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978-0-521-49337-6 - The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom

Roger Masterman

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## Introduction

### The contemporary separation of powers

Upon the opening of the United Kingdom Supreme Court in October 2009, that court's first president – Lord Phillips of Worth Matravers – noted the symbolic significance of establishing the independence of the country's highest court from Parliament:

For the first time, we have a clear separation of powers between the legislature, the judiciary and the executive in the United Kingdom. This is important. It emphasises the independence of the judiciary, clearly separating those who make the law, from those who administer it.<sup>1</sup>

This severing of institutional links was certainly decisive, and may come to have a significance that can only be speculated upon in the early stages of the new court's life. But this institutional independence is merely one aspect of the contemporary separation of powers. Understandings of the United Kingdom's unique separation of powers have tended to hold more currency in their emphasis of the 'pragmatic' realities of constitutional practice, rather than the assertion of a 'formal' doctrinal adherence to a version of separation of powers theory.<sup>2</sup> The bright line distinctions hinted at in Lord Phillips' welcome to the new judicial body have rarely been evident across the spectrum of governmental functions visible in the United Kingdom, nor in its institutional divisions.

In part, at least, these institutional overlaps and lack of functional clarity can be attributed to the fact that our constitution has never been implemented – rather, it has developed, or emerged, over time. And one thing that unites commentators' views of the constitution is that its development – for the most part, and at least since the Civil War – has been

<sup>1</sup> Press Notice 01/09, 'Supreme Court of the United Kingdom comes into existence' (1 October 2009), available at: [www.supremecourt.gov.uk/docs/pr\\_0109\\_\\_2\\_.pdf](http://www.supremecourt.gov.uk/docs/pr_0109__2_.pdf).

<sup>2</sup> See: K. E. Maleson, 'Modernizing the constitution: completing the unfinished business' in G. Canivet, M. Andenas and D. Fairgrieve, *Independence, Accountability and the Judiciary* (London: British Institute of International and Comparative Law, 2006), p.151.

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[More information](#)

organic, with change coming incrementally as opposed to in seismic shifts. There are, of course, notable exceptions to this general trend: the passage of the Parliament Acts 1911 and 1949 and the entry into the European Union among them.<sup>3</sup> But recent years have seen an increase in the number and frequency of significant constitutional changes – such that a number of commentators have suggested that the constitution has been formed anew.<sup>4</sup>

The first Blair administration of 1997 began a process of constitutional renovation which has seen the devolution of power to Northern Ireland, Scotland and Wales,<sup>5</sup> the removal of the right of hereditary peers to sit as of right in the House of Lords,<sup>6</sup> the implementation of freedom of information legislation,<sup>7</sup> the independence of the Bank of England, elected mayors in London and elsewhere,<sup>8</sup> and so on. As of 2007, the premiership of Gordon Brown brought with it the promise of further constitutional reform; welcome steps have been taken towards subjecting the prerogative to the control of Parliament, and discussions have begun on the possibility of codifying a Bill of Rights and Responsibilities with the possibility raised – more speculatively, maybe – of writing down the constitution itself.<sup>9</sup>

While the constitutional reforms which have been given effect to since 1997 have been criticised for their lack of coherent guiding principle, they have prompted debate over the nature of this reformed constitution,<sup>10</sup> and of its underlying principles.<sup>11</sup> The purpose of this book is to continue this

<sup>3</sup> For a recent survey of some of these ‘seismic’ events, see: E. Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Oxford: Hart Publishing, 2006).

<sup>4</sup> A. King, *Does the United Kingdom Still Have a Constitution?* (London: Sweet and Maxwell, 2001); V. Bogdanor, ‘Our new constitution’ (2004) 120 LQR 242; V. Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009).

<sup>5</sup> Northern Ireland Act 1998; Scotland Act 1998; and Government of Wales Act 1998. See also the Government of Wales Act 2006.

<sup>6</sup> House of Lords Act 1999.

<sup>7</sup> Freedom of Information Act 2000.

<sup>8</sup> Greater London Authority Act 1999; Local Government Act 2000.

<sup>9</sup> Ministry of Justice, *The Governance of Britain* (July 2007), Cm.7170; Ministry of Justice, *Rights and Responsibilities: Developing our Constitutional Framework* (March 2009), Cm.7577.

<sup>10</sup> See, among others, the various perspectives advanced by: King, *Does the United Kingdom Still Have a Constitution?*, above n. 4; M. Bevir, ‘The Westminster model, governance and judicial reform’ (2008) 61 *Parliamentary Affairs* 559; Bogdanor, *The New British Constitution*, above n. 4.

<sup>11</sup> See the debate on separation of powers instigated by Lord Lester of Herne Hill QC in the House of Lords: HL Debs, 17 February 1999, cols.710–39. See also the various perspectives

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Excerpt

[More information](#)

trend by examining the separation of powers implications of perhaps two of the most significant of the constitutional reforms of recent years: the Human Rights Act 1998, and the Constitutional Reform Act 2005. The first, *inter alia*, provided for judicially enforceable remedies for violations of the rights found in the European Convention on Human Rights for the first time in domestic law;<sup>12</sup> the latter established a Supreme Court, reformed the Office of Lord Chancellor and reduced the control of the executive over judicial appointments through the creation of an independent Judicial Appointments Committee.<sup>13</sup> Both statutes allocate specific functions to the three branches of government, and both alter the balance of powers among Parliament, the executive and the judiciary as it has been traditionally understood. Both statutes appear to pull in differing directions: the Human Rights Act is argued to have furthered the politicisation of the judicial decision-making process, while the Constitutional Reform Act seeks to insulate the judges from exposure to the political controversy of the legislative branch. As a result of these two, related, legislative projects, a reassessment of the separation of powers in the United Kingdom constitution is perhaps timely.<sup>14</sup>

Yet ideas associated with separation of powers have enjoyed an uneasy relationship with constitutional thought in the United Kingdom. How, it is rightly asked, can the powers of government be truly separated, and concentrations of power avoided, in a system under which ultimate legal authority is said to be placed in but one institution: namely, Parliament? Further, as will be seen in Chapter 1, the constitutional principle of separation of powers is argued to be notoriously difficult to define with any

on parliamentary sovereignty advanced in the House of Lords decision in *Jackson and others v. Her Majesty's Attorney-General* [2005] UKHL 56; [2006] 1 AC 262 (discussed at pp.105–10).

<sup>12</sup> For a survey of the Act in this regard, see: I. Leigh and R. Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Oxford: Hart Publishing, 2008).

<sup>13</sup> For a valuable analysis, see: Lord Windlesham, 'The Constitutional Reform Act 2005: ministers, judges and constitutional change, part I' [2005] PL 806; Lord Windlesham, 'The Constitutional Reform Act 2005: the politics of constitutional reform, part II' [2006] PL 35.

<sup>14</sup> Given that the Human Rights Act 1998 and Constitutional Reform Act 2005 are both of UK-wide application, and that this volume primarily considers overarching principles concerning division of power among the Westminster Parliament, UK executive and senior judiciary, the phrase 'United Kingdom (UK) Constitution' will generally be used in preference to 'British' or 'English Constitution' throughout. It is accepted, however, that a degree of imprecision is also inherent in the use of this phrase, as a result of differences between the three jurisdictions that combine to make up the United Kingdom, and as a result of the devolution of power from Westminster to administrations in Northern Ireland, Scotland and Wales.

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Excerpt

[More information](#)

precision, and worse, to be of no relevance at all in the United Kingdom due to the fact that two key institutions of government – the executive and legislative branches – display a considerable overlapping membership. It is for these reasons, and others, that ideas associated with separation of powers in the United Kingdom constitution are claimed to be more pragmatic than formal.

As a result, the contemporary relevance of separation of powers to the United Kingdom is not now (if it ever was) to be found entirely in its utility as a template of *institutional* design requiring a clear and inviolable separation of executive, legislative and judicial personnel. Nor should separation of powers in the United Kingdom constitution be thought to compel that all governmental *functions* be exercised by individual and specific branches of government in perpetuity – such a reading would be entirely irreconcilable with the cornerstone of that constitution: the doctrine of parliamentary sovereignty. Instead, the contemporary relevance of separation of powers, it will be argued, lies in a broader reading of the concept, as a dynamic and fluid explanation of how the judiciary interact with the executive and legislative branches. Separation of powers is, from that perspective at least, a multi-dimensional concept. It fulfils a descriptive function, allowing us to explain the divisions between governmental functions, including the institutional separateness of the judicial branch. It is also a variable idea, as it allows us to chart the degree to which circumstances permit the judiciary to exercise a checking and balancing role within the constitution.<sup>15</sup> This reading of separation of powers is, perhaps, in the first instance at least, ‘more concerned with territorial boundaries than with providing a constitutional basis for the role of judges.’<sup>16</sup> Yet it is also suggested that this separation of powers is more than simply a descriptive device: just as the unwritten constitution is a construct of the statutes, judicial precedents, conventions and institutions that give life to the system of government, so too are the constitutional principles that inform the relationships between those institutions and determine the hierarchy of norms within the constitution. The separation of powers in the United Kingdom constitution is therefore a product of the legislative, judicial and political decisions that regulate and describe the relationships among the three core branches of government within

<sup>15</sup> For a discussion, see: E. Barendt, ‘Separation of powers and constitutional government’ [1995] PL 599.

<sup>16</sup> D. Woodhouse, ‘The English judges, politics and the balance of power’ (2003) 66 MLR 920, 924.

Cambridge University Press

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Excerpt

[More information](#)

the state. It is entirely in keeping with the nature of our constitutional law and constitutional development to say that the cumulative effects of these dynamic relationships and interactions has been to generate principles and standards of normative status – that prescribe how things *should* be done, rather than simply describe how they *are* done. The contemporary separation of judicial power from that of the executive and legislature may well be regarded as a constitutional fundamental displaying normative characteristics, rather than a description of a temporary state caused by a fortuitous collision of legislative and other factors.

The aim of this book, therefore – through an examination of a number of crucial points of interaction between the judicial and the political branches of government – is to highlight the dynamics of the contemporary separation of judicial power from the powers of the legislature and executive. The book is divided into four parts. In Part I, Chapter 1 examines the doctrine(s) of separation of powers in theory and their applicability to the United Kingdom constitution, noting the central objections to the application of separation of powers theory rooted in the doctrine of parliamentary sovereignty. Chapters 2 and 3 assess the driving forces behind the contemporary separation of power: the Human Rights Act 1998 and European Convention on Human Rights. Though seeking to preserve the idea of sovereignty, the Human Rights Act clearly envisages distinct roles for each of the three branches of government while also extending the range and depth of the courts' powers of judicial review of both executive and legislative activity. Chapter 2 therefore charts the allocation of power made by the Human Rights Act itself while Chapter 3 introduces the influence of the European Convention on Human Rights as interpreted by the European Court of Human Rights and analyses whether, and in what circumstances, the Strasbourg jurisprudence requires either a separation of governmental functions or of institutions.

Part II concerns the interface between the legal and the political in judicial decision making and the tools of institutional restraint that underpin the courts' engagement with questions of policy. Chapter 4 explores the withering of justiciability doctrines and the expansion of judicial supervision into areas of the constitution previously thought to fall outside the sphere of judicial influence. Chapter 5 goes on to examine how the 'ubiquitous'<sup>17</sup> language of deference, together with the doctrine of proportionality, hold the potential to regulate the courts' examination

<sup>17</sup> B. Goold, L. Lazarus and G. Swiney, *Public Protection, Proportionality and the Search for Balance* (Ministry of Justice Research Series 10/07), September 2007, p.9.

Cambridge University Press

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[More information](#)

of ‘political’ matters – providing a principled basis on which to base the potential judicial intervention in matters which frequently engage genuine political choice. While the Human Rights Act 1998 has brought the judicial and the political into much closer relief than traditionally evident in the United Kingdom constitution, the judicial branch is also now possessed of the tools to ensure that its potential intervention in matters which might previously have been regarded as being non-justiciable is based on legal principle, rather than chance or judicial whim. The notion of deference and the doctrine of proportionality provide the structure which guides this separation of powers and ensures that – in the application of this function as a constitutional check – restraint and respect for the views of political actors is inherent in the process of judicial review.

Part III concerns the creative powers of courts. Chapter 6 considers the effect of the Human Rights Act on the law-making abilities of the courts through the lens of section (s.) 3(1) of the Human Rights Act and the courts’ powers of statutory interpretation. Chapter 7 goes on to examine the development of the common law and the creative potential available to courts in determining the meaning and application of ‘the Convention rights’ in domestic law.

Part IV concludes by analysing the institutional independence of the courts and the normative potential of the contemporary separation of powers. The institutional separation of the judiciary from the executive and legislature following the Constitutional Reform Act is examined in Chapter 8. The reform of the office of Lord Chancellor, establishment of a Judicial Appointments Commission and creation of a United Kingdom Supreme Court all contribute to an increased separation of personnel among the three branches of government. As it is the independence of the judiciary that underpins the authority of the judicial role in the constitution, the consequences of this increased separation will be argued to further legitimate the robust review sanctioned by the realigned judicial role, and may cement the constitutional independence of the judicial branch. Finally, Chapter 9 examines the extent to which the contemporary separation of powers can be said to possess enduring qualities that might survive the potential repeal of the legislative provisions that are at the heart of this division of governmental power. This final chapter will assess the cumulative effect of these significant constitutional developments on the status of separation of powers in the United Kingdom, and ask whether the complete functional and institutional separation of the judicial branch can now rightly be regarded a constitutional fundamental immune from legislative interference.

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[More information](#)

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## PART I

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### Separation of powers, the Human Rights Act and the European Convention on Human Rights

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Excerpt

[More information](#)

## 1

## A doctrine of uncertain scope and application

**The meaning(s) and aim(s) of separation of powers**

The meanings and requirements of the separation of powers doctrine have been debated perhaps more than those of any comparable constitutional principle or theory; indeed, ‘few doctrines have been subject to more damning and repeated criticism than that to which the separation of powers has been subject’.<sup>1</sup> In his book, *Constitutional Theory*, Geoffrey Marshall’s famous dissection of the separation of powers concluded that so many were the potential interpretations and requirements of the doctrine, that ‘it may be counted little more than a jumbled portmanteau of arguments for policies which ought to be supported or rejected on other grounds’.<sup>2</sup>

Nowhere, perhaps, has the debate over the meaning, or indeed relevance, of the separation of powers been more heated than in Britain, and more recently, the United Kingdom (UK). At the very best, assessments of the relevance of the separation of powers doctrine have been Janus-like; at worst, they have provoked bouts of academic mud-slinging. In the third edition of his text, *Constitutional and Administrative Law*, Professor De Smith wrote that ‘no writer of repute would claim that [the separation of powers] is a central feature of the modern British constitution’,<sup>3</sup> presumably condemning M. J. C. Vile to that dubious accolade after he had written ten years earlier that, ‘an approach to the study of British government that rules out reference to the “separation of powers” is an inadequate one’.<sup>4</sup> The separation of powers debate has also been seen to

<sup>1</sup> J. W. F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press, 2007), p.83.

<sup>2</sup> G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), p.124.

<sup>3</sup> S. A. DeSmith, *Constitutional and Administrative Law* (3rd edn) (Harmondsworth: Penguin Books, 1977), p.36.

<sup>4</sup> M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967), p.8 (and see also (2nd edn) (Indianapolis: Liberty Fund, 1998)).



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Roger Masterman

Excerpt

[More information](#)

polarise academic and judicial perspectives.<sup>5</sup> On the one hand Professor Hood Phillips denounced the doctrine as a ‘constitutional myth’,<sup>6</sup> while on the other, Lord Diplock was able to confidently assert in the *Duport Steel* case that, ‘it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based on the separation of powers’.<sup>7</sup> Further, Robert Stevens has argued – with what Sir Stephen Sedley described as a ‘hint of transatlantic self-satisfaction’ – that ‘nothing underlines the atheoretical nature of the British constitution more than the casualness with which it approaches the separation of powers’.<sup>9</sup> Yet in spite of the contested relevance of separation of powers, commentators have been unable to completely sever examination of the doctrine from studies of the constitution.<sup>10</sup> Even Professor De Smith did not reject the influence of the doctrine outright, and was forced to concede that ‘a brief survey of the doctrine brings out more clearly some features of the British system of government’.<sup>11</sup>

Part of the difficulty here lies in the fact that in Britain, as with elsewhere, the debate has been unable to escape the myriad difficulties of attempting to define what separation of powers actually requires in practice. Beyond specifying that there should be three branches of government – the legislature, executive and judiciary – even a ‘pure’ theory of the doctrine, uncomplicated by local constitutional practices or quirks, proves troublesome. M. C. J. Vile, in his study, *Constitutionalism and the Separation of Powers*, wrote that:

<sup>5</sup> See: C. Munro, *Studies in Constitutional Law* (2nd edn) (London: Butterworths, 1999), pp.302–7.

<sup>6</sup> O. Hood Phillips, ‘A constitutional myth: separation of powers’ (1977) 93 LQR 11. See also S. A. De Smith, who (elsewhere) referred to the separation of powers as a ‘tiresome talking point’ and an ‘irrelevant distraction for the English law student and his teachers’, S. A. De Smith, ‘The separation of powers in new dress’ (1966) 12 *McGill Law Journal* 491, 491.

<sup>7</sup> *Duport Steel v. Sirs* [1980] 1 WLR 142, 157. See also: *M v. Home Office* [1994] 1 AC 377, 395 (Lord Templeman): ‘Parliament makes the law, the executive carry the law into effect and the judiciary enforce the law.’

<sup>8</sup> S. Sedley, ‘Above it all’ 16 *London Review of Books* 7 (7 April 1994) (quoted in Sir J. Laws, ‘Law and democracy’ [1995] PL 72, 90).

<sup>9</sup> R. Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor’s Office* (Oxford: Clarendon Press, 1993), p.2.

<sup>10</sup> For examination of the doctrine in three of the leading texts on the subject, see: A. W. Bradley and K. D. Ewing, *Constitutional and Administrative Law* (14th edn) (Harlow: Pearson Longman, 2007), ch.5; I. Loveland, *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (4th edn) (Oxford University Press, 2006), ch.3; C. Turpin and A. Tomkins, *British Government and the Constitution* (6th edn) (Cambridge University Press, 2007), ch.2.

<sup>11</sup> De Smith, *Constitutional and Administrative Law*, above n. 3, p.36.

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Roger Masterman

Excerpt

[More information](#)

## THE MEANING(S) AND AIM(S) OF SEPARATION OF POWERS 11

A 'pure doctrine' of the separation of powers might be formulated in the following way: It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these branches there is a corresponding feature of government, legislative, executive or judicial. Each branch of government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check on the others and no single group of people will be able to control the machinery of the State.<sup>12</sup>

In very basic terms, therefore, a strict separation of powers holds that the legislative, executive and judicial arms should be separate of each other, in respect of both their functions and their personnel. Both senses of governmental separation are, however, problematic. In a functional sense, such a theory presupposes that *all* governmental actions can be neatly placed in either the legislative, executive, or judicial category,<sup>13</sup> and that each branch of government may not exercise power which falls outside those corresponding with its own function. As such, the 'pure' theory makes no allowances for governmental activities which are not easily categorised, or over which there is debate about which of the three branches is most apt to exercise them. Institutionally, the 'pure' theory demands a *complete* separation of each of the three branches; no person or group of persons may be a member of more than one branch. Parliamentary systems on the Westminster model – in which the executive branch forms a part of the legislature – would therefore immediately fall foul of this key requirement of the pure theory of separation.

Additionally, the pure theory version of separation of powers also seems to dismiss the notion that the three branches might actively check the actions of each other – appearing to suggest that the very fact of separation is sufficient to 'establish and maintain liberty'.<sup>14</sup> On this reading, any 'interference' by one branch of government with the functions or activities of another would infringe the separation of powers. As a result, it has been

<sup>12</sup> Vile, *Constitutionalism and the Separation of Powers* (2nd edn), above n. 4, p.14. See also E. Barendt, 'Separation of powers and constitutional government' [1995] PL 599, 601.

<sup>13</sup> Cf. G. Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971), pp.99–100; I. Jennings, *The Law and the Constitution* (5th edn) (University of London Press, 1967), p.241.

<sup>14</sup> Vile, *Constitutionalism and the Separation of Powers* (2nd edn), above n. 4, p.18.