



You have downloaded a document from
RE-BUS
repository of the University of Silesia in Katowice

Title: Some Terminological Controversies Concerning the Maxim of Division of Power

Author: Ryszard M. Małajny

Citation style: Małajny Ryszard M. (2009). Some Terminological Controversies Concerning the Maxim of Division of Power. "Silesian Journal of Legal Studies " (Vol. 1 (2009), s. 49-59).



Uznanie autorstwa - Użycie niekomercyjne - Bez utworów zależnych Polska - Licencja ta zezwala na rozpowszechnianie, przedstawianie i wykonywanie utworu jedynie w celach niekomercyjnych oraz pod warunkiem zachowania go w oryginalnej postaci (nie tworzenia utworów zależnych).



UNIwersYTET ŚLĄSKI
W KATOWICACH



Biblioteka
Uniwersytetu Śląskiego



Ministerstwo Nauki
i Szkolnictwa Wyższego

SOME TERMINOLOGICAL CONTROVERSIES CONCERNING THE MAXIM OF DIVISION OF POWER

I. INTRODUCTION

The rule of division of power belongs to a few fundamental maxims of democratic government but, paradoxically, it is probably the most vague one. In the literature of the subject some major terminological divergencies come to the fore, accompanied by the differences of opinion concerning some substantial issues affecting the mentioned precept.¹ It needs then to construct its general definition – so as to identify properly the relative maxims – to clarify its basic terms, and to discern some levels within which it can be analyzed. For there are almost as many interpretations of the principle of distribution of power as the authors who examine it. In view of this, some terminological considerations, even condensed ones, are indispensable.

II. THE LEVELS OF DIVISION OF POWER

The adversaries of the idea of distribution of power – and not only they – emphasize correctly that the term "division of power" pertains to one of the most unclear notions in the constitutional vocabulary, and as such it is used in various meanings. This designation may be construed in different ways, indeed, and analyzed on many research levels, aspects, manifestations, or dimensions. Even the authors of the ancient governmental views took into account the multiplicity of the state organs and certain distinction of powers between them. This distribution, as a considerably complicated phenomenon, was carried out by virtue of various criteria and by the application of manifold cognitive methods. Reaching out for the criterion of a branch of knowledge, the phenomenon in which we are interested can be examined on the legal and socio-political level. The first affects the problem of distribution of the legal spheres of state activity among the suitable state organs or their groups, as well as the mutual relationships between these organs. The second one concerns the issue of a degree of the influence of the social subjects of power exerted upon the process of decision-making within the state apparatus. Into the play come here both the organized (po-

¹ See e.g., A. Pułło, »Podział władzy«. *Aktualne problemy w doktrynie, prawie i współczesnej dyskusji konstytucyjnej w Polsce*, „Przegląd Sejmowy” 1993, No. 3, p. 9, 14; W. Sokolewicz, *Podział władz – idea polityczna czy zasada prawna? Z dylematów współczesnego ustrojodawcy*, w: *Prawo w okresie przemian ustrojowych w Polsce*, Warszawa 1995, p. 19; R. R. Ludwikowski, *Aspekty prawne ostatnich wyborów prezydenckich w Stanach Zjednoczonych*, „Państwo i Prawo” 2001, No. 4, p. 36, 37.

litical parties, interest groups, trade unions, denominations, and social organizations) and unorganized subjects (social classes, strata, and groups). In other words, division of the state power may be considered on the following levels (planes):

A. A legal (functio-organizational) level – i.e., a functional individuation of the particular legal spheres of state activity and accomplishment of the correspondent organizational distribution of this government into the particular organs.

B. A socio-political level – i.e., a lack of social and political identity of the power subjects with the state apparatus or an identification of the specified social classes and groups with the particular organs.

This classification is of leading character, therefore, any other typologies will be of complementary nature. So, within the legal level division of power may be examined in the aspects named below:

A.

I. A formal aspect – i.e., a distribution of the state power under the provisions of law.

II. A substantial aspect – i.e., a distribution of the state power in fact.

B.

I. An objective aspect – i.e., a functional individuation of the particular legal spheres of state activity.

II. A subjective aspect – i.e., an organizational distribution of the state apparatus into the particular state organs according to the previously accomplished functional division of power.

C.

I. A horizontal aspect – i.e., a distribution of powers between the correspondent state organs of the same hierarchical level.

II. A vertical aspect – i.e., a distribution of powers between the organs of central (including federal) and territorial level (including the organs of the members of federation).

D.

I. An external aspect – i.e., a division of powers between the particular groups of organs.

II. An internal aspect – i.e., a division of powers within the particular groups of organs.

It is worth emphasizing that most authors mainly name two antithetical aspects of division of power – in which they are most interested – and use various designations for them. Beyond that, a rational classification of the foregoing aspects can hardly be met.² The constitutionalists primarily deal with the legal aspect of the above principle and less with the socio-political one. Yet, within the sphere of the former they prefer the following aspects: formal, objective, subjective, and horizontal.

² These solely are the most often applied qualifications, since in the French constitutionalism we still meet in this context such terms like *division*, *distinction*, *distribution*, *repartition*, and *specialisation*; and in the German constitutionalism respectively *Verteilung*, *Scheidung*, *Unterscheidung*, and *Sonderung*.

III. THE ADEQUATE NOMENCLATURE

The issue that also requires determination is the correctness of terminology. In the Polish literature the notion "division of power" is accompanied by the term "division of powers", that being often identified with the first one. In the French literature the denomination "separation of powers" (*séparation des pouvoirs*) is used, while in the German one the two notions function parallelly: "division of powers" (*Gewaltenteilung*) and "separation of powers" (*Gewaltentrennung*).³ In the Anglo-Saxon literature, instead, the name "separation of powers" occurs the most frequently but alongside such designations appear as "distribution", "division", "distinction", "partition", "differentiation", "isolation", "dispersion", "diffusion", "fragmentation", and even "separated and divided powers".⁴ All these names are inadequate, save the first four: e.g., the last one is clearly inconsequent. In my belief, there is an essential difference between the terms "division of power" and "division of powers". I am inclined to construe division (distribution) of the state power as a functional (objective) individuation of the particular spheres of activity of the state apparatus. In the first place, at issue here is a factual distribution of the areas of activity of the particular organs, apprehended as a division of tasks. As regards division of powers, it denotes an organizational (subjective) individuation of the particular state organs corresponding to the previously accomplished distribution of power. From the logical viewpoint division of power (i.e., its functio-objective aspect) must be of original character, while division of powers (i.e., its organizatio-subjective aspect) ought to be of secondary nature.

Interchangeably operating of the designations "division of power" and "separation of powers" is utterly misleading, because separation in contrast with division does not observe links between the organs.⁵ Lacking such links an efficient exercise of the

³ See G. Marshall, *Constitutional Theory*, Oxford 1980 (1971), pp. 97–100; J. P. Roche, *Distribution of Powers*, in: *International Encyclopedia of the Social Sciences*, New York–London 1968, Vol. 3–4, pp. 300 ff.; D. Waldo, *The Administrative State. A Study of the Political Theory of American Public Administration*, New York 1948, p. 107; L. H. Tribe, *American Constitutional Law*, Mineola, N.Y. 1978, p. 15; A. Mass, op.cit., pp. 9 ff.

⁴ Therefore, I do not share A. N. Wróblewski's view (*Dwie interpretacje Monteskiusza*, „Państwo i Prawo” 1977, No. 12, pp. 59, 60) that "there is a fairly essential difference between a division of powers and a distribution of powers. Division of powers is a method of building and functioning of public power that provides for rather wide mutual links between its elements in the normal process of implementing the particular formal functions. True, a distribution of powers is a similar method, however, it only permits some specific intervenient activities in certain situations; there is a lack of the premises of steady cooperation here. Hence, as a rule, a distribution of power provides for a more independent action". In my opinion, however, a different scope of links between the particular organs in various political systems obviously cannot be denied. Nonetheless, the distinction made by the author cannot be subsisted, either. From the semantic standpoint the notions "division" and "distribution" are synonyms (see *Webster's Third New International Dictionary of the English Language*, Springfield, Mass. 1981, pp. 660, 664), used solely in different contexts. Moreover, what the author calls "distribution of powers" amounts in essence to their separation. Thus, the identification by A. Pułło (*O jedno rozumienie podziału władz w nauce prawa konstytucyjnego*, „Państwo i Prawo” 1983, No. 6, pp. 35, 36, 45) of the names "distribution" and "separation" in the context of the state power, as well as the conviction that the qualification "division of power" is erroneous, may by no means be accepted.

⁵ See C. L. de Montesquieu, *O duchu praw*, Warszawa 1957, Vol. I, p. 245; L. Lange, *Teilung und Trennung der Gewalten bei Montesquieu*, „Der Staat” 1980, No. 2, pp. 221, 229; W. Zamkowski, *Monteskiuszowska koncepcja podziału a socjalistyczna zasada jedności władzy państwowej*, „Zeszyty Naukowe Un-

state power is impossible. Thus, employing the term "separation" in the context of the state power I find purposeless, apart from the fact that neither state has ever carried out a genuine separation of organs. It is noteworthy that de Montesquieu – and later in. al., Hans Kelsen – had unequivocally declared for distribution of powers (*distribution des pouvoirs*) and against their separation (*séparation*), thereby equipping his conception with the system of checks which extorts cooperation of the particular state organs.⁶ This system precludes *a limine* any separation of organs. Hence the opinions – met in the literature from time to time – that separation of powers is a "pure" or strict division of power,⁷ are logical but impracticable; whereas, practice is the best criterion to evaluate theory.

Returning to the controversy stemming from the problem of correctness of the nomenclature – viz., which name is more proper: "division of power" or "division of powers" – I deem that the first one. This appraisal has also been inspired by the fact that the word "power" (being very multivocal) used in the second term, is imprecisely applied to designate a state organ or a group of organs. In consequence of that the notion "division of powers" is simply obsolete today. Therefore, while applying the designation "division (or distribution) of power", I will use it in its broader meaning, unless a reservation is made that merely the subjective aspect is involved. True, one could reach out for the denomination "division of power and powers", but it is not very handy. Some theoreticians suggest to resign from the name "division of power" and to replace it with a frequently used notion "division of functions". A few of them motivate their position by resorting to the ostensible contradiction between the rule of distribution of power and the principle of sovereignty (in. al., M. Duguit). The other ones (in. al., H. Kelsen and G. Jellinek), while not sharing this view, advances the thesis that the term "division of functions" is more appropriate since the state power is by definition homogeneous and indivisible. For instance, writes Georg Jellinek: "Each state organ represents the state power within its competences. So, only distribution of competences is possible, not distribution of power. In the multiplicity of its organs the state power is one and single".⁸

The foregoing dilemma is exceptionally complex and its solid resolution would require a distinct dissertation. Addressing to it briefly, it should be indicated that it is being solved in a variety of ways. The most common of them consists in dividing the legislative power (*gesetzgebende Gewalt*) away from the power of creating a polit-

iwerysytetu Wrocławskiego" 1958, p. 25–27; H. Kelsen, *General Theory of Law and State*, New York 1973 (1945), pp. 272, 273; Z. Rykowski, W. Sokolewicz, *Zagadnienie podziału władz w Austrii*, „Państwo i Prawo” 1983, No. 12, p. 87.

⁶ U. Lange, op.cit., pp. 213, 214 and the literature quoted there; R. K. Gooch, *Modern French Views on the Doctrine of the Separation of Powers*, "Political Science Quarterly" 1923, Part 1, Vol. 38, No. 4, pp. 588, 589.

⁷ G. Jellinek, *Ogólna nauka o państwie*, Warszawa 1921, pp. 360–362; H. Kelsen, op.cit., p. 255; W. Zamkowski, op.cit., pp. 25, 26; Z. Rykowski, W. Sokolewicz, op.cit., p. 41; K. Loewenstein, *Verfassungslehre*, Tübingen 1969 (1957), pp. 32, 33. Following the same assumption, W Lang (see *Monteskiusz i jego dzieło*, Wrocław 1956, p. 235) arrived at the equally controversial conclusion that it can merely be told about a "division of powers" – otherwise, about their distribution – but not about a "division of power" since this last designation implies a division of sovereign power.

⁸ See Z. Rykowski, W Sokolewicz, op.cit., pp. 79, 80, 85; I. Bibó, *Podział władz państwowych dawniej i dziś*, „Znak” 1982, No. 10, p. 1239; M. Sobolewski, *Zasady demokracji burżuazyjnej i ich zastosowanie*, Warszawa 1969, pp. 18 ff.

ical system (*verfassunggebende Gewalt*), otherwise, an ordinary legislator away from a constitutional legislator. The latter is endowed with the right of "broader" exercise of the people's sovereignty and thereby is being placed above division of power. At the same time, a constitutional tribunal is granted the role of a guarantor of the supremacy of a constitution, including the precept of distribution. The other analysts lay the greatest stress on the sociological and legal levels of the problem, holding that if a nation is the possessor of sovereignty and the exercise of the latter pertains to the representative organs, the foundation of division of power within the state apparatus ought to be distribution of power within a nation itself.⁹ Let us also take into consideration that in their opinion the principle of division is inconsistent solely with the internal aspect of the rule of sovereignty (i.e., supremacy), not with the external one (i.e., independence). That makes this issue easier.

I am convinced that the discrepancy between these two precepts is only apparent. The notions "sovereign power" and the "state power" are not identical. Sovereignty is not a whole power in the state but merely a supreme, unlimited, and incessant authority. Sovereign power is exclusively vested in a nation, yet, the state power is conferred by a nation upon the state organs. These organs implement solely the attributes of sovereignty in the course of a specified term, and may cease to be the depositaries of the sovereign rights of a nation when their term comes to an end. The state organs should be bound by a constitution, being ratified and altered by a referendum. Division of power, or an organizational individuation of the organs and distribution of powers between them, is indispensable to an effective exercise of the whole state power. The words of G. Jellinek, quoted hereinbefore, sound emphatic but do not convince since he had in mind not the state power, but a sovereign one. In a rationally organized state power ought to be dialectically treated, i.e., as being simultaneously divided and united. It is to be exercised by the state apparatus – built on the ground of equality of all the supreme organs or of domination of one of them – which implements the interests of a nation (sovereign). Therefore, I can see neither theoretical nor practical antinomy between the principle of sovereignty and that of distribution of power.

Small wonder that the term "state function" – conceived most generally as a prime direction of the governmental activity – is much more clear than the notion "state power". Nonetheless, as meet with various definitions of the first designation, we encounter different classifications of the state functions. A few examples. G. A. Almond and J. S. Coleman name four "input" functions, i.e., political socialization and recruitment, interest articulation, interest aggregation, and political communication; as well as three "output" functions, i.e., the rule-making, the rule-application, and the rule-adjudication.¹⁰ An interesting typology presents K. Loewenstein, who distinguishes policy determination, policy execution, and policy control.¹¹ M. Sobolewski, in turn, proposes a "double level" systematization of the state functions: protection of

⁹ G. A. Almond, J. S. Coleman (eds.), *The Politics of the Developing Areas*, Princeton 1960, p. 17.

¹⁰ K. Loewenstein, *op.cit.*, p. 40.

¹¹ M. Sobolewski, *O funkcjach państwa*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego (Prace z Nauk Politycznych)” 1971, No. 1, p. 13.

the class rule and the overall social function; internal and external.¹² In older literature W. F. Willoughby tried to justify the specification of five functions: executive, legislative, judicial, administrative, and the electoral one.¹³ However, any of the afore-said sets of functions embraced within the frame of the rule of division of power can hardly be imagined. In practice more than once they overlap to a much greater measure than traditional legislation, execution, and jurisdiction, which a distinction is still celebrated by constitutionalism. As to the first two typologies, with the legal aspect of the governmental tasks they are associated to a small degree. Strictly speaking, division of the state functions – in a sense since the more proper term here would be the "legal spheres of state activity" – constitutes only the objective part of distribution of power; yet any elaborated conception of the principle of division is consisted of the subjective and socio-political aspect and, by rights, the system of checks. In conclusion, it may truly be said that operating of the term "distribution of functions" in the context of the state power would be misleading. It is for these substantial motives that I do not use this designation; not because it cannot adequately play the part of a watchword for all the problems discussed here. The usefulness of the notion "distribution of labor between the state organs"¹⁴ – to which some authors strive to reduce the crux of the precept of division of power – looks alike.

IV. THE LEGAL SPHERES OF STATE ACTIVITY

The consecutive issue of the terminological nature that requires addressing at the beginning, is the question of defining three traditional legal spheres of state activity – legislative, executive, and judicial. For if we are to examine the division of power in any state, then wishing to ascertain whether the powers possessed by these organs actually belong to the spheres assigned to them, we have to fathom the substance of these spheres first. However, the formulation of appropriate definitions, even the most general ones, is not easy inasmuch as the names: "legislation", "execution", and "jurisdiction" are extremely difficult to determine, more insistently the second one. The boundaries between them are not subject to a precise delimitation. Beyond that, it is doubtful whether any of those spheres contains the same, invariable content irrespective of an epoch and country. The multiplicity of the state organs coming forward today, may reach such a phase in the future that any attempt to ac-

¹² See D. Waldo, *op.cit.*, p. 111; H. Kelsen, *op.cit.*, p. 255, 256; G. Jellinek, *op.cit.*, p. 458; Sir W. I. Jennings, *The Law and the Constitution*, London 1960, p. 280; M. J. C. Vile, *Constitutionalism and the Separation of Powers*, Oxford 1969 (1967), pp. 277–279; J. A. Fairlie, *The Separation of Powers*, "Michigan Law Review" 1923, Vol. 21, pp. 419–423, 429–431; R. C. Moulton, *Separation of Powers, Mixed Government, and the Constitution*, Chicago 1981 (an unpublished doctoral dissertation – dis. the University of Chicago Library), pp. 353, 354.

¹³ T. Tsatsos occupies a similar position, writing that this qualification can serve at most as an addendum of the name "division of power" – *idem*, *Zur Geschichte und Kritik der Lehre von der Gewaltenteilung*, Heidelberg 1968, pp. 94, 95.

¹⁴ M. J. C. Vile, *op.cit.*, p. 318; R. C. Moulton, *op.cit.*, p. 199, 382 ff.; Sir W. I. Jennings, *op.cit.*, p. 293, 303; G. Marshall, *op.cit.*, p. 124; W. Zamkowski, *Jedność i podział władzy w Polsce Ludowej*, „Zeszyty Naukowe Uniwersytetu Wrocławskiego”, Warszawa–Wrocław 1961, p. 52; O. W. Kägi, *Zur Entstehung, Wandlung und Problematik des Gewaltenteilungsprinzipes. Ein Beitrag zur Verfassungsgeschichte und Verfassungslehre*, Zürich 1937, p. 240.

compish a reasonable classification of spheres will prove futile. It is this reason that dictates some analysts to distinguish the so-called interfunctions (*Zwischenfunktionen*), e.g., the quasi-judicial one, ect.¹⁵ There are also many definitions of the legal spheres of state activity¹⁶ which often contradict each other. Whereas this matter is highly complicated and would require an extensive and thorough analysis – which is prevented by the capacity of this study – I propose to accept the working formulas instead of carefully balanced designations of the particular spheres. Thus, legislation is the governmental activity consisting in making general and abstract legal norms. Administration is the governmental activity of an executive and managing character – based upon statutory acts – which amounts to the organizing of the life of a country and to the protection of civil rights and liberties. Jurisdiction is the governmental activity aimed at interpreting the law and at trying conflicts which stem from the legal relationships.

Simultaneously, it is worth taking note of the distinction between formal and material legal spheres of state activity, originated by F. Schmitthenner and grounded by the German scholars. The material (objective) spheres are the main directions of the governmental activity – otherwise, legislation, administration, and jurisdiction – being understood in accordance with the above formulas. The formal (subjective) spheres are the complex of legal spheres of state activity of the particular governmental organs which implement the material spheres.¹⁷ Stated another way, the material spheres derive their nature from their substance, while the formal ones depend on a way of distribution of powers between the particular organs. To exemplify, administration in the material aspect is an activity of *par excellence* executive-managing character. In the formal aspect, in turn, it means not only management but also issuing legal acts that specify statutes; in many countries trying minor offenses as well. This distinction will be helpful in tracing the delimitation of powers between any state organs. And it will be proven that the form not always fits tightly to the corresponding substance.

V. THREE THEORIES OF DIVIDED POWER

Unfortunately, the terminological problems do not come to an end with the issues that have been previously discussed. With the passing of time the sense of the designations: "legislative", "executive", and "judicial" underwent major changes. Moreover, not insignificant here are serious difficulties so often encountered by everyone who wishes to ascertain the origins of a given political theory. Many of them, including the theory of division of power, represent the product of a long evolution. The said

¹⁵ See in. al., G. Jellinek, op.cit., p. 469; H. Kelsen, op.cit., pp. 255–258; O. W. Kägi, op.cit., p. 159–161; R. C. Moulton, op.cit., pp. 385, 386; F. Green, *Separation of Governmental Powers*, in: *Selected Essays on Constitutional Law*, Vol. 4, Chicago 1938, pp. 199 ff.

¹⁶ See O. W. Kägi, op.cit., p. 117–119, 158–163; G. Jellinek, op.cit., pp. 463–481; Sir W. I. Jennings, op.cit., pp. 25, 282; M. J. C. Vile, op.cit., p. 285; R. C. Moulton, op.cit., p. 404; A. Pullò, op.cit., p. 31; H. Petzold, *Die Gewaltenteilung in der europäischen Gemeinschaften*, Göttingen 1966, pp. 27, 28. The contributors to the work edited by A. Maass apply the designation "separation of processes" – see A. Maass (ed.), op.cit., pp. 10–15.

¹⁷ For further reading see R. M. Małajny, *Trzy teorie podzielonej władzy*, Warszawa 2001.

theory was born in the seventeenth century on the grounds of the antique theory of mixed government. The latter has been modified during the turn of the seventeenth and eighteenth centuries, assuming the name of the theory of balanced government.¹⁸ Within the ancient political thought also the doctrine of checks came into sight, which later became the component of all the three aforementioned theories. There is no agreement among the competent examiners as to their primary elements as well as to their mutual relationship. Therefore, wishing to spin even condensed deliberations we have to more precisely outline the criteria distinguishing those theories. This can be done in the easiest way by formulating pertinent definitions.

Nevertheless, the most easy does not necessarily mean easy. Those theories were elaborated and discussed in the writings of particular thinkers and commentators upon the levels of different degrees of abstraction. Furthermore, within the theory of distribution of power at least a dozen doctrines may be discerned. To illustrate, solely against the background of the political thought of the English Revolution, W. B. Gwyn individuated five variants of the theory of division depending on the goals set for it.¹⁹ In reference to the piling up complications symptomatic is, among others, the multivocality of the notion "power", most often met in the literature of the subject. According to the context, it can equally stand for a set of legal relationships based upon superiority and subordination – in the present study this name will be exclusively used in this sense – as for the state organ, their group or a legal sphere of state activity. Similar troubles arise in connection with the term "government" which has numerous meanings.²⁰ This author applies it most frequently as a synonym of the notion a "top administrative organ" (*Regierung*); from time to time also as "political system" (*Verfassung*) and seldom as a "state apparatus". The only solution is to rely upon the definitions of the theories mentioned above, even if they were to have an arbitrary character. Nonetheless, if these definitions are supposed to be a base for further considerations, not merely a starting point, on the one hand, they cannot be so narrow as to embrace only one of the doctrines pertaining to a specified theory, and on the other, so broad as to make those theories overlap.

It can summarily be said that the theory of division of power denotes a functional individuation of the particular spheres of state activity and the correspondent organizational distribution of the government into particular organs; these organs should be relatively equal and independent, and ought to have a rather small opportunity to interfere with the activity of each other. The theory of mixed government means a combination of the three forms of government – monarchy, aristocracy, and democracy – where in order to preserve the socio-political balance the state power is distributed between a monarch, the nobles, and the people, while the particular state organs mutually participate in the exercise of their functions. The theory of balanced government designates an aggregation of the theory of division of power and that of mixed government, relying upon the combination of the three forms of government – monarchy, aristocracy, and democracy – where in order to preserve the so-

¹⁸ W. B. Gwyn, *The Meaning of the Separation of Powers. An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution*, New Orleans–The Hague 1965, pp. 37–65, 127, 128.

¹⁹ See *Webster's...*, pp. 982, 983; C. H. Wilson, *The Separation of Powers Under Democracy and Fascism*, "Political Science Quarterly" 1937, Vol. 52, No. 4, p. 481.

²⁰ See W. B. Gwyn, *op.cit.*, pp. 26, 27.

cio-political balance the state power (particularly the legislative function) is distributed between a monarch, the nobles, and the people, together with the simultaneous partial implementation of division of power and the establishment of the system of checks. The doctrine of governmental checks consists in a partial distribution of the legal spheres of state activity within the shared power, enabling each state organ to exercise direct control over the others by means of the appropriate constitutional instruments, which results in the mutual checking of the organs; that implicates a relative balance between them.

The acceptance of the foregoing definitions will make much easier to cope with many research problems, for example, to trace the genesis of the theory of division of power. Although, this is not to say that all the related difficulties disappear. It may be observed even *prima facie* that there are many tangent points, both logically and historically. No governmental mechanism can properly function only by virtue of a pure distribution of power. Therefore, it must be supplemented with the system of checks. All the three theories have a common starting point which is a drive to secure freedom of an individual in the law-observing state. However, this drive is accentuated with different force. Some thinkers have formulated their views in such a way that it is very hard to find which of the theories considered they compromise. On the other hand, the differences that split them cannot be overlooked.²¹ The most important of these amounts to the fact that while the theory of division of power is focused on distribution of the legal spheres of state activity, the theories of mixed and balanced government have been built on the grounds of division of the state power among the social estates (classes). Thus, the first theory possesses primarily the functio-organizational overtone, while the two remaining ones have that of the socio-political (class).

According to the unanimous conviction of the experts of this problem, the original source of the theories of division of power and of balanced government, as well as the doctrine of checks, was the theory of mixed government.²² This statement confines the area of understanding between the researchers. However, at the same time it widely opens the gate of controversy as to the other issues. We meet them not only with the differential attempts to closely define the said theories, but also with their various names. It is not too much to say that we have here a true notional chaos. In the terminological circulation alongside of the designation "mixed government" such names occur as "mixed constitution" (*Mischverfassung*), "mixed monarchy" (*gemischte Monarchie*), "mixed state" (*status mixtus*), etc. The term "balanced government" is accompanied by the notion "balanced constitution" or even by the designation "limited government". The term "system of checks", in turn, is commonly used in the shape of "checks and balance" system, though, this name likewise universally appears in plural ("checks and balances")²³ which is improper since the substance of

²¹ M. J. C. Vile, *op.cit.*, pp. 34–37; R. C. Moulton, *op.cit.*, pp. 34, 105; C. J. Friedrich, *Separation of Powers*, in: *Encyclopedia of the Social Sciences*, New York 1937, p. 663; *idem*, *Constitutional Government and Democracy*, Boston 1950, p. 174; G. W. Carey, *The Separation of Powers*, in: G. J. and S. G. Graham (eds.), *Founding Principles of American Government. Two Hundred Years of Democracy on Trial*, Bloomington–London 1977, p. 102.

²² See e.g., H. L. McBain, *The Living Constitution*, New York 1941, p. 150.

²³ R. C. Moulton, *op.cit.*, pp. 109, 110; M. J. C. Vile, *op.cit.*, p. 18; K. von Fritz, *The Theory of Mixed Constitution in Antiquity. A Critical Analysis of Polybius' Political Ideas*, New York 1954, pp. 78, 184, 186.

this system is to attain a global balance between all the organs, not only some fractional counterpoises. The sole adequate denomination in this context is the notion "system of checks", because it is understood that it is just the checks that are to secure the coveted balance, while the designation "checks and balance" system implies an opposition between balance and checks.

The attitude of the constitutionalists toward the relation between the system of checks and the rule of division of power is uneven as well. Some treat this system as a distinct governmental doctrine, yet, others look on it as an integral element of the mentioned precept. The first view is justified historically, the second logically. The doctrine of checks has been elaborated for the first time by Polybius against the background of the theory of mixed government, and was consequently being evolved until the eighteenth century. The growth of the theory of distribution was running over a distinct path. On the other hand, it should be pointed out that the doctrine of checks has above all technical significance, and its existence cannot be justified without the theory of division. For in a political system founded on the grounds of the principle of unity of power a balance of the organs and their checking are out of the question. Any executive vetoes, impeachments, or judicial reviews are useless here. In addition, the rule of division of power not being buttressed by the system of checks leads either to a paralysis of the governmental activity or to the domination of some organ. Both these precepts are thus of a complementary nature. For the sake of that it is my intention to prefer the logical viewpoint of this controversy and to treat the doctrine of checks as an essential element of the theory of distribution.

Major complications are also present in the efforts to clarify the meaning of the notions that take our interest, and to point at the interdependence occurring between them. To exemplify, if K. von Fritz identifies the system of checks with the theory of mixed government, M. J. C. Vile is inclined to regard it solely as a variant of the aforesaid theory. For R. C. Moulton, in turn, the theory of balanced government is only a reflex of both the classical theory of mixed government and that of division of power.²⁴ At the same time, definitions of the system of checks which resemble further qualifications of the theory of distribution are not lacking, inasmuch as many authors identify this theory either with the system referred to before, or with the theory of mixed government. Switching a research plane, if in the opinion of some analysts this system has appeared as early as in antiquity, the others believe that its birth

²⁴ See S. Pargellis, *The Theory of Balanced Government*, in: C. Read (ed.), *The Constitution Reconsidered*, New York–Evanston 1968 (1938), p. 37; C. H. McIlwain, *Constitutionalism Ancient and Modern*, Ithaca, N.Y. 1947, p. 142; K. Loewenstein, *The Balance Between Legislative and Executive Power: A Study in Comparative Constitutional Law*, "The University of Chicago Law Review" 1938, Vol. 5, No. 4, p. 568; R. C. Moulton, op.cit., pp. 121, 446, 447; W. B. Gwyn, op.cit., p. 3; K. von Fritz, op.cit., p. 78; M. J. C. Vile, op.cit., p. 34. Yet, some explanation require the notions applied in the present study, such as "concept", "doctrine", "theory", and "principle". Most generally, each of the first three notions denotes a subaltern to the specific leading idea, intrinsically systematized and forming a certain whole set of views concerning a given problem. In jurisprudence the differences between them reduced only to the degree of extension of those views: the broadest is theory, narrower is doctrine, and the narrowest is concept. To illustrate – within the theory of division of power we meet among others the doctrine of de Montesquieu, comprising certain concepts. The term "principle" (rule, maxim, precept), instead, is a certain standard of proceeding of *par excellence* organizational or functional overtone, being used usually in the normative context.

ought to be shifted to the seventeenth century. Controversial problems may still be recited. At any rate, based upon the ambiguities presented hereinbefore, it is acceptable to assume that as the genesis of the theory of division of power takes so dim a form in the works of its commentators, it is hardly possible that it will be more explicitly visible against the background of the writings of its precursors.