THE CONTEMPORARY SIGNIFICANCE OF THE PRINCIPLE OF THE SEPARATION OF POWERS

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The principle of the separation of powers into legislative, executive and judicial powers is now recognized as being one of the basic characteristics of a democratic state both in the field of constitutional law and in jurisprudence. Legal commentators who reject it as a condition for determining the existence of a democracy are few and far between in the literature (e.g., W. Sokolewicz). These commentators stress that the separation of powers is mandatory insofar as it is essential to ensure judicial independence, but is not a requisite for justifying equality of position between executive power and legislative from whence it is but a small step to bureaucratic autocracy.

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The principle of the separation of powers is actually set forth *expressis verbis* in very few constitutions (for example, Article 10 Polish Constitution of 1997, and Article 20 of the Basic Law of Germany of 1949). Other constitutions achieve it implicitly, so that it flows from the constitutional method of regulating that State's authorities (for example, from the first three chapters of the constitution of Australia of 1900 which are dedicated to the three distinct powers or even from the headings of these chapters or the language of the individual provisions). At times one encounters provisions in the structure of a constitution which introduce new elements to the tripartite separation of powers. By way of example, one can point to Chapter 9 of the Swedish Instrument of Government Act of 1988, entitled " Financial Power ", or to Chapter IX of the Polish Constitution of 1997, entitled "Organs of state control and for defense of rights". From a literal reading of these constitutional headings, we might infer that we are dealing with yet another kind of power that extends beyond the tripartite scheme. Nonetheless, upon a closer reading of the provisions of the above-cited constitutions, it turns out that any digression from the tripartite separation of powers is illusory and that the state organs that are vested with apparent new powers are in actuality linked to one of the already-existing institutions of the tripartite construct.

The most important element of the principle of the separation of powers should in fact be spelled out by a constitution. Such an approach vest greater practical significance in the constitutionalization of the separation of powers, shielding it against the routine activities of the regular legislator. This is the case, for example, in Poland, where the Constitution not only establishes, in Article 10, Section 1, the principle of the separation of powers and the principle of equality between the three powers, its subsequent provisions define it by specifying the individual elements delineating the respective competencies, the means of appointment, as well as well as the functioning of each of these State organs. Although it does not treat the balance of powers as absolute, the Constitution vests the legislative power with a certain advantage over the other powers. The separation of powers

is linked to the principle of the interplay between the powers. This can vary in scope. However, from the standpoint of the separation of powers, a total separation of the three powers based on a inflexible division of competencies between them is impermissible because it would lead to perturbance of the functioning of the State as a unified whole, as would the supremacy of one organ over the over or over a grouping or organs which would conflict with the notion of the separation of powers. The interplay between one of the powers with another may not lead to any encroachment into their respective spheres.

The interplay between the distinct powers should further enhance their mutual equilibrium and this is what in Montesquieu's thinking serves as the best guarantor of liberty
[liberty is best ensured by those who are governed]. Commingling even two of the three distinct powers would be excessive and would threaten not only the separation of powers but also the liberty of the citizens. There thus needs to be a balance between the three powers and a conferring on each of such competencies that allows them to consider and check the actions of the others.

In the practice of democratic governments in the 19th and 20th centuries, as well as in the theory of constitutional law, the separation of powers was not a purely technical construct but rather a mutual tempering of the three powers and mutual control by means of an appropriate division of powers between them. From the principle of the separation of powers, it emerges that the legislative, executive and judicial powers require separation and, moreover, that such separation must be characterized by a balance and cooperation between them.

The interplay between the various powers manifests itself differently in different democratic states. In most cases, it takes the following form: delimiting the executive and judicial powers by means of statutes, appointment of the executive by the legislative power, judicial appointments made by the legislative and/or executive powers, budget approval by the legislative power, the ability to initiate legislation by the executive power as well as the power to veto it, and control by the judicial power and the judiciary over the activities of the executive administration.

A given democratic State's recognition of the principle of the separation of powers is not however determinative of the form that its political institutions will assume. This is determined by a great number of factors that shape the incarnation of the notion of the separation of powers. On the one hand, such factors tend to be specific, appropriate to a given country and linked to its political traditions, geopolitical circumstances, degree of economic development and the like. By way of example, one can point here to what was typically, in Poland, in the years 1921–1926 and then again following 1989, a certain advantage vested in the legislative power as regards the executive power. In contrast, in a federal nation, the principle of the separation of powers is buttressed by the introduction of the principle of federalism. Local government autonomy as well as competencies reserved for the federation itself are additional variants of the separation of powers and embody the division of tasks between the respective territorial units (federation, federalized country, local government).

Specific factors can wield so great an influence on shaping the political embodiment of the principle of the separation of powers that they can lead to a denial of the very existence of that principle in certain countries. Switzerland may serve as an example of a country as to which the legal commentators consider the principle of the separation of powers to be inapplicable. However, a closer examination of the very

language of the Swiss constitution of 1999 shows that such a view is erroneous and is based solely on somewhat superficial characteristics.

On the other hand, the embodiment of the principle of the separation of powers is also driven by factors that are universal in nature, furthered to a large degree by the developments in civilization. The increase in the number of tasks vested in modern states leads to, for example, greater powers being vested in the executive branch and a greater exercise on the latter's part of functions that are legislative in nature. A clear indication of this has been the numerous democratic states that have recognized the executive's power to enact rules that have the force of a legislative act. We also see this manifested in the structural subdividing of the powers of existing organs into new organs (for example, constitutional courts) or the independence acquired by sub-organs of the existing powers (for example, parliamentary commissions), and similarly, the emergence of sub-organs such as agencies that enjoy a significant degree of autonomy (for example, universities, and specifically in Poland – the National Council for Radio and Television Broadcasting or the Ombudsman for the Protection of Civil Rights). The objective is to ensure in actual practice a balance between the powers and their mutual ability to check each other.

It has been proposed in academic circles to expand the heretofore extant notion of the separation of powers along a horizontal plane that takes into consideration that growing differentiation of the powers, the emergence of various forms of local self-rule and the like, and which would permit a clear distinction between the responsibilities of the various authorities falling under a single one of the powers. Another suggestion is to transpose the principle of separation of powers onto a broader plane and to interpret it as follows (J.P. Muller): "although Montesquieu sees the separation of powers also as a means for the effective constraint and control of the political powers (...) even more original is its objective of ensuring that, in a state where there exists a separation of powers, the various levels of society have the opportunity to reasonably participate in shaping the will of the nation." There is also support (C. Turpin) for the need to distinguish a greater number of decision-makers than the three powers and to include political parties and interest groups among them, meaning decision-makers that are local in nature. None of these proposals have as yet been accepted by the framers of the constitution in any of the democratic states.

Modification of the separation of powers system, moreover, evolves under the influence of regional integration processes and the development of supra-national institutions. Their competencies often overlap with the sphere of the traditional competencies of the national authorities which in turn results in a portion of the latter's powers being exercised by supra-national institutions. This leads to greater control over the internal institutions of a State by supra-national institutions that are independent of that State.

It should also be noted that the principle of the separation of powers itself was introduced into the constitutions of democratic states toward the end of the 18th century and in the first half of the 19th century at a time when political parties as such did not yet exist. Today they majorly shape that principle by *de facto* limiting it to the legal sphere. It would be but a slight exaggeration to conclude that the role played by political parties renders illusory the division of powers into legislative and executive because, in actuality, power is exercised by the party (or coalition) having a majority in parliament and which forms the government. This picture is rounded out by the fact that in democratic states, judges are appointed either by parliament, or by the executive. The political parties standing in the wings of both these branches thus exert an influence, at least as far as filling judicial positions is concerned, on the third branch of power.

Without delving into deeper discussion on the subject of the various theories of the separation of powers that have arisen over the course of history, I would like to point out that the separation of powers in a modern democracy can be considered from three aspects:

Functional aspect (subject-matter)

The functioning of the State is divided into three qualitatively distinct spheres of activities or functions. This furthers the unity of the State's authority as it is exercised in the hands of the sovereign (the nation, the people) but, at the same time, the emanation of this authority is distributed across three functions and the institutions which perform these functions. The individual types of power are not in this construct autonomous in nature but exercise their functions pursuant to the competencies vested in them by a constitution which has been adopted by the sovereign power which stands above them. These functions include:

- legislating, which consists of issuing generally binding legal norms,
- executing the tasks of the State as regards specific matters, with the exception of resolving disputes,
- adjudicating by means of resolving legal disputes.

Organizational aspect (entitative/objective)

The three functions of the State are allocated and subjected to various state institutions (or groups of institutions):

- legislation - to the parliament,
- the execution of the laws — to the government and the administrative institutions subject to it,
- the judicial power — to the common courts and to specific constitutional courts (where they exist)).

Personal aspect — the principle of *incompatibilitas*

The principle of *incompatibilitas* imposes specific constraints on persons in state service as regards their ability to combine the functions they perform, or the official positions that they may hold or the simultaneous exercise of certain kinds of functions and the activities that arise thereunder. This comes into play where it is required for maintaining the credibility of the function exercised, or the proper exercise of such function, and to the extent that a constitution recognizes that the exercise of certain State functions imposes an obligation avoid the possibility of any conflict of interest, so that specific functions and activities carried out by the same person not give rise to any conflict between them. The separation of powers would be ineffective from the organizational aspect if the same person (or group of persons) could engage in activities that intersect with each other at various levels and are distinct in nature.

The modern principle of *incompatibilitas* is understood in two ways:

Formal prohibition on the holding of certain public offices

It refers to the prohibition on the holding of certain public offices simultaneously by the same person. The list of offices covered by this kind of prohibition varies from country to country. Given their quantity and diversity, it is difficult to drawn general conclusions in this respect. At best it should be noted that there have emerged two types of incompatibility of the exercise of certain functions and the holding of certain public offices:

- absolute incompatibility — referring to the outright prohibition on the simultaneous exercise of certain offices which is the approach most frequently adopted (for example, Article 9, Section 1 of the Constitution of Iceland of 1944 as amended through 1991, provides that: "The President of the Republic may not be a Member of

Althingi");

– conditional incompatibility — meaning that certain offices can be held simultaneously subject to certain conditions (for example, Article 59a, Section 2 of the Constitution of Austria of 1920 as amended in 1929, has in its various iterations provided that "The public employee, who is a member of the National Council or of the Federal Council, shall on his request be free from service or be retired.").

Formal incompatibility may also pertain to limitations on the exercise of rights under the voting laws and may also include a prohibition on running for public office which thus creates an inability to exercise the functions of the position pursuant to the principle of *incompatibilitas*. By way of example, I would point to Article 34 of the Constitution of Iceland of 1944 as amended through 1991, which precludes Supreme Court Judges from voting in elections to Althingi.

Substantive incompatibility

The purpose of enacting, in many counties (among others, in Austria, France, Poland , and the USA) regulations imposing conditions on the exercise of public functions was *inter alia* to ensure their proper exercise by precluding even an indirect influence on the public official or the parliamentarian by the institutions from which they could derive some substantive advantage. Their disclosure is intended as a protective measure against the possibility of nascent conflicts of interests as well as behind-the-scenes pressures imposed on parliamentarians from those bodies or persons who can provide them with advantages. This is why such advantages should either be prohibited altogether (for example, in the USA, high-level officials are prohibited from accepting any gifts having a value in excess of a certain statutorily defined dollar amount; in Iceland, the first sentence of Article 9 of the Constitution of 1944 as amended through 1991, provides that "The President of the Republic may not be a Member of Althingi or accept paid employment in the interest of any public institution or private enterprise"), or are permissible subject to a requirement of their contemporaneous disclosure, for example, by means of a financial holdings disclosure statement or filing in Register of Interests (this approach has been adopted, for example, in Poland). The very fact of disclosure and transparency of these kinds of ties should have a great significance not only from the standpoint of ethics but from the practical one as well because as long as there is public knowledge of financial ties, this will compel the parliamentarian or state official to a course of conduct that will avoid even the appearance of acting to the benefit of any person or entity that can provide him with advantages.

Political practice

The acceptance of the principle of the separation of powers by a democratic State is not determinative of the form taken by individual political institutions, including, for example, that of the principle of *incompatibilitas*. The framers of a constitution, in selecting approaches, may for example grant priory not to the separation of powers but to the principle of the collaboration between these powers and thus allow parliamentarians to be members of the government. This solution is typical for certain types of Cabinet-Parliamentary systems of government).

The limitations imposed by the principle of *incompatibilitas* are intended to preclude the one and same person from contemporaneously exercising conflicting functions, offices, positions and the like. The corresponding legal regulations do not usually establish which of these offices has priority but leaves that determination to the individual himself. They do, however, impose defined sanctions, usually consisting of terminating the mandate for the exercise of such functions, offices, positions and the like in the event that the person concerned himself fails to make such an election.

The above-discussed aspects of the principle of the separation of powers do not manifest themselves in all their iterations in all countries. In Great Britain, for example, the principle of the separation of powers is mainly limited to the organizational aspect. It cannot thus be stated that there is a functional separation of powers where the institutions of one of the powers perform functions that are by their nature related to one of the other powers (for example, the House of Lords performs judicial functions; the government has law-making powers). Nor does one find the separation of powers present in the personal aspect, given that one and the same person can hold offices that fall within two or even three of the powers (for example, the Lord Chancellor is effectively the minister of justice, the governing body of the House of Lords, and also sit on several appellate committees). In the United States, the principle of separation of powers is reflected as to the organizational and personal aspects, but the division of powers is not as clear on the functional level as is understood in the European manner of thinking (in particular, in Continental Europe) as regards the three principal public functions. As is underscored in Switzerland, "The Constitution bases the organizational structure of the State institutions on the principle of the separation of powers, without however, treating it as dogma. In contrast to a systemic separation of powers as regards the personal aspect, the federal constitution does not impose a permanent division of powers") *Botschaft des Bundesrates über eine neue Verfassung*, 1996, p. 403).

In the case of the so-called anticorruption legislation that derives from the principle of *incompatibilitas,* one sees a progressive tightening of the substantive rules. This can cause concern as to the degree of the legislative encroachment upon the private sphere as well as on individual rights and freedoms and as to whether it is consistent with the constitutional protection of such rights and freedoms. However, the construct of incompatibility should be not understood as a simple limitation of civic rights. This is because; it is intended firstly to ensure the proper functioning of the State's institutional structure and the protection of the rights of third parties. It thus serves in addition as a guarantee. Second, it applies to persons who hold public office and from whom, depending upon the function they hold in the bigger picture of the State apparatus, we should be able to expect particular solicitude for the welfare of the State.