9. Unpacking the separation of powers

Jiří Baroš, Pavel Dufek and David Kosař[1]

1. INTRODUCTION

Separation of powers has returned to the forefront of both public and scholarly attention, with countries of Central Europe providing ample material for reflection. Recent political developments in Hungary and Poland have reminded us that the tripartite division of state power among legislative, executive and judiciary remains vulnerable to whims of power, and that aggressive pursuit of self-contained goals by the executive may quickly disrupt the delicate balance among the highest bodies in a constitutional democracy. Be it Viktor Orbán's "constitutional blitzkrieg" which resulted in Fidesz's government subjugating both the judiciary (including the Constitutional Court) and numerous independent state agencies, or similar domination by Jaroslav Kaczyński's Law and Justice party over the judicial system in Poland – we have some almost first-hand experience of what happens once a populist leader perceives the principle[2] of separation of powers as an obstacle which prevents him from centralising power and running the country as he sees fit.[3]

[1] The research leading to this chapter has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant no. 678375-JUDI-ARCHERC-2015-STG) and from the Czech Science Foundation (grant no. 19-11091S).

[2] For the purpose of this short chapter, we use the terms "*concept* of separation of powers" and "*principle* of separation of powers" interchangeably.

[3] Among the many writings on recent developments in Hungary and Poland, see eg G Halmai, 'From the "Rule of Law Revolution" to the Constitutional Counter-Revolution in Hungary' in Wolfgand Bedenek (ed), European Yearbook of Human Rights (Intersentia 2012), 367; David Landau, 'Abusive Constitutionalism' (2015) 47 *University of California Davis L. Rev.* 189, 208–211; M Tushnet, 'Authoritarian Constitutionalism' (2015) 100 *Cornell L. Rev*. 391, 433–435; R Uitz, 'Can you Tell When an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary' (2015) 13 *Int'l. J. Const. L.* 279; A Śledzińska-Simon, 'Paradoxes of Constitutionalisation: Lessons from Poland' (*VerfBlog,* 30 March 2016) <http://verfassungsblog.de/paradoxes-of-constitutionalisation-lessons-from-poland/> accessed 30 June 2018.

However, a closer look shows that Orbán and Kaczyński have been hostile only to certain components of the principle of separation powers. Similar observation could be made with respect to other countries in which separation of powers has come under distress. In our view, this provides a reason for inquiring in some more detail into the architecture of the concept of separation of powers.

The aim of this chapter is thus to provide such a conceptualisation, especially by means of distinguishing several components which make up the conceptual but also institutional structure of separation of powers. This will enable us to identify particular deficiencies in both the theory and practice of separation of powers. We furnish our conceptual exploration with examples of populist assaults on the principle of separation of powers, as they happened mainly, although not exclusively, in the Central European context.

Our contribution is three-fold. First, we show that it is necessary to divide the concept of separation of powers into smaller components that can be studied conceptually as well as empirically. We do so by unpacking the concept into four components (separation of institutions, separation of functions, personal incompatibility, and checks and balances) and exploring their limiting and enabling pedigrees. Second, we show that all of these four components embody limiting and enabling elements, but each of them does so to a different extent. This inevitably results in tensions. Consequently, third, each constitutional system, when designing framework of government, must make its own choices and adopt its own combination of enabling and limiting elements.

Our chapter proceeds as follows. Section 2 contextualises separation of powers in the broader debates on constitutionalism and identifies rationales behind the principle. Section 3 then unpacks the concept of separation of powers into four constitutive components. We show that there is an inherent tension between them. Subsequently, we argue that the separation of powers is theoretically indeterminate, which brings into play mental and institutional path-dependencies, as well as a temporal dimension of separation of powers. Section 4 summarises and identifies possible avenues for further research.

2. UNDERSTANDING THE CONCEPT OF SEPARATION OF POWERS AND ITS RATIONALES

The aim of this section is to contextualize the concept of separation of powers within modern constitutionalism and to identify its key rationales. We argue that the concept of separation has two rationales, the limiting and the enabling, that are often in tension. This in turn has several repercussions for the functioning of the individual components of separation of powers discussed in the subsequent section.

2.1 The Context of Modern Constitutionalism

The separation of powers is one of the many concepts in political thought that have migrated from "the West" to the Central European (CE) region. However, the results of the transplantation are highly ambiguous. In order to understand both the theoretical and practical challenges facing constitutional democracies not only in the CE, we first need to sketch the architecture of the concept of the separation of powers. Yet the very first step in such an analysis has to be delineation of the parent concept of *constitutional democracy*.

The modern era has witnessed a general shift in the locus of sovereignty from God or the monarch to the people. The idea that the people are the sole legitimate source of power is now taken for granted: as the constituent power, the people create the constitution, giving it to themselves. This brings out the oldest "separation", namely the separation of *constituent* power (= the people) and *constituted* powers. The structure of the latter is enshrined in the constitution.[4] Traditionally, the constituted powers comprise the legislature, the executive, and the judiciary. The constitution must ensure that the powers delegated are not used in such a way as to injure those who have delegated these powers.[5]

One instrument for achieving this goal is the separation of powers more narrowly construed. The doctrine thus makes sense only within the broader theory of constitutionalism, which stresses primarily the limits of every exercise of governmental power. In European history, constitutionalism transformed unchecked monarchies and pure democracies into constitutional monarchies and constitutional democracies, that is, moderate versions of each imprinted by the spirit of constitutionalism. As Schmitt put it, "a constitutional democracy emerges out of a pure democratic state".[6] However, the role of constitutionalism concerns not only the constitution and specification of the limits placed upon the three basic forms of constituted powers. It also "facilitates – indeed makes possible – a democratic system by creating an orderly framework within which people make political decisions".[7]

---

[4] For a similar argument, see Y Roznai, 'The Newest-Oldest Separation of Powers' (2018) 14 *EuConst* 430, at 431.

[5] M Loughlin, *Sword and Scales* (Hart 2000) 224–225.

[6] C Schmitt, *Constitutional Theory* (Jeffrey Seitzer tr, first published 1928, Duke UP 2008) 235.

[7] *Reference re Secession of Quebec* [1998] 2 S.C.R. 217 [78]; cf W Murphy, *Constitutional Democracy. Creating and Maintaining a Just Political Order* (JHUP 2007) 1; W Murphy, J Fleming, S Barber, S Macedo, *American Constitutional Interpretation* (4th edn, Foundation Press 2008) 45.

Analytically speaking, these complex institutional arrangements of a constitutional democracy thus have two distinct roles: limiting and enabling.[8] In the former role, they are meant to "raise the cost of instant coordination on many possible actions and results, sometimes to make such coordination prohibitively difficult".[9] As a result, they block not only popular will, but also the will of the political elites as well as the potential abuse of power by political officials. Protection of individual rights against encroachments by political authority or by democratic majorities represents the flagship value of this understanding of separation of powers, often synonymised with the tradition of "liberal constitutionalism".[10] On the institutional level, core constitutional constraints include the separation of powers, legislative bicameralism, and judicial review. This "negative" face of constitutionalism neatly complements the Arrowian (social choice-based) anti-populist tradition in democratic theory which denies the possibility of a "popular will" and sees peaceful removal of political elites as the primary purpose of democratic (electoral) participation.[11]

However, it would be a mistake to reduce constitutionalism to the limiting rationale. The other, enabling role of constitutional arrangements highlights the fact that the given arrangements are also meant "to make various actions and results possible" because there is a need for "specialization and organization to get many things done at all".[12] In other words, constitutional constraints are intended not only to limit, but also indirectly to *enable*, *enhance* or *strengthen* the democratic exercise of power. Constitutional regimes "grow stronger" because the division of government into several branches enables better coordination of its activities "on larger scales and over longer time horizons".[13]

After all, one cannot impose limits on the legislative, executive and judicial powers unless they have been created in the first place and embedded in the broader structure of government, with some positive purpose – some socially

---

[8] We are aware that there are some differences between the ideas of "limits" and "restraints": the former has deeper consequences for the possibility of governmental intervention, whereas the latter implies more specific and piece-meal constraints. For the purpose of this chapter, however, we do not differentiate between them; our explication is set on such a level that the differences between "restraints" and "limits" shall not affect our analysis. For a discussion of related terminology and semantics see J Waldron, *Political Political Theory* (HUP 2016) 29–32.

[9] R Hardin, *Liberalism, Constitutionalism, and Democracy* (OUP 1999) 82.

[10] As in J Habermas, *Between Facts and Norms* (MIT Press 1996).

[11] See especially W Riker, *Liberalism Against Populism* (Waveland 1988).

[12] Hardin, *Liberalism, Constitutionalism, and Democracy* (n 9) 82.

[13] M Cameron, *Strong Constitutions: Social-Cognitive Origins of the Separation of Powers* (OUP 2013) 1.

desirable ends – in mind.[14] A final observation to be made in this regard is that limited power has repeatedly proven more effective than arbitrary power, which also explains why elites in constitutional democracies normally do submit to such restraints. Imposing limits upon themselves can be beneficial from their own point of view, so that "they may prefer limited power within a strong state to unlimited power within a weak one".[15]

2.2 Separation of Powers and Justifications of the Enabling Rationale

Separation of powers in modern constitutionalism thus carries both the limiting and the enabling rationales. Let us now zero in on these two with the help of some empirical background. The limiting (sometimes also referred to as "negative" or "restraining") rationale rose into prominence in the Central European context after the breakdown of the communist regimes in 1989. In the course of the dismantling of "the USSR-imposed or borrowed sham constitutionalism",[16] all Central European countries strove to anchor the principle of separation of powers in their constitutional orders – whose obvious main goal was to prevent the restoration of the now-defeated non-democratic regimes by means of blocking the natural tendency of power concentration, power aggrandizement and corruption. In the end, the new Central European constitutions adopted immediately after the fall of communism were "fear's creatures" as they reflected "the fears originating in, and related to, the previous political regime"[17] – however imperfect the particular constitutional provisions turned out to be.

Nevertheless, some authors now judge the one-sided emphasis on constitutional limits as deeply flawed. They argue that despite the expected benefits of constitutional constraints for democratic politics, disproportionate emphasis on the limiting rationale has in fact stifled the vitality of Central European political regimes. In fact, the predominance of what Blokker calls *legal con-*

---

[14] K Whittington, 'Constitutionalism' in K Whittington, D Kelemen, and G Caldeira (eds), *The Oxford Handbook of Law and Politics* (OUP 2010) 281ff.; S Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (The University of Chicago Press 1995) 6, 165.

[15] Cameron, *Strong Constitutions* (n 13) 32. See also Holmes, *Passions and Constraint* (n 14) 6; S Holmes, 'Constitutions and Constitutionalism' in M Rosenfeld and A Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 198; S Holmes, 'Lineages of the Rule of Law' in José M Maravall and A Przeworski (eds), *Democracy and the Rule of Law* (CUP 2003) 20.

[16] A Febbrajo, W Sadurski (eds), *Central and Eastern Europe After Transition* (Routledge 2010) 3.

[17] A Sajó, *Limiting Government* (CEU Press 1999) 2.

stitutionalism led Central European countries "to ignore questions of political participation, public debate on fundamental values and rights, and the diffusion of a culture of constitutionalism throughout political and civil society".[18] Blokker's critique fits into the participatory-deliberative narrative in political philosophy which routinely laments the rationalising, antidemocratic tendencies in modern liberal democracies.[19]

We are of the view – and will argue so later in the chapter – that not least vis-à-vis the current populist surge in the region, the limiting rationale of separation of powers should not be downgraded. At this point, however, we wish to outline basic types of *justification* for the enabling rationale (sometimes also referred to as "positive"), that is, types of reason telling us what – beside the prevention of tyranny – separation of powers is actually good for. First, Christoph Möllers has argued that the separation of powers serves as an organisational instrument of enforcing democratic decisions by empowering the public authorities.[20] While he still considers the "ban on the usurpation of powers" view as "the most important as well as the most complicated"[21] interpretation of the separation of powers, he develops his own positive conception from within the idea of individual and collective *self-determination* (or *autonomy*) which forms the basis of a given polity's legitimacy – an idea with close affinities to the positive conception of republican freedom. In this perspective, legislatures uphold collective autonomy, courts, by protecting rights, enable individual autonomy, and the executive mediates between the two while bringing decisions into reality. Although Möllers casts his autonomy-based justification as primarily procedural, his underlying emphasis on the democratic origin of shared rules as well as his distrust of rationalising (anti-voluntarist) tendencies within contemporary constitutional theory indicate the importance of democratic inputs into the political system.

Aileen Kavanagh takes a different route. According to her "reconstructed view", the principle of separation of powers, apart from its correcting role for potential abuse of power, tries "to allocate power and assign tasks to those bodies best suited to carry them out".[22] The separation of powers can be disaggregated into a "division-of-labour component" (= *separation*) which is to be

---

[18] P Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge 2003) 164.

[19] H Buchstein, D Jörke, 'Redescribing Democracy' (2007) 11 *Redescriptions* 178.

[20] C Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP 2013) 41.

[21] Ibid 49.

[22] A Kavanagh, 'The Constitutional Separation of Powers' in D Dyzenhaus and M Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016) 230.

combined with a "checks-and-balances component" (= *supervision*).[23] These two components are then underpinned and held together by a deeper value of "joint enterprise of governing", which is itself based on the imperative of *efficiency*, or the service and promotion of *good government* (or perhaps *governance*).[24] Note that both desiderata are employed here on behalf of smooth functioning of the government as a whole, an idea that implies emphasis on the outcomes of governing.

Finally, Jeremy Waldron analyses the principle of separation of powers as a dynamic process of "articulated governance" which aims to channel the action of government and disaggregate it into several – as many as ten, in Waldron's case – stages, from earliest deliberation about the desired policy to adjudication of resulting disputes. These are variously distributed among the branches of power, depending on their capacity for the task at hand.[25] The guiding idea as regards the nature of the respective branches is distinct *functions* of government, each possessing internal integrity coupled with a claim against "contamination" by patterns and procedures alien to them.[26] Waldron sees much overlap between the separation of powers and the *rule of law*, because the core point of articulated governance is to protect the values of "liberty, dignity, and respect" that are embodied in the rule of law.

Three basic justifications behind the enabling rationale thus include (i) self-determination, (ii) coordination and efficiency, and (iii) the rule of law (the process-related conditions of political life). These three types of justification roughly correspond to three basic notions of *political legitimacy*: input-based, output-based, and process-/throughput-based.[27] Let us treat them analytically as model alternative justifications of the enabling aspect of separation of powers, which highlight the different types of reasons one might propose on behalf of the productive face of separation of powers.

Two possible objections can be raised regarding these justifications. First, the throughput justification tries to combine the other two (without subscribing to any substantial assumptions), painting in essence an image of successive phases of governance where the legislature has the right of kick-off and the judiciary of wrap-up. Second, none of the types of legitimacy arguably exists in pure form, as there are acknowledged overlaps even within the respective

---

[23] This corresponds with the internal differentiation of the principle we make in the next section.

[24] Kavanagh, 'The Constitutional Separation of Powers' (n 22) 235ff.

[25] Waldron, *Political Political Theory* (n 8) 62–65.

[26] Ibid 45, 52, 66.

[27] At the same time, they are not immune to criticism. For a sharp refutation of the outcome-based justification see A Vermeule, *The System of the Constitution* (OUP 2011) 75–76.

authors' narratives. In response, we would first stress the analytical nature of the distinction which is meant to help us understand the normative-theoretical point of separation-of-powers discourse. Second, and related, our underlying goal is to show how the constitutionalist aspect of the debate is inherently linked to normative political theory, irrespective of whether this link is reflected by authors or not.

Correspondingly, there is one more point worth stressing. Once talk about "self-determination", "efficiency", "welfare", "liberty", or "procedural fairness" commences, we are inevitably pulled into the domain of normative political theory (political philosophy), for there are no apparent moral or political truths about which justification and which corresponding set of values should take priority – on the contrary, there is a great deal of disagreement. In other words, the enabling role of separation of powers takes us to the very heart of contemporary debates among political theorists. Any conception of separation of powers which includes the enabling rationale thus cannot steer clear of normative theorising, rendering the given conception part and parcel of one's normative outlook. Some constitutional theorists acknowledge this is unavoidable and perhaps laudable, for what we are dealing with here is *politics*, and it seems obviously wrong to construe politics as a non-normative, value-free enterprise.[28]

This difficulty in pinning down generally accepted normative goals of the enabling rationale of separation of powers may also explain why the negative (limiting) rationale still retains a theoretical advantage. Unlike all the positive aspirations ascribed to the enabling rationale, prevention of tyranny or the abuse of power is *fairly* uncontroversial in a liberal democracy.

3. FOUR COMPONENTS OF SEPARATION OF POWERS

In the previous section we showed that separation of powers is a complex and often normatively loaded concept. Hence, in order to understand it, it is better to unpack it into the several components and to study them separately. In this section, we thus briefly discuss the interplay between the pure doctrine of separation of powers with the doctrine of mixed constitution and then we identify four components of separation of powers. We analyse these components in more depth and eventually show that there is no generally accepted blueprint of separation of powers. More specifically, we argue that there are several *con-*

---

[28] C Möllers and Eoin Carolan acknowledge this point. See Möllers, *The Three Branches* (n 20) 2ff. and E Carolan, *The New Separation of Powers. A Theory for the Modern State* (OUP 2009) 5, 31ff., 255.

ceptions of separation of powers, some of them more separationist and some more balancing, that depend on many contextual variables.

3.1 Pure Doctrine and Beyond

The preceding theoretical point finds some support in empirical developments. The story of assault on separation of powers in Orbán's Hungary and Kaczyński's Poland, as well as signs of populist tendencies in Czechia and Slovakia, provide weighty reasons to think that the limiting rationale needs to be paid more serious attention, again with respect to Central European countries and beyond the region.[29]

Scholars generally agree that populists are hostile[30] to the various components of separation of powers.[31] The principle is seen by them as cumbersome and artificial, constraining the true political will of the people.[32] However, extant scholarship employs the notion of separation of powers quite interchangeably and vaguely.[33] Most importantly, it does not distinguish between its constitutive components which renders the resulting analyses insufficiently fine-grained. Insofar as populists may come at some components of separation of powers harder than at others, and insofar as they may attack different components depending on the phase of the populist regime, greater awareness of the internal structure of the concept is certainly called for.[34]

In his essay on separation of powers and the rule of law, Jeremy Waldron distinguishes five interrelated principles which "work both separately and together as touchstones of political legitimacy":[35] separation of powers, dispersal of power, checks and balances, bicameralism, and federalism. This allows him to carefully delineate what goals and ideas the separation of powers covers and which are better assigned to the other principles. Waldron's account is instructive in aspiring both to elucidate the internal logic of the concept/prin-

---

[29] See J Holzer, M Mareš (eds), *Challenges To Democracies in East Central Europe* (Routledge 2016).

[30] See Section 3.2 below.

[31] Echoes of Rousseauian plebiscitarianims thus always lurk in the background. See J Müller, *What is Populism?* (University of Pennsylvania Press 2016) 9, 60ff.; N Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (HUP 2014) 129, 149.

[32] P Blokker, 'Populist Constitutionalism', in C Torre (ed.), *Routledge Handbook of Global Populism* (Routledge 2018) 118.

[33] This is a common lament. See Carolan, *The New Separation of Powers* (n 28); Möllers, *The Three Branches* (n 20); Waldron *Political Political Theory* (n 8).

[34] See Kosař, Baroš, Dufek, 'The Twin Challenges to Separation of Powers in Central Europe' (n 77) 457–458.

[35] Waldron, *Political Political Theory* (n 8) 49.

ciple and to link it more closely to the practice of real-world politics. We will nevertheless take a different road, dare we say a more classical one, construing the separation of powers so that it includes both three core meanings of separation (of institutions, functions, and personnel) making up the so-called "pure doctrine", and the principle of checks and balances, which often gets confused with separation of powers as such.

As classically stated by MJC Vile, the pure doctrine can be defined as division of the government

> into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch.[36]

The pure doctrine has been widely criticised, not least for reasons of its questionable relevance for real-world workings of constitutional democracies.[37] For one, it proved inadequate as a descriptive theory, for we know that the three branches variously overlap and interact (in cooperation or conflict). Second, the pure doctrine implausibly expects that the mere existence of separate branches of government could somewhat mysteriously prevent concentration of power.[38] The latter point has been conceded, but with productive consequences: in order for the branches to be able to check others for abuse of functions not assigned to them, several elements of the much older doctrine of "mixed constitution" have been appropriated, resulting in the modern notion of checks and balances. There is one important difference though. While in the mixed constitution the respective branches jointly participated in the shared exercise of government, the modern doctrine of checks and balances accepts that each branch has distinctive functions (ensuring their independence). At the same time, it empowers each branch to "modify positively the attitudes of

---

[36] M Vile, *Constitutionalism and the Separation of Powers* (first published 1967, Liberty Fund 1998) 14.

[37] For an extended argument in this vein see M Elizabeth Magill, 'Beyond Powers and Branches in Separation of Powers Law' (2001) 150 *U. Pa. L. Rev.* 603.

[38] N Mateucci, when describing the experience of various Western countries with the separation of powers, accentuates the fact that in moments of crisis, the system of absolute separation of powers leads to the transformation of political regime; by contrast, in "normal" periods it induces a state of paralysis and stalemate. See N Matteucci, *Lo Stato moderno* (Il Mulino 1997) 154.

the other branches of government".[39] Finally, the descriptive objection is valid as far as it goes, however it seems to miss the analytical benefits which come with the pure doctrine, for each of the modalities of separation seems desirable on its own and corresponds with some deep-seated intuitions about the goals of separating powers.

3.2 Separating, Checking and Balancing Power

Let us now look into the motivations behind each component. The first component, *separation of institutions*, is an essential part of any constitutionalism that tries to disperse power, in contrast to totalitarian and absolutist regimes in which one authority controls all the machinery of the state.[40] As Waldron points out, the idea of dispersal of power "counsels against the concentration of too much political power in the hands of any one person, group, or agency",[41] either formally or informally. A combination of both was apparent in totalitarian/authoritarian post-WWII communist regimes in Central Europe, whose central feature was centralisation of power coupled with socialist economic planning and thoroughgoing regulation. Wherever the Communists took over, the state was swiftly subjected to a communist party dictatorship.[42] The communist regimes denounced the concept of separation of powers as

---

[39] Vile (n 36) 79. This is not the place to discuss the precise relationship between the two ideas. We find convincing Somek's explanation that whereas mixed government assumed pre-legal (pre-constitutional) existence of social classes or strata (aristocracy, bourgeoisie, peasants etc.), actors in a system of checks and balances are only *created* by the constitution, whose origins – at least in the classical version of constitutionalism, which Somek calls "Constitutionalism 1.0" – lie with the undifferentiated sovereign people. See A Somek, *The Cosmopolitan Constitution* (OUP 2014) 38ff., 57ff.

[40] This idea was commonplace for the framers of the American constitution who were afraid of excessive and tyrannical concentration of political power. The solution for them lay in the creation of multiple governmental departments pitted against each other in a competition for power, which was expected to function according to an invisible-hand dynamic. See D Levinson, R Pildes, 'Separation of Parties, Not Powers' (2006) 119 *Harv. L. Rev.* 2311.

[41] Waldron, *Political Political Theory* (n 8) 49; cf. P Pettit, *Republicanism. A Theory of Freedom and Government* (OUP 1997) 177. Waldron treats the principle of dispersal of power independently of the principle of separation of powers, arguing that dispersal has different implications than the principle of separation of powers because it enables diffusing power also within the branches themselves (eg via bicameralism). Because we pursue slightly different aims, we "spread" dispersal of power across the three types of separation whose logic is obviously also partly grounded in the idea of a dispersal of power.

[42] A Sajó, *Limiting Government* (CEU Press 1999) 70.

a bourgeois fraud,[43] and instead endorsed the slogan of "democratic centralism",[44] permeating the state structure "from top to bottom … with the general spirit of the unity of state authority".[45] Virtually all institutions, including the judiciary, were under the firm control of the Communist Party, which was the only[46] body that represented the entirety of "the whole people".[47] This informal hegemony was often formally embedded in constitutions under the heading of the "leading role" of communist parties.[48] This is why separation of institutions, even if formally anchored in these constitutional texts, turned out to be mostly an illusion.

We can see that the aim of separation of institutions is to diffuse political authority among several centres of decision-making. The most obvious institutional expression of this component is the very existence of different branches of state power (the legislature, the executive, and the judiciary) which follow their own internal logics of functioning. A number of more particular imperatives follow, such as no institutional overlap (a ministry is not a parliamentary committee) and no accountability in their core powers to other branches, along with immunity and indemnity.

In comparison with other components, notably checks and balances, attacks on separation of institutions are less frequent (unless we look at straightforwardly authoritarian regimes that have lots in common with the Central European communist experience). Nevertheless, there have been some noteworthy cases provided by populist political forces. For example, the Supreme Court of Venezuela clearly breached separation of institutions by stripping members of the National Assembly of their immunity after it had previously unilaterally taken over the functions of the parliament.[49]

---

[43] J Hazard, *Communists and Their Law* (University of Chicago Press 1969) 42.

[44] Ibid 65.

[45] A Vyshinsky, *The Law of the Soviet State* (Macmillan Company 1948) 300.

[46] Note that the then USSR viewed the restoration of the parliamentary government (whose power, responsibility and accountability would be to the electorate rather than the Communist Party) as a mortal threat to the socialist system, which is why it stopped such efforts in the Czechoslovak Prague Spring of 1968 by invading Czechoslovakia. See Hazard, *Communists and Their Law* (n 41) 66.

[47] Hazard, *Communists and Their Law* (n 43) 65.

[48] Eg V Šimíček, J Kysela, 'Ústavní právo' in M Bobek, P Molek, V Šimíček (eds), *Komunistické právo v Československu: Kapitoly z dějin bezpráví* (Masaryk University Press 2009) 297–329.

[49] J Couso, 'Venezuela's Recent Constitutional Crisis: Lessons to be Learned From a Failed Judicial Coup D'etat' (*Int'l J. Const. L. Blog*, 12 April 2017) <www.iconnectblog.com/2017/04/=venezuelasrecent-constitutional-crisis-lessons-to-be-learned-from-a-failed-judicial-coup-detat-i-connect-column/> accessed 30 June 2018.

The theoretical delineation of separation of institutions however reveals that this component on its own is incapable of ensuring both rationales of the principle of separation of powers, especially with respect to the enabling one ("empowering of government"). After all, powers are never distributed randomly among the respective branches.[50] Institutional separation therefore needs to be accompanied by the idea of specific functions which are to be performed by distinct institutions.

The second component, *separation of functions*, stems from the belief that there are basically three broad classes of activities to be necessarily performed by any constitutional government worthy of its name, to the effect that "all government acts … can be classified as an exercise of the legislative, executive, or judicial function".[51] According to the pure doctrine, each branch of government ought to be concerned with only one corresponding function. It will be clear that such an exclusive marriage between a specific branch and a concrete function is too simplistic and can be easily rebutted by looking at the functioning of the modern state in which the three functions are spread, to various degrees, across all three branches. A more promising approach works with the assumption that each branch is endowed with one *core* function: although even such weakened claim remains unpersuasive for many, we are of the view that some kind of intimate relation between institutions and their functions does reside in the heart of separation of powers.

For example, Aileen Kavanagh has called within her "reconstructed view" of separation of powers for a more serious engagement with the efficiency requirement, to the extent that the performance of substantive tasks should be distributed according to whether a given institution is well equipped to carry them out, with an eye towards the "joint enterprise of governing".[52] Examples of "impure" decision-making tasks include judicial law-making, delegated legislation by the executive, the existence of quasi-judicial bodies and administrative agencies exhibiting court-like behaviour, courts acting as an administrative organ, parliaments acting as administrative organs, or parlia-

---

[50] Kavanagh, 'The Constitutional Separation of Powers' (n 22) 230.

[51] Vile, *Constitutionalism and the Separation of Powers* (n 38) 17. The tripartite division has been challenged, and the suggested number of branches either reduced to two (some normativists) or expanded to four, five or even more. The extra branches would be provided by administration, media, constitutional courts, or external (international) actors. See eg G Bognetti, *La divisione dei poteri. Saggio di diritto comparato* (Giuffrè 2001); Carolan, *The New Separation of Powers* (n 28).

[52] Kavanagh, 'The Constitutional Separation of Powers' (n 22) 231–232.

ments acting as courts.[53] All these seem to undermine the belief that there can be a core, more or less self-contained function.

However, the idea that all acts of the state can be ultimately classified into three groups – that is, judicial, legislative, and executive, where the last is often said to have residual character[54] – keeps lurking in the background. Of substantial help here is the notion of a *cognitive division of labour*. Each of the separate branches of government has access to different kinds of reasons which enable them to carry out the given particular tasks, and together to solve the riddle of *collective action*: these are deliberation (legislature), execution (executive), and critical judgment (judiciary).[55] The differences in internal organisation of the branches then correspond to these tasks, and retrospectively underscore the desirability of institutional separation. Hence, although the division of labour between different organs is more complex than in the pure-doctrine scheme, the very notion of "a function" cannot be easily discarded. In the end, there is something intuitively plausible about wanting the legislature to legislate, the executive to carry out, and courts to adjudicate, while avoiding excessive "contamination" by practices alien to the respective functions.[56]

Improper fusion of legislative and judicial functions can once more be documented by the recent decision of Venezuela's highest court, the Supreme Court of Justice. Faced with the unwillingness of the opposition-controlled National Assembly to accept some of its previous decisions, the Supreme Court issued a ruling in which it stated that "in order to preserve the country's rule of law" it felt forced to transfer to itself ("or to the entity that the Court decides") all the powers enjoyed by parliament.[57] In a flagrant denial of the principle of separation of functions, the Supreme Court of Venezuela merged the functions of the parliament and the apex court, and thus became a law unto itself.

The Central European countries have their own share of experience with disrespect towards separation of functions. After their rise to power, the

---

[53] Ibid 226–227. For similar reflections see H Kelsen, *General Theory of Law and State* (Anders Wedberg tr, first published 1945, The Lawbook Exchange 2011) Pt III; R Bellamy, *Political Constitutionalism* (CUP 2007) 201–202, Carolan, *The New Separation of Powers* (n 28).

[54] R Guastini, *Leçons de théorie constitutionnelle* (Dalloz 2010) 148–149; Möllers, *The Three Branches* (n 20) 96–101. This may sound paradoxical, insofar as the executive is the only branch without which the functioning of *any* complex society is hardly imaginable. Recall, however, that we are dealing here with the conceptual logic of separation of powers, in contrast to an empirical description of how a modern polity works.

[55] Cameron, *Strong Constitutions* (n 13) ch 2; Habermas, *Between Facts and Norms* (n 10) ch 4.

[56] Waldron, *Political Political Theory* (n 8) 66.

[57] Couso, 'Venezuela's Recent Constitutional Crisis: Lessons to be Learned From a Failed Judicial Coup D'etat' (n 49).

communists abolished constitutional and administrative courts, stripped courts of jurisdiction over commercial matters and vested the commercial disputes with the state arbitrage courts, packed the judiciary with lay judges, installed their own people in the Supreme Court and in positions of court presidents, and placed courts under the tight control of the General Prosecutor.[58] Even if the separation of functions was nominally maintained, in practice it was a sham. The communist parties, or more precisely their executive committees, controlled all state institutions, and de facto embodied all three core functions (legislative, executive, and judicial).[59]

The third component of the separation of powers is the *separation of persons*, also known as *personal incompatibility*. The original idea was based on "the recommendation that the three branches of government shall be composed of quite separate and distinct groups of people, with no overlapping membership".[60] Within the pure doctrine, the constitutional objective of the protection of liberty could only be guaranteed via a strict interpretation of personal incompatibility, which would prohibit any kind of overlapping memberships. The idea of constraining the government by a strict separation of personnel however turns out to be normatively too demanding and descriptively inadequate. Especially in parliamentary systems, being simultaneously a MP and minister of government is considered a standard feature, even a desirable one. For this reason the third component has usually been construed as a general recommendation rather than a strict criterion.[61]

From the perspective of process-oriented justification of the separation of powers, what has non-negotiable value is the independence of courts when adjudicating those legal cases where the interests of other branches of government are at stake. Despite that, many believe it does not undermine the

---

[58] A Bröstl, 'At the Crossroads on the Way to an Independent Slovak Judiciary' in J Přibáň, P Roberts and J Young (eds), *Systems of Justice in Transition: Central European Experiences since 1989* (Ashgate 2003) 141; Stanislaw Frankowski, 'The Independence of the Judiciary in Poland: Reflections on Andrzej Rzeplinski's Sadownictwo v Polsce Ludowej (The Judiciary in People's Poland)' (2015) 33 *Ariz. J. Int. Comp. L.* 40; Z Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff 2011).

[59] Hazard, *Communists and Their Law* (n 43) 42.

[60] Vile (n 36) 18.

[61] Kavanagh, 'The Constitutional Separation of Powers' (n 22) 232–233. Lest its significance be entirely disregarded, we should note that there is a serious discussion, stretching from public fora to academic journals, on the problem of *cumul des mandats* which comprises, among others, the desirability of simultaneous participation in regional executives and in the national parliament. See L Hájek, 'Definice, příčiny a důsledky kumulace mandátů zákonodárci' (2016) 18 *Central European Political Studies Review* 141.

independence of courts if judges become members of the upper chamber of the legislature. As one of us has argued elsewhere, the issue of the so-called judicial councils and other forms of judicial self-government is more problematic and highly contested.[62] At any rate, common institutional expressions of personal incompatibility include prohibition of holding simultaneous functions in more than one branch, prohibition of even a temporary assignment to other branches, prohibition of "travelling" among branches (suspension), and/or the ban on active judges becoming ministers of justice and members of the parliament and vice versa.

Finally, the *checks and balances* component provides a countervailing dynamic to the three axes of separation: after all, if any of the branches decided to usurp power (however inefficient that might be), we would want a mechanism to be in place which would put the perpetrators back in their place – and ideally pre-emptively *prevent* any such usurpation. Exercise and possible arbitrariness of state power must be internally checked and controlled, so that it does not encroach upon the sphere of individual liberty, or does not undermine the pursuit of collective goals. The idea of checks and balances has become so tightly linked to separation of powers – partly under the influence of American Federalists – that it is sometimes presented as its very essence.[63] It emerged via the appropriation of certain elements of the older theory of mixed government.[64] The respective institutions were now granted the power to exercise the functions of others, as well as a certain degree of direct control over them through such mechanisms as veto powers, parliamentary questioning of ministers, or impeachment. An underappreciated but arguably pivotal element of this component is the existence and activity of parliamentary opposition, the claims (or rights) of which cannot be overridden by the standing majority.[65] An interesting symbiosis emerged, at least in theory: while the principle of checks and balances *presupposes* the separation of institutions – which means that separation is logically and conceptually more fundamental than either checks or balances – it precludes a total enclosure/specialisation of a particular function.[66]

It will come as no surprise that communist regimes in Central Europe quickly eliminated any traces of checks or balances in their quest for the

---

[62] D Kosař, *Perils of Judicial Self-Government in Transitional Societies* (CUP 2016).

[63] Eg by F Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (CUP 2007) 92; Loughlin, *Sword and Scales* (n 5) 183.

[64] See n 38.

[65] I Shapiro, *Democratic Justice* (Yale UP 1999) 39ff.; Möllers, *The Three Branches* (n 20) 118ff.

[66] See Guastini, *Leçons de théorie constitutionnelle* (n 54) 154.

centralisation of power.[67] Viktor Orbán and Jaroslaw Kaczyński again provide ample contemporary material, especially in their (largely successful) attacks on the judiciary and constitutional courts. Their obvious goal is to immunise their governments from external review by institutions which are most resistant to abrupt changes of political mood and to make sure that these "checking institutions" cease to pose substantive or procedural obstacles that would rob them of political momentum.

3.3 Does It All Hold Together? On the Unavailability of a Blueprint

In the previous section we showed that the separationist logic of the first three components of separation of powers pull in a different direction than the balancing character of the fourth one.[68] Consequently, these four components do not automatically fit together seamlessly and may lead to divergent implications.[69] More generally, given the inevitable co-presence of both limiting and enabling rationales behind the separation of powers,[70] it is ultimately not possible to devise any definite blueprint for how the principle of separation of powers should be understood and implemented. Consequently, each constitutional system can follow in its design a unique logic of separation of powers – more separationist or more balancing – depending on many contextual variables.

But that is not all. First, recall that besides separation of powers itself, there are further "adjacent principles" working towards a more differentiated exercise of power, such as bicameralism and federalism. Waldron even argued that dispersal of power as well as checks and balances should be construed as free-standing (if related) principles.[71] Irrespective of whether one follows this idea, it is clear that conceptual-institutional choice in one place does not necessarily determine choices in others, to the effect that both theoretical and institutional options quickly multiply.

Second, and related, there are still other potential axes of separation, such as the division "of different branches of the armed and police forces, the separation of secular from religious authorities, and indeed, the separation of centres of political power from those in control of commerce and business", which

---

[67] See Hazard, *Communists and Their Law* (n 43) 42.

[68] M Elizabeth Magill, 'The Real Separation in Separation of Powers Law' (2000) 86 *Va. L. Rev.* 1127, 1130. Moreover, the character of "a mechanism by which the separation of powers, or checks and balances, generate spontaneous order" has never been specified in much detail. A Vermeule, *The System of the Constitution* (OUP 2011) 78.

[69] Guastini, *Leçons de théorie constitutionnelle* (n 54) 155–160.

[70] See Section 2.2 above.

[71] Waldron, *Political Political Theory* (n 8) 49.

are "liable to be just as important as more formal devices in guarding against the abuse of public power".[72] Third, any of these can be assigned a limiting or enabling role, not to mention the variations within the particular justifications. Separation of powers thus turns out to be a highly complex and indeterminate principle, especially if we keep in mind that the enabling rationale quickly introduces substantive normative commitments.[73] Specifically for purposes of democratic theory, we suspect separation of powers to be a prime target for attempts at concept-stretching; that is, inflationary pressures rooted in normative beliefs.[74]

All this adds to the importance of *political judgement* on whether a particular constitutional design is lacking on the limiting or enabling side.[75] This virtue is next to impossible to capture in theoretical terms. However, we believe that familiarity with the conceptual-theoretical background of separation of powers makes *good* political judgement more likely.

4. CONCLUSION

While the ills of Central European democracies certainly go beyond assaults on the separation of powers, the fact is that a great many local political leaders perceive this principle as a major obstacle to achieving their political goals. Orbán and Kaczyński are just the most audacious ones. In this short chapter, we argued that we should be careful about giving up too easily on some traditional motivations behind the separation of powers, in the name of theoretical novelty.[76] In fact, we often realise the value of certain principles, and corresponding institutional solutions, only once we have lost them.[77]

Given that separation of powers co-forms the restraining face of constitutionalism, and seeing that the recent rise of populist political forces in the Central European regions threatens to undermine constitutional (liberal) democracy, it can hardly be claimed that the traditional approach to the separation of powers is no longer useful.[78]

---

[72] P Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP 2013) 222.

[73] See Section 2.1 above.

[74] E Beerbohm, 'Democracy as an Inflationary Concept' (2011) 47 *Representation* 19.

[75] See R Beiner, *Political Judgement* (first published 1983, Routledge 2010).

[76] We thus share some of the sentiments of Waldron, *Political Political Theory* (n 8) 71.

[77] D Kosař, J Baroš, P Dufek, 'The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism' (2019) 15 *EuConst* 427.

[78] P Rosanvallon claims so in his *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton UP 2011) 221.

Orbán and Kaczyński do not necessarily aim to abolish the existing institutions, merge them, occupy several posts in the state, or blur the boundaries between their functions. They do seek, however, to immunise their governments' actions from external review and to silence their critics. It thus seems that their primary target is the principle of checks and balances, and one possible direction of research would be to look at whether some components of separation of powers are hit harder (in Central Europe or elsewhere) while others are left relatively intact.[79]

Moreover, the Latin American experience suggests that the particular period of the existence of a populist regime might also play a role. The Venezuelan case attests that populist leaders change their tactics depending on the extent of their grip on state power. Once Chávez and Maduro managed to "occupy the state" and gained control over courts and other checks-and-balances institutions, they started to promote a skewed principle of checks and balances against the rising opposition, at the expense of the principles of separation of functions and separation of institutions.

Besides these "internal" suggestions, we would like to mention two areas of inquiry which could be combined with research into separation of powers as such. First, while populism has become the academic buzzword in recent years (and rightly so), we should not lose sight of another trend of the same kind which pulls in an essentially opposite direction – namely the *rise of unelected actors*, denoting a systemic turn towards actors and bodies who have not received democratic authorisation, and in the eyes of many therefore erode the logic of separation of powers. These include constitutional courts (as the usual suspects), judicial self-governance in general, numerous technocratic bodies, the administrative apparatus of the state, and various civil society actors. Many theorists of democracy and constitutionalism believe that this trend, often in conjunction with a new conceptualisation of separation of powers, could provide an antidote to the current malaise of liberal democracy.[80] Our hunch is that they undervalue both the usefulness of the traditional conceptualisation and the systemic role of legislature.[81]

The notion of democratic authorisation reveals a second promising area of research, namely the problem of political representation. If the enabling rationale inevitably invites considerations normally assigned to political philosophy,

---

[79] See Kosař, Baroš, Dufek, 'The Twin Challenges to Separation of Powers in Central Europe' (n 77) 457–458.

[80] Eg Vibert, *The Rise of the Unelected* (n 63); Carolan, *The New Separation of Powers* (n 28); Rosanvallon, *Democratic Legitimacy* (n 78); J Keane, *The Life and Death of Democracy* (Simon & Schuster 2009) Pt III.

[81] P Dufek, D Kosař, J Baroš, 'Against the Rise of the Unelected: Parliamentary Virtues and the Separation of Powers' (unpublished manuscript).

then the recent "representative turn" in democratic theory should certainly become a matter of interest.[82] One reason has to do with the disputed future of political parties, which have been routinely accused of disrupting separation of powers "from within"[83] (though parties can also be construed as the "good guys" once we realise the value of political opposition). If their future is bleak, then the future of the legislative branch is also bleak, and the traditional concept of separation of powers becomes hardly tenable. Another set of reasons concerns the belief that it is *other* actors (or branches) which have the capacity to represent citizens' interests and identities, such as in Alexy's account of *argumentative representation* by constitutional courts, or Carolan's trust in representative capacities of the administrative.[84] All in all, separation of powers shall entertain both constitutional and democratic theorists for a long time to come.

---

[82] M Brito Vieira (ed), *Reclaiming Representation* (Routledge 2017).

[83] Levinson and Pildes, 'Separation of Parties, Not Powers' (n 40). But see R Epstein, 'Why Parties and Powers Both Matter: A Separationist Response to Levinson and Pildes' (2006) 119 *Harv. L. Rev. F.* 210.

[84] R Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *Int'l. J. Const. L.* 572.