STEP 1: INTRODUCTION: Define, explain and contextualise the Separation of Powers, and outline the two opposing schools of thought

1. Separation of powers = a political theory developed by Montesquieu that identifies 3 branches of state and argues that to prevent arbitrary government, these branches should be kept apart, with separate functions and personnel. The 3 branches are:
   (a) The Legislature: makes the law (The Queen, the House of Lords and the House of Commons)
   (b) The Executive: implements the law (The Queen, The PM, Government Ministers, the Civil Service, the army, the police)
   (c) The Judiciary: resolves disputes about the law (The Queen, the judges, the magistrates)

2. In the UK, there is no formal separation of powers because we have an uncodified constitution (unlike, for example, the USA whose constitution is codified and aims to prevent executive dominance)

3. Two schools:
   (a) FOR the existence of a separation of powers in the UK - summarised by Lord Diplock in Duport Steel v Sirs: “it cannot be too strongly emphasised that the UK constitution, though unwritten, is firmly based on the separation of powers”
   (b) AGAINST the existence of a separation of powers in the UK - summarised by Hilaire Barnett in Constitutional and Administrative Law, 2009: “the separation of powers is neither an absolute nor a predominant feature of the UK constitution”

STEP 2: MAIN BODY: Outline and consider the arguments for the existence/extent of a separation of powers in the UK ... with respect to the relationship between THE EXECUTIVE AND THE LEGISLATURE

FOR the existence of a separation of powers

1. s.1, House of Commons Disqualification Act 1975: Members of the civil service, police and army are prevented from holding parliamentary office

2. Parliamentary scrutiny of the executive keeps the executive in check. For example
   (a) Questions and debates on bills
   (b) General and Select Committees analyse government actions
   (c) The PCA (ombudsman)
3. Private Members’ Bills:
   (a) Have priority on certain days
   (b) Are introduced by a non-ministerial MP, so the bills are non government-sponsored.

4. Constitutional Conventions:
   (a) Individual Ministerial Responsibility: Ministers are accountable to Parliament for their departmental and personal conduct
   (b) Collective Cabinet Responsibility: The cabinet is responsible to Parliament for the actions of government. If it does not retain Parliaments confidence, it may face a vote of no confidence. Following the Fixed-term Parliaments Act 2011, if the government loses a vote of confidence, the House of Commons will be dissolved unless, within fourteen days of the vote, an alternative government is formed from within the Commons or the incumbent government regains the confidence of the Commons. The defeated prime minister would also be required to resign following a lost vote of confidence.

AGAINST the existence of a separation of powers

1. In the words of Lord Hailsham, the UK system of government is an ELECTIVE DICTATORSHIP – the government effectively controls Parliament, i.e.:
   (a) The first past the post electoral system always results in an inbuilt majority in Parliament for the government. Therefore, government bills are rarely rejected.
   (b) The existence of a government whip means there is pressure on governing party MPs to vote according to government wishes.
   (c) Culture of political patronage means career-minded MPs face pressure to vote for government bills.
   (d) Government defines the parliamentary agenda.
   (e) Government Ministers sit in the House of Commons (indeed, a constitutional convention requires them to do so), including the Cabinet and the PM himself.
   (f) Few opportunities exist for Parliament to scrutinise delegated/subordinate legislation made by government ministers.

2. Lack of an effective upper chamber (this results in a weak check on the Executive).
   (a) A constitutional convention exists whereby the House of Lords will not reject bills giving effect to significant manifesto commitments of the government (the Salisbury Convention).
   (b) See also Parliament Acts 1911 and 1949
   (c) White Paper for HoL reform, which could have made the upper chamber stronger, was officially withdrawn in September 2012

3. Parliament struggles to exercise scrutiny over Royal Prerogative powers (i.e. issues of national security, defence, the deployment of armed forces – see Iraq War)
   (a) This is despite the newly enacted Constitutional Reform and Governance Act 2010, which requires parliamentary scrutiny of international treaties prior to ratification.
(b) However, there are indications that Parliament is beginning to play a more active role in respect of the exercise of the Royal Prerogative. For instance, Parliament authorised the deployment of troops in Iraq in 2003, and put the question of intervention in Syria to vote in 2013. Note, however, that the government put the question of intervention in Libya in 2011 to vote in retrospect, and did not table a question in respect of intervention in Mali in 2013.

State overall picture: e.g. “This is the area with greatest overlap between branches of state. Legislative powers of scrutiny do exist over the Executive, but are weak.”

STEP 3: MAIN BODY: Outline and consider the arguments for the existence/extent of a separation of powers in the UK ... with respect to the relationship between THE EXECUTIVE AND THE JUDICIARY

FOR the existence of a separation of powers

1. Constitutional Reform Act 2005:
   (a) s.3 CRA 2005 – government ministers involved in justice have a duty to uphold and protect the independence of the judiciary, and mustn’t seek to influence judicial decisions
   (b) Lord Chancellor is no longer the head of the judiciary, and no longer appoints judges
   (c) Creation of the Judicial Appointments Commission: Appointment of judges is an independent process, and free from political influence

2. Security of tenure exists for senior judges (CRA 2005; Act of Settlement 1701; Senior Court Act 1981)

3. Judicial salaries are determined by independent bodies

4. Judges can judicially review the actions of Parliament

5. Constitutional Conventions:
   (a) The executive will not criticise judicial decisions
   (b) The judiciary will not involve itself in party politics

6. Art. 6, European Convention of Human Rights has limited the quasi-judicial functions of the executive – e.g. the Home Secretary can no longer determine the tariff for life sentences (see ex parte Anderson)

AGAINST the existence of a separation of powers

1. The executive still performs quasi-judicial functions (e.g. Compulsory Purchase Orders; Administrative Tribunals)
2. Belmarsh case: the Judiciary was accused of making political decisions forcing a change of law.

State overall picture: e.g. “Judges are well-insulated from dismissal and political interference”

STEP 4: MAIN BODY: Outline and consider the arguments for the existence/extent of a separation of powers in the UK ... with respect to the relationship between THE JUDICIARY AND THE LEGISLATURE

FOR the existence of a separation of powers

1. s.1, House of Commons Disqualification Act 1975: Judges cannot sit as MPs.

2. Parliamentary privilege: MPs are not liable for statements made in Parliament

3. The Sub-Judice Rule: MPs refrain from discussing current court cases

4. Constitutional Reform Act 2005
   (a) Lord Chancellor is no longer the Speaker of the House of Lords
   (b) Replacement of the Law Lords (used to be part of Parliament)

5. Constitutional Conventions:
   (a) MPS will not criticise judges
      • But increasingly do - e.g. in the fields of the Human Rights Act 1998 and anti-terror legislation
   (b) Judges will not involve themselves in politics
      • But – recent phenomena of the politicisation of the judiciary - e.g. members of the judiciary chairing politically sensitive public enquiries such as the Hutton Inquiry

6. Declarative Theory: Judges only declare law, and do not develop/make law.

AGAINST the existence of a separation of powers

1. Legislative Theory: Judges play a significant role in making the law by interpreting statute (see R v R – possibility of rape within marriage), and also actually influencing statute (see Criminal Justice and Public Order Act 1994)

2. (For the time being at least), the UK Supreme Court is made up of Law Lords, who also have a seat in the House of Lords.

State overall picture: e.g. “a separation between the judiciary and legislature does exist, but there is creeping interference between the two, and the judiciary does have a legislative function”.
Come to a conclusion as to the extent/significance of the separation of powers in the UK.