– draft in progress –

Separation of Powers in Democratic Theory: Understanding Populism and Rise of the Unelected in Central Europe

Jiří Baroš, Pavel Dufek, David Kosař*

Masaryk University, Czech Republic

Abstract: *The concept of separation of powers is notoriously vague and contested. Usually, we realize what separation of powers is only once we have lost it, as evidenced by recent efforts by ruling parties in Hungary and Poland to remove all institutional barriers to pursuing their will. Our argument in this paper has theoretical and empirical aspects. On the theoretical plane, we argue that the concept/principle of separation of powers has been awkwardly neglected in recent democratic theory, even though it provides the backbone of any constitutional democracy and, in its enabling role, resembles full-fledged normative political theory. To tackle it vagueness, we suggest to differentiate between four components of the concept: separation of institutions, separation of functions, personal incompatibility, and checks and balances. On the empirical plane, we show that in order to understand recent challenges to separation of powers in Central Europe we need to take into account historical-political trajectories that have left CE countries with certain mental path dependencies such as instrumental use of law, which have prepared ground for the recent assault on separation of powers. Only after sorting out the theoretical and historical-political background is it possible to grapple with two major recent challenges to the separation of powers in the region – populism and the rise of unelected institutions. We show that populists target some components of separation of powers more aggressively and may attack different components depending on the phase of the populist regime.*

Introduction

Countries of Central Europe (hereinafter also CE) have been routinely depicted as unequivocal success stories of post-communist transitions to liberal (constitutional) democracy, despite a few expectable hitches. Given the generally optimistic outlook,

* Contact person: Pavel Dufek, dufek@fss.muni.cz. We thank Francesco Clementi, Giuseppe de Vergottini, Francesco Biagi, Cristina Fasone, Martin Hapla and Radek Píša for their comments on earlier versions of the paper.

which most likely corresponds to a teleological vision of a linear unfolding of ever-more-democratic democracy, recent developments in the region must have come as an uncomfortable revelation to academic researchers. The turn to populism and (at best) general public indifference to, or (at worst) even wide support for governmental encroachments upon the principle of separation of powers, seem to contradict the desirable path of history.

Constitutional scholars both from within and outside the region have been fairly quick to inquire into the scope and ramifications of these developments, although their understanding of democracy tends to one-sidedly favour a constitutionalist, rather than constitutional-*democratic*, perspective. Meanwhile, democratic theorists have been busy devising novel and innovative accounts of democracy, its justification, legitimacy, or particular institutions/instruments such as deliberation or political representation – not least in response to cautionary voices that liberal (constitutional) democracy *as such* is undergoing crisis (of which the CE developments are in fact good examples). Curiously yet revealingly, however, the principle of separation of powers (hereinafter also SoP) is nigh absent in much of contemporary democratic theory. How come, given that it constitutes a fundamental institutional and normative building block of liberal democracy as we know it? One point we wish to make is that occasional calls for a "new separation of powers" by democratic theorists suffer from a major undertheorisation, which should be seen as a problem insofar as the concept of SoP, as expounded in constitutional as well as political theory, is notoriously vague, contested, and prone to concept stretching.

While the ills of CE democracies certainly go beyond assaults on the separation of powers, the fact is that a great many local political leaders perceive the principle as a major obstacle to centralising power and running their countries as they see fit. Because it is closely linked to the rule of law as another fundamental principle of a constitutional democracy, we believe that developments in CE countries might serve as a useful background to a more theoretically minded exploration of the SoP, its normative roots, and specific challenges to it. Taking the CE experience as a sort of a "magnifying glass" for SoP-related issues, we concentrate on two particular trends: The so-called "rise of the unelected", including judicialisation of politics, and the powerful wave of populism. Our message might be generally framed as expressing the conviction that we realise the value of certain principles (and corresponding institutional solutions) only once we have

lost them,[1] and this is why we should be careful about giving up too easily on some traditional motivations behind the SoP, in the name of theoretical novelty.[2]

This paper proceeds as follows.[3] Section I overviews the main rationales behind the concept – limiting and enabling – and identifies three justifications behind the latter. We point out that the positive/enabling aspect of SoP brings it close to a full-fledged normative political theory, which has several important consequences, some of which tend to go unnoticed by constitutional and democratic scholars alike. Section II unpacks the concept into four components: separation of institutions, separation of functions, personal incompatibility, and checks and balances. We argue that this internal complexity, especially coupled with several other adjacent principles, renders the concept highly indeterminate, which dovetails with the previous point. Section III goes empirical, outlining the specific experiences of the four Central European countries and what ramifications arise for applying the principle of separation of powers here. It thus sets stage for section IV, which discusses the two major challenges to separation of powers that Central Europe faces today – that is, populism and rise of the unelected. Besides pointing out how the undifferentiated usage of the concept might distort our understanding of what has gone wrong, some theoretical lessons are drawn as well with regard to the place of the principle within contemporary democratic theory.

I. Limiting and Enabling: Rationales of the Principle and their Justifications

The separation of powers is the one of the many concepts in political thought that have migrated from "the West" to the Central European context. In order to understand both the theoretical and practical challenges facing the new democracies, we first need to sketch the architecture of the concept. This will allow us later to identify particular deficiencies in both theory and practice of the separation of powers.

To borrow Russell Hardin's terms, institutional arrangements in a constitutional regime have two distinct rationales: enabling and limiting. (A) In the former role, institutions are meant "to make various actions and results possible", because there is a need for "specialization and organization to get many things done at all." (B) However, not always do we want to achieve some aim in the most efficient way, and, as a consequence, we "raise the cost of instant coordination on many possible actions and results, sometimes to make such coordination prohibitively difficult" (Hardin 1999: 82).

[1] Hapla (2017: 36) draws a similar conclusion, noting that it is actually very difficult to tell whether something has gone gravely wrong about separation of powers (both in principle and in practice) if no "means of testing" – that is, imminent threats – are available.

[2] We thus share some of the sentiments Jeremy Waldron has expressed (2016: 71).

[3] Let us note in advance that we do not engage here the issue of separation of powers beyond the state (both vertical and horizontal), although we acknowledge its rising importance. See e.g. Napel and Voermans (2016).

Consequently, not only is the popular will blocked, but also the will of the political elites as well as the potential abuse of power by political officials.

Even though it comes natural to put the limiting role of constitutions into the forefront (cf. Walluchow 2007), it is implausible to link constitutionalism solely to its negative role, as often happens in discussions of the counter-majoritarian difficulty and related issues.[4] After all, one cannot impose limits on legislative, executive and judicial powers unless they have been created in the first place and embedded in a broader structure of government, with some positive purpose in mind (Whittington 2010: 281ff.). Stephen Holmes points out that constitutional constraints themselves are intended to not only limit, but also indirectly *enhance* or strengthen the (democratic) exercise of power.[5] However paradoxical it may seem at first glance, imposing limits upon themselves can be highly rewarding from the point of view of elites themselves (Holmes 2003: 20). In line with Hardin, Holmes (1995: 6) also maintains that "constitutions not only limit power and prevent tyranny, they also construct power, guide it towards socially desirable ends, and prevent social chaos and private oppression". Waldron (2016: 33–38) adds that as far as normative modalities go, there is always a triad: prohibitions, permissions, and *requirements*, and there is no good reason why political and constitutional theory should discard the third option – especially if we agree that constitutions are meant to *empower* people to cooperate and coordinate their pursuits, preferably on equal – democratic – footing.

Let us finally mention three justifications of the enabling rationale which take us towards a partial synthesis. Although Christoph Möllers (2013: 41) still considers the "ban on the usurpation of powers" as "the most important as well as the most complicated" interpretation of the SoP, he develops his own conception of the separation of powers from within the idea of individual and collective *self-determination*: According to Möllers, the task of the three branches of government is the creation of law; consequently, he contemplates both the philosophical justification and the particular roles of the legislature, the judiciary, and the executive power in law-making.

Aileen Kavanagh takes a different route: According to her "reconstructed view", the principle of separation of powers, apart from its correcting role for potential abuse of power, tries "to allocate power and assign tasks to those bodies best suited to carry them out" (Kavanagh 2016: 230). The SoP can be disaggregated into a "division-of-

[4] This point does not rule out the (very real) possibility of tensions between the (institutional embodiments of) principles of constitutionalism and popular sovereignty; we merely emphasise that the former is never solely about creating limits and obstacles.

[5] Loughlin (2003: 46) makes a similar claim, noting that limiting a power is connected with a purpose which is never only negative one and often has much to do with identifying and/or pursuing the "common good".

labour component" which is to be combined with a "checks-and-balances component".[6] These two components are then underpinned and held together by a deeper value of "joint enterprise of governing", which is itself based on the imperative of *efficiency* (ibid: 232).

Finally, Jeremy Waldron analyses the principle of separation of powers dynamically as a process of "articulated governance" which aims to channel the action of government and disaggregate it into several – as much as ten, in Waldron's case – stages, from earliest deliberation about the desired policy to adjudication of potential disputes. These are variously distributed among the branches of power, depending on their capacity for the task at hand (cf. Waldron 2016: 62–65). Waldron sees much overlap between the separation of powers and the *rule of law*, because the core point of articulated governance is to protect the values of "liberty, dignity, and respect" that are embodied in the rule of law.

Three basic justifications behind the enabling rationale of the SoP thus include (i) self-determination, (ii) coordination and efficiency, and (iii) the rule of law (the process-related conditions of political life). Note that the three types of justification roughly correspond to three basic notions of political legitimacy – that is, input-based, output-base, and process-/throughput-based.[7] Let us think of them as alternative justifications of the enabling aspect of separation of powers, although it could be argued that the throughput one tries to combine the other two justifications (without subscribing to any substantial assumptions), painting in essence an image of successive phases of governance where the legislature has the right of kick-off and the judiciary of wrap-up.

However, there is one more point worth stressing. Once talk about "self-determination", "efficiency", "welfare", "liberty", or "procedural fairness" commences, we are inevitably pulled into the domain of normative political theory, for there are no apparent moral or political truths about which justification and which corresponding set of values should take priority – on the contrary, there is an awful lot of disagreement. In other words, the enabling role of separation of powers takes us to the very heart of contemporary debates among political theorists (and political philosophers, if distinction is needed). But of course, this applies in an obverse manner, too: Any conception of SoP which includes the enabling rationale cannot steer clear of the muddy waters of normative theorising, rendering the given conception a piece of one's normative outlook. Some constitutional theorists acknowledge this is unavoidable, and perhaps laudable, for what we are dealing here is politics and it is obviously wrong to construe politics as a non-normative, value-free enterprise.[8]

[6] This corresponds with the internal differentiation of the SoP we make in the next section.
[7] Other core political values such as welfare or individual liberty could be mentioned as well.
[8] Möllers (2013: 2ff.) and Carolan (2009: 5, 31ff., 255) openly acknowledge the point.

Let us now use slightly different words. All this amounts to saying that conceptions – and in some cases, theories – of the separation of powers can be filled up with substance, and subsequently employed in theoretical argumentation, depending on whichever normative vision of a society the given author deems preferable and wishes to defend and justify.[9] In our view, this is an especially uneasy situation for democratic theorists who tend to simply match their "new" conceptions of the SoP – provided they engage it at all – to the broader normative vision, without serious regard to the sophisticated internal logic of the concept/principle. If the SoP really forms the backbone of constitutional democracies and structures in a major way their political life, then there should be something worrying about this habit. It comes as little surprise that the separation of powers has been included by Waldron (2016) among the core principles/institutions of liberal democracies which political theorists and philosophers of our time manage to successfully ignore.

Lastly, we can understand this difficulty as a part of the reason why the negative, limiting rationale still retains theoretical advantage, dare to say primacy. Unlike all the positive aspirations ascribed to the enabling rationale, prevention of tyranny or abuse of power – to use the old-fashioned notions – is *fairly* uncontroversial in a liberal democracy. We will return to this point in a more empirical setting in section IV.

II. Four Components and Adjacent Principles

In a recent essay, Waldron (2016: 49) distinguishes five mutually interrelated principles which "work both separately and together as touchstones of political legitimacy": separation of powers, dispersal of power, checks and balances, bicameralism, and federalism. This allows him to carefully delineate what goals and ideas the SoP covers and which are better assigned to the other principles. We will however take a different road, construing the SoP more broadly, so that it includes both three core meanings of "separation" (of institutions, functions, and personal incompatibility) and the principle of checks and balances which gets often confused with the SoP itself. In other words, we combine the "pure" doctrine of SoP (which consists of the first three components) with the contrary principle of checks and balances.

The pure doctrine prescribes division of the government "into three branches or departments, the legislature, the executive, and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive, or judicial. Each branch of government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch" (Vile 1998: 14). However, the pure version quickly proved inadequate because it implausibly expected that mere existence of separate

[9] Carolan (2009: 31ff.) emphasizes the arbitrariness of the principle.

branches of government could somewhat mysteriously prevent concentration of power (Matteuci 2011: 147–157; Troper 1980). By appropriating elements of the ancient "doctrine of a mixed constitution", a new doctrine of checks and balances was devised, under which each branch of government, while retaining distinctive functions, was intended "to modify positively the attitudes of the other branches of government" (Vile 1998: 79).[10]

(1) *Separation of institutions* is an essential part of any constitutionalism that aspires to disperse power.[11] As Waldron pointed out, the principle of dispersal of power "counsels against the concentration of too much political power in the hands of any one person, group, or agency" (Waldron 2016: 49).[12] Among institutional expressions of this component of separation of powers, we find imperatives such as no overlap and no accountability to other branches, immunity/indemnity, or the separation of government and Parliament. However, given the enabling rationale of constitutionalism, this component alone cannot capture all the preconditions for a full-standing principle of SoP. Separation of powers also covers "the original power-allocation" because powers are not "allocated to different branches on a random basis" (Kavanagh 2016: 230). As such, separation of institutions must be linked to the prior idea of specific functions.

(2) *Separation of functions* originally stems from the idea "all government acts (…) can be classified as an exercise of the legislative, executive, or judicial function" (Vile 1998: 17), which should be entrusted solely to the corresponding branch of the government ("institution"). Of course, it would be naïve to claim unique correlation between a specific branch and concrete function; such a claim is proved false by simply looking at the functioning of the modern state in which "all three branches exercise all three functions to some degree"; also the assumption that each branch is endowed by one core function is unpersuasive (Kavanagh 2016: 226–227; cf. Kelsen 1945: Part III; Bellamy 2007: 201–202; Carolan 2009 *passim*). Examples include judicial law-making, the existence of quasi-judicial bodies and administrative agencies (court-like behaviour), courts acting as administrative organs, parliaments as administrative organs or as courts; delegated legislation by the executive; or administrative legislation. Still, the

[10] This is not the place to discuss the precise relationship between the two ideas. We find convincing Somek's (2016: 38ff., 57ff.) explanation that whereas mixed government assumed pre-legal (pre-constitutional) existence of social classes or strata (aristocracy, bourgeoise, peasants etc.), actors in a system of checks and balances are only *created* by the constitution, whose origins – at least in the classical version of constitutionalism, which Somek calls "Constitutionalism 1.0" – lie with the undifferentiated sovereign people.

[11] This idea was commonplace among framers of the American constitution who were afraid of excessive and tyrannical concentration of political power. The solution lied in the creation of multiple government departments pitted against each other in a competition for power, which was expected to function as an invisible-hand dynamic (cf. Levinson and Pildes 2006: 6).

[12] Waldron treats the principle of dispersal of powers independently of the principle of separation of powers. Because we pursue slightly different aims, we "spread" dispersal of power across the three types of separation.

traditional idea of different (separate) function keeps lurking behind (Guastini 2010: 148–149), even though the particular tripartite division has been always challenged.[13] There is something intuitively plausible about wanting the legislature to legislate, the executive to carry out, and courts to adjudicate, while avoiding excessive "contamination" by practices alien to the respective functions (Waldron 2016: 66ff.).

(3) The third component of separation of powers is the *separation of persons*, also known as *personal incompatibility*.[14] The original idea of separation of persons was based on "the recommendation that the three branches of government shall be composed of quite separate and distinct groups of people, with no overlapping membership" (Vile 1998: 18). However, the imperative of strict separation of personnel turned out to be too demanding, and the third component has been therefore understood as at most a general recommendation (Kavanagh 2016). Especially in parliamentary (as opposed to presidential) systems, being simultaneously a MP and minister of government is considered fully standard. One exception is adjudication of legal cases where interests of other branches of government are at stake; in such cases strict independence of courts is required. Other than that, many believe the independence of courts is not undermined even if judges become members of the upper chamber of the legislature.

(4) The principle of *checks and balances* is the countervailing component of the separation of powers as we conceptualise it here. Contemporary scholars take it as the proper/typical expression of the modern idea constitutionalism (Loughlin 2000: 183). Exercise and possible arbitrariness of state power must be internally checked and controlled, so that it does not encroach upon the sphere of individual liberty, or does not undermine the pursuit of collective goals. As hinted above, appropriation of elements of the older theory of mixed government made it possible to introduce a more complex and adequate approach to mutual relationship between branches of government. The respective institutions were now granted the power to exercise the functions of others, as well as a certain degree of direct control over them (through such institutions as veto power or impeachment). An interesting symbiosis emerged, at least in theory: While the principle of checks and balances *presupposes* the separation of institutions, it precludes a total enclosure/specialization of a particular function (Guastini 2011: 154).

In practice, the coexistence of the separationist and balancing components has turned out to be rather uneasy (Magill 2000). Their respective logics pull in opposite directions, to the effect that the two groups of components do not easily fit together and bring

[13] The number of branches has been either reduced to two (some normativists) or expanded to four, five or even more (Bognetti 2001, Carolan 2009), with the extra branches provided by administration, media, constitutional courts, or external (international) actors.

[14] This has a lot to do with the issue of *cumul des mandats*, an area of research shared by constitutional theorists and political scientists alike. Cf. Hájek (2016).

about divergent or even incompatible implications (Guastini 2011: 155–161). But that is not all. First, recall that there are further "adjacent principles" such as bicameralism and federalism; if we follow Waldron's suggestion, then dispersal of power as well as checks and balances can be construed as freestanding (if related) principles of their own. Choice in one place does not necessarily determine choices in others, and conceptual-theoretical options quickly multiply. Second, and related, there are still other axes of potential separation, such as division "of different branches of the armed and police forces, the separation of secular from religious authorities, and indeed, the separation of centres of political power from those in control of commerce and business," which are "liable to be just as important as more formal devices in guarding against the abuse of public power" (Pettit 2013: 222). Third, any of these can be assigned a limiting or enabling role, not to mention the variations within the particular justifications. The SoP thus turns out to be not only vague and contested, but also highly indeterminate, especially if we keep in mind that the enabling rationale quickly introduces substantive normative commitments. Specifically for purposes of democratic theory, we suspect the SoP is a prime target for attempts at concept-stretching; that is, inflationary pressures rooted either in substantive normative convictions, or socially constructed associations and presuppositions (Beerbohm 2011; Whitehead 2011).

Again, we can see that the principle of separation of powers can be employed quite arbitrarily in a political argument, but it should be now also clear that there is no easy way out of the predicament, just as there is no obviously victorious set of normative beliefs in political theory. This is the most general theoretical upshot of the preceding two sections. The practical consequence is that it is ultimately impossible to devise any definite blueprint for how the principle should be understood and implemented. All this adds to the importance of *political judgement* (cf. Beiner 1984) on whether a particular constitutional design is lacking on the limiting or enabling side. In the following two sections, we turn our sights back on the Central European region, and consider to what extent our explorations prove useful vis-à-vis the twin challenge of the rise of the unelected and the populist upswing.

III. Specifics of Central Europe and Their Ramifications for the Separation of Powers

In comparison to established liberal democracies, Central Europe has experienced much different historical-political trajectory. As a result, straightforward applicability of the standard model of separation of powers, as developed for Western liberal democratic countries, turns out rather problematic.

(1) First, virtually none of the Central European countries possess a reasonably long tradition of democratic self-rule, and, with a partial exception of Hungary, there was little experience with genuinely independent statehood until 1918 (arguably until 1989). Czechs lands were under the control of the Habsburg Empire for almost three centuries after the Thirty Years War (1618–1648). Poland faced a similar predicament: After a series of invasions by the Russian Empire, the Kingdom of Prussia and the Austrian

Habsburg Monarchy, the three regional powers partitioned the Polish territory in 1795. As a result, no truly independent Polish State emerged until 1918. Slovaks were even worse off, having been subjected to Hungarian rule which included rather harsh suppression of any signs of Slovak culture. Hungary is the only outlier, as Hungarians enjoyed significant autonomy after they had forced the Habsburgs to create the dual monarchy of Austria-Hungary in 1867.

Although both Bismarck's Germany and Austrian Empire developed into constitutional monarchies in the late 19th century which created certain room for the separation of powers[15] and the *Rechstaat* principle (Kann 1974; Schmitt 2008; Kühn 2011) and whose legacy ultimately proved critical for the post-WWI and post-WWII development in Austria and Germany (Kelsen 1945, Caldwell 1997; Dyzenhaus 1999, Jacobson and Schlink 2002, Hailbronner 2015), these constitutional monarchies were under the control of Germans and Austrians and the relevant debates held in German found limited traction among Czech, Slovak and Polish elites (Bibó 1991). Hungarians ran their own version of monarchy until the First World War in which absolutist elements prevailed. After the short interwar intermezzo (1918–1938) which was not too conducive to the idea of separation of powers anyway,[16] the Second World War brought

[15] The principle of separation of powers was expressly recognized in the Austrian basic laws of December 1867. See The basic law No.141/1867 *Reichsgesetzblatt* (Official Journal of Laws of Austrian Empire, hereinafter "*RGBl.*") on the Legislative Power, No.145/1867 *RGBl.* on the Executive Power and No.144/1867 *RGBl.* on the Judicial Power.

[16] The often lauded interwar period hardly provides a rosy picture. While the Hungarian Democratic Republic and then the Hungarian Soviet Republic were briefly proclaimed in 1918 and 1919 respectively, Hungary soon returned to a monarchical regime – the so-called "Regency" of 1920–1944, in which the Regent Miklós Horthy de facto ruled as a dictator instead of the formal head of the state, King Charles IV. While Poland and Czechoslovakia abandoned monarchy and, guided by the principle of separation of powers, adopted constitutions that guaranteed judicial independence and entrenched a solid system of checks and balances (Papuashvili 2017), the reality "on the ground" was far from the paper ideal. Poland enjoyed democratic politics only for seven years (1919–1926). In May 1926, Field Marshall Józef Piłsudski staged a military coup d'état and ruled Poland until his death in 1935. His "Sanation regime", which lasted until the Hitler's invasion of Poland in 1939, employed openly authoritarian techniques. Piłsudski circumscribed the powers of the Polish Parliament (*Sejm*), ruthlessly prosecuted opposition, and fostered a cult of personality. Finally, the fairly balanced division of power embedded in the 1920 Czechoslovak Constitution failed to pervade national political life. The first president of the country and a towering figure of the entire interwar period, , Tomáš Garrigue Masaryk, was deeply distrustful of political parties and Parliamentary leaders. He created an informal political organization known as Hrad ("The Castle"), a powerful coalition of intellectuals, journalists, businessmen, religious leaders, and WWI veterans (Orzoff 2009). Due to his charisma, fractured political scene, and support of the "Castle", Masaryk de facto set the country's political agenda until his death in 1937. The Constitutional Court, envisaged by the 1920 Constitution, did not function properly until 1938. Moreover, fundamental rights, despite being explicitly entrenched in the 1920 Constitution, were found non-justiciable by ordinary courts and constituted merely aspirational goals (judges themselves complained about

another abrupt end to any prospects of democratic development. Czechoslovakia and Poland were annexed by the German Third Reich, while Hungary and Slovakia launched clero-fascists regimes under Hitler's tutelage. As if that had not been enough, the communist coups d'état in the late 1940s, and the subsequent communist rule which lasted until late 1980s/early 1990s, put the final nail in the coffin.

(2) The communist rule left arguably the deepest imprint on the region. The central feature of these regimes was *centralization* of power, coupled with socialist economic planning and thoroughgoing regulation. Virtually all institutions, including the judiciary, were under firm control of the Communist Party, which represented "the people" in its ideal form (Hazard 1951: 35–68). Separation of institutions, even if formally anchored in constitutional texts, was an illusion. Communist regimes in CE also quickly got rid of any remnants of a system of checks and balances. Most importantly, they abolished constitutional and administrative courts, stripped courts of jurisdiction in commercial affairs and vested these in state arbitrage courts, packed the judiciary with lay judges, installed trusted comrades at the Supreme Court and as presidents of ordinary courts, and generally placed courts under tight control of the General Prosecutor (Kühn 2011; Frankowski 1991; Bröstl 2003). The principles of separation of functions and of personal incompatibility were nominally maintained; however, given their total control over institutions, communists simply did not *need* to tinker with either of these components.

Ruling communist parties also soon realized that the original Marxist prophecy of the state and law "withering away" was not about to materialise soon. On the contrary, law became critical in preserving communist power (Vyshinski 1951: 303ff.). This *instrumental* view of law, which pushed communist societies away from the ideal of the rule of law towards "rule *by* law" or "rule *through* law" (Holmes 2003: 22–23; see also Ginsburg and Moustafa 2008), has remained deeply embedded in the minds of Central and East European political leaders (Kahn 2005). This in turn led to certain mental path-dependence in thinking about separation of powers among Central European judges and politicians (Bobek 2008). So while the most visible communist institutions, such as the leading role of the Communist Party, the omnipotent *prokuratura* and the state security services, were dismantled or reformed, the communist legacy has not disappeared, as it is an uphill battle to erase four decades communist indoctrination.

(3) Finally, we maintain that the EU accession process in the late 1990s and the early 2000s also had distorting effects on separation of powers in Central Europe. While Poland, Czechia, Slovakia and Hungary were able to choose their preferred model of SoP

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interferences unheard of in the Austrian era; see Kühn 2011: 11ff.). On top of it, the country was deeply divided on ethnic grounds, witnessing the rise of Czech, Slovak as well as German nationalism (Innes 2001). In sum, while Czechoslovakia maintained a basic system of separation of powers until WWII, in reality it had a long way to go towards the ideal of a lone democratic outpost in the East, overviewed by the principles of the rule of law and the separation of powers (Heimann 2011; Orzoff 2009)

immediately after the collapse of communist rule, any constitutional reform in the subsequent period was constrained, and sometimes even driven, by the so-called EU conditionalities. Despite the "double standards" in the accession process (Kochenov 2008), the EU pushed for the same template in all four Central European countries, one that aimed at depoliticising the process of governance and vesting various powers with experts and other non-elected agents (De Somer 2017). This template included, among other things, strong constitutional courts, autonomous judicial self-governance via judicial councils (Parau 2013), as well as numerous other autonomous public bodies (De Somer 2017) that were empowered at the expense of essentially political institutions (parliaments and executives). Central European countries, desperate to "return to Europe", adopted virtually all requirements of this pan-European template.[17] The EU thus *de facto* imposed its own interpretation of separation of powers onto its new members.

Some scholars have explicitly praised the idea of a "courtocracy", i.e. democracy run by the judiciary, as a new and superior form of governance (Scheppele 2005). Emboldened by this intellectual support, the judicial branch in CE countries accordingly embarked on a wide-ranging reinterpretation of the constitution, striking down constitutional amendments, reducing the discretion of the political branches, and judicialising virtually every aspect of political life. Expert organs in other spheres in public life such as ombudspersons and data protection agencies followed the same anti-political line. Theorists sometimes speak in terms of (desirable) *rationalisation* of democratic politics, putting emphasis on the output/efficiency aspect of SoP, which might include acceptance of executive dominance in contemporary democracies (Bognetti 2001).

However, this "catching up" with the West (Komárek 2015) was not a natural development. For one, the pan-European template significantly altered the existing separation of powers, while denying the opportunity for proper deliberation and local fine-tuning (Parau 2016). Instead, it opted for a "one size fits all" solution (Parau 2013; Bobek and Kosař 2014). Also, some of the suggested institutions, such as judicial councils, were alien to the Central European legal culture (Kosař 2016). All this resulted in a one-sided emphasis on formal institutions and the rule of law (courts and judicial review in particular). Elsewhere we have identified the depoliticising effects of the EU accession process among the sources of the current democratic malaise in Central Europe (Dufek and Holzer 2016: 20ff.).

Concentration of Power, Made in Central Europe

The three pieces of historical-political experience taken together cast doubts over the possibility of a painless transplantation of the "Western" understanding of the SoP – contested as it is – to the Central European context. Moreover, it can be argued that

[17] For an account of Czechia's extraordinary resistance against the idea of a judicial council, see Kosař (2016).

they prepared ground for the developments of late 2000s and 2010s, which we now briefly recount.

After Viktor Orbán's *Fidesz* gained constitutional majority in 2010, its one-party government embarked on a quest against independent institutions that stood in his way. It adopted a brand new constitution, which has completely altered the constitutional landscape. It curbed the powers of the Hungarian Constitutional Court and packed it with its protégés, dismissed the sitting Chief Justice of the Supreme Court and replaced him with Orbán's appointee, got rid of the most senior judges (who were not seldom sitting at the Supreme Court or were holding the critical positions of court presidents) by abruptly reducing compulsory retirement age for judges, and hollowed out the powers of the judicial council by vesting judicial appointments into a newly created body staffed by Fidesz people. This "constitutional blitzkrieg" ultimately eliminated any resistance of the Constitutional Court, ordinary courts as well as numerous other independent agencies (Halmai 2012; Gyulavári and Hős 2013; Belavusau 2013; Landau 2013; Tushnet 2015; Uitz 2015; Kosař 2016: 134).

Poland witnessed a similar scenario after Jaroslav Kaczyński and his *Law and Justice* (PiS) party won the 2015 Polish parliamentary elections and followed the same rule book as Orbán in Hungary (Radwan 2015; Śledzińska-Simon 2016; Zuzek 2016).[18] The PiS has made new appointments to the Constitutional Tribunal, reduced the term of the Tribunal's president and replaced him with Kaczyński's protégé, tinkered with the composition of the Polish judicial council, and exercised a significant pressure on the court presidents.

Although Slovakia and Czechia arguably fare better, they too show signs of disregard of the SoP. Róbert Fico managed to fill the Slovak Constitutional Court with loyal Justices, *de facto* immunising SMER's policies from judicial review. Fico's endeavours were only halted by his unexpected loss in the presidential elections (to Andrej Kiska) , forcing him to him to cooperate with the new President regarding further appointments of constitutional court justices (Venice Commission 2017; Lalík 2016). Even Czechia, widely considered most resistant among Central European countries against subversion of the separation of powers, is far from immune. The Czech Minister of Finance and clear front-runner in the upcoming 2017 parliamentary elections Andrej Babiš would not only prefer to "run the state like a firm" (e.g. Jandourek 2013; ECHO24 2016), implying that any checks and balances as well as complex procedural rules are but a nuisance (Lyman 2017; Freedom House 2017), but also abolish the upper chamber of the Parliament and reduce the number of MPs in the lower chamber from 200 to 101, which would seriously skew the rules against smaller political parties (Kysela 2017; Wintr 2017). The directly elected President, Miloš Zeman, has few qualms about such tendencies.

[18] A major difference is that unlike *Fidesz*, the *PiS* does not have a constitutional majority and must stretch the Polish Constitution through new statutory rules.

IV. Rise of the Unelected and Populism as Challenges to Separation of Powers: Back to Theory

The Unelected and Discontent with Democracy

As noted above, dominance of legal constitutionalism and rise of unelected institutions has been widely acclaimed by constitutional scholars and judges, both on the domestic and supranational levels.[19] However, it has found mixed support among political theorists. (A) On the one hand, there are those who share the optimism; such views come in various shapes. Frank Vibert claims that the rise of (the importance of) new unelected bodies signals the emergence of a new branch of government concerned with "handling and dissemination of information, the analysis of evidence and the deployment and use of the most up-to-date empirical knowledge", from which he infers the need to reconceptualise the separation of powers and adjust it to the new conditions (Vibert 2007: 12). Vibert notes that the consequences for representative democracy are "radical", for the new kid on the block occupies a space between, and formerly reserved for, both elected legislatures and courts (ibid: 64). These traditional branches need to concede ground, which entails deep rethinking of what the division of power in democracy means; one expected victim of such transformation would be the traditional understanding of the rule of law. Vibert (2007: chap. 4) also brushes off participatory and deliberative conceptions of democracy for their inability to come to terms with the new reality, thus positioning himself against much of contemporary democratic theory. He thus highlights almost exclusively the output side of legitimacy, and by consequence the "efficiency" understanding of the SoP (see section I), even though he takes a route different to regular defences of the constitutionalist principle.

A similar position is arrived at by John Keane who traces the emergence of "monitory democracy" to the entire post-1945 period, speaking again about an "epochal transformation" of representative democracy (Keane 2012: 212). In his view, monitory bodies, organisations, and networks are "power-scrutinising mechanisms" which control and bring to public attention the use and misuse of power "*in all fields of social and political life*" (Keane 2009: 695, emphasis in original). Again, traditional institutions of representative democracy as well as mechanisms of political participation are pushed into the background, in order to make space for non-party, extra-parliamentary, unelected forms of power monitoring which are nevertheless said to be *representative* of the people in whose name they operate. This is a radical expansion of the "checks on power" aspect of a constitutional democracy, unfortunately without a proper theorisation of what this entails for separation of powers as such (cf. Keane 2009: 860ff.). What is however missing from Keane's story is careful theorisation of the place of *political* institutions and generally of *political action*, especially with respect to the principle of SoP: We are left with a *laudatio* for expansive checks but only a dim idea of balances and separations.

[19] See Kosař and Lixinski (2015) on the attitudes towards the European Court of Human Rights.

(B) Not a few of theorists combine trust in the unelected with deeper reconceptualisation of *democracy, representation* and *legitimacy*, so that the participatory and deliberative element is not get lost in the celebration of the unelected. Although Pierre Rosanvallon speaks with hope and admiration about counter-democratic and indirectly democratic institutions which are in tension with majoritarian bodies (Rosanvallon 2011: 222), he is aware that the *proximity* – participatory – element of democratic legitimacy cannot be underplayed. Together with independent regulatory and oversight authorities (providing *impartiality*) and constitutional courts (endowed with the task of *reflexivity*), it plays indispensable role in making democracies work (again). Rosanvallon, too, invokes the need to go beyond the traditional conception of separation of powers, claiming that the main division of power now concerns the very tension between counterdemocratic/indirect democratic and majoritarian bodies. The powers of "oversight, prevention, and judgment", co-forming a new architecture of the separation of powers, are nevertheless based in a *democratic* type of distrust towards traditional representative institutions (Rosanvallon 2006: 8, 249). Interestingly, Rosanvallon (approvingly) notes that in the new CE democracies judicial review "has actually supplanted" the separation of powers doctrine "as a way of guaranteeing liberties and regulating majority rule" (Rosanvallon 2011: 137).

However, although it might be the case that (constitutional) courts have often functioned as bulwarks against illiberal/undemocratic tendencies of CE legislatures and executives, to say that there now is a new architecture of the SoP and that the traditional model has been, is being, can be or ought to be[20] simply "supplanted" amounts to lazy theorising on behalf of yet another theoretical innovation. As far as the three co-authors if this paper are aware, the classical model of the SoP, as analysed here, is still pretty much in place in the countries in question, and the most pressing question is to how to fine-tune it (or secure it against abuses of power), rather than how to replace it with something new and different.

(C) The final and arguably largest group of political) theorists remain sceptical towards the rise of the unelected and its effects on constitutional democracies. Writing specifically about the CE region, Paul Blokker has criticized the pre-eminence of legal constitutionalism in Central Europe and called for a "more democratic, or civic constitutionalism" as a way out of the crisis (Blokker 2013). To combat increasing civic apathy, medialisation of politics, crisis of political parties and other signs of liberal democratic malaise, Blokker suggests introducing more participatory (including direct democratic) elements into both regular and constitutional politics, combined with decentralisation of political decision-making. He thus refuses to follow suit in becoming enamoured of counterdemocratic institutions and unelected bodies, and applies participatory and partly also deliberative democratic theory to constitutional matters.

[20] Democratic theorists tend to be especially vague about the modality.

Blokker's democratic version of constitutionalism has much in common with *political* constitutionalism expounded by contemporary republican political theorists who put their trust in horizontal *dispersal* of power ensured by its sharing among diverse and competing social groups. This is claimed to render the system of government dynamically responsive to citizens as principals of their representatives (Bellamy 2007: 196; 200ff.; see also Pettit 2013: 220ff.). According to Richard Bellamy, the traditional model of separation of powers can effectively secure neither checks on arbitrary power (as a ruling group can occupy all the branches and agencies, which in fact has been happening in Poland and Hungary) nor responsiveness to citizens – indeed, due to the lack of competition introduced by separation, there are contrary incentives on the part of governmental bodies to rent-seeking, responsibility-shifting and cost-displacing. Combination of inter-institutional rivalry and pluralism of social groups which have effective access to the political sphere ensures that all agents have reasons to engage with their competitors and/or principals (ibid: 206). Bellamy's idea of multiplied competing mutual pressures – a "balance of power", as he terms it – ultimately amounts to elevating a modified (expanded) checks and balances component to a preeminent place within the constitutional framework.

We do not have the space here for a thoroughgoing review of recent writings in democratic theory, even if it was somehow possible given the sheer amount of work done (it is not). Yet anyone familiar with the literature knows that, apart from a couple of exceptions (some of which we cite above), the level of elaboration of this important principle is mostly disappointing and at worst non-existent, especially seen in light of its rich internal logic. In many cases, calls for "reconceptualization" of the principle merely mirror the authors' idiosyncratic theoretical departure points and/or their ethical and political beliefs, and little to no discussion of competing accounts – not to mention the fairly sophisticated classical model, which, for better or worse still informs much of political and constitutional practice not only in CE countries – is put forward. Given that separation of powers co-forms the negative (restraining) face of constitutionalism, and seeing that the recent rise of populist political forces in the region threatens to undermine constitutional democracy, a more in-depth exploration is certainly needed – one that is at the same time empirically informed.

One reason is precisely the populist challenge. Yascha Mounk (2016) argues that depoliticising, technocratic tendencies in present-day constitutional democracies – "vast swaths of policy have been cordoned off from democratic contestation" – slowly mould these regimes into "undemocratic liberalisms" in which citizens become alienated from elite establishment, and large numbers understandably flock to populists: Trumpism is a telling extra-CE example (see also Foa and Mounk 2016, 2017). Now the million-euro question is – do our societies need more democracy or less democracy, given how easily are people swayed by populist rhetoric towards authoritarian visions? What if the age-old distrust towards whims of the multitude harbours a grain of truth? Perhaps not. Yet as European (including Central European) history reveals, "tyranny of the majority" is far from a mere theoretical figure of speech. Recall that the original rationale of the SoP is

to limit power *of whatever kind*: This is why big ideas of how to transform society need to include a careful delineation of the principle of SoP.

The Protean Nature of Populism

Populism arrived to Central Europe in the late 2000s and has been steadily gaining ground since.[21] Why should CE countries be wary of it, and what does its rise imply for our construal of the separation of powers? Nadia Urbinati (2014) speaks about populist *disfiguration* of democracy, by which she means that populism deprives democracy of something which make it "recognisable from the outside" – especially its procedural character which ensures that *will* and *opinion* do not collapse into one. Since liberal democratic societies are unavoidably pluralist with regard to moral, cultural, or religious commitments, such a move threatens with authoritarian imposition of one particularised set of values on the rest of the society, in the name of a monolithic "people" no less (Havlík 2016: 37). To wit, one core procedural instrument is exemplified by the "separation of functions" as well as of institutions (Urbinati 2014: 24, 34). This is why the true target of populism is representative constitutional democracy as such, and the goal is to replace it with "another", preferably nationally defined, democracy (Orbán 2014).

Jan-Werner Müller (2016) has interwoven an advanced understanding of populist goals and strategy with reflection on the recent wave of populist parties and political movements in Europe, including the CE. He stresses two properties of populist politics – its *anti-elitism* and *anti-pluralism*, where the latter is expressed in *pars pro toto* rhetoric: We (the populists) represent the righteous whole – the people, the nation etc. – which by definition cannot be wrong (echos of Rousseauian plebiscitarianism are always present). No society-wide deliberation or everyday "messy politics" is needed; on the contrary, they constitute barriers against implementation of the common good. Politics is moralised into a kind of Manichean struggle between forces of the good and the evil. Correspondingly, procedural tools of a constitutional democracy such as separation of powers or protection of fundamental rights, are portrayed by populists as disposable leftovers from a bygone era (ibid: 60ff.).

Müller correctly notes that such rhetoric regularly dwindles once populists acquire positions in government and other places of power, because once institutions are "theirs", the formerly insurmountable barriers to exercising people's true will collapse. Not surprisingly, one core populist tactic upon acquiring power is to *occupy the state*, i.e. colonise all branches of government by distributing posts to loyal followers (Müller 2016: 44ff.). Another is mass clientelism, and yet another "discriminatory legalism" (as Müller calls it), i.e. selective application of law either in its protective or its sanctioning mode, which amounts to a continued violation of the *rule of law* principle.

[21] Mečiar's era in 1990s Slovakia could be said to have been an early populist bird, although it did not really belong to, or even give rise to, any broader tendency across Central Europe. See Mesežnikov (2008).

The story of assault on separation of powers in Orbán's Hungary and Kaczyński's Poland, as well as signs of populist tendencies in Czechia and Slovakia, give us weighty reasons to repeat that the negative, limiting rationale of separation of powers and more generally of constitutionalism needs to be awarded more attention in CE countries and perhaps beyond the region as well. This is the "checks" part of the checks and balances component of the SoP, and beside judicial review may concern such issues as the role of the opposition, institutionalisation of political parties, the media landscape,[22] or sources of and influences on public opinion

In response to these developments, constitutional theorists and legal scholars have recently joined political theorists and scientists in their study of populism as a political phenomenon and grappled with the relationship between populism and constitutionalism.[23] While scholars commonly have it that populism has a problematic relationship with constitutionalism (Urbinati 2014; Mudde 2016; Müller 2016) and erodes certain pillars of constitutional democracy (Pinelli 2011), some have recently argued that populism contains a specific (if largely implicit) constitutional theory, a kind of "populist constitutionalism". On this reading, populism adopts a particular construal of the theory of constituent power (absolute primacy of constituent power vis-à-vis the constitution and the rules and powers derived from it), a specific interpretation of the theory of popular sovereignty (the *real* – empirical – people as the unity), and a concept of constitutional identity often backed by (mythical) historical narratives of ancestral greatness (Corrias 2016; Blokker 2017).[24]

Despite these nuances, there is (rare) scholarly agreement that populism is hostile to the principle of separation of powers (as conceptualised in this paper), which is rejected by populists as cumbersome, artificial, and constraining of the true political will of the people (Blokker 2017). We agree without hesitation that populism does pose a significant challenge to the SoP. At the same time, however, we want to point out that (A) while populism targets some of its components more aggressively than others, the existing scholarship rarely differentiates among them, and that (B) the particular components under attack may depend on the phase of the populist regime.

(A) Neither Orbán nor Kaczyński are anti-institutionalists in any unequivocal sense. They like institutions as long as these institutions pursue their agenda, or at least behave in a

[22] Andrej Babiš, occasionally dubbed *Babisconi* as a pun on Silvio Berlusconi's era in Italy, is the owner of two major Czech daily newspapers, and the most popular radio broadcast station. He would have probably bought more media outlets had already these purchases (made before the Parliamentary elections) not have stirred enough public attention.

[23] See also the ongoing joint *I-CONnect/Verfassungsblog* mini-symposium on "Populism and constitutional courts".

[24] Some radical democratic theorists, most notably Ernesto Laclau, expressly *defend* populism and "populist constitutionalism" as a means of democratic emancipation and systemic subversion. For a revealing (critical) discussion see Arato (2016: 281–289).

neutral way and do not erect unwelcome obstacles: As Müller (2016) notes, populist "only oppose those institutions that, in their view, fail to produce the morally (as opposed to empirically) correct political outcomes". Hence, their goal is not necessary to abolish the existing institutions, merge them, blur the boundaries between their functions, or occupy several offices at once (Kaczyński himself even prefers to stay in the background as an ordinary MP). Instead, these populist leaders seek to immunize their governments' actions from external review and silence their critics. Hence, their primary target is the principle of checks and balances. That is why both Orbán and Kaczyński ended up in a head-on collision with constitutional tribunals and ordinary courts – the institutions that are most resistant to abrupt changes in political mood.

Orbán had a somewhat easier position regarding the Hungarian Constitutional Court since he won a constitutional majority and, therefore, could increase the number of its justices and change the appointment procedure. In contrast, Kaczyński did not muster constitutional majority in the 2015 parliamentary elections and had to resort to dubious amendments to ordinary laws pertaining to the Polish Constitutional Tribunal, or alternatively, to employ the non-implementation technique in order to "contain" the Tribunal. When it comes to the ordinary courts, however, Orbán has gone significantly further than Kaczyński (at least for the time being) when he ousted the President of the Supreme Court of Hungary, got rid of the most senior judges by abruptly reducing compulsory retirement age, and stripped the Hungarian judicial council of any meaningful power. Ordinary courts in Poland seem to be more resistant to capture, even though the new law on the judicial council may have the same long-term repercussions.

(B) The second point worth noting is that populist regimes' assault on separation of powers may vary over time, depending on how long they have been in existence. Here we can draw some lessons from Latin America. For instance, while Hugo Chavez came to power in 1999, the Bolivarian populist regime has been a fact in Venezuela for almost three decades now. Chavez also initially attacked primarily the component of checks and balances, co-opted the judiciary, and rigged electoral committees.

However, the recent societal pressure on his successor, Nicolás Maduro, forced the Venezuelan populists to resort to new techniques. In March 2017, Venezuela's Supreme Court of Justice – faced with the unwillingness of the opposition-controlled National Assembly to accept some of its previous Decisions – issued a ruling in which it stated that "in order to preserve the country's rule of law" it felt forced to transfer to itself ("or to the entity that the Court decides") all the powers enjoyed by Parliament (Couso 2017). In other words, in flagrant denial of the principle of separation of functions, the Supreme Court of Venezuela merged the functions of the parliament and the apex court, and thus became a law onto itself. Moreover, just in a second ruling, issued the next day, it stripped the members of the National Assembly of their immunity (Couso 2017), which negated the principle of separation of institutions.

We may only guess whether this was a one-off case of a "judicial coup d'état" (Couso 2017) pursued by a desperate populist leader who was running out public support, or rather a sign of growing sophistication and changing strategies of populist regimes. Nevertheless, it seems likely that once they manage to "occupy the state" and gain control over courts and other tools of check-and-balances, populists may actually try to employ the skewed principle of checks and balances against the opposition. They can do so by increasing the powers and functions of the check-and-balances institutions under their control, at the expense of the principles of separation of functions and separation of institutions.

Conclusion

We have covered quite a lot of ground, so let us take stock of what has been said and what it signals for further research on the separation of powers. Most generally, we argued that while the democratic theory literature has not done justice to the complexities of the concept of separation of powers, often as a result of disinterest in or even ignorance, constitutional scholars have until recently failed to pay serious attention to the input-side of democratic legitimacy (and consequently of the input-side of the SoP), leaving themselves blind to both adverse consequences and important causes of the "rise of the unelected" and the populist assault on constitutional theory. Also, they seem to underestimate the fact that the enabling rationale behind the separation of powers inescapably introduces normative issues to which political theory/philosophy is better equipped. So the overarching theoretical aim of this paper is to bridge these two parallel discourses and show that these fields of inquiry would benefit from interrogating each other.

We also stress that because the concept of separation of powers is highly indeterminate, which is a consequence of its internal richness, no definite blueprint can be constructed. The upshot is both empirical and theoretical: Empirically, theorists need to be informed about the particular historical-political situation in particular cases before recommendations are served. Theoretically, the complexity of the concept should be always borne in mind, for different components might be challenged, and different rationales employed, in any given case. As a corollary, there is substantial space for political judgment as a capacity, or virtue, which cannot be really theoretically preordained.

The Central European experience served precisely as such an anchor in this text. Apart from providing some descriptive information (which might be interesting in its own right), we showed that the restricting rationale of separation of powers (above all protection of individual rights and barriers to a "tyranny of the majority") is critical for Central European democracies, and arguably for any constitutional democracy worth its label. The twin challenges to the separation of powers discussed in this paper (the unelected and populism) have found especially fertile ground in CE countries, not least due to their distinctive historical experiences and mental path-dependencies. It has

turned out that populism in Central Europe affects some components of separation of powers harder (especially the checks and balances) harder, while leaving others relatively intact. The Latin American experience then suggests that the particular period of the existence of a populist regime/government might also play a role.

The stand-off between defenders and detractors of the rise of the unelected cannot be unequivocally decided in favour of either group, at least without committing to some controversial normative assumptions. Similarly, whether the antidote to populist overkill is to be found in more democracy or less democracy remains moot. Nevertheless, if this paper convinces some readers that an adequate understanding requires combination of resources provided by political theory, constitutional theory, and social sciences, its mission will have been accomplished.

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