

## W201 The Individual and the State

### Study notes on the Separation of Powers

#### The idea

The idea that by separating powers and creating a balance between executive legislature and judiciary you can create conditions in which liberty can flourish is a powerful one.

Because of the power of the concept and because it was articulated and held sway in the 18th century when the revolutionary American and French Constitutions came into being its prominence in constitutional law was ensured.

#### The history

In the UK the concept does not hold centre stage. The reason for this is historical. The shape of our constitution was determined in 1688 before the idea of the separation of powers was fully developed. Parliamentary sovereignty became the central principle of the constitution after 1689. No upheaval since then has changed this.

For America and France it was different. When each adopted constitutions 100 years later the separation of powers was a fully fledged constitutional theory. In America the policies of George III and his ministers led to the War of Independence in 1776 and in France the absolute power of the Bourbon Kings resulted in revolution in 1789. In the American Constitution in particular the separation of powers became the overriding principle.

#### The philosophers

John Locke the English philosopher writing in 1690 had stressed that the same person should not have power to make laws and to execute them. He said it would be too great a temptation to human frailty. This was written against a background of James II suspending the operation of some laws and dispensing with the penalties of others prior to his overthrow. Locke was really arguing against concentrating power in the hands of one person - the sovereign.

Montesquieu - a Frenchman who had lived in England - writing in 1748 took all this a stage further - he wrote

“there can be no liberty ... if the legislative executive and judicial powers of Government were to be exercised by the same person or authority”.

When the American and French Revolutions took place they both adopted the current constitutional thinking in framing their constitutions.

#### The values behind the idea

You have been taught about fundamental values. When you consider the separation of powers you should for example link the concept with the achieving of **personal liberty** by the separation of government functions and **legal certainty** by knowing that only parliament can legislate and that judges will enforce the law independently.

## **The UK Constitution**

The UK constitution evolved without a comprehensive theoretical framework such as the separation of powers. However because we have been seeking to achieve the same fundamental values (personal liberty and legal certainty for example) we have in places adopted the principle (the independence of the judiciary is one clear example of the separation of powers) along with other principles (eg parliamentary sovereignty and latterly the rule of law) which have helped achieve the same end. How far then does our constitution reflect a separation of powers?

### **The Executive**

The biggest exception to the separation of powers in the UK is the overlap between the executive and the legislature. The government (comprising about 100 senior and junior ministers) is drawn from either Lords or Commons. Contrast this with the USA where the executive is separate and the President appoints his Secretaries of State and government officials from persons who are **not** members of Congress.

The executive in the UK can also be said to have a legislative function when Ministers make regulations through statutory instruments.

The executive also has a judicial function through its use of administrative tribunals (ie immigration mental health pension or social security tribunals).

There are some rules which keep executive and legislature apart. The House of Commons Disqualification Act 1975 precludes civil servants the police or the armed forces from sitting in parliament.

### **The Legislature**

The Queen and members of the government are part of the executive as well as the legislature.

The Queen nominally heads the judicial system as well as the legislature.

### **The Judiciary**

Leaving aside the role of the Queen and the overlap in function involved in administrative tribunals, the independence of the judiciary is the clearest example of the separation of powers in the UK constitution.

The rules which achieve this are:

- senior judges hold office 'during good behaviour' and can not be removed except on an address to the Queen from both Houses of Parliament (Act of Settlement 1700)
- judges cannot sit in the House of Commons (House of Commons Disqualification Act 1975) and by convention judges have no active political role
- ministers have a statutory duty to uphold the independence of the judiciary (Constitutional Reform Act 2005)

- by convention ministers do not criticize judges
- the rules of the House of Commons restrict criticism of judges
- the creation of a Supreme Court by the Constitutional Reform Act 2005.

### **Checks and balances**

To obtain the complete picture it is necessary to look not only at the separation or overlap of powers but also at how each branch interacts with the other and operates as a check.

### **The judiciary**

1 Judges can check the executive in judicial review cases and will do so increasingly in human rights cases.

2 Judges can be a limited check on parliament in the way they interpret and review legislation. The advent of the Human Rights Act and an increased reliance on the rule of law in some judgments suggests a more active role here.

### **The executive**

1 The government (by virtue of its majority in the commons) and its power to initiate legislation generally controls parliament and can ignore select committee criticisms for example.

2 The government can check the judiciary through parliament since judges must apply whatever laws parliament enacts.

### **The legislature**

1 In theory parliament can cause the fall of the government in a confidence vote. It can call the executive to account in debates by questions in the house and in select committees. It can also reject government legislation.

2 Parliament has the ultimate power to dismiss judges. It can also reverse any judicial decision by legislation (eg the War Damages Act 1965 after the *Burmah Oil* case).

### **Modern trends**

The Human Rights Act has reinforced the role of the separation of powers in the UK constitution. Article 6 (1) of the Convention (the right to a fair trial) provides for trial and sentence by an 'independent and impartial tribunal'. This has led to the ending of the Home Secretary's role in criminal sentencing (*T v UK* and *V v UK* 1999 ECHR (children) and *R (Anderson) v Secretary of State for the Home Department* 2002 Lords (adults)).

## **The Constitutional Reform Act 2005 and the separation of powers**

### **Reform of the position of the Lord Chancellor**

Traditionally the Lord Chancellor had roles in all three branches of the state. This was an exception to the separation of powers. He was head of the judiciary and sat as a judge. He was a cabinet minister and member of the executive heading a government department (responsible for much of the legal system). He was part of the legislature and sat in the House of Lords where he was Speaker (sitting on the woolsack on ceremonial occasions).

The Lord Chancellor's role after the Constitutional Reform Act 2005 is now:

#### 1) Judicial

The Lord Chancellor has no judicial role. He no longer sits as a judge. The Lord Chief Justice is now the head of the judiciary.

#### 2) Executive

The Lord Chancellor retains an important executive role. The executive functions of his Department are now to be found in the Ministry of Justice. The Secretary of State for Justice is also Lord Chancellor. This Department is responsible for constitutional matters and aspects of the legal system (House of Lords reform, judicial appointments, legal aid, human rights, criminal justice and civil and family law).

#### 3) Legislative

The Lord Chancellor is no longer Speaker of the House of Lords. The House of Lords have elected a separate 'Lord Speaker' to take over the role of former Lord Chancellors.

### **A Supreme Court and Judicial Appointments Commission**

The Act also establishes an independent Supreme Court (in place of the judicial committee of the House of Lords) and a Judicial Appointments Commission. These reforms are strongly influenced by the separation of powers.

### **Judicial independence and the rule of law.**

The Act imposes a statutory duty on ministers (including the Lord Chancellor) to uphold the independence of the judiciary. There is also a provision that the act does not adversely affect the principle of the **rule of law** or the Lord Chancellor's role in relation to that principle.

This represents a victory by the judges in obtaining statutory recognition a) of a principle (the rule of law) which judges use to limit parliamentary sovereignty and b) preservation of the Lord Chancellor's past role in defending the principle in cabinet.

## **Conclusion**

There is a partial separation of powers in Britain. The biggest overlap is between the executive and legislature with government members sitting in the Lords or Commons. It is easy to forget how many members of the government there are. In total there will be about 100. On the other hand the independence of the judiciary was established early (in the Act of Settlement 1700) and has been maintained and strengthened by laws, rules and conventions preventing judges from sitting in parliament or participating in politics and restricting government and parliamentary criticism of judges. The Constitutional Reform Act 2005 continues this tradition. The independence of the judiciary is the best example of the separation of powers at work in the UK constitution.