

THE EVOLUTION OF THE PRINCIPLE OF SEPARATION AND BALANCE OF THE POWERS OF THE STATE AND THE EXECUTIVE

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Abstract: *The theory and the separation of balance in the powers of the state, implemented at a constitutional level, either specifically or by identifying and organizing the powers, according to the “scheme” established by its advocates, has tried to create the best means possible to establish a moderate government. [12] The passing of time, political, legal and state developments reflected by the current constitution, constant attempts of the executive, especially the governments, to arrogate to itself more and more functions in the legislative field will also influence the evolution of this principle.*

Key words: *principle, separation of powers, balance, executive, evolution.*

1. Introduction

In its original form, the classical one, the principle of separation and balance of the powers of the state works by the following scheme: the state has to fulfill three basic functions, namely: the legislative function which involves the proclamation of general rules; the executive function which consists of applying or implementing these rules; the jurisdictional function which consists in solving the disputes that may appear in the process of the enforcement of the laws. To the performance of each function corresponds a “power”: the legislative power, the executive power, the judiciary power. Each of these powers is entrusted to distinct and independent institutions – the legislative power – to a representative assembly, named the parliament, in generic terms; the executive

power – Head of State and/ or Government; judiciary power – to the judiciary authorities/ judicial organs. [2, 3, 5, 6, 8, 9, 10, 13, 16]

Although, the authorship of the principle of separation of powers is devised by Locke, who announced his theory in 1690, in his paper entitled “Two Treatises of Government” and by Montesquieu, who put forward his theory in 1748, in his paper entitled “The Spirit of the Laws”, the latter being the one who developed it and mostly fundamented it, this principle finds its origins in the Antiquity.

2. The principle – in the Antiquity

Historians like Herodotus, Thucydides, Xenophon or philosophers such as Plato, Aristotle have sent to us, through their writings, reflections about organizing the

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powers and the beginning of its division in Sparta and especially in Athens. [18]

Plato identifies four forms of government, based on the criterion – the character of the one who will take over, namely: timocracy or timarchy, oligarchy, democracy and tyranny. [17]

In contrast with Plato, Aristotle believes that there are three forms of government that correspond to three pure constitutions: monarchy, aristocracy and republic, and other three forms of government that deviate from the first ones: tyranny, oligarchy and demagoguery.

The criterion that Aristotle used, in his attempt to identify these types of government, is “orderly distribution of the power, which is always divided among partners, either according to their particular meaning or under any principle of civic equality” and this division is nothing else than the Constitution [1].

Aristotle talks for the first time about a separation of the powers of state starting from the idea that the law, based on sense, stands at the basis of society, and of all the laws, the Constitution is the one standing at the basis of the state organization while the others have to obey [1].

At the same time, the Constitution must determine the systematic organization of all the powers in a state, but especially, of the one that is sovereign because a state is considered well organized when divided into three parts: general assembly – today’s legislature – deliberates public affairs, body of magistrates – today’s executive – whose nature, attributions and appointment manner should be decided, and the judiciary [1].

Aristotle considers that the government is the Constitution itself by stating that this “is what determines the systematical organization of all the powers in state, especially the sovereign power; and the ruler of the fortress, in all places, is the government. The government is the

Constitution itself..., in democracy, the people are sovereign”. [1]

Based on this foundation, Aristotle identifies the three forms of government: monarchy, aristocracy, republic, but in each one the Constitution must represent the “orderly distribution of power”.

In Aristotle’s opinion, the state is an association of citizens that obey or not a Constitution, citizens being individuals that can have a public assembly and deliberate votes in courts, whatever the state whose members they are, but they wonder if the virtue that characterizes any free man is also a characteristic of the citizen, stating that what qualifies the magistrate to be worthy of governing is that it is necessary to always be worthy and prudent, the latter being more necessary for the politician, as it is for the magistrate, than virtue. [1]

To avoid any kind of confusion it is necessary to specify the fact that Aristotle uses the word “magistrate” in its etymological meaning, a high official, administrative, executive, legislative or judicial in the Roman and Greek states. [1]

Aristotle, like his successors, extensively treats, at first, the legislature – the general assembly, as he calls it, and then the executive power – “the body of magistrates”. Chapter XII from the 6th Book (or 4th in ordinary editions) is dedicated to this latter power treating issues such as the term of office, the possibility of having more terms, the designation of the magistrates, the number of magistrates, also trying to identify a possible definition of this power. Thus:

- the number of magistracies should differ depending on the size of the states, including the fact that in the larger states their number should be bigger, and in the small ones it is accepted, because of lack of personnel, the possibility that a magistrate could combine more functions provided that first the number of functions that are essential for the state and those

who are not absolutely necessary but are still needed be established [1];

- it is considered that on average the term of office of such magistrates is of 6 months – 1 year or less, but in any way in the larger states the chances for a citizen to hold a term more than stated are reduced as compared to the chances that a citizen living in a smaller state has, where, for the same reason – “lack of personnel” – this possibility should be accepted;

- regarding the nomination of the magistrates, he considers that it should take into consideration, first, some rules, namely: the right to appoint magistrates either belongs to all citizens or only to some special classes; the right of being appointed either belongs to everyone or it is a privilege related to census, birth, rights, etc; the way of nominating is either by lot, by choice or through a combined method of the two above mentioned. Of all the ways of organizing the appointment of magistrates only two are appreciated by Aristotle, namely eligibility by lot and eligibility by choice, choosing from these two or combining them; [1]

- although he considers that it is difficult to define the magistracies, he notes, however, a possible definition stating that “generally, the true magistracies are functions that allow the right to deliberate on different objects, to decide and to order”. The latter condition is considered the most important because it can determine whether or not a citizen takes part in the government as a magistrate.

3. The principle – The Enlightenment Century

In the 17th and the 18th centuries, the ideas of the ancients reborn in the attempt to react against the feudal obscurantism, the medieval seclusion, the abuse of power, the theory of separation of powers being considered a necessity in the fight against

absolute monarchy, where the king focused on supreme power, as suggested by Louis XIV when stating: “l’État c’est moi” (“I am the state”).

Although it is considered that the accent was on the idea of the separation of powers in the state, being unthinkable at that time that the powers could collaborate or even more, they could be in a state of balance showed through cooperation and mutual control, actually tried to create or to find a balance between the identified powers and, especially, between the legislative and the executive.

Initially it was considered that the legislative power is superior to the others that have to subordinate. This idea was stated by J. Locke in 1690, so that later Montesquieu, but also Rousseau, considered that law enforcement has its natural limits.

It was shown that to avoid despotism it is mandatory that the three powers – three functions (the enlightened philosophers that have contributed to substantiate this theory have used, generally, the term “power” as a synonym of “function”) not to be entrusted to the same body, whether this had an individual or collegiate character, requiring their specialization. [12]

In this context it was spoken about the impossibility to function, of the non-overlapping of functions principle, principle that could be applied in relation to the legislative function and to the executive one. [12]

Thus, these theories have emphasized the characteristics of the legislative powers, respectively of the executive one, and also the relations between them.

3.1. The principle – in John Locke’s view

The one who gave it its first doctrinal form, after Aristotle, underlying the importance of the separation of powers in

the state in order to guarantee individual freedom, was the English philosopher John Locke in his writing “*Essay on Civil Government*”. [6, 18]

Considering that the arbitrary and omnipotent powers of the ruler is something unacceptable, J. Locke held that political power cannot be absolute, its limit being given by the natural rights of human beings, rights for which, incidentally, it had been established.

J. Locke considered that the existence of society is conditioned by the existence of laws and as a starting point he made a distinction between the natural state and the civil state, the latter being based on a contract whose object is the guarantee of natural rights. “*Signatories*” of this contract granted the right to punish and to make justice, to the society. This right is identified with the judiciary power which, in its turn, is divided into: legislative power, which determines the fact that it violates the rules of coexistence and the corresponding penalties; executive power, which specifically runs the laws issued by the legislative power and the confederative power, which exercises the powers of the state in relation with other states.

The separation of the power into the three powers was justified through the fact that none of the powers in the state should be absolute, but this division does not have to affect the quality of the people who are the sole holders of the powers in the state.

Locke also said that it is necessary that the legislative power and the executive power should be exercised by different holders that are independent and distinct, and the judiciary power should be a component of the legislative power.

3.2. The principle – in Montesquieu’s view

J. Locke’s paper can be considered an ideological source for the ideas expounded in Montesquieu’s work (Charles-Louis de

Secondat, Baron de la Brède et de Montesquieu) – “*De l’Esprit de lois*” (“*The spirit of Laws*”). The essence of this paper does not consist in the identification of the three powers of the state – legislative; executive, regarding the right of the nations, which he simply names the executive power; and the executive one regarding matters under civil law, which he calls the judiciary power, as a matter of fact these cannot be cumulated, especially, the legislative and the executive, and held by the same body. [11]

Due to the effects it produced on the political systems at that time, on the rules contained in the North-American constitutions of the late eighteenth century, including the 1787 Constitution of the United States and in the majority of the constitutions of most modern states, Montesquieu’s theory on the separation of powers in state has become a basic constitutional principle in any state, and its author has been considered a “true father” of the theory. [6]

Montesquieu believed that the legislative power must represent the general will of the state because “under its principles, the prince or the authority makes laws, corrects and revokes them”, and the executive power must accomplish the execution of this general will because in its virtue “the prince or the authority declares war or makes peace, sends or receives messengers, takes security measures, prevents invasions”. [11]

Regarding both executive and legislative powers, Montesquieu stated that they can be entrusted to permanent officers or permanent bodies, but under no circumstances should they be executed by the people. He also claimed that it should be better if the executive power would belong to one person, who was the monarch at that time, because exercising this power might require making prompt decisions. But in any case the executive

power cannot be entrusted to people that might come from the legislative power because there might be a double risk – the decisions could be made only by the legislative power, in which case “the state would fall into monarchy”, or the decisions could be made only by the executive power, and in that case this might become absolute. [11]

In terms of the duties that the executive power might have, Montesquieu takes into consideration the following: this must be the one which establishes the date and the duration of the meeting of the legislative power; it must have the right to oppose the initiatives that come from the legislative power because, in this way, the legislative would become despotic; the monarch, who holds the executive power, should not judge conflicts, but must have the right to name judges. Moreover, Montesquieu considers that exercising these attributions could be done for a limited period of time because “in any dominion, the power’s extent must compensate with the shortness of its duration”, but that the prince’s Council should not be confused with the executive power that the monarch represents because the first one is “by nature the depository of the momentary will of the prince”. [11]

Regarding the three powers identified, Montesquieu not only stated the fact that they should organize and work as being separate from each other, but, on the contrary, he stressed the fact that they should control each other in order to avoid one of them becoming despotic. In this regard, there have also been identified means whereby this control can be achieved. Thus, Montesquieu noted that the executive power must have the right to oppose the legislative’s initiatives, more than it should participate in the regulation by exercising a right of veto, in order not to be deprived of their own prerogatives. The right of legislative initiative,

belonging to the executive, should not be an absolute right precisely because the existence of this genuine veto right would give it the right to reject those proposals that are in disagreement with it. However, law enforcement must be an exclusive attribution of the executive, the legislative should not even apply it, but should not restrict its application because the executive reacts by taking prompt action. However, the legislative is recognized for “having the authority to examine in what way its laws were implemented”, thus controlling the activity of the executive. As a result of this control, the legislative does not have the right to judge the person who made a mistake, it must be inviolable, “but as one invested with the executive power cannot apply any laws in a wrong way without having counselors turning to evil, who hate laws as ministers, even though they are considered people they can be investigated and punished”, but only by the judiciary power. [11]

3.3. The principle – in the view of J.J. Rousseau

Starting from the observation that power, sovereignty, as J.J. Rousseau called it, is inalienable and indivisible, he claims that it can not be divided, split into several other powers.

Identifying two causes that produce any human action: a moral one represented by will and determining the act, and a physical one represented by power and performing the act, Rousseau encounters them even when talking about the political body, the force being known under the name of legislative power, and the power under the name of executive power.

Rousseau believes that the legislative power belongs to the people, but the executive power cannot belong to the people because the public force, to be put in action and to be united according to the

directives of the general will in order to create a link between the state and its ruler (who is actually the holder of power) has to be an agent. In fact, the agent is represented by the government that does not hold the power and is therefore an intermediate body, placed between the subjects and the ruler, a body that is responsible for law enforcement and maintaining the civil and political freedom. This government, also called the supreme administrative, involves the legitimate execution of the executive power, the king or the monarch must be part of it, and “the prince or the magistrate will be named the man or the body charged with its administration.” [19].

Regarding the executive power Rousseau adds that this must be separated from the legislative power, the prince or the magistrate that represents the first one and will get the ruler’s share of rights to demand what he cannot because “the citizens are equal through the social contract, which forces everyone to do what it is ordered by everyone.” [19].

But Rousseau mentions that, disputing the existence of the representative government, it is “clear that the legislative power of the people cannot be represented, but the people can and must be represented by the executive power, that is only the added force of law.” [19].

The separation between the legislative and the executive must not be interpreted as an independence of one from the other. In this regard Rousseau underlines that the executive power must depend on the legislative, any “defect proportion by dividing the government” must be immediately removed. Moreover he considers that some magistrates can be set as intermediaries to use “only the weighing of the two powers and to maintain those rights” and to contribute to the slowdown of the government. Also, Rousseau believes that it is necessary, besides this form of control, to

establish courts in order to remove any damage of the government. [19]

The document through which the executive is established is not a contract but it is a law because the “depositories of the executive power are not the masters of the people, but its officers, that they can name and dismiss whenever they like to, it is not that they can contract, but listen; and assuming the functions imposed by the state, they do not do anything but fulfill their duty of citizens, without having in any way the right to discuss the conditions [19].

4. Conclusions

Disputed by many, considered outdated, even proposing its removal, the theory of separation and balance of the powers of state has survived centuries and it is still considered one of the foundations of contemporary political regimes, standing at the basis of their classification into regimes practicing confusion of powers (rather in favor of the legislative, or in favor of the executive) and the regimes that exercise separation of powers. [4], [5], [6], [7], [13], [14], [16].

It should be noted that there are authors who consider that it was not this principle which stood at the basis of the existence of the government structure in a particular state, a structure that even though it is identical to the exposed one by the principle in question, is due to the “experience” of those who made the constitution [7].

We consider, firstly, that the constitution of any modern state “is nothing but the orderly distribution of power”, therefore it would be exaggerated to talk about the separation of the three powers of state, their absolute separation being unthinkable, a total lack of collaboration between them or, in other words, their independence.

In fact, most current constitutions either explicitly and specifically include the principle of separation and the balance of powers in state or the organization of powers, precisely of the authorities that exercise the three powers in state, being regulated in accordance with this principle, the interpretation of the constitutional texts through specific methods allowing the identification of existence and action of this principle in these cases. [1]

We could mention, as an example title for the express inclusion of this principle into the constitutions, the Constitution of Slovenia which states, in Art. 3 para. (2) that in this republic the power belongs to the people, being executed directly by the citizens, also directly through elections in accordance with the principle of separation of legislative, executive and judiciary powers.

In constitutions such as that of Greece, although this principle is not expressly upheld, the existence of three powers is provisioned in an article, as well as the authorities that exercise them (art. 26), following that these provisions could be developed by the constitution [20], [21].

From the category of constitutions that provide organizational powers according to this principle, we could point out the provisions of some constitutions like that of Argentina (The second part of this is devoted to its “National Authorities”, where the first Title regulates “The Federal Government”, and the legislative power, the executive power, the judiciary power, a distinct chapter being devoted to the Public Ministry); the one devoted to the Netherlands’ governing in Chapter II – Chapter VI the three powers and how they are organized as well as the papers that they issue [20], [21].

So the political power is one, indivisible, and belongs to the people. The manner of organization conceived through the principle of separation and the balance of

powers in state, in fact, entails that this power is therefore not about the existence of more powers in a state, but more authorities that execute the three fundamental functions in a state – the legislative, the executive and the judiciary, but also about some new functions, like the function of deliberation in parliament; its control function of the activity of the executive, the directive function of the national politics and management of the executive bodies, especially of the government, etc. [16].

We should take into consideration the fact that at the moment of this theory’s substantiation there were no political parties, and their appearance has influenced it, no doubt, but, under no circumstances has it determined the replacement of the separation of powers with their confusion.

In this context, we consider valid, more than ever, J.J. Rousseau’s theory that the legislative power is the heart of the state, the executive power is the brain that puts everything in motion, words expressing an anticipated conclusion of the constitutional, political and economic realities and not only, related in general to the executive and, in particular, to the government according to which their role has increased, primarily at the expense of the legislative [19].

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