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The Judiciary and the Separation of Powers

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1. New Dimensions of the Separation of Powers

In the revealing terms of article 16 of the "Declaration of Rights of Man and Citizen" of 1789, "any society in which the guarantee of the rights is not secured and the separation of powers is not determined, has not Constitution at all". From the very beginning of modern constitutionalism, thus, the principle of separation of power has been a basic element in all constitutional regimes.

However, if indeed there is universal agreement that a constitutional regime requires a separation of powers, the significance of this principle and the practical consequences of its application have given rise to considerable debate. The experience of history has shown that from the French and American revolutions of the 18th century onward, putting the principle of separation of powers into practice has been much more complex than the formulas suggested by Montesquieu in De l'Esprit des Lois, or previously by John Locke in his Second Treatise on Civil Government would suggest.

As it is well known, and from an initial perspective, the principle of separation of powers meant that the principal functions of the State (traditionally termed the "executive", "legislative" and "judicial" branches of government) should reside in different and separate entities. The objective sought through this separation was to avoid despotism and to protect the freedom of citizens. In the words of Montesquieu, "all would be lost of the same person or entity were to exercise the three powers: legislating, executing governmental decisions and judging crimes or conflicts among individuals". But since the age of Montesquieu, the significance of the separation of powers has been notably changed, at least in three aspects:

a) First, it is no longer correct to reduce the powers of the State to just three. New forms of distributing public power have arisen. The creation and development of federal systems has meant adding a territorial apportionment of power (between the federal government and the government of the provinces or federated states) to the original functional division of power. Moreover, other centers of power have arisen that were not contemplated in the traditional three-power scheme, such as the creation in many countries of a Constitutional Court separate from the Supreme Court, an independent electoral administration, or an Ombudsman or Defender of the

People having their own powers; as well as, increasingly in many countries, the presence of a new power, the public prosecutor, independent from the executive power.

b) Secondly, in the development of constitutionalism it soon became apparent that it is impossible to maintain an absolute and radical separation among the three traditional powers, rendering each completely isolated and independent from the other two. Ultimately, this would imply that each branch would wield absolute power in its respective area to the extent that the others could not impose any limits in that regard. For that reason, constitutional systems have established formulas of mutual control and cooperation among the three branches of power, and thus the degree of separation and the mechanisms of relationship among them varys considerably in different constitutional regimes. With respect to the first application of the doctrine of the separation of powers during the drafting of the Constitution of the United States in 1787, in the Federalist Papers James Madison defended not a system of radical separation of powers, but rather the creation of "checks and balances" that would make the three branches of government mutually dependent. Moreover, the evolution and development of political parties have significantly altered the separation between the executive and legislative branches, especially in parliamentary regimes, where the executive power depends on the confidence of a parliamentary majority.

c) A third element has given rise to doubts as to the continued validity of the principle of separation of powers. Modern constitutional systems are democratic regimes. The constitutional systems in which authorities with different sources of legitimacy once coexisted, i.e., the authorities of a monarch, the traditional nobility represented in the Senate and the democratic authority represented in an Assembly, have disappeared. In those regimes the separation of powers was an instrument to protect and preserve the diverse centers of authority, and mostly to guarantee the competences of an elected Assembly against the powers of the Monarch. But today, even in those regimes in which some forms of traditional authority persist, such as in the monarchies of Spain or Great Britain, their attributes are symbolic and derive above all from a ceremonial respect for the past. Being that the case and taking into account that, in the words of Article 21, paragraph 3 of the Universal Declaration of Human Rights, "the will of the people shall be the basis of the authority of Government", does it still make sense that the powers of a democratically elected Executive be limited by an also democratically elected Assembly? In democratic systems, where the executive usually is supported by a majority party in the Assembly, the main divisions of power is not the one existing between Executive and

Legislative, but between Majority and Minority (or majority and Opposition). Or, more specifically related to the topic of this reunion, if the legislative and executive powers are derived from the people, what justification can there be for a non democratically elected judicial power placing limits on these branches of government?

2. Present relevance of separation of powers. The independence of the judiciary.

Despite these considerations, the principle of separation of powers continues to be relevant today, for at least two reasons:

a) First, because the separation between the legislative and the executive is still essential, even though usually the Executive is supported by a parliamentary majority. The separation is needed, since it maintains the existence of a legislative procedure in the Assembly, based on openness and public debate; a procedure that that permits the participation of minorities in the discussion and elaboration of the laws, in addition to keeping under surveillance the executive branch. Certainly, in modern constitutional regimes the executive power is democratic in origin, whether directly or indirectly. But this does not obviate the fact that the activity of this power must be subject to public critique and evaluation, which is made possible by the parliamentary debate. Furthermore, it seems necessary in a democratic system that laws are enacted, not in the privacy of the Ministries' offices, but by means of public procedures that are openly known to all citizens.

b) And, secondly and most importantly, the principle of separation of powers continues to be relevant because it provides a guarantee of the independence of the judiciary, making the individual judge independent in relation to the rest of public authorities.

In effect, the independence of the judicial branch and its separation from all hierarchical relationships to the other powers of the State is closely linked to the very justification of a constitutional regime, that is, the guarantee of the rights of citizens and the predominance of the democratic principle. In an apparently paradoxical way, a power whose members are not usually elected by the people represents the strongest guarantee of a democratic system.

In relation to the first point, an essential (but not the only) aspect of guaranteeing the freedoms and rights of citizens is the assurance that the decisions concerning the defense and protection of these rights in each singular case of conflict with private or public powers will be the result not of an arbitrary or momentary will, but rather of mandates established in existing laws containing general regulations applicable to all citizens without preference or discrimination. The impersonality and generality of the laws are considered, in the constitutional tradition, the highest guarantee of freedom and, above all, equality. The independence of judges is a direct consequence of their dependence on the general mandates of the Law. A judge is only subject to the general and equalitarian mandates of the Law if he does not owe obedience to any other particular will , not even his own. In the probably exaggerated view of Montesquieu, the judge is the mouth that pronounces the words of the law. Thus, he should not pronounce words that emanate from other sources. Citizens can only be free if bound solely by the law, which, in cases of conflict, will be interpreted through the decisions of judges.

Moreover, the independence of judges becomes a guarantee of the democratic system. Certainly it is true that, in general, judges are not elected by the people. Thus they do not have democratic legitimacy in their origin, as does the Parliament, or a president elected by universal suffrage. But nevertheless, in a democratic system, the judge's acts must have a democratic basis. The democratic principle, in the classic Rousseaunian formula, implies that any external restriction or limitation on the citizen's freedom may only be justified if it derives from the general will of the people, so that when obeying the law we are in reality obeying ourselves. In modern constitutional regimes this general will is expressed through laws enacted in Parliament. In that regard, the considerable powers exercised by judges in our society, powers that affect property, personal honor, freedom and even the very life of our citizens, can only be deemed legitimate if they are derived exclusively from the democratic will of the people as reflected in the law. In other words, the democratic legitimacy of the judge is fundamentally the result of his applying laws that have been enacted by means of a democratic process. And this legitimacy is lost when judges obey the will of others, whether it be the will of the government or of individuals, rather than the will of the law itself. For that reason, a democratic judge must be radically independent to be a democratic judge.

Thus, the fact that the Courts do not enjoy the direct democratic legitimacy of the Parliament or of presidents elected by universal suffrage, does not place them in a position of hierarchical subordination to those entities when applying the law to a given case. Certainly, judges must

apply parliamentary laws and general regulations enacted by the Executive, within the scope of its jurisdiction. A judge obviously cannot replace these norms with others that he deems fit to create. But when applying those norms in a specific case, judges are in no way bound by particular instructions from current parliamentary majority or from the office of the President, relating to the cases they are judging. The will of the people is the basis of a democratic society, but not just any momentary will, but rather that which is expressed by means of constitutionally determined procedures, to assure its veracity and reliability. Theses procedures reside essentially in the law, and not in instructions or orders that may emanate from the political powers-that-be in a specific case.

3. Guarantees of independence of the judiciary.

Naturally this independence does not imply that judges are not subject to certain controls. Constitutional tradition imposes a series of restrictions on the acts of judges which imply considerable limitations. The first of these restrictions is that a judge's acts must be public. The idea of public trials, in full view of the citizens who not only may form their own opinions, but also may evaluate the judge's conduct and impartiality, is a fundamental element in all constitutional regimes. The right to a public trial may be found in international documents on human rights, such as the Article 14, paragraph 1 of the United Nations Covenant on Civil and Political Rights which states that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial Tribunal established by law". On the other hand, judges must issue their judgments in reasoned rulings, clearly stating the facts on which the decision is based, the rules of law applied and the reasons for which, in application of the law, a given resolution has been rendered. And, finally, although they cannot be subject to any political control on the part of the other powers of the State, judicial rulings are indeed subject to review by other judges by means of a system of appeals brought before higher courts. In criminal cases, this recourse is also included in Article 14, paragraph 5 of the United Nations Covenant on Civil and Political Rights, which states that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher Tribunal according to law". And this is obviously in addition to the fact that, like all citizens, judges are also liable in criminal court for any offenses committed in the exercise of their responsibilities.

The legal formulas designed to ensure the separate and independent nature of the judiciary may be classified as either organic or functional.

a) The traditional formula for ensuring the independence of judges has been that the judge cannot be removed from office by any other power of the state . The judge has thus a guaranteed tenure, usually for life, or, as the British expression goes, “during good behavior” quamdiu se bene gesserint. As a general rule, the organic formulas include also constitutional provisions or legal norms that prohibit judges from also being a member of another branch of power in the State. Certain exceptions to this rule exist, such as the British Lord Chancellor who is a member of the Cabinet, and the president of both the House of Lords and the Supreme Court. Another organic guarantee of the independence of judges may be found in the creation of Judicial Service Commissions separate from the Executive that are in charge of the administrative management of the judiciary. This system, initiated in France in 1946, and especially in the Italian Constitution of 1948, has been widely adopted in other countries, and it means that the administrative and financial aspects of the functioning of the court system would be out of the reach of the Executive power, and would be trusted to an independent body.

b) The main functional guarantee of an independent judiciary may be found in the criminal law protection provided the judicial power, given that, in the words of Alexander Hamilton in The Federalist No. 78, the judiciary is “the weakest and least dangerous department of government", which is thus more subject to pressures and conditions emanating from the other powers of the State that enjoy greater resources. This protection from the pressures of both public authorities and private citizens can be found in two types of norms in criminal law: those that punish interference with or pressures on the courts, and those that penalize the resistance or refusal of the authorities or individuals to execute the final decisions handed down by the courts.

4. The powers of the judiciary.

But separation of powers does not only mean that judges are independent; it also means that the judiciary would effectively wield the power to review the legality, end eventually the constitutionality of the acts of other public (and private) powers. Certainly, the judicial function consists, by definition, in the verification of the adecuation of these acts to the pre-existing law, and therefore it cannot include any political or ideological control, but a strict control of legality.

Concerning the extension of the judicial powers of review they affect, certainly, the Executive, but also the legislative Power. In a regime defined as a rule of law, the executive power (or, in

other words, the public administration) must develop its functions within the terms and according to the procedures stated in legal norms, being subsequently subject to the control of the Courts, be it a control by the common courts, or by specialized ones. As to the legislative branch, the Assembly can obviously alter or modify the existing laws, so that, by its own nature, legislative activity cannot be subject to a judicial review of legality. But, being the judge subject, not only to the statutary (and common) law , but also to the Constitution, a judicial control of the legislative has been developed, implying the review of the constitutionality of parliamentary laws. The ways for this type of control vary considerably among different political systems, but its presence today is almost universal.

The exercise of all these functions by the judiciary requires that its decisions have binding force; that explains the mandate found in certain constitutions that expressly subjects the other powers of the State to the decisions of the Courts. The Spanish Constitution of 1978 contains a provision in that regard that states that “it is compulsory to execute the sentences and other final judgements of judges and courts". Likewise, Article 205, paragraph 2 of the Portuguese Constitution provides that “the decisions of the courts shall be binding on all public and private entities and shall prevail over all other authorities", while Article 165, paragraph 5 of the South African Constitution states that “an order or decision issued by a court binds all persons to whom and organs of the state to which it applies".

5. Conflicts of opinion among powers.

Nevertheless, throughout history conflicts and discrepancies have often arisen between the Courts and the legislative branch of government, and especially between the Courts and the executive. Such conflicts and discrepancies may even be viewed as healthy and desirable, white relationships of ongoing cooperation and agreement between the government and the courts empowered to control governmental acts might even be considered alarming. The normal situation is one in which the Courts regularly revoke administrative and –more rarely- legislative decisions, adopting therefore an interpretation of the law or the Constitution different from the one applied by other powers of the State. Certainly it is difficult for the law to foresee with mathematical precision how conflicts brought before the Courts may be resolved. And there is a wide margin for judicial interpretation, both when establishing the facts of a case as well as determining the law to be applied and the significance of that law. The modern debate between Ronald Dworkin and Douglas Hart concerning the existence of one or various just solutions to a

given conflict is proof of the present awareness of the relevance of the task of the judiciary in interpreting the law.

Thus, discrepancies, and, in some cases, deep discrepancies, may rise between the judicial branch and the other branches of government as to how a law or a mandate of the Constitutions is to be interpreted. These discrepancies usually do not question the Courts' jurisdiction to rule on a given case, but rather whether the ruling is appropriate or not. Perhaps the most well-known example of such an opposition of views would be the conflict that arose between the U.S. Supreme Court and President Roosevelt concerning the constitutionality of the legislative measures adopted during the "New Deal," reflected in Roosevelt's famous affirmation "we have reached the point as a nation where we must take action to save the Constitution from the Court and the court from itself." But many similar examples may easily be found in more recent contexts. In that respect, in a constitutional system based on the separation of powers, when they differ with judgments of the Courts, the legislative and executive branches have few recourses other than to express their disagreement, or to change the legislation in question to avoid future interpretations that do not conform to the spirit of the law.

Many problems may arise when the rulings of judges are the object of criticism on the part of governmental authorities. Certainly, judicial decisions cannot be exempt from any type of political criticism. Occasionally judicial rulings contradict and revoke decisions adopted by the Government and the Administration, and it would seem logical for these entities to defend their positions publicly. Nevertheless, we must not ignore the weak position of the judicial branch and, in consequence, the danger that judges may feel pressured and conditioned by the public statements of those holding positions of political power.

There are measures in criminal law to protect judges from interference or threats. But often the criticism of judicial decisions on the part of public authorities do not represent pressures that would be punishable under the criminal code, although such criticism may indeed put indirect pressure on judges, especially when expressed during the course of legal proceedings still underway and before a judgment is rendered. This possibility was contemplated in Spanish law which provides formulas for defending judges from indirect pressures of that nature. Article 14 of the Organic Law on Judicial Power provides that "the judges and magistrates who consider that their independence has been questioned or threatened shall make it known to the General Council of the Judiciary". If the General Council of the Judiciary considers that the acts in

question do not constitute a criminal offense but that they may condition or affect the independence of the judge in question, it will release a public statement denouncing that action in support of the judge. This type of protection may seem symbolic, but may have considerable affects when transmitted to the mass media and helps to stimulate more confidence in the judge's independence.

In any case, it does not seem advisable that the interpretation of the law by the judges differs consistently from the interpretation rendered by the elected representatives of the people. The separation of powers should not prevent the judicial interpretation of law from responding to the social and legal convictions of society, thus avoiding a divorce between the judicial and the popular concepts of justice. Formulas are provided in constitutional regimes to prevent this divorce. The most common provides for of judges, or at least judges in the most prominent positions, to be elected by representative organs of popular opinion. The appointment of judges to the Supreme Court or Constitutional Court by the Legislature or the Executive, or by both branches together, or by a Council of the Judiciary that reflect the concept of justice being present within the society may serve to guarantee the gradual adaptation of the judiciary to social change. This is necessary in order to avoid situations such as the one described by Radbruch as "a state of war between the people and justice" when defining the status quo in Germany during the Republic of Weimar.

6. Conflicts of competence.

A different type of conflict that may arise between judicial branch and the other powers of the state does not concern the content of judicial decisions, but rather whether the Courts have jurisdiction to rule in matters reserved for the other branches. These cases involve constitutional conflicts, examples of which are by no means lacking in the panorama of comparative law.

Such conflicts may concern matters related to the extent of what has come to be known as "executive privilege", that is, the scope of action of the executive that is considered off-limits to judicial supervision. These matters include deciding whether to resolve a given case the Courts may require the government to hand over classified information considered secret or confidential, or whether the Courts may control the Executive's activities abroad. But there are also cases in which conflicts arise between the Courts and the legislative branch of government. These include cases in which an Assembly forms an investigating committee to review matters

that are the object of legal proceedings in the Courts. In such instances the possibility of conflict is manifest, as the experiences in Italy have demonstrated.

In these cases the principle of separation of powers should result in concrete decisions that define the relations among the powers of the State. For example, it should be decided which branch shall have the competence to classify or declassify certain information, to decide whether classified information may be required as evidence in the course of legal proceedings, or to grant a petition for extradition. When disagreement arises between the opinions of the judicial branch in such matters and those of the other powers of the State, some entity must have the authority to resolve these conflicts. And it is difficult to determine who shall exercise such authority; in fact, the proposed solutions to these problems vary greatly from one legal system to another.

A first possible solution is to entrust the judicial branch with the decision as to the scope of its own jurisdiction in relation to the other powers of the State. In legal proceedings questions concerning a court's jurisdiction are brought before the Courts, and it is the judicial branch that should decide the scope of matters that can be reserved for each of the other branches. It is usually the Supreme Court that rules on questions concerning executive privilege, or the Parliament's authority to create investigative commissions.

On the one hand, this solution guarantees the constitutional position of the judicial branch of government. But it may give rise to doubts as to the impartiality and reliability of the decisions adopted, since in this case the judicial power is affected by its own decisions. Thus in cases concerning which branch shall have competence in given matters, various legal systems provide for organs other than judicial bodies to adjudicate these matters, with a view to lending a greater degree of impartiality to the final decision.

For that purpose, Spain has created a Court of Conflicts formed by equal numbers of members from the Supreme Court and the Council of State, the highest consultative body of the Administration. Nevertheless, since the President of the Supreme Court presides over the Court of Conflicts, the judicial branch has an advantageous position to a certain degree.

An alternative formula is to empower the Constitutional Court with the jurisdiction to resolve conflicts among the constitutional organs of the State, that is, between the judicial branch and the other powers of government. This was the solution embraced in the Italian Constitution of 1948,

which has been adopted in many other constitutional texts. Since the Constitutional Court is set up as a power that is separate from the other powers of the State (and thus separate from the judicial branch), its intervention in these matters offers firm guarantees of impartiality.

As it may be seen, the practical implementation of the principle of separation of power cannot be left, as Montesquieu proposed, to the "very nature of things". Rather, it is needed, not only a complex web of norms, regulating ways of cooperation and conflict resolution, but also the existence of a legal culture which includes the conviction of the need all the public powers to aknowledge the respect to the law as the only way to secure a democratic regime.