



Separation of Powers

Please ask your students to answer questions on a separate piece of paper.

The questions are marked from 1-4 as a guide to how much content the student should provide. Total is out of 34.

The answers here are suggestions and are by no means exhaustive.

What is the separation of powers?

The doctrine of the separation of powers requires that the principal institutions of state—executive, legislature and judiciary—should be clearly divided in order to safeguard citizens' liberties and guard against tyranny.

One of the earliest and clearest statements of the separation of powers was given by French social commentator and political thinker Montesquieu in 1748:



'When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty... there is no liberty if the powers of judging is not separated from the legislative and executive... there would be an end to everything, if the same man or the same body... were to exercise those three powers.'

According to a strict interpretation of the separation of powers, none of the three branches may exercise the power of the other, nor should any person be a member of

any two of the branches.¹ By creating separate institutions it is possible to have a system of checks and balances between them.

But the United Kingdom does not have a classic separation of powers that, for example, applies in the United States.

1) What are the three principal branches of state in the UK? (1 mark)

- Executive, Legislature and Judiciary.

2) For each of the three branches, name the main organisations or bodies considered part of that branch. (3 marks)

- In the UK, the executive comprises the Crown and the Government, including the Prime Minister and Cabinet ministers.
- The legislature; Parliament, comprises the Crown, the House of Commons and the House of Lords.
- The judiciary comprises the judges in the courts of law, those who hold judicial office in tribunals and the lay magistrates who staff the magistrates' courts.

3) What is the main role of each of the branches? (3 marks)

- The Legislature makes laws.
- The Executive puts those laws into effect and plans policy.
- The Judiciary administers justice by interpreting the law when its meaning is in dispute, ensuring the law is upheld.

¹ www.parliament.uk/briefing-papers/sn06053.pdf Benwell, Richard and Gay, Oonagh 'The Separation of Powers' House of Commons Library.

4) Draw a diagram to illustrate the powers of state. (1 mark)

5) Why do you think Montesquieu was so concerned about the same person or body exercising more than one of those three powers? (1 mark)

- Too much power could lead to bias, corruption or conflicts of interest, or at the very least the perception of such.

What about devolution and the separation of powers?



Devolution is the statutory granting of powers from the central government of a sovereign state to government at a sub-national level, such as a regional, local, or state level. It is a form of decentralization. Devolved territories have the power to make legislation relevant to the area.

From 1998, certain powers have been devolved to Scotland, Wales and Northern Ireland from the Houses of Parliament, creating the Scottish Parliament, National Assembly for Wales and Northern Ireland Assembly. They now have executive and legislative powers over certain laws within their countries such as health care, education and prison services.

Beyond the UK

The UK has a partially unwritten and uncodified constitution which allows for more fluidity in the arrangements of its powers of states. Similarly, to the UK, Sweden and the Netherlands are constitutional monarchies: they evolved continuously over at least two centuries, gradually subjecting the exercise of powers held by the head of state and government to legal and constitutional constraints.

On the other hand, some countries have a very explicit distinction between their institutions of



state, for example the **United States'** written and codified Constitution adheres closely to the doctrine of separation of powers. Article I grant powers to the legislature; article II gives executive power to the President; and article III creates an independent judiciary.

Congress is elected separately from the President, who does not sit in the legislature. The US Supreme Court can declare the acts of both Congress and President to be unconstitutional.²



Germany on the other hand has five political bodies which share the three powers of the legislative, executive and judiciary.

Bundesregierung / The Federal Cabinet

Bundestag / The Federal Parliament

Bundesrat / The Federal Council Bundespräsident / The Federal President

Bundesverfassungsgericht / The Federal Constitutional Court

² www.parliament.uk/briefing-papers/sn06053.pdf Benwell, Richard and Gay, Oonagh 'The Separation of Powers' House of Commons Library

³ <http://www.ukgermanconnection.org/politics-german-government>

The Separation of Powers and the Judiciary

Back to the UK: Before the 2005 Constitutional Reform Act

For background, you can read about the reasons the Government of the day introduced the Constitutional Reform Bill⁴ here, in the official ‘explanatory notes’ to the Bill:

http://www.legislation.gov.uk/ukpga/2005/4/pdfs/ukpgaen_20050004_en.pdf

6) Which two branches of state was the 2005 Constitutional Reform Act trying to separate more distinctly? (1 mark)

The judiciary from the legislature.

⁴ Bills become Acts once they are passed by Parliament and given Royal Assent – which means the Sovereign has approved the legislation and it can be brought into force.

After the 2005 Constitutional Reform Act

7) What is the Lord Chancellor and how did this role change after the 2005 Constitutional Reform Act? (3 marks)

- The Lord Chancellor is usually a member of the Cabinet and has a responsibility for upholding the rule of law and protecting judicial independence.
- The Constitutional Reform Act 2005 removed the judicial functions of the Lord Chancellor, and his former role as head of the judiciary is now filled by the Lord Chief Justice (head of the judiciary in England and Wales).
- The role of Lord Chancellor is now combined with that of the Secretary of State for Justice.
- In addition, the Lord Chancellor no longer sits as Speaker of the House of Lords, which now elects its own Speaker.
- This was all intended to create a more formal separation of powers.

8) How did the system of judicial appointments change after the Constitutional Reform Act? (4 marks)

- Before the Constitutional Reform Act 2005, judicial appointments were made on the recommendation of the Lord Chancellor, who was a Government Minister.
- The legislation established an independent Judicial Appointments Commission /Boards for England and Wales, for Northern Ireland and for Scotland.
- In England and Wales judges are represented on the Commissions, but do not hold a majority, and the Commissions have to have a lay Chair. The Commissions recommends candidates to the Lord Chancellor, who has a very limited power of veto. The Act gives the Commissions a specific statutory duty to “encourage diversity in the range of persons available for selection for appointments”. In England and Wales, the Commission recommends candidates to the Lord Chancellor, but that is not the case in either Scotland or Northern Ireland.
- In Scotland it is a Judicial Appointments Board and not a Commission. In Northern Ireland the Commission does not have a lay chair but the Lord Chief Justice chairs.
- Separate procedures apply to the appointment of Supreme Court judges, which take account of the fact that the Court has a UK-wide remit. When a new UKSC Justice needs to be appointed, an ad hoc selection commission is set up and presided over by the President of the UKSC. The Lord Chancellor has limited rights to reject or invite a reconsideration, but once he is content the recommendation passes to the Prime Minister, who then passes the recommendation to The Queen.

9) What replaced the appellate committee of the House of Lords as the highest Court of appeal in the UK and why? (2 marks)

- The Supreme Court of the United Kingdom (UKSC).



- During the passage of the legislation, Lord Falconer, the Lord Chancellor at the time of the legislation that established the UKSC, told the House that “the time has come for the UK’s highest court to move out from under the shadow of the legislature [...] the key objective is to achieve a full and transparent separation between the judiciary and the legislature [...] the Supreme Court will be administered as a distinct constitutional entity. Special arrangements will apply to its budgetary and financial arrangements in order to reflect its unique status.”

How does the UK Supreme Court fulfil the separation of powers?



Although new Justices are given a courtesy title of Lord or Lady, they are not influenced by politics, cannot sit in the House of Lords and do not have a peerage, maintaining the separation of powers. They will thereby not be easily influenced by politics or be involved in the creation of legislation. Nor will there be any perception thereof. This also applies to former Law Lords who became the inaugural Supreme Court Justices’, they can only return to the House of Lords once they have retired from their judicial position.

The new court has much greater accessibility with its own building open to the public transparent court procedures and educational programme. This allows for a greater understanding of the work of the court and has boosted the profile of the highest level of the judiciary. When it remained in the House of Lords, the judiciary there was dominated by the legislature and members of the public found it very difficult to access and knew little about it. This might have created the perception of an unfair balance between the branches of state.

The court is completely transparent in its work. The design of the building reflects this, for example with vast glass panels leading into the entrance and to the modern courtroom two. The UKSC has its own YouTube channel showing past judgments and screens its main UKSC cases live on the Supreme Court live website. This increases the profile of the court and allows for the public to see ‘justice in action’, as well as enabling the public to keep check that the judiciary remains open and fair.

Where there were potential conflicts of interest...

It was often cited that, from an outsider's point of view, observing that the highest court of appeal belonged to the upper house of Parliament, there may have been a conflict of interests for the Lords of Appeal in Ordinary ('Law Lords'). An example of this is during the Hunting Ban 2004

legislation. This was a controversial law that needed the House of Commons to utilise the Parliament Act to be able to pass it (whereby the House of

Commons can overrule the vote of the House of Lords). During the passing of the legislation, two Law Lords relied on their roles as members of the House of Lords chamber and voted on the legislation.



Three cases regarding the hunting ban were later brought in front of the Appellate Committee of the House of Lords, one of which was from the Countryside Alliance group who argued that the banning of hunting was an invasion of their right to a private life. Since the Law Lords had voted on this legislation they were not permitted to sit on those cases.

You can read more about this case on the BBC web link below:

'Law Lords stand by ban on hunting'

<http://news.bbc.co.uk/1/hi/uk/4337604.stm>

10) What problems can you see with the former Law Lords voting on legislation in Parliament? (2 marks)

- This could potentially be seen to be a conflict of interest for the Law Lords, as they are meant to be impartial.
- This would not be easy working in such a highly political environment or indeed participating in the legislative process, because they might have been asked to judge a case on the new law once.

11) How has the creation of the UK Supreme Court enabled a reduced chance of conflicts of interest arising? (2 marks)

- The Justices are no longer allowed to speak or vote in the House of Lords.

- They work in a completely separate building, with separate administrative staff.

Other aspects of judicial independence

Judicial independence is vital to the maintenance of the rule of law and to democracy. The principal of judicial independence requires the protection of the environment within which judges operate, so that they are immunised against direct political interference, whilst also observing that Parliament does have a legitimate interest in the substance of the law and the efficient and effective operation of the court system.⁵

Judges are expected to interpret legislation in line with the intention of Parliament and are also responsible for the development of common law: statutory laws are written laws passed by legislature and government of a country; common law, also known as case law, is law that has been developed in judgments made by judges over hundreds of years.

In the UK, judges are prohibited from standing for election to Parliament under the House of Commons (Disqualification) Act 1975.

Judges in the 'higher courts'⁶ such as the High Court (Queens Division, Chancery and Family Division), the Court of Appeal and the Supreme Court have life tenure until the mandatory retirement age of 70 or 75. This protects their independence. A resolution of both Houses of Parliament is needed to remove a judge from a higher court. Judges in 'lower' courts in England and Wales can only be removed after disciplinary proceedings. The Office of Judicial Complaints is jointly accountable to the Lord Chancellor and Lord Chief Justice. Judges are also protected by immunity from legal action in relation to their judicial functions and absolute privilege in relation to court proceedings. Absolute privilege ensures freedom of speech in court and protection for the judges from civil action.

⁵ http://www.ucl.ac.uk/constitution-unit/research/judicialindependence/seminar_note_may_11.pdf

Each time there is a new judicial appointment, the new judge affirms the following oath:

Judicial Oath

"I, _____, do swear by Almighty God that I will well and truly serve our Sovereign Lady Queen Elizabeth the Second in the office of _____, and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will."

12) In what way does the judicial oath reflect judicial independence? (3 marks)



The oath makes clear that judges are expected to avoid making decisions based on their popularity, but instead simply apply the laws of the land to the problem they face.

Similarly, judges generally believe it is important that the running of the courts, particularly the most senior courts, should not be subject to political decision-making, where judges might be 'punished' by the executive for taking decisions against them. This leads to some big debates about how the higher courts should be financed and run.

Judicial review

Courts can hear cases where a citizen or group of citizens feel they have been 'wronged' by a public body, such as a government minister, civil servant or local authority. Judges can decide if these organisations have acted unlawfully, i.e. treated citizens unfairly/unequally or gone beyond its powers. Sometimes these judicial reviews can be seen as a direct challenge to government when a judge upholds its claims.

Here is one example of a judicial review case.

Councils and campaign groups win key judicial review case against Heathrow runway

Friday, 26 March 2010 16:12

A group of councils and campaign groups have won a key judicial review case against the government, forcing it to hold further consultations before beginning work on the controversial third runway at Heathrow.

In his ruling, the then High Court judge Lord Justice Carnwath ruled that the 2003 Air Transport White Paper – in which the third runway was first proposed - was “obsolete” because of the subsequent Climate Change Act 2008.

He said that for the government to continue with the third runway, it must now review the climate change implications of Heathrow expansion, the economic case for a third runway, and the issue of how additional passengers would get to a bigger airport. He also called on the government to ensure that future aviation policy takes into account the implications of the 2008 Climate Change Act.⁷

13) Can you think of any other judicial review cases? (2 marks)

- ‘Judicial review into 'frightening' Exhibition Road plan’**

<http://news.bbc.co.uk/1/hi/england/london/8551047.stm>

- ‘Kettled teenagers have case for judicial review rejected’**

<http://www.guardian.co.uk/uk/2011/sep/08/kettled-teenagers-have-case-rejected>

European law

Individuals’ rights under the European Convention on Human Rights can be enforced in many cases by the courts, through cases relying on the Human Rights Act 1998, and EU legislation is also binding on the UK and its courts. There are several cases of courts using the Human Rights Act to keep in check the powers of the Government. For example, R (on the application of GC) (FC) (Appellant) v The Commissioner of Police of

⁷ http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=1547:councils-and-campaign-groups-win-key-judicial-review-case-against-heathrowrunway&catid=63:planning-articles
16/07/2013

the Metropolis (Respondent), in which the Supreme Court found the Police Service to be breaching Article 8 (right to privacy) by retaining indefinitely DNA of people who had been arrested but were proved innocent or not brought to trial on their DNA database.

UKSC cases

The UK Supreme Court deals with legal appeals which raise an arguable point of law of general public importance. It is the role of the Supreme Court Justices to interpret these points of law. By doing this, they set the doctrine of precedent, so that if this point of law should come up again the lower courts would follow the decision and definition set by the Supreme Court.

In what way do the following cases demonstrate a separation of powers?

R vs Chaytor & Ors



Four former MPs charged with fraud over the alleged misuse of the expenses system appealed to the UK Supreme Court that they should not have their case heard in an ordinary criminal court. They felt that the idea of ‘parliamentary privilege’ (written in 1689 as part

of the Bill of Rights) protected them, as the expenses system was a matter of parliamentary procedure which, they argued, should properly be dealt with by Parliament.

The unanimous judgment led by Lord Philips stated that this was an ordinary crime and therefore should be tried in an ordinary criminal court.⁸

14) How does the MPs’ expenses case demonstrate judges challenging the powers of Parliament? (1 mark)

- The UKSC has defined the limitations on the rights and privileges of MPs, limiting the powers of the legislature and its representatives.

⁸ http://i.telegraph.co.uk/multimedia/archive/01488/expenses_460_1488724c.jpg_31/05/2013 (Picture)

Her Majesty's Treasury (Respondent) v Mohammed Jabar Ahmed and others (FC)



(Appellants); Her Majesty's Treasury (Respondent) v Mohammed al-Ghabra (FC) (Appellant); R (on the application of Hani El Sayed Sabaei Youssef) (Respondent) v Her Majesty's Treasury (Appellant)

⁹

The treasury froze the money and all assets of three suspected terrorists who had not been officially tried or charged. The suspected terrorists appealed to the UK Supreme Court claiming the Treasury had gone beyond its powers as they did not have Parliamentary legislative approval to freeze suspected terrorists' assets. The UKSC judgment upheld the appeal stating the treasury needed legislative approval through an act of Parliament to be able to take such extreme measures.

15) How does the Terrorist Assets case demonstrate a challenge to the executive? (1 mark)

- The UKSC has reaffirmed the principle that there are some actions Parliament must approve and which cannot be undertaken by executive action alone.

HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department

The Home Office refused the refugee application of two homosexual asylum seekers, one from Cameroon in Africa and one from Iran. The asylum seekers appealed to the UKSC on human rights grounds. They argued that they would be persecuted because of their sexuality if they were sent back to their



⁹

http://i.dailymail.co.uk/i/pix/2009/09/08/article-1211827-063C425B000005DC-350_233x497.jpg
31/05/2013 (Picture)

home country and should not be made to conceal it. The UKSC upheld their appeal.¹⁰

16) How does the gay asylum seekers case challenge the executive? (1 mark)

- The UKSC has defined lawful criteria for asylum seekers against the exercise of power by the Home Office (part of the executive).

17) Do you think the move towards a more explicit separation of powers in the United Kingdom has gone far enough? Please explain your answer (4 marks)

¹⁰

http://wp.patheos.com.s3.amazonaws.com/blogs/altmuslim/files/2013/01/holding_hands2.jpg

31/05/2013 (Picture)