

Cambridge University Press

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

Roger Masterman

Table of Contents

[More information](#)

## CONTENTS

*Acknowledgements* page xi*Table of cases* xii

Introduction 1

The contemporary separation of powers 1

**PART I Separation of powers, the Human Rights Act  
and the European Convention on Human Rights 7**

- 1 A doctrine of uncertain scope and application 9
  - The meaning(s) and aim(s) of separation of powers 9
  - Separation of powers in the United Kingdom constitution 16
  - The supremacy of Parliament 20
    - 'Theory, as usual, followed upon fact ...' 21
    - A relationship of equal branches? 22
    - A descriptive, or normative, device? 24
  - The centrality of judicial independence 26
  - The contemporary separation of powers 31
- 2 The Human Rights Act 1998 and the separation of powers 33
  - Introduction 33
  - Rights as questions of law and/or politics 34
  - The parliamentary bill of rights model 42
  - The Human Rights Act in the United Kingdom constitution 44
    - Integrating rights concerns into the legislative process 46
    - Interpretations and declarations of incompatibility 48
    - Separation of powers at the macro-level: an inter-institutional dialogue on rights? 50
    - Strong form review by stealth? 52
    - Operating in the shadow of Strasbourg 54
  - The separation of powers implications of the dialogic model 56

Cambridge University Press

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

Roger Masterman

Table of Contents

[More information](#)

viii

## CONTENTS

3	The Strasbourg influence	60
	Introduction	60
	The standard of review and requirement of proportionate interference	63
	The inadequacy of <i>Wednesbury</i> review	65
	Proportionate interference	66
	The Strasbourg jurisprudence on separated governmental functions	70
	Executive involvement in ‘judicial’ decisions – sentencing	74
	Judicial review of ‘administrative’ decisions	76
	The Strasbourg jurisprudence on separated institutions	78
	An independent and impartial tribunal	79
	The circumstantial approach to impartiality	80
	The strict separation approach to impartiality	82
	Conclusion	84
	<b>PART II Judicial engagement with the ‘political’ branches</b>	<b>87</b>
4	Justiciability	89
	The extended range of review	89
	The justiciability of the Convention rights	90
	Public resources	93
	National security	96
	‘High policy’ and prerogative powers	99
	Deployment of the armed forces	100
	Foreign relations and the power to enter into treaties	101
	The withering of non-justiciability doctrines	103
	Towards legislative review?	105
	Conclusion	113
5	Deference and proportionality	115
	Introduction	115
	Deference	116
	Deference or a margin of appreciation?	117
	Constraining judicial power under a statutory bill of rights	119
	Deference under the Human Rights Act	121
	‘...servility, or perhaps gracious concession?’	123
	A fig leaf for non-justiciability?	125
	An autonomous or an integrated concept?	128
	Proportionality and the intensity of review	129
	The structure of proportionality review	132
	The integration of proportionality and deference	135
	Proportionality, legitimacy and merits review	139
	Conclusion	141

Cambridge University Press

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

Roger Masterman

Table of Contents

[More information](#)

## CONTENTS

ix

	<b>PART III</b>	<b>The creative powers of courts</b>	<b>143</b>
6	Statutory interpretation and declarations of incompatibility	145	
	Introduction	145	
	The judge as law-maker	146	
	Interpretative latitude under the Human Rights Act	151	
	Interpretative law-making on the Human Rights Act model	154	
	A power of invalidation through interpretation?	156	
	Implied terms and additional words	160	
	Deference to the legislature and the limitations of judicial interpretation	163	
	Democratic dialogue in practice: parliamentary and executive responses to incompatibility	168	
	Conclusion	176	
7	Developing the common law and the meaning of ‘the Convention rights’	181	
	Introduction	181	
	The incremental nature of common law development	181	
	The Human Rights Act and law-making at common law	183	
	The transformative potential of models of horizontality	183	
	The modification of breach of confidence	186	
	Towards directly effective rights to privacy and expression at common law?	189	
	The meaning and application of ‘the Convention rights’	191	
	‘The Convention rights’ in domestic law	192	
	The scope for creative judicial interpretation of ‘the Convention rights’	199	
	Conclusion	202	
	<b>PART IV</b>	<b>The separation of the judicial branch</b>	<b>205</b>
8	The independence of the judiciary	207	
	Introduction	207	
	The institutional independence of the judiciary	208	
	The distinction between institutional and individual independence	208	
	The pressure for increased institutional autonomy	212	
	The office of Lord Chancellor	214	
	The Lords of Appeal in Ordinary	216	
	Structural independence secured? The Constitutional Reform Act 2005	219	
	Independence of the executive	221	
	Independence of the legislature	225	

Cambridge University Press

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

Roger Masterman

Table of Contents

[More information](#)

x

## CONTENTS

Independence, legitimacy and the separation of functions	227
The emergence of a separation of powers jurisprudence?	229
Asserting the division between legislator and judge: procedural fairness at common law	232
Endorsing the Convention's circumstantial approach	232
Towards a 'strict' separation of functions at common law?	236
The reach of separation by fair process	239
Towards a constitutionally separate judicial branch?	242
9 Towards constitutional separation	245
Descriptive or substantive principles of separation?	245
<i>Select bibliography</i>	254
<i>Index</i>	267