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CHAPTER 1

DIVISION OF POWERS AS THE ORGANISATIONAL FRAMEWORK OF THE MODERN WESTERN STATE

The term "division of powers" generally refers to a specific way of organising the various branches and related powers in the system used to govern a state. It is often contrasted with the "fusion" or "concentration" of powers.¹

Various preliminary clarifications make it easier to

¹ Editor's note: we are aware the term "division of powers" is used in legal literature in English (especially in relation to the American constitutional system) to refer to the vertical division of powers and thus as a synonym for federalism, while the horizontal division of powers is described using the term "separation of powers". Nonetheless, in this translation we have opted for the direct translation of the original term used by the author (hence "division of powers") to describe the theory that explores the horizontal relations between Powers that are, historically, divided without being completely or totally separated. Indeed, the author himself said:

"Legal theorists, especially foreign ones, often favour the term "separation of powers" over "division of powers", using it without making any distinction or as a mere alternative. In Italy, the preference has been to systematically use only "division of powers" to indicate a "dividing" structure that can also be applied to limited monarchies and presidential forms of government as well as to parliamentary forms of government. "Separation of powers" can properly only be used for the first two, while "division of powers" fits all. And, as I shall try to show, there truly is a "dividing" model shared by all, despite the very different state structures in the West during the liberal age.

Moreover, the expression "division of powers" also effectively and precisely indicates the various aspects of this complex model. It means the model includes distinct fundamental functions, in relation to which corresponding powers of rule are given, so they can be exercised, and "divided". These powers (or authority linked to the exercise of a function) are allocated to distinct groups of bodies (the Powers — with a capital letter — in the subjective sense of the term). The wording "separation of powers" goes further, postulating the reciprocal independence of all the Powers, which is not always the case.

understand one of the most complex concepts in constitutionalism theory.

The first concerns a basic, systematic classification that is easy to understand. In a political and legal system, the functions of rule — "powers" — can be divided between different political entities. In all western systems, for example, powers are always divided between at least two governance levels, one central and one local (state system and municipalities). At times — and increasingly in recent history — this division has occurred on three levels, with the addition of a regional level between the former and the latter (leading to the creation of "federalist" organisational structures such as the true federal state, the regional state and so on). The phrase "*vertical* division of powers" is sometimes used because the powers are divided between entities that are legally (and politically) distinct and that are located — perhaps only in terms of the relative extent of their jurisdictions — on different levels. Most legal encyclopaedias cover the vertical division of powers under the term *federalism*². However, the focus in this work is on the *horizontal* division of powers as it occurs between bodies or branches in the same legal entity (or in the same political subject, such as in Great Britain, where the central government structure is not deemed by law as having a single legal personality, "the state"). The "horizontal division of powers" largely concerns the distribution of powers across the branches of the entire system of governance mechanisms, regardless of whether this is formally established as a legal person or not. Furthermore, the concept can naturally be extended to cases such as regional and municipal governments or even more generally to any single authority exercising the functions of rule.

The second clarification concerns a far more complex aspect of the concept as it relates to the limited historical duration of this institutional model of the distribution of powers.

The wealth of political and legal literature on the topic —

² See, for example, the entry *Federalismo* in the 4th edition, in Italian, of *Digesto — Discipline Pubblicistiche*, VI, Turin, 1991, p. 273 and following. Here, the question of the "horizontal" division of powers is dealt with using the same method and general concepts underlying my work. See also the updated version of this item in *Digesto — Discipline Pubblicistiche, Aggiornamento*, Turin, 2000, and G. BOGNETTI, *Federalismo*, Turin, 2001.

covering over three centuries — is dominated by one school of thought, especially if one looks beyond the various different positions connected to this. The "division of powers" is largely conceived as the primary means to prevent the rise of an arbitrary or repressive regime, regardless of the actual situation and the roles assigned to the ruling power. In essence, "divided" power should render tyranny impossible. For those authors that have delved into this topic, this has formed the basis for seeking a sort of "ahistorical essence" for the division of powers. Such research has often scoured the very depths of antiquity to seek out precedents in literature and institutional practice that show a "true", adequate concept of "separation". This concept comes to light, albeit only approximatively, in the modern western state and in the theories of related scholars. Such work uses subtle arguments to provide the correct, definitive definition of the "division of powers" (and it then remains to be determined if this is actually adopted in specific systems).

This approach to the problem of the division of powers is misleading.

The "division of powers" is an institutional model that is solely part of the history of the modern western state and, in truth, it can be further ring-fenced to the stage when the "absolute" state was replaced by the "liberal" state. The model was undoubtedly meant to prevent the rise of authoritarian regimes. This generic purpose roughly coincides with other governance models, from earlier times, that also sought to avoid excessive — and dangerous — concentrations of the powers of rule, often leading to "mixed" forms of government that balanced "simple" elements, such as monarchy, aristocracy and democracy.

Yet, the "division of powers" differs from other, earlier "anti-concentration" approaches because it is inseparably linked to the role that the liberal middle class political and legal system assigns to the state in its relations with civil society. It is required to protect the rights to freedom of the individual, such that society can organise itself autonomously in each sphere (including the vital sphere of the economy), while the state guarantees respect for all the legal devices of liberty, without actually interfering in their functioning. Hence, the "division of powers" is a historical creation that was slowly perfected on the basis of a relationship between the state and civil society founded on the liberal bourgeois ideal of complete

individualism. When such an ideal first came into existence, it was in many senses a radical change³. Therefore, examining the "division of powers" as simply a structure of the system of rule, without considering the inherent link to the liberal individualism model of state — and this is what much of the literature does — makes it hard to comprehend the genuine spirit of the model and its actual features.

This not all, though. The "abstentionist" state of liberal individualism ended in the late 19th century or, at the very latest, in America in 1937. And this also heralded the end of the division of powers that had accompanied it. The prevailing theories in literature failed to clearly connect the original division of powers with that form of state and they were also unable to grasp the overall changes in the division of powers as it developed into a *new model*, following the global creation of a contemporary "interventionist" state. In honesty, the literature only partially realised that the sun had already set on the old liberal division. Generally, it did manage to deduce that the division of powers had become an obsolete dogma (e.g. Modugno, Bassi), that the "true" division of powers had to be reduced to those protections of civil liberties from the old division that were not obsolete (e.g. Silvestri) or that what needed to be kept from the old system was the pluralism of state bodies and some form of reciprocal, generic balancing — the only actual "permanent" value of the theory (e.g. Vile, Kägi). Yet, this is not sufficient where legal science seeks a complete understanding of historical process, realises the enormous heuristic potential of conceptual models and can appreciate the connections that always linked forms of state and forms of government.

The historical truth is there are only two proper models of the division of powers. The first is based on the liberal system and could be called — in addition to liberal — *classical*. Classical because it is related to a vision of a political and legal culture of primary historical importance as it elevates the legal

³ For more on this matter, see the arguments presented in the item *Diritti dell'uomo* in the aforementioned 4th edition of *Digesto — Discipline privatistiche. Sezione civile, V*, Turin, 1989, p. 383 and following as well as BOGNETTI, *Introduzione al diritto costituzionale comparato. Il metodo*, Turin, 1994, p. 136 and following.

freedom of the individual to a sovereign aspect in the creation of the entire system.

The bases of a system constructed in such a manner consequently reflect all the purity and simplicity of an attic-Doric political architectural style (or, if one prefers, an early Italian renaissance style). The rise of the "interventionist state" has upturned the liberal system by adding aspects linked to correcting and integrating the liberal individual freedom parameter through the adoption of additional parameters according to a more complex criterion of justice and political expediency. Hence, today's typical system could perhaps be equated more to *baroque* architecture. And in such a context, the classical division of powers has also been twisted such that it now no longer reflects the original model. The new model can be labelled social (often also welfare, or social and democratic) because "social" is the name that has been chosen to depict the new "interventionist" state.

It falls to jurisprudence to uncover not only all the characteristics of the classical model, but also of this new division of powers and then define the spirit of this. This is no simple task for the new model as the time of the "social" model — in contrast to the liberal one — is not yet over and it is never easy to see precisely the structures of those historical processes in the midst of which one finds oneself.

Regardless, the literature must draft a model of the "social" division of powers as it is needed to understand the objective problems of contemporary forms of government. Of course, some points can be taken as more or less settled. It is reasonable to hold that, despite the various forms of government currently found in western states, there is an ideal shared system for the division of powers that has been derived from the liberal model, but differs from this and has its own internal logic. Such a system cannot simply be reduced to a few skimpy protections of civil liberties nor to the banal desire for some degree of balance between the plurality of bodies among which power has been divided in some way or another.

In the pages that follow I shall endeavour, given the limited amount of space available to me, to present the fundamental characteristics of the two models of the "horizontal" division of powers, that is, the *liberal* and *social* models.

This subject is strictly linked to others that are central in the theory of modern constitutionalism, such as, those of the "rule of

law" and the "representative state". I will, though, largely have to waft over such connections, bar the odd reference. Likewise, I will be unable to illustrate suitably the links between the division of powers and the general political and legal developments in the West that this division is part of.

I will be wary — unlike what so often happens — of lingering on the various historical explanations and defences in theory and literature of the "division of powers", from the English levellers, Locke, Montesquieu, the authors of the Federalist Papers and on to Smend, Schmitt and the other leading legal theorists of the 20th century. Such views have often had a determining influence on constitutional structure, but this is not the place for exploring this. I shall outline the two models of division using a comparative analysis based on details drawn from the historical development of the main western political systems. Unfortunately, I shall remain doggedly with the comparative and historical legal science, avoiding any connections to the history of political theory, no matter how interesting these might be.

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