**First lesson**

**The principle of separation of powers**

In this course, the student must assimilate the concept of the principle of separation of powers based on the limitation of the attributions of 3 powers, namely the legislative, executive and judicial powers.

**Introduction**

Developed by Locke (1632-1704) and Montesquieu (1689-1755), the theory of the separation of powers aims to separate the different functions of the State, in order to limit arbitrariness and prevent abuses linked to the exercise of sovereign missions.

Although this theory is often invoked in democratic regimes, it has been more or less rigorously put into practice. France, for its part, has developed its own conception of the separation of powers, based on the limitation of the attributions of the judicial authority with regard to public power.

**The classical theory**

**The classical theory of the separation of powers distinguishes three** main functions within different political regimes:

* the function of issuing general rules constitutes the **legislative function** ;
* the function of executing these rules falls within the **executive function** ;
* the dispute resolution function constitutes the **jurisdictional function** .

Based on the observation that, in the regime of absolute monarchy, these three functions are most often confused and held by one and the same person, the theory of separation of powers argues for **each of them to be exercised by distinct bodies** , independent of each other, both by their method of designation and by their operation. Each of these bodies thus becomes one of the three powers: legislative power is exercised by representative assemblies, executive power is held by the head of state and the members of the government, and judicial power, finally, falls to the courts.

The objective assigned by **Montesquieu** to this theory is to achieve a balance between the different powers: **"So that power cannot be abused, it is necessary that, by the arrangement of things, power stops power."**

**The Doctrine of Checks and Balances**

This theory strongly inspired the writers of the American Constitution, who in 1787 established a presidential regime organized according to a strict separation of the three powers, tempered by the existence of means of control and reciprocal action designed in accordance with the **doctrine of " *checks and balances* "** (which can be translated as the existence of procedures of controls and counterweights).

In order to prevent each of the branches from abusing its prerogatives, the American constituents thus provided for a **strict division of powers between federal bodies and federated states** . They also divided legislative power between two assemblies, gave the President a right of veto over legislative texts, and at the same time recognized the Senate's power to oppose nominations made by the President or international treaties negotiated by the administration.

**Separation of powers and the protection of human rights**

Article 16 of the Declaration of the Rights of Man and of the Citizen of 26 August 1789 also refers to this theory by stating that "Any society in which the guarantee of rights is not assured nor the separation of powers determined, has no Constitution". The separation of powers thus appears as the **indispensable corollary of the protection of the natural rights of man** : the mutual control exercised by the three powers over each other protects the individual from attacks on his fundamental rights. At the same time, the separation of powers constitutes an obstacle to despotism and the temptation of personal power, since no person can concentrate in his hands all the attributes of sovereignty.

**From strict separation to collaboration of powers**

However, **this theory has not always been strictly implemented by the various democratic regimes** . Indeed, too strict a separation of powers can lead to the paralysis of institutions: this was the case in France under the Directory (1795-1799) and under the Second Republic (1848-1851), where the conflict between the executive and the legislative branches each time ended in a coup d'état.

Many regimes therefore prefer the principle of **collaboration between the different powers** to that of their strict separation: the distinction between the legislative, the executive and the judiciary remains, but these powers have means of action with respect to each other. The power of the head of state to dissolve one of the chambers making up Parliament, the possibility for the legislative power to overthrow the Government, the submission of public prosecutors to the hierarchical authority of the Government are all examples of this.

**The French conception of the separation of powers**

Furthermore, the theory of the separation of powers has taken on a particular meaning in France, which the Constitutional Council described, in a decision of 23 January 1987, as the **"French conception of the separation of powers"** . This differs from the classical theory, since it originates in the laws of 16 and 24 August 1790 and the decree of 16 Fructidor Year III (2 September 1795) which prohibit the courts of the ordinary courts from hearing disputes concerning the administration. By these texts, the **legislative and executive powers were removed from the control of the ordinary courts** , on the grounds that the latter did not have sufficient legitimacy to judge acts emanating from authorities based on universal suffrage.

and acting in the name of the general interest. The establishment of an **administrative jurisdiction** from the year VIII (1799) was to partially change this situation: since that date, the acts of the administration could be contested, but before a jurisdiction, distinct from the judicial authority. At the top of the administrative order is the Council of State, created in 1799, which in addition to its jurisdictional functions exercises a role of advice to the Government.

The "French conception of the separation of powers" is therefore today associated with the existence of a duality of jurisdictions in our institutional system.