

SEPARATION OF POWERS

Although of great antiquity the modern basis for the doctrine of the separation of powers can be traced back to the writings of commentators such as John Locke, who in one of his books written in 1690 observed that "the three organs of government must not get in one hand." The doctrine was further examined by the French jurist Montesquieu who based his exposition on the British constitution of the early 18th Century. In simple terms the doctrine recognises three functions of government, namely legislative, executive and judicial. In its purest form the doctrine holds that each of these three functions should be vested in separate organs of government, with no overlap, as to concentrate more than one function in any one organ presents a threat to individual liberty. If the doctrine is followed the same persons should not form part of more than one organ. For example ministers should not sit in parliament. One organ should not exercise the functions of another.

In the United States Constitution of 1787 separation of powers was clearly expressed. Each of the three primary constitutional functions was vested in a distinct organ. Legislative power was vested in Congress consisting of a House of Representatives and a Senate, executive power was vested in the President and judicial power was vested in the Supreme Court and other federal courts as established by Congress.

The president of the USA holds office for four years and does not need the support of Congress to continue in office. He is separately elected from Congress directly from the people. Neither he nor members of his Cabinet can sit or vote in Congress. They have no direct power to initiate Bills but the president can recommend legislation in his message to Congress. He can veto legislation but can be overridden by 2/3 majority in both Houses. Treaties are negotiated by him but must be approved by 2/3 of the Senate. He can recommend key officers such as judges of the Supreme Court but they have to be approved by the Senate. Once appointed judges are independent of both Congress and the President. They can be removed by the Senate only for treason, bribery or similar offences.

In the historic decision of Chief Justice Marshall in *Marbury V Madison* the Supreme Court assumed the power of declaring both Acts of Congress and Acts of the President to be unconstitutional.

In fact the separation of powers in the USA does not involve the isolation of each organ from the other two, but rather an elaborate system of checks and balances. The system rests upon an open recognition that particular functions belong primarily to a given organ.

It is generally agreed that the separation of powers is reflected in the British Constitution but not in any formalised way. Sovereign is the head of the executive but her role is more ceremonial. However contrary to the USA doctrine of separations ministers are by convention members of the legislature. While this is a breach of the doctrine it can be rationalised by saying that it promotes the responsibility of ministers by ensuring that they can be questioned and make statements to the relevant Houses. The doctrine is reflected in the fact that many office holders who make up the executive are disqualified from membership of the House of Commons. This includes civil servants, members of the armed forces and police forces and other holders of office of profit under the Crown. Ultimately the House of Commons controls the executive as it can bring about the resignation of a government with a motion of no confidence. Less drastic control can be exercised in the form of question time and opposition days. The government also has several devices for curtailing parliamentary debate. The House of Lords even in its reformed form can only delay the passage of legislation.

In theory it is for the executive in the form of the Cabinet to determine the policies of proposals to change the law, and for the judges to apply the law. The constitutional significance of this is that the judiciary being independent can apply the law regardless of whether the result is at odds with what the government of the day may desire. In *Hinds v The Queen* the Privy Council declared unconstitutional the 'gun court' set up in Jamaica because of the involvement of members of the executive in the sentencing of offenders. On the other hand the most glaring breach of the doctrine of separation of powers is provided by the functions performed by the Lord Chancellor. He is a member of the executive as head of the Lord Chancellor's department and therefore a member of the Cabinet. He is also head of the judiciary and as head of the House of Lords he is also a member of the legislature. Although this situation has been defended by Lord Irvine amongst others as being pragmatic, problems could arise if the Lord Chancellor for example were to give judgment in a House

of Lords ruling regarding the legality of an action taken by a fellow Cabinet minister. The Human Rights Act 1998 could well worsen matters as the judiciary could be dealing with more highly politicised acts. Difficulties have also arisen in respect of the role of the Home Secretary in setting the tariff. At a less dramatic level there is a breach of the separation doctrine where judicial functions are performed by executive bodies, most notably tribunals. Once again the excuse is pragmatism. In general lines we can say that the executive exercises a degree of control over the judiciary by determination of who is appointed as a judge. Furthermore the High Court has the power to review the legality of administrative action taken by executive agencies.

The separation of the judiciary and legislature is expressly recognised in the House of Commons Disqualification Act 1975, which provides that holders of a full time judicial appointment are disqualified from the House of Commons. Parliament can control the courts in a sense by legislation. But judges' salaries are charged on the consolidated fund meaning that their payment is permanently authorised and does not need to be renewed. Parliament is subject to the law and the courts. The independence of judiciary can also be regarded as a safeguard of the doctrine. Security of tenure, freedom from criticism and judicial immunity ensure that judges are free to do their work ensuring the separation of powers.

In the case of *Duport Steels Ltd V Sirs* both Lords Diplock and Scarman implied that the UK constitution is not based on a formal separation of powers as advocated by Montesquieu and practised in the United States. Rather both Law Lords are speaking in support of a well established convention of the UK Constitution, namely that Parliament makes the law and the judiciary interprets it. This convention derives from the concept of Parliamentary sovereignty in a system where the legislature is elected and accountable and in which the judiciary is required to be impartial and independent in the application of law.

All in all it would only be fair to say that the doctrine of separation of powers is necessary in controlling the delegation of power among organs of government and ensuring the proper use of that power. We have examined the US and the British separation of power and although in the US things are clearer, we can say that power is properly controlled in both cases. If it wasn't results would have been obvious.