Separation of powers doctrine - often misunderstood

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One often hears politicians, journalists, and occasionally, lawyers, expressing support for the separation of powers doctrine.

When they do, I often wonder precisely what they mean.

Is it that they are expressing support for the strict separation of legislative, executive and judicial powers as Montesquieu originally envisaged it, or perhaps as it applies in the UK, or perhaps as it is reflected in the constitution of the USA, or perhaps as it is practised Australian style?

Of course, it could be that they simply mean to express support for the principles of judicial independence.

The trouble is that the separation of powers doctrine is neither the well-spring of judicial independence nor necessarily dictates a strict separation of the judicial, legislative and executive branches of government in Australia, or the United Kingdom.

In my view it is a doctrine that is often misunderstood.

As Weinberg J pointed out in *NAALAS v Bradley [2001] FCA 1728* at paragraphs [477] and [478]:

> *It is sometimes forgotten that the need for judicial independence is not dependent upon the doctrine of separation of powers as originally articulated by Montesquieu and so willingly embraced by Blackstone. The American version of that doctrine, which found its way into the Australian Constitution, provides one route towards a theoretical justification for the need to secure judicial independence. It is not, however, the only route towards such a justification."*
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> *"There has never been any real acceptance of the doctrine of the separation of powers in the United Kingdom. One has only to consider the functions performed by the Lord Chancellor to appreciate that fact. Yet great importance is attached to the independence of the judiciary."*

UK Lord Chancellor under attack – be a politician or judge, but not both

An article that appeared recently in the Current Issues section of the Australian Law Journal reinforces what Weinberg J says about the peculiar position of the Lord Chancellor in the UK and the application of the separation of powers doctrine there.

The article reports on comments made by Lord Steyn, a senior Law Lord, about the position of the Lord Chancellor of the United Kingdom, during an address delivered at Oxford.

Lord Steyn is reported as saying that the time had come when the Lord Chancellor should either be a political figure or a judge but that he could no longer fulfill both roles at the same time. He went on to say that it was unthinkable that the Lord Chancellor could sit on important cases in the House of Lords and that to allow a Cabinet Minster to take part in deciding cases "introduces a risk of things going wrong which would other wise not exist." See (2002) ALJ 216.

This article draws attention to the problems that must be inherent in the UK where one person concurrently serves as a member of the three arms of government. If one were to draw a very simplistic analogy to the federal system in Australia, the Lord Chancellor's position in the United Kingdom would be similar to the Chief Justice of the Australian High Court at the same time being a member of the Australian Senate and a member of the Federal Cabinet. Fortunately there is nothing remotely like this in Australia. Perhaps the closest Australia has come was to have Justices Latham and Dixon serve in diplomatic posts during World War II.

Somewhat limited application of the doctrine in Australia.

However, even in Australia, the doctrine of the separation of powers has a somewhat limited application. Whilst the High Court held early on that the doctrine is reflected in the structure of the Australian Constitution, under our system of responsible government, there is no true separation of the executive and legislative arms of government. The Ministers of the Crown are elected, or selected, from the members of the majority party in the House of Representatives. Indeed, nowadays the party system has all but ensured that the legislative arm of government is firmly controlled by the executive government of the day. For the past 25 years or so, the Senate is the only thing that has prevented the government of the day having total control of the legislature.

Furthermore, the separation of powers doctrine does not apply directly in the states of Australia because their constitutional arrangements do not reflect the same structure as the Australian Constitution. See *Kable v DPP (NSW) (1996) 189 CLR 51 at 65, 77-78 and 109.* In the Northern Territory there is no authority directly on point, but it is unlikely that the separation of powers doctrine applies here, for similar reasons. In fact the judicial arm of government i.e. the Supreme Court of the Northern Territory, hardly rates a mention in the Northern Territory's Constitution viz the *Northern Territory (Self Government) Act 1978.*

For these reasons, if politicians and others really mean to express support for an independent judiciary it would be preferable if they simply said so rather than expressing support for a doctrine that does not clearly stand for the notions they intend to support.