The Principle of the Separation of Powers

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The Principle of the Separation of Powers

A Defense

Zoltán Balázs

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Contents

Preface vii

Introduction ix

1 The Principle of the Separation of Powers in Contemporary Political Theory 1

2 Separation of Powers Grounded in Values 31

3 Order and Articulated Government 59

4 Social Power, Political Power, and Political Authority 81

5 Government and Its Branches 109

6 Agencies, Constitutional Courts, Gray Zones, Federalism, and State of Exception 139

Conclusion 163

Bibliography 167

Index 000

About the Author 000

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Preface

The first version of this new conception of the separation of powers was presented at the 2014 World Congress of the International Political Science Association in Montreal. I developed and deepened it in the consecutive months. I had the opportunity to devote some extra time on this work at St Andrews University where I enjoyed a special grant of the Royal Society of Edinburgh. I am grateful to my home institution, the Corvinus University at Budapest and my colleagues at the Centre for Social Sciences of the Hungarian Academy of Sciences where drafts of the final version were discussed. Special thanks to Professor András Körösényi who was in many ways instrumental in bringing this project to fruition, to my anonymous reviewers, and to the Lexington Books and its staff who had confidence in a remote Hungarian scholar and with whom our cooperation was exemplary. I welcome questions and comments at *zoltan.balazs@uni-corvinus.hu*.

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Introduction

In contrast to the optimism of the 1990s, the horizon of the new century looks rather gloomy, as far as the cause of free, stable, liberal, and constitutionally solid democracies is concerned. The former optimism was based mainly on the fall of dictatorships, on economic growth (especially in relatively well-ordered states), and on the more and more efficient protection of human rights. However, economic growth was blocked by the crisis, and in place of former dictatorships new forms of authoritarianism have been mushrooming. In the worst cases, states' structures and institutions ceased to exist entirely. The efficient protection of human rights is impossible in the latter scenario. Authoritarian regimes promise greater security and strong leadership which, again, seems to threaten private autonomy by curtailing important human rights.

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Many scholars and political analysts find it especially worrisome that the worldwide rise of the authoritarian alternative seems to infect not only the "less-developed" countries but also those that have been considered as the core countries of liberal democracy. It is not only Russia or Turkey that have always been treated with suspicion as far as their constitutional qualities are concerned, and it is not only Czechia, Hungary, Poland and Slovakia, once regarded as successfully integrated members of the enlarged European Union, now being looked at with growing distrust, that explain the worries. The emergence of the new Right and the new Left, either in the form of a new, disquieting and nonconformist leaders (e.g., in the United States, the United Kingdom, Greece, and Spain), or in the form of spreading rightist movements and parties (virtually everywhere in Western Europe and especially spectacularly in Austria, Denmark, France, Germany, Holland, Sweden, Switzerland), or in the form of single issues brought to success (such as the referenda in Greece, Hungary, and the United Kingdom) seems to undermine the established political

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order and adumbrate yet another authoritarian phase in the history of "developed" nations. The deepest cause of the fears, worries, and often anguish is not these developments in themselves but the realization that democracy appears to lack the necessary means to prevent the massive onslaught of these movements, leaders, and ideas. The call for more democracy is at variance with democratic reality or the reality of democracy. What once seemed to be an inspiring and noble ideal looks today more and more a sinister one. Should democracy be contained? If yes, how, and justified by what?

To confront these issues, concepts and means of both normative and analytical political science have to be marshaled. In fact, during the regime changes that took place in the 1990s in Eastern Europe and elsewhere in the world, framers of constitutions usually took great care of building in institutional and procedural guarantees of the very survival of democracies. Historical failures such as the Weimar Republic were not ignored and much effort was put into thinking how such failures can be prevented. Constitutional courts proliferated and their rights were extended even in more established democracies. Internal autonomies were protected and enhanced: local governments, independent and semiautonomous agencies, national banks and other supervising, whistle-blowing, watchdog, and accounting institutions and bodies were established and/or strengthened. The European Union, with its multifaceted and multilevel institutional structure was often considered to be another safeguard against misuses of power by national governments. Democratic culture was taught at universities, middle- and high-level education was constantly reformed according to the perceived needs of a truly democratic society based on moral equality.

To some extent it is probably just because of the very imposition of barriers, checks, balances, veto powers, and international and EU superstructures on democracy that the new millennium saw the growing popular resistance against the restrictions put on democracy on behalf of itself. The dissatisfaction with the governing elites most certainly results partly from their perceived hypocrisy, from the contradiction between preaching more equality and more democracy, and restricting the immediate and clear enforcement of popular will. The grave crises, beginning with the economic one and culminating with the migration crisis and the political earthquakes that have been taking place within the Western world, have made quick, robust, and efficient political action desirable in the eyes of many people, hence the enforcement of popular will becomes a major expectation. Whatever blocks there are must be removed. After all, what else could be more democratic than the very essence of democracy?

Simply calling the emerging radical leftist and rightist movements and parties "populist" does not help a lot. In the history of political thought, at least up until the mid-nineteenth century, democracy was generally thought

to be a dangerous political regime to choose precisely because of its inherent populism. Arguments made against populism today are not dissimilar to arguments mounted against democracy once. For if the cornerstone of modern democracy *is* moral and political equality, then the will of the people cannot be but the aggregation of individual wills. And if the main principle of modern constitutionalism is the sovereignty of the people, then the aggregated general will (which is, as Locke argued, by necessity the majority of individuals wills) is in fact infallible (as Rousseau puts it) and there is simply no reason why it shouldn't be enforced immediately and directly. This is indeed very simple but clear and straightforward. This logic is, so to speak, the deepest political instinct that moves every democracy. Within this logic, all talk about barriers, blocks, veto powers, and so on looks either hypocritical (if the last reason is the preservation of democracy) or fundamentally incompatible with the moral and political foundations of democracy. Political theory and political theorists must be honest to make this as clear as possible.

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And it is here, so the assumption goes, where the need for an alternative logic becomes urgent. Instead of speculating about convincing arguments of how to defend democracy against itself, political theory should help political practice and public discourse refocus the issue. Instead of trying to argue for more equality and social justice which launches the logic of direct democracy and immediate enforcement of popular will, political theory should return to its traditional job and begin to discuss what it means to be governed in a generally acceptable way. It is not necessary to abandon the concept of equality, of course. But equality and indeed any other first principle ought not to be raised to the level of an absolute value that should and can guide all political action, including the most important type, that of governing. Being governed in a generally acceptable way is a no less deep or even deeper instinctive expectation within the political tradition where our political theory is also rooted than the demand that values of equality (and justice, autonomy, freedom, mutual respect, etc.) should be promoted and enforced.

An acceptable way of governing presupposes and involves, of course, respecting these values but also a number of others as well. Further, there is a presumption in favor of democracy understood as a bulwark against personal or collective tyranny. However, governing well and acceptably is a political endeavor that is not committed to democracy as an overarching logic based on a single value of equality. Being governed in an acceptable way appears to be normally a more fundamental and reasonable desire than a commitment to a single value or cause. Indeed, this may partly explain why so many people demand a more direct and immediate democracy (populism?) *and* a more competent and efficient government (authoritarianism?) at the same time. The two basic instincts often clash and many politicians and political commentators observe it with increasing awe and fear how free and autonomous

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individuals seem to succumb to the lure of a restrictive but efficient government. The right way for political theory to confront this state of affairs is *both* to take seriously the need for being governed fairly well and to explore and expose that logic of governing that blocks the force of tyrannical seduction without aggravating it by simply calling for even more democracy. Instead, concentrating on governing provides political theory with a wider scope that includes both the normative foundations of the political community and the daily business of politics.

Social or political contract theories or theories of democracy resemble one another in at least their logic, structure, and basic assumptions. There is no such relatively consensual, standardized approach to explicate good, orderly, and generally acceptable governing in political theory. However, as was proposed above, classic political theory can offer valuable help here. Beginning with Aristotle, the construction of government broadly understood was always conceived of in terms of different functions, procedures, principles, and even social classes, their interrelations and their participation in governing. Prominent ideas were harmonious order, a well-balanced inner structure, or serving the public good. Outdated and obscure as many classic arguments appear today, well-orderedness, checks and *balances*, separation of powers, and the rule of law are well-entrenched principles in modern constitutions as well that are all rooted in the classical tradition. Each of them is worthy of distinguished reflection and attention in view of the contemporary challenges that liberal and constitutional democracies must face.

However, it is the principle of the separation of powers that has some prerogatives here. First, it is more deeply grounded in tradition than the checks and balances; and secondly, it has always been considered a relatively clearly explicable principle, unlike the more shapeless, though of course very important, ideas and ideals of the rule of law and orderedness. But as this book demonstrates hopefully convincingly, the principle of the separation of powers is not only time-honored and fairly well articulated, it is extremely important for outlining a generally acceptable, and as it will be explained in more detail, *articulated* government. And if that is true then the principle is, in the first place, *not* a useful instrument to contain direct or populist democracy as well as authoritarianism. Rather, it entails a fundamentally important conception of how to construct a good government which by implication precludes both menaces, the vision of which haunts so many political theorists, analysts, and politicians today.

AQ 6: First, secondly, thirdly, ... and First, Second, Third have been inconsistently used when discussing about various concepts. Please suggest consistent usage.

Before introducing the structure of the book in more detail, let me make four general remarks on the political and legal theoretical context of the principle and the way it will be treated here. First, classical political theory is a great treasury here, because for Locke, Hobbes, Montesquieu, and Rousseau, the realities of power and governing were intrinsically tied to normative

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concerns with liberty, efficiency, and order. Nevertheless, the present account of the principle of the separation of powers is basically analytical. Classic authors are relevant and will be commented on insofar as their arguments and insights are either sound and convincing, or instructively and helpfully inconsistent.

Secondly, it must be recognized that the principle has been challenged from a number of angles. It is often said to be impracticable, seriously at odds with institutional realities, inapplicable to parliamentary systems and, at least in some books that were published before the onset of the current series of crises, it was considered even harmful (for hampering both the immediate enforcement of popular will and efficient political leadership: the two tendencies that are now rather being thought of as dangers). Taking issue with these criticisms cannot be spared; yet it is important to take them seriously and constructively, that is, to integrate their valid points into the defense of the principle.

Thirdly, it is also noteworthy that most accounts of the principle are strongly embedded in the American constitutional tradition and practice. The reason is the prominence of American legal and constitutional theorists within scholarly discourses. The trend is, therefore, the implicit identification of the particular American approach to the separation of powers with the general doctrine. Correspondingly, many exponents (again, mostly legal theorists) of the British parliamentary system have usually been wary of it, accepting the view that the principle is only virtually, if at all, present in the British constitution. True, Britain's membership in the European Union, marked more deeply by the more rigorously formalist continental tradition, has given an impetus to reflect on the validity of the principle in the British context. No wonder that some commentators on the British referendum to leave the European Union enlist among the reasons or causes of the decision the growing worry about the loss of the legal and constitutional uniqueness of the United Kingdom. Finally, the Australian experience with the principle has been generally and conveniently interpreted as falling in between the two major traditions. However, there is very little reflection in the English literature on other traditions and experiences with the separation of powers despite the ubiquity of it. For a very cursory overview of the world's constitutions demonstrates the centrality of the principle in constitutional thinking all over the world. Opening up an horizon broader than the American perspective and constitutional practice is therefore very much necessary from the point of view of analytical and normative political theory.

Fourthly, it is remarkable how discussions of the principle have almost entirely missed the evident possibility of connecting up theories of power to the principle of the separation of powers. On the one hand, it is perhaps Weber's long shadow over political and social theory that is responsible for

the neglect of power as a normatively justified and explicated aspect of governing. On the other hand, legal and constitutional theory is no less ignorant of power as a political and social phenomenon, identifying the notion of "power" always with "right" and "authority." Connecting up the two ways of thinking is essential to make a convincing argument in favor of the principle.

Let me now outline the organization of the book. It has three main parts. The first two chapters are largely critical of the existing accounts, critiques, and defenses of the separation of powers. However, as was said, many arguments and insights taken from them will be used in the present conception. The third and fourth chapters develop a political theory of articulated government and order, and argue for a separation of kinds of powers. The fifth and sixth chapters explain how the separation of powers as institutions of government, broadly understood, can be derived from this theory.

In particular, the *first chapter* offers an overview of the most recent comprehensive theories of the separation of powers as well as some further reflections on the development of the modern state and its institutions that discuss the principle. M. J. C. Vile's now classic formulation and account of the principle, with its clear normative ambitions, provides for an ample starting point for any further reflections. Richard Bellamy's and Bruce Ackerman's conceptions of the separation of powers are clear examples of revitalizing the principle and revealing its political theoretical potential to force theorists to dig deeper in the political constitution of society. The evolution and strengthening of the administrative state has made many theorists reconsider the principle from a different angle: is it still a viable means to constrain the state in general, and the executive in particular and if it is not, should we worry about the state? These questions have been answered in widely different ways and led to divergent conclusions. The state of art of the principle is, at least in this area, difficult to summarize. This again makes a more analytical approach necessary. In the last part of the chapter, three recent comprehensive theories of the separation of powers will be critically reviewed. Despite their shortcomings, Eoin Carolan's, Christoph Möllers' and Jeremy Waldron's theories contribute immensely to making the principle a more deeply grounded political theoretical device. Carolan and Möllers try to establish the principle in what shall be called here a substantialist manner by inferring it from the very basic concepts of individuals and their needs and rights on the one hand and the collective need of cooperation on the other hand. Waldron develops the idea of articulated government and tries to derive the principle from it. The reasoning of the book exploits these ideas greatly.

The *second chapter* examines the perhaps most prominent strategy of justifying the principle of the separation of powers. This strategy seeks to ground it in some basic political value. The idea is simple: separating powers is necessary to protect a fundamental value. Liberty is surely the most

time-honored value within the context of separation of powers. From Montesquieu to Madison, it has been a commonplace to argue that concentrated and centralized power is dangerous to both private and public liberty. This assertion needs to be discussed in some detail before the conclusion, namely, that the separation of powers is an adequate and necessary remedy for this calamity, can be drawn. Indeed, it is doubtful that this conclusion is tenable as it stands. Liberty is a highly complex concept and power is by no means always and inevitably a threat to it. Especially troublesome would be to argue that positive liberty is contradictory to power relations but even negative liberty is less antagonistically related to power than many are inclined to think. Moreover, the inference of the principle from the protection of liberty is also questionable. What follows from the need to protect liberty from power (once the validity of the assumption about them being antagonistically related to one another is accepted) is not the separation but the endless division of power. It is, on the whole, advisable to look for a different strategy to justify the separation of powers. Further values that tradition recommends include impartiality and functionality. Impartiality is undoubtedly an important value and requirement but it is difficult to relate to the separation of powers. What it presupposes is an impartial point of view, an institution or authority, rather than a "mere" separation of institutions, agencies, and officials. In contrast to liberty and impartiality, the value status of functionality is less obvious. But even if it is indeed a value, it may be instantiated by regimes that not only come short of a separation of powers but quite expressly deny it. As a fourth candidate justice is also discussed. It is rarely mentioned in the context of the separation of powers though John Rawls does propose a scheme of various institutional branches that serve to enforce his theory of justice. This scheme is, however, in deep conflict with the traditional account of the principle of the separation of powers. As a matter of fact, (social) justice is hardly a value that can be easily integrated into the principle which seems to be more an obstacle than a condition to a constitution that is based on the enforcement of social justice. The chapter concludes with a general observation that values constitute a ground for holding the principle that is too thin and instable. Values are not only crucial for justifying political action, political institutions, and public interests but are simply too many to provide for a coherent conception of governing and constitution making.

The *third chapter* begins the more constructive part of the book. It discusses the idea of articulated government and compares it to the rules of a game that is being defined in statu nascendi, by playing it. Justification here is understood as practical articulation. The "name of the game" is order, thus, the articulation of governing is engendered from the generic concept of order. It will be argued that order has two aspects, a natural one and a positive, creative one. Within the context of political order, the natural aspect implies two

requirements, the protection of and respect for minimum personal autonomy (of individuals) and the rule of law in the form of evident and necessary norms of cooperation. Given the complexity of social life, norms need to be refined, many of them must be flexible, and there is an expectation of some consistency of the legal framework of society. This is where the creative aspect of order is being invoked and relied upon. The chapter ends with a brief excursion about the general importance and consequences of making conceptual distinctions such as the one between the aspects of order and the two requirements prior to the theoretical move of separating institutions. The *separation* of powers as a legal-constitutional operation can and must be understood as having been grounded in some deeper *distinctions* that political theory is responsible for.

It will be the *fourth chapter* where the notion of power will be discussed in greater detail. The reason why theorists of doctrine of the separation of powers have largely neglected this issue is perhaps because the literature on power is truly enormous and formidable. Moreover, theories of power are often parts of even more grandiose social theories, a concise discussion of which appears to be a hopeless endeavor. In fact, however, what needs to be done is much simpler. Since the traditional account of the separation of powers takes it for granted that power is inimical to freedom or liberty, it is sufficient to point out what most theories of power agree on, namely, that this is just not the case. Power and liberty stand in an ambiguous relationship. Protecting minimum personal autonomy, for instance, both needs and generates power within the myriad interactions of social life. Most people have a very fundamental experience with power as an enabling, freedom-enhancing potential and another, no less fundamental everyday experience with it as a limiting, constraining, coercive force. It is this latter experience that worried Hobbes most and made him interested in creating *the* ultimate power in and for the commonwealth that would do away with this negative side of social power for good. However, his concept of sovereign power, as it may be called, will be shown to be defective. Inasmuch as it is and acts as power, it will either become a totalitarian force with which order in the present sense cannot be reconciled with, or one among the various powers of society which would make the theory inconsistent because individuals, on assumption, are expected to obey it unconditionally and not as one of the many forces in society. Besides Hobbes, Rousseau is an important thinker in this context. His views will also be discussed along similar lines. His theory of the social contract is even more explicitly centered on the concept of will. The consequences are pretty much the same, notwithstanding his normative disagreement with Hobbes: if and when the general will acts, it acts via the government which, however, looks like more and more as one agent among many. This is, again, inconsistent with the general logic of the social contract.

The solution is to distinguish, then, between social power and political authority, rather than power (general will, sovereign power). This implies, however, that the political authority which is necessary to justify government cannot be represented fully or perfectly by any real or natural agent in the polity. It remains more a kind of a fictional yet indispensable agent, a guardian, a representative of the natural sense of order who guarantees that minimum personal autonomy is protected and the rule of law is effective. Political authority is, thus, distinguished or conceptually separated from social power. What remains to be done is another distinction and conceptual separation: as Rousseau rightly observed, the government *is* an agent both within and above the political society. Its agency is rooted in will, that is, in having power over people. This is, however, not social but political power inasmuch as it is normatively oriented to the public good. Again, Rousseau is especially remarkable for suggesting a triadic balance of powers within the polity that includes the general will, the government as an agent and the social power held by the individual citizens. Although his theory is generally regarded as being hostile to the classic version of the separation of powers, this idea of balance brings us in fact close to a different understanding of it.

The *fifth chapter* outlines a conception of the principle of the separation of powers on the basis of the concepts developed in Chapter 4. It has a more critical and a more constructive part. The idea that social power, political power, and political authority can be thought of as being the core meanings of the various government branches appears to be logical, especially due to the influence of both the traditional and the contemporary formalist and functionalist accounts of the separation of powers. These accounts will be called here essentialist or *substantialist* ones. They have, however, hard time in explaining and justifying institutional reality on the basis of the separation of powers. Instead, the present conception of the principle makes use of the distinct kinds of power and authority in a *relational* manner. The legislative is where each force is represented equally, forming a sort of a balance. The executive is where political power and political authority are intimately connected but social power is excluded; whereas the judiciary is defined as the combination of political authority and social power, with the exclusion of political power. The present conception of the separation of powers articulates governing in a negative way, namely, by telling what the executive and judiciary should *not* do rather than in a way of (trying to) tell what it should do, in what its essence consists. This relational-negative account of the principle can be further refined by virtue of exploring the different types of accesses each branch has to the political authority which is present in each of them. Further advantages of this conception will then be discussed. And since common wisdom holds that presidential regimes are better representatives of the classical conception of the separation of powers than the Westminster-inspired parliamentary

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regimes, it will be instructive to find in the final section of the chapter that on the relational account of the principle parliamentary regimes qualify as no worse, perhaps even better than presidential ones as systems that separate the three important branches of government.

The *sixth* and final chapter deals with various issues related to and consequent upon the relational account of the principle of the separation of powers. First, the view that the undeniably growing and imposing number of so-called independent or autonomous agencies have developed to form a new branch of power will be discussed. This view has its own critics and many of the criticisms that have been raised will be accepted. It is not sufficient, however, simply to accept the claim that the executive branch controls these agencies. For there *are* such actors in modern states that enjoy a considerably greater freedom of action and policy formation (think of central banks) than government ministries or departments; and the supposed executive/political control over them varies heavily over time and across particular institutions. The more constructive view that is compatible with the relational conception of the separation of powers considers them embodiments or representatives of one or more *public interests* the determination of which is always a political issue. Since not every public interest is being debated at a given political moment, many institutions and agencies may develop enduring autonomy within the executive branch.

Another issue is constitutional review. It is here where the relational conception of the separation of powers begins to serve as a reliable compass, a normative measure of assessing how constitutional review is being institutionalized and whether or not it violates the principle and by implication the idea of articulated government. If constitutional review is an exclusive function assigned to regular courts, political power threatens with intruding and corrupting them. The judiciary as a branch where social power and political authority are combined will absorb more and more political power and become a sort of a duplicate legislative. If constitutional review is assigned to the special institution of a constitutional court which may be partly separated from social power, the tendency is rather that it becomes dangerously close to the executive branch. It is only the special relations of the judiciary to political authority that have a potential to keep such threats at bay.

The discussion of "gray zones" is devoted to the problem of how to determine where political authority ceases to exist, yet political power continues to influence and shape social power. This is the problem of how to draw the borders of the state or the government. Again, the principle of the separation of powers provides a useful tool to sharpen individuals' sensibility to this problem. The concept of *antigoverning* will be introduced and defined here to give form to the idea that social power is sometimes used to contain political power by finding and defining its limits by naming and carving out

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political authority. Simply put, individuals often reject, not in a theoretically refined way but as a principle, the intrusion of government in many affairs of their lives, including economic interactions, schooling or health care issues. Similarly, federalism, or more generally, the idea of governing within a vertically structured political framework, is a widely used technique of constraining political authority. The principle of the separation of powers gives here further guidance.

The chapter ends with a brief discussion of the state of exception. Contrary to the common view that the principle of the separation of powers is or should be suspended once such an extraordinary situation is declared, the present conception suggests that if constitutionality is to be preserved within such states of affairs, then the principle will serve as a point of departure for returning to articulated government. The extraordinary powers that the executive is used to possess in such situations must have some justification. The justification is that order must be restored. The extraordinary powers are conferred on the government by the legislative branch which, as a combination of social power, political power, and political authority, contains the germ of every government. Thus, states of exceptions, if they are constitutional (coups d'état excluded), are not about the *suspension* but the *constitution* of the separation of powers. In other words, they reboot the system of articulated government.

This final implication of the present conception of the separation of powers brings us back to the general context of the book. If the direct aim of offering an analytically well-established and normatively convincing conception of the separation of powers that takes critical arguments seriously is successfully achieved, then it is possible only because it is grounded in a broader conception of governing well. Developing and justifying such a conception is an eminent responsibility of political theory. The reason is not only that the very tradition of political theory commits it to do so but because the challenges raised by the rise of direct democracy, often labeled as populist democracy and authoritarianism, both in more established and developing democracies, as well as their strong interrelations oblige it. That is, the principle of the separation of powers is in need of defense not only for its own sake, or for the sake of its constitutional- and juristic applicability and practicability but also for the sake of correcting the increasingly popular understanding of democracy as a regime where the will of the people (the majority) must be always and immediately enforced; and for the sake of containing the belief that strong leaders, supported by the majority, are necessarily better governors and administrators. The author hopes that this book helps political theory better address these challenges in a timely fashion.

Chapter 1

The Principle of the Separation of Powers in Contemporary Political Theory

The doctrine of the separation of powers undoubtedly belongs to the most formative theories of Western political thought. Its history is usually told by referring to the most outstanding classic authors, beginning with Aristotle, with a special emphasis on John Locke, culminating first in Montesquieu's formulation of it, and then preserving this prominence in the thinking of the American Founding Fathers, especially of James Madison. In very general terms, it is contrasted with theories of unitary power, with Thomas Hobbes and Jean-Jacques Rousseau being the main, commonly cited authorities, though this rather summary interpretation of both authors have been challenged by some recent works. No wonder that this long history of such a controversial doctrine which, in addition, has ever been merged with other ideas of the respective author has not produced a simple consensus about its clear meaning. Formative and influential as it has been throughout the past three centuries, the doctrine of the separation of powers remains a remarkably contested conception.

There is no need, nor place here to recapitulate this long and immense intellectual history because others have already done this and the purpose of this book is analytical, rather than historical or exegetical.[1] What cannot be spared, however, is a cursory and critical overview of what appear to be the most significant positions in the current literature in normative constitutional legal and political theory. My purpose here is to capture the core of these positions in terms by which the present conception of the doctrine and its justification can be outlined and defended.

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THE PURE VERSION AND ITS REFINEMENTS

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From an analytical point of view, it is Vile’s now classic book on the doctrine and its relation to constitutionalism that it is perhaps the best point of departure. He offers a very clear and straightforward definition of the principle:

> It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a check to the others and no single group of people will be able to control the machinery of the State.[2]

He calls this view the pure definition of the separation of powers. The purity of the definition ensues from the clear concepts used in it and the structure of the definition. We have a reference to a basic political value, liberty; an assumed (though not explained) link between it and a purported institutional arrangement of the government; then a suggestion about the distinct functions of the three branches of the government that must be kept separate; then a further aspect of the separation, namely, the delineation of the branches in terms of persons and staff; and finally, a reference to the lack of an institution that holds unitary power over the state. This can be interpreted as providing for the missing link between the value of liberty and its protection by the impossibility of abusing any government branch to take over the state which, presumably, would jeopardize public freedom.

For Vile, the doctrine conveys a particular normative emphasis. It is important because it reflects a tradition of the Western political thought which is concerned about political liberty that has often been threatened by arbitrary government:

> For even at a time when the doctrine of the separation of powers as a guide to the proper organization of government is rejected by a great body of opinion, it remains, in some form or other, the most useful tool for the analysis of Western system of government, and the most effective embodiment of the spirit which lies behind those systems. Such a claim, of course, requires qualification as well as justification.[3]

Yet, he stresses that this definition is in certain ways inadequate: “The doctrine of the separation of powers, standing alone as a theory of government, has … uniformly failed to provide an adequate basis for an effective, stable

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political system."[4] This is why the doctrine needs to be amended, integrated into a larger conception of government which is informed by other principles such as the one of checks and balances or of mixed constitution. It follows that the doctrine in its pure form is practically untenable. A partial version of it is, therefore, to be preferred.

There is an unexplained but significant shift from the value of liberty to the values of effectiveness and stability. This shift occurs quite often in other expositions of the principle of the separation of powers as well. There has been little reflection on how the principle is capable of protecting various, potentially conflicting, values. It may or may not be true that the principle is an ample means to protect public freedom or efficient and stable government, and it may or may not be true that the values of freedom and efficiency and stability stand in conflict. To explore these issues, a political theoretical analysis is very much in need.

This is all the more necessary because problems with the principle begin to mount. First of all, it is a long and solid experience of constitutional countries, noted or lamented by countless constitutional theorists that practically every distinct function, that of legislation, execution, and jurisdiction, or more generally, of rulemaking, rule-application, and rule-adjudication are in fact exercised by each three major branches of government, though to various degrees. Hence, in practice, a one-to-one correspondence between functions and branches is an illusion. There is a whole range of embarrassing overlaps between government branches performing functions ascribed to only of them by the doctrine. Secondly, Vile himself takes the argument about the gradual decline of the practical separation of power branches seriously. The historical emergence of the administrative state was hailed by Jeremy Bentham quite a long ago, and whatever was still true about the branches of power working if not separately but at least following distinct logics, was more and more eclipsed by a single unitary state power in the nineteenth century. Finally, written in the 1960s, Vile's book was a reflection not only on the spectacular rise of the bureaucratic state but also on the more or less explicit contempt of Marxism for the formalism and legalism of the doctrine. In the face of these internal and external criticism of the doctrine, Vile's purpose was to preserve the principle of the separation of powers, defend it in the age of rise of the modern administrative state, take stock with the long experiences with its impracticability, and provide some tentative normative basis for it. Coming to his conclusions he professed his faith in the power of the principle:

AQ 2: The text "each three major branches of government, " is not clear in the sentence "First of all, it is a long ..."

> the functional categories of the doctrine of the separation of powers with their intimate relationship to the rule of law, the concept of balance which was essential element of theories of limited government, and the central ideas of representation and responsibility underlying theories of parliamentary government—all

> these continue to be important part of our intellectual apparatus. We still appreciate the ideal of moderate government, one which will avoid the extremes of any 'simple' form of State—an ideal to which the ancient world first gave expression. The demand for freedom from arbitrary rule, which dominated the minds of the post-Renaissance era, is also our demand.[5]

His solution was, thus, to concede to the need of curtailing the validity of the doctrine for reasons of its practical inapplicability, and reach out to other principles, the rule of law and the concept of balance, thereby implicating that the doctrine in itself is somehow even normatively inadequate. However, logic does not dictate that the supposed impracticability of the doctrine is a reason against its justifiability, and there is no normative reason that the doctrine must rely on the help of other principles to be defended. These further principles may be important for other, no less normative, reasons and may be intimately related to the separation of powers, yet it is of little help for the analysis of this principle if it gets entangled with those others right at the beginning.

In a more constructive vein, Vile proposed his positive interpretation of the doctrine. First of all, the legislative function is still relatively easy to demarcate from other functions, if for no other but purely legal reasons. Laws can be passed only by the legislature. This is, however, not merely legalism. Lawmaking involves not only the administrative authorities of the state but also the whole political machinery of negotiations, party politics, interest representation, and the peculiarly political points of view of how to win elections. This special emphasis on the political aspect of the doctrine enables him to shift the focus from functional, institutional, and organizational dimensions to the ethical dimension. The principle of the separation of powers is, in the first place, not a tool for exploring the institutional realities of modern constitutional government but a cornerstone of *political ethics*:

> Certain rules of behavior, *internal* to the group concerned, are as essential as the external rules imposed by the law. … The usefulness of functional analysis in these terms … is that only by this means can the reality, in some form, of a government by law be maintained. Once the external and internal restraints of the idea of functions and the rules they imply have gone, what else remains? (Original emphasis)[6]

Of course, as Vile implicitly realizes, no ethical conception can endure without a structure, without a distinction between good and bad, right and wrong. Therefore, he does try to suggest a more structured conception of the principle, which divides the primary and secondary level of the basic functions of a political system. On the primary level we find the relations between citizens and government as well as those between governments. The first type of relations is more or less what we may more conveniently

call the political one and which serves the purpose of controlling the government in general. On the secondary level we find the three usual functions (rule-making, rule-application, and rule-adjudication) plus the fourth one which he calls discretion and which covers the administrative activities of the state. A special emphasis is given to the courts that represent a unique authoritativeness *within* the government, being able to issue final verdicts. One may object to this conception that it is, in the end, nothing but the old and criticized approach of understanding the doctrine of the separation of powers in terms of institutions and functions. Vile's response may be found in his assertion that the four functions "are not closely tied to particular structures in the constitutional State, but the history of constitutional development in the history of the attempt, often hesitant and vague, to articulate government in such a way that a particular structure plays a dominant or important, but not exclusive, role in the performance of a given function."[7]

Vile's book richly demonstrates the various aspects of the separation of powers and offers a multifaceted approach to it. He touches on the problem of justification in normative terms (liberty, efficiency, stability, nonarbitrariness), relates the doctrine to similar ones (checks and balances, rule of law), points out the ethical dimension, and tries to link it up with the institutional and functional realities of governing. Of particular interest is his distinction between levels of government, or better, of governing because it suggests, though in a very rudimentary fashion, a separation of *spheres* that precedes the institutional and functional compartmentalization of branches and activities. Finally, especially important is his remark about the principle being a vehicle of some political knowledge and ethical norms, because it urges political theorists to reflect on the more fundamental relationship between the principle and the nature of modern political communities. Thus, it is by no means only by way of making tribute to this thoughtful book which discusses the principle constructively and comprehensively that it deserved a closer look but also by way of seeking and finding in it ideas that seem to have been more or less forgotten in later political and legal theory that is often critical or wary of the principle, without making an attempt to take up and continue Vile's tentative and implicit suggestion of integrating the separation of powers into a more general theory of governing.

POPULAR WILL AND THE SEPARATION OF POWERS

Nonetheless, there have been a few serious attempts to find a proper place for the principle in the general political theories of constitutional democracy. Vile's idea about the separation of political spheres appears, though without an explicit reference to it, in Richard Bellamy's no less influential work on

political constitutionalism. His conception of the separation of powers is not just a criticism of the original doctrine but in effect its complete reversion. He writes about a balance of power, rather than its separation that he thinks is largely vertical.[8] Republican in inspiration and intention, he proposes a more horizontal conception that

> supports the procedural account of public reason …, fostering rights and the rule of law far more effectively than the traditional notion of the 'separation of power'. For while this last works by multiplying veto points to minimize interferences with particular liberties or privileges that nonetheless may entrench domination …, the balance of power offers incentives to employ political rule in non-dominating ways by being responsive to the interests of citizens.[9]

Interestingly, his references to classical authors in this context are also different from the usual ones (Locke, Montesquieu). He cites Polybius and Aristotle, among others, who wrote about mixed constitutions and a balance of social forces represented in and by political institutions. This very old idea, Bellamy admits, could and did naturally give way to organicist, corporatist, traditionalist, and elitist constitutions as well. To prevent such outcomes, he invokes the concept of *pluralism* understood as a diversity of interests that pervades even the government:

> On this account, diversity springs as much from the choices of individuals as from innate differences between them. As a result, there is a multiplicity of groups, many with overlapping and occasionally cross-cutting membership. … Two features of this modern republican account of balance need stressing. First, it is a horizontal distribution of power. It involves either rival aspirants for power, as in competing parties, or rival centers of power, as in competing governments in certain aspects of federal arrangements. Second …, it offers the link between principal and agent that is lacking even in horizontal versions of the segmental model. For the rival power seekers or centers must recruit the support of a majority of the people to govern.[10]

Consequently but also interestingly, Bellamy warns that an exclusion of competition between government branches that the doctrine of a complete (pure) separation of powers appears to prescribe would easily result in poor decisions and a blame game insofar as each branch may blame another one or the others for its own failures, arguing that it lacks the necessary (type of) power to implement a good policy or decision. However, what a competition within government, broadly understood, exactly means and what a poor decision amounts to is not spelled out systematically. His example of the Supreme Court decision on permitting abortion, to which the recent decision of same-sex marriage in the United States can be added, might suggest an explanation.

These decisions hinged on one or two votes of a small body, with enormous consequences on the life of millions. This is, from his republican point of view, highly problematic. Each branch should be able to defend its decisions before the greater public and each would have a better chance to do so if its decisions faced the control and challenges of the others and, mainly of the citizenry. Thus, he writes,

> The key … must always be to multiply the groups with which power holders have to engage, forcing them to 'hear' and 'harken to' as many sides as possible. … By being checked by numerous other agents and agencies, an institution is prevented from becoming so much under the sway of any one of them. It can be responsive without becoming dominated.[11]

His ever-sharpening criticism of the doctrine of the separation of powers leads him to its complete reversion. We need to bear in mind, however, that for Bellamy the point is not to enhance the capabilities of governing, for instance, in the form an administrative state. His concern is not stability or efficiency that may, as Vile conjectured, stand in conflict with liberty. Rather, the *punctum saliens* of his conception is the de facto separation, or dispersal, of power and its preservation by means of *not separating* institutional power. Much like Vile, Bellamy opens up the original doctrine conceived of in terms of institutions and functions toward a different understanding, namely, a separation of power in terms of a pluralist society *versus* the government, implying that liberty is better preserved if this, as he says, horizontal separation is in the center. The internal separation of the classical functions and adjusting to government branches may serve merely technical purposes, and if they are taken too seriously, a sort of absolutist interpretation of the doctrine threatens. According to it, the distinct branches begin to impose their power over the others and, paradoxically, over society as well, unless constant popular control prevails. Such control is best organized if the different branches have to compete with one another.[12]

Bellamy's conception is adjusted to his republican presumptions which are highly normative. From an analytical point of view it remains somewhat obscure how competition between government agencies is to be imagined, what the purpose and prize of the competition would be (arguably, there is always a constant competition for power, prerogatives, influence), whether competition is really just a synonym for a dynamic balance and not a *terminus technicus* of a political theoretical conception. It is also not clear whether competition does not presuppose a relatively well institutionalized separation of government agencies *who* need some solidly defined institutional identity with enshrined competences to be able to compete with one another in the first place. In this case, a conception of the separation of power in terms of

institutions would prove to be indispensable. But these criticisms may be put aside here, and the positive message of the argument should be preserved. This is, as was pointed out, the observation that the classic understanding of the separation of powers that restricts the doctrine's purview to government branches and functions can and probably should be reconsidered and the wider reference to the polity as a whole needs to be taken into account. This is especially important because the value of liberty which has always been cited as one, if not the main, normative idea behind the justification of the separation of powers invites this opening up of the perspective. If the value of liberty lies behind the principle of the separation of powers, then it lies behind a lot more other principles that inform our vision of constitutional government.[13]

In a long essay (practically, a book) Bruce Ackerman outlines what he calls the new separation of powers.[14] He grounds his conception in three legitimating ideals, namely, democracy or popular government; professional competence and impartiality; and the protection of fundamental rights. As a well-known defender of parliamentarism which has always been considered to be a system deficient from a clear separation of power of view, and a critic of the American-style presidentialism which is traditionally associated with a purest possible embodiment of the doctrine, much like Bellamy, Ackerman wishes to give a new meaning of it within his constitution of constrained parliamentarism. There is no need here to rehearse his criticism of what he thinks are inherent problems with the US Constitution.[15] These criticisms are probably also controversial on many counts but what is significant in the present contexts is that in spite of his objections to the American system, Ackerman acknowledges that American politics is so deeply imbued by the intricacies and indeed, intrigues between the three major branches of government that they have by now become "second nature to Americans, providing a grammar of legitimation that has allowed citizens to define, and sometimes to decide, matters of fundamental importance over the generations."[16] The point is reminiscent of Vile's remark on the epistemological and ethical dimensions of the principle of the separation of powers but it goes even deeper. For it does not affect only the ethic of government, indeed, of governing as it is being done by politicians, judges, and public officials. It includes the whole citizenry, suggesting that the principle may be more than just a tool of constructing constitutions, though Ackerman himself deploys it for exactly that purpose.

His basic concern is similar to that of Bellamy. It is that a strictly enforced functional and institutional separation of powers envisaged by presidential systems tends to block the free action of popular will. It does not do so always, for political circumstances may enable a political force to dominate both the legislative and the executive branch. However, this is a relatively rare event and because of its rarity, such a temporary and usually short-lived

unification of the two branches tends to cause great repercussions within the system: "In an effort to destroy its competitor, one or another assaults the constitutional system and installs itself as the single lawmaker, with or without the redeeming grace of a supportive plebiscite."[17] In contrast to Bellamy's point about the potential benefits of a competition between the branches of the government, Ackerman thus considers it a threat to the normal and desirable articulation of the popular will.

It is interesting to see how an argument derived from the need to represent popular will can cut in opposite directions, yet both lead to the rejection, or at least a substantial revision, of the traditional doctrine of the separation of powers. On the one hand, we have a position that envisions a thrilling competition between government agencies and institutions for the favors of the public, which presupposes limiting the strict enforcement of the principle. On the other hand, we have the view that competition is bad because it causes a kind of predatory behavior in the respective government branches, and often results in a temporary but total victory of one single power or political will which is, again, an argument for the limitation of the enforcement of the principle. Obviously, such contradicting positions cry out for a more systematic re-evaluation of the principle itself.

In any case, Ackerman's own proposal for the "new separation of powers" starts out from the assumption he shares with Bellamy, namely that popular will and the government need to be distinguished between in the first place and be considered two centers of power. But whereas Bellamy sees this division as a principal-agent relation, where the principal (the people) rightly wants a sort of supreme control over the agent (the government) that the separation of power within it may block, Ackerman is more wary of a system where popular will can prevail without any restraint. "It is wrong … to suppose that every electoral victory marks a broad and deep mandate from the People for the leading proposals set out by the victorious party or coalition."[18] However, as was argued, the American style of constraining the unrestrained power of the popular will by the principle of the separation of powers being rejected, Ackerman seeks different veto points, so to speak, within his parliamentary alternative. His "new trinitarian formulation" distinguishes three agents, "parliament plus the people plus the court."[19] Parliament as the legislative body does not need much argumentation, though Ackerman does think that a bicameral version is preferable to the unicameral one. "The people" is institutionalized by a fine-tuned system of referenda. By "the court" he means mainly the by-now classic institution of the constitutional court. Popular control is evident in the case of referenda and parliamentary elections. The constitutional court is expected to protect individual rights in the first place. Quite remarkably, yet obviously in accord with the parliamentarian presumptions of this conception, the formula ties up each "agent" to the legislative process,

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broadly understood. The traditional functions and branches of execution and rule-adjudication do not receive commentary.

Ackerman's argumentation is not always convincing and clear. He seems to insist on a "trinitarian" approach that contains two institutions and a non-institution (the people); but also argues that there is no need to stick to an institutional triad, after all; and it also seems that what he has in mind are, in fact, certain political theoretical ideas of democracy, private/human rights, and the need of an integrated and coordinated government. It is by no means clear in what sense and in what ways the new separation of *powers* refers to and why the traditional doctrine needs to be abandoned. Notwithstanding this inconclusive and ultimately unpersuasive criticism of the classic principle, Ackerman helps refocus the issue, again, in a more political theoretical context. What emerges as a positive lesson out of his discussion is a vague but important message that the principle of the separation of powers could and should be anchored both in an institutional and in a more theoretical context, and that the two contexts, perhaps spheres of action, need to be linked up.[20]

THE TRIUMPH OF THE EXECUTIVE AND THE RISE OF AUTONOMOUS AGENCIES

Much as recognized and predicted by Vile in the late 1960s, the rise of the administrative state has not stopped. Theorists who considered the principle of the separation of powers still a worthwhile idea have ever been struggling with how to reconcile it with the growing dominance of the bureaucratic dimension of government and the question of whether it is still under control. As it happened, sharply different positions were developed in the past decade. A frontal assault on the principle and its sensibility was launched by Eric Posner and Adrian Vermeule:

> normative theorists should cease bemoaning the decline of Madisonianism and instead make their peace with the new political order. The center of gravity has shifted to the executive, which both makes policy and administers it, subject to weak constraints imposed by Congress, the judiciary, and the states. It is pointless to bewail these developments, and futile to argue that Madisonian structures should be reinvigorated.[21]

They justify this almost ruthless dismissal of the principle of the separation of powers by two main arguments. First, they argue that it has never proved itself indispensable for preserving something valuable. For instance, separating powers does not amount to creating a competition for power that could be as beneficial to the commonwealth in terms of administrative efficiency as

Balazs_9781498523349.indb 10 11/5/2016 2:57:08 PM

is (presumably) a market-type competition in terms of economic efficiency.[22] Rather, the social costs of maintaining several separate branches of power are pretty high. Secondly, the principle does not keep the public more informed on who does what. The principle may as well increase informational uncertainties. The presumptions behind these criticisms are, thus, that the principle would or should but cannot reduce social costs and/or provide the electorate with essential information of the political process that would be otherwise more difficult to obtain.

Briefly, they also note a third possible normative reason for defending the principle: this is liberty. However, it fares no better in that role. The authors contend that

> our conclusion that the erosion of checks and balances has promoted national welfare is relatively uncontroversial in the political science literature, though the point is rarely put in this way … liberty has advanced as a result of this concentration of power … the demise of liberal legalism, of the separation of powers, even of the rule of law itself, need not imply autocracy; across nations, a wealthy and educated population is a strong safeguard of democracy.[23]

If we want some more generally applicable arguments besides these sociological (as they write, demographical) and very American (hence contingent) ones, Posner and Vermeule suggest that modern media and party politics, as well as the rational interest and need of creating and maintaining *credibility* on the part of the executive, are sufficient and reliable guarantees against the tyranny or the potentially tyrannical excesses of the executive.

In a detailed criticism of their book, Richard Pildes pointed out that Posner and Vermeule built their whole theory on the assumption that acts of presidents, as those of anybody else, are constrained only by self-interest.[24] Legal or institutional barriers are practically useless. This is a bold and general assumption that, Pildes argues, does not help us understand what is happening and why. If Posner and Vermeule admit that the presidents contain their own lust for more power for reasons of popularity and credibility, why could not it be argued that popularity and credibility are tightly connected to acting in accordance with norms and the principles of governing, including the principle of the institutional separation of powers? Further, even if presidents and the executive branch tend to look out for legal holes, and create, wherever they can, such holes, they also need strict legal rules to use them as excuses for failures and inaction which, of course, can indeed function as efficient legal barriers. In reality, rules can be vessels of as well as barriers to power. It just pertains to the logic of rules and norms that even if they are created to enhance power, once created, they have their own lives. What one would need is to look into the minds of, say, the top officials of the executive

AQ 3: Please reword the sentence “Further even ...” for clarity.

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branch, with the president in the first case, and see how they think about the constraints of their actions. These constrains do not only include explicit rules but, and this is a point where Vile's reference to political ethics may be recalled, a less well articulated but very robust sense of the separation of power. Pildes asks us to consider a possible scenario that summarizes the basic argument well:

> As a matter of policy, President Obama has an announced preference in favor of raising taxes on the wealthy, but one can safely assume there has not been any internal executive branch discussion of attempting to do so unilaterally, given the clear legal and constitutional understanding that the President cannot alter tax rates on his own. Having so internalized the anticipated response to a presidential declaration of unilateral authority to raise tax rates, President Obama and his advisors are unlikely even to consider, let alone discuss, let alone seriously debate, the assertion of such authority. If Posner and Vermeule were to say that it is not the lack of constitutional authority that is stopping the President here but rather his recognition that the courts or Congress or the public would revolt were he to attempt to do so, we are then just dealing in empty word games.[25]

Thus, far from being invalidated by history and certain empirical observations, the principle of the separation of powers might influence as strongly as ever the minds and thinking of political actors, and why not, of ordinary citizens as well. Posner and Vermeule's book declared the principle outdated, unrealistic, impractical, and at best useless but in fact harmful. Yet, they also argued that the unbound executive remains bound by popular control, thus acknowledging the potential harms and dangers of the uncontrolled control of the executive over the state. This is obviously a deep contradiction, at least on the level of political attitudes. However hard the assault on the principle was, and summary its abandoning, political theory, as I showed, has already anticipated a different line of defending it which is also implied by Posner and Vermeule's suggestions about the workable and reliable checks over the government. The executive is very much part of the polity, not only of the government. As Pildes points out, though tentatively, popular control is partly a matter of a valid and observed rule of acting as the principle of the separation of powers prescribes. Thus, the principle may have deeper normative roots than just governmental efficiency and crisis responsiveness. It is directly related to credibility and through it to the very idea of being governed in ordered and predictable ways.

AQ 4:Please check for completeness of the sentence "The e... ive ..."

Though Posner and Vermeule seem to dismiss the idea of the principle of the separation of powers as being *informative* of what happens in the political sphere, and thus more deceptive than truthful about political realities, their solutions to how to constrain the executive efficiently lack the institutional and structural clarities that the principle of the separation of powers offers.

Balazs_9781498523349.indb 12 11/5/2016 2:57:08 PM

They also try to look for "some conceptually coherent mechanisms of executive signaling" (of there being credible constraints),[26] but it turns out that these mechanisms are in fact techniques of building credibility less for the government and more for the chief executive. Such techniques have ever been part of exerting power deftly and discussed by many classic authors, Machiavelli being the main authority. But arguably, truly structural, institutional, and principled solutions to the deepest concern of a polity are preferable to power techniques adjusted to the personal and circumstantial political needs of the chief executive.

There is another possible objection to the principle, restricted still to its classical context of government branches that recalls Vile's earlier worry about the administrative state. Is it not the case that a new, independent, administrative branch is emerging and the executive power designated to control it loses its control? In fact, politicians in the executive often complain about the autonomous, self-propelling bureaucracy they are supposed to run and use as the "rule-application" machinery. The real trouble is not an unbounded executive but an unbounded administration without the control of the executive.

Limited to the US case, S. Prakash offers a very painstaking legal historical analysis of the thesis and concludes that the story about the presidents gradually losing control over the administration is a myth:[27] "The president is not merely an 'overseer' but a 'decider' and a 'doer.' Put simply, the president is an executive."[28] And arguing with Martin Flaherty,[29] he refers to the principle of the separation of powers, contending that

> In Flaherty's world, though the founding generation affirmed that the legislative power is the power to make laws, the executive power is the power to execute the laws, and the judicial power is the power to decide cases according to the laws, each of these powers had an imprecise core meaning and a periphery even less well-defined. If one cannot define these powers with any level of precision, however, a separation of these powers is impossible. When it comes to words, core definitions are what make 'separation' possible. In a perverse way, Flaherty makes separation of powers more flexible and less rigid by obliterating the concept of separation altogether.[30]

In fact, Prakash argues, the executive branch is pretty much definable and hence there is no reason to suppose that it, or in effect the President, is unable to control it.[31] For Prakash, a legal theorist, the precondition of control is a clear legal state of affairs. For a political theorist, however, only effective power qualifies as real power and the separation of powers is clearly more than a matter of legal definitions. It is a legitimate question of what it means to "execute" laws, especially in view of the fact that the chief executive and his or her closest cabinet members are politicians who do not consider

themselves merely officials of the state. The debate about the role and nature of the executive cannot be ended with simply exploring and concluding what the framers thought and wanted. Even if it is true that the executive exerts effective control over the administration which is, therefore, not an independent branch of the government, contemporary political and administrative theory have demonstrated abundantly that there are many differences in terms of logic, ethic, attitudes, and the like. between political chiefs of the executive and the organizations, agencies, and bureaucracies they run. The principle of the separation of powers must take stock of this difference, too.[32]

Whereas the historically undeniable and impressive rise of the executive branch made Posner and Vermeule wary of the tenability and democratic usefulness of the principle of the separation of powers, coming to its wholesale rejection, Frank Vibert argues vigorously that the truly important development is not superpower of the executive but the emergence of the independent regulatory institutions.[33] In his view, this sphere of autonomous agencies signals the formation of a new branch of government. For him, the principle should not be dismissed because it helps us identify and capture this development in terms of political theory by arguing both for the existence and the normative independence of this new branch. His argument, put in a nutshell, is the following.

AQ 5: Please break the complex sentence “Whereas the ... institutions” into two simpler ones for clarity.

Like Posner and Vermeule, Vibert also thinks that the well-informed citizenry is the safest guarantee against possible abuses of governmental/executive power. To ensure this, institutions that he calls unelected bodies are indispensable.[34] There is some continuity here with the separation of the classical branches of power considered from a historical perspective: politicians and governments try to avoid blame and improve their credibility. The emergence of unelected bodies fits in this historical trend. The concern and the target are the same: the governed.

Being well-informed, according to Vibert, means that we know the difference between *facts and values*. Most unelected bodies are concerned with gathering and assessing facts though some are meant to represent one or a few values deemed important by their framers. Even if facts and values are intertwined from a philosophical point of view, which Vibert admits, there is a difference between unstructured, unconstrained, chaotic debates and more structured, empirically controlled, professional discussions that serve the long-term interests of democracy better.

The putative new branch has a structural resemblance to the judiciary. It, too, lacks democratic accountability but not legitimacy. As the law, or the rule of law, legitimizes the judiciary that does not have to resort to direct democratic supervision, unelected agencies gain their legitimacy not from elections but from their expertise, knowledge, and professionalism.

Balazs_9781498523349.indb 14 11/5/2016 2:57:08 PM

His argumentation boils down to the following three theses: (i) a new branch of power has emerged; (ii) its legitimacy is based, ultimately, on enlightening and educating the electorate by providing it with reliable information concerning facts and sometimes values; and (iii) since it is unelected, this makes it similar to the judiciary.

The internal structure of the executive branch as related to the principle of the separation of powers will be discussed Chapter 6. It is sufficient here to raise two or three objections and leave them spelled out later there. First, much as Posner and Vermeule, Vibert does not really believe in the normative power of the principle of the separation of powers: the new branch is for him a means for checking the executive (more efficiently than the legislative branch). Yet the public or the electorate considers many of these institutions most probably agents of the government, over which it/they have no practical control. They—as a matter of fact, we—must put our confidence in the autonomy and "value-free" judgments and evaluations of these institutions in the very same sense we are expected to trust our elected governments. Secondly, such agencies are not very dissimilar to the classic state bureaucracy that is also more or less "independent" from the direct political influence, yet always under political control. Means and ways of political control over bureaucratic organizations vary but these are no more transparent and structured than the techniques of building trust and credibility in and for top politicians.[35] Thirdly, these agencies hardly compose a singular "branch" in the classic, definable sense that Prakash, for instance, contended.

We may conclude this section by first noting that much of what Posner and Vermeule, as well as Vibert have to say is primarily a commentary on some spectacular phenomena of the modern state, in particular, the growing control of the executive branch and/or its political leadership and the emergence of a wide variety of autonomous or semiautonomous agencies or non-elected bodies within the state bureaucracy. Secondly, besides the valuable case studies both books offer, they wish to say something fundamental about the principle of the separation of powers. Posner and Vermeule dismiss it as a bulwark against tyranny of the executive branch. They think that tyranny is a de facto nonexistent threat (at least in the United States) but also argue at length that there are other safeguards and checks against abuses of executive power. There is, however, the possibility that these checks are partly mere techniques of manipulation and partly accidental occurrences. Credibility of governments and transparency of power exertion, the deep concerns of political theorists like Vile, Ackerman, and Bellamy, may still be a matter of a principled governing that is responsive to the ideas and expectations of the citizens which may, and will be argued in this book, may justifiably expect that public and governmental power is constrained, structured, and

predictable. Finally, Vibert's analysis of the autonomous agencies is highly interesting, and he does embrace them as a new checking system against the abuses of governmental power (including legislation and execution), thus bringing in popular control once again. But the status of this putative branch is both conceptually and normatively questionable (this will be explained in Chapter 6). Nonetheless, a solid justification of the principle of the separation of powers must needs to reflect on these developments and arguments.

NEW COMPREHENSIVE THEORIES

A New Scheme

As it was pointed out in the *Introduction*, the bulk of the contemporary theoretical literature on the separation of powers is very strongly connected with the American experience and constitutional history. With the European integration going on and going deeper and deeper, with new institutions set up at the Union level, and legal developments in individual countries related to the common law of the Union, European legal and constitutional theorists have tried to interpret these developments within the doctrine of the separation of powers.[36] Many interesting observations have been made, some of which will be cited wherever relevant, yet for the purposes of this book it is much more important to focus on the more comprehensive approaches to the doctrine that seek to establish it within the normative spectrum of political theory. Three attempts deserve special attention.

Eoin Carolan also begins with a criticism of the classical theories of the separation of powers. More or less in line with the republican-popular control approach, he also stresses the importance of starting out from a deeper level than the usual functionalist-institutionalist approach does. *Insisting* on it is like free floating on sea with an impossible task of navigation: "The use of the tripartite model necessarily involves a choice between the Scylla of subjective inconsistency and the Charybdis of arbitrary determinacy."[37] Unless we are sure what values the principle should protect (liberty, efficiency, impartiality, the public interest, or control), it makes no sense to engage in constitutional deliberations. Institutions ought to be clearly derivable from the values and principles of the political community.

> [A]n institutional theory, through its reliance on notions of public reason and justification, plays an important part in supporting and shaping the shared normative values of a state. The way in which the institutions openly invoke and employ common communitarian principles affirms the foundational status of these values, whilst simultaneously encouraging citizens to continue to rely on them in any future interaction with the state. It is essential that this process of

> institutional exposition sufficiently inform the public about the nature and characteristics of these constitutionally central values. The separation of powers, however, has been shown to lack such specifics.[38]

Taking seriously the rise of the administrative "branch" of the government expounded in the previous paragraph, Carolan also shares the view of those who think that this is a challenge to the traditional understanding of the doctrine of separation of powers:

> The traditional solution to this dearth of bureaucratic accountability has been to identify the offending administrative agency with one of the three 'legitimate' Montesquieuian organs of state. Administrative bodies obtain a form of parasitic legitimacy, finding normative justification in the authority of their parent institution. Any capacity for independent decision-making on their part is denied.[39]

The solution cannot be a legal theoretical declaration that the executive is by definition in full control of the administration. Rather, this branch needs its own direct legitimacy.

The requirement of legitimacy places the problem into a broader political theoretical context. Carolan writes that "[c]onstitutionalism's political utility … derives from the extent to which it supports the existence of a unitary sense of social consciousness."[40] This stands in contrast to the inherently divided social life of individuals. The administrative state derives its broad legitimacy from its tending to the legion of individual needs citizens have. Its authority, like that of any other branch, stems from sovereign will of the whole.

The new theory of institutional separation is, thus, based on a two-pillar conception of legitimacy. Every branch needs to have its own pillars firmly fixed, one in the sovereign will and the other in the public interest it serves. Courts are meant to serve public interest by resolving private conflicts. Governments (legislation and the executive) are expected to set and achieve public interests in the proper sense. As for the administrative branch, Carolan distinguishes it from the executive on the basis that it no longer works as a simple transmission belt (or a series of such belts). Rather, "[t]he idea here is that, at this discretionary state, citizens with relevant complaints … can register their objections to a proposed course of action. Thereby better informed about the probable actual impact of general provisions on specific individuals or groups, the administrative official can amend a decision accordingly."[41] Administrative agencies are and act, thus, to some extent as courts (much as Vibert thinks) and to some extent as the executive. They are there to make particular decisions as judges do, yet they are also free, unlike judges, to refuse to take into account private interests by reference to the public interest.

An example can be, so one may think, the administrative decision of the police on where and how to permit a demonstration to be organized. Such a decision affects only certain groups, in an extreme case, a single individual. The police are required to appreciate the right to hold demonstrations and permit it within the limits set by the law. However, the law gives a certain room for deliberation to the administrative decision maker based on what the actual public interest prescribes and demands.

Carolan concludes that "[t]he individual … can be said to have a *trichotomy* of interests in the establishment of the state: the abstract pre-social interest in successful collective action; the abstract pre-social concern for individual protection; and, additionally, a partial desire for the concrete advancement of her particular real-life position" [italics added].[42] The triadic formula of the old theory (rulemaking, rule-application, rule-adjudication) is completely reconsidered, or better, replaced by a new formula which focuses on the pre-political state of nature where individuals realize themselves as having abstract needs, namely, a protection of private life, of government (collective action), and some goods that cannot be provided unless social cooperation is functionally and efficiently organized.

AQ 6: Please confirm the insertion of closing double quote in the sentence "Carolan concludes ...".

Carolan's theory is very welcome as it promises to ground the principle of the separation of powers in a sufficiently broad political theory which is not committed to republican or popular democratic political philosophy. His idea to launch the discussion from a pre-political state is particularly exciting. However, neither his terminology nor the construction of the argumentation is entirely convincing. What is clear is the double interest everyone has both to protect privacy and to have some organized control over society (government), yet what the "concrete advancement of particular real-life positions" involves is not sufficiently clear. This should serve as the basis for the administrative branch, yet our need for having social benefits cannot be simply equated with some administrative functions. Many social needs or "particular real-life positions" are fairly well served and provided by civil associations, networks, and market agents. State administration is but one of the service providers, if it is indeed such an agent. Yet again by way of repeating the point that was made (though not yet outlined) against Vibert, it would surely be an exaggeration to declare the compound of these agencies a separate branch of power. Of course, nongovernmental agencies do not possess discretionary power over individuals, but then governmental agencies *with* the required discretionary power are just parts of the government.

It also remains obscure how the other pillar, the link to the sovereign will, is to be conceptualized in the case of this branch. No matter how remote certain government agencies are from the everyday business of politics, their authority and legal power comes from the legal order approved of by the legislation and controlled by the executive. It seems to be a still open question

whether the administrative branch is truly independent of the other ones, and on a par with them.

Carolan seems to hold that the "abstract" needs to protect individual freedom and to secure successful collective action (cooperation?) as contrasted with the concrete needs of individuals are somehow foundational for the state that rests on the principle of the separation of powers. It is certainly possible to talk about abstract ("general" would perhaps be a better term) needs or interests of the polity in political theory and also to contrast them with personal desires, preferences, wills of individuals but it is difficult to see how these distinctions yield the different branches of the government. The need for individual protection (why pre-social?) is hardly something that only the judiciary should provide for, legislation and constitutional courts (perhaps jointly) are as much important. Successful collective action involves presumably legislative and executive functions as well. And as was argued, the many individual desires and needs we have are, again abstractly, not provided only by government agencies.

Briefly, even though the idea of looking at the fundamentals of the polity first before the principle of the separation of powers is introduced is sound and promising, the inference of the principle from the three abstract political (or pre-political) needs of the individuals, and its immediate application to the institutional structure of the modern state, is too quick and questionable.

Articulated Government

One of the most influential contemporary political theorists, Jeremy Waldron has outlined his assessment of the principle of the separation of powers recently.[43] As does this book, he also explicitly aims at exploring how the principle can be justified normatively. He, too, begins with a reflection on some fresh contributions to the discussion about the principle noting that most of them are more or less critical and dismissive. Responding to John F. Manning's critical article on the presence or the derivability of the principle in and from the US Constitution,[44] Waldron remarks that legal and constitutional theory *of* a particular constitution is to be distinguished from a political theory of the principle, much as a theory of democracy is different from an analysis of a particular democracy. Waldron's insistence on the difference is welcome, yet as was shown, political theoretical reflections on the principle have been though sparse but not entirely lacking. His position is pretty much in accord with Vile's and Ackerman's views on the political importance of the principle:

> By saying we should treat the separation of powers as an important political principle, albeit a non-legal one, I do not mean to say that it has merely 'moral' force, as though it were just something a particular theorist dreamed up. …

> The principle of the separation of powers has a powerful place in the tradition of political thought long accepted as canonical among us.[45]

Waldron then considers some time-honored reasons for the principle and argues that some of the reasons are perhaps better captured by other principles such as the rule of law or the checks and balances. He concludes that "[t]he distinction of powers under the Separation of Powers Principle … is given to us by a theory of articulated governance, which distinguishes these functions for what they are, not what they can do to hold one another in check."[46] The idea of articulated governance is the key to understanding the importance of the principle and, by implication, to justify it. Waldron also discusses some classics, in particular, Locke's, Montesquieu's, and Madison's (sometimes, as in the case of Locke for instance, not entirely explicit) arguments for the principle but finds them wanting in the final analysis. Montesquieu and Madison are entirely useless for Waldron in defending the principle. Of particular interest for the idea of articulated government that Waldron thinks is germane to the principle is, however, are Locke and Hobbes' theories.

AQ 7: Please confirm the inserted closing double quotation marks in the sentence "He concludes that ..."

Hobbes' conception is, of course, not the locus classicus for a defense of the principle. Yet Waldron argues that Hobbes had a fairly rigorous conception of *how* to exercise power (no matter that it was unitary) in a differentiated way. A similar argument is found, Waldron insists, in Locke's *Second Treatise* where the usually overseen distinction between federative and executive powers is discussed. Waldron concludes that

> So even if the powers are placed in the same hands, it is going to be very important for people to be extra clear in some other way about the distinction, lest the inherent lawlessness of the federative power *infect* the emphatically law-governed nature of the ordinary (as opposed to the prerogative) actions of the domestic executive. (italics added)[47]

The term "infection" is particularly strong and it is probably meant to sharpen the distinction between the (supposed) "inherent lawlessness" of foreign policy and the no less inherent lawfulness of domestic governance. Lawfulness may be considered a synonym of the rule of law but Waldron has a more particular idea that is part of the rule of law, namely, a clear differentiation of responsibilities and an articulated process of governing. Its phases should be visible and transparent to the individuals. (Needless to say that Locke did have an idea of government branches separated for some more reasons that Waldron is less interested in here.) These phases are separable and distinct from one another, beginning from a policy proposal and ending with its application and ramification, carried out partly by executive agencies and partly by courts. The point for Waldron is, however, not the

exact separation of the phases as individual black boxes in which unrelated actions are performed but that the whole process "correspond[s] to rule-of-law requirements, like the principles of clarity, promulgation, the integrity of expectations, due process, and so on. Each of those elements embodies concerns about liberty, dignity, and respect that the rule of law represents. They offer multiple points of access, participation and internalization."[48] To the anticipated objection that this is a principle of the rule of law after all and not that of the separation of powers, Waldron replies that the two principles indeed overlap but the latter principle is instrumental in making the process articulated in a meaningful sense. The classical branches of government are thus still essential:

> The Separation of Powers Principle holds that these respective tasks have, each of them, an integrity of their own, which is *contaminated* when executive or judicial considerations affect the way in which legislation is carried out, which is *contaminated* when legislative and executive considerations affect the way the judicial function is performed, and which is *contaminated* when the tasks specific to the executive are tangled up with the tasks of law-making and adjudication. (italics added)[49]

So the integrity of each power or branch is both preserved by and necessary for the articulation of government. "Contamination" is, once more, a dark metaphor (repeated three times) but it is obviously meant to stress the importance of the internal structuredness or orderedness of governance broadly understood. Waldron is not very optimistic, however, about the vivacity of the principle in contemporary politics and admits that it is possibly on the verge of "dying a sclerotic death" because, at least in its classical formulations, it may misconceive "the character of modern political institutions" and "we cannot have the benefit of it anymore."[50] Yet he aims and means to revitalize it by placing it into the context of the principle of the rule of law, hoping to justify it as at least an instrumental value.

As it was argued repeatedly, the principle of the separation of powers needs to be related to the more general and fundamental political question of what it means to govern. Hence, the principle brings us directly to the essential problems of political theory and for that reason alone it deserves special attention.[51] Further, recalling Vile's remark once more, this is not just an idea of political theory and of political theorists but very probably, albeit often in a rough form, of ordinary citizens as well who are concerned about how they are being governed. However, Waldron's proposal for the justification of the principle appears to be rather defensive and minimalist. It is made subservient to the rule of law and makes governing appear to be a big business, and similar to managing and running an organization. Yet as

Waldron observed himself, a Hobbesian conception of governing as a differentiated process can be well-articulated enough but hardly qualifies as an embodiment of the principle of the separation of powers. A political theorist may choose not to insist on the classical triad, as many constructive critics have argued, if political and historical realities seem to suggest otherwise. Yet without some substantial argument for the meaning of the distinct kinds, types, logic, or nature of powers that are (to be) separated, the principle becomes meaningless. And although political theory does not need to be constructivist, or it does not need to be practicable, guiding constitution making in a given historical context, it must be able to proffer a conception of what it means to govern and to be governed. Articulated government in Waldron's sense appears to be too narrow a concept, for it presupposes the existence and rationale of government, ignoring the question that Carolan, for instance, put, namely, what kind of interest do we have in being governed or to have a government in the first place? To this question we need an answer which is, and here Waldron is perfectly right, articulated, but not only technically, so to speak, but politically as well.

AQ 8:Please confirm the update done to the sentence "And though ..."

Tradition Revised

Christoph Möllers' recent book on the three branches of power is, similarly to E. Carolan's conception, an attempt to integrate political and constitutional theory. He rightly laments the "mutual ignorance of political theory and constitutional scholarship" one of another's virtues and flaws. In his diagnosis, whereas constitutional theory focuses on institutions and does not engage in democratic theory, normative political theory is preoccupied with the justification of power. As a consequence, "questions of positive law appear too technical for political theory; problems of political theory too abstract for legal doctrine."[52] In Möllers' view, the principle of the separation of powers might serve as a "transmission belt" between the two areas. He formulates the core idea of his view in this way: "constitutional orders acknowledge the contradictory claims of individual and democratic collective autonomy, and that a specific correlation between the three branches of government serves to express, mediate, and mitigate those claims."[53]

Thus, Möllers proposes to return to and preserve the classical triad of legislation, the executive, and the judiciary as the three main branches of government, yet he wants to ground them in normative political theory. His initial distinction between individual and collective autonomy is very similar to Carolan's two basic abstract claims or interests (individual protection and successful collective action) and also reminiscent of both Bellamy's and Ackerman's distinction between popular will and government. Though it would be too far to talk about a de facto consensus in the literature on this

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essential distinction as the basic fact from where the justification of the principle of the separation of powers should be inferred, yet it would be grossly wrong to ignore the congeniality of these ideas.

The starting point in Möllers' model is individual self-determination. What it involves is a huge question burdened with countless philosophical problems such as free will, responsibility, reason, relations to others, and the ensuing conflicts between individuals. Yet it is precisely these problems that make it necessary to think of some public authority and the need for (potentially enforced) collective action. In spite of this need, Möllers maintains, the individual self-determination retains a sort of primacy over collective action and collective self-determination:

> even though the individual will is formed through social communication, its claim to recognition does not depend in the same way on its connection to a collective will as it does vice versa. To put it differently no expression of a collective or political will can be recognized as legitimate if it is no linked to any individual person who supports or constitutes this collective will.[54]

The primacy of individual self-determination is, however, no more than a step of logic. As soon as a democratic constitution is created, the acknowledgment of self-determination becomes already a collective act. In other words, constitution making is a collective act of inaugurating the primacy of individual self-determination. The influence of contractarian political theory is unmistakable here. There is nothing "wrong" with that, of course, as long as it is used as a framework of justification (with public reasons) and not as a particularized theory about substantive principles to which individuals and governments must be subordinated. If the principle of the separation of powers requires a profound normative justification, such a framework is hardly dispensable. Möllers does not explicitly refer to or relies upon social contract theory but his conception cuts clearly in that direction.

How do, then, the three branches of power get inferred from the initial distinction between individual and collective self-determination? First, we have the idea that individual rights can be practiced only in concrete situations that require, however, a general and inclusive legal framework to be in force. Second, practicing rights entails an orientation to future. Policy changes and reform proposals today usually reflect deficiencies and shortcomings of protecting and providing of goods and services to individuals having human rights. Third, these two stages require constant control and monitoring in terms of legality and freedom. Thus emerge the ideas behind the classic branches of power, not (yet) institutionalized but in an embryonic form: "Here, one can discern the path of a law-making circle from the legislature, through the executive, to the judicial decision of a single case. Personal

autonomy appears as a driver of legitimacy on both ends of this scale: once among members of the political community, once among individuals."[55]

The institutionalized forms of the three ideas are for Möllers not their exclusivist embodiments but rather their representatives. The legislature, for instance, "initiates and organizes a democratic decision-making process that generates general, future-orientated legal decisions. The parliament is the institutional manifestation of this model …."[56] It is important that legislative assemblies deliberating and representing different opinions are open to future proposals, hence provide for a forum into which all three basic ideas can flow and meet. It is not the case that the all-inclusive legal framework for individual autonomy and collective action is to be created only by the legislative branch: other branches contribute to this, too. The idea appears to be that the legislative can and ought to incorporate and supervise the different aspects or stages of the dynamic process of individual and collective self-determination. Courts also incorporate the two ends of the spectrum but with an emphasis on the protection of autonomy of individuals. The initiative rests with the individuals, and the courts are the most direct representatives of the law. But such a representation is not merely mechanical as the legal framework is often actively shaped and modified by judicial decisions and formal reviews. Hence, the three stages appear in this branch as well, though the emphasis is on the other side as with the legislation. In this model the executive is in the middle. Its function is "to mediate continually between democratic and individual self-determination."[57] This characterization helps Möllers reject the separation of administration (a putative new branch) and the political government (execution of laws and political programs). The executive is both active in lawmaking (policy proposals, legal drafts) and in tending to the individual needs of particular agents. Again, the executive may be said to incorporate all three ideas (creating rules, applying them and adjudication in some form), yet it occupies a special, mediating position on the spectrum of individual and collective needs and interests.

Möllers' suggestion to place the principle of the separation of powers into a more general political theoretical framework is, to repeat the point, very welcome. Both his and Carolan's efforts to do so are commendable. It is also interesting to see that both authors return to the triadic structure, though whereas Carolan argues basically that the legislative and executive branches should be considered a unified branch and the administrative state is the new third (or second) branch, Möllers upholds the traditional view and conceptualization. However, these differences do not seem very important because both authors seek to establish a contrast between what may still be generally called a legislative (legal framework-constituting) function and the judicial (right-protecting) function of government. The executive or administrative branch is considered to be somehow in between these branches,

with a function that is in some ways similar, in some ways dissimilar to the other two. It is also true that unlike Carolan, Möllers wants to avoid a direct identification of functions with branches, even though he cannot avoid talking about special functional "emphases" in the respective government branches.

Still, despite their many virtues, both theories are deficient in justifying the principle of the separation of powers. The conceptual link between the grand theory of individual and collective concerns (the political theoretical foundations) and the institutional and functional separation of branches of government is not very strong. In Möllers' theory, for instance, each branch is supposed to be lawmaker (norm-provider) yet with different shades or emphases. How these differences evolve, why they are important to sustain in exactly the traditional form of legislation providing for certain rules (laws) but not others, and the executive, again, having discretion to create other types of rules but not laws, is less explained and more just asserted. Again, Carolan's conception of the administrative state as a branch providing for some special needs of private individuals seems to be, as was argued, a rather ad hoc addition to the legislative and the judiciary branch, not clearly derived from the very abstract interests or concerns of a pre-social or pre-political state of nature.

However, it is also noteworthy that Waldron's idea of articulated government suits fairly well these theories. They are very general political arguments for the idea that some sort of articulated government is best conceived of as one where certain functional and institutional separations are in effect (this is Waldron's main concern) *and* that such a government or, even more generally, such a political regime is capable of preserving individual autonomy or self-determination and securing collective action. All three authors stress that their goal is a normative justification of the principle of the separation of powers. However, only Waldron engages in a discussion of some of the traditional normative arguments (freedom, impartiality, the inherent evil of power) and he does so only by way of criticizing classic authors, often, for instance in the case of Madison, in a very cursory manner. A more circumspect analytical discussion of these classical arguments would not just be interesting or a sort of a political philosophical tribute to them but would provide the later reflection on the basic structure of political society with relevant insights about the nature of power and government. The next chapter is devoted to a discussion of classic normative arguments that usually grow out of certain politically and morally important values.

SUMMARY

There is always some arbitrariness in the choice of classic texts for an introductory discussion of a deep issue that can be at least mitigated by showing

that they can be fruitfully exploited for developing a positive conception. From this point of view, Vile's classic treatment of the separation of powers is particularly important because it begins to restore the doctrine or principle to its proper political philosophical role. The principle is not merely a technical device for judicial thinking and constitutional review. It is—and not only in the United States—almost a political instinct of arranging government and its individual agents. Further, Vile anticipates that the principle must be related to the ground issues of living in a political society or polity. Both Bellamy and Ackerman push this issue forward, stressing virtually everywhere the importance of normative political theory in tackling the separation of powers. Both argue for a greater role of popular control over the government. Their conceptions are divergent, however, exactly on the point of whether a separation of branches of power is desirable or undesirable for this purpose. Since both argumentations have some persuasive force and therefore a more systematic reconsideration of the principle is being called for.

The literature on the rise of the administrative state, the mushrooming of apparently autonomous agencies, and the question of whether the executive (mainly in an American context) has become stronger than ever and whether if it is true, it needs more constraints or such constraints are unwelcome obstacles to a more efficient government, is somewhat more connected with the details, concentrating on one (or two) branches of the state or government. But the problem of efficiency and a number of related issues (credibility, autonomy, and accountability) seem to reinvigorate rather than enfeeble the principle of the separation of powers. If these questions and aspects of governing in modern constitutional democracies are truly relevant then the principle is a competent and indispensable point of reference.

Finally, the three theories that are called here as comprehensive ones deserve special attention on account of their direct engagement with the separation of powers. Carolan's and Möllers' conceptions are remarkable for the congeniality of their basic ideas, namely, taking individual rights as primary and institutions are secondary, yet intimately related to one another. Though Carolan is strongly critical of the classical theory of the separation of powers whereas Möllers is friendlier to it, both come up with their own triadic schemes in which the protection of individuals and their rights and liberties remains in the focus. Of particular importance is that both of them show a way of defending an institutional separation of powers that is grounded in a normatively supported theory of making and sustaining a political distinction between individuals and government. This is from where Waldron's idea of articulation and articulated government looks especially promising. Though it is not spelled out in very great details and the link between it and the principle is, as was argued, not sufficiently substantiated, the idea of governing

conceived of as a practice or business that needs a form which the principle of the separation of powers might provide with is particularly interesting.

NOTES

1. Let me refer the reader interested in this, among others, to M. J. C. Vile's classic analysis of the development of the doctrine: M. J. C. Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 1998) and to a helpful discussion of it: Martin H. Redish and Elisabeth Cisar, "'If Angels Were to Govern': The Need for Pragmatic Formalism in Separation of Powers Theory," *Duke Law Journal* 3 (1991): 449–506.
2. Vile, *Constitutionalism*, 13.
3. Ibid., 2.
4. Ibid.
5. Ibid., 315.
6. Ibid., 324–25.
7. Ibid., 329.
8. The idea of verticality/horizontality in a conception of institutionalized separation of powers suggest a federal system or at least a system where self-governments enjoy considerable constitutional autonomy. For an exposition of federalism within the context of the separation of powers see Jessica Bulman-Pozen, "Federalism as a Safeguard of the Separation of Powers." *Columbia Law Review* 3 (2012): 459–506.
9. Richard Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007), 196.
10. Ibid., 199, 200.
11. Ibid., 205, 206.
12. R. Congleton argues that the division of power in terms of institutional competition (between branches but, by implication, between all sorts of legal entities and agencies within the political structure) has been de facto beneficial for the Western-type constitutional democracies. Roger D. Congleton, "On the inevitability of divided government and improbability of a complete separation of powers." *Constitutional Political Economy* 24 (2013): 177–98.
13. There is a growing interest in republicanism in European political theory as well. Within the present, separation of power context, Ch. Bickerton has argued for an anti-Madisonian vision of the European Union. In his view, the generation of a European people precedes the idea of the separation of powers that presupposes the real popular sovereignty (which was, for Madison, already an accomplished fact). Institutional divisions and separations do more harm than benefit if the common legitimation ground is missing. Christopher J. Bickerton, "Europe's Neo-Madisonians: Rethinking the Legitimacy of Limited Power in a Multi-level Polity." *Political Studies* 3 (2011): 659–73.
14. Bruce Ackerman, "The New Separation of Powers," *Harvard Law Review* 3 (2000): 634–725.

15. Many other theorists preceded his criticism, arguing along similar lines and addressing the American type of separation of powers, see Robert A. Goldwin and Art Kaufman, eds, *Separation of Powers – Does It Still Work?* (Washington, DC: American Enterprise Institute, 1986).

16. Ackerman, *The New Separation of Powers*, 642.

17. Ibid., 645.

18. Ibid., 664.

19. Ibid., 668.

20. Other theorists touch upon the principle of the separation of powers only indirectly but have qualms about it similar to those of Ackerman and Bellamy. It is especially that putative primacy of the judiciary that has received extensive criticism. See, for instance, Larry D. Kramer, "Popular Constitutionalism, Circa 2004," *California Law Review* 4 (2004): 959–1012. Defenders of an appropriate role of the judiciary within lawmaking include David Dyzenhaus and John Ferejohn. See Dyzenhaus "The Very Idea of a Judge," *University of Toronto Law Journal* 1 (2010): 61–80; *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006); Ferejohn, "Judicializing Politics, Politicizing Law," *Law and Contemporary Problems* 65 (2002): 41–68. See more on this in Chapter 5.

21. Eric A. Posner and Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* (Oxford: Oxford University Press, 2010), 209. Of course, the principle was under attack during the 1980s as well. Ch. Hardin (1986) concluded his essay with claiming that "[w]e badly need a united government that can act steadily and comprehensively on the macroeconomic problems inherent in a modern industrial giant like the United States." Charles M. Hardin, "The Separation of Powers Needs Major Revision," in *Separation of Powers – Does It Still Work?* Ed. Robert A. Goldwin, Art Kaufman (Washington, DC: American Enterprise Institute, 1986), 114. For various accounts of the principle and the survey of "radical attacks" see also Redish and Cisar, *If Angels Were to Govern*, esp. 466–70.

22. See Congleton's opposite view: *On the inevitability of divided government.*

23. Posner-Vermeule, *The Executive Unbound*, 13–14.

24. Richard H. Pildes, "Law and the President." *Harvard Law Review* 125 (2012): 1–42.

25. Pildes, *Law and the President*, 20.

26. Posner-Vermeule, *The Executive Unbound*, 141.

27. "But given that under the Straussian view the president does not have the ability to tell the agencies what actions or decisions to take, how can the president really prevent crippling disagreements that lead to inefficient execution of laws? The Food and Drug Administration may use its statutory discretion to draft regulations to curb tobacco demand, while the Agriculture Department may draft discretionary regulations to increase loans and grants available to tobacco farmers. Though the president can point out that the departments are acting at cross-purposes and attempt to convince them to act in concert toward the same goals, on Strauss' view, the president has no constitutional means of imposing consistency. For imposing a common goal would be to make decisions vested by Congress in the departments and not with the president. Can it be that the framers thought they were creating efficient administration

by permitting Congress to create executive fiefdoms where the president would be limited to probing and prodding?" Saikrishna Prakash, "The Essential Meaning of Executive Power," *Illinois Law Review* 3 (2003): 807–8.

28. Ibid., 807.

29. Martin S. Flaherty, "The Most Dangerous Branch Abroad." *Harvard Journal of Law and Public Policy* 30 (2006): 153–71.

30. Prakash, *The Essential Meaning of Executive Power*, 817–18.

31. In a similar vein, Redish and Cisar argued earlier that "the constitutional validity of a particular branch action, from a perspective of separation of powers, is to be determined not by resort to functional balancing, but solely but the use of a definitional analysis." Of course, they stress, that their "pragmatic formalism" "is not intended to imply imposition of rigid, abstract interpretational formulas." *If Angels Were to Govern*, 454.

32. N. Katyal argues that "the executive is the home of two different sorts of legitimacy: political (democratic will) and bureaucratic (expertise)." Neil Katyal, "Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within." *Yale Law Review* 115 (2006): 2317. He demonstrates the case of the foreign service as being relatively but effectively insulated from the more political parts of the executive. Yet he also admits that particularly in times of crisis, the two parts view of the executive becomes unreal and probably undesirable, too. The concept of "crisis" is, however, a notorious one in political theory. For Hobbes, Rousseau, Schmitt politics is just about "crises." See more on this later.

33. Frank Vibert, *The rise of the unelected. Democracy and the new separation of powers* (Cambridge: Cambridge University Press, 2007). Of course, he is neither the only, nor the first theorist to note this but his book is a useful and well-argued variant of this conception.

34. Posner and Vermeule (*The Executive Unbound*) also consider the argument that the intrabranch division of the executive is a check on its power. They reject it, however, basically on the grounds that the true meaning of the separation of powers cannot be saved by it.

35. N. Devins and D. E. Lewis have expressed doubts about the real independence of such agencies, in an American context. What they show is the reality of political struggles for controlling them between the legislation and the executive. Many such institutions have been created if not directly for such purposes but under the heavy influence of power motives. Vibert remains silent on this issue. Neal Devins and David E. Lewis, "Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design," *Boston University Law Review* 88 (2008): 459–98.

36. Bickerton, *Europe's Neo-Madisonians*.

37. Eoin Carolan, *The New Separation of Powers. A Theory for the Modern State* (Oxford: Oxford University Press, 2009), 27.

38. Ibid., 33.

39. Ibid., 50.

40. Ibid., 5.

41. Ibid., 131.

42. Ibid., 134.

43. Jeremy Waldron, “Separation of Powers in Thought and in Practice?” *Boston College Law Review*, 2 (2013): 433–68.

44. John F. Manning, “Separation of Powers as Ordinary Interpretation,” *Harvard Law Review* 124 (2011): 1939–44.

45. Ibid., 437.

46. Ibid., 442.

47. Ibid., 448.

48. Ibid., 458.

49. Ibid., 460.

50. Ibid., 467.

51. B. Peabody and J. Nugent also argued, in a somewhat inchoate manner, for a political grounding of the principle. They called for a “polymorphic” understanding of the separation of powers, writing that “we do not focus on the separation of powers as an end in itself, but see it as a set of arrangements designed to promote multiple goals, each potentially fulfilled at several levels of governance. … The separation of powers ties different functions and traits essential for governance and different kinds of power to distinct institutions in order to promote accountability, effective policy-making and administration, and political legitimacy, among other goals.” Bruce G. Peabody and John D. Nugent, “Toward a Unifying Theory of the Separation of Powers.” *American University Law Review* 1 (2003): 34. They emphasize in the conclusion that the “constitutional theory—including efforts to unify separation of powers scholarship—must be practical, understood as rooted in politics itself” (62). That is fair enough. However, the list of essential values they compiled is very ad hoc, and as it will be argued in Chapter 2, it is doubtful that a sound doctrine of the separation of powers can be based on any list of values.

52. Christoph Möllers, *The Three Branches. A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013), 2–3.

53. Ibid., 4.

54. Ibid., 64.

55. Ibid., 80.

56. Ibid., 84.

57. Ibid., 97.

Chapter 2

Separation of Powers Grounded in Values

What is good or right about the separation of powers? This question is practically never asked in a straightforward manner, even though, as we have seen, many authors do suggest more or less explicit answers to this question. Explicitness in and of normative justification is not just a theoretical concern of philosophers. In politics, it is often practically relevant. As Carolan puts it very aptly:

> an institutional theory, through its reliance on notions of public reason and justification, plays an important part in supporting and shaping the shared normative values of a state. The way in which the institutions openly invoke and employ common communitarian principles affirms the foundational status of these values, whilst simultaneously encouraging citizens to continue to rely on them in any future interaction with the state. It is essential that this process of institutional exposition sufficiently inform the public about the nature and characteristics of these constitutionally central values. The separation of powers, however, has been shown to lack such specifics.[1]

The principle of the separation of powers is often considered a cornerstone constitutional value, sometimes explicitly, sometimes implicitly enshrined by constitutions.[2] Constitutional courts are free to cite and rely on it in both of its forms or cases. If a new institution is created or discussed, or if competences and autonomy of an existent institution is under constitutional revision, legal experts and ordinary politicians alike are called to reflect on the principle. But citizens, too, not only need but, as Ackerman admitted, do in fact shape their political views and attitudes according to the principle, of course, not necessarily in full awareness of it.

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The classic justifications of the principle were typically invocations of some general political values. The idea has been that the separation of powers serves some more basic needs and values of the polity. Liberty or freedom, impartiality, some kind of efficiency or functional clarity has been perhaps the most common references. In this chapter these proposals will be discussed. In view of its contemporary influence in political theory, justice will also be discussed as a potential basis for the normative justification of the principle. Finally, the idea that the various branches of government might be justified separately on the basis of distinct constitutive political values will be explored.

LIBERTY

Montesquieu

The most common justification of the principle is probably the one that invokes the value of liberty. Many classic authors can be cited, though it is Montesquieu whose argument is usually relied upon. It is simple and apparently straightforward:

> The political liberty of the subject is a tranquility of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite that the government be so constituted as one man need not be afraid of another. When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.[3]

Since an exegesis of classical texts is not the concern of this book, arguments should speak for themselves in a present-day context. As are we today, Montesquieu was also very much aware that liberty is an obscure concept that needs to be given some more specific sense. Hence he first argued that

> [w]e must have continually present to our minds the difference between independence and liberty. Liberty is a right of doing whatever the laws permit; and, if a citizen could do what they forbid, he would be no longer possessed of liberty, because all his fellow-citizens would have the same power. … Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power: but constant experience shews us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. … To prevent this abuse, it is necessary, from the very nature of things, that power should be a check to power.[4]

It has been often observed the Montesquieu's views are not necessarily consistent and straightforward.[5] Much has been written about whether he was up to describing the English Constitution (as the title of Chapter VI seems to promise)[6] or really trying to justify what he saw as "the" moderate government with different power centers and competences. Difficulties arise, however, already concerning the more abstract issue of how to understand the relation between liberty and the separation of powers. For Waldron, Montesquieu's assertions are unconvincing because they remain mostly tautologies to which, he argues, even Madison falls prey.[7] If legislation and the executive (or the executive and the judiciary) are united, there is no liberty—but why? Because unified power threatens it? Why should unified power as such threaten liberty? The reason that Montesquieu's gives, namely, that in such a case tyrannical laws may be enacted and executed, misses the point entirely because such laws can be enacted and executed if, for example, the legislative and the executive just happen to be in agreement about them. Or is this already a case of unified power? There have been countless political situations where one political will dominated or had the last word on a particular social or political issue. Moreover, this is the typical case in parliamentary systems running on the basis of a single majority governing.[8] More caution is in order here. "Unified power" may be acceptable as posing no inevitable threat to liberty if only the executive and the legislative branches are unified but the judiciary is left out.[9] But such a presumption goes beyond Montesquieu's assertion cited above (he famously regarded the third branch as the weakest one, without real power) and needs further reflection and reasoning. What if one proposes another combination of the branches, declaring, for instance, a unification of the executive and the judiciary to be acceptable as long as the legislative branch is excluded? Or should we say that any two branches may be unified if the third is kept independent? These are highly abstract and almost meaningless speculations but the original argument does not prove anything more substantial, hence the relationship between *liberty* and *separation* (of branches? of wills? of rights/powers?) needs further and deeper discussion.[10]

Furthermore, if Montesquieu's first, very Hobbesian, assertion about liberty being a subjective experience of safety is taken seriously, then that experience, the tranquility of mind is easily disturbed and destroyed by a chaotic and irrational array of power competences.[11] A Kafkaesque government is, *from this respect*, hardly preferable to some unified power that is rational, transparent, benevolent, and simple.[12] Thus, it is doubtful whether a version of the principle of the separation of powers that recommends mere fragmentation of the government and its power is really preferable to a transparent structure. Such is Elisabeth Magill's account, however, who assures us that

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> [t]his kind of fragmentation is complicated, even chaotic, but it is also our assurance against threatening concentrations of government power. … But once we recognize that government power can be, and is, diffused *within* a branch, and that fragmentation of state power need not … be among branches, the concern that an arrangement concentrates power in a branch becomes anachronistic.[13] (italics in original)

Concentration of power may be avoided but the question whether thereby private and/or public liberty is enhanced or better preserved remains quite open because chaos entails unpredictability which induces most people to reduce their expectations for a better life that is hardly a step toward greater liberty. Rebecca L. Brown emphasizes this point: "whatever else we might say, liberty depends on some notion of predictability, or perhaps rationality, in government as a basic prerequisite to fair decision-making."[14] Needless to say that it does not follow that liberty is to be equated with predictability or rationality. Much as it is true that liberty and separation of powers/agents/wills are not identical, liberty and predictability, too, are two notions that constitute a complex relation.

We must thus look much deeper. It is to be noted that Montesquieu's argument for the separation of powers may be interpreted in a narrow and in a broad sense. The narrow interpretation warns of the threat of the unification of what seems to have been already established, namely, legislative and executive power. However, as was argued, this interpretation begs the question of why and how government branches are in need of separation in the first place. Simply to assert that freedom is thereby protected is indeed rather hollow. Waldron concludes with an unusually harsh criticism of Montesquieu: "[i]t is high time we acknowledged Montesquieu's failure to provide us with substantive arguments explaining in detail why the separation of powers is necessary for liberty."[15]

Let us consider therefore the broader and deeper (if only more implicit) argument about the threat "unified" power poses to freedom. First, it is necessary to clarify the adjective. Since the term "unification" suggests some established institutional background (unification of power or government branches), it is advisable to avoid the term within the broad context. An alternative term may be "concentrated power." But this, too, has undesirable preemptive institutional aspects. A concentration of power implies that vessels, carriers, agencies of power are already at the disposal of capable agents.[16] Then the idea of "accumulated power" may suggest itself. This concept is arguably broader than the former ones but accumulating (amassing, augmenting)[17] power also presupposes at least certain mechanisms and structures of social power to be operative. In other words, it is presumed that there are ways and means of how to accumulate, and by implication, preserve power.[18]

Finally, there is the possibility that all (kinds of) power are as such a threat to liberty because everyone who holds some power is prone to use his or her power in a tyrannical way. "Constant experience shews us that every man invested with power is apt to abuse it"—writes Montesquieu (see above), supporting this interpretation.[19] In other words, such agents will not only neglect but positively coerce others to obedience that will have no remedy against this coercion.

To accept this anthropological assumption of the tyrannical tendencies in human nature one needs to presuppose that Lord Acton's famous aphorism is true, namely, that power corrupts and that absolute power tends to corrupt absolutely. Again, "absolute" power is a rather indiscriminate concept but it may only underline the anthropological inclination to concentrate, unify, accumulate, as much power as we can. But even if this does not happen, the corruptive effects of power pervade everything, everywhere. Petty tyrants abound. A single mayor of a small city can be as tyrannical as an executive director of a company within their own competences—and beyond; not to speak about parental power exerted over children sometimes tyrannically.

Such a dim view of power is deeply rooted in the Augustinian tradition that regards power or the subjection of man to man to be a consequence of sin. Subjection is an unavoidable, painful but just punishment. The original divine intention was that humans live in freedom. But there is now a tendency in human nature to assemble as much power as possible and to use it to selfish purposes. Whether we are inclined to do so for reasons of security and fear of others (Hobbes) or of sheer enjoyment or of lust for power and glory (Augustine) or of other interests that power may serve (Locke), is indifferent. Whichever is the best or most plausible explanation, having power just amounts to wanting others to obey us. This is contrary to their freedom of action. The one that wants power wants, by implication, others to have less liberty. At last we are at a possible root of Montesquieu's worry.

Power and Liberty

There are two possible ways to go on now. We may challenge the assumptions about power and its relation to liberty. Alternatively, we can accept the assumptions and consider whether the principle of the separation of powers can be inferred from them.

Let us begin with the first alternative. Let it be stated immediately that challenging the assumptions does not amount to their wholesale rejection. There is no need to be blindly optimistic about power in general and about power-holders in particular to question the assumption that power always (in minimal amounts as well) corrupts. Acton himself was more careful in his choice of words. He wrote that power *tends* to corrupt. "Corruption" or

"tyranny" or "tyrannical use of power," are moralizing descriptions that do not necessarily interpret social and political reality adequately. When power and the freedom of others are under discussion, we need to be more objective. It is of course true that power in the hands of a private person amounts to having the chance to exert obedience which is against the will of the subjected. This is the standard definition of power.[20] By assumption, once I am told what to do or not to do, I cannot have the full liberty to act as I wish.[21] The problem is, however, that in many cases obedience cannot be equated with restricting one's freedom of action. On the contrary, doing what otherwise I would not do or would not have done may amount to an action that would not have been carried out unless the will of the other were effective. Power (obeying the other's will) may in certain cases constrain the other agent's liberty, in other cases it will not. Moreover, it may even enhance it.

For instance, paying taxes is surely rather often against the will of many, and payments are regarded acts of obeying laws (the will of the authorities?) yet without taxes a great many opportunities of action would just not be created in the first place. Of course, it can be objected here that such kind of power behind which a legal and legitimate government stands is not power but, say, authority. Yet again, this objection ignores the problem: the principle of the separation of powers refers to *power*, and with good reason. Even a legitimate authority needs constraints, so the argument goes, because behind it there is always power. However, as was argued, power can be as much about creating as about destroying opportunities of action. The relationship between power and freedom of action is by no means unequivocal.

This is why the concept of power needs an even more systematic reflection before it can be employed in an exploration of the separation of power doctrine which will be done in the next chapter. Here we can only say that contrary to a perhaps commonsensical and classical assumption about freedom and power understood as standing in an antagonistic relation to one another, they may often form a coherent and dynamic unity. If that is the case, then the protection of liberty, not being inevitably endangered by power, does not necessarily require the separation of powers, provided that this is interpreted as some constraint put on power, its accumulation, concentration, unification, or exertion. There seems to be a more ambiguous relation between the two concepts.

If we nonetheless accept the assumptions about liberty and power standing in an antagonistic relationship vis-à-vis one another, it is still unclear whether and how the principle of the separation of powers ensues from it. Still within the framework of the broad interpretation, the lesson to be drawn from the assumptions is that any power in anybody's hands needs to be curtailed, controlled, divided, or checked efficiently in ways that do not reproduce the same peril. For using Madison's famous strategy that tells us that if the

causes of something bad cannot be rooted out, and if attempted at, something worse would happen, let us try to ameliorate the consequences,[22] the argument emerges that since our tendency to desire more and more power cannot be curtailed by will, we should see to it that no one be in a position where his or her power can grow indefinitely and infinitely. In particular, potential power-holders can be best controlled by agents who have the same or similar prerogatives and competences, no matter where and when. For if power really tends to corrupt then it does so everywhere, even though Acton must have had in mind only public powers and authorities.

Obviously, this is not the separation of particular powers, especially not of government branches and institutions but, firstly, an old rule of thumb of an endless dividing of power which we may call the anarchist or ostracist model. If any agent, person, or body happens to accumulate too much power, bereave of them of at least some of their power. Since public liberty is jeopardized by the inordinate amount of power in anybody's hands, that power should be shared or redistributed. Secondly, the need to constrain of any power may generate the idea of checks and balances (in an embryonic form, present in the Roman constitution), the well-known principle of using power to control power. Thirdly, even the idea of mixed constitution may emerge. It may sound recondite and inapplicable to contemporary constitutions, yet it may also be necessary to secure liberty. For without a clear view of what social, economic, political, even tribal (ethnic, whatever) forces the commonwealth is composed of, no mechanical or functional arrangement of checks and balances, however smartly designed, would ensure that no social or economic force would and could take hold of the whole.

The protection of the value of liberty *in the broad sense* against (unified, absolute, concentrated, accumulated) power seems to be served by these principles more efficiently than by the principle of the separation of powers. For the anarchic model requires a constant division of any power, including governmental powers, regardless of functions or values they may specially protect. The principle of checks and balances is as much about the merging as about the separating of powers. It prescribes that whenever and wherever some power emerges, concentrates, and solidifies, another power center be constituted to balance it effectively, usually by way of having a share in its competences and participating in its exertion.

However, both principles are blind from a constitutional theory point of view and blindness, as was argued, implies chaos that is hardly reconcilable with public and private liberty. Political theorists need these principles them because they tell them important things about political and institutional realities. They predict and anticipate patterns of behavior sometimes well, at least for the theorist. But they are inept categories for developing a principle that can guide not only, indeed, not even primarily constitution making but

constitutional and political *thinking* not only among theorists but also within the broader public. In other words, without some further ideas or principles it is improbable that politicians, constitution makers, and citizens would agree on what and whose power is in need of counter balancing, and by what other kind of power. Had the American Framers the "principle" of checks and balances or the anarchist model or the principle of the separation of powers in mind? Most surely it was the latter, if anything, even though the result is closer to some checks and balances argument. Decisions of the Supreme Court that refer to the principle of the separation of powers may be somewhat illusionary, as John F. Manning has shown us with painstaking rigor, yet the very need for at least an illusion, a normative justification of a reliable and commonly accepted principle testifies to the blindness of every other political theoretical argument.[23] Thus, even though the protection of liberty would be best secured by an indiscriminate division of all powers and/or their permanent counterbalancing (which is doubtful, however), such general rules of thumb cannot be relied upon when it comes to conceive, constitute, or justify a political society with its various institutions.

AQ 1: Please reword the sentence "Had the American Framers ..." for clarity.

As a matter of theoretical fact, it is the idea of mixed constitutions that comes closest to the principle of the separation of powers in terms of constitutional potential.[24] Historically speaking, it had substantial advantages in and for early modern and transitory societies. Consolidated constitutional democracies as we now know them are, however, built on, or at least on the fiction of, homogeneous societies where the traditional understanding of mixed constitution is no more reality (monarchs and aristocratic upper chambers do not really possess real political and social power). A Tocquevillean theorist may still insist, of course, that for public liberty a *real power*-based mixed constitution is still preferable, perhaps in a corporatist from. The strength of the principle of the mixed constitution is, so the argument may go, lies in that that it takes real social forces or powers seriously. It looks for power wherever it evolves (corporations, unions, various minorities) and aims at solidifying their positions constitutionally in such a way that they will tend to cooperate, rather than compete, with one another. Since cooperation presupposes mutually respected identities, social groups can retain and preserve their autonomies, securing freedom to their members via these autonomies.

AQ 2: Should "from" in the sentence "A Tocquevillean ... in a corporatist from be "form."

AQ 3: Please reword the sentence "The strength ..." for clarity.

A lot more could be said in support of the principle of a mixed constitution that, too, is concerned with freedom and looks upon power as a threat to it, yet it is obviously more worried about a kind of central power than intermediary power centers. In one sense, it is also akin to the power balance argument, amending it with the idea of a constitution based on institutional cooperation. Without further advancing the theory of a mixed constitution which is not the concern of this book, it may be conjectured that such a theory could also be revitalized and normatively justified. The point remains, nevertheless, that from the broad interpretation of power and liberty *alone,* the justification of

the principle of the separation of powers does not ensue. It may but only if further assumptions are added, much as in the case of the principle of a mixed constitution. Liberty and power are too general concepts to ground either principle normatively, solidly, and without remainder.

Positive Freedom

Montesquieu could be interpreted as a promoter of what we used to call a positive concept of liberty.[25] He is certainly more inclined to regard liberty as essentially tied to lawfulness. This concept of liberty is related social cooperation, public good, governing, morality, reasonableness, and a lot more. Conceptions which start out from the negative concept of liberty advise us usually to accept nothing more but a minimal government where intricacies raised by the principle of the separation of powers or articulated government look indeed secondary. And we have been employing the negative concept of liberty so far, though tacitly. No wonder that a justification of the principle cannot be derived from it. Why not start, instead, from some positive concept of liberty?

There are two responses to the suggestion. First, as was argued, the negative concept of liberty also makes sufficient room for criticizing the idea that the separation of powers is inferable from the thesis that liberty and power always and inevitably stand in conflict. Power as a creative, freedom-enhancing ability is compatible with a rigorous concept of negative liberty as well. This, too, can and will be exploited later.

Secondly, the idea of positive liberty is essentially contested. In his celebrated essay, Isaiah Berlin does not just contrast the two notions.[26] Rather, he clearly opts for negative liberty as the core of the concept itself, arguing that philosophers advancing a positive concept of liberty are prone to develop a conception of it. Since such conceptions of liberty cannot operate without several other values, philosophical presumptions, theorems about the world and the human nature, the original meaning of (negative) liberty gets inevitably obscured. Therefore, if political theory wants to re-ground the principle of the separation of powers in some positive concept of liberty, a host of questions regarding that concept immediately appears. Thereby a straightforward grounding of the principle of the separation of powers in a single value becomes unattainable.

IMPARTIALITY

Waldron cites Locke as a possible source for a different justification of the principle. True, Locke is also concerned partly with the protection of private liberty, yet his reasoning is different and it must be cited at length:

> The *Legislative* Power is that, which has a right *to direct* how the *Force of the Commonwealth* shall be imploy'd for preserving the Community and the Members of it. … [B]ecause it may be too great a temptation to humane frailty, apt to grasp at Power, for the same Persons, who have the Power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making, and execution, to their own private advantage, and thereby come to have a distinct interest from the rest of the Community, contrary to the end of Society and Government: Therefore in well order'd Commonwealths, where the good of the whole is so considered, as it ought, the *Legislative* Power is put into the hands of divers Persons who duly Assembled, have by themselves, or jointly with others, a Power to make Laws, which when they have done, being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for the public good.
>
> But because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a *perpetual Execution*, or an attendance thereunto: Therefore 'tis necessary there should be a *Power always in being*, which should see to the *Execution* of the Laws that are made, and remain in force. And thus the *Legislative* and *Executive Power* come often to be separated.[27]

Again, exegetical and historical analysis may be put aside. Locke's argumentation is rather complex. He refers to human frailty, a predilection to look first at our own interest and to exempt ourselves from the burdens of rules and laws wherever possible. The underlying value in need of protection is thus not public liberty but *impartiality*. Locke goes on to argue, however, that there is a highly practical reason for the establishment of a power that is not identical with the legislature. Laws must be enforced and administered which is a different business than making them. We may call this reason the *functionality* of government. Finally, there are some vague but important references to the "end of society of government," the "good of the whole," a "well-ordered commonwealth," and the "*public good*." The last suggestion is extremely general and cuts at the very roots of the political society. It is not really a simple, though foundational, value. Hence its discussion will be postponed to the next chapter whose topic will be just these questions. Let us consider here impartiality and functionality as possible sources of the principle.

Impartiality is surely a value that we cherish in many social relationships. But not at all everywhere and always: partiality is essential to love, for instance. Unlike in the case of liberty that for instance may be contrasted with slavery, a rank evil, there is no prima facie evaluational difference between impartiality as something good and partiality as something bad. However, rulemaking, rule-application and rule-adjudication, the standard business of governing, are surely subjected to the requirement of impartiality. Partiality

may be a value within the private sphere of individuals. Even in that sphere it is perhaps not a real value but a consequence or an aspect of love. In any case, once we are dealing with collective norms, impartiality must prevail.

In a very complex sentence, Locke duly condemns partiality both in lawmaking and in law application. In the case of lawmaking, partiality means acting out of self-interest and neglecting public interest. In the case of law application, partiality means disobedience, exemption, motivated by self-interest again. Locke seems to suggest that in order to prevent such abuses, a separate mechanism is needed which is the executive branch of government. (This "mechanism" may be nothing more but, as Locke argues verbatim, a personal separation of legislative and executive competences.)

There are several problems with this reasoning. When it comes to legislating, impartiality is an ambiguous requirement. From a purely legal point of view, it is of course true that the concept of the norm entails some sense of impartiality. A norm is a norm only if it is applicable equally to similar or equal cases. Yet this is a formal point. What Locke has in mind, and most of us would also fear of, are norms made such that they favor some but not every citizen or group of citizens in a society. Yet this is still not unequivocal enough. A law may grant privileges to, say, doctors or soldiers, on the basis that they have a special role for the well-being of the community. What we are in fact worried about is favoring individuals or collectives for selfish reasons, for their "private advantage" as Locke puts it. He is especially concerned with the private advantages of the lawmakers. Impartiality requires putting the public good first.

This is fair enough as it stands but raises further difficulties. First, much of modern legislation is heavily and reasonably influenced by a great variety of private interests. That there should be a Criminal Code which penalizes murder or a Civil Code which sanctions breaches of contract are uncontested general norms. That the free downloading of certain artistic and scientific works from the internet should classify as violation of property rights is a more contested claim, evidently influenced by private interests, yet it is by no means unrelated to public interest and the public good. Whatever legal regulation emerges here in a particular country, will be an amalgamation of both public and private interests that must be taken into account, hence be represented in and by legislation. It appears that a total ban on taking private advantages into account within the legislative process is not only impossible to enforce but even irrational, to the point of an arbitrary decision to declare what is public and what is not. The value and requirement of impartiality helps us understand neither how legislation is being done, nor how it ought to be done.

Further, Locke's special worry about *the* legislative body having a common yet private interest that may stand in conflict with the public interest

seems rather difficult to conceptualize in a modern democracy. In his age, the English Parliament might have been dominated by groups having relatively similar social and economic status. And it is true that political sociologists may also find contemporary legislative bodies recruited from narrow elites that are sociologically unrepresentative of the whole society, probably more so in developing democracies.[28] But given the competitive nature of politics in most consolidated democracies (parties, movements, politicians), and the electoral control over the legislative that is far greater than it was in Locke's time, one really has to subscribe to a hardcore Marxist or elitist social theory to be afraid of a legislative assembly that predates over the state. In that case, no separation of power would help, anyway.

We must keep in mind that the whole argument serves to convince us that the legislative body should be contained by the executive. However, the argument nowhere and in no sense compels us to accept this. How and in what sense could the executive power force the legislative power to put public interest first? And if it could, would not it become a sort of alternative legislative power, a constitutional court of some sorts, but not really a different *kind* of power? How is the executive power related to the public interest, if legislation is understood as *determining* and *deciding* about the public interest, even if wrongly? One may think of a veto right, similar to that of the US presidents, but also of some constitutional courts, yet such ideas belong to the principle of checks and balances, a merging of powers rather than separating them. The idea of impartiality understood in terms of favoring public and excluding private interests does not engender the principle of the separation of powers. Rather, it calls for a unitary kind of authority that can make the final decision. This result is contrary to what we are looking for, namely, the justification of the principle.

By returning to Locke's argument, we should notice another idea within it. He recommends a separation of the executive from the legislation partly because he thinks that members of the legislative may be less than willing to obey their own rules. Impartiality is now considered within the process of rule application, rather than rulemaking. It pertains to the executive or administrative side of government that it should see to it that the lawmakers obey their own laws. No doubt, hardly anyone would object to the requirement that laws be enforced regardless of whether they must be applied to the lawmakers themselves. Contra Locke, however, we can comfortably argue that a modern legislative body whose members do not, as a rule, obey they own laws cannot stand long. Its constituency would not tolerate such a behavior in the long run. The argument would be more convincing if the lawmaker were a single person whose disobedience to its own laws would be perhaps less conspicuous. But that would be an argument only for replacing the single lawmaker with a collective body of lawmakers (the sharing of legislative

power among many) and not, in itself, for a separation of legislation and the executive.

Further, Locke's argument works only if we presuppose that the executive does enforce the laws impartially. This is, again, somewhat tautological: impartiality is secured if the executive is separated from the legislative branch, yet only if the virtue of impartiality is present in the executive. But why cannot we simply presume it to be present in the legislative branch in the first place? Or on the contrary, why should we presume it to be present in the executive branch? Empirically, persons and officials running the executive branch often seek the favors of the legislative branch (think of examples where minor violations of rules, even crimes committed by MPs are connived at by the police or the state prosecution). And of course there is the great problem of the executive not applying the laws impartially, to its own agency. How the requirement of impartiality can be imposed upon the executive without a super-executive, a state within the state, remains an unsolvable problem.[29]

Finally, the modern administrative state works with a great number of rules that the executive creates, only with a very general and weak control exerted by the legislative, and a somewhat stronger, yet passive, control exerted by the judiciary. This may not be an argument against the principle of the separation of powers, of course, but an argument in favor of it, yet Locke's logic would dictate that, once more, a super-executive would be called for.

The conclusion, let it be stressed, is *not* that the principle has nothing to do with the value of impartiality. On the contrary, Locke's point is a real trouble of any polity. Moreover, it is arguable that once the principle becomes a de facto political norm of the commonwealth, the value of impartiality will be easier to represent and legal practice and the behavior of both the legislative and the executive branches will conform more closely to it. The question is how to make the principle of the separation of powers such a norm, if it is restricted to the functions and institutions of the government. It seems that fundamental values such as liberty and impartiality cannot be simply translated into structural and institutional speculations via the principle.

FUNCTIONALITY

Let us recall what may be considered a more or less distinct argument within the long paragraph cited from Locke: "But because the laws, that are at once, and in a short time made, have a constant and lasting force, and need a perpetual execution, or an attendance thereunto; therefore it is necessary there should be a power always in being, which should see to the execution of the laws that are made, and remain in force." The argument is different from the

previous one as it appears to work without a strong moral or normative reference, unless the reason that laws should "have a constant and lasting force" is considered as such. It may be the case, especially if we contrast a polity with constantly changing legal rules to another one where rules are more lasting. The concept of the rule of law is often understood partly as a reliable and secure order of institutions, procedures, and norms. The concept of order will, as was said, be discussed in the next chapter. Locke's argument will now be interpreted as a functionalist one. It urges constitution makers to distinguish between the legislative and the ex ecutive *functions* of the government. A high number of classic authors, especially those predisposed to thinking in legal terms, have followed suit, and argued, as we saw, that rulemaking, rule-application, and rule-adjudication are distinct functions. True, these functions are not easy to translate into institutional and constitutional reality, and many have abandoned the principle of the separation of powers precisely because of such difficulties. Nonetheless, there is an easily discernible internal logic in the differentiation of these functions.

The first question is whether functionality is a value at all. No doubt, there is a dignified atmosphere created by time-honored tradition around states organized along the functional separation of powers. Dictatorships of various kinds have not spared the effort to look constitutional. For example, Communist countries boasted of having constitutions that sharply separated lawmaking and law application. They, too, sustained a legal system where laws had to conform to the constitution (though constitutional courts were absent), laws were passed by a properly designed legislative body, according to a no less properly designed lawmaking procedure, and decrees of inferior legal status were expected to cohere with the legal order so conceived. The executive was clearly distinguished from the legislation, sometimes quite strictly. Judges were declared to be subject only to the law and elected by the legislation.[30] Moreover, since Communist parliaments would convene only rarely and for only short sessions, Locke's argument would seem just perfectly applicable to them.

Of course, no serious scholar would declare these systems real and true examples of the separation of powers, not even in terms of functionality. For political regimes such as the Communist ones with a legally enshrined functional separation of powers were run by a single political will that dominated both the legislative and the executive branches (in the worst cases, fully dominating the judiciary as well). This will was formed and represented by the Communist party, in the center with the Politburo. But since the relationship between the party and the state, the two basic institutional pillars of the regime, were never constitutionally defined, the two structures developed into a misty, complex unity, the nomenclature, where each level, organization, indeed, member of the party was in charge of something.[31] The whole system

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can be characterized by the non-separation of party and state. Yet if this is the essence of the system, then the functionalist conception of the separation of powers misses the point hugely. It seems that functionality is in itself hardly else but an aesthetic value without much political relevance. Moreover, it may just obscure political and even institutional reality.

The example of dictatorships is instructive from a different angle, too. Any highly developed society and its political machinery requires a fairly high degree of institutional sophistication. Even though a single leader's personal will can be the decisive authority in every public affair, governmental issue, whatever; there are obvious limits to the actualization of this potential in the vast majority of affairs and issues. Simply put, a single individual is incapable of running the whole business of governing. Most branches of the government must and will follow their internal routines. Further, the effective implementation of such a will presupposes a differentiation of competences. Even if the leader's will can change the law, overwrite administrative resolutions, alter procedures, and suspend or overwrite judicial decisions any time, without some consistently uphold functional separation of institutions and agencies such a will tends to become ineffective. A well-ordered institutional arrangement, with a demarcation of competences and discretions, is often an important tool in the hands of tyrannical or dictatorial leaders.

It may happen, of course, that in order to demonstrate their supreme power, such leaders make arbitrary re-arrangements, let competences and discretions deliberately get confused. But such tricks and maneuvers of power may motivate many political leaders' actions in genuine constitutional systems as well. Cabinet reshuffling is an important political tool in the hands of every leader who may at times risk the governmental benefits and advantages of clear functionality in order to regain and retain his or her political influence and power. Thus, these motivations in themselves do not help us distinguish between dictators and democratic politicians.

A functional separation of institutions and agencies remains indifferent to both systems. It may serve a higher or perhaps less dubious value, the value of efficiency or efficient government, but efficiency is still essentially different from liberty and impartiality. It is, to use axiological terms, not an intrinsic but an extrinsic value. A concentration camp may be a highly sophisticated and efficient organization with clearly demarcated functions, yet its existence is wholly devoid of intrinsic value. It is, then, hardly a surprising conclusion to say that functionality in the sense discussed so far is not something on which the justification of the separation of powers can be built.

However, even though the mere functional separation of powers does not justify itself, as it were, one would be ill-advised to drop the entire idea. We should recall Vile's remarks: "For even at a time when the doctrine of the separation of powers as a guide to the proper organization of government is

rejected by a great body of opinion, it remains, in some form or other, the most useful tool for the analysis of Western system of government."[32] The idea that emerges here is that the functionalist interpretation of the principle really is about understanding government or governing. To return to the examples of totalitarian dictatorships where the functionalist separation of the three functions served as mere facades of power, we may begin to unmask real power by taking the three functions seriously, filling them with some more substantive political content. And then we may suddenly rediscover Locke's brief allusion to the importance of these functions being defunct, so to speak, unless they are run by diverse persons, not only by different institutions. Of course, in the case of Communist systems and other ideologically unified regimes, the simple fact that, say, members of legislation were legally barred from filling in top state positions and vice versa was insufficient to match the real requirement of a personal separation of powers. For they all could (often had to) be members of the Communist party, run by the principle of "democratic centralism," where a strict subordination rule applied. What matters is, therefore, that there be a kind or a degree of *political* difference between the three functions, a difference of concerns, aims, motives, and ultimately, of wills. This is what Vile might have had in mind when he wrote that the distinct functions are meant "to articulate government in such a way that a particular structure plays a dominant or important, but not exclusive, role in the performance of a given function."[33] Functions are not just institutionally or legally important. Their real significance is borne out when they are related to one another, not as passive elements of a jigsaw puzzle, but as political agents that are in some ways competing with, in some other ways complementing one another, whereby a political process ensues that even Ackerman admits to be virtuous for the United States in some basic sense because it gives shape to the political identity of a polity. These ideas will be discussed in the next chapter, in relation to the notion of order.

JUSTICE

Justice is among the cornerstone values in many liberal constitutional theories. Though it is seldom, if ever, considered as a value from which the principle of the separation of powers may be successfully derived or that can be useful in justifying it, given its paramount role in constitutional theory, a brief attempt is in order.

It is easy to discover certain connections between the value, even virtue, of justice and the individual branches of government. Commutative justice, or justice in the classical/traditional sense, is a supreme virtue of judges and a value of the judiciary (impartiality, by the way, is another one). Other

aspects or senses of justice, for instance, social or distributive justice, may be deemed to be paramount virtues of the legislation, and if Rawls is right, for the constitution making of the polity. In Ackerman's conception of constrained parliamentarianism, a special court is designed to care for the equal distribution of the basic goods of citizens, thus, a fundamental principle is represented and enforced mainly (albeit not exclusively) by an independent agency.[34] However, the executive as such does not seem to have a special role in enforcing some specific aspect of justice.

It may be argued now that justice should be understood in terms of basic institutions and structures rather that of behavioral patterns of individuals and particular agencies of the government. It is of course desirable that judges have a good sense of justice, that officials of the social system act fairly and compassionately, and perhaps also that politicians give distributive justice some priority when they legislate. Yet whole systems of modern governing cannot be evaluated normatively in terms of justice understood in the classical sense as a personal or perhaps collective virtue. Rawls' reformulation of justice still refers to the notion of virtue, yet in a special sense. Justice belongs to structural ethics, to the basic structure of the polity as a construction: "Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust."[35]

One may accept or reject this normative axiom for which Rawls does not argue but it is a view that represents the traditional social constructivist approach well. According to it, since individual conceptions of the good life may differ, people tend to disagree on many moral issues, yet social coordination and cooperation is necessary, therefore there must be a common ground of normative agreement among members of the polity which allows for moral pluralism but makes cooperation possible. Such a normative agreement cannot be based on moral values and virtues that regulate only specific areas of human conduct or make sense mainly in personal relationships (such as benevolence). Hence, a broader normative concept and moral-political foundation of cooperation is required. In Rawls' view justice is such a concept provided that the classical or commonsense understanding of it (everyone should get what he or she deserves) is reconsidered and broadened (toward fairness). Good governance aimed at the public good consists, then, in nothing else but protecting, preserving, and promoting justice so understood.

In some sense it is astonishing that Rawls has nothing to say about the principle of the separation of powers (as it is, nor anything about power). But he does discuss the problem of how to implement the principles of justice and transform them into institutions and agencies in a way that resembles of the classic doctrine:

> The main problem of distributive justice is the choice of a social system. The basic principles of justice apply to the basic structure and regulate how its major institutions are combined into one scheme. … [T]he idea of justice as fairness is to use the notion of pure procedural justice to handle the contingencies of particular situations. The social system is to be designed so that the resulting distribution is just however things turn out. To achieve this end it is necessary to set the social and economic process within the surroundings of suitable political and legal institutions. … In establishing these background institutions the government may be thought of as divided into four branches. Each branch consists of various agencies, or activities thereof, charged with preserving certain social and economic conditions. These divisions do not overlap with the usual organization of government but are to be understood as different functions.[36]

In particular, he distinguishes between the branches of allocation, stabilization, transfer, and distribution. Taken together, these four branches regulate social cooperation in terms of prices, employment, taxes, inheritance, basic needs, and whatever the two main principles of justice as fairness may demand. Rawls does not tell us how to institutionalize these branches properly because "the principles of justice regulate the whole structure; they also regulate the balance of precepts. In general, then, this balance will vary in accordance with the underlying political conception."[37]

The four branches do not in any sense correspond to the classical branches of government. The term "branch" is highly idiosyncratic here and hard to translate into the traditional language of the separation of powers, although the logic of functional separation does resemble of it. Rawls refers to these branches as that of the government. However, in the second part of the sentence we find further references to them as "activities" and "various agencies." We may try to apply Rawls' idea to a more accessible case. If a country wishes to defend itself by military force (as most countries in the world would quite probably wish), then it may make the "principle of defense" more operational by distinguishing first between functions or activities, rather than institutions, of it. Intelligence and counterintelligence, deterrence, civil relations/state building capacities, border defense, strategic forces—all these are functions of a complex defense policy on the basis of which various agencies and organizations, including the classical armed forces, with overlapping capabilities, are needed. It is in this sense that the principle of justice may be thought of as a guiding principle that can be made operational and functional by the "branches" of government (here: of defense) that Rawls defines.

Most probably he does not mean to cover the whole business of governing by these branches yet they are, resting on the most fundamental principles of the polity, the most important part of governing. As a matter of fact, much as defense is, the socio-economic activities of governing are also usually assigned to the executive branch of the traditional structure government.

Thus, the implementation of the principles of justice as Rawls defined them would be a task of the executive. The four branches of allocation, stabilization, transfer, and distribution are functional principles, so to speak, whose operationalization belongs among the responsibilities of the executive power. Yet it is also clear that for Rawls legislation, too, must work in conformity with these basic principles or branches. And it is here where the term "branch" really begins to cause troubles. For "legislation" as a body, a highly important institution of government, constitution makers should find a place among various agencies of these "branches" but, say, whereas an agency responsible for fair competition in the market, or a national bank in charge of price stability, are clearly definable institutions with well-conceived aims that can be adjusted to the various functional principles or "branches" (allocation, stability, etc.), "the" legislation is by no means such an institution. It is expected, nay, required to act in accordance with the basic principles of justice, and so must do the executive, too. Is the difference between the two classical branches a fact that deserves not a single word? Not to speak about the judiciary which, it seems to follow from this logic, must also act in accordance with the basic principles of justices, rather than with the law. This is, again, highly troublesome.[38]

Perhaps by way of sensing the trouble, Rawls himself suggests a correction to his conception.

> Since the distribution of income and wealth is assumed to be just, the guiding principle changes. Let us suppose, then, that there is a fifth branch of government, the exchange branch, which consists of a special representative body taking note of the various social interests and their preferences for public goods. It is authorized by the constitution to consider only such bills as provide for government activities independent from what justice requires. … [T]he exchange branch includes a separate representative body. The reason for this is to emphasize that the basis of this scheme is the benefit principle and not the principles of justice. … With the distinction of branches in mind, the conception of justice as fairness becomes, I believe, more plausible. To be sure, it is often hard to distinguish between the two kinds of government activities, and some public goods may appear to fall into both categories.[39]

The idea is that there is a "separate representative body" in charge of everything else once the principles of justice have already been done justice to, so to speak. This body is to operate on the basis of the "benefit principle." It may redistribute further resources once the constituency agrees upon having further common purposes. It seems to follow that the legislation in the traditional sense is in Rawls' scheme practically superfluous. The "representative body" is there only to "take note of the various social interests," and "consider bills" which may include discerning, discussing and possibly accepting

policies based on the benefit principle. Though Rawls does not use the word legislation, this is in what it consists. If this body is indeed something like a legislative assembly, then it is very troubling from a traditional separation of powers view that in this regime the competence of the legislative body is constrained by the principles of justice (note that we are dealing with both principles, the second of which entails quite substantial redistribution of resources). One wonders whose competence it is to determine the limits of the competence of legislation so conceived (Rawls admits that there can be problems of distinguishing between "the two kinds of government activities" but skips these questions). Is it a constitutional court? This is improbable, given the sheer size of the task. Nor can it be the judiciary as such, since that is not a standing body or a big organization. There seems to be no other choice but the executive. If that is the case, then the so-called representative body becomes nothing more but a special committee set up and controlled by the executive (representation does not necessarily entail elections, it may be conceived in terms of a corporative body). This body is essentially part of the executive, only entrusted with the special representation of the benefit principle.

The whole regime looks somewhat inconsistent and utterly at odds with the traditional doctrine of the separation of powers.[40] This may not be a problem for Rawls but it would be for someone who would think that constitution makers should not only try to enforce a general moral principle during the formation of the polity but should have at least some relevant conception about how government is best arranged, how procedures and institutions are to be designed and how political power is to be allocated. For grounding the whole constitution in the principles of justice (as fairness?) appears to be an attempt to overturn the principle of the separation of powers because it prescribes that constitution makers and political theorists be concerned exclusively with the implementation of the principles of justice. This implies not only that concerns of power, liberty, impartiality and other important values related to the principle of the separation of power are disregarded or neglected but also that social and political institutions are quite deliberately rearranged according to the four (or five) branches or functions that allegedly ensue from the principles of justice. No doubt, this is a possible normative choice but the abandonment of the principle of the separation of powers is at least a consequence of the choice that deserves notice.

OTHER VALUES

Beyond liberty, impartiality, functionality, and justice as fundamental, comprehensive values of the polity, a number of further virtues and values could be discussed, such as peace, civility, benevolence, honesty, loyalty,

dedication, and so on. They are relevant not only in civil and political life but also in and for good governance. Corruption, for instance, a major sign of bad governance, is at variance with honesty as a virtue that we expect judges, public officials, politicians, in other words, representatives and members of each branch of the government to possess and practice. Benevolence, again, taken in the Humean sense as a basic social bound may also be considered a virtue that should be a quality of each government branch as well. But such values and virtues seem to be too indefinite, too much tied to the life-world of individuals, to qualify as principles from which the constitution of the commonwealth in general and the principle of the separation of powers in particular can be derived.

It is not that arguing for a generally limited government along such lines is wholly impossible. Many eighteenth-century theorists of government and of the state, Hume included, did not really bother the principle of the separation of powers, provided that civilized sentiments prevailed in society. Alexander Pope's famous maxim is an ultimate blessing for such an approach: "For forms of government let fools contest, / Whate'er is best administer'd, is best; / For modes of faith let graceless zealots fight, / His can't be wrong whose life is in the right." Once irrational conflicts are eliminated and social *mores* make civilized and comfortable life possible, government taken as a single agent is free to administer society as it wishes. There is a continuity of virtue, honesty and benevolence, a unity of political culture between citizens and governments that makes the principle of the separation of powers interesting only for political (theoretical) zealots or thinkers like Montesquieu who happen to have to live in an insufficiently civilized society. Though Posner and Vermeule do not at all refer to Pope or Hume or any of these theorists, their thesis about the uselessness of the principle and their belief in credibility as a reliable and efficient safeguard against the abuse of executive power are very much reminiscent of this argumentation.

Those who are more worried about such safeguards being efficient or who are less confident about the quality of civilization in their societies or who are more sensitive about the temptations of power in even the most civilized society would most probably insist that the principle is still important. It is, as Vile indicated, perhaps political ethic that partly defines and fundamentally shapes civilization. But benevolence, civility, and honesty are social and political virtues that have an extremely wide range of meaning and application. Important as they may be in taming the behavior of power-holders, they cannot be a proper ground for a separation of powers that requires a more solidly established political justification.

There is, finally, the possibility to link up the different branches of government with specific values. These values are expected to be operative and discernible in the activities of the respective branches. The idea was spelled

out by David Rosenbloom in a classic piece.[41] He associated the executive with cost-effectiveness and costumer orientation (as to this, see also Vibert's and Carolan's similar remarks); the legislative with representation, responsiveness and political accountability; the judiciary with constitutional integrity, rights and procedural due process. In a recent overview of the literature that the article inspired, Rosenbloom summarizes briefly a number of further proposals that followed the same logic.[42] Some pointed out, however, that certain defining or constitutive values may be in inherent conflict with one another (e.g., the political and the neutral aspects of the executive); or minimally in tension. And a number of public administration theorists have identified various historical trends and empirically verifiable behavioral strands in bureaucratic management which led Rosenbloom to conclude that "[t]he public values governments attach to execution, legislation and adjudication and how they organize, think about, and implement them vary tremendously" because "[o]ther values can join or displace those in the framework. Social equity, social capital, citizen engagement, and vibrant democracy are obvious contenders."[43] Admitting of the importance of empirical and historical studies in how bureaucracies, administration, ultimately, the entire executive works, what norms it is guided by, it is now easy to see that it would be theoretically arbitrary to ground the principle of the separation of powers in selecting out a single value or a particular combination of values for each branch.

Beyond the argument of arbitrariness, there is another problem with the approach that public administration theorists advance. This is a sort of a blind spot that results from tacitly taking the government and its branches to be an organization. In fact, however, the executive is obviously different from both the legislative and the judiciary branches in this respect. It develops and cherishes values that may be called internal norms such as professionalism, dedication, and loyalty toward one's institution and its special mission. Judges are not required to be loyal to the judicial administration (though norms of collegiality and some esprit de corps do influence their behavior), neither do Representatives of Congress or Members of Parliament have special loyalty obligations to the legislative body as such (apart perhaps from a duty to contribute to its aura of authority by proper dressing and behavior). The question is, then, whether the arguably very strong internal bureaucratic norms of the executive understood as administration should be thought to be grounding or justifying values, on a par with those that may be called external ones and that Rosenbloom himself named as those constitutive for the executive power (cost-effectiveness, costumer orientation). Most probably, the internal bureaucratic-organizational values of the executive should be considered instrumental or extrinsic values only, subservient to the intrinsic public ones. In reality, however, such distinctions are very difficult to make

and uphold. Values that are necessary for running an organization may easily overturn values that justify it. And instrumental values *are* necessary ones therefore an overturning of the justifying or inherent values of the executive is highly probable. There is no theoretical guarantee, except for the theorist's urging and choice, that the intrinsic values would win the game and become the de facto justifying values.

Further, especially in the case of the legislative branch, the argument for the grounding of the principle of the separation of powers in a particular (set of) value(s) breaks down for the simple reason that legislation is generally expected to let every serious, contested, politically relevant value to enter the deliberation and lawmaking. Of course, lawmaking, political leadership, and democratic constitutionalism presuppose and require a host of values, skills, and principles to be cherished and followed beyond those that the political moment pushes forward. Yet it seems rather futile and, again, arbitrary to look for a single or a closed set of values that governments, and in particular legislations, should hold up as their justifying ones.

Finally, there is a very down-to-earth consideration against this line of thought. Judges, for instance, should be impartial and just. But so must be referees, teachers, and in many situations of everyday life parents as well. Political leadership might be similar to entrepreneurship and public officials are often similar to managers. Even though certain values appear to belong more to the political sphere (e.g., leadership, democratic sensibility, sense of social justice, and respect for the constitution), the political sphere is not identical with the government and its institutions. Spheres of value do not necessarily coincide with our institutional world as defined by constitutions and customs. Distinguishing and making sense of value spheres or realms is an interesting problem of political theory but separating government branches only in terms of virtues and values does not look a promising way to justify the principle of the separation of powers.

SUMMARY

This chapter has been largely critical. The principle of the separation of powers has been traditionally justified by its potential to defend individual and public liberty. Most defenders, including the classical ones, did not, however, put forward systematic arguments and worked more with presumptions and assertions that resemble more of tautologies, as Waldron complained. The political philosophy of liberty is, of course, an immense subject. But only a cursory overview of some classic arguments revealed that the relationship between negative liberty (which is the stricter and more demanding counterpart of tyranny) and power is by no means unambiguously antagonistic. Thus,

the protection of liberty is in itself an unsafe ground to justify the separation of powers.

Beyond liberty, a number of important values were discussed for that purpose. Impartiality, another serious candidate, was found difficult to relate especially to legislation. Functionality and efficiency are, as often noted in the literature, also insufficient to carve out a political-normative ground for justifying the principle. Justice, a cornerstone value in modern political theory and often recommended as the ground value of government, is especially troublesome inasmuch as it not only fails to justify the separation of powers but it is potentially in conflict with it.

The argument to abandon the justification of the principle in terms of a specific value and presuppose a favorable axiological continuity between government and civil society is, however, both contingent (what if the axiological continuity is not favorable as in a genuinely Fascist society or it is simply not the case?) and, more importantly, it does not make the principle unjustifiable tout court. Finally, attempts to justify it in a way that each branch is associated with one or more values are either arbitrary or rather useless in practice.

NOTES

1. Carolan, *The New Separation of Powers*, 33.

2. Some examples (each accessed and checked August 3, 2016): the title of Section 3 of the *Finnish Constitution* refers to and spells out the logic of the principle (http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf). The Preamble of the *Turkish Constitution* defines "[t]he separation of powers, which does not imply an order of precedence among the organs of the State, but refers solely to the exercising of certain state powers and discharging of duties, and is limited to a civilized cooperation and division of functions; and the fact that only the Constitution and the laws have the supremacy" (https://global.tbmm.gov.tr/docs/constitution_en.pdf). *The Constitution of Poland* makes the principle a cornerstone of institutional order in Article 10: "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" (http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm). *The Constitution of Portugal* enlists a number of political values in Article 2, including "the separation and interdependence of powers" (https://www.constituteproject.org/constitution/Portugal_2005.pdf). *The Slovenian Constitution* determines in Article 3 that "[c]itizens exercise this power directly and through elections, consistent with the principle of the separation of legislative, executive and judicial powers" (http://cj.md/uploads/Slovenia.pdf). A number of American state constitutions have similar provisions. *Maryland* is, for instance, very rigorous: "the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other"

(Article 8, http://msa.maryland.gov/msa/mdmanual/43const/html/00dec.html). *Texas* has the principle formulated in a very detailed manner, in Article 2., Section 1: "The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted" (http://www.constitution.legis.state.tx.us/). To these and further such examples we must add practically each constitution that separates the various branches of the government and puts constraints on their competences and powers, making thereby implicit references to the principle itself. This includes the US Federal Constitution, as Waldron noted.

3. Montesquieu, *The Spirit of Laws*, 199.

4. Ibid., 197.

5. Vile, *Constitutionalism and the Separation of Powers*; Waldron, *Separation of Powers*; Michel Troper, "Separation of Powers," trans. Philip Stewart, in *A Montesquieu Dictionary* [online], directed by Catherine Volpilhac-Auger, ENS Lyon, September 2013. Accessed August 3, 2016. URL: http://dictionnaire-montesquieu.ens-lyon.fr/en/article/1376427308/en.

6. On that account, L. Claus claims, Montesquieu failed. However, the English Constitution is in fact a better guarantee of liberty but for a different reason, namely, for the principle of power sharing. Montesquieu had a sense of that, too ("power should be a check to power") but was led astray by the Bodinian obsession of essentialism in terms of power. Laurence Claus, "Montesquieu's Mistakes and the True Meaning of Separation," *Oxford Journal of Legal Studies* 1 (2005): 419–51.

7. Waldron, *Separation of Powers*, 453–54.

8. The British parliamentary system has ever been considered as an exception to the separation of powers (it was allegedly a gross misunderstanding on the part of Montesquieu to regard it a specimen or benchmark of the principle). More on this in Chapter 5.

9. Both C. Munro and P. Leyland admit that the British Constitution as it de facto works cannot be described as a model of the principle of the separation of powers yet it does not refute the principle, either. Peter Leyland, *The Constitution of the United Kingdom. A Contextual Analysis* (Oxford, Portland: Hart Publ. Ltd., 2012); Colin Munro, *Studies in Constitutional Law* (London, Edinburgh, Dublin: Butterworths, 1999).

10. D. Levinson and R. H. Pildes argue that the real stake about the separation of powers is not powers but parties (i.e., real political agents or actors—or wills). Daryl J. Levinson and Richard H. Pildes, "Separation of Parties, Not Powers." *Harvard Law Review* 119 (2006): 2311–86.

11. R. Brown's assessment of Montesquieu's dictum is that "whatever else we might say, liberty depends on some notion of predictability, or perhaps rationality, in government as a basic prerequisite to fair decision." She does not really address the simple question of why a Hobbesian state or government that is *not* built on the principle of the separation of powers, would fail to satisfy the requirement of securing

liberty. Rebecca Brown, "Separated Powers and Ordered Liberty," *University of Pennsylvania Law Review* 6 (1991): 1534.

12. A nice contrast between the blessings of unified, rational, consensual, and benevolent power and dispersed, irrational, and malevolent social power is provided by Jonathan Swift in the Fourth Travel of Gulliver. England does not fare better than any other European country in terms of good governance. Of course, Swift is not unequivocal about the absolute goodness of the horse society, either.

13. Elizabeth M. Magill, "Beyond Powers and Branches in Separation of Powers Law," *University of Pennsylvania Law Review* 150 (2001): 651, 653.

14. Brown, *Separated Powers and Ordered Liberty*, 1534.

15. Waldron, *Separation of Powers*, 454.

16. M. Troper notes that in Montesqueiu's terminology, the idea of separation is contrasted with states of affairs that can be described as "conflating" or "combining" or "joining" powers. All these possibilities might be discussed one by one but I think that the distinctions discussed in the main text provide a sufficiently broad context for the various understandings of the idea of *un*separated power(s). Michel Troper, "The Development of the Notion of Separation of Powers." *Israeli Law Review* 26 (1992): Section 28, passim.

17. Magill is especially concerned with "concentration" and "aggrandizement" of power but since she rejects the "formalist" doctrine of the separation of powers, her only way to fight power concentration remains an obscure idea of balancing fragmented government. Magill, *Beyond Powers.*

18. R. A. Dahl makes a number of useful distinctions between the magnitude/amount, scope, extension, distribution, and costs of power that may be regarded as quantifiable measures of having power and, by implication, if not a recipe but at least the ingredients of a proper and fine cocktail of it. Robert A. Dahl, "Power as the Control of Behavior," in *International Encyclopedia of the Social Sciences* Vol. 12, ed. D. L Sils (New York: Macmillan, 1968): 405–15.

19. Redish and Cisar (*If Angels Were to Govern*) stress that this fear of accumulated power appears recurrently in the Federalist Papers and Jefferson's writings, too. The locus classicus is of course Paper 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." James Madison, Alexander Hamilton, John Jay, *The Federalist Papers* (New York etc.: Bantam Books, 1982), 244.

20. Max Weber, *Economy and Society*, eds Gunther Roth and Claus Wittich (London, etc.: California University Press, 1978).

21. Since Montesquieu thinks that liberty is what it is only if it does not constrain the freedom of action of others, he assumes that rules defining the constrains are necessary for liberty. This is a fairly standard view. Power is not a threat to liberty if it is concerned with enforcing the constraints. However, since he does hint at the anthropological threat of *any* power to its holder, he should have had pointed out the no less deeply anthropological desire not to be constrained in our actions.

22. Madison, Hamilton, Jay, *Federalist Papers*, No. 10.

23. J. Manning was not the first, however, to note that the US Supreme Court, an obviously competent body to discuss and explore the principle, has not achieved

AQ 4:Please clarify the text part "had pointed out the no less deeply anthropological desire not to be constrained in our actions".

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much in that respect. R. Brown had made basically the same point twenty years earlier, referring to other commentators as well: "[o]ne point on which the literature has spoken virtually in unison is no cause for celebration: the Supreme Court's treatment of the constitutional separation of powers is an incoherent muddle." Rebecca Brown, "Separated Powers and Ordered Liberty." *University of Pennsylvania Law Review* 6 (1991): 1517.

24. Redish and Cisar, *If Angels Were to Govern*, 458.

25. Troper, *Separation of Powers*.

26. Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford: Oxford University Press, 1968 [1958]).

27. John Locke, *Two Treatises of Government*, ed. and intr. by Peter Laslett (Oxford: Oxford University Press, 1998), 364.

28. See Heinrich Best and Maurizio Cotta, eds. *Parliamentary Representatives in Europe 1848–2000. Legislative Recruitment and Careers in Eleven European Countries* (Oxford: Oxford University Press, 2000) and Elena Semenova, Michael Edinger, and Heinrich Best, eds. *Parliamentary Elites in Central and Eastern Europe* (Routledge: New York, 2014).

29. This is not to say that the value of impartiality as well as a number of further, related values such as honesty or transparency cannot be represented and enforced by some separation of its agencies from the rest of the government. State audit offices, administrative courts, and other control agencies may have rights over the legislative body and the executive with respect to their finances and legal decisions. These will be covered later, the argument here is merely that these values alone cannot bear the whole burden of the justification of the separation of powers.

30. Article 112 of the 1936 Soviet Constitution, for instance, provided for the independence of judges: "Judges are independent and subject only to the law." Accessed August 9, 2016, https://constitutii.files.wordpress.com/2013/01/1936-en.pdf.

31. Maria Csanadi, *Party-states and their Legacies in Post-communist Transformation* (Cheltenham: Edward Elgar, 1997).

32. Vile, *Constitutionalism and the Separation of Powers*, 2.

33. Ibid., 329.

34. Ackerman, *The New Separation of Powers*.

35. John Rawls, *A Theory of Justice. A Revised Edition* (Cambridge, MA: Belknap Press of Harvard University Press, 1999), 3.

36. Ibid., 242–43.

37. Ibid., 244.

38. O'Neill and Williamson remark that this Rawlsian scheme disappears from his later thought and therefore it is not clear whether he wanted to retain them for the just basic structure of society. See Martin O'Neill and Thad Williamson, "Branches of Government," in *The Cambridge Rawls Lexicon,* eds Jon Mandle and David Reidy (Cambridge: Cambridge University Press, 2014): 64–68.

39. Rawls, *A Theory of Justice*, 249, 250, 251.

40. In *Political Liberalism*, Rawls seems to move toward a less justice-oriented conception of the well-ordered society. The chapter ("Lecture") on "The Idea of Public Reason," for instance, outlines a somewhat differently formulated ideal that is to work as an constraint on what considerations are and what are not allowed to enter the

political arena. Rawls calls them the "limits of public reason." Here, he does mention the traditional branches of government but repeats that they all must respect or honor these limits, even more so than citizens in their private affairs. He writes that this ideal "applies in official forums and so to legislators when they speak on the floor of the parliament, and to the executive in its public acts and pronouncements. It applies also in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review." For Rawls the principle of the separation of powers remains to have no relevance when it comes to the most fundamental principles of the political society. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 216.

41. David H. Rosenbloom, "Public administrative theory and the separation of powers." *Public Administration Review* May/June (1983): 219–27.

42. David H. Rosenbloom, "Reflections on 'Public Administrative Theory and the Separation of Powers'." *The American Review of Public Administration* 4 (2013): 381–96.

43. Ibid., 386, 387.

Chapter 3

Order and Articulated Government

Neither liberty, nor impartiality, nor functionality, nor justice alone proved to be sufficient for grounding the principle of the separation of powers though each of them (and a number of further values) highlighted it from different angles. Liberty is especially important because it helps us keep focus on power which is largely neglected in the literature on the principle. It will be discussed in the next chapter in more detail. The discussion of impartiality and justice has drawn our attention to the differences, similarities, and overlaps between the distinct branches of government in terms of moral functions and political responsibilities, in general, of normative concerns. The instrumental or extrinsic values of functionality and efficiency supported the need to look for a political theoretical conception of the principle that goes beyond the mere assertion of values that should be protected by it. It seems that the distinct branches of government could and should be related to the basic structure of the political society so that it can serve as a political compass, as it were, for citizens and political officials not only during constitution making and reviewing but also as a rule of political ethos.[1]

JUSTIFICATION AS ARTICULATION

How should the idea of a justification of the separation of powers be understood in the first place? The logic of a single value engendering the principle did not prove to be convincing. Its most recent theories, discussed in the first chapter and taken together, point to the need of a deeper political theory which connects some pre-political concerns or interests (Carolan) or concepts of autonomy (Möllers) with governing in a particular way (Waldron) and in a distinctly organized structure (traditional doctrine). The idea to be spelled

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out here is that these are not just components or logical steps of a theory but also and perhaps more importantly their articulation is itself the justification we are in search of.

In pure theory, articulation is a process by which ideas are expressed and at the same time ordered, though of course the mere articulation of an idea, of a concept, or conception does not prove or justify it in the strict logical sense of the word. In practical reasoning, including political theory here, where actions are partly motivated by beliefs about what ought to be and what ought not to be done, the articulation of an idea is often an articulation of a practice and/or our normative-reflective attitude to it. Justification is in an essential sense entailed by an articulation of a practice if our normative-reflected attitudes to it are assertive and confirmative. (Negative justification—condemnation—is entailed by an articulation of a practice to which we react with refusal, derogation.)

Within the present context, the idea is discernible in Waldron's conception of articulated government.

> To insist on being ruled by law is … to insist on being ruled by a process that answers to the institutional articulation required by the Separation of Powers—there must law-making before there is adjudication or administration, there must be adjudication, and the due process which that entails, before there is the enforcement of any order. … The legislature, the judiciary, and the executive—each must have its separate say before power impacts on the individual.[2]

The practice we are dealing with is governing, more broadly, being governed by law. One, like Pope quoted in the previous chapter, can have a vague or unarticulated conception of this practice. However, the contention that "I am indifferent to how I am being governed" is difficult to believe not only because the government (always broadly understood) is present in all too many areas of my life but also because it seems to presuppose that I *know that* I am being governed—that is, I know, however faintly, what governing as a practice involves. And knowing *that* is hard to reconcile with a lack of some minimally reflective and normative attitude to it at the same time. Waldron, too, uses a strong assertive or confirmative verb, that of *insisting*, to express the normative aspect of *knowing* a practice. Thus, a practical justification of the idea of articulated government ensues.

In particular, to remain with Waldron's idea for another moment, articulated governing is a practice that has first of all distinct *phases* rather than functions or components. "Governing" is some kind of a self-sustaining, structured *process*. However, it is not a process that has either an exact beginning or an ending. It is not a business which is planned, outlined, started, done, and eventually finished. True, in democracies with regular elections, especially in the case of parliamentary systems where the legislative majority

determines the executive will, governing has a narrower meaning similar to business, especially such ones that follow the popular project-logic (writing a program, gaining the mandate to implement it, then legislating and executing the program). In the broader, constitutional sense, however, governing entails many more things, including the functioning of the judiciary, many autonomous or semiautonomous decisions of various agencies, and of course the application of laws and other rules determined by previous majorities. In Waldron's view, this broader understanding of governing has nonetheless a shape; a structure, with many beginnings; and many endings other than elections. Articulated government or governing refers to both the never-ending process and its natural structuredness.

An analogy can be useful here. Suppose a group of children assemble on the playground. Some know each other, but there are strangers, too. They all want to play because that is what children do, especially on the playground. They could agree to play a game the rules of which everyone knows but suppose there is no such game at hand, or they consciously decide to play something new. It is rarely the case that they would sit down and begin to discuss what they should play. Most probably, they would begin to use spontaneously whatever their surrounding provides them with, natural and artificial objects, including even one another, and resort to concepts, memories (say, of a movie everyone saw), and rules other games that they are familiar with. The new game will not be entirely new and will resemble of other games. But the relevant point is that it will have rules to be observed, there will be goals or prizes, subgroups and leaders will emerge, and functions and roles will evolve. Briefly, a new game will indeed come to existence. It will be defined, conceptually shaped, that is, articulated by playing it. It will be an articulation both of an idea (one may later codify the rules and make the game repeatable) and of a practice. Finally, anyone wishing to join in will have to observe the rules and appreciate the special goodness (telos) of the game. Its understanding entails sharing the goodness and wanting to play *it*, that is, not just to play *something*.

The more complex a practice is, the more difficult it is to determine in what a normatively assertive articulation of it consists. A children game causes pleasure (excitement, interest) and that pleasure is a special good from which the justification of the game springs—at least from an adult's eye. However, adults are often unwelcome by children in their games precisely because they sense that adults have a different attitude to it, not the requisite intrinsic normative support but, say, the extrinsic concern over their own amusement or the children's well-being, including their pleasure. The players themselves take the game usually very seriously and hardly if ever reflect on it from any point of view but the very idea of playing, that is, doing the game. They "support" the game not (primarily) for its pleasure-causing function but simply because they want to play *it*.

As was argued, it would be a questionable claim to say that governing or being governed is a similarly self-evident condition of every human being of which every one of us approves. This is why an *articulated* government is being called for and sought. In Waldron's view, articulation means a process that has a kind of a self-effacing structure, a set of rules by which the "game" is being played, which somehow takes the shape or form of the traditional institutional separation of powers. It is not entirely clear, however, how and why exactly this (and not a different) structure unfolds when governing is considered as a practice. It seems as if the old triad prevailed in the end for no other reason but that this is the inherent logic of governing. But this is a claim that is no stronger than Montesquieu's mere suggestion, criticized by Waldron, that liberty just requires the principle of the separation of powers. Obviously, a more elaborated conception of articulated government is needed to ground the justification of the principle.[3]

WELL-ORDERED SOCIETIES

Waldron repeatedly warns that the various branches of government should watch out not to "contaminate" or "infect" one another. These verbs have a particularly strong normative force. The implication is that without the separation of the three branches, governing would become "impure," that is, obscure, abstruse, chaotic, and presumably self-destructive. In itself and as it stands, this warning may, however, be interpreted as a mere call for a more transparent and efficiently functional governing, a requirement that totalitarian or dictatorial regimes may as easily satisfy (or perhaps even more easily) as constitutional democracies. What is necessary therefore is that governing be understood as a practice that makes room for some participation of the governed, not necessarily in a republican, active, decision-making role but minimally in a Lockean way of assenting, consenting to the idea and practice of civil government. Once such a conception is sufficiently established, the principle of the separation of power can more meaningfully and consistently be developed from it.

The concept that seems to have a good potential for establishing such a conception is *order*; hence the aim of the game we are called to play is to create and maintain order. In political theory, this concept is most commonly considered either explicitly or and perhaps more often implicitly within what is known today as contractarianism.[4] Locke's argument cited earlier makes a reference to order and is therefore worth looking at once more.

> in well order'd Commonwealths, where the good of the whole is so considered, as it ought, the *Legislative* Power is put into the hands of divers Persons who

> duly Assembled, have by themselves, or jointly with others, a Power to make Laws, which when they have done, being separated again, they are themselves subject to the Laws, they have made; which is a new and near tie upon them, to take care, that they make them for the public good. (italics in original)[5]

The key concept is the well-ordered commonwealth. It is defined as one where "the good of the whole" is the guiding principle of legislation, and where everyone is subject to the law, legislators included. The law is not just a rule to be enforced but it creates a new tie upon them, as Locke puts it. Of course, for Locke laws must conform to the precepts of the natural law which remains valid in the political order as well. In a sense, then, even the state of nature is well-ordered inasmuch as the natural law informs everybody on the basic measures of right and wrong conduct. Making a step backward in time, we can say that Aristotle would have agreed with Locke on the point that a good political order is one where the public good is the main principle and motivating force of rulers. Aristotle thought, however, that the good of the whole commonwealth was a function of the personal virtuousness of the rulers which consisted in their willingness and competence to serve the common good. Such differences notwithstanding, most classic authors did not dwell much on the notion of order, taking for granted that political regimes guided by and toward the public good are well-ordered. Public good and order are in one way or another but essentially connected.

In modern contractarian theory, John Rawls' conception of the well-ordered society is perhaps the most well-known. In *Political Liberalism* he sums up the conception is a concise way:

> To say that a society is well-ordered conveys three things: first … it is a society in which everyone accepts, and knows that everyone accepts, the very same principles of justice; and second …, its basic structure, that is, its main political and social institutions … is publicly known … to satisfy these principles. And third, its citizens have a normally effective sense of justice and so they generally comply with society's basic institutions which they regard as just.[6]

It is significant that Rawls renders here the concept of order a function of not only an objective arrangement of institutions but some subjective awareness and acceptance and sense of justice on the part of citizens. In other words, the elements of knowledge and assent are parts of the definition of order. The normative-reflective attitude to the principles of justice and the institutions they engender are necessary to make order or well-orderedness an articulated state of affairs (not, of course, a particular practice).

In contrast to Locke and generally to the classical tradition of natural law and the public good, Rawls relates order to the principles of justice.[7] As is also well-known, modern contractarian theories are typically deductive. Once

the core of the social contract is determined,[8] the main problem is the implementation of that core (usually one or two principles), and governments are merely agents of the implementation. Rawls' conception of the well-ordered society is thus one that must meet the fundamental requirements of justice to qualify as such a society. The basic principles of it must be accepted consensually and institutions be designed according to them. Injustices constantly arise and institutions may be inflexible and in constant need of reform. Thus, citizens must possess a special sensitivity toward, or a sense of, justice that presupposes some proper education with setbacks and failures as well. Therefore a perfect match of the principles and reality is never to be expected. However, such societies are still well-(though not perfectly)-ordered. From this perspective the notion of order serves not as an ideal (that is served by the ideal of justice) but a (somewhat self-congratulating) *consequence* of a well-intended and well-implemented constitutional design.

It seems, then, that the concept of well-orderedness or good order is either inherently context-dependent or necessarily consequent upon the rightness of the constitutive principles of the polity. Be it some Aristotelian (elitist) concept of virtue, or a robust conception of natural law and the public good, or a Rawlsian pre-commitment to the principles of justice, the notion of order cannot stand in itself; it is as insufficiently articulate as is the concept of articulated government itself. No wonder that order as such seems to be able to justify not only fully or at least minimally constitutional but dictatorial regimes as well where governments are repressive but may be functionally well-organized and their operations and behavior predictable. Thus, without some further normative notions order appears to be a politically incomplete concept.

Not everyone agrees with the conclusion, however. There is an ongoing debate in current political theory on whether the concept of the political order is inherently normative though not necessarily tied to any specific conception thereof.[9] The idea is precisely that political order involves at least some aspect of legitimacy or normative validity. Sure, civil war or anarchy is arguably worse than a repressive but secure order, yet even such a Hobbesian state of war can be overcome only in virtue of some consensus guided by natural law. This implies that some further assumptions need to and can be made with regard about the nature of the commonwealth and the normative aspect of order depends on these further assumptions. If this is true, we would be still far from Rawls' very specific concept of a well-ordered society which is based on the principles of justice. If such "thick" conceptions of a well-ordered society are not necessary for the concept of a political order to possess some normative quality, then the political theorist would not be committed to any specific moral creed or institutional arrangement.

Bernard Williams spells out many of these ideas in his posthumous book on political realism. Like Rawls with whom he takes issue, Williams also

resorts to the concept of order and some other normative concepts: "I identify the 'first' political question in Hobbesian terms as the securing of order, protection, safety, trust, and the conditions of cooperation. It is 'first' because solving it is the condition of solving, indeed posing, any others. It is not (unhappily) first in the sense that once solved, it never has to be solved again."[10] Thus, we are at the very foundations of the political community, without either the elitist or the contractarian premise according to which a conscious (tacit or explicit) consent to a robust conception of the public good or of a good order is necessary to make the concept of order truly meaningful.

Williams' conception of order is, however, intrinsically tied to normative validity. This is why he calls his formula the basic legitimation demand (BLD). Legitimation is a normative concept because it entails acceptance and consent by all persons involved: "I shall claim first that merely the idea of meeting the BLD implies a sense in which the state has to offer a justification of its power *to each subject"* (italics in original).[11] Since Williams also criticizes what he calls political moralism, the view that moral theory must precede political theory, and since his idea of normativity is also a concept that has in many moral theories an axiomatic function,[12] he in turn has also been criticized for not being consistent.[13] But the details of the arguments and counter-arguments can be ignored here. The point to be appreciated is the difference between (1) a thick moral-political conception of the well-ordered society based either (1a) on a robust sense of in what the public good or the natural law consists or (1b) on some highly sophisticated principles and (2) the thin normative political conception of an ordered society where the government (or the state in general) is possible only if its power is minimally justified, that is, accepted and hence legitimate. The principle of the separation of powers needs to be derived from such a conception which avoids the pitfalls both of elitist moralism and of moral contractarianism but goes back to the normative foundations of political society. Williams' theory of the basic legitimation demand is a serious attempt to formulate such a conception. Yet since it does not directly lead us to the constitution of the polity and the government, we can turn directly to the concept of order.

To return to the analogy of playing a (new) game: those interested or involved should not and cannot be conceived of as having no presumptions, experiences, customs about playing whatsoever; the very idea of playing a game (that of order here) presupposes a vague but strong consensus about participation, rules and objectives in general. Most probably, there will be players who will have a more decisive voice in both determining the particular objectives and rules; and it is also probable that elements of free deliberation and consensus will not be missing. Yet neither the creation of the game ex nihilo, nor the game having been preconceived by some strong and benevolent adults is as adequate rendering of what emerges on the playground.

THE DESCRIPTIVE AND NORMATIVE ASPECTS OF ORDER

What does order as a descriptive-normative concept involve, then? It will be instructive to consider some derivatives of the concept as they are being used in many languages. We distinguish between order and disorder, orderedness and unorderedness, and sometimes talk about inordinacy (or inordinateness) and orderliness. Order is the root of all these synonyms and antonyms, most of which have a clear normative aspect that does not need to be spelled out in great detail. Being ordered implies being arranged, set or put together in a structured manner, possibly with a purpose. What is inordinate is thought to be excessive, irregular, out of proportion. What is not orderly is found to be chaotic, unarranged. Both adjectives come with a ting of there being some preexistent natural order that has been uprooted. The shortest overview of these concepts suggests that order is both somehow "found" and "created," "discovered" and "imposed upon," things.

Order should not be thought of as necessarily a cosmic category which predetermines social order and human nature as well. Such grand philosophical ideas and schemes are not just out of fashion (though the search for the Big Theory in physics seems to have some roots in that tradition which is, by the way, not inordinate) but also too demanding for *ordinary* people. A political concept of order must be accessible to all citizens. Many things have to be "ordered" in the human world and the concept of an ordered society presupposes more or less conscious and widely appreciated human effort to create or restore a habitable world unique to our species.

As was previously observed, without some further ramifications the concept of order is normatively all too permissive. It will be instructive here to use an example that can help us highlight what is at stake, namely, that there can be, indeed, there have been worlds or societies that look ordered yet at the same time somehow grossly at odds with order.

This is how the Dominican friar Bernal Díaz, escorting Cortes and his troops, describes their wonder and utter awe at the sight of the richness, greatness, and *orderedness* of Tenochtitlan, the Aztec capital:

> When we gazed upon all this splendour at once, we scarcely knew what to think, and we doubted whether all that we beheld was real. A *series* of large towns stretched themselves along the banks of the lake, out of which still larger ones rose magnificently above the waters. Innumerable crowds of canoes were plying everywhere around us; at *regular* distances we continually passed over new bridges, and before us lay the great city of Mexico in all its splendour.[14]

But as if he were still in a shock, and trying to make the reader believe the unbelievable, the good friar literally reports about another sight:

> One certain spot in this township I never shall forget, situated near the temple. Here a vast number of human skulls were piled up *in the best order* imaginable,—there must have been more than 100,000; I repeat, more than 100,000. In like manner you saw the remaining human bones piled up in order in another corner of the square; these it would have been impossible to count. Besides these, there were human heads hanging suspended from beams on both sides. Three papas stood sentinel on this place of skulls, for which purpose, it was told us, they were particularly appointed.[15]

European eyes of that age were, of course, accustomed to various refined methods of torturing human beings and condemning them to several brutal kinds of execution, and to scenes of war abundant in blood and mutilation, as well as all sorts of human miseries caused by other human beings. But the sheer measures of institutionalized manslaughter as practiced by and accurately recorded by the Aztecs must have had a silencing and frightening effect on the in-marching and battle-hardened Spanish mercenaries. The contrast is (and probably was) almost unendurable. An incredible achievement of human architecture, expressing a no less astonishing social order stands in a grotesque opposition to a religion or belief system that literally thrives on brutal death. However neatly, we may say orderly, the skulls were arranged their sheer quantity suggested something being gravely inordinate with this order. An experience of order may reveal an absolute disorder.[16]

As was said, this is not just grand theory. After moving into an empty house or apartment most people love to create their own, personal, physical order. Bringing order into their daily routine is also an activity that many people consider a safeguard and a proof of their autonomy. However, our autonomy and independence is by no means absolute. After arranging our life either in the physical sense (finding a place for objects that surround us) we may invite guests for a party, who may find *our order* either just different from theirs or, eventually, somehow objectively inordinate or unorderly or in disorder, not in the sense that we failed to do the room, for instance, but in the sense that things are somehow out of their natural place. Many things can be out of order, remember for instance Gulliver's experiences on the island of Laputa. It is not that everything has an eternal, cosmic place, and that tables must be always in the middle of the dining room and bookshelves must stand at the wall but in the sense that piles of books cannot serve as regular chairs and that shoes do not belong on the table. Pedestrian as these examples are, they may nonetheless reinforce the two aspects of order: on the one hand, that it is not a rigid, cosmic category that leaves no room for human creativity, and on the other hand, that creating order is not identical with absolute arbitrariness, whimsicality, a miraculous deed. This is why not every given social arrangement that looks stable and even widely accepted, qualifies as a good

order, and we may now simply say, as order. A properly understood concept of order provides us with a sufficiently firm normative ground and a telos that does not commit us to more specified moral presumptions but does not justify any form of predictable and functionally well-organized yet repressive and miserable governing.

Applied to a rough political theory of order it may now be said that the concept of order has a descriptive and a normative aspect, and that knowing (being sure) that society is generally speaking ordered we also mean to grant to it our rough approval. This is not a merely passive approval, of course, but one that is constantly on an alert mode. Once the social order is no more "orderly," as it were, or we experience things that we regard as inordinate, or parts or areas of life seem to slip into a kind of disorder, our approval becomes more and more conditional as we begin to find order to be an inadequate description of reality. Of course, there are hardly such absolutely universal measures that can always and everywhere be applied. Without sufficient historical or anthropological knowledge we cannot tell whether or not a particular society was ordered (well). We need not engage in such discussions, however, and go into further details of history.[17] It is sufficient for our purposes to make sure that *our* historically shaped concept of order is properly formulated, retaining the dimensions of "naturalness" and "free and conscious choice" alike.

THE CONCEPT OF POLITICAL ORDER

Upon encountering others as citizens, members of the polity, that is, beyond friendship, family, or other natural bonds, we have two major expectations. Firstly, we expect that whatever we are commanded, instructed, required, asked, and permitted to do should have more or less clear subjective and objective boundaries. A complete submission to the other is in neither sense ever orderly. It is beyond the natural sense of order because, some playing with words permitted, an order without borders is inordinate (excessive, disproportionate, and amorphous: not an order at all). A social order having no subjects but only elements or mere agents is no more social. Positively formulated, a political order entails a concept of *minimum personal autonomy*, with a perhaps paradoxically sounding consequence that the constitution of political order needs constraints provided by the existence of its members.

Secondly, we expect that others also follow rules and norms, and adjust their behavior to ours according to these norms. Again, it is part of the sense of order that it has a structure with some justification. Here, too, it is expected and required by the natural sense of order that political order have a comprehensible and approvable structure. This structure itself does not need to be

cosmically or scientifically or morally justified or conceived of as eternally given and unalterable; the more it looks like this, the more it threatens individuals with penetrating their lives thoroughly and bereaving of them their minimum personal autonomy. But it must be able to rely on the most possible persons' sense of order as naturally given. Positively formulated, political order entails a concept of the *rule of law*, the idea that minimum personal autonomy is both protected and controlled by norms that are in some sense beyond dispute though in another sense proper subjects of reflection and alteration.[18]

The idea of property may serve here as an illustration. It is most certainly a cornerstone of all constitutional democratic states and societies and famously one of the central tenets of Lockean contractarianism. Locke himself ties the idea of natural law (prescribing self-preservation) to the idea of property (everyone is the owner of his or her own person).[19] One does not need to subscribe to the Lockean theory in every respect to appreciate the "institution" of property as being crucial to minimum personal autonomy. The point is not, of course, that everyone has a right to *some* amount of private property; not even that everyone has a *right to* property. The point is, rather, that personal autonomy is inconceivable without the idea of property, of "being able to own" (this or that). In extreme cases such as a decision to give up everything one possesses we still need to presuppose that disowning is an act of owning, namely, of one's will as a property over which one has the ultimate authority. But such—often religiously motivated—cases are rare and interesting here for purposes of bringing home the core of the idea. This is, to repeat, that by possessing property we presume that there is an aspect of a natural order which enables human beings to own and disown, and prohibits others to interfere with it.

Property so conceived also helps us respect and acknowledge others as autonomous beings. The idea of property entails orderedness: rules of acquiring, inheriting, transferring, exchanging, receiving, selling, increasing, using, registering, accounting, evaluating and potentially a lot more. In virtue of possessing and owning, we are already subjected to rules. Again, not every single rule or regulation is a natural consequence of there being such an institution as property. Moreover, modern capitalist economies work with property rules so sophisticated that many ordinary people cannot cope with even understanding many of them. Yet notwithstanding sophistry and technicality, there always remains a natural sense of property entailing first that what I own is not yours and vice versa; and second that this is not merely a matter of primitive right (similar, for instance, to self-defense) but of some generalized norms that are necessary because property is an "institution" that enlivens, catalyzes social interactions and cooperation. If I happen to own a one hundred dollar note, there is a clear sense that no one else owns it and

I am free to spend it as I like; though "owning money" is a complicated issue because of the nature of modern money (the dollar note is more of a right to buy property rather than property proper). Still, saying it is my "own" is perfectly sensible, much as it is to admit immediately that without a host of further rules of the money-game, its ownership would be senseless, after all.

The concept of *political order* is now hopefully easier to circumscribe. It entails, therefore, that citizens are aware that they are in a strong sense autonomous but must obey rules which are tolerably stable and calculable, written or unwritten, "unalterable" or changeable by and within a due process. Life is of course full of violations of rules, of abuses, of cases of unfair application. Confrontations with such cases may cause confusion, anger, a refusal to continue with cooperating with others. Grave abuses or the sheer quantity of abuses may result in the cessation of order, the restoration of which is usually a function of there being a credible rule-maker or a rule-making process where one important source of credibility is the recourse to a sense of natural order.

Much like the concept of order in the most general sense, the concept of political order is not just a description but involves a degree of individual and collective awareness of and assent to it. In other words, both minimum personal autonomy and the rule of law are concepts that everyone must possess and appreciate. Naturally, ordinary people would not put it in such terms but simply say if they feel necessary that "this is none of your/his/her/their business" and that "rules are there to be observed" or that "there must be some order." The point is of course the same: to make others (perhaps ourselves) aware of some facts that carry with them a normative force as well.

Autonomy simply means that everyone is master of his or her life, and governs him- or herself freely in some essential sense. It need not be assumed that to qualify as an autonomous person an individual must be able to have a detailed conception of (good) life, not to speak about an examined life, with constant reflection on past, present and future. Minimum personal autonomy does not presuppose of one's being able to give a detailed and refined description of oneself in terms of virtues and vices, deep thoughts and ideas about the world, society or nature.[20] It assumes only to be able (i) to reflect on one's desires, memories, good and bad actions, goals; (ii) to act in accordance with them; (iii) and to see that others, too, possess a similar autonomy.[21]

The rule of law means, again, put very simply, that personal autonomy is protected and controlled by enforceable norms that are calculable, non-arbitrary, enduring, and relatively flexible. They have a shape, so to speak: in modern democracies, it is the constitution, among other things, as a political (and not primarily a legal) text that expresses the idea of the political order having a shape. Natural and social circumstances may change, emergency situations may occur, political awareness may grow, thus it is a general

expectation that rules be adjusted to these changes. Adjustment procedures may also vary, but there is a natural core of the existing rules that must be kept intact to avoid violence, civil war, terror, briefly, a complete loss of social and political orientation.

The two requirements must be conceived of as essentially tied to one another. From a rule of law point of view the concept of personal autonomy means that no one is *entitled* to interfere with it. From the individual's point of view the principle of the rule of law means that the rules are somehow *out there*, beyond the borders of one's autonomy, and though one is subject to them, they are there to govern him or her (and everyone else), not to absorb him or her as in a perfect utopian society.

It is perhaps helpful to contrast an ordered society with a totalitarian regime. No matter whether such a regime ever existed in a pure or accomplished form, historical experience has provided us with ample evidence that certain ideologies did aim at such arrangements and have sorely achieved impressive results. As was argued repeatedly, totalitarian regimes do not lack order. Or so it appears because they are highly organized, technically refined, and they are often run by a sophisticated machinery of government. Nor should there be a complete negligence of individuality as in a regime whose government thinks only in terms of faceless masses. On the contrary, in a totalitarian regime everyone matters, everyone is expected to contribute as much as he or she can to the purposes of the whole. However, no one possesses autonomy. It is not just the doctrine that penetrates every individual's life from the cradle to the coffin. It is the regime itself. Everyone is expected to identify him- or herself fully with the political system. Private autonomy taken in the former sense is an anomaly to be tolerated only for the time being or, occasionally, a temporary tool to achieve other goals (one example is permitting people to freely satisfy their absolutely basic needs as they wish, on certain occasions such as wars; another example is tolerating personal property for the time being).[22] In other words, granting private autonomy is at most a strategy, a technique of command that can be suspended or withdrawn any time.

Such a regime may be perfectly well-organized with a fully functional institutional structure and countless rules. But again, the crucial point is that the government or the leaders of the regime expect that individuals would find out themselves what rules they should apply. Having become identical with the regime and its "order," they are expected to be lawmakers to, executives of, and judges (and for that matter, executioners) over themselves, as if they were citizens of a perverted Kantian moral republic. The rules are not there to protect and control private autonomy and to constitute a bordered order but to communicate, articulate, reveal the essence of the regime. Put briefly, in a totalitarian regime organization replaces political order and collective political agency replaces individual autonomy.

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To recapitulate, the concept of political order is rooted in our general concept of order that was shown to be a generic and general idea deeply rooted in human experience. It has both a descriptive and a normative aspect. It involves two specific concepts, that of minimum personal autonomy and the rule of law. It gets articulated in and by experience going through a normative-reflective process. Though order is, in itself, not a practice like that of governing, its articulation as a state of affairs (the name and aim of the game) is similarly a way of justifying it because of its inherent normative content. This implies, most importantly, that for justifying order we need not presume either the abstract truth of certain very particular moral axioms (such as the principles of justice) or the presence of some robust sense and idea of the public good. Once it is articulated in this manner, order justifies itself.

Thus, if the justification of the principle of the separation of powers can be derived from the generic notion of order, then there is no need to search for a single value or principle in which it ought to be grounded. What we have to do is to continue with the exploration of minimum personal autonomy and the rule of law, and to spell out, to articulate them in more detail.

FROM DISTINCTION TO SEPARATION

As the concepts of minimum personal autonomy and the rule of law are inconceivable without one another, they are distinguishable. This is a crucial point for the principle of the separation of powers. For the notion of *separation* is also, and perhaps foremost, an act of distinguishing, of making a *distinction*, of realizing what something *is* by realizing what it *is not*. The two acts of realization are of course separable only in an analytical sense. By seeing that *b* is not *a*, we also see that *a* is not *b*.[23] Further, in many, if not all, cases of distinguishing *a* from *b* or *b* from *a* we also reflect on their connectedness or relatedness.[24] Of course, in the process of "learning" or "knowing" the world we do not always need to separate or distinguish things because their particularity is in some ways immediately given.[25]

In the world of concepts, however, such immediate or direct realization of differences is more difficult. In any case, once we say that we *realized* a difference, we also imply that it was *not* entirely evident. But that also means that after the realization of the difference we must presuppose that since it was not entirely evident, there must be something that explains the lack of evidence and this is a relation between the two that connects them in some evident way. There is no need to engage in some even more sophisticated philosophical epistemology. A cursory overview of one or two examples of "separation as making a distinction" in political theory can highlight the point.

Consider first the relationship between the concepts of justice and fairness. Since we are dealing with two distinct *concepts* to which we are accustomed to using, we are perhaps less aware that the two principles of values that these concepts denote are not as easy to distinguish as we may presume. As a matter of fact, Rawls' theory that expressly identifies the two (justice *as* fairness) has not helped sustain the distinction in public debates.[26] Yet they are distinct not only as concepts (words) but as real values or principles that prescribe different actions. Justice tells us to give everyone his and her due. Fairness tells us, at least in contemporary usage, to give everyone what he or she needs to live a life worthy of a human being. Those who insist that we are indeed dealing with two distinct concepts would point out that helping the least advantaged to live a better life, irrespective of his or her commitment to contribute to this improvement, is not just though it may be fair. Positive discrimination is unjust but can be fair (or may be fair but is definitely unjust). Yet the two concepts are not *entirely* different, after all. One can argue that what fairness prescribes is nothing else but a correction of rough justice, a taking-into-account of facts and states of affairs that common sense justice ignores. Positive discrimination, affirmative action is only a redressing of the problems that commonsense justice alone cannot handle, yet they do not contradict justice in a larger or deeper sense. However, once the distinction between fairness (justice in some larger or deeper sense) and justice is consequently blurred or ignored, as many critics of Rawls fear, individual merits and demerits, personal desert and responsibility would soon cease to be sensible grounds of justifying moral action (praising good and condemning evil). The tentative lesson is that justice and fairness are arguably distinct yet fundamentally related concepts and genuine values. These distinctions can ground institutional and policy differences, so we are dealing here not only with problems of political theory but of political practice.

The second example has a more direct relevance for the principle of the separation of powers and will be exploited in the forthcoming chapter. This is the distinction between power and authority. Once more, there is no place, nor need here to rehearse the many arguments about how they can be distinguished. Serving merely illustrative purposes here and now, it should suffice to point out some platitudes. The two concepts denote two distinct but related types of subjugation. Power is usually considered to be a relationship between agents whose wills clash, yet one of them bows to the other. An authority relationship is less obviously or evidently a clash of wills, yet it is by no means a sort of free cooperation to achieve some common goal. Agents subjected to an authority obey orders or follow instructions. However, they do so because they in some sense accept or consent to authority. Whether or not their consent is "free" or genuine depends, in turn, on whether

they were coerced, influenced, persuaded when they entered the relationship: again, power may reappear in the background of authority.

The relevant points are, first, that we are dealing here with similar yet distinct relationships. And secondly, their distinctness is borne out often by an act of separation. Unlike perhaps the distinction between justice and fairness which most people recognize in and by their everyday moral practice, power and authority, at least in the Western tradition, has been more tightly connected with political practice. Cicero's concise formulation, *potestas in populo, auctoritas in senatu*, was perhaps neither legally nor politically accurate, yet the idea that the two concepts can and perhaps should be applied to explain the nature, competences, prerogatives of the separate bodies of senate and popular assembly (or assemblies), has had a fertilizing impact on political thinking and substantial consequences in reality. The medieval conception of the separation of church and state, or better, spiritual and temporal power, actually, between auctoritas and potestas was no less important to the development of the modern conception of the state with limited competence over the private sphere of citizens. These are well-known commonplaces yet very seldom, if ever, quoted and discussed in contemporary discussions about the principle of the separation of powers.

The examples are meant to highlight the way in which the problem of deriving and justifying the principle is best approached. Minimum personal autonomy and the rule of the law are distinct yet essentially related concepts that make up order and are defining features of a politically ordered society. Their relation is, however, not a self-explaining one. In fact, in a sense political theory has ever been struggling with the problem of how to reconcile social authority with individual autonomy and this problem looms large here, too. The point to be stressed here is merely the need to distinguish them with the possibility that they may then ground institutional and policy realities.

The example of totalitarian regimes showed us the consequences of failing to make or uphold the distinction. No matter which part of the concept is regarded as the absolute or trumping part, the mutual absorption of the two concepts result in a regime where individuals are at least potentially mere functions of the system of rules which is, however, nothing more but a function of a singular will. Thereby autonomy and authority collapse into and annihilate each other. Thus, the most essential requirement of a political order to qualify as such is to let itself be articulated as precisely as possible. This in turn amounts to having the two concepts of order to be well-established, explained, and most importantly perhaps, anchored within the institutional system. The articulation of order is an articulation of minimum personal autonomy as well as of the rule of law within not only political theory but also political practice, understood both as an experience and as an expectation of ordinary citizens.

SUMMARY

Jeremy Waldron conceives the idea of articulated government as a process from which the three basic branches of power, hailed by tradition, emerge. How exactly this happens or should be conceptualized, remains largely unclear. What is governing it the first place? The analogy of playing a "new" game was used here to highlight the nature of the issue. The name of the game here is order and the rules that are defined, more by practice than by constitutional deliberation and deep reflection, are outlined by the articulation of governing. The concept of order, it was argued, is particularly useful because it contains two important aspects that help political theory avoid both an over-theorized version of inferring order from highly abstract first principles and an undertheorized version of leaving the constitution of order a matter of and for the enlightened or charismatic few. The first, descriptive aspect is what may be called the natural sense of order that no political order can ignore or violate in an enduring and stable way. The other, normative aspect is what allows and even calls for an active and participatory attitude in creating a social and political community that fits the needs of everybody (though not necessarily equally: Kantian moral equality is not an absolute prerequisite of an ordered society).

Reflecting and focusing on the concept of political order, the natural sense of order entails, as was argued, two requirements. One is minimum personal autonomy that needs to be preserved and protected. Regimes that are unwilling or fail to do so may be refined machineries of domination but do not qualify as ordered ones. The other requirement is the rule of law which is both about some evident, natural norms that must be respected by everybody and every institution to which the legal system must also be adjusted; and about a fairly wide range of positive norms that regulate the more sophisticated aspects of social cooperation and order where the creative, active aspect of order becomes more visible.

The distinctions between "aspects of order" and the requirements entailed by the natural sense of order also suggest that the conceptual operation of distinguishing is prior to the separation of institutions and agencies of governing. The rules of the game, the articulation of governing involves a process in which roles and institutions emerge once more basic, structural distinctions have been established, the agents and inherent objectives are determined. This is not, of course, a historically or temporally sequentialized process but what Rawls called lexicographical phasing.

NOTES

1. Constitutional theorists, especially legal theorists have made tremendous work in exploring how the principle has been working especially in the tradition American

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constitutional review. However, besides a few short—usually neutral or assenting—remarks on Montesquieu's claim that the principle is crucial to preserve liberty, they have paid very little attention to the validity of this normative claim. This is and remains a task for normative political theory.

2. Waldron, *Separation of Powers*, 459.

3. As was argued in the previous chapter, liberty is certainly related to transparency and predictability. Brown also noted this relation but her argument for the principle is in fact closer to a defense of the principle of the rule of law, with a special stress on the judicial protection of individual rights, suggesting that "positing the separation of powers is intended, in part, to ensure the protection of every individual's due-process rights" (*Separated Powers*, 1550). Redish and Cisar make a dismissive judgment of this strategy, writing that "[b]y collapsing separation of powers into the goal of preserving 'ordered liberty,' [Brown] has effectively undermined both the inherently prophylactic nature of separation of powers and the use of multi-barrier 'safety nets' against tyranny. … The net result is an abandonment of the entire separation of powers structure, despite her obvious desire to do no such thing" (*If Angels Were to Govern*, 504–5). This is perhaps too strong. Brown's point about protecting liberty by transparency is a worthy one, what needs to be done is to show how the separation of powers could be used as a well-structured, order-oriented principle that makes governing transparent and articulate, whereby private and public liberty is better preserved and protected. Also, though Magill's laudable efforts to reinvigorate a formal approach to the principle were criticized in the previous chapter because her conception threatens with an aimless fragmentation of government power that may jeopardize, rather than enhance, liberty; nonetheless, her original grasp of the idea that is being explored here is sound. However, she puts it in a self-defeating manner: "it is a hopeless enterprise to talk about balance among the branches of government. We have not come close to articulating a vision of what an ideal balance would look like. … In short, we do not know what balance means, how to measure it …" (*Beyond Powers*, 604–5). Of course, talking about balance in the abstract is rather hopeless, yet articulating a vision of an ordered government may yield a meaningful conception of balance as well which gets expressed in and by the principle of the separation of powers.

4. This is not to say that non-contractarian theories ignore it. On the contrary, the concept of natural order is highly important in the classical conservative tradition, including, in this respect, even Rousseau: see Maurizio Viroli, *Jean Jacques Rousseau and the Well-Ordered Society* (Cambridge: Cambridge University Press, 1988). Since the justification of the principle of the separation of powers needs not to be biased in either a more liberal or a more conservative political philosophy, the basic insight or experience that the concept of "natural order" conveys will also be exploited here.

5. Locke, *Two Treatises of Government*, 364.

6. Rawls, *Political Liberalism*, 35.

7. In *A Theory of Justice*, Rawls expounds the conception somewhat differently: "[a] well-ordered society [is] one designed to advance the good of its members and effectively regulated by a public conception of justice. Thus it is a society in which

everyone accepts and knows that the others accept the same principles of justice, and the basic social institutions satisfy and are known to satisfy these principles. … Now a well-ordered society is also regulated by its public conception of justice. This fact implies that its members have a strong and normally effective desire to act as the principles of justice require" (Rawls, *A Theory of Justice*, 397–98). In this, revised, version there is a reference to the common good.

8. Some well-known examples: Alan Gewirth, *Reason and Morality* (Chicago and London: The University of Chicago Press, 1978), 135: "Act in accord with the generic rights of your recipients as well as of yourself. I shall call this the Principle of Generic Consistency." Gauthier, *Morals by Agreement*, 145: "in any co-operative interaction, the rational joint strategy is determined by a bargain among the co-operators in which each advances his maximal claim and then offers a concession no greater in relative magnitude than the minimax concession" (this what Gauthier coins as the Principle of Minimax Relative Concession). Thomas M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), 153: "An act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced, general agreement." David Parfit, *On What Matters I–II* (Oxford: Oxford University Press, 2011), Vol. I, 413: "An act is wrong just when such acts are disallowed by some principle that is optimific, uniquely will-able, and not reasonably rejectable."

9. Bernard Williams, "Realism and Moralism in Political Theory," in *In the Beginning was the Deed*, ed. Geoffrey Hawthorne, 1–17 (Princeton: Princeton University Press, 2005); Andrea Sangiovanni, "Justice and the Priority of Politics to Morality," *Journal of Political Philosophy* 2 (2008): 137–64; Matt Sleat, "Bernard Williams and the possibility of a realist political theory," *European Journal of Political Theory* 4 (2010): 485–503; Alex Bavister-Gould, "Bernard Williams: Political Realism and the Limits of Legitimacy," *European Journal of Philosophy* 4 (2001): 593–610; Katrina Forrester, Judith Shklar, "Bernard Williams and political realism." *European Journal of Political Theory* 3 (2012): 247–72 and Edward Hall, "Bernard Williams and the Basic Legitimation Demand: A Defence." *Political Studies* 2 (2015): 466–80.

10. Williams, *Realism and Moralism*, 3.

11. Ibid., 4.

12. Korsgaard argues, for instance, that normativity is part of the human nature (an empirical-realist claim, indeed), since we are reflective beings. Christine M. Korsgaard, *The Sources of Normativity* (New York: Cambridge University Press, 1996).

13. Sleat, *Bernard Williams and the Possibility of a Realist Political Theory*. For a defense of Williams, see Hall, *Bernard Williams and the Basic Legitimation Demand*.

14. Bernal Diaz del Castillo, *Memoirs*, accessed August 3, 2016, http://www.gutenberg.org/files/32474/32474-h/32474-h.htm, Chapter LXXXVIII.

15. Ibid., Chapter LXI.

16. Human history is regrettably very rich on further examples of order hiding disorder. One of the most striking and well-known images from our recent history is

arguably A. Eichmann, the incarnation of moral insanity and extreme inordinateness, dressed up as utter orderliness.

17. Certain points are, nonetheless, interesting. What shocked the Spaniards (manslaughter on a massive scale) was, some anthropologists claim, in some larger sense a natural response to certain natural needs. By help of a complex and highly sophisticated mythology this "response" became an integral part of social cooperation, that is, victims of human sacrifices did cooperate with the rituals. It proved to be, however, extremely vulnerable to a different conception of cosmic order. Durable as the practice of large-scale manslaughter was, it collapsed dramatically.

18. Hans Kelsen advances a similar view, if only within the conceptual framework of the state: "If the state is comprehended as a legal *order* then every state is a state governed by law (*Rechtsstaat*) and this term becomes a pleonasm. In fact, however, the term is used to designate a special type of state or government, namely, that which conforms with the postulates of *democracy* and *legal security*." Hans Kelsen, *Pure Theory of Law* (Gloucester, MA: Peter Smith, 1989), 313. Italics are added to stress the similarity of this account to the present one: order is a generic concept (though the concept of the state or government is not distinguished from it) that establishes the constitutive requirements of democracy (here: minimum personal autonomy) and legal security (here: rule of law). Later Kelsen reinforces the close conceptual connection between the state and order: "Once it is recognized that the state, as an order of human behavior, is a relatively centralized coercive order and that the state as a juristic person is the personification of this coercive order, the dualism of state and law is abolished…" (Ibid., 318). In the present conception the "personification of coercive order" will be called political authority (and not the state, see the next chapter). What is remarkable is Kelsen's conceptual struggle with the notion of order that looks both tied to some natural sense, the behavior of individuals, and to some "relatively centralized coercive order," becoming—unfortunately, let us add—identical and ultimately undistinguishable from one another. The conception of German idealism of state penetrating the individuals' behavior and thinking looms large here as well. The possibility of upholding the distinctions *within* the political order is ignored.

19. Locke, *Two Treatises of Government*, 287.

20. For such grand conceptions see Gauthier: "As an autonomous being, the liberal individual is aware of the reflective process by which her later selves emerge from her present self, so that her preferences are modified, not in a random or uncontrolled way, but in the light of her own experience and understanding" (*Morals by Agreement*, 346). G. Dworkin offers an overview of various definitions of autonomy and concludes with a similarly broad and demanding account: "autonomy is conceived of as a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values." Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), 20.

21. A less demanding conception of autonomy is for instance offered by Robert Nozick: "It is important and valuable that a person have a range of autonomy, a range or domain of action where he may choose as he wishes without outside forcing.

Recognizing and respecting such a domain of autonomy is a response to the person as a value-seeking self." Value-seeking is not, however, to be understood as a morally elevated endeavor, to most people it does not necessarily involve more than certain "important and significant choices (such as religious practice, place of residence, choice of mate and lifestyle, choice of occupation), as well as a vast range of trivial choices which go to make up the daily texture of life." Robert Nozick, *Philosophical Explanations* (Cambridge, MA: Belknap Press of Harvard University Press, 1981), 501. John Kekes (1998) also argues for a minimalist account of autonomy which requires that agents perform their actions relatively freely, are capable of sufficiently understanding their significance (without deep reflections on them), of evaluating and comparing them with alternative courses of acting. John Kekes, *A Case for Conservatism* (Ithaca, London: Cornell University Press, 1998).

22. In Marxist ideology, the institution of property is the main hindrance to entering the Communist utopia. Precisely because it is essentially tied up with individuality and personal autonomy, it causes alienation and false consciousness which in turn results in rules that make rule and ruling possible.

23. Ontology being not my concern here, these propositions are not meant to be philosophically accurate. Nonetheless, it must be noted that *a* and *b* are understood either as particulars or instances of universals.

24. This requires further ontological terms to be invoked such as universals.

25. Hardly anyone would need to "distinguish" between a planet and a watch, for instance. Empirically, however, there can be contexts or tricky perspectives where even otherwise remote objects resemble of one another. This is of course not real but perceptional resemblance.

26. For a detailed overview of the meaning of fairness see the *Appendix* in David H. Fischer, *Fairness and Freedom* (Oxford, New York: Oxford University Press, 2012).

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Chapter 4

Social Power, Political Power, and Political Authority

In Chapter 3 it was argued that the principle of the separation of powers should and can be derived from a political theory that starts with the concept of a political society. In particular, the concept of political order was shown to have descriptive and normative aspects alike and it was argued that it entails two specific requirements, that of minimum personal autonomy and that of the rule of law. These concepts are distinct but related and thus constitutive of order. Their distinction or rather, distinguishing, is not only a theoretical but a practical process of articulating government (or the "business," the "practice of governing") and it implies the fundamental separation of the autonomous individuals and the rule of law constraining but also protecting personal autonomy. In this chapter it will be argued that both concepts are essentially related to the notion and phenomenon of power, and that a reflection on these relations helps us articulate three distinct types of power. These types will then serve as grounds for the principle of the separation of powers in a narrower, institutional sense.

SOCIAL POWER

Theories of Power

It is worth repeating here that there is practically no reflection on the very notion of power in the literature on the separation of powers.[1] There are several reasons to explain this, one may be semantics (influenced, of course, by theory). "Power" is probably used often only as a synonym of government branch, in other words, already in an institutionalized sense. Having legislative power entails having the power, that is, the right, to make laws.

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Power and right are, however, hardly synonymous concepts except in this established legal-institutional context. If one wants to ground the principle in a deeper political theory, then this context has to be left behind.

As we already saw in the discussion of liberty, the classic concern with tyranny, with the accumulation of power in one hand, or its concentration within one government branch presupposes that power is primarily a social and political *phenomenon*, an inevitable feature of social life that needs to be curtailed, tamed, and perhaps put to better use. For as was also argued power is not trivially a destructive force. Rather, it might have an enabling, creative side as well. A number of political philosophers and social theorists with otherwise highly divergent views have agreed that this is indeed the case. For Hannah Arendt, for instance, power is a collective capacity to act in concert, and power stands in sharp contrast to violence which is, albeit necessary in certain cases (punishment, defense), a mostly destructive force.[2] Although in a less systematically outlined fashion and with always deliberately ambiguous conclusions, Michel Foucault, too, points out repeatedly that modern individuality (the liberal self) is as much a creature of power as is its victim.[3] In light of these ambiguities regarding the notion of power we cannot spare to reflect on it in a bit more systemic way.

Max Weber's definition of power states that it is a social relationship where wills of agents (individuals or groups) clash.[4] Weber hastens to add that his definition is very broad (as he puts it, amorphous) and that it is therefore almost useless in social theory. As is well known, his further investigations focus on domination (Herrschaft, authority) and its legitimacy. He nowhere explains how power relations that he considers real and important transform into relations of domination, that is, legitimate power. Sociologists of power relations, like Talcott Parsons, Pierre Bourdieu, Michael Mann, Niklas Luhmann, or Jürgen Habermas have outlined grand theories of how power mechanisms work, and, especially Parsons and Luhmann, tried to connect them up with highly stylized and abstractly constructed situations of ego-alter relations. They, too, emphasize the benefits of power for the integration of society (Parsons)[5] and for the reduction of its complexity for individuals (Luhmann).[6] There is no space to assess these theories here. Notwithstanding the sophistry and idiosyncrasy of their terminology, they often simply confirm the insight that power is very often, if not always, a two-sided phenomenon.[7]

On the one hand, power entails obedience which is a constraint to the freedom of the subjected agent and an enhancement of the freedom of the superior agent. On the other hand, however, even if the subject must obey (what "must" means is, of course, another question) and he or she indeed loses part of his or her freedom in the sense of not being able to act as he or she wishes, new opportunities of action may arise. A very simple example is when a student is told what to read (to avoid possible confusions with cases

of authority, let us suppose that she must do the reading as a punishment), she may nonetheless earn new knowledge, perhaps become indeed more disciplined and responsible. These are not just desirable moral traits but also new capabilities. Obedience may restrict freedom in the short, but enhance it in the long run. Resisting power (the will of the other), on the contrary, may help one preserve immediate liberty to act otherwise, yet entail a loss of freedom in the longer run because it may consume precious resources that could be or could have been used in more profitable ways. Power as such does not seem to be unequivocally contrary to freedom.

Further, once rational choice theories of power are also taken into account, we are in the midst of calculations and gauging payoffs of power games.[8] It turns out that not only resisting but also exerting power may prove to be less profitable than non-exerting it because it may also be highly costly (think of costs of enforcement, monitoring, making threats credible, gaining reliable information about the other's intentions, etc.). Higher costs of action *A* (involving an exertion of power) ceteris paribus, limit the freedom of acting otherwise, and to compel one to choose *B* or *C* (obeying the other or avoiding contact, for instance). Further refinements are possible ad infinitum as it is often an open question how to define and measure power resources and costs, for instance,[9] and how to predict the behavior of the other agent. The idea to be appreciated here is, once more, that there is no reason to think that having or exerting power *always* increases freedom of the one, and decreases that of the other agent.

Another crucial fact regarding power relationships between agents is that the classic formula of "clashing wills" does not imply that such a clash is always an event where both sides are conscious of the clash. The old problem of political theory of how to distinguish between "having" and "exerting" power is engendered by the simple fact that a subject may take another agent's will as a maxim of his or her action even though the other agent is not conscious of this.[10] Power is had but not exerted; yet anticipated exertion of power makes it, so to speak, work anyway. Paradoxical as it may sound it is the subject who exerts the power that the power-holder possesses. The will of the superior is made effective by the subject's perception of the will of the power-holder. The reverse is also true. Anticipated resistance may motivate many power actions. I may lock my enemy in the room for a while even though he does not realize that he has been locked in, nor becomes conscious of my action later. His will to resist is merely presupposed yet it is effective in my own action. Consciousness or mutual awareness of power, of what the other side wants, does not seem to be a sine qua non condition of power being real and effective.

All this makes power a rather evasive phenomenon. It is a social relationship, as Weber noted, yet one that is notoriously difficult to localize, identify,

and capture. However, this is more troublesome for empirical research than for political theory. Minds cannot be read directly, yet this is a difficulty for social sciences in general. The crucial lesson of both macro and micro-theoretical explorations, reflections on power relations, including game theory and Foucauldian historical-cultural-institutional analyses as well, is that power and freedom are not antithetical in the sense and extent as classical liberal theory seems to have thought or presupposed.

Power and Personal Autonomy

How is, then, minimum personal autonomy related to power? On a Hobbesian understanding, for example, our main concern is the protection of our minimum autonomy (very minimal, indeed, reduced basically to sheer existence). Hobbes was very much aware of the importance of perception and anticipation of power exertion. For him the state of war is already at hand when not a single shot has been fired (yet). Others may not threaten or mean to threaten our autonomy directly, it is sufficient that we anticipate them to do so. In such a world, power is a pervasive and mostly destructive force, inasmuch as it is a means to defend our minimal sphere of personal autonomy, that is, sheer life. There seems to be little appreciation of power for its putative capability-enhancing potential, except perhaps that the need to protect our autonomy motivates us not just to develop defensive techniques but also aggressive ones, hence there is much resource spent, in fact, spoiled on protection.

It is possible to argue that protection as was described does contribute to some kind of development that Hobbes would not have admitted (life in the state of war is and remains, according to him, a highly uncivilized and poor kind of life). The crucial kind of development would of course be social cooperation and not just the refinement of personal qualities and individual techniques of defense and (preventive?) attack. Indeed, some theorists have argued that even from a Hobbesian world a robust kind of social cooperation may evolve gradually, without any major event of social contracting.[11] Thus, even a minimalist sort of protecting personal autonomy could establish social links between individuals on the basis of primitive but rational calculation: two individuals can protect one another more efficiently than they could do so if left alone, sparing resources for each. Of course, the precondition to such cooperation is a form of trust, renouncing power as a means of settling internal debates. Hence, in this argument power is still considered to be a destructive force per se, yet instrumental to its own gradual abolition. Power in a rough, social sense makes us think, calculate, make estimations, and for that very reason helps us overcome it or its worst destructive consequences.

There is, however, a more robust sense in which power can be reconsidered as a force that is necessary to protect minimum personal autonomy. The notion

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of protection can easily be taken in a too narrow sense. Protecting physical objects, for instance, is often associated with fences, security techniques, weapons and the like. In a complex society the protection of property is a more complex business. Highly refined methods of insuring property, preserving its value by various economic means such as the optimal allocation of resources abound. Such methods and complex thinking require and presuppose sophisticated institutions and social trust, that is, the cooperation of others.

Furthermore, as was argued, one need not have a comprehensive conception of good life, a thoroughly and regularly examined conscience and consciously fostered character to qualify as an autonomous person. Yet when we think of ourselves, even if only as owners of physical objects, much more is at stake. Ownership of such things and their protection is to most people instrumental to protect and promote values of independence, comfort, security, generosity, and so on. Ownership seldom serves a purely hedonist value of enjoyment or feeling of possessing something and it is more than an animal instinct. But once such and other values are found inherent to even minimum personal autonomy, we begin to think of other individuals inevitably and, again, not necessarily and not always as potential foes but partners to a cooperative endeavor of not just protecting but preserving and endorsing shared values.

The very idea of protection, or as Hobbes and Locke put it, self-preservation may thus suggest more than a primitive urge of physical protection by deterrence and aggression.[12] However, it would a mistake to paint a rosy picture of autonomous individuals happily protecting one another. In that case the very idea of protection would lose its sense. There would no one threatening us and what is ours. The point is, thus, rather that we are worried about what others have in mind, what they consider valuable, how they think about moral matters. In a similar vein, Hobbes also emphasized the significance of human passions that relate us to others. Fame, (vain)glory, respect are, he argued, highly cherished and coveted goods that are available only if people are seriously interested in one another.[13] Autonomy becomes a concept and reality that brings in, among others, moral issues. Protecting even minimum personal autonomy by power makes us interested in others' thinking, value orderings, and moral preferences.[14]

Since we are interested in others' moral preferences, for instance, the "clash," or perhaps first an encounter, of wills is inevitable. If we find the moral preferences of the other agent troublesome, we may resort to the *harm principle* which says roughly that everyone's moral preferences are fine as long as I do not have suffer harm due the actions of others, caused or incited by those preferences. The principle looks very straightforward and practical. However, concepts such as "harm" (and benefit or advantage/disadvantage) are difficult to be rendered meaningful without referring to a highly specified

context. They are thus not very useful in moral and much more useful in legal practice. Generally, anything that is bad (e.g., suffering, loss of value, disadvantage) qualifies as harm. But it makes all the difference whether harm is intentionally caused or merely suffered, whether suffering or some disadvantage is morally deserved or undeserved.

Further, many people hold that even the harm principle presupposes the principle of moral equality (of equal worth) of human beings and are alarmed first by what they perceive as violations of that principle. Unless equal moral worth is presupposed and accepted, the harm principle is morally troublesome because it leaves *structurally disadvantaged* individuals powerless and harmed, without anybody, including themselves, even noticing it.[15] Many defenders of the principle of moral equality may go pretty far in wishing to control even private opinions claiming that unless the principle is not imbued to everybody, the harm principle is useless or even harmful itself. Not everybody would be happy with the practical consequence of this reasoning, however. Some would reject it, refusing to believe that the principle of the moral equality of every human being is such a self-evident or fundamental truth without which the harm principle and with it the protection of minimum personal autonomy is inconceivable. Making a further step, they would point out that the protection of autonomy cannot and should not be a matter of a single principle because single principles are apt to induce its defenders to invade others' lives aggressively, making use of political, social and legal *power*. The harm principle itself is not harmless morally, either because it presupposes another general principle or, as the previous argument showed, it is too strongly tied to very diverse contexts. There are, thus, serious reasons to doubt that clashes of wills as we experience them day by day can be reasonably expected to be resolved by a single or a closed set of moral principles or ideals.

Protecting autonomy sometimes raises the most fundamental moral questions of life and meaning of human existence, no matter how unphilosophically they are treated and answered by most people. If I merely tell my neighbor that "it's none of your business," she might not lose her interest in my business because she thinks that what I am doing is morally wrong, perhaps potentially threatening her autonomy. I will then feel compelled, if not coerced, to face this and say something in response. I may feel myself *forced* to justify my actions, way of thinking, living my life and this is often real power exerted *over me* even though, as was also argued, my enforced reflection on my own views may (but only may) yield a genuine benefit to myself. Simply refusing to justify my actions, more generally, to justify my life before others is not always enough and not even profitable. I may need strength, composure, or character to say no; and in lack of these resources I may just give in and become forced. However, arguing with others is often a more efficient way of protecting my autonomy even though the very act of

arguing with them entails wanting them not just to accept my position but also giving in to my arguments.

Power thus intrudes even the most elevated moral discussions, often in a form of a disagreement over the interpretation of terms, other times in the form of a doubt about the other agent's true motivations. It follows that power will be very much part of our ordinary debates of what it means to protect minimum personal autonomy. One does not need to accept a full-blooded Nietzschean genealogical approach to see and admit that advancing, putting forward moral arguments is bound up with power, and that being successful in defending one's moral arguments is a necessary precondition of preserving and protecting our personal autonomy.

It is not just moral debates that we are having from day to day. Protecting our personal autonomy by power in a positive, freedom-enhancing way may occur in various other social interactions. A simple example can be my decision to spend money on some good or service that I deem important to protect my autonomy even if it involves a clash of wills because producers of other goods and services are thereby disadvantaged (this is often referred to as consumer power). Obviously, of course, they are free to innovate, change their profile, or improve their products or services, which will be beneficial to them in many more ways, yielding more profit and thereby greater freedom to them. This may be a highly stylized account of many real market processes but the point is that the argument can indeed work. To repeat, protecting even minimum personal autonomy is not identical with using power to prevent and fend off interventions, if only anticipated ones. That would indeed make social life intolerable and cooperation difficult if not impossible. Precisely because even minimum autonomy is a human issue and we are always compelled to defend and protect it in complex ways, by arguments, examples, lessons, experiences, decisions; and our efforts do not always and inevitably constrain the freedom of others but also enhance theirs and ours as well.

Power is, thus, first and foremost a social phenomenon that appears in all various interactions between individuals. It is a normal feature of their—of our—lives. It involves clashes of wills that is, furthermore, not necessarily and not always destructive for the protection of personal autonomy. On the contrary, for the protection of autonomy power is often used in ways that create and not only demolish possibilities of action. Hence the normative lesson to be drawn is that rules and governments neither can, nor should be considered as substitutes for social power.

"A Very Strange Doctrine"

It is instructive to relate social power to the most prominent question of how to establish and sustain political order, by using Locke's argument.

He himself called it "a very strange Doctrine to some Men" that "every Man hath a Right to punish the Offender, and be Executioner of the Law of Nature."[16] The idea is somewhat roughly put forward, and since Locke is more interested in a political society that already has a government than in the state of nature without a government which cannot be sustained anyway, his does not bother to spell out the details. But he had to face the objection later that a government may violate natural law. His response was an admission that grave injustices justify rebellion though he added that this is, both empirically and historically, a highly unlikely event.

We can now give a more refined answer. The construction of the social contract, or more generally, the theory of the practice of order works most persuasively if some real power is *always* hold by individuals. It is not only an extreme case of a grave violation of the natural law (like passing Nuremberg-like laws) that individuals have a right (and in that particular case, a moral duty) to resist. The more important thing is that they may retain considerable power "to execute the law of nature" (more or less the same as preserving their personal autonomy, too) *after* establishing the government, and not only in relation to the government but vis-à-vis one another. This is why it is advisable to prefer the broader concept of order to the idea of the social contract which always presses us to demarcate sharply two phases of existence: one pre-political and the other political. In the pre-political phase all power is in the hands of the individuals while in the political phase almost all power is handed over to the government and there is only a dormant, passive, virtual right to resist grave violations of the laws of nature. In reality, however, most people do not think that the protection of their minimum personal autonomy can and should be an *exclusive* responsibility and right of the government or of any other superagency. The state-of-nature kind of *social power*, as it may be called, is by its nature dispersed, constantly constituted, used, preserved, accumulated and destroyed in a political society, a politically ordered society as well. Moreover, it is part of the proper order.

FROM SOVEREIGN POWER TO POLITICAL AUTHORITY

Power and the Rule of Law

We have, thus, a notion of social power that refers to both a destructive and a creative, evolutionary force or phenomenon. We cannot dispense with it entirely, yet its destructive, centrifugal, and disintegrative aspects worry most people. There seems to be a natural desire for some guarantees of cooperation that, however, do not jeopardize personal autonomy. The rule of law was presupposed to be a constitutive aspect of the concept of order.

The idea that the rule of law, or more generally, a social-political structure defined by rules and institutions and known to everybody requires some *force* to be maintained seems evident enough to many people. The lure of every utopian-totalitarian attempt lies, as was argued, partly in the desire and hope that individuals would finally become unified with the law (with Reason, as Enlightenment philosophers put it),[17] so that law-enforcement will be no more necessary. Our true nature is rule-following, provided that rules are fully rational. However, one does not need to hold full-fledged political philosophical views to reject such thinking and disbelieve in such hopes, although this lure is still very strong.[18] In reality, as long as there are violations of rules, irreconcilable conflicts about their interpretations, partial and inconsistent cases of applying them which incites resentment and may provoke resistance, the obedience to rules remains a nonautomatic behavior. No matter how instinctive or deeply conditioned our obedience is in many cases, the whole body of the law cannot become part of our nature. It is a common experience that upon arriving in a foreign (really, an alien) country, we immediately become attentive to rules, try to understand the logic of rule-following of the natives, are always prepared to change our perception, and generally, we control ourselves more consciously. During domestic political turbulences, revolutions, regime changes many people have similar experiences. What was formerly an evident rule (e.g., a prohibition to assemble in public squares), becomes extinct overnight. New rules emerge, either sanctified by some lawmaking authority or just by commonsense, enforced either by some special organization or simply by the citizens themselves. No matter how but when it comes to making sense of order in society, it is quite natural to find that the necessity of rules is bound up with some power capable of enforcing them, should some individuals, on some occasions, violate the rules or disagree about their content.

Hobbes

What kind of power is it? As a first response, we may think of Hobbes' theory of the sovereign. As is well-known, his conception of it rests on his idea of artificial personhood emerging out of the will of individuals:

> The only way to erect such a Common Power … is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say, to appoint one man, or Assembly of men, to beare their Person; and every one to owne, and acknowledge himselfe to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concerne the Common Peace and Safetie.[19]

In this conception an absolute sort of power is necessary and sufficient to uphold the rule of law. There is no further distinction, as Hobbes explains further:

> The Legislator in all Common-wealths, is only the Soveraign. … For the Legislator, is he that maketh the Law. And the Common-wealth only, praescribes, and commandeth the observation of those rules, which we call Law: Therefore the Common-wealth is the Legislator. But the Common-wealth is no Person, nor has capacity to doe any thing, but by the Representative, (that is, the Soveraign;) and therefore the Soveraign is the sole Legislator.[20]

In Chapter XVIII Hobbes lists and discusses the prerogatives of the sovereign. Although he acknowledges and describes various administrative competences of the state that the sovereign may transfer to different bodies and persons but such transfers, entitlements, and competences are always a matter of exigency, functionality, or perhaps of tradition that is, however, liable to change by the sovereign any time. The underlying concept is, thus, a power that is based on consent and is rendered unconditional or absolute by the act of its creation or constitution. Further, it is a power that substitutes for the power individuals have in the state of nature. Individuals do not merely consent to that there be a sovereign power; they also consent to that they confer their social (natural) power to maintain, as Hobbes puts is, public peace and safety. Therefore, whatever the protection of their autonomy requires, is the responsibility of the state. Social power is, in effect, *replaced by* sovereign power (except for the right of every individual to defend his or her life but nothing more), which is responsible for legislation and administration (execution of laws). For sake of convenience, this understanding of sovereign power may be called absolute power, a type of power that cannot tolerate any other type of power.[21]

It would of course be anachronistic to accuse Hobbes of totalitarianism in the modern sense. Hobbes does acknowledge various bonds between individuals in society that they are free to make, and he means this sovereign power to be constrained by the laws of nature. However, he cannot find a real remedy against the sovereign power's violation of these laws within society. Therefore, from an analytical point of view, a strictly and consistently Hobbesian conception makes indeed no room for social power in the sense explained above. This, however, amounts to having a social order that is, in the present sense, no more an order.

Should we then simply dismiss the Hobbesian conception of sovereign power understood as absolute power? Perhaps yes but before doing so it is worthwhile to consider another aspect of it. Recall that power was defined as a phenomenon, a social relation that involves a clash of wills. How is the

Hobbesian absolute power, then, to be understood as *power*? Who exactly exerts that power and with whom is that agent in (potential) conflict?

To the question of who possesses and exerts power, the Hobbesian answer is unequivocal: it is the sovereign. Hobbes makes it as clear as he can that the sovereign is not just a symbol but an effective agent, an artificial person but a person nonetheless, with a will and with lawmaking and administrative capacities. The question arises, then, of how artificial and natural personhood is related. In Chapter XIX of the *Leviathan*, Hobbes discusses the advantages and disadvantages of each basic form of government (monarchy, aristocracy, and democracy) and concludes, after a careful weighing of the pros and cons, that although the monarchical government is far from being perfect (an infant monarch lacks the necessary faculties of forming a will or having a volition), it is preferable to the others. The decisive reason seems to be that artificial personhood being born by a natural person is more effective in the real world. Assemblies of persons suffer more from human frailty and evil inclinations, if for no other reason but the greater number of natural persons involved in the sovereign. This makes the formation of an effective common will a troublesome business. It is very difficult to bind the sovereign power conceived of as an absolute will to the world of real power if it is constantly subverted by personal desires. Thus, social power as a world of effective, personal and natural wills that clash regularly, no matter how influential or decisive certain wills (of the more or most powerful) are, is a constant threat to the idea and effective exercise of a singular sovereign will.[22]

But let us suppose for a moment that absolute power *is* efficient and effective. Many monarchs and governing bodies in history proved to be such, ruling with basically unquestioned authority. We now face the next question of with whom the supposed sovereign power stands in conflict. To this question there seems to be only an implicit answer. In accordance with the presumption that the turbulences of social power being used to protect minimum personal autonomy necessitate *a* power that enforces rules, it may seem that this kind of absolute power stands in conflict with individuals and their personal wills. The agent (possessor, executor) of absolute power is conceived thus as an agent that is *added to* the mass of individual wills and put above them to crush their actual or potential resistance.

Yet a strict Hobbesian would emphatically deny this interpretation. Such an agent is not an additional one but, as the replacement argument showed, the only agent *with power* that remains on the stage after the social contract is accomplished. However, in this case the sovereign power as absolute power ceases to be *power* simply because there is no one to confront it (domestically, of course). In other words, whatever sovereign power wants or does, prescribes or judges, is exactly what individuals who had (but no more have) social power want and consent to. This is indeed very close to Rousseau.

The problem is that Hobbes is a realist who thinks that the sovereign authority needs power. Conflicts among individuals continue to arise and without effective governmental power they threaten the commonwealth and its inner peace. Social power remains and needs to be suppressed constantly.[23]

One may, therefore, propose a revision of the argument. Just because sovereign power is *power*, individuals must retain their wills (and by implication, some power) to (be able to) resist sovereign power. The Leviathan makes real sense only if individuals are, at least in principle, able to resist it. Unless they were, the Hobbesian state would indeed be a pre-Enlightenment and pre-Romantic philosophical construction of either Reason or General Will wholly penetrating individual wills, making their resistance to reason or to the general will not just unnecessary but unthinkable. This is not the case here, however. Individual wills remain separate entities, capable of resisting the Leviathan that is, therefore, an effective power machine (central administration, magistrates, armed forces, juries, etc.). But then we face the question of what it means "to conferre all their power and strength" and "reduce all their Wills, by plurality of voices, unto one Will"? Does all this refer to a single action, represented by the social contract, yet not to anything that happens later? Some clarification is provided by the concluding clause. By one act of willing, namely, to create sovereign power, individuals commit themselves to the maintenance and the irrevocable acceptance of it, yet only "in those things which concerne the Common Peace and Safetie." This implies that there are things that are beyond such concerns where the common power is not competent. In this case the sovereign power is real power because it stands in (potential) conflict with the myriad of individual wills that, of course, regard sovereign power as an agent born out of their consent yet is in a deep sense an alien force. Social power indeed returns.

The crucial question is of course what common peace and safety involves and who is about to decide it. The Hobbesian answer is, once again, that it is the sovereign power. If, for instance, two individuals quarrel about something, which they consider crucial to their personal autonomy yet their quarrel threatens domestic peace, the sovereign may (indeed, ought to) resolve the dispute or simply ban it. The individuals are not free to use their power to protect their autonomy but must accept the sovereign's decision. But then they do not *have* the power to protect their autonomy in the first place because they had relinquished it. We are again back at the totalitarian implications of absolute power, for in order to be effective, sovereign power must be such that individuals do not have any relevant power in their hands to protect their autonomy. From the sovereign power's point of view, resistance cannot even be anticipated. But then it is no more power in the present, and real, sense. "Quarrels" or "disputes" that threaten common peace and safety are in a strict sense simply impossible.

It is unnecessary to push forward the matter within the Hobbesian context. Clearly, if we want sovereign power to qualify as real power, we need agents capable of resisting it. If, however, the creation of sovereign power entails that no such agents can exist any longer, we may choose either a totalitarian direction where the concept of order becomes untenable (sovereign power replaces social power entirely), or abandon the concept of sovereign *power*.

Rousseau

Before doing so, however, it will be instructive to reflect on Rousseau's conception from this aspect. First of all, it is significant that Rousseau makes it very clear that the concept of the will is crucial to understanding the structure and logic of political societies. His concept of the general will is, as is well known, bound to the notion of sovereignty: the general will is what the sovereign wills. The main characteristics of the general will (indivisibility, indestructibility, infallibility, inalienability) are constitutive of, or analytical to, the common sense of willing as a human faculty. Political theory is therefore connected here with the metaphysics of willing.

As a matter of fact, infallibility is less evidently analytical to the notion of the will but it is by discussing this feature that Rousseau distinguishes between the general will and the will of all, adding a further constitutive requirement to the general will to qualify as such, namely, the orientation toward the (public) good. What is intrinsically oriented to the good cannot be fallible. This clause can be, however, ignored for a moment since the main point is that sovereign power can be and is power because it just consists in there being an agent with a will that is similar to every individual person's similar faculty.

So far, the Rousseauian conception of sovereignty is not substantially different from the Hobbesian one though apparently more detailed in its characterization of willing. We must ask the same question now: what is the general will contrasted with? In Rousseau's work we also find clear references to the impossibility of the general will clashing with the wills of the individuals in the sense that the formation of the general will constitutes in every individual renouncing his or her will as effective in matters of public concern because otherwise

> if some rights remained with private individuals, in the absence of any common superior who could decide between them and the public, each person would eventually claim to be his own judge in all things, since he is on some point his own judge. The state of nature would subsist and the association would necessarily become tyrannical or hollow.[24]

However, Rousseau admits, much like Hobbes does, that private freedom remains a meaningful concept in political society as well, as individuals

retain their particular wills. But such wills are to be neglected, even overcome, by the general will, should that be necessary: "Thus, in order for the social compact to avoid being an empty formula, it tacitly entails the commitment—which alone can give force to the others—that whoever refuses to obey the general will, will be forced to do so by the entire body."[25]

The conclusion looks now much the same: if the general will necessarily overrides individual wills, not by crushing them as in a power relation but by way of replacing them, it is no more a proper and genuine will. However, unlike the Hobbesian argument, Rousseau's conception contains further possibilities.[26] Exactly where Hobbes continued to argue that the sovereign is also the government, that is, it is not only the lawmaking authority but it governs, administers, executes laws, Rousseau proposes the distinction between legislation and execution, that is, the well-known branches of government.[27] The argument is not simple, however, and must be cited at some length:[28]

> Every free action has two causes that come together to produce it. The one is moral, namely the will that determines the act; the other is physical, namely the power that executes it. When I walk toward an object, I must first want to go there. Second, my feet must take me there. … The body politic has the same moving causes. The same distinction can be made between force and the will; the one under the name legislative power and the other under the name executive power. Nothing is done and ought to be done without their concurrence. We have seen that the legislative power belongs to the people, and can belong to it alone … [whereas] the executive power cannot belong to the people at large in its role as legislator or Sovereign, since this power consists solely of particular acts that are not within the province of the law, nor consequently of the Sovereign, none of whose acts can avoid being laws. Therefore the public force must have an agent of its own that unifies it and gets it working in accordance with the directions of the general will. … What then is the government? An intermediate body established between the subjects and the sovereign for their mutual communication, and charged with the execution of the laws and the preservation of liberty, both civil and political.[29]

Remarkably, the argument starts with an analysis of *free action*. This, according to Rousseau, can be analytically or metaphysically divided into two components, will and power, or decision and its execution. This is what his example suggests. But then he suddenly argues that the will and the power (or force) to act, are actually two motives or causes, that is, two distinct powers, after all. No wonder then that the rest of the argument breaks the path toward the direction of a separation of power*s*. Both the legislative and the executive powers can *act* which entails that they are somehow different *agents*. Commentators have often struggled with understanding the Rousseauian political metaphysics where the general will's acts are laws

(*general* acts) and the executive will's (i.e., the government's) acts are *particular* orders. The distinction is sharp, implying that the two powers cannot and should not be conflated; their separation is obvious (a matter of direct perception, without the need of further reflection—see the previous chapter on the issue of recognizing something as being distinct from another thing).[30] Yet since the argument attributes agency to both powers, the distinction is blurred and the two powers begin to appear increasingly similar in nature. By the end of the section cited we have a political society structured in a way that seems rather Lockean: "subjects (individuals) + government + the sovereign." The government is responsible to both instances: to the people for maintaining liberty (civil and political) and to the sovereign for the execution of the law. Rousseau sticks to this solution, arguing that a balance is needed among these forces or powers for a healthy state and polity to exist, and concluding that

> The government is on a small scale what the body politic which contains it is on a large scale. It is a moral person endowed with certain faculties, active like the sovereign and passive like the state, and capable of being broken down into other similar relations. … [This is] a new body in the State, distinct from the people and the Sovereign, and intermediate between them.[31]

This is an astonishing development from a metaphysical analysis of free (political) action,[32] modeled according to the experience of how individuals act,[33] to the political theoretical claim that the government is a "moral person" which implies, of course, that it has a will and is not merely a motive, a cause, a blind force that resides within the body politic to be harnessed to achieve what the polity wills. Whereas the executive is first considered a function of the body, an immediate reflex of the body politic once a law is enacted by the general will (the law is *willed*), in the end it looks as a new person, a new body within the polity that has its own ambitions, concerns, aims, briefly, a peculiar personality. Hence the answer to the question of with whom (what agent) is the sovereign will contrasted appears to be that, since the subjects and their wills cannot be counterparts to the sovereign will for Hobbesian reasons, it is the government as some agent that may fill in that role.

There are two problems with this reasoning. First, the coherence of the argument is questionable. Recall how it was developed. Free action was said to consist of willing and acting. Add to this the option of (having) power. It means "to be able to act freely" plus "against the will of others." Sovereign power should therefore be able to confront and subdue others. If there are no others, it cannot be power in a strict sense. Therefore, so the argument may be interpreted, two wills must be constructed as being efficient causes within the body politic.[34] However, if the analysis of free action is correct, then the

two wills imply the possibility of two different actions and the possibility that they are in conflict. But this contradicts the conception of sovereign will being the supreme one that always and by definition is *the* (general) will of the polity. Rousseau is obviously torn between these positions:

> The essential difference between these two bodies is that the state exists by itself, while the government exists only through the sovereign. Thus the dominant will of the prince *is not and should be* anything other than the general will or the law. His force is merely the public force concentrated in him. As soon as he wants to derive from himself some absolute and independent act, the bond that links everything together begins to come loose. If it should finally happen that the prince had a private will more active than that of the sovereign, and that he had made use of some of the public force that is available to him in order to obey this private will, so that there would be, so to speak, two sovereigns—one de jure and the other de facto, at that moment the social union would vanish and the body politic would be dissolved. (italics added)[35]

There is the possibility of a duplicate will of the body politic which marks its end, yet without this possibility the sovereign is not a real power: it has no one to conflict with. Moreover, it seems to have no power to act at all.

The second problem with the reasoning is its substance. Simply put, sovereign power cannot be considered on a par with the *particular wills* of individual citizens or of the prince (of the government, or, as Rousseau puts it later, the *corporate will* of the magistrates) because it ceases to be sovereign. Sovereignty consists in its being or having a force that is irresistible and unquestionable. It must be an evident guarantee that order is maintained. The rule of law needs a concept of sovereign power which is capable of reassuring and confirming *the sense of order* among citizens. This requires that there be a real force behind the concept of sovereignty that is therefore credible and efficient. Such a force cannot, in principle, tolerate resistance. But power can, as was argued, and resistance toward power, be it either active or passive, of any kind, contributes to the freedom-enhancing aspect of power relationships. What sovereignty can do is making sure that the inherent instability of social cooperation based entirely on power relationships is substantially reduced. But to be able to do so, sovereignty must be something that does not suggest itself as an additional force within the polity, similar to the force or power individuals possess. The Rousseauian conception aims at presenting sovereignty as something evidently irresistible (there is and can be only one general will) yet comes to view it as a power that not only replaces individual wills in matters of public concern but is an efficient cause or motive, in the end, an *agent* who wills and acts much as everyone else does. This agent, the government, although initially meant to be a tool, a force, a limb of the sovereign, without an independent or autonomous will, in the end looks like

a new body, a moral agent, a replica of the sovereign, with the potentiality of having a particular will.[36]

Rousseau's conception of the sovereign *power* is, therefore, not a consistent and defensible answer to the question of how social power is to be constrained and also protected within the concept of order. The rule of law, an essential component of order, needs some force to be maintained but it cannot be a kind of power that is analogical with the power that individuals (and their groupings and other social collectives) possess and exert. The creation of the government as an agent, however, amounts to precisely this.

Authority

Instead of power we can, however, rely on the concept of authority to make sense of the general will or sovereignty and to avoid the pitfalls of the Hobbesian and Rousseauian conceptions. The distinction between authority and power was discussed briefly in the previous chapter. It was argued that the distinction is not only theoretically sensible but practically useful for creating, justifying, and thereby sustaining social institutions. The literature on the separation of powers is, however, pretty silent not only on the notion of power but also on authority. Much as with power, there is no space and need here to reflect in on special literature on authority in great detail. It is sufficient to cite the points of agreement on the main features of this relation.[37]

Authority, like power, is an intersubjective relationship which involves the agent with authority and the agent who is expected to obey it. Unlike with power, authority relations do not typically entail conflicts or clashes of wills. Subjects to authority may not *wish* to follow orders, carry out instructions, comply with the desires, accept the counsels of the authority-holder, yet not wishing or desiring to do something is not identical with not wanting or willing to do so, even though in practical deliberations, without sufficient reflection, many people would not bother themselves with such neat distinctions. Nonetheless, the distinction is real and crucial. For it is explicable only if in some sense we are right in supposing that an authority stands and is justified precisely because it rests on some consent. Therein lies the difference from power: in power relations, the obedient agent makes the power-holder's will his or her *maxim of action*, whereas in an authority relation the subject *identifies* his or her will with that of the authority. In the former case, the two wills are kept sharply separate, in the latter case there is a partial, though by no means full, identification of the wills.

A partial identification of the will of the subject and of the authority-holder which may also be called partial consent entails both that the subject acknowledges that the authority-holder is justified in telling him or her what to do, and that his or her competence over the justification of authority is

limited. For instance, to use the most common examples, a doctor's or a lawyer's expertise is a justification for doing what they tell us to do (or not to do). Yet since we lack the expertise they have, we cannot in principle tell where and how their expertise ends. (Of course, expertise is only one, though very common, basis for justifying authority, yet the logic remains the same for other types of authority, too.) Determining the limits of authority can be easier if there are (potentially) rival instances of authority, perhaps of different kinds.

If we conceive of the rule of law component of the concept of order as "willed by" an authority, rather than imposed upon the subjects as some power, we can be more comfortable with the implications. Instead of the concepts of sovereign *power* and general will we may relate the common sense part of order (that there should be some constraints put on social power) to a *political authority* of the commonwealth.[38]

The political authority of the commonwealth rests, in accord with what most contractarian theories also stress, on some consent of its subjects. Consent is the basis of its justification since at least in modern constitutional regimes there is no special expertise or competence or an unquestionable moral foundation other than the necessity of order from which political authority might be derived. However, contrary to some contractarian theories, political authority cannot be fully and entirely under the control of its subjects, either: it cannot be a mere coordinating or arbitrating mechanism. It must be thought of as being *more competent* than any citizen or individual or their associations to provide for order, in particular, in maintaining the rule of law. It is thus both limited and unlimited: limited in the sense that it cannot survive without consent and justification, and unlimited in the sense that it is meant to be a final or ultimate political instance. Being an authority, therefore, it *has* limits although it is futile to seek to determine once and for all where these limits are and precisely in what they consist.

AQ 1: Please clarify the sentence "However, contra"

Political authority so conceived does not and need not engage in power interactions. True, many authorities that we encounter on a daily basis give us orders, instructions, counsels. Doctors tell us what to take in, lawyers tell us what to undersign and what not. But they never coerce, force us to do so, the ultimate decision lies with us. Thus, the political authority is not a political agent after all and perhaps we can even say that it does not act, nor will anything, not at least in an ordinary sense. It is here, with the aspect of political agency, where both the Hobbesian and the Rousseauian conceptions of sovereign power are fundamentally different from the idea of political authority. They seem to want to eat the cake and keep it, too: to have sovereign power be effective as power by administering social affairs (Hobbes) or by guiding the political society (Rousseau), yet to have it work as an internalized force or motive in individuals. The concept of political authority grounds itself in the partial consent of individuals

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inasmuch as it relies upon their need and sense of order; but it does not take part in either the administration of society or in its guiding.

POLITICAL POWER

Social power was shown to be both positively and negatively connected with minimum personal autonomy, the subsistence of which is a requirement of every political order. The positive, constructive aspects of power relations are natural, evident reasons for protecting them, whereas their negative, destructive aspects are similarly natural, evident reasons for curtailing, restricting them. Therefore, the other requirement implied by the concept of political order which is called here the rule of law entails some theoretical and practical consequences, that is, a simply and roughly formulated collective claim for coordinated action. Political authority expresses, represents, supports and holds accountable governments and political actors for precisely this rough and simple, yet meaningful claim.

Nothing more, however. This is what seems to have caused mounting troubles for Rousseau. Despite his belief that the general will is effective he began to construct a new body, the government with a separate will and personality, as was cited in the previous paragraph. Later in the relevant chapter of *The Social Contract* he continues to spell out the details:

> However, for the body of the government to have an existence, a real life that distinguishes it from the body of the state, and for all its members to be able to act in concert and to fulfill the purpose for which it is instituted, there must be a particular self, a sensibility common to all its members, a force or will of its own that tends toward its preservation. This particular existence presupposes assemblies, councils, a power to deliberate and decide, rights, titles and privileges that belong exclusively to the prince. … The difficulties lie in the manner in which this subordinate whole is so organized within the whole, that it in no way alters the general constitution by strengthening its own, that it always distinguishes its particular force, which is intended for its own preservation, from the public force intended for the preservation of the state.[39]

Of particular interest and relevance is the emerging idea that the government has its own purposes and business, even that of preserving itself which, so it appears, is its natural and inevitable feature. It is a price that must be paid, however, because the existence of government is nonetheless an indispensable condition of collective action once political authority is without the necessary power to force individuals to observe the rules.

We may now wonder in what the government's special or particular business (purposes, particular will) consists. Rousseau suggests the following

structure: "The government receives from the sovereign the orders it gives the people, and, for the state to be in good equilibrium, there must, all things considered, be an equality between the output or the power of the government, taken by itself, and the output or power of the citizens, who are sovereigns on the one hand and subjects on the other."[40] The references made to some equilibrium, to some equality within the structure of the polity are especially remarkable. It is explicitly about the necessity to create a *balance*, literally a balance of powers, where the government has a special kind of power, and the citizens are both the sovereign and its subjects. This is a crucial idea, it seems, coming very close to the articulation of a separation of powers *inferred from* distinguishing them from one another, even though Rousseau is usually considered to be rather hostile to the classical version of the doctrine of the separation of powers. The idea is, nonetheless, very roughly spelled out here and the citation itself is open to a variety of interpretations. But some triadic scheme with internal relations that are in some sense "equal" is undoubtedly implied in it, with a reference to the individuals once taken separately, once taken together, and to the government as another, separated agent.

The idea of government agency and personality has the advantage of entailing a will and a faculty of acting. This is consonant with the notion of holding power. It can, therefore, be confronted with the individual wills of private persons. But both the Hobbesian and the Rousseauian conception declares that the government's will, representing the general will (the political authority) should always overcome the private wills of individuals (for Rousseau, including members of the government, too). Such an inevitable triumph is, as was argued, not reconcilable with the very notion of power. However, once the government is separated from the political authority, it is possible if not very plausible, as Rousseau predicts and fears, that it will become the most pernicious particular will in the polity. How can we escape from this dilemma?

What deserves here special attention is a further dimension of social order that contractarianism and many other classical political theories tend to ignore, namely, the political nature of the political community.[41]

It must be admitted that the concept of order suggests, as it stands, a certain static feeling. It may look like a framework, a broadly understood constitution, if not a positive civil religion, to refer to Rousseau once more, where personal autonomy is preserved by the rule of law, in practice, by laws, norms and orders, given or sanctioned by specific institutions, supervised by the political authority. However, such an institutionalized and procedurally established conception of practice ignores the dynamic elements of order. As was argued, the protection of minimum personal autonomy requires and generates power which itself is a dynamic social phenomenon but the idea of political authority cools this down by an atmosphere of tranquility and

immobility. The image of a government that administers, organizes, manages, executes is dynamic only in a mechanical sense. It would be a serious mistake, however, to ignore the truly political aspect of the political community that is creative, passionate, sometimes calculative, sometimes deliberative, often agonistic and intolerant but always dynamic and open-ended. Therefore, if there is some truth about the common wisdom that politics is at least partly always power, then besides the naturalness of social power we must take into account the no less naturally power-ridden political dimension of social life.

The power-imprint of politics is, however, distinct from social power. Politics is not *just* a continuation of individual disputes, debates, struggles over values and interests and the limits of autonomous action. Neither is politics only a sphere of collective action, of whatever kind. There are many organizations, associations, groups of individuals, more or less permanently organized, focusing on a single issue or a full-fledged vision of life that are nonetheless consistent with the protection of individual and personal autonomy. What they lack is an access to the political authority of the commonwealth. They do not have it because they do not want to have access to it. There is no other way to get access to the political authority but by way of taking the whole of the polity seriously, taking, at least potentially, responsibility for the whole. Individuals (like candidates running for presidency) or groups of individuals (such as parties striving for parliamentary majority) who take this responsibility may thereby get a potential access to the political authority of the polity. It is, therefore, the peculiarity of political power that its agents possess a special, nonlegal mandate to conflict with other political agents over the access to political authority and thereby define and redefine the elements of the rule of law.

Much as social power, political power is inherently divided, but it has a limited scope and a topical or thematic field where it can be legitimately exerted. Whereas social power, being in the hands of individuals who can be legitimately or rightly concerned with any aspect of their autonomy, has no thematic limits, political power does have such limits. It must be concerned with the whole, with the public interest or good as such, taking (potential) responsibility for the entire polity, whereby its agents have a clear understanding of one another.[42]

There is thus a practically inevitable competition, a continuous struggle for an exclusive access to the political authority. This was an alien and inherently destructive idea to most classic theorists, including Hobbes and Rousseau, and even Madison. Modern party-based democracies are quite explicit about this competition but earlier dynastic struggles about legitimacy (in the legal sense) were politically also struggles for this access. In reality or empirically, political actors have a variety of motivations behind their actions, including, of course, personal ambitions, passions, preferences, and emotions of love

and hatred. Moreover, it may be the rule, rather than the exception, that they represent their personal preferences, rooted in and taken from the sphere of social power (concerns over rights, economic justice, or personal freedom) *as* general and public interests of the whole. The point is, however, that the during the articulation of order, the normative aspect inevitably appears and they cannot justify any proposed change to the elements of the rule of law *as not* being the general and public interest of the whole. Nonetheless and perhaps paradoxically they, as their opponents as well, must realize and acknowledge that the result of their competition over the access to the political authority that alone can sanction and sanctify generally binding laws and norms is a matter of power. Hence in what the public interest consists remains in some sense an inherently temporal result of a competition.

When Rousseau distinguished between the general will and, very briefly, the will of all he argued that the latter is but a mere sum of private wills that can and should be overruled by the general will. It is absolutely unclear, how. Now we can simply say that the general will, not being a "will" in the proper sense (attributable to some real agent) cannot overrule anything. However, the "will of all," in reality, mostly only "of the majority," as Locke explained, is the political will of the community, represented by a particular political agent, that can secure for itself the blessing of the political authority by taking responsibility for the good and interest of the whole. That may, however, be always open to challenge and may provoke political resistance: the reality of power.

SUMMARY

By articulating the concept of political order, as was argued, a practical justification of it is also developing because of the inherent normative aspects of the concept. If the analysis of order is correct, then its two main requirements, the protection of *minimum personal autonomy* and maintenance of the *rule of law* are both related to power and as it turns out, to authority. In particular, as the conceptual diagram below shows, minimum personal autonomy is strongly tied to *social power*, to both of its positive, freedom-enhancing and to its negative, freedom-restricting side. The positive aspects require and justify the protection of social power whereas its negative aspects call for restriction. Together, they establish the need for the rule of law. This requirement is related to both aspects of the concept of order. By order we mean, as a matter of self-evidence, a natural and unalterable feature of life that is best captured by a notion of a self-effacing authority to which every rational and sober individual is expected to give his or her consent. Therefore, nobody has the right to uproot it. However, this *political authority* is not a proper

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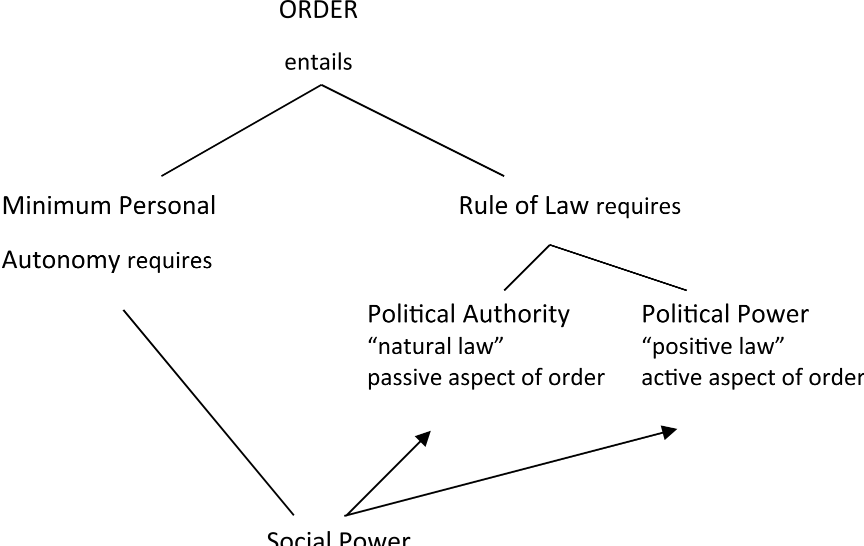

Figure 4.1 The Conceptual Map of Order and Power. *Source*: Created by the author.[43]

agent in the sense of having an identifiable, particular will and the means to act. The rule of law also requires adjustment to the changing environment, the changing desires, worries and preferences of individuals which opens a sphere of collective action marked by creativity and dynamism, but also by disputes and even animosity. This is the political sphere, marked by *political power*, where agents are distinguished from agents of social power in terms of their willingness to take responsibility for the whole of the political community by making positive laws. They struggle over an always temporarily exclusive access to political authority whereby they can form and express their conception of the rule of law.

NOTES

1. Möllers makes a brief reference to the notion of power but without any serious reflection on it, he dismisses it as underdetermined, writing that "[i]t evades a more accurate description of the factors at work" (*The Three Branches*, 80).
2. Hannah Arendt, *On Violence* (New York: Harcourt, Brace and World, 1970).
3. Michel Foucault, *Power/Knowledge—Selected Interviews and Other Writings*, ed. Colin Gordon (Brighton: Harvester, 1980).
4. Weber, *Economy and Society*.

5. Talcott Parsons, "On the concept of power." *Proceedings of the American Philosophical Society* 107 (1963): 232–62.

6. Niklas Luhmann, *Macht* (Stuttgart: F. Enke Verlag, 1998).

7. James H. Read, "Is power zero-sum or variable-sum? Old arguments and new beginnings." *Journal of Political Power* 1 (2012): 5–31.

8. John C. Harsanyi, "Measurement of Social Power, Opportunity Costs and the Theory of Two-Person Bargaining Games." *Behavioral Science* 7 (1962): 67–80 and Brian Barry, "Power: An Economic Analysis." in *Power and political theory—some European perspectives*, ed. Brian Barry (London, New York: Wiley, 1976), 67–101.

9. Keith Dowding, "Resources, power and systematic luck: A response to Barry," *Politics, Philosophy and Economics* 2 (2003): 305–22.

10. Dahl, *Power as the Control of Behavior*; Steven Lukes, *Power: A Radical View* (London: Macmillan Press, 1974).

11. Andrew C. Schotter, *The Economic Theory of Social Institutions* (Cambridge: Cambridge University Press, 1981); Gauthier, *Morals by Agreement*.

12. Gauthier advanced an interpretation of Hobbes where the right of protection conceived as a fairly broad autonomy to advance individual interests is reconcilable with the Leviathan's sovereignty: "Hobbes must espouse an alienation social contract theory in order to defend absolute, permanent sovereignty. If the subjects merely loan their rights to the sovereign, then he is assured neither absolute nor permanent power. But an alienation social contract theory is not therefore incompatible with limited sovereignty. Indeed, if persons have the capacity to alienate certain of their rights in order better of further their interests by undertaking overriding commitments, then internal, moral restraints … will do much of the work Hobbes assigns to external, political constraints" (*Morals by Agreement*, 151).

13. "The Hobbesian state of nature is, after all, plainly and self-evidently replete with social interactions." Peter T. Steinberger, "Hobbes, Rousseau and the Modern Conception of the State." *The Journal of Politics* 3 (2008): 596.

14. The idea of power being positively linked with freedom is a central theme of Philip Pettit's republicanism. His key term is "antipower." He identifies it with freedom in the positive sense, distinguishing it from the mere non-interventionalist (negative) concept of freedom while steering clear from any *conception* of positive freedom. Antipower *is* power, that is, a means to resist others' will. Since Pettit's argument is clearly normative from the first step and is moved by a worry about powerless people and groups, he does not really note that what he calls antipower is massively present in modern society anyway. Whether it should be further promoted, especially by laws and governments, is another question. See Philip Pettit, "Freedom as Antipower," *Ethics* (April 1996): 576–604.

15. Such views of the harm principle usually work with the more robust or thick concept of autonomy (see Raz 1986, Ch. V).

16. Locke, *Two Treatises on Government*, 272.

17. For a characteristic formulation consider J. G. Fichte's version: "It is the end of the Earthly Life of the Human Race to order all its relations with Freedom according to Reason." Johann G. Fichte, *The Characteristics of the Present Age,* trans. William Smith (London: Chapman, 1847), 44.

18. Aurel Kolnai. *The Utopian Mind and Other Papers: A Critical Study in Moral and Political Philosophy*, ed. Francis Dunlop (London: Athlone Press, 1995).

19. Thomas Hobbes, *Leviathan,* intr. C. B. MacPherson (New York: Penguin Books, 1977 [1651]), 227.

20. Ibid., 312–13. The reasoning is not entirely consistent. Hobbes writes both that the Commonwealth and that the Sovereign is the sole legislator, yet they are not identical. Steinberger (*Hobbes, Rousseau*) argues that Hobbes did make a distinction between the commonwealth (the political body) and the sovereign (the artificial person or the soul of the commonwealth). By a single constitutive act two distinct entities are created, hence oneness (one act of constitution) and twoness (two entities) are both truly predicable of the reasoning and its consistence is thereby saved.

21. The argument is theoretically clear. Whether it is plausible, is another matter. Martinich argues, for instance, that "Hobbes exaggerated the desire for power and should have known it." Aloysius P. Martinich, *Hobbes* (New York, London: Routledge, 2005), 45. Plamenatz agrees, writing that "Hobbes seems to have had in mind a relatively simple image of the structure of authority," ignoring the exploration of the possibility of their being different *kinds* of authority. John Plamenatz, *Machiavelli, Hobbes and Rousseau*, eds. Mark Philp and Zbyniew A. Pelczynski (Oxford: Oxford University Press, 2012), 150–51. This is, as was argued here, also true for social power being a sort of power that cannot (is not allowed to) survive once sovereign power is established.

22. The reason may be that "Hobbes believes that a mixed government, by which is meant a government in which more than one entity is a political force, or any other system of government that involves checks and balances, is inherently unstable and does not have or display genuine sovereignty." Aloysius P. Martinich, *A Hobbes Dictionary* (Oxford: Blackwell, 1995), 277.

23. Mansfield is exceptional in taking power seriously within a Hobbesian context. In his interpretation, for Hobbes "power is also neutral", that is, it does not have any particular end or content. "Such neutrality reflects or reveals the undesirability of separate institutions based on the need for will to be judged by reason [that is, by the end or content]—a legislature that wills, or a judiciary that judges, for example. It also opposes a separation of powers that would obviate the dangerous dominance of will over reason by establishing institutions that check each other." Harvey C. Mansfield, *Taming the Prince: The Ambivalence of Modern Executive Power* (New York: The Free Press; London: Collier Macmillan Publ., 1989), 175. If the present analysis of power is correct, however, the sovereign power—if it *is* power—must have some content or end, namely, to confront and overcome social power. In other words, it is not just the case the social power is being created by individuals and in their interactions incessantly but also that it is sovereign power that inadvertently, by being power, creates and provokes social power. To this problem Hobbes does not have a solution.

24. Jean-Jacques Rousseau, On the Social Contract, in *The Basic Political Writings*, trans. Donald A. Cress (Indianapolis/Cambridge: Hackett Publ. Comp. 1987 [1762]), 148. As is well-known, Rousseau sometimes contradicts himself or at least borders on inconsistency. For instance, he later writes that "[w]e grant that each person alienates, by the social compact, only that portion of his power, his goods, and

liberty whose use is of consequence to the community" though immediately adds that "we must also grant that only the sovereign is the judge of what is of consequence." Ibid., 157.

25. Ibid., 150.

26. Steinberger concludes that Hobbes and Rousseau, notwithstanding their differences, agree on the crucial point that the state "is not something that has been discovered, or that has emerged naturally and immanently, or that has been thrust upon us from the outside. It is, rather, the self-conscious, voluntary creation of free, rationally calculating individual human beings. It functions as a man-made bulwark … against the ever-present threat of savage and horrific barbarism, the barbarism of anarchy. As such, it demands *the absolute obedience* of the very people who have created it" (*Hobbes, Rousseau*, 610–11, italics added). The differences are of secondary but not negligible importance. Rousseau maintains popular control and believes in the enhancement of *moral* freedom within the state. In other words, he makes room, at least in principle, for some kind of a division of powers, and is concerned with some kind of personal autonomy being preserved.

27. For Rousseau, the judiciary is part of the executive.

28. Rousseau begins, interestingly, with a very strong disclaimer: "I am warning the reader that this chapter should be read carefully and that I do not know the art of being clear to those who do not want to be attentive" (*On the Social Contract*, 173).

29. Ibid.

30. Plamenatz (*Machiavelli, Hobbes and Rousseau*) notes that Rousseau does not really prove that the conflation of the legislative and the executive powers is a threat to liberty (Montesquieu's concern). That may be true, as Rousseau's main point is that the theoretical (if not metaphysical) difference between the nature of the two powers should be as evident to everyone as the distinction between willing and acting.

31. Rousseau (1987), 175.

32. Plamenatz writes that "[i]n this Third Book Rousseau has little that is new or suggestive to say" (*Machiavelli, Hobbes and Rousseau*, 256). It seems that the Third Book does propose very interesting new ideas.

33. It is of course an open question how accurate Rousseau's depiction of free action is. Some metaphysicians may disagree with a view that someone having a will but not the capabilities with regard to a particular act can be said to have a will at all (perhaps only an act of volition or a desire: does it make sense that I *want to* fly like a bird? or that I *want to* be someone else?). If having a will entails having the power to act according to it is the correct position, then the sharp distinction between willing and acting is hardly tenable. If, however, willing and acting are two distinct events, that is, neither entails the other (as Rousseau seems to suggest), then the possibility arises that power may attach to both. (Remember the common distinction between having and exerting power.)

34. This is, let it be repeated, an interpretation of the text that rests on the analysis of the nature of power and the consequences thereof to the nature of sovereign power. Rousseau does not explain the emergence of government as a moral person in these terms and does not explicitly say that the sovereign (here, the state) and the government are actually two agents. However, his terminology and reasoning does allow for

such an interpretation. Of course, it is possible to stick with Rousseau's more explicit statements and argue as T. Strong does that "will is for Rousseau a state of being, not an action." Tracy B. Strong, *Jean-Jacques Rousseau. The Politics of the Ordinary* (Lanham, Boulder, New York, Oxford: Rowman and Littlefield, 2002), 99. But it remains puzzling how the sovereign can simply "will" the law without also "making" it. And O'Hagan notes that setting up the government is itself an act of the sovereign, thus—though he also stresses the difference between willing and acting—we have another argument for the plausibility of the view that we must conceive of the sovereign as a person who does not only will but also acts. Timothy O'Hagan, *Rousseau* (London, New York: Routledge, 1999.)

35. Rousseau, *On the Social Contract*, 175–76.

36. E. Putterman interprets Rousseau's reasoning about government in a way that allows for a distinct legislative body that, according to him, has at least some "agenda-setting" power. See Ethan Putterman, "Rousseau on Agenda-Setting and Majority Rule," *American Political Science Review* 3 (2003): 459–69. J. Scott disagrees, maintaining that no such body is permissible in Rousseau's polity: "The primary purpose of the separation of powers in Rousseau's theory is to maintain the generality of the laws from the particularity necessary in their execution by delegating the executive power to a distinct body." John T. Scott, "Rousseau's Anti-Agenda-Setting Agenda and Contemporary Democratic Theory," *American Political Science Review* 1 (2005): 138. R. Douglass (2013) also shares this assessment: "Rousseau's argument against the use of representatives, then, was only one against representative sovereignty, not against representative government." Robin Douglass, "Rousseau's Critique of Representative Sovereignty: Principled or Pragmatic?" *American Journal of Political Science* 3 (2013): 737. Both Scott's and Douglass' positions are better entrenched in a literal interpretation of Rousseau but some ideas of the *Social Contract*, especially the strong relation established between power and will (which is a right observation by Rousseau), do open up the possibility of a fight for the right to represent sovereign agency (sovereignty as an agent) within the polity. This is exactly what happened in England. It may seem to be a perversion or a normative failure in Rousseau's eyes ("the dominant will of the prince is not and *should not be* anything but the general will") but it may be an entailment of the theory. Note in the quotation that Rousseau seems to tacitly admit that the general will *is* representable (by the prince)!

37. Joseph Raz, "Authority and Justification," in *Authority*, ed. J. Raz (New York: New York University Press, 1990) and Meir Dan-Cohen, "In Defence of Defiance." *Philosophy and Public Affairs* 23 (1994): 24–52.

38. A similar view is advanced by D. Lutz. However, his more practice-oriented approach to the principle of the separation of powers neglects theoretical-normative questions, saying that "all means of slowing down, channeling, or thwarting majority will (be subsumed) under 'separation of powers'." Donald S. Lutz, *Principles of Constitutional Design* (Cambridge: Cambridge University Press, 2006), 111.

39. Rousseau, *On the Social Contract*, 176.

40. Ibid., 174.

41. Rosenbloom writes, reflecting on his earlier article, that that "article should have been more explicit in defining politics. The term is used in the Lasswellian sense of 'who gets what, when, how'. … This incorporates political activity such as coalition building, cooptation, and generating support among legislators, state-holders, and other relevant groups, the allocation of services and constraints …" (*Reflections*, 386). Now it is certainly true that no account of the separation of powers can dispense with the political sphere but politics is not reducible to conflicts over resources.

42. Levinson and Pildes (*Separation of Powers, Not Powers*) argue for a revision of the separation of powers, substituting it with a separation of parties, that is, the real political agents. If the defense of the principle of the separation of powers along the lines of articulating government based on (good) order is successful, however, then the more volatile and historically contingent political entities like parties (that differ widely across constitutional political regimes anyway) cannot substitute for the "powers." Further, as was also argued, parliamentary, especially majoritarian systems have always relied upon the unitary (though not monolithic) concept of political power. More on this in the next chapter. Similar doubts were raised earlier by James Q. Wilson, "Political Parties and the Separation of Powers," in *Separation of Powers—Does It Still Work?* eds. Robert Goldwin and Art Kaufman, 18–37 (Washington, DC: American Enterprise Institute, 1986).

43. For sake of brevity, the natural, self-effacing, static aspect of order is labeled here as "natural law" whereas the creative, power-related, dynamic aspect of order is labeled as "positive law." These terms have a rich conceptual history that can be, however, ignored here.

Chapter 5

Government and Its Branches

THE SUBSTANTIALIST CONCEPTION

Rousseau Again

The articulation of political order explained in the previous chapter suggests a rough triadic structure of the political community and a corresponding concept of articulated governing. The issue to be discussed in the first place here is whether and how the familiar principle of the separation of powers conceived of in terms of distinct government branches can be derived from this structure. A trivial way to do so is what can be called a *substantive approach*. According to it, the three forces that constitute order in a political community are (and should be) mirrored by the three major branches of government, in such a way that there be a one-to-one correspondence between these concepts. The three branches are substantially related to them.

This conception was already hinted at by Rousseau. Let it be repeated here: "The government receives from the sovereign the orders it gives the people, and, for the state to be in good equilibrium, there must, all things considered, be an equality between the output or the power of the government, taken by itself, and the output or power of the citizens, who are sovereigns on the one hand and subjects on the other."[1] It may be surprising to find an argument, however implicit, in favor of the separation of powers in Rousseau but if the idea of "separation of powers derived from distinction of powers" is sound then the germ of the principle is present here. Of course, the distinctions between social power, political power and authority are different from the ones we find in Rousseau but not entirely off his points.

For Rousseau, legislative power remains with the people as the sovereign, that much is clear. There is no reference to the judiciary, however, only to a

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relationship between the government and people as recipients of orders. The government appears, thus, both as the executive of the "orders" of the sovereign and the agent that gives orders to the people. But the terms of "equality" and "equilibrium" (in other translations, balance) make sense if the government is also considered to be part of a structure, of an ordered whole which is here the state. The concept of the state suggests an institutional entity or body, giving a form to the political community. The state is both a unitary agent but it is constituted by different actors. What emerges here is, therefore, a distinction made between state and government in a narrow sense, with the principle of the separation of powers being applicable to the state rather than to the government. It is, then, the state that has different branches (the legislative branch is "the" people whereas the government is both the executive branch and what may be called, following Locke, the federative or political branch), in accordance with the basic structure of the political community.

It should be noted that while Rousseau does discuss the inner structure of the government as the executive (an organized structure of magistrates and administrative bodies), he does not dwell on the legislative agency and its institutional structure, not to speak about the judiciary. Nonetheless, it is clearly a sort of substantialism that informs the basic idea, namely, to make the structure of the state correspond to the structure of the political community.

Formalism versus Substantialism

This conception is, let it be repeated, a rather unofficial reading of Rousseau. The doctrine of the separation of powers has developed in a different direction after him. It became more concrete in and by the increasingly popular and influential American constitutional thinking and practice which concentrated more on legal and institutional, rather than on purely analytical and conceptual separations. The core idea of the separation of powers moved toward a "separation of legal powers" and a "separation of government branches." Paradoxically, what seemed to be a less abstract and more practical approach to the principle has not proved to immune to political irrealism. As Levinson and Pildes note, "[f]ew aspects of the founding generation's political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers" and that "from the outset of government under the Constitution, practical politics undermined the Madisonian vision of rivalrous branches pitted against one another in a competition for power."[2] The result has been a no less increasing dissatisfaction with the principle of the separation of powers for its being "formalist."

To many scholars, formalism appears to be the purest version of essentialism or substantialism. According to it the distinction between the separated branches consists in "making, applying and adjudicating norms."[3] Such neat

formulae are easy targets not only for those who think that institutional or separations and legal-constitutional norms are of secondary nature but also for those who lament that not only political realities are completely different from what the principle prescribes but so is *legal practice*, too. Norms, for instance, are being made by each branch as a rule. This is reflected by the many inconsistencies of authoritative decisions of the Supreme Court (i.e., the legal experts) who often have tried, in vain, to uphold the formalist account of the principle.[4]

Nonetheless, some theorists insist that "the constitutional validity of a particular branch action … is to be determined not by resort to a functional balancing, but solely by the use of a definitional analysis."[5] For the great virtue of formalism, as opposed to a functionalist approach that makes the principle of the separation of powers practically indistinguishable from an always ad hoc-looking "checks and balances principle" (though this principle may have its own virtue, namely, of political realism) is that it provides constitution makers, reformers, politicians, judges with a clear compass. It does not need to be followed mechanistically but without it the greater value of liberty is in jeopardy. Rebecca Welsh recommends "purposive formalism";[6] Redish and Cisar argue for a "pragmatic formalism," which they consider to be buttressed by evidence taken from legal history: the different functions of legislation, execution and adjudication have proven to be relatively well-established. Saikrishna Prakash shares this formalist-essentialist view about the executive power being a distinct and discernible type of legal power, though his analysis is also restricted to the material taken from the American history of the executive power.[7]

In sum, formalism has been attacked for both its political and institutional irrealism and the ensuing impracticability and legal uselessness. Its defenders have been, however, mainly concerned with the needs of judicial revision and rarely or only superficially with a political-normative justification. Yet without it their position remains open to the usual criticisms. The need for a compass is real and politically relevant. However, the principle of the separation of powers cannot beget its own justification. This is why on a closer look formalism ceases to look like essentialism or substantialism. In fact it is but a type of a nominalist-legalist approach to the principle, ontologically speaking quite the opposite of realist essentialism.[8] Think of the purest conceivable formula of the principle: the legislative is the entity that *has the power* to legislate, the executive is the entity that possesses the executive power and the judiciary is the entity that has the judicial power. This is clearly nominalism where "having the power to" is understood in a purely legal sense. If we disregard the specific American historical experience with the undeniable realities of competing branches, we can get dangerously close to sanctioning any political system that makes a *legal* distinction between "legal powers" and

assigns them to formally separated institutions. Totalitarian regimes could then, as was argued in Chapter 2, qualify as being based on the principle of the separation of powers (i.e., legal powers).

Substantialism in the New Theories of the Separation of Powers

There is, thus, a need to return to Rousseau and to the political theory of the separation of powers. The main authors of this approach were discussed in Chapter 1. As was argued critically there, some kind of revised substantialism works behind both Carolan's and Möllers' theories of the separation of powers. Especially Möllers comes very close to the Rousseauian conception (though without referring to it) by identifying the legislative branch as the highest organ of deliberation of the polity, adding to it the judiciary as a primary guardian of private interests of individuals and the executive as an intermediary agent between the two. Now, whereas Rousseau avoided, perhaps wisely, spelling out the institutional and practical details of his substantive approach, Möllers does not and he runs into difficulties.

The judiciary, for one, is obviously not something like a collective ombudsman or a collection of ombudsmen.[9] Neither is it merely an arbitrator meant to help citizens cooperate with one another as Möllers seems to suggest. First, there are plenty of other means and tools for lubricating social cooperation, and secondly, the judiciary is hardly just one of them. It can be such in many cases but not in all. Criminal procedures are particularly illuminating in this respect: it is not the individual victim or the offended person but the state prosecution that pursues the charge against the criminal or offender. What has been committed is not just an individual or private act of crime but an offense against everybody. Thirdly, the protection of individual interests and autonomy is surely part of the constitutional duties of the judiciary but so it is of the two other branches: citizens may not only hope but rightly expect the legislation and the executive to enact and enforce laws and decrees accordingly.

AQ 1: Please check for completeness of the sentence "Neither is it merely ..."

The executive branch, again, is hard to imagine as being a mediator "between democratic and individual self-determination."[10] Möllers admits that the executive is led by a political leadership but thinks that there is a neat continuum within the executive in terms of mediation: "As the executive distances itself from the political leadership and more organizational levels come between government and an individual official, rules defining the scope of executive action grow stricter and lawmaking comes closer to the legal sphere of individual citizens; to their individual claim to self-determination."[11] First of all, it is not clear what the distancing of the executive from the political leadership involves, what moves and causes it.[12] If there is a separate administrative will within the executive (remember Rousseau's concept of the corporate will), then we have clandestinely divided the executive into

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two parts without reasoning. Secondly, the idea that the executive is led by a political will which is presumably firmly grounded in the legislative branch, causes the structure to collapse anyway. Why not draw the line of separation elsewhere, or draw another line, for instance, between political leadership and the executive branch proper? Of course, adding a new branch would not square with the abstract structure of the political community initially drafted, so we run into a serious discrepancy.

It is quite understandable therefore what Carolan proposes, namely, to merge the legislative with the executive (in fact, the political government) branches in theory and claim that the administrative branch should be regarded as a distinct branch. This is again much in the spirit of Rousseau. The political government, or the political branch of the state, coincides more or less with the legislative, whereas the classical executive branch is here identical with the administrative branch. It would then be easier to be profiled as a "mediating" agent. It no more represents the state as a whole, nor is it any more a transmission belt running from the political branch of the state to the individuals. It is, of course, different from the judiciary which, in Carolan's conception of the political community, serves much the same purpose as in Möllers' conception, namely, the protection of private interests. (This claim is, obviously, questionable for the same reasons that need not be repeated.) What does, then, the administrative branch cover? It represents and corresponds to the abstract need of the "concrete advancement of particular real-life positions" of individuals: "The idea here is that, at this discretionary state, citizens with relevant complaints … can register their objections to a proposed course of action. Thereby better informed about the probable actual impact of general provisions on specific individuals or groups, the administrative official can amend a decision accordingly."[13] Yet again, even if there are agencies with the discretion and competence to amend (review?) certain decisions presumably taken by the political branch of the state, the abstract function or need that Carolan identifies as constitutive of the political community involves, as was argued in Chapter 1, much more than what this branch can provide for. Real-life positions can be advanced in many more ways and by many more agents, hence the one-to-one correspondence between this branch and the abstractly formulated property of the political community is hardly tenable. Moreover, such amendment or corrective procedures are arguably part of the responsibility and practice of the judiciary as well, especially but not exclusively in common law regimes.

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1.5. Substantialism as a Correspondence between the Political and State Structures of the Polity

It appears, then, that the abstract ideas of a political (theoretical) structure as outlined by the various authors do not correspond with the practice and

operative principles of the distinct branches of the state (the government broadly understood). Still, one may insist that the problem is not the substantialist conception in itself. The failures in making the structure of the political community and the structure of the state correspond to one another must be, so it may be argued, mistakes of the underlying theory of the political community. We could try, for instance, to infer the structure of the state from the concepts developed in the previous chapter. This is all the more commendable because the justification of the principle of the separation of powers must be commonsensical, expressive of the nature of governing as most people, however vaguely, understand it. Thus, if the major branches of government or state are considered to be in some way fixed by common sense and tradition (which is arguably another expression of past common sense), then the underlying theory of the political community should be formulated such that the necessary correspondence is theoretically secured.

It is easy to see, however, that the concepts developed earlier, namely, social power, political power and political authority, though linkable to the concept of political order in ways explained previously, cannot be in such a substantialist manner regarded as generating the branches of the state.

(i) The *legislative branch*, for one, is not identical with *political authority*, nor is it its exclusive representative or seat. As was argued, political authority is a passive "actor" whereas legislative assemblies are usually vigorous and very often unpredictable agents. They are also arenas for and of political debates and polemics where sometimes surprising decisions are made, with only faint signs of wisdom or judiciousness. Conflicts between the wills of political agents mark legislative procedures and debates, and private interests also heavily influence decision-making processes. It would be grossly missing the mark to identify legislation with the representation, promotion, and enforcement of the general will or the public good, either directly or indirectly. Finally, as will be argued in more detail, the other two branches have as much right to rely on and refer to political authority as the legislative branch. Thus, political authority is not an exclusive possession of the legislative branch.

However, legislation is not simply a more or less faithful mirror of the millions of social interests that make up social life. This would perhaps entail the thesis that this branch is but a concentrated version of *social power*. Full-fledged corporatism and similar conceptions that were developed along such ideas, including perhaps sincere reformist-socialist attempts to base political representation on classes or other relevant major interests of society, have remained, however, largely theories. In practice, corporatism has proven to be hardly more than a tool in the hands of strong political wills. Even if legislation is stripped of the aura of political authority, it is always both more and less than social power. It is less than it because the vast realities of social

power cannot be comprised in an institution that has limited capacities for deliberations, negotiations, decisions, and control. And it is more than social power because it contains normally the widest possible selection of *political* wills available in a given polity. Width does not only or even principally refer to the number of parties. Even if only two parties are being represented in a particular legislative body (the American system being the classic case in point), the political machineries behind electoral successes (and failures), controversial as they certainly are in many respects, provide for a wide and almost incessant political activism that pervades the political community. It is in this sense that social power is and remains operative mostly within the countless interactions of individuals who in turn may, if they wish, participate in forming the relevant political wills that are, then, most conspicuously operative in the legislation, at least in normal times.

Yet again, the legislative branch is not identifiable with *political power*, either. The main reason is straightforward enough: as many scholars have observed, the executive branch is as much impregnated with political power as is the legislative branch. In parliamentary systems, the lack of a sharp institutional separation between legislation and execution makes this immediately perceptible. The executives of American-styled presidential systems based on institutional separation are, however, no less deeply influenced by political power. This is by no means an anomaly. Rather, this is how the system is constructed and for good reasons. Presidents run for electoral support to enforce their political programs, often clashing with the legislative. They may have a veto right, they may appoint chief executives and sometimes judges on the basis of their concurrence with their political programs. The "good reasons" include not only the familiar checks and balances argument which may be seen as distorting or compromising the principle of the separation of powers in the interest of the greater good (the even more effective defense of liberty). They are simply the necessities of having a unified political will, especially in matters of foreign policy but also, at least today, in many domestic affairs.[14] Hence, political power is as much present in the executive as it is in the legislative, making the latter identifiable with the seat of political will and power an untenable view.

(ii) Similar conclusions can be drawn from attempts to set up such a one-to-one correspondence between the *judiciary* and the various powers that have been distinguished previously. First, *social power*. Although both Möllers and Carolan, and perhaps the whole Lockean tradition and the modern libertarian property-based social contract theories that regard the efficient protection of private interest best served by the courts, are right in thinking that the judiciary is vitally important in managing many social affairs and conflicts, these affairs and conflicts influence in various ways the other

branches as well. It is also true and important that judges have a sort of personal autonomy, their consciences enjoy, so to speak, a special and in some way curious social protection and sovereign privilege. In that respect and for that reason, their personal experiences and knowledge embody and express a sort of social power, too. However, these aspects alone do not substantiate a claim that the judiciary corresponds to social power. First, many individuals have practically never anything to do with the judiciary system for their whole life. Nonetheless, it would be grotesque to conclude that they simply do not have, do not exert or are affected by, social power. Many debates and conflicts, especially moral and political ones, between private persons cannot be translated into legal terms without remainder although examples of using courts to settle such conflicts abound. Secondly, the conscience-based personal autonomy of judges is seriously restricted by the law, and, even more importantly, bound by the legal and material contexts of the cases they rule. Social power is evidently much broader and deeper in every respect. Thus, the judiciary would be a Procrustean bed for social power taken in its entirety.

The judiciary is often seen today as the branch of power that has some special responsibility for preserving the legal order as a whole, indeed, for upholding and protecting the rule of law. This claim would perhaps suggest an identification of this branch with *political authority*, rather than with social power. David Dyzenhaus argues, for instance, that "authority and not truth makes law. But one who wants to be an authority has to accept the constraints of the rule of law. And these constraints are both moral and the constitutive or constitutional conditions of being an authority."[15] The branch that has the authority to make law is the legislative branch. Dyzenhaus seems to suppose that since any authority has certain limits, there should be an identifiable agent entrusted with controlling that authority. However, this is clearly a question-begging solution because in that case we would simply presuppose another authority whose constraints should be controlled yet by another authority and so on. To avoid such vicious circles, the convenient solution is to distinguish between a legislative authority (which is but political power wearing some vestments of sovereignty) and a rule-of-law (i.e., the real) kind of authority and argue for an institutional arrangement where this real authority rests with the judiciary. Dyzenhaus comes closest to this by the following example:

> the humanitarian reasons are so strong that no decent regime could permit torture. As a result, if officials consider that they have to torture to avoid a catastrophe, the ticking bomb situation, such an act must happen extra-legally, more or less the position the Israeli Supreme Court has taken. In this situation, all a court should say is that if officials are going to torture, they should expect to be criminally charged and at trial they may try a defence of necessity.[16]

Writing about the vocation of judges, he reaches out as far as to Hobbes to support judicial supremacy:

> Put differently, Montesquieu's claim that judges are the mouths through which the law speaks has to be reformulated so that loi/lex becomes droit/ius: judges are the guardians of legality or legal right, not of the content of the positive law. As Hobbes showed, this conception of a judge is prior to the law, in the sense of being prior to any positive legal order.[17]

The main guardian of the principle of the rule of law is, of course, the judiciary. Therefore, for instance, the executive may deem torture as indispensable for the protection of the polity but it must bow to the judgment of the judiciary. It is questionable whether Hobbes would indeed have agreed with this interpretation[18] but the point is clear. However, as was argued in the previous chapter, the nature of authority, including political authority, does not sit very well with institutional exclusivity. Institutions, including courts, and especially corporate agents are exposed to arbitrariness, various influences and personal convictions. Courts where several judges sit and rule together make their decisions by vote much like the legislative does.

However, Dyzenhaus himself launches his book with an ambition and presumption that contradicts his later arguments for judicial supremacy:

> At one level, then, my ambition is to sketch the basis for a productive account of the relationship between the three powers—the legislature, the government, and the judiciary. I will try to show that it is better to understand their relationship in terms of what they share and not in terms of what separates them, since their separation is in the service of a common set of principles. *The powers are all involved in the rule-of-law project.* They are committed to realizing principles that are constitutional or fundamental, but which do not depend for their authority on the fact that they have been formally enacted. In order to count as law or as authoritative, an exercise of public power must either show or be capable of showing that it is justifiable in terms of these principles. (italics added)[19]

In short, if political authority is a passive agent of the rule of law, then it is and should be as much present in the legislative and the executive as in the judiciary. Put negatively, what matters is that none of the branches can claim an absolutely exclusive access to the political authority.

Attacking the thesis of judicial supremacy, Larry Kramer makes the same observation, both as a matter of historical fact and of principle:

> Each branch could express its views as issues came before it in the ordinary course of business: the legislature by enacting laws, the executive by vetoing them, the judiciary by reviewing them. But none of the branches' view were

> final or authoritative. They were the actions of regulated entities striving to follow the law that governed them, subject to ongoing supervision by their common superior, the people themselves.[20]

Thus, what should be final and authoritative is (as it has ever been) the verdict of the people as the bearer of the ultimate political authority. It is, of course, an unsettled matter how that passive authority can work through the various branches, including the judiciary. Kramer has no better answer to this question than those who advance judicial supremacy or something like that, the main point being a deep distrust of direct popular control (either directly or indirectly, via referanda or legislation). The reason is the fear of political power influencing judicial decisions. However, it is the jury system and the system of elected judges in certain countries and states where it is imperative to make a distinction between elections and direct participation being regarded as an exertion of political power and as a conferral of political authority. If citizens know and are willing to make this distinction, then they may not consider such systems as institutionalized channeling in of political power. The clear understanding of articulated government is crucial here. Other political communities would or could not resist the temptation of corrupting their own judicial systems by political power. Hence there is hardly a final and universally valid method or procedure of delineating political power and political authority and allowing only the latter to legitimize courts. What is and must remain unambiguous is, first, that in one way or another, political authority must be present within the judicial branch. Otherwise it would cease to be part of the government, broadly understood. And secondly, in no way is political authority an exclusive possession of that branch.

It may sound an extreme view but the idea that the judiciary is, at least on certain issues, a more suitable seat of *political power* than legislation is by no means without reason and even less without historical evidence. Constitutional and Supreme or High Courts have been attacked sometimes heavily for their involvement in lawmaking. Some or perhaps most defenders of judicial activism have routinely assured those who find this worrisome that what is at stake is "merely" the moral and legal control over the political power exerted in and by the legislation. This is, however, falling back on the previous strategy of a virtual identification of the judiciary with being the sole representative of political authority. Yet it is possible to find more pertinent arguments in favor of judicial lawmaking. John Ferejohn, for instance, finds that courts are better places for certain types of political deliberation[21] and more qualified for making political decisions under certain specific political circumstances.[22] It is a matter of fact that in many countries courts take part in making political decisions, thinly veiled by the claim that they are merely interpreting some laws or the constitution. Taking stock with

the developments in this respect (again, restricted to the American history), Ferejohn writes that

> [t]o some extent, the political aspect of court appointments is both inevitable and legitimate in our governmental structure. Democratic responsiveness and legality are complex and sometimes conflicting ideals. … Practices of judicial rule-making are right at the contested boundary of these concepts. … While courts are legislating, all of us have a legitimate interest in who sits on them. While court appointments are inevitably political, they are not always partisan. When courts become politicized in a partisan sense, matters become more troubling.[23]

In what a difference between being partisan and being political may lie, remains obscure. Presumably, being partisan amounts to judges listening to and giving way to petty interests, personal tastes, whatever; whereas being political means being committed to the public or common good. It is doubtful, however, that such a distinction could stand the test of not only empirical evidence but deeper theoretical reflection, for reasons that need not be spelled out here. However, if we want to push the matter further and in a more consistent manner, we should perhaps embrace fully the idea of political power being the major driving force in judicial activities. If an extreme Marxist position that would perhaps sit well with such a view is unacceptable, then an elitist or a moralist account of politics could be more closely associated with this view. The consequence would of course be that the legislative branch should be considered hardly more than a motley assemblage of various social and economic preferences, without the possibility of developing and forming political wills and agents; and the executive branch would be but the executor of court rulings and the judiciary in general.

Historical and contemporary evidence of courts' becoming political agents on certain issues are not difficult to find, as was already argued, but they are still exceptions rather than the rule.[24] It is also true that deliberations in courts are often more objective than elsewhere in the public sphere, judges can be more impartial, perhaps more experienced, more open to the public good, and it is true that voting is not uncommon and especially important in constitutional revisions. In countries where judges are elected by popular vote, one may not (only) consider this a conferral of political authority but an influence of political power and in this context, a rightful one.

But there are serious obstacles to the making deliberations more political and politically open within the judiciary: as was already pointed out, the language and grammar of law is not only difficult for most people but also inherently restrictive. Normative political debates, for instance, can hardly be meaningfully conducted in that language. Judges encounter individual cases and must be largely reactive. It is simply hard to imagine a modern state being

governed by judges: issues that are held to be the most divisive and in the forefront of public debates in a given country at a particular time, where the wisdom and/or power of judges is called for, make up still only a tiny part of what political agents pursue, though perhaps less spectacularly. And voting is indeed an inherently "political" procedure but it is really more important in constitutional revisions and less so in the daily business of the judiciary. Therefore, the judiciary is not to be equated with political power.

(iii) Finally, we may consider the government, now regarded to be *the* executive branch, to be identifiable with any of the powers that make up the political structure of the polity. The arguments that have been discussed so far already adumbrate a negative answer.

First, the legislative branch is evidently highly politicized and so is the political leadership of the executive. Parts of it (the administrative "branch") may seem to be independent of political influence and direct control, as Vibert and Carolan claim. Recent empirical studies tell us otherwise.[25] The executive branch, even its more administrative and service-provider components, is under the organized and institutionalized control of the political leader(s). Second, the arguments for the political authority's not being appropriable by any single branch of the state apply here, too. Traditionally, even within presidential regimes where the chief executive enjoys direct popular support, his or her main constitutional function is the execution of laws. The legislative is even in such systems "closer" to the political authority, and where courts are entitled to constitutional revision, or there is a separate Constitutional Court, presidents may seem to come third in this row. Nonetheless, they are in it. Third, it is undeniable that the modern state with its manifold executive and administrative functions is much more deeply embedded in the lives of the citizens than some centuries ago. But it does not follow what Carolan envisions, namely, that the administrative branch almost merges with social power. It is, as was argued, inseparable from the political part of the executive and despite these modern developments, at least in non-totalitarian regimes, it is still unable to cover or embrace social power in its wholeness. It is, however, necessary to reflect on certain functions of the modern state that indeed represent a merge of social and political power (partly or wholly state-owned firms, for instance) and that will be done in the next chapter. Nonetheless, the main thesis that the executive branch is not identical with social power remains valid.

One may argue perhaps that the substantive conception does not require a full correspondence between the abstractly formulated structure of the political community and the institutional structure of the state. The basic structure is to be considered to provide constitution makers and institution-makers with some general guidance or ideals. For instance, even though the legislation

does not always, perhaps not even as a rule, follow the public good, nevertheless it should, and act under the politico-moral assumption that the political authority (the sovereign people) constantly supervises and controls it. It is, however, easy to see that such a justification of the substantive approach fails. The objections that were raised above to the idea that the respective branches of the state could be inferred from the abstract notions of the political order and community highlighted conceptual and substantial inconsistencies. The legislative body is not just empirically but also ideally a branch where political power-holders conflict with one another. Decisions are made there by majority vote which, as Locke argued, represents a mere force. Similarly, courts as well as executive agencies are not just accidentally or eventually but also ideally agents that *invoke political authority* directly.

The substantive conception may still be thought to be defensible by help of the principle of checks and balances, as was already hinted at. Thus, even though each branch has a special relation to an abstract element of the basic political structure, the principle of checks and balances requires or at least makes it inevitable that other elements also appear and shape the operational principles of the respective branches. On a closer inspection, however, we can see that the logic of checks and balances is simply not inherent to the structure of the distinct branches. In other words, constitution makers are at considerable liberty to design institutions in a variety of ways that are all responsive to the principle of checks and balances which appears to be rather formal or merely technical. For instance, judges may be elected by the electorate directly, or by the legislative power, or be appointed by the executive, or be selected out by themselves from their own ranks (i.e., from among legal experts and professionals). These methods may also be combined. Whichever or whatever choice is made and institutionalized, an appropriate counterbalance may be established. Ministers may or may not be accountable to the legislature hence their person and policy may be more or less open to direct political influence and exposed to political conflicts. Members of parliament may or may not be permitted to head executive offices. This variegation of the application of the principle of checks and balances makes it more a technical or instrumental rule whereas the principle of the separation of powers belongs to the conception of the basic political order and the articulation of governing.

THE RELATIONAL CONCEPTION

The Core Idea

The core idea behind the alternative approach that will be called a relational one is basically a lesson derived from the previous considerations. It is

hopefully straightforward enough and therefore satisfies the requirement of articulated and hence intelligible governing: instead of attempting to make branches of power to correspond with social power, political power and political authority respectively, the various branches should be conceived of as specific *combinations* or *relations* of these notions and political realities. In particular, *legislation is the branch of the state (or of government broadly understood) where social power, political power and political authority encounter and are equally represented. The judiciary is defined by the presence of political authority and social power and by the absence of political power. The executive branch is marked by the presence of political authority and political power and by the absence of social power.* Formal logic allows for the possibility of a "branch" where social and political power are represented without the presence of political authority. On the one hand, this is a possibility that needs to and will be discussed, yet since governing (and having a state) conceptually presupposes the presence of political authority in every part and branch of the government broadly understood, social and political power combined without political authority cannot be a proper part of the state and the branches of power.

The essential insight is, thus, that the various power branches are truly expressive of some kind of power or authority, however, not as their sole or main representatives but as their special combinations or relations. Let us now explore this conception, beginning with the legislative branch again.

The Legislative

The legislative enjoys in most, if not all, liberal-democratic constitutions a sort of primacy among the branches of state, most conspicuously perhaps in parliamentary systems. However, it is not identical with the sovereign. This is made explicit in most countries by the personification of the sovereign. The person of the president or the monarch usually enjoys special, often rather odd-looking prerogatives such as sovereign immunity or the right to pardon. These serve to confirm the distinctness of political authority from the legislative branch as an institution of the polity. Political authority oversees the whole process of governing and sanctions it. This is important because that it is what makes the state, the government broadly understood, and entity distinct from the political society which in turn is a prerequisite of articulated governing and political order. Political authority is a passive agent, usually only a component of the political structure of the polity. It represents the natural, self-evident, perhaps trivial aspect of order or orderedness.

Being the *supreme norm-maker* (often with some restraints on constitution making), the legislative fulfills a special role in sustaining the creative side of order. The ratification or sanctification of laws is reserved for a different

agent which again underlines the distinctness of legislation and political authority. However, ratification can be denied in most cases only for a short period of time, and even in the absence of a formal ratification, norms become usually valid by their own force. This is also a sign that the legislative body does not lack political authority, either. The full nonidentity of legislation and political authority does not preclude partial identity. When the nominal or personal representative of political authority undersigns, ratifies, sanctifies laws, "it" does so as an expression of the fact that the law has been passed in an orderly form, in conformity with due procedures, but "it" cannot replace legislation and its full power to act on behalf of the political authority of the commonwealth. As for and in the legislative branch, political authority is nothing less and nothing more but the ultimate guarantee of the orderedness of the polity in and for the other branches as well.

In presidential and semi-presidential systems where the chief executive is directly elected and has, therefore, a similar kind of access to the sovereign (the people), as well in constitutions with some kind of judicial review which implies that the Constitution is a will (almost literally, a testament) of the political authority to which the court(s) have a special access, the legislative powers are for that reason not absolute and exclusive. Notwithstanding such possible constraints, the implication is not that the other branches (the executive in general, or the judiciary as different courts, or the president as an office, or the constitutional court) *represent* political authority vis-à-vis the legislative but only that some kinds of *institutional-legal access* to it are open to other branches as well.

The legislative is also the principal and indispensable arena of *political* debates and controversies, not of course because substantial deliberations and argumentations always precede decisions (this may or may not occur) but because decisions are made by majority vote and are public.[26] *Voting* is naturally not the only means to demonstrate who wins and who loses, that is, who possesses the greater *political power* at a given moment. Having political power means to be able to influence, eventually to change, the political behavior and intentions of other agents in various ways and by a host of means before and after legislative actions. As by-now classical community power studies, most notably P. Bachrach's and M. S. Baratz's study of non-decisions and S. Lukes' essay on nonevents pointed out,[27] power may be exerted in ways that lack an open conflict between interests, due to unclearly and unfreely formulated preferences, resulting in manipulated decisions. Anticipated power that was discussed in Chapter 4 is often the real cause behind actions of subjects; subtle media influences and manipulated historical experiences predetermine political preferences; agenda setting and procedural rules preclude political alternatives and policy proposals to surface or to reach the political arena, not to speak about the legislative. This

is true for social power or power in general as well, by the way. It would thus be naïve to think that struggles over political power and collisions of will are made transparent in and by parliamentary voting (including plenary, committee and caucus sessions). Moreover, as the definition above already suggested, political power is very much present in the executive (government in the narrow sense) and justifiably so. The point here is not, therefore, that only manifest political power is real but its reverse, namely, that it is the legislative branch that makes the political power aspect of the political community manifest. What community power theorists and critics of power relations being hidden by the facades of legality and political rhetoric tend to neglect is that in constitutionally ordered polities legislatures cannot but make it manifest, at least in the very last moment, that without political power no decision can be taken. This is, for that matter, essentially true also for popular referenda with legally binding decisions as well as practically for civil (unincorporated) associations, bodies running autonomous institutions (such as universities), boards of trustees of public or private funds and foundations, and so on. Such societies and decision-making bodies borrow the political idea of putting the cards on the table in the final round by forcing everybody to reveal his or her political identity, which is often separated from personal identity that remains hidden by secret balloting. No matter how consensus-oriented the political culture of a given polity is, the institution of voting is the last resort for resolving eventual conflicts because it creates an imminent and manifest, though of course always interim, result of the power struggle. Political authority can sanction only such results, thus, the relevant point is that political authority and political power are met by the legislative act of passing a law by public vote that becomes fully a law by the ratifying act of the representative of political authority.

Finally, *social power* must also find home in the legislation. There is a variety of ways in which this aspect becomes manifest. (i) Electoral systems that run entirely or at least partly (mixed systems) on the basis of *individual electoral districts* articulate this component more conspicuously than purely proportional systems. Individually elected representatives still have direct access to social interests and influences of their constituencies. They are expected to give a voice to them, either in parliament or at least within their parties or parliamentary factions (caucuses). (ii) *Ombudsmen* entrusted with protecting certain elements of personal autonomy with special rights and duties may have a privileged status within the constitutional system. Enjoying such a status in relation to the legislative branch can also be considered as confirming and reinforcing the social power aspect of legislation. (iii) Even fully proportional electoral systems are expected to be responsive to what may be called the *commonsense expectations* of voters, notwithstanding the political wills formed in and by party competition and coalition building. The concept

of free mandate is still one of the cornerstones of representative democracies, though normally it is overruled by the realities of party discipline and the political power aspect of legislation. But party discipline is at least partly compensated for in certain countries by more or less explicit legal guarantees that the inner organizations, structures, decision-making processes of parties conform to general democratic rules.[28] Further, factions or caucuses in parliaments may have rules that prescribe uniform voting but may also allow for exceptional cases when and where conscience vote may, or should, decide. These are usually issues that are thought to be affecting personal-moral sensibilities that are, in turn, especially important for the personal autonomy component of order which gives rise to social power. The regulation of party finances is very diverse across countries and it cannot be discussed here, yet the very issue and the need to regulate party finances testify to the importance of social power being exerted over party politics. (iv) *Legislative committees* may have rights and authority to compel witnesses of any kind to make a testimony under threat of penalty (subpoena), or invite experts selected on a wide basis of expertise to give their opinions on various issues (affidavits). (v) In various ways, many democratic constitutions allow for some forms of *direct participation*, especially referenda and plebiscites, with different degrees of binding power over the legislative. Thus, there is a whole range of means to secure that social power is represented *within* the legislative branch.

The legislative branch may, therefore, be considered itself to be a model of *balance* for the whole state. Lawmaking (sanctioned by the political authority), voting (a manifest expression of political power), and a variety of constitutional and legal means channeling the influence of social power over legislation constitute the essence of the legislative branch. It is needless to say that this balance is rarely a visible or self-evident truth. For various reasons, political authority may appear to be more efficiently supporting the chief executive (prime minister, president), especially in crises or emergency situations, though many constitutions, very significantly, maintain the primacy of the legislative branch even in such times. Or the judiciary, especially courts having the power for constitutional review, are sometimes apt to place themselves in between the lawmaker and the political authority. Further, even though most people do understand that without standing majority there can be no reliable, calculable, and efficient governing, many of them find the sheer and naked force behind voting in some ways undignified and repugnant. The presence of social power is, again, regarded by many in ambiguous ways: lobbying, private talks, single issues dominating complex processes are often looked upon with suspicion, whereas party discipline is detested, too. The manifoldness and ambiguities of expectations with regard to the legislative, unmatched in this respect by any other branch of power, proves, however, that this branch is unique on just this account. There is no classical political

theory of how these aspects are to be balanced properly. It does not make much sense to separate social power, political power and political authority within legislation because their nature is fundamentally different. Political power is quite easily captured by the practice of voting but social power is itself a multifaceted phenomenon. Political authority safeguarding the prerogative of lawmaking of the legislative branch is by its very nature (not being a power) non-agential, vague, and somewhat diffuse. Nonetheless, constitutions that respect the principle of the separation of powers tend to establish a balance between these aspects and give thereby some form or shape to the legislative branch of the state.

Perhaps the notion of balance that suggests some arithmetically comparable quantities being equal in a given structure should be amended and corrected by the notion of *harmony*. It is more an aesthetical concept which is, however, perhaps more capable of conveying the point that the three main concepts are meant to capture the structure of political community as a political order with articulated government. A disadvantage of both concepts, balance and harmony, is that both appear somewhat static and suggest a completed work of art which is, of course, far from the realities of politics. Nevertheless, much as constitutions, principles *are* as such also standing *measures* and guidelines of institution-making and political action.

The Judiciary

According to the relational conception, the judiciary is defined as being essentially related to political authority and social power but lacks a constitutional and organic relationship to political power. This doubtlessly mirrors a very traditional view. Justice Antonin Scalia puts it is a characteristically sharp way:

> There is, I think, a functional relationship, which can be best described by saying that the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*. (italics in original)[29]

Thus, courts must protect individuals against any majority but by no means by way of *promoting a consistent political program even of*, say, protecting individual rights which may *happen to be* (only) the majority view. The point expressed by the "law of standing" is that courts cannot be allowed or cannot allow themselves to engage in anything else but deciding over individual cases on the merits of the case alone. This traditional view can be reinforced

by the relational account of the separation of powers. The ultimate goal of judicial independence is, therefore, not only "the fair and impartial adjudication of disputes in accordance with law"[30] but thereby the maintenance and support of the principle of the separation of powers that is necessary for an articulated government that rests on the concept of (good) order.

The traditional view has been also challenged on account of some legislative competences and control powers over the executive in the hands of the judiciary. Some of these competences and powers may be justified by the checks and balances principle which, as was argued above, lacks the political theoretical depth that the principle of the separation of powers has. The real challenge is created by the claim that the judiciary not only has but it *should* have a share in other branches of power as a matter of principle. This claim was already discussed above and the arguments need no recapitulation. The main lesson can be repeated, however. This is that the judiciary is also a representative of political authority though not identical with it, but this representative function entitles it to do that part of governing which it is meant to do.

Judges are bound by the laws and other legal norms. Their access to the political authority is a peculiar one that lacks the creative capabilities to alter and adjust the laws positively and directly to the needs of order and ordered social life. The more substantially their judgments and verdicts reflect an alternative, perhaps implicit, norm to what the law contains and prescribes, the more they risk to become lawmakers. However, they have another sort of direct access to the political authority that does not expose them, at least in principle, to such a risk. This is what may be called the finality aspect of authority.

As legislators legislate, make laws, judges simply judge, make judgments. This seems to be a very formal and tautological statement but there is all the difference between making laws and making judgments. Laws are, as was argued, the results (often, though not always, interim results) of political struggles that must be, nevertheless, within the confines of natural order. Insofar as this or something like this is in Dyzenhaus' mind (the rule-of-law project), there is nothing wrong with that. But if he or like-minded scholars want more, namely, that the judiciary should have a share in shaping the legal system, the principle of the separation of powers gets subverted. For what appears to be frequently neglected in political theories on the judiciary is that contrary to lawmaking which is an anticipation of the future, judging is making things past. An authority does not merely give advice, instructions or even commands concerning what one should do but it also evaluates, assesses, approves or disapproves of one's actions, thereby fixing issues, at least in principle, once and for all (the process of how to arrive at the final judgment may, of course, consist in several steps, including interim judgments, but this

can be ignored here).[31] Laws and constitutions may change but judgments made in the past cannot be overturned for reasons other than new, substantial evidence emerging or an error detected later.[32] Constitutional review is partly different, that is true, but that is precisely because decisions of that kind are similar to lawmaking. What makes the judiciary a separate branch of power is, however and in this respect, the essential finality of its decisions behind which the assessing, evaluating, judging nature of political authority stands.

There is, however, a possibility for the judiciary to reach out to the political authority in a different way. Since political authority is strongly tied to the natural aspect of the concept of order, the judiciary may use its reflective capabilities to correct and to warn a legislation that appears to exceed its competence of forming the legal framework of order by making use of political power. It may do ever more so because judges have a unique experience with social power as it appears in the courtrooms in the form of the thousand cases of conflict between individuals and various collective agents, including the government; which in turn makes a lasting and often decisive impact on their personal conscience as well. It is in this sense and in this branch that social power finds itself most powerfully expressed within the government or state structure. This role and possibility of the judiciary is, let it be repeated, a largely passive and limited one. Correcting the legislation does not mean having the power to ignore the law but to use the interpretative freedom judges have to advance a reading of the law that is closer to a natural sense of order. Warning the legislation is normally a silent voice that can be heard by attentively listening to judicial decisions and rulings but especially constitutional courts may speak in a loud voice. What is necessary to bear in mind is that protecting the rule of law by being especially attentive to the natural aspect of order does not and cannot amount to promoting a political program even if it may be labeled as the protection and enhancement of individual rights.

The Executive

Within the relational conception of the separation of powers, the executive is defined as a branch that combines political authority and political power but excludes social power. First, political authority is, as was argued, in some ways closer to the legislative and the judiciary than the executive. The legislative has the exclusive power to enact laws whereas the judiciary is closer to the immediate experience of social power and the natural sense of order and orderliness, and it is more consciously concerned with the maintenance and protection of the rule of law than the executive is expected to be. However, much as the judiciary was shown to have special access to the political authority, the executive, too, has a specific access to it. This is the concept of *public interest*, and the practice of its application. Here is a randomly selected

example. On January 21, 2010, President Obama issued a statement, commenting on a Supreme Court decision with regard to the so-called Super Pacs. The issue is irrelevant here, to be noted is the argumentation:

> [w]ith its ruling today, the Supreme Court has given a green light to a new stampede of special interest money in our politics. … That's why I am instructing my Administration to get to work immediately with Congress on this issue. We are going to talk with bipartisan Congressional leaders to develop a forceful response to this decision. *The public interest requires nothing less*. (italics added)[33]

The implications are, first, that public interest needs to be defended from an attack which, legally, comes in the form of a Supreme Court decision; and second, that the defense should be provided for by the two other branches, cooperating with each other closely.

The first implication may be considered to be a reference to or an invocation of the political authority on behalf of which the chief executive means to act. As was argued, the judiciary has a different, yet no less legitimate way to invoke political authority. The two ways may, as in the present example, conflict with one another. This is, however, not a refutation of the principle of the separation of powers but an evidence that the substantialist approach to it is flawed. Even if the institutionally separated branches of government or state clash on a particular issue, each of them must be able to justify its reasoning and action in terms of some public good that is part of normalcy, of the commonsensical notion of order. In the example, the chief executive appeals to this common sense notion of order which, in his view, the Supreme Court decision violated. The appeal is not explained in detail, the main point is that *there is* an appeal to the political authority that the executive claims to represent in the given case.

The second implication, namely, an alliance proposed between legislation and execution brings, however, the notion of public interest onto the terrain of politics where the judiciary is not allowed in principle to enter. The specification of public interest requires political action. Whatever is there to be done, in the assessment of the President, needs to be discussed and legally formulated, enacted as a law or as a presidential decree. The natural aspect of order (orderliness) is, as was argued repeatedly, more a kind of some passive control over the creative, dynamic aspect of order (ordering). It requires political agency to uphold, change and enforce the rules within the limits set by the political authority, that is, to keep the negative aspects of social power at bay, to enhance social power as a positive force, and to protect the polity.

It is hardly a surprise that the concept of public interest has been often found to be elusive and almost useless in political and especially legal

theory.[34] But it is now perhaps clear why and also why it is, nevertheless, an important and indispensable concept. It serves as a switching device between political power and political authority, and it is by which the executive can govern. The public interest links the executive up with the political authority. If we believe that there is such as a thing as public interest, it presupposes a general or unified will because it stands in contrast to individual and corporate interests. However, any contentious claim about in what "the" or "a" public interest consists, requires decision which cannot but be a political one. In cases of laws, the political responsibility for articulating public interest lies with the legislative, in cases of executive orders the political responsibility rests with the executive.

The peculiarity of the executive in this conception is that the direct, legitimate influence of social power is excluded. The legislative branch is open to any interest, personal and corporate as well; the judiciary is even more open to them because social power is what gives to it a stuff to deal with. But contrary to the Rousseauian conception of the executive which makes a distinction between it and the legislative in terms of "generality" and "particularity," that is, the legislative making general rules and the executive applying them to particular cases (giving orders); the principle of the separation of powers conceived as a relational doctrine requires and sanctions the exclusion of considerations related to individual interests and concerns within the scope of governing, narrowly understood.

The modern state provides countless services to its citizens. Its administrative agencies operate in many cases much as courts do, that is, they hear individual cases and make decisions. It may thus be objected that the executive branch is as much involved in the lives and affairs of individual as are courts. Probably even more so, as many citizens have more such contacts and encounters with the executive than with courts.

This is indeed a challenge to the idea of the executive from which social power is excluded in principle. It needs a more elaborated answer that will be provided in the next chapter. However, the rudiments can be sketched here, to accomplish the discussion of the relational conception of the separation of powers here. The basic idea is, again, that without a legitimate and justifiable public interest government or executive actions contradict the principle of the separation of powers. The public interest must be detectable, however disguised, behind the activities of the executive. There are services, such as issuing passports, that are or should be quite automatic in a free country, with the public interest in the background being (the positive protection of) liberty. Regulatory decisions of state agencies and officials, such as issuing driving licenses, professional certificates, conferring academic degrees in certain countries, and so on. are individual decisions but, at least in principle, they are merely applications of general provisions that are

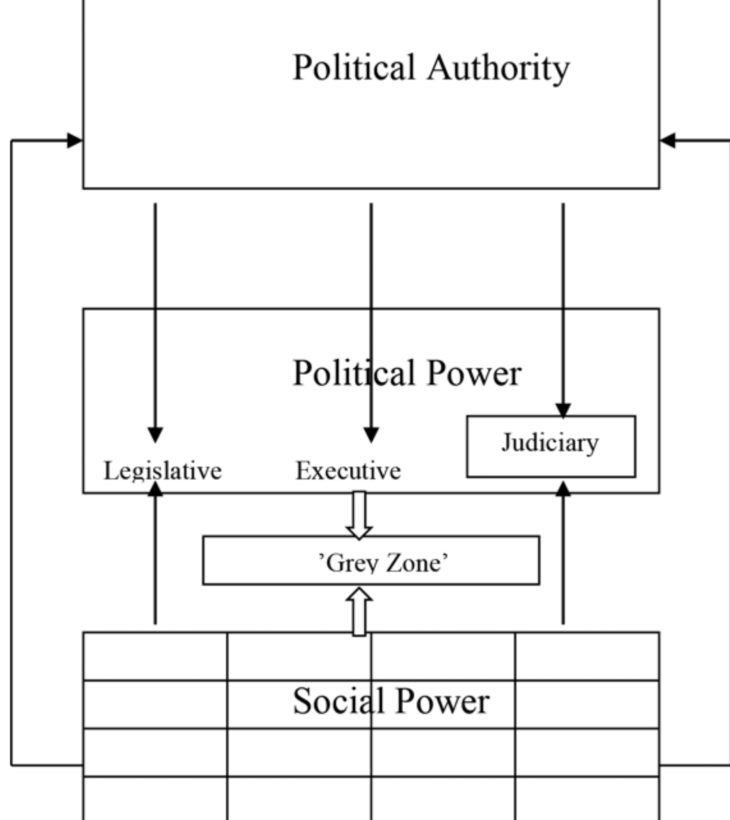

Figure 5.1 The Separation of Powers as Kinds and Branches. *Source*: Created by the author.

inferable for other public interests. Supplying the economy with money by way of a possible state monopoly of printing banknotes is backed by other, obvious public interests. Public schooling, health care, sponsoring culture by public money are usually much more controversial issues because the public interests involved are thought to be less obviously the sole responsibility of the state. When it comes to affirmative action, trading monopolies, taxing exemptions, money transfers on the basis of the fairness principle, the public interests affected are even more debated and the usual counter arguments related to possible moral, in some cases material or financial corruption are inevitably raised. It is, however, not only the probability of personal corruption of politicians or public servants that is at issue but the *corruption of the principle of the separation of powers*. In other words, when social power with its inevitable and legitimate personal context intrudes into the government,

the executive branch narrowly understood, it begins to undermine and subvert the very idea of articulated government based on (good) order. It would be obviously futile to attempt at drawing a very clear line between what belongs to the state or the government proper and what should remain outside of it. But the principle of the separation of powers is not expected to tell constitution makers, reformers, legislators, executives, judges and ordinary citizens exactly where those lines should be drawn. It is rather a compass, an idea to guide thinking, a device to sharpen the sensibility for articulated government.

The relational conception of the principle of the separation of powers is, thus, a consequence of abandoning the untenable substantialist approach, yet it retains the basic insight of it, namely, that articulated government presupposes clearly defined concepts. The legislative branch of such a government itself displays a balance of social power, political power, and political authority, not being identical with any of them. The judiciary is, or tends to, be insulated from political power, whereas the executive is, or tends to be in a well-articulated government, normatively separated from social power. The graphic figure above serves to summarize the basic argument.

PARLIAMENTARIAN VERSUS PRESIDENTIAL REGIMES

Before closing this chapter, let us briefly reflect on the classic claim, if not a dogma, that the separation of powers is a doctrine on which the American Constitution, and generally, presidential systems rest but which is of almost negligible importance in and for the British and generally, Westminster-type parliamentary systems. Colin Munro quotes, for instance, legal theorists who sharply deny the doctrine's validity in the British constitutional framework though he adds that

> some leading judges seem to have risked incurring academic disrepute … Lord Diplock referred to some of the Commonwealth constitutions as having been drafted by persons 'familiar … with the basic concepts of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom.' … Lord Scarman … also remarked that 'the constitution's separation of powers, or more accurately functions, must be observed if judicial independence is not to put at risk.'[35]

The reference to the judiciary and its independence is especially important, especially in light of the assessment offered by Robert Stevens who wrote that

> In England, the concept of judicial independence, an integral part of the separation of powers, is an inchoate one. On might have thought that, since many

> of the early ideas about the separation of powers developed in England, the concept of judicial independence might be articulately analysed in the legal literature. Far from it. In modern Britain the concept of the separation of powers is cloudy and the notion of the independence of the judiciary remains primarily a term of constitutional rhetoric.[36]

However, he also predicts that the idea or rather, the practice of the principle of the separation of powers will organically grow further and become stronger. The direction may, however, be less a principled embrace of the doctrine. The British tradition prefers avoiding a general scheme, if for no other reason but the lack of a written constitution. Thus writes Peter Leyland:

> As the UK constitution lacks any sense of overall design, the extent to which the overall separation of powers should have a central future role can be questioned. The most important consideration may be avoiding potential conflicts of interest between constitutional players rather than reshaping the institutions according to a particular model. … The idea … is that under a constitutional framework, whether formal or informal, power must have limits, and in order to achieve such limits, there needs to be a division of power. In the UK constitution the separation of powers is an untidy concept. The idea certainly does not apply in the strict sense. ... It is more accurate to conclude by emphasising that there are conventions that are observed that safeguard some *division* of power and functions between the various branches of government. (italics in original)[37]

In the most systematic recent treatment of the issue of the separation of powers within the British context as being influenced by the European Union and its institutions and legal practice, Roger Masterman concurs with Leyland's evaluation, writing about the principle that it "is perhaps better understood as a mechanism for restraining governmental power rather than achieving clear institutional and functional separation."[38] And later that "[s]eparation of powers in the contemporary constitution is at the very least, therefore, a dynamic, multidimensional, idea that is reflected in the status of, and interactions between, the institutions of government within the constitution and in the rules and principles by which those relationships are managed."[39] His analysis also targets the judiciary and its status within the constitution. Much like Munro and Stevens, and in fundamental agreement with those theorists who favor and bless judicial supremacy or at least a greater and more principled role of the judiciary in shaping the legal system, Masterman claims that

> judicial decisions are *both* binding findings of the content and meaning of legal rights, *and* contributions to an inter-institutional discussion from which the legislature, and possibly the executive, can depart if they so choose. …

> In separation of power terms, the consequence of these developments has been a considerable narrowing of those spheres within which executive action may only be subject to parliamentary and popular scrutiny. This narrowing represents a considerable strengthening of the separation of powers as a system of checks and balances. (italics in original)[40]

Our concern is of course not whether or to what extent the European Union and the continental tradition, whatever that involves, has influenced the British constitutional developments. The point is not even the deepening awareness of the significance of judicial independence within the British context. Nor is it whether it was the specific British political culture and political sensibilities, an atmosphere of mutual respect for institutional boundaries based on a civilization of respect and tolerance, that is, whether it were the historical circumstances that have preserved a de facto separation of powers, despite the lack of a clearly formulated constitution. In short, the details of the British constitutional history are of secondary importance. The point is, rather, that a parliamentarian system may be as much expressive of the principle of the separation of powers understood as a relational conception as a presidential one. Perhaps even more. First of all, the "King in Parliament" formula is highly illuminating. It captures the essence of political authority as being both in and outside of the legislative: the monarch is defined as being in it, yet his or her very "being there" is considered to be a specially relevant and not a trivial fact. Presidents endowed with political power are less capable of representing the idea of political authority being completely identical with *none* of the government branches. Second, as was argued, the strong connections, even overlaps, between the legislative and executive branches of government, generally considered to be a hallmark of parliamentary regimes, are not a refutation of the principle of the separation of powers being operative because political power is, on the relational account of the principle, justifiably present in both branches. What matters is that social power should not become part of the executive in the manner it is present in the legislative branch (in the British case, the electoral system underlines the importance of social power being directly channeled into the legislative branch). Third, the independence of the judiciary may be a delicate issue within the British but not necessarily in every parliamentary regime. In other words, a truly independent (in the sense used here) judiciary is compatible and comfortable with the parliamentary system and the debates about the British judiciary being (having been) influenced by the executive by ways of private consultations, as well as certain judicial functions retained by the House of Lords for a long period of time have been more particularly related to the British experience. It should not be forgotten that via the common law system social power is

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perhaps more efficiently represented in the judiciary branch than in the Continental regimes which counterbalances the previous threats of influence.

In sum, there is no evidence that parliamentary regimes are in any way inferior to or more deficient than presidential regimes in terms of representing and expressing the principle of the separation of powers, once the principle is interpreted and justified according to the relational conception.

NOTES

1. Rousseau, *On the Social Contract*, 174.
2. Levinson and Pildes, *Separation of Parties, not Powers*, 2313; 2322.
3. E. Magill for instance, writes that "[i]t is easy enough to define the essence of the three government functions in abstract terms. The legislative power is the specification of the basic norms that govern behavior; the executive power includes the implementation of those laws; and the judicial power is the adjudication of disputes that arise under the laws" (*Beyond Powers*, 614).
4. Carolan (*The New Separation of Powers*); Rebecca Welsh, "A Path to Purpose Formalism: Interpreting Chapter III for Judicial Independence and Impartiality," *Monash University Law Review* 1 (2013): 66–105; and Manning (*Separation of Powers*) demonstrate by Irish, Australian and American examples extensively how inconsistent the doctrine's application has been in and by Supreme Court or High Court decisions and they attribute this partly to the impracticability of the formalist approach.
5. Redish and Cisar, *If Angels Were to Govern*, 454.
6. Welsh is concerned, however, only with the judiciary, compiling a two-geared test for deciding whether an institutional reform or a legal innovation squares with the principle of the separation of powers: the first question is whether "the function is judicial or non-judicial" and the second is whether "the conferral of the function is compatible with the independence and impartiality of the judicial institution" (*A Path to Purpose Formalism,* 96). P. A. Gerangelos warns, however, that "if there is an uncertain intention in the first place to entrench the separation of powers, much of the justification for the purpose formalist position melts away." Peter A. Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process. Constitutional Principles and Limitations* (Oxford, Portland: Hart Publ. Ltd., 2009), 41.
7. Prakash, *The Essential Meaning of Executive Power*.
8. In legal theory, it is "functionalism" with regard to the separation of powers that comes closest to essential realism but it is no less frequently criticized for its being blind, lacking any normative basis from which it follows that any function is justified by virtue of its functioning.
9. Earlier, Brown (*Separated Powers*) attempted to defend the separation of powers along similar lines, starting out from and giving primacy to the function of the judiciary as a chief protector of individual rights and of the due legal process.
10. Möllers, *The Three Branches*, 97.

11. Ibid.

12. Many scholars have serious doubts about the true and enduring independence of even "independent agencies." see Katyal, *Internal Separation of Powers*; Neal Devins and David E. Lewis, "Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design," *Boston University Law Review* 88 (2008): 459–98. More on this in the next chapter.

13. Carolan, *The New Separation of Powers*, 131.

14. It is highly interesting what Locke in *Two Treatises of Government* has to say about the difference and similarity of the executive and the federative powers. He introduces the latter by referring to "natural power" possessed by everyone in the state of nature and that becomes somehow compressed by the social compact and is inherited, so to speak, by the government as it continues to stand in a state of nature in relation to other commonwealths. Locke tries to argue that the federative and executive powers are "really distinct in themselves" (365), yet they "are hardly to be separated" (366). The almost unconstrained liberty that the federative power has in matters of foreign policy is really difficult to reconcile with the very constrained liberty that the executive power has (in principle) with regard to domestic policy (being the executor of laws). It is perhaps not an anachronism to see here the seeds of the institutionally and bureaucratically separated but politically inseparable functions of the executive that, at least in contemporary democracies, are no more restricted to narrowly conceived foreign affairs. In other words, what Locke labeled federative power as an institutional prerogative is, in fact, the core of political power.

15. David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006), 12.

16. Ibid., 99.

17. Dyzenhaus, *The Very Idea of a Judge*, 79–80.

18. Dyzenhaus makes his case rest upon parts of the *Leviathan* where the general functions of judges and the natural law are discussed but ignores, for instance, Chapter 18 where Hobbes explicitly states that "[e]ightly, is annexed to the Soveraigntie, the Right of Judicature; that is to say, of hearing and deciding all Controversies, which may arise concerning Law, either Civill, or Natural, or concerning Fact" (Hobbes, Leviathan, 234).

19. Dyzenhaus, *The Constitution of Law*, 5. As a matter of fact, he ends the book with a similarly balanced view that makes room for legislative supremacy yet with a hint to its constraints: "[t]he only hope for the legal left, for those who wish to construct a normative account of how law can make our societies better, is to argue for a renewed and reinvigorated legislature. And in order to support that argument, they have to rely on the role of the legislature in promoting social progress through law, that is, through institutions and mechanisms that respect legality, taking into account that our understanding of legality today is deeply influenced by our sense that the subject of the law is the individual bearer of human rights" (229). It is not easy to decode the exact message of the passage: what if the legislature does not want to promote social progress? Should then the judiciary advance this program and if yes, how?

20. Quoted in Robert C. Post and Reva B. Siegel, "Popular Constitutionalism, Departmentalization, and Judicial Supremacy," *Yale Law School Faculty Scholarship*

Series 178 (2004): 1032. L Kramer writes that "there is now a general consensus among social scientists that courts have not been a strong or consistent countermajoritarian force in American politics." Kramer, Larry D. "Popular Constitutionalism, Circa 2004," *California Law Review* 4 (2004): 971. He argues that popular constitutionalism is the right track to follow. Post and Siegel rightly observed that Kramer's view "judicial supremacy is less a concept of jurisprudence than of political theory" (1027).

21. "[A] better account of the legislative role of courts in a democratic society would emphasize that the legitimacy of judicial lawmaking is based on its deliberative character. … Insofar as courts are expected to reasons, they are accountable for their decisions." Ferejohn, *Judicializing Politics, Politicizing Law*, 53–4.

22. "The fragmentation hypothesis implies that courts have more freedom of action when the political branches are too fragmented to make decisions effectively. In such cases, policy making tends to gravitate to institutions that can solve disputes effectively." Ibid., 59.

23. Ibid., 43–44.

24. Some scholars argue that even the most spectacular and politically controversial decisions of courts have achieved little social change and have basically followed rather than shaped the political will of the commonwealth. See Taavi Annus, "Courts as Political Institutions." *Iuridica International* 13 (2007): 599–607.

25. Prakash, *The Essential Meaning of Executive Power*; Devins and Lewis, *Not-So Independent Agencies*; Patrick C. Wohlfahrt, "The Tenth Justice? Consequences of Politicization in the Solicitor General's Office." *The Journal of Politics* 1 (2009): 224–37 and especially Kirti Datla and Richard L. Revesz, "Deconstructing Independent Agencies (and Executive Agencies)," *Cornell Law Review* 4 (2013): 768–843. See more on this in the next chapter.

26. Möllers (*The Three Branches*) rightly emphasizes the importance of openness and publicity.

27. Bachrach and Baratz, *Power and Poverty*; and Lukes, *Power: A Radical View*.

28. A selection of party statutes with an explanatory introduction is available at https://www.ndi.org/files/Political-Parties-Statutes-ENG.pdf Accessed August 8, 2016.

29. Antonin Scalia, "The Doctrine of Standing as an Essential Element of the Separation of Powers." *Suffolk University Law Review* 17 (1983): 894.

30. Law, *Judicial Independence*, 1371.

31. Richard J. Lazarus, "The (Non)Finality of Supreme Court Decisions." *Harvard Law Review* 128 (2014): 542–625.

32. There can be some other reasons such as overturning a "decision" of an illegitimate court.

33. http://www.whitehouse.gov/the-press-office/statement-president-todays-supreme-court-decision-0. Accessed August 9, 2016.

34. See Mike Feintuck, *The Public Interest in Regulation* (Oxford: Oxford University Press, 2004).

35. Munro, *Studies in Constitutional Law*, 305. Earlier, W. B. Gwyn also found that "despite frequent statements to the contrary, the relation between the House of

Balazs_9781498523349.indb 137 11/5/2016 2:57:13 PM

Commons and the government in the British parliamentary system does satisfy the separation of powers doctrine." Gwyn, *Modern Forms of Government*, 84.

36. Robert Stevens, "A Loss of Innocence? Judicial Independence and the Separation of Powers," *Oxford Journal of Legal Studies* 19 (1999): 367.

37. Leyland, *The Constitution of the United Kingdom*, 83.

38. Masterman, *The Separation of Powers*, 13.

39. Ibid., 31.

40. Ibid., 56, 104.

Balazs_9781498523349.indb 138 11/5/2016 2:57:13 PM

Chapter 6

Agencies, Constitutional Courts, Gray Zones, Federalism, and State of Exception

The relational conception of the principle of the separation of powers offers an account of what are the main responsibilities of the legislative, the executive, and the judicial branches of government in maintaining the idea of articulated government, serving the basic order of the commonwealth. These three branches have often thought to be an insufficient or outdated structure and/or an inadequate framework to explain governing in modern constitutional democracies. As has been noted several times, the rise of the administrative state; the explosion of autonomous or semiautonomous agencies; the growing importance of constitutional courts, central banks, as well as the obviously not new, yet mostly neglected fact of federalism; and the various regimes of local governments have provided theorists with reasons to revise the classic doctrine of the separation of powers. Since the present conception of it can be considered a return to or a confirmation of the basic soundness of the classic doctrine, these developments and the arguments that are derived from them must be addressed. In the previous chapters, various answers have already been suggested but mostly in a tentative form. This chapter is meant to focus on these answers in more detail.

AGENCIES

The mushrooming of autonomous or independent agencies, with different degrees of legal autonomy, has been noted and is discussed more and more frequently. Their position within the government is itself a contested issue. So Marc Quintyn observed that "the separation of powers involved in this new mode of governance begs for clarity in the interactions between these

Balazs_9781498523349.indb 139 11/5/2016 2:57:13 PM

new regulators and the other branches of government."[1] In Chapter 1, Frank Vibert's conception was discussed at some length because his ambition was indeed to respond to this challenge systematically and bring clarity into this area by arguing for a view that these institutions and agencies make up a new branch of government. The normative underpinning of this view was that this branch provides the electorate with reliable information concerning facts and sometimes values. "It" is not elected but is in this respect similar to the judiciary.[2] Vibert's view is also similar to Carolan's theory of the administrative branch as a service provider to individuals.

The arguments against this view[3] included, first, the merely assertive nature of the claim that these agencies are also capable of controlling the executive. More rigorous research is needed to explore the real power relations between these agencies and the (central? chief?) executive. Studies referred to here raise doubts about the control of agencies over the executive. Structural reasons do count and it does make a difference who (the legislative or the executive) delegates authority and appoints the leaders of these agencies. Much depends on how the concept of institutional autonomy is defined (see below). What is more difficult to assess is, for instance, the personal trust between the president and his appointees that may give *them* a fair amount of autonomy in running their institutions but this is not equated with the autonomy of the *agencies* themselves. Power relations are, as was also argued, often very volatile and these institutions are less safely protected by the concept of articulated government than are the traditional branches.[4]

Thus, secondly, doubts were raised whether citizens truly consider such agencies independent and not proper parts of the executive over which they have little (practically, even less) control than over the government in the narrow, more political, sense. Of course, empirical studies of trust often find that certain institutions or organizations such as the police or the fire service do enjoy considerably greater trust than, for example, parties, politicians, or indeed, "the" government in general even though these are more openly and directly subjected to electoral control. However, these indices are interpretable in different ways. Armed forces or fire services work on crucial fronts of social and political well-being, are usually monopolies, and most citizens have, under normal circumstances, few other choices but to trust them. This is convenient and seldom contradicted by contrary experiences. They are also very special parts of the executive: they have a separate code of behavior, uniforms, esprit de corps, cultural traditions, and vocations. These are important features but none of these truly separates or exempts them from political control. On the contrary, the strong democratic political/civil control over the police, for instance, is a cornerstone of the rule of law and democratic constitutions. Other, perhaps most such agencies do not enjoy such popularity and trust, therefore their participation in the government broadly understood is

even less separable from the executive politically than those who have some truly independent access to the public.[5]

Matters would be more complicated if some agencies were run by directly elected chief officers as Jacob Gersen and Christopher R. Berry recommend.[6] They call this regime "unbundled executive." The idea is to give citizens the possibility to have several policy package being represented by a single chief executive.[7] Democratic accountability and greater freedom of the electorate over policy choices ensues. The idea is not entirely unrealistic if federalism and a vertical separation of powers and competences are considered parts of it (see more on this below) and if recurrent, serious conflicts between governments and certain agencies and their chief officials are remembered: think of central banks having their own priorities or of ombudsmen. They are not directly elected but usually enjoy independent democratic legitimacy via the legislative branch. What Gersen and Berry recommend is, however, much more. And if a constitutional reform embraced this conception, the problem of the lack of direct citizen control over various parts of the executive would be solved. But then it would make no more sense to speak about *the* executive branch. The authors do not seem to be worried about this, they regard this as a mere coordination problem: "[i]f coordination is the overriding principle of government organization, then the unbundled executive is likely worse than a single strong unitary executive. … If coordination is one value among many, then the calculus is far more complicated, and does not obviously disfavor the unbundled model."[8] It is not that simple, however. Coordination is not just a value, one among many. If having a single overriding political leader(ship) means to be responsible for everything, then the separation of powers would be incompatible with it. Yet the logic of articulated government is also about coordination but not in "having a single policy package" sense. It favors a regime where there is *one* political decision-making mechanism in which the executive has a distinct role. It does not follow that maintaining order and articulated governing consists in nothing else but political and policy decision-making, hence the separation of power*s* is first of all about distinguishing and separating kinds of power and authority, not institutions. Thus, laudable as it seems to allow citizens to directly elect various executive officials (again, how should it be determined *which* agencies' policy issues deserve such a distinction?), the result would be a distorted understanding of the separation of powers and consequently the logic of articulated governing.

If it is granted, first, that the executive is and must remain a unitary agent, and second, that citizens do not have sufficient control over the so-called independent agencies (nor should they), these agencies may nonetheless form a silent but strong center of power that does partition the executive. There is, however, a conceptual difficulty with the view that the autonomous agencies compose a separate "branch of government" in the classic, at least

theoretically conceivable sense. For if we take independence and autonomy seriously, it follows that every unelected body, be it a regulatory agency, a service provider, or a tribunal, is independent from all the others. But how can we label a structurally fragmented set of institutions a new branch? This would entail a shared, sufficiently coherent logic of functioning and of legitimacy. If Vibert's idea about generating and providing the public with relevant information would indeed be a defensible justification of this new branch, how could we understand independence, especially if it entails being insulated from one another, not just from the other branches? It seems that one cannot have and eat the cake, too; either we have a unitary branch conceived of in terms of a single value or principle or a wide field of autonomous agencies that are only virtually related to one another.

A reply to this dilemma might be to reconsider the idea of independence and argue that it means three different things: first a legal, statutory independence; second, a relative insulation from the executive understood as the central bureaucracy of government; and third, a matter-of-fact kind of insulation from one another.

As to the first part of the reply, legal independence can be formal or partial. On the one hand, a national tax authority may be a legal person. This implies a sort of independence. Yet it may be fully under government control (concerning its budget, staff, responsibilities, or casual tasks such as making regulation proposals). On the other hand, some secret services may have no legal independence yet may be de facto more autonomous in respect of their activities. Thus, legal autonomy in itself is not necessarily a good proxy of independence in the required (real, operative, empirically meaningful) sense. Secondly, the insulation from the central bureaucracy is indeed an empirical question, answering of which needs a thorough research of the budgets, recruitment policies, privileges, rights to set and/or sanction norms of these agencies, and their softer powers. However, it is just the many practical and legal forms and various degrees of autonomy that do not really seem to be congruent with a single, overarching logic that would link up every unelected body on a chain and put them on a common ground vis-á-vis the executive.[9] And thirdly, if these institutions are entrenched legally and/or empirically in such a way that they cannot influence one another, either; then the presumption that they stand nevertheless on a common ground collapses anyway.

AQ 1: The sentence "And thirdly, ..." is not clear. Please clarify.

However, the intuition of many scholars about a new phenomenon's emergence cannot simply be declared mistaken or groundless. There is indeed an astonishing number of agencies, institutions that are neither legally nor structurally integrated into the conventional structure of governments. How can we positively account for them within the relational conception of the separation of powers?

Balazs_9781498523349.indb 142 11/5/2016 2:57:13 PM

Let us turn once more to Vibert's account because he also offers a very useful overview of the *types* of agencies that he thinks represent this development. These are (1) service providers like central banks, (2) risk assessors like licensing agencies, (3) boundary watchers like supervisory authorities in the finances, (4) inquisitors such as audit offices, and (5) whistle-blowers like ombudsmen. He does not, however, argue for these categories. They are more or less heuristically established ones. On a closer reflection it turns out that it would indeed be difficult to show that, for instance, central banks are *just* service providers. Often they are also supervisory authorities as well. Ombudsmen may also hold a much wider portfolio and are not just umpires. Many agencies such as land registry offices or traffic safety boards and the like tend to fulfill only a single function but others have several tasks. Of peculiar significance are what Vibert omits entirely, namely, think tanks. Many of them are not just advisory agencies behind parties but provide constant support for government politicians while running the administration. Thereby they, too, have a share in the business of governing. Such institutions cannot be subsumed under any of these rubrics.

One may try to come up with another categorization or conclude that one would be probably better off sparing all such efforts. However, what seems to be a more reasonable approach is what was already suggested in the previous chapter: to examine these institutions and agencies along the *specific public interests* that justify them. But, there is no presumption that there must be a one-to-one correspondence between individual institutions and single public interests. For instance, the protection of property has ever been one of the most uncontroversial public interest which is served by various agencies (intellectual property right offices, land registries). They do not simply provide services or process data; they have a fundamental and clearly discernible value to protect. Even dictatorial regimes used to insist on upholding a solid and predictable property regime.

Another example is guaranteeing price stability as a public interest. This is the usual justificatory reason for the independence of central banks about which there is a singularly voluminous political economical literature where the principle of the separation of powers is sometimes referred to.[10] Peter Bernholz argues, for instance, that the independence of central banks, at least normatively, is nothing else but another form of protecting price stability since the gold standard was abandoned.[11] As a matter of fact, objectives determined by central bank laws (and lawmakers) are not so unanimously one-value-oriented. Across countries, various provisions are in force.[12] Given the general nature of such clauses and the public interests involved, political economists have increasingly found it difficult to establish an unequivocal relation between price stability and central bank independence.[13] Accordingly, Fabrizio Gilardi observes that the independence of central banks is

perhaps less about price stability per se and more about the more general points of credibility and certainty, which are values shaped by other popular and cultural attitudes as well.[14] These values are highly abstract and general. Therefore, they are too unspecific to justify *central bank* independence. The conclusion is aptly vague: "knowing where independence comes from in the first place seems a necessary condition for any assessment of the desirability of these institutional arrangements."[15] Quintyn, too, admits that "independence in and by itself, is not *the only* solution in fighting inflation" (italics in original), and he grounds the justification of independent regulatory agencies in transparency, integrity, independence, and accountability. He concludes that "G [governance] is gradually being considered as more important than I [independence]."[16]

In a sense the concluding reference to the notion of governance accomplishes a process that began as a clearly discernible public interest being connected with an autonomous institution whose autonomy is grounded specifically in the promotion or preservation of that public interest (price stability); and ended with a realization of the inevitably political aspect of any public interest. Thereby the political justification of the autonomy or independence of these agencies returns as a necessity. This in turn brings in the principle of the separation of powers once again. Since the statutes of such institutions may be laid down and accepted either in forms of laws or by executive decrees, their direct political dependence is variable. But as Devins and Lewis argued, the legal difference between legislative and executive delegation do not make for a real distinction between institutions created by either branch. The reason is clearly the presence of political power in both branches. Thus, however autonomous these agencies are legally or financially, or insulated from direct political influence (perhaps only temporarily) in terms of their personnel and functions, they become parts of the great terrain of political power. Their raison d'être and ultimate justification lies in one or more public interests that are naturally being formed and re-formed in political debates.

Thus, price stability is a fairly clear objective but its achievement is a matter of great many factors, hence it cannot be a sole responsibility of a single agency. If legislators insist, nonetheless, that the stability of prices is a principal public interest, they may also think that central banks should be given more powers to achieve that aim, yet giving more legal powers to them entails giving more political power, too.[17] Thereby the sole objective is likely to be amended with further public interests, in practice, to support the general line of economic policy of increasing welfare which is, however, one of the chief responsibilities of the elected government.

The very same story could be told about other values or public interests. Fair competition is, for instance, in some sense an even more complicated

issue than price stability because it is served by numerous agencies by default. If these various public interests that are primarily related to public values within economic policy are put together, we are in the midst of a political debate that affects the very basic political and economic philosophical questions of the economy and public welfare in general. Whether the various public interests that emerge out of these debates (values of the sanctity of private property, price stability, fair competition) can be brought together under a common umbrella such as the protection of the market economy which may or may not be a general public interest, depends on our beliefs about its efficiency to provide for social wealth and material security. Once this issue is decided by a political *fiat* (temporarily, as with any public interest), another discussion may follow about the need and way of establishing specific agencies to protect and advance values deemed to be fundamental for preserving market economy.

A similar reasoning is available for the welfare responsibilities of the state. Here, again, discussions on whether there indeed are such responsibilities should come first and will go on probably without a terminal decision. Once, however, a temporary decision is made, the ground for identifying specific values and concerns related to these responsibilities is prepared. One may then argue for or against values and concerns such as scientific progress, natural diversity, environment protection, high culture and civilization, and so on. Once such values and concerns are more or less consensually but never unquestionably identified and ranked, they can be entrusted to specific agencies and institutions that must take care of them. The emergence of autonomous agencies and institutions does not, therefore, establish a new branch of power. There is no common logic behind them, except their close connection to particular public interests which, however, makes them very much part of the executive and not, contra Vibert, similar to the judiciary.

CONSTITUTIONAL COURTS

The enormous literature on the political institution of constitutional review and the various institutions involved in this process cannot be rehearsed here. It should suffice to reflect on this issue from the point of view of the relational conception of the separation of powers.

It was argued in the previous chapter that the judiciary has its special accesses to political authority, or better, to its distinct features or dimensions. Besides certain more locally relevant types of access like electing judges and jury members, a more general and highly important such access is finality. It is arguably a very strong aspect of any authority. Another access is the sense of natural order that relates political authority directly to the will of the

citizens, that is, to its genesis. These make the judiciary especially authoritative and although relatively powerless yet a guarantee of peace and natural justice. During the course of constitutional review, however, the judiciary is obviously drawn into a terrain where political power predominates. This is a clear threat to the separation of powers, at least within the present conception of it.

For sake of convenience, let us return to the Super Pac decision of the American Supreme Court that was cited earlier. To recite, the President expressed his strong disagreement with the decision in very harsh terms and referred, as an ultima ratio, to the public interest that in his view would have required a different ruling. If we read the reasoning of the decision, written by Justice A. Kennedy, it becomes quickly clear why and how such a view could be formulated and defended. Here are some crucial passages that need to be quoted at length:

> 2 (a) Although the First Amendment [*henceforth: FA*] provides that 'Congress shall make no law … abridging the freedom of speech,' §441b's prohibition on corporate independent expenditures is an outright ban on speech, backed by criminal sanctions. It is a ban notwithstanding the fact that a PAC created by a corporation can still speak, for a PAC is a separate association from the corporation. Because speech is an essential mechanism of democracy … political speech must prevail against laws that would suppress it by design or inadvertence.
>
> (b) The Court has recognized that the FA applies to corporations ….
>
> (c) This Court is confronted with conflicting lines of precedent: a pre-*Austin* line forbidding speech restrictions based on the speaker's corporate identity and a post-*Austin* line permitting them. Neither *Austin*'s antidistortion rationale nor the Government's other justifications support §441b's restrictions. … (1) The FA prohibits Congress from fining or jailing citizens, or associations of citizens, for engaging in political speech, but *Austin*'s antidistortion rationale would permit the Government to ban political speech because the speaker is an association with a corporate form. … (2) This reasoning also shows the invalidity of the Government's other arguments. It reasons that corporate political speech can be banned to prevent corruption or its appearance. The *Buckley* Court found this rationale 'sufficiently important' to allow contribution limits but refused to extend that reasoning to expenditure limits … and the Court does not do so here. … [T]his Court now concludes that independent expenditures … do not give rise to corruption or the appearance of corruption. That speakers may have influence over or access to elected officials does not mean that those officials are corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy.[18]

The reasoning is glaringly political, going far beyond the narrow interpretation of the Constitution in general and the First Amendment in particular,

which would have ended perhaps with simply stating that corporations and Super Pacs are agents who have a right to free speech. This narrow interpretation could have been sufficient to support the decision that swept away any kind of restriction on free speech even though making sense of the concept of "restriction" would have required the Court to bring this summary argument a bit farther. Yet the Court began to argue with the reasoning of the "government" (as well as of previous "Courts") and made conjectures about what corruption is, how it may evolve, and how it would affect citizens' faith in democracy. These arguments are at most very loosely related to the Constitution and more tightly to the dominant common (?) understanding of what corruption consists in.

Without further evidence gathered together by analyzing hundreds of thousands of similar decisions taken worldwide by Constitutional, Supreme, or High Courts, it can be safely assumed that such and similar cases of reasoning abound. Of course, there is all the difference between constitutional courts being directly or indirectly threatened by governments, politicians, and in certain cases, private individuals to make a political decision in favor of something or somebody; and courts/judges assuming a proactive role voluntarily or feeling obliged to do so and proffering arguments that are meant to convince a wider public about the rightness of a constitutional principle. Nonetheless, this role is a clearly political one.

As John Manning demonstrated, even principles not mentioned in a constitution can be used to support decisions. Such is the case with the principle of the separation of powers itself within the American context.[19] Other political principles, grounded somewhere in some political or social theory can also be invoked in crucial decisions. Here is, for instance, how the German Constitutional Court argued for upholding the lawfulness and constitutionality of (basically) transferring sovereign powers to the European Union and its various organs:

> Personally, an office holder is democratically legitimate if his authority is based on a continuous chain of legitimation that begins with the people. … The exertion of state power receives its material-objective legitimacy principally via the guidelines set by the Parliament for the administration, as well as via the influence exerted by the Parliament over the government, and the administration's being bound by governmental instructions. … The more intensely fundamental rights are affected by a debated policy measure … or the more deeply it is linked with the whole polity, the higher must be the legitimacy requirements. What is decisive is not the form of legitimation but the efficiency of democratically guided decision processes. … Much depends on the coincidence of different bases of legitimacy. … A reduced legitimacy flowing through one legitimation channel can be counterbalanced by an increased legitimacy flowing through other channels.[20]

This argumentation is based on the concept of legitimacy/legitimation and on a conception that most probably has its roots in the Weberian theory (different bases of legitimacy) and in what seems to be a system theory of society (references to efficiency and legitimacy flowing through channels).

Thus, certain decisions taken during constitutional review are inspired by arguments that are more directly popular, involving particular values (freedom of speech) and public interests (suppression of corruption), whereas other cases demonstrate how some political and social theory of articulated government and of good order (faith in democracy, legitimacy) influences the reasoning of the Court and the judges. These are, nonetheless, arguments that are inherently debatable, making constitutional review, at least beyond a certain (but easily achievable) point, a political institution. The conclusion is inevitable: the more constitutional review immerses, either due to some external pressure or to an inner conviction of judges, in arguments concerning political values, theories, and especially public interests (of the day), the more courts begin to subvert the idea of articulated government as expressed by the principle of the separation of powers.

From an institutional regime point of view, constitutional review can be assigned to various actors. Mixed cases put aside for a moment, one pure regime is when it is an exclusive job of the judiciary. In such a regime, once political power is added to political authority and social power, a normal combination of the judiciary, the result is a *doubling of the legislative* where, as was argued, these powers are equally represented. Normally, of course, we do not consider supreme courts or the assemblage of all kinds of courts having these powers as another chamber of the legislative. The reason lies in the distinctness of the accesses to political authority on the part of the judiciary and the executive. On the one hand, courts argue as authorities do, namely, with a strong aspect of finality and the monopoly of a special knowledge of the constitution that is thought to be an embodiment of the will of the polity, with a special emphasis on natural order and a natural sense of justice. On the other hand, the legislative branch has the sanction of the political authority "to begin," "to create," "to launch," rather than "to finish" or "put an end to." Its job is to make laws whereas the judiciary is expected to observe those laws and to apply them with an eye on the natural order. However, despite these differences arising from the different accesses to the political authority, the presence of political and social power as well as of political authority in both the legislative branch and the judiciary once it has the right to annul laws, for instance, on the basis of their unconstitutionality does pose a threat to the separation of powers.

If a constitution establishes a constitutional court which is institutionally separated from the judicial branch, then social power is excluded from it (though individuals may still have some right to appeal to the constitutional court, see the *actio popularis*) but the court can easily become a *version of*

executive power, a combination of political authority and political power. This, too, may sound somewhat strange because constitutional courts do not govern, have no administrative function in running the state bureaucracy, and those who fear of such courts having undue powers used to reason that these courts assume (abuse?) functions of the legislative, rather than those of the executive branch. Again, it is worthwhile to reflect on how political authority is represented by these two agents. Governments (executive branches) have a specific access to the political authority which consists in their rights to base their decisions on the public interest, that is, to tell what needs to be done to promote the public good without endangering natural order. Constitutional courts, however, must ground their decisions in the constitution. In addition, they used to retain the vestiges of the judicial system. Their reasoning is generally very legalistic and technical. It is not always easy, especially for lay people, to find the political arguments in it. And if such courts have the power to annul laws, they appear to be closer to the legislative branch. Notwithstanding these features, from the point of view of the separation of powers expounded here they are closer to the executive.

It does not follow, of course, that there is or should be a political agreement between constitutional courts and the government. On the contrary, given the usually great differences in tenures, these two agents may be in various conflicts. Hence, governments may have different institutional devices to ensure the constitutionality of their policies like the US Office of Legal Counsel. In other regimes, governments and other agents have a right to have their proposals checked by the constitutional court (pre-review, scrutiny, disputes) which makes these courts in this respect and in this capacity explicitly parts of the executive. The historical and empirical significance of institutionally separated constitutional courts is most probably a function of their legal and political *struggles* with governments. Again, from the present conception of the principle of the separation of powers such a virtual doubling of the executive is not a welcome development, similar to the distortion engendered by an increased direct electoral control over specific agencies that the conception of the unbundled executive recommends.

GRAY ZONES

Each branch of the government must rely on political authority. In other words, political authority is represented by each power, though in distinct ways and by various means. Nonetheless, the general interest in there being a political order entails the wish to have a government that has and respects its own limits. The principle of the separation of power helps governments and citizens to have an idea of how this can be done.

Political authority is not unconstrained, or better, it is not identical with government: it is a necessary but not sufficient condition of governing. Political and social power are, however, necessary conditions only in certain branches of governments. Formal logic compels us to ask whether a combination of political and social power is possible, without the inclusion of political authority.

In Chapter 4, while discussing the notion and emergence of political power, the role of political parties was also touched upon. Parties are eminent agents of and for building up political power, at least in most modern constitutional democracies. Elsewhere and in different times other actors are responsible for forging and giving shape to political power. These actors are supposed to be free to reflect on any issue they deem vital for the whole polity. These issues, in turn, are products of the interactions taking place among individuals and their associations, organizations, and between them and the state or the government. These are the normal processes of the creation and cessation of social power. Parties and similar political agents (movements and various sorts of political associations) have their ways of keeping issues in focus, of animating public debates, of making individuals interested in public affairs, of providing them with specific opportunities to live a (politically) virtuous life, and so on. No wonder that the idea of separating parties, rather than (state or government) powers is sometimes raised.[21]

However, it is governments and not parties that govern. In the legislative, parties take part in the government broadly understood (including, therefore, even oppositional ones), outside of it they are excluded from it. It is just the relational conception of the separation of powers that can provide an account for their special and distinct role in the polity, inasmuch as they serve as the primary channels for transforming social power into political power.

The very same logic of combining social and political power works within the wide gray zone between government and state and the larger society and its various spheres (economy, education/schooling, social services, culture, etc.). This issue was also touched upon briefly. Cross-country differences are enormous in this respect hence only very general claims can be established here. The most general one is that it is in this zone where political power is being transformed into social power. What takes place here is, more or less, the reverse process of what was described above, that is, social power being transformed into political via parties and similar political agents. The problem is, however, that whereas there is, for instance, a very clear border between parties in and outside of the legislative and there is a threshold of the conferral of political authority on elected political agents (and of its loss upon being forced to leave the legislative), there is no similar threshold of the creation and cessation of political authority within the gray zones of political power turning into social power. Parties entering congresses or parliaments

receive a normally unquestioned mandate to run *the* government by forming *a* government. They are free to form coalitions, to enter and leave *a* government with the general mandate to run *the* government. In the process of governing, however, under the continuous influence of political power, legally enshrined public interests may often strongly begin to shape individuals' lives, making the government a perpetual actor within their private spheres. This involves not only the presumption that everyone is supposed to prefer a state of living *with* a government (a presumption on which the principle of the separation of powers rests) to living *without* a government but also that a great number of public interests are built into the private (private?) system of preferences of individuals.

Commonplaces about differences between societies that apparently prefer a high level of state redistribution and societies that prefer the opposite can be spared here. These are obviously policy choices that are not made by governments in absolute freedom, behind a veil of ignorance, yet nor are they absolutely predetermined. A complete dismantling of a welfare state may not succeed in a few years' time but significant changes can be made quickly to a regime that has a comprehensive scheme for how to shape the lives of citizens. Centralization and nationalization, entailing a rapidly increased level of redistribution, may be brought about in a much shorter time. Such decisions obviously influence private lives to a great extent by forcing individuals to change and adjust their plans and ambitions to the new policies.

But we can go even deeper and general. The previous scheme of "policies change—citizens adjust their decisions to them" suggests perhaps an overly rationalist-calculative attitude on both sides. Power is, however, a more pervasive phenomenon. In the first place we must note that political power intrudes the private sphere not only when it imposes on us an institution, a norm, perhaps a way of living and knowing (e.g., obligatory schooling) but also when such things wane or disappear or become confused and leave the individual alone in a particular area of existence. For if power has a positive, freedom-enhancing aspect as well, the withdrawal and removal of power in the form of an institution, a transfer, a right, and an opportunity amounts to the reduction of freedom, too, which is in the core of minimum personal autonomy. The multifaceted phenomenon of social and political power, as well as their constant transformation is the great issue of Foucault's analyses of power, so at least they may be interpreted in this context. As is well-known, he explicitly refused to think about power in terms of legitimacy, sovereignty, legal authority and the like. Rightly so, inasmuch as his focus was institutions that work precisely in the gray zone were political power becomes social power.[22] No doubt, his formulations often look excessive if not extravagant. However, even the point that individual freedom (minimum personal autonomy) is a function of social cooperation that is concerted by

the government appears both valid[23] and much less frightening if we add, which Foucault did *not*, that the separation of power*s* is exactly the guarantee that the undoubtedly existent gray zones that cover much of what makes up life in a modern society *have* their borders.

Since the problem is, as was argued, that it is difficult to tell in principle where the government, possessing political authority but lacking social power "ceases" to exist, yet its political power continues to influence private lives by merging with social power, the very function of the principle of the separation of powers is to justify *every* effort to mark the borders of authority. In a way, such efforts are a kind of *antigoverning*, more or less in the sense Philip Pettit defined antipower: it is related to power as is antimatter related to matter.[24] Both have the same particles but different charges (plus some more differences), annihilating each other. They are in some essential sense similar yet cannot coexist. Using the analogy we may define governing in the following way: it consists in making use of political authority and political power to achieve public good or pursue certain public interests. Antigoverning, then, consists in making use of social power to keep political power at bay by finding and defining its limits through naming and carving out political authority. It is not a consistent and coordinated policy of doing something, that is, antigoverning has no objectives, it has nothing to do with the common good. Once social power begins to be accumulated, orchestrated, used for any common purpose, it becomes political power. Antigoverning is and remains a diffuse but potentially efficient social strategy to creatively resist the intrusion of political power into the private sphere of life. It is not, however, an egoist or narrowly individualist, personal resistance such as tax avoidance or a stoical moving into the inner citadel. Antigoverning *is* a kind of governing, much as antipower is power in an essential sense.

Consider the following example. A government may find it necessary and justifiable to bail out one or more banks. The reasons are to save the economy, thousands of jobs, to secure tax revenues, and so on. There are various financial ways and means to do so. One such means is (or may be part of a more comprehensive scheme) to literally buy up banks or nationalize them. The initial intention may be to sell them as soon as recovery begins and the threat of bankruptcy is over. It may be necessary to modify laws, or only the state budget but it is also possible that the government is able to finance this strategy by using executive powers that may or may not include the involvement of so-called autonomous agencies. Thus far the story is an effort to return to order by creating new rules and using novel means, within the competences of governing proper. It may happen, however, that banks that were in private hands previously remain in the public hand because no legal provisions were made to privatize them at a given moment, in a given economic situation. On the surface, such banks may continue to operate in

ways that are not different from other banks. However, governments may feel inclined to have a say in determining their business objectives or, perhaps half-consciously, change their behavior, preferences, and sensibilities by the simple fact that other market agents under some government control are advised to seek financial help and services with such banks. Moreover, since the government, in its capacity of being a stakeholder, is responsible for the proper management of such banks, especially in consideration of the taxpayer money that has been invested in them, and therefore it is obliged to delegate executive officials to the management, the whole organization becomes and remains a peculiar mixture of social power (which includes economic power) and political power.

As long as the economic crisis persists and the bankruptcy is an imminent threat, the public interest in bailing out such a bank is transparent (though of course inherently debatable and controversial). It is often not easy if not impossible to tell, however, when the crisis is truly over and the public interest allows re-privatization or it positively prescribes it, once the more general public interest of there being a market economy prevails. The principle of the separation of power helps here by telling us not *when* the public interest ceases to exist and a potentially harmful, corruptive combination of political and social power continues. What it tells us is *that* such a combination is possible and that it is *no more governing*. We cannot say that it is wholly and absolutely illegitimate and that it should be banned and prosecuted because of the very nature of the issue. There is no "it" that could be prohibited. Yet there is a danger of political power exerted by the government forming social (and in this example, economic) life in a way that clandestinely and perhaps not even deliberately corrupts the free interactions of individuals. Antigoverning is an awareness of this danger and a principled resistance toward political power, in the first place, by seeking the limits of political authority (when does the public interest cease to exist?). Further, it *is* possible that the government or the state can operate as one among the many private clients and agents in the banking sector. Yet whether or not it is capable of doing so can be controlled by observing the bank's decisions and behavior. Thus, antigoverning is also a principled way of seeking the borders between social and political power.

Another example is schooling and compulsory education. It can be told now more concisely. Suppose that it is the state that runs most primary and secondary schools and determines the content-related and quality standards and requirements for non-state-run schools as well. There is a public interest accepted by wide consensus that backs this scheme. It would certainly be an exaggeration to say that schools are just parts of the executive branch, perhaps endowed with some autonomy that would be, however, similar to the autonomy of, say, the taxing authority within the executive branch broadly understood. Nonetheless, such would be the case (and practically was or

is in many nondemocratic countries) unless we can tell where the political authority ceases to exist in this sector and how social and political power can be distinguished here. The search for the limits of political authority and the distinction between political and social power is normally most intensive and ostensible in establishing the institutional guarantees of parental supervision and participation in school management (often local governments are also involved in it), in safeguarding the freedom of teaching (e.g., free choice of textbooks), and in the participation of various professional bodies within the process of textbook writing and editing. That there are such identifiable and relatively well-ordered processes and institutions active within this sector is a proof that antigoverning as defined here is an established practice. Everyone is supposed to understand that despite the general and consensually supported public interest of there being a state-run primary and secondary education, the government's *political authority* ceases beyond a certain point within schools. And everyone is supposed to understand that even though the contents of textbooks cannot be entirely free from political pressure (i.e., the views of the majority), *social power* as represented, for instance, by the freedom of asking any question related to those contents and challenging them as well as by the freedom of answering them partly on the basis of the teacher's personal conscience is different from *political power*.

The gray zone that we are discussing is enormous. Professional associations and chambers may be conferred administrative rights and powers on. Besides state-owned companies (as in the example of the bank above), states have a wide range of means to influence economic transactions well-beyond what public interests would justify. Health and social care systems are in many respects similar to education. The principle of the separation of powers understood in the present relational sense and based on the three different kinds of power and authority is and remains a useful and reliable compass to find and justify borders and limitations within this vast field.

VERTICAL SEPARATION OF POWERS

The mainstream literature of the principle of the separation of powers reflects relatively little on the vertical structure of government. Legislative, executive, and judiciary are considered as equal in the sense that they together form the government, broadly understood. Of course, the executive and to a certain degree the judiciary is hierarchically organized or structured, hence verticality is present within these branches (committees and caucuses of the legislative body may also be regarded as being on a "lower" level than the plenary body). However, the point about the vertical separation of powers is not this hierarchical organization of the separate branches but the idea that a

central or federal government shares its general function of governing with local or member states/provinces. This raises the question of whether and how the present conception of the separation of powers can accommodate this kind of verticality.

There are a few attempts that discuss this issue. Jessica Bulman-Pozen's recent article puts federalism into the context of the separation of powers but explicitly states that "[t]he goal of this Article is to describe an under-appreciated and undertheorized dynamic, not to defend a strong normative conclusion."[25] Nonetheless, she expresses her agreement with those who are concerned with the rise of the administrative state and consider states as bulwarks against federal or central government, understood as the agent of a unitary executive will. But the otherwise interesting recording of the various means and techniques of delegating functions and tasks by Congress to states supports more a kind of a checks and balances argument than the principle of the separation of powers. Thus she writes that

> when Congress gives states a role in executing federal law, it tends to delegate not *exclusively* but rather *concurrently*. States may implement federal law by conforming to standards set by the federal executive; state and federal agencies may implement the same regulatory provisions or enforce the same statues; or state officials may executive federal law under the supervision of a federal agency. (italics in original)[26]

Many of her concrete examples are convincing proofs for the power of the states to resist not only the executive but also legislative will, although it is the legislative itself that is responsible for delegating rights and power in a (deliberately?) confusing way. The term "concurrent" may often seem euphemistic for the lack of transparence and the rule of contingency and arbitrariness. The outcome may be deemed if not desirable but at least satisfactory from the point of view of checking the executive and in general, the federal state. Given that federalism belongs to the core the American Constitution, there is little chance that the simple lack of transparency in itself would ever justify a constitutional reform that would do away with federalism. In states that have a different structure for various cultural, historical, and legal reasons, the question of whether and how verticality can be integrated into the conception of the separation of powers needs, therefore, a more substantial and normatively defensible account.

Let us consider a unitary state where the strong markers of federalism (the full structure of legislative, executive, and judiciary branches on a member state or province level) are missing. Local governing, municipal autonomies, and non-territorial (e.g., ethnicity-based) autonomies are still possible and generally thought to be important institutions of participatory democracy and,

following Tocqueville, of freedom against an eventual tyranny of the majority. These values and their importance notwithstanding, the present relational conception of the separation of powers needs to relate these forms of autonomies to the basic forms of power and the idea of articulated government.

Municipalities and local governments even in unitary states are forms of government that display many features similar to those of the central government: they have the right to make locally enforceable rules and manage local affairs with legally guaranteed powers and need popular legitimacy and check exerted by regular elections. However, the judicial branch is largely missing. It follows then that within local governing we can find, first, the duplication of the legislative branch in the sense that social and political power are present in local and municipal assemblies and they assume a kind of political authority as well. The latter is, however, inherently constrained because it is subjected to the general political authority of the polity. Yet, the limits of a local instance of political authority imply that the general political authority is also limited. The possibility and indeed the reality of political authority being vertically structured in this way is of particular importance for the separation of powers because, as was argued above, antigoverning is a strategy of searching and finding the limits of political authority. The vertical structuration of political authority entails a possibility to find some limits not outside but inside. This is not a logical consequence of the separation of powers but a widespread practice of constraining political authority. Social and political power being co-present in formal and institutionalized assemblies of local and municipal representatives of citizens constitutes a special occasion and framework for the general political authority being also instantiated there.

Further, antigoverning is also a search for distinguishing social and political power. Local governments in the narrower, administrative-management sense work much as the executive does, enjoying the political power and the (partial) political authority conferred on them by the local representative assemblies. The direct involvement of social power in the local executive is similarly undesirable but since local decisions related to some local public interests may also become integral parts of the lives of citizens in much the same way as those of the government's decisions do, the merging of social and political power is inevitable. In contrast to the political influence of the central executive on the private sphere of citizens, however, the concern over the politicization of local communities is generally much lower given the relatively low costs of leaving the community and the limited competences of the local executive.[27] Nonetheless, the effects of local political power perpetuating and sustaining itself by replacing, penetrating social power illegitimately, in other words, without the support and approval of political authority, are the same. Hence, from a separation of powers perspective, the basic idea distinguishing between social power that emerges out of a concern

over minimum personal autonomy and political power that is being established to create and maintain order becomes specifically close to the everyday realities within smaller, local communities. The vertical separation of powers is, once more, especially important for the practice of sharpening citizens' power sensibilities and competences.

AQ 2: Please confirm the edit made to the sentence "Hence, from a separation ..."

STATE OF EXCEPTION

Many constitutions contain provisions and clauses that regulate the process of governing in abnormal, exceptional, emergency situations. There can be various degrees and types of emergency situations but this issue can be ignored here. The question that needs to be discussed here, in the final subsection of this chapter, is whether the principle of the separation of powers is also suspended in such situations. On the face of it, the answer looks in the affirmative. Since the institution of extraordinary magistrate was introduced in Rome, the possibility of a concern over an undue prolongation of centralized power was created. Centralized power was thought to be a threat to private and public liberty. It was already argued, however, that liberty and power have a more ambiguous relationship than the liberal political tradition of negative liberty assumes. Nonetheless, it seems fairly obvious that a deliberate act of concentrating and centralizing all and all kinds of power in a single person's hands is in itself inordinate. The justification can be nothing less than the necessity of restoring order. In other words, overcoming the extraordinary situation is the aim of extraordinary powers. Dictators are needed to avoid dictatorship. The separation of powers must indeed be suspended in order to restore itself.

However, constitutions that regulate states of exception and emergency usually do so in a way that upholds the principle of the separation of powers. The legislative power is curtailed but the legislative branch itself remains intact, especially for purposes of checking the executive. The competences of the executive are broadened but the judiciary is kept rigorously separate. Thus, in many instances the very idea of constitutionality appears to be inherently linked up with the principle of the separation of powers. In theory it is possible to have a configuration where the distinct branches become unified constitutionally but as long as constitutions do not provide for their own suspension in cases of emergency, there seems to be a way to avoid the extreme situation of having no constitution for the sake of constitutionality.

Deciding over the situation of emergency is usually assigned to the legislative branch. This is the branch of power where social and political power and political authority are all represented. Therefore, the relational conception of the principle of the separation of powers provides for a possibility of

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concentrating power without an outright abolition of the principle inasmuch as the legislative body already represents concentrated power, or perhaps more aptly formulated, concentrated governing.

Of course this does not conform to the idea of articulated governing as captured by the separation of powers which prohibits the absorption of the executive and the judiciary by the legislative branch. However, such an absorption is empirically impossible. Social power cannot be absorbed by government or by any of its branches, at least in the long run. The protection of minimum personal autonomy will remain a concern of the individuals whose agreement on the state of exception must be earned. The political authority of the polity cannot be appropriated by the legislative branch (nor by the executive or the judiciary). In a strong sense it remains with the citizens. The rule of law will equally remain a concern of everybody affected. Individuals may perceive the rule of law as being seriously endangered. This is the reason why political power becomes stronger and gives an extra strength to the executive which, therefore, is also unlikely to be absorbed by the legislative branch. Thus, the idea of concentrated governing contradicts the practice of articulated government but as a generative concept, as the idea of a game about creating and maintaining order, the legislative branch is capable of both concentrating power for emergency purposes (and conferring it usually onto the executive) and of containing it by maintaining and articulating the constitutive distinctions between social power, political power, and political authority.

The lesson is, thus, that the states of exceptions or emergency are perhaps more occasions for launching, unfolding, rather than for suspending, the game of "ordering." These cases make social and political power as well as political authority more direct, more purely and a priori perceptible than in normal times. On this point, Carl Schmitt's dictum about the political preceding the state (or the law or the government) looks valid but what it entails is not the creation of law and rules ex nihilo, decisions made for the sake of decisions, leadership for the sake of leading but the restart of the game of order, the rules of which are, as was argued throughout this book, summed up as articulated governing and outlined in and by the reflections on the principle of the separation of powers.

NOTES

1. Quintyn, *Independent Agencies*, 290.

2. Though Vibert (*The rise of the unelected*) does not address this, it must be noted that the whole executive is, after all, an unelected body, at least in parliamentary regimes. If that point is taken, then as a ministry or department is an unelected body within or of the executive, all other agencies and institutions are similar in exactly the same respect. Ministries and departments may or may not be led by politicians who

may or may not be elected. But even if they are elected, their legitimacy is derived from the legislative body (often via the prime minister in cases where he or she has unlimited rights to hire and fire ministers), much as the legitimacy of some of the chief officials of autonomous agencies.

3. For references of studies based on empirical findings that raise objections against the factual independence of these agencies, see fn 25 in Chapter 5.

4. M. J. Breger and G. J. Edles offer not only an overview of theories of independent agencies (Chapter 3) but explain many details of their internal processes and their relations to the executive branch proper. Their conclusions are much more cautious and tentative than those of Vibert and other enthusiasts. They merely suggest that "the drive for independence from the executive is a constant counter-theme present in the centralizing trend of the administrative state. … The working out of these developments and their meaning for traditional public law suggests, we believe, the next frontier in administrative law." Marshall J. Breger and Gary J. Edles, *Independent Agencies in the United States: Law, Structure and Politics* (Oxford: Oxford University Press, 2015), 392. They base these conclusions on historical developments, the pendulum-like nature of politicization and depoliticization, and the ebbs and tides of presidential control over "independent" institutions. The principle of the separation of powers has, it is argued here, a more systematic and abstract vision of these agencies that will be espoused shortly.

AQ 3: Please clarify the sentence "Doubtlessly, the ..."

5. Doubtlessly, the most important such "agency" (though Vibert omits it entirely) is and has ever been the army. From Washington to Eisenhower (and several presidential candidates), military performance and experience have proved to be decisive for many politicians' career. Parliamentary regimes are no different in this respect. The influence of the top echelon of the army on the executive branch is often systematic and distinctive. It would certainly be of considerable interest to study the doctrine of the separation of powers as being operative in this area. However, the present conception of it can accommodate the army and armed forces as representing a fairly distinct set of public interests.

6. Jacob Gersen and Christopher R. Berry, "The Unbundled Executive," *Public Law and Legal Theory Working Papers*, University of Chicago Law School, no. 214 (2008).

7. "Specialized elected executives therefore make elections more effective mechanisms for controlling officials; the greater the unbundling, the greater the mitigation of agency problems in government." Gersen and Berry, *The Unbundled Executive*, 7.

8. Ibid., 19.

9. Quintyn argues that "governments are drawing some lessons from the CBI [central bank independence] experience in that they are looking for more balanced arrangements …; nevertheless, cross country experience also shows that governments are struggling with the positioning of these institutions within the constitutional and political framework, that is, no clear model has emerged" (*Independent Agencies*, 284).

10. Salzberger and Voigt, *Separation of Powers*.

11. Peter Bernholz, "Independent central banks as a component of the separation of powers." *Constitutional Political Economy* 24 (2013): 199–214.

12. United Kingdom: "An objective of the Bank shall be to [protect and enhance] the *stability of the financial [system]* of the United Kingdom (Bank of England Act)."

Balazs_9781498523349.indb 159 11/5/2016 2:57:14 PM

[http://www.bankofengland.co.uk/about/Documents/legislation/1998act.pdf#page=22Pe].

Germany: "Die Deutsche Bundesbank ist als Zentralbank der Bundesrepublik Deutschland integraler Bestandteil des Europäischen Systems der Zentralbanken. Sie wirkt an der Erfüllung seiner Aufgaben mit dem vorrangigen Ziel mit, die *Preisstabilität* zu gewährleisten, hält und verwaltet die Währungsreserven der Bundesrepublik Deutschland, sorgt für die *bankmäßige Abwicklung des Zahlungsverkehrs* im Inland und mit dem Ausland und trägt zur *Stabilität der Zahlungs -und Verrechnungssysteme* bei. (Par. 3)." [price stability, properly organized money transferring system, stability of payment and accounting systems].

https://www.bundesbank.de/Redaktion/DE/Downloads/Bundesbank/Aufgaben_und_Organisation/gesetz_ueber_die_deutsche_bundesbank.pdf?__blob=publicationFile.

France: "La Banque de France définit et met en œuvre la politique monétaire dans le but d'assurer la *stabilité des prix*. Elle accomplit sa mission dans le cadre de la *politique économique générale du Gouvernement* (Art. 1.)" https://www.banque-france.fr/fileadmin/user_upload/banque_de_france/histoire/textes/statuts-lois.pdf.

Switzerland: "The National Bank shall pursue a monetary policy serving *the interests of the country as a whole*. It shall ensure *price stability*. In so doing, it shall take due account of the development of the economy (Art. 5)."

https://www.admin.ch/opc/en/classified-compilation/20021117/index.html. (Public interest references are stressed by added italics.) Thus, very general economic policy-related goals and objectives are also inserted into the laws, price stability being one, but by no means to only, such goal. Documents accessed August 9, 2016.

13. K. Hielscher and G. Markwardt conclude, for instance, that "[f]rom a theoretical perspective, increasing CBI helps to solve the time-inconsistency problem and should therefore improve the countries' inflation performance. However, empirical evidence supporting this conventional view is somewhat inconsistent. … [T]he quality of political institutions is an important determinant of the relationship between CBI and inflation." Kai Hielscher Kai and Gunther Markwardt, "The role of political institutions for the effectiveness of central bank independence," *European Journal of Political Economy* 28 (2012): 295.

14. Fabrizio Gilardi, "The Same but Different: Central Banks, Regulatory Agencies, and the Politics of Delegation to Independent Authorities." *Comparative European Politics* 5 (2007): 303–27.

15. Ibid., 322.

16. Quintyn, *Independent Agencies*, 291.

17. A case in point is the authority of central banks and their governors to use moral suasion, for instance, to influence the behavior of economic agents. As a matter of fact, political economists have indeed created various indexes to measure central bank independence. See Cukierman, Webb, and Bilin, *Measuring the Independence of Central Banks*.

18. No 08–205, January 21, 2010. Accessed August 9, 2016, https://www.law.cornell.edu/supct/html/08-205.ZS.html.

19. See Manning (*Separation of Powers*). See Welsh (*A Path to Purpose Formalism*) and Carolan (*The New Separation of Powers*) for Australian and Irish examples.

20. BVerfG, Urteil des Zweiten Senats vom 18. März 2014 – 2 BvE 6/12 – Rn. (1–245), *my translation*. Accessed August 9, 2016, http://www.bverfg.de/e/rs20140318_2bvr139012.html.

21. See fn 42 in Chapter 4.

22. Foucault's analyses demonstrate a constantly developing account of power, with a growing emphasis on the more general concepts of governmentality and biopower, leaving behind the narrower focus on institutions. Further, although he offers innumerable "definitions" of power, they are often closer to metaphors, making the integration of his "theory" into a more rigorous conception of a separation of power quite difficult. However, on the highly abstract level of distinguishing social and political power, noting their constant merging and dissolving in one another, Foucault's remarks do appear to be apt and revealing. For an overview of the evolution of Foucault's thinking about power see Barry Hindess, "Discipline and Cherish: Foucault on Power, Domination and Government," in *Discourses of power: from Hobbes to Foucault* (Oxford: Blackwell, 1996): 96–136.

23. In Hindess' formulation, "There is more to the pastoral work of government, as Foucault understands it, than the mere provision by the state of knowledge, skills and services to citizens. This is, first, because much of the work of government is performed by non-state agencies, and secondly, because that work also includes individualizing regimes of discipline and supervision, and the use of techniques aimed at the formation of personalities and households" (Ibid., 133).

24. Pettit, *Freedom as Antipower*.

25. Jessica Bulman-Pozen, "Federalism as a Safeguard of the Separation of Powers." *Columbia Law Review* 3 (2012): 463. For another attempt to integrate the idea of federalism into a general doctrine of the separation of powers see Peabody and Nugent, *Toward a Unifying Theory of the Separation of Powers*. What they do is, however, basically just to assert the importance of federalism to the general conception of the separation of powers. See also fn 51 in Chapter 1.

26. Ibid., 476.

27. Correspondingly, the higher are the costs of leaving the local community, the higher is the dependence on the local authorities and officials especially in the case of citizens who must rely on local social services and local markets.

Balazs_9781498523349.indb 162 11/5/2016 2:57:14 PM

Conclusion

The separation of powers principle enjoys a unique authority in mainstream Western political and constitutional-legal theory. It has a respectable history: a number of classic authors praised and recommended it for the purposes of protecting private and public liberty. Countless constitutions have incorporated it either explicitly or implicitly. In many cases, these are hardly more than lip services to the authority of the principle; in other cases, constitutional review takes it seriously, constitutional courts ground their decisions in it, and probably it influences everyday thinking and practice of politicians and ordinary citizens in more than one way.

Yet more and more concerns have been raised about it. Some theorists complain that the principle, in either its formalist or functionalist version, is at odds with reality to in irremediable extent. Others question its normative force: is liberty really protected by it? Or is that protection reliable, real, and necessary? Jeremy Waldron already mourns the passing of the principle and adds that its loss is perhaps fatal. Again, others think that the principle may be preserved but not in its classical triadic form. Especially the growing size of the administrative branch, previously considered part of the executive, and the proliferation of so-called independent institutions or agencies has made many theorists revise the classical doctrine. Some retain the triadic system but define the three branches differently; others would admit and add a new branch to the three established ones.

AQ 1: The later part of the sentence "Some theorists ..." is not clear. Please clarify.

This book was written with the intention of defending the classical version of the doctrine. It had to face the fundamental objections and grave concerns raised by legal and political theorists as well as the few more comprehensive attempts to revive the separation of powers. To meet these challenges, the principle was shown to need a defense that brings us to its genesis. Therefore, we had to leave the familiar terrain of institutions and already established

Balazs_9781498523349.indb 163 11/5/2016 2:57:14 PM

branches of state or government power. Without the assistance of analytical and normative political theory, the principle is stymied within the often barren debates of interpreting legal documents, constitutions, and judicial decisions.

The familiar and classical defense of the principle relied on the value of liberty or freedom that was thought to be threatened by power. Political theory and philosophy has examined both concepts in great detail but the theoretical insights and results have been largely neglected by theories of the separation of powers. Particularly striking is the lack of reflection on the phenomenon of power. The present conception of the separation of powers did not develop new ideas either on power or authority or liberty, it only has attempted to integrate some of the most established results of the relevant literature. It argued that based on these results, the familiar strategy of justifying the principle as a sine qua non condition of protecting liberty proves itself indeed insufficient and deficient. As a matter of fact, the generalized strategy of inferring the principle from a single prominent value is doomed to fail too. The separation of powers principle seems to be deeply rooted in political thinking, in fact, in thinking politically. It is not merely an aspect of government and of constitution making. What is right about the original idea that the separation of powers and liberty are fundamentally connected is that power and liberty are both our essentials concerns and experiences of living in a political society.

AQ 2: Please clarify the later part of the sentence "What is right ...."

It is crucial to appreciate this point, although the principle needs and deserves a normative defense yet one that does not discriminate for or against liberal or conservative (either classical or modern) political philosophical pre-commitments. Thus neither power nor liberty needs to be understood in either a distinctly or exclusively liberal or conservative way. Therefore the normative ground that should be taken in the first place is a concept and experience that precedes and perhaps preempts both (or any other) normative theory. An apt concept, as was argued, is order. It has both a natural aspect and a creative, social and political aspect, pre-framing life in a political community. Now whenever order is conceptualized and its meaning is articulated, there emerges a rough idea of justification as well: it must be reflective of what is natural (requiring admission) and of what is necessary (requiring consent). And whenever order is being reflected on within a more particular scheme of thinking as *political order*, its justification becomes a matter of articulating government, of articulating how governing consists in both protecting the natural part of political order and in preserving its flexibility, particularity and human face. The principle of the separation of powers is, as was argued, the rule of a game, that of governing for the sake of good order. Its justification is essentially its articulation, that is, the reflective constitution of the game.

Continuing with the reflection on the game of governing so conceived, it was argued that political order entails two general requirements that any government must respect: the protection of minimum personal autonomy and the rule of law. Both requirements have a natural aspect and call for flexible,

Balazs_9781498523349.indb 164 11/5/2016 2:57:14 PM

creative, positive norms. In a well-ordered commonwealth, on the one hand, individuals enjoy considerable freedom to live an autonomous life (such a life does not have to meet the high-minded requirements certain moral theories envision) that they find normal. They also need and consent to being governed, that is, they expect that norms are being imposed on them and that they must conform to them. Governments, on the other hand, enjoy considerable freedom to define and determine norms as long as they do not fly in the face of normalcy, namely, of what individuals consider acceptable.

This is a very simple and abstract summary of how governing is articulated. It becomes more pertinent to the separation of powers once we reflect on how the two requirements, the protection of minimum personal autonomy and the rule of law, are related to the realities of power. First of all, power relations are ineliminable from social life and this is not an imminent threat to order. It is difficult to imagine social interactions without some power because the protection of minimum personal autonomy requires us to engage in such interactions. Power may, thus, both undermine freedom and also enhance it. The reality of power, as here it was called, social power is a constant feature of social life. Creating and protecting order cannot be a government-organized elimination or a voluntary renunciation of power by individuals. But the other requirement, the rule of law, presupposes a general will to have a government responsible for order, broadly understood. This general will was identified here as political authority to avoid both the dilemma of having two kinds of powers clashing with one another and struggling for ever, and the other "solution" of either of them overcoming the other by some tour de force of political theory (and the political theorist). The will of forming a government and taking the responsibility for shaping order, establishing norms, and defending community values and the existence of the polity was shown to emerge out of social power but never becoming identical with political authority. This was called political power.

By having defined the three major kinds of power and authority, articulated governing begins to take shape. Contrary to the traditional conception of the separation of powers, the book argued that the various branches of government should not be conceived of as expressing a single essence or substance such as "making, applying and adjudicating norms." Criticisms of such substantialist approaches are right on the point that reality is too often at variance with it. If we want to avoid the conclusion that the principle gets (perhaps justifiably) compromised, and want to maintain that the separation of powers is a crucial principle of all ordered government, then these criticisms are indeed devastating. However, it is possible to define the three branches of government in a relational manner, making use of the three kinds of power and authority. The ensuing definitions provide us with a measure or compass to evaluate constitutions and constitutional practice. It does not merely tell us whether a particular practice, arrangement, or reform proposal corresponds to an abstract principle whose importance and relevance is often

put to question but more significantly it informs us—and the public—about the political righteousness, so to speak, of governing. To use another analogy, this relational account of the principle of the separation of powers provides political theory with a negative potential similar to the potential of moral prohibitions: it tells us what is wrong and not what is right or good. It follows the logic of "thou shalt not." A positive potential would be similar to various moral theories telling us how to live a good life or which principle to follow. But as there can be various ways of living a good life and our conscience is often torn between the callings of conflicting moral principles, there can be various ways of institutional arrangements, including the establishment of so-called autonomous agencies, federal systems, and a lot more. Debating about them is what makes politics an interesting but endless game. The separation of powers principle as a negative political principle withdraws from telling us anything specific about *this* game. It is more about a metagame, the one of governing for the sake of order.

In the past few years, partly in tandem with the recent political and economic crises, and with the rise and challenge of autocratic regimes consolidated democracies have also witnessed the strengthening of nonestablished parties and movements as well as the growing importance of strong and/or strange leaders and politicians. Even the most established democracies like the United States, the United Kingdom, and the Scandinavian countries are not exceptions. The trust and confidence in strong *and* benevolent executive power is shaken. It is doubtful whether political theorists, who put forward arguments against the practicability and defensibility of the principle of the separation of powers in light of this rise of the administrative and strong state a few years ago, are or would be as sanguine as they were about the virtues and strengths of democratic culture and public discourse. The separation of powers may now seem more trustworthy means of articulated and free governing than either the more obscure guarantees of public and private liberty such as political credibility or fear of the electorate; or the highly segmented world of autonomous and supervisory agencies and institutions that appear to be rather weak especially in crisis situations. Further, the European Union as a political commonwealth is also in deep crisis. It is very probable that this is partly due to its unarticulated government structures that implant in many European citizens an uneasy feeling about who is responsible for what and a growing anger about the impotence of the Union.

There is thus a historical moment now for political theory to seriously engage itself with the separation of powers and its relation to the basic structure of well-ordered polities. The book was intended to be a modest defense of the principle; yet the very exposition of the defense turned out to be impossible to do without asking and answering the most fundamental questions of good governing and political order.

Balazs_9781498523349.indb 166 11/5/2016 2:57:14 PM

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Balazs_9781498523349.indb 174 11/5/2016 2:57:14 PM

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Balazs_9781498523349.indb 175 11/5/2016 2:57:14 PM

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