

# Separation of powers critical essay



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BUSTER**

" The 'separation of powers' is incomplete within the current unwritten UK constitution. " The ' separation of powers' is doctrine of the UK constitution first termed by Montesquieu, a French political philosopher, in his 1748 book *De l'esprit des lois* (The Spirit of the Laws) he argues that there are three bodies of government – the executive, legislature and judiciary – which each have a discrete area of power with clear functions that no other body can imitate: this is true ' separation of powers'.

The purpose of which is to limit state power so that no element has an abuse of power hence protecting civil liberties. By Montesquieu's definition, the separation of powers is incomplete as there is clear overlap between the different branches of government, notably the legislative and executive.

Contrastingly, the revisionist definition of the separation of powers as, remarked by Lord Bingham, claims that while the doctrine of the separation of powers is weak by the terms of the classic characterisation, " the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so" This convincing revaluation of the separation of powers principle indicates that under the new " partial" definition, the separation of powers is a clear, complete doctrine in the UK unwritten constitution.

By Montesquieu's characterisation, the separation of powers is incomplete within the current constitution as argued by Bagehot. In *The English Constitution*, Bagehot asserts that there is a " close union, nearly complete fusion of the executive and the legislative powers" and claims the Cabinet act as the connecting link by which he defines as " a committee of the legislative body selected to be the executive body". This violates a pivotal

principle of the separation of powers doctrine, as stated by Vile, that the persons who compose these three agencies of government must be kept separate and distinct.

Thus showing the separation of powers is incomplete within the UK constitution. Furthermore, the overlap of the legislative and executive is shown in the fact that government ministers are drawn from either of the Houses of Parliament; Also, up to 2005, the Lord Chancellor held a position in all 3 branches of government: a Cabinet Minister, a member of the House of Lords and head of the Judiciary. These instances violate a key principle of the 'true' separation of powers: that no individual can be a member of more than one branch. Furthermore, Courts legislate in the sense that they develop principles of the Common Law thus undertaking the functions of both the judicial and legislative branch. This serves as evidence that, in accordance with Montesquieu's belief, the separation of powers is incomplete within the UK constitution. However, the government has introduced legislation in order to limit the overlap between the different branches of government. In order to prevent the executive branch dominating Parliament the House of Commons Disqualification Act, 1975 limits the number of ministers who sit in the House of Commons to 95 persons.

This restricts the influence of the executive branch on the legislative process thus further separating the roles of each branch. Also, the Constitutional Reform Act reduced the powers of the Lord Chancellor which was frequently criticised as violating the doctrine of separation of powers, as well as the European Convention of Human Rights, by exercising executive, judicial and parliamentary functions. The Act ended the Lord Chancellors role as Head of

the Judiciary with the creation of a new position: the Lord Chief Justice; the Act also severed the direct link between the Lord Chancellor and the speaker of the House of Lords.

This indicates a shift towards a more distinct separation of powers in line with the view of Montesquieu thus completing the doctrine within the UK constitution. It is possible to assert that in the UK constitution, it is impossible to have a complete separation of powers because if each branch regulated its own actions, it could potentially lead to an abuse of power and thereby could lead to the violation of the rights and liberties of the public.

This has led to the development of a system of checks and balances whereby each branch can monitor the actions of the other branches while still being confined to their specified parameters of power. For example, the judiciary act as a check on the Government by hearing challenges to executive decisions in judicial review cases by which the claimant feels the decisions made by the government are unreasonable or indicate an abuse of power.

Judges can also consider whether the Government, or Parliament, has acted in a manner compatible with the European Convention on Human Rights. For example, in *Equal Opportunities Commission v Secretary of State for Trade and Industry* [2007], the Equal Opportunities Commission claimed that the Government failed to comply with its obligation to implement Directive 76/207/EEC (the Equal Treatment Directive of the European Union) when attempting to amend the SexDiscriminationAct 1975, a claim which was upheld by the High Court.

The system of checks and balances is an integral part of the ‘partial’ separation of powers as it limits the amount of power possessed by each branch to ensure there is no dominant faction however still potentially infringes on another bodies role thus defying Montesquieu’s concept. On the other hand however, in the Federalist Paper 47, Madison argues that Montesquieu “did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other,” thus upholding the view that the separation of powers is complete within the UK constitution due to the operation of the checks and balances system.

The checks and balances system also emphasises that judicial independence plays a pivotal role in the separation of powers in the UK constitution. Bagehot claims there is a near fusion of the legislative and executive branch therefore, it is essential that there is a check on the power exercised by these branches. The judiciary can effectively act as a check on the powers of the executive due to the Constitutional Reform Act 2010 which established a new Judicial Appointments Commission which ended the Lord Chancellor's position as head of the judiciary and his power to appoint judges.

Also, the creation of the UK Supreme Court assumed the power of the Appellate Committee of the House of Lords thus severing the connection between the judicial and legislative branches and indicating a shift towards a more independent judiciary. According to Lord Steyn, the constitutional principle of judicial independence within the doctrine of the separation of powers exists to prevent the rise of arbitrary executive power which, under the UK constitution, this system is total and effectively so.

This statement supports the views of Lord Bingham as stated previously, which thus shows that though the English Constitution does not reflect the pure form of the separation of powers, it exists in a partial form whereby there is a clear separation between the judicial branch and the legislative and executive branches. To conclude, the conflicting definitions of the 'separation of powers' makes it difficult to evaluate the extent to which it is present in the UK constitution.

If considering Montesquieu's pure definition it is clear that the separation of powers is incomplete within the constitution, especially between the executive and legislative branches of government as supported by the arguments of Bagehot. However, considering the 'partial' doctrine, it is possible to assert that the separation of powers is very evident in the constitution especially considering the independence of the judiciary.

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