

SEPARATION OF POWERS: THE UK EXPERIENCE

Venkat Iyer*

Abstract: As one of the few countries in the world with uncodified constitutional arrangements, the United Kingdom does not have strict separation of legislative, executive and judicial powers. There are significant overlaps between the three organs of state and, as the British constitution has evolved over centuries, the distribution of powers has undergone a carefully managed incremental change. Recent years have, however, seen stronger pressures for a sharper delineation of powers, and these have led to a transformation of the constitutional landscape on an unprecedented scale. Using three examples from the recent past, this article explains the nature, scale and impact of these reforms and argues that the pace of change is likely to accelerate in the near future as demands for a written constitution become more vociferous.

Keywords: *United Kingdom; separation of powers; Brexit; Lord Chancellor; House of Lords; Supreme Court*

I. Introduction

The separation of powers principle, in so far as it applies to the constitutional arrangements in the United Kingdom, has engaged the attention of political and legal commentators, both within the country and outside, for a very long time. The topic acquired heightened scrutiny in the late 1990s when a new Labour government under the leadership of Anthony (Tony) Blair signalled its intention to undertake the root-and-branch reform of certain institutions of state. These institutions had traditionally defied the Montesquiean approach to separation of powers and therefore represented, in the view of the reformers, an anomalous state of affairs.¹ The issue also came to the fore more recently, under highly fractious circumstances, in the context of the decision of United Kingdom to terminate its membership of the European Union (EU) following the 2016 referendum on the subject (the “Brexit” referendum).

This article examines the extent to which separation of powers has been applied in practice in modern Britain.² It will look briefly at the evolution of

* School of Law, Ulster University.

1 The most widely commented upon of these was the office of the Lord High Chancellor (Lord Chancellor), the occupant of which belonged to all three branches of government. For an account of the origins and evolution of the Lord Chancellor’s position, see Diana Woodhouse, *The Office of Lord Chancellor* (Oxford: Hart Publishing, 2001).

2 For the sake of convenience, the term “Britain” will be used interchangeably with “the United Kingdom” unless the context requires a differentiation to be made. As is well known, the United Kingdom consists

the doctrine and try to explain the factors that have influenced its development. Particular attention will be given to the stresses and strains that the doctrine has been subjected to, especially in the debate surrounding Brexit, and an attempt will be made to assess the course of its development in the foreseeable future.

II. Origins and Nature

The doctrine of separation of powers, a device intended to ensure that the three principal branches of government in a state — the legislature, executive and judiciary — are divided in person and in function from each other so that there is no undue concentration of power to the detriment of individual liberty, can be traced back to the fourth century BC when it featured in the writings of the Greek philosopher Aristotle.³ The idea also found resonance in the works of more modern writers, including the Geneva-based theologian and reformer John Calvin, the Scottish historian George Buchanan and the English philosopher John Locke. However, its most systematic and influential exponent was the French judge and man of letters, Baron de La Brède et de Montesquieu, who had spent many years in England and set out his thoughts on the subject in his book *The Spirit of the Laws*.⁴ Montesquieu had a profound influence on the founding fathers of the Constitution of the United States, one of whom, James Madison, averred that “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”.⁵ Unsurprisingly, the constitution of the United States embodies a fairly strict interpretation of the separation of powers doctrine.

In so far as England was concerned, Montesquieu recognised that the doctrine of separation of powers could not be applied in its purest form because the uncodified English constitution had many features which made it a “mixed” constitution, albeit one with inbuilt checks and balances. For that reason, the British constitution is often referred to as a “balanced” constitution characterised by some fusion of powers.⁶ The virtues of the English constitution, though it

of four countries — England, Wales, Scotland and Northern Ireland — and three legal jurisdictions — England and Wales, Scotland and Northern Ireland. The term “Britain” (Great Britain), when applied strictly, only covers England, Wales and Scotland.

3 *Politics*, as cited in Neil Parpworth, *Constitutional and Administrative Law* (Oxford: Oxford University Press, 9th ed., 2016) p.18 para.2.2.

4 First published in French in 1748 as *De l'Esprit des Loix*. See also, Anne M Cohler, Basia Carolyn Miller and Harold Samuel Stone (eds), *Montesquieu: The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989).

5 James Madison, “The Particular Structure of the New Government and the Distribution of Power among Its Different Parts” *The New York Packet* (1 February 1788) (*The Federalist Papers No 47*), available at http://avalon.law.yale.edu/18th_century/fed47.asp (visited 22 July 2018).

6 See, eg, Walter Bagehot, *The English Constitution* (New York: Cornell University Press, 1995) pp.67–68: Bagehot referred to this arrangement as the “efficient secret of the British Constitution”.

embodied the separation of powers principle imperfectly, were adumbrated by another well-known writer of the nineteenth century, the jurist and politician William Blackstone. His views were summarised by a scholar thus:

“[Blackstone] argued that the English system was different from others. It was not a democracy, aristocracy, or monarchy; it was, rather, a mix of all three. For Blackstone, democracies are virtuous and thus best in determining what the end shall be; aristocracies are wise and thus best at determining the means to reach the end; and monarchies are powerful and thus best at executing the means. In combining the three in separate institutions (the Commons, Lords, and Crown respectively), the English constitution provides all that is necessary for good government.”⁷

The implication of Blackstone’s view is that constitutional formalism is perhaps less important than conventions and social structures with a strong predisposition towards the common weal, and which are operated with a degree of flexibility and fairness. In the case of the United Kingdom, of course, it needs to be remembered that all members of the executive, ie, the council of ministers, are drawn from the legislature — whether the House of Commons or the House of Lords; until 2009, the highest court of the land was part of the legislature, and judges cannot rule on the validity of any law passed by Parliament.⁸ But this has not militated against political accountability or the safeguarding of civil liberties, which points to the possibility that a strict and formal separation of powers as exists under a written constitution is not a *sine qua non* for effective and efficient government.

That the doctrine nevertheless finds a place in the peculiar constitutional arrangements of the United Kingdom — and has done so for a long time — is undeniable. In addition to explicit statutory injunctions,⁹ it is implicit in at least three ways, as an Australian lawyer pointed out nearly a hundred years ago:

“While a statute of the Imperial [i.e. the UK] Parliament cannot be challenged on the ground of usurpation [of power from any of the other branches of government], the doctrine in question is implicit: (1) as a convention of the Constitution; (2) as a constitutional limitation upon the activities of organs of state subordinate to the Imperial Parliament; (3) as a rule of statutory

7 Andrew Wroe, “Separation of Powers” in Paul Barry Clarke and Joe Foweraker (eds), *Encyclopedia of Democratic Thought* (London: Routledge, 2001), available at <https://kar.kent.ac.uk/8259/1/sepofpowers.doc> (visited 22 July 2018).

8 *Pickin v British Railways Board* [1974] AC 765 (HL). In this sense, the judiciary is subordinate to the legislature. One of the fascinating questions of British constitutional law which has engaged the attention of scholars, legal practitioners and judges for a long time is whether judges can make law: see, eg, Lord Reid, “The Judge As Lawmaker” (1972) 12(1) JSPTL 22, for one view on that question.

9 For example, the House of Commons (Disqualification) Act 1975 which prohibits judges from standing for election to Parliament.

construction which operates necessarily, if often unconsciously, upon the judicial mind when interpreting legislative enactments.”¹⁰

The *status quo* has frequently been justified on the ground that, regardless of its theoretical imperfections, it promotes stability and efficiency in the running of the government on a day-to-day basis.¹¹ As one commentator put it, the system “intentionally promotes efficiency over abstract concerns about tyranny.”¹²

Legal justifications have also been offered for the lack of a complete separation of powers. It has been argued that there is no theoretical basis under British constitutional law for a clear-cut separation, for example, of legislative and judicial functions. A distinguished senior judge noted in evidence to a parliamentary Select Committee that “[u]nder the British constitution Parliament, under the Crown, is supreme. In different ways, both the executive and the judiciary are servants of Parliament’s will”.¹³ The case against a complete separation of powers has also received strong academic support: in the words of Professor JAG Griffith, “The working constitution is a complex piece of machinery which depends on a commixture of functions, not their separation.”¹⁴

The period following the Second World War, however, saw a discernible shift in attitudes concerning informal constitutional arrangements in many Western democracies, with a demand from pressure groups for the system of conventions and informal understandings to be replaced by formal structures and statutory provisions. In the United Kingdom, this trend received a boost when, after a prolonged period of Conservative rule, the Labour party managed, in 1997, to gain power on a manifesto which promised radical constitutional reform, including

10 W Jethro Brown, “The Separation of Powers in British Jurisdictions” (1921) 31(1) Yale LJ 24. In support of the last-mentioned aspect, the author cites the example of the right of an executive commission of enquiry (of the kind that is common in many Commonwealth countries) to impose a penalty for refusal to testify before it. At p.28, he states: “[i]n a jurisdiction where Parliament has plenary powers, the right might be expressly conferred, but in the absence of manifest and incontrovertible legislative intent, the separation of powers would operate as a rule of statutory construction to inhibit the right”.

11 One practical way in which the efficiency of government is said to be promoted is through the process of delegated legislation. Under such legislation, some law-making powers are outsourced by Parliament to the executive so that Parliament does not have to concern itself with relatively small matters, and parliamentary time is therefore freed up to deal with larger and more momentous issues.

12 Ronald J Krotoszynski, “The Separation of Legislative and Executive Powers” in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Edward Elgar Publishing, 2011) p.248.

13 Sir Robert Carnwath, as cited in Select Committee on Constitutional Reform Bill, *First Report* (HL 2003–2004, 125-II) para.111, available at <https://publications.parliament.uk/pa/ld200304/ldselect/ldref/125/12503.htm> (visited 20 July 2018). Another senior judicial figure, Lord Jauncey of Tullichettle was even more emphatic: in his view, there “was not and never has been a strict separation of powers in the English constitution”; *Ibid.*, para.112. Lord Carnwath’s written evidence and those of the other Lords are actually available in Written Evidence, reported as a separate High Court volume. But as the references here run specifically to what was cited in the HL of the *First Report*, it would seem more expedient to refer to those immediately. Reference to those pieces of Written Evidence has thus been omitted.

14 *Ibid.*, para.113.

the incorporation in domestic law of the European Convention on Human Rights (ECHR), removal of the right of hereditary peers to sit in the House of Lords, abolition of the office of the Lord High Chancellor, creation of a Supreme Court to replace the Appellate Committee of the House of Lords, greater devolution of powers to Scotland and Northern Ireland, creation of a new appointment process for judges and enactment of legislation to provide wider citizen access to information held by public bodies. Some of these reforms were justified explicitly on the grounds that there was a need to give greater effect to the separation of powers principle, although the reform agenda stopped short of calling for a written constitution.¹⁵ The need for a sharper separation of powers was also justified on the grounds that the ECHR — which the UK Parliament had made part of domestic law in 1998 — would not countenance legislative and judicial powers to be combined in the same body, *viz*, the House of Lords.¹⁶

How those reforms were sought to be implemented, and what impact they had on the constitutional scheme of the United Kingdom, will be discussed in the following section. Due to space constraints, attention will be focused on two of the most high-profile reforms, namely, changes to the office of the Lord Chancellor and the removal of the judicial power from the House of Lords. Consideration will then be given to the separation of powers issues which were thrown up by the Brexit referendum.

III. The Lord Chancellor and Separation of Powers

Even to the untrained eye, the legal and constitutional position occupied by the Lord High Chancellor, from the office's inception around the time of the Norman Conquest of 1066 to the mid-2000s (when far-reaching reforms, short of abolition of that office, were carried out), would seem anomalous when viewed through the prism of separation of powers. The holder of this office, who in precedence and privileges occupied a position higher than even the Prime Minister,¹⁷ belonged to all three branches of government: he was the presiding officer of the House of

15 Calls for a written constitution are made from time to time by commentators and pressure groups, but the idea has not received much traction among the political classes. See, eg, Anthony Barnett, "Why Britain Needs a Written Constitution" *The Guardian* (30 November 2016), available at <https://www.theguardian.com/commentisfree/2016/nov/30/why-britain-needs-written-constitution> (visited 22 August 2018). The argument against a written constitution is often voiced with equal vigour; see, eg, Stephen Laws, "There Are Substantial and Unacceptable Risks in Moving to a Legal Constitution from Our Current Political One" *Constitution UK* (15 September 2014), available at <http://blogs.lse.ac.uk/constitutionuk/2014/09/15/there-are-substantial-and-unacceptable-risks-in-moving-to-a-legal-constitution-from-our-current-political-one/> (visited 22 August 2018).

16 The Human Rights Act 1998, which incorporated the ECHR into UK law. Section 3 requires British judges to take into account the provisions of the Convention and the jurisprudence developed under them while interpreting domestic law and deciding cases.

17 The only other office higher in status was that of the Lord Steward, a high functionary who is only appointed for the day of royal coronations. Traditionally, the office of Lord Chancellor was occupied by

Lords, a Cabinet Minister and the head of the Judiciary, and as such exercised legislative, executive and judicial functions.

Not surprisingly, this anomaly attracted critical scrutiny from those who viewed the separation of powers principle as a fundamental tenet of constitutional government and one which should be given the broadest possible effect, both in letter and in spirit. Although not all Lord Chancellors had, in fact, exercised the full extent of their powers, some did.¹⁸ Strong practical justifications were offered for such practice, notably that the Lord Chancellor was a bridge between the three major institutions of state. Any conflicts of interests — real or perceived — were dealt with through conventions: for example, no Lord Chancellor would hear a case, sitting as a judge, which involved legislation “in the passage of which he had been directly involved nor in any case where the interests of the executive were directly engaged”.¹⁹ But such arguments did not cut much ice with the Blair government which initiated a wide-ranging package of reforms aimed at abolishing that ancient office. Those reforms were only partially successful, for reasons which will be explained shortly.

A key aspect of the reforms was to remove the judicial functions of the Lord Chancellor. He was stripped of his status (and powers) as the head of the judiciary, with the Lord Chief Justice being given that role. He was also denuded of his powers to select judges,²⁰ although all judicial appointments were still made in his name. The proposal to abolish the office of Lord Chancellor met with stiff parliamentary resistance,²¹ and it soon became clear that the government’s preferred method of simply replacing the Lord Chancellor’s Department with a Department of Constitutional Affairs (DCA) was not feasible.²² In the event, a period of chaos ensued, which only ended when the government agreed to retain the ancient office, albeit after receiving the necessary parliamentary support to combine it with the office of Secretary of State for Constitutional Affairs.²³ In May 2007, the DCA itself was abolished and its functions transferred to a new Ministry of Justice. As a result,

a clergyman. One of his chief functions was to act as the Keeper of the Great Seal (The Great Seal of the Realm).

18 In modern times, Lord Hailsham of Marylebone was the most prominent example.

19 HL Deb 23 Feb 2000, Vol.610, col WA33 (Lord Irvine LC). See also, *McGonnell v United Kingdom* (2000) 30 EHRR 289 (Commission Decision).

20 That task was entrusted to an independent Judicial Appointments Commission, which had minority judicial representation and a lay chairman. Separate procedures were prescribed for the appointment of Justices of the Supreme Court (which had UK-wide jurisdiction).

21 A particularly potent argument advanced against the change was that the office of Lord Chancellor was needed to speak on behalf of the judiciary in the Council of Ministers.

22 This is because, among other things, many of the Lord Chancellor’s “protected functions” had been written into statutes over centuries, and reform would require amendment or repeal of all such statutes and not merely the passing of an Order-in-Council (through the exercise of the Royal Prerogative) as had been the practice when transferring the functions of other Cabinet Ministers (Secretaries of State) from one department to another.

23 Constitutional Reform Act (CRA) 2005.

the position of Lord Chancellor is now combined with that of Secretary of State for Justice.²⁴ It remains a conventional ministerial office which is entirely in the gift of the Prime Minister.

The effect of the reforms, which were subsequently described as “messy” by the Prime Minister who initiated them,²⁵ was that the Lord Chancellor now has considerably less say in day-to-day decision-making on matters concerning the judiciary, although he retains notional power in the matter of judicial appointments.²⁶ He has to completely forfeit any role in the legislative branch of government, with the appointment of a Lords Speaker to preside over proceedings in the House of Lords. He also does not sit as a judge anymore. Arguably, the most important function he still performs is in upholding the rule of law and judicial independence, which is discharged largely at Cabinet level, and in ensuring that the executive maintains good relations with the judiciary. It is difficult to assess how effectively Lord Chancellors after the CRA 2005 have exerted themselves in the matter of upholding the rule of law and judicial independence, given that information on such matters is usually hard to come by as it involves discussions in the Council of Ministers or private exchanges between the Lord Chancellor and members of the judiciary.²⁷

Looked at from the perspective of separation of powers, the reforms to the office of Lord Chancellor have had both symbolic and real implications. In symbolic terms, the removal of certain functions (such as chairing proceedings in the House of Lords) has signalled a “clean break” with the *status quo ante*. In real terms, the reduction of certain powers (for instance, those in relation to the selection of judges) has meant that the Lord Chancellor now operates at a sufficient distance from the executive to make him less vulnerable to the criticism that the office was unacceptably intertwined with that branch of government. But the stated objective of the campaigners for reform, namely to achieve a complete separation of powers, was not fulfilled.

24 One important consequence of this development is that the tradition of Lord Chancellors being chosen exclusively from among members of the House of Lords has been broken. Advocates of reform have argued that this has increased democratic accountability as post-CRA Lord Chancellors (who hold that position simultaneously with that of Secretary of State for Justice) are members of the House of Commons.

25 “Tony Blair Admits Lord Chancellor Reform Was ‘Messy’” *The Telegraph* (6 January 2010), available at www.telegraph.co.uk/news/uknews/law-and-order/6939018/Tony-Blair-admits-Lord-Chancellor-reform-was-messy.html (visited 24 July 2018).

26 Among other things, he can veto any recommendations made by the Judicial Appointments Commission, although in practice successive post-CRA Lord Chancellors have used this power exceedingly rare. The Lord Chancellor can also issue additional criteria — over and above those prescribed in statute — for appointments that are contemplated for particular judicial posts.

27 Some information can, however, be gleaned from published sources: see, eg, Graham Gee, Robert Hazell, Kate Maleson and Patrick O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution* (Cambridge: Cambridge University Press, 2015).

IV. A New Supreme Court

Another important plank of the Blair government's reform was the removal of the judicial power that the House of Lords had enjoyed — through the Appellate Committee of the House of Lords — since at least 1876²⁸ and the entrustment of it to a new Supreme Court of the United Kingdom.²⁹ The rationale for this reform was similar to that offered for the reform of the office of Lord Chancellor, namely that it was anachronistic in the twenty-first century for a single body to exercise both legislative and judicial powers.³⁰ One advocate of change went so far as to argue that the establishment of a Supreme Court “is an item of long and outstanding unfinished business from 1875”.³¹ Prescriptions of international human rights law³² were pressed into service in support of the reform proposals.

When the idea was mooted, it ran into stiff opposition from a number of quarters. Opponents argued, among other things, that the Appellate Committee had functioned satisfactorily over the decades and was therefore still fit for purpose; that it provided very good value for money; that there were no complaints, from either litigants or members of the public at large, about bias or other blemishes on the part of the judges who sat on the Committee; and that the creation of a new court, separate from the House of Lords, risked “judges arrogating to themselves greater power than they have at the moment”.³³ Even so, the government pressed ahead with its proposal and, with little consultation, moved a Bill in Parliament which was extensively debated.³⁴

28 Parliament has enjoyed the power to decide disputes for a much longer time, going back to the *Curia Regis* (the advisory body to the King in the early Middle Ages), though that power went through a number of changes over the centuries — see, eg, Glenn Dymond, “The Appellate Jurisdiction of the House of Lords” (HL Library Note 2009/010), available at www.parliament.uk/documents/lords-library/lln2009-010appellate.pdf (visited 24 July 2018).

29 The idea was first mooted in a Consultation Paper published by the government in 2003: see Department of Constitutional Affairs, “Constitutional Reform: A Supreme Court for the United Kingdom” (CP 11/03, July 2003), available at <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/supremecourt/supreme.pdf> (visited 22 August 2018).

30 A number of subsidiary arguments were also advanced in favour of change, including that: the existing arrangements was confusing to the public who did not appreciate sufficiently that, in practice, only judicial members of the House of Lords participated in adjudication or that the judges (Law Lords) did not, by convention, involve themselves in political matters affecting legislation being considered by the House; and growing constraints on physical space within the Palace of Westminster — in which the House had been located — was making the functioning of the Appellate Committee increasingly difficult.

31 Sir Thomas Legg QC (former permanent secretary of the Lord Chancellor's Department), cited in Select Committee on Constitutional Reform Bill, *First Report* (n.13) para.100.

32 For example, the Universal Declaration of Human Rights (adopted 10 December 1948); UNGA Res 217 A(III) (UDHR); and the ECHR which had, by the time the reform process got underway, been translated into domestic UK law through the Human Rights Act 1998.

33 The last mentioned fear was expressed by Lord Neuberger of Abbotsbury, a sitting Law Lord who went on to becoming the head of the new Supreme Court.

34 The Bill was referred to a Select Committee with wide-ranging powers to scrutinise and, if thought fit, amend it before consideration by the whole House. The referral to a Select Committee was considered

This measure generated more controversy than the proposal to reform the office of Lord Chancellor. Strong and cogent arguments were advanced against the idea by a range of institutions and people — including judges, legal practitioners and academics from across the political spectrum — who felt that the government had not made out a persuasive case for reform of such a momentous nature. Critics noted that neither high principle nor reasons of practicality justified this piece of reform. Such was the strength of sentiments on the subject that some Law Lords were reported to have complained that “the plans were a product of political vanity rather than a properly thought-out constitutional reform”.³⁵ One of them, who went on to become President of the court, was particularly scathing: “[c]reating the Supreme Court amounted to ‘frivolous’ tinkering with the Constitution and appeared to have been ‘dreamt up ‘over a glass of whisky’ by the former prime minister Tony Blair”.³⁶

Many challenged the fundamental premise on which the government’s case had been built — that is, that democracy, human rights and the rule of law required a sharp and clear-cut separation of powers between the various organs of state. That, it was argued, cannot be considered an inflexible rule to be applied globally, because it had been shown by centuries of practice in ancient democracies like the United Kingdom that fusion of powers could aid, rather than hinder, the advancement of such cherished values. Even the argument based on the ECHR, on which the government set much store, received short shrift. Sir Robert Carnwath took that argument head on. “The European Court of Human Rights,” he said, “does not insist on a rigid division of functions between the judges and the legislature. It is concerned with specific connections in individual cases. The Law Lords have responded by a self-imposed restriction on participation in parliamentary debates. There is no reason to think that this is ineffective. Nor is there any evidence that the independence of the Law Lords is in doubt, or perceived to be so by government or anyone else.”³⁷

Those opposed to the government’s move also made out a strong case on grounds of cost. The shift from the Palace of Westminster to a new building across Parliament Square involved an expenditure of £56 million of public money — a significant rise from the original estimates of between £6 million and £32 million. The new court was also due to cost a further £14 million per year to run, as against an original estimate of £8.4 million. By contrast, the Appellate Committee of the House of Lords needed only around £5 million a year in running costs.³⁸ A former

remarkable given that it was a rarely used procedural move in the process of law-making: see, Select Committee on Constitutional Reform Bill, *First Report* (n.13) para.4.

35 Robert Verkaik, “Britain’s New Supreme Court to Cost £14 a Year” *The Independent* (15 September 2009), available at www.independent.co.uk/news/uk/home-news/britains-new-supreme-court-to-cost-16314m-a-year-1787327.html (visited 22 August 2018).

36 *Ibid.*

37 Select Committee on Constitutional Reform Bill, *First Report* (n.13) para.118.

38 See, eg, James Hand, “‘A Great Conspicuous Tribunal...’? Reflections on the Passing of the Appellate Committee and the Creation of the New UK Supreme Court” (2008) 3 Web JCLI 1–10.

Lord Chancellor, Lord Mackay of Clashfern, characterised the expenditure on the new court “considerable” and questioned “whether these additional costs on litigants, not only in the Supreme Court itself, but also in all the other civil courts of the United Kingdom is justified by the benefit claimed for the proposal”.³⁹

The argument that public perceptions about the House of Lords necessitated a change in the arrangements was also given short shrift by the Select Committee: “[t]o the extent that we have been able to assess public perception both of the current situation and of the proposed changes the most we can say is that opinion does not run high”.⁴⁰ It was also clear that opinion among senior judges was divided on the issue. Lord Woolf, the then Lord Chief Justice of England and Wales, pointed out that the House of Lords was split. “I do not think,” he observed, “one can say, even if you are committed to the Supreme Court, that it has to happen tomorrow. That is not as urgent a matter ...”⁴¹

Those who balked at the idea of the Supreme Court had other concerns, too. Some feared that the enviable reputation that the Appellate Committee of the House of Lords had built up over decades (with judges known globally for their “complete integrity and formidable power of intellect”) might be eroded. There was no guarantee, they thought, that the new court will inherit the “aura of authority” enjoyed by the Appellate Committee, and there was a real risk of the reforms having a destabilising effect on the “unwritten understandings” that have underpinned the legitimacy of the United Kingdom’s highest courts.⁴²

No less stark were apprehensions expressed about the possibility of judicial overreach. Judges could, it was argued, be emboldened by their new surroundings to ignore the conventional rules of restraint and adopt activist approaches in defiance of the principle of parliamentary sovereignty.⁴³ That fear is particularly pronounced when seen in the context of the Human Rights Act 1998 which comes as close to an entrenched bill of rights as is possible under the constitutional arrangements of the United Kingdom. Given that UK judges are obliged to heed the jurisprudence developed under the ECHR (which forms the basis of the HRA), the risks were all too obvious. As one academic commentator noted, “[s]tatutory bills of rights depart sharply from the traditional separation of powers and place self-government and the rule of law in some danger”.⁴⁴

What this means in practice is that the scope of judicial review is expanded well beyond any traditional understandings and boundaries of that process:

“[T]he logic of a statutory bill of rights is to make justiciable matters that would otherwise be questions of policy, for which the executive answers to

39 Select Committee on Constitutional Reform Bill, *First Report* (n.13) para.121.

40 *Ibid.*, para.117.

41 *Ibid.*, para.128.

42 *Ibid.*, para.123.

43 *Ibid.*, para.122 (Lord Rees-Mogg).

44 Richard Ekins, “Human Rights and the Separation of Powers” (2015) 34(2) UQLJ 217. Other dangers posed by bills of rights, both statutory and entrenched, to the rule of law are also discussed in this article.

Parliament. The legal uncertainty about the executive's freedom to act, and the related instability of the judicial reluctance to quash executive action, are inconsistent with the rule of law and tend to undermine the capacity for decisive action that good government requires."⁴⁵

Fears about judicial activism, expressed by the likes of Lord Neuberger and Lord Rees-Mogg, appear to have materialised, as the Supreme Court judges have in recent years begun to show a greater willingness to assert themselves in such sensitive areas as immigration. These areas were traditionally seen to be largely the domain of the executive, subject only to necessary legislative authorisations.⁴⁶ Lord Neuberger went so far as to characterise this more muscular approach as "judicial aggrandizement" and an usurpation of power by the judges from democratically elected politicians.⁴⁷ He was particularly concerned over the effect this development might have on separation of powers and stressed the importance of judicial restraint which, he argued, was "key" to the role of the court:

"The Supreme Court, as the final appeal court, hearing only cases of general public importance, must try to be particularly sensitive to the delicate balance between the branches of the state in a constitutional settlement which is of a remarkably ill-defined and flexible nature."⁴⁸

The debate over the new Supreme Court also saw a number of more radical suggestions being made, but those suggestions were, in the event, rejected. They included: giving the new court full United Kingdom-wide jurisdiction,⁴⁹ the creation of a position analogous to the Advocate-General in the European Court of Justice⁵⁰ and giving the court exclusive power to select the cases that it was minded to hear.⁵¹ Despite all the controversy and the opposition, the government pushed ahead with

45 *Ibid.*, 230.

46 See, eg, Brice Dickson, "Activism and Restraint within the UK Supreme Court" (2015) 21(1) *EJoCLI*, available at <http://webjcli.org/article/view/399/515> (visited 17 August 2018).

47 "Lord Neuberger says 'Judicial Aggrandisement' on the Rise at Expense of Politicians" *Scottish Legal News* (24 June 2015), available at <https://www.scottishlegal.com/article/lord-neuberger-says-judicial-aggrandisement-on-the-rise-at-expense-of-politicians> (visited 17 August 2018); Lord Neuberger, "The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience" (Conference at the Supreme Court of Victoria, Melbourne), available at <https://www.supremecourt.uk/docs/speech-140808.pdf> (visited 17 August 2018). Among other things, he argued in this speech that "the UK Supreme Court is almost drifting into being a constitutional court"; see para.18.

48 Lord Neuberger, "The Role of the Supreme Court Seven Years On — Lessons Learnt" (Bar Council Law Reform Lecture, London, 21 November 2016), available at <https://www.supremecourt.uk/docs/speech-161121.pdf> (visited 17 August 2018).

49 The government's proposal excluded any jurisdiction for the court over criminal appeals from Scotland, as was the case with the Appellate Committee of the House of Lords, for historical reasons.

50 The holder of this office would be able, among other things, to draw the attention of the parties, the court and the public at large to the general implications of the court's decision in any individual case before it.

51 Under the government's proposal, "leave" to bring an appeal to the court may be given either by the court itself or by the Court of Appeal in England and Wales or Northern Ireland or the Court of Session in Scotland.

its plans, and the Supreme Court became a reality in 2009.⁵² Some consequential changes followed suit, including an explicit statutory provision disqualifying serving judges of the Supreme Court from sitting or voting in the House of Lords.⁵³ Another important change concerned the Judicial Committee of the Privy Council, which had also been in the sights of campaigners seeking changes on the grounds of separation of powers. The power of this body to adjudicate upon “devolution” issues affecting Scotland, Northern Ireland and Wales was transferred to the Supreme Court.⁵⁴

Nonetheless, the creation of the Supreme Court could be said to be largely symbolic. Even the government Minister steering the project, Lord Falconer, hinted as much when he informed Parliament that the new court would “symbolise the separation of powers between the judiciary and legislature”⁵⁵ rather than saying that it would create that separation — because the separation had already been in place *de facto* for all practical purposes.

V. The Brexit Debate

Arguably, the most important development in the separation of powers debate in modern times took place in the immediate aftermath of the momentous referendum held on 23 June 2016 (the “Brexit” referendum) in which the electorate expressed their wish, by a slim but decisive majority, to terminate the United Kingdom’s 43-year-old membership of the EU.⁵⁶ That development, in which delicate questions involving the respective powers of the executive and the legislature were posed and debated, will now be considered at some length.

The Brexit referendum was called after the UK Parliament passed the European Union Referendum Act 2015 (Referendum Act), which offered voters an “in/out” choice on this important question. The result of the referendum set the stage for the actual process of withdrawal. Under the provisions of the relevant treaty,⁵⁷ the United Kingdom was required to give formal notice of withdrawal to the President of the EU, following which the parties (that is, the United Kingdom on the one side and the EU on the other) were allowed a period of two years to negotiate the terms

52 For more information about the court, see www.supremecourt.uk.

53 CRA 2005 s.137.

54 *Ibid.*, s.40, read with Sch.9.

55 HL Deb 14 June 2007, Vol.692, col WS125.

56 51.89 per cent of those voting wanted the United Kingdom to leave the EU and 48.11 per cent of them wanted to stay. A total of 33,577,342 persons voted in the referendum, and this represented an overall turnout of 72.21 per cent of registered voters. See Electoral Commission, *EU Referendum Results*, available at <https://www.electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> (visited 22 August 2018).

57 Treaty on European Union (Maastricht Treaty) art.50.

of withdrawal. Regardless of whether the negotiations succeeded or not, the United Kingdom's membership of the EU would, under the terms of the treaty, stand terminated at the end of that period. The process of giving notice was commonly referred to as the "triggering of Article 50".

It became quite clear soon after the announcement of the referendum result that a significant and vocal section of the British population who had voted in favour of Britain's continuing membership of the EU (the "Remainers") were unwilling to give their government a free hand in implementing Brexit. Some of them took the view that the process of withdrawal required parliamentary approval at various stages, including at the point of the triggering of art.50. They based their argument mainly on the twin constitutional principles of parliamentary sovereignty and separation of powers. Those in favour of Brexit (the "Leavers"), on the other hand, argued that since Parliament had already authorised the referendum and the government had given a solemn promise to voters⁵⁸ that their wishes will be respected — and their decision implemented — there was no need for a further vote on the subject in Parliament. This view was endorsed by the government which signalled its intention to trigger art.50 by using its prerogative powers to conclude and withdraw from international treaties. The government took the view that such a course of action would be constitutionally proper. Interestingly, the Act which authorised the referendum was silent on whether the government needed an authorising resolution from Parliament for the invocation of art.50.

The government decided not to trigger art.50 immediately after the result of the referendum but to wait for a short period during which, among other things, a committee of civil servants overseen by a senior figure from the ruling Conservative party would carry out "intensive work on the issues that will need to be worked through".⁵⁹ During that period, three groups of citizens brought judicial review proceedings in the High Court of England and Wales seeking a declaration that the use by the government of its prerogative powers to issue a notification to invoke art.50 was unlawful. The main legal basis for their application was that the act of giving notification "would frustrate or substantially undermine rights and duties established by Acts of Parliament" — namely the European Communities Act 1972 (ECA) and other Acts which assume the

58 This promise was contained in a leaflet circulated to voters by the government which stated: "This is your decision. The Government will implement what you decide." See Cabinet Office, *Why the Government Believes That Voting to Remain in the EU Is the Best Decision for the UK* — with References (6 April 2006), available at <https://www.gov.uk/government/publications/why-the-government-believes-that-voting-to-remain-in-the-european-union-is-the-best-decision-for-the-uk> (visited 22 August 2018).

59 One of the other reasons for the delay in the triggering of art.50 was that the ruling Conservative party needed to choose a new Prime Minister, as the incumbent, David Cameron, had announced his decision to step down following the referendum result.

United Kingdom's membership of the EU.⁶⁰ The applicants wanted the court to rule that nothing short of primary legislation by Parliament was necessary for Britain's withdrawal from the EU.

One of the Interested Parties to the High Court action⁶¹ put the issue in starker terms. It argued that the case was all about *who* makes the decision that the United Kingdom shall withdraw from the EU, not with who ultimately notifies that decision to the European Council. In the view of this party, "constitutional authority to make that decision rests with our elected parliament" and not with "government ministers in exercise of residual Crown prerogative powers".⁶² The question was thus framed in clear "separation of powers" terms. This party adopted a maximalist stance and argued, among other things, that the prerogative powers which the executive claimed did not exist as it had been abrogated by domestic legislation over the years.⁶³

The Interested Party (as referred to above) also sought to impugn the government's proposed action on the grounds that it would breach the "devolution settlement" arrived at between the various component parts of the United Kingdom.⁶⁴ Among other things, argued the party, there was a legal obligation on the devolved administrations to observe, transpose and implement EU law within their respective jurisdictions and to desist from acting incompatibly with such law. The party said that the government's proposed action of taking the United Kingdom out of the EU would result in the breach of those obligations.⁶⁵ This argument, too, was framed in separation of powers terms as follows:

"In passing the devolution statutes, Parliament has relied on, and referred to, the implementation of, and continuing compliance with, EU law as a permanent feature of the internal constitutional arrangements between

60 See, James Eadie *et al.*, "Skeleton Argument of the Secretary of State" (30 September 2016), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/558592/Miller_v_SSExEU_-_Skeleton_Argument_of_the_Secretary_of_State_300916.pdf (visited 20 July 2018). These submissions were used *R(Miller) v Secretary of State for Exiting the European Union* [2018] AC 61.

61 The People's Challenge, a group of UK and EU citizens including UK expatriates residing in France, who argued that their rights would be affected if the United Kingdom withdrew from the EU.

62 Helen Mountfield *et al.*, "Skeleton Argument on Behalf of the Second Group of Interested Parties" (21 September 2016), available at www.documentcloud.org/documents/3131742-Skeleton-argument-on-behalf-of-the-2nd-group-of.html#document/p2 (visited 20 Jul 2018) para.2. Likewise, this was used in *R(Miller) v Secretary of State for Exiting the European Union* (n.60).

63 In the alternative, the party argued that (1) even if any prerogative powers subsisted in this field, they did not extend to modifying, abrogating or removing fundamental rights and (2) in any case, the use of such powers in the present circumstances would amount to an abuse of power by the executive.

64 These include arrangements under the Scotland Act 1998, the Northern Ireland Act 1998 and the Government of Wales Act 2006, which provided for varying measures of "devolution" of power to Scotland, Northern Ireland and Wales, respectively.

65 A further argument put forward by the Interested Party was that, as part of the "Belfast Agreement" which was concluded between the British and Irish governments in 1998, there was a continuing assumption that both the United Kingdom and the Republic of Ireland would remain members of the EU.

Westminster and the devolved legislatures and governments. Only Parliament can change those arrangements.”⁶⁶

The government’s rebuttal of the applicants’ case first drew the court’s attention to the widely differing stances adopted by the Interested Parties.⁶⁷ It then went on to note that the Crown’s prerogative powers in matters such as giving effect to the will of the people as expressed clearly in a referendum authorised by Parliament had not been abrogated, and that the exercise of such powers would be entirely consistent with settled practice in international and domestic constitutional law. “Decisions as to the making of and withdrawal from treaties are paradigm examples of the use of the prerogative”, asserted the government.⁶⁸

The government also pointed out that its proposed action was neither precluded by nor inconsistent with the ECA or any other domestic law. Furthermore, the triggering of art.50 did not have the potential to change any domestic law; any such change, if and when it was likely to occur, would be the subject of proper parliamentary scrutiny in the normal course at a later stage.⁶⁹

More fundamentally, the government questioned the courts’ competence to entertain the question being posed by the applicants, on the basis that the decision to leave the EU was not amenable to judicial review. If accepted, the application would require the court to provide a relief which cannot be countenanced as it would “necessarily involve the Courts impermissibly trespassing on proceedings in Parliament”⁷⁰ — which in turn would be a serious breach of both the separation of powers principle and the doctrine of parliamentary sovereignty.

It is worth noting that, despite the width of judicial review, UK judges have traditionally shown self-restraint in the exercise of that jurisdiction and deferred to the executive in certain areas of state activity. A parliamentary briefing paper explained the position thus:

“Some uses of the royal prerogative, for example, involve issues of ‘high policy’, such as the appointment of ministers, the allocation of financial resources, national security, signing of treaties and defence matters and judges would not usually interfere in these matters. For an example of this traditional view see the case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ...”⁷¹

66 Mountfield *et al.*, “Skeleton Argument on Behalf of the Second Group of Interested Parties” (n.62) para.46.

67 For the sake of convenience, this term will be used when referring collectively to the applicant and the interested parties.

68 Eadie *et al.*, “Skeleton Argument of the Secretary of State” (n.60) para.8(1).

69 *Ibid.*, para.8(2).

70 *Ibid.*, para.8(3).

71 Richard Benwell and Oonagh Gay, “The Separation of Powers” (HC Library Standard Note SN/PC/06053, 16 August 2011), p.7. The standard note is available at <http://researchbriefings.files.parliament.uk/documents/SN06053/SN06053.pdf>.

But that view has undergone some change over the years, as the same briefing paper noted:

“More recently, in *Av Secretary of State for Home Department*,⁷² concerning the detention without charge of suspected international terrorists in Belmarsh prison, the Attorney General argued in 2004 that ‘these were matters of a political character calling for an exercise of political and not judicial judgment’ and that ‘it was not for the courts to usurp authority properly belonging elsewhere’. However, Lord Bingham, who gave the leading judgement, rejected this argument, concluding that ‘the function of independent judges charged to interpret and apply the law is universally recognised as a cardinal function of the modern democratic state’ and that the Attorney General was ‘wrong to stigmatise judicial decision-making as in some way undemocratic’.”

The government argued that the making of and withdrawal from treaties still remain “matters exclusively for the Crown in the exercise of its prerogative powers, and are not justiciable in the Courts”. They cited several authorities to that effect⁷³ and noted that “[t]hese are areas in which there are no judicial or manageable standards against which to judge the Crown”.⁷⁴ It is worth noting that, in a “dualist” system such as that obtained in the United Kingdom, treaties operate only on the international plane: they do not alter domestic law or affect individual rights unless Parliament has given effect to them through municipal legislation.⁷⁵

The government also strongly resisted the challengers’ arguments on the points relating to devolution. The conduct of foreign affairs was, it argued, a subject area over which the devolved legislatures did not have any competence and as such that argument could not be used to frustrate the people’s will in the matter of the United Kingdom’s withdrawal from the EU.⁷⁶ There were a number of other arguments going to the nature of EU law which the government pressed to buttress its case, but those arguments are not relevant for the purposes of the present discussion.

72 [2004] UKHL 56.

73 *Rustomjee v R* (1876) 2 QBD 69, 74 (Lord Coleridge CJ); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 398, 418 (Roskill L); also *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 AC 513, 553D (Browne-Wilkinson L).

74 *Buttes Gas and Oil Co v Hammer* [1982] AC 888, 938 (Lord Wilberforce).

75 See, eg, *JH Rayner (Mincing Lane) v Department of Trade and Industry* [1990] 2 AC 418, 500 (HL) (Oliver L’s dictum).

76 Eadie *et al.*, “Skeleton Argument of the Secretary of State” (n.60) para.8(4). Devolution issues were also, incidentally, raised in judicial review applications brought in the High Court of Northern Ireland, where they were rejected: see *Re McCord* [2016] NIQB 85.

A. *The High Court verdict*

Given the importance of the case and the need for expedition, it was disposed of by three senior judges comprising a Divisional Court of the High Court as a “rolled up” hearing.⁷⁷ The court had, in essence, to choose between two rival contentions: (1) in the absence of an express prohibition in statute (that is, the ECA) against the use of the royal prerogative in circumstances such as those presented in the case, the government was entitled to use the prerogative to trigger art.50 of the European Treaty; or (2) given the momentous nature of the decision to leave the EU and the serious consequences it would have on a number of existing rights, the government could not trigger art.50 unless it could show express statutory authorisation for the use of the royal prerogative. The court accepted the latter contention and granted the declaration that was prayed for.⁷⁸ It was, in laymen’s terms, a victory for the legislature and a defeat for the executive.

B. *The Supreme Court appeal*

Unsurprisingly, the government appealed the High Court’s decision in the UK Supreme Court where, in marathon hearings lasting four full days and dozens of counsel, the issues were reargued with great passion and erudition. The Supreme Court underlined the constitutional importance of the case and decided to reformulate the issues before it in the following terms:

“Some of the most important issues of law which judges have to decide concern questions relating to the constitutional arrangements of the United Kingdom. These proceedings raise such issues. As already indicated, this is not because they concern the United Kingdom’s membership of the European Union; it is because they concern (i) the extent of ministers’ power to effect changes in domestic law through exercise of their prerogative powers at the international level, and (ii) the relationship between the UK government and Parliament on the one hand and the devolved legislatures and administrations of Scotland, Wales and Northern Ireland on the other.”⁷⁹

While dealing with those issues — including their separation of powers aspects — the court conducted a wide-ranging analysis of the nature of the changes being made, the character of EU law within the United Kingdom’s domestic legal system,

77 This is where both the application for leave and the substantive merits of the claim are considered in a single hearing.

78 *R (Miller) v Secretary of State for Exiting the European Union* [2017] 1 All ER 158.

79 *R (Miller) v Secretary of State for Exiting the European Union* (n.60) [4].

the appropriateness of the use of prerogative powers where fundamental rights are involved and the importance of parliamentary sovereignty in such matters. It placed a high value on the fact that EU law had become an important source of UK domestic law — one which had moreover gone on to enjoy “overriding supremacy”. In the event, the court veered to the view that such a source could not be extinguished by ministerial decision or ministerial action alone.⁸⁰

The Supreme Court found it difficult to accept that the absence of any express constraint in the 1972 Act against prerogative powers being used to nullify its effect was sufficient justification for the government’s proposed action. More was needed, said the Court:

“Had the Bill which became the 1972 Act spelled out that ministers would be free to withdraw the United Kingdom from the EU Treaties, the implications of what Parliament was being asked to endorse would have been clear, and the courts would have so decided. But we must take the legislation as it is, and we cannot accept that, in Part I of the 1972 Act, Parliament ‘squarely confront[ed]’ the notion that it was clothing ministers with the far-reaching and anomalous right to use a treaty-making power to remove an important source of domestic law and important domestic rights.”⁸¹

One aspect of the matter to which the court gave short shrift — perhaps unfairly from the point of view of the government — was the importance to be attached to the clearly expressed will of the people. This led critics to contend that by doing so, the court effectively ruled that the referendum counted for nothing. The court addressed the matter as follows:

“The Attorney General submitted that the traditional view as to the limits of prerogative power should not apply to a ministerial decision authorised by a majority of the members of the electorate who vote in a referendum provided for by Parliament. In effect, he said that, even though it was Parliament which required the referendum, the response to the referendum result should be a matter for ministers, and that it should not be constrained by the legal limitations which would have applied in the absence of the referendum.”⁸²

Noting that the Referendum Act 2015, “did not [make] provision for any consequences of either possible outcome” unlike the Acts authorising some of the

⁸⁰ *Ibid.*, [81].

⁸¹ *Ibid.*, [87]. The court reinforced its view by going on to say subsequently at [108]: “The fact that a statute says nothing about a particular topic can rarely, if ever, justify inferring a fundamental change in the law.”

⁸² *Ibid.*, [116].

earlier referenda, the court came to the conclusion that “[w]here, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation”.⁸³ The court averred that the result of the referendum could only have political, not legal, force.⁸⁴

The decision of the court was by no means unanimous. Three of the 12 judges dissented and held that it would be wrong, for principled constitutional reasons, to deny the government the right to trigger art.50 using the royal prerogative. Lord Reed, one of the dissenting judges, offered the following explanation:

“I entirely accept the importance in our constitutional law of the principle of Parliamentary supremacy over our domestic law ... That principle does not, however, require that Parliament must enact an Act of Parliament before the UK can leave the EU. That is because the effect which Parliament has given to EU law in our domestic law, under the 1972 Act, is inherently conditional on the application of the EU treaties to the UK, and therefore on the UK’s membership of the EU. The Act imposes no requirement, and manifests no intention, in respect of the UK’s membership of the EU. It does not, therefore, affect the Crown’s exercise of prerogative powers in respect of UK membership.”⁸⁵

Lord Carnwarth in his dissenting judgment made a fundamental point about separation of powers. “[I]t is important”, he argued, “to recognise the sensitivity in our constitution of the balance between the respective roles of Parliament, the Executive and the courts.”⁸⁶ In his view, it was wrong to see the contentions in the current case “as a simple choice between Parliamentary sovereignty, exercised through legislation, and the ‘untrammelled’ exercise of the prerogative by the Executive.”⁸⁷ Lord Carnwarth noted that Parliament could hold the executive accountable through its normal procedures, and the courts should only step in where such procedures were seen as clearly falling short. Failure to observe this would mean the courts risked disturbing the delicate balance of the United Kingdom’s unwritten constitution.⁸⁸

He drew support for his view from Lord Mustill who, in *ex p Fire Brigades Union*,⁸⁹ explained in fairly simple terms how the separation of powers doctrine

83 *Ibid.*, [121].

84 *Ibid.*, [124].

85 *Ibid.*, [177].

86 *Ibid.*, [248].

87 *Ibid.*, [249].

88 *Ibid.*, [252]–[253].

89 *R v Secretary of State for the Home Department, ex p Fire Brigades Union* (n.73).

is intended to work in practice under the United Kingdom's constitutional arrangements:

“It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed. This requires the courts on occasion to step into the territory which belongs to the executive, not only to verify that the powers asserted accord with the substantive law created by Parliament, but also, that the manner in which they are exercised conforms with the standards of fairness which Parliament must have intended. Concurrently with this judicial function Parliament has its own special means of ensuring that the executive, in the exercise of delegated functions, performs in a way which Parliament finds appropriate. Ideally, it is these latter methods which should be used to check executive errors and excesses; for it is the task of Parliament and the executive in tandem, not of the courts, to govern the country ...”⁹⁰

The litigation over the Brexit referendum provides fascinating insights into the interplay between prerogative powers and the powers of Parliament in a system which, given the absence of a written constitution, relies heavily on conventions.

VI. Conclusion

The UK government has never accepted the case for complete separation of powers. It has always recognised — and continues to recognise — that there will be some areas of overlap, and those overlaps can, it believes, be justified on the grounds of practicality and convenience. As the Minister who moved the Constitutional Reform Bill 2005, Christopher Leslie, noted in the Commons:

“[W]e want to ensure that we clearly define the separation of powers, where it is appropriate, but that is not incompatible with having a partnership between the different branches of the state.”⁹¹

The lack of a complete separation of powers has found support in judicial decisions, too, as has the asymmetrical nature of the relationships between the three branches

⁹⁰ *Ibid.*, [567].

⁹¹ Benwell and Gay, “The Separation of Powers” (n.71) p.8.

of government. A sample can be found in these remarks by Lord Steyn in a case decided by the House of Lords in 2002:

“Our constitution has ... never embraced a rigid doctrine of separation of powers. The relationship between the legislature and the executive is close. On the other hand, the separation of powers between the judiciary and the legislative and executive branches of government is a strong principle of our system of government. The House of Lords and the Privy Council have so stated: *Attorney-General for Australia v The Queen and the Boilermakers’ Society of Australia* [1957] AC 288, 315; *Liyana v The Queen* [1967] 1 AC 259, 291; *Hinds v The Queen* [1977] AC 195; *Dupont Steels Ltd v Sirs* 1980] 1 WLR 142, 157B. It is reinforced by constitutional principles of judicial independence, access to justice, and the rule of law.”⁹²

That the situation is evolving is clearly not in doubt, as developments in the past two decades, including those discussed above, have shown. The process is likely to accelerate in the coming years, as the pressures for a written constitution for the United Kingdom continue to grow.⁹³

⁹² *R(Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837, [39].

⁹³ See, eg, Barnett, “Why Britain Needs a Written Constitution” (n.15).