Rob O'Regan QC, Jim Herlihy and Michael Quinn. Its recommendations became a Bill for a new *Criminal Code* for Queensland. I introduced that Bill into the Parliament in May 1995 and it contained no provision equivalent to section 57. The reasons why are covered above.

There were many controversial aspects to the new *Criminal Code Bill 1995* (Qld). The deletion of the equivalent of section 57 was not one of them. There was no debate in the Parliament about this matter and it did not become an issue that it was to be deleted. The *Criminal Code Bill 1995* (Qld) became the *Criminal Code Act* and received royal assent from Her Excellency the Governor in 1995. It was not however at that time proclaimed. The reason for that was that its proclamation needed to go hand in hand with the proclamation of a new Simple Offences Act, and the Bill for that was not ready. Further consultation and fine tuning on that comparatively minor piece of legislation would have taken another few months. However, at that point an election intervened. In the subsequent ministerial reshuffle I was relegated for a short period to the backbench, and my successor as Attorney-General was left with the responsibility of completing the Simple Offences Bill and introducing it into the House. Six months later a by-election caused a change of government. The Simple Offences Bill had not been introduced. The new government, being a conservative government, did not approve of root and branch reforms. Conservative philosophy dictates that you build on what you have rather than tear it down and start again. You may graft new growth, but you do not destroy the organism and plant a new one. Accordingly they repealed the *Criminal Code Act 1995* (Qld). As a result, section 57 remains part of our law. A number of amendments were introduced to the *Criminal Code Act 1899* (Qld) at the same time in 1996 as the *Criminal Code Act 1995* (Qld) was repealed. Some of them implemented reforms presaged in the *Criminal Code Act 1995* (Qld). However, in the spirit of conservative law reform, only those matters that were seen as urgent or necessary in the circumstances of the day were amended. No attention was given to section 57. As a result, section 57, though it had been repealed in 1995, again became an unnoticed part of the furniture of the house we live in without anybody ever actually turning their mind to it.

Clearly we ought to get rid of this undemocratic provision. There may be some in our community who feel that they would be able to construct an argument to the effect it is desirable that non elected officials should be appointed to sit in judgement on the truth value of what elected officials say. Perhaps they could even come up with some argument to the effect that it is much more democratic that an impartial umpire who has never been contaminated with the mandate of the people should judge the results of political debates. Perhaps they could deploy the argument used by Adolf Hitler when he was accused by the fading German opposition in the 1930s of showing bias because he had banned political parties. On that occasion the Fuhrer said, ‘I am not biased. I have banned them all’.

Don’t get me wrong. A totalitarian state is a long way down the track from a situation where the executive arm of government can investigate legislators elected by citizens to speak for them in Parliament, simply and only for the manner in which they do so. An awfully long way down the track. But that is the track.

V CONCLUSION

To sum up, there is no magic to the Doctrine of the Separation of Powers. It is not a mantra whose incantation will automatically discredit a practice. Backed however, by other principles we hold dear, like the sovereignty of Parliament, which is basic to representative democracy itself, and the independence of the judiciary, the separation of powers is a useful and potent instrument for jurisprudential analysis.

It is clear from the examples we have just considered that the principle of mutual restraint is not being observed. Politicians are making or remain empowered to make pseudo judicial decisions, judges in New Zealand are making and judges here are at risk of being drawn into making decisions about the truth value of statements made in parliament, and in Queensland we have an independent statutory authority, which is part of the executive, investigating a legislator elected by the people to speak for them, only for the manner in which he did so. The principle of mutual restraint is not being adequately observed in the Westminster world. The institutions of government in the Westminster world ought to behave with more self discipline than this. Where they fail to be, in Lord Browne-Wilkinson's words, 'astute to recognise their respective constitutional roles', it is up to the lawyers to tell them to be.