

**THE SEPARATION OF POWERS IN AUSTRALIA:  
IMPLICATIONS FOR THE STATE OF QUEENSLAND**

John Alvey  
School of Management, Queensland University of Technology  
[j.alvey@student.qut.edu.au](mailto:j.alvey@student.qut.edu.au) ; or [zzjoalve@uqconnect.net](mailto:zzjoalve@uqconnect.net)

Professor Neal Ryan  
School of Management, Queensland University of Technology  
[n.ryan@qut.edu.au](mailto:n.ryan@qut.edu.au)

Australasian Politics Stream

Refereed paper presented to the  
53<sup>rd</sup> Australasian Political Studies Association Conference  
University of Otago, Dunedin, New Zealand,  
28-30 September, 2005.

## **Abstract**

The doctrine of the separation of powers is well-known at the federal government level but this doctrine has had little impact at the state government level in Australia. This paper looks at four themes: the theory of the separation of powers; the separation of powers at the Commonwealth level; the implications for the states particularly Queensland; and the historical record of separation of powers in the state of Queensland. First, the paper provides a brief survey of the main writers on the theory of the separation of powers from ancient to modern times. There is a significant difference between the theory and practice of separation of powers. Second, the paper looks at the separation of powers at the Commonwealth level. The Commonwealth Constitution outlines the separation of legislative, executive and judicial power. The original doctrine and constitutional intent by the founding fathers in the constitution has been modified by the decisions of the High Court and some of these cases are discussed. In various constitutional cases the High Court has separated the judicial power from the other two powers but not separated the legislative and executive powers due to the nature of the Westminster system of “responsible government”. Third, the paper considers the implication of the separation of powers doctrine for state governments particularly Queensland. Although there is no formal separation, there is an implied separation of powers at the State level in Australia. Fourth, the paper looks at the historical record at the state level particularly Queensland. In this account it is shown that the powers of the executive have encroached on the other two branches. These cases of abuse have arisen because the separation of powers doctrine has not been entrenched or even recognized by state governments. This matter requires urgent attention.

## **Introduction**

The doctrine of the separation of powers (the separation of the executive, legislative and judicial powers) is well-known at the federal government level but this doctrine has had little impact at the state government level in Australia. This paper looks at four themes: (1) the theory of the separation of powers; (2) the separation of powers at the

Commonwealth level; (3) the implications for the states; and (4) the historical record of separation of powers in the states.

The paper considers these issues. It begins with a general discussion of the traditional rationale for the theory of the SOP, derived from ancient and modern philosophers, and then the two main models of government are discussed: the UK and the US models. Then the position of the SOP at the Commonwealth level. The analysis continues through a case study of the Queensland SOP and implications for the states. Finally the historical record of the SOP in the state of Queensland is discussed. The recent cases of Fingleton, Hanson & Ettridge (2003) has demonstrated a need to revisit the SOP at state level.

### **(1) The Theory of the Separation of Powers from Ancient to Modern Times**

The theory of the separation of powers may be divided between two historical periods ancient and modern. The ancient theory can be traced back to ancient Greece and the philosophical writings of Plato, Aristotle and Polybius. These ancient philosophers and their writings have had a great influence on modern writers. The modern theory can be traced from the Glorious Revolution of 1688 in England and the writings of Locke and Montesquieu.

#### **Ancient Theory - SOP**

Before looking at the separation of powers in the Australian States in detail, it is important to look at the history and theory of the separation of powers doctrine. There

has been a historical development of the doctrine which can be traced back to ancient Greece to philosophers such as Plato (427?-347? BC), Aristotle (384-322 BC) and later the Greek historian Polybius (205-123 BC). Aristotle was empirically inclined, making a study of 158 constitutions of Greek city states before formulating his theories of government, while Plato's *Republic* is a treatise on political theory created by an original thinker's imagination (Fitzgerald 1980: 40). Aristotle criticises Plato's *Laws* as a system of government that is neither democracy nor oligarchy but an intermediate form usually called polity and the constitution in the *Laws* has no element of monarchy but only elements of oligarchy and democracy with a inclination toward oligarchy (Aristotle, cited in Fitzgerald 1980: 41). Patapan (2000) notes that, in classical political thought, Aristotle recognised different functions of government, which included the deliberative, magisterial and judicial aspects of ruling. Aristotle's answer to the formation of, and competition between factions (such as rich and poor) was the 'mixed regime' or 'polity' (Patapan 2000: 151). The ancient version of the modern separation of powers is seen in the ancient 'mixed constitution'.

The ancient theory of the 'mixed constitution' is a mix of and balance between three forms of constitution, according to the number of its ruling body. These included: monarchy (rule by the one), aristocracy (rule by the few), and democracy (rule by the many) (see Yao 1980b in Fitzgerald 1980: 48; see also Aristotle's six-fold separation: in *The Politics* Book III vii classification of correct and deviated Constitutions; Strauss & Cropsey 1981). He said there was a cycle of these regimes. According to the Greek historian Polybius these three constitutions each degenerate, over time, into their respective corrupt forms (tyranny, oligarchy, and mob-rule) by a gradual decline which

he calls *anacyclosis* or “political revolution” (Polybius 6.9.10; 6.4.7-11; 6.3.9; Lloyd 1998: 2). Polybius credits the six categories (i.e. the original three forms of simple constitution and their respective perversions) to “Plato and certain other philosophers” (6.5.1). Plato (*Laws* 712c), however allows for only five of the six forms of constitution because he does not distinguish between democracy and mob-rule. Aristotle on the other hand, mentions the full six, claiming that each of the original three (sovereignty of the one, the few, and the many) splits into two sub-categories, based on whether the ruling authority’s motives are selfish or unselfish:

Deviations from the constitutions mentioned are tyranny corresponding to kingship, oligarchy to aristocracy, and democracy to constitutional government [or polity]; for tyranny is monarchy ruling in the interest of the monarch, oligarchy government in the interest of the rich, democracy government in the interest of the poor, and none of these forms governs with regard to the profit of the community (Aristotle, *Politics* 1279b).

### **Modern Theory - SOP**

The modern reinterpretation of the separation [of powers] doctrine as purely a system of checks and balances resulted from demonstrable misconstructions of the literature on the subject, particularly the work of Locke (1690), Montesquieu (1748) and Madison (1788). This reinterpretation also enabled the separation of powers (SOP) doctrine’s detractors to deny that it was ever a part of the English Constitution.

### **UK Model - SOP**

This section will look at the main separation of powers theories on the UK model, known as the Westminster system of government. These theories on the UK model will include

Locke, Montesquieu and Blackstone. The English philosopher John Locke (1690) actually writing before the Glorious Revolution of 1688 in England, he was critical of absolute monarchy and he advocated constitutional monarchy, limited government and a doctrine of natural rights. The French philosopher Montesquieu (1748) developed the ideas of Locke and was also inspired by the works of Aristotle, Polybius and other classical writers. Montesquieu is credited with elaborating the modern separation of powers doctrine. The English lawyer Blackstone (1765-69) presented a comprehensive picture of English law and the civil rights of Englishmen. Blackstone greatly influenced the Americans about civil rights and the English common law.

### **US Model - SOP**

This section will look at the ancient influence on the American Constitution and the main separation of powers theorist on the US model, that is, James Madison. Madison was one of the founders of the US federal structure and one of the main writers on the US model of government. In the *Federalist* (Madison, Hamilton & Jay) (1788). Madison advanced a system of checks and balances as a precaution against oppression by rulers.

### **(2) The Separation of Powers at the Commonwealth Level**

The Commonwealth Constitution outlines the separation of legislative, executive and judicial power. The original doctrine and constitutional intent by the founding fathers in the constitution has been modified by the decisions of the High Court and some of these cases are discussed. In various constitutional cases the High Court has separated the

judicial power from the other two powers but not separated the legislative and executive powers due to the nature of the Westminster system of “responsible government”.

A useful starting point for our investigation of the separation of powers doctrine in the Australian context is of course the federal government. It can serve as a useful model for the States. Since federation the Commonwealth has taken priority over the States and continues to do so and the *Commonwealth of Australian Constitution Act* (1900) sets out a type of separation of powers between the legislative power (section 1), executive power (section 61) and judicial powers (section 71). This follows the *Constitution of the United States of America* (1788) that set out a separation of powers and institutions. The US Constitution sets out the separation of powers (Article I, section 1: the legislative power is vested in Congress (Parliament); Article II, section 1: the executive power is vested in the President; and Article III, section 1: the judicial power is vested in the Supreme Court).

The separation of powers in Australia has been fundamentally shaped and defined by the High Court (Sawer 1961; Vile 1967; Finnis 1967) which chose a Blackstonian ([1765-69] 1884) common law conception of the separation of judicial powers, in preference to the principles elaborated in Hamilton, Madison & Jay [1788] *The Federalist* and articulated in the American Constitution (1788) (Patapan 1999). The High Court’s admission that it now ‘makes the law’ (Mason 1990; Kirby 1990, 1997; Marks 1994; Brennan 1998; Patapan 2000: 5, 31), as discussed below, has presented unprecedented theoretical and political challenges. The Court has been compelled to reconcile its new role with the rule of law and to explain what law-making means for the judiciary. There are now challenges to the concept of the separation of judicial power in Australia. This

includes a transformation in the role of the Attorney-General, the creation of new institutions and a move towards an American conception of checks and balances (Patapan 1999).

The Australian Founding Fathers faced a choice between two major conceptions of the separation of powers: one derived from the American Constitution and *The Federalist* (Hamilton, Madison and Jay 1788 [1788]); the other from British constitutionalism and Blackstone (1765) (Patapan 1999: 391). The Australian Founding Fathers settled upon an amalgam of British responsible government and American federalism. The result has been described as ‘a hybrid form of government’ (Emy 1978: 181; Galligan 1995: 38). This amalgamated and mutated Australian system revealed the ambiguity of the terms settled upon in the Australian Constitution. It allowed the High Court to be the pre-eminent interpreter of the Constitution and to define the nature of the separation of powers in Australia (Thompson 1980; Maddox 1991; Singleton, Aitkin, Jinks & Warhurst 1996; Patapan 1999; Patapan 2000: 150).

The High Court took up this opportunity and defined the separation of powers in Australia principally as a separation of the judicial power from the other powers [*Alexander’s Case* (1918); *Dignan Case* (1931)]; this had far reaching influence on the development of Australian constitutionalism until the court’s recent admission in 1990 that it not only interprets the law but also ‘makes’ the law (Mason 1990). This declaration has exposed the court to political and scholarly criticism and raised profound questions concerning the tension between a lawmaking judiciary and the doctrine of separation of powers. This theoretical tension creates immediate political implications for the separation of powers doctrine in Australia; it makes the judiciary more vulnerable

to political attack, it requires a new role for the Attorney-General, and it requires the creation of new mediating institutions. In 1995 Attorney-General Williams argued that there was no longer any reason to treat the High Court as an institution differently to other policy-making bodies (Williams 1995). All of these suggest a shift towards an American conception of institutional checks and balances (Patapan 1999: 1-2).

A preliminary review of recent Australian literature on the separation of powers in Australia may be seen in the work of authors such as Haig Patapan and Suri Ratnapala. Their recent works on the subject of the separation of powers include: Patapan 1999: 391-407; Patapan 2000: 150-177; Ratnapala 2002: 88-117, 118-143. For the history and philosophical dimensions of the separation of powers doctrine: see Ratnapala 1990; Ratnapala 1994; Lumb and Moens 1995; and Zines 1997. At first glance the foundation of the legal and constitutional position of the separation of powers in the Australian Commonwealth Constitution appears clear (s. 1 legislative power; s. 61 executive power; s. 71 judicial power). In regard to the basic constitutional provisions (in the Australian Commonwealth Constitution) effecting the separation of legislative, executive, and judicial powers, the main sections are ss.1, 61, and 71. Yet the High Court has focussed on the separation of the judicial power (s. 71) [see the *Dignan* Case 1931)].

### **The High Court's rationale for the SOP Doctrine**

The High Court has justified the existence and use of the separation of powers doctrine in its interpretation of the Australian Constitution in two ways: federalism and libertarianism. The first justification emphasises the importance of a separated and independent judiciary for the purpose of maintaining the federal character of the

Constitution. Three main High Court cases that involve the federalism theme are: *Alexander's Case* (1918) 25 CLR 434, 469-70, 479; *Boilermakers' Case* (1956) 94 CLR 254, 276; and *A-G Cth v R* (1957) 95 CLR 529, 540-541. The second justification used by the High Court actually has two strands. The first strand indicates that, as part of the system of checks and balances, the dispersal of powers helps to protect individual liberty. The High Court's response to concerns, such as it has become a law-making court, has been the attempt by the Court to justify the separation of powers by emphasising its importance for the protection of liberty (Brown 1992; Winterton 1994; Zines 1994, 1997; Parker 1994; Hope 1996; Patapan 1999: 399). Two cases that involve the first strand of the libertarian theme are: *Q v Davison* (1954) 90 CLR 353, 380-81; and *Q v TPC* (1969-70) 123 CLR 361, 392. The second strand indicates that by securing judicial independence, the dispersal of powers protects liberty. Four cases that involve the second strand of the libertarian theme are as follows: *NSW v Cth* (1915) 20 CLR 54, 93; *Kotsis* (1970) 123 CLR 69, 109-10; *Q v Quinn* (1977) 138 CLR 1, 11; and *Re Tracey* (1988-9) 166 CLR 519, 579-80 (Ratnapala 1999: 2).

### **Commonwealth Executive Infringes on the Judiciary**

Commonwealth justices have security of permanent tenure (retirement age is 70 years of age) and independence from the executive (section 72, *Commonwealth of Australia Constitution Act* 1900). The executive however chooses, judicial replacements and makes the appointment official. The Executive can also remove justices from office. Justices are removed by the Governor-General in Council after an address from both houses of the Parliament and removal is on the ground of proved misbehaviour or

incapacity (Lumb & Moens 1995: 375-6). In 1984 the Senate appointed committees to enquire into the behaviour of Murphy J (Justice of the High Court) in relation to allegations he attempted to 'pervert the course of justice'.

Justices are appointed formally, by the Governor-General, in practice, however justices are selected by Cabinet. The Attorney-General will usually seek advice about the suitability of appointees from fellow ministers, from state Bar Associations, and (as required by law since 1979) from state Attorneys-General. Once appointed, members of the Court have tenure to the age of seventy. Section 72 gives Parliament the power to remove justices for proved misbehaviour or incompetence. There is no precedent for the removal of a High Court Judge, but in the mid-1980s anti-Labor Senators initiated two separate Senate committee inquiries and then a parliamentary commission of inquiry in their attempt to remove Justice Lionel K. Murphy (a former Labor Attorney-General) from the High Court, for alleged misbehaviour. This sorry episode, ending with Murphy's death; the power of Commonwealth Parliament to dismiss a High Court Judge remains untested. It demonstrated that in practice Parliament's power to dismiss a judge has not had a final determination on the issue. The High Court, in practice, is beyond the direct influence of Parliament and the government of the day. The only opportunity governments have to direct the future of the Court in one direction or another comes infrequently when vacancies need to be filled with new appointments (Stewart & Ward 1996: 47-8).

The Commonwealth executive infringing on the Judiciary is best illustrated by the Lionel Murphy case. The separation of and independence of the judiciary is an important aspect of the doctrine of the separation of powers. The activist judge, Lionel Murphy had

a controversial life and political and legal career and is worth mentioning. Judges personally exercise judicial power and their removal from the bench is of great interest to the issue of the independence of the judiciary within the separation of powers. It is important to look at who Lionel Murphy was, his background, and politics. As a Labor Party radical Lionel Murphy with his actions as a Labor Attorney-General and his decisions as a High Court Judge upset the conservative forces in politics and the law in Australia and attempts were made to remove him as a High Court Judge.

### **(3) The Implication of the Separation of Powers Doctrine for State Governments**

The paper considers the implication of the separation of powers doctrine for state governments. Although there is no formal separation, there is an implied separation of powers at the State level in Australia.

Historically, there has been a lack of a constitutional separation of powers at the State Government level in Australian, including Queensland. Queensland Government's have dominated and controlled the Parliament; their accountability to parliament has been very limited. This has been compounded by two factors. First, the abolition of the Legislative Council in 1922 (Fitzgerald 1984: 22-28). Second, it never developed an effective parliamentary committee system to review the Government of the day (Hughes 1980: 147-51). The Queensland parliamentary system of government is a locally modified version of the Westminster system that does not completely separate the legislature and the executive powers. The judicial power is, for the most part, kept separate but is not constitutionally entrenched (as at the Commonwealth level; s. 71 Commonwealth Constitution). The appearance of the separation of the institutions of

Parliament, Executive Council (including Cabinet) and the State Courts is given in several ways. First, their physical location in separate buildings. Second, the faces of the individuals heading the major institutions are different. The heads of each of the institutions are: Speaker (legislature), Chief Justice (judiciary) and Governor and Premier (executive). These offices are always held by different individuals. The powers they exercise however overlap. The Premier and Cabinet Ministers, exercise both legislative and executive powers. The Chief Justice and other Judges exercise judicial power. The New South Wales, Queensland or Victorian Constitutions do not separate judicial and legislative power (see also *Clyne v East* 1967; *BLF Case* 1986; *Mabo Case* 1988; *Collingwood City Case* 1993). The Speaker and the Governor perform mainly ceremonial roles.

The separation of powers theory of the constitutional separation of the three branches of government (the executive, the legislature and the judiciary) so that each has separate personnel exercising specific autonomous powers is not implemented in practice. Unlike the Commonwealth Constitution, the Queensland Constitution Acts do not prescribe a rigid separation of powers; therefore, the Queensland Parliament could legislate to alter the judicial role of the courts. As Lumb (1991: 132) argues “there is no constitutional impediment to a state parliament legislating in a manner which would intrude upon the exercise of judicial power.” This would, of course, then be open to an appeal to the High Court (at the Commonwealth level) to possibly overrule the State Parliament and its legislation. Nevertheless, it is generally accepted that the distribution of powers is as follows: the legislative power is exercised by the Legislative Assembly (no Legislative Council) although this is effectively controlled by the Premier and

Cabinet; the executive power is exercised by the Executive Council (including the Governor, Premier and Cabinet Ministers); and the judicial power is exercised by the State Courts (especially the Supreme Court and Court of Appeal). The Queensland Supreme Court or the Court of Appeal has not as yet ruled specifically on the issue of the separation of powers doctrine in a case in Queensland but would likely follow precedent set by other States (Carney 1993: 5).

### **The Separation of Powers in Queensland**

The separation of powers doctrine has the constitutional separation of the three branches of government: the executive, the legislature and the judiciary so that each has separate personnel exercising specified, autonomous powers. Unlike the Australian Commonwealth Constitution, the Queensland Constitution Acts do not prescribe a rigid “separation of powers”; therefore the Queensland Parliament could legislate to alter the judicial role of the state courts. Under the Australian version of the Westminster system, the separation of powers is not complete as the executive is part of and responsible to the legislature. Queensland’s Constitution Acts, unlike the Australian Constitution, do not provide expressly that Ministers of the Crown have to be elected parliamentarians. By Westminster conventions, however, that is the case; this convention is one foundation for “responsible government”. Also Queensland is part of a federation and the Australian High Court has overruled the state’s authority in certain areas through reference to the federal government’s constitutional powers. Further, legislative authority of states within the Australian federation have been limited by rulings of the High Court of Australia [see *Koowarta case* (1982); *Mabo case* (No 1) (1988) and (1992) (No 2)].

In Queensland as is the situation in other States of Australia, there is a lack of separation of powers, that is there is a lack of constitutionally entrenched separation of powers (legislative, executive and judicial powers). The separation between the legislative power, the executive power and the judicial power is not constitutionally entrenched (Lumb 1991; Lane 1994). The institutions and personnel who are empowered to exercise these powers and the checks and balances for the use of these powers are also not constitutionally entrenched. The official positions (in practice: the Premier, the Speaker and the Chief Justice) that lead in the use of these powers are also not constitutionally entrenched. The Premier, is the leader of the Government and the executive power as well as the legislative power (Hughes 1980). The Speaker, is the leader of the Parliament and its administration and the legislative power (Hughes 1980). The Chief Justice, the leader of the Judiciary and the judicial power (de Jersey 2001a, & b). These officers have roles and functions that are not specifically constitutionally entrenched. With the absence of an upper house of review (the Legislative Council was abolished in 1922; Fitzgerald 1984) a comprehensive parliamentary committee system is even more necessary (see Fitzgerald Inquiry, *Fitzgerald Report* 1989; Coaldrake 1989) in Queensland and the positions of Chairman of Committees along with the Speaker need to be more important positions to check the powers of government and to review government decisions.

At least 'the independence of the judiciary' (see note on separation of powers theory) and its role in judicial review of Government legislation and other actions needs to be constitutionally entrenched (Carney 1993). The role of the Supreme Court and Court of Appeal is the final determinate institution on State constitutional matters and

Queenslanders' civil rights unless this conflicts with Commonwealth powers in which case the High Court decisions prevail (*Commonwealth of Australia Constitution Act* 1900, s. 109). The Queensland Constitution, as a result of the work of a number of bodies, has recently been consolidated and for the first time contained in one document. The consolidated Constitution, the *Queensland Constitution Act 2001*, came into effect on Queensland Day (6 June) 2002. However the separation of powers has yet to be entrenched, as in the Commonwealth Constitution (or the State Constitutions), this will require a manner and form procedure such as a State Referendum (Carney 1993).

#### **(4) The Historical Record at the State Level**

The paper looks at the historical record at the state level, particularly in Queensland. In this account it is shown that the powers of the executive have encroached on the other two branches. These cases of abuse have arisen because the separation of powers doctrine has not been entrenched or even recognized by state governments. This matter requires urgent attention.

#### **Queensland**

The theory of the doctrine of the separation of powers requires the separation of the judicial power from the other two powers (legislative and executive powers); in practice in Queensland the independence of the judiciary has been compromised by political interference, particularly in the process of judicial appointments. At times, the executive has infringed on the judiciary in Queensland; this was exposed in the Fitzgerald Inquiry (1987-9) and in the subsequent Fitzgerald Report (1989). The lack of knowledge of the

doctrine of the separation of powers by political leaders in Queensland such as Premier Bjelke-Petersen (1968-87) was also exposed during the Fitzgerald Inquiry (Bjelke-Petersen presented evidence at the Fitzgerald Inquiry on 1 & 9 December 1988; *Fitzgerald Report* 1989: A161, A170, A232; see also Spindler 2000: 1-4; Palmer's *Oz Politics* 1996-2003: 1-4; Whitton 1989: 184-5; Lovell et al 1995: 64). The Fitzgerald Inquiry also presented evidence of political interference in judicial appointments such as the Chief Justice position (see appointment of Justice Dorman Andrews as CJ; Coaldrake 1989). Bjelke-Petersen also used the defamation laws to stifle opposition and to gag discussion of the level of corruption in the Government (*Fitzgerald Report* 1989; Whitton 1989: 110; Wear 2002: 219).

Under the doctrine of the separation of powers and also under the Westminster system of government, the judicial power is required to be separated, from the legislative power and executive power (Lumb 1983; *Fitzgerald Report* 1989; Carney 1993). After the excesses of the Bjelke-Petersen years, all aspects of government required review. The judicial culture in Queensland required examination and the behaviour of judges came under the terms of reference of the Fitzgerald Inquiry. The behaviour of Judges Pratt and Vasta, in particular, exposed deep problems in the appointment and removal of the judiciary (*Fitzgerald Report* 1989; Fitzgerald 1990). The unusual circumstances of the removal of Judge Vasta from the Supreme Court required a process to be developed; the process included a Parliamentary Judges Commission of Inquiry to recommend dismissal before a Parliamentary vote on the matter (*Fitzgerald Report* 1989; Dickie 1989; Whitton 1989: 14).

The position of Chief Justice is an important position within the judiciary and the office holder is required to lead the judiciary and maintain its independence from the government of the day (de Jersey 2001a, 2001b). Under the Australian (and Queensland) version of the Westminster system of government the independence of the judiciary is an important aspect of the partial separation of powers. In Queensland, the judiciary has struggled to maintain its independence, free from political interference. The present Chief Justice Paul de Jersey has led well and maintained judicial independence. De Jersey CJ has constantly raised the issue of the lack of appropriate funding for the judicial system in Queensland. De Jersey CJ has also recently criticised the funding level and expertise, within the Office of the Director of Public Prosecutions (ODPP); he has suggested that, had greater resources been provided, the recent *Hanson* and *Ettridge* cases (2003) might not have reached trial (de Jersey in *R v Hanson; R v Ettridge* [2003] QCA 488 (6 November 2003); de Jersey cited in *The Courier-Mail*, 7 November 2003, p. 1). This case exposed some political influence and infringement on the judiciary and judicial independence.

Another recent case impacting on the separation of powers was the Supreme Court of Queensland – Court of Appeal case *R v Fingleton* [2003] QCA 266 (26 June 2003) (the *Fingleton* Case (2003)). The case involved the behaviour of the Chief Magistrate Diane Fingleton toward her fellow magistrates in 2002, exposed political and legal problems for the executive, the independence of the judiciary and the separation of powers. The *Fingleton* Case (2003) involved several aspects including an investigation of relevant matters by the Crime and Misconduct Commission (CMC) Inquiry, public comments by political leaders criticising the case and the judgments as well as alleged

possible political and executive interference by the Attorney-General Rod Welford in the judicial process.

Other issue which will be discussed in the chapter include: the impact of the Fitzgerald Inquiry, political penetration of the judiciary, the separation of the judicial power, the judicial culture, the removal of Vasta J, the removal of Fingleton CM, the *Hanson* and *Ettridge* cases (2003), and the interference by the Attorney-General. In the next section let us look in more detail at the Fitzgerald Inquiry (1987-9) and the separation of the judicial power.

### **Chief Magistrate Diane Fingleton (Queensland/Brisbane Magistrate's Court)**

Another controversy concerning the judiciary and the separation of powers arose in the career of Diane Fingleton and events which ended her term in office as Chief Magistrate (see *R v Fingleton* [2003] QCA 266 (26 June 2003)). The Chief Magistrate Diane Fingleton was a controversial appointee of the former Labor Attorney General Matthew Foley. The executive infringement on the judiciary is at issue again (as it was with Justice Vasta). The executive in the early stages of the judicial process to review the performance of the Chief Magistrate, but it is unclear about the later stages. There has been a judicial review process (including court cases) concerning the actions taken by the Chief Magistrate against her fellow and subordinate magistrates. The separation of powers doctrine requires that the executive stay out of the judicial process as much as possible and this includes the hearing of evidence and the determination of judgment about the Fingleton matter.

The facts and significant dates leading up to Magistrate Basil Gribbin's complaint to the Crime and Misconduct Commission (CMC) about the Chief Magistrate Diane Fingleton are as follows: On June 4, 2002 Queensland's Chief Magistrate Diane Fingleton summoned the Southport magistrate Sheryl Cornack to discuss complaints about her performance. On September 6, 2002 Cornack files a Supreme Court affidavit calling for a judicial review of Fingleton's performance. On September 18, 2002 Chief Magistrate Fingleton e-mails Beenleigh co-ordinating magistrate Basil Gribbin asking why he gave evidence against her for a fellow magistrate, Anne Thacker (who was fighting a transfer). The same e-mail also demanded Gribbin show cause why he should remain in his position. On September 20, 2002 Gribbin files a complaint with the Crime and Misconduct Commission (CMC) claiming that Fingleton's dealings with him represented criminal misconduct in attempting to pervert the course of justice.

The issue involves Magistrate Basil Gribbin making allegations of misconduct against the Chief Magistrate Diane Fingleton. As far as lawyers appearing in Queensland courts are concerned, Basil Gribbin was one of the most respected magistrates in the State. This makes the accusations by Gribbins against Fingleton all the more serious. Gribbin says that Fingleton is "an appalling chief magistrate" and he formally complained to the Crime and Misconduct Commission (CMC), asking the crime-fighting body to investigate whether Fingleton had attempted to pervert the course of justice. It is an unusual situation that someone in charge of a pillar of a judiciary such as the magistracy, should be accused of such offences and almost unprecedented that the claim is made by a fellow magistrate. To attempt to pervert the course of justice is a serious legal offence, potentially punishable by imprisonment. The Chief Magistrate may have

committed offences under sections 119B and 140 of the *Queensland Criminal Code* (1899).

The Labor Attorney General Rodney Welford said that he was satisfied with the judicial review process involved in investigating the matter. The CMC's Chairman, Brendan Butler, SC, and one of his key lawyers, Stephen Lambrides, disqualified themselves. Their substitute was the retired Supreme Court of Appeal judge William Pincus QC, in consultation with Queensland's Chief Justice Paul de Jersey QC. One key document of evidence in the case is an e-mail message sent by Fingleton to Gribbin in which she threatened him with demotion and it links her action to his decision to give evidence against her in the case of another magistrate, Anne Thacker (Hedley Thomas, *The Courier-Mail*, 28 September 2002: 26). Gribbin believed this behaviour by Fingleton was potentially 'threatening a witness' and attempting to pervert the course of justice in judicial proceedings and the Chief Magistrate as a judicial officer had a duty to uphold the law and protect witnesses against threatening conduct.

Under the *Crime and Misconduct Act* (2001), the CMC, when considering a complaint against a judge or magistrate, "is limited to investigating misconduct of a kind that, if established, would warrant the judicial officer's removal from office". The *Queensland Magistrates Act* (1991) permits the suspension of a magistrate from office if a Supreme Court judge, on the application of the Attorney-General, "has determined that there are reasonable grounds for believing that proper cause for removal of the magistrate exists". Reasonable grounds under the Act include proved misbehaviour, serious neglect of duties, incompetence or conviction of an indictable offence (Hedley Thomas, *The Courier-Mail*, 28 September 2002: 26).

There has been political comment and criticism on the matter. For example, Michael Horan the Opposition Leader has said that Ms Fingleton should stand aside until the CMC inquiry is completed. Mr Horan has said that “Queenslanders are rapidly losing confidence in the justice system of Queensland.” Attorney-General Rodney Welford, however, has said that he was stunned by Mr Horan’s “ignorance” of the due process of separation of powers. In reply, Mr Horan has said that under the *Magistrates Act* (1991), Mr Welford had the right to suspend a magistrate from office if he/she breached one of four grounds. He said the fact that this right existed showed there was no clear separation of powers between the Government - represented by the Attorney-General - and magistrates. Nevertheless, in this instance it appears that Ms Fingleton has not breached any of the four grounds, which include committing an indictable offence or being guilty of misbehaviour (Todd, *The Courier-Mail*, 28 September 2002: 16).

On June 11, 2003 the Court of Appeal President, Margaret McMurdo stood aside from sitting on the appeal of the jailed Chief Magistrate Di Fingleton. There was a possible conflict of interest as she knew the Chief Magistrate and was a friend, impartiality and independence of the judiciary was maintained. On June 26, 2003 Fingleton’s Appeal was rejected, her sentence was upheld but her jail term was reduced from 12 months to 6 months. The Queensland Government waits for her resignation. The Queensland Supreme Court – Court of Appeal decided to order: 1.) Appeal against conviction dismissed; and 2.) Appeal against sentence allowed to the extent of varying the sentence by suspending it for an operational period of two years after the appellant has served six months of the term imposed (McPherson, Davies and Williams JJA; *R v Fingleton* [2003] QCA 266 (26 June 2003)). The court considered the only example of a

sentence imposed on a judicial officer for a somewhat similar offence in relatively recent times and that was *R v Lionel Murphy* (CCA (NSW) 340 of 1985 and 245 of 1985). That case involved a High Court justice (Murphy J) sentenced to 18 months imprisonment but with an order for release after entering into recognizance after serving 10 months of the sentence. The conviction in the *Murphy* case (later set aside on appeal) was for attempting to pervert the course of justice in judicial proceedings, which was the alternative charge against Fingleton here in the *Fingleton* case.

Executive interference may have occurred in the judicial process on June 27, 2003 when the Queensland Attorney-General Rod Welford puts a deadline of 5.00pm Friday 27 June 2003 for Di Fingleton to resign as Chief Magistrate, if he does not hear from her by then he will apply to the Queensland Supreme Court to order her removal from office. On June 30, 2003 Fingleton decided to resign (effective the next day June 31 2003). Fingleton bows to Government pressure, she also rules out exercising her rights in the judicial process, that is a High Court Appeal to challenge the Court decision. On July 2, 2003 Fingleton officially resigns from the position of Chief Magistrate. On July 23, 2003 Fingleton sacks her Solicitor Patrick Murphy and also sacks her legal team, she will appeal to the High Court. On December 3, 2003 Fingleton left prison after serving six months jail time (Fingleton was sentenced to 12 months, but the sentence was reduced on appeal to six months).

On October 8, 2004, Fingleton was granted leave to appeal to the High Court, 10 months after being released from jail. In the High Court lawyers were forced to admit they had overlooked laws which may have saved Fingleton from prosecution on a charge of retaliating against a witness. In a case reminiscent of Pauline Hanson's court ordeal,

the High Court has found that Fingleton may have been protected by her position as a magistrate. High Court Justice Michael McHugh told the hearing (on October 8, 2004) that the judiciary may be protected from prosecution under Queensland's Criminal Code (1899) and *Magistrates Act* (1991). Justice McHugh argued that Fingleton may have had the same protection under the laws in exercising her administrative duties as she did in performing her criminal function. In a joint decision with Justice William Gummow, Justice McHugh argued that Fingleton may have gone to jail for simply doing her job, that is, she was doing what she was authorised to do. Justice McHugh told the hearing that it was hard to imagine a stronger case of miscarriage of justice. A backlog of cases is likely to delay Fingleton's High Court appeal hearing until at least the middle of 2005 (*The Sydney Morning Herald*, 8 October, 2004, "Magistrate 'jailed for doing her job'"). On 23 June 2005 the High Court quashed her conviction for unlawful retaliation against a witness, holding that the conduct that led to the charge was protected by the immunity against criminal prosecution conferred by the *Magistrates Act*.

The Fingleton case highlights serious problems for the independence of the judiciary in Queensland. The case indicates the Queensland executive (Attorney-General) infringing on the judiciary; by the Attorney-General pressuring the Chief Magistrate to resign, so that a replacement appointment could be made. The role and powers of the Chief Magistrate and rules relating to the transfer of magistrates need greater clarity and transparency. There appears to be a lack of the separation of judicial powers from the executive power here.

### **Attorney-General Rod Welford - Interference or Leadership?**

Executive interference in the judicial system can be seen in the Queensland State Government's recent introduction of 'indefinite sentencing'. It might be said that this undermines judicial power and increases the executive power. Following immense public concern expressed in early 2003 regarding the release of convicted sex offender Dennis Raymond Ferguson from prison upon the expiry of his term of imprisonment, the Queensland Legislative Assembly enacted the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld). Attorney General Rod Welford has introduced this legislation to overcome the High Court's concerns in the NSW *Kable* Case [*Kable v DPP* (1995-96) 189 CLR 51] (see Ratnapala 2002: 114-5). The 1996 decision of the High Court in *Kable v DPP* (1996) is authority for the principle that State legislatures may not vest in State courts functions which are incompatible with the operation and standing of those courts as repositories of the judicial power of the Commonwealth (Giskes 2004).

In the *Kable* Case (1996) the High Court considered the validity of s. 5(1) of the *Community Protection Act* 1984 (NSW), which empowered the NSW Supreme Court to make an order for the detention of a specified person (Gregory Wayne Kable, a prisoner convicted of the manslaughter of his wife). The High Court held that the Act was invalid for the reason that it conferred on the State Court a power that was incompatible with the exercise by it of federal judicial power (Ratnapala 2002: 114). In 1994 the NSW Government introduced a special act, ordering Greg Kable to be detained indefinitely. Cathy Pereira (of the Prisoners' Legal Service) in regard to the *Kable* Case (1996), has argued that: "The High Court in the case of Kable didn't accept that community protection was a reason to impose imprisonment of people who hadn't committed an offence and I guess it's for the High Court to determine whether the dangerous prisoner's

act is repugnant for the same reason” (Clark, ABC *Stateline Queensland*, 24 October, 2003).

## **Conclusion**

The separation of powers in theory and practice will not necessarily be the same thing, the purpose behind the doctrine can be seen to be embedded in democracies. In the Westminster system, as practiced in Australia, discussion of the doctrine is riddled with exceptions and variations. Certainly, in its classical form it exists here only partially at best: but in practice, mechanisms for avoiding the over-concentration of power exists in many ways. Some of the ways may include: through constitutions and conventions; the bicameral system; multiple political parties; elections; the media; courts and tribunals; the federal system itself; and the active, ongoing participation of citizens. The doctrine of separation of powers is part of a simultaneously robust and delicate constant interplay between the arms of government (legislative, executive and judicial). A tension within the separation of powers will always exist, and the greatest danger of abuse and excess will always lie with the executive arm - not judges or legislatures (Hamilton 1788 in *The Federalist* (1788) describes the judiciary as the least dangerous branch; Patapan 2003). It is in the executive that lies the greatest potential in theory and in practice for the misuse of power and for its corruption (Madison 1788 in *The Federalist*, No. 51). Preventing this in our system relies as much upon conventions as constitutions and the alarm bells should ring loudly when government leaders dismiss or profess ignorance of the concept (Spindler 2000: 4).

Under the Australian version of the Westminster system of government, the government (executive) is associated with and dependent on the Parliament (legislature) (Lane 1994: 130). The Westminster system of 'responsible government' has become increasingly irrelevant to the Australian States. Strong governments like the Bjelke-Petersen Government (1968-87) in Queensland (Hughes 1980; Fitzgerald 1984; Coaldrake 1989) tend to undermine parliamentary sovereignty and erode democracy and civil rights. State Constitutions, including the Queensland Constitution (1867, updated 2001), provide very few restraints upon a government seeking to radically transform a State. It is clear that more checks and balances are needed.

The partial separation and partial sharing of powers in the Australian States, particularly legislative and executive powers, in the structure of government also require checks and balances. A balance of powers is to be struck within the system of government and an evolutionary progression toward the goal of limited government can be achieved through the courts and their use of judicial power. This goal of limited government (Locke 1690) can partly be achieved by the independence of the courts and the judiciary (Montesquieu 1748) and in their constitutional role of judicial review. The two ends of the spectrum are complete separation of powers or complete concentration of powers. The complete or absolute separation of powers (would lead to anarchy) (Lumb 1983: 24) or the complete or absolute concentration of power (would lead to tyranny) (Madison 1788 *The Federalist*, 47: 244, cited in Patapan 2000: 153). The compromise is the partial separation and partial sharing of powers (Blackstone [1765-69] 1884) with a system of checks and balances (Vile 1967; Lumb 1983).

## ***References***

Alvey, J.R. (1991) A Comparative Study of Public Accounts Committees: Implications for Queensland Public Accountability, Unpublished MPubAd Dissertation, Department of Government, The University of Queensland: St Lucia, Brisbane, pp. i-100, March 1991.

Alvey, J.R. (1998) The Shifting Federal Balance and the Failure of Bjelke-Petersen to Advance the Cause of States' Rights, Unpublished MA Thesis, Department of Government, The University of Queensland: St Lucia, Brisbane, pp. i-137, December 1997.

Alvey, J.R. (2005) (in progress) The Separation of Powers in Australia: Issues For the States, Unpublished MBus (Research) Thesis, School of Management, Queensland University of Technology (Gardens Point Campus): Brisbane.

Aristotle (1981) [written approx 323 BC] *The Politics*, Translated by T.A. Sinclair, Revised and Re-Presented (1981) by Trevor J. Saunders, Penguin Books: Harmondsworth, Middlesex.

Aristotle (1984) [written approx 323 BC] *The Politics*, Translated by Carnes Lord, University of Chicago Press: Chicago.

Barthomey, P.C. (1989) "Checks and Balances" art. In *Encyclopedia America* 6, 1989, 353.

Blackstone, W. (1884) [1765-69] *Commentaries on the Laws of England*, (edited by Cooley, T.), Callaghan and Co: Chicago.

Brennan, G. (1998) 'The Parliament, The Executive and the Courts: Roles and Immunities', Lecture at School of Law, Bond University, 21 February 1998.

Brown, A.J. (1992) "The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge: Federal Law Review, Vol. 21, pp. 48-89.

Carney, G. (1993) "The Separation of Powers in the Westminster System" Queensland Chapter of the Australasian Study of Parliament Group, Speech given at Parliamentary Annexe, Brisbane, 13 September 1993, pp. 1-11.

Chinard, G. (1993) "Polybius and the American Constitution" In Shoffelton, F. (ed) (1993) *The American Enlightenment*, Library of the History of Ideas. Vol. 11. University of Rochester Press: New York, pp. 217-37.

Coaldrake, P. (1989) *Working the System*, University of Queensland Press: St Lucia, Brisbane.

de Jersey, P. (2001a) "The Role of Chief Justice of Queensland" Supreme Court of Queensland: pre-Easter Seminar 2001, Wednesday 11 April 2001, 2.00 pm, pp. 1-7.

de Jersey, P. (2001b) "Judicial Leadership in Changing Times" General Sir John Owen Oration, United Services Club, Friday 26 October 2001, pp. 1-13.

de Jersey (2002) "The Role of the Supreme Court of Queensland in the Convergence of Legal Systems", XVITH Congress of the International Academy of Comparative Law, Friday 19 July 2002, 2.00 pm - 4.00 pm, University of Queensland, pp. 1- 22.

Dickie, P. (1989) *The Road to Fitzgerald and Beyond*, University of Queensland Press (UQP): St Lucia, Brisbane.

Duff, M. (1897) "Presidential Address" Transactions of the Royal Historical Society, New Series, 11 (1897): 1-17. Quoted in "Polybius" Classical and Medieval Literature Criticism, (1988) Gale Research: Detroit.

Emy, H. (1978) *The Politics of Australian Democracy / Fundamentals in Dispute* (2<sup>nd</sup> ed), MacMillan: Melbourne.

Emy, H. and Hughes, O. (1991) *Australian Politics: Realities in Conflict*, Macmillan: Melbourne.

Finnis, J. (1967) "Separation of Powers in the Australian Constitution" in *Adelaide Law Review*, Vol. 3, pp. 159-77.

Fitzgerald, G.E. (Chairman) (1989) *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct*, Report of a Commission of Inquiry Pursuant to Orders in Council, 3 July 1989, S.R. Hampson, Government Printer, Queensland: Brisbane. (Outlined the separation of powers: Parliament, Executive, Administration, Judiciary).

Fitzgerald, R. (ed) (1980) *Comparing Political Thinkers*, Pergamon Press: Sydney.

Fitzgerald, R. (1980) "Socrates and Plato" in Fitzgerald, R. (ed) (1980) *Comparing Political Thinkers*, Pergamon Press: Sydney, pp. 1-18.

Fitzgerald, R. (1984) *A History of Queensland / From 1915 to the 1980s*, University of Queensland Press: St Lucia, Brisbane.

Fitzgerald, R. (1990) "Judicial Culture and the Investigation of Corruption: A Comparison of the Gibbs National Hotel Inquiry 1963-64 and the Fitzgerald Inquiry 1987-89" in Prasser, S. et al (1990) *Corruption and Reform*, University of Queensland Press: St Lucia, Brisbane, pp. 61-80.

Galligan, B. (ed) (1986) *Australian State Politics*, Longman Cheshire: Melbourne.

Galligan, B. (1995) *A Federal Republic / Australia's Constitutional System of Government*, Cambridge University Press: Cambridge.

Giskes, R. (2004) "The Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld): the High Court decision in Kable and applications under the Act", Research Brief No 2004/02, Research Publications and Resources Section, Queensland Parliamentary Library, Parliament of Queensland,  
<http://www.parliament.qld.gov.au/Parlib/Publications/publications.htm>.

Gwyn, W.B. (1965) *The Meaning of the Separation of Powers*, Tulane University and Martinus Nijhoff.

Hamilton, A. (1966) *The Federalist Papers*, Fairfield (ed), 2nd ed., Anchor: New York.

Hamilton, A.; Madison, J.; and Jay, J. (1961) [1788] *The Federalist*,<sub>2</sub> (edited by Wright, B.) Harvard University Press: Massachusetts.

Hamilton, A.; Madison, J.; and Jay, J. (1982) [1788] *The Federalist Papers*, (edited by Willis, G.) Bantam: New York.

Hope, J. (1996) "A Constitutional Right to a Fair Trial? Implications for the Reform of the Australian Criminal Justice System", *Federal Law Review*, Vol. 24, pp. 173-99.

Hughes, C. (1980) *The Government of Queensland*, University of Queensland Press: St Lucia, Brisbane.

Hullung, M. (1976) *Montesquieu and the Old Regime*, University of California Press: Berkley.

Kirby, M. (1990) 'Judicial Independence in Australia Reaches a Moment of Truth', *University of New South Wales Law Journal*, 13: 187.

Kirby, M. (1997) "Judicial Activism", Speech given to the Bar Association of India Lecture, 6 January, New Dehli.

Kirby, M. (1998) "Attacks on Judges - A Universal Phenomenon", *American Bar Association, Winter Leadership Meeting, 5 January, Maui Hawaii*.

Kirby, M. Justice, (2005) *Current Members of the High Court, p. 1*,  
<http://www.hcourt.gov.au/kirbyj.htm>

Lane, P. (1979) *The Australian Federal System*, (2nd ed), Law Book Co.: Sydney.

Lane, P. (1980) *A Student Manual of Australian Constitutional Law*, The Law Book Co Ltd: Sydney.

Lane, P. (1994) *An Introduction to the Australian Constitutions*, (6th ed), The Law Book Company Ltd: Sydney.

Laslett, P. (1963) *John Locke Two Treatises of Government*, ? A Critical Edition with an Introduction and Apparatus Criticus by Peter Laslett (1963), Cambridge University Press: Cambridge.

Laslett, P. (1970) *Locke's Two Treatises of Government*, Cambridge University Press: Cambridge.

Locke, J. (1960) [First published 1690] *Two Treatises of Government*, Introduction and notes by Laslett, P., Mentor: New York.

Locke, J. (1963) [First published in 1690] *Two Treatises of Government*, ?, A Critical Edition with an Introduction and Apparatus Criticus by Laslett, P. (1963), Cambridge University Press: Cambridge.

Lord, C. (1984) *Aristotle The Politics*, [323 BC] Translated and with an Introduction, Notes, and Glossary by Carnes Lord, University of Chicago Press: Chicago.

Lovell, D.W., McAllister, I., Maley, W. and Kukathas, C. (1995) *The Australian Political System*, Longman: Melbourne.

Lloyd, M.D. (1998) "Polybius and the Founding Fathers: the separation of powers", St Margaret's School, pp.1-15.

Lucy, R. (1993) *The Australian Form of Government: Models in Dispute*, Macmillan: South Melbourne.

Lumb, R.D. (1983) *Australian Constitutionalism*, Butterworths: Sydney.

Lumb, R.D. (1991) *The Constitutions of the Australian States*, (5<sup>th</sup> ed) University of Queensland Press: St Lucia, Brisbane.

Lumb, R.D. and Moens, G.A. (1995) *The Constitution of the Commonwealth of Australia Annotated*, 5th ed, Butterworths: Sydney.

Maddox, G. (1991) *Australian Democracy in Theory and Practice*, Longman Cheshire: Melbourne.

Maddox, G. (1993) "Republic or Democracy?" *Australian Journal of Political Science* (special issue) 28: 9-26.

Madison, J. (1788) *The Federalist*, No 51 (see Hamilton, A.; Madison, J.; and Jay, J. (1961) [First published 1788] *The Federalist*, (edited by Wright, B.) Harvard University Press: Massachusetts).

Madison, J. (1961) [First published 1788] 'Federalist Paper No. 48' In Rossiter, C. (ed) *The Federalist Papers*, Mentor: New York.

Madison, J. (1966) [First published 1788] *The Federalist Papers*, Fairfield (ed) (2<sup>nd</sup> ed), Anchor: New York.

Marks, K. (1994) "Judicial Independence", *Australian Law Journal*, Vol. 68, pp. 173-84.

Mason, A. (1990) "Judicial Independence and the Separation of Powers - Some Problems Old and New", *University of New South Wales Law Journal*, Vol. 13, pp. 173.

Montesquieu, C.L. Baron de. (1966) [First published 1748] *L'Esprit des Lois (The Spirit of the Laws)*, translated by T. Nugent, Hafner Publishing Company: New York.

*Palmer's Oz Politics*, (1996-2003), Brian Palmer 1996-2003,  
<http://www.ozpolitics.info/rules/sep.htm>

Parker, C. (1994) "Protection of Judicial Process as an Implied Constitutional Principle", *Adelaide Law Review*, Vol. 16, pp. 341-57.

Patapan, H. (1999) "Separation of Powers in Australia", in *Australian Journal of Political Science*, Vol. 34, No. 3, March 1998, pp. 391-407.

Patapan, H. (2000) *Judging Democracy: The New Politics of the High Court of Australia*, Cambridge University Press, Cambridge.

Patapan, H. (2002) Chapter 6: "The High Court" in Summers, J., Woodward, D. and Parkin, A. (2002) *Government, Politics, Power and Policy in Australia*, (7th ed), Longman, Pearson Education Australia: Frenchs Forest, Sydney.

Patapan, H. (2002) "High Court Review 2001: Politics, Legalism and the Gleeson Court", in *Australian Journal of Political Science*, Vol. 37, No. 2, pp. 241-253.

Patapan, H. (2003) "High Court Review 2002: The Least Dangerous Branch", *Australian Journal of Political Science*, Vol. 38, No. 2, July 2003, pp. 299-311.

Plato (1974) [375 BC] *The Republic*, Translated by Desmond Lee (1974), Penguin Books: Harmondworth, Middlesex.

Plato (1975) [375 BC] *The Laws*, Translated with an Introduction by Trevor J. Saunders (1975), Penguin Books: Harmondworth, Middlesex.

Plato (1980) [375 BC] *The Laws of Plato*, Translated with commentary by T. L. Pangle, Basic Books/University of Chicago Press: Chicago.

Polybius (1979) *Histories*, (translated by Paton, W.R.), Harvard University Press: Cambridge, Mass.

*Queensland's Constitution*, Queensland's Constitution homepage,  
<http://www.constitution.qld.gov.au/>

Queensland Courts: <http://www.courts.qld.gov.au/>

Rache, P.A. (1992) *Republics Ancient and Modern: Classical Republicanism and the American Revolution*, The University of North Carolina Press: Chapel Hill.

Ratnapala, S. (1986) *The Constitutionality of Executive Law Making in Australia*, Macquarie University LLM thesis, unpublished, pp. i-232.

Ratnapala, S. (1990) *Welfare State or Constitutional State?*, The Centre for Independent Studies Policy Monographs 15.

Ratnapala, S. (1994) *The Discipline of the Separation of Powers: A New Approach to Judicial Power in Australia*, The University of Queensland PhD thesis, unpublished, pp. i-482.

Ratnapala, S. (1995) Westminster Democracy and the Separation of Powers: Can they Co-Exist?, photocopy The University of Queensland Law Library (LA204.19 - Constitutional Law subject - Study note).

Ratnapala, S. (1999) LA213 Constitutional Law 1999, Lecture Notes for weeks 3-10, Topics: Separation of Powers, Executive and Ministerial Responsibility, Relations between the Houses, Lecturer: Dr Suri Ratnapala, T.C. Bernie School of Law: University of Queensland, pp. 1-46.

Ratnapala, S. (2002) *Australian Constitutional Law: Foundations and Theory*, Oxford University Press: Oxford.

Ryan, N., Parker, R. and Hutchings, K. (1999) *Government, Business and Society*, Prentice Hall: Sydney.

Ryan, N., Parker, R. and Brown, K. (2003) (2nd ed) *Government, Business and Society*, Pearson Education: Sydney.

Sawer, G. (1961) "The Separation of Powers in Australian Federalism", *Australian Law Journal*, 35: 177.

Scott, R., Coaldrake, P., Head, B. and Reynolds, P. (1986) "Queensland" in Galligan, B. (1986) *Australian State Politics*, Longman Cheshire: Melbourne.

Separation of Powers:

<http://www.parliament.qld.gov.au/History/history/separpow.htm>

Shackleton, R. (1961) *Montesquieu: A Critical Biography*, Oxford University Press: London.

Singleton, G., Aitken, D., Jinks, B. & Warhurst, J. (1996) *Australian Political Institutions*, (5th ed) Longman: Melbourne.

Singleton, G., Aitkin, D., Jinks, B. and Warhurst, J. (2003) (7th ed) *Australian Political Institutions*, Longman, Pearson Education Australia: Frenchs Forest, Sydney.

Spindler, G. (2000) "The separation of powers: doctrine and practice" NSW Constitution>TheJudiciary>Overview>Separation of powers, pp. 1-4.

Stewart, R.G. & Ward, I. (1996) *Politics One*, Macmillan Publishers Australia: South Yarra, Melbourne.

Strauss, L. & Cropsey, J. (1981) *History of Political Philosophy* (2<sup>nd</sup> ed) University of Chicago Press: Chicago.

Suanzes, J.V. (1999) "Sovereignty in British Legal Doctrine" *E law - Murdoch University Electronic Journal of Law*, Vol. 6, No. 3, September 1999, pp. 1-42.

Thompson, E. (1980) "The Washminster' Mutation", in *Responsible Government in Australia*, (edited by Weller, P. and Jaensch, D.), Drummond: Richmond, Melbourne.

Vile, M.J.C. (1967) *Constitutionalism and the Separation of Powers*, Clarendon Press: Oxford.

Wear, R. (2002) *Johannes Bjelke-Petersen: The Lord's Premier*, University of Queensland Press: St Lucia, Brisbane.

Whitton, E. (1987) "Queensland: An Independent Judiciary!" in *Can of Worms II* Sydney: Fairfax Library.

Whitton, E. (1989) *The Hillbilly Dictator: Australia's Police State*, ABC: Crows Nest, NSW.

Williams, D. (1995) "Who Speaks for the Court?" *Proceedings of the Australian Institute of Judicial Administration Conference on Courts in a Representative Democracy*, September.

Williams, D. (2000) 'Bias; the Judges and the Separation of Powers' in *Public Law*, Spring 2000.

Winterton, G. (1983) *Parliament, The Executive and the Governor-General*, Melbourne University Press: Melbourne.

Winterton, G. (1994) "The Separation of Judicial Power as an Implied Bill of Rights" in Lindell, G. (ed), (1994) *Future Directions in Australian Constitutional Law*, The Federation Press: Sydney.

Winterton, G. (1998) 'Popular Sovereignty and Constitutional Continuity', *Federal Law Review*, 26:1.

Wynes, W. (1976) *Legislative, Executive and Judicial Powers in Australia*, (5th ed.), Law Book Co.: Sydney.

Yao, W.T. (1980a) "Plato and Confucius" in Fitzgerald, R. (ed) (1980) *Comparing Political Thinkers*, Pergamon Press: Sydney, pp. 19-39.

Yao, W.T. (1980b) "Aristotle and Mencius" in Fitzgerald, R. (ed) (1980) *Comparing Political Thinkers*, Pergamon Press: Sydney, pp. 40-53.

Zines, L. (1994) "A Judicially Created Bill of Rights?", *Sydney Law Review*, Vol. 16, pp. 166-84.

Zines, L. (1997) *The High Court and the Constitution*, (4th ed), Butterworths: Sydney.