

THE DOCTRINE OF THE SEPARATION OF POWERS AND THE ITALIAN CONSTITUTION

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In the recent discussions about the constitutional reforms in the East-Central European countries, the principle of the separation of powers was often put on the top of the list of the principles whose implementation was regarded as a necessary step to the development of the democracy and the rule of law in those countries after the fall of the communist regimes. But when the time for drafting the new constitutions arrived, an explicit mention of the principle was frequently avoided and the drafters preferred to speak about the State powers and their constitutional position in separate provisions. In the preliminary debates, great importance was given to the sixteenth article of the Declaration of Human Rights (1789), according to which a society where the guarantee of rights and the separation of powers are not provided for, does not have a constitution. Other reasons, perhaps concerning also the practical functioning of the State, prevailed over the initial principled purposes when the next steps of the creation of the new democratic orders were made. From this perspective, the new constitutions adopted by the East-Central European countries look very similar to the constitution of the Italian Republic, where an explicit reference to the principle of the separation of powers is absent, too.

Can we justify this choice on the basis of different, scientific and practical reasons? Do such reasons really exist? These are very sensible questions because we are confronted with two different alternatives. On the one hand, this choice can appear as a necessary consequence of the failure to take into account the doctrine of Montesquieu that freedom is not possible where the powers of the State are not kept strictly separated. On the other hand, we would not find it difficult to explain the silence about the principle of the separation of powers, if we start from the opinion of the late Italian lawyer Vittorio Emanuele Orlando. According to Orlando, all the branches of the State have to be connected and have to function according to the principles of co-ordination and co-operation to avoid the stalemate that an abstract and inattentive implementation of the principle of separation could cause in the

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relations between the authorities of the State. If the first hypothesis were accepted, we would be obliged to admit that the design of an illiberal regime is provided for, even if the democratic principle is given the first place in the hierarchy of the constitutional values conforming the structure and the functioning of the State. If the fear of a stalemate in constitutional relations is supposed to have inspired the drafters of the constitution, we can argue that the constitution tries to create an equilibrium between the powers of the State by allowing those mutual interferences that a strict construction of the principle of the separation of powers does not leave room for.

From a theoretical point of view the separation of powers can appear incompatible with the democratic principle, which apparently implies a pervasive influence of the people's sovereignty through all the branches of the State. The separation of powers requires the mutual independence of the State's branches, while in a democratic regime the functioning of all the powers of the State should depend on the same source of legitimacy — the political will of people. In the United Kingdom of the eighteenth century that Montesquieu chose as the model in designing the doctrine of the separation of powers, the powers which were supposed to be independent, had different sources of political and social legitimacy: the executive was underpinned by the legitimacy of the dynasty, the legislative legitimacy was founded on the people's consent and the judges were connected with the tradition of the mobility incorporated in the House of Lords and the judiciary. The differences in the social and political legitimacy supported the independence and the separation of the powers in a way that the principles of a democratic society does not allow.

This historical example would suggest that the guarantee of the fundamental freedoms and of the human rights which the separation of powers is aimed at insuring, could be imperilled by a strict implementation of the democratic principle. Apparently the uniformity of the democratic legitimacy does not allow the functioning of the system of checks and balances which even a static design of the separation of powers implies. The constitutional actors in a democracy are not supposed to be inspired by those conflicting interests which Montesquieu saw at the basis of the equilibrium of the United Kingdom constitutional system. The sovereignty of the people, if it is not adequately checked, allows for dictatorship of the majorities. But an objection could be submitted. Is it true that in the modern society the exercise of the people's sovereignty has a coherent expression in the so-called **volonte generale**? Can we imagine that the **volonte generale** is based on a consistent system of interests that are shared by all the individuals? If this is not the case, the idea of a constitutional equilibrium that is the result of the conflicting interests of the constitutional actors can be useful also in the present time. Even different branches of the powers of a democratic State can hold different functional and organisational interests, and conflicts can arise between them with regard to the defence of their constitutional positions and the free exercise of their functions against mutual interferences and threats. Therefore the doctrine of the separation of powers could still have an actual interest to the framers of the new constitution. Evidently, new constitutional arrangements of the relations between the State powers could be sketched, which do not explicitly stick to Montesquieu's model but gain profit from the development of the principles that underpin that model. The guarantee of fundamental freedoms and research of a constitutional equilibrium based

