

INTRODUCTION TO LAW

Lesson 5

The form of the state



Dr. Heliona Miço



The topics

- The relation between the content and the form of the state
- Key factors regarding the form of the state
- The forms of state power
- The principle of separation of powers
- The principle of unity of powers

The relationship between the content and the form of the state

- Every socio-economic formation responds to a specific type of state.
- Different reasons explain the variety of forms in the appearance of the state.
- The **monarchy is typical for the feudal state** because of the hierarchical organization of the nobility.
- With the fall of feudalism, the monarchy took another form, **absolute monarchy characterized by centralized power** and a tendency for territorial expansion.
- With the transition towards capitalism, the monarchy changed form and became a **bourgeois republic**.

Key factors that explain the form of the state

➡ 1) The content of the state

- ➡ *For example,* the development of capitalism could not be ensured by the existence of the peasantry, but by the existence of a free worker interested in his work, as well as by democratic forms of state, different from those of the feudal system.

Key factors that explain the form of the state

- **2) The ratio of political and social forces and the war between them.**
- An explanation can be found in Germany. Germany until the end of the First World War was a constitutional monarchy. The defeat of Germany led to the collapse of the monarchy and the creation of the Democratic Republic of Germany (Weimar Republic).
- But the economic crisis, unemployment, international inferior position, and the civil war between the Social Democrats and the Communists, favored the National Socialist forces led by Hitler bringing a new form of state, the fascist regime.

Key factors that explain the form of the state

- Other factors that affect the shape of the state are **international factors, historical traditions of a country**, etc.
- After World War II, the intervention of military forces in Greece caused Greece to maintain the monarchy, as a form of government for a period of 10 years;
- The second case is the preservation of the monarchy in Great Britain.

The forms of state power

- The state power is the highest, independent, indivisible, unlimited, and all-encompassing power.
- It expresses the ability to:
 - ❖ make decisions,
 - ❖ issue orders,
 - ❖ ensure their implementation even through the monopoly of physical coercion if necessary,
 - ❖ punish those who violate the order,
 - ❖ and resolve various social conflicts in court.

Separation and unity of state power

- In addition to this, the term “state power” is also used in a narrow perspective.
- According to this perspective, some states are based on the **separation of powers**, and some states are based on the **unity of state power**.
- There are legislative, executive, and judiciary powers.
- If these powers are separate from each other and belong to separate fields, then we have a separation of powers.
- If the relationship between these powers legitimizes the supremacy of one specific power (legislative one or Parliament), then **we have a unity of powers**.

Legislative power

- The state operates through the rules of law. Every state body operates according to legal norms.
- Laws are the most important legal norms that regulate the main activity of the state.
- Laws unravel the basic constitutional principles, by being the norms with the highest legal force.
- Laws determine the behavior of citizens and state bodies.
- **The Parliament or the Assembly is the main legislative body in different countries.**

Executive power

Laws have a general and abstract character.

- The general norms must be concretized through special acts in the process of implementation of the law.
- The activity of the administration has the duty to implement the laws and other acts of the legislative body.
- In addition to issuing **sub-legal acts**, administrative bodies also undertake **material actions**: they take measures to follow the teaching process, maintain public facilities, build social and cultural works (schools, hospitals, museums, etc.), treat the sick people, etc.
- Good or bad implementation of the law depends mainly on the work and activity of central or local administrative bodies.

Judiciary power

- Judicial activity is performed by **the courts**, which are the bodies that administer justice.
- Judicial activity aims
 - to resolve conflicts that arise between citizens,
 - to resolve conflicts that arise between citizens and administrative bodies
 - to compensate for damages
 - to punish the one who committed the crime.
- The court should be subject only to the law and the judiciary system operates on the principle of the independence of judges.

Judiciary power

- Another principle of the functioning of this power is the right to appeal to a higher court.
- The individual has the right to appeal to the **Court of Appeal** against the decision of the **Court of First Instance**.
- Although the decision of this court becomes final, there is a possibility that this decision will be reviewed in the **High Court**, in the case of a violation of the law.
- **To ensure the independence of judges**, it is provided that judges can't be removed from their duty or dismissed or transferred except **through the decision of the High Judicial Council**.



The principle of separation of powers

- In a democratic system, the political institutions of a country during their functioning are based on the principle of separation of powers.
- The separation of legislative, executive, and judicial powers is considered **the best form of government**.

Three parts of the state in Ancient Greece

- Each state has three well organized parts, and through this organization the state can exercise its own functional unity.
- Aristotle has treated the division of powers between the **General Assembly**, **The body of officials** and **The judiciary**.

State powers in Feudalism

- During feudalism there was another approach to the separation of powers.
- During this period, it prevailed the theory that **the king was blessed by God and possessed inalienable power.**
- The three powers, such as the legislative, the executive, and the judiciary, depended on the King.

The theory of the separation of powers

- **Montesquieu** (mid 18th century).
- According to Montesquieu, power had to be divided between various organs, **in order that nobody/organ would have absolute power to detriment the others.**
- For the proper functionality of the state, **the state must be divided into separate powers.**

The Bourgeois society

- In bourgeois society it is seen as **a must the need to separate state bodies with specific competencies.**
- The legislative body, through its decision-making process, addresses the most important social problems, formulating the legal framework for their solution.
- The executive body knows more closely and in detail the social problems that arise in different areas. It has the power to issue sub-legal norms for the implementation of laws, as well as to carry out material actions.
- Whereas the court makes the correct interpretation and application of legal norms.

The Presidential and Parliamentary System

- The separation of powers means **the division of functions and the independence of the organs from one another.**
- However, the ratio of state bodies depends on the state system whether it is a **presidential** or **parliamentary system**.

The presidential system and its characteristics

- ➔ (1). The executive power is exercised by the president, who is both **the head of state and the head of government**.
- ➔ Ministers are called **secretaries of state** and they are the administrative heads of departments. They act according to the directives of the president.
- ➔ Since the Council of Ministers is not functioning, the President takes the opinion of the secretaries of state on the most important issues, but it is **the President who decides at the end**.

The presidential system and its characteristics

- ➡ (2). The President **is elected by the people**, through general election. This gives him greater authority equal to the Parliament or Congress.
- ➡ (3). There is a **complete separation of powers** related to:
 - ➡ a) the inability of parliament to overthrow the President by a vote of no confidence as in parliamentary systems;
 - ➡ b) the inability of the President to dissolve parliament.

The example of the Albanian Constitution

Article 104 of the Constitution

- 1. The Prime Minister is entitled to present to the Assembly a motion of confidence for the Council of Ministers. If the motion of confidence is voted by less than half of all the members of the Assembly, the Prime Minister, within 48 hours from the voting of the motion, requests the President of the Republic to dissolve the Assembly.
- 2. The President dissolves the Assembly within 10 days from the receipt of the request. A request for a motion of confidence may not be presented while a motion of no confidence is being examined according to article 105.

The presidential system and its characteristics

- ➔ **4.** The President shall not be held accountable for his work unless he commits a crime. But even in that case, the President has to be removed from his post to enable trial. Also, the president cannot influence legislative activity.

Neni 90 (Kushtetuta e Shqipërisë)

- 1. Presidenti i Republikës nuk ka përgjegjësi për aktet e kryera në ushtrim të detyrës së tij.*
- 2. Presidenti i Republikës mund të shkarkohet për shkelje të rëndë të Kushtetutës dhe për kryerjen e një krimi të rëndë. Propozimi për shkarkimin e Presidentit në këto raste mund të bëhet nga jo më pak se një e katërta e anëtarëve të Kuvendit dhe duhet të mbështetet nga jo më pak se dy të tretat e të gjithë anëtarëve të tij.*
- 3. Vendimi i Kuvendit i dërgohet Gjykatës Kushtetuese, e cila, kur vërteton fajësinë e Presidentit të Republikës, deklaron shkarkimin e tij nga detyra.*

The deviations of the presidential system

- 1. The President has **the right to veto a suspension of the law** passed in Congress. If a law is turned by the President for a review in Congress, then the law must be approved by a two-thirds of the majority. This is called the **President's interference with the legislative power**.
- 2. The second case concerns the **appointment of secretaries of state and ambassadors by the President but with the consent of the Senate**, which is one of the chambers of Congress. (the interference of legislative power on the executive)

The deviations of the presidential system

- 3. The third derogation relates to the formation of judicial bodies as a third power. The lower court judges are elected with the consent of the Senate. This is a violation of the separation of powers.
- 4. The President, despite not attending Congress, **has the right to send messages to the Congress** which are a means of exercising legislative initiative. These messages contain proposals for approvals or amendments of laws.
- 5. The Congress influences the executive power **not only by appointing officials** but also by **hearing reports from the State Secretaries**.

The deviations of the presidential system

- **(6). Judicial bodies also interfere with the legislative power.**
- The US Supreme Court has the right to control the constitutionality of laws, i.e. their compliance with the Constitution.
- If the Supreme Court finds a law incompatible with the Constitution, then it has the right to prohibit the application of this law.

The parliamentary system and its characteristics

In this system, the separation of powers is smoother than in the presidential system.

1. The main characteristic **is the formal supremacy of parliament**, which means legislative power over other powers.
2. Another characteristic is **the existence of government as an administrative body that is distinct from the head of state**.

The parliamentary system and its characteristics

- 3. The executive power is held by both the head of state and the head of government. But the head of state, both in the constitutional monarchy and in the parliamentary republic, performs functions with formal character and lacks proper administrative activity. The functions of the administration are mainly held by the government and the Prime Minister.
- 4. **The Parliament is the holder of the highest power.** The government is approved by the parliament and is accountable to it. The Parliament sets the general political line through laws, while the government has the executive power. But, the parliament can overthrow the government (Art 105 of Albanian Constitution).

The parliamentary system and its characteristics

- 5. The government can influence the activity of parliament in two ways:
 - a. The government has the right to propose to the head of state the dissolution of parliament before the end of the mandate (art 104);
 - b. The government has legislative initiative (art 81, par 1).
- The cases where Members of Parliament take the post of the ministers is a government intervention in the affairs of parliament.

The semi-presidential system and its features

- This is a mixed system because it features both the presidential and parliamentary systems.
- France is the representative of this system since the constitutional reform of 1962.
- Generally, this system is based on the election of the president by popular vote, but without disrupting the parliamentary form.

The semi-presidential system and its features

- This system differs from the presidential system as **the government is headed by the Prime minister who is separated from the head of state.**
- The government is accountable to the Parliament which by a vote of no confidence imposes the resignation of the government.
- On the other hand the executive power (government) has the right to dissolve the parliament before the end of the mandate.

The semi-presidential system and its features

- The main difference between this system and the parliamentary system is **the election of the head of state, who in the semi-presidential system is elected by general voting.**
- In France, the president elected by the people's vote has a great authority, in the same level with the authority of the parliament.

The principle of unity of powers

- The principle of unity of power **does not mean** that there is only one body in the state that performs three functions.
- But this system implies that **one state body not only is the principal one but has the right to interfere in the affairs of the other organs.**
- Usually the main body is the legislative body that has the right to interfere with the executive and judicial powers, to control how laws are implemented.

Albania

- The principle of the unity of power has been applied in Albania both under the Constitution of 1946 and the Constitution of 1976.
- Formally the People's Assembly was the highest body to elect the Council of Ministers and the Supreme Court.
- The ministers were accountable to the People's Assembly.
- **But indeed this principle implied the omnipotence of the state party leadership.**

The concept of political organization of society

- **Every society is politically organized.** This organization includes social organizations that have a political character.
- The political organization of society includes the state, as well as other organizations with different roles.
- **Examples:** political parties, youth organizations with a political character, other organizations that perform some form of political function (trade unions, etc.)



The concept of state structure

- **The concept of the structure of the state** is related to:
 - the meaning of the state as a political organization and
 - the people who make up this organization.
- The state is used in the **geo-political term**, but also as an **organization** made up of people who have coercive means.

The concept of state structure

- **Each organ that exercises state power has a certain position** based on the competence provided by law or legal framework.
- Competence means the totality of the rights and duties of a state body.
- The state body and the citizen as rights holders differ from each other.

Subject and territorial competencies

- The competencies are divided into 2 types, **subject and territorial competencies. (kompetenca lendore dhe territoriale)**
- **The subject competencies** relate to the specific tasks performed by the state body, its rights, and duties.
- **The territorial competencies** define the territorial boundaries within which the state organ can exercise its subject competencies.

The State bodies

- The state consists of different bodies that differ from each other **in their duties and roles.**
- There is a classification according to the variety of organs.
 - By composition
 - By the way of formation
 - By the role in the working process
 - By the circumstances
 - By the competences
 - By the place and position

By composition

- By composition, state bodies are divided into collective and monocratic organs.
- The **collective body** is made up of a number of people, such as the Assembly, the Council of Ministers, the Municipal Council.
- The **monocratic body** is the President, the Prime Minister, the Ministers, etc.

By the way of formation

- The state bodies are divided into **elected** and **appointed organs** according to the way of formation.
- The elected bodies are the Assembly, Municipal Councils, and Mayors.
- The appointed bodies are the Council of Ministers.
- The President of the Republic, after appointing the Prime Minister, upon his proposal also appoints the Ministers.
- Deputy Ministers are appointed bodies.



The role in the working process

- According to the roles they play in the working process the state bodies are divided into decision-making and advisory organs.
- **Decision-making bodies:** The Assembly, the Council of Ministers, the President, the Ministers.
- **The advisory bodies** are the various councils/ boards within the ministries.

The circumstances

- Under the circumstances in which organs are created, they are divided into **ordinary** and **extraordinary** organs.
- Ordinary organs that are created in the normal course of action of the state are common, while **extraordinary organs are created** due to the emergency situations of the state.

The competencies

- According to their competencies, the state bodies are divided into bodies with **general** and **specific** competencies.
- General competencies have those bodies that extend their jurisdiction throughout the territory of the state.
- Specific competencies have those bodies with special powers that operate only in a particular field.

By the place and position

- According to the place and position they occupy in the system of organs of the same name the state organs are divided:
 - ❖ into **superior** and **subordinate** organs (ex: Ministry of Education as a superior organ vs Center of Educational Services as a subordinate organ)
 - ❖ and **central** and **local** organs (Council of Ministers vs municipalities).