The Arms of Government

Introduction

In Tasmania's colonial history, the role of each arm of government was at times unclear. Furthermore, the separation of powers was weak. For example, in the 1800s Chief Justice Pedder was part of the Executive and Legislative Councils. At that time the executive also attempted to overtly interfere with the judiciary, a practice that culminated famously in Tasmania's 1848 'judge storm'. Judges, for their part, arguably exercised non-judicial power by the practice of certifying that legislation was not repugnant to British law. The creation and separation of the three arms of government has therefore long been an important constitutional issue in Tasmania.

Current Arrangements

Defining the Arms of Government

One role of a constitution is to create and describe the various arms of government: the 'constitutive function'. In the Tasmanian Constitution, the Constitution Act 1934 (Tas) ('Constitution Act') is limited in this regard. Other statutes, common law and convention play a more significant role.

Executive (see The Crown of Tasmania)

Part II ('The Crown') of the Constitution Act regulates the appointment and powers of the Deputy Governor/Lieutenant-Governor, Ministers and the Cabinet Secretary. Several provisions also address the demise of the Crown.

The key provisions are located elsewhere. For example, the Letters Patent and s 7 of the Australia Act 1986 (Cth) regulate the office of Governor. Convention effectively vests executive power in the Premier and Cabinet rather than 'the Crown'. Common law provides that state executive power generally parallels Commonwealth executive power, although prerogative powers are divided along federal lines.
Legislature (see The Parliament: role, structure and functions)

Part III (‘Parliament’) of the Constitution Act is more extensive than Part II. It creates a bicameral parliament and describes its operation. For example, it regulates membership and voting.

Nonetheless, the Act has significant limitations. Notably, it fails to expressly empower Parliament to legislate. Further, it fails to direct Parliament to act for the peace, order and welfare of Tasmania. Today, it is sections 2 and 3 of the Australia Act 1986 (Cth) that achieve this.

Judiciary (see The Judicial Branch)

The Constitution Act makes almost no reference to the judiciary.

The various Supreme Court Acts (Tas) and the Supreme Court (Judges’ Independence) Act 1857 (Tas) contain relevant provisions. For example, they create a limited protection of tenure and address eligibility and remuneration. However, much is left to convention and common law.

Separating the Arms of Government

Does the Constitution Act Create a Separation of Powers?

In The Spirit of Laws (1748), Montesquieu advocated for the division of executive, legislative and judicial power among three separate arms of government. In the Boilermakers Case, the High Court held that the Commonwealth Constitution creates such a separation, on the basis of two of its features. First, three separate chapters address each arm of government. Secondly, three separate provisions expressly vest legislative, executive and judicial power in different bodies. A separation of powers could not similarly be implied from the Constitution Act.

Structure

The structure of the Constitution Act suggests a division of power between the executive and the legislature. Part II relates to the Crown. Part III relates to Parliament. However, there is no part relating to the judiciary. Consequently, at most the structure of the Act reflects the bipartite division of power that Locke proposed in Two Treatises (1689).

Vesting Provisions

The Constitution Act does not expressly vest legislative, executive or judicial power in any body.

Some provisions of the Act do envisage a separation of powers. For example, neither public servants nor judges can be MPs. However, other features of the Act speak against a separation of powers. For example, the Chief Justice of the Supreme Court may act as Deputy Governor, a practice that, while widely accepted, is highly problematic. Consequently, a tripartite separation of powers cannot be implied from the Act.

Should the Constitution Act Create a Separation of Powers?

On one view, the Constitution Act should separate the judiciary from the other arms of government. Doing so could have a powerful normative effect. This is particularly important given that - like most former colonies - Tasmania has a history of encroachments on judicial independence (see Introduction). Given this history, the absence of a strong statement of judicial independence in the Constitution Act is surprising.

On the other hand, there are advantages to a more flexible approach to the separation of judicial power. For example, in Tasmania the Magistrates Court carries out merits review. However, the impression that the Constitution Act gives of a bipartite division of power is nonetheless concerning. This is because the Act itself weakens the boundaries between the legislature and the executive. For this reason, the Act leaves the separation of powers weak overall.

However in practice - despite the limitations of the Constitution Act – Tasmania enjoys a fairly rigorous separation of powers. This raises two questions:

- Is the separation of powers legally or politically mandated in other instruments or by other means (e.g. convention)?
- If so, what would be the advantages and disadvantages of codifying that concept? Is divergence between the ‘real constitution’ and the ‘written constitution’ problematic?

Could the Constitution Offend The Kable Doctrine?

The Kable doctrine provides that the Constitution is invalid if it confers powers on Tasmanian courts that exercise federal jurisdiction ‘which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth’. The Constitution, further, should not undermine the ‘role of those courts as repositories of federal judicial power’. A lack of judicial independence from the executive may have this effect. The fact that (by convention) Tasmania’s Chief Justice acts as Lieutenant Governor is therefore problematic: see The Judicial Branch for a more detailed analysis.
Issues

- A great deal of the law and custom defining and separating the arms of government is located outside the Constitution Act.
- The separation of judicial power under the Constitution is weak.

Questions

- What is the legal or practical basis of the separation of powers that Tasmania enjoys?
- Should Tasmania’s separation of powers be codified?
- Is Tasmania’s constitutional law/practice consistent with the current position of the High Court regarding the separation of powers at the state level?

Expert Views and Recommendations

These views and recommendations relevant to the arms of government are summarised in detail elsewhere in The Crown of Tasmania, The Judicial Branch and The Parliament: role, structure and functions.

Expert View

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Footnotes

8. Ibid 275.
9. See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 78 (Dawson J).
11. Ibid s 8; Letters Patent (21 November 2005) cl XII.
15. See *Magistrates Court (Administrative Appeals Division) Act 2001* (Tas).
19. *Kable v Director of Public Prosecutions (NSW)* (1997) 189 CLR 51, 103 (Gaudron J).
See further (references)

Attachments