What is Separation of Powers ?

The doctrine of separation of powers is a fundamental constitutional concept which provides that distinctions be made between the functions of the state and also the personnel responsible for the functions that deals respectively with the debating and making of legislations (legislature), the execution of power (executive) and also the interpretation of law and the adjudication of individual cases in accordance with the law provided by the Parliament (Judiciary)[1].

As famously opined by Lord Acton[2], "Powers tend to corrupt, and absolute power corrupts absolutely." Behind his quote, we comprehend the importance of separation of powers in a country and the severity of possible consequences if such doctrine is not complied with. The significance of such doctrine lies in the concept of constitutionalism which imposes restraints and limitations on government and all the organs under it. According to Montesquieu, if the executive and legislative functions are concentrated on a single body, the citizens would be in fear of tyrannical rule by the government through arbitrary misuse of powers. Without the doctrine of separation of powers, the country's liberty shall be at stake as there will be risks of it being ruled in a bureaucratic and tyrannical manner. Constitutionalism seeks to prevent such incident.

Importance of Separation of Powers[3]

The concept of separation of powers can act as a guideline for a country that is starting from scratch as to the allocation of executive, judicial and also legislative function in their institution. It is thought to be a template for the design of a constitutional system.

Moreover, by separating the powers and allocating them to the institution with the right capability, a country can be run efficiently.

As per Professor Eric Barendt, the doctrine of separation of powers acts as a safeguard against the citizens' liberty. The idea is that if all powers are concentrated on one body, it

[1] Eloise Elise & Edward Stone , Public Law (University of London 2018) pg 38

[2] Elizabeth Giussani , Constitutional and Administrative Law (1st Edn , Sweet & Maxwell 2008) pg 75

[3] Andrew Le Sueur , Maurice Sunkin , Jo Eric Khushal Murkens , Public Law (3rd Edn , Oxford University Press 2016) pg 132

would undoubtedly result in the abuse of powers which would jeopardize the liberty of citizens.

Overlaps

Baron Montesquieu in his book had advocated for the three arms of state to perform their tasks separately. But according to Colin Monroe, Montesquieu had not drawn a clear line as to the form of separation that should be taken or if there should be a 'complete separation of personnel' for different agencies [4] .Through subsequent interpretation of Montesquieu, it is worth noticing that Montesquieu did recognised that there should be overlapping in the form of check and balance between the three arms of state[5].

Is there separation of powers in the British constitution? If the meaning of separation is taken by it's purest sense,that is the total segregation of functions and personnel between the three arms of state with completely no overlaps, the answer would be 'no'. Separation of powers can be categorized under institutional and also personnel form.The former suggests that three functions should be carried out by three distinctive institutions and the latter stresses that an individual should not exercise more than one function.

It is very obvious that the United Kingdom does not conform with all these requirements as there are obvious overlaps between the three arms of state and separation is less distinct. Contrast could be made between the Parliamentary system practiced by the United Kingdom and also the Presidential system adopted by countries such as the United States.The United States shows a more distinct separation of powers compared to the United Kingdom as their executive and their legislature are separated in clear manner.One obvious characteristic of the presidential system in the United States is that the election of president and the House of Representatives are carried out in different terms[6].

[4] Colin Monroe , Studies in Constitutional Law (1987) , pg191

[5] n2 pg 77

[6] n3 pg132-34

Legislature and Judiciary

MPs and peers are ineligible to serve as full-time members of the judiciary[7] and vice-versa,but there are no prohibitions set on MPs or peers' eligibility on holding part-time judicial appointments.

Judges could be seen performing legislative function as the system of common law not only allows for the judges to adjudicate on cases but also to develop and change the law[8]. But on certain occasions, judges has been accused of creating new law instead of their assigned role of developing the law as seen in *Shaw* v *DPP*[9]. Human Rights Act (hereinafter written as HRA) has also given judges a wider discretion and has boosted the capability of judges for legal innovations. S3(1) of the HRA requires the court to interpret UK legislation so that is compatible with the Convention rights and if a court is satisfied that a provision is incompatible with a Convention rights, the courts are given the power to make declaration of incompatibility[10], such could be seen in the Anti-Terrorism, Crime and Secretary Act 2001. Concerns arises where such discretion granted under HRA would lead to judges taking 'interpretation' to downright, the changing of legislation[11], judges encroaching into the realms of legislature would be against Parliamentary sovereignty.

Until 2009 , senior judges were entitled to sit in the Parliament to participate on the Parliamentary debates and voting . This was in breach of Art6 of European Convention of Human Rights which prohibit judges who sat in the legislative process of a legislation is prohibited from adjudicating on the same issue relating to the legislation. This is so because the impartiality of judges was doubted as they had expressed their interests and views on the subject matter regarding the particular legislation and this raised the question as to the possibility of biasness[12]. Such problems had came to an end when the 'Judicial role' of the House of Lords have been transferred to the UK Supreme Court through the Constitutional

[7] House of Commons Disqualification Act 1975 , Sch. 1 ; Constitutional Reform Act 2005 , s. 137.

[8] R v R [1991] UKHL 12

[9] [1962] AC 220

[10] Human Rights Act 1998 , s. 4(2) .

[11] R v A (No.2) [2001] UKHL 25

[12] Jackson v Attorney General [2005] UKHL 56.

Reform Act 2005 and judges of Supreme Court were statutorily disqualified from participating in Parliamentary work.

The judiciary respects Parliamentary supremacy and usually they refuse to adjudicate on cases regarding things said or done during Parliamentary sessions. This is known as Parliamentary privilege. It ensures the freedom of the MPs so that they are allowed to speak openly about issues without the fear of it being used against them in court proceedings[13]. Exception is shown in the use of Hansard[14] as a form of evidence in court proceedings, this would effect the freedom of speech of MPs in the House of Lords. the House of Lords justified the use of Hansard by stating that whatever was said in the Parliament was not questioned , they merely sought to give effect to the intention of Parliament .

The sub judice rule[15] prohibits the MPs from discussing and making comments regarding cases awaiting to be heard in Parliament as such comments from the MPs would interfere with the administration to justice in court. MPs are also required to be mindful of their criticisms regarding judges or judgments as it will effect public confidence towards the judiciary.

Executive and Legislature

In the United Kingdom, there is no complete separation between the legislature and executive. Contradictorily, members of Parliament consist of government ministers. It is described as "a complete fusion of executive and legislative power[16]". At first glance, this might seem to go against the doctrine of separation of powers, but it is a way of check and balance. By placing ministers in the Parliament, they could be hold accountable to the Parliament through methods such as Parliamentary question time. The legislature is also empowered to pass a a vote of no confidence towards the prime minister of the day. In the US , there's no such procedure but in extreme cases, provision exists for the impeachment of the President.

[13] Bill of Rights 1689 , Art. 9

[14] Explanations of ministers regarding bills that were introduced to the Parliament and what were they intending to achieve.

[15] n3 pg 147

[16] Walter Bagehot , The English Constitution (1963) pg65

The effectiveness of check and balance is doubted as the 'payroll vote' makes it difficult for the ministers to be hold accountable as most of the MPs in House of Commons consists of members of the ruling party. Ministers who intends to vote against the government are obliged to first resign from their respective offices. This seems like a guaranteed support for the government during Parliamentary vote. Surprisingly during the March 2019[17] House of Commons vote regarding BREXIT, cabinet MPs who chose to vote against the government did not faced public questioning from the Prime Minister, Theresa May. It is argued that there are risks of ministers dominating Parliamentary work by making both primary and delegated legislation and also influence legislative process with political agendas. Moreover, the Parliament with it's largely reactive nature scrutinize and subsequently approve or reject bills from the government. This resulted in few opportunities for private members bill to even reach the statute book[18].

Some legal constraint are placed upon the executive to curb the dilemma above. Total numbers of MPs who can serve as ministers are restricted and most holders of public offices such as the police officers and armed forces are disqualified from being MPs[19].

Judiaciary and Executive

'The casual British attitude of separation of powers' , as per Robert Stevens[20] could be seen in the former power of the Home secretary to set sentence that is to be served by the Juvenile Killers[21]. This sentencing function is seen to be performed by the Home secretary, which is the executive. Such placement of power was criticized as the Home Secretary is a politician that is seeking re-election, would he or she be able to set aside the impact on government popularity and set a fair and impartial sentence for the offenders ? Such were illustrated in the case of *R* v *State for Home Department ex parte Venables and Thompson*[22].

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[17] Government's Brexit deal defeated again in 'meaningful vote'
< https://www.parliament.uk/business/news/2019/march/key-brexit-vote-as-meaningful-vote-returns-to-the-commons/ > accessed on 16 April 2019

[18] n3 pg 148

[19] House of Commons Disqualification Act 1975 , s.1 .

[20] Helen Fenwick , Gavin Phillipson , Public Law and Human Rights (3rd Edn , Routledge 2011) pg 137

[21] Children and Young Person's Act 1933 , s.53 (1).

[22] [1998] AC 407

The Home Secretary in this case had bowed to media pressure, acted unlawfully during the setting of tariff of a child killer. The Home Secretary, when performing such judicial function should not be affected by external factors and should base their decisions solely on the law and also the recommendations made by the trial judges and the Lord Chancellor.

The power of Home Secretary to set tariff was challenged[23] as it was deemed to have failed to comply with Art 6(1) of the European Conventions of Human Rights which states that everyone is 'entitled to a fair and public hearing' by 'independent and impartial tribunal established by court'. The decision to set tariff was not by an impartial tribunal but by the Home Secretary, which is clearly not independent of the executive. This ultimately resulted in the function of setting tariffs for juvenile killers to be passed to the Lord Chief Justice, which is part of the judiciary[24]. Albeit this, the Home Secretary still retained the power to set tariff for adult life prisoners. This had lead to controversy and such power was subsequently challenged[25].

Lord Chancellor

Historically, the role of Lord Chancellor has been known as a controversial position in the UK Constitution. This is because the Lord Chancellor used to occupy crucial positions in three main organs of the state. He was entitled to sit in the Judicial Committee of the House of Lords; He was an important Cabinet minister and also acted as the Speaker of the House of Lords. The Lord Chancellor also had the power to appoint judges and assign which judges to adjudicate on which cases. He was as often seen as the living embodiment of the denial of separation of powers. Such blatant overlaps of powers vested upon the Lord Chancellor was criticized as it endangered judicial independence, breached the basic constitutional principle and not to mention, was deemed out of step with the rest of European nations.

Though controversial, Lord Woolf (then Lord Chief Justice) had commented that such position of the Lord Chancellor enhanced the functioning of political system and judicial independence was strengthen. As he was a member of the Cabinet, the Lord Chancellor would advocate on behalf of the courts and the justice system by explaining to the ministers

[23] T v United Kingdom; V v United Kingdom (2002) 30 EHRR 121

[24] n19 pg 138

[25] R(On the application of Anderson) v Secretary of State for Home Department (2002) 3 WLR 1800

regarding the proper significance of a decision made by the judiciary. He was able to ensure that the courts were sufficiently resourced. Moreover, he could also explain to the judiciary as to the realities of the political arena and also the straining of resources for the courts[26].But by the late 1990s, the support for such overlaps of the power of Lord Chancellor declined significantly.

Constitutional Reform Act 2005(Hereinafter referred to as CRA05)

CRA05 is the Parliament's decision on carrying out institutional reforms which sought to promote constitutional principle over pragmatism. In other words, to provide for a greater degree of separation of powers in the UK. The nature of reform with the elevation of principle above pragmatism caught many by surprise as the UK had always been adhered to the traditional value of 'what works' ascribed in the British constitution. The final straw which have cemented the need for institutional reform in the UK seemed to have resulted from the decision of European Court of Human Rights[27]. The decision in *McGonnell* had raised doubts on the UK's Lord Chancellor's role as a judge in the House of Lords and also simultaneously his involvement in the legislative process. If the decision is followed by the UK courts, it would have prevented the Lord Chancellor from adjudicating on cases which involves legislations passed or amended where he had active participation in.

In 2003, the British government had proposed for the abolition of the post of Lord Chancellor abruptly, without any consultation. Such proposal was met with overwhelming amount of oppositions from inside and outside of Parliament[28]. The judiciary were especially alarmed as they were not consulted for such major change. Lord Woolf, the then Chief Justice) had also expressed his concerns regarding the abolition as it would have created tremendous threat to judicial independence, seeing that the government had not came up with any constitutional safeguards to replace the role of Lord Chancellor as the protector of judicial independence[29].

[26] n19 pg 142

[27] McGonnell v United Kingdom (2000) 30 EHRR 289

[28] Neil Parpworth , Constitutional and Administrative Law (5th edn, Oxford University Press 2008) pg 22

[29] n19 pg 146-47

After heated debates, the government was forced to withdraw from it's original plan of abolition of the post of Lord Chancellor. Though in a much reduced form, the title and office of the Lord Chancellor remains. Overlapping roles had been removed so that Lord Chancellor had ceased to be the speaker of House of Lords, his role as head of judiciary had been passed to Lord Chief Justice. The responsibilities of the Lord Chancellor's department were transferred to the Department of Constitutional affairs and subsequently to the new Ministry of Justice.

Prior to CRA05, it is the behest of the Lord Chancellor and Prime Minister to appoint judges. For senior positions, the Lord Chancellor, in a confidential manner, would consult existing judges at this level to the merits of potential candidates for promotions. This system has been ironically known as the 'secret sounding'. It was severely criticized for the lack of clarity and transparency in the process of selection and it would only limit the membership of senior judicial posts to the small elite of senior barristers which overwhelmingly consists of white, male and upper-class candidates. The role of appointing judges is now transferred to the Judicial Appointment Commission which was brought about under CRA05 and formally launched on April 2006.

Overlaps with Malaysia

No matter the country, if would be very difficult for a complete separation of powers to take place, take for example Malaysia and the infamous instance of the 1988 Judicial Crisis. The judiciary was very determined to defend the liberties of citizens against arbitrary actions by the Executive. The then Prime Minister was unhappy with several decisions made in the courts as it restricted the powers of the executive. This had led to Tun Salleh Abas being removed from office and five Supreme court judges suspended. The executive sought to remove the inherent judicial power of the courts stated the constitution[30] through the Constitutional (Amendment) Bill 1988. This shows that the executive played a significant role in the law making in Parliament in Malaysia.

Sultan Azlan Shah had expressed his concern as to the power of the judiciary as the High courts seemed to have been stripped off their power of inherent jurisdiction and would

[30] The Federal Constitution of Malaysia , Article 121(1)

only have the judicial power provided by the Parliament. Such concerned was confirmed in *Public Prosecutor* v *Kok Wah Kuan*[31] where it was ruled that the judiciary may only exercise judicial powers that are stated under the federal law. As the judiciary's role is to ensure every organ of the state stays within the limits of law, the independence of the judiciary forms the basis of separation of powers. After 20 years, the Malaysian judiciary had finally restored their institution to their rightful position [32] .The question of conclusive determination of compensation by an accessor instead of a court was ruled to have violated Article121(1) of the Constitution. Although the judiciary did not expressly strike down the 1988 amendment, but it was clear that the judiciary had decided that their power is vested upon them in Article121(1) of the Constitution.

'Quis custodiet Ipsos custodes?', but who will watch the watchman? As mentioned above , the judiciary ensures all other organs conform within the power vested upon them in the constitution. But what if the impartiality of judges themselves were affected by political agendas or even worse, they were indulging in corrupted practices? Such circumstances was revealed recently by lawyer Haniff Khatri through the media where judges were working with government ministers to defraud the government. As revealed by the Court of Appeal judge Datuk Dr Hamid Sultan Abu Backer, there were also serious political interference in the judiciary in cases such as the sodomy case of Datuk Seri Anwar Ibrahim v Public Prosecutor[33] and also Karpal Singh's sedition case, leading to dubious decisions. This illustrates how rampant involvement of the executive without proper control would not only lead to violations of the doctrine of separation of powers, but also to catastrophic outcomes[34].

[31] [2008] 1 MLJ 1

[32] Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another [2017]

[33] [2010] 2 MLJ 312

[34] About Time to Reset Our Judiciary < https://www.thestar.com.my/news/nation/2019/02/17/about-time-to-reset-our-judiciary-if-the-government-does-not-take-action-against-top-civil-servants/ > 20th April 2019

Conclusion

If a state only demonstrates the doctrine of separation of powers if it is completely segregated in terms on functions and personnel, as seen in the United States, then it is clear that the UK does not have a separation of powers. In my humble opinion, it is important that we should not focus excessively on the forms of separation of powers, but the ways in which it operates in practice. It is also crucial to highlight the needs for the institutions to work together[35] as a whole. In the UK, although there exist overlaps in both forms of functions and personnel, but there is a system of strong check and balances. Though not perfect in it's operation, had allowed for the UK constitution to serve the country tremendously well for more than 300 years. (3096 words)

[35] n3 pg126

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