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Separation of Powers from the German Perspective

PD Dr. Kay Windthorst*

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I. HISTORY OF SEPARATION OF POWERS IN GERMAN CONSTITUTIONS

The separation-of-powers concept was not legally recognized in Germany until comparatively late. While this maxim has been part of the Constitution of the United States of America since 1787 and also firmly anchored in the French Constitution in 1791, the realization of a genuine separation of powers was opposed in Germany for quite a long time. The origins of this development can be seen in the early constitutions of German states. The Constitutional Charter for the State of Prussia dating back to January 31, 1850, for instance, stipulated that representatives of the people had to be involved in legislation through so-called chambers. Furthermore, judicial power was exercised in the name of the King by independent courts that fell under no jurisdiction other than that of the law.

The separation of powers was more clearly expressed in the constitutions of some German states after the First World War. One example is the Republic of Baden's Constitution, dated March 21, 1919, which expressly assigns state power to legislative, executive, and judicial authorities. This decision noticeably ties in with deliberations by Montesquieu, who drew a distinction between legislation, administration, and adjudication in his magnum opus *De l'Esprit des Lois* as early as 1748. However, the separation-of-powers concept as understood in this way did not initially become accepted from a national perspective. The Constitution of the German Empire, dated April 16, 1871, referred to as Bismarck's Reich Constitution, established a system of combining and blending different powers. Separation of functions occurred only at a lower level.

Amazingly, the Weimar Republic Constitution, dated August 11, 1919, tied in with this combined system and refrained from a clear stipulation in favor of a separation of powers. The National Socialist dictatorship that reigned from 1933 until 1945 marked the dawn of a dark era for the separation of powers and the freedom of
the individual. These principles are the very antithesis of the centralistic structure of this oppressive state.

The separation-of-powers concept experienced a renaissance at the end of the Second World War. The initiative re-emerged from the states. Their constitutions, which were decreed during 1946 and 1947 (that is to say, before the Basic Law (the new Constitution of the Federal Republic of Germany) came into force), contained a clear commitment to separation of powers. A typical example is the Constitution of the Free State of Bavaria, dated December 2, 1946. In Article 5, Paragraph 1, it assigns legislative power exclusively to the people and to the representatives of the people.\(^7\) Conversely, executive power lies in the hands of the state government and the subordinate administrative bodies. Judicial power is exercised by independent courts.\(^8\)

The constitutions that emerged during the same period for the states that, at the time, still existed in the Soviet-occupied zone at first seemed to continue to adhere to the separation of powers. But in reality, socialistic elements were predominant. This undercurrent is evidenced by the Constitution of the State of Thuringia, dated December 20, 1946.\(^9\) State power, then, not only has to come from the people and be exercised by the people, but it also must serve their well-being.\(^10\)

II. THE IMPLEMENTATION OF SEPARATION OF POWERS IN THE BASIC LAW

The preliminary work on the Basic Law was slow to embrace the separation-of-powers concept. The so-called Lake Chiem Draft of a Basic Constitutional Law, dated August 25, 1948, stipulated the separation of powers only for the German states.\(^11\) Accordingly, legislation, executive power, and adjudication have to be exercised by bodies of equal ranking, regardless of the government’s responsibility vis-à-vis the state parliament. However, in the later drafts of the Parliamentary Council—a committee of representatives of the states—that discussed the final version of the Basic Law, separation of powers also was established at the fed-

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8. Id. art. 5, ¶¶ 2-3.
10. Id.
11. Lake Chiem Draft art. 29, ¶ 3, in REPORT ON THE LAKE CHIEM CONSTITUTIONAL CONVENTION, AUG. 10 TO 23, 1948 64 (1951).
eral level.\textsuperscript{12} These drafts stipulated that the people exercise state power in legislation, administration, and adjudication separately for each of these areas through special bodies in accordance with this Basic Law. Moreover, adjudication and administration should be governed by the law.

These formulations in the drafts of the Parliamentary Council created the direct basis for the separation of powers to be anchored in the Basic Law, which was proclaimed on May 23, 1949.\textsuperscript{13} The key provision is Article 20, Paragraph 2.\textsuperscript{14} Accordingly, all state power comes from the people.\textsuperscript{15} It is exercised by the people in elections and referendums. State power is realized through special bodies for legislation, for executive power, and adjudication. This fundamental decision contains three basic statements, which, though interconnected, convey messages of their own. On the one hand, the people are recognized as the original holders of state power. On the other, the way in which the people exercise state power is decidedly settled: by elections and referendums.

Referendums are direct plebiscite decisions regarding particular matters—the reorganization of the states, for instance. One actual example is the highly-publicized 1996 referendum on the unification of the states of Berlin and Brandenburg. (This referendum did not, however, achieve the required majority.) Elections have more practical significance for the realization of state power. Elections call upon individuals who exercise state power and, in doing so, directly and democratically legitimize the government by the people's vote. The Basic Law stipulates elections only for the representatives of the German Bundestag, the Lower House of Parliament.\textsuperscript{16} This provision also specifies the requirements to be satisfied in this process. Accordingly, elections must be general, direct, free, equal, and confidential.\textsuperscript{17} These principles of electoral law also are binding for electing the representatives of the state parliaments and the local government representatives.\textsuperscript{18} This requirement not only guarantees a minimum degree of homogeneity between the constitutions of the government and the states in this

\begin{itemize}
\item \textsuperscript{12} Minutes 12.48/329, Parliamentary Council, Principal Comm., 4th Sess., at 4 (1948) (F.R.G.).
\item \textsuperscript{13} GRUNDEGESETZ [GG] [Constitution] (F.R.G.).
\item \textsuperscript{14} GG art. 20, ¶ 2.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id. art. 38, ¶ 1.
\item \textsuperscript{17} Id.
\item \textsuperscript{18} Id. art. 28, ¶ 1.
\end{itemize}
issue, but it also recognizes the fact that elections take place at this state level, too.

III. EMBODIMENT OF SEPARATION OF POWERS IN THE BASIC LAW

The key statement on the separation of powers is contained in the final clause of Article 20, Paragraph 2. It demands that the state power legitimized by the people be exercised through special bodies for legislation, for executive power, and for adjudication. This constitutional embodiment of the separation-of-powers principle is corroborated in conjunction with the guarantees of fundamental rights through Article 1, Paragraph 3. Accordingly, the basic rights bind legislation, executive power, and adjudication as directly applicable law.

A. State Authority as a Reference Point

The Basic Law governs the exercise of state power in these sub-areas in separate sections. Section 7 divides the responsibility for legislation between the federal government and the states. It comprises the principle that the states possess the power to legislate. The government possesses the power of legislation only if the Basic Law itself assigns to it the jurisdiction for specific topics. Regardless of this constitutional exception to the rule, the main focus in constitutional practice is on federal law. This divergence between the regulatory claims of the Constitution and the constitutional reality was one reason why, in 2006, the power to legislate held by the states was expanded and reinforced as part of the so-called federalism reform.

Section 8 settles the responsibility for executing federal laws. In principle, this responsibility, unless otherwise stipulated or permitted by the Basic Law, lies with the states. Such an alternative assignment of administrative power to the government is limited to certain regulatory matters. These matters include, for example, the Foreign Service, the Federal Border Guard, and the Armed Forces. The Basic Law deals, in its own section, with adjudication—the so-called third power. Articles 92 to 104 govern court organization and judicial independence. They also contain

19. GG arts. 70-82.
20. See id. arts. 73-74.
23. Id. art. 87, ¶ 1; id. at art. 87b, ¶ 1.
important procedural guarantees, such as the jurisdiction of the judge being determined by law in advance. These provisions leave no doubt that the separation-of-powers principle has been laid out in the Basic Law.

B. Modifications in the Understanding of Separation of Powers

All this conclusion does, however, is open the floodgates to a host of contentious legal issues concerning the separation of powers. One key reason is that this principle is not realized in the Basic Law as a strict separation. Instead, it permits breaches under various exceptions, which will be discussed in detail later. Suffice it to say that, at this stage, a flawless, strict separation system is not possible because the complex conditions require a certain interaction between the various parts of state power. The question, therefore, is not whether such a procedure is permitted at all, but in which cases, under which conditions, and to what extent such breaches of the separation of powers are to be accepted. The answer is held mainly in the specific parameters of the Basic Law. This contention will be explained in detail later.

It must be stated, though, that it is not about a strict separation or simple division of state power. According to the constitutional order of the Federal Republic of Germany, which is settled by the Basic Law, the organization of power through the division and structuring of functions predominates. The concept of separating the powers has evolved into the idea of sharing responsibility and distributing functions. This idea creates the basis for carrying out public duties in divided and related responsibility. This altered appreciation also is reflected in a changed concept. Instead of the separation of powers, we now talk in Germany mainly about a separation of functions, a distribution of functions, or a structuring of powers. The term separation of powers can therefore only continue to be used if it is not equated with a strict division or separation and instead becomes receptive to this transformed understanding. Only the tradition of parlance would have this

24. *Id.* art. 101, ¶ 1, sentence 2.
25. See discussion *infra* Part IV.
term retained. However, the term does not appropriately convey the features. This argument carries a good deal of weight. In the current historical moment, separation of powers should be relinquished and superseded by the terms distribution of functions or structuring of powers. 29

IV. STRUCTURE OF THE REGULATION OF SEPARATION OF POWERS IN THE BASIC LAW

A. Distinction Between Material, Organizational, and Personal Separation of Functions

Regardless of terminology preferences, the structure of separation of powers in Germany must now be conveyed. This structure becomes clear if we take a holistic look at the provisions of the Basic Law, which divide or connect state power. At the federal level, a distinction can be drawn according to how the assignment is linked, between material, organizational, and personal separation of powers. 30

B. Principle and Exceptions of Material Separation of Functions

Material separation of powers is commonly described as a material separation or distribution of functions. The idea is that the material state functions of legislation, administration, and adjudication are primarily and in principle assigned to a body established specifically for fulfilling this responsibility. 31

1. The Relationship Between Legislative and Executive

According to the system of functions in the Basic Law, norm-setting falls primarily to the Bundestag, the Lower House of Parliament, as the legislative power. The federal government, as the highest executive body, is assigned the government and the administration as main tasks. Courts are assigned adjudication.

The relationship between these functions and the administering bodies is arranged essentially by two structural principles. First is the legal obligation stipulated in Article 20. Parliamentary law is obligatory for bodies of executive power and adjudication. This principle is comparable to the Supremacy Clause in Article VI of

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29. Id. at 25.
31. Id. at 795.
the Constitution of the United States of America. The submission to parliamentary laws is repeated again for the judiciary in Article 97, Paragraph 1. The second is the unwritten principle that the core area concerned is assigned exclusively to the bodies envisaged specifically for this purpose and cannot be touched. This tradition precludes breaches.\textsuperscript{32} The difficulty, however, lies in determining the core area of each function. It can generally be paraphrased as the functions that are typical, formative, and constitutive for the particular function area.\textsuperscript{33} This definition, though, conveys a certain ambiguity. It therefore is criticized in part.\textsuperscript{34} However, there has not yet been any success with developing more suitable demarcation criteria. Thus, we should stick to the concept of the core area and the associated protective effects.

In certain cases, the interpretation of the maxim first mentioned—the principle of rule of law establishing a legal obligation for the executive and the judiciary—can cause problems. First, this principle means that executive power and adjudication have to comply with parliamentary laws when making decisions. These laws must not be disregarded or ignored. If they are, the decisions will be illegal by virtue of the conflict-of-laws rule of priority of the law. Article 20, Paragraph 3 also contains the so-called Vorbehalt des Gesetzes, a principle difficult to translate.\textsuperscript{35} By its effects, the legislature, which is legitimized democratically and directly, has the exclusive jurisdiction on all essential decisions made by the government.\textsuperscript{36} Essential in this context primarily means measures that interfere with citizens' basic rights. This doctrine does not, in principle, preclude the executive branch's power to undertake administrative duties, but it does demand a sufficiently determinate parliamentary law. Only for a few matters, such as imprisonment, for instance, is regulation reserved for the Parliament (Bundestag) and precludes any action of executive power.\textsuperscript{37} Outside of this area, the principle demands only an adequately determined normative programming of executive power. In this way, the principle of the Vorbehalt des Gesetzes, which establishes the necessity of a parliamentary law, substantiates the principle of

\textsuperscript{32} Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] 9, 268 (280) (F.R.G.); id. at 34, 52 (59); id. at 67, 100 (139); id. at 95, 1 (15).

\textsuperscript{33} 2 Stern, supra note 27, at 542.

\textsuperscript{34} Horn, supra note 26, at 438-40.

\textsuperscript{35} See 2 Stern, supra note 27, at 802-15.

\textsuperscript{36} This is the so-called Essential Decisions Doctrine. See BVerfGE 40, 237 (249); id. at 49, 89 (127); id. at 59, 257 (278); id. at 77, 170 (230-231); id. at 83, 130 (152).

\textsuperscript{37} GG art. 104, ¶ 1, sentence 1.
the material separation of functions between legislative and executive.

According to this principle, the core areas of these state authorities must always be respected. Yet, outside this area, the principle of separation of powers is subject to different interdependencies and limitations. Interdependencies occur, for example, when decreeing federal laws, for which Articles 77 and 78 stipulate various forms of involvement by the so-called Bundesrat, the Federal Council. This Upper House of Parliament represents the German states. In principle, the Federal Council is entitled only to an objection that has the effect of a suspensive veto. As an exception, however, the Basic Law requires certain federal laws to be approved by the Federal Council. This requirement appears especially when the federal law concerns essential matters of the states. The states can realize their interests through the Federal Council, which is composed of members of the state governments. If the Federal Council refuses the required consent, decreeing of the federal law is not temporarily inhibited, but rather has ultimately failed. So, the involvement of the Federal Council results in the restriction of the legislative function of the Lower House (Bundestag).

This Upper House veto power is justified by the state structure of the Federal Republic of Germany. From the perspective of a material separation of functions, the involvement of the Federal Council exhibits an additional peculiarity in that it is a multiple-power body. According to Article 50, the states are involved through the Federal Council in legislation, in the administration of the federal government, and in matters concerning the European Union. As an interim result, the Basic Law permits limitations in the material separation of functions, first and foremost in the relationship between legislation and executive power.

2. **The Relationship Between the Judiciary on the One Hand and the Legislative and Executive**

However, with regard to adjudication, the principle of material separation of functions is subject to only minor restrictions. Such restrictions occur in the relationship between the judiciary and legislative function because the judge is bound to parliamentary

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38. *See, e.g.*, id. art. 84, ¶ 1, sentence 6; *see also, e.g.*, art. 85, ¶ 1, sentence 1.
39. *Id.* art. 23, ¶ 2, cl. 2; *id.* art. 23, ¶¶ 4-6.
laws. In the relationship between the judiciary and executive, restrictions for adjudication can result from having acknowledged a core area of executive action. Within that core, in particular, are counter-balance decisions by the administrative authorities. These authorities have a scope by weighing different interests that the courts must respect. These agency-level evaluations bring about a reduction in judicial control density.

C. Principle and Exceptions of Organizational Separation of Functions

Besides the material separation of functions, the principle of separation of powers also includes the organizational separation of functions. Idealized, it guarantees independence of the function-holders from each other. The Basic Law, however, permits breaches of the principle to a broad extent. The most important exception is the ongoing dependency of the federal government's existence on Parliament. The legislature is a key feature in the concept of a parliamentary government system that is established by the Basic Law and evident in various places. The Federal Chancellor is elected by the Bundestag. This Lower House can express a vote of no-confidence to the Federal Chancellor if the majority of members elect a successor and request the Federal President to discharge the Federal Chancellor. The Federal President must comply with this request and appoint the Chancellor-elect as the new Federal Chancellor. Throughout the history of the Federal Republic of Germany, there have been two such attempts at a so-called constructive vote of no-confidence. In 1972, the attempt to vote out Chancellor Willy Brandt by electing the opposition leader Rainer Barzel failed, but, in 1982, Helmut Kohl was successfully elected in place of Helmut Schmidt.

Likewise, the Federal Chancellor also can personally request that the Lower House expresses confidence. If the majority of the members deny this request, the Federal President can, at the suggestion of the Federal Chancellor, dissolve the Lower House within twenty-one days. There have been four instances of this

40. Id. art. 97, ¶ 1.
42. 2 STERN, supra note 27, at 795.
43. GG art. 63.
44. Id. art. 67.
45. Id. art. 68.
dissolution to date. Federal Chancellors Brandt, Schmidt, Kohl, and Schröder wanted to overcome a parliamentary standoff on the issue of confidence by dissolving the Lower House and having a re-election. The Federal Chancellor’s strong dependency on the Parliament in Germany largely restricts the principle of an organizational separation of functions. In this regard, there is a key difference from the separation of powers in the United States of America, which permits an impeachment of the President by Congress only under specific conditions.

D. Principle and Exceptions of Personal Separation of Functions

The third element of the separation of powers is the personal separation of functions. This element requires dissimilarity in the personnel filling of the various bodies. The official of a body of power may not, in principle, belong to any other power. The so-called incompatibility concept is explicitly stated in only a few places in the Basic Law. According to Article 55, Paragraph 1, the Federal President may not belong to either the government or a legislative body of the government or of a state. The members of the Federal Constitutional Court may not belong to the Lower House, the Federal Council, or any corresponding bodies of a state. Conversely, in Article 137, Paragraph 1, the Basic Law virtually leaves the regulation of the issue of whether executive officials may belong to a parliament at the same time to the legislature, which can restrict its members’ eligibility for executive positions through the law.

The Basic Law does not establish personal separation of functions in a central area, namely, the affiliation of a person to parliament and government. Compared with German law, the Constitution of the United States contains considerably more extensive stipulations for incompatibility. In the United States, no member of Congress may hold a salaried federal office during the period of mandate. Conversely, it is difficult in both countries to avoid the general risk of personal separation of functions, which results from people belonging to the same party, and, for example, fosters the spoils system.

46. These instances led to following decisions of the Federal Constitutional Court: see BVerfGE 62, 1 et seq.; id. at 114, 121 et seq.
47. U.S. CONST. art. I, § 2, cl. 5; id. art. I, § 3, cls. 6-7; id. art. II, § 4.
48. 2 STERN, supra note 27, at 795-96.
49. GG art 94, ¶ 1, sentence 3.
V. HORIZONTAL AND VERTICAL DIMENSIONS OF SEPARATION OF POWERS

A. Between the Federal Government and the States

In addition to the horizontal structuring of functions at the federal government level with its various ramifications and breaches, this principle also has a vertical dimension. On the one hand, it concerns the division of state power between the government and the states.\(^5\) In this regard, stricter stipulations apply than for the horizontal structuring of powers. A shared exercising of functions by the government and the states, specifically what we call in Germany a “mixed or blended administration,” is wholly undesirable.\(^5\)\(^2\) An exception is allowed for so-called joint functions, such as coastal protection.\(^5\)\(^3\)

The vertical dimension of separation of powers is assigned to the federal-state principle and assessed according to the rules derived from that principle. The distribution of power for legislation, executive action, and adjudication between the government and the states results, from a vertical perspective, to a balancing of state power. Just like the separation of powers, it ultimately serves to protect the freedom of the individual against an unrestrained state power.\(^5\)\(^4\)

B. Between the German Government and the European Union

The division of sovereign power between the Federal Republic of Germany and the European Union is problematic. Thematically, it also can be assigned to the vertical separation of powers.\(^5\)\(^5\) Given the complexity and intricacy of the issues, I will stick to illustrating a few main features. A special situation arises because the European Union is a supranational entity, but not a state. It


\(^{52}\) The Federal Constitutional Court considers such a form of administration as undue in principle. BVerfGE 11, 105 (124); id. at 32, 145 (156); id. at 41, 291 (311).

\(^{53}\) Gg art. 91a, ¶ 1.

\(^{54}\) See BVerfGE 104, 249 (279); KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND [MAIN FEATURES OF THE CONSTITUTIONAL LAW OF THE FEDERAL REPUBLIC OF GERMANY] 231 (20th ed. 1995); TRIBE, supra note 51, at 123-37.

\(^{55}\) PAUL KIRCHHOF, GEWALLENBALANCE ZWISCHEN STAATLICHEN UND EUROPÄISCHEN ORGANEN [POWER BALANCE BETWEEN NATIONAL AND EUROPEAN ORGANS], 965, 968-70 (1998).
qualifies neither as a federal state nor as a commonwealth. The European Union is, in fact, a confederation. The member states are responsible for its emergence, its existence, and its development. They are the "masters of the treaties" to whom the legal community of the European Union owes its existence and the legitimization of its actions.

Indeed, certain legal acts of the European Union, such as European Council regulations, create a direct effect for national authorities and citizens. This claim to direct application is not based, however, on original law-making power, but on the treaty on the founding of the European Community. The treaty was brokered by the member states and sanctioned by their democratically legitimized parliaments. This act of approval is the reason for the application of European law in Germany. Only by crossing this bridge can it attain intrastate validity. Legal acts of the European Union that do not fall under the consent law are not binding for German state power or German citizens.

Additional restrictions arise from the principles of limited individual empowerment and subsidiarity, which are anchored in the founding treaties, the so-called primary law of the European Union. According to these principles, the Union may operate only if, in the articles of primary law, it is assigned jurisdiction to do so. Furthermore, it may decree measures within this framework only insofar as the goals cannot be reached at the member-state level and, therefore, because of their scope or effects, would be better taking place at the European level. This restriction lends additional weight to the fundamental responsibility of the member states for the exercise of state power. However, there may be no conclusion drawn of these principles among the member states because any law that the European Union decrees within its jurisdiction is binding for the member states. In the event of a conflict with national law, the national law will remain valid, but it may not be applied.
Furthermore, the member states are obliged to participate in European integration and its continuing development. This legal obligation arises from the principle of community loyalty, which is a key element of the articles of the primary law.\textsuperscript{62} In Germany, Article 23, Paragraph 1 of the Basic Law contains a corresponding obligation. Compliance with this obligation and the requirements to be respected in the process are monitored by the Federal Constitutional Court.\textsuperscript{63} In this regard, the Federal Constitutional Court is in a relationship of cooperation with the European Court of Justice.\textsuperscript{64} The relationship of cooperation reflects the interlinking between the European and German legal systems. This interlinking is led less by the idea of a strict separation of powers than it is by an assignment, a distribution, and a balancing of functions.

VI. CONCLUSION

The embodiment of the separation of powers in the Basic Law shows that the essence of its original function is, through the reciprocal control of legislation, executive power, and adjudication, to restrict the power of the state and, hence, safeguard the freedom of the individual. This alignment is to be assigned, on its merits, to the principle of rule of law. It is the expression of no-confidence over a violation of state power. This notion of protection remains applicable. It therefore continues to shape the understanding of Article 20, Paragraph 2, which represents the central constitutional regulation for the separation of powers.

In more recent times, the Federal Constitutional Court and representatives of the law are assigning to the separation of powers a further purpose, which is gaining in importance: the functional adequate exercise of state authority. Accordingly, the distribution and assignment of powers is geared toward ensuring that state decisions are taken as "right" as possible. This means that they are taken by the body that is best qualified to do so, through its organization, composition, function, and procedure.\textsuperscript{65} This goal derives from the notion that different holders of state functions, depending on organization and procedure, have different jurisdictions. An optimized assignment of functions is therefore required,

\textsuperscript{62} EC Treaty art. 10.
\textsuperscript{63} See BVerfGE 89, 155 (186-90).
\textsuperscript{64} BVerfGE 89, 155 (175); id. at 102, 147; id. at 118, 79.
\textsuperscript{65} BVerfGE 68, 1 (86); id. at 90, 286 (384); id. at 95, 1 (15); id. at 104, 151 (207).
and decisions should be made by the agency that possesses the capabilities required to do so. The more complex and heterogeneous the decision conditions are, the more important this aspect of the division of power becomes. Its primary purpose is not to protect the freedom of the individual—it is to improve the effectiveness of state actions.  

This expanded function and modified alignment of the constitutional principle of the separation of powers responds to changes in the legal relationships between state and citizens. In this regard, it is no longer only about protection against state intervention to secure the citizens' freedom, but also it is about participation in state benefits. The branches of government set the fundamental conditions enabling legally guaranteed freedom to become a reality. Separation of powers—understood as a demand for function-adequate distribution of power—enhances the efficiency of exercising state authority and at the same time serves the interests of the citizens. The judiciary and jurisprudence are called upon to react to these interdependencies by further development of this element of the separation of powers.
