

Separation of Powers in Maldives

The separation of powers is an established constitutional principle. It dictates that, in order to prevent the accumulation of too much power in one person or decision-making body, there must be some separation of the three branches of the constitution: the Executive, the Legislature and the Judiciary. If this is not achieved, there is a danger that absolute power will be vested in one individual, which could lead to inefficiency and corruption. This article will examine the doctrine of separation of powers and how it applies to the constitution of the Maldives.



The theory of separation of powers has been developed by writers as far back as Aristotle, who, writing in the 4th century BC, recognised that the “rule of a master is not a constitutional rule”¹ and that government has 3 functions. He opined that government intervention is necessary because of human imperfection; however it should be limited to ensure that government vests as far as possible in the people. The classic formulation of the theory of separation comes from the writings of the 18th-century philosopher the Baron de Montesquieu. In his 1752 work *L’Esprit des Lois* (The Spirit of the Laws), he explained that there are three functions of government and three main organs of government. In order to protect individual liberty, the three functions of government – the formulation, the application and the enforcement of the law – should be kept separate and performed by the three organs of government – the Legislature, the Executive and the Judiciary. The structure should provide a system of checks and balances between the different branches to ensure that no one body can monopolise power in order to abuse it. Political theorists have long pointed out the dangers of non-observance of the separation of powers. According to Article 16 of the French Declaration of the Rights of Man of 1789, drafted after the overthrow of the despotic King Louis XVI, ‘Any society in which the safeguarding of rights is not assured, and the separation of power is not observed, has no constitution.’

There is some debate as to whether a just constitution can accommodate an overlap of personnel between the different branches. To take two examples, the UK constitution displays a considerable overlap of personnel, not the least of whom is the Prime Minister. He is the head of the executive, but is also a Member of Parliament, hence drawn from the body of the legislature. He is therefore responsible for proposing legislation and can ensure its passage through Parliament by use of the party whip system and his Parliamentary majority. In contrast, the Constitution of the United States clearly stipulates that there can be no overlap of personnel. Article 1 of the US Constitution vests the Legislative power in Congress, Article 2 vests the Executive power in the President and Article 3 vests the judicial power in the Supreme Court and other inferior courts. Further, the Constitution states that there can be no overlap of personnel between the different functions. That the US Constitution adheres to Montesquieu’s strict model of separation is unsurprising: it was produced in 1787, just 25 years after the *Esprit des Lois* was published, and the draftsmen were well-versed in Montesquieu’s constitutional

¹ Aristotle, Politics, Book One VII.

theories. As for the Maldives, it has been said that "An Englishman would say the President of the Republic of the Maldives is Her Majesty the Queen, the Prime Minister, the First Lord of the Admiralty, the Chief Constable, the Leader of Her Majesty's Opposition, the Chief Justice of England and Wales, the Speaker of the House of Commons, the Lord Chancellor, the Head of the Church of England, the Archbishop of Canterbury and the Archbishop of York, all rolled into one."²

The Maldivian Constitution was first produced in 1932. The current Constitution dates from 1998. At its conception, it was heralded as proclaimed 'the world's most democratic constitution' by President Gayyoom. This, of course is no guarantee: Joseph Stalin made a similar claim at the unveiling of the Soviet Constitution of 1936.

Article 4 of the Maldivian Constitution of 1998 sets out the functions of government:

“(1) The powers of the State of the Maldives shall be vested in the citizens. The said powers, for purposes of governing the State, shall comprise the following:

- (a) the Executive;
- (b) the Legislature; and
- (c) the Administration of Justice.

(2) In accordance with this Constitution the executive power shall be vested in the President and the Cabinet of Ministers, the legislative power shall be vested in the people's Majlis and the People's Special Majlis and the power of administering justice shall be vested in the President and the courts of the Maldives.”

It can be seen from Article 4 that the Maldivian government does not operate a strict separation of powers. The functions of government are clearly divided, but the organs of state overlap. There is a supposed separation of the Executive and Legislative branches, but Article 4(2) clearly states that the President occupies dual responsibilities as head of the executive and the judiciary.

The Executive and the Legislature

The cabinet of ministers is appointed by the President, although it is notable that Article 55(2) of the Constitution allows him to take direct charge of any ministerial department without appointing a Minister. Currently there are 20 ministries, and President Gayyoom is in control of the Ministry of Finance and Treasury and jointly in charge of the Ministry of Defence and National Security.

Under Article 42, the President has further powers which seem to undermine any pretence of separation. He may appoint or remove many members of the government, including the Vice-President, the Speaker and Deputy Speaker of the People's Majlis, government ministers, the Attorney-General, Atoll Chiefs, the Auditor-General and the Commissioner of Elections. The Commissioner of Elections is charged with preparing an approved list of candidates for the Presidency, from which the Majlis may select a

² “Constitution of the Maldives: A Structure Built on Loose Sand” at www.maldivesroyalfamily.com/maldives_constitution.shtml

candidate. This effectively means that a Commissioner appointed by the incumbent President has considerable influence over the choice of that President's challenger in the elections. Those looking for reasons why the current Maldivian President, Abdul Maumoon Gayyoom, is the longest serving "democratically elected" President in Asia need only look to the powers he has to influence his own election.

The President also has powers to "promulgate decrees, directives and regulations, as may be required from time to time for the purposes of ensuring propriety of the affairs of the government and compliance with the provisions of the Constitution and law" under Article 42(e). This allows him to temporarily enact quia timet legislation without having to lay it before the Majlis for approval until they reconvene at the next sitting. This allows him to bypass the Majlis, thereby infringing upon the functions of the legislature, in the same way as delegated legislation does in the UK constitution.

Whilst the President has extensive discretion over the appointment and dismissal of members of the government, removal of the President by the Legislature is a far more difficult process. According to Article 47, a motion must be brought by at least one third of the Majlis, having signed it in their own hand, alleging either that the President is permanently physically or mentally incapable of remaining in office, that he has intentionally violated the Constitution, or has committed a serious offence under Islamic law. The motion must then be approved by a two-thirds majority of the Majlis before being investigated by a commission comprising five members, two chosen by the President and a third member 'acceptable to both the People's Majlis and the President'.

In the UK, where it has been argued that there is no effective separation of powers, there nonetheless exist checks on the power of the executive.³ They include a strong Parliament, the courts and the media. In Maldives, the People's Majlis should operate to check the President's powers. However, not only does the President himself select eight of its members (Art. 64), he also appoints the Speaker of the House, who administers all the affairs of the Majlis and presides over its meetings (Art.68), and the Secretary-General, who organises the sittings of the Majlis (Art.91). In addition, the President has considerable powers in approving legislation. A Bill, once passed by the Majlis, must be presented to the President within 7 days. If he chooses not to assent, he may amend the Bill and return it to the Majlis for reconsideration. The amended Bill must be assented to by a two-thirds majority of the Majlis; otherwise it will be declared void. There is no opportunity for the Majlis to negotiate the Bill by making its own amendments. This places clear barriers in the path of any reform-minded Majlis. Given that a two-thirds majority amounts to 34 votes in the Majlis, this is quite a task, especially given that the President already controls the appointment of eight of these members. Even if passed, any act which is inconsistent with the Constitution is voidable. Who is the arbiter of what is unconstitutional? Unsurprisingly perhaps, it is the President who has wide-ranging powers with regard to interpreting the Constitution, including being able to promulgate decrees to enforce compliance with the Constitution (Art. 42(e)). Under Article 90, the President may even pass legislation without calling a Majlis, if it is not

³ See S.A. De Smith's works on constitutional law.

currently sitting and if ‘in [his] opinion, expedient legislation is required.’ This confers a considerable amount of discretion to alter the law, albeit temporarily.

In most constitutions, a multi-party system operates to keep checks on the political establishment. However, “Because of certain provisions in the constitution,” the President claimed recently, “a party system is not viable or cannot be operated in the country as the Constitution stands.”⁴ Recent moves towards establishing a multi-party system have been met with scepticism from those attempting to initiate reform in the country. The lack of a critically-minded Majlis means that the President can effectively act without fear of the political consequences.

Similarly, the press usually operates to bring pressure to bear on the government for any misguided policy decisions. The press is often called the fourth organ of the Constitution, as it has tremendous influence over political decision-making. However, state control of the media in Maldives has extinguished any hopes of establishing a free press capable of effective criticism, thus removing a valuable constitutional safeguard.

The judiciary

In the UK, the courts play a vital role in ensuring that the government adheres to the rule of law. This is a role that has developed throughout history. As far back as 1765, a prominent English judge, pointed out that a government may not act unless it is in accordance with the law, and it is for judges to decide whether the government possesses such a legal right:

“If it is law, it will be found in our books. If it is not to be found there, it is not law... By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license... If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.”

Lord Chief Justice Camden in *Entick v Carrington* (1765)

The President is the head of the judicial system in Maldives. Article 39 states that ‘the President shall be the highest authority of administering justice in the Maldives.’ This obviously has its dangers. The independence of the judiciary is essential to ensure that those facing charges do so in the absence of the possibility of political bias. A body that is part of both the executive and the judiciary will be responsible for formulating policy and then interpreting that policy in the courts. There is no independent arbiter of justice and therefore no check on executive authority.

⁴ Interview to BBC’s World Today programme, 11 June 2004.

The President appoints the Chief Justice and all other High Court, and inferior, Judges (Arts. 112 & 118). He may also remove from office any High Court Judge if 'in the opinion of the President, [the Judge] fails to satisfactorily discharge his duties and responsibilities' (Art.117). In the case of inferior judges, the President has even greater powers, able to remove a judge entirely at his discretion (Art.122).

The High Court hears all appeals from inferior courts in the Maldives (Art.115). If the cases have been brought by the State, then it is the President who decides which cases are worthy of referral to the High Court.

There is no independent system of judicial review. A recent investigation into the death of an inmate at the Maafushi gaol was undertaken by a Presidential Commission, whose members were all appointed by the President, by virtue of a Presidential Decree.⁵ Parts of the report were not even made public. It is claimed that this is 'for reasons of national security', but with no system of independent verification, how can one be sure?

The only conclusion to draw is that the Maldivian constitution lacks an effective separation of powers. Even where such a separation theoretically exists, as between the Executive and the Legislature, the influence of one over the other seeks to undermine the separation. In addition, the mechanisms which normally operate to safeguard the constitution, such as a free press and multi-party politics, simply do not exist in Maldives to bring the government to account for their actions. In such a climate, the potential for abuse of power is evident. Where is the guarantee, that a President possessed of such a wide-ranging power, can be trusted to wield it responsibly? One cannot simply hope for a President to be a paradigm of morality, there must be a constitutional system guaranteeing that he cannot misuse his power. To return to Aristotle: "constitutions which aim at the common advantage are correct and just without qualification, whereas those which aim only at the advantage of the rulers are deviant and unjust, because they involve despotic rule which is inappropriate for a community of free persons"⁶. Reformers currently meeting to discuss amendments to the Constitution will do well to remember this.

⁵ Can be found at www.e-maldives.com/reports/HassanEvanNaseemenglish.pdf

⁶ *Politics* Chapter 3, Part VI.