



The Separation of Powers

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“Separation of powers” refers to the idea that the major institutions of state should be functionally independent and that no individual should have powers that span these offices. The principal institutions are usually taken to be the executive, the legislature and the judiciary.

In early accounts, such as Montesquieu’s *The Spirit of the Laws*, the separation of powers is intended to guard against tyranny and preserve liberty. It was held that the major institutions should be divided and dependent upon each other so that one power would not be able to exceed that of the other two. Today, the separation of powers is more often suggested as a way to foster a system of checks and balances necessary for good government.

In the United States and other presidential system, a strict separation is often a fundamental constitutional principle. In the United Kingdom and other common law jurisdictions, however, the theory of separation has enjoyed much less prominence. In the UK, the major offices and institutions have evolved to achieve balance between the Crown (and more recently the Government) and Parliament. The system resembles a balance of powers more than a formal separation of the three branches, or what Walter Bagehot called a “fusion of powers” in *The English Constitution*.

In the last decade the concept of a separation of powers has been evident in a number of policy initiatives. The previous Government suggested that, in its reforms of the judiciary in the *Constitutional Reform Act 2005*, it was moving toward a more formal separation of powers. The creation of an independent Supreme Court and dismantling of the many-faceted office of Lord Chancellor have unpicked some aspects of the fusion of powers. Matters have also been complicated by the *Human Rights Act 1998* and its requirement for judges to consider the European Convention on Human Rights and the decisions of the European Court of Human Rights in Strasbourg. More recently, the proposed change in the number of Members of Parliament, use of parliamentary privilege and Members’ involvement in super injunctions have again raised issues of the interaction of the institutions of state.

This Standard Note considers the extent to which 1) the executive and legislature; 2) the executive and judiciary; and 3) the judiciary and legislature now overlap and interact.

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1 Introduction

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

One of the earliest and clearest statements of the separation of powers was given by 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.¹

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. Instead, the independent action of the separate institutions should create a system of checks and balances between them.

The United States Constitution adheres closely to the separation of powers. Article I 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 Supreme Court can declare the acts of both Congress and President to be unconstitutional.

In practice, however, many countries do not aim for a strict separation of powers, but opt for a compromise, where some functions are shared between the institutions of state. In the UK, the powers of Parliament, Government and courts are closely intertwined. In fact, the executive and legislature are seen as a “close union, [a] nearly complete fusion of the

¹ Montesquieu, Charles de Secondat, baron de. *The Spirit of Laws* (c.1748). Translated and edited by Anne Cohler, Basia Miller, Harold Stone. (New York: Cambridge University Press, 1989)

executive and legislative powers,” which Walter Bagehot viewed as the “efficient secret of the English constitution”.²

Globally, the separation of powers has enjoyed very different degrees of implementation. Parliamentary systems of government have usually united legislature and executive for the sake of expediency.³ By contrast, presidential systems tend to be strictly separated.

Recently, however, the question of the separation of powers has been given new relevance in the UK by the question of constitutional reform and by the new constitutional questions, largely arising from the implementation of European laws such as the Human Rights Act 1998. Professor Vernon Bogdanor has predicted that “issues which, in the past, were decided by ministers accountable to Parliament will now come to be decided by the courts”.⁴

This Standard Note sets out the theory of the separation of powers and examines its relevance for questions of constitutional reform in the United Kingdom.

2 The institutions of state

Typically, the separation of powers refers to Montequieu’s version of the three main institutions of state, though this is often complicated by different layers of authority, such as the supranational Commission, Council, Parliament and Courts of the European Union.

In the UK, the executive comprises the Crown and the Government, including the Prime Minister and Cabinet ministers. The executive formulates and implements policy. 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. Senior judicial appointments are made by the Crown.

2.1 Separation of executive and legislature

In the UK, and other common law jurisdictions, the executive and legislature are closely entwined. The Prime Minister and a majority of his or her ministers are Members of Parliament and sit in the House of Commons. The executive is therefore present at the heart of Parliament.

By contrast, in the USA, the President may not be a member of the legislature (Congress), and is elected separately from congressional elections. This may result in the President being a member of a different political party from the majority of members of Congress.

The UK’s integration of executive and legislature is said to provide stability and efficiency in the operation of government. It has been described as “a system that intentionally promotes efficiency over abstract concerns about tyranny”.⁵ For example, the Prime Minister is usually both head of the executive branch and leader of the majority party in the legislature, which

² Bagehot, *The English Constitution*, 1867, p 67–68

³ Ronald J Krotoszynski, ‘The separation of legislative and executive powers’ in Tom Ginsburg, Rosalind Dixon (eds) *Comparative Constitutional Law*, Cheltenham: Edward Elgar, 2011, p 234

⁴ Professor Vernon Bogdanor, ‘Parliament and the Judiciary: The Problem of Accountability’, speech to the UK Public Administration Consortium, 9 February 2006. See more generally Vernon Bogdanor *the New British Constitution 2009*

⁵ Ronald J Krotoszynski, ‘The separation of legislative and executive powers’ in Tom Ginsburg, Rosalind Dixon (eds) *Comparative Constitutional Law*, Cheltenham: Edward Elgar, 2011, p 248

gives the executive branch much more freedom of action than a president usually enjoys in a presidential system of government.

Additionally, Parliament may delegate law-making powers to the Government through powers to draft secondary or delegated legislation. This can liberate Parliament from the need to scrutinise small technical details, while maintaining the safeguard of Parliamentary approval.

In this way, in the UK legislature and executive are far from separate powers. On the other hand, the executive presence in Parliament may actually facilitate scrutiny provided that the necessary procedures are in place. For example, Question Time can be a powerful procedure for holding the executive to account, throwing ministers straight into the lion's den of the legislature.

The former Prime Minister, Gordon Brown, set out some of the arguments for the efficiency of a mixed system:

My hon. Friend is proposing the American constitution for Britain. He knows the deadlock that often happens with the American constitution when Congress, the Senate and the President cannot agree on what needs to be done. If he looks back to what has happened over the past few months, he will see that we were able to persuade Parliament to put our banking reforms through and were able to finance our banks so that we could rescue them, whereas it took the Americans weeks and months to get those provisions through their legislature as a result of the issues that arise from the separation of powers.⁶

Where a government has a large majority of seats in the Commons, the crucial issue is whether the government can dominate Parliament and ensure that its proposed legislation is enacted, or whether there are sufficient procedures in place to ensure that proposals are sufficiently scrutinised and either endorsed or rejected by Parliament.

In order to prevent the executive from controlling Parliament the *House of Commons (Disqualification) Act 1975* created limits on the number of salaried ministers who sit in the Commons. Additionally, the legislative branch of government retains the formal power to dismiss executive officers from office. The convention of ministerial responsibility establishes the accountability of government to Parliament.

Following the decision to cut the number of MPs in the House of Commons from 650 to 600, enacted in the *Parliamentary Voting System and Constituencies Act 2011*, the Public Administration Select Committee examined the role and responsibilities of ministers to see if there was scope for reductions there too. About 20% of MPs are currently on the "payroll vote" as ministers or their Parliamentary aides and are obliged to vote with the Government or resign their position. If this number remains static at the same time as MPs are cut, it could effectively increase the payroll vote, further strengthening the Executive relative to Parliament.⁷ Section 14 of the *Parliamentary Voting System and Constituencies Act 2011* requires a review to be established to examine the effects of the reduction in the number of MPs after the next general election, expected to be in 2015.⁸

⁶ HC Deb 10 June 2009 : Column 808

⁷ Public Administration Committee, Seventh Report, *Smaller government: what do Ministers do?*, HC 530, March 2011

⁸ For further information, see [Library Standard Note 5929](#) *Constituency boundaries: the sixth general review*

Recent changes

One of the most important aspects of the executive's control over the legislature is the allocation of time for debates. The Government usually has almost complete control over the agenda of the legislature. The Backbench Business Committee was created in 2010 as a way of granting the legislature more operational independence from the executive. The Wright Committee believed that the Backbench Business Committee would give MPs more control and ownership of the Parliamentary agenda, make debates more relevant for the public and strengthen the scrutiny role of Select Committees, which would be able to apply for time on the floor of the House through the Backbench Business Committee.⁹ The Coalition Government's Programme for Government committed the Government to introducing a Business Committee for all forms of business by the third year of Government.¹⁰

2.2 Legislature and judiciary

The second element of the separation of powers is separation between legislature and judiciary. In the UK, judges are prohibited from standing for election to Parliament under the *House of Commons (Disqualification) Act 1975*. Judges are expected to interpret legislation in line with the intention of Parliament and are also responsible for the development of the common law (judge-made law).

Judges in the higher courts have life tenure, which protects their independence, and a resolution of both Houses is needed to remove a High Court judge from office, while judges at the lower levels can only be removed after disciplinary proceedings.¹¹ Judges are also protected by immunity from legal action in relation to their judicial functions and absolute privilege in relation to court proceedings.¹²

Lord Phillips of Worth Maltravers, President of the UK Supreme Court, explained that:

The citizen must be able to challenge the legitimacy of executive action before an independent judiciary. Because it is the executive that exercises the power of the State and because it is the executive, in one form or another, that is the most frequent litigator in the courts, it is from executive pressure or influence that judges require particularly to be protected.¹³

Constitutionally, judges are subordinate to Parliament and may not challenge the validity of Acts of Parliament.¹⁴ However, there remains a some leeway for judges to interpret statute and this raises the question of whether the judges are able to "make law".

There is an element of judicial law-making in the evolution of common law.¹⁵ In *Magor and St. Mellons Rural District Council v Newport Corporation (1952)* the House of Lords rejected the approach of Lord Denning who had stated that, where gaps were apparent in legislation, the courts should fill those gaps. Lord Simonds commented that this amounted to a "naked

⁹ House of Commons Reform Committee, First Report of Session 2008–09, *Rebuilding the House*, HC 1117, November 2009, section 181

¹⁰ [The Coalition: Our Programme for Government](#) May 2011

¹¹ Lord Phillips of Worth Maltravers, 'Judicial independence and accountability: a view from the Supreme Court', Gustave Tuck Lecture, 8 February 2011, pp 6–7

¹² See, for example, *R (on the application of Morgan Grenfell & Co.) v Special Commissioner of Income Tax* [2003]

¹³ Lord Phillips of Worth Maltravers, 'Judicial independence and accountability: a view from the Supreme Court', Gustave Tuck Lecture, 8 February 2011

¹⁴ See *Pickin v British Railways Board* [1974] AC 765

¹⁵ Barnett, Hilaire, *Constitutional and Administrative Law*.

usurpation of the legislative function under the guise of interpretation”.¹⁶ Later, however, in his lecture, *The Judge as Lawmaker*, Lord Reid said that while it was once “thought almost indecent” to suggest that judges make law, the notions that judges only declare the law was outdated.¹⁷ Lord Scarman argued a middle course, suggesting that “the objective of judges is the formulation of principles; policy is the prerogative of Parliament”.¹⁸

The *Jackson* case in 2005 on the application of the Parliament Acts to the *Hunting Act 2004* prompted obita (remarks) from the House of Lords which questioned the relationship between parliamentary sovereignty and the rule of law in a novel manner, suggesting that there were limits to sovereignty where constitutional fundamentals were at risk.¹⁹

The cooperation between judiciary and legislature has been described as a “constitutional partnership” as Parliament may give tacit approval to judge-made law by not interfering with it. Lord Woolf, for example, has argued that “the crown’s relationship with the courts does not depend on coercion”, but on a state a trust.²⁰ Professor Bogdanor has argued, for example, that the Human Rights Act necessitated a compromise between two doctrines—the sovereignty of Parliament and the rule of law—and that the compromise “depends upon a sense of restraint on the part of both the judges and of Parliament”.²¹

A further complication has been the incorporation of European Community law into UK domestic law. In *Factortame (no 2)* Lord Bridge interpreted the *European Communities Act 1972* to mean that UK statute would not apply where it conflicted with European law, a significant departure from the principle of Parliamentary sovereignty.²² Further, under section 4 of the *Human Rights Act 1998*, a court can declare a statute to be incompatible with the European Convention on Human Rights and the Government is then obliged by the Convention to rectify the inconsistency.²³

Parliamentary privilege

Article 9 of the Bill of Rights 1689 set out the principle of privilege of Parliament: freedom of speech and debate. According to Lord Neuberger, Master of the Rolls, it is “an absolute privilege and is of the highest constitutional importance”.²⁴ Any attempt by the courts to contravene Parliamentary privilege would be unconstitutional. No court order could restrict or prohibit Parliamentary debate or proceedings.²⁵

On the other side of the coin, there is a convention that Members of Parliament will not criticise judicial decisions. This is complemented by the *sub judice* rule that guards against Parliamentary interference in cases currently before the courts.

¹⁶ Gwyn, W. B. *The meaning of the separation of powers* (The Hague: Martinus Nijhoff, 1965), p 9

¹⁷ Lord Reid, ‘The Judge as Lawmaker’ (1972) 12 *Journal of the Society of Public Teachers of Law* 22

¹⁸ McLoughlin v O’Brian [1983] 1 AC 410

¹⁹ Jackson v Her Majesty’s Attorney General [2005] UKHL 56. For a discussion, see Jeffrey Jowell “Parliamentary sovereignty under the New Constitutional Hypothesis” [2006] *Public Law* 562

²⁰ House of Lords, In re M., on appeal from M. v. HOME OFFICE [1994] 1 A.C. 377

²¹ Professor Vernon Bogdanor, *Human Rights and the New British Constitution*, JUSTICE Tom Sargent memorial annual lecture 2009

²² *R v Secretary of State for Transport ex parte Factortame Ltd (No 2)* [1990] 2 AC 85; For a discussion of *Factortame*, see Paul Craig in Chapter 4 of *The Changing Constitution* 7th ed ed Jeffrey Jowell and Dawn Oliver

²³ Joint Committee On Human Rights, Sixteenth Report Session 2006–7, *Monitoring the Government’s Response to Court Judgments Finding Breaches of Human Rights*, HL 128/HC 728, June 2007

²⁴ Master of the Rolls, *Report of the Committee on Super-Injunctions: super-Injunctions, anonymised injunctions and open justice*, p vii. See [Library Standard Note 2024](#) Parliamentary privilege and qualified privilege

²⁵ *Ibid*, p vii, conclusion 9(i)

Sub judice

The *sub judice* rule is intended to defend the rule of law and citizens' right to fair trial.²⁶ Where an issue is awaiting determination by the courts, that issue should not be discussed in the House in any motion, debate or question in case that should affect decisions in court.

However, the *sub judice* rules are not absolute: the Chair of proceedings of the House of Commons enjoys the discretion to permit such matters to be discussed. Moreover, *sub judice* does not affect the right of Parliament to legislate on any matter.²⁷

The 1999 Joint Committee on Parliamentary Privilege explained that *sub judice* rules are intended "to strike a balance between two sets of principles. On the one hand, the rights of parties in legal proceedings should not be prejudiced by discussion of their case in Parliament, and Parliament should not prevent the courts from exercising their functions. On the other hand, Parliament has a constitutional right to discuss any matter it pleases". It went on to explain that the rules strike the balance between Parliament's constitutional duty and role and the constitutional role of the courts.²⁸

The proper relationship between Parliament and the courts requires that the courts should be left to get on with their work [...]. Restrictions on media comment are limited to not prejudicing the trial, but Parliament needs to be especially careful: it is important constitutionally, and essential for public confidence, that the judiciary should be seen to be independent of political pressures. Thus, restrictions on parliamentary debate should sometimes exceed those on media comment.²⁹

2.3 The executive and judiciary

The third element of separation is between the executive and the judiciary.

The judicial scrutiny function with regard to the executive is to ensure that any delegated legislation is consistent with the scope of power granted by Parliament and to ensure the legality of government action and the actions of other public bodies.³⁰ On the application of an individual, judicial review is a procedure through which the courts may question lawfulness of actions by public bodies.³¹ This requires judges to be independent of government and Parliamentary influence.

The judges have traditionally exercised self-restraint or "deference" in the areas of power that they regard themselves as competent to review. Some uses of the royal prerogative, for example, involve issues of "high policy", such as the appointment of ministers, the allocation of financial resources, national security, signing of treaties and defence matters and judges would not usually interfere in these matters. For an example of this traditional view see the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374,

²⁶ Ibid, p vi

²⁷ See Erskine May at 436–438 and 525–526. Standing Orders of the House of Commons, Public Business, HC 700, Session 2010–12, 181 and 182; Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, 2010, 73, 74.

²⁸ Master of the Rolls, *Report of the Committee on Super-Injunctions: super-Injunctions, anonymised injunctions and open justice*, section 5.3

²⁹ Joint Committee on Parliamentary Privilege, Session 1998–1999, *Parliamentary privilege*, HL 43-I / HC 214-I, section 192

³⁰ By contrast, following the principle of parliamentary supremacy, primary legislation is not usually subject to judicial review.

³¹ Judiciary of England and Wales, 'Judicial review', <http://www.judiciary.gov.uk/you-and-the-judiciary/judicial-review>

More recently, in *A v Secretary of State for Home Department*, concerning the detention without charge of suspected international terrorists in Belmarsh prison, the Attorney General argued in 2004 that “these were matters of a political character calling for an exercise of political and not judicial judgment” and that “it was not for the courts to usurp authority properly belonging elsewhere”. However, Lord Bingham, who gave the leading judgement, rejected this argument, concluding that “the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal function of the modern democratic state” and that the Attorney General was “wrong to stigmatise judicial decision-making as in some way undemocratic”.³²

3 The Constitutional Reform Act 2005

In the *Constitutional Reform Act 2005*, the Government and Parliament reformed some of the areas where, in the UK, the “powers” had been least separated. The Minister responsible for the bill in the Commons, Christopher Leslie, told the House that “we want to ensure that we clearly define the separation of powers, where it is appropriate, but that is not incompatible with having a partnership between the different branches of the state”.³³

The Act created a separate Supreme Court and the Lord Chief Justice replaced the Lord Chancellor as head of the Judiciary in England and Wales. It also placed a statutory duty on Ministers to uphold judicial independence.³⁴ The Bill was referred to a select committee in the Lords.³⁵ The Select Committee on the Constitutional Reform Bill produced its report in June 2004 and this contains background information on the arguments over separation of powers.³⁶ The Commons Constitutional Affairs Select Committee report of 2004-5 is also relevant.³⁷

The Lord Chancellor

Before 2005, the office of Lord Chancellor was a bridge between the institutions of the state. He was head of the judiciary with responsibility for the appointment of judges, a member of the Cabinet and Speaker of the House of Lords. In *McGonnell v United Kingdom, 2000*, the then Lord Chancellor, Lord Irvine, clarified that “the Lord Chancellor would never sit in any case concerning legislation in the passage of which he had been directly involved nor in any case where the interests of the executive were directly engaged”.

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. The Lord Chancellor no longer sits as Speaker of the House of Lords, which now elects its own Speaker. This was intended to create a more formal separation of powers. However, others saw the Lord Chancellor as a voice for the judiciary in Parliament and argued that the Lord Chancellor could ease tensions between the branches of state. The House of Lords

³² *A and others v Secretary of State for the Home Department* [2004] UKHL 56

³³ HC Deb 26 Jan 2004 : c27

³⁴ UCL Constitution Unit, ‘[The politics of judicial independence in Britain's changing constitution: January 2011–December 2013](#)’,

³⁵ House of Lords Select Committee on the Constitution, 6th Report of Session 2006–07, *Relations between the executive, the judiciary and Parliament: Report with evidence*, HL Paper 151, July 2007, Q 184

³⁶ [House of Lords Constitutional Reform Bill First Report HC 125 2003-04](#)

³⁷ [Constitutional Affairs Select Committee Constitutional Reform Bill: the Government's proposals](#) HC 275 2004-05

Constitution Committee's reported in 2007 on relations between the executive, the judiciary and Parliament and contains useful background.³⁸

Judicial appointments

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](#) for England and Wales. Judges are represented on the Commission, but do not hold a majority and the Commission has to have a lay Chair. The Commission recommends candidates to the Lord Chancellor, who has a very limited power of veto. The Act gives the Commission a specific statutory duty to "encourage diversity in the range of persons available for selection for appointments".³⁹ Separate procedures apply to the appointment of Supreme Court judges, which take account of the fact that the Court has a UK wide remit.⁴⁰

Since enactment, concerns have been raised that the *Constitutional Reform Act* had actually reduced the diversity of new appointments to the senior judiciary compared to the old informal system, which sought out candidates rather than depending upon selection from applicants. The new process has also been criticised for being slow and involving the President and the Deputy President of the Supreme Court in the selection of their own successors.⁴¹ A research project at the Constitution Unit, University College London is examining these issues.

The length of time that the new process takes was also criticised, as was the involvement that the current system currently gives to the President and Deputy President of the Supreme Court in the process of selecting their own successors, a feature of the appointment process which, it was pointed out, is almost unique to Britain.⁴² In the US, the Senate is involved in appointments to the Supreme Court and some have suggested that in Britain a parliamentary committee might be involved in pre-appointment hearings. However, others expressed concern that such proceedings could be influenced by the media.⁴³

The Supreme Court

Until 2009, the Lords of Appeal in Ordinary (the Law Lords) sat in the legislature as well as acting as the highest appeal court in the UK. However, the *Constitutional Reform Act* created a separate Supreme Court, separating out the judicial role from the upper House.

During the passage of the legislation, Lord Falconer 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".⁴⁴

³⁸ House of Lord Constitution Sixth Report 2006-07 *Relations between the executive, judiciary and parliament*

³⁹ Lord Phillips of Worth Maltravers, 'Judicial independence and accountability: a view from the Supreme Court', 8 February 2011, pp 3–4

⁴⁰ See [Procedure for appointing a justice of the Supreme Court of the United Kingdom](#) March 2010 Supreme Court

⁴¹ UCL Constitution Unit, 'Judicial Independence, Judicial Accountability and the Separation of Powers', Note of Seminar at Queen Mary, University of London, 11th May 2011

⁴² Ibid.

⁴³ UCL Constitution Unit, 'Judicial Independence, Judicial Accountability and the Separation of Powers', Note of Seminar at Queen Mary, University of London, 11th May 2011

⁴⁴ HC Deb, 9 February 2004, c1131

However, there was considerable opposition to the Government proposals. Lord McCluskey QC was not convinced by the arguments in favour of a separate Supreme Court. He commented that “a good deal of nonsense is spoken about the separation of powers [...] for 135 years or so, serving judges have always played an important part in the deliberations of this House. They seldom vote”.⁴⁵ Nevertheless, the legal function of the House of Lords was separated from the legislative function and the Supreme Court was fully established in October 2009.

Since the creation of the Supreme Court, concerns have been raised that the judiciary is still dependent on the executive in the form of the Ministry of Justice for its funding. Lord Phillips of Worth Maltravers commented that “the Court Service of England and Wales has not been able to provide us with their contribution and we had to call upon the Lord Chancellor to make up the difference” and argued that “this arrangement clearly does not provide the security of funding which had been envisaged by Parliament and risks the Court being subject to the kind of annual negotiations the arrangements were intended to avoid.”⁴⁶ He suggested that this financial dependence was “already leading to a tendency on the part of the Ministry of Justice to try to gain the Supreme Court as an outlying part of its empire”.⁴⁷ Independence, he urged, was even more important since “Over 50 per cent of that workload now consists of public law cases [which...] involve challenges to the legality of executive action”.⁴⁸

4 Super-Injunctions

In 2011, the question of separation of powers has arisen in relation to the use of injunctions. An injunction is a court order that requires a party to do or refrain from doing certain acts. For example, it may order that certain identifies, facts or allegations may not be disclosed. Standard Note 5978 [Privacy](#) provides background as to the development of a new type of injunction whose very existence may not be disclosed. In some cases, known as “super injunctions”, the court has provided for anonymity and a prohibition on publishing or disclosing the very existence of the order. Restrictions may also be placed on access to documents on the court file.⁴⁹ Professor Zuckerman has argued that super-injunctions created a new kind of procedure for an “entire legal process [...] conducted out of the public view” of which the very existence is “kept permanently secret under pain of contempt”.⁵⁰

In April 2011, David Cameron said that he felt “uneasy” about super-injunctions and that judges were developing a privacy law without Parliamentary approval.⁵¹ The *Human Rights Act 1998* imposed a duty on the judges to interpret legislation “as far as possible” in a manner to make it compatible with the European Convention on Human Rights. Article 8 of the Convention sets out respect for privacy and family life, which the courts have developed as part of the common law in the absence of statutory privacy laws in the UK. Those

⁴⁵ HL Deb 7 March 2004 c 1030

⁴⁶ Lord Phillips of Worth Maltravers, ‘[Judicial independence and accountability: a view from the Supreme Court](#)’, 8 February 2011, p 15

⁴⁷ Ibid, p 16

⁴⁸ Lord Phillips of Worth Maltravers, ‘[Judicial independence and accountability: a view from the Supreme Court](#)’, Gustave Tuck Lecture, 8 February 2011, p 19

⁴⁹ Master of the Rolls, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice*

⁵⁰ Zuckerman, *Super Injunctions—Curiosity-Suppressant Orders Undermine the Rule of Law*, C.J.Q. Vol. 29 (2010) at 134.

⁵¹ BBC News, ‘Q&A: superinjunctions’, Dominic Casciani, <http://www.bbc.co.uk/news/mobile/uk-13473070>

developments have led some to argue that the courts have gone beyond their power to develop common law to introduce a right of privacy into English law.⁵² Others have suggested that the enactment of the *Human Rights Act* effectively created the right of privacy, so the foundations were, in fact, laid by Parliament.⁵³

Parliamentarians have criticised the judiciary for their use of a novel legal instrument. MPs have used parliamentary privilege to circumvent the injunctions, naming recipients in the House.⁵⁴ On the other hand, members of the judiciary have argued that Parliamentarians have used privilege to defy the law and that this could undermine the role of judges. Lord Judge suggested that it may not be advisable for MPs to “flout a court order” even if they did not agree with it. He insisted that “there has never been any question, in any of these orders, not in any single one of them, of the court challenging the sovereignty of parliament [...] We are following the law, as best we understand it”.⁵⁵

Some MPs have criticised the use of privilege to name those protected by injunction. Chuka Ummana said that “if MPs and peers use parliamentary privilege to flout Court injunctions, that is a serious breach of the separation of powers”.⁵⁶ Mr Speaker has said that he strongly deprecated “the abuse of parliamentary privilege to flout an order or score a particular point.”⁵⁷ The Attorney General announced on 23 May 2011 that a joint committee of both Houses would be established to examine the issues privacy and the use of anonymity injunctions.⁵⁸

⁵² Master of the Rolls, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice*, section 1.4

⁵³ [Injunction review: judges only implementing Parliament's privacy laws, says Lord Justice](#) 20 May 2011 *Telegraph online*

⁵⁴ John Hemming HC Deb 23 May 2011 c638.

⁵⁵ The Telegraph, ‘Judges accused of gagging bid’, 20 May 2011

⁵⁶ Ibid.

⁵⁷ HC Deb 23 May 2011 c653

⁵⁸ HC Deb 23 May 2011 c635