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## Chapter four : Principle of Separation of powers

### Introduction

In the context of Chapter 3 on constitutions we noted the importance of ensuring that state/governmental power is limited by a constitution. One way in which state power can be controlled is through the principle of the separation of powers. In essence, under this doctrine public/state power is divided and dispersed between three separately constituted institutions, each with a distinct function to perform. This is in accord with the principle of constitutionalism, namely that the power of the state should be limited. The aim of this chapter is to consider the constitutional principle of the separation of powers and examine its significance in the context of the Algerian constitution.

### The origins of separation of powers

It was the French philosopher Charles Montesquieu who first proposed a system of separation of powers. He believed that if power was allocated to one person, or a small group of people, it would inevitably lead to abuse of power, and the rights of the citizens would not be safeguarded. He believed that it was better to divide power between different branches and give those branches the power to control each other's work. We call this *a system of checks and balances*. Dividing power is intended to prevent corruption and abuse of power.

**The definition** of the separation of powers, however, is a somewhat elastic concept which is subject to different interpretations. These range from a very strict separation of powers, through to gradations of the principle, whereby the functions and institutions interrelate and check and balance each other.

### KEY FACTS

#### Key facts on the separation of powers

The separation of powers is an internal method of institutionally controlling state power.

Under the doctrine of the separation of powers, public/state power is divided and dispersed between separately constituted institutions (legislature, executive and judiciary), each with a distinct function to perform (law-making, governmental and adjudicative/interpretative).

### **The executive function** Art 84 - Art 113 from Algerian constitution 2020

The executive (or governmental) function is performed by the government/administration. The executive administers (carries out) the functions, powers and duties contained in general legislative provisions made by the legislature (above). The executive is the most difficult of all three organs to define, and it has been described simply as the residual functions/roles of the state that exist once the legislative and judicial functions have been outlined and demarcated (Lord Lester and D Oliver (eds), *Constitutional Law and Human Rights* (Butterworths, 1997), p 22).

### **The legislative function**

This function is performed by the legislature, and it involves the enactment of general laws. In the United Kingdom the Queen in Parliament represents the law maker as a Bill passes through both Houses of Parliament and receives Royal Assent in order to become an Act of Parliament.

الوظيفة التشريعية تتمثل هذه الوظيفة عندما يقوم البرلمان بإصدار القوانين العامة في المملكة المتحدة، تمثل الملكة في البرلمان عندما يمر مشروع القانون من خلال كل من مجلسي البرلمان ويحصل على موافقة الملك ليصبح قانوناً

## **KEY FACTS**

### **Key facts on the different powers of the state**

in general terms:

- The legislative function involves enacting law.
- The executive function involves the implementation of the law as well as making policy decisions.
- The judicial function involves settling legal disputes arising from the law.

### **What is the rationale behind the separation of powers?**

The separation of powers is central to a democratic constitution, and detailed below are four reasons to follow the principle:

#### **1-To avoid a concentration of public power in one body/institution**

As noted above, Montesquieu argued that state power should be divided and separated in order to avoid a concentration of power, which otherwise could lead to tyranny and oppression:

Thus, if one person performed two or more state functions this would inevitably lead to oppression and tyranny. For example, if a person making the laws (a legislative role) also enforced and implemented these legislative provisions (an executive role) and then determined whether an individual had violated that law in a case before them (a judicial role), this person would in effect enjoy

excessive and tyrannical powers. If all state power was concentrated in one body, therefore, it would inevitably be abused. After all, it is well known that ‘Power tends to corrupt and absolute power corrupts absolutely’ (Lord Acton, *Letter to Bishop Mandell Creighton*, April 1887, cited in M Elliott and R Thomas, *Public Law* (4th edn, Oxford University Press, 2020), p 108).

## **2-To provide a system of checks and balances between the branches of government**

Under a partial separation of powers the objective is to avoid a concentration of power. This is achieved not by an absolute separation and isolation of the three functions, but instead through the creation of a number of checks and balances between them. In other words, one institution may well interfere with the (constitutional) function of another.

## **3-To provide efficient government**

At one level the doctrine of the separation of powers helps to achieve efficient government. In short, allocating definite functions to specific institutions staffed with particular expertise (eg government which is expert at administering and the judiciary which is expert at assessing evidence and judging), necessarily provides efficient government.

## **4-To safeguard the independence of the judiciary**

The separation of powers subsumes the fundamental notion that the judiciary should be constitutionally independent. In a democratic constitution it is of paramount importance that the judges – who form part of the court system – are independent, impartial and free from interference from the other branches of the state (and in particular the executive). The principle of the independence of the judiciary embraces, *inter alia*, the notion that the judiciary must be free to determine disputes before them strictly in accordance with the law

## **KEY FACTS**

### **The rationale behind the separation of powers**

- To avoid an abuse of state power by preventing a concentration of public power in one body/institution.
- To provide a system of checks and balances between the branches of government.
- To provide efficient government.
- To safeguard the independence of the judiciary.

SOURCE : (Unlocking the Law) Mark Ryan, Steve Foster - Unlocking Constitutional and Administrative Law- Routledge FIFTH EDITION 2023

