

‘Constructive relationships between the three arms of government—the executive, the legislature and the judiciary—are essential to the effective maintenance of the constitution and the rule of law. In recent years, the character of these relationships has changed significantly, both because of changes in governance and because of wider societal change’ (UK Government, 2007).

Reflecting on the above statement, assess whether the relationship between the Legislature and the Executive adheres to the separation of powers theory.

This essay will be examining the United Kingdom's connection with the theory of separation of powers. The essay will discuss how while the judiciary follows said principle the executive and legislative branches are connected. Also, it will be looking at what the separation of powers theory is and what it is meant to prevent. The powers of parliament, checks and balance already in place and a case that shows a negative aspect.

The separation of powers theory identifies 3 basic elements, the executive, judiciary and legislative. In brief the executive is the government, the judiciary is the judges, and the legislative is parliament. The idea is if each one of these roles was put together it would lead to tyranny. This is due to the power each body holds. The idea is that no single body in the state should be able to govern the country, create laws and judge whether someone is guilty of said law. The executive has the power to carry law into effect or superintend its enforcement. The legislative has the power to discuss and bring force to law. The judiciary has the power to judge and to apply the law in particular cases. As is seen within the question itself the UK is rather different compared to other governmental bodies such as the United States of America. For the UK the separation between the Legislative and executive is blurry.

As seen above the judiciary is not involved in the blurry separation. This is due to a preserved effort through legislation. Legislation such as the (*constitutional reform act 2005*)¹ which introduced the supreme court as the arbiters appeals. Regarding the connection between the executive and judiciary, the fundamental principle is that those who enforce the punishments should be independent of political process, however, there has been odd cases such as (*Liversidge v Anderson 1942*)². Again, under Section 3 (*Constitutional Reform Act 2005*)³ the Lord Chancellor required together with other government ministers, to preserve continued independence of the judiciary. Regarding appointment to the judiciary part 4 of the (*Constitutional Reform Act 2005*)⁴ established an independent Judicial Appointments and

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- ¹ Constitutional Reform act 2005. Available at: <https://www.legislation.gov.uk/ukpga/2005/4/contents> (Accessed 1 March 2022)

² *Liversidge v Anderson* (1942) House of Lords A.C. 206:
<https://uk.westlaw.com/Document/IE1D48630E42711DA8FC2A0F0355337E9/View/FullText.html>

- ³ Constitutional Reform act 2005, Section 3. Available at: <https://www.legislation.gov.uk/ukpga/2005/4/section/3> (Accessed 1 March 2022)
- ⁴ Constitutional Reform act 2005, Section 4. Available at: <https://www.legislation.gov.uk/ukpga/2005/4/part/4> (Accessed 1 March 2022)

conduct ombudsman. Both the (*Act of settlement* 1701)⁵ and (*senior Courts Act* 1981)⁶ preserve further independence by ensuring that judges cannot be dismissed because they give judgements with which judgements of day disagree. As shown here there are many laws and regulations in place to prevent absorption of the judiciary into the weird combination of legislative and executive. One Scholar Joseph Raz (1979) *The authority of law: essays on law and morality*⁷ in his points of law made the statement that 'there should be no political pressure on judges. MPs can criticise judgements, but they cannot personally criticise judges. To ensure the legality of action and equality before law.' this was an excerpt from his fourth point of law and preaches the need for separation of judiciary from executive regarding criticism. One interesting quote regarding the judiciary and the idea of separation of powers comes from Barendt (1998) *Judging the Media: Impartiality and Broadcasting*⁸. It is regarding the idea that out of the three the judiciary is the least dangerous. The quote is 'There is no liberty, if the judicial power be not separated from legislative and executive'. This means that the judiciary does not in and of itself have the ability to strip away people's rights. They are only able to enact laws given to them by the legislative. An example being that the courts can't enforce their judgements without government support e.g., bailiffs.

What is Parliamentary sovereignty? The initial idea is that the government should be subject to the law. However, in the UK our government is connected to the creation of it. Our parliament has the ability to pass whatever law they want with one major caveat; the people need to be receptive to it. An example of this can be found due to the poll tax riots (BBC, 2016)⁹. Due to the widespread negative reaction to the new tax the proposed bill was promptly rescinded. However, it should not be forgotten that parliament has supreme law-making powers in UK, it can amend, pass or repeal any law it chooses. Two examples of this are the (*continental shelf act* 1964)¹⁰ and the (*war damage act* 1964)¹¹.

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- ⁵ Act of settlement 1701. Available at: [https://www.legislation.gov.uk/ukpga/1981/54/contents](https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/parliamentary-collections/act-of-settlement/#:~:text=The%20Act%20of%20Settlement%20was,Act%20was%20extended%20to%20Scotland. (Accessed 1 March 2021)• ⁶ Senior Courts Act 1981. Available at: <a href=) (Accessed 1 March 2022)
 - ⁷ Raz, J. (1979) *The authority of law: essays on law and morality*. Oxford: Clarendon Press.
 - ⁸ Barendt, E. (1998) 'Judging the Media: Impartiality and Broadcasting', *The Political quarterly* (London. 1930), 69(B), pp. 108–116. doi:10.1111/1467-923X.00195.

⁹ Nick Higham (2016) 'National Archives: Thatcher's poll tax miscalculation' *BBC news*. Available at: <https://www.bbc.co.uk/news/uk-38382416>

¹⁰ <https://www.legislation.gov.uk/ukpga/1964/29/introduction>

- ¹¹ War damage Act 1965. Available at: <https://www.legislation.gov.uk/ukpga/1965/18> (Accessed 1 March 2022)

The legislative and executive have an odd connection within the UK, this section will be looking at a document that discusses this topic and the separation theory in general. The document is Richard Benwell and Oonagh Gay (2011) *The separation of power*¹². To begin this makes the claim that unlike the United States of America the United Kingdom has more of a balance of power than a firm separation. As previously stated, the executive and legislative are entwined. This integration is not looked at negatively in fact it is looked at as a positive part of the UK system. The system is said to provide stability and efficiency in everyday life. One such description of the system is 'a system that intentionally promotes efficiency over abstract concerns about tyranny'. An example of this self-proclaimed efficiency is the fact that usually the MP is head of the executive branch and has a majority over the legislation. Due to this Parliament may delegate law making powers to the government through powers to draft secondary or delegated legislation. The streamlined nature of this comes from the aspect that it liberates parliament from scrutinising little technical details, while maintaining safeguards of parliamentary approval. Following this is another benefit which is question time, this is a very positive aspect as it places ministers in a situation that forces them to answer to the legislative. While speaking of their connection there is in fact some safeguards to prevent the executive fully controlling the legislative, that falls to the (*house of commons disqualification act 1975*)¹³. This limits the number of salaried ministers allowed to sit within the commons. The final part is that the ministerial responsibility establishes accountability of government to parliament. One more recent change that has affected control of the executive over the legislative is the allocation of times to debate. This is through the Backbench committee which was formed in 2010 to allow the legislature more operational independence as prior to this the executive had complete control. The idea behind this formation was that it would give MPs more control and ownership of the parliamentary agenda allowing issues relevant to the public to be debated¹⁴.

An interesting example of a situation that shows a negative aspect of the UK system can be found in the previously mentioned ('*Liversidge v Anderson 1942*)¹⁵ case. The background of this case is that during the war period the then home secretary used emergency powers to detain someone he had a reasonable cause to believe had hostile associations. After the man was detained, he was swiftly imprisoned, however the home secretary gave no reason as to why. Of course, the man appealed but on appeal due to how the separation of powers worked it placed the judges in a difficult situation on whether they could investigate the objective basis for a reasonable cause. The difficulty stemmed from

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- ¹² Richard Benwell and Oonagh Gay (2011) *The separation of powers*. Available at: <https://researchbriefings.files.parliament.uk/documents/SN06053/SN06053.pdf> (Accessed 1 March 2022)
 - ¹³ House of commons disqualification Act 1975. Available at: <https://www.legislation.gov.uk/ukpga/1975/24/contents> (Accessed 1 March 2022)

¹⁴ House of Commons Reform Committee, First Report of Session 2008–09, Rebuilding the House, HC 1117, November 2009, section 181

¹⁵ *Liversidge v Anderson* (1942) House of Lords A.C. 206: <https://uk.westlaw.com/Document/IE1D48630E42711DA8FC2A0F0355337E9/View/FullText.html>

where they supposed to look at the home secretary's actions as a reasonable man or per the social standard of a home secretary. The appeal was dismissed in the end and Lord Macmillan at the time believed that if the home secretary had acted in good faith, he need not disclose the basis for his decision nor were his actions justiciable in a court of law. Lord Atkins retorted that with 'a strained construction put on words with the effect of giving an uncontrolled power of imprisonment to the minister'. In short Macmillan stated that the judiciary should have no reason to question the minister if he is acting in good faith and that nothing the home secretary has done should warrant questioning. Whereas Atkin believes that following that line of logic gives too much leeway that could be used to affect democracy. As no man should be allowed to imprison people without explanation. Since this event Lord Atkins descent has been preferably used in law making and appeals. In a January 2010 ruling the Supreme Court occasioned the (*terrorist asset Freezing act* 2010)¹⁶ which drew upon Atkins descent.

What are the checks and balances in place to prevent the separation of powers theory? To begin with part 4 of the (*Constitutional Reform Act* 2005)¹⁷. This effects the way in which judges are appointed by forming a separate body to confirm whether applicants are fit for the job. Next is the (*act of settlement* 1701)¹⁸. This is the act that officially gave judiciary independence. This also established high court judges and Lord justices of appeal. Regarding checks and balances this also added formal mechanisms that prevented judges from being immediately being removed.

In conclusion I believe that the executive and legislative within the United Kingdom don't adhere to the separation of powers theory. As previously stated within this essay the system within the UK is more akin to a bending of powers and thus far it adheres to be rather affective. After reading what the separation of powers is and how it works within the UK it does not fully apply, however with the current checks and balances and new ones such as the relatively new backbench committee it is clear to see that while the executive and legislative don't follow the standard procedure there is at least a consorted effort to keep them separate enough so that no single one completely absorbs the other.

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- ¹⁶Terrorist asset-freezing etc. Act 2010. Available at:<https://www.legislation.gov.uk/ukpga/2010/38/contents> (Accessed 1 March 2022)
 - ¹⁷ Constitutional Reform act 2005, Section 4. Available at: <https://www.legislation.gov.uk/ukpga/2005/4/part/4> (Accessed 1 March 2022)
 - ¹⁸ Act of settlement 1701. Available at: <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/collections1/parliamentary-collections/act-of-settlement/#:~:text=The%20Act%20of%20Settlement%20was,Act%20was%20extended%20to%20Scotlan>d. (Accessed 1 March 2021)

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