Law School Tutors Guideline Series

Constitutional and Administrative Law

CHAPTER FOURTEEN

THE SEPARATION OF POWERS

For

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Constitutional and Administrative Law

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Constitutional and Administrative Law

THE SEPARATION OF POWERS

The Doctrine examines the relationship between the Executive, the Legislature and the Judiciary as functions of government.

Let us consider the Criminal Law in relation to the creation of a new offence.

- The creation of the offence is the legislative function of the Legislature.
- Enforcement of the law, by way of arresting the accused and bringing that person to trial, and subsequently, if convicted and sentenced to a period of imprisonment, of administering the punishment is an executive function carried out by the police and the prison service on behalf of the Executive.
- The trial itself is a judicial function carried out by the judiciary.

However, it is not always as easy, as it is in the above example, to distinguish between the different elements involved and thus to classify them into separate functions and activities, regarding all the various activities of government.

The extent to which the functions are distinguishable and the extent to which, at least regarding the U.K., the three functions are exercised separately by the organs to which they are normally attributed, falls to be examined. Furthermore, one needs to ask oneself whether such a separation or distinction between these various functions and activities of government is either possible or desirable.

The Legislative function and the legislature

In the U.K. the legislative function is vested in the Queen in Parliament. Certain qualifications to this are needed.

a). It is clear that the Commons is the senior partner of the three bodies (Commons, Lords & Queen) that make up the Queen in Parliament. The Lords is subservient to the Commons and the Queen is merely symbolic.

b). The will of the Commons is by and large the will of the Executive.

c). Entry into the European Community has affected the Doctrine of Sovereignty.

The Legislature performs other functions besides legislating. Parliament is a forum for debate on the general policy of the executive and criticises it.

The Executive Function and the Executive.

Broadly speaking this amounts to maintaining a system of government by the state. Its activities will range from the formulation of broad policy down to the details of routine service and day-to-day administration.

Historically the Sovereign is identified with the executive and government is still performed in her name. Today however the policy is determined by ministers, departments of state and by relevant authorities. E.C. membership has added to the bodies involved, eg. The Council of Ministers and the E.C. Commission.

The Judicial Function and the Judiciary.

The main function of the judiciary is to determine disputed questions of fact and law. This is carried out by courts and tribunals, with a mixture of professional and non-professional members.

Courts, however, appear to create law as well, though it is denied by the judges that this amounts to legislation as such. They make rules of procedure and there is the question as to whether or not the judges do or do not actually make laws.

The courts also perform administrative functions e.g.. administration of the estates of deceased persons. Some court work does not involve disputes e.g.. un-contested divorces where there is no property to divide and no children to be provided for.

It has been questioned whether the essence of sentencing by the court is not in fact administrative, especially in the light of proposals for sentencing by quota.

There are different versions of just what the doctrine says, which have been presented by different persons at different times in history. There is no one definitive Separation of Powers doctrine. There is also a conflict of views as to what each of the terms within the doctrine stand for.

The basis of the Doctrine is that the essential values of law, liberty and democracy are best protected if the three primary functions of a law-based government are exercised by distinct institutions.

The reasoning behind this is that 'If one person has all the power (or so the theory goes) that power might be abused.' Total power corrupts. By sharing out the power each holder of a portion of that power provides a reciprocal check and balance against the other holders of the other portions of that power.

Origins of the Doctrine of Separation of Powers.

Plato is reputed to have originated the Doctrine. The modern originator is reputed to be John Locke, a 17th century theorist and his basic model was embraced by the U.S.A. 'It may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make.[1]

Montesquieu,[2] famously wrote :-

> 'When the legislative and executive powers are united in the same person, there can be no liberty. If the judicial power is not separated from the legislative and executive powers again there is no liberty. If judicial power is joined with legislative power the life and liberty of the subject would be exposed to arbitrary control for the judge would then be the legislature. Secondly if the judicial and executive functions were joined the judges might misbehave.'

Montesquieu based his ideas on the analysis of the British Constitution in the 18th Century as he saw it. His ideas were, however, idealised and not entirely accurate since he did not appear to understand the exact roles of the various participants in the British constitutional set up.

Even if Montesquieu's analysis of the British Constitution in the 18th century was accurate, Marshall claims that his definitions of the roles of the executive do not correspond with the role of the executive today, since his perception was limited to the Law of Nations, i.e.. Public International Law, International Relations, the Making of War & Peace, foreign affairs and related business.

Comparative study with other constitutions.

The American Constitution 1787. This was a clear expression of the Doctrine of Separation of Powers. The three functions were to be performed by three distinct organs. The President representing the Executive. The Supreme Court for the Judiciary. Congress made up of the House of Representatives and the Senate for the Legislature. After establishing the three bodies the U.S. Constitution built an elaborate system of checks and balances to allow for the control and limitation of control by the other bodies.

It is clear that the types of constitutional control by checks and balances differs in different constitutions. eg. in the U.S.A. the courts can declare legislation to be unconstitutional. This is a more powerful form of judicial review than that available in the either the United Kingdom or France.

To what extent does the Doctrine apply to the U.K.?

Separation can mean at least three different things :

1). **Personnel** : The same person should not be involved in more than one function of government.

2). **Control :** That one function should not control or interfere with another function, eg the judiciary should be independent of control or interference by the executive.

3). **Functions :** One organ of government should not exercise the functions of either of the others, eg. ministers should not legislate.

THE LEGISLATURE AND THE EXECUTIVE

Personnel : Do the same persons or bodies form part of both the legislature and executive ?

To some extent the answer is YES. So, for example, the Sovereign is head of both the executive and an integral part of the legislature.

1 Plato ' Second Treatise of Civil Government' 1690.

2 Montesquieu . De L'Esprit de lois 1748

By convention, ministers who are part of the executive must belong to either the Lords or the Commons, i.e. the legislature, in order that they might be answerable to Parliament and to ensure cooperation between the executive and the legislature. Without this the constitution would not work.

Contrast the U.S. and France where the Executive and the Legislature are separate. They are often under the control of different political parties. Total non-cooperation resulting in stalemate is rare, though Senator Dole achieved this briefly in 1995 and was subjected to public censor for so doing. Nonetheless cooperation can be poor, adversely affecting the effectiveness of the Executive.

A measure of separation is achieved in the U.K. in that most members of the executive (i.e. Civil Servants) are disqualified from membership of the Commons, though the most senior members (i.e. Ministers of the Crown) must be members of Parliament.

Control : Does the Legislature control or interfere with the Executive & vice versa ?

The government is dependant on the support of Parliament. However, in practice the government usually dominates Parliament by majority. But Parliament is to some extent able to call the government to account. The strength of public opinion on various issues and its potential effect on future elections and the size of the government majority have a direct relationship to the degree of accountability. Accountability is exercised via Ministerial and Cabinet responsibility, Question time, Select Committees, Inquiries such as Nolan and Scott etc. But how effective is this control?

An interesting comparison can be drawn between the overwhelming support the government received over the Gulf conflict and the lack of support from the opposition during the Falkland's Campaign.

Function : Do the Legislature and the Executive exercise each other functions ?

It is clear that the executive produces much delegated legislation. This is not necessarily a major breach of the doctrine in so far as Parliament and the Legislature have laid down the basic principles of delegated legislation, and as long as there is effective scrutiny of delegated legislation.

THE EXECUTIVE AND THE JUDICIARY

Personnel : Do the same people participate in the Executive & the Judicial Functions ?

The courts are the Queen's courts and the Queen is the head of the executive. However the Queen is no longer able to act as a judge in her own court - Prohibitions del Roy (1607) and cannot create laws outside Parliament - Bill of Rights 1688. The Privy Council exercises a judicial and an Executive role.

The Lord Chancellor is a member of the Cabinet, Head of the Judiciary and a member of the Legislature, and is entitled to sit in and preside over the House of Lords when it is exercising its judicial functions as the highest court of appeal, though this latter is highly personal and few modern Lord Chancellors have chosen to do so.

The Attorney General is an elected member of the commons, responsible for instituting prosecutions, even against the Crown. His decisions to prosecute or otherwise cannot be challenged in the courts. **Gouriet v U.P.O.W**.[3]

Government Ministers are often given judicial functions as part of the appeal process against decisions made by their departments, eg the Secretary of State for Wales in respect of appeals on planning issues.

Control : Does the executive control the judiciary or vice versa ?

The judges are appointed by the executive. However as Wade & Phillips point out, the independence of the judiciary is secured by convention and by the professional and public expectation that judges should not be political appointees. Many Prime Ministers may have ultimately regretted their judicial appointments. Lord Mackay was no doubt not entirely popular with the Tory Party. Even before the 1997 election Cherie Booth has already indicated that Lord Irvine would be his successor should Labour be returned to office.

Compare the chequered career of Lord Donaldson who was appointed as head of the Industrial Court in 1971 during the Heath Government to supervise attempts,[4] to control the perceived excesses of the Trade Unions. The court was abolished by the returning Wilson Government in 1974. Donaldson, perceived as the arch-enemy of working class rights, entered the judicial wilderness. The return of the Tories in 1979 saw Donaldson rewarded by

3 **Gouriet v Union of Post Office Workers** [1978].

4 later realised by the Thatcher Government by alternative means.

his appointment as Master of the Rolls when Denning retired.

Judges have a high degree of security of tenure during good behaviour - though this does not stretch to whisky smuggling, which resulted in the resignation of a judge, perhaps to protect his pension and embarrassment of the office. Retirement is at 72.

Ministers and civil servants by convention should not criticise judicial decisions - though this has not prevented comments about 'Scandalous sentencing' criteria in rape cases etc.

The judiciary should not be overtly political and should not comment on government policy though recently there has been widespread public disagreement between the judiciary and the government on proposals for mandatory sentences imitating the development in the U.S. 'double strike and your out' sentencing system. There were significant tensions between the Lord Chancellor Mackay and the conservative government. The same problem has overcome relations between Lord Irvine and the current Labour administration. On the one hand David Blunkett's proposals for dealing with asylum seekers has been rejected by the courts. Lord Irvine, in an effort to ease over-crowing in prisons has controversially advised short custodial sentences or fines and community sentences.

Through the auspices of the Labour created Law Commission a wide range of legal reforms such as the Divorce Bill were put forward by the Lord Chancellor Mackay, which were seen as undermining moral values which the Tories claimed as central to their political mores. Mackay's appointments of Scott and Nolan proved to be contentious. Statements about Mr Howard's desire for stiffer sentencing were been criticised by judges as removing their discretion and as impracticable by Judge Tulmin who conducted an inquiry into the prison service. A judge appointed to conduct an enquiry will inevitably be called upon to make judgements on the propriety of executive action.

The judiciary exists at least on one level to protect the citizen from the unlawful acts of the executive - via judicial review - and thus controls (or supervises the excesses of) the executive.

Theoretically at least, the judges should not be influenced by their own political views. Judges have traditionally laid considerable emphasis on their political neutrality - eg Lord Scarman in **Nottinghamshire C.C. v Secretary of State.**[5] However, this has not prevented criticism of the judicial role in cases such as the **Fares Fair Case** [6] regarding the requirement of economic criteria in the Transport Act for the running of the London Underground which prevented the G.L.C. from providing a heavily subsidised transport service in the capital. Similar complaints have been levied against the judiciary in passport cases and the court's role regarding the detention of aliens during the Gulf Crisis did not escape criticism.[7]

Some executive actions within the ambit of The Royal Prerogative and Act of State cannot be challenged in the courts. [8]

European Union Law asserts control over the executive in relation to those things within its competence and the U.K. Courts and The European Court of Justice can censure the executive, nullify its acts, declare them void and illegal and can fine the executive for non-compliance.

The European Court of Human Rights, under the Council of Europe which is separate and distinct from the E.U. can rule against the executive and fine it but cannot directly nullify its acts or power to act though this is likely to be the result of a court's adverse deliberations regarding the activities of the executive. The decision of the E.C.H.R regarding the exercise by the Home Secretary of the royal prerogative to decide the length of time a prisoner must stay in prison and to over-ride the judge's suggested length of sentence is an example. Indeed, exercise of the Royal Prerogative by the executive has been consistently opposed by the court regarding passports, visas and the control of terrorism despite the exemptions in the European Convention on Human rights in respect of such matters where the court feels they apply, indicating that such decisions were not inevitable. With the advent of the **Human Rights Act 1998**, the focus of such control of the judiciary over the executive is shifted to domestic courts.

Function : Do the executive and the judiciary exercise each other's functions ?

5 **Nottinghamshire C.C. v Secretary of State** [1996] 1 All . E. R. 199.

6 **London Borough of Cambden v General London Council**

7 See also **Laker Airways v DoT** [1977], **Congreve v H.O.** [1976] & **R v M.P.C. ex pte Blackburn** [1968].

8 see **Carl Zeis v Stiffung v Rayner & Keeler** [1967] 1 AC 853; and **Nissan v A.G.**

The system of administrative tribunals supplements the courts in deciding disputes in certain defined areas, eg. pensions, industry, social security etc. Whilst the tribunals may appear to be bound up with the same name as and often to share the same building as the administration, they are in fact part of the administration of justice and are said to work independently of the executive.

The magistrates courts have certain administrative functions, eg. licensing. The decision making of government departments and ministers can be judicial in that ministers may be required to hear appeals from the decisions of department officials, arguably judicial decisions made by the administration. The existence of public inquiries, often sponsored by government departments is arguably judicial and not independent. Judicial Review normally means that such tasks are ultimately subject to the supervisory jurisdiction of the Q.B.D. but an effective ouster clause can prevent this from happening, for example the **S.S.A. 1989.** The Home Secretary's powers over sentencing have been severely curtailed by the impact of the Human Rights Act 1999 in a major battle based on the concept of the Separation of Powers fuelled by the impact of European Law.

The Lord Chancellor is in charge of the Legal System and Lord Mackay pursued a clearly executive driven agenda of reforming and modernising the system, minimising the divisions between the bar and solicitors, trying to make the system more cost effective and streamlined. The control of legal aid was central to his remit as was the number of judges employed by the system. The reforms initiated by Lord Mackay have been continued by Lord Irvine with the Civil Procedure Rules 1998 in place and reform of the Criminal Proceedings Rules pending under the guidance of Lord Faulkner, Lord Chancellor / Minister for Constitutional Affairs.

THE JUDICIARY AND THE LEGISLATURE

Personnel : Do the same persons or bodies form part of both the Judiciary and the Legislature. ?

All full time judicial appointees are disqualified from membership of the Commons. The separation is strict. With regard to the House of Lords, the Lord Chancellor has a role in both the judicial and the legislative sphere. The Law Lords are judges and may take part in its legislative function though NOT as members of a political party, and they will exercise restraint in the matters in which they will take part, eg. restrict themselves to reform of law, prisons etc in which they are experts.

By convention Lay Peers should not take part in judicial work in the House of Lords and attempts by peers to do so in the past have resulted in them being ignored.

Control : Does the Judiciary control the legislature or vice versa ?

Judges can be removed by a decision of the both Houses of Parliament and can advise removal of a judge to the Queen if necessary. Only one judge has been removed since 1701 and that was an Irish Judge who had effectively retired, for misappropriation of court funds. But note this figure masks the true number who have been advised to retire - to avoid impeachment !

There are procedural rules in the Commons to prevent the criticism of judicial decisions, though excessively political judgements have been criticised by Law Lords and in the Commons - eg Lord Dennings in **Duport Steels v Sirs** [9] and see Selwyn Lloyd's speech repeated by Viscount Tonypandy when he was Speaker of the House of Commons. "It can be argued that the judge made a mistake and was wrong and the reason for this contention can be given within certain limits. What is wrong is to impute any motive to judges acting in their responsible office."

Control of the legislature by the courts. The main wish of the courts is to give effect to the doctrine of the Sovereignty of Parliament and to interpret the will of Parliament. The courts can inquire if a statute is made in the correct manner and form and then give effect to it but it will not inquire into the legitimacy of the contents of the statute. Parliament can legislate if it does not like the decision of a court both for the future and retrospectively. [10] Thus, any decision that a court makes can be undone or changed either for the future or even retrospectively. With the advent of the **Human Rights Act 1998,** the courts now have the power to interpret statutes in a manner compatible with the Act or if that is not possible to recommend that Parliament change the legislation. It is likely that retrospective legislation would fall foul of the **HRA. 1998.**

The European Communities Act 1972. This is a demonstration of the power of the legislature over the judiciary. The

9 **Duport Steels v Sirs** [1980]

10 E.g. **Burmah Oil** and **The War Damages Act 1965.**

courts are bound to follow the case law of the European Court of Justice in matters of Community Law.

However, the possibility of a power to dispense with legislation contrary to E.C. law was raised in **Factortame**[11] and subsequently confirmed and applied in **Ex parte Equal Opportunities Commission.** [12] It is clearly required by E.C. Law and this reality is accepted by the House of Lords.

Function Do the Legislature and the Judiciary exercise each other's functions ?

Do the Judges make Law :? According to Lord Simmonds in **Shaw v D.P.P**. "In the sphere of criminal law, I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state, and that it is their duty to guard against attacks which may be the more insidious because they are novel and unprepared for". [13]

Contrast this with Donaldson MR in **R v H.M. Treasury ex pte Smedley** [14] " ... It therefore behoves the courts to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament or, so far as this can be avoided, even appearing to do so. ... "

Does Parliament act as a court? YES. With regard to the investigation of alleged breaches of the privileges of either house, Parliament can punish, in a manner more Draconian than the courts. The Commons and the Lords can lock people up for long periods without appeal, though the facility has not been used for many years.

The importance of the doctrine

Some writers see the separation of powers as vital - others as superfluous. Some state that a strict adherence is impossible - but that its value lies in emphasising the dangers and thus promoting the existence of essential checks and balances to prevent abuse where there is a break down in the separation.

Dicey perceived the Rule of Law, Separation of Powers and supremacy of Parliament as the cornerstones of the constitution, but, De Smith wrote that 'No writer of repute would claim that it is a central feature of the modern British system of government."

In **R v Hinds** [15] Diplock.L speaks of " the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the U.K."

Marshall[16] provides a different rationalisation of the ingredients of the Doctrine. He sets out five aspects of the separation of powers doctrine a) differentiation b) legal incompatibility of office holding c) isolation, immunity, independence d) checks and balances e) co-ordinate status and lack of accountability.

REFORM : LORD CHANCELLOR DEPARTS

Apparently Lord Irvine of Lairg will enter the history books as the last fully-fledged holder of the ancient office of Lord Chancellor, having seemingly, at first sight, to have resigned on the 11th June 2003. Lord Falconer of Thoroton was appointed to the new post of Secretary of State for Constitutional Affairs. The newly created Department of Constitutional Affairs takes over the work of the Lord Chancellor's Department, plus the work of the now defunct Welsh and Scottish Offices, with two cabinet ministers acting in future as spokespersons for Scotland and Wales. The offices of Secretary of State for Wales and Scotland are under temporary stewardship, pending abolition.

Consultation is underway to set up a US style Supreme Court to replace the judicial function of the House of Lords. It is unclear what the jurisdiction of this Supreme Court will be. If it is limited to constitutional matters, the Court of Appeal could become the highest civil appellate court, as originally envisaged in 1873 when the Supreme Court of Judicature was established. Following protests about .the abolition of the judicial role of the House of Lords the court was reinstated. Nonetheless, the rationale behind having a two tier appellate system is not apparent.

It is not initially clear what would happen to the Law Lords or who would sit in the new Supreme Court but is does seem that the UK is about to embrace a distinct continental style public law / administrative court hierarchy. If the new Supreme Court has a broader public law role, the court could take over appellate jurisdiction from the Court of

11 **Factortame**

12 **Ex parte Equal Opportunities Commission.** [1995].

13 **Shaw v D.P.P.** : See also **Knuller v DPP** [1973] AC 435.

14 **R v H.M. Treasury ex pte Smedley** [1985] 1 QB 657

15 **R v Hinds** [1976]

16 Marshall. Chapter 5 ; or see John Alder at p57 where he presents a brief summary of Marshall's views.

Appeal for challenges to high court orders pursuant to applications for judicial review under Order 54 Civil Procedure Rules 1998. If that is the case then the supervisory powers of the courts could find their way to the new court. Does this also pave the way for a written constitution empowering the Supreme Court to overrule unconstitutional legislation and what impact will this have on the Human Rights Act 1998? The remoulding of the Supreme Court of Judicature also conveniently coincides with the changing nature of the European Union and the creation of a European Constitution and affords an opportunity for the government to tailor the judicial system in to the changing structure of the European Court of Justice and a newly emerging European Union justice system, with its own multi jurisdictional police force and prosecution service.

The apparent abolition of the Lord Chancellor's Office seemed to have created a constitutional vacuum. The House of Lords had no leader until Lord Falconer was belatedly appointed Lord Chancellor the following morning. Statute currently provides that the presence of the L.C. is required on the Woolsack in the House of Lords and thus an amending statute will be required to abolish the office. The target date for the abolition of the Office appears to be Summer 2006 A consultative process has now be instituted to determine what will replace the Lord Chancellor's Office and to design the new Supreme Court. Some form of judicial appointment body is envisaged. This body is also tasked with appointing members to the new Supreme Court. Whether some or all of the existing law lords will retain their posts is unclear. It is not even clear whether members of the court will have to be lawyers. It is quite extra-ordinary that such a major constitutional reform process has commenced without any prior consultation and without any debate in either House. As with the on going reform of the House of Lords, effective if not legal abolition of yet another longstanding constitutional institution has taken place before what is to replace it has even been worked out.

The members of the new Supreme Court will be appointed by a committee, subject to a power of veto vested in the Minister for Constitutional Affairs. The Lord Chief Justice will be given increased powers to administer the courts. By the end of 2004 the remaining hereditary peers will have been replaced by appointed new peers. The Law Lords will no longer sit in the House of Lords.

The Lord Chancellor's Office has long since been viewed as an anachronistic breach of the doctrine of the Separation of Powers. The LC held a seat in the cabinet, participated in legislation and headed up the judiciary. Abolishing the Office is being heralded as a major step towards separating the judiciary from politics but will this be the case? Lord Faulkner, a cabinet minister, will not sit as a judge, but the Department of Constitutional Affairs will continue to administer the court system. Plus ca change . . . . ! ! ! To the extent that the judicial process is necessarily constrained by financial resources, it is difficult to imagine that a complete separation between the legal system and politics can ever be achieved. Perhaps that is why the overtly political title Ministry of Justice has been avoided.

None-the-less, it is clear that the Doctrine of the Separation of powers has received serious consideration by the current administration and that the anomalous breaches of the doctrine arising within the pre-existing set up governing the House of Lords as a final court of appeal and of the Lord Chancellor's Office are rapidly being corrected.

Constitutional and Administrative Law

Questions about the doctrine.

- Does the Doctrine of the Separation of Powers exist in reality or merely in political theory? Is application of the Doctrine either practical or practicable? Can the Doctrine be applied to the UK or any other State?
- Does the Doctrine (as a reality or as a perceived ideal to be striven for in abstract rather than absolute form) temper relations between the various organs of the state?
- What effect, if any, does the Civil Service, with its permanent nature and development of career structures, fixed ideas and policy have on the doctrine?
- Would a more rigorous enforcement of the doctrine be beneficial? What disadvantages exist for effective governments subject to the doctrine? Could the U.K (or any other) system of government function if the Doctrine was enforced?
- What is of over riding importance, the democratic nature of British Government or the enforcement of a Doctrine of Separation of Powers?
- Does the failure to institute a strict separation of powers jeopardise the sanctity of the Rule of Law?
- If the doctrine of Separation of Powers does not exist, in part or in whole, are there adequate safeguards and checks and balances within the constitution to remedy its absence? If not, what constitutional reforms are needed to remedy the situation?
- Is the alleged presence of the doctrine of Separation of Powers a mask behind which those in power can hide and which acts as a shield against needed reform of the constitution?
- Does the Doctrine of the Separation of Power have any place in an analysis of the way in which power is divided within the European Union?

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