

Public Law Practice Coursework

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The separation of powers, originally established by Baron Montesquieu in *De l'Esprit des Loïs* (1748) can be seen as an integral part of any constitution. Montesquieu voiced the necessity for a separation of the primary three bodies: the executive, the legislature and the judiciary.

In Lord Woolf's statement: "*The separation of powers has never been part of the framework of our unwritten Constitution.*" He is clearly stating that he believes that under the constitution of the United Kingdom there are important departures from the classic doctrine, and the separation of powers has never been a basis on which the people could rely upon.

In contrast to this, Lord Irvine states "*The British Constitution is firmly based on the separation of powers*" which obviously means he wholly believes the British constitution is in no breach of the doctrine. There are arguments both for and against each statement.

The first thing to note with regards to Woolf's statement is there are indeed clear overlaps between the three primary bodies. The most obvious being the status of the Executive and Legislature. Montesquieu stated '*when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.*' Following on from this, the executive is primarily identified as the Prime Minister and the Cabinet, yet by convention they must be a member of either the House of Commons or the House of Lords, which is identified as the Legislature. Therefore a near fusion of the two powers has been formed and a clear contradiction to Montesquieu's words is apparent.

Montesquieu however was aware that it would be difficult to obtain absolute separation and that there would be some overlaps between the different bodies: '*neither should exercise the whole power of the other branch of government.*' Yet directly resulting from the executive sitting in the legislature is the notion that the Government will of course have a majority in the Commons, therefore the executive is exercising whole power over the legislature. This of course is a clear breach of Montesquieu's doctrine.

This led Lord Hailsham to refer to the arrangement (A Government with a majority) as an '*elective dictatorship*'. However, although it is a clear breach, it may be noted that out of 659 MP's only approximately 100 are Cabinet Ministers, so the Government are outnumbered in any case.

To a large extent, the judiciary form a separate body from both the executive and the legislature. It has been said, that as the United Kingdom has an unwritten Constitution we have a need for trust and accountability in our public bodies and another need to enhance the credibility and effectiveness of our public institutions. This is further recognized by Lord Steyn: '*Central to the Rule of Law in a modern democratic society is the principle that the judiciary must be, and must be seen to be, independent of the executive.*' However, although this has been firmly established, judges are appointed by Her Majesty after consultation with the Prime Minister, following recommendations by the Lord Chancellor. ****COMMENT**** This is not only a breach of the doctrine, but of the Human Rights Act 1998 and the requirements of judicial independence under Article 6 European Convention of Human Rights.

However, this glaring anomaly is to be rectified under the Constitutional Reform Act 2005, which will see the establishment of an independent Judicial Appointments Commission, on a statutory basis, to recommend candidates for appointment as judges.

The clearest departure from the doctrine is the role of Lord Chancellor. Over 1400 years old, the Lord Chancellor's role is unique and controversial with relation to the separation of powers, because the office holder has power in the three primary bodies of the constitution - the executive, the legislature and the judiciary. The Lord Chancellor is a senior member of the cabinet and is in charge of his own government department. At the same time, he is head of the independent legal system and is responsible for the management of the courts, appointing magistrates and judges, and deciding who should become QCs. And thirdly, he is a vital part of the British parliament where he presides over the House of Lords, and is speaker in the House of Commons. The role of the Lord Chancellor is in direct contradiction with Montesquieu's doctrine.

Lord Irvine has further said regarding the role of the Lord Chancellor: *'If the relationship between the executive and the judiciary is embodied in one person, in one ancient office, we cannot properly scrutinise its operation and it is not immediately transparent to the public.'*

And from this, steps were taken to reform this in June 2003, when the Prime Minister announced plans for a department of constitutional affairs which will incorporate most of the responsibilities of the former Lord Chancellor's role, but with new arrangements for judicial appointments and an end to the previous role of the Lord Chancellor as a judge and speaker in the House of Lords. Once these plans are confirmed by legislation, the post will be abolished, and the main element standing between The British Constitution and Montesquieu's doctrine will no longer be in the way.

On balance, it is clear there is more than enough evidence to back up Lord Woolf's statement, as there are many issues which may lead you to believe there is no emphasis on the separation of powers within the British Constitution. However, there are issues that do attempt to create a balance between the overlaps of the primary bodies and the doctrine. For instance, although there are clear overlaps, some may say a near complete fusion, of the executive and the legislature, in answer to this there are many 'checks and balances' placed on the Government, to ensure there is no excess or abuse of power, such as the convention of accountability which requires Government ministers to justify their actions to Parliament. The judiciary also exercise control over the use of executive powers by means of judicial review. There are also many ways in which the Government is held to account through parliamentary questions, debates and select committees. In this case, Montesquieu's provision of one body not exercising whole power over another is being adhered to; proving therefore the separation of powers is part of the framework of Britain's constitution.

Judicial Independence has been said to be basic to the British Constitution, and the final point to note regarding the separation of powers is as previously mentioned, the independence and security of the judiciary is vital. It should be noted that in the United Kingdom, judges are offered security of tenure under The Act of Settlement 1700 and the Supreme Court Act 1981. The judges are also barred from becoming members of the House of Commons and their salaries are paid from a consolidated

fund that is not subject to political control. This is to ensure that judges dispense justice according to their judicial oath – ‘according to the laws and usage of this realm, without fear or favour, affection or ill-will’. This final point is proof in itself that the United Kingdom has sought to form a separate and independent judiciary, if not a separation of powers.

Although the constitution has been and is still in clear breach of Montesquieu’s doctrine, it seems impractical to suggest that ‘the separation of powers has never been part of our unwritten constitution’ as it is apparent that considerable efforts have been made throughout the years to legitimise these overlaps and to provide the public with trust worthy and credible bodies. Randy E Barnett stated in *The Lost Constitution* (2004) ‘*The separation of Powers is certainly neither an absolute nor a predominant feature of the British Constitution*’. It seems the case that now the separation of powers is predominant and with the aid of the constitutional reform act 2005 the United Kingdom is now heading towards a constitution ‘firmly based on the separation of powers’.

Word Count: