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THE THEORY OF THE DISTRIBUTION OF POWERS AND ITS PRACTICAL IMPLEMENTATION

There are two major forms of the democratical exercise of powers: the direct and the indirect democracy. The entire system of the separation of powers can be classified within the scope of the indirect exercise of democracy, although in a broad sense methods of the direct exercise of the democracy can make up such division of powers, which can be used as a bance against the machine of power structures, which relys too much on the binary code of the government-opposition, and distances itself too far from the people. Here I would like refer to the legal instrument of the referendums, within which, it is possible to talk about a significant direct exercise of democracy, in case if the people can force the assignment of the referendum as well (Such as like in Hungary, where 200.000, or in Lithuania, where 300.000, or in Slovenia where 40.000 signatures are required for the initiation to have so.)

Hereinafter we are going to focus on the indirect form of exercising the democracy.

The distribution of power, the separation of powers and checks and balances are closely related concepts deriving from coherent theoretical basis. However, their usage is often inconsistent and mixed up frequently in the legal jargon. Therefore, it is necessary to clarify their meanings.

Although the theory of the distribution of power is a product of the Age of Enlightenment, its practical manifestation has been in existence for centuries. The divided power is necessarily restricted which is a prevention of the abuse of power and an institutionalized form of the protection against autocracy. Therefore it is unequivocal that the real implementation of the distribution of power had been in the center of efforts, much before it was defined.

Contrary to popular belief, Montesquieu didn't establish the classic three branches of powers, but Aristotle did so. He mentioned deliberative body of public affairs, magistrates and judiciary which – considering the complex role of the parliament – is completely equal to the trinity of legislative, executive and judicial powers. Politeia was declared as the appropriate structure of power which is a mixture of democracy and oligarchy.

Cicero, in his work The State, committed himself to such type of it inwhich there is an intermediate structure among the monarchy, the rule of aristocracy and the democracy. These two theories can be confidently regarded as a preliminary concept of the distribution of power, because the mixed state can only exist through the precise delimination of the authority of various factors by involving them into the power in sociology-political sense.[1]

Polübiosz went even further. His theories came up to the conclusions of the 'classical greek philosophers'. According to his point of view, the different social forces must check and restrict each other, which adumbrates the system of 'checks and balances'.[2]

Beside the legislative and the executive powers John Locke mentions a third-one, the federal power. It can be regarded as the equivalent of the head of state power which is considered a factor of the government system and posses a role of foreign policy as well.[3]

The great oracle Montesquieu distinguishes the legislative power, the power which falls within the scope of international law and executive power related to civil law issues. The latter mentioned is the judicial power and the second mentioned is referring to the monarch/head of state power, which is eventually equal to the trinity-system of Locke's. (It should be noted that in this era the depositary of the executive power was the monarch or the administration appointed by him. In the absence of the welfare state, the principal executive tasks tended to the foreign policy.) As an affirmation Montesquieu separates the legislative power into a bicameral National Assembly.[4]

For several aspect in the theory of the distribution of power, it may be more appropriate to use the concept of the separation of the functions of power instead of the concept of the separation of powers. Because on one hand these patrons of the idea practically envisaged the separation of the function of legislative, executive and judicial powers among different bodies. They fought against the concentration of these three functions in one node, so that their aim was not the abolition of the relation of powers.

On the other hand, this proposed concept is more compatible to the system of checks and balances. Latter mentioned can not only be achieved through the rigid separation of constitutional factors, but also by their legally institutionalized relationship-system. The theory of Montesquieu underlying the distribution of powers is also based on this principle. An important factor of the balance is that the individual branches of power, is that one branch should not overpower the other ones,which is guaranteed by the system of authorities of the various bodies controlled by each other. For instance the dismissal of the government and the potential of the dissolution of parliament. (By the motion of censure in the Hungarian government system and the exclusion of the dissolution of parliament could be mentioned as the distribution of powers, but it is not possible, because of the political identity in between the two concepts).

It is more appropriate to talk about the separation of the functions of powers because the number of branches of powers depends on the certain constitutional systems of the states, but organically only these three functions of

power can exist. (Therefore the individual functions can be implemented into several branches, mainly the diffuse system of the executive power can be divided among several centers.)

The American theory, the 'checks and balances' shall be equal to the concept mentioned above. Usually that concept named as a synonym of it, nevertheless according to some opinions that is considered to be different from it.

According to this, the various factors of power are in an interdependace with and mutually dependent from each other. The theory also distinguishes the functions of power from the branches of power. Not the decisions manifested in the resolutions of individual bodies which regarded as a whole, but all the decisions on the case which are taken into a unit by its procedure laid down.[5] According to Neustadt the US Constitution declares the distribution of power, but not the separation of functions. Moreover – and this is really different from the continental theory – the same functions should be distributed among several organisations. J. Merry says this based on a different principle from the principle of the distribution of power, because it declares the necessity of balancing out the political power with political power.[6] By the system of the 'checks and balances', an authority can recieves a variety of powers at the same time. This essentially different indeed from the classic distribution of power and regarded as a counterpart of the model of the rigid separation of the functions of power and establishing an institutionalized connection between the individual branches. In a certain sense the system of 'checks and balances' goes even further in the aspect of setting up of guarantees. In addition to the distribution of power – with its institutional system entiteled with the prevention from overpower – it prevents the functions from being expropriated by the individual branches of power. For my part I support to categorize the branches of power different from the principle of the balance of parlamentary system which falls in the wide scope of the term of the distribution of power.[7]

According to the theory in question – and of course its practice – the legislative and the executive power organizationally don't depend from each other. They come into being in different ways, the president is unremovable and the Parliament also can't be dissoluted by the executive power. The personal concentration is also precluded between the two bodies. Nevertheless the president can become the part of the legislative process with the right of veto, the members of the Supreme Court are appointed by the consent of the Senate. (The latter can be disputable that this kind of distribution of power is not the implementation of the non-reciprocal control of the bodies, but can be the separation of the judicial function itself.)

It is obligatory to distinguish in between the "de facto" and the "de iure" branches of powers. In the narrow sense only the latter ones are considered to be a seperate branch of powers. The legal ground of it, is that only tohose bodies are entitled to exercise the legally binding, enforcable, and official scopes of authorities of the states.(For instance neither the economy, nor the press is entitled to do so. The only reason why we can consider them to be so, is that because from the aspect of the entire society they can put a significant effect on human behaviour, and therefore they can practically force the obedience of the norms. The level of significance of these "de facto" braches of powers are mostly dependent from the customs of the local political culture.[8]

The branches of powers can be distinguished to those branches which do transfer powers, and to those ones which does not do so (merely exercising the power). The previous ones participate in the formation (through nominations and appointments) of other bodies exercising certain scopes of authority. The President of the State is typically such a participant (especially in Hungary). Moreover the Head of the State has almost more significant powers in evolving the other braches of powers, than exercising its own scopers of authorities.

In the Hungarian governmental system, the President with his suspensive veto becomes a part of the legislation which is reminiscent of the model of 'checks and balances'. (As the Constitutional Court – that just mentioned a special branch of power – implements the legislative function.) The judicial branch of power is independent, shall not be bound by any instructions, entirely separated from the executive power by creating the organization of the National Council (recently: National Judicial Office; hereinafter – OBH) However, it can be neutralized by the President's autonomous decision: the institution of pardon and with the countersign of the Minister of Justice. Thereby the executive power and the power of the head of state take over the function of judicial power thus the judiciary can be removed. The head of state has significant powers with regard to the appointments of certain officials of the executive power.

The classic parlamentary system realizes the concentration of the branches of power instead of separation, while it can be noticed the separation of functions between the branches of power. In the Hungarian model the institutional separation has a greater presence despite the personal concentration, while the separation of functions between the branches of power resembles the American theory.

It should be noted that the (former) Hungarian Constitution didn't even mention the concept of the distribution of power with a word, nevertheless it is present as almost an evidence int he practice of the Constitutional Court (hereinafter AB). It's interesting that one AB 31/1990 decision on the issue of interest rates of housing loan, which is irrelevant in our topic, concluded 'The Hungarian state organization is based ont he distribution of power.' However, one of the later dissent of Géza Kilényi regard the head of state as a part of the system of 'checks and balances' by his powers, namely Kilényi discerns the American organizing principle in the Hungarian form of government. (It is not entirely clear whether he uses the latter concept in relative or different meaning in relation to the concept of the distribution of power.). Altought the in thenew Constitution (AKA: Foundational Statute) it is explicitly written in Article C) paragraph (1) : "The operation of the State of Hungary is based on the separaton of powers." The two classifications can be made parallel.[9] In other words the law can exlude the concentration of certain bodies (for example the unilateral dependence of the government from the parliament, the judiciary from the executive power) or that some people can be members of two branches of power at the same time.(The latter will be mentioned at the analysis of the relation of the parliament and the government.)

The actual political situation can make empty the legal distribution of power (besides the lack of personal distribution of power also can alsp empty the institutional one), or vice versa, certain constitutionally non-existing branches of power can be made existing ones.

The modern distribution of power shall be tested in the lights of these new dimensions, because instead of the traditional separation of branches of power – depleted by the evolution of the classic distribution of power especially after the horrors of dictatorships – the need is increased again and this to create new power-sharing factors. Lets line up these factors with schematic panels. (The in-depth analysis of the constituent power is justified, because despite of its importance it is neglected in the legal literature and essential to the foundation of the whole system of govrenment.

The constitutional power

The demand of mentioning the constitutional power as a separate factor can be arised after the question of creating the classic branches of power is transferred from theory to practice. Namely when not just scientific foundation but social legitimacy inevitably arise. Its importance is justified that the whole framework of the system of the exercise of power is specified by the constitution, which can't be only the ultimatum of the ruler or a particular social group, layer, class in a constitutional democracy. As Bibó concisely said: 'It shall be a separated power from the legislative, specifying the distribution of competence of the other powers.

First the English Civil War created the constitutional power institutionally, afterwards the U.S.A. and France followed it. Sieyés emphasized: 'The constitution can't be any part of the bodies which was created by itself.[10]

Numerous eminent members of the legal literature highlight the importance of separation of the constitutional power.[11] Claus Offe highlights this with a lifelike way: Not the players themselves should dictate the rules of the game that who is allowed to play.[12]

It's not quite often but examples are exist presently for separated constitutional power in the world's constitutional systems.[13]

In Hungary, there isn't a separate constitutional power,[14] the Parliament can amend the Constitution with a two-thirds majority. Numerous opportunities were brought up for the adoption of the new scheme of the constitution. The accepted text – maybe amended with a two-third majority – should be reinforced by the next parliament. The possibility of a confirmatory referendum was brought up. The preliminary conceptual issues would be worth making it subject to a consultative referendum ensuring the success of the confirmatory referendum.

Because of the Constitution's constantly involved necessary renewal[15] consideration could be given to establish a constituent assembly which can be convened at anytime if it's necessary.[16] Instead of the two-thirds law, the possibility of a declaration of fundamental rights or a two-tier constitution[17] has already arosen. It could play its role more suitable by an individual institution, because of the high political dissension namely of the binary code of the government and opposition.[18]

The Head of State

(In the presidential systems the Head of State is in charge of the Executive Branch. In the semi-presidential systems it is the most appropriate to talk about a "two-headed" law enforcement), where the President of the Republic also belongs to the Executive Branch).

The head of state appeared as a special branch of power in the theory of the government systems, because previously it was the depositary of the executive branch of power, but with the fulfilment of the parlamentarism, its importance was diminished first, afterwards it got a new role. Actually it is not a seperate branch of powers but a part of the system of checks and balances, which controls the operation of the traditional branches of power or benefits the exercise of functions of power to some extent. It is possible to talk about its definitive functionning by having the knowledge of the substantive law.[19] Benjamin Constant illustrates the role of the head of state with a fair metaphor. The three (original) branches of power, each is like a train, which might collide, leave their rails and there must be a power that leads them back to their original ways. János Sári points out that afterwards the constitutional courts have been created, the head of state doesn't conduct activities in accordance in law, but decides ont he basis of political discretion. The theory of Constant describes the latter as a justice-logic activity.

In my view regarding to the power of the Head of the State a special level could be observed amidst the President of the parliamental democracy and the semi-presidential system. So what kind of scopes of authority could come up to strenghten the merely nominal powers of the President in the parliamental democracies?

In my opinion, it is noticeable that in certain parliamentary states during the recent years some significant controlling powers has been deployed to the heads of the states. (Sometimes sometimes it is not easy to distinguish from the semi-presidential states. According to my viewpoint from the aspect of the scope of authority the active head of state is considered as a form of the semi-presidential system, while the plethora of powers among the passive/ controlling roles features is a specific mean of the system previously discussed.

What kind of scopes of authority may arise in connection with confirmation of the head of state?

In Latvia, the president of the republic could declare a referendum about it, whether it be early elections. This double filtering does not allow to the head of the state **arbitrarily** the dissolution of parliament which is representing sovereignty, but in case of a huge shifting in people's will it means a great controlling possibility.

At the same place President of the Republic shall be entitled (required third of the Members of Parliament) to suspend the enactment of any new laws for a period of two months. If during this timeperiod, more than 10 % of enfranchised people signs the application, an abrogative referendum must be held. The validity and effectively threshold is very high.

In Lithuania, the head of state may raise the unconstitutionality of any valid and operative acts, and entitled to turn to the constitutional court, where the plenum could suspend the application of the law. This is an almost unique way of constitutional review, because ad absurdum the effectiveness of an act created 10-years ago could be suspended by the head of the state.

It came up in professional circles that in case if the prime minister is voted out in Parliament, case of or through the course of a constructive vote of censure the President of the Republic should have some discretion.

The head of state may have stronger scope of authority than average in case of appointing. In Slovakia, the members of the Constitutional Court are appointed by the head of state and 10 judges will be selected by the Parliament of the 20 candidates. In France, the third of the plenum are appointed by the President of the Republic, and in Turkey all the members nominated by professional and judicial bodies.

The Constitutional Court

After the Austrian implementation in 1920, the continental system structured constitutional litigation, based on a separated organization, spreaded like a river backwash, mainly after the Second World War. Mentioning it as a separated factor of power is only possible in case of having a strong scope of authority. In such case it is a part of the legislative, so we can consider it as an element of the system of 'checks and balances'. Actually it performs law enforcement activity, it doesn't just compare the facts with the law, but the law with the constitution also. The courts don't take part in the developement of the relationship between the legislative and executive, nor in the normative settlement of living conditions. From the aspect of the governmental systems as a whole, the judicial system is typically not used to analyzed. The courts don't take part in managing the living conditions in longterm either, while the greater autonomy and freedom of the constitutional courts and the possibility of complete and general annulation of rules can put this type of body to the edge of politics.[20]

The politicalization of the judges in Constitutional courts strongly depends on the set-up of if, and also from the method of their election**.**

What is the Constitutional Court? Can the question be raised, that it is an evidence for many.

In general terms we could respond, it is a norm controlling board, which looks at legal norms and state laws on constitutional grounds.

In international comparison two basic constitutional models are known. In one of the models the traditional courts – headed by the Supreme Court of the State – compare the individual legal norms with the standards of the constitution, and ultimately push aside the statute in concern. So, in this scheme, quasi all courts implement constitutional judicature, but due to appeals, and legal remedies the Supreme Court of the country is the authentic and principal organ of the interpretation of the Constitution. Therefore constitutional judicature is called decentralised in countries of the above range.

The other model is where, an individual body is set up to review legal acts, statutes in the light of the constitution. (Only in the latter, it is possible literally, and in the classical sense, to speak about constitutional court.) Obviously, beside this, there could be other spheres of authority, of bodies above mentioned.

There is no separate constitutional court classically in the *UK, US, Australia, Canada, Denmark, Norway, Sweden, Japan.* Article 120 of the Dutch Constitution is a peculiarity: the courts – so that there is no separate constitutional court – do not rule on the constitutionality of a law!

As far as *Switzerland* is concerned, we might say, a particular mix of the classical European and American models mingle. Each court has the right – except the federal level – to examine the constitutionality of the laws. The Federal Court has the power to participate in individual constitutional complaints; however, it is authorised to destroy legal regulations on cantonal level.

The *Greek* form of constitutional type judiciary is also a curiosity; among members of the Supreme Court of the State and law professors, judges are appointed by drawing of lots. The judiciary only has the jurisdiction to control the acts, there is no authority for lower-level legislation, such as statutes. Also, it should be pointed out that other courts in their scope of discretion consider the constitutionality of the statutes.

In Hungary the mandate period of a member of the Constitutional Court is a twelve years term. Member of the Court cannot be re-elected. This represents a significant change compared to the previous law, under which, beside a nine-year term mandate, there was a one-time opportunity to re-election. However, this created a chance, at least in theory, that the constitutional judges (at least towards the end of their mandate), with their "behaviour", and their votes are trying to promote their re-election. In several states the mandate ends at the time of retirement. (eg.: Austria, Bosnia and Herzegovina, Turkey, etc.). In Azerbaijan the first mandate period is a term of fifteen years! A one-time re-election is possible, but the second cycle can last only for 10 years. (See. Legény op. cit. 235 p.)

Such people are excluded from the membership of the Constitutional Court whom were members of the government, or were senior party officials within four years prior to the date of the election, or held state leadership positions.

At least nine and no more than fifteen Members of Parliament that form a nomination committee make a proposal for Members of the Constitutional Court. The committee must provide a seat for each representative of the parliamentary parties.

Another concern is the election of the judges. International practice usually shares the right of election. In many countries the head of state also has the option to delegate members. Bicameral parliaments also provide complex opportunities from this point of view.

In France, for example, the President of the Republic, the president of the National Assembly, and the President of the Senate shall appoint 3-3 members out of the possible 9.

A third of the 15 members of the **Italian** Constitutional Court are delegated by the parliament, another third by the head of state, three colleges authorized through certain collegiums of the Supreme Court, one by the Council of State and the State Audit Office. This model is inherently provides that persons with a professional judicial experience could became a member of the body.

In **Austria** the president, the vice-president, the 12 ordinary members and half of the six alternates appointed by the President of the government designation. The Federal Council and the National Council recommends regular 9-9 and 3 or 6 alternates. One-third of whom also appointed by the President of the Republic.

In **Slovakia** it is also the President of the Republic who appoints the 10 constitutional judges recommended by the National Council of 20 persons. The particularity of these two latter models is the plural designation system, that is, a few finally gain the membership, but there will be some disappointed, who are being considered, – would take the mandate, but do will not be initiated to office. On the one hand it partly reduces the prestige of candidacy, and the other hand results in the fact that the most appropriate persons probably will not undertake candidacy.

In **Spain**, the judges are appointed by the King. Four of them by the lower, another four, by the upper house are appointed based on a two-thirds majority, another four (2-2) are appointed by designation of government and the Judicial Supreme Council.

Three members from the out of whole thirteen of the Portuguese Constitutional Court are already co-opted by the already elected ten individual. In my view this particular solution is welcomed, because, from inside candidates' expertise can be judged more objectively, on the other hand is more perceivable, what kind of expertise and skills are needed to get a better distribution of cases.

Very specific the **Belgian** model. Judges are appointed by the King with two-thirds majority of the Senate, from two different circles of candidates. Members of one of the groups spent have at least a five years of previous mandates in the high positions at the Court of Cassation, at the Council of State, at the Constitutional Court, or at least university teachers for at least five years. The second group, however, are formed by persons who were members of the Senate or the House of Representatives at least for 8 years, so here politics specifically channelled in, in stark contrast with the model that kept away majority of robed bodies from the world of politics! This solution, specifically makes the Constitutional Court a part of the power-sharing system of checks and balances.

The **Turkish** model is highly specific. It is complete authority of the head of state to appoint the 11 regular members and four deputy members. It is the specificity of the model, that public institutions / organizations appoint judges. (These are higher courts, the State Council, the Higher Education Board, administrative professionals' organizations and bar associations.)

We could consider as a discrepancy from the classic "binary code" the solution – that is applied in **Bosnia and Herzegovina** and what prevents from the inevitable comparison with the duality of government / and opposition. President of the European Court of Human Rights appoints 3 from the 9 members of the Constitutional Court. Further exception that these members cannot be citizens of neither the given state nor those of neighbouring countries.

Costa Rica's constitutional structure is outstandingly interesting. The normative task is implemented by the Sala Courta, an individual plenum of the Constitutional Court. (The two bodies – with a relative autonomy – Intertwine interlocks.) The members are elected by a two-thirds majority in parliament for an eight-year term. Inasmuch the legislature with a two-thirds decision had not replaced the judges so mandates automatically extends. In my opinion, this model provides simultaneous manifestations of independence and control.

In Hungary, judges of the Constitutional Court are elected by the Parliament by a two-thirds majority. The entire origination of the post from parliament is a substantial nexus between the policy and the body. If one political side has a two-thirds support, then even the most prominent jurists could be stigmatised as "party soldiers". If, however, the proportion of two-thirds is divided among several political power, the situation is also subject of concern. In general, for the interest of consensus in the commission both sides mutually agree to one other's candidate, so it can be traced back, who recommended the individuals. That is why it would be appropriate to introduce multi-channel nomination of the members.

We focused on the protection of the four freedoms noting that the characteristics of individual constitutional courts, focal points can be judged only on the grounds of all their jurisdiction. We may add, that not only the constitutional complaint and the normative control are related with fundamental rights, but the same could pertain to international treaties, as well as for consideration of the referendums and election issues. If we refer to the name of the specific bodies, apparently as specific property names they should be entered uppercase; however as abstract doctrinal concepts, we specify these bodies as constitutional courts.

Municipalities

Some kind of self-government of the municipalities can not only be fitted into the classic original theory of distribution of powers, but it was exactly contradictory to that. On one hand the aversions against the feudalistic privileges of the cities, on the other hand the connection between the concept of the distribution of power and sovereignty might be the main reason for this. The self-governance is in accordance with the voluntary restrict of sovereign contrary to the national sovereignty. Nevertheless it can be noted that the main branches of powers get their own authority by defining the sovereign, there is no obligatory legal basis for their independent existence. The trend representing the whole society broke away with the conception of liberalism according to which declares that individuals unify to a whole on the highest level of the state and they began to respect the individual in the self-governance as a protecting system based on the constitution against the state.[21] From the aspect of the society the auto-

nomy of government is very important, but it is difficult to take into consideration at the analysis of the government systems, because it has so many parts, that a unified conclusion can't be drawn for the entire state.[22]

The Prosecutor's Office

As the judiciary is an independent branch of power, usually the independence of courts is meant to be, nevertheless the Prosecutor's Office is also an important part of the judiciary system. However, the Prosecutor's Office is independent from the courts. It is also independent from the government thus it can be regarded as an individual branch of power, despite it functions in a hierarchical system, the appointment of the General Prosecutor usually depends on the government or the legislature.

The administration

The organizational autonomy of the administration is justified by the separation of the political and social subsystem.[23] The top leadership of ministries belong to the world of politics but the apparatus is concerned with the legislation of civil service, the change of government is not necessarily associated with their dismissal. In the Hungarian legal system for instance the prohibition of withdrawing the authorities and the right for giving instructions in only procedural issues are beside the independence of the organization. Nevertheless we know at the time of switching cycle there is usually fluctuation in the apparatus in a huge percentage, in practice the instructions of the leaders determine the activity of the subordinate personnel. It is a rightful suggestion that the autonomous bodies can be regarded in a certain sense as a separated factors of power, because – though their functions are government related – rights for giving instructions doesn't apply for them. Their establishment are in relation to other branches of power (parliament, government, head of state), but – and this is the basis of their autonomy – they are non dismissible. Their judgement is similar to the prosecutor's office in this case, because generally they reflect the actual political combination. However, from the reason of their non-dismissibility they can be autonomous. This is especially true if the mandates of the persons who were appointed by the former government will be valid in the next cycle.[24]

The opposition

The concentration of the government and the majority in the parliament increasingly refers to the opposition like the counterweight of the executive. The range of two-thirds legislative items are the result of the involvement of the opposition into the legislative whereby a new factor of distribution of power is born. The all-time confrontation of the opposition and the government, which is a necessary corollary, makes this distribution of power to dysfunctional, because the opposition takes control over the professional control with an eternal and autotelic confrontation.[25]

The second chambers

Although this element had been featured in the theory of Montesquieu its renaissance is owed to the interlacement of parliament-government mentioned above. The federal-type second chamber namely a priori symbolize the independence of the member states, (as individual factors of distribution of powers) having their own sovereignty, which are manifesting in the role of their federal legislature and in the Member States' legislative subjects delimited by the constitution. The second chambers, involving corporate elements in themselves, are the expression of interests of the civil society, which are also remedy aginst the popular representation-based concentration of powers.

The people's participation

The entire system of distribution of powers can be classified into the institutional system of indirect democracy, while the instruments of indirect democracy can create distribution of powers against the power machine, which is sceded from the people and functioning too much accordingly to the binary code.

Distribution of powers between states

János Sári propounds the possibility of analyzing the distribution of powers between states and although here and now we are dealing with the governance within states, due to the junction to the European Union we also have to mention this in here.

In the integrational organizations, the authorities of the Member States and the EU, the judiciary system intended to enforce the community law, and paralell co-existence of the intitutions of the Community and the Member States existing can mean the basis of distribution of power.

Other social factors

'The media is the fourth branch of power!' 'The economy is the fourth branch of power!' It is can be heard frequently in the political journalism jargon. There is a little truth in the constitutionally naturally rejectable views, because the factors mentioned have impact to the power-political system. For example the media can significantly influence the results of the elections and this has a huge impact on the legislative power and on its composition. The independent functionning of the economy can specify the real margin of the executive. Nevertheless these factors are not part of the state, don't have the usage of monopoly of the legitimate violence, namely their will are not enforcable in the world of the constitutional law.[26]

The branches of power in our country

Afterwards let us see how the classic triad of powers are formed in Hungary as there is no chance to form an overall picture from the reason of the diversity of national legislation. I've already pointed this question out in details in my study on the Hungarian governmental system. Here and now I am only demonstrating the outline of my deduced train of thought. The three classic branches of power certainly is alive, furthermore the head of state with a slightly wider authority than ceremonial is also regarded as an individual factor, however he is not purely the depositary of the political power, but considered as a neutral intermediary branch of power. His authorisations are either independent, rather interferal (ex.: appointments, signature of ministerial countersign, the signature of the laws…

etc.) The principle of 'checks and balances' doesn't prevail because of our country's parlamentary system, the parliament overcome the other branches of power: it elects and dismisses the government, lays down the budget, which significantly specifies and gives limitations of the scope of the executive. Its legislative power extend to all, which is a controversial element of the Hungarian legal system, therefore it can distract the government's power of regulation of. The election of the Head of State and the Constitutional Court are also the tasks of the Parliament. The Constitutional Court with its specific activity reminiscent of the deliberation, does not expand the classic triad.

The whole system is based on the Constitution, the Constitution is the cornerstone of sovereignty. Imaging intuitively, the Constitutional Court is not derived from it, but it is a supporting factor.

The classic baranches of the triad are not located paralett to each other but practically all grow out from the legislative. The head of state, based on the form of government, even points outside of the constitution, because he is the carrier and the bearer of the external sovereignty towards the publicity.[27] The separate analysis of the prosecution is not a common practice in the legal literature. However, due to its exclusion of being instructed, in vain the election of the Prosecutor General is an authority of the Parliament, it can be risked to mention, that it could be such an individual factor in the distribution of powers like the Constitutional Court. Lets have a brief look what kind of stages of development the peresent arrangement went through in our country.

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[1] See. SÁRI János: *A hatalommegosztás*. Osiris Kiadó, Budapest 1995. pp. 19–21.

[2] Sári János mentioned that after, Sabine és Louis Fisher insights. Ld. SÁRI i.m., p. 18.

[3] See SÁRI i.m. pp. 30–34.

[4] See SÁRI i.m. pp. 37–40.

[5] SÁRI János, i.m. pp. 46–47.

[6] This is no different than any of the separation of powers doctrine in my opinion.

[7] Lijphartmainly political science (and not constitutional) categorization distinguishes the separation of powers between the majority and the minority, the distribution of power (between the executive and legislative power, the Chambers – what constitutional law this call up the most power sharing!), a fair distribution of power (proportional representation) and formal restriction on the power (by the minority veto power). This highlights See Sartori, Giovanni. Comparative Constitutional Engineering, 2003, (translated by Elizabeth Soltesz), Academic Press, Budapest 2003, p. 96.

[8] About the concept see SIMON János: *A politika értékválságban – a demokratikus politikai kultúra keresése*, L'Harmattan CEPoliti Press, 2013. Budapest, 7–17. o.

[9] The organizational division of power in political terms it means that a party dominated by an interest group at the same time in two different branches of power, position. However, only the probability can be reduced, for example, otherwise, selection of different periods (cf. Presidential systems, Israeli Prime Minister's choice). Personal power-sharing in a political sense, however, hardly be tested scientifically category, because of the dependence of a person so much due to the way that almost uncontrollable, opaque.

[10] SAMU Mihály: *Alkotmányozás, alkotmány, alkotmányosság,* Korona Press, Budapest 1997., p. 45. Theoretical problem is that this formulation, we do not have the constitution to legitimize itself, on the other hand is not possible amendment of the Constitution.

[11] See. CSERVÁK Csaba: *A hatalommegosztás elmélete és gyakorlati megvalósulása*, Jogelméleti Szemle, 2002/1. sz.

[12] Referred by Samu Mihály, See. For example: SAMU Mihály: Az alkotmányozás jellege és követelményei In CSIZMADIA László, NÉMETH Miklós Attila, KEMÉNY András: *Társadalmi szerződés*, Püski Press, Budapest 2010., p. 71.

[13] I mention as an example the Taiwanese Constitution, which calls up a special Constituent RMB in order to create and modify the Constitution. (In essence, similar to the role of the Bulgarian People's Congress High).

[14] In 1848, the Constituent Assembly created the laws, then gave way to the Legislative Assembly.

[15] The requirements for the constitution of permanent control. The 1791 French constitution would have given only the fourth cycle, the adjustment mode.

[16] The scope of the originators of course, should be regulated in depth. Thus, a specific number of representatives of the government, the president, what percentage of all the members of the Constituent Assembly, or a specified number of voters could be the subject of rights.

[17] KUKORELLI István: *Az alkotmányozás évtizede*, Korona Kiadó, Budapest 1995, p. 46.

[18] The second chamber is a way out. It could be that the constitution itself, possibly supplemented with other elements, non-governmental organizations, local government delegates.

[19] See CSERVÁK Csaba: *Milyen a magyar kormányzati rendszer? – A kormányforma fejlődése és problémái,* Jogelméleti Szemle, 2001/4.

[20] This evolution of the conditions, see the chapter on this below.

[21] SÁRI János, i.m. p. 237.

[22] In other words, as many political composition may occur relative to the government's attitude globally undetectable.

[23] In Hungary ORTT, The Economy Competition Office, and certain point of view the OVB.

[24] The above is not a state administrative body can be said as the National Bank, which works the same way, but plays some power with the power of the central bank through mandatory provision.

[25] Solving the Danish Constitution, however, offers a smart solution: 30 % of the MPs propose referendum.

[26] This may justify the institutionalized separation and real factors, even in the name of dominance and power lines.

[27] Starting from the brake system of checks and balances, however, the Constitutional Court with regard to the legislative function of the power-sharing factor, because of negative legislation participate in the exercise. May be subject to similar terms of implementation.

Summary

Cservák Csaba. **The theory of the distribution of powers and its practical implementation.**

There are two major forms of the democratical exercise of powers: the direct and the indirect democracy. The entire system of the separation of powers can be can ce classified within the scope of the indirect exercise of democracy, although in a broad sense methods of the direct exercise of the democracy can make up such division of powers, which can be used as a bance against the machine of power structures, which relys too much on the binary code of the government -opposition, and distances itself too far from the people. Here I would like refer to the legal instrument of the referendums, within which, it is possible to talk about a significant direct exercise of democracy. The American theory, the 'checks and balances' shall be equal to the concept mentioned above. Usually that concept named as a synonym of it, nevertheless according to some opinions that is considered to be different from it. The demand of mentioning the constitutional power as a separate factor can be arises after the question of creating the classic branches of power is transferred from theory to practice. Namely when not just scientific foundation but social legitimacy inevitably arise. Its importance is justified that the whole framework of the system of the exercise of power is specified by the constitution, which can't be only the ultimatum of the ruler or a particular social group, layer, class in a constitutional democracy. As Bibó concisely said: 'It shall be a separated power from the legislative, specifying the distribution of competence of the other powers. The head of state appeared as a special branch of power in the theory of the government systems, because previously it was the depositary of the executive branch of power, but with the fulfilment of the parlamentarism, its importance was diminished first, afterwards it got a new role. What is the Constitutional Court? Can the question be raised, that it is an evidence for many.In general terms we could respond, it is a norm controling board, which looks at legal norms and state laws on constitutional grounds. In international comparison two basic constitutional models are known. In one of the models the traditional courts – headed by the Supreme Court of the State – compare the individual legal norms with the standards of the constitution, and ultimately push aside the statute in concern. So, in this scheme, quasi all courts implement constitutional judicature, but due to appeals, and legal remedies the Supreme Court of the country is the authentic and principal organ of the interpretation of the Constitution. Therefore constitutional judicature is called decentralised in countries of the above range. Afterwards let us see how the classic triad of powers are formed in Hungary as there is no chance to form an overall picture from the reason of the diversity of national legislation. I've already pointed this question out in details in my study on the Hungarian governmental system.

Key words: Hungarian public administration, distribution of powers, constitutional court, other social factors.

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О СУДЕБНОМ РЕШЕНИИ КОНСТИТУЦИОННОГО СУДА ГРУЗИИ ОТНОСИТЕЛЬНО ОБРАТНОЙ СИЛЫ УГОЛОВНОГО ЗАКОНА

Действующий Уголовный Кодекс Грузии был принят в 1999 году. Указанный документ определяет порядок действия уголовного закона во времени, в частности, согласно ст. 2: «преступность и наказуемость действия определяется законом, действующим на период его совершения». Данной нормой утверждается принцип законности, что «не существует преступления и наказания без закона». Согласно этому общему правилу, рамки ответственности преступника должны устанавливаться в соответствии с нормами уголовного кодекса, действующими к моменту совершения преступного деяния.

С действием нормы во времени тесно связан вопрос об обратной силе закона. Свойство закона, когда он может распространяться на действия и факты, при совершении которых данный закон не действовал, называется обратной силой закона. Вопрос обратной силы закона приведен в ст. 3 УКГ, и состоит он из четырех частей. Из положений, установленных этими частями, непосредственный предмет нашего обсуждения представляет положение, содержащееся в первой части, в которой сказано, что «уголовный закон, устраняющий преступность деяния, или смягчающий наказание, имеет обратную силу. Уголовный закон, устанавливающий или отягчающий ответственность, обратной силы не имеет».

Именно это норма стала одним из предметов жарких споров и дискуссий в грузинской правовой реальности, чему особенно способствовало решение Конституционного суда Грузии от 13 мая 2009 г., в котором трое из участвующих в рассмотрении конституционного иска судей написали три различных мнения. В Конс-