Effective parliaments are essential to democracy, the rule of law, human rights, gender equality and economic and social development. Democracy has many forms but it is usually predicated upon an effective separation of powers between the executive, the judiciary and the legislative – i.e. parliaments – to spread power and maintain checks and balances. Many of us hail from systems based on this tenet and perhaps would find any other constitutional arrangement unusual.

The core legislative, oversight and representational functions of parliaments provide an essential contribution to the quality of a country’s overall governance by adding value to government policy, providing additional legitimisation for government actions and activities, initiating policies independently of government, and enabling policy to be translated into social reality by means of laws.

The theory of the separation of powers may be divided between two historical periods: ancient and modern. The ancient theory can be traced back to ancient Greece and the philosophical writings of Plato [375 BC], Aristotle [323 BC] and Polybius [118 BC]. Classical political thought recognised the different functions of government. Aristotle, for example, distinguished between the deliberative, magisterial and judicial aspects of ruling. These ancient philosophers and their writings have had a great influence on modern writers.

The separation of judicial power became prominent in Montesquieu’s [1748] account on the separation of powers. In the political treatise Spirit of the Laws, Montesquieu distinguishes between the legislative power, the executive power and what he calls ‘the power of judging’, the judiciary. This tri-partite system is intended to prevent the concentration of unchecked power by providing division of responsibilities allowing for checks and balances to avoid autocracy or inefficiencies. In many systems, however we observe that the branches, especially the legislative and executive, are closely entwined, for example by the fact that Cabinet Ministers need to be appointed from elected Members of Parliament.

The Commonwealth has also recognised the importance of this tenet; in 2003 the Commonwealth Heads of Government adopted the Latimer House Principles, which were intended to frame the relationship that should exist between the three branches of power in the light of political and governance challenges that were being observed across the Commonwealth.

It is indeed in the 2005 Malta CHOGM Communiqué that it was stated that: “Heads of Government noted that the Commonwealth (Latimer House) Principles on the Accountability of and Relationship between the Three Branches of Government, which recognise the importance of a balance of power between the Executive, Legislature and Judiciary, constitute an integral part of the Commonwealth’s fundamental political values as set out in the Harare Commonwealth Declaration.”

Their application has helped to advance the rule of law, democracy and good governance globally. This is the basis of our discussion today. Beyond the theoretical treatises which cannot be argued with, within our own Commonwealth jurisdictions, such a clear-cut separation of these powers may not always exist, with possible blurring between them.

Despite this, one should not underestimate Montesquieu’s ideas of law and their relationship with society, dating back centuries and in place, in the majority of modern democracies. His approach was grounded in the then radical notion that laws were not divinely inspired or handed down by ancient lawgivers, but evolved naturally out of everything that influences a country, including traditions, habits, history, religion and economics. Laws, Montesquieu believed, could be rationally studied and then adjusted to increase liberty for all. We can transpose this idea to most of societies in that their laws tend to reflect the culture and beliefs of a society. In fact, if one were to analyse the evolution of the laws of a society one could have a good idea of how the belief and value systems of that society has evolved over the same period.

The doctrine of the Separation of Powers often lies in a written constitution. In Malta for example, the 1964 Constitution made Malta an independent parliamentary democracy within the Commonwealth, based on three organs of the state: the legislature (Parliament), the
Executive (Cabinet of Ministers) and the judiciary (the courts). At the time, the Queen remained the Head of State of Malta, but considerable power relating to purely internal matters was devolved to a Cabinet of Ministers under the leadership of a Maltese Prime Minister.

Albeit a strict separation of powers is predicated in the Maltese Constitution, one can still find areas in which in practice this is questionable. A case in point – which I must say is very close to my heart – is the evolution the Maltese Parliament has experienced in the past two years. Up to a few months ago, notwithstanding Parliament being politically autonomous from the two other branches, administratively it remained part of the Public Service, hence its budget and staffing remained, to a certain extent, at the discretion of Government. This has now changed: the law has set up an independent Parliamentary Service and made the Speaker of the House de jure responsible for its administration. As from this year the budget of the Parliamentary Service has been established by way of a resolution of the House, and new procedures have been put in place allowing the Service to engage its own staff.

Another issue of distribution of powers that concerned Parliament was a case brought before the Constitutional Court in Malta by a witness appearing before the Public Accounts Committee. The witness was challenging a ruling by the Speaker stating that according to the Guidelines for Witnesses Appearing before the Public Accounts Committee, a witness must answer all questions put to him unless these questions may incriminate him. The witness invoked his ‘right to silence’, which the Constitutional Court upheld. We could of course discuss the merits of this case and its implications for the tenet of the separation of powers at length, however I am merely referring to it to show that in practice, the division is not always a clear cut one. This is in spite of having a Constitution that posits this division in an unequivocal manner.

In spite of the arguments which seem to justify and advocate a strict separation of powers without reservations, and that such separation needs to be spelled out in a written Constitution, it would mean that the Mother of Parliaments itself would be on an unsure footing. It has been argued that if there were a strict separation, and overlaps or checks and balances were inexisten, then all systems of Government would become unmoveable. A lack of cooperation between limbs would result in constitutional deadlock and therefore, many argue that a complete separation of powers is possible neither in theory nor in practice. One can see this overlap in the UK with the position of Lord Chancellor where historically, his position was distinctive in that he was a member of all three branches of Government and exercised all three forms of power.

I believe the doctrine of the separation of powers remains probably one of the most basic concepts which build a modern democracy. The separation of powers is immensely important not only by setting out a clear division of power among the organs of the state, but more importantly provides for the mechanisms that ensure that these organs do not abuse the powers vested in them and from being abused. I do, however, also agree that an overlap and balance between the three powers and where they worked together to achieve a fully functional democratic system is required.

A degree of tension within the separation of powers will always exist, and I believe that it is no secret that the greatest danger of abuse and excess will always lie with the executive arm – not judges or legislatures. It is with this in mind that I feel that as Commonwealth members we need to keep in mind the Latimer House Principles that we have agreed should provide an effective framework for power sharing and control. It is the responsibility of each Commonwealth member to regularly ask itself whether its Executive respects the freedom of the Legislature and the Judiciary to discharge their responsibilities.

To conclude, I am also including the recommendations set out as a result of the session at the Commonwealth People’s Forum. Across the Commonwealth, the separation of the powers of parliament and the judiciary must be enhanced. Civil society calls on Commonwealth Governments to:

- Promote, utilise and realise the Commonwealth Latimer House Principles to ensure the financial and administrative independence of parliament and the judiciary;
- Implement fair and impartial appointment processes for judicial officers and provide support, particularly those in lower courts, where independence may be threatened; and
- Uphold and protect freedom of expression for the media.

This article is based on a speech and presentation given by the CPA Small Branches Chairperson at the 2018 Commonwealth People’s Forum in London, United Kingdom on 17 April 2018, ahead of CHOGM 2018. For a report of the event please turn to page 112.

Left: The CPA Small Branches Chairperson speaking on the Separation of Powers at the 2018 Commonwealth People’s Forum.