

Chapter 2: The institutions of government and the separation of powers

Problem scenario

Following Brexit, an Act of Parliament is passed to rebalance the allocation of power in the UK Constitution. Its chief aims are to reduce the power of the Government; to assert the sovereignty of the elected Parliament and to ensure the loyalty of the judiciary to Parliament's enactments. To this the, the (fictitious) Constitutional Reform (Allocation of Power) Act 2024 makes the following provisions:

- It reduces the number of Government Ministers capable of being appointed from Parliament to a maximum of 30. Any further ministerial appointments can be drawn from elsewhere.
- It requires a vote in the House of Commons upon the formation of a government to approve ministerial appointments and plans for government.
- It requires all judicial appointments to be approved by a vote in the House of Commons, with all judges capable of being removed from office in the event of a vote of no confidence supported by two-thirds of the Commons.

Imagine that you were presented with this scenario and asked to discuss any issues arising from it that concern the separation of powers in the UK Constitution. This problem question, which has provided a backdrop to this chapter's consideration of the separation of powers principle, picks up on certain issues pertaining to the relationships between the key institutions of the state – the legislature, the executive and the courts. We now explore each of the stated provisions of the Constitutional Reform (Allocation of Power) Act 2024 in more detail.

The provision to reduce the number of Government Ministers capable of being drawn from Parliament to a maximum of 30 goes right to the heart of the apparent fusion of power that currently exists between the legislature and the executive. Currently, a maximum of 96 Government Ministers may be drawn from Parliament. This gives rise to the aforementioned overlap that currently exists between Government and Parliament, insofar as the Prime Minister

and the Senior and Junior Ministers of the Government are all drawn from one of the Houses of Parliament; typically, though not exclusively, the House of Commons.

This overlap and fusion of power, in turn, raises questions with regards to the separation of powers principle, as this chapter has already explored. On this basis, the question behind this particular provision, therefore, is whether a reduction in the number of Government Ministers drawn from Parliament would impact upon the relationship between the legislature and the executive and improve the separation of powers in the UK Constitution. Whilst such a reduction would inevitably reduce the number of people serving both Parliament and the Government, the basis for the fusion of authority would exist, just to a lesser degree.

This provision, requiring House of Commons approval for ministerial appointments and plans for government, is designed to supplement and improve the existing mechanisms through which Parliament is able to hold the Government to account and keep it in check. Currently, and as this chapter has discussed, Question Time, general debate and discussion, as well as Select Committee work, all serve to ensure that the Government's exercise of power is checked and scrutinised by the House of Commons. The idea behind this provision of the 2024 Act, however, would be to improve this check and provide a further level of scrutiny. It would, however, raise questions about the separation of powers insofar as ministerial appointments are very much an executive function, within the remit of the Prime Minister. Requiring Commons' approval for appointments could be seen as Parliament interfering to an unnecessary degree in the operation and process of government.

The final provision, listed in the problem question, concerns the relationship between the legislature and the judiciary and the notion of judicial independence. Since the enactment of the Constitutional Reform Act 2005, judges have been appointed through a process involving the Judicial Appointments Commission. This was created by the Act to improve the transparency and independence of a process that previously involved the Lord Chancellor to a much larger degree. Judicial independence, as this chapter has explained, is important not only for the process of justice and in ensuring the impartiality of case judgments, but more broadly the rule of law; a value itself linked to the importance of the separation of powers. The notion, however, of requiring all judicial appointments to be approved by a vote in the House of Commons, and providing for a process through which judges can be removed by a two-thirds majority vote raises further questions for the separation of powers in the UK constitution. The rationale underlying the creation of the Judicial Appointments Commission was to improve the independence of the judiciary and to increase the

separation of powers between the courts and Parliament and the Government. By permitting the House of Commons to play such an important role in the appointment of judges, however, dilutes this independence and means that the judiciary is essentially tied to the legislature, lessening the separation of functions introduced by the 2005 Act.

We can see that the problem scenario raises important questions concerning the relevance of the separation of powers principle to the UK constitutional arrangements.