

Separation of powers

The **separation of powers** often imprecisely and metonymically used interchangeably with the *trias politica* principle, is a model for the governance of a state. Under this model, a state's government is divided into branches, each with separate and independent powers and areas of responsibility so that the powers of one branch are not in conflict with the powers associated with the other branches. The typical division is into three branches: a legislature, an executive, and a judiciary, which is the *trias politica* model. It can be contrasted with the fusion of powers in some parliamentary systems where the executive and legislature are unified.

Separation of powers, therefore, refers to the division of responsibilities into distinct branches to limit any one branch from exercising the core functions of another. The intent is to prevent the concentration of power and provide for checks and balances.

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Antiquity

Aristotle first mentioned the idea of a "mixed government" or hybrid government in his work *Politics* where he drew upon many of the constitutional forms in the city-states of Ancient Greece. In the Roman Republic, the Roman Senate, Consuls and the Assemblies showed an example of mixed government according to Polybius (*Histories*, Book 6, 11–13).

Early modern biparty systems

John Calvin (1509–1564) favoured a system of government that divided political power between democracy and aristocracy (mixed government). Calvin appreciated the advantages of democracy, stating: "It is an invaluable gift if God allows a people to elect its own government and magistrates."^[1] In order to reduce the danger of misuse of political power, Calvin suggested setting up several political institutions which should complement and control each other in a system of checks and balances.^[2]

In this way, Calvin and his followers resisted political absolutism and furthered the growth of democracy. Calvin aimed to protect the rights and the well-being of ordinary people.^[3] In 1620, a group of English separatist Congregationalists and Anglicans (later known as the Pilgrim Fathers) founded Plymouth Colony in North America. Enjoying self-rule, they established a bipartite democratic system of government. The "freemen" elected the General Court, which functioned as legislature and judiciary and which in turn elected a governor, who together with his seven "assistants" served in the functional role of providing executive power.^[4] Massachusetts Bay Colony (founded 1628), Rhode Island (1636), Connecticut (1636), New Jersey, and Pennsylvania had similar constitutions – they all separated political powers. (Except for Plymouth Colony and Massachusetts Bay Colony, these English outposts added religious freedom to their democratic systems, an important step towards the development of human rights.^{[5][6]}) Books like William Bradfords *History of Plymouth Plantation* (written between 1630 and 1651) were widely read in England. So the form of government in the colonies was well known in the mother country, including to the philosopher John Locke (1632–1704). He deduced from a study of the English constitutional system the advantages of dividing political power into the legislative (which should be distributed among several bodies, for example, the House of Lords and the House of Commons), on the one hand, and the executive and federative power, responsible for the protection of the country and prerogative of the monarch, on the other hand. (The Kingdom of England had no written constitution.)^[7]

Montesquieu's separation of powers system

The term "tripartite system" is commonly ascribed to French Enlightenment political philosopher Baron de Montesquieu, although he did not use such a term. In reality he referred to "distribution" of powers. In *The Spirit of the Laws* (1748), Montesquieu described the various forms of distribution of political power among a legislature, an executive, and a judiciary. Montesquieu's approach was to present and defend a form of government which was not excessively centralized in all its powers to a single monarch or similar ruler, form of government known then as "aristocracy". He based this model on the Constitution of the Roman Republic and the British constitutional system. Montesquieu took the view that the Roman Republic had powers separated so that no one could usurp complete power.^{[8][9][10]} In the British constitutional system, Montesquieu discerned a separation of powers among the monarch, Parliament, and the courts of law



Montesquieu

In every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law

By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals. The latter we shall call the judiciary power; and the other, simply, the executive power of the state.

— The Spirit of the Laws, Book XI^[11]^[12]

Montesquieu argues that each Power should only exercise its own functions, it was quite explicit here:

When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner

Again, there is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

— The Spirit of the Laws, Book XI^[11]^[12]

Separation of powers requires a different source of legitimization, or a different act of legitimization from the same source, for each of the separate powers. If the legislative branch appoints the executive and judicial powers, as Montesquieu indicated, there will be no separation or division of its powers, since the power to appoint carries with it the power to revoke.

The executive power ought to be in the hands of a monarch, because this branch of government, having need of dispatch, is better administered by one than by many: on the other hand, whatever depends on the legislative power, is oftentimes better regulated by many than by a single person.

But, if there were no monarch, and the executive power should be committed to a certain number of persons, selected from the legislative body, there would be an end of liberty, by reason the two powers would be united; as the same persons would sometimes possess, and would be always able to possess, a share in both.

— The Spirit of the Laws, Book XI^[11]^[12]

Montesquieu did actually specify that the independence of the judiciary has to be real, and not merely apparent.^[13] The judiciary was generally seen as the most important of the three powers, independent and unchecked,^[14] while also likely to claim to be the least dangerous one.^[13]

Checks and balances

Is the principle that each of the Branches has the power to limit or check the other two and this creates a balance between the three separate powers of the state, this principle induces that the ambitions of one branch prevent that one of the other branches become supreme, and thus be eternally confronting each other and in that process leaving the people free from government abuses. Checks and Balances are designed to maintain the system of separation of powers keeping each branch in its place. This is based on the idea that it is not enough to separate the powers and guarantee their independence but to give the various branches the constitutional

means to defend their own legitimate powers from the encroachments of the other branches.^[15] They guarantee that the powers of the State have the same weight (co-equal), that is, to be balanced, so that they can limit each other, avoiding the abuse of state power. The origin of checks and balances, like separation of powers itself, is specifically credited to Montesquieu in the Enlightenment (in The Spirit of the Laws 1748), under this influence was implemented in 1787 in the Constitution of the United States

The following example of the separation of powers and their mutual checks and balances for the experience of the United States Constitution is presented as illustrative of the general principles applied in similar forms of government as well.

«But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. 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.»

«A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions. This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State»

— James Madison, The Federalist Papers No. 51, ^[16]

Legislative (Congress)

- Passes bills; has broad taxing and spending power; regulates inter-state commerce; controls the federal budget; has power to borrow money on the credit of the United States (may be vetoed by President, but vetoes may be overridden with a two-thirds vote of both houses)
- Has sole power to declare war, as well as to raise, support, and regulate the military.
- Oversees, investigates, and makes the rules for the government and its officers.
- Defines by law the jurisdiction of the federal judiciary in cases not

Executive (President)

- Is the commander-in-chief of the armed forces
- Executes the instructions of Congress.
- May veto bills passed by Congress (but the veto may be overridden by a two-thirds majority of both houses)
- Executes the spending authorized by Congress.
- Declares states of emergency and publishes regulations and executive orders.
- Makes executive agreements (does not require ratification) and signs treaties (ratification requiring approval by two-thirds of the Senate)

Judicial (Supreme Court)

- Determines which laws Congress intended to apply to any given case
- Exercises judicial review, reviewing the constitutionality of laws
- Determines how Congress meant the law to apply to disputes
- Determines how a law acts to determine the disposition of prisoners
- Determines how a law acts to compel testimony and the production of evidence
- Determines how laws should be interpreted to assure uniform policies in a top-down fashion via the appeals process, but gives discretion in individual cases to low-level judges.

specified by the Constitution.

- Ratification of treaties signed by the President and gives advice and consent to presidential appointments to the federal judiciary, federal executive departments, and other posts (Senate only).^[17]
- Has sole power of impeachment (House of Representatives) and trial of impeachments (Senate); can remove federal executive and judicial officers from office for high crimes and misdemeanors

- Makes appointments to the federal judiciary, federal executive departments, and other posts with the advice and consent of the Senate. Has power to make temporary appointment during the recess of the Senate
- Has the power to grant "reprieves and pardons for offenses against the United States, except in cases of impeachment."

The amount of discretion depends upon the standard of review, determined by the type of case in question.

Comparison between tripartite and bipartite national systems

Constitutions with a high degree of separation of powers are found worldwide. The UK system is distinguished by a particular entwining of powers.^[18] A number of Latin American countries have electoral branches of government.

Countries with little separation of power include New Zealand and Canada. Canada makes limited use of separation of powers in practice, although in theory it distinguishes between branches of government.

New Zealand's constitution is based on the principle of separation of powers through a series of constitutional safeguards, many of which are tacit. The Executive's ability to carry out decisions often depends on the Legislature, which is elected under the mixed member proportional system. This means the government is rarely a single party but a coalition of parties. The Judiciary is also free of government interference. If a series of judicial decisions result in an interpretation of the law which the Executive considers does not reflect the intention of the policy, the Executive can initiate changes to the legislation in question through the Legislature. The Executive cannot direct or request a judicial officer to revise or reconsider a decision; decisions are final. Should there be a dispute between the Executive and Judiciary the Executive has no authority to direct the Judiciary or its individual members and vice versa.

Complete separation of powers systems are almost always presidential, although theoretically this need not be the case. There are a few historical exceptions, such as the Directoire system of revolutionary France. Switzerland offers an example of non-Presidential separation of powers today: It is run by a seven-member executive branch, the Federal Council. However, some might argue that Switzerland does not have a strong separation of powers system, as the Federal Council is appointed by parliament (but not dependent on parliament) and although the judiciary has no power of review, the judiciary is still separate from the other branches.

Typical branches

- executive
- legislative
- judicial

Additional branches

- auditory
- electoral – in which election commissions, tribunals or courts are maintained separately from other branches
- prosecutory
- civil service commission

Three branches

Australia

Australia does not maintain a strict separation between the legislative and executive branches of government—indeed, government ministers are required to be members of parliament—but the federal judiciary strictly guards its independence from the other two branches. However, under influence from the American constitution, the Australian constitution does define the three branches of government separately, and this has been interpreted by the judiciary to induce an implicit separation of powers.^[19] State governments have a similar level of separation of power, but this is generally on the basis of convention, rather than constitution.

Austria

The Constitution of Austria was originally written by Hans Kelsen, the prominent constitutional scholar in Europe at that time. Kelsen was to serve as a part of the judicial court of review for Austria as part of its tripartite government.

Czech Republic

The Constitution of the Czech Republic, adopted in 1992 immediately before the dissolution of Czechoslovakia, establishes the traditional tripartite division of powers^[20] and continues the tradition of its predecessor constitutions. The Czechoslovak Constitution of 1920, which replaced the provisional constitution adopted by the newly independent state in 1918, was modeled after the constitutions of established democracies such as those of the United Kingdom, United States and France, and maintained this division,^[21] as have subsequent changes to the constitution that followed in 1948 with the Ninth-of-May Constitution, the 1960 Constitution of Czechoslovakia as well as the Constitutional Act on the Czechoslovak Federation of 1968.

Denmark

- Parliament – legislature
- Prime Minister, Cabinet, Government Departments and Civil Service – executive
- High Courts and lower courts – judiciary

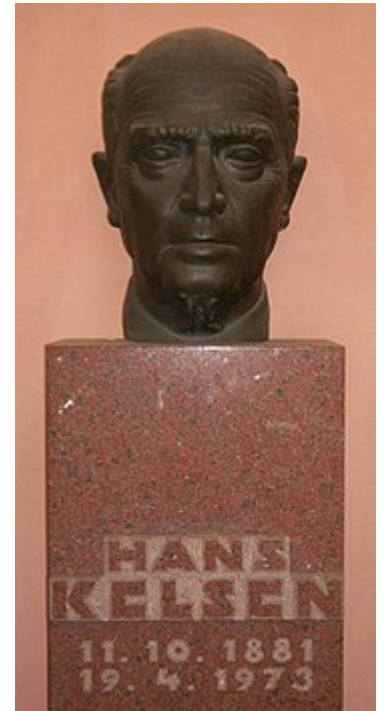
France

According to the Constitution of the Fifth Republic, the government of France^[22] is divided up into three branches:

- Executive. This includes the popularly elected president as well as the prime minister and cabinet. The French Prime minister is nominated by the president, but the government is responsible to the lower house of the legislature, the National Assembly.
- Legislature. A bicameral legislature that includes the Senate (upper house) and the National Assembly (lower house). The relationship between the two houses is asymmetric, meaning that in case of dispute, the National Assembly has the final word according to Article 45^[23] of the Constitution.
- Judiciary. This includes the judicial and administrative orders. It also includes a constitutional court.

Hong Kong

Hong Kong is a Special Administrative Region established in 1997 pursuant to the Sino-British Joint Declaration, an international treaty made between Britain and China in 1984, registered with the United Nations. Currently, Hong Kong has three branches of government as codified in the Basic Law, its constitution, which largely preserved political structures of the British colonial era, under the doctrine of one country, two systems.



Hans Kelsen was the principal author of the tripartite Constitution of Austria.

- Legislative Council – legislature
- Government – executive
- Judiciary (Court of Final Appeal and other courts and tribunals) – judiciary

The Chief Executive, elected by a 1200-member Election Committee which historically was dominated by pro-Beijing establishment members, is both head of the region and head of government, and chairs the Executive Council which is composed of "unofficial" members and government secretaries.

The legislature consists of 70 members, 35 of whom are elected by "functional" constituencies represented by members within various industries rather than the public at large.^[24] Separation of power between executive and legislature is, therefore, questionable.^[25]

The courts frequently exercise a power of judicial review of administrative actions and also decide matters of constitutionality of legislation, though this power is circumscribed under the power of the People's Republic of China's National People's Congress to make final determinations as to interpretation.^[26] Hence, the separation of powers is again structurally weak.

It is worth noting that the branches' separation of power may not be intended within the Hong Kong Basic Law as leaders of the PRC have publicly called for the three branches to cooperate and be led by the Chief Executive.^[27]

Further, Deng Xiaoping was quoted to have categorically dismissed Hong Kong having a "Trias Politica" system.^[28]

India

India follows constitutional democracy which offers a clear separation of powers. The judiciary branch is fairly independent of the other two branches with the power to interpret the constitution. Parliament has the legislative powers. Executive powers are vested with the President who is advised by the Union Council of Ministers headed by the Prime Minister. The constitution of India vested the duty of protecting, preserving and defending the constitution with the President as common head of the executive, parliament, armed forces, etc. not only for the union government but also the various state governments in a federal structure. All three branches have "checks and balances" over each other to maintain the balance of power and not to exceed the constitutional limits.^[29]

- President can set aside a law passed by the legislative or an advise given by the Union Council of Ministers when it is inconsistent with the constitution of India.
- Even president accepts a law passed duly by the legislative, it can be repealed by the Supreme Court after a fair trial if it is against the Basic structure of the constitution. Any citizen of India can approach the Supreme Court directly to repeal the unconstitutional laws made by the legislative or executive.
- President can be impeached after conducting a fair trial by the parliament for his unconstitutional orders/decisions.
- President can be asked to step down by the judiciary for his unconstitutional orders/decisions on the grounds of losing eligibility criteria of the president.
- Parliament can impeach judges of Supreme Court and High Courts of states for their incompetence and mala fides. Higher bench of judges can set aside the incorrect judgements of smaller bench of judges to uphold the constitution.

Iran

- Government – Executive
- The legislature of Islamic Republic of Iran – Legislative
- Judicial system – Judicial

Italy

In Italy the powers are separated, even though the Council of Ministers needs vote of confidence from both chambers of Parliament, that represents a large number of members (almost 1,000).^[30]

Like every parliamentary form of government, there is no real separation between Legislature and Executive, rather a *continuum* between them due to the confidence link. By the way, the balance is protected by Constitution also between these two branches.^[31] and, obviously, between them and the judiciary branch, which is really independent.

Malaysia

- Parliament – legislature
- Prime Minister, Cabinet, Government Departments and Civil Service – executive
- Federal Courts and lower courts – judiciary

Nepal

- Legislative Parliament – Legislature
- Prime Minister, Cabinet of Minister and Government Departments – Executive
- Supreme Court – Judiciary

Norway

- Parliament – legislature
- Prime Minister, Cabinet of Norway, Government Departments and Civil Service – executive
- High Courts and lower courts – judiciary

A note on the status of separation of power checks and balances, and balance of power in Norway today.^[32]

In the original constitution of 1814 the Montesquieu concept was enshrined, and the people at the time had the same skepticism about political parties as the American founding fathers and the revolutionaries in France. Nor did people really want to get rid of the king and the Council of State (privy council). King and council was a known concept that people had lived with for a long time and was for the most part comfortable with. The 1814 constitution came about as a reaction to external events, most notable the Treaty of Kiel see 1814 in Norway. There was no revolution against the current powers that had been the case in the US and France.

As there was no election of the executive, the king reigned supremely independent in selecting the members of the Council of State, no formal political parties formed until the 1880s. A conflict between the executive and legislature started developing in the 1870s and climaxed with the legislature impeaching the entire Council of State in 1884. (See statsrådssaken (Norwegian wikipedia page))

With this came a switch to a parliamentary system of government and while the full process takes decades, it has led to a system of parliamentary sovereignty where the Montesquieu idea of separation of powers is technically dead even though the three branches remain important institutions.

This *does not* mean that there are no checks and balances. With the introduction of a parliamentary system, political parties started to form quickly and this led to a call for electoral reform that saw the introduction of a Party-list proportional representation in 1918. The peculiarities of the Norwegian election system generate 6–8 parties and make it extremely difficult for a single party to gain an absolute majority. It has only occurred for a brief period in the aftermath of World War II where the Labour Party had an absolute majority.

A multi-party system parliament that must either form a minority executive or a coalition executive function as a perfectly good system of checks and balances even if it was never a stated goal for the introduction of a multiparty system. The multiparty system came about in response to a public outcry of having too few parties and a general feeling of a lack of representation. For this reason you'll find very little on the topic of separation of powers or checks and balances in the works of Norwegian political sciences today.

Pakistan

- Parliament – Legislative
- Prime Minister and his Cabinet – Executive
- Supreme Court and lower courts – Judicial

United Kingdom

- Parliament – legislature

- Prime Minister, Cabinet, Government Departments and Civil Service – executive
- Courts – judiciary

The development of the British constitution, which is not a codified document, is based on this fusion in the person of the Monarch, who has a formal role to play in the legislature (Parliament, which is where legal and political sovereignty lies, is the Crown-in-Parliament, and is summoned and dissolved by the Sovereign who must give his or her Royal Assent to all Bills so that they become Acts), the executive (the Sovereign appoints all ministers of His/Her Majesty's Government, who govern in the name of the Crown) and the judiciary (the Sovereign, as the fount of justice, appoints all senior judges, and all public prosecutions are brought in his or her name).

Although the doctrine of separation of power plays a role in the United Kingdom's constitutional doctrine, the UK constitution is often described as having "a weak separation of powers" A. V. Dicey, despite its constitution being the one to which Montesquieu originally referred. For example, in the United Kingdom, the executive forms a subset of the legislature, as did—to a lesser extent—the judiciary until the establishment of the Supreme Court of the United Kingdom. The Prime Minister, the Chief Executive, sits as a member of the Parliament of the United Kingdom, either as a peer in the House of Lords or as an elected member of the House of Commons (by convention, and as a result of the supremacy of the Lower House, the Prime Minister now sits in the House of Commons) and can effectively be removed from office by a simple majority vote. Furthermore, while the courts in the United Kingdom are amongst the most independent in the world, the Law Lords, who were the final arbiters of judicial disputes in the UK sat simultaneously in the House of Lords, the upper house of the legislature, although this arrangement ceased in 2009 when the Supreme Court of the United Kingdom came into existence. Furthermore, because of the existence of Parliamentary sovereignty, while the theory of separation of powers may be studied there, a system such as that of the UK is more accurately described as a "fusion of powers".

Until 2005, the Lord Chancellor fused the Legislature, Executive and Judiciary, as he was the ex officio Speaker of the House of Lords, a Government Minister who sat in Cabinet and was head of the Lord Chancellor's Department which administered the courts, the justice system and appointed judges, and was the head of the Judiciary in England and Wales and sat as a judge on the Judicial Committee of the House of Lords, the highest domestic court in the entire United Kingdom, and the Judicial Committee of the Privy Council, the senior tribunal court for parts of the Commonwealth. The Lord Chancellor also had certain other judicial positions, including being a judge in the Court of Appeal and President of the Chancery Division. The Lord Chancellor combines other aspects of the constitution, including having certain ecclesiastical functions of the established state church, making certain church appointments, nominations and sitting as one of the thirty-three Church Commissioners. These functions remain intact and unaffected by the Constitutional Reform Act. In 2005, the Constitutional Reform Act separated the powers with Legislative functions going to an elected Lord Speaker and the Judicial functions going to the Lord Chief Justice. The Lord Chancellor's Department was replaced with a Ministry of Justice and the Lord Chancellor currently serves in the position of Secretary of State for Justice.

The judiciary has no power to strike down primary legislation, and can only rule on secondary legislation that it is invalid with regard to the primary legislation if necessary.

Under the concept of parliamentary sovereignty, Parliament can enact any primary legislation it chooses. However, the concept immediately becomes problematic when the question is asked; "If parliament can do anything, can it bind its successors?". It is generally held that parliament can do no such thing.

Equally, while statute takes precedence over precedent-derived common law and the judiciary has no power to strike down primary legislation, there are certain cases where the supreme judicature has effected an injunction against the application of an act or reliance on its authority by the civil service. The seminal example of this is the Factortame case, where the House of Lords granted such an injunction preventing the operation of the Merchant Shipping Act 1988 until litigation in the European Court of Justice had been resolved.

The House of Lords ruling in Factortame (No. 1), approving the European Court of Justice formulation that "a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law, must disapply that rule", has created an implicit tiering of legislative reviewability; the only way for parliament to

prevent the supreme judicature from injunctively striking out a law on the basis of incompatibility with Community law is to pass an act specifically removing that power from the court, or by repealing the European Communities Act 1972.

The British legal systems are based on common law traditions, which require:

- Police or regulators cannot initiate complaints under criminal law but can only investigate (prosecution is mostly reserved for the Crown Prosecution Service), which prevents selective enforcement—e.g., the 'fishing expedition' which is often specifically forbidden.
- Prosecutors cannot withhold evidence from counsel for the defendant; to do so results in mistrial or dismissal. Accordingly, their relation to police is no advantage.
- Defendants convicted can appeal, but only fresh and compelling evidence not available at trial can be introduced, restricting the power of the court of appeal to the process of law applied.

United States

The greatest expression of the separation of powers was incorporated in the United States Constitution, the founding fathers included features of many new concepts, including hard-learned historical lessons about the checks and balances of power and the then-new concept of separation of powers. Similar concepts were also prominent in the state governments of the United States. As colonies of Great Britain, the founding fathers considered that the American states had suffered an abuse of the broad power of parliamentarism and monarchy. As a remedy, the US Constitution limits the powers of the federal government through various means, in particular, the three branches of the federal government are divided by exercising different functions, and are separated in origin by separate elections, each branch controls the actions of others and balances its powers in some way

In the United States Constitution Article 1 Section I gives Congress only those "legislative powers herein granted" and proceeds to list those permissible actions in Article I Section 8, while Section 9 lists actions that are prohibited for Congress. The vesting clause in Article II places no limits on the Executive branch, simply stating that, "The Executive Power shall be vested in a President of the United States of America."^[33] The Supreme Court holds "The judicial Power" according to Article III, and it established the implication of Judicial review in Marbury v. Madison under the Marshall court!^[34]

The presidential system adopted by the Constitution of the United States obeys the balance of powers sought, and not found, by the constitutional monarchy. The people appoint their representatives to meet periodically in a legislative body, and, since they do not have a king, the people themselves elect a preeminent citizen to perform, also periodically, the executive functions of the State. The direct election of the head of state or of the executive power is an inevitable consequence of the political freedom of the people, understood as the capacity to appoint and depose their leaders. Only this separate election of the person who has to fulfill the functions that the Constitution attributes to the president of the government, so different by its nature, and by its function, from the election of representatives of the electors, allows the executive power to be controlled by the legislative and submitted to the demands of political responsibility^[35]

Judicial independence is maintained by appointments for life that makes disappear very soon any sense of dependence on the Executive, with voluntary retirement and a high threshold of dismissal by the Legislature, in addition to a salary that can not be diminished during their service.



George Washington at Constitutional Convention of 1787, signing of U.S. Constitution



Play media

U.S. Supreme Court Justice Antonin Scalia testified before the Senate Judiciary Committee about separation of powers and checks and balances of the U.S. Government

The federal government refers to the branches as "branches of government", while some systems use "government" to describe the executive. The Executive branch has attempted^[36] to claim power arguing for separation of powers to include being the Commander in Chief of a standing army since the American Civil War, executive orders, emergency powers and security classifications since World War II, national security, signing statements, and the scope of the unitary executive

«In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than it may in contemplation appear. Some difficulties, however, and some additional expense would attend the execution of it. Some deviations, therefore, from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle: first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.»

«It is equally evident, that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.»

— James Madison, The Federalist Papers No. 51, [16]

Other systems

Republic of China

According to Sun Yat-sen's idea of "separation of the five powers", the government of the Republic of China has five branches:

- Executive Yuan – led by the premier but in actuality it is the president who sets policy – executive
- Legislative Yuan – unicameral – legislature
- Judicial Yuan – its Constitutional Court (highest) and Supreme Court have different jurisdictions – judiciary
- Control Yuan – audit branch
- Examination Yuan – civil service personnel management and human resources

The president and vice president as well as the defunct National Assembly are constitutionally not part of the above five branches. Before being abolished in 2005, the National Assembly was a standing constituent assembly and electoral college for the president and vice president. Its constitutional amending powers were passed to the legislative yuan and its electoral powers were passed to the electorate.

The relationship between the executive and legislative branches are poorly defined. An example of the problems this causes is the near complete political paralysis that results when the president, who has neither the power to veto nor the ability to dissolve the legislature and call new elections, cannot negotiate with the legislature when his party is in the minority.^[37] The examination and control yuans are marginal branches; their leaders as well as the leaders of the executive and judicial yuans are appointed by the president and confirmed by the legislative yuan. The legislature is the only branch that chooses its own leadership. The vice president has practically no responsibilities.

Belgium

Belgium is currently a federated state that has imposed the trias politica on different governmental levels. The constitution of 1831, considered one of the most liberal of its time for limiting the powers of its monarch and imposing a rigorous system of separation of powers, is based on three principles (represented in the Schematic overview of Belgian institution):

Trias Politica (horizontal separation of powers):

- The legislative power is attributed to an elected parliamentary body elected with a representative general election system (one person one vote).
- The executive power is attributed to the Council of Ministers. Ministers are formally appointed by the King, though in practice the prime minister decides the composition of his cabinet. The ministers are usually from the elected members of parliament (non-elected people can also be nominated). However they must first resign from their elected seat.
- The judicial power is in the hands of the courts. Magistrates are nominated by the minister (on proposal from a Council of the Magistrates).
 - Magistrates can be nominated to become a judge (sitting magistrates) or instructing judge (investigating judge) or Procureur (public prosecutor) (the standing magistrates).
 - The executive branch of the government is responsible to provide the physical means to execute its role (infrastructure, staff, financial means).
 - Judges and some other people cannot run for elected office while they are nominated to certain positions (military, police-officers, clergy, notaries, bailiffs).

Subsidiarity (vertical separation of powers):

- Supranational directives (EU legislation) and international treaties are subjected to approval of the federal level (the federal level being Belgium the nation state)
- The federal level is composed of the following:
 - A bicameral parliament (House of Representative and Senate) (in 2014 this will be a directly elected house and an indirectly appointed Senate of the regions)
 - A federal government (led by the Prime Minister and the ministers and secretaries of state)
 - Tasked with overseeing justice, defense, foreign affairs, and social security public health
 - High Court, Constitutional Court, Cassation Court and Council of State
- The regional level is composed of the following:
 - A monocameral parliament
 - A regional government led by the minister-president (ministers and secretaries of state) is tasked with regional matters.
- Provinces also have similar structures:
 - A monocameral provincial council
 - A nominated provincial governor assisted by deputies is tasked with provincial matters.
 - Appellate Court, Assises Court
- An intermediate level of Arrondissements subdivides the provinces
 - it has only an executive level with an arrondissemental commissars
- City and communal entities:
 - A city or communal council
 - A mayor, assisted by aldermen, is tasked with local matters.
 - Magistrates Court, Correctional Court (three judges).
 - Justice of the peace and Police Court judges (single judge courts)

Secularism (separation of state and religion):

- The king, the head of state, holds no political authority and requires executive approval by a minister for every action and statement; he nominates the ministers but he does not choose them (his executive powers); he signs and decrees the laws voted in parliament (his legislative powers);
- The head of state is commander in chief of the military (in title only), politically the military depends of the Minister of Defense and the chiefs of staff are responsible towards parliament and take their orders from the Minister of Defense and the government;

- Certain functions are deemed incompatible and people must resign from their function if they want to assume responsibilities in another function (military commanders have never been government ministers, even during a war)

Costa Rica

In the aftermath of the 43-day civil war in 1948 (after former President and incumbent candidate Rafael Ángel Calderón Guardia tried to take power through fraud, by not recognising the results of the presidential election that he had lost), the question of which transformational model the Costa Rican State would follow was the main issue that confronted the victors. A Constituent Assembly was elected by popular vote to draw up a new constitution, enacted in 1949, and remains in force. This document was an edit of the constitution of 1871, as the constituent assembly rejected more radical corporatist ideas proposed by the ruling Junta Fundadora de la Segunda República (which, although having come to power by military force, abolished the armed forces). Nonetheless, the new constitution increased centralization of power at the expense of municipalities and eliminated provincial government altogether at the time it increased the powers of congress and the judiciary.

It established the three supreme powers as the legislature, executive, and judicial branches, but also created two other autonomous state organs that have equivalent power, but not equivalent rank. The first is the Tribunal Supremo de Elecciones de Costa Rica (electoral branch) which controls elections and makes unique, unappealable decisions on their outcomes.

The second is the office of the Comptroller General (audit branch), an autonomous and independent organ nominally subordinate to the unicameral legislative assembly. All budgets of ministries and municipalities must pass through this agency, including the execution of budget items such as contracting for routine operations. The Comptroller also provides financial vigilance over government offices and office holders, and routinely brings actions to remove mayors for malfeasance, firmly establishing this organization as the fifth branch of the Republic.

European Union

The European Union is a supranational polity, and is neither a country nor a federation; but as the EU wields political power it complies with the principle of separation of powers. There are seven institutions of the European Union. In intergovernmental matters, most power is concentrated in the Council of the European Union—giving it the characteristics of a normal international organization. Here, all power at the EU level is in one branch. In the latter there are four main actors. The European Commission acts as an independent executive which is appointed by the Council in conjunction with the European Parliament; but the Commission also has a legislative role as the sole initiator of EU legislation.^{[38][39] [40]} An early maxim was: "The Commission proposes and the Council disposes"; and although the EU's lawmaking procedure is now much more complicated, this simple maxim still holds some truth. As well as both executive and legislative functions, the Commission arguably exercises a third, quasi-judicial, function under Articles 101 & 102 TFEU (competition law); although the ECJ remains the final arbiter. The European Parliament is one half of the legislative branch and is directly elected. The Council itself acts both as the second half of the legislative branch and also holds some executive functions (some of which are exercised by the related European Council in practice). The European Court of Justice acts as the independent judicial branch, interpreting EU law and treaties. The remaining institution, the European Court of Auditors, is an independent audit authority (due to the sensitive nature of fraud in the EU).

- Council of the European Union— executive and legislative
- European Commission— executive, legislative and quasi-judicial
- European Council— executive
- European Court of Auditors— audit
- Court of Justice of the European Union and the General Court— judicial
- European Parliament— legislative

Germany

The three branches in German government are further divided into six main bodies enshrined in the Basic Law for the Federal Republic of Germany.

- Federal President (Bundespräsident) – formally executive, but mainly *representative* in daily politics

- Federal Cabinet (*Bundesregierung*) – executive
- Federal Diet (*Bundestag*) & Federal Council (*Bundesrat*) – bicameral legislative
- Federal Assembly (*Bundesversammlung*) – presidential electoral college (consisting of the members of the Bundestag and electors from the constituent states)
- Federal Constitutional Court (*Bundesverfassungsgericht*) – judiciary

Besides the constitutional court the judicial branch at the federal level is made up of five supreme courts—one for civil and criminal cases (*Bundesgerichtshof*), and one each for administrative, tax, labour, and social security issues. There are also state (*Länder / Bundesländer*) based courts beneath them, and a rarely used senate of the supreme courts

Hungary

The four independent branches of power in Hungary (the parliament, the government, the court system, and the office of the public accuser) are divided into six bodies:

- Parliament (Magyar Országgyűlés): elected every 4 years by the people in a highly complex, two-round voting system
- Government (Magyar Kormány): installed and removed by 50%+1 basic majority vote of the parliament, 4-year terms
- Supreme Court (Legfelsőbb Bíróság): Chief justice elected by qualified (2/3) majority of the parliament, no government oversight
- Constitutional court (Alkotmánybíróság): members elected by qualified majority of the parliament for 8 years, this body nullifies laws and has no government oversight.
- Chief public accuser (Legfőbb ügyész): elected by qualified majority of the parliament, 6-year terms, ~~the~~ budget fixed, no government oversight.
- The President of the Republic (Köztársasági Elnök) is elected by qualified majority of the Hungarian parliament for 5-year terms (cannot be reelected more than once). The President's task is to oversee the functioning of the democracy. Most of his/her powers are ceremonial only: like signing laws into power and commanding the military in time of peace. But before signing, once he/she can also return accepted bills with advices to the Parliament for reconsideration, he/she can also request nullification in advance from the Constitutional Court. He can negotiate with civil/professional unions regarding the bills. Without the President's permission, the country can neither declare war nor deploy the armed forces.

The independent pillar status of the Hungarian public accuser's office is a unique construction, loosely modeled on the system Portugal introduced after the 1974 victory of the Carnation Revolution. The public accuser (attorney general) body has become the fourth column of Hungarian democracy only in recent times: after communism fell in 1989, the office was made independent by a new clause XI. of the Constitution. The change was meant to prevent abuse of state power, especially with regards to the use of false accusations against opposition politicians, who may be excluded from elections if locked in protracted or excessively severe court cases.

To prevent the Hungarian accuser's office from neglecting its duties, natural human private persons can submit investigation requests, called "pótmagánvád" directly to the courts, if the accusers' office refuses to do its job. Courts will decide if the allegations have merit and order police to act in lieu of the accuser's office if warranted. In its decision No. 42/2005 the Hungarian constitutional court declared that the government does not enjoy such privilege and the state is powerless to further pursue cases if the public accuser refuses to do so.

See also

- Arm's length principle
- Constitutional economics
- Constitutionalism
- Corruption Perceptions Index
- Fourth Estate
- Fifth power
- Fusion of powers
- Judicial activism
- Judicial independence
- Legal reform

- Philosophy of law
- Pith and substance
- Power sharing
- Reserve power
- Rule of Law
- Rule According to higher Law
- Separation of church and state
- Separation of duties
- Signing statement

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