

# MONTESQUIEU'S THEORY OF THE SEPARATION OF POWERS, LEGISLATIVE FLEXIBILITY AND JUDICIAL RESTRAINT IN AN UNWRITTEN CONSTITUTION

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## **Abstract**

A constitution is a body of laws that is composed of various branches which exist as the legal source of its powers. These are designed to regulate by defining the role of the executive, legislature and the judiciary, which are the three organs of government that Baron Montesquieu defined as necessary in a constitution. The constitutional government can be evaluated on its capacity (i) to maintain the rule of law, (ii) to preserve an electoral mechanism for political democracy and (iii) to protect a morally and legally acceptable set of substantive rights. The conventions are the source of unwritten constitutions which preserve the balance of powers by relying on the concept of judicial restraint and deference to the executive. The contemporary relevance of Baron Montesquieu's theory is in the context of a fused system, and the question is the extent to which the executive can override the judicial powers in matters of state.

**Keywords:** separation of powers; unwritten constitution; Westminster model; constitutionalism; juridical review; "one voice" principle; administrative deference.

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## [A] INTRODUCTION

The separation of powers is essential in a democratic constitution because it provides checks and balances. Power is vested in three organs: the executive, the legislature and the judiciary. The doctrine of separation of powers was formulated in the 18th century when Baron Montesquieu devised the theory of three branches which provide the instruments of dispensing the power of the state. In the United Kingdom (UK), which has an unwritten constitution, the enactment of statutes with reference to the Magna Carta 1215, the Settlement Act 1701 and the Constitutional Reform Act 2005 has served to provide the checks on executive power. There is a need to examine the constitutional framework of the UK to undertake a comparative analysis with reference to the extent

that there is an overlap in the balance of powers and the scope of the doctrine and relevance in the modern era.

The formulation of a constitutional separation of powers by Montesquieu was significant in providing a limit to the powers of the executive and preventing its arbitrary exercise. The Enlightenment presented the dawn of a new era in European legal history when the divine right to rule by monarchs was challenged, and laws were deemed to emanate from the legislature that was elected by a mechanism of an elected assembly. Montesquieu defined three types of government:

republican, monarchical, and despotic. In the first the people is possessed of the supreme power; in a monarchy a single person governs by fixed and established laws; in a despotic government a single person directs everything by his own will and caprice (Montesquieu 1748, bk 11, ch 1).

The theory of a separation of powers has been interpreted by some jurists as reflecting the law of "Presidential systems where there is a clear separation of powers rather than a model of Westminster Parliamentary democracy" (Calabresi & Bady 2010, 17; and Hood Phillips 1977, 11). The difference being that the "Parliamentary systems were based on a fusion of powers, not a separation of powers" (Bagehot 1964, 5). This is because in a parliamentary system the executive branch is formed from the party with the most representatives in the legislature, and the executive remains dependent on the legislature for the ability to enact laws. There are several salient characteristics of constitutions which group them into separate categories. They can be divided into: written and unwritten constitutions; rigid and flexible; supreme and subordinate; federal and unitary; with separated powers and fused powers; and republican or monarchical. Despite their structure the issue is the extent of the division of powers between the executive, the legislature and the judicial branches or their integration into one consolidated power.

In this article there is an evaluation of Montesquieu's theory of the separation of powers and its application to the UK constitutions. This is with a contemporary background of the fusion of powers in the modern framework where there has been convergence of power of the three organs of state. There has to be a determination of the scope of parliamentary sovereignty and judicial review that separates the executive, legislative and judicial powers in the UK's unwritten constitution. This is an important principle of the checks and balances in an unwritten constitution which has not been formulated by design.

The road map of this article is as follows: Part B considers the scope of the constitution based on the legal theory that Montesquieu devised regarding the separation of powers and the concept of a social contract that emanated in transition to a constitution from a government based on arbitrary powers; Part C considers the UK and its unwritten constitution and is concerned with the application of the doctrine in which three organs of state are fused; Part D considers the balance of powers achieved through legal constitutionalism by distinguishing the legal and the political authority of the state in making a law and the “one voice” principle of the judiciary deferring to the executive; and Part E concerns the United States (US) constitutional doctrine which, unlike that of the UK, has adopted Montesquieu’s theory and where the administrative deference of the courts is in recognition that the horizontal power structure of the state can be maintained with checks and balances in a clear separation of powers.

## [B] INTELLECTUAL FERMENT OF THE ENLIGHTENMENT

The development of constitutions since medieval times has reflected the epochs in which they were formulated, and their composition was the result of the political will and legal scholarship of the period. The issue that concerned the legal theorists was not just absolute government but also the arbitrary powers granted to the executive to alter the framework of the hierarchy of the state. This concerned the hereditary rule which most often was symbolized by the authority of the monarch exercising their prerogative power to rule without any checks and balances, such as an elected legislature and an unfettered judiciary.

The power to rule without a corresponding legislative mandate or laws has been reflected on by philosophers who have theorized how to organize state power, in particular with respect to dividing it within government. The difference has been a historical landscape within which the nation state has evolved from the process of changes as follows:

separation of church and state, the detachment of secular power from its supposedly divine origin, the emergence of the concept of the “state”, the notion of popular sovereignty and the contrast between the constituent power of the people and the constituted power of the monarch which were invoked during the fundamental changes in the realities of political societies of the time (Tsatsos 1968, 11, 14).

The post-Renaissance period led to a ferment when the concepts devised by Grotius, Descartes, Bodin, Hobbes, Pufendorf, Locke, Kant

and J.J. Rousseau became recognized as the text for developing a polity based upon rational principles. The most prominent was the concept of the social contract that provided a radical new solution to the problem of absolute power and was premised on the legitimacy of government, popular approval and the participation of the people. This was defined as a basis for a meaningful relationship between state and society.

In England and Scotland the theory of the social contract emanated from philosophers who believed in justification for a legitimate order of government. Hobbes, who had witnessed the English Civil War, and for whom “absolute power” in a monarch was essential as symbolic of a monolithic state which would vest it with legitimacy, considered division of powers as approximate to letting the state self-destruct. He argued: “For what is it to divide the power of a commonwealth, but to dissolve it; for powers divided mutually destroy each other” (Hobbes 2004: *Leviathan*, xxix.12, cf *De Cive*, xii.5).

The more radical John Locke, who is considered an early exponent of the social contract theory, restricted the executive's powers and bound it to the legislature, and he constructed a bipolar model in his *Second Treatise of Government*, in which he ascribed it legitimacy by invoking the social contract as a necessary framework for the attainment of liberty. He argued that men consented to give up their freedom to establish a more secure way of living together in communities to protect their “lives, liberties and ... property” (Locke 1690, 123).

This was the purpose of the social contract in a polity and served to bind the ruler with the “consent of the governed by restricting the basis and the extent of the ruler's powers” (Locke 1690, 131, 134). Governmental power was never absolute, but from its inception was restricted and directed in its application, “and all the measures used for this purpose were legitimate, and those that did not have this objective were an abuse of the trust of the people” (Locke 1690, 143). The fact that human nature was “weak” made this “outcome likely” which led him to the conclusion that a “state's power needed to be divided, so that legislative and executive powers were not synonymous and should be exercised through different branches” (Locke 1690, 143,144).

In order to establish the framework for a social contract Locke distinguished four powers: “the legislative, the executive, the federative and the prerogative power” (Locke 1690, 132). The judiciary was not identified as a separate power, but only as a component of the executive power to enforce the writ of the land. The social contract also meant that original sovereignty lay with the people and was considered to be

indivisible and inalienable. The people then transferred its exercise to another entity which became the legislative, “ranking supreme among all government powers” (Locke 1690, 132, 134). This constituted legislature “could not transfer its power on to another body and neither was any other power allowed to usurp its mandate” (134). The social contract existed by electing the legislative, an act by which “the people had exercised their freedom and had provided their consent to the rules promulgated by this body. In response, the legislature upon receiving its powers had a duty to work for the public benefit through enacting law and not revert to a ‘state of nature’” (137).

However, unlike Locke the focus of Montesquieu was on the separation of powers which divided the sovereign’s powers horizontally into executive, legislative and judiciary. Like Locke, he considered the crucial purpose of this separation to be the protection of the political liberty of the people, which he defined as the power to act within the framework of the law. This, in his view, would provide a reliable justification for the institutional structure of the constitutional system. This formal concept for a normative process had a “particular concern and focus on the judiciary and their role in the separation of powers” (Tamanaha 2004, 53).

The legal theory that Montesquieu inaugurated had an overlap with political theory, and he advocated a more purposeful remedy of a constitutional system that should be designed in such a manner that it would “actively promote liberty, not just prevent abuse”. This could only be achieved by dividing up the state’s power and organizing it in a way “that required cooperation among the created institutions as well as allowed for mutual control” (Montesquieu 1748, bk 1, ch 5). He advocated that the constitutional framework had “to ensure that the various branches of the constitution were able to keep each other in check” (ibid).

The Enlightenment philosophers who proposed a radical transformation from absolute government brought with them the perspective of a social compact which was all encompassing and gained ascendancy in France at the inception of Montesquieu doctrine. This gave sustenance to the compact of an executive power which can interpret the will of the community through the formation of a mandate of the people that gave a broad discretion to the legislature to make laws in the interests of the people. Its proponent J.J. Rousseau states:

Men are thus all subject to *volonté générale* (the general will). It is not the will of all the individuals or of the majority, as even the majority may be mistaken, but it is always to public advantage and for the “greater good” (Rousseau 1763, bk 1, ch 7, 33).

This can be contrasted with the constitutional theory that emanated from the German philosopher Immanuel Kant who projected the “state” as being at the apex of its organizational structure. He emphasized the

primacy of the legislative functions of a state and the rule of law where sovereign primacy is embodied in the way that both the executive (who enforces and administers it) and the judiciary (who interprets it) are dependent on the laws set by the legislator. This in turn requires that “a people’s sovereign (legislator)” not “also be its ruler” which implies a separation of powers in order to ensure that the ruler’s will is bound by laws (Kant 1997, 6:313-314).

Without this separation “there is no rule of law, but only rule by executive ‘ordinances or decrees (not laws)’” (Kant 1997, 6:316). The state as an abstract concept was the primary concern of the German philosophers at the inception of the doctrine of separation of powers and its effect on the legal system. This was because in German public law theory there is a distinction between the *Staatsrecht* / “state law” and *Verfassungsrecht* / “constitutional law” since the “state” is a separate entity from society and emerged before the framework of constitutions in the legal system (Murkens 2008, 10-12).

Kant rejects the theory of the separation of powers as based on a balance of powers advocated by Montesquieu and advances “the notion of the concept of a separation of powers” onto the realm of “the polity’s capacity to achieve a rights based condition” (Murkens 2008, 59) This was a philosophical dilemma, and Kant enumerated the powers of various bodies as vested in the supreme power of the state.

The embodiment of the state produced the articles of the Constitution and statutory law but the former were logically no “higher” or better protected than the latter. ... State power was pre-constitutional that was only limited, and not constituted, by law. ... This explains why Imperial *Staatsrecht* had ... no theory of the primacy of the constitution (Murkens 2013, 16).

Unlike the philosophers of the period who developed his doctrine, Montesquieu was specific in his theory that consecrated into legal principles the three branches of a constitution and the need to provide a balance of powers. This was the extent of his thesis: that it was to reflect the division and the checks and balances of the constitutional government. The objective of this was not the social contract or how it was arrived at, such as present in Locke’s reasoning or the political science-based reasoning of Rousseau, nor was he concerned with the state as the embodiment of the community that Kant espoused without delving into the checks and balances and constitutional theory.

The issues that Montesquieu was not able to define were the extent of the fusion of those powers and the capacity of the constitution to either wither or mutate and move towards the overlapping of powers. This is an matter of construction, and in modern constitutions the organs of government do not have a strict division of power. They can exercise powers independently, but they are dependent on the interplay between one branch and the other two branches. The examination of the extent of the integration of the branches can be measured by contrasting the framework of a written and an unwritten constitution. This requires initially an analysis of the UK constitution and the distribution of power among its branches before evaluating the framework of a written constitution where the checks and balances have been defined by articles of the constitution, such as in the US.

## [C] SEPARATION OF POWERS IN THE UK CONSTITUTION

Unwritten constitutions are reliant on conventions, such as in the UK where there is no written document that establishes the roles of the executive, legislature or judiciary. The conventions stipulate that Parliament is sovereign, that the party which has the majority in the House of Commons forms the government and that the monarch can dissolve Parliament upon the advice of the Prime Minister. There have been several statutes that have constitutional, status such as the Magna Carta 1215, Settlement Act 1701 and the Constitutional Reform Act 2005, and together they form the constitutional framework.

Constitutions that are unwritten have been created over time and developed from conventions and established customs that may have been influenced by the exercise of the royal prerogative. A.V. Dicey described the royal prerogative as

the remaining portion of the Crown's original authority, and it is therefore ... the name for the residue of discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers (Dicey 1905, 3).

The UK constitution is the prime example of this type of constitution that is based on parliamentary supremacy. It allows the legislature to enact laws, and its sovereignty as a law-making source cannot be challenged. The executive has the power to enforce laws and implement the policy of the state and has a role in shaping the state's laws within the boundaries set by the legislature and courts. The executive formulates rules governing the application of the laws.

Montesquieu's perspective was that the British constitution was the epitome of individual and political liberty. He viewed it as an advanced constitution which embodied the

principles that were here is one State in the world whose special aim, and "the direct aim of its constitution", is political liberty—and that is England. If those principles be good, liberty will appear in them as in a mirror. These principles are self evident and if one can find such principles in a constitution, there will be no need to go on looking for them—that is, through philosophical speculation (McWhinney & Ors 1953, 113).

Montesquieu contemplates viewing the "principles", and he restates that he is not interested in whether the English do at present enjoy political liberty: "It is enough for me to state that it is established by their laws and I am not looking further than that" (McWhinney & Ors 1953: 113). In his theoretical framework Montesquieu would accept "that constitutions are dependent on the climate of the country in which they have been framed".

Specifically, laws should be adapted "to the people for whom they are framed, to the nature and principle of each government, to the climate of each country, to the quality of its soil, to its situation and extent, to the principal occupation of the natives ... [Laws] should have relation to the degree of liberty the constitution will bear, to the religion of the inhabitants, to their inclinations, riches, numbers, commerce, manners, and customs ... [Laws] have relations to each other, as also to their origin, to the intent of the legislator, and to the order of things on which they are established; in all of which different lights they ought to be considered (Montesquieu 1748, bk 1, ch 3).

The constitutional lawyer Viscount Bryce in an analysis of constitutions that are analogous draws a parallel between the Roman and the British constitution and argues that constitutions are a product of the customs of a country and their ancient backdrop is a consequence of a long assimilatory process. He argues that:

Constitutions are the expression of national character, as they in turn mold the character of those who use them; and the same causes which made both peoples great have made their political institutions also strong and rich, specially full of instruction for all nations in all times (Bryce 1901, 20).

Bryce draws the distinction between those laws that are based on common law *ius*, which emanates from the British parliamentary model, and those from the Roman *lex*, where statutory codes are the basic norm (Bryce 1901, 20). In Bryce's view it is necessary to have a more specific test because both past and present constitutions conform to one leading



type or another that can be distinguished by their development over a period of time. He states:

If we survey Constitutions generally, in the past as well as in the present, we find them conforming to one or other of two leading types. Some are natural growths, unsymmetrical both in their form and in their contents. They consist of a variety of specific enactments or agreements of different dates, possibly proceeding from different sources, intermixed with customary rules which rest only on tradition or precedent, but are deemed of practically equal authority. Other Constitutions are works of conscious art, that is to say, they are the result of a deliberate effort on the part of the State to lay down once for all a body of coherent provisions under which its government shall be established and conducted (Bryce 1901, 30).

Bryce's definition can be further subdivided by the provisions under which the government shall be established. This concept may be distinguished with the ancient being the former and the later being the modern constitution, which provides a comparable test to explain their different legislative functions. In Rome in the second century BC, legal bills "were enacted by the general assembly (whether *comitia centuriata* or *comitia tributa*) that had application and force" (Pliny the Elder 1855, 15; Dionysius 1950, 75).

The *regulae iuris* is a formulation of Roman law that it is not a fixed body of rules, but rather "rules" that were "recognised or found" to be applicable in a specific case (Stein 1966, 20). In common law the constitutional statutes are frequently promulgated to declare, modify or abolish precedence and repeal legislation. The Roman laws emanated from statutes that are interpreted by judges in the civil law courts through legal precedence developed by the courts rather than legal writings, as was the custom of Roman jurists. The concept of *regulae*—general rules that emanate from cases—is that "the law may not be derived from a rule, but a rule must arise from the law as it is" (Justinian, 50.17).

The formulation of Roman law is that it is not a fixed body of rules, but rather "rules" that were "recognised or found" to be applicable in a specific case. Law was therefore not created but "discovered", which means that enacted law in Rome began as "recorded customary law" (Stein 1966, 4). Those constitutions of the latter type are those that are usually composed of one instrument which is overriding and whose "form and title" distinguish it from ordinary legal precedent (Stein 1966, 35).

The 19th-century British jurist William Bagehot stated in reference to the English constitution that there was a "hidden being" in the fusion of legislative and executive powers. This made the doctrine of separation

of powers less relevant to the UK, and he defined the function of the English constitution as dependent on two main sections of an ancient constitution which are the “dignified part and the efficient part”. The dignified parts of government he describes as those which bring it force and attract its functional power. The efficient parts apply that power, and its composition is

the efficient secret of the English constitution that may be described as the close union, the nearly complete fusion of the executive and legislative powers. According to the traditional theory, the goodness of the constitution consists in the entire separation of the legislative and executive authorities, but in truth its merit consists in their singular approximation (Bagehot 1964, 6).

The more critical approach has been adopted by M.J.C. Vile who states that the separation of powers is essential because of its application to principles underpinning the constitution. The reason why it has been misinterpreted is because

[a] major problem in an approach to the literature on the doctrine of the separation of powers is that few writers define exactly what they mean by the doctrine, what are its essential elements, and how it relates to other ideas (Vile 1967, 13).

The issue that is at the centre of debate is “power” that is described as being very ambiguous. The majority of legal scholars argue that in principle there are several separate components which are usually combined under the doctrine of the separation of powers. This is because it is contended that the idea of separation itself is not sufficient to create a viable constitutional order, and it must be complimented by other concepts, such as the theory of mixed government, the idea of balance, or the concept of checks and balances (Vile 1967, 13).

The most important elements of a constitution, in Vile's view, are the three elements that compose it and which need to develop through the interaction between its organs. The model constitution needs to set out how they are interdependent, mutually interacting and intimately related to certain values patterns. It needs to be established that the character of a constitution is determined by the “interpenetration of points of function, structure and process”, and in postulating the “development of a model that integrates all three elements Vile states that the concept of function is the most important” (Vile 1967, 72-73).

The functional aspect can be viewed in the example of Aotearoa/New Zealand which also has an unwritten constitution that is reliant on several constitutional documents that form the framework of the laws. The Treaty of Waitangi Act 1975 gave the treaty signed with the Maori minority in 1840

a constitutional status and is regarded as a “Constitutional document” that serves “to guide” the relationship between the Maori people and the New Zealand Government. The Treaty of Waitangi is a governing document which was adopted by New Zealand’s Government when it ratified the Statute of Westminster in 1931, and it was formally incorporated by the Adoption Act of 1947. In the state’s foundational laws the

constitutional arrangements are found in a range of statutes, documents, practices, conventions and institutions. They describe and create the institutions of the State, set out the constraints on the exercise of State power, and regulate the relationship between citizens and the State (New Zealand Ministry of Justice nd).

It has been argued that the term “unwritten” never meant the absence of writing; rather it implies the absence of any truly supreme law. The New Zealand Parliament is deemed to be supreme and its enactments are not susceptible to annulment by any court. The implication of this principle of a

legislative supremacy is that the common law developed by judges in light of New Zealand values serves an important updating function. In that sense common law serves to write things that remain unwritten (Rishworth 2016, 137).

In an unwritten constitution there is no estimable division of powers. Eoin Carolan argues that the tripartite concept of executive, legislature and judiciary cannot define the complexity of modern states, and in particular their administrative functions (Carolan 2009, 47). The separation of powers requires that “this delegated law-making power be exercised in a way that reflects the institutional strengths and limits of the executive branch” (Carolan 2009, 50). This notion depends on “a re-interpretation of the doctrine that stresses its dependence on the values that underpin the state”. The manner in which the demands of the separation of powers is understood is by the evaluation of the “proper objectives of the state” (Carolan 2009, 52). The current problems related to the overlap between the three organs of government are based upon the institutional organization of the state. For this reason, it might be more appropriate to evaluate the concept of identifying state institutions with specific social interests (Carolan 2009, 257).

It has also been argued that “the system of checks and balances and the idea of independence of power components stand out against each other” (Magill 2000, 1127). The theory of separation of powers is a key ingredient of constitutional government, but the theory is ambiguous and not directly relevant to the British constitution. The concept has been linked with good government, with fidelity to the governed and respect

for the checks and balances of power in a state. The inference is that constitutional government is an ingredient of the major concepts such as the rule of law, judicial review in the “new constitutional settlement” in the aftermath of the UK Constitutional Reform Act 2005. There have been attempts to define the scope, meaning and role of the constitution with separation of powers, but it is still an abstract concept because of the different functions of the branches in an unwritten constitution.

However, the doctrine of the separation of powers does form the basis for a framework on the values and principles, and there has to be a definition of the objects of constitutionalism to satisfy the public law discourse. This issue has a bearing on the meaningful application of a balance of powers even if not the “separation of powers as an ingredient of ‘constitutionalism’” which is essentially government “without an arbitrary exercise of power” (Murkens 2009, 427). In order for that to happen the reason why the separation of powers exists has to be discerned, and this can be achieved when the purpose for which the framework has institutionalized the separate organs of government has been determined.

## [D] CONSTITUTIONALISM AND THE FUSION OF POWERS

In the UK there is a nexus between the legislature and executive branches of the constitution with the political part of the government connecting the two branches together but still retaining profound differences. In English constitutional tradition there is a common law-based judicial review of administrative action that forms the framework for securing a balanced constitution. According to Dicey, judicial decision-making's purpose is for “securing certainty and maintaining a fixed legal system with strong respect for precedent, than at amending the deficiencies of the law” (Dicey 1914, 363-364). This supports the view that respect for precedent is the necessary foundation of judge-made law.

The executive branch in the UK consists not only of the head of government but also the civil servants who provide the administrative function of the state. The bureaucracy has important duties to implement the policy of the executive body, and this process has led to the principle of constitutionalism, which is inherent in both unwritten and written constitutions. Political constitutionalists argue for an increased space in the UK constitution for the judiciary by proposing that Parliament must not enact legislation that bars judicial review.

Adam Tomkins observes that Parliament should frame legislation as transparently as possible, and that the courts should review this by developing a power analogous to the “declaration of incompatibility” under the Human Rights Act 1998 (HRA) when there is doubt about the proper scope or meaning of a government power. If legislation does conflict with human rights, then the courts should have the power to strike out the ouster clauses. In effect where the court finds that a power conferred on the government does not appear to be necessary, it should refer the power back to Parliament, which should reconsider the matter, its view being final in this respect. The intervention of the judge is based on the proposition that what “Parliament intended is ambiguous; where the government has acted without parliamentary authority; and where it has acted in a manner that circumvents parliamentary scrutiny” (Tomkins 2010, 23).

It would render the statutes null and void and incompatible with the HRA as in the House of Lords ruling in *A v Secretary of State for the Home Department* (2005). Tomkins has espoused the view that there has to be a balance between “political” and the “legal” purpose within public law. The ambit of judicial review is primarily on “executive and administrative actions broadly conceived, whether undertaken by ministers, agencies, local authorities, boards, commissions, or any other organ that comprises the modern administrative state, including review of such actions under the HRA” (Tomkins 2010, 43).

In the Westminster Parliament the judicial contribution to constitutional law remains significant because the application of a precedent requires judicial intervention in specific circumstances. In *Chandler v The State (No 2)* (2022), it was stated that constitutional provisions will lead to.

Judicial latitude in applying a constitutional provision which will be considerably less in relation to those which are framed in concrete and specific terms. These are often expressed in general terms because the legal application of constitutional law is by formulating the ground-rules of the liberal democratic order and is not ordinarily a matter of containment and restraint—though the rules do that as well; it is a matter of establishing the texture of the system (Sales 2018, 691).

The conceptualization of the theory of constitutionalism implies that law should be made responsive to

social propositions, ie moral norms, policies and experiential propositions about the way the world functions and this is made possible when the rules made by courts are durable – generalizable over time as well as over persons – and therefore should not be based on policies that seem transitory (Sales 2018, 691).

The courts are not representative institutions of state, which implies that they have to proceed gradually and take precautions when being judicially active. This is because the

Legitimacy of the judicial establishment of legal rules depends in large part on the employment of a process of reasoning that begins with existing legal and social standards rather than those standards the court thinks best (Sales 2018, 691).

There is a need to distinguish the theory of political constitutionalism which has its conceptual basis the study of "representative democracy" and its obedience to Parliament and the "doctrine of parliamentary sovereignty". Legal constitutionalism "identifies the primacy of rights protection" and by stepping over the assertion of individual rights in a "democracy" it upholds the concept that:

The prescribed limitations must exist on Parliament in the manner it governs itself and the analysis is on the "role of courts and judicial review" (Delaney 2014, 545).

The spirit of legal constitutionalism transcends the framework, and its essence lies in the compromise between judicial restraint and the motion, stability and dynamic approach which is at the basis of the common law. The imperative is the need to preserve the constitutional principles embodying the framework in both a written constitution and an unwritten constitution. Judge Cardozo states:

When changes of manners or business have brought it about that a rule of law which corresponded to previously existing norms or standards of behavior, corresponds no longer to the present norms or standards, but on the contrary departs from them. (Cardozo 1928, 7)

The theory of constitutionalism is based on a political determination that leads to the distinction between qualified rights and absolute rights. If adopted then it could lead to the repeal of the HRA because domestic courts may be unwilling to countenance national courts who are engaged in the judicial review of qualified rights. They would not accept adjudication on precisely the same terms as the Strasbourg Court when the nature of these disputes will not alter the fundamental issue at stake. The UK "would have to repeal the HRA by denying direct adjudication of national courts over qualified rights or the proportionality review would be infringing the HRA" (Kavanagh 2012, 191).

Peter Craig comments that Parliament has managed to exert some control over areas of legislation in some limited instances despite the insertion of exclusionary clauses. He remarks:

This recognition is built on certain assumptions concerning the relationship between the legal and political branches of government, as exemplified by the generally accepted proscription on the judicial substitution of judgment for that of the administration in relation to the merits of discretionary power. It is apparent, once again, in the judicial recognition of some degree of deference, the discretionary area of judgment, or respect to be accorded to the initial decision maker under the Human Rights Act 1998, the extent of which will vary depending, in part, on the nature and extent of the initial decision maker's democratic credentials (Craig 2011, 112).

However, there is an understanding that even in relation to the initial decision-makers who possess some democratic legitimacy, such as ministers, there is the requirement of some level of judicial oversight that ensures they do not surpass the limits set down by their elected principals who occupy political office. Craig argues that this "transmission-belt theory no longer provides a convincing explanation for the entirety of administrative law" (Craig 2011, 115). The scope of excluding judicial review in such a case of group rights needs a determination of "legal authority to act" or "acting within the scope of power" that can entail the choice of values and balancing within the context of rationality and proportionality (Craig 2011, 122).

The traditional judicial review does acknowledge the relationship between political authority and the legal branch. There is support for an existing judicial recognition of a degree of deference, or respect for the decision-maker under the HRA, the extent of which will be dependent upon the delegated body's representative standing. In *R (on the application of International Transport Roth GmbH) v Secretary of State for the Home Department* (2003) the Home Secretary had introduced a scheme pursuant to section 32 Immigration and Asylum Act 1999, making carriers liable to a fixed penalty for every illegal entrant found in their vehicles. As a consequence, multiple claimants brought proceedings against the Home Secretary challenging the lawfulness of the scheme. The judicial review resulted in the judge stating that the scheme was incompatible with article 6 of the European Convention on Human Rights and Additional Protocol of the HRA as comprising unjust restrictions on the free movement of goods.

The Court of Appeal held that the scheme was in breach of article 6 but also stated that there was no breach of community law. Simon Brown LJ ruled:

The scheme here did impose too great a burden on drivers—such that the unfairness of it was disproportionate to the effectiveness of

the penalty regime on reducing the number of clandestine entrants (para 53).

Laws LJ in a dissenting judgment held:

The extent of any deference to be paid to the legislature depends in part on the nature and quality of the measure in question: more concretely, whether its content falls within the special responsibility of the executive ... or the special responsibility of the judiciary. A paradigm of the executive's special responsibility is the security of the state's borders. A paradigm of the judiciary's special responsibility is the doing of criminal justice (para 77).

His Lordship stated further that: "The degree of deference owed to the democratic decision-maker must depend upon where the impugned measure lies within the scheme of things" (para 77). The degree of deference to be given by a court should depend on the institutional competence of either the executive or the judiciary. This is an important ruling which implies that traditionally judicial review does acknowledge the relationship between the political and the legal checks and balances.

It implies that, while acknowledging the initial administrative decision-maker does not trespass beyond the limits accorded by the legislature, there has to be an administrative law doctrine that is binding. The political constitutionalist doctrine acknowledges the consequence which flows from the notion that there must a more radical limitation placed on judicial review because the legislature is the forum of the political action compared to the judiciary. Jon Elster states:

Constitutionalism ensures that constitutional change will be slow compared to the fast lane of parliamentary politics. The constitution should be a framework for political action not an instrument for action (Elster 2000, 100).

In *R (On the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (2)* (2008) the British Government acting through the Privy Council had enacted a law made in the interim without approval from the House of Commons and had substituted the judgment of the appeal court that had permitted the transfer of the islanders to their indigenous islands. The British Foreign Secretary argued in the case that the courts had no power to review the validity of a British Indian Ocean Territory (Constitution) Order 2004 Order in Council legislating for a colony, either because it was primary legislation having unquestionable validity comparable with that of an Act of Parliament, or because review was excluded by the Colonial Law Validity Act 1865. The Islanders had submitted an application that a right of abode was inviolable and that



only an Act of Parliament could exclude it, but this argument did not prevail with their Lordships.

The legal constitutionalists consider the scope of the prerogative power, rationality, and the legitimate expectations of the appellants. This exemplifies the value choices that are often inherent in making determinations as to the scope of power, whether statutory or, as in this instance, prerogative power. The courts have been forthright in declaring that in areas of non-justiciability such as acts of foreign states they will exercise their discretion only on the basis of the judicial deference to the executive.

In “*Maduro Board*” of the Central Bank of Venezuela (*Respondent/ Cross-Appellant*) v “*Guaidó Board*” of the Central Bank of Venezuela (2021) Lord Lloyd-Jones who gave the main ruling of the Supreme Court held that on the “recognition of foreign states, governments and heads of states it is a matter for the executive”. The courts in the UK accept statements made by the executive “as conclusive” as to whether an individual is to be regarded as a head of state (paras 63, 69). This rule is called the “one voice principle” and its rationale is “that certain matters are peculiarly within the executive’s cognizance” (para 78). The court held that it deferred to the executive in formulating its judicial rulings as to the acts of state of foreign governments which includes recognition of foreign governments and their assets which are held in the UK.

The claim was by the *de jure* government of President Maduro, which is not recognized by the UK Government, and by Eduardo Guaidó, who is recognized as *de facto* head of state not in power. Historically, the courts have drawn a “distinction between the recognition of a government *de jure* and *de facto*” (paras 83, 85). His Lordship stated that this distinction is now “unlikely to have any useful role to play before courts in this jurisdiction” (para 99).

The rationale for judicial review is that courts need to be involved in cases where there are “contentious value assumptions or difficult balancing exercises, then the premise is unsustainable, since it would destroy adjudication across private as well as public law” (Craig 2011, 113). The legal constitutionalists argue that there should be more parliamentary control over legislation and the executive’s actions based on the notion that they want to remove the parts of administrative law doctrine where the executive has overbearing powers. They argue that the separation of powers concerns have been an important reason for the growth of judicial review (Gardbaum 2014, 613).

Lord Sales in a conference speech reviewed the balance of powers in a constitution and its impact on the judiciary's role, stating:

The repair function of common law and constitutional law is made possible by the judicial contribution to that law, which allows for adjustments over time to align constitutional norms with social expectations, so that they do not drift too far apart. Application of legal norms is a constant process, which can arise in the courts at any time. This distinguishes it from legislative action, where the focus is on a specific act at a particular time to define new laws to govern in the future. The judicial application of an already existing norm binds together past, present and future in a way that a legislative act does not. A judge has to understand how the norm to be applied came to exist in the past and its meaning then and decide what meaning it should bear in the present to govern the dispute before the court and (potentially) what meaning it should carry into the future to be derived from the precedential value of the decision (Sales 2022).

The legal constitutionalists argue that the balance of powers in a constitution does require a modicum of a separation of powers in the framework and the increased role of the judges and the doctrine of precedence. The discretion to act within the scope of legal constitutionalism will increase the powers of judicial review in the UK Parliament. The administrative bodies at the lower rungs of the decision-making process implement the executive decision-making and the courts have managed to bind them to their precedent based on a public law doctrine that is inherent in the balance of powers developed over time with an evolving framework of judicial review.

## [E] SEPARATION OF POWERS AND ADMINISTRATIVE DEFERENCE

The US Constitution devised in 1787 is an example of a written constitution that has consciously adopted Montesquieu's doctrine of the separation of powers. The nexus with the theory of Montesquieu in the US Constitution is due to the Federalist Papers, which were authored by Alexander Hamilton, James Madison and John Jay and provided a preamble to the US Constitution. The intention was to integrate liberty as a principle of the Constitution and to formulate a checks-and-balances doctrine in the states and then at the federal level. This was the ideal of Montesquieu, which was given shape by the framers of the US Constitution who had experience of drafting the texts of the states' constitutions.

The constitution of Massachusetts was deemed in Madison's essay as conforming to the principle of the separation of powers because it had

a sufficient though less pointed caution in expressing this fundamental article of liberty. It declares “The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them” (Wootton 2003, 36-37).

At the inception of American independence the major challenge for the Federalists was that the revolution had swept away a large number of the foundations of the very concepts they had inherited.

In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. (Madison 1993, letter 51).

Another important theme in Madison’s conception was that federalism and the separation of powers complimented the protection of liberty against abusive government. He contends that the division of government power between different institutions has positive value because liberty is best maintained “by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places” (ibid).

This provided the incentive to draft a new federal constitution and its framer Madison argued: “It goes no farther than to prohibit any one of the department’s from exercising the powers of another department” (1993, letter 47).

Madison argued that the checks and balances emanate from the judiciary’s power to annul legislation not in conformity with the US Constitution. Judicial power extends to the right to repeal any “Act of the Congress and all legislative or executive action violating the constitution, which could concern the institutional framework and any unjust laws” (1993, letter 69).

The Constitution has been interpreted to have provided a balance of powers where the legality of the executive’s action can be challenged and invalidated after application for the writ of *mandamus*. In essence, “federalism and the separation of powers have been presented as the primary institutional arrangements generating this diffusion” which is based on “the diffusion of powers among different individuals in different institutions to produce many desirable institutional goods: checks and balances, democratic accountability, and effective government” (Fontana 2018, 727).

The rule was stated by Chief Justice Marshall in *Marbury v Madison* (1803) that appointees of the federal government are capable of examining the executive actions of the government:

but where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy (para 167).

Justice Marshall also ruled that it was the duty of the judicial department to state the ambit of the statute. Those who apply to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other “then the Court will decide on the operation of each” (para 169). However, the process of decentralization in a state involves a “central power possessing authority to decentralize and empower the functional and administrative responsibilities” to the lower echelons of government (para 180).

The separation of powers is an enduring concept and the judiciary has not been restrained from exercising its rights inherent in the constitution. This has led to the concept of administrative deference when the judiciary has overruled legislation that it found to be in breach of the constitutional principle of a balance of powers. The Supreme Court has been instrumental in asserting this doctrine that echoes Montesquieu's separation of powers and aligns it with the balance of powers enshrined in the US Constitution.

In *Chevron USA Inc v NRDC* (1984) a petitioner sought judicial review of a judgment from the United States Court of Appeals for the District of Columbia Circuit, which set aside a regulation issued by the Environmental Protection Agency (EPA). This gave the EPA the right to implement or permit requirements for non-attainment states under the Clean Air Act Amendments of 1977. The formulation gave the subject states the ability to treat all pollution-emitting devices within the same industrial sector as though they were in the same industry. The Court of Appeal ruling was challenged by judicial review on the grounds that it was not a reasonable interpretation of the statutory framework.

The Supreme Court held that the EPA had acted *ultra vires* because it had to address the question whether Congress has directly given it the authority to implement the regulation and

if the statute was silent or ambiguous with respect to the specific issue, the question for a court was whether the agency's action was based on a permissible construction of the statute. The Agency had to give sufficient weight to the construction of a statutory scheme

and the legislative background of the statute did reveal that the EPA's interpretation was in accordance with the principal objectives of the statute which was for the purpose of the reasonable economic growth. That in this measure the EPA's interpretation was entitled to deference to the executive (*Chevron* 1984: paras 844-845).

Justice Stevens' seminal opinion is deemed to have inaugurated the theory of administrative deference to reasonable executive branch interpretations of law.

In 1996 Congress had enacted the Line Item Veto Act, which enabled the US President to exercise authority to cancel certain spending and tax benefit measures after he had signed such measures into law. In *Clinton v City of New York* (1998), upon the exercise of presidential authority under this enactment, the procedure was questioned for its constitutionality. The District Court ruled that the Line Item Veto Act violated the Constitution because it had not conformed with the article I, section 7 of the Constitution.

The appeal was heard by the Supreme Court and the issue was whether the Line Item Veto Act was constitutional and whether the unilateral presidential action that either repeals or amends parts of duly enacted statutes is equivalent to an express prohibition. Judge Stevens, stating the opinion of the court, held that the Line Item Veto Act had no legal force or effect and had failed to satisfy the "cancellation procedures that violated the Presentment Clause" (*Clinton v City of New York* (1998): paras 436-439). The effect was not in accordance with the "finely wrought" procedure that the Framers designed", but "truncated versions of two bills that passed both Houses" (paras 436-431). The deference shown by Congress had "overstepped the powers granted to the President and in surrendering part of the traditional legislative appropriations power to the President was invalid and the legislation was revoked" (para 418).

Justice Stevens' opinion calling for judicial deference to reasonable executive branch interpretations of law in *Chevron* recognizes that quandary while his later opinions and votes limiting the scope of *Chevron* reflect the justices' desire to preserve as much of the separation of powers as possible by allowing for judicial review. The judge stated that the Act allowed the President a "unilateral power unlike the construction of previous statutes" (para 447). The case is important in the "assertiveness of the judicial branch in the separation of powers doctrine in the US constitution and the separate roles that are delineated for the executive and the legislative branch" (Calabresi 2004, 77).

## [F] CONCLUSION

Baron Montesquieu's adoption of the doctrine of separation of powers was meant for absolutist government where arbitrary rulers had established their legislative monopoly over the state. In terms of its application it has general universal relevance because there are three organs of government and each has its own department which vests the power under the constitution. The political liberty in the unwritten British constitution has of its own volition adopted constitutional statutes such as the Magna Carta 1215, Settlement Act 1701 and Constitutional Reform Act 2005, which has distributed powers and thus created a balance of powers. The judicial role of the House of Lords ended when the Supreme Court became the highest appellate court in the UK.

The implication is that the British constitution is composed of a set of rules which constitutes the state, and the inference is that the doctrine of the separation of powers should not be applied to parliamentary-style constitutions. It is argued that parliamentary systems are essentially based on a fusion of powers, not a separation of powers. This is premised in Bagehot's concept that in a parliamentary system the legislature selects the political composition of the executive branch, which then remains dependent on the legislature to enact its laws. The judiciary is vested with the power to review administrative action and has the power to invalidate legislation that is against the HRA.

The presidential-style model of a constitution, as in the US, pointedly reflects the separation of powers doctrine with the executive exercising the role of the head of state; the Congress as the legislature; and the judiciary as the final arbiter of constitutional guarantees. There is a greater incentive to fashion a separation of powers with checks and balances that reflects the constitutional dispensation according to its framers' intentions. This rule has to be set against the fact that the Constitution contains no express limits on how much federal authority can be delegated to a government agency, but does limit the authority granted within the statutes enacted by Congress. The courts have addressed the issue of the standard of review that should be applied by a court to a government agency's own interpretation of a statute when it is charged with administering a departmental project and have evolved a judicial policy of deference.

The main element of a constitution is the ability to preclude the abuse of power. Montesquieu's doctrine of the separation of powers is an essential factor of the constitution and is a necessity for the prevention of the executive exercising an overriding power. The most important aspect of

the constitution is not that it is written or unwritten but the power that is distributed among the various branches of the state. The judiciary have the duty of restraint in the exercise of their powers and to ensure its compliance with the constitution by maintaining it as an active and intervening source of the tripartite system of government.

### **About the author**

**Zia Akhtar** obtained his LLB and LLM from London University. He has also studied at the College of Law and is a member of Gray's Inn. He is a specialist in public law and his articles have been published in leading law journals. He is currently studying for a PhD at Coventry University and will complete his doctorate this year in Public International Law.

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