Special Section: Populism and Constitutionalism

The Twin Challenges to Separation of Powers in Central Europe: Technocratic Governance and Populism

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Separation of institutions, functions and personnel – Checks and balances – Hungary, Poland, Czechia, Slovakia – Short tradition of separation of powers in Central Europe – Fragile interwar systems of separation of powers – Communist principle of centralisation of power – Technocratic challenge to separation of powers during the EU accession – One-sided checks on the elected branches and empowering technocratic elitist institutions – Populist challenge to separation of powers in the 2010s – Re-politicising of the public sphere, removing most checks on the elected branches, and curtailing and packing the unelected institutions – Technocratic and populist challenges to separation of powers interrelated more than we thought

Until the 2010s, Central Europe was routinely depicted as an unequivocal success story of the post-communist transition to constitutional democracy.[1] It seemed that the peoples of Central Europe would live happily ever after. Given this optimistic outlook, recent developments in Central Europe must

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[1]The only exception was Slovakia during Mečiar's regime in 1993–1998, which was referred to as a 'laggard' (A.C. Janos, *East Central Europe in the Modern World: The Politics of the Borderlands from Pre- to Postcommunism* (Stanford University Press 2000)) and a 'troubled democracy' (H. Kitschelt, *Post-Communist Party Systems: Competition, Representation, and Inter-Party Cooperation* (Cambridge University Press 1999) at p. 42).

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have come as a surprise to many. Hungary started drifting toward 'illiberal democracy'[2] in the early 2010s,[3] Poland has witnessed the same turn since 2015,[4] and Czechia may follow suit as a consequence of the 2017 parliamentary elections and the 2018 presidential elections.[5] Slovakia, a political laggard in the 1990s[6] and the least 'democratically experienced' state in the region, all of a sudden became the only country in the region that is not, for now, on the clear 'reverse transition' track.[7] As Hanley and Vachudová put it, 'the narrative of progress in the region is dead, replaced by democratic backsliding – and even sliding into authoritarianism'.[8]

The majority of scholarly reflections on recent Central European developments have been framed as the deterioration of the rule of law or as an attack on liberal democracy and constitutionalism.[9] We find these works illuminating. However, we argue that the separation of powers sheds further light on both the sources and the layers of the difficulties contemporary Central European democracies are facing. First, the concept of separation of powers provides a more concrete and fine-grained analytical tool to assess current developments in Central Europe than all-encompassing and abstract notions such as democracy, constitutionalism, and

[2]Note that this concept is contested, as populism may represent both a democratic corrective and a threat to democracy. *See* J.-W. Müller, *What is Populism?* (University of Pennsylvania Press 2017) at pp. 56-57; C.R. Kaltwasser, 'The ambivalence of populism: threat and corrective for democracy', 19 *Democratization* (2012) p. 184.

[3]*See* M. Bánkuti et al., 'Hungary's Illiberal Turn: Disabling the Constitution', 23 *Journal of Democracy* (2012) p. 138.

[4]*See* W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

[5]*See* S. Hanley and M. Vachudová, 'Understanding the illiberal turn: democratic backsliding in the Czech Republic', 34 *East European Politics* (2018) p. 276.

[6]See *supra* n. 1.

[7]Even this claim could be disputed after the assassination of the investigative journalist Ján Kuciak and his girlfriend in February 2018. However, the victory of a liberal anti-corruption activist Zuzana Čaputová in the 2019 presidential elections shows that Slovakia is currently more immune to the populist spell than its Visegrad neighbours.

[8]*See* Hanley and Vachudová, *supra* n. 5. The same phenomenon is emphasised in this issue by P. Blokker, 'Populist Counter-Constitutionalism, Conservatism, and Legal Fundamentalism', p. 519, M. Krygier, 'Institutionalisation and its Trials. (Anti-)Constitutional Populism in Post-Communist Europe', p. 544, S. Suteu, 'The Populist Turn in Central and Eastern Europe: Is Deliberative Democracy (Part of) the Solution?', p. 488.

[9]*See* e.g. G. Halmai, 'From the "Rule of Law Revolution" to the Constitutional Counter-Revolution in Hungary', in W. Bedenek (ed), *European Yearbook of Human Rights* (Intersentia 2012) p. 367; L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', 19 *CYELS* (2017) p. 3; A. von Bogdandy et al., 'Guest Editorial: A potential constitutional moment for the European rule of law – The importance of red lines', 55 *CMLRev* (2018) p. 983; K.L. Scheppele, 'The opportunism of populists and the defense of constitutional liberalism', 20 *German Law Journal* (2019) p. 314.

the rule of law.[10] Second, our disaggregation of the separation of powers into clearly defined components allows us to identify different sources of erosion of the separation of powers throughout the entire modern history of Central Europe, which components were attacked and in what sequence.[11] Third, in comparison to the abovementioned abstract notions, understanding the recent developments in Central Europe in terms of separation of powers is much closer to the thinking of ordinary people and their everyday political experience. Quite simply, Central European citizens are more familiar with the language of separation of powers[12] than with rather technical concepts such as rule of law, or constitutionalism, which are embedded in the specialised jargon of lawyers, often incomprehensible to ordinary people, and too remote from the people's everyday exposure to politics. Finally, many scholars engaging with populism touch upon separation of powers,[13] but even the most recent contributions[14] to this debate do not treat separation of powers as the central focus of their analysis.

In this regard, Central Europe serves as a sort of magnifying glass for the challenges to the separation of powers that take place in other parts of the world as well. More specifically, given the recent assaults on the separation of powers in the region, we have at our disposal a wealth of examples for theorising about the goals and strategies of populist leaders with respect to the constitutional democratic framework. Be it Viktor Orbán's 'constitutional Blitzkrieg' against the judiciary and other independent agencies, Jarosław Kaczyński's packing of the Polish Constitutional Tribunal and purging of the Supreme Court, or similar tendencies on the part of Róbert Fico in Slovakia and Andrej Babiš in Czechia,[15] we have on our hands a real-world laboratory of the limits and cracks of separation of powers.

We show that all of these charismatic leaders, to varying degrees, perceive a functioning separation of powers as a major obstacle which prevents them from

[10]For a similar claim *see* C. Möllers, 'Separation of Powers – A Short Manual for the Perplexed', in H.-M. Napel et al. (eds.), *The Powers That Be: Rethinking the Separation of Powers. A Leiden Response to Möllers* (Leiden University Press 2016) at p. 324-325.

[11]This exercise would again be extremely difficult to do with concepts such as the rule of law, liberal democracy or liberal constitutionalism, which (in contrast to separation of powers) had much less traction in Central Europe before WWII and under communist rule.

[12]It is common sense that too much power concentrated in the hands of one person or group (no matter whether it is a politician or a boss in your company or a family member) sooner or later leads to the abuse (or at least arbitrary use) of power. Such basic common sense about what the rule of law or liberal democracy or constitutionalism entails arguably does not exist.

[13]*See infra* nn. 150-155.

[14]*See* 2019 ICON Symposium on 'Public Law and the New Populism' (ICON, Vol. 17, Issue 2) and the twin German Law Journal special issues on 'Public Law and Populism' (2019, Vol. 20, Issue 2) and on 'Populist constitutionalism: Varieties, complexities, and contradictions' (2019, Vol. 20, Issue 3).

[15]See below.

centralising power and running their countries smoothly. They share the same playbook, even though Orbán and Kaczyński went further than their Czech and Slovak counterparts and actually managed to dismantle virtually all (Orbán) or many (Kaczyński) institutional barriers to pursuing their will.

At first sight, it might seem puzzling that these political leaders faced so little resistance from the relevant institutions and managed to push through their centralisation agenda without much public disapproval. In fact, the majority of the people seem to be at best indifferent to, if not supportive of, their actions.

However, on closer inspection, these developments are not that surprising. We show that the separation of powers is at best a flimsy and certainly not a particularly longstanding tradition in Central Europe and that this path-dependence has substantial ramifications for present-day political developments. Contrary to many contributors to the ongoing debate on the state of the rule of law in Central Europe, we thus emphasise the embeddedness of the current problems in the history and legal cultures of the region. In other words, the history of the separation of powers and the abuse thereof plays a significant role in understanding the current predicament of Central European countries.

Our argument is threefold. First, we argue that the fragile interwar systems of separation of powers in Central Europe were further disfigured during communist rule, and subsequently by the EU's technocratic 'let the experts rule' approach to the separation of powers. This made it easier for populists to attack the separation of powers and in particular its checks and balances component. Second, with an overview of the Central European trajectory in this area, we argue that the two major recent challenges to the separation of powers in the region – the rise of the unelected and the wave of populism – are more interrelated than usually thought and that the former has greatly contributed to the latter. In fact, it can be understood as a direct precursor to, and an important part of the triggering mechanism of, recent populist expansion. We construe this series of developments and the related phenomena as an 'overreaction' to an 'overreaction'. The accession period overreacted to the communist past by extreme depoliticisation of the public sphere, installing one-sided checks on the elected branches and empowering technocratic elitist institutions (especially the judiciary). This, in turn, led to populist overreaction, which swung the pendulum back to the other extreme by the re-politicising of the public sphere, removing most checks on the elected branches, and curtailing and packing the unelected institutions (in particular the judiciary). Third, we show that each Central European regime attacked some components of separation of powers more aggressively than others.

The article proceeds as follows. In the next section, we briefly explicate the internal logic of the separation of powers and unpack it into four key components: separation of institutions, separation of functions; separation of personnel; and checks and balances. Subsequently, we explain the peculiar Central European

understanding of separation of powers in the pre-WWII era as well as the communist principle of 'democratic centralisation' of power. We thus set the stage for a discussion of the two current major challenges to the separation of powers in Central Europe – technocratic governance and populism. Finally, we argue that the problems of the separation of powers in Central Europe are greater than any quick institutional fix could remedy.

The separation of powers: why it matters and what it stands for

The concept of separation of powers is notoriously vague and controversial.[16] Moreover, we usually only realise what separation of powers is, and what value it is to us, once we have lost it. Therefore, in order to understand the extent to which actions by populist leaders in Central Europe have impacted upon the separation of powers, we need to conceptualise this principle carefully. In order to do so, we will unpack it into four constitutive components.

For the purposes of this article, we construe the separation of powers so as to include both the three core components of the principle of 'separation' (separation of institutions, functions and personnel) as well as the principle of checks and balances.[17] In other words, we combine the 'pure' doctrine of separation of powers (which consists of the first three components)[18] with the older doctrine of 'mixed constitutions' which ultimately transformed into the modern principle of checks and balances.[19] While the coexistence of the separationist and balancing

[16]*See* e.g. E. Carolan, *The New Separation of Powers. A Theory for the Modern State* (Oxford University Press 2009); C. Möllers, *The Three Branches* (Oxford University Press 2013); J. Waldron, *Political Political Theory* (Harvard University Press 2016).

[17]This is in fact a standard account in the separation of powers literature (*see* e.g. Möllers, *supra* n. 10, p. 43-49; A. Kavanagh, 'The Constitutional Separation of Powers', in D. Dyzenhaus and M. Thorburn (eds.), *Philosophical Foundations of Constitutional Law* (Oxford University Press 2016) p. 221 at p. 233-234, Waldron, *supra* n. 16, p. 49; A. Sajó and R. Uitz, *The Constitution of Freedom. An Introduction to Legal Constitutionalism* (Oxford University Press 2017) at p. 129-139; and D.B. Maldonado, 'The Conceptual Architecture of the Principle of Separation of Powers', in D. Bilchitz and D. Landau (eds.), *The Evolution of the Separation of Powers Between the Global North and the Global South* (Edward Elgar 2018) at p. 150-156).

[18]M.J.C. Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund 1998) at p. 14. For criticism of the pure doctrine from a historical perspective *see in particular* N. Matteucci, *Lo Stato moderno* (Il Mulino 1997) at p. 147-157; M. Troper, *La separation des pouvoirs et l'histoire constitutionnelle française* (L.G.D.J. 1980).

[19]A. Somek, *The Cosmopolitan Constitution* (Oxford University Press 2016) at p. 38ff. and 57ff.; Vile, *supra* n. 18, p. 79.

components has turned out to be rather uneasy in practice,[20] as their underlying logics pull in opposite directions,[21] we believe that these four components capture the core of the principle of separation of powers[22] on the domestic level.[23]

As regards the three key 'separationist' components, the *separation of institutions* 'counsels against the concentration of too much political power in the hands of any one person, group, or agency'.[24] Among institutional expressions, we find imperatives such as no overlap with and no accountability to other branches, or the formal separation of government and Parliament. Because powers in a constitutional state are not 'allocated to different branches on a random basis',[25] separation of institutions must be linked to the prior idea of specific functions. The *separation of functions* stems from the idea that all government acts 'can be classified as an exercise of the legislative, executive, or judicial function',[26] which should be entrusted solely to the corresponding branch of the government ('institution'). Even though in practice these functions do not always fully overlap with institutions (branches),[27] there is nevertheless something intuitively plausible about wanting the legislature to create laws, the executive to carry them out, and courts to adjudicate on them, each avoiding excessive 'contamination' by practices alien to the respective functions.[28] Finally, the

[20]M.E. Magill, 'The Real Separation in Separation of Powers Law', 86 *Virginia Law Review* (2000) p. 1127 at p. 1130.

[21]R. Guastini, *Leçons de théorie constitutionnelle* (Dalloz 2010) at p. 155-161.

[22]We explain our conceptual approach in more detail elsewhere: *see* J. Baroš et al., 'Unpacking the Separation of Powers', in A. Barraggia (ed.), *New Challenges to the Separation of Powers* (Edward Elgar forthcoming). *See also supra* n. 17.

[23]Due to space constraints, we cannot engage here with the EU's division of competence literature. *See* e.g. H.-M. Napel et al. (eds.), *The Powers That Be: Rethinking the Separation of Powers. A Leiden Response to Möllers* (Leiden University Press 2016); S. Garben and I. Govaere (eds.), *The Division of Competences Between the EU and the Member States* (Hart Publishing 2017); R. Schütze, *European Union Law*, 2nd edn (Cambridge University Press 2018).

[24]Waldron, *supra* n. 16, p. 49. 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.

[25]Kavanagh, *supra* n. 17, p. 230.

[26]Vile, *supra* n. 18, p. 17.

[27]Examples of such mingling include judicial law-making, the existence of quasi-judicial bodies and administrative agencies (that engage in court-like behaviour), courts acting as administrative organs, parliaments acting as administrative organs or as courts, delegated legislation by the executive, or administrative legislation. Some scholars even challenge the assumption that each branch is endowed with one core function (*see* e.g. Kavanagh, *supra* n. 17, p. 226-227); but *cf* H. Kelsen, *General Theory of Law and State* (The Lawbook Exchange 2011) pt III; and Carolan *supra* n. 16.

[28]Waldron, *supra* n.16, p. 66ff. Of course, the tripartite division itself has always been controversial, and various authors either reduce the number of branches to two or expand it to four, five or even more (*see* e.g. G. Bognetti, *Dividing Powers. A Theory of the Separation of Powers* (Wolters Kluwer 2017); and Carolan, *supra* n. 16), with the extra branches provided by administration, media, constitutional courts or external (international) actors.

third separationist component, the *separation of personnel* (or personal incompatibility) then stands for the idea that one person should not sit in more than one branch of government. Again, the pure imperative of strict separation of personnel turned out to be too demanding. Especially in parliamentary systems, being simultaneously an MP and a minister is considered appropriate, and many believe that the independence of courts is not necessarily undermined even if judges become members of the upper chamber of the legislature.[29] This component thus has been understood as mostly a general recommendation. One exception is the adjudication of cases where interests of other branches of government are at stake; in such cases, strict independence of the courts is required.[30]

The fourth component of separation of powers, *checks and balances*, deserves more attention, as it renders the pure doctrine of separation of powers significantly more complex and, as we will show below, its understanding has been the main battleground in Central European democracies. Checks and balances are usually taken as a typical expression of the modern idea of constitutionalism,[31] and not seldom synonymised with the separation of powers as such. However, that would be a mistake, because in order to even entertain the idea of mutual control and purposeful mingling of certain functions of the respective branches there has to be an institutional or functional separation in the first place, logically speaking.[32] At any rate, in order to curb the looming arbitrariness and abuse of power, separation needs to be combined with supervision.[33] This is why each branch is granted the power to exercise some of the functions of other branches as well as a certain degree of control over them.

The checks and balances component is an internally complex one and, unlike the three separations, it is difficult to state with much precision which instruments and mechanisms fall under this component of separation of powers.[34] In fact, the

[29]*See* e.g. J. Waldron, 'Separation of Powers in Thought and Practice', 54 *B.C.L. Rev.* (2013) p. 433; and Kavanagh, *supra* n. 17, p. 233. The typical example of such institutional design was the Appellate Committee of the House Lords until the 2005 constitutional reform (*see* e.g. D. Woodhouse, 'United Kingdom. The Constitutional Reform Act 2005 – defending judicial independence the English way', 5 *ICON* (2007) p. 153).

[30]But *see* ECtHR, 22 June 2004, Case No. 47221/99, *Pabla Ky* v *Finland*.

[31]*See* e.g. S. Calabresi and K. Rhodes, 'The Structural Constitution: Unitary Executive, Plural Judiciary', 105 *Harvard Law Review* (1992) p. 1153 at p. 1156; E. Barendt, 'Separation of Powers and Constitutional Government', 5 *Public Law* (1995) p. 599; M. Loughlin, *Sword and Scales* (Hart 2000) at p. 224-225; F. Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (Cambridge University Press 2007) at p. 92; and Sajó and Uitz, *supra* n. 17, p. 128-139.

[32]*See* Guastini, *supra* n. 21, p. 154.

[33]*See* e.g. Kavanagh, *supra* n. 17, p. 233.

[34]For a similar lament *see* Möllers, *supra* n. 10, p. 46-47.

existing literature remains mostly silent or ambiguous in this regard. That said, we think that Nicholas Barber's distinction between *swords and shields*[35] is of considerable help here. Both are instruments wielded by the respective branches that allow them to 'keep each other in their proper place'.[36] *Swords* are sanctions or threats that one institution can actively use against another in order to induce it to act (or not act) in a certain way.[37] For instance, an executive faced with a legislature that consistently refuses to support its policies may be able to dissolve the parliament and call fresh elections. Vice versa, a legislature that believes that its executive has diverged too far from its mandate may be able to cut the executive's funds or initiate a vote of no confidence. Swords also include instruments such as veto power, the impeachment of judges or members of the executive by the legislature, judicial review of legislation over the acts of the legislature, and packing the courts by the executive with new judges (sometimes with the agreement of the legislature).[38] Within the present framework, we suggest construing swords as instances of *checks*, for they allow intervention in the affairs of other branches.

In contrast, *shields* protect one body from another. According to Barber, shields are 'immunities that serve to protect institutions, or officials within those institutions, from the unwarranted attentions of other bodies'.[39] They may include immunity of heads of state from prosecution, insulation of parliamentary debate from certain parts of civil and criminal law, the royal prerogative, immunity of MPs, the protection of judicial salaries from the parsimony of other branches, the exemption of certain administrative acts (such as the award of citizenship) from judicial review, or judicial self-governance that gives judges a significant say in the appointment and promotion of their peers.[40] With respect to the standard model, we interpret shields as tools of *balancing*.

It might be objected that shields follow the logic of separation and should be therefore linked to the three modes of power separation. Nevertheless, even if we grant the separationist logic of shields, it makes sense to categorise them separately. First, both shields and swords fall 'outside of the normal requirements of the separation of powers'.[41] Second, we suggest construing shields as a kind of second-level remedy: logically speaking, they are preceded not only by the three

[35]*See* N. Barber, 'Self-Defence for Institutions', 72 *Cambridge Law Journal* (2013) p. 558; and N. Barber, *Principles of Constitutionalism* (Oxford University Press 2018) p. 79-82.

[36]J. Madison, 'No. 51', in C. Rossiter (ed.), *The Federalist Papers* (Penguin, 1999) at p. 288-293.

[37]*See* Barber (2013), *supra* n. 35, p. 561-564 and 577.

[38]Most of these examples are taken from Barber (2013), *supra* n. 35, pp. 561-562.

[39]Barber (2013), *supra* n. 35, p. 560.

[40]Most of these examples are taken from Barber (2013), *supra* n. 35, p. 560-561. On judicial self-governance *see* D. Kosař, 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self Governance in Europe', 19 *German Law Journal* (2018) p. 1567.

[41]Barber (2018), *supra* n. 35, p. 79.

separations but also by the subsequent (possibility of) encroachment of the respective branches of government upon the others' exclusive competences. The purpose of shields is then to *rebalance* these encroachments, which is why we subsume them under the fourth component of the principle of the separation of powers.

One may further object that the checks and balances also include the free media, the pluralistic civil society and regulatory agencies,[42] which might be just as important as more formal swords and shields in guarding against the abuse of public power.[43] We agree that the impact of these actors on the functioning of the separation of powers might be significant. However, we consider these factors merely as contingent circumstances or additional requirements[44] that might influence whether a given system of checks and balances between the three branches will be observed and will bring about the desired set of results, rather than essential components of the principle of checks and balances itself.[45] Therefore, we will focus primarily on the interaction between the three traditional branches of power[46] and refer to the abovementioned additional requirements only if it is necessary for understanding developments in Central Europe.[47]

In what follows we show how different regime types in Central European history have treated our four components of the separation of powers. We will first analyse the pre-communist era and then the impact of the 40-year-long rule of the communist regimes. Subsequently, we zero in on the post-Cold War era and the key challenges to the separation of powers in the late 1990s, 2000s and 2010s.

[42]We are grateful to an anonymous reviewer for stressing the importance of these actors.

[43]Note that there are also other meanings of separation (such as separation of the armed forces from the political branches, the separation of secular from religious authorities, and the separation of centres of political power from those in control of commerce and business); *see* P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge University Press 2013) at p. 222.

[44]*See*, mutatis mutandis, M. Philp, 'Delimiting Democratic Accountability', 57 *Political Studies* (2009) p. 28 (regarding the concept of accountability).

[45]*See also supra* n. 17.

[46]Note that tripartite separation of powers is still a prevailing account in the separation of powers literature (*see* e.g. Vile, *supra* n. 18, ch. 4; Kavanagh, *supra* n. 17; Möllers, *supra* n. 10, p. 80-106, Maldonado, *supra* n. 17, p 150-156; Barber (2018), *supra* n. 35, p. 56-70.

[47]Note that we do not have the ambition in this paper to look at the totality of society, nor to provide a full-fledged sociological theory of separation of powers that would incorporate all the potential influences on the exercise of state power. For a similar point, *see* Möllers, *supra* n. 10, p. 324-325.

Historical legacies of central europe and their ramifications for separation of powers

It is often claimed that once upon a time there was a Golden Age of classical separated powers, in particular within constitutional nation-states of Europe and that today this classical system has been eroded. We agree with Carolan[48] and Möllers[49] that this is a myth. The situation on the ground has always been messier than the often rosy historical accounts, and the political exigencies never held fully to the prescriptions of the tripartite model of separation of powers. Therefore, virtually all states, to a lesser or greater extent, departed from the tripartite model in their daily functioning. However, we will show that Central European countries went particularly far, especially but not only in the communist era.

Pre-communist era

While most[50] Central European countries witnessed glorious eras of self-governance,[51] none of them enjoyed *democratic* self-rule between the Enlightenment era and WWI.[52] Moreover, with the exception of Hungary, Central European countries had little experience even of genuinely *independent statehood* in this period. Czech lands were under the control of the Habsburg Empire for almost three centuries after the Thirty Years War (1618–1648). Poland faced a similar fate a century later. The Polish-Lithuanian Commonwealth started to decline in the mid-17th century and the three regional powers – the Russian Empire, the Kingdom of Prussia and the Austrian Habsburg Monarchy – eventually partitioned the Polish territory in 1795. As a result, no truly independent Polish State emerged until 1918. Slovaks were the worst off, as they never ran their state prior to 1918 and the Hungarian rule suppressed any signs of the Slovak culture rather harshly. Hungary is thus the only outlier, as Hungarians enjoyed significant autonomy after they had forced the Habsburgs to create the dual monarchy of Austria-Hungary in 1867.

[48]Carolan, *supra* n. 16.

[49]Möllers, *supra* n. 16.

[50]Slovakia is an exception since (apart from a short spell under Hitler's tutelage during WWII) it had not experienced autonomous statehood until the split of Czechoslovakia in 1993.

[51]However, these glorious times date back mostly to the Middle Ages and the Enlightenment. *See* e.g. Z. Rau et al., *Magna Carta: A Central European Perspective of our Common Heritage of Freedom* (Routledge 2016).

[52]Note that, in the depth of the Middle Ages and the early modern era, the Czech Kingdom (1198–1618), the Polish Kingdom (1025–1569) and the Polish-Lithuanian Commonwealth (1569–1795) were autonomous and influential players in European politics.

However, Hungary had a different vision of monarchy to its Austrian counterpart. While the Austrian part of the Empire as well as Bismarck's Germany in the late 19th century developed into constitutional monarchies that created a certain room for the separation of powers[53] and the *Rechtsstaat* principle[54] the legacy of which ultimately proved critical for the post-WWI and post-WWII development in Austria and Germany,[55] Hungarians ran their own version of monarchy in which absolutist elements prevailed.[56] To be sure, Hungarians, as well as Czechs, Slovaks and Poles, were exposed to the Austrian and German constitutional regimes, but these monarchies were under the control of Germans and Austrians and their solutions found limited traction among the Hungarian, Czech, Slovak and Polish elites.[57]

The interwar period does not paint a rosy picture either. 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 state, King Charles IV.[58]

Poland and Czechoslovakia did slightly better after WWI. They abandoned the 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.[59] However, the reality 'on the ground' was far from the paper ideal.

[53]The principle of separation of powers was explicitly recognised in the Austrian basic laws of December 1867. *See* 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.

[54]R.A. Kann, *A History of the Habsburg Empire 1526–1918* (University of California Press 1974); C. Schmitt, *Constitutional Theory* (Duke University Press 2008); Z. Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff 2011).

[55]Kelsen, *supra* n. 27; P.C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: the Theory & Practice of Weimar Constitutionalism* (Duke University Press 1997); M. Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press 2015).

[56]For further details on the Hungarian monarchy *see* L. Valiani and M. Secker, *The End of Austria-Hungary* (Alfred A. Knopf 1973); P.M. Judson, *The Habsburg Empire: A New History* (Harvard University Press 2016).

[57]I. Bibó, 'The Distress of the East European Small States', in K. Nagy (ed.), *Democracy, Revolution, Self-determination: Selected writings/ Istvan Bibo* (Columbia University Press 1991) p. 13.

[58]For further details *see* Y. Merkin and M. Merkin, *Crosscurrents: Navigating the Turbulent Politics of the Right During The Horthy Era in Hungary, 1920-1944* (CreateSpace Independent Publishing Platform 2017).

[59]G. Papuashvili, 'Post-World War I comparative constitutional developments in Central and Eastern Europe', 15 *I•CON* (2017) p. 137.

Poland enjoyed democratic politics for only 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 Hitler's invasion of Poland in 1939, openly employed authoritarian techniques. Piłsudski circumscribed the powers of the Polish Parliament (*Sejm*), ruthlessly prosecuted opposition, and fostered a cult of personality.[60]

Finally, although the 1920 Czechoslovak Constitution contained a nuanced system of separation of powers,[61] this principle was sidelined in national political life. Most importantly, the first president of the country and a towering figure during the entire interwar period, Tomáš Garrigue Masaryk, was deeply distrustful of political parties, parliamentary leaders and the Parliament itself. He created an informal political organisation known as *Hrad* ('The Castle'), a powerful coalition of intellectuals, journalists, businessmen, religious leaders and WWI veterans.[62] Due to his charisma, the fractured political scene and support of the 'Castle', Masaryk *de facto* set the country's political agenda until his death in 1937. He also built a cult of personality around himself,[63] albeit of a different sort from Horthy's and Piłsudski's. As a counterweight to Masaryk's 'Castle', the leaders of key political parties created their own informal group, the so-called *Pětka* ('The Five'), which made important decisions outside the parliament and further weakened the legislature as well as the overall system of separation of powers.

Both Masaryk and the *Pětka* thus prioritised informal institutions and craved for an accumulation of power in their own hands. Some politicians even meddled with judicial independence. It is telling that Czechoslovak interwar judges complained of interferences unheard of in the Austrian era.[64] Other important safeguards of the separation of powers envisaged by the 1920 Constitution, such as the Czechoslovak Constitutional Court, were dysfunctional.[65] In sum, while Czechoslovakia did maintain a basic system of separation of powers until WWII,[66] it was far removed

[60]For further details of the life of Pilsudski *see* P. Hetherington, *Unvanquished: Joseph Pilsudski, Resurrected Poland, and the Struggle for Eastern Europe* (Pingora Press 2012).

[61]Some commentators have even claimed that it was too nuanced and contained so many checks and balances that it could hardly function in practice. *See* J. Osterkamp, 'Ústavní soudnictví v meziválečném Československu', 146 *Právník* (2007) p. 585 at p. 616.

[62]A. Orzoff, *Battle for the Castle: The Myth of Czechoslovakia in Europe, 1914–1948* (Oxford University Press 2009).

[63]Ibid.

[64]*See* Kühn *supra* n. 54, p. 11 ff.

[65]Osterkamp, *supra* n. 61; T. Langášek, *Ústavní soud Československé republiky a jeho osudy v letech 1920–1948* (Aleš Čeněk 2011).

[66]For further details *see* A. Innes, *Czechoslovakia: The Short Goodbye* (Yale University Press 2001).

from the ideal of the lone democratic outpost in the East,[67] which was guided by the principle of separation of powers.[68]

After the interwar intermezzo (1918–1938), which was not all that conducive to the idea of separation of powers anyway, WWII brought an abrupt end to any prospect of democratic development. The Czech lands and Poland were annexed by the German Third Reich, while Hungary and Slovakia launched clero-fascist regimes under Hitler's tutelage. The post-WWII democratic period in Central Europe was too short and too preoccupied with retribution[69] and state rebuilding[70] to reinstall and cultivate a functioning system of separation of powers. As if that was not enough, the communist coups d'état in the late 1940s put another nail in the coffin.

In sum, the pre-communist period was characterised by constant assault on the separation of powers, particularly on its crucial separation of institutions component. This is typical of non-democratic political regimes in general, which actively suppress diffusion of political authority among several centres of decision-making. As we have seen, even in the (for many people paradigmatic) First Czechoslovak Republic, there was a strong tendency towards centralisation of power, which eroded the formal architecture of separation. Nevertheless, a much deeper imprint on understanding the separation of powers in Central Europe was left by the communist rule, and it is to this period that we now turn.

Separation of powers dismantled: the communist way of concentrating power

The central feature of communist regimes was *centralisation* of power based on the Marxist socialist concept of the 'unity of power in the assembly',[71] coupled with socialist economic planning and thorough regulation. Lenin's principle of 'democratic centralisation' meant that discussion within the Party about the policies of the state was permitted, but once the discussion was concluded, state and Party institutions had to adhere rigidly to these decisions.[72] As a result, all three branches, including the judiciary, were under the tight control

[67]Masaryk and Beneš portrayed Czechoslovakia as the 'Switzerland of the East'. *See* Orzoff, *supra* n. 62.

[68]M. Heimann, *Czechoslovakia: The State That Failed* (Yale University Press 2011); Orzoff, *supra* n. 62.

[69]*See* e.g. B. Frommer, *National Cleansing: Retribution Against Nazi Collaborators in Postwar Czechoslovakia* (Cambridge University Press 2005).

[70]*See* T. Judt, *Postwar: A History of Europe since 1945* (Penguin Press 2005) at p. 13-240; and L.R. Johnson, *Central Europe: Enemies, Neighbors, Friends* (Oxford University Press 1996).

[71]J.A. Hazard (ed.), *Soviet Legal Philosophy* (Harvard University Press 1951) at p. 95.

[72]*See* A. Brown, *Rise and Fall of Communism* (Vintage 2009) at p. 107-111.

of the Communist Party, which uniquely represented 'the people' in its ideal form.[73]

While communists soon realised that they needed all three branches,[74] separation of institutions, even if formally anchored in constitutional texts, was an illusion. Pretty much all institutions were connected with and subordinate to the Communist Party leadership. Communist regimes in Central Europe 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 it in the state arbitrage courts, packed the judiciary with lay judges, installed trusted comrades in the Supreme Court and as presidents of ordinary courts, and subordinated courts to the General Prosecutor.[75]

Given their control over all state institutions, communists did not need to tinker with separation of functions and personnel that much. Nevertheless, they still breached them. The General Prosecutor, the guardian of the socialist legality, embodied the merger of legislative, executive and judicial functions. He exercised all three of them, as he was heavily involved in the legislative process (legislative function), represented public prosecution in criminal trials and took various administrative decisions (executive function), attended the deliberations of judges, reviewed judicial decisions and could challenge any decision he deemed inappropriate through extraordinary appeal (judicial function).[76] Apex courts in communist regimes not only decided 'cases and controversies', but also issued 'interpretative guidelines' with no relation to any real-life pending case. While the official purpose of these guidelines was to unify the divergent case law of the lower courts,[77] their real aim was to prevent deviations from the Party line. The communist regimes also stripped ordinary courts of jurisdiction over commercial law cases and created a specialised system of state

[73]Hazard, *supra* n. 71, p. 35-68. We are aware that we cannot do justice to the nuances of democratic centralisation and socialist legality and that all the theory behind these concepts was not laughable, but we do not have the space to engage with the communist theorists here.

[74]*See* Barber (2018), *supra* n. 35, p. 76-77.

[75]*See* Kühn, *supra* n. 54; S. Frankowski, 'The Independence of the Judiciary in Poland: Reflections on Andrzej Rzeplinski's Sadownictwo v Polsce Ludowej (The Judiciary in People's Poland)', 33 *Ariz. J. Int. Comp. L.* (2015) p. 40; A. Bröstl, 'At the Crossroads on the Way to an Independent Slovak Judiciary', in J. Přibáň et al. (eds.), *Systems of justice in transition: Central European experiences since 1989* (Ashgate 2003) p. 141.

[76]*See* Hazard, *supra* n. 71, p. 110-112 (discussing the original Soviet model of *prokuratura*); and Kühn, *supra* n. 54, p. 43-45 (discussing the Central European modifications of the Soviet model).

[77]*See* e.g. Z. Kühn, 'The Authoritarian Legal Culture at Work: The Passivity of Parties and the Interpretational Statements of Supreme Courts', 2 *Croatian Yearbook of European Law and Policy* (2006) p. 19.

arbitrage courts, which exercised policy, planning and adjudicatory functions at the same time.[78]

Ruling communist parties also soon realised 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.[79] 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',[80] has remained deeply embedded in the minds of Central European political leaders.[81] Four decades of communist indoctrination led in turn to a certain mental path-dependence in thinking about the separation of powers among Central European judges and politicians.[82] First, there was no growing ground for a robust civic political and legal culture. Second, while the most visible communist institutions, such as the leading Communist Party, the omnipotent *prokuratura*, or the state security services, were dismantled or reformed after 1989, the communist legacy and subservient mindset have not gone away.[83]

The twin challenges to separation of powers after 1989

The Central European communist regimes started to fall apart in the 1980s and eventually collapsed in 1989. This sparked Central European peoples' interest in public affairs and resulted in unprecedented civic engagement. This was an era, however short, of genuine debate on restructuring the state and its functioning.[84] To be sure, the pace, as well as the particular shape of democratic transitions, varied widely. As Václav Havel put it in November of 1989, just a week after the Velvet

[78]*See* e.g. R. David and J.E. Brierley, *Major Legal Systems in the World Today: an Introduction to the Comparative Study of Law* (Stevens and Sons 1985) at p. 251-261.

[79]A. Vyshinsky, *The Law of the Soviet State* (Macmillan Company 1948) at p. 303 ff.

[80]S. Holmes, 'Lineages of the Rule of Law', in J.M. Maravall and A. Przeworski (eds.), *Democracy and the Rule of Law* (Cambridge University Press 2003) at p. 22-23. *See also* T. Ginsburg and T. Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press 2008).

[81]For a thorough analysis of the 'rule through law' in a post-communist setting *see* J. Kahn, 'The Search for the Rule of Law in Russia', 37 *Georgetown Journal of International Law* (2005) p. 353; and M. Popova, 'Putin-Style "Rule of Law" & the Prospects for Change', 146 *Daedalus* (2017) p. 64.

[82]M. Bobek, 'The Fortress of Judicial Independence and the Mental Transitions of the Central European Judiciaries', 14 *European Public Law* (2008) p. 99. Path-dependence in thinking, as well as the structural importance of persistence of informal practices and structures from the past in the new democracies of Central Europe are emphasised by Krygier, *supra* n. 8.

[83]The typical example of the communist institutional legacy is Kaczyński's 2016 reform of the public prosecution (*see infra* n. 204). Some scholars even claim that socialist legal tradition is still alive; *see* A. Uzelac, 'Survival of the Third Legal Tradition?', 49 *S.C.L.R.* (2010) p. 377.

[84]P. Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge 2013).

Revolution, '[i]n Poland [the revolution] took ten years, in Hungary ten months, in East Germany ten weeks: perhaps in Czechoslovakia it will take ten days!'.[85] The mode of transition differed as well. Poland and Hungary witnessed smooth transitions of power orchestrated at roundtable talks that led to many compromises, while the Czechoslovak communist regime, the harshest one in Central Europe, had to yield to pressure from the streets, without significant concessions to the communist leadership.[86]

Nevertheless, all four Central European states shared an essentially similar[87] post-communist trajectory in the 1990s. They strove for democratisation, adopted wholesale constitutional reforms, built new institutions, and abandoned their state-planned economies in favour of free markets. Amid heated debates they chose their frameworks of government, often returning to the interwar arrangements, and entrenched their own conceptualisation of the separation of powers. When amending or adopting new constitutions, the obvious main goal of the separation of powers was to prevent the restoration of the now-defeated communist regimes by means of blocking the natural tendency of concentration of power and corruption. The deeply-rooted desire that power should be exercised in a different way from in the past reflected 'the fears originating in, and related to, the previous political regime',[88] in which power was monopolised by communists. Moreover, all four Central European states also yearned to join the European Union. In their desire to become EU members, they happily embraced the 1993 Copenhagen Criteria[89] and initiated the cumbersome accession process.[90] As we show below, the accession process contributed[91] to the first and often overlooked technocratic challenge to the separation of powers in Central Europe, one that served as a prequel to the current populist attacks. In this sense, it was the first overreaction that prepared the ground for the next.

[85]Cited from T.G. Ash, *The Magic Lantern: The Revolution of '89 Witnessed in Warsaw, Budapest, Berlin, and Prague* (Vintage Books 1993) at p. 78.

[86]*See* e.g. S. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991).

[87]Slovakia under Mečiar's semi-authoritarian rule (1993–1998) was an exception. *See supra* n. 1.

[88]A. Sajó, *Limiting Government* (CEU Press 1999) at p. 2.

[89]The Copenhagen criteria (after the European Council in Copenhagen in 1993 which defined them) are the essential conditions all candidate countries must satisfy to become EU member states (*see* Presidency Conclusions, Copenhagen European Council 1993).

[90]D. Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* (Kluwer Law International 2008).

[91]Note that the Council of Europe and in particular the Venice Commission also played a key role in this technocratic challenge, especially in the early 1990s. For a critical assessment of the Venice Commission's impact on Central Europe, *see* B. Iancu, 'Quod licet Jovi non licet bovi?: The Venice Commission as Norm Entrepreneur', 11 *Hague J Rule Law* (2019) p. 189.

Separation of powers distorted: the rise of the unelected during the EU accession process (technocratic challenge)

While the EU accession process in the late 1990s and early 2000s arguably brought about many positive effects,[92] it had long-lasting distorting effects on separation of powers in Central Europe. As mentioned above, Poland, Czechia, Slovakia and Hungary were able to choose their preferred model of separation of powers – one that reflected their historical, political and social legacies as well as the new challenges – immediately after the collapse of communist rule. However, their room for manoeuvre was greatly diminished in the accession period as any constitutional reform was constrained, and sometimes even driven, by the so-called 'EU conditionalities'.[93]

During the accession process, the EU, often relying on Council of Europe standards,[94] pushed for the same template in all four Central European countries,[95] one that aimed at depoliticising the process of governance and vesting various powers with experts and other non-elected agents.[96] This template included, among other things, strong constitutional courts,[97] autonomous judicial self-governance via judicial councils,[98] as well as numerous other autonomous public bodies[99] that were empowered at the expense of political institutions. Central European countries, desperate to 'return to Europe', adopted virtually all requirements of this Pan-European template without much resistance.[100] The

[92]*See* H. Grabbe, *The EU's Transformative Power: Europeanization Through Conditionality in Central and Eastern Europe* (Palgrave Macmillan 2006); and F. Schimmelfenning and U. Sedelmeier, *The Europeanization of Central and Eastern Europe* (Cornell University Press 2005).

[93]*See* e.g. Grabbe, *supra* n. 92; E. Gateva, *European Union Enlargement Conditionality* (Palgrave Macmillan 2015); and Kochenov, *supra* n. 90.

[94]*See* e.g. D. Kosař and M. Bobek, 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe', 15 *German Law Journal* (2014) p. 1257 (regarding judicial councils).

[95]Kochenov, *supra* n. 90. Note that the EU was not always successful in implementing the uniform standard regarding each requirement, but by and large it succeeded in Central Europe.

[96]S. De Somer, *Autonomous Public Bodies and the Law: A European Perspective* (Edward Elgar 2017). On the EU impact *see also* Suteu, *supra* n. 8, p. 6-7.

[97]*See* W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2014).

[98]C. Parau, 'The dormancy of parliaments: The invisible cause of judiciary empowerment in Central and Eastern Europe', 49 *Representation* (2013) p. 267.

[99]De Somer, *supra* n. 96.

[100]See Parau, *supra* n. 98. For an account of Czechia's unique resistance to the idea of a judicial council *see* D. Kosař, *Perils of Judicial Self-Government in Transitional Societies* (Cambridge University Press 2016).

EU thus *de facto* imposed its own understanding of separation of powers on its new Central European members.[101]

The first typical feature of the peculiar functioning of the separation of powers in Central Europe during the accession process was a super-strong constitutional court not responsive to the electorate and unreflective of the views of the majority of the population. The main example was the Hungarian Constitutional Court under the presidency of László Sólyom (1990–1998). During the 1990s, it styled itself as the guardian of the country's complex legal and social transformation.[102] The Hungarian Constitutional Court proceeded in a highly activist fashion with respect to the economic and social policies of government by limiting what the government could do at its own discretion. To fulfil this role, the Hungarian Constitutional Court availed itself of the substantial competencies granted to it, especially in terms of the abstract review of legal norms. In its position as the most vehement negative legislator in the region, the Hungarian Constitutional Court generally endeavoured to modernise Hungary's legal system and purposefully sought to introduce into the country the standards of legal thinking typical of Western democracies.[103]

It was, however, not only the Hungarian Constitutional Court that was an active player during the transition to democracy in Central Europe. According to Hermann Schwartz, almost all the courts in Central Europe were 'remarkably independent – astonishingly so in some cases – and quite ready to challenge and overturn important statutes, bills and regulations'.[104] As such, they grew into 'important "veto players" in the politics of post-communist Europe'.[105] In comparison to the Hungarian Constitutional Court, the Polish Constitutional Tribunal was perhaps more willing to help the government in achieving the transformation, rather than to put obstacles in its way. Nonetheless, in the context of a multi-party system where various compromises proved very difficult to

[101]One could object that certain features of the Pan-European template of separation of powers were already in place when the accession process started. This is correct, but the accession process significantly deepened the rise of the unelected and, moreover, made it impossible to revise the early post-Cold-War policies and strike a new reasonable balance between the three branches of government.

[102]R. Procházka, *Mission Accomplished. On Founding Constitutional Adjudication in Central Europe* (CEU Press 2002) at p. 113-139. *See also* G. Halmai, 'The Hungarian Approach to Constitutional Review: The End of Activism? The First Decade of the Hungarian Constitutional Court', in W. Sadurski (ed.), *Constitutional Justice, East and West* (Kluwer Law International 2002) p. 189.

[103]H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (The University of Chicago Press 2000) at p. 106.

[104]Schwartz, *supra* n. 103, p. xi.

[105]B. Bugarič and T. Ginsburg, 'The Assault on Post-communist Courts', 27 *Journal of Democracy* (2016) p. 69 at p. 71.

achieve, the Polish Constitutional Tribunal still gradually built up a relatively strong position for itself.[106] In the end, although the number of statutes declared unconstitutional was far from small,[107] 'the Court itself and the Parliament have learned to shape their mutual relations' despite the occasional conflict.[108] Later on, however, the period after the rise of Kaczyński brothers to power in 2005 was marked by frequent and much more serious conflicts between the government and the Polish Constitutional Tribunal.[109] The Kaczyński brothers lost this battle, but this episode is crucial for understanding why Jaroslav Kaczyński attacked the Polish Constitutional Tribunal so ferociously when he came to power again in 2015. He simply viewed his 2005-2007 failure as injustice which was condoned by the Polish Constitutional Tribunal and came to the conclusion that in order to realise his policies he needed to paralyse or capture the Polish Constitutional Tribunal.

The Czech Constitutional Court also gradually became a politically visible player, especially in the era of the 'opposition agreement' between the two leading parties, which enabled the Czech Social Democratic Party to govern with the support of the oppositional Civic Democratic Party (1998–2002). Afterwards, the most significant cases concerned key government policies of Mirek Topolánek's (2006–2009) and Petr Nečas's governments (2010–2013).[110] The most controversial decision of the Czech Constitutional Court to date came in 2009, when it accepted the doctrine of unconstitutional constitutional amendment and struck down the constitutional law[111] that was supposed to solve a long political crisis by cutting short the fifth term of office of the Chamber of Deputies, thus seeking the quickest path to snap elections.[112]

[106]Procházka, *supra* n. 102, p. 83 ff. *See also* M. Brzezinski, *The Struggle for Constitutionalim in Poland* (Macmillan 1998) at p. 165-175.

[107]Especially after the 1997 constitutional reform, the ratio of the findings of unconstitutionality (excluding constitutional complaints) increased rapidly (for instance, in 1999 the ratio was higher than 40%).

[108]L. Garlicki, 'The Experience of the Polish Constitutional Court', in Sadurski, *supra* n. 102, p. 265 at p. 281-282.

[109]D. Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review* (Princeton University Press 2010) at p. 99-107.

[110]These policies concerned, among other things, reducing social benefits and introducing health care fees in the wake of financial crisis. *See* e.g. Judgment of the Czech Constitutional Court of 20 May 2008, Pl. ÚS *Health Care Fees*; and Judgment of the Czech Constitutional Court of 23 April 2008, Pl. ÚS 2/08 *Sickness Benefits*.

[111]Constitutional Act no 195/2009 Coll.

[112]Judgment of the Czech Constitutional Court of 10 September 2009, Pl. ÚS 27/09 *Melčák*. For further analysis *see also* Y. Roznai, 'Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court's Declaration of Unconstitutional Constitutional Act', 8 *ICL Journal* (2014) p.29.

In contrast, the activism of the Slovak Constitutional Court throughout the 1990s can be best explained by reference to violations of the rules of the democratic game committed by Vladimír Mečiar's government (1994–1998). The opposition, as well as President Michal Kováč, therefore relied on the Slovak Constitutional Court, which became an important counter-majority force.[113] Later on, the Slovak Constitutional Court helped re-establish institutional stability in Slovakia and became less involved in public life. However, the accession period strengthened its position. In no other country in Central Europe was the influence of external factors greater in the process of adopting Pan-European constitutionalism than in Slovakia.[114]

The second example is the Pan-European template of judicial councils imposed on Central European countries.[115] A judicial council is an independent intermediary organisation positioned between the judiciary and the politically responsible administrators in the executive or the parliament, one that has significant powers primarily in appointing, promoting and disciplining judges.[116] It may also play a role in the areas of administration, court management and budgeting for the courts, but these powers are only secondary to its 'personal competences' regarding the careers of individual judges. Judicial councils exist in many European countries such as Italy, France and Spain.[117] However, the Pan-European judicial council model advocated by the EU (with the help of the Council of Europe) during the accession process was a very peculiar version of a judicial council, which has few, if any, equivalents in Western Europe,[118] since it required the entrenchment of a judicial council in the Constitution, granting judges at least parity in that body, vesting the real decision-making power with that body, transferring most 'personal competences' regarding a career in the judiciary to that body, and selecting the Chief Justice or its equivalent as the chairman of the judicial council.[119]

[113]Procházka, *supra* n. 102, p. 168 ff.

[114]Blokker, *supra* n. 84, p. 145 ff.

[115]*See* Kosař and Bobek, *supra* n. 94; Parau, *supra* n. 98; and Kosař, *supra* n. 100.

[116]N. Garoupa and T. Ginsburg, 'Guarding the Guardians: Judicial Councils and Judicial Independence', 57 *American Journal of Comparative Law* (2009) p.103.

[117]*See* Kosař, *supra* n. 40.

[118]Even the Italian judicial council (*Consiglio Superiore della Magistratura*), which served as a template for the Pan-European model, differs in several aspects and, more importantly, its success has always depended on many endogenous and exogenous factors. *See* S. Benvenuti and D. Paris, 'Judicial Self-Government in Italy: Merits, Limits and the Reality of an Export Model', 19 *German Law Journal* (2018) p. 1641.

[119]*See* Kosař and Bobek, *supra* n. 94; and Kosař, *supra* n. 100.

This design of Pan-European judicial councils, which was eventually implemented in Hungary, Slovakia and, partly, also in Poland,[120] *de facto* insulated the judicial branch from the political branches as well as from the general public. In Barber's terms, judges were awarded impenetrable shields against any leverage by politicians, and at the same time, politicians were denied all swords against the judiciary.[121] This, in turn, led to the corporatisation of the judiciary and various accountability perversions, singled out judges as a special caste which could remain totally isolated from the wishes of the electorate,[122] and further reduced the already weak democratic legitimacy of the Central European judiciaries.[123] We will show below that this one-sided empowerment and detachment of the judiciary made it easy for the populist leaders to delegitimise judges in the eyes of the ordinary people, pack the judicial councils with their protégés, and later on to use them as weapons against their critics within the judiciary.[124] Viewed through these lenses, it is not surprising that the strongest judicial council, the one in Hungary, was attacked most ferociously,[125] while

[120]On why Czechia resisted the Pan-European judicial council model *see* Kosař, *supra* n. 100; and A. Blisa et al., 'Judicial Self-Governance in Czechia: Europe's Black Sheep?', 19 *German Law Journal* (2018) p. 1951.

[121]*See supra* n. 40.

[122]For instance, the former chair of the Polish Association of Judges called the judges a 'special caste of people', a term which Law and Justice immediately started to use, in a pejorative sense, to describe the Polish judiciary; *see* A. Czarnota, 'Rule of lawyers or rule of law: On constitutional crisis and rule of law in Poland', in B. Iancu and E. S. Tănăsescu (eds.), *Governance and Constitutionalism: Law, Politics and Institutional Neutrality* (Routledge 2019) p. 51 at p. 53. On the Law and Justice media campaign against the judiciary, *see also* F. Zoll and L. Wortham, 'Judicial Independence and Accountability: Withstanding Political Stress in Poland', 42 *Fordham International Law Journal* (2019) p. 875 at p. 904-907.

[123]*See* Z. Fleck, 'Judicial Independence in Hungary', in A. Seibert-Fohr (ed.), *Judicial Independence in Transition* (Springer 2012) p. 793 (on Hungary); Kosař, *supra* n. 100; and S. Spáč et al., 'Capturing the Judiciary from Inside: The Story of Judicial Self-Governance in Slovakia', 19 *German Law Journal* (2018) p. 1741 (all on Slovakia); A. Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition', 19 *German Law Journal* (2018) p. 1839 (on Poland); and Parau, *supra* n. 98 (on Central Europe in general).

[124]*See* P. Kingsley, 'After Viktor Orban's Victory, Hungary's Judges Start to Tumble', *The New York Times*, 1 May 2018, ⟨www.nytimes.com/2018/05/01/world/europe/hungary-viktor-orban-judges.html⟩, visited 22 August 2019; and B. Novak and P. Kingsley, 'Hungary Creates New Court System, Cementing Leader's Control of Judiciary', *New York Times* (12 Dec 2018), ⟨www.nytimes.com/2018/12/12/world/europe/hungary-courts.html⟩, visited 22 August 2019 (on Hungary); and Śledzińska-Simon, *supra* n. 123 (on Poland).

[125]Ibid. *See also* Fleck, *supra* n. 123; and D. Kosař and K. Šipulová, 'The Strasbourg Court Meets Abusive Constitutionalism: Baka v. Hungary and the Rule of Law', 10 *Hague J Rule Law* (2018) p. 83.

the Czech judiciary, which did not follow the judicial council model,[126] has been left largely intact.[127]

Third, other independent expert and regulatory agencies also played an inappropriate role during the process of the post-communist transition. The foremost examples are the Central Banks which, according to Juliet Johnson, committed two basic sins of 'commission' and 'omission'.[128] The first and for our purposes more important sin consisted of the distorted interpretation of the Central Banks' independence, which found its expression in a lack of cooperation with governments. The second sin concerned the relative neglect of banking supervision, i.e. unsatisfactory fulfilment of one of the most important functions of Central Banks. The separation of powers itself was, however, more affected by the lack of coordinated action between Central Banks and the political branches of government in the joint enterprise of governing during a turbulent era of economic, political and social transformation. In the end, the assertion of institutional independence of Central Banks was compounded by their unwillingness to take into account the actions of governments, as well as by unilateral pursuit of their own vision of economic policies.

Of all these actors the most important was certainly the judiciary, especially constitutional courts. Some scholars have even claimed that a 'courtocracy' – a democracy run by the judiciary – is a new and superior form of governance.[129] Emboldened by such intellectual support, the judicial branch in Central European countries 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.[130] Expert organs in other spheres of public life such as ombudspersons and data protection agencies followed the same depoliticising pattern.[131]

[126] *See supra* n. 120.

[127] It is difficult for the Czech President, Miloš Zeman, who appoints all Czech judges, and for the Czech Prime Minster, Andrej Babiš, whose Government nominates all candidates for judicial office to the President, to criticise the Czech judiciary for its lack of democratic legitimacy and to blame judicial self-governance for bad personal decisions.

[128] J. Johnson, *Priests of Prosperity: How Central Bankers Transformed the Postcommunist World* (Cornell University Press 2016).

[129] K.L. Scheppele, 'Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic Than Parliaments)', in W. Sadurski et al. (eds.), *Rethinking the Rule of Law in Post-Communist Europe* (CEU Press 2005) p. 25.

[130] Sadurski, *supra* n. 97.

[131] *See* e.g. M. Bánkuti et al., 'From Separation of Powers to a Government Without Checks: Hungary's Old and New Constitution', in G.A. Töth, *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (CEU Press 2012) p. 248-249.

Despite its appeal, this 'catching up' with the West[132] was not a natural development. The Pan-European template significantly altered the existing separation of powers in Central Europe, while denying the opportunity for proper deliberation and local fine-tuning.[133] Instead, it opted for a 'one size fits all' solution.[134] Some of the suggested institutions, such as judicial councils, were even alien to the Central European legal culture as they ignored the German and Austrian roots of the Central European systems of court administration.[135] All this resulted in a one-sided emphasis on technocratic institutions staffed by experts, at the expense of representative institutions and civic engagement.[136]

To apply the conceptual separation of powers toolbox discussed above, the Pan-European 'separation of powers template' stressed insulation of the judicial branch and independent agencies, instituted one-sided judicial checks upon elected branches,[137] and suppressed the 'balances element' of the principle of checks and balances. Besides carving out a prominent role in the standard framework of the separation of powers, courts were thus given several swords as well as shields,[138] whereas the other two branches were deprived of virtually any say over the judicial branch. Two mutually reinforcing developments were thus taking place. On the one hand, Central European courts judicialised virtually every aspect of politics,[139] constitutional courts overacted to the slightest change in judicial salaries (even if the cuts reflected widely accepted difficulties such as floods or financial crises),[140] and most powers regarding the careers of individual judges were transferred to judicial councils, which were composed primarily of judges themselves.[141] On the other hand, the impeachment of judges was considered *chutzpah* and the political branches gradually lost control over judicial

[132]*See* J. Komárek, 'The Struggle for Legal Reform after Communism: A review of Zdeněk Kűhn, The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation (Martinus Nijhoff 2011)', 63 *American Journal of Comparative* Law (2015) p. 285 at p. 288-289.

[133]B. Puchalska, *Limits to Democratic Constitutionalism in Central and Eastern Europe* (Ashgate 2011) at p. 91-122; C. Parau, *Transnational Networks and Elite Self-Empowerment: The Case of Judiciary in Central and Eastern Europe* (Oxford University Press 2016).

[134]B. Bugarič, 'A crisis of constitutional democracy in post-Communist Europe: "Lands in-between" democracy and authoritarianism', 13 *I·CON* (2015) p. 219 at p. 241; Parau, *supra* n. 98; Kosař and Bobek, *supra* n. 94.

[135]Kosař, *supra* n. 100.

[136]Blokker, *supra* n. 84. For a complex view on civic engagement *see also* Suteu, *supra* n. 8, p. 10.

[137]*See* Vibert, *supra* n. 31, p. 3.

[138]*See supra* nn. 35-40.

[139]Sadurski, *supra* n. 97.

[140]Note that the Czech Constitutional Court has already issued 16 judgments regarding judicial salaries and that the Slovak Constitutional Court has rendered seven such judgments (both courts almost always rule in favour of judges).

[141]*See supra* nn. 115 and 123.

appointments as well as judicial promotions.[142] At the same time, the immunity of MPs had been shrinking.[143]

This Pan-European template distrusts politicians and voters,[144] relies on an independent elite (experts) to identify the common interest and the appropriate solution, suppresses pluralistic views of society and politics, prioritises one-size-fits-all solutions, and dispenses with the accountability of unelected institutions.[145] It praises expertise, puts emphasis on outputs and efficiency, derives its legitimacy from rational speculation and (quasi-)scientific procedures,[146] avoids engaging with the people,[147] and neglects constitutional sentiments[148] and symbolic narratives. These depoliticising effects of the EU accession process contributed to the current democratic malaise in Central Europe.[149] More specifically, we argue that this overemphasis on technocratic institutions prepared the ground for the recent populist attacks on separation of powers, to which we now turn.

Overreaction to overreaction: populist leaders take the stage (populist challenge)

In response to current developments in Central Europe, lawyers have recently joined political theorists in their study of populism as a political phenomenon[150] and grappled with the relationship between populism and constitutionalism.[151] While the majority of scholars accept that populism has a problematic

[142]Ibid.

[143]*See also* ECtHR [GC] 17 May 2016, Case No. 42461/13 and 44357/13, *Karácsony and Others* v *Hungary*; and Judgment of the Czech Constitutional Court of 16 June 2016, No. I. ÚS 3018/14.

[144]*See* A. Seibert-Fohr, 'Judicial Independence in European Union Accessions: The Emergence of a European Basic Principle', 52 *German Yearbook of International Law* (2009) p. 405; and Kosař, *supra* n. 100. *See also* R. Unger, *What Should Legal Analysis Become* (Verso 1998) at p. 72-73 and J. Waldron, 'Dirty Little Secret', 98 *Colum. L. Rev.* (1998) p. 510.

[145]*See* D. Caramani, 'Will vs. reason: the populist and technocratic forms of political representation and their critique to party government', 111 *Americal Political Science Review* (2017) p. 54. *See also* C. Bickerton and C. Invernizzi Accetti, 'Populism and Technocracy', in C. Rovira et al. (eds.), *The Oxford Handbook of Populism* (Oxford University Press 2017); and Müller, *supra* n. 2, p. 97.

[146]Caramani, *supra* n. 145.

[147]Blokker, *supra* n. 84.

[148]A. Sajó, *Constitutional Sentiments* (Yale University Press 2011).

[149]P. Dufek and J. Holzer, 'Debating Democracy in East Central Europe: The Issues and their Origins', in J. Holzer and M. Mareš (eds.), *Challenges to Democracy in East Central Europe* (Routledge 2016) p. 15 at p. 20ff.

[150]For a more thorough characterisation of populism *see infra* nn. 152-155. *See also* L. Corso, 'When anti-politics becomes political: what can the Italian Five Star Movement tell us about the relationship between populism and legality', in this issue, and the sources cited therein.

[151]*See also* the joint *I-CONnect/Verfassungsblog* mini-symposium on 'Populism and constitutional courts' (2018, ⟨www.verfassungsblog.de/category/focus/constitutional-courts-and-populism/⟩, visited 22 August 2019).

relationship with constitutionalism[152] and erodes certain pillars of constitutional democracy,[153] some have recently argued that populism contains a specific constitutional theory, a kind of 'populist constitutionalism'. Read this way, populism adopts a particular conception of constituent power (ascribing absolute primacy to the constituent power vis-à-vis the constitution and the rules and powers derived from it), a specific interpretation of popular sovereignty (with the *real* – empirical – people representing the unity), and a concept of constitutional identity often backed by (mythical) historical narratives of ancestral greatness.[154]

Despite these nuances, there is overwhelming scholarly agreement that populism is hostile to the principle of separation of powers, which is rejected by populists for being cumbersome, artificial and constraining of the true political will of the people.[155] We agree that populism does pose a significant challenge to the separation of powers, but we go beyond the existing scholarship which rarely differentiates between the four components of separation of powers. Accordingly, we now show that populism targets some of these components more aggressively than others, and explain why it was so easy for populist leaders in Central Europe to do so. To be able to do that, however, we must first finish our story of the separation of powers in Central Europe by analysing the developments of the last decade.

After Viktor Orbán's *Fidesz* gained a constitutional majority in 2010, its one-party government embarked on a quest against independent institutions that stood in its way. It adopted a brand new constitution which has completely altered the constitutional landscape.[156] Among other things, the new constitution curbed the powers of the Hungarian Constitutional Court, increased the number of justices, and changed the appointment procedure.[157] These changes allowed Orbán to pack the Hungarian Constitutional Court with his protégés.[158]

[152]N. Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Harvard University Press 2014); C. Mudde, 'Europe's Populist Surge: A Long Time in the Making', 95 *Foreign Affairs* (2016) p. 25; Müller, *supra* n. 2; H. Kriesi, 'Revisiting the Populist Challenge', 25 *Czech Journal of Political Science* (2018) p. 5.

[153]C. Pinelli, 'The Populist Challenge to Constitutional Democracy', 7 *EuConst* (2011) p. 5.

[154]L. Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity', 12 *EuConst* (2016) p. 6; and P. Blokker, 'Populist Constitutionalism', in C. de la Torre (ed.), *Routledge Handbook of Global Populism* (Routledge 2018) p. 113.

[155]Blokker, *supra* n. 8. *See also* Krygier, *supra* n. 8.

[156]A. Jakab and P. Sonnevend, 'Continuity with Deficiencies: The New Fundamental Law of Hungary', 9 *EuConst* (2013) p. 102; K. Kovács and G. Tóth, 'Hungary's Constitutional Transformation', 7 *EuConst* (2011) p. 183.

[157]Halmai, *supra* n. 9; D. Landau, 'Abusive Constitutionalism', 47 *University of California Davis Law Review* (2013) p. 189 at p. 208-211; M. Tushnet, 'Authoritarian Constitutionalism', 100 *Cornell Law Review* (2015) p. 391 at p. 433-435; R. Uitz, 'Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary', 13 *ICON* (2015) p. 279.

[158]Ibid. *See also* P. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe', 15 *EuConst* (2019) p. 48 at p. 56-57.

When it came to the ordinary courts, Orbán removed the sitting Chief Justice of the Supreme Court and replaced him with his appointee;[159] prematurely terminated the term of office of the Supreme Court Vice-President, Lajos Erményi, by statute, allegedly on the grounds of the reorganisation of the Hungarian judiciary;[160] got rid of most senior judges (who often sat on the Supreme Court or held critical court president positions) by abruptly reducing the compulsory retirement age for judges;[161] hollowed out the powers of the judicial council; and transferred judicial appointments to a newly created body staffed by Fidesz people.[162]

Yet Orbán did not stop there. He also captured the State Audit Office, the National Media and Telecommunications Authority, election commissions and other independent agencies.[163] This 'constitutional Blitzkrieg' ultimately eliminated any resistance on the part of the Constitutional Court, the ordinary courts as well as numerous other independent agencies.[164]

Poland witnessed a similar scenario after Jaroslav Kaczyński and his Law and Justice (PiS) party won the 2015 Polish parliamentary elections. Kaczyński launched an attack on the Polish Constitutional Tribunal. As he failed to muster a constitutional majority in the 2015 parliamentary elections, he had to resort to dubious amendments to ordinary laws concerning the Polish Constitutional Tribunal and to employ the non-implementation technique in order to 'contain' the Polish Constitutional Tribunal before he could pack it with loyal judges.[165]

Nevertheless, he got eventually his way. He proceeded in five steps. First, President Andrzej Duda refused to swear in three judges rightfully appointed by the previous parliamentary majority in the lower house of parliament (*Sejm*) before the 2015 elections.[166] Second, the new *Sejm* after the 2015

[159]Kosař and Šipulová, *supra* n. 125.

[160]Ibid.

[161]*See* T. Gyulaváriand and N. Hős, 'Retirement of Hungarian Judges, Age Discrimination and Judicial Independence: A Tale of Two Courts', 42 *Industrial Law Journal* (2013) p. 289; and U. Belavusau, 'On Age Discrimination and Beating Dead Dogs: *Commission v. Hungary*', 50 *CMLRev* (2013) p. 1145.

[162]N. Chronowski and M. Varju, 'Two Eras of Hungarian Constitutionalism: From the Rule of Law to Rule by Law', 8 *Hague J Rule Law* (2016) p. 227; Kosař, *supra* n. 100, p. 134.

[163]Halmai, *supra* n. 9; Uitz, *supra* n. 157; and Castillo-Ortiz, *supra* n. 158.

[164]*See* A. Vincze, 'Hungary: Regulatory bodies in an illiberal democracy', in B. Iancu et al. (eds.), *Governance and Constitutionalism: Law, Politics and Institutional Neutrality* (Routledge 2018) p. 119; and Castillo-Ortiz, *supra* n. 158, at p. 65.

[165]*See* L. Garlicki, 'Disabling the Constitutional Court in Poland', in A. Szmyt and B. Banaczak (eds.), *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989-2015* (Gdansk University Press 2016) p. 63; T. Koncewicz, 'Of institutions, democracy, constitutional self-defence and the rule of law: The judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond', 53 *CMLRev* (2016) p. 1753; and Sadurski, *supra* n. 4.

[166]Ibid.

elections, already under Kaczyński's control, nominated five instead of two Justices to the 15-member Polish Constitutional Tribunal.[167] By doing so Kaczyński filled not only the two new vacancies but also three vacancies 'created' by Andrzej Duda. Third, after Kaczyński met with resistance from the sitting president of the Polish Constitutional Tribunal (Andrzej Rzeplinski), who refused to let three 'unlawful PiS justices' into the building of the Polish Constitutional Tribunal, he paralysed the Polish Constitutional Tribunal by refusing to allow the publication of the Polish Constitutional Tribunal's judgments in the Official Journal, thus depriving them of legal effect, and by increasing the Polish Constitutional Tribunal's quorum for adopting plenary judgments.[168] Fourth, once Rzeplinski's term had come to an end in December 2016, Kaczyński adopted a law which created the new position of 'acting president' of the Polish Constitutional Tribunal. Subsequently, President Andrzej Duda quickly appointed Julia Przyłębska, one of the two justices lawfully elected in 2015. Przyłębska immediately brought in the three unlawful PiS judges who were previously rejected by the former president of Polish Constitutional Tribunal Rzeplinski and called a general assembly of judges, where her PiS colleagues elected her the President of the Polish Constitutional Tribunal.[169] Fifth, Kaczyński arranged a deal with Justice Andrzej Wróbel, who voluntarily resigned in January 2017.[170] This allowed the governing PiS party to appoint the eighth Justice and finally gain a majority on the 15-member Tribunal. By June 2017 the Polish Constitutional Tribunal was under the firm control of Kaczyński as his PiS had appointed nine out of the fifteen Justices.

Kaczyński also tightened his control over ordinary courts, hitting lower courts as well as the Supreme Court. Like Orbán, Kaczyński first took control over the selection, promotion and disciplining of judges. He did so by packing the National Council for the Judiciary, which has significant power over: (1) the assessment, promotion and disciplining of sitting judges' (2) the appointment of new judges; and (3) the selection of court presidents.[171] More specifically, he prematurely terminated the terms of 15 judges sitting on the 25-member National Council for the Judiciary, changed the election rules so that 15 new judicial members of the National Council for the Judiciary were elected by

[167]Ibid.

[168]Ibid.

[169]Ibid.

[170]*See* E. Siedlecka, 'Sędzia Andrzej Wróbel odchodzi z Trybunału Konstytucyjnego. PiS obsadzi kolejne miejsce', *Gazetta Wyborcza*, 25 January 2017, ⟨wyborcza.pl/7,75398,21289466, sedzia-andrzej-wrobel-odchodzi-z-trybunalu-konstytucyjnego.html?disableRedirects=true⟩, visited 22 August 2019.

[171]*See* Śledzińska-Simon, *supra* n. 123, especially p. 1847-1855; and Zoll and Wortham, *supra* n. 122, p. 896-898.

parliamentary majority rather than by their peers, and then appointed his protégés to the vacant posts. As a result, 21 out of 25 members of the National Council for the Judiciary were appointed by the legislature controlled by Kaczyński and his PiS. This capture of the National Council for the Judiciary allows Kaczyński to control judicial appointments and exercise pressure on sitting judges with threats of discipline or denial of promotion.[172]

Furthermore, Kaczyński knew that lower court presidents and vice-presidents could be very important players in Central European judiciaries.[173] He thus gave his Minister of Justice, Zbigniew Ziobro, a six-month window which allowed Ziobro to dismiss court presidents and appoint new ones without consultation. Ziobro fully exploited this 'window of opportunity' and replaced 160 court presidents and vice-presidents.[174]

Only then did Kaczyński target the Polish Supreme Court. He again took a page from Orbán's playbook and reduced the compulsory retirement age for judges from 70 to 65 years,[175] which 'by accident' also applied to the Polish Supreme Court President, Małgorzata Gersdorf, who turned 65 in 2017 and whose constitutional term of office was only supposed to end in 2020, and to more than one third of the Supreme Court judges.[176] At the same time, he increased the number of judges on the Supreme Court from 81 to 120.[177] The cumulative effect of these two measures was that Kaczyński, having the National Judicial Council already under control, could in theory in one fell swoop appoint 70 out of 120 Supreme Court judges, including the new Supreme Court president. However, in November 2018 the European Court of Justice stepped in and ordered the suspension of the new law that had lowered the compulsory retirement age for Polish judges.[178] Not without hesitation, Poland reversed that

[172]Ibid.

[173]*See* Kosař, *supra* n. 100. For the role of court presidents in comparative perspective *see* A. Blisa and D. Kosař, 'Court Presidents: The Missing Piece in the Puzzle of Judicial Governance', 19 *German Law Journal* (2018) p. 2031.

[174]Zoll and Wortham, *supra* n. 122, p. 898-899.

[175]In fact, Kaczyński killed *two* birds with one stone; by reducing the compulsory retirement age he got rid of not only Chief Justice Gersdorf, but also of approximately one third of the Supreme Court judges (M. Wiewióra, 'The new Act on the Supreme Court in Poland', *Duel Amical*, 27 February 2018, ⟨www.duelamical.eu/en/articles/new-act-supreme-court-poland⟩, visited 19 August 2019).

[176]Zoll and Wortham, *supra* n. 122, p. 894-896.

[177]*See* 'Where the law ends. The collapse of the rule of law in Poland – and what to do', European Stability Initiative, 29 May 2018, Berlin – Warsaw, ⟨www.esiweb.org/index.php?lang=en&id=156&document_ID=190⟩, visited 19 August 2019.

[178]ECJ, Order of the Vice-President of the Court in Case C-619/18 R, *Commission* v *Poland*.

law by enabling forcibly-retired judges to return to work; the damage to the Supreme Court had, however, already been done.[179]

In the meantime, Kaczyński started his crackdown on independent agencies and media boards.[180] Kaczyński is thus following the same playbook as Orbán in Hungary, perhaps even more shamelessly. The only difference is that Kaczyński, in contrast to Orbán, does not have a constitutional majority and has to resort to changes through ordinary statutes.[181] With the help of his protégé, the Polish president Andrzej Duda, this strategy has worked so far, even though he did not manage to silence all pockets of resistance; some independent agencies such as the Polish ombudsman remain active despite their vocal criticism of Law and Justice reforms.

Slovakia and Czechia have fared slightly better, but they too show signs of disregard for the separation of powers. Slovak Prime Minister Róbert Fico and his *Smer* managed to fill the Slovak Constitutional Court with loyal Justices and thereby *de facto* immunised *Smer*'s policies from judicial review. Only Fico's unexpected defeat to an independent candidate, Andrej Kiska, in the 2014 presidential race prevented him from completely controlling the Slovak Constitutional Court[182] because it forced Fico to cooperate with the new President on new constitutional court justice appointments.[183] Although Fico had to step down as Prime Minister amid mass protests following the assassination of investigative journalist Ján Kuciak and his girlfriend in February 2018, he still has a tight grip on Slovak politics. In October 2018, he almost managed to orchestrate a constitutional amendment that would exclude the Slovak President from the selection of judges for the Slovak Constitutional Court, but he eventually lost out in a dramatic late-night parliamentary session.[184]

[179] *See* e.g. L. Pech and S. Platon, 'The beginning of the end for Poland's so-called "judicial reforms"? Some thoughts on the ECJ ruling in Commission v Poland (Independence of the Supreme Court case)', *EU Law Analysis*, 8 July 2019.

[180] For instance, the new law allowed him to dismiss all the boards of public-service broadcasters and vest their control with the Treasury Ministry. *See* J. Fomina and J. Kucharczyk, 'Populism and Protest in Poland', 27 *Journal of Democracy* (2016) p. 58 at p. 63.

[181] *See also* Krygier, *supra* n. 8, p. 5.

[182] *See* Venice Commission, 'Slovak Republic – Opinion on questions relating to the appointment of judges, adopted by the Venice Commission at its 110th Plenary Session (Venice, 10-11 March 2017)', CDL-AD(2017)001.

[183] *See* ibid.

[184] *See* e.g. M. Sliz, 'Koalícia neschválila zmeny ústavného súdu. Odskočili od nej kotlebovci', *Aktuality.sk*, 24 October 2018, ⟨www.aktuality.sk/clanok/635231/koalicia-neschvalila-zmeny-ustavneho-sudu-odskocili-od-nej-kotlebovci/⟩, visited 19 August 2019.

Later on, Fico himself ran for the President of the Slovak Constitutional Court,[185] but he has failed to secure that post.[186]

Even Czechia, widely considered the most resistant among Central European countries to attacks on the separation of powers, is far from immune. The winner of the 2017 parliamentary elections and current Prime Minister, Andrej Babiš,[187] not only prefers to 'run the state like a firm',[188] implying that checks and balances, as well as complex procedural rules, are nothing but a nuisance,[189] but has also pledged to abolish the upper chamber of the Parliament (Senate), reduce the number of MPs in the lower chamber from 200 to 101,[190] and abolish municipal assemblies.[191] In other words, Babiš aims for a centralisation of power by strengthening the majoritarian elements of Czech parliamentarism, and for a weakening of checks on his powers and policies. The recently re-elected President, Miloš Zeman, fully supports such views. According to several judges of the Czech Constitutional Court and the Supreme Administrative Court, Zeman went even further as his envoys have allegedly attempted to persuade judges of these two courts to decide high-profile political cases in line with Zeman's preferences.[192] More recently, the dubious

[185] *See* V. Prušová and M Kern, 'Fico kandiduje na Ústavný súd', *Dennik N*, 7 January 2019, ⟨dennikn.sk/1343550/fico-kandiduje-na-ustavny-sud/⟩, visited 19 August 2019.

[186] His candidacy sheds new light on the October constitutional amendment bill – Fico apparently had a personal motive in passing this amendment as he intended to run for the office of constitutional justice and suspected that President Kiska would have never nominated him.

[187] *See* T. Haughton et al., 'Czech elections have become really volatile. This year was no exception', *Washington Post*, 24 October 2017, ⟨www.washingtonpost.com/news/monkey-cage/wp/2017/10/24/czech-elections-have-become-really-volatile-this-year-was-no-exception⟩, visited 19 August 2019.

[188] *See* e.g. J. Jandourek, 'Babiš chce řídit stat jako firmu. To asi nepůjde, stát není firma', *Reflex on-line*, 6 September 2013, ⟨www.reflex.cz/clanek/info-x/51716/babis-chce-ridit-stat-jako-firmu-to-asi-nepujde-stat-neni-firma.html⟩, visited 19 August 2019. For a scholarly analysis of Babiš's entrepreneurial party *see* L. Kopeček, 'I'm Paying, So I Decide – Czech ANO as an Extreme Form of a Business-Firm Party', 30 *East European Politics and Societies* (2016) p. 725; V. Hloušek and L. Kopeček, 'Entrepreneurial Parties: A Basic Conceptual Framework', 24 *Czech Journal of Political Science* (2017) p. 83.

[189] *See* e.g. R. Lyman, 'The Trump-Like Figures Popping Up in Central Europe', *New York Times*, 24 February 2017, ⟨www.nytimes.com/2017/02/24/world/europe/zbigniew-stonoga-andrej-babis.html⟩, visited 19 August 2019.

[190] This change would seriously skew the electoral rules against smaller political parties. Viktor Orbán actually did the same in Hungary (*see* literature *supra* n. 3).

[191] *See* A. Babiš, *O čem sním, když spím: Vize 2035 pro Českou republiku, pro naše děti* (Czech Print Center 2017).

[192] *See* O. Kundra, A. Procházková, 'Mynář se pokusil ovlivnit vysoce postavené soudce', *Respekt*, 6 January 2019, ⟨www.respekt.cz/politika/mynar-se-pokusil-ovlivnit-vysoce-postavene-soudce⟩, visited 19 August 2019; R. Kalenská, 'Soudcova výpověď o Zemanově útoku na justici: Dával mi jasně najevo, jak máme rozhodnout, říká Baxa', *Deník N*, 16 January 2019, ⟨denikn.cz/54570/soudcova-vypoved-o-zemanove-utoku-na-justici-daval-mi-jasne-najevo-jak-mame-rozhodnout-rika-baxa/⟩, visited 19 August 2019.

resignation of the Minister of Justice, who abruptly resigned after the Police recommended prosecution of the Prime Minister Babiš, further intensified concerns about judicial independence and led to massive public protest.[193]

To be sure, neither Orbán nor Kaczyński (nor Babiš nor Fico) are anti-institutionalists in an unequivocal sense.[194] They like institutions as long as those institutions pursue their agendas,[195] or at least behave in a neutral way and do not put up unwelcome obstacles. As Müller notes, populists 'only oppose those institutions that, in their view, fail to produce the morally (as opposed to empirically) correct political outcomes'.[196] Hence, their goal is not necessarily to abolish the existing institutions, merge them, blur the boundaries between their functions, or occupy several offices at once. In fact, even Kaczyński does not reject the separation of powers as such (note that he prefers to stay in the background as an ordinary MP rather than becoming Prime Minister, which would openly concentrate power in his hands) and he 'merely' pushes his own vision of separation of powers.[197]

To be more precise, these populist leaders in the first place seek to immunise their governments' actions from external review and to silence their critics. Therefore, their primary target is the principle of checks and balances, and especially its 'checks' element. They want to take swords away from agencies they do not control and reduce the shields these institutions have vis-à-vis the democratically elected branches.[198] That is why both Orbán and Kaczyński have ended up in a head-on collision with constitutional tribunals[199] and ordinary courts[200] – the institutions that are most resistant to abrupt changes in the political mood.[201] Interestingly, once they captured the courts, they vigorously

[193]*See* H. de Goeij and M. Santora, 'In the Largest Protests in Decades, Czech Demand Resignation of Prime Minister', *The New York Times*, 23 June 2019, ⟨www.nytimes.com/2019/06/23/world/europe/czech-republic-protests-andrej-babis.html⟩, visited 19 August 2019.

[194]In this issue, the relationship of populists to political institutions is analysed by Blokker, *supra* n. 8, p. 7; Suteu, *supra* n. 8, p. 10-11; and Krygier, *supra* n. 8, p. 22-23. *See also* the discussion on how populists use law for their own purposes in Corso, *supra* n. 150, p. 10-12.

[195]For a good analysis of how they (ab)use constitutional courts once they take control of them, *see* Castillo-Ortiz, *supra* n. 158, p. 67-71.

[196]Müller, *supra* n. 2.

[197]*See* e.g. the Polish response (UNHRC, 6 June 2018, A/HRC/38/38/Add2, p. 4) to the Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland (UNHRC, 5 April 2018, A/HRC/38/38/Add1).

[198]On swords and shields *see supra* nn. 35-40.

[199]*See* Castillo-Ortiz, *supra* n. 158.

[200]*See supra* nn. 159-162 and 171-179.

[201]A crackdown on independent agencies soon followed (*see supra* nn. 163-164 and 180). Note that given the fact that both Hungary and Poland are parliamentary systems, the executive enjoys the support of a parliamentary majority (and both Orbán and Kaczyński have secured pliant Presidents) and thus that the major battleground is between political branches and the judiciary, and not government-parliament relations.

started defending and exploiting them.[202] Sometimes they even established a brand new judicial check, e.g. the system of administrative courts in Hungary.[203]

However, the ramifications of their actions go deeper and have an impact on other components of the separation of powers as well. For instance, one of Kaczyński's first steps after his 2015 electoral victory was to reform public prosecution by merging the Office of the Public Prosecutor General with the Minister of Justice.[204] In combination with other judicial reforms, this means that the Polish Minister of Justice has extensive power over both those who prosecute and those who hear the cases being prosecuted.[205] This arrangement not only interferes with the separation of institutions component but also reminds us of the communist model of *prokuratura*.[206] Viktor Orbán, due to three consecutive electoral victories which gave him constitutional majorities, has not had to interfere with the separationist components so far. However, as during communist rule,[207] the separation of institutions, even if formally anchored in the new Hungarian constitution, is an illusion; pretty much all institutions are now subordinate to Orbán's Fidesz and their supporters. That said, we do not know whether Central European populist leaders will remain content with upholding the separationist components or whether, when under threat of political defeat, they will decide to follow the example of their non-European counterparts who have not shied away from shameless violations of the separation of institutions and separation of functions.[208]

Conclusion: why institutional tweaks are not enough

The rise of political leaders such as Viktor Orbán and Jarosław Kaczyński and their respective actions have forced us to rethink what has gone wrong with Central European democracy. We have argued that analysing their actions from the

[202] *See* Castillo-Ortiz, *supra* n. 158, at p. 67-71.

[203] *See* R. Uitz, 'An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts', *Verfassungsblog*, 2 January 2019, at ⟨verfassungsblog.de/an-advanced-course-in-court-packing-hungarys-new-law-on-administrative-courts/⟩, visited 22 August 2019.

[204] Zoll and Wortham, *supra* n. 122, p. 891-892.

[205] Ibid. On the top of that, as was shown above, he enjoys great discretion in selecting court presidents.

[206] *See supra* n. 76.

[207] *See supra* nn. 77-78.

[208] One recent example is the Venezuelan Supreme Court which, under orders by President Maduro, transferred to itself ('or to the entity that the Court decides') all the powers enjoyed by Parliament, officially 'in order to preserve the country's rule of law'. *See* J. Couso, 'Venezuela's Recent Constitutional Crisis: Lessons to be Learned from a Failed Judicial Coup D'etat', *Int'l Journal of Constitutional Law Blog*, 12 April 2017, at ⟨www.iconnectblog.com/2017/04/venezuelas-recent-constitutional-crisis-lessons-to-be-learned-from-a-failed-judicial-coup-detat-i-connect-column/⟩, visited 22 August 2019.

perspective of separation of powers produces valuable insights that would otherwise have remained obscure if we had inspected them only through the more common prism of the rule of law. In order to achieve this, we unpacked the concept of separation of powers into four key components and examined how Central European regimes between WWI and the end of the Cold War treated separation of powers in practice.

We have shown that Central European leaders have always gravitated towards a centralisation of power (often culminating in a cult of personality) and that basic imperatives of the principle of the separation of powers were sidelined even during the occasional democratic periods in these countries' histories. Moreover, the interwar regimes left little room for an active and pluralistic civil society and the communists openly suppressed it. These historical legacies of Central European countries, a strong push toward centralisation and a lack of a robust civic political and legal culture, have left a deep imprint on the Central European mindset.

Of course, all that is meant to enable a better understanding of the current state of affairs. We argue that the post-1989 era is best explained as a series of 'overreactions to overreactions'. The largely understandable desire to prevent the re-establishment of a communist-style centralisation of power encouraged the adoption of a Pan-European template exhibiting clear depoliticising logic, which was significantly boosted by the EU accession process.[209] This Pan-European template prioritised unelected actors, especially constitutional courts, judicial councils and agents of technocratic governance. Not surprisingly, they happily ruled the day. With the benefit of hindsight, we argue that this distortion of the separation of powers proved detrimental to greater civic engagement.[210] As such, it helped pave the way for the populist backlash against 'elitism' of whatever sort (be it 'Brussels', George Soros, or social scientists), and generally against any 'limitations on the expression of the general will, most notably the constitutional minorities and the independence (from politics, and therefore from democratic control) of key state institutions (e.g. the judiciary, the central bank)'.[211] To put it simply, the two major recent challenges to the separation of powers in the region – the rise of the unelected and the wave of populism – are more interrelated than usually thought, and the former has greatly contributed to the latter.

Regarding the individual components of separation of powers, we have shown that each Central European regime has attacked some components of separation of powers more aggressively than others. Totalitarian and authoritarian regimes

[209]Even though many standards of the Pan-European template have been developed primarily within the Council Europe and only then adopted by the European Commission.

[210]*See* Blokker, *supra* n. 84; and Czarnota, *supra* n. 122, at p. 54 and p. 62-63.

[211]C. Mudde, 'The Populist Zeitgeist', 39 *Government and Opposition* (2004) p. 541 at p. 561.

first dismantled virtually all checks on their power and then resorted to more straightforward violations of the three separationist components (especially the separation of institutions element). In contrast, the major battleground after 1989 has been the checks and balances component. While the Pan-European technocratic template erected one-sided judicial checks on elected branches and suppressed the 'balances element', the populist leaders swung the pendulum back, removed most checks on the elected branches and packed the unelected institutions. Only the future will tell whether Central European populists will stop here or whether they will just maintain the facade of constitutional democracy for now while remaining ready to tinker openly with the separationist components as well.[212]

Given all the institutional and mental path-dependencies as well as the often neglected deleterious effects of the rise of the unelected, it is now easier to understand why populist leaders in Central Europe have had so little difficulty in dismantling the separation of powers. That said, it is still frightening that the judicial branch has been unable to tame anti-constitutional forces and protect the Central European *Rechtsstaat*. Forget for now the fact that Central European judiciaries might have called this fate upon themselves.[213] The lesson to be learnt is that the judicial branch turned out to be surprisingly weak once the struggle became real.[214]

The Pan-European template of separation of powers thus worked reasonably well in good times, but it failed once storm clouds appeared on the horizon, most probably because it had little tradition in Central Europe and because it did not enjoy enough political and societal support.[215] This finding has three repercussions for the future. First, mere institutional tweaks to the constitutional framework are not themselves capable of righting the ship in Central Europe. The foundations of the separation of powers are political in nature and require broad consensus on a set of values that underpins it. Therefore, what we need is to combat bad mental path-dependencies and incentivise a willingness to engage in respectful interaction, be it deliberation or bargaining – so that 'the norms of political equality, individual liberty, civic tolerance, and the rule of law' become a staple among the major ideological

[212]The latter route would suggest that populists simply attack different components of the separation of powers at different phases of their development (*see also* the Venezuelan populist regime discussed *supra* n. 208).

[213]*See* e.g. Czarnota, *supra* n. 122, at p. 58-59; *see also* example mentioned *supra* n. 122.

[214]For a similar conclusion *see* K. Kovács and K.L. Scheppele, 'The fragility of an independent judiciary: Lessons from Hungary and Poland – and the European Union', 51 *Communist and Post-Communist Studies* (2018) p. 189. *See also* Krygier, *supra* n. 8.

[215]*See* e.g. Czarnota, *supra* n. 122.

players in Central European politics.[216] Second, the separation of powers needs someone (other than one of the three branches) who will defend it when it is under pressure. The Pan-European template relied almost exclusively on the judicial branch, which might suffice against ordinary challenges. However, when the judicial branch itself is under frontal attack, civil society, the free media and other 'contingent circumstances'[217] become at least as important as the formal mechanisms to maintain the balance of power. Third, it is dangerous to rely primarily on the European Court of Justice and think that it will single-handedly be able to rescue Central Europe and restore a functioning separation of powers.[218] While the European Court of Justice surely plays an important role, especially in the current developments in Poland,[219] the failure of the Pan-European template shows that a top-down approach to the separation of powers does not work in Central Europe and that any long-term solution must have the broad support of the people.[220]

[216]J. Dawson and S. Hanley, 'What's Wrong with East-Central Europe? The Fading Mirage of the "Liberal Consensus"', 27 *Journal of Democracy* (2016) p. 21.

[217]*See supra* n. 44.

[218]*See* e.g. The Editorial Board, 'EU's top court shows how to tackle autocrats', *Financial Times*, 27 June 2019, ⟨www.ft.com/content/836095aa-9821-11e9-8cfb-30c211dcd229⟩, visited 19 August 2019; Pech and Platon, *supra* n. 179.

[219]*See* e.g. M. Bonelli and M. Claes, 'Judicial serendipity: how Portuguese judges came to the rescue of the Polish judiciary: ECJ 27 February 2018, Case C-64/16, Associação Sindical dos Juízes Portugueses', 14 *EuConst* (2018) p. 622; M. Krajewski, 'Who is Afraid of the European Council? The Court of Justice's Cautious Approach to the Independence of Domestic Judges: ECJ 25 July 2018, Case C-216/18 PPU, The Minister for Justice and Equality v LM', 14 *EuConst* (2018) p. 792; and L. Pech and S. Platon, 'Judicial independence under threat: The Court of Justice to the rescue in the ASJP case', 55 *CMLRev* (2018) p. 1827.

[220]Note that some scholars argue that the people had been deeply disappointed with the pre-populist governance framework, *even if* they disagreed with the subsequent actions of Central European populist leaders and thus that the return to the *status quo ante* would not solve the current problems; *see* e.g. Czarnota, *supra* n. 122, p. 62-63 (on Poland).