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

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

on the conflicts of the constitutional actors could be pursued also in this way. From this point of view, we may use the Italian constitutional order to study the possibility of implementing freedom and democracy without an explicit acceptance of the doctrine of the separation of powers.

II. In the Italian constitution there is no explicit provision for the separation of powers. Special rules are separately devoted to the caretakers of the legislative and judicial functions: Art. 70 entrusts the former to the Houses of the Parliament collectively and Art. 102 gives the latter to the ordinary judges that are created and ruled by a special statute, the so-called **legge sull'ordinamento giudiziario**. A clause concerning the holding of the executive function is missing: there is no provision reserving this function to the public administration and to the body that stays on top of it — the Government. In this way the legal authority of the Parliament and that of the ordinary judges are directly guaranteed by the constitution, while with regard to the executive function the constitution entrusts the legislature with the task of giving it to the proper branch of the State. This choice does not mean that the existence of the public administration is not provided for in the constitution. There are special rules concerning the organisation and the way of functioning for the executive branch of the State, but an explicit clause reserving the administrative function in principle to this branch is missing. Therefore, the public administration is not allowed to adopt administrative acts and to develop an administrative activity without a previous legal provision entrusting it with specific and enumerated administrative competencies. It clearly depends on the legislative decisions with regard to the existence, the breadth, and the exercise of its administrative function. From this point of view, the Italian Constituent Assembly preferred a strict version of the principle of legality, being afraid that a general reservation of the executive function to the public administration could make an unchecked exercise of administrative activity easier.

The absence of a specific reservation of the executive function to the public administration leaves open the question of the legitimacy of the possible adoption of administrative acts by the legislature in the form of parliamentary statutes. According to some opinions, the Houses of Parliament would be able to substitute themselves for the administrative bodies of the State in the exercise of administrative activity because this activity is not explicitly entrusted to administrative bodies only. If we accepted these ideas, we should recognise the legitimacy of the parliamentary statutes granting somebody special privileges and prerogatives by the derogation of previous general rules and in violation of the principle of equality. The consequence looks excessive, and it is only partially accepted by the constitutional jurisprudence whose position is that the legislative assemblies are allowed to adopt administrative acts only when there is no danger of a violation of the principle of equality, that is, when the situation that they want to provide for is very peculiar and not similar at all to the situations taken into account by the general legislative rules.

This solution, which is based on suggestions that can be drawn from the Constitution (for instance, the provision concerning the expropriation of individual enterprises by state in Art. 43) and has been accepted by the jurisprudence of the

Italian Constitutional Court, is obviously more justified by the attention to the rights and interests of the people concerned than by the concern with the guarantee of the execution of the executive function. But it is a justification that is coherent with the features of the constitutional system I described earlier.

The dependence of the executive power and public administration on decisions of the parliamentary legislature is a peculiar aspect of the parliamentary government in Italy. If it is true that the crisis of the traditional doctrine of the strict separation of powers started with the advent of the parliamentary government because the political legitimacy of the Government was no longer independent and autonomous, but dependent on the political consent of the Houses of the Parliament, the Italian Constitution made a further step in that direction by founding the legal legitimacy of the functions of the executive power on parliamentary decisions.

If we go back to the doctrine of the separation of powers and to the question of its implementation in the Italian constitutional order, we have to distinguish — with regard to the constitutional position of executive power — two aspects. The doctrine of the separation implies on the one hand the separation and distribution of the functions in such a way that each function is given to a different branch of the State, and on the other hand, the mutual independence of the different branches of the State to which the functions are separately entrusted. The constitutional provisions I mentioned do not insure the complete separation of the functions between the executive and the legislative branch: as long as the principle of equality is not violated, the legislature is allowed to adopt administrative acts in the form of parliamentary statutes. Even the independence of the public administration from the legislative assemblies is not complete because it does not have an autonomous power of self-organisation and depends on the decision of the parliamentary legislator. However, the constitution requires that in its functioning the executive bodies of the State comply with the principles of the good management and impartiality of the administration (Art. 97): the fulfilment of this task obviously implies a partial separation of the minor executive bodies from the political decision-making process that links the Government to the Parliament through the relation of confidence established between them (Art. 94). Even the Government is in a way independent from the legislative power. It is allowed to stay in office until it has the confidence of the Houses, but its responsibility before Parliament requires that it is independent in the decisions that fall in its jurisdiction, because there is no responsibility without freedom of decision (in the frames of the confidence relation and the political programme agreed upon by the Government and the Houses).

In the Italian constitutional order, the executive power is given independence from Parliament. This independence is only functional because it does not imply a political legitimacy separate and different from the legitimacy of the Houses and it is not based on a constitutional reserve of the executive function in favour of the public administration. Probably the Italian form of government is a more democratic version of the parliamentary system of government than other parliamentary governments were, i.e., the parliamentary monarchies of the 19th century, the so-called Westminster government and the German parliamentary government of the Federal Republic. The choice of the Constituent Assembly drew inspiration from the memory of the fascist

dictatorship and the fear of its revival in the post-fascist Italy. The result is an extremely weak executive power that does not have the constitutional privilege and prerogative given, for instance, to the Government in the French constitution.

III. At this moment it is convenient to change point of view and look at the implementation of the principle of the separation of powers in the Italian constitution starting from the constitutional position of the bicameral Parliament. Each of the Houses is completely independent and autonomous regarding the organisation of its offices and the exercise of its functions. They find the guarantee of their powers as well as the principles concerning their position in the constitutional order in the rules of the Constitution. No other body or authority of the State can adopt regulations concerning the organisational and functional arrangements of the parliamentary institutions, and the implementation of the relevant constitutional rules is within the competence of the parliamentary Standing Orders (Art. 64).

The organisational independence of the Houses corresponds to the direct constitutional legitimacy of their holding of the legislative function (Art. 70). Because they are the immediate expression of the will and political choices of the people who in the Italian constitutional system are the holders of the sovereignty, they cannot depend on the decision of other State bodies concerning the regulation of their power. It would be contradictory to put Parliament at the centre of the form of government and — at the same time — give the competence of entrusting it with legislative function to other State authorities. On the contrary — as we have seen — some of these authorities depend on decisions of the legislative power concerning the holding or the exercise of their functions.

In a representative constitutional order the Houses have a more direct political legitimacy than other bodies and authorities of the State, because their members are directly elected by the people. Such a position that implies a dependence of the MPs on the will of the electorate, could endanger the independence of the members of the parliamentary assemblies if their position were not protected by the ban of the imperative mandate (Art. 67). This provision is a very controversial one because it apparently contradicts the constitutional recognition of the political parties (Art. 49), whose decisions are supposed to be mandatory for the MPs as the political parties link them with the political will of the people. But — according to the dominant opinion in the Italian doctrine — the purpose of the ban of the imperative mandate does not prevent the MPs from voluntarily being bound by decisions of the political parties while it does not recognise legal relevance to that bond: therefore the MPs are legally free in deciding their votes and the line of their conduct even when they accept and stick with the policies of their political parties. The Italian constitutional order does not allow for the recall of the members of Parliament, whose freedom is supposed to be the guarantee of their faithfulness to the general interests in spite of all the partial interferences of the fractional interests. And it is on the basis of the ban of the imperative mandate that the Constituent Assembly adopted the constitutional rules concerning the immunity and the irresponsibility of the members of Parliament which completes the design of the guarantee of their independence.

IV. If the legislative function is entrusted to the Houses, not all the normative functions are reserved to them. As we have seen, Art. 70 of the Constitution does not restrict the competence of the legislature to the adoption of acts with normative content. It also allows it the adoption of administrative acts in the form of parliamentary statutes when the principle of equality is not endangered. From a strictly legal point of view, the legislative function can be identified with the adoption of the formal parliamentary statutes that have the special legal force called in Italian doctrine **forza di legge**. Only in this way we can explain those constitutional provisions that allow other State bodies to adopt, on the basis of explicit authorisations by Parliament and according to the principle of the rule of law, normative acts without **forza di legge**, regulations and orders.

However, the Constitution also derogates from Art. 70 in expressly authorising the Government to approve normative decrees with **forza di legge** in the presence of situations of urgency and necessity (Art. 77), or on the basis of delegation of the legislative function by Parliament (Art. 76). The commentators usually say that these acts have to be treated as identical to the parliamentary statutes. Their opinion can be accepted as far as enforcing the mentioned decrees is concerned: as the parliamentary statutes, they may lose their force only by an act adopted by Parliament, by a similar act of the Government, or by the decision of the Constitutional Court saying that decrees are unconstitutional. From another point of view, the governmental decrees are largely different from the parliamentary statutes because their legal force does not depend on the provisions of the Constitution only, but is strictly connected with a decision of the legislature. It is a parliamentary statute that has to provide for the delegation of the legislative function to the Government which is required to comply with the principles prescribed by the legislator. A decree adopted by the Government in the presence of a situation of urgency and necessity is kept in force only if it is converted in a parliamentary statute, which has to be approved in sixty days after the governmental deliberation.

Therefore, the derogation from Art. 70 does not imply a downgrading of Parliament from its position of the central political authority: in any case, it is in full control of the passage of normative acts and — for that very reason — of the decision-making, and the implementation of the policies agreed in the frame of the relation of confidence between the Government and the Houses. Even when we have an evident deviation from a strict construction of the principle of the separation of powers, the design of the parliamentary government is not betrayed. It is based on the principles about which the Constitution is evidently more concerned than about the heritage of the doctrine of Montesquieu.

V. The third State function identified by traditional legal theory is the judicial function. It is supposed to be a function that does not imply the exercise of a creative power: the judges have to stick to the law and are the least dangerous branch. The framers of the Italian Constitution were worried by the problems of the independence of the judiciary rather than the independence of the other State powers from the judiciary.

Art. 102 expressly entrusts the judicial function to the so-called ordinary judges

created and ruled by **legge sull'ordinamento giudiziario**. This act does not have a special position in the hierarchy of the sources of law. For example, it is not comparable to the organic laws of the French Constitution but it is supposed to provide for the whole and complete rule of the judiciary. It ought to ensure the uniformity of the position of all the judges in the constitutional system while only the judges under its control should be the holders of the judicial function. The purpose of this solution is the unity of the judicial power as a guarantee of the implementation of the principle of the equality of all citizens before the law through the uniformity of the rule of the judges. Judges who had the same training, have the same legal position and are appointed on the basis of the same provisions, are supposed to follow a similar jurisprudence, and to draw inspiration from similar principles of legal interpretation.

Nevertheless, the Constitution itself derogates from this project providing for special, administrative and military jurisdictions, which are not founded on **legge sull'ordinamento giudiziario** (Art. 103) and are controlled by different rules of appointment of their judges. Thus, the unity of the judiciary is not completly implemented and the Constitution deals with the problem of the independence of the judges according to different solutions that separately provide for an independent position of the ordinary, administrative and military judges. The constitutional provisions concerning the independence of the ordinary judges are sufficiently detailed and specify the ways of appointment and the legal position of the judges (also with regard to their career and their discipline), but the Constitution leaves it to Parliament to decide the status of other judges. These different treatments could imply a different level of independence. For instance, the administrative judges have still a connection with the executive power which has an important role in the appointment of the top level judges, and the functioning of the military judges is in some way conditioned on the existence of the military hierarchy.

The task of implementing the independence of the ordinary judges is entrusted to **Consiglio superiore della magistratura** chaired by the Chief of the State. Two thirds of its members are directly elected by the judges themselves and one third by the houses of Parliament with a special majority. The **Consiglio** exercises the administrative and disciplinary functions concerning the career of the judges which were exercised by the Government in the past regime. It is an ironic consequence of the doctrine of the separation of powers that the implementation of the independence of the judiciary implies the devolution (to the judiciary itself or to a body of the judiciary) of functions that should be entrusted to another power or to some bodies of this power. As we have seen, something similar happens with Parliament, whose independence and autonomy require that both the Houses have separate administrative, judicial and financial functions.

Notwithstanding the existence of **Consiglio superiore della magistratura** and its administrative and judicial functions, the commentators hesitate to construe the constitutional provisions concerning the independence of the ordinary judges as the guarantee of a kind of self-government of this special branch of the State. The **Consiglio** does not have the task of controlling and handling the interests of the ordinary judges, but it has to carry in effect the general interest of the independence of the judiciary, which could not always be in agreement with the interests of the judicial profession. Actually, the presence of some members elected by Parliament in the

Consiglio, the chairmanship of the Chief of the State, and the special constitutional position given to this body support such an opinion. However, the fact that the legitimacy of the **Consiglio** is connected with the election of the majority of its members by the judges, sometimes impacts the substantive activity of the body, emphasising instead the protection of the interests of the judges in preference to the general interests in an independent and lawful functioning of the judiciary. Not always the presence of the members elected by Parliament has provided a check upon this trend, which has caused frequent conflicts between the judges and the other powers of the State. But these precedents could suggest only minor reforms of the machinery and not a complete or even partial revision of it.

The constitutional position of the judicial power is certainly difficult to be dealt with. When the principle of the sovereignty of the people is adopted and a parliamentary government is established, the legitimacy of the State and all its branches is founded on a common basis, that is the will of the holder of the sovereignty as it is expressed through the democratic institutions. While from the functional point of view, the judiciary is strictly connected with the source of the sovereignty as far as it has to stick to the law (Art. 101), the selection of judges, and therefore their institutional position cannot be provided for according to the channel of the parliamentary decision-making process. This way of proceeding would bring into deliberation elements of political evaluation that contradict the principle of the independence and separation of the judiciary from political parties. Therefore, the Constitution has adopted the solution of founding the appointment of the judges on evaluations of their processional abilities, examined by elder magistrates and university professors. Is this way of appointment of the members of the judiciary a sufficient basis of legitimacy to justify the judicial independence? Is a separate judiciary organised in such a way, fitted to a democratic order? Or would it be preferable to have the judges directly elected by the people? The latter solution seems to be very dangerous, because it may make judges dependent on political choices and politically biased.

Is the arrangement chosen by the framers of the Constitution sufficient to guarantee the independence of all the individual judges? Or is there a danger that the independence of the judiciary as a whole can imperil the personal independence of a judge when there are disagreements between him and the majority of the judges sitting in the **Consiglio superiore**? We can suppose that the members of the **Consiglio**, especially if they are professional judges, are more adept at ensuring the independence of their colleagues. But the law implementing the constitution provides for the right of the judges to sue the **Consiglio** before the administrative judges or **Corte di cassazione**, when their legal status is damaged by an Act of the **Consiglio**. In this way the body whose task is to guarantee the independence of the judiciary, is submitted to an external control. The constitutional position of the judges will result from an equilibrium between different checks and balances.

VI.

The whole design of the relationship between the State powers is evidently more complex than the mere implementation of the doctrine of the separation of powers implies. The framers of the Constitution had to

find an agreement between different principles that could have been in conflict. On the one hand, for example, the democratic principle requires a coherent unity of political legitimacy of all the bodies of the State, which contrasts the ideal of the separation of powers. Democracy is supposed to be the main purpose of the contemporary constitutional orders: it requires recourse to the majority principle. Democratic institutions can work only on the basis of the rule that decisions should be accepted when they are agreed upon by the majority of the people who have to take part in the decision-making. The danger is that of the dictatorship of the majority; this is why one of the most important aims of modern constitutionalism is the protection of minorities. On the other hand, the protection of minorities has to be founded on the principle of the guarantee of civil freedoms and human rights. Although civil freedoms and human rights are closely connected with the origins of the democratic constitutional order, they cannot be guaranteed by political bodies that are accountable to the people for the implementation of the policies of the majority. This is why modern constitutions have had to provide for separate and neutral bodies that should be disconnected from the democratic decision-making process. If we look at the former discussion on the independence of the judiciary, it is easy to realise that this design is not a very easy one to be dealt with. The need to protect civil freedoms and human rights conflicts with the danger that separate and neutral bodies could subordinate the general interests to the group interests of their members.

The harmonisation of the principle of democracy with the guarantee of civil freedoms and human rights is not the only problem in designing a constitutional system departing from a strict implementation of the principle of the separation of powers. Another set of problems concerns the relations between the executive and the legislative powers. According to the traditional doctrine, the two powers should be kept separate and mutually independent. This is the solution adopted by the American Constitution whose framers looked at the example of the English contemporary government but substituted the democratic legitimacy of the presidency for the dynastic legitimacy of the monarchy. Many commentators think that such a solution can work only if co-operation exists between the State powers which, however, the system of checks and balances does not always make easy. This is why the parliamentary government is preferred in Europe: the trust relationship between the cabinet and the parliament insures co-operation between them. The executive power partially loses its independence as its legitimacy does not depend directly on the vote of the people but on the confidence vote of the Houses. The cabinet in a parliamentary government is weaker than the president of the USA, but it is more easily trusted by the parliament that can enlarge its role through the delegation of legislative functions, or entrusting to it important administrative tasks. In any case, the efficiency of the executive power depends on the legislative assemblies in the parliamentary government. From this point of view, too, the principle of the separation of powers is subservient to the principle of democracy even if the necessary arrangements undermine the independence of the Government. The Italian Constituent Assembly, fearful of the return of a dictatorship similar to the fascist one, preferred a weak executive power to a strong and unchecked one.

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DOKTRINA DELITVE OBLASTI IN ITALIJANSKA USTAVA

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POVZETEK

V sodobnih razpravah o ustavnih reformah v vzhodni in srednji Evropi je načelo delitve oblasti pogosto v ospredju pozornosti. To načelo je ob začetku razprav o ustavnih spremembah veljalo za ustavni temelj, skladno z Deklaracijo o človekovih pravicah (1789), medtem ko iz drugačnih, morda zlasti praktičnih razlogov v novih ustavah ni jasno zapisano. V tem je velika podobnost z ustavo Republike Italije. Tudi s teoretskega stališča je lahko delitev oblasti nezdružljiva z demokratičnim načelom, saj zahteva vzajemno neodvisnost vej oblasti, te zahteve pa ni mogoče uskladiti z zahtevo, da mora biti vir legitimnosti vseh vej oblasti politična volja ljudstva. Dosledna uveljavitev načela delitve oblasti bi lahko celo ogrozila temeljne demokratične svoboščine in človekove pravice, ki naj bi jih načelo zagotavljalo. Kriza tradicionalne doktrine dosledne delitve oblasti se je začela z nastankom parlamentarne vladavine, saj politična legitimnost vlade ni bila več neodvisna in avtonomna, pač pa odvisna od političnega soglasja parlamenta. Italijanska ustava je šla še korak naprej, ko je legitimnost funkcij izvršilne oblasti utemeljila v parlamentarnih odločitvah. V italijanski ustavni ureditvi je izvršilna oblast neodvisna od parlamenta, vendar pa izvršilna funkcija ni z ustavo rezervirana za javno upravo. Taka ureditev, v kateri je izvršilna oblast zelo šibka, je tudi posledica izkušenj s fašistično diktaturo in bojaznijo pred njeno ponovno uveljavitvijo. V predstavniški ustavni ureditvi ima parlament bolj neposredno politično legitimnost kot drugi organi in veje oblasti, ker volivci poslance volijo neposredno. Neodvisnost poslancev je zagotovljena z odpravo imperativnega mandata (67. člen), ki pa je protislovna: taka ureditev je namreč v nasprotju z načelom, da morajo poslanci spoštovati odločitve svoje politične stranke (49. člen), ker naj bi bile politične stranke vez poslancev z volivci. Protislovnost je razrešena s tem, da je upoštevanje stališča stranke "prostovoljno" in ni zakonsko sankcionirano; tako italijanska ustavna ureditev tudi ne pozna instituta odpoklica poslanca. Oblikovalci italijanske ustave so malo pozornosti namenjali neodvisnosti ostalih vej oblasti od sodstva, mnogo več pa

neodvisnosti sodstva od odstalih vej oblasti. Neodvisnost sodne veje oblasti naj bi bila zagotovljena z enotnostjo sodne oblasti, izražene v enakosti vseh sodnikov kot izključnih nosilcev sodne funkcije, kar naj bi zagotavljalo enakost državljanov pred zakonom. Vendar pa že ustava sama odstopa od tega projekta s posebno regulacijo upravnih in vojaških sodišč, kar lahko pomeni različne stopnje neodvisnosti sodstva. V celoti so odnosi med vejami oblasti mnogo kompleksnejši od tradicionalne doktrine delitve oblasti, predvsem zaradi uveljavljanja in varovanja civilnih svoboščin in človekovih pravic.