## Optimize Public Law, Podcast 3: Separation of Powers - Transcript

This is a podcast which accompanies *[Optimize] Public Law* by Ursula Smartt.

In the previous podcasts we looked at the unwritten Constitution and the sources of law which make up the British Constitution. One of the main subjects of discussion in your coursework or part of the public law examination tends to be the separation of powers. One of the great political thinkers and philosophers of the Age of Enlightenment (a cultural movement originating in France during the late 17th and early 18th centuries) was **Montesquieu**. Critical legal thinking is still based on his idea of the ideal or pure democratic state and the separation of powers.

What Montesquieu meant by this was that every democratic state has three sorts of power: the **Legislative** (also known as the **Legislature**) which makes laws; the **Executive** (or Government); and the **Judiciary** (or **Judicature**). Montesquieu wrote in his *Spirit of the Laws* in 1748 that pure separation of these three powers would be the basis for a Constitution of a true democratic state. Where this was *not* the case, and where the **Executive** was unchecked and randomly made laws at will, Montesquieu warned that this would lead towards a tyrannical state. Montesquieu's **pure separation** of powers refers to an ideal where the major institutions of a state should function independently from each other, and that no individual should have all of these powers that span all three offices.

[What then are the roles of these three powers? The **Executive** (or Government) can make peace or war, can send or receive embassies, establish public security and law enforcement, and provide against invasions in respect to things dependent on the law of nations. The **Legislative** (or Parliament)

makes or unmakes laws. And the **Judiciary** can punish criminals or determine disputes in civil law between individuals.]

Let us have a closer look at the American Constitution. In the United States, a presidential system, we see **Montesquieu's pure system** at work that is the strict separation of powers, guaranteed in codified (or written) Constitution. **The United States Constitution** adheres closely to the separation of powers. This means that all three branches (or powers) are systematically split between the **Executive** (the President), the **Legislative** (Congress) and the **Judiciary** (the US Supreme Court). The President of the United States cannot serve in Congress and serving Congressmen cannot be a Supreme Court Judge. Montesquieu's pure theory is then realised in American politics, in that no branch becomes more powerful than the other two. The American Constitution clearly states what the Executive, the Legislative and the Judiciary can or cannot do. Article I of the Constitution, for example, grants 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 as part of the Legislature. The US Supreme Court can declare the acts of both Congress and the President to be unconstitutional.

This is not clear and guaranteed in the British Constitution which, as you have now learnt, is unwritten or uncodified. In the UK the roles of the various powers have merged between parts of Government. In the United Kingdom and other common law jurisdictions, the theory of separation of powers is therefore less clear or – to use Montesquieu's words, less 'pure'. In the UK, the major offices and institutions have evolved to achieve a balance between the Crown (and more recently the Government) and Parliament. The system in the UK then resembles more of a **balance of powers** than a formal separation of

the three branches. Walter Bagehot in his major work *The English Constitution* of 1867, called the British system a 'fusion of powers'.

In Britain, the legislative aspect is **Parliament** where laws are made. The Executive or **Government** (the Cabinet) plans future legislation and formulates policy, and the **Judiciary** is made up of all the UK courts, the UK Supreme Court and the Judicial Committee of the Privy Council, who have the final say on legal issues. The **Prime Minister** is an active member of the Legislative (that is Parliament). He or she can vote for or against a bill in Parliament. And he is also a leading member of the Executive. Members of the Cabinet (that is Ministers with a portfolio) are also members of the Legislative who have the right, as Members of Parliament, to vote on issues. This means there is a merging of roles in the British constitutional model and the separation of powers are not as clearly separate as in the American case.

You may well be asked to discuss the advantages and disadvantages of the American versus the British model in a discursive essay. A typical exam question might be that of a US Congressman saying to a British MP: **'There is no such thing as separation of powers in the United Kingdom.'** You should then discuss this statement by comparing and contrasting the US and the UK constitutional set-ups in relation to the separation of powers. Chapter 5 of your textbook *Optimize Public Law* will help you with this. Take a look at the practice section – 'Putting it into practice' –where there are some helpful hints how to tackle and structure such a discursive question. Your main argument should centre on the flexibility of the modern constitutional model of the United Kingdom and the positive argument that an unwritten (or uncodified) Constitution can evolve and change in times of crisis or war adding to the freedom of the individual in a modern society. Supporters of the American

model however will support their true separation of powers, bolstered by the strictly codified US Constitution which provides Government with specific rights, and that no power can trespass onto power held by other parts of the political or judicial system. This is known as 'checks and balances'.

Which leads us on to another typical exam or coursework discussion point: what then are the checks and balances in the United Kingdom? How can Parliament effectively control the Executive? What have been the major constitutional changes over the past decade or so in the UK which has no written Constitution and is therefore in a constant state of flux?

You will gain high marks if you can explain that in the UK, the **Executive** and **Legislature** are closely intertwined. Make the point that the Prime Minister and the majority of his or her Ministers are Members of Parliament and sit in the House of Commons. Professor Vernon Bogdanor thinks that this is a positive development. In his *The Sovereignty of Parliament and the Rule of Law* of 2006, Bogdanor argues that the UK's integration of Executive and Legislature provide stability and efficiency in the operation of Government. The Prime Minister is then both, the Head of the Executive (that is the Government) and the Leader of the majority party in the Legislature. Parliament then delegates law-making powers to the Government through measures to draft secondary or delegated legislation in form of statutory instruments. You should make the point again, that the Legislature and Executive in Britain are not strictly separate powers as Montesquieu would have liked.

How then can the checks and balances be achieved to control the Executive? The Westminster Parliament can facilitate scrutiny by a number of procedures,

such as **Prime Minister's Question Time**, which is a powerful way for holding the Executive to account. This means Ministers have to answer weekly questions in Parliament. This is a public event and you are encouraged to go along to the Westminster Parliament which has free entry each day that the Parliament is in session. Question Time takes place for an hour, Monday to Thursday, and you can sit in the public gallery and observe each Government department answering questions according to a rota, called the **Order of Oral Questions**. The questions asked must relate to the responsibilities of the Government department concerned. **Question Time** provides an opportunity for checks and balances, for MPs and Members of the House of Lords, to question the Government Ministers about matters for which they are responsible. The Prime Minister answers questions from MPs in the Commons for half an hour every Wednesday from midday. You may have to queue a little longer for this event outside Parliament.

Then there a **Select Committees** which scrutinise the work of the Executive. Select Committees work in both Houses of Parliament. They check and report on areas ranging from the work of Government Departments to economic affairs. Some are in the form of public sittings which again you can attend. Some are televised. Once a Select Committee has written its findings up in a report it will require a response from the Government. Some Select Committees have a role that crosses departmental boundaries such as the **Public Accounts or Environmental Audit Committees**. Depending on the issue under consideration they can look at any or all of the Government departments. The Culture, Media and Sport Select Committee, for example looked at how Britain should prepare for the London 2012 Olympics. More recently there was discussion about the role of the BBC, and how the British press should be properly regulated.

There are five major **Lords Select Committees**: the European Union Committee; the Science and Technology Committee; the Communications Committee; the Constitution Committee; and the Economic Affairs Committee.

So, what happens when a party has a large majority in government (as was the case in 1997 when Labour won the General Election)? The crucial issue here is whether the **Government** (that is the Executive) can dominate **Parliament** (that is the Legislature). How can we be sure that proposed legislation is properly enacted and that there are sufficient procedures in place to ensure that proposals are sufficiently scrutinised and either endorsed or rejected by Parliament to avoid a dictatorship or tyranny?

The legislative branch of Government retains formal powers to dismiss executive officers. Ministers have to adhere to the Ministerial Code and the **House of Commons (Disqualification) Act 1975** created limits and rules on the number of salaried (Cabinet) Ministers sitting in the House of Commons. And the Convention of **Collective Ministerial Responsibility** established the accountability of Government to Parliament.

One good example is the parliamentary expenses scandal which was uncovered by the Daily Telegraph in 2009 under the **Freedom of Information Act 2000**. [In 2011, the **Public Administration Select Committee** examined the role and responsibilities of Ministers, following the Parliamentary expenses scandal in 2008.] You would do well if you researched into this scandal which would enhance your coursework in particular. Parliamentary irregularities and misappropriation of public funds by certain MPs led not only to a large number of resignations in 2009 but also to criminal convictions. Parliament then passed

the **Parliamentary Voting System and Constituencies Act 2011** which will cut the number of MPs in the House of Commons from 650 to 600 after the next General Election. The General Election of May 2010 resulted in a hung Parliament and a coalition Government, made up of Conservatives and Liberal Democrat MPs. The last formal coalition was the Wartime Government led by Winston Churchill between 1940 and 1945. The last coalition in peacetime was the Labour-Liberal-Conservative coalition headed initially by Ramsay MacDonald (Labour) and later Stanley Baldwin (Conservative) and Neville Chamberlain (Conservative) from 1931 to 1940.

One final topic which you will have to discuss is the independence of the judiciary in the UK. Is there true separation of the powers of the Legislature (that is Parliament) and the Judiciary [or Judicature]?

You should argue that the independence of the Judiciary manifests itself in many forms in the UK. For example, judges are prohibited from standing for election to Parliament under the **House of Commons (Disqualification) Act 1975**. Judges do not make law. Judges are expected to **interpret legislation** in line with the **intention of Parliament**. Judges are then responsible for the development of common law, also known as judge-made or case law. Judges in the higher courts have tenure for life with a present retirement age of 70. This then protects their independence, and a resolution of both Houses of Parliament is needed to remove a High Court judge from office, while judges at the lower levels can only be removed after disciplinary proceedings. Judges are also protected by immunity from legal action in relation to judicial functions and absolute privilege in court proceedings. The separation of powers means that in practice, citizens must be able to challenge the legitimacy of executive action before an **independent judiciary**.

Constitutionally, judges are subordinate to Parliament and may not challenge the validity of Acts of Parliament. You should cite the case of *Pickin v British Railways Board* [1974] here to support this point (a House of Lords case). Make the point strongly in a discursive essay that judges interpret legislation they do not make law. Or do they?

You will gain high marks if you can cite some learned opinion at this point, because constitutional lawyers don't agree. Lord Reid in his 1972 lecture 'The Judge as Lawmaker' said that while it was once thought almost indecent to suggest that judges make law, the notion that judges only declare the law is rather outdated. Lord Scarman disagreed. He argued in the case of *McLoughlin v O'Brian* (a House of Lords case of 1983) that the main objective of judges was the formulation of legal principles (or precedents), whereas policy-making was strictly the prerogative of Parliament.

When writing and composing an essay on the separation of powers, you do well by citing and discussing the *Jackson* case of 2005. It is important that you read this case in full and quote some of their Lordships' dicta in the case. The legal argument centred on the validity and application of the **Parliament Acts 1911 and 1949** which were then applied to the **Hunting Act 2004**. *Jackson* questioned the relationship between Parliamentary Sovereignty and the Rule of Law in a novel manner, suggesting there were limits to Parliamentary Sovereignty which put constitutional fundamentals at risk. Which will then bring you to the conclusion that there are indeed some elements of judicial law-making in the evolution of common law.

You have learnt that the Executive exercises the power of the state. But it is also the Executive, in the form of government departments, Ministers or local

government bodies, that is frequently being challenged in the administrative courts in form of Judicial Review (see Chapters 8 and 9 in Ursula Smartt's *Optimize Public Law* text).