Chapter 12

The Separation of Powers

Péter KRUZSLICZ

ABSTRACT

The constitutional principle of the separation of powers and the doctrine behind the principle are as fundamental as they are complex. Three main reasons are behind this complexity. Firstly, a doctrine and a proper theory based on which the doctrine and the principle are developed hide behind the principle. Secondly, by its nature, the concept of the separation of powers is related to the more general constitutional principle of the rule of law. Even though the rule of law appeared mainly after the separation of powers, as a more abstract principle, it also encompasses its constitutional requirement. At the same time, the substance of the separation of powers concerns the institutional organisation of the state despite its above-mentioned relation to the more general principle of rule of law.1 Thirdly, the functions of the branches of power that are to be separated according to the principle are radically different. Regarding the three main branches, it is obvious that while the judiciary asks for complete independence, a logical gap exists between legislative and executive powers,2 with the first one being general when the legal norms are adopted and the second one being concrete when it proceeds to the implementation of the norms. Hence, their separation is not so evident, and the principle may require an equilibrium by balancing those powers.3 Finally, the last reason for the complexity inherent in the concept of separation of powers is due to the different approaches used for the interpretation of the principle. On one hand, it can convey the institutional meaning of separation of bodies, and on the other hand, it can be more functional if an equilibrium is to be maintained while exercising different state functions.4

As with all constitutional principles, the founding theory of the separation of powers should be analysed in the larger context in which it developed. It is strongly linked to what Montesquieu thought to be the English constitutional regime, even though he was obviously misreading the actual political context. It was implemented – not for the first time but with the most important consequences – in the newly established constitutional regime of the United States of America, and of course, the impact of the American context was greatly influenced the result of its implementation. When it comes to analysing the separation of powers in the context of contemporary states of the Central European region, those contextual facts should also be noticed. In addition, for this region of interest, in a comparative constitutional study, it is also important to notice that a voluntary implementation of an

1 E.g. Serbian Constitution, the relation between Art. 3 (rule of law exercised through the separation of powers) and Art. 4 (government system based on the division of powers).
2 Bibó, 1986, pp. 385–396.
3 E.g. Art. 1 of the Romanian Constitution: "The State shall be organised based on the separation and the balance of powers".
4 Decision 38/1993 (VI. 11.) of the Constitutional Court of Hungary.

Kruzslicz, P. (2022) 'The Separation of Powers' in Csink, L., Trócsányi, L. (eds.) *Comparative Constitutionalism in Central Europe: Analysis on Certain Central and Eastern European Countries*. Miskolc–Budapest: Central European Academic Publishing. pp. 239–253. https://doi.org/10.54171/2022.lcslt.ccice_13

already well-developed principle in a new or different political context can lead to confusing results. Central European states have a particularly rich constitutional heritage, e.g. the Constitution of Poland and Lithuania was among the first to implement the separation of powers5 as contemporary constitutional regulation, and the principle could be reintroduced in the very foundations of the legal order of Poland when socialist regime disappeared. When doing so, the constituent power of Central Europe could not only use the well-established theory and doctrine of the separation of powers, but it was also aware of and used the already existing constitutional solutions of other constitutional states for the implementation of the principle. However, the exportation of constitutional models to a different context can result in discrepancies in the political praxis.

According to the main hypothesis of this chapter, the separation of powers as implemented in the Central European region leads to the rise of strong executive powers. This pheonomenon is independent of the presidential or the parliamentary character of the regimes. On the contrary, a strong executive power is even more common in parliamentary regimes. In addition, if there is a general, international tendency towards the strengthening of executives for many reasons,6 the emergence of strong executives in the region can also be read as a consequence of Central European traditions and a special need for such strong governments in the particular political context of the region. On one hand, Central European states have struggled with important political, social and economic challenges during their modern history, often demanding a strong and stable executive. They did so to spare themselves of political difficulties which can result from a permanent governmental crisis due to the lack of strong leadership. Some of them also had a negative historical memory of the excessively strong parliamentarism causing such difficulties.7 On the other hand, a permanent need for reforms – especially after the change of regimes – also required a strong political executive that would be able not only to propose but especially to implement such reforms with success. Thus, even for states such as Hungary or Croatia, which benefitted from an important tradition of parliamentarism under the dualist regime of the Habsburg empire, after the cataclysms of the twentieth century, a stronger executive seemed to be a good solution. However, implementing the separation of powers can be difficult in such a political and constitutional background and may call for special arrangements to guarantee the very fundamental aim of the principle: creating a legal obstacle to the concentration of power.

KEYWORDS

separation of powers, checks and balances, concentration of power, institutional equilibrium, constitutionalism and rule of law.

1. The general purpose of the separation of power and its implementation in Central European states

While the theory, doctrine and principles of the separation of powers can be complex, their meaning can easily be summarised according to the separation of power's purpose: to be an obstacle against the concentration of power in order to avoid arbitrary or abusive exercise of public power. That is the reason why one of its first and most obvious constitutional consecration directly linked it to the existence of a modern constitutional state: Art. 16 of the Universal Declaration of the Human and Civic Rights, which states that "any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution". The authors of the declaration knew that the separation of powers should be a basic requirement for the

5 Lukowikowski and Fox, 1993.
6 Stumpf, 2015, pp. 8–14.
7 E.g. Poland or Hungary in different periods of their history.

organisation of a modern political society. Even more so, it became obvious that the definition of a modern constitution demanded the efficient protection of rights and the separation of powers.

Something similar was declared in a constitution coming from the Central European region in the same historical period. As mentioned above, the Constitution of Poland and Lithuania adopted on 3 of May 1791 stated that

> the integrity of the states, civil liberty and social order remain always in equilibrium, the government of the Polish Nation ought to, and by the will of this law shall comprise three authorities, to wit: a legislative authority ... a supreme executive authority ... and a judicial authority.[8]

The Polish Constitution of 1791 is first to be mentioned as a proof of early constitutional dialogue between Western European theories and Central European constitutional regulations. Moreover, it was the first European constitution to implement the theoretical principle of the separation of powers to the institutional organisation of the state by establishing a regime of political accountability of the cabinet before the Sejm.[9]

Such a comprehensive understanding of a basic constitutional principle became even more interesting for Central European states during their constitutional transition. The separation of powers was obviously interpreted as a fundamental requirement of the rule of law, and it was cherished as such by post-communist constitutions. It could be a sign of complete change as regards to the former regime of the socialist state, characterised by the concept of dictatorship in the name of proletariat. In theory, socialism, according to the Marxist critics of the doctrine of the separation of powers, rejects this constitutional principle, considering it a tool in the fight of bourgeoisie against aristocracy. In reality, those regimes where mostly characterised by the concentration of powers at the level of communist parties and are thus qualified as state-party regimes; for that reason, during the constitutional transition, Central European constitutions paid a special attention to the principle of the separation of powers. This is also demonstrated by the fact that most Central European constitutions contain a special provision on the principle and underline its importance by inserting this provision at the very beginning of the constitutional text. In the Romanian constitution, it is under Art. 1, para. 4 that the principle of the separation of powers is declared as follows: "The State shall be organised based on the separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy". The Czech constitution highlights the principle in Art. 2, para. 1: "The people are source of all power in the State; they exercise it through bodies of legislative, executive and judiciary powers". A more recent example that also clarifies the importance of the principle consecrated in Art. C – the third one concerning the organisation of the state – is given by the Fundamental Law

8 Art. V of the Constitution of Poland and Lithuania of 3 May 1791.
9 Art. VII of the Constitution of Poland and Lithuania of 3 May 1791.

of Hungary as follows: "The functioning of the Hungarian State shall be based on the principle of the division of powers".

Those Central European constitutional provisions highlight the importance of the principle of separation of powers by attributing it an exceptional position in their text. Of course, such an important place reserved in their texts is also motivated by the fact that the separation of powers is one of the most general and abstract principles. By reading the different constitutional provisions, it is also clear that they reflect the above-mentioned different approaches to the definition of the principle.

Those already cited mostly relate the principle to the organisation of the state: to its very exact organisation (as in the case of the Romanian provision), to the source of public power and the actors exercising it (as does the Czech constitution) or to the functioning of the state (as the Hungarian Fundamental Law states). The Slovenian constitution follows the same method as the Czech one, as stated in Art. 3 para. 2: "In Slovenia power is vested in the people. Citizens exercise this power directly or through elections, consistent with the principle of the separation of legislative, executive, and judicial powers".

In the case of Poland and Croatia, the principle is attached directly to the system and to the government's organisation. Such an approach is also interesting – especially in the case of Poland, where constitutional bodies do not fit clearly the classical division of powers. Under Art. 10, the Polish constitution defines the principle as the very foundation of the system of government: "The system of government of the Republic of Poland shall be based on the separation of and the balance between the legislative, executive, and judicial powers" Under Art. 4, the Croatian constitution states, "In the Republic of Croatia government shall be organised on the principle of separation of powers into the legislative, executive and juridical branches".

The Serbian constitution different from the others, taking a comprehensive approach towards the principle and attaching it to the rule of law and the state's institutional organisation at the same time, under its Art. 3 and 4, as follows: "Rule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights. The rule of law shall be exercised through ... separation of powers..." and "Government system shall be based on the division of powers into legislative, executive, and judiciary. Relation between three branches of power shall be based on balance and mutual control. Judiciary power shall be independent". To be exhaustive, the Slovak constitution is the only one not referring directly to the principle of the separation of powers, which is, of course, a constitutional principle in Slovakia as well, but only the branches are mentioned in three respective titles – five, six and seven.

Upon a first read of those provisions, the different approaches are clear. Firstly, even though only the Serbian constitution reveals expressly the relation between the principle of the separation of power and the general principle of rule of law, it is obvious that as a constitutional principle, for every states of our interest, the first one is a normative requirement for the second one. It will have a great impact on its constitutional interpretation – especially in the above-mentioned context of the constitutional transition, where the concept of rule of law and its implementation

always benefitting from special attention. This is also proven by the fact that in the Romanian constitution, for example, the framework of constitutional democracy is expressly mentioned in relation to the constitutional consecration of the principle.

Secondly, most of the constitutional provisions take a more concrete approach by defining the principle in relation to public power and its exercise or, even more concretely, by connecting it to the organisation of the State or to the system and the organisation of its government. In both cases, the principle of separation of powers is declared with conformity to its result as an institutional principle regulating the organisation of the state's institutional framework. This helps to obtain a precise and proper interpretation of the principle when defining the relations between the institutions.

However, this definition is not only static but also and especially dynamic.[10] Thus, thirdly, the dynamic approach is also present even in the way that the principle is defined: the Romanian and the Polish constitutions state not only the separation but also the balance of powers. Of course, the first one does so in the context of a special, semi-presidential regime. And the second one puts forward the concept of balance with regards to the difficulty to range all the constitutional bodies into the classical division of the three branches of power.

The Serbian constitution goes even further by also addressing balance and mutual control. It is also the once that underscores the independence of the judiciary. As regards the ongoing constitutional reform, such a definition merits special attention.

Finally, the Hungarian Fundamental Law choses a special way to constitutionalise the principle. According to its already existing constitutional interpretation when the Fundamental Law was adopted, it consecrates the principle not in relation to the organisation but to the functioning of the state. This practical aspect is also highlighted by the context of the provision, the second paragraph of the same article, which forbids the acquisition and exercise of the power by force and its exclusive possession, and it even makes the right to resist such attempts a universal constitutional obligation.

After its importance due to its strong connection to the abstract concept and the general idea of rule of law and to the special context of the democratic transition in Central European states, in which the above-cited constitutional provisions were adopted, the complexity of the principle also appears. When the idea of making a strong, constitutionally guaranteed obstacle to the concentration of powers is more than appealing for Central European states, its exact definition, i.e. how to insert it in their newly adopted constitutions in a clear and efficient way, is not so easy to be found, even though an important number of – especially Western European – models are at their disposal.

First, its general importance should be exactly rephrased not only by the placement of the provision but also with regards to the link to public power exercised

10 Csink, 2018, pp. 313–325.

in a modern constitutional state. That is the reason why it took place between the first constitutional provisions, and it is often related to the source of power or to the general organisation of its exercise.

Secondly, the organisation of institutions and bodies should be efficient, but once again, not only by separating them, which would be impossible – except of course for the judiciary – due to the relation between the two other branches of the legislative and executive powers, but also by balancing them, thus speaking about balance or division as well as separation. The idea of mutual control is more than important, even if mutual trust could be also mentioned.

Thirdly, it is in the everyday reality of the constitutional exercise of powers that the principle is to be guaranteed; therefore, making it in relation with not only structure but also functioning can be an interesting solution. Such a definition is appealing especially with regard to the constitutional interpretation of the principle, which is often functional and not only institutional.[11] The theoretical complexity and the heaviness of the doctrine behind the principle show the complexity of its implementation.

2. The general theory of the separation of powers and its consequences for the implementation of the principle in Central European states

With regard to its general and abstract but very comprehensive aim of making an efficient constitutional obstacle to the concentration of power, but also to the complexity of the doctrine and the theory of the separation of powers demonstrating the huge difficulty when, by the implementation of the principle, the above-mentioned aim is to be realised, first and for must, a theoretical analysis is to be presented. Because of the separate chapters covering the form of government, the parliamentarism, the head of states and the independency of the judiciary, this theoretical approach seems to be complementary; however, this theory-based method is also and especially adequate to the Central European context. It helps to understand with a comparative method, by learning from similarities and differences of the implementation of the principle, the apport of the theory but also the struggle of the region when it comes to applying it in its political reality.

An important evolution hides behind the principle, making it even more complicated to apply or at least asking for special prudence when applying it. Even though the very foundation of the separation of powers comes from a theoretical question answered in the late seventeenth and eighteenth centuries, no one can deny its practical importance in the context of the twentieth and the twentieth century,[12] and new, modern interpretations of the theories are increasingly present in academic writing.[13]

11 Varga, 2013, pp. 1–8.
12 Bibó, 1986, p. 385.
13 Carolan, 2009.

When describing the theoretical development of the separation of powers, from the context of development as much as that in which the practical implementation took place, some conclusions can be drawn. By this theoretical analysis, in the second part of the present chapter, a nuanced overview of the constitutional consecration and the interpretative application of the principle of separation of powers can be developed. This overview aims to highlight the special apport of the theory in the context of Central European states, but it also makes some conclusive remarks on the difficulties and points of the reasons for a partial or uncomplete result in the principle's implementation.

Even though the impression that it would belong to history is obviously wrong, it is true that the doctrine of separation of powers is one of the most ancient constitutional theories. Though the aim of the doctrine to make an efficient obstacle to the concentration of power is always actual, it has come under constitutional attention in specific historical periods. Of course, the most important is the rise of the constitutional state after liberal revolutions based on the state theory of the Enlightenment. That is the reason why most of the scholars located its origin in the seventeenth century. However, for the present analysis, the second half of the twentieth century, such as the contemporary period, is just as important.

When fighting against totalitarian regimes, the practical apport of the theory of the separation of powers was brought up again. This theory has, of course, appeared to gain a special interest after the regimes changed in the Central European region. However, the contemporary period, characterised by the strengthening of powers outside the state's institutions at the national but also and mostly at the supra-, trans- and international levels, make the theory of separation of powers very actual.

Furthermore, it would be false to deny that its origin is a lot deeper in European political philosophy and that even for the good understanding of the doctrine, it is more than necessary to go back to Ancient Greece and to Medieval Europe. The theory was first mentioned during antiquity, and its real meaning could be developed thanks to the apport of medieval scholars. Thus, even for the aim of the present analysis, it is important to begin its presentation by analysing those historical periods. The doctrine of the separation of powers has always advanced thanks to the permanent dialogue between political philosophy, the theory of state and constitutional law, and its consecration politically driven.

2.1. The development of the theory

Undoubtedly, Aristotle was the first to mention the three branches of power. When examining the organisation of the state's public functions, he made a fundamental distinction between deliberating, leading and judging,[14] which he mostly used to describe the different form of political structures. He also studied the different nature of those functions and noticed the logical difficulty of making deliberating and leading functions parts of the same dimension. The basic apport of the theory

14 See Arisztotelész, 1969.

is to bring into light the existence of different political functions and to provide a clear definition of them, so that they could be used as elaborated terms for the following period of evolution of European political thoughts. At the same time, of course, by defining and proposing those functions, Aristotle not only suggested how power can be described and then organised, but he also directed political philosophy in a specific direction with the aim to relate those functions to the state's organisation. However, no normative meaning of the theory existed yet, and ancient political philosophy was not looking to give such a sense to its theories and notions.[15] The simple apport, as much as for the philosophers of the Enlightenment as for the contemporary constitutional doctrines, was to clarify that power can be divided in specific functions and that those functions are about deciding on policies, implementing policies and judging. Those functions are, of course, also interesting when one wishes to learn more about a special form of government.

When revisiting the theoretical evolution of the separation of powers, most scholars decide to make a jump from antiquity to the Enlightenment; however, medieval philosophers had made a great impact on the theory of separation of powers. This impact was as much indirect as fundamental for the evolution of a theory aiming to justify the structure of the organisation of powers. Its apport for the philosophers of the Enlightenment or for those working on constitutional regulation after the fall of the socialist states should be underlined as the very basic idea of the need for a moral or philosophical justification of power and of the structure in which it is exercised comes from this period of European history and political thought.

If Greek philosophers were, according to the method of stoicism, not interested in the practical aspects of their theory of state, when looking for ideal organisation of structures, they chose an only theoretical method; conversely, for medieval scholars, the moral or ethical justification of the reality of exercising public power became a central question due to the influence of Christianity. Even though monarchies finally managed to become the primary public authority in a long-term battle against the Church, they integrated the idea of a moral justification in their structure thanks to this victory. It is interesting to highlight that when the Church, by the so-called Gregorian reforms, attempted to take a path of constructing public organisation also by legal normativity, the public organisation of power tried to come back on a value-based justification in order to be considered the primary source and sole possessor of public authority. During the medieval period, the justification was moral and religious, which was about to change with modernity. However, the method of looking outside of the simple reality of exercising public power to justify it became central for the philosophers of the Enlightenment. The apport of this period was to ensure a theorical basis for the organisation of the state which came from outside of its structure, and the symbolic, almost religious character of such a justification also has important consequences for our region of interest and even in contemporary times.

15 Bibó, 1986, p. 389.

The modern definition of the constitutional state has been elaborated with those theoretical requirements during the Enlightenment. The importance of the Enlightment is crucial for the whole modern constitutional organisation of the state. The theory of the separation of powers as such has its origins also in the philosophy of the Enlightment; however, that theory was not developed as obviously as one would now think or would have thought at the time of the adoption of the constitutional provision about this principle during the constitutional transition of Central European states.

The first author of the Enlightenment writing about the separation of powers was undoubtedly John Locke,[16] who made a distinction between the legislative, the executive and the federative powers of the state. Even though three categories of public power were identified and defined in his essay, the judiciary, which differed greatly by its nature from the others, was not among them. The so-called federative power would be, for us, part of the executive and about its external action. However, it is important to note that with Locke, the first modern approach to public power with a willingness to make a distinction between categories inside this power rather than functions appeared, and it remained a constant foundation of every theoretical study on public power. The idea to separate those inside the state's institutional structure also appeared with Locke, who was the first to see a reason for the justification of the state in a well-organised and regulated separation between those different categories of public power. However, the real author of the theory of separation of powers was Montesquieu[17] – not only because he decided to go back to the three functions already identified by Aristotle but also because he argued for their institutional separation to avoid the abusive exercising of public power, in the modern constitutional sense.

It is particularly important, even for the context of contemporary Central European states, to summarise the basic sense of the theory at its origin. First, when Montesquieu developed the theory, he analysed the English government. However, the structure of the English Commonwealth was not a real example of separation of powers in a way that Montesquieu wanted to propose it for the organisation of modern constitutional states. The structure and the dynamics of public power in England was more characterised, in the seventeenth and eighteenth centuries, by a constant fight between parliament (commons) and government (monarch). If those were separated, it is because of this special context. Instead of reaching an equilibrium, by the nineteenth century, this fight resulted in the supremacy of the parliament. Thus, when Montesquieu tried to find a well-balanced structure with mutual control and trust as an obstacle to the concentration of powers that results, obviously, in a risk for arbitrariness, he was misreading the English organisation of powers. However, the theory became as crucial as the idea of the protection of human rights – both related, from the nineteenth and twentieth centuries and in radically different ways and contents, to the principle of the rule of law for constitutional modernity, as reflected by the above-cited Art. 16 of the Universal Declaration. Only the aim was completely

16 Locke, 1690. Chapter 12.
17 Montesquieu, 1748; 2019.

clear with this observation: that all kind of powers can become arbitrary and abusive and that this can only be avoided when the concentration of power is prohibited by a special organisation of the state, i.e. power balanced by another power. However, even the first observation leads to the sorrow realisation of the most obvious character of power – that it looks for concentration, and, with institutionally separated state functions, only a formal limit is placed as an obstacle to such a general tendency. However, this formal or even symbolic justification with the attractive idea that a first power can be retained from its worse intentions by another power, if formally distinct, became a central element even as such for the modern constitutional state.

That is how the founding fathers of the United States of America have decided to make it the key element of the organisation of theirs newly founded states.[18] They opted for it, of course, mostly because they wanted to make a difference between themselves and the former king, for a presidential regime and a clear separation between the above-mentioned functions. However, they finally established checks and balances between legislative and executive powers. The first constitutional implementation of the theory of Montesquieu, is, for that reason, distinct from the theory itself. Usually, powers could not be kept absolutely separated, and this only worked because of the special context and a strong political will to avoid the concentration of powers.

The second implementation of the theory in France during the Revolution leads to a particular understanding of Montesquieu's original theory. First, it could not be easily implemented because of the political fight between the monarchy and parliamentarism, with a democratic justification of the latter's power. Meanwhile, the judiciary could become independent, and the whole nineteenth-century French constitutional history was characterised by the struggle in defining the relations between the legislative and the executive branches of powers. In this context, it is not so strange that the idea for a supervising power able to guard and guarantee the equilibrium according to the theory of Benjamin Constant came to help the implementation of the theory of separation of powers in order to "put the locomotive back on the rails". However, even though the practical implementations of the theory resulted in radically different answers to the question of the effective organisation of the state's structure, and the praxis of the separation of powers revealed important challenges, it is a symbolic principle and a key element of the modern constitutional state around Europe and the Western world.

2.2. The main critics of the theory

The main critics of the basic theory should be analysed as much as its theoretical foundations. The first critics are as old as the theory of separation of powers itself. According to Jean-Jacques Rousseau,[19] the legislative and executive powers cannot be equal, and such an equality would be necessary to enable one to limit the other in a constitutional equilibrium. The reason is simple: the legislative expresses the general

18 Straub, 2011, Federalist Paper number 47.
19 Rousseau, 1762; 1978.

will of the sovereign, and the executive should act according to what the general will expressed. Thus, legislative power comes first and executive power second, and a hierarchy exists between them. Such a theory describes exactly the reality of the context in which the separation of powers had to be implemented, especially in European states. However, it is obvious that even though such a difference in the importance of the function, as much as the already mentioned logical problem in their different nature, make the realisation of the separation of powers difficult, they do not make it impossible. Especially because of these differences, there can be a well-balanced equilibrium in the state when the different categories of powers are exercised. As those functions are fulfilled by different institutions, it is even clearer that the relations between those institutions can be regulated in a well-balanced way.

The already mentioned Marxist critics saw, in the separation of powers, a simple idea of domination by the newly arrived bourgeoisie, who would be represented by the legislative, and the old dominating aristocracy, represented by the executive, according to the logic of the fight between social classes. Although those critics certainly took a different approach and drew radically different conclusion, they followed Rousseau's argument that a hierarchy exists between the two branches and that European history can be analysed as proof. Nevertheless, the concentration of power remains a danger, and the already presented reality of the socialist state is the best example of it. The abusive and arbitrary exercising of power cannot be avoided only with a constitutional regulation rebalancing the different branches of power by their relations. It is also to be noted that none of those main critics have dealt with the judiciary.

The main apport of those critics can be found, nowadays, mostly with regards to the constitutional problem of representative democracy as the source of legitimacy of power and constitutional democracy as its source of legality. However, those two appear in two different dimensions, and as such, they can be easily reconciled.

This is also an important aspect to be analysed for Central European states. It has been already mentioned that, e.g. the Romanian constitution, when consecrating the principle of the separation of power, relates it to the principle of the rule of law by placing it in the framework of the above-mentioned constitutional democracy. Democracy and separation of powers are not in contradiction but complementary to one another; however, in most Central European constitutional regimes, after the constitutional transition, a misunderstanding occurred when constitutional relations between the parliament and the government had to be interpreted following – albeit not always approving – the above-mentioned critics.

First, the attractive goal of the implementation of the rule of law became dominant. The constitutional interpretation of the separation of powers arguing for the institutional separation for itself but also for the integration, even if those are not considered as separate branches of powers in most of Central European states, of other constitutional bodies such as head of states, constitutional courts or local communities (the last ones being considered a proper branch by the Croatian and Slovak constitutions) to establish a balanced functioning of the state neglected the

importance of representative democracy, which is also, of course, a constitutionally protected principle. However, in a second time, the strong argumentation – once again, in logical line with the above-mentioned critics – about the democratic principle led to the strengthening of democratically legitimate organs – especially of governments benefitting from a strong parliamentary majority.

3. The consequences of the theory and its implementation in Central Europe: conclusive remarks

As announced as the main hypothesis of the chapter, this tendency towards a strong executive despite the often functional and dynamic interpretation of the principle of separation of powers would be a main element of conclusion after the theoretical overview of its concept. Setting aside the judiciary power, whose independency is a basic constitutional requirement, despite some difficulties presented in a separate chapter, the constitutional interpretation of the separation of powers demanded, on one hand, an institutional separation of individual functions between legislative and executive, and on the other hand, the existence of a dynamic equilibrium between those two. Rejecting any hierarchy between the two branches, mutual control and even trust was proposed to establish an equilibrium where the balance can also be guaranteed thanks to complementary institutions such as the head of state and the constitutional court, even though the first – especially when directly elected – can be considered as part of the executive and the second as part of the judiciary.

Such an interpretation, when the executive could benefit from a strong parliamentary majority, leads combining the interpretation of the separation of powers with the application of the consequences of democratic principle to a particularly strong political position of the executive branch of power. As there is no hierarchy and the parliament became obedient to the government – also because of the constitutional choice of strong and stable executive – the executive branch of power has a large margin to realise its political programme. The only limit to that can be the constitutional framework when its protection is ensured by an independent constitutional justice. Such a strong executive is a danger for the implementation of the aim of the separation of powers because only elections can limit, periodically, the use of power.

However, with a general and theoretical study following a summary of the constitutional provisions on the separation of powers and without going into a more detailed analysis of the institutional framework of the Central European states, the basic character and the complexity of this fundamental constitutional principle were clarified, providing a more optimistic perspective. First, avoiding the concentration of power has a special importance in the region, especially after the fall of the socialist states, with a strong engagement with implementing the rule of law in the regional political reality. A symbolic principle such as the separation of powers could thus be more than essential, and its importance has been largely underlined by the constitutions adopted in the region. In addition, to make it real in the political praxis of the Central

European states, eager to realise such a constitutional experience but also aware of the difficulties of such a realisation, the complexity of the theory with regards to the regional political context must be highlighted.

Especially with regards to our analysis on its theoretical development, for contemporary Central European States, it means that there is no general or abstract magic solution for the separation of powers. According to historical examples, even with an independent judiciary which was more or less real for most European states by the end of the nineteenth century, the relations between legislative and executive demanded special arrangements. Moreover, for those arrangements, the context is an important factor. The political and social reality of the state in question has a great impact on the way that the theory of separation of powers can be implemented in the national constitutional framework, especially with regards to the national political praxis. If in a modern constitutional state, the organisation of the institutional framework should be structured by constitutional provisions, and a clear distinction between the main functions of the state can help to construct such a structure to avoid the concentration of power, the constitutional consecration of a symbolic principle is not enough. According to the political reality, it must be interpretated and applied in a dynamic way so that it could realise this very basic aim and protect it constitutionally. Therefore, several factors should be taken into consideration – the balance or the equilibrium not being static but always in movement and asking for rebalancing and control, and limitation or self-restriction by those who exercise the power being as important as their limitation or rebalancing by other powers. The separation of powers can become a constitutional reality only when, with all that complexity and with the help of an able and vigilant public administration,[20] a proper political culture is implemented.

Thus, as the constitutional provisions demonstrate, such a principle can be formally declared easily, but its constitutional textualisation can also help to apply it. Separation or division, balance or mutual control, organisation of the state, system of government or functioning of the state can contribute to the definition and the application of the separation of powers in the constitutional context of the state in question in a balance with democratic requirements.

Internal and external factors should also be taken into consideration. If from a sole constitutional perspective, head of states, constitutional courts or local communities (even though those are not considered as individual branches for most of the studied states) can play an important role to find a well-balanced equilibrium, political parties, the civil society or the media should also be considered as factors that can help find such an equilibrium. External actors often related to non-constitutional internal ones – e.g. transnational non-governmental organisations, transnational companies, supranational or even international institutions – also became important parts of the political reality of those states, and without considering them as such, it is impossible to realise the aim of the principle of separation of powers. In such an

20 Paczolay, 2013.

optimistic perspective and extremely rich theoretical heritage, with regards to the context, the symbolic and even mythic principle of separation of powers should not be forgotten, especially for Central European State. On the contrary, it should be used in a more appropriate way to achieve its comprehensive aim – but to do so, by taking into consideration its theoretical and contextual complexity.

Bibliography

Arisztotelész (1969) *Politika*. Budapest: Gondolat, pp. 62–64.

Bibó, I. (1986) 'Az államhatalmi ágak elválasztása egykor és most' in Nagy, E., Huszár, T., Vida, I. (eds.) *Bibó István Válogatott Tanulmányok II.* Budapest: Magvető. pp. 385–396.

Carolan, E. (2009) *The New Separation of Powers. A Theory of Modern State*. Oxford: Oxford University Press; https://doi.org/10.1093/acprof:oso/9780199568673.001.0001.

Csink, L. (2018) 'Concepts of Separation of Powers in a Comparative Approach – Similarities and Dissimilarities', *Prezlglad Prawa Konstytucyjnego*, 2018/6, pp. 313–325 [Online]. Available at: https://doi.org/10.15804/ppk.2018.06.26 (Accessed: 18 February 2022).

Locke, J. (1999) 'An Essay on the True original, extent and end of Civil Government' (1690) in Locke, J. *Második Értekezés a polgári kormányzatról*. Budapest: Polis, Chapter 12.

Lukowikowski, R. R. and Fox, W. F. (1993) *The Beginning of the Constitutional Era: Bicentennial Comparative Analysis of the First Modern Constitutions*. Washington: Catholic University of America Press.

Straub, S. (2011) 'James Madison, On Tyranny', *Federalist Paper,* 47 [Online]. Available at: https://thefederalistpapers.org/founders/madison/james-madison-on-tyranny-federalist-paper-47 (Accessed: 14 October 2021).

de Montesquieu, C. S. (1748) *De l'Esprit des Lois*. (Reprint: 2019), Paris: Flammarion.

Paczolay, P. (2013) 'A közigazgatás mint hatalmi ág', *Tolle Lege*, 2013/1, pp. 1–6. [Online]. Available at: http://tollelege.elte.hu/sites/default/files/articles/paciveglzsa.pdf (Accessed: 14 October 2021).

Rousseau, J-J. (1762) *Du contrat social*. (Reprint: 1978) Hachette, Paris.

Stumpf, I. (2015) 'A kormány alkotmányos jogállása', *Új Magyar Közigazgatási Jog*, 8(2), pp. 8–14.

Tomescu, C., Levai, M. C. (2012) 'The Principle of Equilibrium and Separation of Powers under the Romanian Constitution', *The USV Annals of Economics and Public Administration*, 12(1), pp. 284–293.

Varga, Zs. A. (2013) 'Hatalommegosztás, az állam- és a kormányforma', *Pázmány Law Working Paper*s, 2013/5, pp. 1–8.

Veress, E. (2011) *Államfő és kormány a hatalommegosztás rendszerében*. Kolozsvár: Scientia.

Legal Sources

Constitution of Poland and Lithuania of 3 May 1791
Serbian Constitution
Romanian Constitution
Decision 38/1993 (VI. 11.) of the Constitutional Court of Hungary