

Part 1 Constitutional fundamentals

4 The separation of powers

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Introduction

...separation of powers, together with the rule of law and parliamentary sovereignty, runs like a thread throughout the constitution of the United Kingdom. (Barnett, p.97)

The separation of powers is a constitutional principle designed to ensure that the functions, personnel and powers of the major institutions of the state are not concentrated in any one body. It ensures a diffusion rather than a concentration of power within the state. Under the uncodified, largely unwritten British constitution there is no strict separation of powers. Instead, while some separation of powers exists, it is more accurate to speak of a system of checks and balances which ensures that powers are not abused. The fundamental purpose of the separation of powers is to avoid the abuse of power and thereby to protect the rights and liberties of citizens.

The concept itself is of great antiquity and can be attributed to Aristotle (384–322 BC); however, the clearest exposition of the doctrine can be found in the French writer Charles-Louis de Montesquieu's *De l'esprit des lois* (1748) †. In essence, Montesquieu states that the three organs of government – the executive, legislature and judiciary – should each have a discrete and defined area of power and that there should be a clear demarcation of functions between them: this is true 'separation of powers'.

Under a written constitution, the powers allocated to various institutions will be clearly defined. In the UK – in the absence of such a document – the issue that requires evaluation is the manner in which and the extent to which differing functions are kept separate. For the purpose of analysis, the subject may be further broken down by considering the extent to which the executive and legislature, executive and judiciary, and judiciary and legislature overlap and interact. It should be noted that even under a written constitution a complete separation of powers is not possible, and that without some degree of interaction between the institutions there would be constitutional deadlock.

ESSENTIAL READING

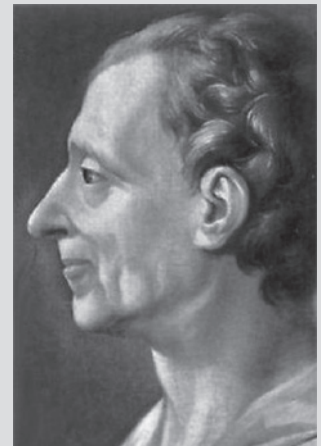
- Barnett, Chapter 5: 'The separation of powers'.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings you should be able to:

- ▶ explain the constitutional significance of the separation of powers
- ▶ outline the powers and functions of the major institutions
- ▶ identify those areas where functions, personnel and powers overlap
- ▶ describe the conventional rules that prevent abuse of power
- ▶ critically assess the relevance of separation of powers under the constitution.

† *De l'esprit de lois* (French) = 'On the spirit of the laws'.



A portrait of Montesquieu. Image courtesy of Wikipedia Commons.

4.1 The major institutions of the British state

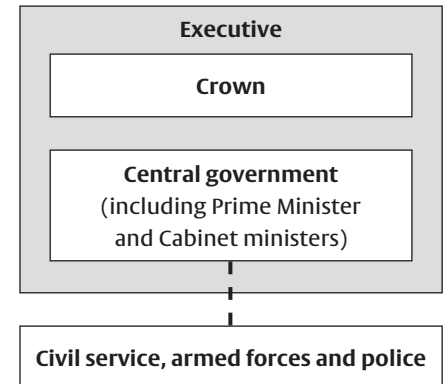
The principal institutions are the executive, the legislature and the judiciary. Each of these bodies exercises its role in the name of the Crown.

4.1.1 The executive

The executive comprises the Crown and the government, including the Prime Minister and Cabinet ministers. Ancillary to Her Majesty's Government is the civil service which runs the administration of the state, and the armed forces and the police which uphold executive power.

The role of the executive is to formulate and implement government policy across all governmental activities. The elected government of the day is accountable to Parliament, which has the ultimate power to dismiss a government and force a general election through which the people will decide on who will run the next government. Members of government are primarily elected Members of Parliament who sit in the House of Commons, although a number of government ministers also sit in the House of Lords.

In order to prevent the executive dominating Parliament there are limits imposed on the number of salaried ministers who sit in the Commons under the House of Commons (Disqualification) Act 1975.



4.1.2 Parliament

Parliament comprises the Crown, the elected House of Commons and the currently unelected House of Lords. The House of Commons, which is superior to the Lords in its law-making powers, is made up of elected Members of Parliament who represent their individual areas (constituencies). A general election must by law be held at least every five years (Parliament Act 1911). Membership of the House of Lords consists of a minority of hereditary peers, a majority of life peers appointed by the Crown and Archbishops and Bishops of the Church of England. Under the Constitutional Reform Act 2005, Lords of Appeal in Ordinary (Law Lords) who have also been members of the House of Lords will no longer be entitled to sit in the Lords.

4.1.3 The judiciary

The judiciary includes all the judges in the courts of law, and also those who hold judicial office in tribunals, and the lay magistrates who staff the magistrates' courts. Senior judicial appointments are made by the Crown. It is the function of the judges to interpret legislation in line with the intention of Parliament and to develop the common law (judge-made law). Constitutionally, judges are subordinate to Parliament and have no power to challenge the validity of Acts of Parliament.

Judges are prohibited from standing for election to Parliament under the House of Commons (Disqualification) Act 1975.

The Lord Chancellor

As noted in Chapter 2, prior to the Constitutional Reform Act 2005, the office of Lord Chancellor spanned the major institutions of the state. The Lord Chancellor was head of the judiciary with responsibility for the appointment of judges. He or she was also a member of the Cabinet, and therefore played a central political role in government. The Lord Chancellor also presided over the House of Lords as its Speaker, thereby fulfilling a legislative role. The role of the Lord Chancellor was frequently criticised as violating the doctrine of separation of powers and concentrating executive, judicial and parliamentary functions in one person.

Two cases have challenged the equivalent positions in the Channel Islands and Scotland. In *McConnell v United Kingdom* (2000) 30 EHRR 289 (*The Times*,[†] 22 February 2000) the European Court of Human Rights ruled that the right to a fair trial was violated by the participation in a planning decision of the Deputy Bailiff of Guernsey, who was both a senior judge in the Guernsey Royal Court and a senior member of Guernsey's legislative body, the States of Deliberation. In the Scottish case of *Starrs v Procurator Fiscal, Linlithgow* [2000] HRLR 191, the Court of Session ruled that the independence of the judiciary was impaired, and hence the right to fair trial violated, through the dependence of temporary judges for reappointment on the office of Procurator Fiscal.

[†] *The Times* (founded in 1785) is a useful source of law reports.

As a result of such criticisms, the office of Lord Chancellor has been reformed. A Department for Constitutional Affairs was established, headed by a Secretary of State and that position was combined with that of Lord Chancellor. The Constitutional Reform Act 2005 removed the judicial functions of the Lord Chancellor and his former role as head of the judiciary is now filled by the Lord Chief Justice. The Lord Chancellor no longer sits as Speaker of the House of Lords, which will elect its Speaker from among its members. In future the Lord Chancellor need not be a senior lawyer and may be a member of either House of Parliament. In a major reorganisation of the Home Office, a Ministry of Justice was established in 2007. The Ministry takes over the responsibility of the Department of Constitutional Affairs and also assumes responsibility for the National Offender Management Service, sentencing and prisons.

4.1.4 Judicial independence

ESSENTIAL READING

- ▶ Barnett, Chapter 5: 'The separation of powers', pp.98–102 and Chapter 27: 'The grounds for judicial review', pp.762–765.

Judges in the higher courts – High Court and above – have tenure under the Act of Settlement 1700, which protects their independence from both the executive and Parliament. Superior judges can only be dismissed by an address to the Crown from both Houses of Parliament. To protect the judiciary, judges enjoy immunity from legal action in relation to their judicial functions. The public interest in the administration of justice requires that judges possess absolute privilege in relation to court proceedings, even where they make statements that might be defamatory.

In the exercise of their judicial functions, judges must demonstrate that they are impartial. Any words or actions which are capable of raising a suspicion that a judge is biased give rise to criticism. Bias may take several forms; it may be:

- ▶ political bias
- ▶ bias due to an affiliation with a person or organisation
- ▶ personal bias against persons or groups because of their identities or characteristics.

Financial dealings may also give rise to a suspicion of bias. In their judicial role, judges must disqualify themselves if there is a suspicion of bias: 'justice must not only be done but must manifestly be seen to be done'. Two cases illustrate this aspect of judicial independence:

- ▶ In *Dimes v Grand Junction Canal Proprietors* (1852) 3 HL Cas 759, the Lord Chancellor held shares in a canal company which was involved in litigation. The House of Lords ruled that the Lord Chancellor should have disqualified himself from sitting. Even though it was accepted that he was not influenced by the interest, the court ruled that it was of the utmost importance that 'the maxim that no man is to be judge in his own cause should be held sacred' [p.793].
- ▶ In *R v Bow Street Stipendiary Magistrate ex parte Pinochet (No 2)* [1999] 2 WLR 272, the House of Lords overturned its own previous decision relating to the extradition of General Pinochet to face allegations of human rights violations during his period as Head of State in Chile. Lord Hoffmann, who had participated in the earlier decision, held office as a Director of Amnesty International which had been allowed to present evidence. The earlier decision was set aside because it gave rise to an appearance of bias.

Reading cases (law reports)

In your law studies you will need to read many cases. This does **not** mean reading the full transcript of a trial, but the decisions and judgments made by the court. The majority of the cases you read will be from the Appeal Court, or the House of Lords. Often you will simply be asked to read the views of one judge (such as Lord Justice O'Connor in *Merkur Island Shipping Corp v Laughton*).

But there is more to reading a case than just a bit of reading. See Activity 6.4 in Chapter 6, and 'Reading law reports' in your *Learning skills for law* guide.

RESEARCH QUESTION

Use the Online Library or printed sources to locate the English cases relating to General Pinochet. In your portfolio make a note of the dates of the cases, the courts where they were heard, and brief details of the conclusions. Note the role of Lord Hoffmann.

Summary

The essential function of the separation of powers doctrine is to avoid the over-concentration of power in one institution of the state. It is therefore necessary that personnel and functions are distributed between the three institutions and that these are clearly defined in order that those who exercise powers under the constitution are accountable to citizens.

REMINDER OF LEARNING OUTCOMES

By this stage you should be able to:

- ▶ explain the constitutional significance of the separation of powers
- ▶ outline the powers and functions of the major institutions.



Students who wish to gain a Qualifying Law Degree must demonstrate that they are capable of 'locating and retrieving relevant information on a specified topic using primary and secondary paper sources and electronic sources including the world-wide web'. Note down your progress on the task in your *Skills portfolio*.

4.2 The relationships between the institutions

4.2.1 The executive and the legislature

The government proposes legislation: only Parliament may enact laws which give legal effect to these proposals.[†] As noted above, the Prime Minister and a majority of his or her ministers are Members of Parliament and sit in the House of Commons. The executive is therefore present at the heart of Parliament. By contrast, in the USA, the President may not be a member of the legislature (Congress), and is elected separately from congressional elections. This may result in the President being a member of a different political party from the majority of members of Congress. That cannot happen in the UK, as the Prime Minister will always be the leader of the political party that won a majority of seats at a general election. Where a government has a large majority of seats in the Commons, the crucial issue is whether the government can dominate Parliament and ensure that its proposed legislation is enacted, or whether there are sufficient procedures in place to ensure that proposals are sufficiently scrutinised and either endorsed or rejected by Parliament.

Parliament may delegate law-making powers to the government through powers to draft subordinate or delegated legislation. The purpose of this is to free Parliament from the need to scrutinise every technical rule contained in legislation and to enable the government to draft the detailed rules. Such legislation is subject to the ultimate approval of Parliament. Delegated legislation, however, does raise questions about the separation of powers between the executive and legislature.

[†] Parliamentary procedure is discussed in Chapter 9. When you have studied that topic you will be able to relate it to the separation of powers.

4.2.2 The executive and judiciary

Judicial independence from government is a key requirement of the separation of powers. Judges must be seen to be politically impartial. The judicial function is to interpret Parliament's intentions as expressed in legislation and to ensure – through judicial review (see Barnett, Chapters 26 and 27) – that any delegated legislation is consistent with the scope of power granted by Parliament. The rule of law also requires that judges ensure the legality of government action; this function could not be fulfilled if the judges' independence was in doubt.

M v Home Office

An example of judicial control can be seen in the case of *M v Home Office* [1994] 1 AC 377. See *re M* [1993] 3 WLR 433 on p.63 of this guide.

The judges exercise self-restraint in the areas of power that they regard themselves as competent to review. Many exercises of the royal prerogative, for example (see Chapter 6), involve issues of 'high policy': such diverse matters as the appointment of ministers, the allocation of financial resources, national security, signing of treaties and defence matters. In order to protect judicial independence and the appropriate separation of powers, judges will rule that such matters are for the executive to decide.

An example of this is seen in the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (the *GCHQ* case). The Prime Minister had ordered that workers at the Government's Communication Headquarters (the signals intelligence body) should no longer be allowed to be members of trade unions, a right which had been enjoyed for several decades. The Union challenged the legality of the ban. The Court of Appeal and House of Lords ruled that where national security was in issue, the courts would not interfere.

ACTIVITY 4.1

- a Consider *M v Home Office* and the *GCHQ* case and briefly explain their significance in relation to the separation of powers.
- b Why do you think the judges responded in different ways to the facts of these cases?

4.2.3 Legislature and judiciary

Parliament is the supreme law-making body within the UK. Judges interpret legislation using the 'rules' of statutory interpretation which you will study in the *Common law reasoning and institutions* subject guide. Constitutionally, judges have no power to question the validity of legislation: see *Pickin v British Railways Board* [1974] AC 765 discussed in Chapter 7. However, within the constraints imposed by the 'rules' there remains a certain amount of leeway for the judges to give new meaning to statutory language, and this raises the question of whether the judges 'make law'. This aspect of the judicial role is enhanced under the Human Rights Act 1998 (see Chapter 15) which imposes a duty on the judges to interpret legislation 'as far as possible' in a manner to make it compatible with Convention rights. Where this is not possible, however, the superior courts (High Court and above) can issue a 'declaration of incompatibility' but cannot declare an Act of Parliament invalid. The effect of this arrangement preserves both the supremacy of Parliament and also the separation of powers.

The development of common law also raises the issue of judicial law-making. You will realise when you study the doctrine of precedent that judges are able to develop the law in line with contemporary requirements. While all of common law is judge-made law, it must be remembered that Parliament may at any time overturn a judicial decision, thereby preserving its sovereignty.

Go to your study pack and read the brief extract from *Merkur Island Shipping Corp v Laughton (The Hoegh Anapa)*. You can read the whole case report via the Online Library.

ACTIVITY 4.2

In *Magor and St Mellons RDC v Newport Corporation* [1952] AC 189 the House of Lords rejected the approach of Lord Denning MR, in the Court of Appeal, who had stated that, where gaps were apparent in legislation, the courts should fill those gaps. Lord Simonds commented that this amounted to a 'naked usurpation of the legislative function under the guise of interpretation' (p.191).

Now consider the following three cases:

- a **In *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 the House of Lords ruled that compensation was payable to oil companies whose property had been destroyed during war time in order to prevent it from falling into enemy hands. The government quickly proposed and Parliament passed the War Damage Act 1965 which effectively nullified the decision.**
- b **In *Shaw v Director of Public Prosecutions* [1962] AC 220 the House of Lords ruled that the publisher of a directory of prostitutes' services was guilty of the offence of conspiracy to corrupt public morals – an offence previously unknown to law. Parliament did not invalidate the decision.**
- c **In *R v R* [1992] 1 AC 599 the House of Lords ruled that a husband who had raped his wife at a time when it had been lawful for him to do so was guilty of rape. The European Court of Human Rights upheld the House of Lords' decision, despite the fact that it imposed retrospective criminal liability in violation of Article 7 of the European Convention on Human Rights in *SW v United Kingdom* (1995) 21 EHRR 363. The Criminal Justice and Public Order Act 1994, s.140, redefined rape to include a husband having sexual intercourse with his wife without her consent.**

Were the judges in these cases 'usurping the legislative function'? Explain your opinion.

Explain your opinion

In many of the activities in this subject guide, you will be asked for an opinion. Here are some examples:

Activity 8.1: What advantages, if any, can you identify in having a hereditary head of state?

Activity 9.4: Write a brief passage outlining the strengths and weaknesses of question time as a means of scrutinising the government, and explaining what reforms you think should be made to the rules and/or procedure.

Activity 12.2: Do you think Parliament should be immune from interference by the courts? Is this immunity necessary? Are there any circumstances in which the courts would be justified in intervening?

Many academics, politicians and legal experts have written on these subjects. Often they disagree with one another.

When you have studied this guide, read your textbook and thought about these issues, you will be capable of giving your own opinion. In answering these questions, and examination questions on the same subjects, we do not mind what answers you give – provided that you can present a coherent and well-reasoned response. We are not interested in answers that merely repeat the ideas of some expert.

After all, whose opinion do the examiners want to test?

Your tutor's opinion?

The opinion of the authors of your textbook?

Your opinion?



Make a note of how comfortable you feel about answering questions in a way that expresses your own opinion.

Summary

In order to understand clearly the separation of powers under the British constitution, it is necessary to study the relationships between the three major institutions and to examine any overlaps in personnel and functions. Where such overlaps exist – as most obviously in the case of the executive sitting in Parliament – it is then important to consider what factors there are which make the situation acceptable. In the case of the executive in Parliament, this clearly facilitates scrutiny of the executive, provided that the necessary procedures are in place.

4.3 Conventions and the separation of powers

As we have seen, there are many areas in which the three institutions contravene the doctrine of separation of powers. This is explained by the fact that the British constitution is largely unwritten and has evolved over time, adapting to circumstances as the need arises. It would be fair to conclude that not only is there no strict separation of powers between the institutions, but the separation of powers is quite weak. However, it must also be recognised that, in general, allegations of ‘unconstitutional conduct’ are rare. The explanation for this anomaly lies in constitutional conventions.

The following conventional rules are relevant.

In relation to the judiciary :	In relation to the executive :
Members of Parliament will not criticise judicial decisions.	The convention of ministerial responsibility (both collective and individual: see Chapter 8) ensures the accountability of government to Parliament.
Where proceedings are before a court, or imminent, Members of Parliament are barred from raising the issues in debate.	

You should be alert to the concept of separation of powers throughout your study of this course, where examples of separation of powers are presented. When considering sovereignty, for example, you should be aware that the sphere of power conceded to Parliament to enact laws, to regulate its own procedure, etc. is a clear, if implicit, example of separation of powers. Equally so is the cautious judicial attitude to questioning the exercise of the royal prerogative and the courts’ attitudes to the privileges of Parliament. Furthermore, the Human Rights Act 1998 has had a significant impact on the separation of powers. See Chapter 15 for further details.

The attitudes of some academics and judges to the separation of powers differ markedly (see for example the *dictum* of Lord Diplock in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, at p.157).

ACTIVITIES 4.3–4.5

4.3 To what extent is separation of powers:

- a evident and
- b desirable under the constitution?

4.4 What is the explanation for the apparent conflict between judges and some academics? Are these two views capable of being reconciled?

4.5 Critically assess the statutory provisions and constitutional conventions that support the concept of separation of powers.

SELF-ASSESSMENT QUESTIONS

- 1 What are the three ‘organs of government’ whose powers need to be separated?
- 2 Within the British state, what constitutes the executive?
- 3 What did the Act of Settlement 1700 do for the position of judges in higher courts?
- 4 Why, in 1999, was the decision to extradite General Pinochet set aside?
- 5 What was the significance of the case of *M v Home Office* (1994)?

Summary

The role of conventions in relation to the separation of powers is critical. Examining the relationships and identifying overlaps reveals only half the constitutional picture. Therefore, in order to gain a full understanding, attention must be paid to the conventional rules.

SAMPLE EXAMINATION QUESTIONS

Question 1 'Our unwritten constitution rests upon a separation of powers. It also rests upon a mutual recognition of those powers. It is for Parliament to make new laws and to amend old laws, including the common law. It is for the courts to interpret and enforce the law. It is for the government to govern within the law. Each in its own sphere is supreme.' (Lord Donaldson of Lynton MR in *M v Home Office and Another* (1994).) Discuss.

Question 2 Critically assess the view, expressed by Walter Bagehot in the nineteenth century, that the 'near fusion' of the executive and legislature represents the 'efficient secret' of the constitution.

Advice on answering the questions

Question 1 This quotation spans all three of the major institutions of the state, and requires an analysis of the role and powers of each. It also calls for a critical examination of the degree of separation between them. Start by explaining what the separation of powers means and explain its constitutional importance – perhaps pointing out that it is a concept of great antiquity. The next task is to explain briefly the role of each of the major institutions of the state: the personnel and functions of each. The next – and major – task is to analyse the relationships between the institutions and explain the extent to which they overlap in personnel and functions.

You need to discuss each pairing of the institutions, namely, the executive and legislature, the executive and judiciary, and the legislature and the judiciary. Devote an equal amount of time to each of the pairings. Too many candidates fail this type of question not because they do not have the knowledge or understanding, but because they have failed to cover the whole topic.

Question 2 This question focuses on the executive and the legislature and therefore more detailed coverage of these institutions is required. Your introduction will be as above: explaining the rationale for separation of powers and the major institutions.

The bulk of your analysis will be confined to the executive and Parliament. Do not be tempted to waste valuable time discussing other aspects of separation of powers. You will gain no marks for material that is irrelevant to the question and will lose marks because you have deprived yourself of the time to discuss what was required.

Reflect and review

Look through the points listed below:

Are you ready to move on to the next chapter?

Ready to move on = I am satisfied that I have sufficient understanding of the principles outlined in this chapter to enable me to go on to the next chapter.

Need to revise first = There are one or two areas I am unsure about and need to revise before I go on to the next chapter.

Need to study again = I found many or all of the principles outlined in this chapter very difficult and need to go over them again before I move on.

Tick a box for each topic.

	Ready to move on	Need to revise first	Need to study again
I can explain the constitutional significance of the separation of powers.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can outline the powers and functions of the major institutions.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can identify those areas where functions, personnel and powers overlap.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can explain the conventional rules which prevent abuse of power.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
I can critically assess the relevance of separation of powers under the constitution.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If you ticked 'need to revise first', which sections of the chapter are you going to revise?

	Must revise	Revision done
4.1 The major institutions of the British state	<input type="checkbox"/>	<input type="checkbox"/>
4.2 The relationships between the institutions	<input type="checkbox"/>	<input type="checkbox"/>
4.3 Conventions and the separation of powers	<input type="checkbox"/>	<input type="checkbox"/>

