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# Separation of Powers

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## SUMMARY

The separation of powers is an important concept in constitutional law. In this chapter the origins and meaning of the doctrine will be considered. Reference will be made to Montesquieu's *L'Esprit des Loix* which is widely regarded as the most influential exposition of the doctrine. We will then consider whether or not there is a separation of powers in the UK constitution. In so doing, it will be necessary to examine, amongst other things, the reforms set out in the Constitutional Reform Act 2005. It will also be necessary to acknowledge that there is generally a difference of opinion between academics and judges as to the importance of the separation of powers doctrine to an understanding of the UK constitution.

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## Introduction

- 2.1 The 'separation of powers' is a doctrine that has exercised the minds of many. Ancient philosophers, political theorists and political scientists, framers of constitutions, judges and academic writers have all had cause to consider the doctrine through the centuries. Discussion in the UK has tended to focus upon whether or not it can be said that the UK's unwritten or uncodified constitution is based upon a separation of powers. Strong views have been expressed on both sides of the debate, as will become apparent below. However, at this initial stage, it needs to be appreciated that in considering this doctrine, we have moved from the discipline of law to that of political theory. The separation of powers is a doctrine not a legal principle.

2.2 It may not be possible to state precisely the origins of the doctrine of the separation of powers. However, if we look to the writings of the Greek philosopher Aristotle, it is possible to discern a rudimentary separation of powers doctrine. Thus in his *Politics*, Aristotle remarked that:

There are three elements in each constitution in respect of which every serious lawgiver must look for what is advantageous to it; if these are well arranged, the constitution is bound to be well arranged, and the differences in constitutions are bound to correspond to the differences between each of these three elements. The three are, first the deliberative, which discusses everything of common importance; second, the officials . . . ; and third, the judicial element.

2.3 The English political theorist, John Locke, also envisaged a threefold classification of powers. Writing in *The Second Treatise of Government* (1689), Locke drew a distinction between three types of power: legislative, executive, and federative. In Locke's analysis, the legislative power was supreme and although the executive and federative powers were distinct, the one concerned with the execution of domestic law within the state and the other with a state's security and external relations, he nevertheless took the view that 'they are always almost united' in the hands of the same persons. Absent from his classification is any mention of a separate judicial power. Moreover, the proper exercise of these powers is achieved not through separation but on the basis of trust, ie that a community has entrusted political power to a government. Thus Locke's analysis does not, strictly speaking, amount to the exposition of a doctrine of the separation of powers. For that, we must turn to the writings of Montesquieu.

## Montesquieu and *L'Esprit des Lois*

2.4 Charles Louis de Secondat, otherwise known as Baron de Montesquieu, was a provincial French nobleman and parliamentary magistrate. His lasting contribution to political theory, *L'Esprit des Lois* (*The Spirit of the Laws*) was the product of his observations whilst travelling in Europe between 1728 and 1731, although the book itself was not published until 1748. Much of Montesquieu's time during this period was spent in England attending the court of George II and moving in political circles. His exposure to English political life and the manner in which government was conducted has accordingly led to speculation as to the extent to which some of the views expressed in his book were formulated by his English experiences.

2.5 *The Spirit of the Laws* is an eclectic book. It contains writings on many aspects of law and government, including the view that the laws of a state are greatly influenced by certain of the characteristics of that state, such as its climate, terrain, and mores. Writing in the preface to the book, Montesquieu requested a favour of his readership that he feared would not be granted, namely that they ‘approve or condemn the book as a whole and not some few sentences’. His fears have subsequently been realized. Attention has tended to focus on particular parts of *The Spirit of the Laws*, most notably in the present context on chapter 6 of Book 11. In this chapter entitled *On the Constitution of England*, lies the very core of Montesquieu’s exposition of the Separation of Powers. For the author:

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizen would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.

All would be lost if the same man or the same body of principal men, either of nobles, or of the people, exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of individuals.

2.6 The rationale underlying the separation of powers, to prevent the abuse of power, is apparent throughout this passage. Speculation has sometimes centred upon whether chapter 6 of Book 11 is a description of the constitutional framework which Montesquieu observed in England, or whether it is his prescription for the features that a constitution ought to exhibit. In addition, questions have arisen as to the extent to which he was influenced by the opinions of others, most notably Viscount Bolingbroke, a contemporary English politician and pamphleteer. Whatever the answers to these questions, the fact remains that Montesquieu has, in the words of the authors of *The Federalist Papers*, come to be seen as ‘the oracle who is always consulted and cited on this subject’. In their opinion, ‘if he be not the author of this invaluable precept in the science of politics, he has the merit of at least displaying and recommending it most effectually to the attention of mankind’. It is perhaps not surprising, therefore, that M J C Vile has described Montesquieu as the ‘father of modern constitutionalism’.

## Is there a separation of powers in the UK constitution?

- 2.7 If by separation we mean a strict separation between the three functions or organs of government, the legislature, the executive, and the judiciary, so that there is no overlap whatsoever, then the simple answer to the question is 'No'. A separation of powers in the purest sense is not, and never has been, a feature of the UK constitution. An examination of the three powers reveals that in practice they are often exercised by persons or bodies which exercise more than one such power. Thus, for example, there is a broad overlap between the legislative and executive in the UK constitution. The PM and his cabinet colleagues are members of both bodies and indeed, as we shall see in Chapter 11, constitutional convention requires that this is so. Therefore Bagehot's assertion in *The English Constitution* (1867) that there was a 'close union and an almost complete fusion of legislative and executive power' in the constitution is as true today as when those words were originally published. This is despite the fact that s 2 of the House of Commons Disqualification Act 1975 imposes a limit of 95 on the number of ministers entitled to sit and vote in the HC. Not for nothing did the former Lord Chancellor, Lord Hailsham, once describe the British system of government as an 'elective dictatorship'.
- 2.8 There are too many examples of overlap between the three functions of government for them all to be included in this book. The following list is therefore not exhaustive, although it does seek to highlight several of the more significant incidences of overlap.
- Law Lords sit on the appellate committee of the HL and the judicial committee of the Privy Council as well as in the HL as a legislative body.
  - Parliament exercises a legislative function and to a lesser extent a judicial function in that it is responsible for the regulation of its own internal affairs.
  - Government ministers are members of the executive who exercise a legislative function in Parliament and also when they make delegated legislation.
  - In addition to exercising a judicial function, courts legislate in the sense that they develop principles of the common law.
  - Government ministers exercise a judicial function when they determine appeals in relation to disputes arising under, for example, town and country planning legislation.
  - Magistrates exercise administrative as well as judicial functions in that they grant licences.

Of all the instances of overlap, however, it was the position of the Lord Chancellor which was traditionally cited in support of the argument that there is no separation of powers in the UK constitution.

## The Lord Chancellor

- 2.9 The office of Lord Chancellor has existed for centuries. It has occupied a unique position in the UK constitution in that the incumbent was a member of all three branches of government and therefore exercised all three forms of power: legislative; executive; and judicial. However, on 12 June 2003 the Government announced that it was to dispense with centuries of tradition by abolishing the office of Lord Chancellor. The announcement was received with surprise in many quarters. Rather than being made as the conclusion to a consultation process, the announcement actually set such a process in motion. Accordingly, in the months which followed, the Government published various consultation papers on issues such as the establishment of a new way of appointing judges and the creation of a Supreme Court.
- 2.10 Following the enactment of the Human Rights Act, concerns had been expressed about the continuing ability of the office holder to sit as a member of the appellate committee of the HL or the judicial committee of the Privy Council and determine appeals heard by those courts. Although the Lord Chancellor in the first Blair Government, Lord Irvine, rarely sat during his period of office and despite the fact that his successor, Lord Falconer, had stated publicly that he would not sit judicially, it remained a cause for concern that a member of the executive could potentially perform a judicial function in the highest courts in the land. Indeed, there was even speculation in the light of the decision in *McGonnell v United Kingdom* (2000) that the Lord Chancellor's presence on an appeal committee might give rise to a challenge under art 6 of the ECHR: the right to a fair hearing by an *independent* and impartial tribunal. Accordingly, since the Government was of the view that it could 'no longer be appropriate for a senior judge to sit in cabinet or for a government minister to be our country's senior judge', it resolved to 'bring such anachronistic and questionable arrangements to an end'.
- 2.11 Originally, therefore, the Government proposed to abolish the office of Lord Chancellor. However, the proposal met with a considerable amount of opposition both within and outside Parliament. Accordingly, the Government relented and the office was retained. Section 2(1) of the Constitutional Reform Act 2005 thus provides that 'a person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be qualified by experience'.

Relevant experience may include any of the following:

- experience as a minister of the Crown
- experience as a member of either House of Parliament
- experience as a qualifying practitioner, ie a barrister, advocate, or solicitor with the appropriate rights of audience, or
- experience as a teacher of law in a university.

The PM is under an obligation to ‘take into account’ the different types of experience referred to in s 2(2). He may, if he so wishes, take into account other experience which he considers relevant (s 2(2)(e)). Thus a PM’s hands are not tied by s 2 as to whom to recommend for appointment as Lord Chancellor although as Lord Bingham has pointed out, ‘theoretically at least, the Prime Minister’s judgment on this matter is no doubt open to review’. A Lord Chancellor need not have the legal background which has been a prerequisite for previous holders of the office. Neither must he be a member of the HL. Thus on becoming PM at the end of June 2007, Gordon Brown secured the appointment of Jack Straw MP as Lord Chancellor and Secretary of State for Justice. Mr Straw had previously been a member of all the Labour Governments elected since 1997, holding various cabinet posts including Home Secretary and Foreign Secretary.

2.12 The first part of the long title to the Constitutional Reform Act 2005 states that it is ‘An Act to make provision for modifying the office of Lord Chancellor, and to make provision relating to the functions of that office’. The more important of these modifications, and the general effect of the Act on the Lord Chancellor’s role, may be summarized as follows:

- The Lord Chancellor has ceased to be head of the judiciary. That role is now performed by the Lord Chief Justice who is also President of the Courts of England and Wales (s 7 of the 2005 Act).
- The automatic link between the Lord Chancellor and the speakership of the HL has broken by the creation of a separate post, Lord Speaker (see Chapter 6). This may be held by a Lord Chancellor in the future, but this need not necessarily be the case (s 18 and Sch 6).
- The Lord Chancellor does not sit as a Law Lord and will not sit as a judge in the Supreme Court when that court is operational (see below).
- The Lord Chancellor now appoints judges, or recommends to the Queen the appointment of judges, on the basis of a recommendation received from a Judicial Appointments Commission (s 6 and Sch 12 (see below)).

- The Lord Chancellor is required to take an oath in which the office holder undertakes to respect the rule of law, defend the independence of the judiciary (see further below) and ensure the provision of resources for the efficient and effective support of the courts (s 17).

As a prelude to these reforms, the Lord Chancellor's Department ceased to exist and was replaced by the Department for Constitutional Affairs (DCA) under the control of the Secretary of State. That department has itself now ceased to exist. It has been replaced by the Ministry of Justice headed by the Secretary of State for Justice and Lord Chancellor with responsibility for the former roles of the DCA as well as the criminal justice functions of the Home Office. Ministries of Justice are a common feature of European governments. The creation of a Ministry of Justice in the UK, although welcomed by some, has been the subject of criticism in other quarters. In part this is due to the manner in which the 'machinery of government change' was made. More importantly, however, there have been concerns expressed about the impact of the change on the perceived independence of the judiciary.

## Judicial independence

- 2.13 The judicial power is the weakest of the three governmental powers in the UK constitution. Lord Steyn has argued that it is also the least dangerous department of government. It can be overridden by Parliament because the courts recognize and accept that body as being legislatively supreme: see, for example, *Burmah Oil v Lord Advocate* (1965) (paras 4.25–4.26). Nevertheless, it is a significant power. In the modern age, where executive decision-making has greatly increased, it is vitally important that there are checks on the exercise of executive discretion. Recourse to the courts, principally by way of a claim for judicial review (see Chapters 12–14), represents just such a check on the legality if not the merits of executive decisions. Thus the acts of the executive may be declared to be lawful/unlawful by the courts and of course such a power is particularly important in the post-Human Rights Act era. In order for the judiciary to uphold the rule of law (see Chapter 3) and to discharge their functions generally, it is imperative that they are independent of the other two branches of government. In the past, a vitally important part of the Lord Chancellor's role was to protect the judiciary from the undeserved and unsubstantiated criticisms of the press, the public, and his ministerial colleagues alike. Now, there is also a guarantee of continued judicial independence to be found in s 3 of the 2005 Act. Section 3(1) provides that:

The Lord Chancellor, other Ministers of the Crown and all with responsibility for matters relating to the judiciary or otherwise to the administration of justice must uphold the continued independence of the judiciary.

- 2.14 For the purposes of s 3, the ‘judiciary’ includes the judiciary of the Supreme Court (when operational), any other court established under the law of any part of the UK, and any international court (s 3(7)). Section 3 does not, however, impose a duty which is within the legislative competence of the Scottish Parliament to impose (s 3(2)). In other words, it recognizes that the responsibility for justice is a devolved matter. Separate provision is also made for Northern Ireland in that s 1 of the Justice (Northern Ireland) Act 2002 is replaced by a new s 1: see s 4 of the 2005 Act.
- 2.15 Section 3 imposes further duties for the purpose of upholding continuing judicial independence. Thus by virtue of s 3(5), the Lord Chancellor and other ministers ‘must not seek to influence particular judicial decisions through any special access to the judiciary’. In other words, ministers must not attempt to gain any access to the judiciary which is over and above that enjoyed by a member of the public. They may of course continue to seek to influence judicial decisions by the arguments advanced on their behalf in a court of law.
- 2.16 It is evident, therefore, that despite the reforms to the office of Lord Chancellor, the holder of that post still has important responsibilities in respect of matters relating to the judiciary. These responsibilities are such that the Lord Chancellor (unlike his other ministerial colleagues) is subject to further obligations set out in s 3. Thus s 3(6) provides that the Lord Chancellor ‘must have regard to’:
- the need to defend judicial independence
  - the need for the judiciary to have the support necessary to enable them to exercise their functions, and
  - the need for the public interest in regard to matters relating to the judiciary or otherwise to the administration of justice to be properly represented in decisions affecting those matters.
- 2.17 These duties were created in accordance with a concordat which was agreed between the then Lord Chancellor, Lord Falconer, and the then Lord Chief Justice, Lord Woolf, on 26 January 2004 at a time when it was the Government’s intention to abolish the office of Lord Chancellor. In some respects they reflect the traditional role of the Lord Chancellor, eg to defend the independence of the judiciary. They also, however, reflect the changing nature of that role by placing an emphasis on the administrative functions of the Lord Chancellor in relation to the judiciary. It might be argued that the tone of s 3(6) also reflects the changing nature of the Lord Chancellor’s role. ‘Must have regard to’ is not a particularly strong obligation to impose in relation to matters as important as the need to defend judicial independence. Primary responsibility for that particular role has transferred to the Lord Chief Justice as head of the judiciary.



2.18 In commenting on the ‘judicial independence’ provisions in the 2005 Act, Professor Woodhouse has drawn attention to the lack of a statutory definition of the phrase and has suggested that it ‘may be seen more appropriately as a means to several ends rather than as an end in itself’ – those ends being, for example, maintaining public confidence in the justice system and the UK’s system of government. The reforms made to the office of Lord Chancellor in terms of eligibility for appointment (see above) have, in her opinion, made it less rather than more likely that future Lord Chancellors will be effective defenders of judicial independence, despite s 3 of the 2005 Act. Thus she observes:

Because the officer holder need not be a member of the legal profession, may be an elected politician, and will no longer have the responsibilities that in the past engendered a particular loyalty to and empathy with the judiciary, the relationship between judges and Lord Chancellor will inevitably change. There will be nothing, other than title and tradition, to make the Lord Chancellor – as compared with any other minister – the uniquely appropriate minister responsible for judicial independence.

Given the likelihood that future Lord Chancellors are ‘more likely to be non-lawyers and career politicians’, Professor Woodhouse contends:

If this is the case, it will be even more difficult for them than it had been for their predecessors to put the interests of judicial independence above those of their party, particularly if this should require them to confront openly a ministerial colleague or disagree publicly with a government policy, a course of action that could jeopardize their ministerial careers.

2.19 The creation of a new Ministry of Justice is a development which has attracted the attention of the HC Constitutional Affairs Committee. In a report published on 26 July 2007 (HC 466), the Committee was critical of the way in which the Government had announced its intention to establish a new ministry with the role and functions of the former DCA together with the criminal justice functions of the Home Office. In its opinion, the Government had handled what was rather more than a mere change of government machinery in a very poor manner, equivalent to its previous handling of the reforms concerning the role of the Lord Chancellor. Evidence which the Committee received suggested that combining the roles of the DCA and the criminal justice functions of the Home Office could pose constitutional difficulties. Thus the law reform organisation Justice contended:

The constitutional issue is whether there is any conflict possible between the duty to uphold the rule of law and the independence of the judiciary, on the one hand, and the taking of lead responsibility for criminal justice, on the other, by the new Secretary of State.

2.20 In a position paper which was submitted to the Committee by the judiciary of England and Wales, the creation of a Minister of Justice was seen as ‘not of itself contrary to the constitutional principle of the separation of powers’. However, it was regarded as a development which ‘is not a simple machinery of government change, but one which impacts on the separation of powers by giving the Lord Chancellor, as Minister of Justice, decision-making powers that are potentially incompatible with his statutory duties for the courts and the judiciary’. To illustrate the point, the position paper continued thus:

By way of example, a Minister of Justice would almost certainly be the subject of regular judicial review, in respect particularly of prisons. At present, the Home Secretary quite properly does not meet with senior members of the judiciary when such matters concerning him are sub judice. The relationship between the Lord Chancellor and the Lord Chief Justice, on the other hand, governed by the Constitutional Reform Act 2005 . . . depends on continuous dialogue, concurrence and consultation between the two in the fields of judicial appointments, discipline and the administration of justice. Serious thought needs to be given as to how this essential relationship, which relies on mutual co-operation, could survive unscathed in a new environment.

It remains to be seen how these arrangements will operate and whether they will do so in such a way as not to compromise the independence of the judiciary.

## Judicial appointments

2.21 In a written statement to the HL Committee on the Constitutional Reform Bill (April 2004), the then Lord Chancellor criticized the arrangements for appointing judges as follows:

There can be no doubt that we are served by judges, tribunal members and magistrates of the very highest calibre. But equally, there can be no doubt that our record of selecting them is no longer acceptable. The selection process should not be entirely in the hands of a single Government Minister. The process should be independent and transparent. In its current form, it is neither. That the process has worked as effectively as it has is a tribute to the integrity and probity of successive Lord Chancellors. But appointments have been as successful as they have despite the selection process, not because of it.

2.22 Accordingly, s 6 of the 2005 Act provides for the establishment of an independent Judicial Appointments Commission (JAC) which is responsible for selecting candidates to recommend for judicial appointment to the Lord Chancellor. Its existence removes from the executive the day-to-day responsibility for selecting candidates for appointment, and it significantly reduces ministerial discretion in

the appointment process. It is clear, however, that despite its name, the JAC is a recommending rather than an appointing body. Its existence does not therefore bring an end to the practice of the executive appointing judges. The justification for the continuing role of the executive in this context was explained to the HL Committee by the then Lord Chancellor as follows:

appointing judges is a central function of the State. Parliamentary accountability for the appointments system must therefore be retained, through the Secretary of State. It follows that a Secretary of State who is accountable for appointments should have a real, albeit carefully tempered, discretion in those appointments . . . The recommending model also preserves the Constitutional convention that The Queen acts solely on the advice of her Ministers.

## Tenure

2.23 Provision for the security of judicial tenure was originally made in the Act of Settlement 1700. Its more recent expression, at least in terms of the judges of the Court of Appeal, High Court, and the Crown Court (collectively the ‘Supreme Court’) is to be found in the Supreme Court Act 1981. Section 11(3) of this Act provides that judges of the Supreme Court remain in office ‘during good behaviour’, subject to a power of removal vested in the monarchy on an address presented to it by both Houses of Parliament. A judge of the new Supreme Court will enjoy the same security of tenure: see s 33 of the Constitutional Reform Act 2005. A criminal conviction may therefore be the catalyst for removal from office, although a judge would be more likely to retire in such circumstances. He may be compulsorily retired under s 11(8) and (9) of the 1981 Act where it is evident that he is unable to perform his duties due to infirmity or that incapacity has prevented him from resigning. Under the Judicial Pensions and Retirement Act 1993, the retirement age for judges was set at 70. This may be extended, however, to the age of 75 for an individual judge if it is thought in the public interest to do so.

## Remuneration

2.24 In addition to security of tenure, judges enjoy security of remuneration. This means that their salaries are protected against being reduced by government action. Moreover, judges are immune from legal proceedings in respect of the discharge of their judicial functions.

## The two camps

- 2.25 The debate as to whether or not there is a separation of powers in the UK constitution has, as Professor Munro has noted, led to the establishment of two opposing camps. In the first of these camps can be placed the academic writers on constitutional law. The general consensus amongst them is that there is no separation of powers. Thus, for example, the late Professor S A de Smith contended that: 'No writer of repute would claim that it is a central feature of the modern British constitution'. Similarly W A Robson referred to the doctrine as 'that antique and rickety chariot . . . So long the favourite vehicle of writers on political science and constitutional law for the conveyance of fallacious ideas'. Recently, Professor Barendt has suggested that academics have generally paid scant regard to the separation of powers and that their treatments of the doctrine 'tend to be either brief or dismissive'.

## The view of the judiciary

- 2.26 In the opposing camp are the judiciary. On numerous occasions, senior judges have expressed the opinion that the UK constitution is based on a separation of powers. Thus in *Duport Steels Ltd v Sirs* (1980), Lord Diplock stated that:

at a time when more and more cases involving the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British Constitution, though largely unwritten, is firmly based on the separation of powers; Parliament makes the laws, the judiciary interpret them.

- 2.27 Absolute faith in the certainty of this conviction has led the Privy Council (PC) to read a separation of powers into a former colony's constitution on the basis that it has been drafted by persons familiar with the 'Westminster model': see *Hinds v R* (1977) which was subsequently applied in *DPP of Jamaica v Mollison* (2003) and *Griffith v The Queen* (2005). In *Mollison*, Lord Bingham observed:

Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described . . . as 'a characteristic feature of democracies'.

- 2.28 It should be noted, however, that in a comment on *Hinds* published under the heading 'A Constitutional Myth: separation of powers', Professor Hood Phillips remarked: 'But one rubs one's eyes when one reads that the concept of the separation of powers was developed in the unwritten constitution of the United Kingdom'. Nevertheless,

in the earlier case of *Liyanage v R* (1967), where the PC declared invalid legislation made in Ceylon (now Sri Lanka) which had been amended in order to ensure that the unsuccessful plotters of a coup were convicted, the court did so on the basis of the separation of powers.

- 2.29 More recently in *R v Secretary of State for the Home Department, ex p Fire Brigades Union* (1995) (para 4.21), a case concerned with the alleged abuse of prerogative power, Lord Mustill observed in his dissenting judgment that:

It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed.

- 2.30 Extra-judicial observations on the separation of powers have been voiced by senior members of the judiciary. Thus before his retirement as a Law Lord, Lord Steyn stressed the importance of the doctrine thus:

When the government has a massive majority in the House of Commons the executive becomes all powerful and parliamentary scrutiny of the acts and intentions of the executive is not always as careful as it ought to be. That is when the constitutional principle of the separation of powers becomes important.

In a subsequent lecture Lord Steyn remarked:

It used to be said that the doctrine of separation of powers is a comparatively weak principle in the English constitution. As between the legislature and the executive that is still so . . . But the separation of powers as between the legislature and executive, on the one hand, and the judiciary, on the other hand, has been greatly strengthened.

And later observed:

Under our constitution the separation of powers protecting judicial independence is now total and effectively so. This constitutional principle exists not to eliminate friction between the executive and judiciary. It exists for this reason only: to prevent the rise of arbitrary executive power.

## A partial separation of powers

- 2.31 Faced with opposing views as to the importance of the separation of powers doctrine to the UK constitution, the inevitable question is 'Which one is correct?'. The

answer, however, is rather less straightforward. As we have seen, the incidences of overlap between the various powers even post the Constitutional Reform Act 2005 are such that it is impossible to claim that there is an absolute separation of powers in the UK constitution. Indeed, an absolute separation would in practice be counterproductive in that it would prevent the abuse of power by preventing the exercise of power. Government could not operate if this were the case.

- 2.32 It is significant that a body of persons which exercises one of the three powers, the judiciary, believe that there is a separation of powers. That Parliament makes the laws and the judiciary interpret them has become something of a judicial mantra. It may be argued, as Professor Barendt has done, that these statements are made ‘to reinforce the argument for judicial restraint in interpreting statutes’ and that they reflect a belief in a pure or absolute separation of powers. If the judiciary remain of this opinion, and there is no reason to believe that they will not, then the separation as between the judicial and the other powers will continue to be preserved even if the legislative and executive branches of government become even more entwined. In this sense, therefore, it can be argued that there is a partial separation of powers in the UK constitution.
- 2.33 The importance of this partial separation ought not to be overlooked. Neither should such a separation, to borrow the words of Professor Munro, ‘be lightly dismissed’. At a time when the courts are hearing cases brought by individuals under the Human Rights Act 1998 in which it is alleged that a public body has breached a Convention right, it is imperative that the judiciary remain separate and independent from the executive if they are properly to fulfil the role accorded to them under the constitution. Arguments such as these explain why the Constitutional Reform Act 2005 is the vehicle for an important institutional reform: the establishment of a Supreme Court.

## The Supreme Court

- 2.34 The establishment of a Supreme Court has clear separation of powers implications. Hitherto, the Law Lords have sat in the legislative chamber of the HL as cross-benchers and have therefore been able to exercise a legislative as well as a judicial function. Such arrangements have, however, caused confusion in the minds of some because, as the Government’s consultation paper, *A Supreme Court for the United Kingdom* (July 2003), pointed out:

It is not always understood that the decisions of the ‘House of Lords’ are in practice decisions of the Appellate Committee and that non-judicial members of the House never take part in the judgments. Nor is the extent to which the Law Lords themselves have decided

to refrain from getting involved in political issues in relation to legislation on which they might later have to adjudicate always appreciated.

- 2.35 As is evident from the above, the separation of powers between the legislative and judicial branches of government was thus achieved in practice by a combination of convention, habit, and custom. Although the arrangements appeared to work in practice, the Government nevertheless felt that reform was necessary. Thus in a written statement to the HL Committee on the Constitutional Reform Bill, the then Lord Chancellor opined:

The Law Lords are judges and not Legislators; the separation between these two roles should be made explicit. The principle of separation is already established in many other democracies. It is time... for our institutional arrangements to reflect the reality of the constitutional position... The Government believes strongly that our highest court should be one which others can look to as a beacon of excellence. The quality of the current Law Lords is undisputed. But if our highest court is to be an example to all, it must also be demonstrably independent of the legislature... The ECHR, established in English law by the Human Rights Act, stresses that judges must be independent, impartial and free of any prejudice or bias – both real and perceived. For this to be ensured, judicial independence needs not just to be preserved in practice, but also to be buttressed by appropriate and effective constitutional guarantees. The establishment of a Supreme Court will provide those guarantees.

- 2.36 The creation of a new Supreme Court is thus intended to emphasize the functional separation between Parliament and the courts by putting matters on a more formal footing. This functional separation is to be accompanied by a physical separation. Thus the first members of the new Supreme Court (the serving Law Lords at the time that the court comes into existence (s 24 of the 2005 Act)) will no longer be entitled to sit and vote in the HL. The court of final appeal will also no longer be situated within one of the chambers of Parliament. Instead, the Justices of the Supreme Court as they will be styled (s 26 of the 2005 Act) will hear cases in the Middlesex Guildhall when the renovation of that building is complete. At the time of writing, this is expected to happen by the end of October 2009.
- 2.37 Although the new arrangements have clear attractions from a separation of powers perspective, especially when it is appreciated that the growth in judicial review cases over the years and the role of the courts under the Human Rights Act 1998 makes the need for a judiciary which is independent of the executive more important than ever, it would be a mistake to think that the establishment of a Supreme Court was universally welcomed. Indeed, in the Law Lords' own response to the Government's consultation paper, there was a distinct lack of unanimity among their Lordships on several issues, including whether there is a need for a Supreme

Court at all. A number of serving Law Lords were of the opinion that ‘on pragmatic grounds, the procedural change is unnecessary and will be harmful’. It was their belief that:

the Law Lords’ presence in the House is of benefit to the Law Lords, to the House, and to others including the litigants. Appeals are heard in a unique, suitably prestigious, setting for this country’s court of final appeal. The ‘House of Lords’ as a judicial body is recognized by the name throughout the common law world. Overall, it is believed, it has a fine record and reputation.

- 2.38 Such views may be contrasted, however, with those of the Law Lords who were in favour of a Supreme Court. Their argument was not that the present arrangements do not work well. Rather, their support for a Supreme Court was based on principle rather than pragmatism. These Law Lords:

regard the functional separation of the judiciary at all levels from the legislature and executive as a cardinal feature of a modern, liberal, democratic state governed by the rule of law. They consider it important, as a matter of constitutional principle, that this functional separation should be reflected in the major institutions of the state, of which the final court of appeal is certainly one.

- 2.39 A final yet important point ought to be made about the creation of the Supreme Court. Despite the new name, the court will not be like Supreme Courts in other countries which have the power to strike down primary legislation which is in conflict with the constitution (paras 1.5–1.6). Instead, the new court will have the same appellate jurisdiction as that which is currently exercised by the Appellate Committee of the HL and the Judicial Committee of the Privy Council. Thus like its predecessors, the Supreme Court is highly likely to continue to recognize the legislative supremacy of Parliament, albeit subject to certain limits (see Chapter 5).

#### FURTHER READING

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For guidance on further reading, visit

[www.oxfordtextbooks.co.uk/orc/parpworth5e](http://www.oxfordtextbooks.co.uk/orc/parpworth5e)

## SELF-TEST QUESTIONS

- 1 What was Montesquieu's contribution to the development of the doctrine of the separation of powers?
- 2 Why do you think that the former Lord Chancellor, Lord Irvine, has referred to the independence of the judiciary as 'a fundamental article of Britain's unwritten constitution' and as 'a critical aspect of the doctrine of separation of powers'? To what extent, if any, do you think that the reforms set out in the Constitutional Reform Act 2005 are likely to lead to the better protection of judicial independence than has hitherto been the case?
- 3 Do you agree with the view that by the beginning of the 21st century, the office of Lord Chancellor had become a 'constitutional anomaly' which was in need of reform?
- 4 What are the arguments both for and against the claim that there is no separation of powers within the UK constitution?

- 5 To what extent, if any, will the establishment of a Judicial Appointments Commission ensure that there are 'significant and powerful fetters on the executive' (per Lord Falconer) in relation to the appointment of judges?
- 6 With the doctrine of the separation of powers in mind, what are the arguments both for and against the establishment of the Supreme Court?
- 7 Professor Woodhouse has contended: 'A proactive, open, and accountable Supreme Court is likely to be more effective in protecting and defending judicial independence than a government minister – even one with the exalted title of Lord Chancellor'. Do you agree?
- 8 Lord Bingham has commented that of all the Government's proposals which were later largely reflected in the Constitutional Reform Act 2005, 'the most eye-catching, the most widely criticized and in the event the most contentious was that to abolish the Lord Chancellor's office'. Why do you think that this was so?