

## **Teaching the German Way of Separating Powers – Challenges and Approaches**

### **Introduction**

Germany has a parliamentary system of government. This means that the separation of powers is structured differently than it is in a presidential system. It does not make much sense to concentrate on the balance of power between the legislative and the executive branch of a parliamentary system. When we identify the parliament as the legislature and the cabinet as the executive there is indeed a connection between these constitutional organs and therefore a balance. But this balance is overshadowed by another more important relationship. This is the relationship between the cabinet and the parliamentary majority on the one hand and the parliamentary minority – or opposition – on the other. However, the text of the constitution ignores this circumstance to a great extent. Instead, Montesquieu's impact on German Basic Law is ever-present. But he was unaware of parliamentary systems.

I will divide my lecture into three main parts. First, I will give an overview of the system of checks and balances in Germany. In doing so, I will refer to the text of the constitution as well as to political reality. Then, I will talk about the educational challenges the separation of powers poses to teaching. We have to consider the fact that what we are dealing with here is a highly complex and very demanding matter of civic education. In the final part of my lecture, I will move on to presenting some didactic and methodical principles which can serve as guidelines when teaching the separation of powers in school. I will leave the question of whether or not these principles are convincing for the subsequent discussion.

### **1. The Meaning of Separating Powers**

The separation of powers forms the institutional foundation of all constitutional democracies. Its goal is to check political power and thus protect the freedom of the people. The basic meaning of this concept is that political power as a whole should neither be held by one single person nor by one single political body alone. Instead, power should be distributed among several political bodies and therefore between a larger number of people. The separation of powers demands that these political bodies be legally distinct. This means they must have the right to form their own political will. Furthermore, it allows for important state functions only to be carried out by several of the bodies working together. This mechanism forces them to come to terms with each other and this way checks their power. And finally, the separation of powers provides the political bodies with the ability to influence each other and thus to even out each other's potential power. We can conclude, therefore, that the term *separation of powers* implies that the power of the different political bodies is limited in its extent, restrained in its expansion and mutually controlled.

A logical result of this is that the political process is rather time-consuming and is oriented towards compromise. This is not a flaw in the system, though, because that way the consequences of decisions are monitored from different perspectives and are reviewed at multiple stages throughout the process. Ultimately, a double rationale lies behind the separation of powers which is as follows: It is the nature of tyranny to establish a political system that is as simple as possible, whereas it is the characteristic trait of a constitutional democracy to create a system which is rather complex.

#### **a) The Separation of Powers from the Perspective of Constitutional Law**

We can look at the separation of powers from the perspective of constitutional law as well as from the point of view of political science. The constitutional analysis aims at understanding the competences different political bodies possess and how their relationship to one another is organized. The analysis based on political science, on the other hand, concentrates on the actual political reality. The latter is determined primarily by the mechanisms of the political system. Let me begin with the constitutional analysis.

Regarding Germany's constitutional structure, we can observe a vertical and a horizontal separation of powers. The vertical separation of powers spreads public power on different levels of authority. These levels are the European Union, the Federal Government, the states, or *Länder*, and the municipalities. The horizontal separation of powers, on the other hand, divides power between political bodies situated on the same level. The most significant hierarchical level is the federal government on which I will now go a little more into detail.

The Basic Law mentions three powers: the legislative, the executive, and the judicial branch. Clearly, this *trias politica* goes back to Montesquieu. It can be found in the American Constitution as well. A crucial difference, though, is that in Germany five political bodies share these three branches. Since the constitution provides these five political bodies with special rights they are called constitutional organs. The five constitutional organs are the *Federal President*, the *Federal Cabinet*, the *Federal Parliament* (which roughly corresponds to the American House of Representatives) the *Federal Council* (in which the States are represented) and the *Federal Constitutional Court*. Regarding the Federal Cabinet, the Basic Law additionally complicates affairs by vesting the Federal Chancellor, who is the head of the cabinet, the Federal Secretaries, and the Cabinet as a whole with special powers. This shows that the overall design of the German system of separating powers strongly differs from the American one.

But how exactly does the Basic Law distribute three branches among five organs? The answer to this question is this: the legislative and the executive branch are in themselves split up between several organs. Only the judiciary is assigned to one group exclusively, which consists of the federal and the state judges and their respective courts. And of these, only the Federal Constitutional Court is significant for the system of checks and balances.

In order to begin with the legislative branch, it is divided between four, and sometimes even up to five organs. The Federal Parliament, the only democratically elected organ, assumes a key position in this constellation since the constitution plainly states that it is the Federal Parliament that passes new laws. The Federal Council, consisting of members of the sixteen State Cabinets, is not any less powerful. Its main function is to carry amendments but it can also object to them or even vote down proposals already passed in the Federal Parliament. The Federal Cabinet plays a vital role in the law-making procedure, too, as it has the right to introduce new bills. It makes strong use of this right since it can draw on its departments' expertise. The Federal Chancellor, and the Secretaries whose departments are affected by a new law, sign it and thus shoulder the political responsibility. The end of the process is marked by the Federal President signing the law who in doing so confirms that the law-making process and the text of the law conform to the constitution. The Federal Constitutional Court only interferes as a corrective when it is invoked in order to review the constitutionality of a law. So as you can see once more, there are similarities but also great differences between the German and the American way of separating powers.

As for the executive power, the Basic Law distributes it among the Federal Cabinet, the Federal President, and the authorities on the federal and the state level. In doing so, the Basic Law assumes that governing forms part of the executive power. The role of governing is assigned to the Federal Cabinet, in which the Federal Chancellor plays a vital part. The Basic Law equips him with the right to determine the general guidelines of policy.

The Federal President, in turn, plays a special role. He is not directly involved in the policy-making process. His main function is to act as a symbol of the entire polity. His lack of political power manifests itself in the fact that he needs the Chancellor's or a Secretary's countersignature in almost all of his political actions. It is only in times of parliamentary crisis that the President can actually act in his own right. Such periods of crisis are characterized by the lack of a clear pro-Cabinet majority in the Parliament. This jeopardizes the continuing existence of the Cabinet which hinges on a parliamentary majority. When such a situation arises, the President can dissolve the Parliament and thus bring about new elections. This would be unthinkable in a presidential system like the American one.

The relationships between the constitutional organs can best be labeled as *shared power* and *controlled power*. These terms were introduced by Karl Loewenstein, who as a German immigrant taught at Amherst College, Massachusetts.

I have already shown the meaning of the term *shared power* using the law-making process as an example. But I might just as well have used the example of foreign policy. The principle in both cases is simple: Several constitutional organs cooperate in order to fulfill a political function. No one can impose his will on the others.

*Controlled power*, in turn, is a more interesting term. What it means is that the constitutional organs can make each other act in a certain way, that they can make each other justify themselves politically, and that they may hold each other legally accountable for their actions. It depends on the judgment of the controlling organ whether or not controlled power is exercised. It is possible but not mandatory. For instance, the Federal Parliament can install an investigative committee. Members of the Federal Parliament can direct questions to the Federal Cabinet. The Chancellor, in turn, can request that the Federal Parliament hold a session. The Parliament can topple the Chancellor by a vote of no confidence. The Federal President, on his part, can dissolve the Federal Parliament.

## **b) The Separation of Powers from the Perspective of Political Science**

Due to the fact that the legislative and the executive branch are the predominant subjects of the different means of checking power, we could gain the false impression that a dualism exists between the parliament and the cabinet, as is the case in presidential systems. As the analysis from the perspective of political science shows, however, the opposite is the case. In parliamentary systems, another dualism overshadows the one between parliament and cabinet. I think it has become clear so far that the basic condition in a parliamentary system is a solid pro-cabinet majority in parliament. Only then can the cabinet remain in office for a larger period of time. Therefore, it is the responsibility of the parliamentary groups backing the cabinet to assure a pro-cabinet result in all the bills put to the vote by keeping party discipline. The fact that members of parliament can be secretaries at the same time helps in this endeavor. In the American political system there is no equivalent to this.

On the other hand, it is also a vital condition for the minority group in the parliament to stand united in order to gain attention in public discourse. So in a nutshell, there are two political entities to be identified within the parliament: The pro-cabinet majority, which consists of the parliamentary majority and the cabinet itself, and the opposition. They can be termed *constitutional institutions*, so as to tell them apart from the *constitutional organs* that I mentioned before.

The most vital task of the opposition is to check and to criticize the Federal Cabinet. Also, the opposition constitutes an ever-present alternative to the cabinet regarding the political agenda and the personnel. Its highest hope is to gain a majority of the seats in the next election and to take over the cabinet.

We could refer to this as a kind of separation of powers between the pro-cabinet majority and the opposition. Although in this case, the two constitutional institutions seem to be out of balance. The parliamentary majority can implement its political agenda without further ado whereas the opposition cannot. The opposition only possesses minority rights which allow it to file motions in order to fulfill its function of checking the cabinet. It can address inquiries to the cabinet, install investigative committees or demand that a judicial review of legal norms be carried out by the Federal Constitutional Court. Finally, it can publicly criticize the cabinet in every parliamentary session and present its alternatives. Since the pro-cabinet majority as well as the opposition wants to win the next election, they are constantly competing with each other. As a consequence, they keep each other in check.

The pro-cabinet majority and the opposition have the same opportunity to address the voters and to promote their political agendas. Nonetheless, the pro-cabinet majority has an advantage due to the departments' expertise it has access to. Here, the balance of power is actually tipped towards one side. In my opinion, it is hardly possible to eliminate this flaw.

The Basic Law does not mention the word „opposition” at any point. Nor does it go into detail about the close links between the cabinet and the pro-cabinet majority in parliament. So the Basic Law is clearly flawed due to Montesquieu's ubiquitous distinction between the legislative and the executive branch. Interestingly, the constitutions of several of the states are closer to reality in this regard as they take into account the parliamentary system. I quote Article 12 from the constitution of the state of Schleswig-Holstein: “The parliamentary opposition constitutes a central part of parliamentary democracy. Its task is to criticize and to check the cabinet's agenda and its policies. It represents an alternative to the cabinet and the representatives and parliamentary groups supporting the cabinet. The opposition shall therefore have the right to equal political opportunities.”

## **2. Educational Challenges of the Separation of Powers**

I would now like to address some issues regarding the educational perspective on the separation of powers. The first observation is that the separation of powers is a very challenging concept as it continues to be a subject of political theory. I only need to mention the names Aristotle, John Locke, and – of course – Montesquieu. But we have to keep in mind that we will never get a grasp of the political reality in Germany if we keep falling back on Montesquieu's theory.

Also, by reading the Basic Law, we will be limited to understanding only the constitutional foundation of the separation of powers. But this can lead to misunderstandings as the Basic Law uses the terms legislature, executive, and judiciary, just as Montesquieu did. This triple distinction is inaccurate due to several reasons.

The first of these reasons is: The term *executive* above all refers to the cabinet. What this conceals, though, is that the main function of the cabinet is not to execute laws, but to govern, which means to actively shape the present and the future. In order to adapt our terminology to this reality, we would therefore have to introduce another branch, which we could call the *gubernative* or *governing branch*. Be this as it may, it is a grave misconception to limit the role of the cabinet to policy-execution.

The second reason why the *trias politica* laid down in the Basic Law is inaccurate is the simple fact that there are more than three branches or – in other words – political functions. John Locke called them the *prerogative power* and the *federative power*. The German Basic Law recognizes them as *emergency powers* and *foreign power* and establishes the respective judicial framework.

Nevertheless, Montesquieu's categorization is deeply entrenched in the public perception. The public only knows and accepts three branches. This is partly because the scholars of public

law have dogmatized Montesquieu's *trias politica* for a long time. His system of separating powers has constantly been oversimplified and thus falsified. Please keep in mind that according to Montesquieu, the monarch – the holder of the executive power – takes part in the law-making process. In Germany, on the other hand, the general public attributes the legislative function to the Federal Parliament and the Federal Council exclusively. And likewise, most people associate the executive branch with the Federal Cabinet. The role of the Federal President, in turn, is simply being ignored. Many school books even add their share to this misconception. They often use a popular chart that oversimplifies the separation of powers to an extent that it creates a false image. Besides, the chart suggests a presidential system rather than a parliamentary one.

But Germany has a parliamentary system, as I mentioned several times. Still, many people mistake it for a presidential system, and erroneously interpret the political reality in terms of such a system. My dear colleague Mr. Werner Patzelt conducted empirical research on this issue. Some of his findings are the following: A great number of people take it as a contradiction to the principle of separating powers when members of the parliament are secretaries at the same time. Many people think it should be the opposition's job to support the cabinet rather than criticizing it. Also, many view the representatives' obligation to bow to party discipline negatively.

The separation of powers is the core principle of the institutional order in a democracy. For that reason, it is a key subject-matter in civic education. Simultaneously, it is a very problematic issue. This is due to several reasons. The first being that many students have misconceptions about the separation of powers they pick up from their parents, some of which I just presented. It costs a lot of effort to correct these false impressions because they are very popular and many text books even promote them further. The second reason is that from the didactic point of view, the topic has some serious disadvantages. It is abstract and complex. It bears no significance for the everyday life of the students. It does not trigger any concern on the part of the students. As a consequence, students show a low level of motivation to deal with the separation of powers. The third reason lies in the relatively low popularity that studying institutions usually enjoys in German civic education. This should apply even more to the separation of powers as this issue is concerned mostly with the interaction of political organs and institutions. The result is didactics' regrettable neglect of approaches to imparting the separation of powers.

### **3. Suggestions for Teaching the Separation of Powers**

I would like to close by discussing some thoughts on teaching the separation of powers in civic education. I will begin by focusing on text books. Many text books address the separation of powers. Usually, they do so by presenting the issue as a bulk of predetermined information students are supposed to study. That means the topic is presented as a ready-made structure. This is anything but thought-provoking. Instead, on the students' part, only passive uptake is required. Taking into account the findings of the psychology of learning, this is of course rather unfavorable.

German didactics of civic education recommends several guiding principles for approaching political institutions. For instance, civic education in school is supposed to establish a connection between the institutions and students' everyday experience. By analyzing problems of decision-making, the students are to be made aware of the institutions involved. Classes should portray institutions from the perspective of politicians in office. All these proposals are merely of limited practical use when teaching the separation of powers. The issue in question here is more abstract than political institutions alone. Our topic requires, above all, constructive and deconstructive reflection.

A basic understanding of the separation of powers can already be implemented in elementary school. The children can think about why there is a mayor or a local council in their community. They can reflect on the responsibilities both of these political organs have. They can pose the question if the organs did a good job if they were not subjected to any control.

Classes during the first years of secondary education – I'm referring to 7<sup>th</sup> to 10<sup>th</sup> graders – focus on the separation of powers in the political system of Germany. Students read the respective articles of the Basic Law. In doing so, they are to ask about the relevance of the various provisions made there. They identify the major relationships between the constitutional organs in an inductive fashion. They acquire knowledge of the mechanisms of shared power and controlled power. They follow the opposition's and the parliamentary majority's actions by using the media. They get an impression of the connections between these two institutions and compare them with the text of the constitution.

During the second half of secondary education – I'm referring to 11<sup>th</sup> and 12<sup>th</sup> graders – the students deepen their understanding of the separation of powers. They argue about whether it weakens or strengthens democracy. They look at whether the separation of powers is a valid criterion for distinguishing democracies from autocracies. They discuss the consequences that changes in the system of the constitutional organs would have on the balance of powers: What effects would it have if the Federal President were elected by the people? What would the consequences be if the Federal Chancellor were elected directly by the people? What effects would plebiscites have on the conduct of the constitutional organs?

In order to close, I come to the following conclusion: The separation of powers is definitely a demanding issue. But, beyond any question, it is also a crucial issue. The difficulties we face in teaching it must not keep us from putting it on the agenda of civic education.