RIVISTA DI
DIRITTI COMPARATI

Separation of powers. Past, present and future*

Cesare Pinelli

TABLE OF CONTENTS: 1. Past. – 2. Present. – 3. Future.

1. Past

While asking ourselves what was the meaning of the separation of powers principle in the past, we tend to look at Locke and Montesquieu as the ultimate authorities in the field. We thus neglect the remote tradition and practice of mixed government, whose connection with those regarding the separation of powers may at least deserve attention.

In Aristotle's political theory the 'good' forms of government were monarchy, aristocracy, and democracy – each founded on the prevalence of one of three social forces (the king, the nobles and the people respectively) over the others. Each form was inherently unstable and susceptible to degenerate into its 'corrupted' counterpart, namely tyranny, oligarchy, and ochlocracy. Although widely accepted in ancient times, such classification was unable to solve the problem of ensuring governmental stability. With the theory of mixed government, the Greek historian Polybius seemed to have provided the solution. While observing the institutional practice of the Roman Republic, he noted the coexistence of the three 'good' forms of government, which gave rise to a system of checks and balances slowing down the rate at which each would naturally tend to its corrupt form if unhampered by its counterparts.

Montesquieu's theory of the separation of powers was not concerned with whether a form of government might endure, as in Polyibius, but with how it might guarantee political liberty. His most celebrated warning was 'There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three

* Conference of the Dottorato di diritto pubblico del Dipartimento di Studi giuridici ed economici della Università La Sapienza di Roma and the PhD of the Warsaw University, 28 November 2022. L'articolo è stato sottoposto, in conformità al regolamento della Rivista, a *double-blind peer review*.

powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals' (*Esprit des lois*, Book XI, Chap. VI).

For the first time in history, the risks of concentration of powers into the same body were referred to the loss of political liberty. Although maintaining that mixed government constitutes an essential requirement for a non-despotic state, Montesquieu stressed that it alone could not suffice to grant freedom: 'Democratic and aristocratic states are not in their own nature free. Political liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power: but constant experience shews us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say, that virtue itself has need of limits. To prevent this abuse, it is necessary, from the very nature of things, power should be a check to power. A government may be so constituted, as no man shall be compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permit'.

On the other hand, for Montesquieu the people's freedom did not consist in 'power in the people's hands', but in security under the law. 'One great fault there was in most of the ancient republics, that the people had a right to active resolutions, such as require some execution, a thing of which they are absolutely incapable. They ought to have no share in the government but for the choosing of representatives, which is within their reach'.

Here comes a first connection between the separation of powers and the rule of law, namely between two principles that in modern constitutionalism are both distinguished and mutually connected. Such relationship results from a very complex evolution going from the 1789 French Revolution to the first half of the Twentieth century.

In continental Europe, the rule of law acquired the function of subordinating the crown, and, later on, the executive and the judiciary, to the legislative power. The deep transformations engendered from the 1789 Revolution put parliament at the top of the institutional machinery. While representing the people, parliament expressed a principle of legitimacy entirely opposed to that of the *ancien régime*. Therefore, no other authority, be it the executive or the judiciary, could bind parliament, as well as no other act could override the law. Being the product of the *volonté générale*, the legislation on the one hand prevailed over any act of other public authorities which might violate the rights of citizens and, on the other hand, demonstrated that a further protection was not needed of those rights. Parliament's supremacy, in other words, was such also with respect to the

constitution. Notwithstanding the solemn statement of Article 16 of the 1789 Declaration of man and citizen ("Any society in which the guarantee of rights is not secure or the separation of powers not determined has no constitution at all"), the separation of powers was never intended in France in the sense that the spheres of each power are separated one from each other, as the American Constitution aims to do.

The suspicion for the judiciary resulting from the negative experience with the royal courts of the *ancien régime* is no less important for an apprehension of the French model. After the 1789 Revolution, courts were prevented not only from meddling in the exercise of the executive power, but also from taking cognizance of the acts of the administration. Only during the III Republic, the *Conseil d'Etat* began to extend its control beyond formal and procedural requirements to the contents of administrative measures, favouring both a liberal interpretation of the role of public authority in society and a revision of basic concepts of administrative law. On the other hand, these developments reinforced the French version of the legality principle, to the extent that the law was conceived as the benchmark of the administrative judges' review.

The democratic or, more precisely, the Rousseauian pretention that the legislation, being the expression of the *volonté générale* is per se aimed at pursuing the public good, appeared thus countering the Montesquieuan ideal of a limited political power, whose aim consisted instead in guaranteeing the liberty of the individual.

2. Present

The Constituent Assemblies of the European States convened after the fall of the totalitarian regimes left aside the previous presumption that Parliament was the best safeguard of the rights of citizens. Although still crucial for the functioning of democratic life, Parliament was no more conceived as the exclusive or even the highest institution capable of ensuring fundamental rights guarantees. To the contrary, fundamental rights should bind not only administrative bodies and the judiciary, but also Parliament.

This shifting, expressly codified in the 1949 German Basic Law and in the 1978 Spanish Constitution, or implicitly held, as in the 1948 Italian Constitution, lies at the core of the idea of constitution which characterizes those legal orders. The constitution isn't put at the top of the sources of law as being the highest expression of the State's will, but because it enshrines

substantive principles, first and foremost respect for fundamental rights and democracy, intended to endure irrespective of the contingent expressions of public powers, including political decisions of the majorities of a certain legislature. And, with the establishment of constitutional review over legislation, courts become the instrument of the constitution's supremacy over all public powers.

Hence derive decisive changes in the conception of the separation of powers.

First, the State's powers can no more be reduced to the Montesquieu's triad of the legislative, the executive and the judiciary. The Constitutional Court stands certainly among public powers, as well as the Head of State, to the extent that, at least in parliamentary regimes, the King, or the President of the Republic, is now completely detached from the executive.

On the other hand, the separation of powers is conceived along horizontal no less than vertical lines, given the establishment of federal or regional states as crucial feature of the new constitutional arrangements, and the consequent emergence of a legislative as well as an administrative autonomy of the Member States (or of the Regions) providing further limitations to the old state-centered political power.

Secondly, the concept of separation of powers is now constitutionally connected with the independence of the judiciary. While the separation between the legislative and the executive might depend on the form of government of each state, namely presidential, semi-presidential or parliamentary, independence of the judiciary stands among the constitutional conditions of contemporary democracies.

The judiciary must be free from external pressure or from political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the democratic version of the separation of powers that was then created. Moreover, independence of the judiciary was to be granted not only vis-à-vis the other State's powers (external independence), but also within the judiciary itself (internal independence) since in exerting its functions each judge must also be left independent from other judges. The presumption emerges that without independent judges there can be no correct and lawful implementation of rights and freedoms. Therefore, independence of the judiciary is not an end in itself, nor a personal privilege of the judges, but a condition for enabling judges to fulfil their constitutional role of guardians of the rights and freedoms of the people.

Thirdly, the already mentioned change of the constitution's meaning and function affect the concept of the people. These compose a community sharing something more than the procedures that make it an electorate, namely a certain set of values that are constitutionally translated into principles. It is the presumption that the translation corresponds to the people's credence – or 'the expectation' that people have about the laws under which they live – that confers legitimacy to the constitution. Such legitimacy is in turn believed to transcend the political majorities of the moment, without being considered a metaphysical, or a morally indisputable, truth; rather, it may count as evaluation of the peoples' common interest.

Accordingly, the latter are presumed sovereign on the ground that they are provided with the choice of repudiating the values they shared when the constitution was formulated. It is the very constitution's endurance that depends on that choice. Whenever constitutional principles fail to reflect the people's utmost cherished values, the constitution ceases as well to exert its function of ensuring the stability of a certain legal order.

The constitution's relationship with the people is thus grounded on a conventionalist premise, namely the translation of popularly perceived values into constitutional principles. While remaining free, whichever choice of the people regarding their further adherence to those values is thus provided with a term of reference. In this sense, sovereignty can no more be intended as omnipotence even with respect to the people's ultimate power of denying the constitutional principles' congruence with their own present values.

The constitutional concept of the people leaves thus the people free to change their mind not only with respect to the constitution, but also to themselves. Populist appeals to the people, on the contrary, presuppose, and necessarily require, the notion of a homogeneous people that remains the same across and through change. In this perspective, it is not the people's attachment to certain values that affords legitimacy to the constitution. It is rather the nature of a certain people that is conceived as superior to the constitutional principles of the rule of law, of the separation of powers, and of respect for political or cultural minorities.

It is true that, under populist regimes, free elections are held in formal compliance with the representation principle and the majority rule. But, given the already mentioned conception of the people, the representation principle loses here its function of ensuring competition between political views of the people's interest. The same occurs with the majority rule, that no more presupposes respect for minorities, nor requires external control

through rule of law mechanisms, and can thus be deceptively reduced to a winner-take-all rule.

Hence derive 'constitutional retrogressions' such as dismantlement of interbranch checks, perpetrated through court-packing operations and modifications of the competences or of the financial independence of constitutional courts. These provoke an erosion of the rule of law notwithstanding the observance of formal legality. In the same direction goes the increasing use of constitutional amendment or replacement aimed at making 'a state significantly less democratic than it was before', namely a regime with 'a relative absence of accountability and a lack of rights protection'.

Constitutional retrogression is deemed as consisting in 'a simultaneous decay in three institutional predicates of democracy: the quality of elections, speech and associational rights, and the rule of law'. More subtle threats to democracy emerge here than those posed by totalitarianism, since at least formally free elections continue to be held. It is this feature that qualifies these regimes as 'hybrid', or as standing in-between constitutional democracy and the totalitarian state. The holding of elections coexists there with serious restrictions of fundamental rights, as well as various limitations of the independence of the judiciary and of further non-majoritarian authorities.

3. Future

As we have seen, in the experience of post-totalitarian constitutionalism, the separation of powers principle functioned differently than in the past. However, its core ideal was maintained of granting individual liberty. Can we imagine, and how, to preserve such ideal in the future?

We experiment everywhere that threats to constitutional democracy may lurk outside the perimeter of what has traditionally been labelled as "violation of civil liberties". Unlike such acts as closing down a newspaper, phenomena such as governing parties virtually monopolizing access to the media through patronage deals or proxy arrangements, or state/party/business ties creating vast resource disparities between incumbents and opposition, may not be viewed as civil liberties violations. We should be aware that «the use of political power to gain access to other goods is a tyrannical use. Thus, an old description of tyranny is generalized: princes become tyrants, according to medieval writers, when they seize the property or invade the family of their subjects» (M. Walzer). Nowadays, the

use of political power to gain access to other goods constitutes an infringement of citizens' political rights. Since their exercise is necessary for free elections, protective devices preventing such infringements need to be included among the attributes of democracy.

But the waning of the private/public divide is not the sole feature that characterizes current constitutional developments. With the globalization of markets and of communicative systems, the external/internal dichotomy is blurred as well.

In particular, the `essential hybridity' of the law of finance between private law and public law should not be viewed only as a rupture of the traditional private/public dichotomy, but also as a breach of the relationship between the political and economic spheres. The deregulation of financial markets brought such spheres to a coalescence that not only weakened `the form of stability and restraint imposed by public regulation vis-a-vis economic processes', but also launched the financial markets' decision making, hitherto limited to the legal and to the economic field, into a political dimension.

A dramatic shift emerged thus in the realm of power from democratically elected authorities to private companies, which attempts of regulation appear for the moment inadequate to deal with. We know that it was provoked by a general retreat of politics no less than by the action of global markets and of the new communicative system. But we still ignore the long-term consequences of such transformations. This is particularly true for constitutional law scholars.

Controversies over constitutionalism – whether it should be grounded on limiting power and/or on legitimizing it through democratic means – regularly presuppose its connection with the political power of the state. In the neoliberal epoch, new power relationships arose however from society, not from public institutions, leaving formally unchallenged the constitutional design. In addition, the realm of economic global power or of the communicative system, being inter alia inextricably connected with technological change, appears to constitutionalists far more elusive than that of political power.

While depending to a significant extent on power relationships arising from society, even structural decisions regarding allocation of resources are unlikely to be substantially taken by democratically elected authorities. The issue of checking the decisions arising from private powers, and of the mechanisms that could be forged to this end, is not simply political. It has become a constitutional issue, being constitutive of a certain legal and economic order.

The future of the separation of powers is intrinsically connected with that issue. Such principle has succeeded in ensuring freedom in various epochs, not because it presupposes a formal distinction into three powers, but because it requires that power should not be concentrated or monopolized. Although referred since now to the power of the state, there is no reason why the separation of powers could not inspire new rules and institutions aimed at limiting private entities that tend to concentrate power at the global scale, to the point of threatening the very distinction between the political and the economic sphere. If this will be the case, further reflections might deserve even the tradition of mixed government, where mutual checks were put on powers representing different social forces.

***

KEYWORDS: Separation of powers; mixed government; democracy; parliaments; judiciary

***

Cesare Pinelli - Full Professor of Constitutional Law, Sapienza – Università di Roma (cesare.pinelli@uniroma1.it)