Social Contract Theory and the Theory of Separation of Powers

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Abstract:
In a democracy power emanates from the people and it belongs. The essential principle governing in a state of law, the entire political organization, relations between citizens and public power, the relations between different branches of government, the separation of powers. In exercising political power appears a certain separation of powers (functions) authorities (powers) which do not involve a single division of political power but require a balance and cooperation between public authorities. If this organization is achieved through several categories of state bodies with clearly defined functions and features and characterized by organizational and functional autonomy and by mutual balance and collaboration, we are in the presence of separation / balance of powers. This condition is typical of democratic systems of government.
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1. Influences on state theory

Theory of state supported by representatives of different influences social contract theory and the separation of powers. Regarding the creation of the state, **Hugo Grotius** (1583-1645) is committed contractualist theory, according to which most people are free and equal joined in a State organization to shelter from danger and to use each other transferring sovereignty without conditions on a man or more. So people transmit power and government determines its form of government. After the contract people lose the right to control them or punish government.

According to his theory concerning the natural law, Hugo Grotius analyzed society's right to punish those who disregard the laws and threaten its existence. This right must not be arbitrary, such as revenge, but must be a manifestation of reason, to be exercised within the limits of justice and humanity. The punishment must consider the benefit of both the one who committed the act and by that he had not committed interest and the whole world without distinction. [1] After Hugo Grotius's view regarding the social compact between rulers and the ruled, it must

take the form of an international treaty and not as internal documents, contracts. Grotius invoked the binding force of international treaties. On state sovereignty no longer exists, outside of divinity, nothing else than the rules of natural justice. In international relations, says Grotius, peace must be preferred war, but by virtue of natural law states have a right to defend itself, to use force against force and, therefore, situations legitimate to wage wars.[2] In a recent paper is considering that among the elements of sovereign equality of Member find rights and obligations: rights inherent in full sovereignty, the right of aces build your own system socio-political, economic, cultural obligation to respect the personality of other States, the obligation to commitments and comply with their duties imposed by law Interntional. [3]

Thomas Hobbes (1588-1679) state is created based on a social contract to maintain peace and security in society, because man is wolf to man (Homo Homini Lupus), and pre-existing natural state of humans is the war of all against all State (bellum omnium contra omnes). In Hobbes' conception, when the social contract gives people certain rights to the State but do not yield power, as Grotius, but their natural rights in exchange for peace. In Hobbes' conception of the state is an artificial creation, a machine that has absolute power omnipotent, unlimited individuals. The state provided with absolute authority necessary to prevent war between individuals. This is the typical representative of absolutism Hobbes. Fearing anarchy, Hobbes suppresses freedom to meet one requirement – order. In his conception Hobbes see salvation only through a state power that would be able to dominate in all sovereignty struggles and individual passions. State power is a summum imperium, is absolute, it is sovereign. The state is the only source of law, because only the state defines the right, because only he has the power to command and the law is a command.

John Locke (1632-1704) brilliantly symbolizes a democratic and liberal tendency, the opposite trend Hobbes's absolutist. In the conception of Locke man is naturally sociable and is not in a state of war, Hobbes, but in a state of nature that includes several fundamental rights: the right to liberty, the right to work, the

right to private property and so on for humans, says Locke, natural state is just society. What is missing is the authority that can guarantee these rights. The state is, for Locke, a reaffirmation of the limits of natural liberty that finds its guarantee in him. Individuals sacrifice only so much of law and freedom that makes possible the formation of the upper body protection. Establishment of public power, the citizens opens consensus thesis that once established the power, the will of citizens would retain a predominant on it could revoke at any time. Declared will of the people is sovereign. The state is no longer a mere expression of power or arbitrariness but must necessarily, by its nature, guaranteeing individual rights. Populi suprema lex Salux is certainly a fair rule so fundamental and that is certainly one who can do no wrong. [4]

Locke outlines the theory of separation of powers, arguing that the legislative power should be separated from the executive (administration and judiciary) and the federated (external defense of the State), theory will be later taken up by Montesquieu.

Jean Jacques Rousseau (1712-1778), the foremost representative of the social contract theory, holds that man is in a state of nature, man is a social animal but a poor animal with two trends: mercy and perfectibility, which make him human. In the social contract, Rousseau seeks absolution practical problem. He acknowledges that a pure and simple return to their natural state, after reaching the state of civilization, it is impossible. Rousseau notes that what constitutes happiness was primitive joy of freedom and equality, what matters is finding a way to return the civilized man possessing such rights to form political constitution after their rule.

After Rousseau, the social contract should be such: it is necessary for individuals to give their rights for a moment the state, which then plays them all names changed (will not be natural rights but civil rights). In this way, the act being met equally by all, no one will be privileged, equality is thus ensured. In addition, each retains his liberty for the individual is subject only to the state, which is the synthesis of individual freedoms.

To find a form of association which will defend and protect with the whole common force people and goods of each associate, and in which each one, uniting all, do not listen, however, only himself and remain equally free as before, this is the fundamental problem whose solution is the social contract.[5]

The social contract is only dialectical process by which individual rights and state converge emanating from him again reinforced and somewhat religious. The effect is that all men remain free and equal, as in the natural state, while protecting their rights becomes a guarantee that that state was missing. Individuals are subject only to the formation of the general will and they work together.

Law, for Rousseau, is nothing but the expression of the general will, therefore it is not an arbitrary act of authority. No authority is legitimate if not based on law, so the general will. In this general will consist true sovereignty which can not belong to a particular individual or a corporation, but belongs necessarily always the people, since it constitutes a state.

Sovereignty is, in Rousseau's conception, inalienable, indivisible and imprescriptible. Always sovereignty resides in the people, and he may at any time and a resume.[6]

We note that in Rousseau's conception pact is based on the totality of individual wills that blend into a general will, leading to a political community through merger. The general will is the public reason, the sovereign is represented by all citizens whether their will may be worth public will. However, democratic governance, said Rouuseau is an ideal, it is not adaptable to people. That makes the laws knows better than anyone how to be met and interpreted. It is not good that makes the laws to execute, nor the whole body of the people to divert attention from the general goals to attach to particular.

Referring strictly to democracy, Rousseau said: "A true democracy has never existed nor could there ever will. "[7] It follows, therefore, that Rousseau does not accept any democratic representative regime.

2. Definition of modern law

Hugo Grotius believes that natural law is the means to ensure the rational and peace. Natural law is given by all the principles which reason dictates, to satisfy our natural inclinations, social life.[8] Grotius thinks the immutable character of natural law and states that he would be there even if God did not exist.

Hugo Grotius's opinion, four fundamental precepts directs the entire law:

- alieni abstinentia (respect of all that is the other)
- promissorum implemendorum obligatio (respecting commitments)
- damni culpa dati reparatio (repair damages caused another)
- poene interhomines meritum (fair punishment for those who violate these principles)

These principles of natural law determines are embodied in what the author calls the right human volunteer. It is estimated that the doctrine of natural law Grotius is between current dogmatic Christian natural law, the natural law tends to subordinate divine positive law, natural law and the modern rationalist stream, which tends to eliminate the divine positive law as legal order.[9] As stated, the principle "pacta sunt servanda"..., establishes the duty of States to comply in good faith with its international obligations arising from international rules and treaties, treaties having binding if they are lawful and whether they were entered into with the free consent.[10]

Hobbes is that the law determines right, because the sovereign is the sole legislator. According to Hobbes, an act is legal if done according to the law of the sovereign. Moreover, Hobbes's conception was based on three main coordinates.

- Hobbes argues the existence of a natural law underpinning the peace and security of society, positive law not only means by which to achieve peace
- Hobbes not find the idea of limits by state law as positivists argue, because he argues that sovereignty is absolute and indivisible

- Political and legal system of Hobbes does not identify the positivist characterized by neutrality law. Positive laws, Hobbes, the ultimate goal to ensure peace and security of individuals are subordinated to natural law that shows what must be.

John Locke believes that there is naturally no society but instead is just the natural state for human society. Right must ensure freedom of individuals through its prescription categories: the right to control, limit, allowing prohibits etc. Fulfillment of agreements between rulers and the ruled can not be achieved by establishing a rule-based civilization, that is right. Moreover, Locke stresses the need for the survival of state laws.

Rousseau, the law is characterized by a generalization collective. The law is not an arbitrary act, it is the expression of the general will, which means that it is rational and legitimate. For that ensures freedom and justice, only the law can fulfill man. From this theory that Rousseau does not reject natural law, but the law makes it a natural analog because it has meaning and validity than through public reason and positive civil law. Rousseau note that it is not absolute positivism and makes law coming from God a human form. The difference between justice and the law may be raised from various perspectives such as for example, in terms of general features founding of existence, justice can be foundational value and the right can be întemeiatul.[11]

Charles Montesquieu (Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, 1689-1755), in his fundamental *L'esprit de loi* states that laws are necessary ratios derived from the nature of things and that before existed proper said there were reports of possible justice. Legal interest laws, policy matters, criminal, civil, etc., are required depending on the achievements of a number of different factors, which may vary according to conditions of space or time in history: form of government, various forms of political freedom climate or the nature of the territory and a series of conditions acquired during social experience such as customs, trade, use of money, religious etc.

Spirit of the law is the fact that the law appears as a result of all the factors that influence human life, says Montesquieu.[12] Montesquieu's theory about the separation of state powers has had great resonance. Its director principle is that to prevent abuse of power, things have so ordained that the power to restrict power. When in the hands of the same person or the same body of officials is met legislative power and the executive power there is no freedom, because it can bear fears that the same monarch or senate same draw tyrannical laws that apply them tyrannically. There is no liberty if the judiciary is not separated from the legislative and executive powers. If she had joined with the legislative power over life and liberty of citizens would be arbitrary, for the judge would be the legislator, and if it combined with the executive judge would force an oppressor.[13]

3. Kant's conception of the Law and State

Immanuel Kant (1724-1804) states that the right foundation in man, an idea that is older and belongs to the natural law. The idea of leaving the man to reach the state, understood him as an synthesis rights founded in human nature has a reason profound and never could be dismissed in its entirety nor those who believed that crumbling social contract with historical arguments. Kant's merit is to be removed that confusion between historical and natural, purely rational principles affirming the value of natural law. Thus, natural law school ends Kant (naturrecht) and rational law school starts (vernunftrecht). Natural law is as rational.[14]

The conception on state Kant defines the state as "the union of a multitude of men under legal laws" but this variety should be designed and associated under contract by the will of all. Kant said that the state should be selected based on a social contract.[15] The social contract is the legal basis of the ideal state; it must be organized based on the recognition of individual rights as a synthesis of human freedom.

The purpose of the state, says Kant, is the protection of law. Kant believes freedom and equality of the most important legal asset; they are both rights

innate, natural, and most important rights to be governed by positive law, which is dependent on the will of the legislator but an important factor in determining its content is the social life.

The distinction between natural law and positive law is to Kant that natural law is based on reason and the right positive inspiration, therefore came to be arbitrary.[16]

In a modern state institution or set of institutions connected with the capacity to ensure the effectiveness of social rules elementary is the government, he effectively becomes the only institution able to resort to the use of physical force having at his disposal an overwhelming force, compared to the force it has provided any other group in the state and having the monopoly of the legitimate use of force except residual duty of every individual to defend himself.[17]

The state must ensure citizens to enjoy their rights, but they should not interfere in individual activities or to care for individual interests. He has fulfilled its function when it secured the freedom of all, and in this sense should be the rule of law. Freedom is affirmed in order to practice our conscience as a moral existence.

Conclusion

While the principle of separation of powers has found wide application in constitutional practice of Western countries, it has been criticized by a number of thinkers and politicians, including former US President Woodrow Wilson, who estimated that aplicaţiunea this principle to disappear, practically any idea of responsibility in government. German doctrine (Laband, Jellinek) considered Montesquieu's theory as illogical and unworkable in practice. Such was the view that it represents only a method of organization meant to weaken the omnipotence of the state to defend individual. Lawyers Germans, strongly influenced by ideas statist stressed that "following the weakening of political power by assigning attributions to various organs juxtaposed quasiindependente

each other, each having an area of own activity, although working on the same work overall, it was the inability of the state to create a new order, to meet the needs of a society in a state of flux ".[18]

From the legal point of view, the principle of separation of powers enshrined in constitutional law and numerous documents in many modern constitutions. Totalitarian political regimes of all shades have criticized the separation of powers, arguing that in fact the power would be unique and that it would belong to the people, and therefore could not be divided. In reality, willfully ignoring the separation of powers and the removal of its former practice of socialist states constitutions, it was favored concentration of power in the hands of people and denying any practical mechanisms for collective leadership. Principle of unity of power to pave the way for dictatorships, but also subordinate the entire system of political organization domination of a single party, a circumstance that resulted in the liquidation of political opposition, denying the principles of pluralism and finally removal from the major democratic principles of constitutional law validated by an entire historical experience. The return to democracy in Eastern European countries has gained widespread rehabilitation of separation of powers, recognizing its usefulness as a fundamental principle of political organization and premise of the settlement entire social life on humanist and democratic principles.

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