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Comparative and Bulgarian Implications of the Separation of Powers Principle*

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The article discusses the theoretical and practical issues regarding the adoption and implementation of one of the core ideas of democratic constitutions, i.e. the principle of separation of powers. The article highlights the importance of those values in social life that served as the basis for the formation of basic constitutional principles. It is being stated that even if the text of the Constitution contains democratic principles, they will not function in the absence of their original, truly democratic nature. The article also introduces the distortions that may function along with the democratic principles in case values having other origin are prevalent in society. The case of Bulgaria is investigated to demonstrate those problems and their solutions that are specific to post-socialist new democracies.

Keywords
Constitution of Bulgaria, separation of powers, constituent powers, constituted powers, Constitutional Court

Introduction

I have intentionally chosen separation of powers as the subject of this article, not as a proof that it is more important than sovereignty, rule of law and political pluralism to the protection of constitutional democracy, but due to the limitations that common sense dictates for such an article.

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Constitutional principles are sine qua non to the system of values in the established democratic constitutional design opted by people in the nation state. All constitutional principles act in a kind of concerted action and no principle should be left undeveloped or used as a trump card against the others. Separation of powers is not the sole standard setting criterion of governmental structure in a constitutional democracy. Patterns and forms of separation of powers enforced within the constitutional design determine the form of government in the constitutional architecture. It is, however, probably the most intensive dynamic indicator to the relationship between political power and political freedom. It is not accidental that the fall of Berlin triggered the establishment of new constitutional frameworks in the Central and South-East European emerging democracies, in which the separation of powers was entrenched as antipodal to the principle of the unity of power of the older communist regimes.

Together with the economic transformation, new democratic constitutions proved to be one of the most important cornerstones instrumental to the transition to democracy and market economy. It was this constitutional framework built on the separation of powers and other democratic principles and standards that paved the way to the reintegration of emerging democracies in Europe through membership to the Council of Europe, adherence to the NATO alliance and, upon completing acquis communautaire, becoming part of the EU with the South-East European enlargement of the Union.

Dimensions of the Separation of Powers Principle

There was no national tradition of parliamentary government and balanced separation of powers before and after the communist takeover in almost all of these countries with very few exceptions. Undoubtedly during the interwar period Czechoslovakia was most illustrative of all of them. However, without doubt in Central and Eastern European states, including Bulgaria, the practice of government even in its relatively most democratic phases falls short when measured against contemporary

international, European and comparative constitutional democracy standards in the West[1].

The present institutional system provides for parliamentary government of a unitary republic based on democratic principles. Limited constitutional government is founded on popular sovereignty, separation of powers, political pluralism, rule of law, primacy of international law, protection of human rights, private property and free initiative.

The parliamentary government has been based on a balance of divided political institutions of legislative, executive and judiciary functioning independently or in cooperation, acting in conflict and interaction. Though sometimes during the past twenty-five years the constitutional framework has been criticised for the demerits in the established balance of powers, the constitutions have been successful in providing a secure system of safeguards for limited government and have prevented the emergence of arbitrary power mostly due to the principle of separation of powers. Being a typically reactive document in severing ties with the former system of government, as all of the newly drafted constitutions of the Central and East European Democracies, the 1991 Constitution of the Republic of Bulgaria proclaimed explicitly the principle of the separation of powers into legislative, executive and judicial branches (article 8).

The traditional view on the content of the separation of powers principle has been restated by the Constitutional court of the Republic of Bulgaria in 1993[2].

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[1] This feature of the Bulgarian constitutionalism has been noted by some Bulgarian and foreign political scholars - see **Huntington S.,** Third Wave: Democratization in the Late Twentieth Century. Norman and London. University of Oklahoma Press, 1991, pp. 272 – 273; **Bell J**., Peasants in Power: Al Stamboliski and the Bulgarian Agrarian National Union (1899-1923), 1977; **Moser Ch**., Political History of the Transition in Bulgaria, Sofia, 1995; **Katrugalous G**., Report on the Balkan Constitutionalism at the Rigas Network Opening Conference in Athens, April 1-4, 1999 see Rigas Network, Opening Conference Reports It would be misleading to reduce the explanation of the Balkan constitutionalism and Bulgarian living constitution to Kelsenian methodology of legal positivism or decisionist approach of C. Schmitt and his followers, See **Schmitt C**., Theorie de la constitution, Leviathan, Presses universitaires de France, 1993; **Tanchev E.,** The Constitution and the Rule of Law, in Bulgaria in Transition ed. J.Bell, Westview Press, 1998, pp. 65 – 90.

According to the decision, the concept of the separation of powers is to a great extent relative and has been used due to the impact of certain historical and political factors. The state power within the framework of the separation of powers principle has three different spheres of performance, which have been attributed to three independent albeit interactive branches of power. The separation of powers principle, according to the Constitutional Court is a method to achieve the optimal functioning of the supreme state power and a safeguarding device against illegitimate monopoly of state power and lawlessness which might have a destructive effect on constitutional government and citizens rights and freedoms. However, the main idea defended by the Bulgarian Constitutional court was that the separation of powers is the only division of governmental functions which is instrumental to the differentiation of competences between political institutions.

Hence, the Constitutional court decision adhered to a thesis emanating from an old conceptual framework, that can be traced to J. Bodin's sovereignty formula of supreme power and J.J. Rousseau's radical democratic visions, distorted to the communist principle of unity of state power. To a great extent the content of the decision is a consequence of the so-called "soft" application of separation between the legislature and the executive in the parliamentary forms of government. The final accord in the decision, states that the principle is not to be interpreted as a triple power government and that the powers are not separated by a ''Chinese wall" (this expression used by the court), with the repositories of different branches of government constantly and permanently interacting in the coordination of the single state power and sovereignty.

The meaning of the separation of powers principle, developed during different phases of human civilisation is much more complex and multidimensional than the Bulgarian Constitutional Court interpretation at the start of transition in 1992.

[2] Decision N 6 of April 22 1993, Case N 4/93 of the Constitutional Court of the Republic of Bulgaria, Constitutional Court of the Republic of Bulgaria, Jurisprudence 1991-1996, Open Society Institute, COLPI, Sofia, 1997, (in Bulgarian), pp. 49-51.

It is common in practical politics and often in constitutional theory to replace the principle with its features and consequences, without having in mind its multidimensional context. It is extremely difficult to count the meanings attributed to the principle in everyday politics. It has been used to justify the division of labour in government, the division of politics from bureaucracy of the public administration, differentiation of the functions in government and competence of the state organs, and sharing of political power between the elites, etc[3].

By introducing the principle in the written constitutions the founding fathers' basic goal has been to build a governmental system with powers divided between the institutions in order to prevent absolutism which would have a devastating impact upon civil freedom and political democracy[4].

The essence of the separation of powers principle might be revealed through its functions, implicit dimensions and practical implications to constitutional government and political freedom. Being an indicator and a safeguard to freedom and democracy under the legitimate constitutional government with limited powers, the principle has a universal significance which might be traced in several directions:

- safeguarding individual liberties, collective rights and a functional guarantee of the stability of the democratic political regime by ruling out abuse, usurpation, concentration of power in an institution, person, group, minority or majority;
- indicating the dynamic characteristics of the political system, regime and process;

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[3] If alternatively or cumulatively these features of the principle are tantamount to its content it would certainly be true that separation of powers is universal and common to all different forms of government. One could attribute the principle even to the totalitarian and autocratic governments, since it is well known fact that despotism rests on certain division of the governmental labor too, for even an absolute ruler cannot perform the governmental power alone and under no conditions he or she is able to perform the different functions of the modern bureaucratic machinery of the state by themselves.

[4] The linkage of the separation of powers to a democratic political regime and the system of political freedom was explicitly stated in the 1776 United States constitution and in the famous article 16 of the 1789 Declaration of the Rights of Man and Citizen in France, See Constitutions that Made History, ed. by A.P.Blaustein and J.Siegler, New York, 1988, pp. 14-117.

- shaping the form of government, determined to a great extent by the model of the separation of powers opted in the constitution;
- functionally related to other constitutional principles in the modern nation state and especially to the popular sovereignty (people are sovereign but by dividing powers of the institutions commissioned and responsible between themselves and to the people, no institution can accumulate sovereign and absolute power in the state), *Rechtsstaat* (rule of law) as a prerequisite of legitimacy and legality in government etc.
- indicating the type of constitutional system - nominal, liberal or new constitutionalism.

The complicated contemporary dimensions of the separation of powers do not mean unity of power or simple division of functions and competence between the institutions in the constitutional framework of limited and responsible government. Differentiation of the constituent from constituted powers is a prerequisite to the modern constitutional government, determining constitutional supremacy and the nature of the constitution as a creation of constituent power and popular sovereignty expression[5]. The preliminary differentiation of powers is meant to exclude hasty, undemocratic and ill-thought constitutional amendments by the constituted organs, which under the legitimate constitutional government are supposed to act within constitutional limitations. Constituent power performance, however, is limited within the amending of the constitution and ceases to exist after the amendments have been ratified. Governmental functions are to be performed by the constituted powers, after the constituent power has established rules of the game assigned to the political institutions.

The separation of powers, established in the first constitutional generations, is the classical triad of legislative, executive and judicial powers attributed to Parliament, Presidency, Cabinet, and the Courts in different patterns, depending on the form of government and political

[5] Constituent power repositories and the procedure of constitutional amendment are provided in the Chapter 9 of the Bulgarian 1991 Constitution. The people acting through the Great National Assembly or Parliament with procedures and super majorities, aiming to achieve high degree of consensus are the sole repositories of constitutional amendment or empowered to adopt a new constitution.

tradition[6]. In defining the horizontal division between the three branches of power, the written constitutions emphasized autonomy, independence, checking, interposition and conflict between the institutions as a safeguard of balance, excluding concentration, abuse and usurpation of power and despotic government.

To this classic triple division a vertical dimension of the principle should be added, due to federalism and to a lesser extent by the devolution, decentralization and deconcentration in the unitary states. In the federal states the horizontal separation between the legislative, executive and judicial branches within Central and State governments is shaped by a priori constitutional vertical division of powers between the institutions of the Federal and member state governments. Exclusive and cooperative competence is the basic method of constitutional limitation in the vertical division of power[7].

Legal and political theory contributed to the establishment of specific patterns of implementing the principle of separation of powers by subdividing or constituting new agents or by emphasizing the impact of extra institutional factors. Foreign affairs was reserved as an independent federal branch while the judiciary was blended with the executive in the Lockean scheme of government. Any attempt to look at the separation of powers principle, especially under the parliamentary government would be incomplete, if the contribution of B. Constant is ignored. *Pouvoir neutre*, attributed to the head of the State, an institution within the constitutional monarchy, according to Constant, was added to the three classic branches of power. Although conceived to frame the balance between monarchic and popular sovereignty, the concept of four branches has been revived and substantially modified within the framework of parliamentary or semi-presidential government in modern Europe after World War II. Presidentialism, however, has been founded on the rigid separation of powers and its Madisonian meaning of checks and balances between the institutions including the psychological

[6] Different constructs of horizontal separation of constituted powers have been created by J. Locke, Montesquieu, J. Madison, B. Constant, Abbey Mably, W. Badgehot and others.

[7] In all of the federal states elements of inter-governmentalism are to be found, and subsidiarity principle has emerged in the federal framework too to be adapted to contemporary supranational unions of nation states.

dimension where the ambition of the politicians in different branches is to counteract and stop the absolutist and despotic trends.

In contemporary constitutional democracies the horizontal separation between the legislative, executive and judicial branches has been developed further in the internal differentiation of the institutions, designed as repositories of the three powers. Bicameral legislatures, dualism in the executive, shaped by subdivision between presidents and cabinets and differentiation of jurisdictional models with separate, specialized court systems complete the structural balance within the separation of powers principle in the modern nation state at the turn of the 21st century. Further yet is the European model of concentrated, abstract, posterior, specialized control, performed by the Constitutional Court, devised to protect constitutional supremacy, human rights, being a counter majoritarian check and policing the constituted powers' trespass of constitutional limitations[8].

The horizontal separation of powers has institutional, functional and political dimensions.

However, there is no constitutional system of government based on absolute separation, non-interaction and conflict, for the balance between the branches is achieved by mutual control through exercising competence checking on each other in order that the institutions be kept within constitutional limitations. After the horizontal division of spheres of government and their attribution to different institutions has taken place, each of the branches receives within its competence residuary powers belonging to the main spheres of power of the other branches in order mutually to control them against concentration of absolute power. For example, the presidential veto is within the domain of the legislative power, but has been attributed to the executive, while by the power of pardon, being of a judicial nature, the president corrects injustice, caused by the judiciary.

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[8] The Constitutional Courts, designed after Kelsenian scheme in 1920, have been recognized as being primary features in the common European constitutional heritage. D. Rousseau, The Concept of European Constitutional Heritage, in the Constitutional Heritage of Europe, European Commission for Democracy through Law, Council of Europe Publishing, Science and Technique of Democracy N 18, Srassbourg, 1997, pp. 16-35.

While totalitarianism, despotic government, rule by convention and confederacies negate the separation of powers, authoritarian government, plebiscitarian regimes and constitutional dictatorship, legitimated by reason d'etat doctrine deform the principle.

Political parties and openness in the public sphere within political pluralism modify the model of the separation of powers principle in the modern constitutionalism and contribute to the interaction and cooperation between the branches of power. Political party systems in the context of the parliamentary government reduce the functional separation between the parliament and the executive, for the cabinets control parliamentary majorities and, due to the discipline of the MPs, can transform the executive political decisions in legislation. Although party mechanisms bring cooperation between the legislative assembly and the executive, which is a feature of parliamentary government, the separation of powers does not disappear under the limited constitutional government. Simultaneously, due to the political party systems, the European parliamentary governments form the basis of the "soft" or flexible separation of powers, which differs from the rigid model - common to the presidentialism and especially to the US system of government.

The nature of the separation of powers influences the structure of government, institution building, mutual relationship and control, systems of responsibility of the executive to the legislative branch of government, and the role of the judiciary in the responsibility of the President, Cabinet and ministers.

Instead of functional division or competence differentiation, the separation of powers principle has an impact on the formation, functioning and mutual control and responsibility between the institutions within the constitutional government, based on the rule of law.

Applied to the formation of the institutions of the constituted powers, the separation of powers principle implies independent sources of authority, achieved by the constitution makers through different ways of constituting the branches. While in the presidential system this effort has led to totally different sources of formation of the three branches of government in the parliamentary systems, differentiation of the sources is not a clear-cut one. However, even in a parliamentary government the

legislature is directly elected by the people and though it is generally recognized that the executive or cabinet originates from the majority in the representative assembly, the participation of the head of the state in the ministerial investiture is a prerequisite to the parliamentary government.

Due to the varying nature of the constituted powers, the three branches of government perform different governmental functions. In exercising their competence they enter in relationships of support and autonomous action, control and interposition, sharing and cooperation. In this phase over-exaggeration of Montesquieu adds to the misconception that there is but a simple division of labor in government.

The separation of power principle plays an important role in designing the liberal system of constitutional democratic government with enumerated powers by the mechanisms of responsibility between the branches.

While in the radical democratic theory popular sovereignty and dependence on the will of the electorate has traditionally been conceived as an ultimate check on government, liberal constitutionalism emphasized procedures of control and responsibility for the checking of despotism and abuse of power[9]. To a great extent the control and responsibility in democratic governance is shaped by blending the ideas from the two political currents – radical democracy and political liberalism.

The legislatures are subject to political control by the electorate, to the executives by the power of dissolution, and legally to the Constitutional courts performing judicial review on the constitutionality of parliamentary statutes.

The presidential responsibility through impeachment is an exclusive complicated procedure for removing the head of state on limited grounds. The political responsibility of ministers to the parliament is engaged by countersignature of the presidential ordinances, who are subrogated and liable to the legislature instead of the president.

The Cabinet is collectively responsible to the Parliament, and under no confidence vote is supposed to resign. The individual

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[9] The first written constitutions mark the beginning of this trend. The necessity of devices for checks and responsibility was justified best by **Madison J.,** The Federalist Papers, New York, 1961, N 51, 322.

ministerial responsibility may be political, criminal and civil, and depending on its nature may be exercised through the legislature or judicial branch. The cabinet and the ministerial legal acts are subject to control for the compliance to the parliamentary legislation by the administrative courts.

The judicial branch, which is more independent from the other branches of power, is under the obligation to act within the constitution and laws, drafted by the parliament, but judges, having immunity, can be removed on very limited grounds by impeachment or by special procedures exercised by the Council of Magistrates.

This short overview of the scheme of formation, performance of functions and responsibility is indicative of multi-dimensional division and counteracting of different agencies of power, which cannot be reduced to the division of the functions in government.

In democratic constitutional systems different degrees of separation between the legislative and executive powers depend on the form of government and on the particular legal family the country belongs to.

However, the degree of structural and functional autonomy of the judiciary is always greater than that of the legislative and executive branches of power, designed to be a forum of political struggle and the most important stake of the party aspirations. Constitutional arrangements on the judicial branch are structurally designed in order to prevent the Judiciary from becoming a subject of the political game.

The classic separation of powers principle is further complicated in the context of functional division of political decision-making - policy determination, policy execution and control over the political decisions[10]. Legislative assemblies, executive organs and judicial bodies might perform separately or blend the functions in the political process within one of the powers. The division of political functions does not coincide with the tripartite separation between the legislative, executive and judicial branches of government as a sole repository of one of the powers.

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[10] **Loewenstein K.,** Political Power and the Governmental Process, Chicago University Press, 1966.

Dynamic balance of powers is maintained through interdependence and cooperation between the branches to avoid conflicts, protect liberty and human rights, and to work against the concentration of power into any one of the institutions. Functional cooperation between the institutions is not unification or blending of powers, and cannot be interpreted as trespassing the separation between the branches and transforming it into its antipode – the unity of power principle. Hence, the thesis that in the modern nation state exists unity of state power and that separation of powers means division of functions only, may be considered as a way to avoid difficult answers regarding contemporary complicated dimensions of the principle. In any case, even the adherents of the simple division of functions thesis cannot prove that with the unity of power in a democratic constitutional state, rule of law and limited responsible government, that any institution at certain moment can exercise absolute power.

Bulgarian Constitutional Practice in the Area of the Separation of Powers

In the 1991 Constitution of the Republic of Bulgaria, the separation of powers formula should be interpreted in the context of the constitutional provisions on the formation, structure, competence, interrelationship and responsibility of the constituted branches of power. The meaning of Article 8 of the Bulgarian Constitution should be interpreted from the view of the preliminary differentiation of constituent authority and its agents – the Grand National Assembly and the Parliament – acting according to the procedures and super majorities, provided in Chapter 9 of the Constitution.

The constituted branches of power cannot exercise their functions without some interdependence, mutual control and cooperation. The normal practice in democratic constitutional government means that different powers interact within one constitutional framework, established by the constituent power.

Within the context of the parliamentary system of government, the unicameral National Assembly is the sole repository of the legislative power, intended to exercise parliamentary control over governmental

policies and action. The Council of Ministers and the Prime Minister are the embodiment of the executive power. Judicial power is exercised by the courts and administrative justice, being separated from other branches and under the leadership of the Supreme Judicial Council, in order to secure its independence.

At the first glance the President of the Republic is situated outside the tripartite configuration of the constituted powers, for in the determination of its competences the prime factor has been the secondary division of the separated constituted powers in order to achieve a better balance and create devices for the mutual control between the powers. Within the scheme of constitutional parliamentary government, the head of state, being a representative of the people, has been assigned exclusive competence and the function to react against the abuse of power by the other branches, especially when encroaching on civil and political freedom or trespassing the limits of their constitutionally enumerated powers. The Presidency has been attributed powers which can be performed only by sharing them with organs belonging to the other branches, exemplified by the powers of appointment and decrees which cannot be exercised without the initiative or recommendation of the executive power, and especially by the ministers, politically responsible to the Parliament, or by the Supreme Judicial Council. In Bulgaria, without being an agent of one of the constituted powers created by the horizontal separation of powers, the President is closer to the executive power. The Presidency plays important political functions too. Due to the political influence and moral authority the presidential institution has some functions of a "*povouir neutre*", especially in the duty to guarantee smooth performance of constitutional governance and by his or her status of a political arbiter to prevent and resolve the conflicts between the branches through negotiation and persuasion.

Being an institution for posterior, abstract, concentrated and specialized judicial review of the compliance of parliamentary statutes to the Constitution, the Constitutional Court is not assigned any of primary separation of powers of the three constituted branches of government, neither it is situated within the structure of the Judiciary. The Constitutional Court is the main institutional safeguard to the supremacy of the Constitution and to the separation of powers principle. No doubt,

the Constitutional Court is a constituted institution with limited powers, but has been attributed a role to keep the other branches of constituted power within the limits of the Constitution, or within the framework of the will of the constituent power. The Constitutional Court acts as intermediary between the constituent power and the legislative, executive and judicial branches of government by policing their functions within the constitutional limitations. While the president stands as a political guarantor to the constitutional supremacy the Constitutional court occupies the status of juridical arbiter by deciding on the conflicts of competence between the institutions.

The legislative power has been vested in the National Assembly, which according to the 1991 Constitution and preserving a trend in the system of parliamentary government excercises control over the executive, and particularly over the Cabinet's policy.

In accordance with the Bulgarian constitutional tradition since the Tirnovo Constitution, the Parliament is unicameral[11].

The National Assembly consists of 240 MPs elected by universal, equal and direct elections by secret ballot. The eligible candidates should have 21 years of age, not be under judicial interdiction and not be serving a prison sentence.

Bulgarian citizenship is a prerequisite for holding voting rights. However, the 1991 Constitution requires that only Bulgarian citizens can run in the parliamentary and presidential elections[12].

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[11] Since the debates on the 1879 Tirnovo Constitution the upper Second chamber of notables was considered to be a conservative element in the framework of the constitutional government and was severely criticized as a reactionary ornament, which has no place in the unitary state, slows down the speed of the legislative process and weakens political representation. Apart from these demerits of bicameralism its merits were not present in the public discourse and it seems no constitutional reform in the forseen future will even attempt to consider bicameralism. All of the 16 constitutional drafts contained unicameral assemblies and the structure of the Parliament did not receive serious attention in the Constitutional committee of the Great National Assembly which adopted the 1991 Constitution.

[12] The attempts to broaden the sphere of application of this provision in the local elections for candidates for mayors during 1995 law on the local elections were stopped by the Constitutional court of the Republic of Bulgaria declaring unconstitutionality of the relevant statutory provisions. The founding fathers considered double citizenship as an impediment to the right to be elected since there

Since the drafting of the 1991 Constitution, eight general elections were held in 1991, 1994, 1997, 2001, 2006, 2009 and 2013 and 2014 under the proportional system in multimember districts and the results have been determined by the D'Honte method[13]. Though the proportional electoral system has been under severe critique in all pre-election debates, for it safeguards the parties' leadership influence over the selection of candidates and prevents the election of more and independent deputies, it has been preserved so far. The most important changes concern the codification of the four electoral laws in a unified electoral code, appointment of professional Central electoral commission and the introduction of preferential voting to decrease the party leadership control on the electoral lists.

Moreover, party lists are limitation to the liberty of the voters, since they frame their vote on party preference, attributing secondary importance to the personal qualities of candidates. The influence of parties on the selection of candidates has two important effects. It stabilizes the Cabinet within the context of a proportionally elected Parliament on the one side and stirs up the party factions discipline on the other, decreasing the significance of parliamentary debate and silencing majorities' support or opposition to government bills.

Deputies enjoy functional parliamentary immunity from detention or criminal prosecution except for perpetration of high crime, when a warrant from the National Assembly or by its chairman, if the Assembly is not in session, is required. No warrant, but notification only, should be required if an MP has been detained in the course of committing a grave crime.

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might be conflict of loyalities. If a person holding double citizenship would like to stand for parliamentary ellection, he has to give up his foreign citizenship before registration. In 1996 during the term of the previous 37 legislature, the Constitutional court of the Republic of Bulgaria cancelled the election of an MP who besides his Bulgarian citizensip was holding US citizenship, acquired by naturalization.

[13] D'Honte method has been borrowed from the procedure for counting proportional representation in the German Bundestag. The system acts in favor of the parties' leadership and with the limited number of parties represented in the legislature is instrumental to cohesion of the parliamentary groups, fosters party discipline of the MPs and adds to the stability of parliamentary majority government.

A majority of the MP's, consisting of more than a half deputies, constitutes the quorum to conduct business in the National Assembly[14]. All decisions in the National Assembly are taken by simple majority voting, except for the no confidence vote and voting after the presidential veto has led to the return of a bill for second voting.

The power to introduce bills belongs to the MPs and ministers and the draft laws are assigned by the Chairman of the National Assembly to the so-called leading commission, i.e. the commission according to the subject matter of the bill. The practice however indicates that about 90% of the laws are bills, introduced in the assembly by the government, which is considered to be normal wthin all parliamentary systems of government. The Cabinet has been always technically better equipped and informed about the need to introduce bills and the regulation it should provide. Attempts to improve the chances for MP legislation with a slight increase of the number of the parliamentary experts or by forming a Council on Legislation in the Parliament were unable to balance the Cabinet predominance at the initial phase of the legislative process[15].

[14] Electronic cards for registration and voting have been introduced in Parliament, but sometimes abuses have been reported with some of the absent MPs lending their cards to be used during absence by their colleagues present in the Assembly. This danger to the representative democracy practice has led to different proposals for amending the practice and procedures of voting. In the beginning of 1999 the Chairman of the 38 National Assembly proposed amendments to the House Rules that would allow voting from other buildings, so that the MPs which are not present in the Parliament's building can excercise their voting rights themselves, following the parliamentary debate on TV monitors. Since such proposition is unheard of to any parliamentary institution in the world it did not receive any particular attention and was not seriously debated.

[15] The 1991 Constitution has not specified subject matter of parliamentary legislation according to the example of the 1958 Constitution of the Fifth French Republic and 1991 Constitution of the Republic of Romania. There has been also no division of legislation into different types - constitutional, organic and ordinary laws. Having in mind the abuse of law decreeing power of government abused during the times of Tirnovo constitution, the founding fathers did not consider worth including provisions for delegated legislation in the 1991 Constitution, which might have been helpful to the legal reform. Particular reservations for statutory regulation are to be found in Chapter 2 of the Constitution concerning human rights. Leaving the domain of parliamentary legislation unlimited, has sometimes lead to appetites of MPs and parliamentary groups to regulate matters which are traditionally arranged by substatutory provisions by the administration.

One more constitutional principle deserves special emphasis. The 1991 Constitution has accepted the priority of international norms over the municipal law. The 1991 Constitution (Article 4 and 5) declares that all the international instruments ratified by Bulgaria shall become domestic law. Moreover, they should take precedence over conflicting domestic law. International norms should not automatically supersede the provisions of the Constitution, and on the interpretation of the Constitutional court issued before the ratification in case of contradiction the Constitution is to be amended before of the approval of the international instrument in the National Assembly.

The Constitution in Article 85 has specified that international instruments which are of a political or military nature, concerning State participation in international organizations, envisage corrections of the borders, contain obligations for the treasury, envisage the state participation in international arbitration and legal proceedings, concern fundamental human rights, affect the action of the law or require new legislation in order to be enforced, are subject to parliamentary ratification.

With Bulgaria’s full EU membership since 2007, the EU law has received supranational, direct, immediate and horizontal effect.

Besides legislative power and ratification of the international instruments, the Parliament adopts the budget, establishes taxes, determines the holding of national referendums, elects and dismisses the Prime Minister, the ministers, and resolves personal and structural changes in the Cabinet on the Prime Minister’s motion, declares war, peace and martial law, approves state loan agreements, deployment and use of Bulgarian armed forces outside the country and foreign troops on the tereitorry and crossing national territory, schedules presidential elections, grants amnesty, etablishes orders, medals and national holidays. The National Assembly also elects one third of the judges in the Constitutional Court and a fixed quota of the Members of the Supreme Judiciary Council.

The 1991 Bulgarian Constitution ruled out voluntary or – self-dissolution of the Parliament, revocation of the mandate by the people, and provided for executive dissolution of the Parliament, limited on

certain conditions[16]. The Parliament is to be dissolved by the President if efforts to form a Cabinet are ineffective and the legislature cannot elect a government to remain in power with parliamentary support.

The executive power is vested in the Council of Ministers elected according to the principles of parliamentarism by the National Assembly from the majority party or coalition, and excercises its functions so long as it retains the parliamentary confidence.

The 1991 Constitution established positive parliamentary government with the vote of confidence being a mandatory element in the procedure of the Cabinet investiture.

The Cabinet is politically and collectively responsible to the Parliament, and an absolute majority of MPs can bring the government's resignation by no confidence vote, with the motion on censure able to challenge the whole policy or a particular sphere of executive action.

The Council of Ministers formation procedure has been borrowed from the 1975 Constitution of the Greek Republic investiture of government. This procedure was devised to prevent frequent parliamentary crisis, which by the time of the drafting of Bulgarian constitution was to be expected as a normal outcome of party struggles and inability of reaching political compromise due to drastic polarization under the challenges engendered by the difficulties of transition.

Under the 1991 Constitution, the President plays an active role in the investiture of the Cabinet but has limited power of parliamentary dissolution. Following the consultations with the parliamentary groups, the President appoints the Prime Minister - designate, nominated by the party holding the highest number of seats in the National Assembly to form a government. If the Prime Minister-designate fails to form a government within seven days, after reporting to the President, a new Prime Minister - designate, nominated from the second largest party should be entrusted by the President to form a government. Upon a failure of this second Prime Minister-designate to form a cabinet, the President should appoint a third Prime Minister-designate, nominated by one of the minor parties in parliament upon his choice. If the third

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[16] On the different modes on the dissolution of the parliaments in comparative prospective see, **Markesinis B.S.,** The Theory and Practice of Dissolution of Parliaments, Cambridge, 1972.

attempt to form a government has been unsuccessful it is considered as a proof of the inability of the parliament to produce a government, and the President has to dissolve the National Assembly, schedule new general elections to take place within a two months and appoint a caretaker cabinet, which is presidential, for it owes its mandate and is responsible to the President[17].

The President – the elective head of state under the 1991 Constitution of the Republic of Bulgaria – has been shaped as an asymmetric institution. Directly elected by an absolute majority system in two rounds he can serve for two consecutive terms each being five years. In this way the constitutional system is based on double legitimacy. The powers of the President, however, are limited for at the time of the drafting of the constitution the majority in the Grand National Assembly feared the emergence of one man rule which has been a tradition in Bulgarian politics since the liberation in 1878 and throughout the communist past.

The powers of the President put him on the scale of parliamentary presidents closer to the German than to the president of the Fifth French Republic, with the institution being more similar to the President of Finland or Austria. Of all constitutions of the emerging democracies, notwithsthanding the parliamentary system of government, in Bulgaria the institution of vice presidency has been established[18]. The Vice President is chosen on a ballot with the President, and, except balancing, the ticket serves the important function of replacing the President in the case of vacancy in office for the whole remaining term.

The President is Commander in Chief of the army and presides over the National Security Council, and for the first time since the adoption of the 1991 Constitution – the National Consultative Council.

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[17] During the January 1997 political crisis in Bulgaria caused by the ill devised and poorly executed policies of Bulgarian socialist party J. Videnov's government this system had a disasterous effect for preventing resolution of the political conflict by dissolution of parliament; it contributed to building extraparliamentary popular actions, endangering the peaceful transition to democracy, which has been acnowledged to be the highest achievement in Bulgaria since 1989.

[18] So far the single example of a parliamentary constitutional system providing Vice President has been India since 1949.

He appoints the heads of the armed forces and declares war or national emergencies when the parliament is not in session.

The President has no power to initiate laws, but he exercises suspensive veto to be overcome with absolute majority by the parliament, and he can influence the legislative process by his messages and addresses to the nation and to the Grand National Assembly.

The presidential power of political arbitrage consists in reaching compromises, resolving the conflicts and facillitating smooth functioning of the constitutional system. The President is not politically responsible for his actions and policies, except for the breach of the Constitution when he can be impeached by the National Assembly by a qualified majority and tried before the Constitutional court.

The constitutional requirement of countersignature, however, was designed to safeguard the Presidency, making the minister who signs the act parliamentarily responsible and in this way securing the principle of limited and responsible government.

The Council of Ministers is headed by Prime Minister, being principally the leader of the party or coalition winning the parliamentary election[19].

Implications of Separation of Powers Principle for Constitutional Review and Particularly for the Constitutional Courts

To the greatest extent the principle of separation of powers and the mode of its application is primordial to the locus standi of the Constitutional Court or where the Constitutional Review is located in the national constitution and the established form of the government.

[19] However during the 1992-1994 the country was run by a cabinet formed with the mandate of MRF, being the third in parliamentary strength but with the support of BSP, the second in parliament an independent person - presidential adviser L.Berov served as a Prime Minister. The composition of the cabinet is not prescribed in the 1991 constitution, neither the number of the ministries is limited by it; and it depends on a decision of the National Assembly. The Council of Ministers has so far included Deputy Prime Ministers, ministers and chairmen of state committees. One party governments have prevailed.

There are three basic dimensions of the separation of powers principle with implications to the constitutional courts within the nation state constitutional and legal system.

In general this approach considers the relationship of the Constitutional Courts:

- within the framework of constituent versus constituted powers,
- the other branches of power – executive, legislative, and, to a certain extent, the local authorities,
- relations with other courts and institutions of the judicial branch.

In the European systems of constitutional review the following models can be found:

1. Constitutional courts being part of the judicial branch – especially for those that have provided for direct complaint by the citizens and legal persons. It might be explicitly stated in the constitutions, it might be implicit by including regulation on the Constitutional Court within the Chapter dedicated to the judicial branch. However, if the judicial decisions might be appealed and referred to the Constitutional Court, then the Constitutional Court becomes itself the highest tier or instance within the system of the judicial branch.
2. Constitutional Courts – situated outside the realm of the three branches classical triad of Montesquieu. Constitutional court (CC) is a fourth or a fifth branch in the sense of Benjamen Constant neutral power political arbitrage reserved to the head of state under the parliamentary system of government. CC in a position of legal arbiter or neutral legal intermediary without primary domain of divided powers but only secondary checks as part of a secondary division of branches.
3. Pragmatic approach – defining the locus standi in the separation of powers framework by the functions of the CC.
4. Location of CC between the constituent and constituted powers – the CC as police to the constituent power, a limited intermediary between these two powers. They have no powers to develop, extend or amend the constitution, which is a realm of the constituent power, but are obliged to interpret and update

constitutional provisions within the borders and limits set by the founding mothers and fathers of the Constitution.

Supranational Dimension of the Separation of Powers Principle

Supranational legal systems – trends in constitutional government forms evolution

- from the clear cut division of Ulpinian Roman law between *ius civile* and *ius gentium* to *pacta sunt servanda* principle in public international law,
- from *pacta sunt servanda* through the principle of primacy of international law and by legal transplants and implementation of soft law international standards to harmonization and gradual low intensity, step by step incremental constitutionalization,
- from constitutionalization to multiple unevenly developed but interacting constitutional orders,
- from unwritten constitutional commitments and arrangements to constitutional pluralism.

In the context of the supranational separation of powers Constitutional Court have special functions in adjusting national constitutional law and supranational constitutional systems

1. Constitutional Courts and supranational Law avoiding and settling conflicts with international treaties or EU law within the context of European integration;
   - harmonization, unification, legal transplants;
   - hierarchical structuring, opening of national constitutions and pooling of sovereignties;
   - harmonious parallelism or in securing harmony through constitutional contrapunctualism.
2. Constitutional Courts and Supranational Courts – separating powers beyond nation states constitution setting jurisdictions and keeping borders between different judicial systems.
3. Constitutional Courts act in partnership and cooperation with supranational courts and respect of evolving common constitutional jurisprudential practice in the context of

interacting multiple constitutional orders under constitutional courts.

Sometimes this complicated relationship has been labeled as judicial diplomacy between national and supranational courts.

Conclusion

Within the fabric of constitution drafting, principles might be considered an intermediary link between political institutions and legal norms. If constitutional architecture might be approached as an abstract normative activity, a series of decompositions might be observed. The first transformation being decomposition of democratic values into democratic constitutional principles followed by the constitutional principles decomposition into constitutional norms, recognizing and protecting fundamental human rights on one side, and building institutions and distributing competencies between them, on the other. Then according to the hierarchy of the national legal system, constitutional provisions receive detailed regulation in the parliamentary legislation or the executive law making and are interpreted and enforced by the constitutional courts and other courts of general or specialized jurisdiction, as well.

In this train of thought, values might be considered as cornerstones of the constitutional framework. Constitutional principles perform the task of functional safeguards to human rights and constitutional government, on one side, and guarantee the values around which the constitutional consensus has been reached, on the other.

Values exert crucial effect on the functioning of constitutional principles. A fully-fledged democratic constitutional system cannot survive if protection of democratic values which have been considered reasons for the very construction of a written constitution are inefficient. Deviation from the original values around which the constitutional system was built might be the beginning of the end of constitutional democracy or the end of the beginning of democracy if the principles are set free from their initial authentic democratic content shaped by the constitutional values.

Keeping a democratic constitution from malfunctioning or descending to autocracy requires adherence of constitutional principles to initially agreed democratic system of values. Severing the link between values and principles in a constitutional democracy might subvert the role of democratic principles to protect non-democratic values or antipodes to the original democratic values.

Majority rule might be used against sovereignty of the people by removing people from the position of beneficiaries of governmental decisions achieved by direct or representative democracy, and even abused by legitimate encroachments on human rights.

Separation of powers might be transformed into a tool of limiting political freedom and individual rights if the institutions bearing varying powers act in a divided manner though in agreement to limit democratic government. Nearly the same result might be achieved when the conflict between the powers exacerbates to such an extent that democratic governance cannot defend its sustainability.

Rule of law or *rechtsstaat* in a formal sense might be utilized against political liberty, justice and security to defend the legality of enlightened despotism or to confer legitimacy to a constitutional autocracy.

However, sustainability of constitutional democracy requires the adapting of values and principles to the evolving social reality in order to protect democratic constitutional system from withering away, by being unable to preserve itself from the challenges of accelerating transformations in contemporary globalized world.