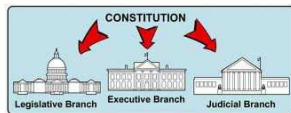


Separation of Powers



3 elements to a constitution

- Legislative
- Executive
- Judiciary
- They should, as far as possible, be separate from each other

Per Lord Mustill R V Home Sec. ex p Fire
Brigade Union[1995] 2 AC 513, 567

"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 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."

An example of this can be seen in criminal law

The creation of a new offence is a matter for legislation, enforcement of the law is an executive function, and the trial of alleged offenders is a judicial function.



Why separate?

- 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?

EXECUTIVE

- The branch of 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.
- 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.
- In a broad sense the executive comprises all officials and public authorities by which functions of government are exercised. (including civil service & armed forces)

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

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.

House of lords

- Used to be all hereditary peers, now limited to 92 who inherit their seats
- In total over 700 peers
- Many belong to main political parties
- Others known as “crossbenchers” - no political affiliation
- 26 most senior archbishops are members
- Lords can become members of Government

House of Commons

The UK public elects 650 Members of Parliament (MPs) to represent their interests and concerns in the House of Commons. MPs consider and propose new laws, and can scrutinise government policies by asking ministers questions about current issues either in the Commons Chamber or in Committees

There are overlaps hence, no strict separation of powers

- Parliament exercises a legislative function and to a lesser extent a judicial one in that it is responsible for 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 that they develop principles of common law
- Government ministers exercise a judicial function when they determine appeals in relation to disputes arising under such instruments as town & country planning legislation
- Magistrates exercise administrative as well as judicial functions when they grant licences

“This threefold division of labour between a legislator, an administrative official and an independent judge, is a necessary condition for the rule of law in a modern society and therefore, for democratic government itself.”

- Henderson, *Foundations of English Administrative Law*

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

- Montesquieu, *The Spirit of Laws*
(Montesquieu was an 18th century jurist)

Executive and Judiciary

- The Lord Chancellor was previously the Head of the judiciary, a senior member of cabinet and presided over the Lords as Speaker.
- The Constitutional Reform Act modified the role which is now held within the Sec of State for Justice, it remains as a cabinet post in House of Commons, but lost its judicial roles and that in House of Lords

Judiciary and legislature

- Prior to Constitutional Reform Act, Law Lords sat in House of Lords and on the ultimate court of appeal. The Act created the Supreme Court and Supreme Court Justices. They will not receive life peerages and any serving judge who is a member of HOL is disqualified from sitting or voting in the HOL

There is no formal separation of powers as we have no written constitution

- The functions of the legislature and executive are closely inter-related and ministers are members of both yet they each have their own and largely exclusive domain.

EU influence

British membership of EU effectively means that EU organs now exercise legislative, executive and judiciary powers in the UK

Judicial powers are exercised by the EU Court of Justice whose independence is guaranteed,
Legislative authority is vested in the Council, representing governments of the member states

“Separation of powers remains imperative. Without it the concept of the rule of law can scarcely survive”

Allen, Constitutional Justice Ch 2

- Any questions?
