

Harry Potter and the Separation of Powers: A Law and Literature Review of J.K. Rowling's *Harry Potter and the Order of the Phoenix*.

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Abstract

A nearly just society is influenced, if not governed, by the principle of the separation of powers. In J.K. Rowling's series of books on Harry Potter the Ministry of Magic, the wizards governing body, is ignorant to the principle and because of this natural justice and the rule of law are threatened, however Dumbledore, the Headmaster of Hogwarts School of Witchcraft and Wizardry, repeatedly ensures that the outcome of the judicial process is just, albeit it through encouraging kidnap and escape, and illustrates that natural justice can only survive when the judicial function is subject to the separation doctrine. How J.K. Rowling deals with these issues is explored in this paper.

Harry Potter and the Separation of Powers

The separation of powers within a state has its history in Greek philosophy it has been recognised as an integral part of nearly just societies, John Locke is responsible for developing it in its modern form:

[it]... may be to great a temptation to human frailty... for the same person to have the power of making laws, to have also in their hands the power to execute them, whereby they may exempt themselves from obedience from the laws they make, and suit the law both in its making and execution, to make their own private advantage.¹

Montesquieu, the French jurist, argued that the separation of powers is so fundamental that *"there can be no liberty...if the legislative, executive and judicial powers of government were to be exercised by the same person or authority"*.²

The idea that a separation of powers is necessary comes from the concern that if legislative, executive and judicial functions were concentrated in the same person or body, that body would become too powerful and would abuse its power. Dicey recognised the importance of the rule of law as an underpinning principle of the separation of powers, this was explored by Geoffrey Robertson QC in the Downey Inquiry; "...never again should MP's be regarded – or regard themselves – as above the law".³ FA von Hayek further explored the idea; *"...the Rule of Law means that government in all its actions is bound by rules fixed and announced beforehand."*⁴

¹ 'Seconds Treatise of civil government', 1690 cited in A. Carroll, 'Constitutional and Administrative Law (2nd Ed)', 2002, Longman, Harlow, 34

² 'L'Esprit des Lois', 1748 cited in Ibid, 34

³ 'The Guardian', 4th July, 1997

⁴ 'The Road to Serfdom', 1971 cited in G. Slapper and D. Kelly, 'The English Legal System (5th Ed)', 2001, Cavendish Publishing, London, 17

This demonstrates that the separation of powers, the rule of law and natural justice is necessary in a nearly just society.

J.K. Rowling's series of books is about a wizard boy who is part of two parallel societies, the *muggle*⁵ society and the wizard society. Throughout the wizard society there is an underlying assumption that wizard folk are superior, one of the central characters, Hermione, herself a *mudblood*,⁶ demonstrates constant annoyance at this superiority complex; "*It all stems from this horrible thing wizards have of thinking they're superior...*"⁷

Despite this superiority complex it is the intention of this paper to show that the wizard society and their *Ministry of Magic* could learn from the muggle doctrine of the separation of powers.

The constitution of the wizarding society is fundamentally unjust because of its ignorance of the doctrine of the separation of powers, the Ministry of Magic is both executive and legislature and the *Wizengamot*⁸ is composed entirely of Ministers from the Ministry and chaired by Cornelius Fudge, the Minister for Magic. This lack of separation of powers leads to tyranny, with the Ministry controlling the content of the *Daily Prophet*,⁹ and this tyranny is exemplified when the principles of natural justice are threatened in the trial of Harry Potter.

The Ministry of Magic conducts a series of unjust trials in the cases of Buckbeak,¹⁰ Sirius Black,¹¹ and Harry Potter.¹² It is Harry Potter's trial, detailed in 'Harry Potter and the Order of the Phoenix',¹³ that will form the focus of this paper's critique of the wizards' constitutional system.

The trial of Harry Potter shows that through the lack of a separation of powers in the wizards' constitutional system, there is a distinct disregard for the rules of natural justice, traditionally applied to judicial decisions. These rules are inherent to satisfy the well-known principle that 'justice should not only be done but should manifestly and undoubtedly be seen to be done'.

The *nemo judex* rule, the rule against bias, is one of the fundamental rules of natural justice. Cornelius Fudge, chair of the *Wizengamot*, knows Harry Potter well and this introduces the potential of bias, and it is clear from the trial that Cornelius Fudge is biased against Harry Potter:

⁵ Non-wizard folk.

⁶ Someone not of pure wizard blood.

⁷ J.K. Rowling, 'Harry Potter and the Order of the Phoenix', 2003, Bloomsbury, London, 155

⁸ The judiciary.

⁹ *Supra* n.7, 71 & 89

¹⁰ Buckbeak, a Hippograf, was sentenced to death after he attacking Draco Malfoy when provoked. J.K. Rowling, 'Harry Potter and the Prisoner of Azkaban', 1999, Bloomsbury, London.

¹¹ Who was imprisoned in Azkaban without fair trial. *Ibid*

¹² Harry is tried for underage sorcery having conjured a petronus charm to defend against a Dementor attack. *Supra* n.7

¹³ pp. 127 - 137

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In the very middle of the front row sat Cornelius Fudge, the minister for magic. Fudge was a portly man who often sported a lime-green bowler hat, though today he had dispensed with it; he had dispensed, too, with the indulgent smile he had once worn when he spoke to Harry.¹⁴

Others involved in the disciplinary hearing are also known to Harry Potter; “*Ron’s brother Percy was sitting at the very end of the front bench. Harry looked at Percy, expecting some sign of recognition from him...*”¹⁵ Further, Fudge is aware that Harry has the support of Dumbledore¹⁶ whom Fudge would also much like to discredit:

Accepting Voldemort back would mean trouble like the Ministry hasn’t had to cope with for nearly fourteen years...Fudge just can’t bring himself to face it. It’s so much more comfortable to convince himself Dumbledore’s lying to destabilise him.’... ‘the Ministry’s leaning heavily on the *Daily Prophet* not to report any of what they’re calling Dumbledore’s rumour-mongering¹⁷

It is clear that there is not only apparent bias but actual bias from Cornelius Fudge. Fudge expressed his views of Harry Potter by way of the wizard newspaper the *Daily Prophet*:

I know, Harry. But you see what they’re doing? They want to turn you into someone nobody will believe. Fudge is behind it, I’ll bet anything. They want wizards on the street to think you’re just some stupid boy who’s a bit of a joke, who tells ridiculous tall stories because he loves being famous and wants to keep it going.’ [said Hermione].¹⁸

Not only is Fudge’s view of Harry the subject of hearsay but he himself said in Harry’s trial; “*Let me explain. He’s [Harry] been thinking it through and decided Dementors would make a very nice little cover story, very nice indeed.*”¹⁹

The right to be tried by an independent and impartial tribunal is a basic principle of natural justice. Lord Goff in *R v Gough*²⁰ laid down the rule against bias:

Having ascertained the relevant circumstances the court should ask itself whether...there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.²¹

¹⁴ *Ibid* 127

¹⁵ *Ibid*

¹⁶ Head teacher of Hogwarts School of witchcraft and wizardry and also an upstanding and respected wizard throughout the wizard community. “All eyes were now on Dumbledore. Some looked annoyed, others slightly frightened; two elderly witches in the back row, however, raised their hands and waved in welcome.” *Ibid*

¹⁷ *Ibid*, 89

¹⁸ *Supra* n.7, 71

¹⁹ *Ibid*, 130

²⁰ [1993] AC 646

²¹ Cited in *Supra* n.1, page 313

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This is further explained by Carroll when he writes:

A person empowered by law to make decisions having potentially, detrimental consequences for the rights, interests or legitimate expectations of others, should not act if he or she has any actual...or apparent interest in the subject matter of the issue to be determined. Should this occur the decision will be tainted by bias and may be held to be void or of no legal effect.²²

The rule against bias is also recognised in Article 6²³ and discussed in *Campbell and Fell v. United Kingdom*.²⁴ Further not only must the tribunal be impartial but it must also appear to be impartial.²⁵ This is not the case in the trial of Harry Potter.

The second fundamental rule of natural justice is the *audi altrem partem* rule, the right to a fair hearing. Harry Potter's ability to raise a defence and to be represented is threatened when the Wizengamot move the time and location of the trial without informing Dumbledore, who defends Harry Potter:

'Ah,' said Fudge, who looked thoroughly disconcerted. 'Dumbledore. Yes. You – er – got our – er – message that the time and – er – place of the hearing had been changed, then?' 'I must have missed it,' said Dumbledore cheerfully. 'However due to a lucky mistake I arrived at the Ministry three hours early, so no harm done.'²⁶

Harry's fundamental right to a fair hearing is seemingly irrelevant to Fudge through his consistent attempts to firstly discredit him, as seen above, and secondly by making it as difficult as possible for Harry to raise an adequate defence.

The right to a fair trial under the European Convention on Human Rights guarantees through Article 6(3)(b) the right to have adequate time and facilities for the preparation of a defence and Article 6(3)(c) provides that everyone has the right to legal assistance. Since the European Convention and the Human Rights Act 1998 the right to a fair trial is now more than just a principle of natural justice but legislation that guarantees these rights. The system in place in the wizard society should give high regard to the natural justice principles so that justice can be seen to be done in view of the fact that there appears to be no legislation guaranteeing these rights in the wizard society.

During the trial Cornelius Fudge also tries to prevent Dumbledore from calling witnesses; "*He [Fudge] stared down at Dumbledore for a moment or two, then with the appearance of a man pulling himself back together, said, 'We haven't got time to listen to more tarradiddles, I'm afraid, Dumbledore. I want this dealt with quickly.'*"²⁷ In order to secure a fair trial it is necessary that a defendant can call upon witnesses to

²² *Ibid*, 311

²³ Right to a Fair Trial - European Convention on Human Rights. (Implemented into the United Kingdom as the Human Rights Act 1998).

²⁴ E Ct HRR A at (1984), 7 EHRR 165

²⁵ *Piersack v. Belgium* E Ct HRR A 53 (1982), 5 EHRR 169

²⁶ *Supra* n.7, 128

²⁷ *Supra* n.7, 131

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present evidence this is recognised in Article 6(3)(d) which guarantees the right to secure the attendance of witnesses the defence intends to call.²⁸

Fudge even challenges the principle of legal certainty; “*‘laws can be changed’ said Fudge savagely.*”²⁹

All of these issues show complete ignorance to the doctrine of the separation of powers. Fudge is involved in the legislature, the judiciary and the executive of the Ministry of Magic. Though the English constitutional system has been criticised for overlaps between the three organs of government “*the restraints which operate between the different institutions of government (the ‘checks and balances’) are sufficient to guard against the types of abuse to which the separation is directed.*”³⁰ There appear to be no such ‘checks and balances’ in the wizard’s constitutional system.

However, despite the inbuilt injustice in the system in the cases of the Buckbeak, Sirius Black and Harry Potter it is Dumbledore who ensures justice is done. Dumbledore is a figure that stands apart from the Ministry of Magic and is thus not part of any of the arms of the state. This serves to illustrate that justice can only occur when the body that ensures justice is done, in this case Dumbledore, is subject to the doctrine of the separation of powers.

²⁸ However this right is not absolute and courts can deny the right to call witnesses in ‘exceptional circumstances’.-*Unterpertinger v. Austria* (1991) 13 EHRR 175

²⁹ *Ibid*, 137

³⁰ *Supra* n.1, 36

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