Separation of powers

‘ The separation of powers, as usually understood, is not a concept to which the United Kingdom constitution adheres. ’ The doctrine of separation of powers was perhaps most thoroughly explained by the French Jurist Montesquieu (1989), who based his analysis on theBritish Constitutionof the early 18th century. This essay will discuss the doctrine of separation of powers, its meaning and importance within the United Kingdom’s un-codified constitution. It will analyse the relationship between the Executive, Legislature and the Judiciary and how the United Kingdom does not strictly adhere to the doctrine.

Montesquieu (1989) argued that to avoid tyranny, the three branches of Government, the Legislature, the Executive and the Judiciary should be separated as far as possible, and their relationship governed by ‘ checks and balances’ (Montesquieu, 1989), Montesquieu (1989) described the divisions of political powers between the three branches and based this model on his perception of the British Constitutional System, a system which he perceived to be based on a separation of powers between King, Parliament and the law courts. Originally it was the Monarch who had all the power, however, it has now been transferred.

The Legislature, or law making function, which covers actions such as the enactment of rules for society. The Executive, or law applying function, which covers actions taken to maintain or implement the law, defend the state, and conduct internal policies. Finally, the Judiciary, or law enforcing function, which is the determining of civil disputes and the punishing of criminals by deciding issues of fact and applying the law. These functions of

Government should be carried out by separate persons, or bodies and that each branch should carry out its own function.

For example, the Legislature should not judge nor should the Executive make laws. The Legislature, Executive and the Judiciary should also all have equal legal status so each could control the excessive use of power by another branch. The British Constitution is fundamentally different to the US constitutional model and its fragmented structure. The American model is a deliberately designed political body constructed with precision by the 18th century 'founding fathers' and maintained to the present day by an entrenched codified document.

By contrast, the British constitutional model has evolved and adapted over the centuries, deriving from statute law, customs and monarchical power among various sources. Such contrasting constitutional evolution has led to differing interpretations and applications of the theory of the separation of powers. In essence, the separation of powers within Britain's constitutional system tends to be far less explicit and somewhat blurred in comparison to the more rigid US system of government. Indeed, some would say that the basic principles of the separation of powers are not specifically adhered to within the British political model.

The most obvious evidence of this is reflected in Britain's parliamentary system of government, as opposed to a presidential type in the USA, where 'the assemblies and executives are formally independent of one another and separately elected'. In practice this means that in the USA the President and

members of the legislature (Congress) are elected separately and occupy completely different political branches, whereas in the UK the most senior elected members of Parliament also form the executive branch of government.

This more fused political structure leads to a situation where the Prime Minister and Cabinet (the executive) are also elected members of Parliament (legislature), creating a scenario that conflicts with the essence of the separation of powers. The British political system also had the historic position of Lord Chancellor possessing the greatest theoretical power, being part of the executive (Cabinet), legislature (House of Lords) and the head of the judiciary simultaneously.

Such a concentration of power is broadly prohibited in the USA and other western democracies due to the nature of their codified constitutions. Such constitutional developments have led to the creation of political circumstances in the UK whereby the executive has gradually come to dominate the legislature, despite the British political tradition of sovereignty ostensibly residing in Parliament. This scenario has led to allegations of excessive power within the executive and of an 'elective dictatorship', with 'public policy originating in cabinet and being presented to a party-dominated House of Commons'.

In such anenvironment, a government with a significant parliamentary majority, e. g. Labour since 1997, can maintain control of both the executive and the legislature, with Parliament becoming a mere 'rubber-stamp' of approval in the process of creating legislation. The judiciary,

symbolized by the role of the Lord Chancellor who is a member of the ruling party, has over the years appeared to have been manipulated by the governing regime in a way that the US Supreme Court could never be.

Such trends of excessive executive power have been exacerbated by dominant Prime Ministers such as Margaret Thatcher and Tony Blair. However, in recent years the British government appears to have accepted this constitutional imbalance and has taken specific measures to enhance its version of the separation of powers, addressing its rough edges and tackling some of the growing criticisms of executive dominance that has been a consequence of the UK's constitutional development.

This process has been evident in a number of key constitutional reforms, starting with theHuman RightsAct of 1998, a piece of legislation that has created more explicit safeguards concerning the distribution of political power within the UK. In particular it appears to have provided additional powers to the branch of government that is often overshadowed within the UK's political system, namely the judiciary. This Act has subsequently enforced the need for British law-makers to strictly adhere to the principles of human rights when passing legislation in order to remove the prospects of legal challenges at a later stage.

After this Act was passed, one of the most prominent judicial challenges under human rights legislation occurred in December 2004, when the Law Lords declared that the detention of eight terrorist suspects without trial at Belmarsh Prison was in conflict with the suspects' human rights. In practice, as evident in the Belmarsh case, it means that legislation that derives from

Parliament, under the control of the executive, can now be more closely scrutinised and challenged by the judiciary, bolstered by an enhanced human rights framework.

In this context, Parliament: 'retains its sovereign status..... if the courts cannot reconcile an Act of Parliament with the European Convention on Human Rights, they do not have the power to override..... that legislation..... (but) the courts can declare the legislation incompatible with the European Convention on Human Rights and return the Act to Parliament for revision' . Thus, a clearer separation of powers now appears to be in place as a result of the Human Rights Act.

However, while the Act does provide added powers of judicial scrutiny over the executive and legislative branches in their law-making role, Parliament retains ultimate sovereignty and can change the law as it wishes, in spite of judicial criticism. In terms of ignoring such judicial interventions, any government would probably cause itself considerable political damage in doing so, but it has the right to do so nevertheless. In thisrespect, the UK Human Rights Act is not as robust in preserving fragmented government and civil liberties as the US Bill of Rights is, which it has been compared to.

Indeed, the current British Conservative opposition has even talked of abolishing this legislation, and this would have implications for tackling the effectiveness of the separation of in the UK. Britain modernised its constitutional model with further legislative and institutional reforms such as the Constitutional Reform Act (2005). A key element of this Act

was the creation of a Judicial Appointments Committee that limited executive patronage in appointing the judiciary, as well as a British Supreme Court, reflecting a more explicit separation of judicial.

This new court has replaced the Law Lords as the highest Court of Appeal in the UK. The Law Lords have in many ways
symbolised the blurring of the branches of government in the UK, with their dual role as interpreters of the law on behalf of the judiciary, but also as law-makers due to their membership of the House of Lords. This Act also significantly reduced the powers of the Lord Chancellor, formerly the most powerful position in British politics with a foothold in all government branches. The Law Lords and Lord Chancellor were increasingly viewed as nachronisms within the UK political system and subsequently deemed to be in need of significant reform as part of the process of refreshing Britain's implementation of the separation of theory. a In conclusion, it is recognised that certain degree of power and functions between the three organs do overlap, which suggest that although each organ functions within its own sphere, none is supreme. The sphere of power conceded to Parliament to enact law to regulate its own procedure is a clear example of the existence of Separation of Power. Therefore, the doctrine of Separation of Power is deemed to be a rule of political wisdom.