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Lóránt Csink[1]

Concepts of Separation of Powers in a Comparative Approach – Similarities and Dissimilarities

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Słowa kluczowe: podział władzy, równowaga władz, parlamentaryzm

Abstract

Separation of powers is one of the most basic principles democratic states are based on. Still, there is No. common standpoint what exactly separation of powers means. The present essay examines the ideas of Rousseau, Marxist scholars and some modern theorists concerning separation of powers and checks and balances mechanisms that exist in the legal system. The author analyses as well how the different powers balance each other in practice.

Streszczenie

Koncepcja podziału władzy w perspektywie porównawczej – podobieństwa i różnice

Podział władzy jest jedną z podstawowych zasad, na których oparte są państwa demokratyczne. Nie odnajdziemy jednak wspólnego stanowiska co do rozumienia i zakresu podziału władzy. Niniejszy esej analizuje idee Rousseau, marksistowskich uczonych i niektórych współczesnych teoretyków dotyczące podziału władzy oraz mechanizmów kontroli i równowagi, które istnieją w systemie prawnym. Autor analizuje również, w jaki sposób poszczególne władze równoważą się w praktyce.

[1] ORCID ID: 0000-0002-6098-086X, PhD, Faculty of Law and Political Sciences of Pázmány Péter Catholic University. E-mail: csink.lorant@jak.ppke.hu.

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Centuries have passed since Montesquieu established his famous theory on the tripartite system of the state. Although he never used the term "separation" (instead he wrote of certain distribution of power, or controlling of power)[2], this has become the base of separation of powers. However, despite the great academic pedigree of the theory, it does not have a unanimous consent what it really means[3]. The hypothesis of present paper is that there is not a single notion of separation of powers but it is bound by historical and cultural features. In other words: in different historical ages and in different societies separation of powers has various interpretations, as a result of which one cannot give a general understanding of separation of powers. Another hypothesis of the paper is that the theory drawn by Montesquieu is still applicable to model the functioning of state organisation.

To verify the hypotheses I first introduce the possible contemporary interpretations of separation of powers, secondly, I deal with the functioning of separation of powers and evaluate the reasons why it works differently in different historical and cultural circumstances. Thirdly, I intend to find a dynamic approach of the functioning of separation of powers and lastly, as a conclusion I analyse under which circumstances can public law be strong.

I. Different approaches to separation of powers

Despite the universal acceptance of separation of powers it has never been truly applied in practice. At least not in a way theorists speak of separation of power. Theory and practice were the closest at the establishment of the United States. Virginia declared in its constitution that the powers shall be "forever separate and distinct" and Maryland stipulated that whoever has a position in any of the branches might not have a position in a different branch. There occurred some views in the Federalist Papers that the different branches

[2] A. Riklin, *Montesquieu's So-Called 'Separation of Powers' in the Context of the History of Ideas,* Budapest 2000, p. 2.

[3] E. Carolan, *The New Separation of Powers. A Theory for Modern State,* Oxford 2009, p. 18.

should be absolutely separate (like Centinel and Penn), Madison pointed out that not even Montesquieu considered that the control of an institution cannot be divided between different branches or the control of two different institutions would be performed by the same person[4]. One needs a model that is not only impeccable in theory but also efficient in practice[5].

One can categorise the theories into three different groups. First there are some views that, either professedly or not, deny separation of powers. Secondly, some other views base on Montesquieu's theory and thirdly, there are some views that find a standpoint different from the tripartite theory.

The phrase "denial of separation of powers" is misleading. Such views do not deny the division of labour among various functions, instead, they deny that the branches have equal power. The common standpoint of such views is that they find the legislative more important, as it represents the people directly, as a result of which it has a greater legitimacy than any other branch. The branch that enjoys the direct approval of the voters is hierarchically above than branches missing such legitimacy. There is a close link between such standpoints and parliamentary sovereignty.

The theory of separation of powers and its denial are of same age. Jean Jacques Rousseau acknowledged the distinction between legislative and executive but he denied their separation. Basing on popular sovereignty, Rousseau considered the people as the "supreme power" whose power is undividable and unalienable. It is noteworthy that Rousseau differentiates the editor (writer) of the law and the legislator. He says that it is not the editor who makes the law but the sovereign people who, either explicitly or implicitly, accepts it. As the legislator is the people and the executive is a much smaller organ, No. equality is conceivable between them[6].

Basing on a different approach, the socialist theory on state finds separation of powers contrary to people's sovereignty, too. It finds the principle as a necessary compromise between the people (the labours) and the former ruling classes. Yet after the turnover of socialism, the situation had changed. The Marxist doctrine says that separation of powers was necessary because

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[4] A. Riklin, op.cit., pp. 12–13.

[5] E. Carolan, op.cit., p. 205.

[6] J.J. Rousseau, *The Social Contract*, http://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf (9.09.2018). See esp 29 and following.

of the various and conflicting interests of branches and of social classes but in socialism the people have a unanimous will[7]. The unity of the people's will did not make it necessary to differentiate among branches. Still, one can observe some division of labour among the following branches: (1) organs of state power (2) organs of state administration (3) judiciary and (4) attorneys[8]. In such a division organs of state powers legitimise all other organs. In this point of view the theory is familiar with Rousseau's with the significant difference that while Rousseau stressed the importance of the volonte general, i.e. the people, the Marxist concept laid emphasis on state organs.

However, the denial of separation of power can also be observed under democratic circumstances, too. Such standpoints emphasise the direct legitimacy of the parliament and reckon that all other public power roots in the parliament. They say that parliament is not balanced by other branches, but only by the free elections that can remove the parliament[9]. This view argues that parliamentary terms (i.e. time limitation for the parliament) are more severe checks than the separation of functions. This is also familiar to Dicey's idea saying that the most basic guarantee is that power can be removed by the people in elections[10]. Also in America several scholars state that "the current degree of ignorance about the framers' design about the nature of judicial power, and about the people's right of self-government, surely deepens the scandal"[11].

It is noteworthy that such argumentations prefer majoritarian democracy to consensual democracy: it bases on the fact that the parliament represents the majority of the people, therefore it should have as little legal control as

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[7] O. Bihari, *Összehasonlító alkotmányjog*, Budapest 1967, pp. 176–177.

[8] Ibidem, p. 179.

[9] Among Hungarian scholars see S. József: *Ki a káoszból, vissza Európába,* Budapest 1993 and P. Béla, *Gondolatok a hatalommegosztásról,* [In:] *Tanulmányok Dr. Bérczi Imre egyetemi tanár születésének 70. Évfordulójára*, Szeged 2000. About the Polish features see B. Banaszak, K. Nowacki, *The Model of Executive Power in Poland: Outline of Political Evolution*, "European Public Law" 2009, No. 2, p. 180.

[10] A. Venn Dicey, *Introduction to the Study of the Law of the Constitution*, London 1915, p. 28, http://files.libertyfund.org/files/1714/0125_Bk.pdf (09.09.2018).

[11] W. Gingi, *Saving the Constitution from the Courts,* Norman–London 1995, p. 268. See also L. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review,* Oxford–New York 2004.

possible[12]. Supporters of the idea find it the Westminster model of parliamentarism. However, the parliament is not an unlimited power, not even under the English constitution, as Edward Coke defined in 1610. The latest British constitutional achievements (Human Rights Act 1998, Constitutional Reform Ac 2005) are steps towards a constitutional chart (instead of the historical constitution) which further limit the possibilities of the parliament. Furthermore, constitutional traditions have a great impact on the constitution that are also limits the competences of the parliament. In the United Kingdom the parliament does not practice a competence, even if it is formally acceptable if it is against constitutional traditions.

Finally, it is also noteworthy that supporters of parliamemtary supremacy are aware of non-majoritarian[13] or counter-majoritarian institutions[14], like the constitutional court. They find it dubious that constitutional adjudication can limit organs of popular representation.

Most of the scholars acknowledge the existence of separation of powers. However, there are great differences what the principle exactly means. In the following, I draw up the most common views.

The standpoint of the complex view is that state organisation has become more complicated since Montesquieu drew up his theory. There have emerged new institutions (like ombudsman, constitutional courts) that were unfamiliar in the times of Montesquieu and whose functions do not really fit to the tripartite model. Furthermore, state power is not influenced by public organs only but also by private law entities (media, economic sector, NGOs, etc.). In this regard the view is practical; it seeks the elements that have an impact on state functions.

According to Montesquieu, separation of powers is necessary to avoid tyranny. According to the complex view, avoiding tyranny does not necessitate the rigid separation of all centres of power but it does require that No. state power can be performed without control[15].

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[12] For the criticism of majoritarian democracy see P. Smuk, *Ellenzéki jogok a parlamenti jogban*, Budapest, 2008, p. 21.

[13] P. Paczolay, *The Transformation of the Constitutional Court in Hungary*, Párizs 2015, p. 169.

[14] N. Dorsen et al., *Comparative Constitutionalism*, Thomson-West 2003, pp. 108–109.

[15] István Bibó is quoted by T. Győrfi, A. Jakab, *2. § Alkotmányos alapelvek; ellenállási jog*, [In:] *Az Alkotmány kommentárja*, ed. J. András, Budapest 2009, p. 205.

The parliamentarist doctrine roots in the fact that the government has majority in the parliament in parliamentary systems, as a result of which government and parliament have a common political base. In parliamentary systems governments can govern only if it possesses the confidence of the absolute majority of the parliament, otherwise the government's mandate is terminated. As a consequence, legislative and executive branches are directed by the same political power, legislative and executive branches are united and they form a single political branch. Furthermore, the relation between the legislative and the executive is just the opposite to Montesquieu's view. It is not the executive that executes the conducts of the legislative but the legislative performs the political will of the government[16]. Most of the drafts are introduced by the government or MPs of the governing party, the parliament follows the policy of the government, etc.

This political branch is balanced by a neutral branch, consisting of organs of the judiciary, the constitutional court, the ombudsman and possibly the president. Consequently, the theory observes the balances between the political and the neutral branches.

The main difference between the complex and the parliamentarist views is that the latter examines only factors of public law and neglects non-constitutional ones (media, parties, etc.).

The parliamentarist approach practically bases on the division of the political power and the controlling power. They can be divided on the base if they make political decisions (i.e. decisions basing on a value choice) or they make legal decisions (i.e. decisions basing on a legal authority). According to the standpoint powers are separated if political and legal entities can mutually check and balance each other[17].

The tendency of modernised Montesquieu is based on the classic separation and intends to apply it to contemporary systems. The focus is not the political nature of organs but their functions and it examines if the function in question has a legislative, executive or judicial character.

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[16] L.F.M. Besselink, *The Separation of Powers under Netherlands Constitutional Law and European Integration*, "European Public Law" 1997, No. 3, p. 313.

[17] J.C.A. de Poorter, *Constitutional Review in the Netherlands: A Joint Responsibility*, "Utrecht Law Review" 2013, No. 2, p. 89.

Originally, Montesquieu considered branches institutionally, which means that each function is performed by one single organ. As simple the Montesquieu-principle is as difficult it is to apply[18]. The number of organs participating in state power has multiplied, therefore the original theory cannot be applicable contemporarily. Yet it is applicable if one considers it not institutionally but functionally. This means that the state still has three main function: legislation, execution and jurisdiction. There are organs adopting generally biding norms, there are some others applying to everyday cases and there are also some organs that make biding decision on the application of a norm.

It is true that different institutions may have functions of same nature or one institution may have both legislative and executive functions. Despite the mixture of functions among institutions, the different characters of the branches are still valid.

Consequently, the view regard not the institutions performing state power but the functions the perform instead.

Considering the functions of state power there emerged new (or renewed) theses that do not base on the tripartite system of Montesquieu.

The delegation theory of Arthur Lupia models state power as the relation between the principal and the agent; according to the model the principal transfers power to the agent[19]. This idea is close to the Transmission Belt Theory that seeks how can authorisation be given for performing political power[20]. Both theories combine the ideas of popular sovereignty and separation of powers; they find it important that power should be derived from the people and the power should be delegated (transmitted). Because of delegation (transmission) the power is a restricted one; no-one can perform more power than delegated.

Another view finds that the greatest challenge towards separation of powers is the administrative state in which public power is performed by decentralised organs making discretionary decisions. Arbitrary power is limited in parallel with the limitation of discretionary decision making. Law itself is not satisfactory, as law cannot foresee all cases of life in advance, there must be a margin of appreciation for the authority applying the law. One possible

[18] E. Carolan, op.cit., p. 22.

[19] P. Paczolay, op.cit., p. 169.

[20] E. Carolan, op.cit., p. 107.

solution is that the experience of the authority keeps the decision non-arbitrary (discretion as expertise) or the influence of different group interests result in an objective decision-making (discretion as interest representation)[21].

The views mentioned above deal with the exercise of state power and they have the same target as the classic views, namely to exclude arbitrary decision-making. However they found a very different way to achieve this end.

II. How does separation of powers work in practice?

My position is that the real strengths of the separate branches are not persistent yet they vary from time to time and from region to region. If they do, separation of powers will function differently in various times and countries and it has No. universal meaning that could be applicable all times. To verify the statement, one should consider historical experience.

In Europe parliamentarism was found out to combat against absolutism. To avoid arbitrary decision-making of the absolute monarch, there was a social need for legal certainty (i.e. social norms are defined by normative acts and not by the particular decisions of the monarch) and for equality (there is No. exception from the application of the law). Under such political and social circumstances parliamentarism meant three aims. First, the adoption of generally binding laws is not in the hands of the king but in the parliament's. In other words, the parliament's activity in lawmaking increases and the king's activity decreases. Secondly, within the legislative power, the importance of the directly elected lower chamber increases and the noblemen's higher chamber loses its importance. Thirdly, universal suffrage, in order to have as great legitimacy as possible. Such features (parliament-dominated legislation, lower chamber dominated parliament and universal suffrage) aimed at one thing: legislation is in the hands of the people. Having achieved such goals the system turns into constitutional monarchy in which the king owns the executive power only.

In such historical era (late 18th, early 19th century) democracy meant that there were No. obstacles to the people's representation. All such obstacles were considered as the reminiscence of absolutism, and as such they were deemed

[21] Ibidem, p. 108.

to be antidemocratic. In Europe, until the 20th century, democracy was equal to the extension of the parliament and not its limitation. In the early 19th century it would have been deeply antidemocratic if a judge avoids applying the law of the people's representation because of abstract principles.

At the same time the United States had an entirely different historical era. Unlike in Europe, there was No. clash between absolute monarchs and parliaments, after achieving independence. Therefore it was a largely democratic view that the power of the parliament is not unlimited and the judge can neglect the law if it is unconstitutional – as chief justice Marshall said in Marbury v. Madison[22]. One may conclude that the same phenomenon (i.e. not applying a law because of constitutional reasons) was democratic at the one and antidemocratic at the other side of the Atlantic.

In Europe the significance of the judicial branch started rising in the 20th century. After the sad experience of World War 2 European countries realised that the constitution and especially the human rights must limit the free activity of parliaments. This procedure can be drawn by rule of law: all public powers, including lawmaking, are bound by law. To secure the constitutionality of public power judiciary became a real balance of legislation. As a result of the procedure the separation of power model transferred to the "judicial rule of law"[23].

While in Western Europe the judicial power gained importance after World War 2, Central-Eastern European countries had to follow an utterly different way. As they were at the Eastern side of the Iron Curtain, due to soviet pressure they established the Marxist state organisation in which powers are not separated. Theoretically, the parliament exercised all powers but real decisions were made outside the parliament in different committees of the communist party.

At the time of the transition of 1989–1990, post socialist countries laid strong emphasis on free elections and intended to strengthen the parliament's position. Soon after the transition the judicial control over the legislation gained importance in all countries, still the views promoting the supremacy of the parliament are significant.

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[22] 5 U.S. 137 (1803).

[23] A. Zs Varga, *Eszményből bálvány? A joguralom dogmatikája,* Budapest 2015, p. 142.

Summing up all the experience one would conclude that in different times and regions a different branch becomes significant and separation of powers can only be interpreted within the particular historical and cultural frame.

III. The dynamic approach to separation of powers: the seesaw effect

With separation of powers Montesquieu aimed at avoiding tyranny; he found it obvious that arbitrary power is wrong. And the remedy against such power is that power balances power. Montesquieu did not consider separation of powers as a target but as a tool to avoid absolutism.

As a consequence, there is a great similarity between separation of powers and checks and balances; some find the two things as equal in legal literature. Concerning balance one would recall the picture of a scale: separation of powers works properly if the scale is in equilibrium. However, Montesquieu's tripartite system creates a very fragile equilibrium. Therefore, it is a well-founded criticism against the system that No. perfect state of balance can be created in practice. And if one of the branches is overweight the entire system collapses. To solve the dilemma Constant thought of establishing a neutralising power (the head of state) whose sole task is to keep the scale in equilibrium. Yet the system also faced challenges in practice; neutral head of states (either kings or presidents) also perform executive tasks and cannot keep the scale in practice. In other words, the head of state is not solely the balancing power but also a weight in the scale.

What can be the solution? The dilemmas mentioned above should not lead us to give us Montesquieu's theory yet we should not model it with a scale. The function of separation of powers is more alike to a seesaw[24].

What are the features of a seesaw? The seesaw is practically never in a state of equilibrium, the continuous up and down movements are the points of the game. Due to Physics, not only children of the same weight can play the seesaw. In addition, the children's distance from the ground is persistent. If one of them approaches to the ground, the other one moves further from it with the very same distance. It is also noteworthy that there can be certain dif-

[24] The interdependence of the branches was first compared to a seesaw game by A. Sajó, *Limiting Government. An Introduction to Constitutionalism,* Budapest 1999, p. 76.

ference in weight between the children playing but if the difference exceeds a certain level, the game cannot be continued.

What does this means for separation of powers? If separation of powers is modelled by a seesaw (instead of a scale) then the equal weight of the branches is not a criterion. The difference in weight, just as in the case of the seesaw, can be balanced. Such a balancing factor might be the activity of the branch (how broadly it uses its competences) and on the contrary, at the case of overpower, self-restraint might be a solution. Remarkably, if the weight of one of the branches exceeds then after a while the other branch will compensate it. Such continuous up-and-down movement keeps the state organisation going.

It is also noteworthy that, just like seesaw, state organisation is a zero-sum game. Any branch receiving more power results is a loss of power at a different branch. In case of judicial activism, the discretion of legislation reduces. On the contrary, if laws are too detailed, the role of judicial interpretation shrinks.

In general, state organisation tolerates a certain amount of difference in weight. Above the level, if one of the branches overpowered, the seesaw stops and there is No. separation of power any longer.

IV. Conclusion: the strength of public law

Public law has the task to ensure constitutional order; this means the constitutional protection of human rights on the one hand and the constitutional functioning of state organisation on the other. The two parts link together; the malfunctioning of state organisation likely results in the violation of human rights.

We are all interested in a strong public law that establishes the proper operation of the state and stipulates the limits of state power. In case the state does not function properly, one may first come to the conclusion that public law is not strong enough and secondly that public law should be strengthen then. Yet the power of public law is not equal to the tyranny of public law. Public law has its limits and it is only one, undoubtedly a very important one, element of state life. Functioning of the state is also influenced by other factors like constitutional traditions, local culture, politics, etc.

Separation of power is considered to be a universal value. Indeed, modern democratic constitutions all consider the principle, either explicitly or not. However, separation of powers function variously in different states. There is No. general recipe for a country how to separate powers. A powerful public law considers and respects the country's peculiarities.

Lastly, separation of powers should not be interpreted formally. Powers are not separated just because there are different organs and persons for the different tasks. Powers are separated only if they are able to check and balance each other. Public law in itself cannot ensure such a state; political culture and constitutional tradition also influence if checks and balances work in practice. Yet it is the task of public law to ensure the frames of separation of powers.

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