The Invisible Separation of Powers

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1 INTRODUCTION

This chapter examines how various legal institutions, procedures and doctrines, which are not generally considered part of institutional checks and balances, can support the core function of the separation of powers: controlling political power. Part 2 describes this function, as well as the particularities on which the separation of powers can be understood as a complex system with different layers and dimensions. Part 3 explains the conditions under which certain legal institutions can be analysed as part of the 'invisible layer' of the separation of powers, as opposed to institutional checks and balances. Part 4 provides detailed analyses of four legal institutions that function as 'invisible checks and balances'. The examination of minority direct democracy, doctrines of substantive constitutional unamendability, judicial enforcement of political rights and the influence of international legal regimes on domestic policy decisions are illustrated by short case studies from New Zealand, Moldova, South Africa and Hungary. Part 5 summarises the peculiarities of invisible checks and balances, and their relevance when examining the state of the separation of powers within a given political system. Taking into consideration the invisible layer of the separation of powers reflects on the challenges that contemporary constitutional democracies face. These include the weakening of independent institutions[1], the erosion of institutional checks and balances and at the same time the strengthening of the central political power.

2 THE COMPLEXITY OF THE SEPARATION OF POWERS[2]

2.1 Peculiarities of the Classic Doctrine

The classic doctrine of the separation of powers is occasionally the subject of reconsideration. There are no clear definitions of the doctrine in the legal literature[3], and it

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[1] The judiciary and the 'Fourth Branch' institutions can both regarded as independent. See Tarunabh Khaitan, 'Guarantor (or the so called "Fourth Branch") Institutions' in Richard Bellamy and Jeff King (eds): *The Cambridge Handbook of Constitutional Theory* (Cambridge: Cambridge University Press, 2025), pp. 603-621.

[2] The argumentation expressed in titles 1.1. and 1.2. was partly published in one of my previous works. Zoltán Pozsár-Szentmiklósy, 'Informal Concentration of Powers in Illiberal Constitutionalism: The Case of Hungary' (2024) 16 *Hague Journal on the Rule Law* 2, 289–314, at 292-293.

[3] MJC Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 1998, 2nd ed.), p. 13

'has not been wholly reproduced in the institutional architecture of any modern state'.[4] Moreover, new social and political phenomena pose new challenges for constitutional law and call for new interpretations of the separation of powers. Novel approaches to the doctrine mostly focus on selected aspects of the relations and activities of state organs[5]. However, none of these various approaches are exclusive, and their significance depends on the particularities of the examined theoretical problem or the legal dispute in question. Moreover, many of these approaches can be considered jointly. It is thus more appropriate to depart from the 'pure doctrine', as well as from its alternatives to some extent, and view the concept of separation of powers as a complex system that comprises different dimensions, levels and layers and is interdependent with other principles. With this approach, the cooperation between state organs, their impact on each other, their legitimacy as well the relation of the doctrine with other constitutional principles (e.g., the rule of law) can be also taken into consideration.

2.2 The Function of the Doctrine

There is another relevant aspect that is rarely discussed in scholarly works: the function of the doctrine itself. The classic (Montesquieu's theory) and simplified understanding of the doctrine's function can be summarized as 'a bulwark against the abuse of state power and the threat of tyranny'[6]. When considering the constitutional values to protect when preventing tyranny, two interrelated principles come to light in classic interpretations: 'limited government' and 'individual liberty'[7]. Alongside the prevention of tyranny, the doctrine can serve other aims[8]. However, additional objectives, together with the general purpose of the prevention of tyranny and underlying constitutional values, are all linked to the exercise of political power.

The difference between motivations that determine the political branches' activities and those of the judicial branch is widely accepted in legal scholarship[9]. Important analyses

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[4] Eoin Carolan, *The New Separation of Powers. A Theory for the Modern State* (Oxford: Oxford, University Press, 2009), p. 18.

[5] E.g., the doctrine as a set of principles (Jeremy Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 2, p. 433), the interdependency and cooperation of the government branches (Aileen Kavanagh, 'The Constitutional Separation of Powers' in David Dyzenhaus and Malcolm Thorburn (eds): *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016), pp. 235, 237), the relationship between the different citizens' interests and the activity of the government branches (Carolan, '*The New Separation of Powers',* pp. 127–136), the relationship between the different types of citizens' autonomies and the activities of the government branches (Christoph Möllers, 'The Three Branches. Comparative Model of Separation of Powers' (Oxford: Oxford University Press, 2013), pp. 80-106).

[6] Kavanagh, 'The Constitutional Separation of Powers' p. 221.

[7] Vile, 'Constitutionalism and the Separation of Powers' pp. 12, 15.

[8] Eoin Carolan identifies these as securing a balance between institutions, ensuring that law is made in the public interest, enhancing efficiency, preventing partiality and self-interest, ensuring objectivity and generality in the creation of laws, and allowing elected officials to supervise the actions of executive officials as additional aims. He also claims that there can be an overlap between these objectives and the individual's support of them, which always depends on personal perceptions and preferences. See: Carolan, '*The New Separation of Powers'* pp. 27-28, 128-136.

[9] Alexander Bickel, 'The least dangerous branch: the Supreme Court at the bar of politics' (New Haven, CT: Yale University Press, 1986)

remind us that in reality there is a gap between the judiciary and the 'political organs'[10]; the separation of powers principle is an instrument for constituting and restraining political power[11], and the division of powers is needed to avoid 'excessive concentrations of political power'.[12] All these arguments support the conclusion that controlling and limiting political power (especially majoritarian, centralized political power) is a core function of the separation of powers.

2.3 The Different Dimensions and Layers of the Separation of Powers

From the point of view of supporting this core function (limiting the political power), different dimensions and layers of the complex system of separation of powers become relevant.

The horizontal dimension describes the relationship between the different branches of government, while the vertical dimension considers the relationship between state institutions and sub-national, federal, or supranational actors.[13] The intra-branch separation of powers may also be relevant in the case of parliaments[14] or the executive[15]. The temporal dimension focuses on term limits and fixed mandates of state officials, especially in the case of political branches. The difference between the constituent powers and constituted powers is also relevant as a 'constitutional dimension' of the separation of powers,[16] which also has a temporal aspect, when considering the possibility of future generations being the authors of their own constitutions.[17] There are signs that the digital dimension of the separation of powers should also be taken into account.[18]

The complexity of the system of the separation of powers is also reflected in the diversity of the types of institutions that can support the functioning of the doctrine itself. According to the classic approach, the status and powers of state organs are usually considered in this regard, as institutional checks and balances. In addition, other legal institutions and related social practices may also provide certain counterbalancing effect on the political power. The exercise of certain fundamental rights (e.g., the right to petition, the freedom of assembly) can affect the scope of the political power, as can the various modalities of deliberation (e.g., open meetings of representative bodies, citizens' assemblies) and public participation (e.g., participatory budgeting, political or civic campaigns).

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[10] Carolan, 'The New Separation of Powers' p. 26.
[11] Möllers, 'The Three Branches' p. 10.
[12] Waldron, 'Separation of Powers in Thought and Practice' p. 433.
[13] Jessica Bulman-Pozen, 'Federalism as a Safeguard of the Separation of Powers' (2012) 112 *Columbia Law Review* 3
[14] Jeremy Waldron, 'Bicameralism and the Separation of Powers' (2012) 65 *Current Legal Problems*
[15] Near Kumal Katyar, 'Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within' (2006) 115 *The Yale Law Journal*
[16] Yaniv Roznai, 'The Newest-Oldest Separation of Powers' (2018) 14 *European Constitutional Law Review* 2
[17] Joel Colón-Riós, 'Constituent power, the rights of nature, and universal jurisdiction' (2014) 60 *McGill Law Journal* 1
[18] Oreste Pollicino, 'The quadrangular shape of the geometry of digital power(s) and the move towards a procedural digital constitutionalisation' (2023) 29 *European Law Journal* 1-2

3 THE INVISIBLE LAYER OF THE SEPARATION OF POWERS

3.1 Institutional and Invisible Checks and Balances

As mentioned above, classic approaches to the doctrine of the separation of powers do focus on the status and powers of state organs. Election and appointment rules, provisions relating to the end of a term of office, as well as those rules that provide certain protection for state officials (e.g., incompatibility and immunity rules) are of key importance from the point of view of the requirement of separation of agencies, functions, and persons.[19] The competences and powers of state organs and the practice related to the exercise of them best describe the functioning of institutional checks and balances in a given constitutional system.

However, an examination of the actual functioning of checks and balances can be more nuanced if the spectrum examined is broader. In constitutional democracies, certain legal institutions, procedures and doctrines are not regarded as institutional checks and balances, but may provide a significant, structured counterweight to the central political power. In the next chapter, minority direct democracy, doctrines of substantive constitutional unamendability, judicial enforcement of political rights, and the influence of international legal regimes on domestic policy decisions will be examined from this perspective. Each of these institutions, procedures and doctrines (hereafter referred to as institutions) has a distinct function (primary function) that is not related to the operation of the system of the separation of powers in the classical sense. In other words, these primary functions do not relate to the status of state organs or their competences and powers.

In order to take into account the possible controlling effect of these institutions on the central political power (as their secondary function), certain requirements have to be met. First, the entity/actor behind the exercise of the given institution must be independent of the central political power in the formal sense and also in its objectives. Counterbalancing is only possible between different (separate) entities. In the case of the institutions analysed in the next chapter, these actors can be identified: a political minority in the case of minority direct democracy, a constitutional court or a supreme court in the case of doctrines of substantive constitutional unamendability, a group of politically active people/a civil society organization in the case of judicial enforcement of political rights, and international/intergovernmental organisations in the case of the influence of international legal regimes on national policy decisions. Second, the exercise of the given institution in its effect must be capable of changing the course of action of the central political power. A counterweight is only effective if it is capable of constraining. Minority direct democracy can constrain the majority parliamentary decision-making. Doctrines of substantive constitutional unamendability can constrain the constitution-amending power. Judicial enforcement of political rights can directly constrain the government, as can the influence of international legal orders on domestic policy decisions. Third, the central political power must be able to take countermeasures that could reverse the controlling effect of these institutions. By definition, the central political power is in a position to make decisions and take actions that may limit the scope of other actors, but in this respect its counteractions will specifically neutralise the constraining effect of the institutions concerned. These actions

[19] Vile, 'Constitutionalism and the Separation of Powers' pp. 17-18.

may also take the form of general legislation aimed at changing the functioning of the institutions concerned, overriding judicial decisions, decisions expressed through institutions of direct democracy, or even non-execution of national or international court judgments.

The legal institutions, procedures and doctrines that may have the secondary effect of limiting the central political power in the sense described above are not necessarily interrelated.[20] In this sense, the 'invisible layer' of the separation of powers does operate in isolation from the institutional checks and balances. The list of institutions that can be examined in the context of the invisible layer of the separation of powers is not closed: it can be extended by taking into account the above requirements.

3.2 Invisibility and Normativity

It is worth explaining, why it is plausible to call this layer 'invisible', even though the concerned legal institutions, procedures and doctrines are formally identifiable, therefore, rather 'visible'.

The counterbalancing function of these institutions to central political power is usually not considered when examining the actual state of the separation of powers in a given polity. In other words, despite the fact that the legal institutions, procedures and doctrines concerned and their primary functions are 'visible', identifiable, their effect on constraining the central political power (as their secondary function) remains hidden to the classic approach to the separation of powers, which focuses on institutional checks and balances. This framework is to some extent similar to, but also different from, the concept of the 'invisible constitution'. While the concept of the 'invisible constitution'[21] refers to a general peculiarity of all constitutions, which have 'invisible features that play a role in the interpretation, legitimacy, and stability of the constitutional system',[22] the 'invisible checks and balances' cannot be generalised to that extent. Whether the functioning of the 'invisible layer' of the separation of powers becomes relevant in a given constitutional and political system and in a given period may vary, as may the question of which legal institutions, procedures and doctrines play a role in the given context.

Based on the above, the invisible layer of the separation of powers (more precisely: the invisible checks and balances) remains in the legal paradigm and the normative concept of the doctrine of the separation of powers. In this respect, the system of checks and balances is complemented by an additional layer consisting of legal institutions, legal procedures and legal doctrines the functioning of which is based on general peculiarities. Given the fact that these institutions, in addition to their specific primary function, can also contribute to the functioning of the doctrine of separation of powers itself, this effect can be evaluated on the basis of the normative standards related to the separation of powers.

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[20] For a previous version of this explanation see: Zoltán Pozsár-Szentmiklósy, 'The Invisible Separation of Powers and the Control of the Central Political Power: Lessons from Hungary, Moldova, and Romania' in Martin Belov (ed) *Populist Constitutionalism and Illiberal Democracies* (Cambridge: Intersentia, 2021)

[21] For a detailed analysis see Rosalind Dixon and Adrienne Stone, *The Invisible Constitution in Comparative Perspective* (Cambridge: Cambridge University Press, 2018)

[22] Silvia Şuteu, *Eternity Clauses in Democratic Constitutionalism*, (Oxford: Oxford University Press, 2021) 127.

4 LEGAL INSTITUTIONS, PROCEDURES, AND DOCTRINES OPERATING IN THE INVISIBLE LAYER OF THE SEPARATION OF POWERS

4.1 Minority Direct Democracy

Various legal institutions and procedures can be associated with direct democracy.[23] Although the introduction of institutions and procedures of direct democracy is not a necessary condition in a constitutional democracy, direct democracy has a clear democratic function. It can channel people's preferences into collective decision-making processes at different levels (e.g., local, territorial, state, federal or even supranational level) and on different issues (e.g., policy, budgetary, legislative or constitutional issues). Its primary function is therefore to support participation and strengthen participatory democracy. Moreover, institutions and procedures of direct democracy can also strengthen the legitimacy of the collective decisions to which they lead.[24]

Among the various institutions and procedures associated with direct democracy, the national referendum can typically support these functions in the strongest form. The collective decision is taken as a result of public participation at the national level and reflects the majority opinion of the entire political community. Therefore, both the participatory and legitimacy functions are present in the whole process, if it meets the requirements of free and fair elections, is based on the universal and equal suffrage.[25]

In this context, a national referendum initiated by the executive may lead to a result in which its political preference is supported by the people, therefore, in addition to the legal consequences of the referendum (e.g., legislation on the relevant issue), the majoritarian political bloc strengthens its public support. On the other hand, if a national referendum is initiated by a political minority or by a body independent of the ruling political majority, the result of a successful referendum may weaken the legitimacy of the ruling power, at least with regard to the political issue in question.

Based on the above features, it is worth making a clear distinction between instruments of minority direct democracy (initiated by a political minority, or an entity that is independent of the government) and those of plebiscitarian direct democracy (initiated by the government or the political majority).[26] While instruments of minority direct democracy

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[23] For an overview see Laurence Morel, 'Referendum' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012)

[24] This particularity is also a key aspect of the 'democracy debate' related to referendums: the legitimizing function is primarily attributed to the majority opinions of the political community, that can overlook the perspective of minority interests and individual rights. See Richard Epstein, 'Direct Democracy: Government of the People, by the People, and for the People?' (2011) 34 *Harvard Journal of Law and Public Policy* pp. 819-826, at 823.

[25] European Commission for Democracy through Law (Venice Commission), *Revised Code of Good Practice on Referendums* (2022)

[26] Silvano Moeckli, 'Direct Democracy and Political Participation from a Cross-National Perspective' in Thomas Zittel and Dieter Fuchs (eds), *Participatory Democracy and Political Participation: Can Participatory Engineering Bring Citizens Back In?* (Abingdon: Routledge, 2006), pp. 107-124, at 107.

can act as an effective counterweight to the government or the political majority,[27] instruments of plebiscitarian direct democracy can strengthen the power holder.[28] In other words, minority direct democracy serves the very function of the doctrine of the separation of powers,[29] while the frequent use of plebiscitarian direct democracy has the opposite effect, as it can lead to a concentration of political power.

Minority direct democracy can be considered as part of the invisible layer of the separation of powers for several reasons. It is initiated by an entity independent of central political power. In its effects, it can block certain decisions of the central political power, thus effectively limiting the executive's room for manoeuvre in the policy or regulatory area in question. This control function becomes effective in cases where minority direct democracy is exercised with a result that contradicts the political interests of the executive. The central political power can take further steps to counteract this limiting effect of minority democracy (e.g. initiate a new policy or legislation, override the decision taken).

An illustrative example of a national referendum initiated by the citizens against a general institutional arrangement shared by the entire political elite is the 1999 referendum on reducing the number of parliamentary seats in New Zealand.

4.1.1 Referendum on the number of parliamentary seats in New Zealand (1999)

In New Zealand, the institution of the citizen-initiated referendum was introduced in 1993, with the passage of the respective Act,[30] which allows a national referendum to be initiated on any legislative matter. After consultation with the initiator and a three-month public consultation period, the wording of the proposed question is determined by the Clerk of the House of Representatives. The 'promoter' of the referendum may collect signatures in support for a period of twelve months. The required number of signatures is relatively high: not less than 10% of the electorate.[31] If this condition is met, Parliament orders the referendum to be held on the given question. The result of a citizen-initiated referendum is only indicative: it is not binding on Parliament and it has no direct legislative effect.

In practice, proposals for citizen-initiated referenda are not linked to the political elites, but rather come 'from individuals without pre-existing networks'.[32] This was the case with the national referendum organised in 1999, known as the 'Robertson referendum', which was initiated by an individual, Margaret Robertson. The aim of the referendum was to reduce the number of members of parliament from 120 to 100, in this regard by reversing

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[27] In Lijphart's view, in the case of referenda combined with popular initiatives, 'the majority is stimulated to take minority views and interests into account'. Arend Lijphart, *Patterns of Democracy. Government Forms and Performance in Thirty-Six Countries* (New Haven, CT: Yale University Press, 2012, 2nd edn) pp. 221-222.

[28] In this context the argument that 'in case of direct democracy checks and balances do not function' is relevant. See Erwin Chemerinsky, 'Challenging Direct Democracy' (2007) *Michigan State Law Review*, pp. 293-306, at 296.

[29] Zoltán Pozsár-Szentmiklósy, 'Direct democracy and the separation of powers' in Antonia Baraggia, Cristina Fasone and Luca Pietro Vanoni (eds), *New Challenges to the Separation of Powers. Dividing Power* (Cheltenham: Edwards Elgar Publishing, 2020) pp. 31-45, at 45.

[30] Citizens Initiated Referenda Act 1993 (Public Act 1993 No 101)

[31] Referenda Act 1993, Articles 11(1), 15(3), 18(2)

[32] John Parkinson, 'Who Knows Best? The Creation of the Citizen-initated Referendum in New Zealand' (2001) 36 *Government and Opposition* 3, pp. 403-421, at 415.

the effect of the 1996 electoral reform, which introduced the Mixed Member Proportional (MMP) system instead of the First Past the Post (FPP) system and increased the number of MPs from 99 to 120.[33] While the proponents claimed that a smaller parliament would be 'more efficient' and 'harder working', political scientists expressed concern that the proposal would result in a 'less responsive parliament'.[34] The referendum was held alongside the 1999 general election and another citizen-initiated referendum (the so-called 'Whithers initiative' on the criminal justice system), and resulted in a high turnout (84.8%) and overwhelming support for the initiative (81.5%).[35] Despite the strong public support for the case, the government did not propose any related legislative reform. Its response promised to discuss of the case in conjunction with a review of the MMP electoral system. In 2000, the House of Representatives set up a Parliamentary Committee to review the MMP system. After complex deliberations, the Committee came out in favour of retaining the MMP system and the number of parliamentary seats.[36]

In this case, the question of the citizen-initiated referendum of 1999 was a typical a populist question, directed against the entire political class. It can be seen as a manifestation of minority direct democracy, as it was initiated by voters who were not part of the central political power. In theory, the overwhelming popular support for the case could have acted as an effective counterweight to the government, forcing it politically to propose the necessary legislative steps – which were not taken in the end. A plausible explanation for this could be the stability of New Zealand's constitutional and political system, in which representative democracy is deeply rooted. It is also worth noting that the national referendum did not target the executive or any particular political power, but rather the entire political class. The government did not act on the initiative, but also did not take any counter-measures, and continued with complex deliberations on the case. As part of these deliberations, a consultative referendum was organised on the electoral system in 2011, on the basis of government's initiative. With a turnout of 74%, a clear majority of the voters (58%) opted to retain the MMP system.[37] As a result, the 1999 national referendum in New Zealand had the theoretical potential to counterbalance the executive, but its effect was neutralised by the deliberative process.

4.2 Doctrines of Substantive Constitutional Unamendability

Supreme courts and constitutional courts are occasionally faced with the question of whether a formal amendment to the codified constitution is consistent with the core values of the constitution. In the case of constitutions that contain an eternity clause, i.e., a provision that explicitly excludes the possibility of amending certain parts of the constitution, the

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[33] Jack Vowles, 'The Politics of Electoral Reform in New Zealand' (1995) 16 *International Political Science Review* 1. It can be noted the electoral reform was also supported on a national (constitutional) referendum in 1993, initiated by the Government.

[34] Parkinson, 'Who Knows Best?' p. 418.

[35] Nigel Roberts, 'Referendums', *TeAra.govt.nz The Encyclopedia of New Zealand*, https://teara.govt.nz/en/referendums/print

[36] Stephen Church – Elisabeth McLeay, 'The parliamentary review of MMP in New Zealand' (2003) 39 *Journal of Representative Democracy* 4

[37] Roberts, 'Referendums'

supreme judicial organ may link its power to examine the constitutional amendment to the eternity clause.[38] Such a power can be seen as an institutional counterweight exercised by the court. On the other hand, in cases where the constitution does not contain such a clause, or the court does not link its review to the clause, the supreme judicial organ can conduct such a review only if it identifies the core content of the constitution that is not subject to amendment. As a result of interpretation, a doctrine of substantive constitutional unamendability can be elaborated, which precludes formal amendments that contradict the core norms of the constitution.[39]

Such doctrines follow a similar logic. According to them, the constitution is based on a number of principles, rights or institutional arrangements that reflect the core values of the society and to which all the other provisions of the constitution are linked. If a constitutional amendment is adopted that contradicts these values, the internal structure and coherence of the constitution would have been violated, thus weakening its normativity and ability to form the basis of the legal order could be weakened. The famous 'basic structure doctrine', developed by the Supreme Court of India,[40] best illustrates the logic described above. Another classic argument associated with doctrines of substantive unamendability is that a constitutional amendment that is substantively inconsistent with the core values of the constitution may be considered as a new constitution, rather than an amendment to the existing constitution anymore – best described in the 'constitutional replacement doctrine' of the Constitutional Court of Colombia.[41]

Substantive constitutional unamendability also plays an important role in the context of the separation of powers. The constitution-amending power and the supreme judicial organ, which is entitled to protect the constitution and to issue authentic interpretations of it, are both constituted powers and can therefore counterbalance each other's actions.[42] In the case of explicit eternity clauses, the supreme judicial organ must necessarily have the competence to examine whether the amendment to the constitution is in conformity with the values protected by the eternity clause, in accordance with the will of the constituent power. In such cases, the power of the supreme judicial organ to review the constitutional amendment can be considered as part of the institutional checks and balances because it is based on the explicit provision of the constitution.

The situation is different when the court bases its decision on the doctrine of the substantive constitutional unamendability. The elaboration of this doctrine can be linked to the primary function of the supreme judicial body, which is to give authentic interpretations of the constitution. When the court bases its decision on this doctrine and declares a formal constitution amendment unconstitutional in the absence of explicit constitutional authorisation, it is no longer exercising institutional checks and balances. In such cases, the court's review of the constitutional amendment is based on a power it has created for itself.

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[38] On the detailed analysis of eternity clauses in the context of democratic requirements see Şuteu, *Eternity 'Clasuses in Democratic Constitutionalism'*

[39] Aharon Barak, 'Unconstitutional constitutional amendments' (2011) 44 *Israeli Law Review* 3

[40] Kesavananda v. State of Kerala (1973) 4 SCC 2003

[41] See Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 *International Journal of Constitutional Law* 2

[42] Yaniv Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017) pp. 180-186.

This power is related to the secondary function of constitutional interpretation: alongside the expression of the authentic meaning of the constitution, the effective control of the constitution-amending power. In such relationship, the supreme judicial organ must be independent of the constitution-amending power, which in the given context can be considered as the central political power. This power may also react to the decision of the supreme judicial organ by overruling it or limiting its powers. These peculiarities indicate that the review of constitutional amendments based on a judicially created doctrine of substantive constitutional unamendability can be analysed in the context of the invisible layer of the separation of powers.

The 2016 case of the Constitutional Court of the Republic of Moldova, in which the Court annulled a constitutional amendment enacted sixteen years earlier, illustrates these considerations.

4.2.1 Unconstitutional Constitutional Amendment in Moldova (2016)

The Constitution of the Republic of Moldova contains several entrenchment provisions related to constitutional amendments, including the necessary preliminary advisory opinion of the Constitutional Court, and an eternity clause prohibiting amendments to the Constitution that would violate fundamental rights and their safeguards.[43] The Constitution does not explicitly mention the Constitutional Court's power to review the conformity of the enacted constitutional amendments with the eternity clause. Before 2016, the Court did not exercise such power. The basis of the case in question was the regulation of the election of the President. Since the adoption of the Constitution (1994) the fundamental law provided for the direct election of the head of the state, while the amendment of the Constitution in 2000[44] changed this modality, prescribing the indirect election of the president (election by the Parliament). In the period between 2000 and 2016, there were three occasions when Parliament failed to elect a president because the required majority was not achieved, so Parliament was dissolved and early parliamentary elections were held (2000, 2009, 2010). Overall, this period can be characterised by instability in the political and the governmental system.[45]

On the basis of a petition filed by a group of MPs in 2015, the Constitutional Court examined the 2000 constitutional amendment in detail, both on procedural and substantive grounds. In its decision, the Court pointed out that although it had examined the first version of the draft constitutional amendment in 2000, Parliament had significantly altered the amendment in the second reading.[46] With regard to the substantive review of the amendment in question, the Court stated that 'the Constitution is founded on universal and undeniable values – among these, the principle of rule of law and the system of checks and balances' and that 'no amendment of the Constitution shall disturb the harmony of the

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[43] Constitution of Moldova, Articles 141(2), 142(2)
[44] Law 1115-XIV of 5 July 2000.
[45] Zoltán Pozsár-Szentmiklósy and Yaniv Roznai, 'The Timing of Judicial Review of Constitutional Amendments – Towards a 'Time Sensitivity Test' Following the Moldovan Constitutional Court's Decision on the Modality of Electing the President' in Sofia Ranchordás and Yaniv Roznai (eds.), *Time, Law, and Change. An Interdisciplinary Study* (Oxford: Hart Publishing, 2020), pp. 143-166, at 149.
[46] Decision 7/2016. (4 March 2016) CC 93.

Constitution or the harmony of values enshrined in the Constitution.'[47] In the Court's interpretation, the institutional deadlocks caused by the amendment contradicted the requirement that the norms contained in the Constitution should function as a harmonious system. The Court did not explicitly link its reasoning to the eternity clause of the Constitution and made no reference to existing doctrines of substantive unamendability. However, its approach to protecting the unity and harmony of constitutional norms and the requirement of a balanced position of institutions can be considered as a substantive standard, having mixed origins.[48]

The 2016 decision of the Moldovan Constitutional Court illustrates how an independent judicial body responsible for the protection of the Constitution can create an effective counterbalance to the constitution-amending power, dominated by political forces. By elaborating a doctrine of substantive constitutional undamendability in the given constitutional system, the Court reacted to a previous decision of the constitution-amending power that caused an institutional imbalance and precluded possible future, similar situations. Moreover, the decision had a powerful effect because it invalidated the constitutional amendment after sixteen years of constitutional and political practice. The constitution-amending power accepted this position, as no further constitutional amendments were initiated in this regard.

4.3 Judicial Enforcement of Political Rights

Political rights are first and foremost fundamental rights with a specific function: to influence the collective actions and decisions of the political community through the expression of opinions in various ways, the organisation of public events aimed at highlighting the challenges facing society, the operation of social and political communities in a structured form, and – in the most direct form – through voting in elections and the various forms of direct democracy.[49] The exercise of these political rights is guaranteed by constitutions and charters of fundamental rights, while their restriction is possible only in exceptional cases. In addition to the strong protection of fundamental rights in general, in the case of political rights, the instrumental role they play in the maintenance of democracy[50] can also be taken into account when examining the justiciability of their limitation.

The exercise of political rights has a direct impact on the formation of policies and decisions of the community.[51] The enforcement of political rights when they are restricted is

[47] Decision 7/2016. (4 March 2016) CC 59, 74-75.
[48] Pozsár-Szentmiklósy and Roznai, 'The Timing of Judicial Review of Constitutional Amendments' pp. 154-157.
[49] Rainer Forst expresses a more general argument in this regard when claiming that the exercise of human rights takes place in political context: 'human rights do not just protect the autonomy and agency of persons, they also express their autonomy politically'. Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 *Ethics* 4, pp. 711-740, at 712.
[50] In this regard, there can be made further distinctions. Adam S. Chilton and Mila Versteeg argue that individual political rights are less effective in having an impact on government behavior than organizational rights. Adam S. Chilton and Mila Versteeg, 'Do Constitutional Rights Make a Difference?' (2016) 60 *American Journal of Political Study* 3, pp. 575-589, at 586.
[51] Jiří Přibáň and Woicieh Sadurksi, 'The Role of Political Rights in the Democratization of Central and Eastern Europe' in Woicieh Sadurksi (ed) *Political Rights Under Stress in the 21st Century Europe* (Oxford: Oxford University Press, 2006)

usually interpreted in the context of the doctrine of fundamental rights, especially because such enforcement with legally binding effects requires the activity of the courts.[52] If this enforcement involves the removal of a systemic obstacle to the exercise of political rights, it also has a significant impact on the system of the separation of powers. When such systemic barriers are removed (often as a result of strategic litigation), right holders and their groups will have more opportunities to effectively control political bodies that otherwise do have an interest in maintaining their position, which is less subject to control. In other words, the removal of systemic barriers to political rights by right holders can weaken the concentration of power of political organs.

The course of actions leading to the elimination of such systemic barriers can be considered as part of the invisible layer of the separation of powers due to its particularities. Individuals, groups, and organisations that stand up for the enforcement of their political rights are, by definition, independent of the central political power, which restricts the possibility of exercising these rights through regulatory and law enforcement measures. Political rights have distinct functions: as self-expression of individuals and their groups, and as necessary instruments of democratic processes. While these primary functions of political rights are not related to the separation of powers, they can have a secondary function of counterbalancing the central political power when enforced against systemic barriers maintained by the government. The government may also respond to the removal of such systemic barriers with other regulatory and law enforcement measures – as a move to re-concentrate its powers.

The enforcement of the genuine freedom of assembly in the Republic of South Africa illustrates precisely the particularities described above.

4.3.1 Enforcement of the genuine freedom of assembly in South Africa (2018)

While the constitutional system of the Republic of South Africa – the establishment of which has served as a model for democratic transitions – guarantees a wide range of political rights to all members of the political community, the exercise of the freedom of assembly has been difficult in certain respects due to systemic barriers. The right to peaceful and unarmed assembly is explicitly mentioned in the Constitution.[53] In this context, the Regulation of Gatherings Act 1993 (RGA) defined 'gatherings' as assemblies of more than 15 persons in public spaces,[54] stipulated that organisers of gatherings had to notify the authorities in advance, while it was a criminal offence to hold a gathering without prior notification.[55]

On 11 September 2015, members of the Social Justice Coalition chained themselves together and then to the staircase leading to the entrance of the Civic Centre in Khayelitsha, Western Cape, to protest against the inadequate sanitation and the threat this posed to the health of the residents. More people later joined the protest, which grew to more than 15 people. When the protesters refused to disperse, they were arrested under the relevant

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[52] Aharon Barak, *Proportionality. Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012) p. 388.
[53] Constitution of the Republic of South Africa, Article 17
[54] Regulation of Gatherings Act 1993 (Act no. 205 1993), Article 1(vi)
[55] RGA Articles 3, 12(1) a)

provisions of the RGA because the organisers had not notified the authorities in advance. This was because the meeting was planned with the participation of 15 people, which is below the limit set by the RGA.[56] Having been convicted at first instance, the protesters appealed on the grounds that the relevant provision of the RGA violated their freedom of assembly. The High Court accepted these arguments and declared that the relevant provision of the RGA was unconstitutional as it prevented people from exercising their constitutional right.[57] The Constitutional Court also reviewed the case and in its unanimous decision confirmed the unconstitutionality of the provision of the RGA under review. In addition to stating that the criminal sanction was too severe and that the importance of the purpose of the restriction could not outweigh the freedom of assembly,[58] the Constitutional Court also emphasised that this right is particularly important as a political right in the case of children, who cannot exercise their right to vote.[59]

In this case, a civil society organisation, independent of the state, was involved in the enforcement of the right to health. In doing so, its members exercised their right to peaceful assembly. The state, represented by the federal government, is responsible for ensuring the conditions for the free exercise of the right of assembly, but in this case, it maintained restrictions in that regard. The restrictive provisions contained in the RGA constituted a systemic obstacle to the effective exercise of a political right, the addressee of which in most of the cases is also the central political power. The removal of this systemic barrier, based on the initiative of a civil society organisation and the decision of independent judicial bodies, can be seen as an effective counterbalance to the concentration of power in the hands of the executive.

4.4 Influence of international legal regimes on national policy decisions

International law affects the functioning of sovereign states in many ways.[60] The norms of international ius cogens are binding on all countries, as are the international treaties to which they are parties. International legal orders are becoming increasingly important at both regional and global levels. In the case of international treaties, countries voluntarily limit their capacity to exercise sovereign power in a given area, often in cooperation with other countries or international organisations. Actions and decisions of such organisations, as soft law measures or binding resolutions, often have direct legal effect at the national level. In an institutional setting where bodies established on the basis of the international legal order (e.g. dispute settlement fora, regional human rights courts) carry out their functions under the relevant international treaty, such actions can be seen as institutional checks and balances from the perspective of national governments.

Actions performed under international legal regimes may also affect the system of the separation of powers in a given country in other ways.[61] In addition to carrying out their

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[56] Human Rights Law Centre, 'South African High Court finds notice provision inconsistent with freedom of assembly' *https://www.hrlc.org.au/* (24 January 2018)
[57] High Court of South Africa (Western Cape Division, Cape Town) Case no: A431/15
[58] Constitutional Court of South Africa, Case CCT32/18 [101]
[59] Case CCT32/18 [72]
[60] For a classic approach see: Hans Kelsen, 'Sovereignty and International Law' (1960) 48 *Georgetown Law Journal* 4
[61] Jean Galbraith, 'International Law and the Domestic Separation of Powers' (2013) 99 *Virginia Law Review* 5

regular functions under the relevant international treaty, international bodies may also take actions that affect the political choices of the government in question. Such action may be taken in cases where the practice of the government in question systematically jeopardises the proper functioning of the international cooperation, but does not rise to the level of direct sanctions, or even exclusion form cooperation. If these measures serve a specific function in relation to the regular tasks of international cooperation, but – as a side effect and secondary function – also aim at forcing the government to take certain political decisions, the measure in question differ from institutional checks and balances.

A good example is conditionality, which is increasingly used in international cooperation.[62] Among these, the European Union's (EU) 'conditionality mechanism', introduced in 2020, has clear characteristics. It is primarily linked to the protection of the EU's financial interests. Since the EU provides funds to its member states in various forms on the basis of detailed regulation, it has a key interest in demanding a legal framework and implementation that guarantees lawful, transparent and accountable use of these funds. If these conditions are not met, the European Union can suspend the allocation of certain funds to a particular member state. In order to meet these conditions, the European Commission, a political-administrative body of the EU, can impose specific requirements on the member state concerned in the field of legislation and implementation of laws. The European Commission also has the final say on whether these conditions are met. In other words, a political-administrative body operating at the international level can directly influence certain policy decisions of the executive power operating at the national level.

Based of the above features, EU conditionality mechanism is a typical procedure belonging to the invisible layer of the separation of powers. It has a specific function, which does not primarily belong to the system of separation of powers – the protection of the financial interests of the international entity. At the same time, the effective control over the national government in the given field (by limiting its room for manoeuvre in the respective policy issues) can be identified as a secondary function of these procedures. The control mechanism is present in the relationship between the national government concerned and the international organisation, a body independent of the national executive. The national government can initiate counter-measures, typically related to other decision-making procedures within the international cooperation.

The conditionality mechanism initiated by the institutions of the European Union against Hungary as a member state illustrates all aspects of the above peculiarities.

4.4.1 EU conditionality mechanism in the case of Hungary (2022)

The legislative bodies of the European Union adopted the regulation on the protection of the financial interests of the EU in 2020.[63] The conditionality mechanism opens up the possibility

[62] As Antonia Baraggia puts it, 'conditionality implies the existence of two (or more) distinct levels of governance – each of them with a certain degree of political autonomy, but with a different bargaining power'. Antonia Baraggia, 'The rise of conditionality within the global administrative space: a challenge for the separation of powers' in Antonia Baraggia, Cristina Fasone and Luca Pietro Vanoni (eds), *New Challenges to the Separation of Powers. Dividing Power* (Cheltenham: Edward Elgar Publishing, 2020) pp. 78-100, at 88.

[63] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget

for the EU institutions to take appropriate measures against member states in cases where the breaches of the principles of the rule of law in a given Member State 'affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.' The possible breaches of the rule of law affecting the EU's financial interests are defined (e.g., concerns about the proper functioning of public authorities carrying out financial control) and the most powerful measure that can be taken is the suspension of payments to the member state concerned when the European Commission implements the Union budget.[64] Following the adoption of the Regulation, the Hungarian Government, supported by the Government Poland,[65] applied to the European Court of Justice (ECJ) for the annulment of the contested regulation in its entirety, claiming that it lacked a proper legal basis as it did not relate solely to financial matters and infringed Article 7 of the Treaty on the European Union (TEU), which sets out the only procedure for deteremining whether there is a serious breach of the fundamental values of the EU in a given member state. In its judgment, delivered by the full Court, the ECJ stated that the European Union must be able to defend the values reflected in Article 2 TEU.[66] According to the Court, the sound financial management of the Union budget and the financial interests of the Union may be seriously jeopardised by breaches of the principles of the rule of law committed in a Member State. In the Court's view, he Regulation does not circumvent the procedure laid down in Article 7 TEU and respects the limits of the powers conferred on the European Union.

The following year, the Council of the European Union, acting on the proposal from the European Commission, decided to take measures to protect of the Union budget against breaches of the rule of law in Hungary.[67] The decision followed a series of institutional recommendations made by the European Commission to Hungary to strengthen the anti-corruption framework, but the steps taken by the Hungarian Government were deemed insufficient. In the case of Hungary, the Council decision suspended 55% of the budgetary commitments for three operational programmes under cohesion policy.

Hungary's backsliding on the rule of law has been in the focus of the international community since 2010. However, the recommendations of international advisory bodies,[68] and other institutional mechanisms under EU law[69] have not proved effective in limiting the government's room for manoeuvre. In contrast, the EU institutions seem to be effective in pushing the government in the direction of anti-corruption policies through the conditionality mechanism. While the primary function of the conditionality mechanism is to protect the financial interests of the EU, a secondary function can also be identified as counterbalancing the national government. In this case, in addition to the independent bodies of the EU, ten national governments also played a general counterabalancing role by

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[64] Regulation (EU, Euratom) 2020/2092 Article 4.1, 4.2. a)-h), 5.1. a) (i)

[65] Poland also turned to the ECJ, its petition was supported by the Government of Hungary.

[66] Case C-156/21 127-128.

[67] Council Implementing Decision (EU) 2022/2506 of 15 December 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary

[68] See the latest opinion in this regard: European Commission for Democracy through Law (Venice Commission): *Hungary – Opinion on Act LXXXVIII of 2023 on the Protection of National Sovereignty* (2024)

[69] For a critical analysis of the rule of law mechanisms see: Petra Bárd and Dimitry V. Kochenov, 'War as a Pretext to Wave the Rule of Law Goodbye? The Case for An EU Constitutional Awakening' (2021) 27 *European Law Journal* 1-3

supporting the EU institutions in the case before the European Court of Justice. The Hungarian Government is likely to take countermeasures in the future within the framework of EU decision-making.

5 CONCLUSION

The legal institutions, procedures and doctrines examined above have certain characteristics in common. Their primary function is defined by law within a given constitutional system. Secondarily, these institutions can limit the scope for manoeuvre of the central political power within a given context. In such cases, the entity behind the institution in question opposes the central political power's actions to concentrate power, and the central political power can also take counter-measures. In the New Zealand case presented, the civic initiative of the national referendum targeted the entire political class, but its effect was neutralised in the long term through deliberation. In the Moldovan case involving an unconstitutional constitutional amendment, the Constitutional Court effectively counterbalanced the constitution-amending power. In the South African case regarding the enforcement of the right to freedom of assembly, citizens effectively opposed the federal government's concentration of power. The EU conditionality mechanism and its application against Hungary illustrates how an international legal regime can influence national policy decisions.

When examining the functioning of the separation of powers in a given polity, focusing only on institutional checks and balances can sometimes be misleading. Institutional checks and balances may function well on paper, but this does not necessarily result in a genuine counterbalancing effect on central political power. Extending the examination of the separation of powers to include legal institutions belonging to its invisible layer, such as direct democracy, the doctrine of substantive constitutional unamendability, the judicial enforcement of political rights against systemic obstacles and the influence of international legal orders on national policy choices, provides a more precise examination of the actual situation of the separation of powers in a given polity. The list of legal institutions invisible to the classic theory is open-ended; therefore, it is worth analysing them in future.