

Separation of Powers

Historical Development

The identification of three elements in a constitution derives from Aristotle

“There are three elements in each constitution in respect of which each 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 be the differences between each of these elements. The three are, first, the deliberative, which discusses everything of common importance; second, the officials; and third, the judicial element.”

Viscount Henry St. John Bolinbroke [1678-1751] advanced the idea of separation of powers. He argued that the protection of liberty and security within the state depended upon achieving and maintaining an equilibrium between the Crown, Parliament and the people;

“In a constitution like ours, the safety of the whole depends upon the balance of the parts; and the balance of the parts on their mutual independency from one another.”

Baron Montesquieu [1685-1755], living in England between 1729-1731] stressed the importance of the independence of the judiciary;

“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty...Again, if there is no liberty if the power of judging is not separated from the legislative and the executive. If it were joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge might behave with violence and oppression. There would be an end to everything, if the same man, or the same body, whether of the nobles or of the people, were to exercise those three powers, that of enacting laws, that of executing public affairs, and that of trying crimes or individual causes.”

If powers are not separated within a constitution then how are the checks and balances put in place to limit the power of the government?

Compare this ideology with the constitution of a one party state, where absolute power resides in one person or body exercising executive, legislative and judicial powers.

There shall be one lawful political party...(e.g. the old communist regimes)

Are laws democratic?

Are they open to change?

Are they retrospective?

Hence a constitution usually creates three elements to exercise the functions of government. Each one is separate conferring a single function upon that area:

- **Executive**
- **Legislative**
- **Judiciary**

America keeps to the separation within its constitution

The President is the Chief Executive

All legislative Powers are vested in a Congress of the United States, which shall consist of a Senate and House of Representatives

The Judiciary being the third element.

In the UK the powers and personnel are largely, but not totally separated, with checks and balances in the system to prevent abuse. In other words a mixed government and weak separation of powers.

WHAT ARE THE THREE ELEMENTS?

EXECUTIVE

The branch of state or government which is entrusted with the formulation of policy and with its execution. It can include all those institutions and persons concerned with the implementation of law and policy

In the UK the supreme executive power is vested in the king or queen who by convention acts on ministerial advice. In practice the executive is headed by the Prime Minister and his cabinet but it includes all Ministers and other members of parliament.

Hence in our parliamentary system the members of the executive are also members of the legislature. In addition the Civil Service, local authorities, police and armed forces, constitute the executive in practical terms.

LEGISLATURE

The constitution may prescribe the membership and the powers of the legislature, it can also lay down basic qualifications for the candidates and for electors (e.g. prescriptive age, no criminal record, no bankrupts, etc.).

It may also prescribe the voting system. (e.g. Majority or Proportional Representation)

In the UK, the Queen in Parliament is the sovereign law-making body. Parliament comprises the Queen, House of Lords and House of Commons.

All Bills must be passed by each House and receive the Royal Assent.

Parliament has two chambers (bicameral) each exercising a legislative role although not having equal powers. and each playing a part in ensuring the accountability of the government.

Membership of the HOL is not by election but by inheritance. Recent constitutional changes have now limited the peerage to 92 members. Other peers are life peers appointed under the Life

Peerage Act 1958, usually nominated by the government of the day. Labour recently nominated a number of life peers to give a greater balance to the make up of their Lordships House. The House is not accountable in any direct sense to the people or electorate.

The House of Commons is directly elected and a parliamentary term is limited by the Parliament Act 1911 to a maximum of five years .

The House is made up of the majority party which secures the highest number of seats at the election, which will form the government. The Head of that party will be invited by the Queen to take office as Prime Minister. In turn the PM selects his/her cabinet. The opposition parties make up the remainder of the 651 seats or Members of Parliament. The Opposition is the party with the second largest majority.

THE JUDICIARY

This is the branch of the state which adjudicates upon conflicts between State institutions, between the State and the individual and between individuals. The judiciary should be independent of both Parliament and the Executive. It is apparent that whilst there is a high degree of independence there is a definite overlap between the three bodies.

The first of these is the office of Lord Chancellor.

The office derives from the Norman Conquest when the King's secretary became known as the royal 'chancellor'.

Lord Chancellor used to sit on all three levels. He used to be speaker in HOL but now there is an elected Lord Speaker.

He is a Cabinet Minister

He goes out of office with the government.

The Lord Chancellor is a Cabinet minister and currently a Member of the House of Commons. Recent reforms including the creation of the Ministry of Justice and the election of a Lord Speaker for the House of Lords have significantly altered the role of Lord Chancellor.

Ministry of Justice

On 9 May 2007, the Ministry of Justice was created. The

Ministry of Justice is responsible for courts, prisons, probation and constitutional affairs.

The Secretary of State for Justice and Lord Chancellor is the Rt Hon Chris Grayling MP.

Function in relation to courts

Head of the judiciary-

President of the Supreme Court (under Supreme Courts Act 1981)

The administration of the Supreme Court which consist of:

- Court of Appeal;
 - High Court;
- and
- Crown Courts.

Administration of the County Courts.

Magistrates are appointed by him Indirectly there is a local committee that makes recommendations

Circuit judges and Recorders are appointed by the Crown on his advice.

The dismissal of Magistrates, without showing due cause and Circuit Judges for incapacity and misbehaviour.

Responsibility for the court service;

Legal Aid and advice schemes;

the Land Registry and

Public Records Office.

He also presides over the Court of Protection (Mental Health Act 1959)

The Lord Chancellor has duties in respect to law reform and works closely with the Law Commission of England & Wales .

Their task is to keep under review all the law with which it is concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law.

The Lord Chancellor may refer matters to the Law Commission for investigation or it may investigate matters of its own volition.

THE JUDICIARY

The Lord Chief Justice, Master of the Rolls, President of the Family Division, Vice-Chancellor, Lords of Appeal in Ordinary and Lord Justices of Appeal are appointed by the Queen.

Usually these appointments are made on consultation with the Prime Minister.

The Lord Chancellor makes appointments to the High Court Bench.

For appointments to the High Court, barristers must be of ten years standing and solicitors with rights of audience in the High Court and Circuit Judges of two years standing.

Appointment to Court of Appeal:

Barristers must be of ten years standing and solicitors with rights of audience and any current member of the High Court.

Senior judges cannot be dismissed for political reasons but can be for 'misbehaviour'. What constitutes misbehaviour relates to the performance of a judge's official duties or the commission of a criminal. However, not every judge convicted will be dismissed six have been prosecuted for driving with excess alcohol in their blood but continued with their office. They can be removed by compulsory retirement if they are incapacitated.

The Judicial Pensions and Retirement Act 1993 introduced retirement at the age of 70, which may be extended to 75 if in the public interest. From 1959, the retirement ages were set at 75 for a High Court Judge and 72 for a Circuit Judge. Before these dates judges were permitted to remain in office. Lord Denning retired at 83.

Disqualification

Full time members of the judiciary are barred from legal practice and may not hold appointments as directors or undertake any professional or business work. Judges are also disqualified from the House of Commons.

Immunity from suit

All judges have immunity from legal action, provided he acts, or believes he acts, within his jurisdiction.

Bias or personal interest

A judge is under a duty not to adjudicate on cases where he has an interest, personal or financial.