§ 1 Theoretical and constitutional backgrounds of executive-legislative relations

I. The distinction between parliamentary, presidential and semi-presidential (hybrid) governing systems

- a common distinction in political science and comparative constitutional law doctrine
  - the classical examples: U.S.A., France, Great Britain
  - the risk of drawing too strong conclusions of this distinction
- usually, in a presidential system the president is both, the head of state and the head of government, while in a parliamentary system the head of government is a prime minister elected by the parliament and the government depends on the parliament
- usually, in a *presidential system* there is a *stricter separation of powers* with a greater independence from each other while in a parliamentary system the powers are more closely interlinked and interlocked
  - if the majority in the parliament does not support the president this can lead to numerous constitutional disputes (example: U.S.A. under President Donald Trump)
- in a semi-presidential system, there may be a separate head of government and usually the executive-legislative relations are more complicated
  - example: France, where some important powers are concentrated with the Prime Minister, not with the President

II. The design of the inter-institutional relations by the constitution

- with primacy above any other law or regulation
- institutional practice deviating from the constitutional rules cannot alter them but is illegal
- usually, only the details may be concretised by ordinary law or an organic law
  - any such law must comply with the wording and the spirit of the relevant constitutional provisions and the fundamental values and ideas of the constitution

III. The fundamental principle of separation of powers in free and democratic constitutional states based on the rule of law

1) Philosophical and historical foundations

- THEORY OF MIXED CONSTITUTIONS in ancient Greece and Rome
  - ARISTOTELES (Politeia, 4th century b.c.), PLATON, POLYBIOS
- JOHN LOCKE (Two Treaties of Government, 1690)
- CHARLES DE MONTESQUIEU (De l'Esprit des Lois, 1758)
- early implementation in North America (since 1776) and France (since 1791)
- Art. 16 of the French Déclaration des droits de l'homme et du citoyen (1789):
  "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution."

2) Definition, objectives and key requirements of the separation of powers

- definition: division of state activity into three blocks (legislature, executive, judiciary) and allocation to different institutions or groups of institutions
- objectives: securing freedom and *moderating state power by separation and interlocking of powers*; rational and functional organisation of state power
- key requirements:
  - functional, organisational and (partly) personal separation of powers
  - guarantee of a balance of powers
  - absolute guarantee of the *core area* of each power

3) Ways of anchoring of the separation of powers in the constitution

- Realisation of the separation of powers by an appropriate arrangement of the state institutions in the constitution
- a fundamental constitutional principle (or sub-principle) of separation of powers
  - example: art. 20(2) phrase 2 German Basic Law

4) The impact of the principle of separation of powers on the understanding of the constitutional provisions on the executive-legislative relations

- all provisions of a free and democratic constitution based on the fundamental idea of separation of powers must be interpreted and applied in line with this concept
- this even guides and limits the legislator when passing organic laws provided for in the constitution

5) The problem of checks and balances in constitutional systems not based on the concept of separation of powers

- the example of the Socialist Republic of Vietnam and its concept of democratic centralism

IV. The uniqueness of each constitutional institutional system and its consequences for the understanding of the executive-leglislative relations

- each institutional system must be seen in the *context of the whole constitution*, in particular of its fundamental values and ideas, and of the history and constitutional history of the state
- therefore, unlike in other fields of constitutional law, in this context, solutions and doctrine from other constitutional states usually cannot be transferred directly but only serve as a source of general inspiration and orientation
- solutions and ideas from countries with a different type government system must be analysed carefully even before being taken as a source of inspiration or orientation

V. Who is the final arbiter? The prerogative of the constitutional court to settle disputes between the state institutions and, thus, to develop the institutional law

- in particular in the way of *judicial further developing of law*, guided by inspiration drawn from comparison of laws
- this requires a series of well-founded, elaborated judgements forming a sophisticated, coherent jurisprudence
- the need to guarantee and enforce effectively the independence and authority of the constitutional court in order to ensure the separation of powers
  - but also the need of professional independence and ethics of the constitutional judges
- the important *role of the scholars* of constitutional law to monitor, compile, systematise, analyse and critically discuss the constitutional jurisprudence and to support its development in a broad scientific discourse
- not always the good guys: the controversial role of the Constitutional Court of Thailand in Thailand's political conflicts and the attempt of a coup d'Etat by the Constitutional Court of Moldova in June 2019