SOME CONSIDERATIONS REGARDING THE LIMITS AND CRITICISM OF THE SEPARATION OF POWERS IN THE STATE

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Abstract:
The principle of separation of powers constituted the basis of the state organization of all bourgeois states, it being explicitly or implicitly enshrined in the constitutions of these states. From a political point of view, the principle of the separation of powers was considered a generator of political freedoms through the balance and collaboration of the separate powers as competences necessarily belonging to the constitutional state, where the dignity of the person is ensured and where there is "the rule of law." As specified in the doctrine, the separation of powers in the state does not exclude their collaboration. Thus, on an organic level, ministers can be parliamentarians and are responsible before the parliament. Functionally, each party is charged with the main title of a function, but participates equally in the function exercised by the other. The parliament and the government exert a constant reciprocal action on each other. They collaborate in an intimate manner in the implementation of the general activity of the state, but they collaborate in different forms in the same cause of structural diversity.
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The principle of the separation of powers, from a historical point of view, appeared as a principle of national sovereignty, as a weapon of war directed by the ideologues of the bourgeoisie against the absolute power of the monarch. In its beginnings, the bourgeois revolution saw in the separation of powers the means to dismantle absolute monarchical authority. As Leon Duguit mentions, Montesquieu never presented a theory of the separation of powers "implying an absolute separation of the bodies exercising the executive and legislative function". He considered that it is necessary to have a continuous action of the two powers, one on the other, a true collaboration. [1]

The collaboration of the powers is the consequence of the struggle of the people who gradually, through sustained efforts and energy, manage to send their representatives to the parliament. The collaboration of powers, in the conception of Laubadère, another constitutionalist, finds its expression in the participation of the

government in the legislative activity in the form of the legislative initiative, participation in the discussion of draft laws and their voting, in the promulgation of laws and in their completion by issuing regulations. Regarding the participation of the parliament, in the executive activity, Laubadère can only illustrate it by referring to the granting by the parliament to a minister of the powers to conclude loans. This balance is interpreted by him as "the equality of both powers before the nation". [2]

Regarding the attributions of the parliament and the government, Laubadère believes that some derive from these bodies' own functions in accordance with the principle of separation of powers, and others from their functions exercised in accordance with the principles of parliamentarism, that is, collaboration and balance between powers. In this sense, Maurice Duverger recognizes that the balance of power is very unstable. One body usually prevails over another, and at the same time the predominance of legislative assemblies is a rare phenomenon, on the contrary, the predominance of the executive body is a more frequent phenomenon. [3]

The executive bodies have the right to regulate through their own acts areas that in the past were reserved for the law. [4] Such a practice has a permanent character and is not susceptible to any control, nor does it involve the ratification of acts issued by the parliament. In certain situations that are appreciated by the parliament as exceptional, it gives the government, for the entire duration of the maintenance of such situations, the right to regulate instead of the parliament. [5]

Guetzévitch mentions that in the conditions of current life "a decree, a regulation, an ordinance presents more elements" to realize the program than a law, than a legislative measure. In his conception, the legislative power is able to play the role of a decision-making and action body. The government must be the engine of the state. It is his role to push the legislature and at the same time to ensure through a spontaneous and continuous intervention the very life of the state. The number and importance of enforcement regulations have increased continuously, even in countries such as England and the USA, which had some reservations about the concept of enforcement regulations.

A feature of our contemporary system of government, says Maurice Amos, resides in the practice now followed by parliament of giving ministers the power to make

regulations having the force of laws, for the purpose of specifying the details of existing laws and even of to develop their importance. [6]

As Emile Giraud stated, there was "the substitution of the action of the legislature by that of the executive". [7]

Regarding the development taken by the regulation, it has been explained and justified in a manner that generally does not differ from one author to another. Emile Giraud appreciated that the regulation eases the legislator's work. In fact, it was found that the development of the regulatory power operated naturally, without any opposition from the legislative power, jealous of its prerogatives. [8]

Regarding the practice of delegated legislation, the specialized literature presents either general considerations, or regarding the legislative activity of the parliament. [9] Jacques Théry believes that the responsibility of the members of the assembly composed of hundreds of people is a divided responsibility, too diluted. [10] They do not personally have the necessary information elements and that is why they trusted the government, better placed than them to judge and analyze. Other authors explain the genesis of the predominance of the executive through the need to strengthen the role of the state and its effective intervention in economic and social activity, as a result of the complexity of economic life, which calls for energetic and operative measures from the state.

Trying to demonstrate the necessity of reducing the role of parliament, Jacques Chastenet resorts to some historical considerations. [11] The principle of separation of powers is sometimes used in order to concentrate as much power as possible in the hands of executive bodies. Although the principle of separation of powers is specific to democratic states, being considered as a panacea to maintain stability and freedom, sometimes attempts have been made to circumvent it and switch power into the hands of the executive bodies. As A. Vanderbilt pointed out, individual freedom and the progress of civilization can only be achieved if "each of the three powers conforms to the constitutional principles of the separation of powers." [12]

It is openly acknowledged that the principle of separation of powers was used as a doctrine in the struggle of the bourgeoisie against monarchical absolutism. During the struggle of democracy against the royal power, the center of gravity was the control of the parliament - the struggle of the parliament against the royal power. In a modern

democracy this struggle does not exist. The true meaning of the democratic regime requires the strengthening of the executive, as stated by Georges Bourdeau, "which becomes from this fact stronger than the power of the old kings and the old royal ministers. [13]

There are also authors who tried to create a parallel between the increase of executive power and the need for social reforms. In their opinion, only the executive power would be competent to realize them. As stated by S.B. Chrimes the state has taken over the continuous growth of social and economic reforms and these require a complex administration and a constant interference with the daily problems of the people. Such reforms are not possible to be debated in the parliament or even in its committees. Inevitably, therefore, parliament tends to debate only the general principles of legislative work and confer power on the government. [14]

André Tardieu stated: "Assemblies seen in their multitude are incompetent and unskilled. This parliamentary mediocrity affects legislative work." Laws are passed slowly. The only viable solution, said Tardieu, is to put the parliament under guardianship, to constitutionally restrict its powers, and especially its legislative power. [15]

From the doctrine, there are also theories that affirm the uniqueness of power, but with a meaning that argues for the strengthening of executive power. [16]

The doctrine regarding the separation of powers has also known cases of categorical rejection of this principle, approaching the thesis of the uniqueness of power, and some constitutionalists of the 20th century even proclaimed the end of this theory of the separation of powers. Thus, Marcel de la Bigne de Villeneuve, referring to the powers of the state, said: "This authority, this power, whose role is to melt into an immense and simple synthesis all the diverse needs and legitimate interests of the state community, must in necessarily unique." [17]

S. Lessona, referring to the theory of the separation of powers, mentioned that such a "mystical" theory threatens to destroy the organic unity of the state and fragment its life into a multitude of bodies with equal rights and independence. At the same time, he noted that in the contemporary state we are no longer witnessing a dismemberment of sovereignty, nor an absolute mechanical separation of the state functions entrusted to separate bodies, but a separation of the functions conferred on bodies that collaborate

with each other. [18] Of course, today, as in the past, there is still talk about the separation of powers in the state and in many constitutions of the states of the world, the separation of powers is provided for, but its meaning is completely different, namely: "separation of functions, supreme power" belonging to the state. Lessona states that the supreme power must remain in the hands of a single body which, according to his opinion, must be the head of state. [19]

Georges Burdeau, giving another justification for the uniqueness of power, states that its uniqueness finds its justification both in its origin and in its exercise. "In its origin, because it finds its foundation in the idea of law whose instrument is the state apparatus. In its exercise, because it represents the legal force of this idea of law." [20]

All these opinions end with the accreditation of the predominance of the government function and this not only for historical considerations, considering the priority of the government function in the state, but also for the fact that the government function is asserted as the most important and irreplaceable. [21]

Similar conclusions are reached by the author I. Jennings, who, proceeding to an analysis of the functions of parliament, administration and justice, reports that neither according to the nature and content of the activity, nor even according to the procedure of this activity, it is not possible to establish a precise and determined limit between these organs. "Separation of powers - in Jennings' opinion - is reduced in fact only to the requirement of the independence of the judiciary and the relief of the parliament from the activity of applying the general principles established by it in the law and by the current administration." [22]

We must observe the attempt to consider the independence of judges as the more stable element of the separation of powers, for the reason that the judicial function would be less of a political function. [23] Burdeau says, however, that through judicial control the judge is drawn into the sphere of politics and this control prevents the development and enrichment of the idea of law. Although the principle of separation of powers has found wide application in the constitutional practice of Western countries, it has been criticized by a number of thinkers and politicians, including Woodrow Wilson, who estimated that the application of this principle makes any idea of accountability in governance.

The German doctrine (Laband, Jellinek) considered Montesquieu's theory as illogical and impossible to achieve in practice. Thus, it was appreciated that it would only represent a method of organization designed to weaken the omnipotence of the state to defend the individual. German jurists strongly influenced by statist ideas pointed out that "pursuing the weakening of political power by distributing powers to different bodies juxtaposed, quasi-independent of each other, each having its own field of activity, even though they work on the same general work, the impotence of the state has been reached to create a new order, to satisfy the needs of a society in full transformation." [24]

From a legal point of view, the principle of separation of powers has been enshrined in numerous constitutional law documents. It is also found in the well-known Declaration of the Rights of Man and Citizen from 1789 (France) as well as in the documents of the American Revolution. One of the fathers of the current US constitution, James Madison, showed that: "the accumulation of all powers - legislative, executive and judicial - in the same hands, regardless of whether they belong to a single person, a few or many, or whether it is hereditary, self-appointed or elective, may justifiably be regarded as the true definition of tyranny." [25]

It is remarkable that totalitarian political regimes of all shades have criticized the principle of separation of powers, arguing that in fact power is unique and that it belongs to the people and, consequently, could not be divided. In reality, however, by willfully ignoring the principle of the separation of powers and by its practical elimination from the constitutions of the former socialist states, the concentration of power in the hands of some individuals and the practical denial of any collective leadership mechanisms was favored. The principle of the unity of power paved the way for some dictatorships, but it also subordinated the entire system of political organization to the dominance of a single political party, a circumstance that had the effect of liquidating the political opposition, denying the principles of pluralism and finally, moving away from the great democratic principles of constitutional law validated of a whole historical experience. [26]

The principle of separation of powers is enshrined in many modern constitutions, such as: the Constitution of the Canton of Jura in Switzerland, the Constitution of the Republic of Moldova of July 28, 1994, the constitutions of Germany, Spain, Italy,

Denmark, Greece, Finland, Portugal, the Constitution of the USA and other states, as well as in the current Constitution of Romania. [27]

Conclusions

The principle of the separation of powers has been criticized by some authors, as it is considered either outdated or outdated, or reflecting a certain stage of constitutional development. All critics of the separation of powers omit, intentionally or unintentionally, the fact that the separation of powers was never conceived, not even by its theorists, as an artificial separation or isolation between the powers of the state. We rally to the idea that the separation of powers represented and represents a guarantee against the usurpation of power by totalitarian forces and a means to ensure the balance between the powers of the state. Moreover, regarding the content and meanings of the separation of powers in the doctrine, it was stated and is stated more and more often that it is less about separation than about the balance of powers. Important in the state organization is the independence of the state authorities, which cannot be total, but must be very broad. State bodies must depend on each other only as much as is necessary for their formation or designation and possibly the exercise of certain powers.

In conclusion, it can be appreciated that the principle of separation of powers in a flexible and dynamic sense remains an essential element, indispensable for the existence and functioning of the rule of law. It is no coincidence that numerous theoretical works, documents of political parties, opinions of some specialists, refer to the necessity of the separation of powers.

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