THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Short Remarks on the Principle of Separation of Powers

Ionela Despa[1]

Abstract: The principle of separation of powers, as a basic principle of a real democratic political system, concerns that state activities, powers are separated by the fact that they take place separately, distinct from one another, each with its specific, but in the social polical reality it can be seen that there are links between public authorities in terms of organizational and functional, namely cooperation and mutual determinations. In terms of organization, the link is given by the fact that some state bodies involved in the formation of other, and the functional aspect concerns the connection of collaborations: the constitutionality of laws passed by Parliament is controlled by the Constitutional Court or Government activity can be examined by Parliament. The modern form of the principle of separation of powers requires autonomous public authorities, sharing their incumbent functions, establishment of means of cooperation and mutual control, all in the ambience of a genuine and real autonomy. So a state cannot work unless the law adopted by thelegislature is applied to urge the executive and the judiciary by the executive contest carries out its decisions. This cooperation should be accompanied by a power control, equipped with legal and institutional means that will not neutralize eachother.

Keywords: freedom of individual; delimitation; liberal democracies

1. Introduction

The separation of powers is considered a condition of the existence of the rule-of-law state. The origin of the theory of separation of powers is in Antiquity, at the historians Herodotus and Thucydides, at the philosophers Plato and Aristotle, at the writers Aeschylus and Sophocles.

The matter of the separations of powers has been clearly formulated for the first time by John Locke, his preoccupation starting from the practical necessity to moderate the force of the state's powers. Locke considered that in the state exist three powers: the legislative power, the executive power and the confederative power. He does not differentiate a judicial power, having the opinion that this depends on the legislative power, but distinguishes four functions of the state, one of which is the jurisdictional function.

As for the confederative power, he defines it as being: "*a power which we can call natural, because it corresponds to a faculty which every man had before entering the society. This power comprises the right to peace and war, the right to form leagues and alliances and to have all kinds of negotiations with the persons and communities outside the state*".

John Locke, in his work "Essay on Civil Government" (1960), argues the necessity to transpose in practice this principle as follows "*The temptation to get at the power would be too great if the same persons who have the power to make laws would also have in their hands the power to execute them, for they could be exempted from the laws they are making*".

[1] University of Craiova, Faculty of Law and Administrative Sciences, Address: 13A. I. Cuza, Craiova 200585, Romania: Tel.: +40 251 414398, Fax: +40 251 411688, Corresponding author: ioneladespa@yahoo.com.

2. The Principle of the Separation of Powers

The necessity to ensure freedom of individual towards public powers determined Montesquieu to resume the theme of the separation of powers and to propose as solution in order to defend the individual freedom, the mutual control of powers.

In the work of Montesquieu does not appear *in terminis* "the principle of the separation of powers", but, as Eisenmann noticed – one of the most profound exegetes of the work of the French illuminist philosopher – assigning three state functions to the authorities or groups of authorities absolutely distinct and independent, meaning to three authorities or groups of authorities perfectly separated in all aspects (functional, personal and material) Montesquieu subsumed his schema to one single idea: the idea or principle of the separation of the powers.

The principle of the separation of powers became a dogma of liberal democracies and the essential guarantee of individual in relations with power. According to this principle, the state has to fulfil three functions (Ioan, 2008, p.238 and following)

- enactment of general rules - legislative function;
- application or execution of these rules, meaning the executive function;
- resolution of disputes which occur in the process of applying laws – jurisdictional law.

The exercise of each function belongs to a power, so it results the existence of a legislative power, an executive power and a judiciary power. Montesquieu, in creating the theory of separation of powers also condensed it in the dictum which became a sublime hope: "Le pouvoir arrète le pouvoir". More precisely, Montesquieu showed that the powers in the state are: "*the legislative power, the executive power of things which depend on the right of kindred and the executive power of those depending on the civil law*", meaning the legislative, the executive and the judiciary powers, these powers being defined as compared with the state's functions.

In the conception of Montesquieu, each power had to be assigned to an independent body or a system of bodies so that each body or system of bodies carrying out its activity within the limits of the state's function which corresponded to the power to which belonged, practically was carried out a mutual control of the three powers and abuses were avoided.

Montesquieu wrote: "*There would be lost all if the same man or body of leaders, whether of noblemen or of people, would exercise these three powers: the power to make laws, the power to carry out the public decisions and the power to judge infractions or disputes between individuals*".

Practically, in the conception of the French thinker, was excluded the accumulation of powers.

Alongside with the events of the French Revolution (1789) has been extended the conception according to which each power is "a part of sovereignty, the representatives receiving from the nation, through proxy, the legislative power, the executive power and the judiciary power, which is exercised without interference of the other powers and without being able to act upon these, in a discretionary, sovereign way" (Nedelcu & Nicu, 2004, p.55 and following).

This way of understanding the principle of separation of powers – as an absolute, rigid delimitation of the legislative power, executive power and judiciary power – is not topical anymore (Vedinaș, 2002). With regard to this aspect other authors also expressed.

A first argument is that the state power is unique and undivided, belonging to a single holder – the people. Thus can be deducted that is not indicated to use the formulation "share of powers", possibly being able to speak about the share or distribution of the functions which the exercise of power implies.

Another argument has as fundament the idea that using the concept of "separation of powers" is put in contrast with the principle of indivisibility of sovereignty, for, admitting the existence of several distinct and independent "powers", we should also admit the possibility to constitute some "shares" of sovereignty which would be assigned to each power.

3. The Modern Concept

The occurrence of political powers in their modern form determined mutations in understanding the principle of the separations of powers. Practically, contemporaneously with most of the constitutional systems, the real matter is not that of the separation and balance of powers, but that of the ratio between majority and minority, between governors and opposition.

In the modern meaning of the principle of separation of powers it must be also considered the fact that to the traditional functions (legislative function, executive function, judiciary function) are added new ones, of the legislative, executive and judiciary bodies (managing function and the deliberation function of the Parliament, the function of control of legislative over the executive, etc.), occurring the so-called "mixed areas" between state's authorities and some new institutions, such as the Constitutional Court and the People's Lawyer.

The delimitation between powers, especially between legislative and executive power, is absolutely conventional as long as, on the one hand, the Parliament itself "executes" or "applies" the law (for example application of Constitution by issuing ordinary laws), and on the other hand, the executive branch of the state's bodies carries out itself a regulatory activity.

The separation of powers, in the classical meaning, has as criterion the role of state bodies as compared to law, more precisely the fact that some create it, others apply it and others solve the disputes. This approach concerns reality in a superficial manner. The assertion is based on the fact that in such a conception the entire state's activity is reduced to issuing, applying and guaranteeing the rules of law, while the state activity is a complex phenomenon, with delicate aspect of nuance, which obviously exceeds the pre-elaborated theoretical schemes (Iorgovan, 2001, p. 115 and following).

In the modern meaning of the principle of separation of powers it must be taken into account the following aspect: it is absurd to be believed that the legislative function is in balance with the executive function, that "making the law" is identical with "executing it". The execution of law is, by definition, subordinated to legislation, and in case between the two functions exist hierarchical ratios, then between the bodies which fulfil the relevant functions are the same ratios.

An important aspect which must be emphasized in such context is that the separation of powers cannot be conceived as opposition between them, because such conception is to be likely to paralyse the state's activity.

The fundamental vice of the theory of separation of powers has been seized by Rousseau, through a violent and spiritual diatribe: as the sovereignty cannot be divided into its principle, here it is divided into its object. Consequently, should the indivisibility of sovereignty is admitted, the elementary logics leads to the impossibility to admit the divisibility of power.

The Constitution of Romania does not use the word "separation" which could lead to an exclusivist, rigid interpretation of the term, and establishes the terms "the balance" or "co-operation of powers".

As it is mentioned in the specialty literature "*since the political power is a single one, and the functioning of state mechanism in which is organized, beginning with the inter-war period, exceeded the rigid framework of the <<trinity of power>>, the continuation, in the Constitution, of the classical language referring to the separation of powers would have meant to promote a terminology without a theoretical background*" (Balan, 1998, p. 37 and following).

In the juridical literature, it is considered closer to reality the formulation "the principle of separation of powers, of balance, cooperation and their mutual control" and as main argument in supporting this theory can be brought the manner of regulation itself by the Constitution of Romania of the matter of powers in state. Beginning with the Constitution of 13 April 1948, as a consequence of the fact that Romania became a state with a totalitarian political regime, the principle of separation of powers remained only a formal provision.

By the Constitution approved through the referendum of 8 December 1991 in Romania has been re-instituted the rule-of-law state. Consequently, as is shown in art.2 of the fundamental law, the unique

holder of the power is the Romanian People. The Constitution of Romania, avoiding the word "separation" which could lead to an exclusivist, rigid interpretation of the term, establishes the words "balance" or "co-operation of powers in the state".

However, in practice, the separation of powers was never (and should not be) a perfect, absolute as it would have led to an institutional stalemate.

In Romania, the 1991 constitutional text dosen't explicitly states this principle, although it underlies all institutional building, which has been a matter of political tension between majority and opposition of those years. Since 2003, following the national referendum of 18-19 October, the revised Constitution directly states (art. 1, para. 4) that "the state is organized according to the separation and balance of powers - legislative, executive and judicial - in the democracy constitutional"

In reallity. the implementation of the theory of separation of powers always has the focus on executive-legislative relationship, emphasizing the tendency to concentrate power in the executive (thus limiting the role of parliament). Legislative delegation by Parliament awarded Government regulatory powers, consisting of the right to issue ordinances and ordinance, or the government can commit to accountability to the legislature on a bill that gives a prominence Executive of the Parliament. On the other hand, the transfer of legislative power to the executive meets the efficiency trends of governance.

Bibliography

Alexandru, Ioan (2008). *Tratat de administraţie publică/Treaty of public administration.* Bucharest: Universul Juridic.

Iorgovan, Antonie (2001). *Tratat de drept administrativ*/*Treay of administrative law*. 3rd edition. Bucharest: All Beck.

Dănişor, Dan-Claudiu (2003). *Actorii vieţii politice*/*Actors of political life*. Craiova Sitech.

Apostol-Tofan, Dana (2003). *Drept administrative*/*Administrative law*. Bucharest: All Beck.

Bălan, Emil (1998). *Domeniul Administrativ, prefectul şi prefecture în adminsitraţia publică*/*Administrative domain, the Prefect and the Prefecture in the public administration system.* Bucharest: Lumina Lex.

Muraru, Ion (1993). *Drept constituţional şi instituţii politice*/*Constitutional law and political institutions*. Bucharest: Actami.

Iulian, Nedelcu & Nicu, A. L. (2004). *Drept administrative*/*Administrative law*. Craiova: Themis.

Popa, N.; Dogaru, I.; Dănişor, Gh. & Dănişor, Dan-Claudiu (2002). *Filosofia Dreptului. Marile Curente*/*Philosophy of law. Main trends.* Bucharest: All Beck.

Vedinaş, V. (2002). *Drept administrativ şi instituţii politic-administrative*/*Administrative law and political-administrative institutions*. Bucharest: Lumina Lex.

Vida, Ion (1994). *Puterea executivă şi administraţia publică*/*Executive power and public administration*. Bucharest: R.A. The Official Journal.