Article

Reconceptualising separation of powers

by Peter Cane

In this short paper I will first briefly trace the development of the modern concept of separation of powers in the English and the US legal and governmental systems. I will then argue that the concept no longer provides a helpful approach for analysing governmental systems and constitutional designs. Finally, I will propose a new conceptual framework more suited to describing and explaining differences between systems of government such as "parliamentarism" and "presidentialism". This new framework provides the methodological scaffolding of an historical and comparative study of control of administrative power in England, the US and Australia that Cambridge University Press publish in book form in Spring 2016 under the title *Controlling Administrative Power: An Historical Comparison.*

A SHORT HISTORY OF SEPARATION OF POWERS IN ENGLAND AND THE US

Montesquieu

Separation of powers is perhaps the most fundamental, but also the most contested, of all principles of constitutional design. As Geoffrey Marshall once said (*Constitutional Theory,* (Oxford: Clarendon Press, 1971), 97):

> *It is possible, indeed commonplace, for commentators to draw different conclusions both as to whether there is or is not a separation of powers in a given Constitution and as to what particular conclusions of law or policy follow from the existence of a separation of powers, even where it is admitted to exist.*

As Marshall implies, the 'principle' (or 'doctrine' or 'theory') of separation of powers is deployed both descriptively and prescriptively, to analyse and evaluate the allocation and distribution of governmental power. My concern here is descriptive rather than normative – with the constitutional architecture of separation of powers rather than the political values it may or may not promote.

Although the principle, in one formulation or another, predates the eighteenth century, its modern version is most commonly attributed to the Baron de Montesquieu in Book XI, chapters 5 and 6, of *The Spirit of the Laws*, first published in 1748. (I have used Thomas Nugent's 1949 translation published by Hafner Press, New York.) Montesquieu argued that

- "In every government there are three sorts of power".
- There can be no liberty "when the legislative and executive powers are united in the same person, or in the same body of magistrates" or, again,
- "if the judiciary power be not separated from the legislative and executive".

On the basis of a significant period of residence in England in the late 1720s, Montesquieu formed the opinion that it was the one country in the world that had "political liberty for the direct end of its constitution". However, he cautioned, "it is not my business to examine whether the English actually enjoy this liberty or not. Sufficient it is for my purpose to observe that it is established by their law". Montesquieu identified two liberty-promoting characteristics of the English constitution: its "mixture" of interest-based power in Crown, Lords and Commons, and its "separation" of legislative, executive and judicial governmental power between different institutions and officials. In terms of Montesquieu's ideological agenda – reform of the French system to maintain and strengthen the power of the aristocracy as a check on the monarchy – he was more interested in the English constitution's mixed aspect than in its separation of powers. Nevertheless, it is on his account of separation of powers as a guarantee of political liberty that his fame and enduring influence rest. He was, of course, praised by the English, and his ideas had significant effects on political developments in America and, less directly, in France, in the late eighteenth century.

Montesquieu's view of England

Read purely as a description, Montesquieu's account of separation of powers in the English constitution is deficient by modern political-science standards. Nevertheless, taken in historical context (see Introduction by D W Carrithers to *The Spirit of Laws by Montesquieu: A Compendium of the First English Edition* (Berkeley,

CA: University of California Press, 1977), it is a remarkable achievement. Anyway, despite his tendency to "creative accounting", Montesquieu does effectively capture the essence of the Glorious Revolution. Let me explain.

Although it makes sense to say that since King John had been forced to sign up to Magna Carta in 1215, the English monarchy had not wielded absolute power in the style of later European monarchs (notably, the French Bourbon regime, which was Montesquieu's target), English kings and queens had enjoyed what we now call "sovereignty" – that is, ultimate, intra-systemic power. In the mediaeval period, before the Revolution, all the levers of government – executive, judicial and legislative – were, to a greater or lesser extent, under the control of the monarch. The judges of the common law courts enjoyed a significant measure of day-to-day independence from royal control, but were appointed to, and sustained in, office entirely at royal pleasure. Alongside adjudication in their own courts (notably Common Pleas and King's/Queen's Bench), the common law judges were integrally involved in both legislative and executive activities, as well as in the judicial affairs of the closely-controlled Court of Star Chamber and the other "conciliar" courts. Senior government administrative officials were, literally, servants of the Crown. As for the legislature, in the ordinary course of things, the personal and prerogative wealth of the monarch was sufficient to finance the affairs of state without needing Parliament, the normal role of which was to support the monarch in running the country. Parliament played a particularly important part in legitimising Henry VIII's major state-building enterprises.

Against this background, the seventeenth-century Revolution radically transformed the English governmental and political landscape. Sovereignty shifted from the monarch-with-the-occasional-assistance-of-Parliament to the monarch-in-Parliament. The monarch now depended on Parliament not only for the resources needed to finance running the country, but also for his or her position as monarch. At the same time, the head of state had to work much harder to control anti-royalist factions in the Commons, making the monarch increasingly dependent on the most powerful members of Parliament. As a result, this proto-cabinet gradually became more and more independent of royal pleasure. As for the judiciary, the conciliar courts had been abolished in 1641 and the Privy Council had been stripped of its domestic jurisdiction. The Lord Chancellorship was gradually transformed into a predominantly judicial office. The monarch lost the power to dismiss judges of the common law courts, and the House of Lords assumed the function of final appeal court. Once literally His or Her Majesty's Justices, integrally involved in most aspects of government, the common law judges were now, in principle at least, marginal participants, subordinate executants of the will of Parliament. In return, they received security of tenure and salary, and were accorded the exclusive power to interpret legislation. Independence of the judiciary became the most important element of "separation of power" in the English system, as observed by Blackstone (in the *Commentaries on the Laws of England*) later in the eighteenth century and by Dicey (in *An Introduction to the Study of the Law of the Constitution*) at the end of the nineteenth.

Montesquieu's approach to the study of systems of government was highly innovative. He was one of the first thinkers to apply newly-minted scientific methods of observation and analysis to human society. He collected data – much of it first-hand – on a number of diverse governmental systems. At the same time, he understood the role of abstraction and model-building in reporting and explaining empirical data. He was, perhaps, the first exponent of techniques foreshadowing nineteenth-century advances in the historical, anthropological and evolutionary study of human societies, and their legal and governmental arrangements. There is no doubt that his political agenda for reform of the French system affected the way he collected and interpreted the data. For instance, as already noted, he was more interested in the active role of the aristocracy in English public affairs than in the institutional structure of the English state. The minimal role he ascribed to the judiciary (mere mechanical application of the law made by the legislature) was a product more of his hopes for France than of his experiences in England, where the significance of the common-law-making activities of the judges was unaffected and undiminished by their relegation to a subsidiary position in the governmental system. Alongside the sunny scene depicted in *The Spirit,* Montesquieu's travel notes from the time he spent in England paint a picture of rampant corruption and venality far different from the "political liberty" that he took to be the goal of good government under separation of powers. Nevertheless, despite all this, Book XI, chapter 6 of *The Spirit* charts a transition from a state in which legislature and judiciary were politically subordinate to the executive, and in which legislative, executive and judicial powers were not sharply distinguished from one another, to one in which three distinct institutions – Crown, Parliament and the courts – performed distinctively different characteristic functions (executive, legislative and judicial, respectively) and were relatively independent of and, as a result, interdependent on, one another.

As we now know, of course, the Revolution that had been the best part of a century in the making was to be undone in the course of the next two hundred years. By the early twentieth century, the monarch was no longer the nation's chief executive. The government was now responsible to Parliament, not the monarch; but at the same time the development of political parties had handed to the government effective control of the very body to which it was responsible. Although the independence of the judiciary had been significantly reinforced, and although the judicial role of the House of Lords

had been effectively quarantined from its political functions, Parliament had superseded the courts as the prime source of law, and the principle that judge-made law is subordinate to legislation had been firmly established.

In the course of the twentieth century, the Government's effective control of Parliament was strengthened by the disempowerment of the House of Lords in the Parliament Acts of 1911 and 1949. The Lord Chancellor, as a member of the Cabinet, took an active part in the exercise of executive and legislative, as well as judicial, power. The strengthening of party discipline and the broadening of the franchise had embedded a two-party system in which the opposition was effectively the government-in-waiting, a mere irritant to the party in power rather than a serious threat needing to be regularly placated. The independence of the English judiciary was rightly celebrated and jealously guarded; but the same could not so easily be said of the large and complex system of court-substitute administrative tribunals. Moreover, the judges were generally quite deferential to the executive and exercised no control over the legislature. From the middle of the nineteenth century the size, functions and popular expectations of government grew inexorably. Although legal sovereignty remained (and remains) where it had been since 1689 (in the Queen-in-Parliament), by the early twentieth century effective sovereignty belonged to the Executive which, in the late 1970s, Lord Hailsham (with a measure of party-political hyperbole, perhaps) branded an "elective dictatorship", a formidable agglomeration of legislative, executive and bureaucratic power.

However, in the past half-century, political sovereignty has not only shifted but has also been disaggregated as a result of major constitutional developments such as Britain's membership of the European Union, devolution to Scotland, Wales and Northern Ireland, the UK's accession to the European Convention on Human Rights and the Convention's domestication by the Human Rights Act 1998. Each of these developments has imposed significant limitations on the capacity of the UK government to formulate and implement policy goals.

Montesquieu in the US

As already noted, Montesquieu's analysis influenced the drafting of the Constitution of the emergent United States of America. In some of the most famous passages of *The Federalist Papers*, James Madison wrote:

> *The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny…[this] does not mean that these departments ought to have no partial agency in, or no control over, the acts of each other [but only]…that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted…the most difficult task is to provide some practical security for each [department] against the invasion of the others (A Hamilton, J Madison, and J Jay, The Federalist Papers (edited with an Introduction and Notes by Lawrence Goldman) (Oxford: Oxford University Press, 2008), 239-41).*

Unlike Montesquieu's reflections on constitutional design, Madison's were entirely tendentious. Like his co-authors, Alexander Hamilton and John Jay, Madison was a politician, and *The Federalist Papers* are political propaganda, not theory or science. Despite the fact that the Founders deliberately set out to reject their English constitutional heritage, the design of the US system of government bears more than a passing resemblance to the English system as portrayed by Montesquieu. The US Presidency, like the English monarchy, is a singular rather than a plural executive. Members of the two Houses of Congress respectively are chosen by different methods, both of which vary from the method by which the President is chosen. Senior government officials are responsible to the President, not to Congress. The main function of the President is to run the country in accordance with the laws made by Congress. As in England, the independence of the judiciary is protected and promoted by security of tenure and salary, and the main function of the courts is to enforce the Constitution on the one hand and laws made by Congress on the other.

The fundamental difference between the eighteenth-century English system and the US constitutional design is that the English system was monarchical while the US design was republican. In theoretical terms, the result (then and now) is that in England, sovereignty resides somewhere within the government machine whereas in the US, sovereignty is located outside the government machine, in the People. In other words, in the US system no organ of government – whether legislature, executive or judiciary – is sovereign and all organs of government are delegates of the People, separately authorised and empowered by the People. Whereas in the English way of thinking, one organ of government is sovereign and the others are subordinate, in the US way of thinking all organs of government are coordinate to, and in that sense quasi- (but only quasi-) independent of, one another. Thus, for instance, legislative initiative rests with Congress, but the President has (formal and effective) qualified power to veto Congressional legislation. Congress shares with the President the power to appoint senior government officials (including judges); and, more generally, it is responsible for establishing and disestablishing executive agencies. The judges, as delegates of the People, enforce the Constitution against both the legislature and the executive, each of which can enlist the assistance of the court in its dealings with the other. The coordinate status of governmental institutions creates what has been called a 'balance of forces' (HH Bruff, *Balance of Forces:*

Separation of Powers in the Administrative State (Durham, NC: Carolina Academic Press, 2006)) that can mutually 'check' each other's exercises of power.

Because it is based on a relatively rigid constitution, the structure of the US system has not changed fundamentally in the past 200 years; but its dynamics certainly have. The relative power of the various institutions of government is now very different from that contemplated by the Founders. For instance, they imagined that because of its democratic credentials, the legislature would be the "most dangerous branch"; but this accolade is now more likely to be conferred on the Presidency. Again, because Congress and the Presidency share power over the bureaucracy, it has been constructed as a fourth, quasi-independent branch of government, sharing powers with each of the three other branches. Thirdly, the Supreme Court has significantly strengthened its position. Early in the nineteenth century (in the famous case of *Marbury v Madison*) the Supreme Court assumed the power (not explicitly conferred by the Constitution) to pronounce on the validity of Congressional legislation and executive action, and since the mid-twentieth century it has been fashioning the Bill of Rights into a powerful weapon of "social justice" and a protector of personal autonomy.

AN ANALYTICAL FRESH START

Despite all these various changes, the conceptual tool of choice for analysing the institutional design of systems of government remains separation-of-powers theory. This is particularly so in the US where the Constitution is understood to be based on (one version of) the theory which, as a result, cannot be jettisoned from constitutional discourse even if this were thought desirable. The theory has kept its hold on the constitutional imagination despite repeated assertions that there are many different versions of separation of powers in operation in various states around the world. Others go further and say (for instance) that the English system of government is actually not characterised by separation of powers (mainly because of the relationship between the executive and the legislature in a "Parliamentary" system); or that the US system is not one of separated powers but rather – in the words of Richard Neustadt (RE Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (New York: Free Press, 1990), 34) – one in which "separate institutions share power". The source of the problem is not – as often asserted or implied – that Montesquieu got things wrong about England or that the US Founders misapplied Montesquieu. Rather, the trouble is that Montesquieu's ideas were developed before the emergence of the administrative, regulatory, welfare and entrepreneurial states, and as part of a tendentious account designed as much to promote change in France as to deepen understanding of the nature of the British polity or develop a philosophical "theory" of good governance.

This suggests that it might be helpful to introduce a different theoretical framework for analysing twenty-first-century governmental systems – not only, but including, the English and the US systems. I want to propose a new analytical approach based on two distinctions, one between two patterns of allocation and distribution of public power (which I shall call "diffusion" and "concentration" respectively); and the other (related to the first) between two models of control of public power (which I shall call "checks-and-balances" and "accountability" respectively – but note that in common parlance both terms are used in much wider senses than mine and often, more-or-less synonymously).

Diffusion and concentration

Diffusion involves dividing power between various institutions by giving each institution a share in the exercise of the power. A good example of diffusion of power is the US Constitutional requirement of "presentment", which refers to the power of the President to veto Congressional legislation ('qualified' by the power of Congress to override a Presidential veto). Under this arrangement, legislative power is shared between Congress and the President. In abstract terms, the hoped-for effect of diffusion is to reduce the power of government by putting barriers in the way of government action in general and policy-making in particular, and by requiring various institutions to cooperate and collaborate in the exercise of power. By contrast with diffusion, concentration involves dividing power between institutions in such a way that each can exercise its power unilaterally without the need to gain the consent or cooperation of the other institution(s) – separated institutions exercising separate powers, we might say. In theory at least, concentration facilitates policy-making and other government action, and "strengthens" government. In these terms, public power is highly diffused in the US and highly concentrated in England.

Note that both patterns of power distribution involve dividing power between various institutions and allocating to each a characteristic form of power. Power is divided in this way in all systems of government in large societies. The basic difference between the two patterns turns not on whether power is divided but rather on whether or not the divided power is 'shared'.

Another fundamental difference between diffusion and concentration is that under diffusion, the various empowered institutions are separately and distinctly authorised to exercise whatever powers they have been given, and are in that sense "coordinate". By contrast, under concentration, authority is ultimately derived from a single "sovereign" institution to which all other institutions are in some sense subordinate. As already noted, in the US system the three traditional branches of government – legislature, executive and judiciary

– are each understood to exercise power delegated to them directly by "the People", in whom "sovereignty" is said to reside. By contrast, in the English system – in theory at least – "sovereignty" resides in the Queen-in-Parliament, and the authority of the executive and the judiciary is ultimately subject to that sovereignty.

Two further points should be made about the distinction between diffusion and concentration. First, I have deliberately not used the terms "concentration" and "diffusion" to refer to systems of government as such. Rather, they describe two different patterns of distribution of public power. This is because, I would argue, any system of government may (or, perhaps, every system will) be found, on examination, to contain elements of both techniques. Indeed, it is possible to interpret the Australian federal system (for instance) as a conscious combination of elements of concentration and diffusion joining, as it does, a parliamentary system of government with federalism. As in the English system, power (legislative, executive and bureaucratic) is highly concentrated ("horizontally") in the executive whereas it is significantly diffused ("vertically", in terms of areas of competence) between the Commonwealth and the States. Again, it is widely agreed that in the US, power is much less diffused (much more concentrated in the Presidency) in the field of foreign policy than it is in domestic policy. The two constitutional techniques are better envisaged as two coordinates of a field in which various systems of government can be located according to the particular combinations of the two techniques that they display.

Each technique has a pathological state: inertia, stalemate or even paralysis in the case of diffusion, and "dictatorship" in the case of concentration. A well-functioning system needs some combination of diffusing and concentrating elements in order to avoid either dysfunctional extreme. For instance, the growth of the power of the US presidency in the past two centuries, especially in the realm of foreign affairs, can be understood partly as a response to the need for strong, coordinated government in times of crisis. Conversely, the impact of the European Convention of Human Rights on the English legal and governmental system since the mid-twentieth century may be explained partly in terms of a desire to reduce the risk of executive ("elective", to use Lord Hailsham's term) dictatorship of the sort that afflicted Europe and the Soviet Union so disastrously in the first half of the twentieth century.

Secondly, I have deliberately avoided associating the distinction between concentration and diffusion with the widely adopted contrast between parliamentarism (of which the English system of government is typically cited as exemplary) and presidentialism (of which the US system of government is typically treated as the exemplar). Both "parliamentarism" and "presidentialism" are too narrow for my purposes because they refer primarily to the relationship between the political executive and the legislature. Concentration and diffusion refer more generally to the distribution of power, and the relationships, between organs of government including, for instance, the non-political executive ("the bureaucracy"). For example, the highly decentralised internal structure of public administration in the US is one of the most significant points of distinction between that system of government and the English system. Incidentally, this example clearly illustrates a shortcoming of the traditional theory of tripartite "separation of powers" (between legislative, executive and judicial) and "separation of institutions" (legislature, executive and judiciary): the internal structure of the executive branch and the distribution of power within that branch between its elected and appointed elements are central features of any system of government. The theory of separation of powers fails to address this feature of governance because it was developed before the growth of the administrative state, and it has not been radically updated since then, perhaps because it has been frozen in written constitutions, especially the US constitution. As a result, the administrative state has had to be "retrofitted" (D Rosenbloom, "Retrofitting the Administrative State to the Constitution: Congress and the Judiciary's 20th-Century Progress" (2000) 60 *Public Administration Review* 39) into a constitutional structure that was not designed to accommodate it.

In order fully to appreciate the distinction between concentration and diffusion, it will be helpful to contrast diffusion, which involves division and sharing of *power*, with what might be called "fragmentation" (or "disaggregation"). For instance, in the English system of government, as a matter of constitutional law and convention, legislative power is (in terms of these distinctions) fragmented between the political executive, the two Houses of Parliament (Commons and Lords) and the Monarch, in the sense that the participation of each of these institutions is required for enactment of a statute. By a mixture of convention and practice, however, effective control of the legislative process is more-or-less concentrated in one of these institutions – the political executive – because none of the other institutions has an effective veto over legislation. In other words, fragmentation of power is consistent with concentration. By contrast, in the US system, primary legislative power is shared amongst the President, the House of Representatives and the Senate because each has a formal, more-or-less effective veto over proposals for legislation. In other words, in the terms used here, power is not fragmented but diffused. A useful way of thinking about the distinction between fragmentation and diffusion of power may be to analogise fragmentation to division of labour and diffusion to division (and sharing) of power. Alternatively, we may say that power that is legally or theoretically fragmented may be effectively or practically concentrated.

On the other hand, it is also important to distinguish

between concentration and what we might call "coordination". A danger inherent in diffusion (division and sharing) of power between institutions that have independent authority and must negotiate and cooperate to achieve their respective policy objectives is loss of efficiency, effectiveness and "energy" in the conduct of government. When powers are shared, disagreement about how they should be exercised may cause delay or prevent action. In the US system, the so-called "fiscal cliff" is a graphic example of the dangers of diffusion. Coordination, as understood here, is a means of preventing diffusion of power becoming dysfunctional by effectively concentrating power that is formally diffused and shared. In the English system, the development of political parties outside the legislature and the influence of intra-parliamentary parties on the conduct of MPs have a powerful coordinative effect. Indeed, party politics underpins executive control of the legislature. In the US, by contrast, in recent decades, increasing ideological solidarity within political parties (especially within Congress) and polarisation between them, in conjunction with "divided government" (in which the President's party does not control the lower house of Congress, or the upper house, or either), has had precisely the opposite effect of increasing the inertial effect of the diffusion of power between the Presidency and Congress.

Checks-and-balances and accountability

Each of these models of power-distribution is associated with a distinctive mode of controlling power. In traditional terms, the mode of control characteristic of diffusion is "checks-and-balances". So, for instance, the qualified Presidential veto in the US system establishes a "balance of power" between the executive and the legislature by dividing legislative power between Congress and the President. Sharing power between institutions enables each to "check" the other. "Checking" has two connotations: one is stopping or delaying, as in "checking (someone's) progress". The other is supervising – as in "checking up on" someone or "keeping an eye" on them. The mode of control characteristic of concentration is referred to here as "accountability". The classic example of this mode of control is ministerial responsibility to Parliament in the English system of government. Ministerial responsibility is the price that governments in parliamentary systems pay for the large amounts of unilateral power they enjoy.

A spatial metaphor may help to illuminate the difference between accountability and checks-and-balances. In the former case, the institution required to give account and the institution to which account must be given can be pictured as being in a vertical relationship. By contrast, institutions between which power is divided and shared can be pictured as being in horizontal relationships. So, for instance, in the English system, ministers are responsible to parliament and are, in this sense, subject to it. In the US system, by contrast, the President is not responsible to Congress. Nevertheless, "oversight" of the executive is one of the core functions of Congress. Another way of thinking about the difference between the two modes of control is in terms of a distinction between bipolarity and multi-polarity. A relationship of accountability can be pictured as bipolar (or "bilateral"), between an institution required to give account and an institution empowered to receive an account. By contrast, neither oversight nor checking carries any implication of bipolarity because power may be divided or shared amongst more than two institutions. It does not follow, of course, that an institution may not – in theory at least – be accountable to more than one other institution. However, each of those relationships will be best understood as discrete and bipolar. By contrast, an institution may be subject to oversight by (say) two institutions without being accountable to either in any formal sense. For instance, the US Presidency is subject to oversight by both Congress and the Supreme Court, but is not "responsible" to either.

A third way of thinking about the modes of control is in terms of whether or not the institutions involved are "coordinate" to one another. In an accountability relationship, the institution empowered to receive an account has "authority" over the institution required to give account. In that sense, the latter institution is "subordinate" to the former. By contrast, where power is shared between institutions, none has "authority" over the other(s) in the sense involved in a relationship of accountability: authority in that sense is incompatible with maintaining a balance of power. Similarly, division of power as a basis for the checking of one institution by another assumes that each has an autonomous source of authority and that neither has authority over the other. Fourthly, the two modes of control (checks-and-balances, and accountability) differ in their basic temporal orientation. As controls on the exercise of public power, checks-and-balances are essentially prospective (or, perhaps, ongoing) in operation – they are designed to make it harder for government to get things done. By contrast, responsibility and accountability are essentially retrospective in operation – restorative and reparative rather than preventive. Retrospectivity of control increases the strength that government derives from concentration of power. A clear example is provided by the rule of English law that the validity of delegated legislation may be challenged in court only after the legislation has been implemented. Contrast the rule of US federal law allowing the validity of administrative rules to be challenged before they have been promulgated (*Abbott Laboratories v Gardner* (1967) 387 US 136). The US rule has been identified as one of the prime causes of the "ossification" of the US administrative rule-making process.

If we conceptualise one of the goals of controlling public power as being to protect individual liberty, we can further differentiate checks-and-balances from accountability in terms of how they protect liberty. Checks-and-balances, I suggest,

protect liberty indirectly. Their prime function is to slow government down by making it difficult for any one institution to achieve its policy objectives without the cooperation of other institutions. Diffusion is motivated by distrust of government and a desire to limit the encroachment of public power on the private, social and economic realms. In the US system, the "people" are understood to have delegated limited powers to government and to have retained the residue, which represents the "rights" that the Bill of Rights (for instance) was originally designed to protect. Checks-and-balances enforce constitutional limitations on public powers and, in that way, reduce the risk of governmental over-reaching. They reflect a preference for private over public activity in (almost) all areas of life – in other words, for a very thin understanding of "the public interest" (R E Goodin, "Institutionalising the Public Interest: The Defense of Deadlock and Beyond" (1996) 90 *American Political Science Review* 331).

Accountability, by contrast, protects individual liberty directly, albeit retrospectively. Concentration of power enables government to act unilaterally and decisively. It is associated with trust that government will act in the public interest, understood in a relatively thick, rich way. Inevitably, of course, governments sometimes exceed or even abuse their wide powers. Against this eventuality, accountability mechanisms provide citizens with avenues for complaining about and challenging government action, and obtaining recompense and reparation for harm done by such action. In the English system, since the mid-twentieth century, accountability mechanisms have been increased in number and strength in response to the increasing concentration of governmental power over the previous century.

Once again, however, just as systems of government may contain elements of both diffusion and concentration, they may also display characteristics of control by both checks-and-balances and accountability. As a result, a system may to some extent protect liberty indirectly while also, in other ways, protecting it directly.

IMPLICATIONS OF THE FRESH START

In summary, my suggestion is that we may fruitfully analyse legal systems and governmental arrangements in terms of three inter-related characteristics:

1. The extent to which and the ways in which public power in the system is concentrated on the one hand, or diffused on the other.

2. The extent to which and the ways in which power in the system is controlled by accountability mechanisms on the one hand, and checks-and-balances on the other.

3. The extent to which and the ways in which individual liberty is protected directly on the one hand, and indirectly on the other.

Assuming this analytical framework is, indeed, helpful we might then ask: helpful for what? One answer may be that concentration, diffusion and their associated modes of controlling power, are underpinned by different values (trust versus distrust of government, for instance) and that by understanding the nature of the system we can better understand the values on which it rests and, if we want, recommend changes to the system that would promote different values.

The use to which I have put the new analytical framework in the forthcoming book mentioned at the beginning of this article is to test the following hypothesis: similarities and differences between regimes (of institutions, norms and practices) for controlling administrative power in England, the US and Australia may partly be understood and explained in terms of the three distinctions I have drawn. For instance, a striking difference between US administrative law on the one hand, and Anglo-Australian law on the other, is that US courts often "defer" to interpretations of statutory provisions made by administrative officials and agencies, whereas English and Australian courts never do so. I argue that this stark difference is partly explicable by the facts that public power is much more diffused in the US system than in either the English system or the Australian system; that checks-and-balances is the main mode of controlling public power in the US system whereas accountability is the main mode in the English and Australian systems; and that in the US system, individual liberty is primarily protected indirectly whereas, in the English and Australian systems, it is primarily protected directly. Unfortunately, space prevents elaboration of this argument here. All I can do is to suggest that the analytical framework I have introduced enables us to understand legal and governmental systems in ways that separation of powers theory does not, and to recommend it on that basis.

Professor Peter Cane

Australian National University College of Law