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THE PRINCIPLE OF THE SEPARATION OF POWERS: THE ONTOLOGICAL PRESUMPTION OF AN IDEOLOGEME

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ABSTRACT

The theoretical materiality of the principle of the separation of powers is beyond doubt. This principle is inevitable in discourse on the constitutional framework of the state, democracy and the rule of law, and it has its own form of expression in positive law. Although the relevance of the principle of the separation of powers in social discourse creates the illusion of the conceivability of its content, the ontological questions concerning this principle remain largely vague. This can be explained by considering two aspects. First, as established in scientific doctrines and constitutional forms of expression, the principle of the separation of powers has become a social and legal ideologeme; it approximates an axiom which is no longer substantiated anew. Second, discourse concerning ontology is always complicated, since it calls to question the essence itself. It is complicated not only because it requires a particular intellectual effort and academic courage, but also because the outcome of such discourse is unpredictable and can lead either to the ideologeme being confirmed to be true or being unexpectedly revised, or perhaps can even lead to the demise of what has so far been self-

evident, unquestionable, obvious, universally known, etc. This article analyses the ontological essence of the principle of the separation of powers – an approach towards the human being, whereby meaning is given to the consequent system of causal relationships within the whole theory. Discourse in this article takes ontological issues as its object of inquiry: why did we decide to separate powers and how many of these separated powers are there?

KEYWORDS

The principle of the separation of powers, Constitution, ideologeme, myth, checks and balances

Power must never be trusted without a check.
(John Adams)
Why do you think so, dear sir?
(Gediminas Mesonis)

INTRODUCTION

The principle of the separation of powers principle has strong positions in scientific theory. This principle is permanent in discourse on the constitutional framework of the state, democracy and the rule of law. The principle of separation of powers has expression in positive law – constitutions and in the constitutional jurisprudences. So, this theory seems clear. However, the article attempts to look again at the content of the problem, in part through a chrestomathy.

This article analyses the ontological essence of the principle of the separation of powers – an approach towards the human being, whereby meaning is given to the consequent system of causal relationships within the whole theory. Discourse in this article takes ontological issues as its object of inquiry: why did we decide to separate powers and how many of these separated powers are there? Why is it important, although not very pleasant, to show this ontological presumption?

Only by having elicited this presumption, which is the basis for forming the need to separate powers, can we reveal a whole series of nuances and raise new doctrinal questions, which naturally unfold only if the presumption about human beings and their nature is not ignored.

Having defined the ontological presumption of the principle, we discover a number of conceptual theoretical challenges. What are those theoretical challenges? And why do they appear to us only when we see the presumption on the human being? These questions are the subject of this scientific article.

1. THE TRANSFORMATION OF THE THEORY INTO AN IDEOLOGEME

Eduardo Galeano (a Uruguayan writer) has, among other things, once stated that we live in a world where the funeral matters more than the dead man himself, that the physical appearance is more important than the intellect, that we exit in a culture in which content has no priority. It is difficult to find arguments to the contrary. However, it may be noted that it is not only now that we are living in such a world; the world has always been like this – at all times and in almost all spheres, including science. Let us recall that Nicolaus Copernicus (1473–1543) or Johannes

Kepler (1571–1630), while alive, never ventured to print some of their books on the movement of planets and other astronomical phenomena. This was done after their death. How you deliver your message, and where or when you deliver it, is usually more important than the content of the message itself.

The development of scientific theories is not an exception. Everything runs smoothly insofar as it does not deviate from mythologised theories, historical facts or ideologemes, i.e. the boundary markers defined by the existing theories. It is somewhat simpler for the so-called 'exact sciences', since the system of 'indisputable truths', i.e. myths and ideologemes, of these sciences is not known to the public, and the revision of these myths and ideologemes takes place only within the circle of those who have knowledge of them. Discourses in social sciences and humanities take place in a different way. In these discourses, everyone knows 'everything' and has strong opinions, although these spheres contain a plethora of myths, ideologemes and hollow concepts. They are then employed to interpret more hollow concepts, which, consequently, after having been purportedly 'explained', are identified as indisputable truths and become part of the particular theories. Later on they are referred to as 'chrestomathic' (i.e. well-known) in textbooks. The content of such ideologemes becomes resistant even to scholarly discourse.

Below are some thoughts about the term 'ideologeme'[1] as it is used here. Why is this concept used here and how does it differ from a myth or an ideology? An ideologeme should be treated as an inseparable structural element of an ideology. The principle of the separation of powers is rather insufficient in terms of its ontological purposes to qualify for the status of an autonomous ideology; but, as a structural formation, it has an important role to play in respect to conceptions of higher abstraction. In our discourse, we can confidently regard the principle of the separation of powers as an ideologeme, which is used to interpret the notions of democracy, the rule of law and the human rights protection mechanism, as well as the contents of these notions.

An ideologeme presents itself and is presented as an unquestionable truth or as an axiom, the substantiation of which is no longer required or is treated as redundant. Although academic freedom of expression provides an opportunity to question an ideologeme, these efforts, even though logically irreproachable, are generally accepted with distrust and with the permanent reaction of rejection.

An ideologeme becomes an ontological source for further discourse and further development of thought for modelling and substantiating a causal relationship. Ultimately, ideologemes find their reflection in positive law and, therefore, unlike

[1] This publication excellently reveals the essence of an ideologeme: Nida Vasiliauskaitė, "Kaip parduoti 'dvasingumą'?" (How to sell 'spirituality'?) // https://www.delfi.lt/news/ringas/lit/nvasiliauskaite-kaip-parduoti-dvasinguma.d?id=16293666.

myths, they have a legal form for the protection of their content. Thus, if a social myth acquires a legal form, this is an indication that it can already be regarded as an ideologeme. The ideologeme as well as its content is then defended not only by scientific discourse – whose purpose is not to defend, rather, among other things, to constantly question and verify the objectivity of the content – but it is also defended by the imperative nature of explicit and implicit legal norms. The discourse itself on the questioning of an ideologeme in law may be perceived not as a routine verification or, ideally, as a pointless mental exercise but, in some cases, also as a delict questioning something 'obvious' or encroaching on some value. Although constitutions and legislation express the content of philosophical, legal and social thought of a particular society and a particular epoch, upon the acquisition of a legal expression, a particular thought with a particular world-view becomes an independent object – a legal value. As András Zs. Varga has observed, a beautiful abstract idea reflecting an ideal, i.e. being slightly utopian in its nature, may unexpectedly turn into a peremptory idol in law. For instance, the rule of law, which is a theory of a sufficiently high abstraction level, has already for a long while been 'a magic wand' of constitutional courts and has been applied to decide matters that are not utopian at all, but rather are real legal matters.[2] The author summarises that the rule of law, which has a normative form nevertheless remains only an abstraction; whereas we, in the name of it, subordinate all actions of persons and communities to an arbitrary legal interpretation and apply it to all social and legal needs, actions and the whole system of the notion of liberties.[3] It is obvious that such 'a magic wand' in the hands of constitutional courts can suggest that courts may become omnipotent. The situation is also vividly depicted by Tomas Berkmanas, who argues that courts have started 'playing kings' – the kings of the political system.[4] Even if this appears to be the case, we must acknowledge that these are kings with very limited powers, who are 'hostages' of the myths and ideologemes existing in the scientific doctrine. This is what we see very when analysing the reflection of the ideologeme in the jurisprudence.

One such compulsory ideologeme in social discourse on a democratic state under the rule of law has become the principle of the separation of powers. Scientific literature favours the theme of the separation of powers. It is described by outlining various aspects. It is not uncommon that examples for the principle of the separation of powers are found even in antiquity. Certainly a strong desire to see always offers

[2] András Zs. Varga, *From Ideal to Idol? The Concept of the Rule of Law* (Budapest: Dialóg Campus, 2019), 14–16.
[3] See *ibid*., 22.
[4] Tomas Berkmanas, "Motives in Support of Judicial Activism: Critique and Ethics of Restrained Adjudication as an Alternative," *Baltic Journal of Law & Politics* 2:1 (2009): 115.

an opportunity. Linking antiquity with the theory of the separation of powers is a bluff. Summarising all the experience of humankind up to John Locke and Charles-Louis Montesquieu's epoch, we can maintain that the divisions, discovered and observed both in theory and practice, at those times reflected only the actual distribution of political powers, rather than the concept that would justify the need for such division. As described in the theory of Aristotle, the division of powers between different classes is merely a reflection of the existing reality; Aristotle tended to treat the governance of a state as an occupation, requiring both learning and practical experience.[5] Since Cicero's time, the state has been an affair of the people, because power arises from the collective authority of the people; but this concept is developed only to the point where it is stated that an official, in performing his duty, relies on the law and that he himself is a creature of the law.[6] Here, we do not yet see any suggestion to separate anything.

Practical examples also illustrate to us not the concept, but the existence. Here are just a few examples. In England, in 1215, the Great Charter of Freedoms *(Magna Carta Libertatum)* was adopted. Why was it adopted? Was it adopted because the monarch King John Lackland (1166–1216) realised that it was not good that power was concentrated in his hands alone and wanted to share power with barons? Or, perhaps, because the armies of barons, both individually and collectively, were several times larger than that of the monarch? These questions imply answers. The Great Charter of Freedoms was nothing more than an attempt to rescue the power that had remained with the monarch,[7] whose nickname, 'Lackland', can reveal more about his powers than long studies into the historical facts of that period. Let us take an example that is closer to us, from the history of the Grand Duchy of Lithuania. We will probably agree that the diarchy between Grand Duke Algirdas and Grand Duke Kęstutis was not designed with the aim of protecting human rights or in view of creating counterbalances with respect to each other. The distribution of powers between the authorities of the glorious Polish–Lithuanian Commonwealth similarly reflected the powers rather than the concepts. In summary, we can state that, prior to Locke, powers were divided not because doing so was more reasonable – in order to achieve some of the objectives based on the doctrine – but because such a balance of powers was established.

Scientific discoveries by Nicolaus Copernicus (1473–1543), Galileo Galilei (1564–1642) and others affirmed the possibility of the cognition of the world; a state started to be perceived as a mechanism with its own laws of operation. At that time,

[5] Aristotelis, *Rinktiniai raštai (Selected Works)* (Vilnius: Mintis, 1990), 271–272.
[6] George H. Sabine and Thomas L. Thorson, *Politinių teorijų istorija (History of Political Theories)* (Vilnius: Pradai, 1995): 180–190.
[7] Arthur R. Hogue, *Origins of Common Law* (Indianapolis: Liberty Fund, 1986), 51–54.

an investigation of an object had several directions, which, it must be said, have remained until today. In its conception, Niccolò Machiavelli (1469–1527) assessed the nature of the human being and used it to highlight the effectiveness of state governance and the effectiveness of maintaining the control of a state. In agreement with Thomas Hobbes (1588–1679), who saw humans as individuals not free of egoism, aggression and non-compliance with principles, John Locke (1632–1704) viewed the mechanism of state governance as a system that, rather than making use of those human characteristics, should limit them.[8]

Locke was the first to substantiate the conception of the theory of the separation of powers at the theoretical level. In *Two Treatises of Government* (1690), the author makes a distinction among the legislative power, the executive power and the federative power ('power of war and peace, leagues and alliances, and all the transactions, with all persons and communities without the commonwealth'). According to Locke, the legislative (parliament) should make and enact laws, the executive (government) should execute them, and the federative authority should have full powers of foreign policy. Locke subdivided the executive into two branches, which are reflected in the specificities of internal and external affairs. The author did not separate the judiciary as autonomous and treated their activity as one of the functions of the executive. Such an approach towards the judiciary has certain logical meaning and it would not be easy even today to absolutely deny this. Some authors consider that envisaging the possibility for the judiciary to follow only the law and to administer justice based only on the law reminds us more of the place and function of the judiciary as perceived by Locke rather than Montesquieu. Having separated powers, nevertheless, Locke gave priority to the legislative power, which, in his view, stands supreme and directs all the others.[9] The doctrine of parliamentary sovereignty has not yet been denied by the scientific theory of constitutional law in contemporary England.[10]

The theory of Charles de Montesquieu (1689–1755) was also based on historical experience. Antanas Tamošaitis groups him with proponents of the historicism method.[11] Montesquieu's experience of seeing history tells us the following: too much power suddenly vested with a single citizen in a republic creates a monarchy or even more than a monarchy. "There would be an end of everything, were the same man

[8] Gediminas Mesonis, "Valdžių padalijimo teorija ir jos įgyvendinimo modeliai: kriterijų kokybės problema" (The Separation of Powers: The Problem of the Criteria Quality), *Jurispudencija* Vol. 61(53) (2004): 7–8.
[9] John Locke, *Second Treatise of Government* (Cambridge: Hackett Publishing Company, 1980), 71–80.
[10] Colin R. Munro, *Studies in Constitutional Law* (London: Butterworths, 1987), 127–132.
[11] Antanas Tamošaitis, *Istoriškoji teisės mokykla Vokietijoje. Istorizmo reakcija prieš racionalizmą XIX šimtmečio pradžioje (The German Historical School of Law. The Reaction of Historicism against Rationalism at the Beginning of the 19th Century)* (Kaunas: Printing House Spindulio b-vės spaustuvė, 1928), 19.

or the same body … to exercise [all] three powers."[12] In *The Spirit of the Laws (De L'Esprit de Lois)*, unlike Locke, Montesquieu separated the judiciary as an autonomous body not to be associated with the executive. In the same way as Locke, Montesquieu assigned priority to the legislative over the other powers. Law making is the main function and the sole prerogative of the representative body. According to Montesquieu, the other two branches of power merely execute and implement legislation enacted by the legislature.

Recognising the need for the separation of powers, Montesquieu started formulating the elements of the mechanism of checks and balances. But this was the very beginning of the theory of checks and balances.[13] The history of constitutionality in the United States illustrates how the principle of the separation of powers acquired the mechanism of operation, i.e. the system of checks and balances, which not only became a theoretical doctrine but was thoroughly consolidated in positive law – the US Constitution.

The debates on the US Constitution highlighted a few important objects of cognition. A mechanism was designed that, as explained by James Madison, would ensure constant self-regulatory mutual control among the branches of government.[14] These self-regulatory mechanisms were named by Americans the system of checks and balances.[15] This system was intended to guarantee that each of the branches of government has the opportunity to prevent the illegal activities of another branch and, thus, to defend the values protected by law – human rights and freedoms.

On a continuous basis, this discourse also raised the ontological question of the very need to limit power, to put it more precisely, to limit those in power. Naturally, two positions were represented in this discourse: the human being must be trusted and cannot be trusted. John Adams openly states in one letter that "Power must never be trusted without a Check".[16] His words were echoed by Madison, upholding that, "if men were angels, no government would be necessary".[17] To simplify these metaphors, it is obvious that they suggest that those in power cannot be trusted. The lengthy debates (which, besides the above-mentioned figures, in one or another way, involved Thomas Jefferson, Alexander Hamilton, Benjamin Franklin, Roger Sherman,

[12] Šarlis L. Monteskjė, "Apie įstatymų dvasią" (On the Spirit of Laws): 297; in: *Filosofijos istorijos chrestomatija. Naujieji amžiai (Chrestomathy on the History of Philosophy. New Ages)* (Vilnius: Mintis, 1987).
[13] Cheryl Saunders, "Theoretical Underpinnings of Separation of Powers": 74; in: Gary Jacobsohn and Miguel Schor, eds., *Comparative Constitutional Theory* (Northampton, MA, USA: Edward Elgar Publishing, 2018).
[14] James Madison, "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments": 288–289; in: R. C. Kesler and C. Rossiter, eds., *The Federalist Papers* (New York, 1999).
[15] Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 90–96.
[16] John Adams, *John Adams to Thomas Jefferson, with Postscript by Abigail Adams, 2 February 1816* // https://founders.archives.gov/documents/Jefferson/03-09-02-0285.
[17] James Madison, *supra* note 14.

Robert Livingston, John Jay and others) resulted in the adoption of the Constitution, which not only directly reflected the model of the separation of powers, but also indirectly indicated the attitude of the said Founding Fathers of the United States and the US Constitution towards the human being – who cannot be trusted and must be limited.

Since then, the separation of powers is not only a scientific theory, but a powerful social myth, which has become one of the ideologemes comprising the ideology of a democratic state. It is not just a theory; it is an ideologeme *par excellence*, to which reality is subordinated by force. Of course, having transformed into an ideologeme, the doctrine of the separation of powers remained an object of discussion, but the current discourse has been sluggish and dull. The main direction in the academic discourse is aimed at issues concerning the system of checks and balances, while the conception itself and its ontology are basically no longer called into question. Discourse in relation to the ideologeme is complicated and hardly promising. Hans Kelsen observes that it is only the parliament that derives its authority directly from the people, while the other branches derive their authority from the parliament; therefore, Kelsen concludes that the separation of powers cannot be regarded as separation.[18] In addition, Kelsen pointed out that not only the separation of powers, but also the separation of functions, is a mere theoretical abstraction, as the legislative function is carried out also by other bodies, not solely by parliaments.[19] In his view, the conception of the separation of powers is a beautiful myth, the constant mention of which in the doctrine is nothing more than a tribute to the opinion established both in doctrine and science.

2. THE PHENOMENON OF THREE POWERS

If you want to fail a student at a colloquium – and not just a student and not only at a colloquium – ask a question about the separation of powers and the person will become hopelessly confused. Yes, it is likely that the person will mention those three branches of government and, possibly, will add some names, but, once the person starts interpreting the content, he or she is done. What are the reasons for getting lost in this way?

First of all, the question regarding the quantity of the branches of power arises. There are three branches, among which the separation of powers takes place. Let us stop at this point. Why are there three of them? How do I know it? Indeed, the

[18] "The principle of a separation of powers understood literally or interpreted as a principle of division of powers is not essentially democratic" (Hans Kelsen, *General Theory of Law and State* (Cambridge: Harvard University Press, 1945), 282).
[19] "This organ never has a monopoly on the creation of general norms" (*ibid.*, 272).

number 'three' was likewise mentioned by both Locke and Montesquieu. But has anyone mentioned a different number? And why not, for instance, four, or two, or any other number?

Let us examine what the scientific doctrine states in this respect, by looking at the classic authors and, indeed, not only at them. Let us start with Dominique Rousseau, who dedicates a whole chapter to the separation of powers *(Le principe de la séparation des pouvoirs)*. The three branches of power are mentioned in detail but, regrettably, no hint is given as to the validity of their number.[20] At the outset of his discourse, Dominique Chagnollaud briefly mentions Montesquieu and the three branches of power but, subsequently, almost exclusively concentrates on the nuances of interaction among the three powers. It is true that, at the end of the discourse, the author asks himself whether it is not worth talking about the birth of new powers *(la naissance d'autres pouvoirs)*. In the position of the fourth branch of power, the author would see the constitutional justice body or the media.[21] However, all reasonable considerations come to an end with the contention that the classical (tripartite) notion of government had become a constitutional myth. The term 'myth' is named there by the author himself. Louis Favoreau provides similar reflections, noting that constitutional courts, in terms of their powers, are comparable to the fourth branch of government and could be regarded as such.[22] Another fundamental work, *Le droit constitutionnel de la Belgique* on Belgian constitutional law, expands over a thousand pages. Belgium, i.e. the structure of its state, is analysed to its capillaries. And how many branches of power do we find here? If you were not familiar with the classical theories about triads, it would be difficult to understand the background context of the federal and regional parliaments, or regional and monarchic powers. It is true that references are made to those three branches of power; also, local authorities are identified as powers *(pouvoirs locaux)* (which is an obvious reflection of Belgian federalism), but the meaning of all this diversity of vertical and horizontal divisions remains unclear.[23] In his work *Contentieux Constitutionnel*, Dominique Turpin coherently analyses the French Constitution of 1958 and the organisation of powers enshrined therein. But here, likewise, we cannot find any reason for the division of powers. Even more, the terminology used here is unconventional to our eyes. Instead of the usual term of the separation of powers, the author uses an expressive idiomatic phrase: the delimitation of the competences of constitutional public powers *(La délimitation des compétences des pouvoirs publics*

[20] Dominique Rousseau, *Droit du contentieux constitutionnel*, Préface de Georges Vedel, 4e édition (Paris: Montchrestien, 1995), 219–231.
[21] Dominique Chagnollaud, *Droit constitutionnel contemporain. Théorie générale. Les grands régimes étrangers*, Tome 1 (Paris: Armand Colin, 2001), 87–111.
[22] Louis Favoreu, *Konstituciniai teismai (Constitutional Courts)* (Vilnius: Garnelis, 2001), 18–38, 64–66.
[23] Francis Delpérée, *Le droit constitutionnel de la Belgique* (Paris: LGDJ, 2000), 625, 726, 728.

constitutionnels).[24] While reading, finally, one realises that what is involved here is the same, i.e. the tripartite separation of powers. Explaining the purpose of the separation of powers, Philippe Ardant relies on Montesquieu and argues that this separation is necessary in order to avoid the despotism of power and guarantee civil liberties.[25] Now let us look at monographs of Dutch scholars. In describing their constitutional setup of powers, they do not mention the principle of the separation of powers at all, but define their system as representative democracy. Definitely, you can similarly find the three branches of government here, but why they are three, and why there are these particular powers and not others among them, remains a mystery.[26]

Thus, all reflections on the number of powers reach a similar conclusion. All doctrinal attempts at recalculation have not changed the established doctrine of the triumvirate of powers as being a 'self-evident matter'.

The analysis of the theoretical discourses did not add clarity. If the theory is enigmatically abstract, let us look at some examples from legal practice. At first, we can examine a couple of practical examples that are in close proximity: in the Lithuanian and Polish constitutions. In the Constitution of the Republic of Poland of 1997, the separation of powers is the subject of the separate Paragraph 1 of Article 10, which stipulates that the system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers ("Ustrój Rzeczypospolitej Polskiej opiera się na podziale i równowadze władzy ustawodawczej, władzy wykonawczej i władzy sądowniczej").[27] Thus, the Constitutional Tribunal of the Republic of Poland did not face a difficult intellectual task in interpreting the Constitution to determine the number of branches of government, even though no serious problems would probably have been encountered in this respect. The ideologeme 'can count' only up to three. Therefore, the above-mentioned paragraph of the Constitution came into existence as an expression of the 'self-evident matter'.

The term 'separation of powers' is not set out in the Constitution of the Republic of Lithuania of 1992, but it is present in the jurisprudence of the Constitutional Court of the Republic of Lithuania as a result of the interpretation of the Constitution. Here we can once again affirm the powerful capacity of the theory of the separation of powers, which has transformed into an ideologeme. Do not be surprised that the Lithuanian Constitutional Court also comes up with three branches of government.

[24] Dominique Turpin, *Contentieux Constitutionnel* (Paris: Puf, 1986), 359–364.
[25] Philippe Ardant, *Institutions politiques et droit constitutionnel* (Paris: LGDJ, 2001), 47.
[26] Constantijn A.J.M. Kortmann and Paul P.T. Bovend'Eert, *Dutch Constitutional Law* (The Hague: Kluwer Law International, 2000), 59–139.
[27] See Konstytucja Rzeczypospolitej Polskiej // https://www.sejm.gov.pl/prawo/konst/polski/kon1.htm.

We can only speculate what would be if the theory of the separation of powers – envisaging the tripartite system – did not exist at all. What would happen if the uncompromised ideologeme did not prompt the number of the branches of government from our subconscious? One could wonder how the institutions that have ensured themselves independence in our Constitution (the Bank of Lithuania, the Prosecution Service, the National Audit Office) would have been treated. Would they not plunge into the current tripartite system as equivalent? It is this example that makes evident the problems stemming from the theoretical inconclusiveness of this ideologeme. This rather concisely explains our vacillation (and not only that), for instance, over the status of the prosecution service. Notably, this institution must be accountable to someone, as it is not part of the triumvirate of the separation of powers. But this institution is independent of everyone, because, in its uncompromised form, the Constitution prescribes that "prosecutors, when performing their functions, are independent and obey only the law" (Art. 118 of the Constitution of the Republic of Lithuania). The courts are likewise independent and they also obey only the law (Art. 109 of the Constitution). Yet, maybe the independence of a judge is not equivalent to that of a prosecutor? All these questions require conceptual decisions; whereas the easiest explanation is found within the frames of the ideologeme, as it is inadmissible to depart from it, and even so there are not intellectual and volitional powers to do so. We are not alone in this respect: in half of the states in Europe, e.g. France, Spain, Austria, etc., the separation of powers emerged specifically as a result of the interpretation of their respective constitutions.[28] It has already been noted that the French Constitution of 1958 contains no mention of the principle of the separation of powers, which is 'discovered' and referred to for the first time by the Constitutional Council *(Le Conseil constitutionnel)* only in 1979.[29] Thomas Kuhn is correct in stating that, in these cases, as a rule, "in the partially circular arguments that regularly result, each paradigm will be shown to satisfy more or less the criteria that it dictates for itself and to fall short of a few of those dictated by its opponent."[30] Let us return to our example concerning the prosecution service. The ideologeme does not say anything directly about the prosecution service, the central bank or the national audit office; it indicates, at most, three branches of power; hence, the discussion is hereby closed: 'three of you are to stay and all the others are to leave now, please!'

So – if we proceed on the unquestioned assumption that there are three branches of power, are they at least equivalent? Can we add more clarity at least

[28] Albrecht Weber, *European Constitutions Compared* (München: Verlag C. H. Beck oHG, 2019), 65–70.
[29] Dominique Rousseau, *supra* note 20, 265.
[30] Thomas S. Kuhn, *Mokslo revoliucijų struktūra (The Structure of Scientific Revolutions)* (Vilnius: Pradai, 2003), 133.

with regard to this point? In fact – not at all. I recall the discussion in Riga with a judge of the Federal Constitutional Court of Germany, who argued that the parliament that receives its authority directly from the people cannot be compared to the judiciary or the executive. In principle, Locke and Montesquieu would agree with this argument, or – it would be more correct to say – the aforementioned judge expressed her agreement with them. After all, we have argued that it is not so important who first derives powers and how they multiply later; indeed, we have maintained that it is more important how the people – the sovereign – treats these branches of power in the constitution. In line with our argumentation, we have also contended that the inequivalence of the branches of power would mean that no balance is possible among those that are inequivalent. It has been a pleasure to be involved in the discussion, but the previous discourse has remained nothing more than that: mere discourse.

In analysing the role of courts in the system of the separation of powers, the representatives of the modern doctrine are also not unanimous. While the position of the judiciary as an autonomous branch of power has been recognised, there is debate on how and to what extent they must take part in the system of checks and balances. Some see the judiciary as the guarantor of the established balance of power, others emphasise the function of the court to be an arbiter in disputes between the branches of power. The third group believes that the judiciary – apart possibly from the constitutional court – should not be involved in disputes between the legislative and executive powers.

Although the doctrine of the separation of powers has taken a firm position at the Olympic top of constitutional principles, and although it has constitutional guarantees both in written form and on the jurisprudential level, it is not fully unanimous on yet another issue. Is it separation of powers or power? Is it plural or singular? Civil society grants authority to the parliament in elections. Meanwhile, by virtue of the constitution and laws, the parliament confers authority on other branches of power. It seems then that it would be consistent to assert that the parliament creates the remaining two branches of power? Or is there one power, but we divide it into three branches that separately cannot dare to be called 'power', because each of them individually has only one third of the power mandated by the people? Are they branches of one power or separate powers?

It is obvious that, theoretically, it would be more consistent and more precise to use the term 'separation of power' rather than 'separation of powers'. It has already been mentioned that civil society is the sole sovereign. It would, therefore, logically follow that the sovereign's power is divided. However, bearing in mind that the term 'separation of powers' (in its plural form) is firmly embedded in our scientific

doctrine, I do not propose a shift to the singular. While in full awareness of its ontologically singular content, I will continue to use the plural form.

Civil society remains the primary source of sovereignty; thus, the model of the separation of powers itself, as well as its content, is in the will of civil society. It may alter not only the nuances of the mechanism of checks and balances, but also the content of the ideologeme itself. Thus, it may increase or reduce the number of powers or replace the centres of their authority otherwise. A possibility for discourse remains, though let us reiterate that efforts to change the mechanism of checks and balances should not have the effect of destroying the effectiveness of governance; thus, the separation of powers must not grow into the absolute independence of powers.[31]

3. THE HUMAN BEING IN THE IDEOLOGEME OF THE SEPARATION OF POWERS

As it has been mentioned, all discourses on the separation of powers have so far ended up in either direct or indirect recognition of the *status quo*. However, the relevance of Hegel's dialectics has not been absent in this discourse. The existence of antitheses (that there are not only three branches of power) means the materiality of syntheses. Even if the result of a synthesis is very similar to a thesis, it is not equivalent to a thesis, because it has already gone the path of a synthesis. This means it is only a question of time before quantitative changes become qualitative. I assume that all efforts to revise this theory have so far been largely unsuccessful, because the discourse has rarely returned to the ontological question of this theory. Why do we separate powers? What reason compels us to do so? Notably, the greatest ontological 'mystery' of the ideologeme lies in these questions. Apparently, the reason for the separation of powers is not intentionally hidden, but its emphasis is rarely direct. Once we have summarized the development of the scientific thought, we can note that only the façade side of the stage is most distinctly visible; there seems little if any resolve to explore the backstage area. And, yet, some of the answers are there.

Why is the separation of powers needed? Leafing through an infinite number of sources, we can select the most frequent explanations: 'to prevent power from being concentrated in the same hands', 'to prevent abuse of power', 'to preclude violations of human rights by those in power', 'to make persons in positions of power to act responsibly', 'to ensure the operation of the system in which the branches of power counterbalance each other', 'to ensure that no branch of power remains beyond

[31] Gediminas Mesonis, *supra* note 8: 7–8.

control' and so on. The idea is the same everywhere, only the form of expression and synonyms differ. But, does this explain the need for the principle of the separation of powers? Let me formulate the following question: why is it wrong if power is concentrated in the same hands? As someone with a keen interest in history, I could provide numerous examples of when the sole concentration of power has produced the desired results for societies or states. Why do branches of power need to counterbalance each other? Is this part of the principle of responsible governance? Do these counterbalances not undermine the effectiveness of governance and do they help? Do they really? As can be seen below here are some questions that fall even closer to the ontological centre: Who has told you that those in power tend to abuse it and are inclined to violate human rights? How do you know it? Ah! All human experience shows this. Excellent! To start with, it is not all human experience, but there are certainly many examples attesting to this. Why then do we torment ourselves over this separation? What is the reason for such theoretical uncertainties and distrust of those in power? Historical experience? Nevertheless, does social existence determine social consciousness or doesn't it?

So, we do not trust those in power and, therefore, we want to limit their power. Logical. Who sits in power? I will take a guess. People. We do not trust those in power; thus, we do not trust the people who sit there. Let us express the idea in a more economical way. Whom do we not trust? The human being. How does the doctrine of the separation of powers view the human being? After reading a whole host of literature on this subject, I have found few sources as regards the beginnings of the theory, shedding light on humans rather than power.

How is the human being depicted in this theory? Here the human being is not with a capital letter at all; here the human being is a subject not worthy of trust; he is evil or, at best, potential evil, as the theory of the separation of powers does not make any exemptions – everyone who has come to power must be subject to the mechanism of checks and balances. To sum up, the ontological basis for the theory of the separation of powers should read approximately as follows: a human being in power is a source of danger – prone to abuse, prone to infringements and prone to violate the rights of others.

Indeed, nothing else can be said but that this is a 'humane' theory – some sort of uncomfortable truth. That is why generally this aspect is gracefully circumvented. Now it is becoming clearer why the theoreticians of the separation of powers have written little about the human being. The focus is on the powers of the authorities and the search for a model of responsible – effective – governance within the system of the separation of powers. For example, we can recall the political and legal jostling in Lithuania regarding the appointment of one minister. Or, in this connection, we

can point to an example from Belgium, insofar as it has failed to form a government for more than half a year.

Niccolò Machiavelli regarded the human being only as a natural villain and, on that basis, developed instructions on how to use these human characteristics to an even greater advantage. The Founding Fathers of the United States had been engaged in long discussion on how the human being should be treated, as the outcome had to determine the content of the Constitution. The conception that the human being is potentially evil had won. Locke realised that 'every man is judge for himself',[32] i.e. that everyone will find excuses and arguments to acquit himself. Let us not be surprised at individual philosophers, as even Christianity, which has already surrounded all of them for two millennia, is based on the theory of human sinfulness – everyone has inherited sin upon birth into this world. It is true that we can discern moments of brightness or darkness (this judgment will be left to the discretion of the reader) in the philosophy of Immanuel Kant. For instance, Kant traces 'the moral law' embedded through metaphysics in each of us.[33] For such a human being, or society made up of such people, no mechanism of checks and balances perhaps is needed, as we would be able to trust them. But let us not rush. What kind of the moral law do people have in themselves? Is it a universal one or one determined by subjective existence? If it is universal, then everything is fine: we know how people will behave in power, as morals are universal; so, their choice will not contradict our morals, because they are symmetrical. Unfortunately, the universal nature of morals is plainly a utopian wish. Max Weber explains that everyone has their own moral law; therefore, even the worst outlaws have their own morals; morals may be contradictory; external morals may lead to particular things, while morals 'between brothers' may allow entirely different ones.[34] Some common areas in morals do not help the situation. Thus, not only according to Weber, we will not avoid a subjective factor in moral perception. Accordingly, does it suit us if anyone with a subjective moral law is in power? Thomas Hobbes states that, "in such diversity, as there is of private Consciences, which are but private opinions, the Commonwealth must be distracted, and no man dare to obey the Sovereign Power, farther than it shall seem good in his own eyes."[35] There is no other path; "value-based (moral) expression is possible through the subjective system of values of one who is interpreting"[36]. Here

[32] John Locke, *supra* note 9, 123.
[33] Imanuelis Kantas, *Praktinio proto kritika (The Critique of Practical Reason)* (Vilnius: Mintis, 1987), 46.
[34] Max Weber, *Protestantiškoji etika ir kapitalizmo dvasia (The Protestant Ethic and the Spirit of Capitalism)* (Vilnius: Pradai, 1997), 48.
[35] Thomas Hobbes, *Leviatanas (Leviathan)* (Vilnius: Pradai, 1999), 320.
[36] Gediminas Mesonis, *Konstitucijos interpretavimo metodologiniai pagrindai (Methodological Basis for the Interpretation of the Constitution)* (Vilnius: Registrų centras, 2010), 174.

is the answer to Kant – even a person into whom metaphysics has, according to Kant, embedded the moral law will have to be limited.

Let us summarise. The conception of the separation of powers is underpinned by the presumption that those in power can by no means be trusted; therefore, once they come to power, they inevitably have to be subject to the system of checks and balances.

On the one hand, many good things have been said in science, and not only, about human rights and freedoms and the need for humanism. Thus, it is no coincidence that the content of modern constitutionalism is an example of humanist triumph. On the other hand, it is only after we have clarified the ontology of the principle of the separation of powers that we can notice the major contrast in modern constitutionalism. The constitutions give priority to human rights and freedoms but, at the same time, albeit in a disguised form, they fix a lack of trust in human beings, by essentially asserting that human nature is dishonest.

Have you noticed this contrast? It is so skilfully disguised that even the most prominent sources, aspiring to doctrinal completeness, hardly clarify anything in this regard. Let us look at one of the most recent sources, whose authors *ex officio* deserve to be cited: *German Constitutional Law. Introduction, Cases and Principles* (Oxford University Press) – a weighty book, indeed. It is so impressive that it seems we will definitely find all the answers and all the doubts will be dispelled. And what do we find? What is said by the representatives of the German scientific doctrine about the separation of powers? It appears that in this thick book, this principle is allocated equally two pages, one of which contains the citation of the German Constitutional Court. At first glance, there is nothing to be excited about, but let us be patient, as the number of pages does not yet mean they do not contain important things. The first sentence, taken 'from heights' reads: "Separation of powers is the classical core of a constitution founded on the rule of law".[37] It sounds nice, but nothing more. The following page rejoices at the fact that the principle of the separation of powers is a product of the French Revolution, as well as affirms that the purpose of this principle is to ensure that state powers 'monitor and limit one another' and that there must be a balance between them.[38] The discourse of scientific thought is thereby completed, with only the Constitutional Court being quoted further. Let us not lose hope. It is our last hope. The German Constitutional Court states that the separation of powers, entrenched in Article 20 of the Basic Law *(Grundgesetz für die Bundesrepublik Deutschland)*, is a fundamental organisational

[37] Christian Bumke and Andreas Voßkuhle, *German Constitutional Law. Introduction, Cases, and Principles* (Oxford: Oxford University Press, 2019), 347.
[38] *Ibid*., 348.

and functional constitutional principle.[39] It would be pointless to continue citing the jurisprudence provided in that source, since the same has been mentioned on many occasions. Unless we can note that the German Constitutional Court acknowledged that the Basic Law does not require absolute separation (as if the scientific theory would have required it) but rather the mutual oversight, limitation and moderation of power. The moderation of power is a separate story, but it is not a matter of this article. In principle, it is clear that the above source provides nothing new.

Now, if we try to reiterate the ideologeme formulated by the theoreticians of the constitutional doctrine along with our ontological presumption of the principle of the separation of powers, how will this look like? This would read as follows: those in power can by no means be trusted; therefore, the separation of powers is a fundamental organisational and functional principle of the Constitution. It should be admitted that, although this is true and straightforward, it perhaps makes it possible to understand why the developers of jurisprudence have been silent about this presumption. This is a far too inconvenient truth.

For several reasons it is important, although somewhat unpleasant, to show this ontological level presumption. Only by having elicited this presumption, which is the basis for forming the need to separate powers, can we reveal a whole series of nuances and raise new doctrinal questions, which naturally unfold only if the presumption about human beings and their nature is not ignored. Consequently, what can be noticed which otherwise cannot be perceived unless we 'see' the ontological presumption of the separation of powers in relation to human nature?

First and foremost, if the principle of the separation of powers is dissociated from its presumption, a persistent methodological error is made. It is then that a purely instrumental measure – the separation of powers – is transformed into a purpose. The main focus of the scientific doctrine and jurisprudence is then shifted to the barely meaningful nuances of the mechanism of checks and balances.

It should be conceded that, if the presumption were reversed to the contrary, i.e. suggesting that human beings are fair, reliable and always honest, the separation of powers would become disproportionately costly, ineffective and lead to competitive backwardness compared to those countries that will not have it. The best example is a private business activity. Could you imagine a model of company management that would actually reflect Locke and Montesquieu's conceptions? Will you say that this is the case? Is it really not the owners of companies who have the legislative, the executive and judicial powers, or speaking in more simple terms – power from God?

[39] *BVerfGE 95, 1, 15 – Sudumfahrung Stendal* // https://www.servat.unibe.ch/tools/DfrInfo?Command=ShowPrintVersion&Name=bv095001.

If this presumption is ignored, we need the separation of powers merely because it is needed for its own sake. A conceptual theoretical gap becomes evident when the said presumption is recognised and then, at the same time, the self-serving nature of the principle of the separation of powers is ruined. The separation of powers is not an objective, but only a method. We do not need the separation of powers as an objective, but we need to discipline wicked people in power. Only if the presumption is not ignored, there is the possibility of looking for other, perhaps more cost-effective and more reasonable, models to limit those – wicked – in power. If the presumption is recognised, the separation of powers becomes one of the more or less proven methods, notably just a method. Once a principle turns to a method, it becomes desacralised. Furthermore, the peremptory nature of the ideologeme of the separation of powers creates one more distinct problem in the relationship between this principle and responsible governance (good administration). It is not infrequently that responsible governance is sacrificed in favour of the ego of the ideologeme itself.

If we uphold that human nature is such that, while in power, a human being is a potential danger, there is still another theoretical problem. Naturally, the question arises as to whether not everyone in power in the broader sense, i.e. anyone vested with authority, must be counterbalanced by means of the system of checks and balances. There are many administrative functions, among them very important ones, that do not fall within the classical tripartite mechanism of the separation of powers. And, after all, human nature, if it is vested with any authority, is the same everywhere. Yes, there is the system of administrative courts, but they are only relevant in a conflict situation. Administrative courts do not constitute a counterbalance in a prior-to-conflict, or day-to-day, situation.

In summary: on the one hand the idea that the principle of separation of powers bases on distrust of people honesty looks like a simple truism; on the other hand, this is not the case. It’s not an obvious truth for everyone; it’s a forgotten truth, it’s a truth that’s not very comfortable talking about. But this is an important truth. Just remembering this truth is an opportunity to analyze the principle of separation of powers only as a method and not an end goal. Without ignoring the presumption, there is no sacral space left in the doctrine of the separation of powers, because the method cannot be sacral. Sacred can only be a goal.

It is obvious that many problems come to face us once the ontology of the conception of the separation of powers has been revealed. Perhaps we should not have opened this box? After all, it is so easy and psychologically comfortable to believe that human beings are fair and honest and that we separate powers because this is an old and beautiful tradition, which we use, like a pearl in a crown, to decorate our constitutions. However, the risk of this discourse is low. Theoretical abstractions,

which acquired constitutional forms, have become similar to eternal ones. I presume that we will continue to live happily by considering the method to be the objective, while remaining silent on its actual purpose. Ultimately, this might be the path to peace and harmony in society, at least at this stage of human history.

CONCLUSIONS

The principle of the separation of powers is a theoretical abstraction that has become an ideologeme in the course of its development. Basically, the content of this principle is called into question in neither social nor academic discourse. The ideologeme of the separation of powers has been established as a constitutional principle and it serves as a basis for interpreting theories of an even higher abstraction level about democracy and the rule of law.

The practical separation of powers prior to Locke and Montesquieu's epoch should be treated only as the distribution of powers, expressing a specific balance of forces. The model of the separation of powers as developed by Locke expressed the conception that it is necessary to separate branches of government and that each of the branches should be vested with its own powers. In its conception, courts are classified as the executive, since they apply the effective law, do not permit derogation from it, punish for violations of it and, thus, enforce the law and ensure its operation. In Montesquieu's model of the separation of powers, courts are separated into an independent branch within the tripartite system of powers and are assigned with the administration of justice. This approach has remained prevalent until today, both in the scientific doctrine and in social discourse.

Although the theory of the separation of powers has become an ideologeme and, thus, a self-evident matter, some of its theoretical aspects are vaguely interpreted in the scientific and jurisprudential doctrine.

This theoretical uncertainty is linked to the following question: what do we have after all: one power divided into three branches, or three powers? Theoretical uncertainty is also evident due to the number of separated powers. Although the tripartite understanding of the separation of powers has been established, the search by both Locke and today's scientific doctrine for an optimal number of separated powers has, however, largely remained undenied.

The most prominent doctrinal uncertainty is to be associated with the ontological basis of this conception – its approach towards the human being. The basic ontological presumption of the principle of the separation of powers, according to which those in power cannot be trusted, contrasts with other ideologemes that glorify human beings, with the result that, in the scientific doctrine and jurisprudence,

the presumption of this ideologeme is not correctly voiced and can only be inferred from the context. The conception of the need to separate powers is based on the approach towards the human being and human nature and the fact that human beings generally tend to abuse their positions, do not act fairly, are not positive in nature, and cannot be trusted. Thus, those in power *ex officio* constitute danger.

If the presumption of the ideologeme is not ignored, a dichotomous contrast becomes apparent in philosophical and jurisprudential discourse. On the one hand, the human being, the measure of constitutionality, the rights and interests of the human being have special protection. On the other hand, human beings are most dangerous, especially if they are in power; therefore, a person is placed in competition with other similarly wicked human beings to counterbalance them. Attempts to make these uncertainties objective by reference to the text of the constitution of some country or the text of particular constitutional jurisprudence have been fruitless. This is a theoretical issue.

Since the theory in question is designed for the organisation of state authorities, the theory is vague as to the need for this principle to be applied in any other mechanism of governance. If the presumption is that human beings need to be limited, then in line with logical consistency, limitations are necessary whenever they are vested with authority.

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