On the Origins of the Separation of Powers: Some Historical Remarks

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1 Prelude

History has shown that in societies politically organized as constitutional States, one shall not take for granted the achievements of civilization on which we set our lives. At times, like the one we live in Europe right now, new and unexpected menaces emerge, and regrettably, humanity does not always reveal to have learned even the hardest lessons of the past.

Therefore, it is critical to revisit the different ideas that constitute the foundations of the constitutional State as a social and political paradigm, which rests on the crossover of three principles: the guarantee of fundamental rights, the separation of powers, and popular sovereignty. Righteously three principles that are very simple in their basic formulation, but very challenging legally and of enormous plasticity in their practical realization.

This very brief fragmented text focuses on the historical origins of the principle of separation of powers – which has its most impregnable stronghold in the independence of the judiciary. It focuses as well on the way that principle established itself, from a very early stage, as one of the pillars of modern constitutionalism, although with different national variations, in the light of the idiosyncrasies of each legal experience.

It is a history worth remembering, full of encounters and disagreements, with some subtle ironies, and without which we can hardly respond to the severe challenges that the separation of powers faces today. We hope with these historical remarks to meet the expectations of our readers.

2 Locke's Lost Opportunity

It is common knowledge that the framework of the separation of powers is Book XI of *De L'Esprit des Lois*, published for the first time in 1748 in Geneva by a French aristocrat named Charles-Louis de Secondat, baron de La Brède et de Montesquieu. Briefly, Montesquieu.

The first ironic note of this story is right here. Montesquieu was not the first political thinker to defend the necessity of limiting the power through its separation in several

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parts, albeit being considered for all posterity as the inventor of the principle of separation of powers. James Madison was well aware of this significant misunderstanding – one might say a misunderstanding of historic proportions – when in his *Paper* no. 47 writes, *"the oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying and recommending it most effectually to the attention of mankind."* Not yet satisfied with this small insinuation, Madison maliciously proceeds with the exposure of Montesquieu's material source: *"the British Constitution was to Montesquieu what Homer has been to the didactic writers on epic poetry."*[1]

Oracle or didactic writer, none of the qualificatives is particularly fair in regards to the French thinker, who was an earnest intellectual – with concerns of theoretical and empirical rigor –, and who, in particular, expressly cites the British Constitution as his immediate source: *"though all governments have the same general end, which is that of self-preservation, (…) there is one nation in the world that has political liberty for the direct end of its Constitution."* Therefore, as proposed, *"we shall presently examine the principles on which this liberty is founded."*[2]

To what extent the subsequent analysis made by the author – in particular, in chapter VI of the Book XI of *De L'Esprit des Lois*, rightly entitled *"Of the Constitution of England"* – substantiates a rigorous description of the British reality of the time, which he had known personally, or from which point these considerations become normative, it is an issue over which much ink has been spilled. Perhaps what it is about is a somewhat idealized description of a changing reality, but where the aristocratic inclination of the observer hindered him from seeing what was happening at the time: that the power of the House of Lords was already slipping through its fingers and progressively placing itself in the the House of Commons. Indeed, for whom does not appreciate the idea of equality between men under any circumstances – after all, *"in such a state there are always persons distinguished by their birth, riches, or honours"* that cannot be *"confounded with the common people"*[3] – it is understandable that the significant erosion of the position of the Lords, accentuated after the Revolution of 1688, was left in the shadows.

Who indeed Montesquieu does not quote, not even to disagree with him, is John Locke, who on the other side of the English Channel had already advocated for the separation of powers, in the pages of his famous *Two Treatises of Government*, published for the first time in 1689. Six decades before *De L'Esprit des Lois* saw the light of the day. Moreover, Locke had advocated for the separation of powers precisely with the same purpose that motivated Montesquieu, of limiting the power of the State, and thus avoid the historical record, which is simultaneously a prediction: *"every man invested with power is apt to abuse it, and to carry his authority as far as it will go."*[4]

In effect, according to Locke, *"it may be too great a temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make (…), and thereby come to have a distinct interest from the*

[1] A Hamilton et al. (2001) p. 250.
[2] CL Montesquieu (1951) p. 396.
[3] Ibid, p. 400–401.
[4] Ibid, p. 395.

rest of the community."[5] From this premise, the first great philosopher of Liberalism goes on to make a not particularly successful attempt of a substantive distinction between the legislative power and the executive power, supported by a clear circumstantial difference: laws do not take much time to produce, meaning that their authors do not need to assemble for too long. However, despite being produced at once, the laws are in force permanently, and their execution is perennial, wherefore, the executive power must always be in effect. The legislative power is limited in time, whereas the executive power is continual.[6]

After defining this dichotomy, Locke proceeds to define another power but definitely goes in the wrong direction and thus misses the right destination. More than a third power, the so-called federative power seems like an external (or international) variation of the executive power, albeit substantially disconnected from obedience to strict laws. Most importantly, its incumbent is indeed (and, in the opinion of its maker, it would be good if it continued to be) the same as the executive power: the monarch[7].

If the British philosopher had not worried about being politically correct – e.g., in such careful defense of the so-called royal prerogative, as "*this power to act according to discretion for the public good, without the prescription of the law and sometimes even against it"*[8] – perhaps he would have observed the political reality of England at the time with a more analytical spirit and therefore confronted with the courts, their judges and the jury institution.

Furthermore, many years prior to this time, Thomas Hobbes – who always paid a high price for the political incorrectness of his *Leviathan* – had already identified three different legal areas of the relationship between the sovereign and the subjects. One area covered by the law, in which men owed obedience to the laws defined by the sovereign according to the obligations voluntarily assumed in the social agreement. Another area diametrically opposed, of true liberty, related to some inalienable rights and that therefore could never constitute an object of the said agreement under any circumstances. Finally, one intermediate area, not (yet) entirely covered by the positive law, in which prevails what, at present times, we would call general freedom of action. In reference to this third area, Hobbes states quite clearly that when a subject has a *"controversy with his sovereign of debt, or of right of possession of lands or goods, or concerning any service (…), or concerning any penalty (…), grounded on a precedent law"*, he has likewise *"the same liberty to sue for his right as if it were against a subject, and before such judges as are appointed by the sovereign."*[9]

Therefore, if Hobbes could already in 1651 perceive this perspective of the British constitutional system – judges appointed by the sovereign, to apply the law in lawsuits brought by the subjects (among themselves) and against the sovereign himself (naturally, with as much independence as was conceivable at the time) – indeed it could also have been perceived by Locke, in 1689, when he returned to his beloved England and published *Two Treatises of Government,* right after the *Glorious Revolution.*

[5] J Locke (1996) p. 364.
[6] Ibid, pp. 364–365.
[7] Ibid, pp. 365–366.
[8] Ibid, p. 375.
[9] T Hobbes (1904) pp. 143–144 and pp. 158–159.

3 The Judge Montesquieu

The opportunity that Locke lost would thus be taken on by a judge – with a very keen sociological vein – in the lands of France.

The Baron of Montesquieu is figured in history as the father of the separation of powers precisely because he was a judge by profession. In other words, because he was a judge in the Parlement of Bordeaux – an occupation relatively common at the time for a certain French aristocracy – he understood that the judicial function does not apply the law in the same way that the executive function does. Both the executive power and the judicial power perform law enforcement tasks. In this sense, they are both secondary functions subordinate to the law, but they do not share the same nature. In the active prosecution of the public interest, the first is a partial power and organizes itself hierarchically. The second is characterized by impartiality, passiveness, and independence.

This is the destination point of Montesquieu's theory. Notwithstanding, the journey is equally fascinating. In his own words, *"in every government, there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law. By virtue of the first, the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted. By the second, he makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions. By the third, he punishes criminals, or determines the disputes that arise between individuals."*[10]

This rigorous and in-depth description of the functions that States took on at the time reveals that there is in his thinking an undeniable dichotomy between making the law and applying it – meaning that the correspondent functions are in divergent plans. Based on this description, Montesquieu concludes with the most relevant terminological note of the history of political ideas: *"the latter we shall call the judiciary power, and the other simply the executive power of the state."*[11]

Fundamentally, the conceptual and terminological distinction of the different functions of the State does not yet mean separation of powers. Thus, losing no time, Montesquieu carries on with absolute clarity: *"when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. (…) Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. (…) There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."*[12]

Finally, while listing the capacities and limits of each of the three powers individually, Montesquieu also dedicates himself to identifying their respective incumbents: a parliament with two houses (one composed of people distinguished by their births and another composed of illustrious people that represent the commons); the monarch himself; and no permanent judges who are *"persons taken from the body of the people"* (by

[10] CL Montesquieu (1951) pp. 396–397.

[11] Ibid, p. 397.

[12] Ibid, p. 397.

reference to the institution of the jury, but that in practice does not discharge the presence of a professional judge)[13]. Hence the idea, to be strengthened later, that the spirit that encouraged this author was not genuinely democratic – let alone republican – but rather the establishment of a mixed government that combined the monarchy, the aristocracy, and the democracy in variable degrees.

Overall, in the mid-18th century, in absolutist France, only a judge – experienced and erudite as Montesquieu – would be able to create the distinction between executing and judging as two different ways to apply the same law: by the (armed) arm of the monarchs and their direct servants, and by the prudence of the judges – in the latter case not even the distinction between criminal justice and civil justice is missing. Ergo, the intelligence of a judge is both in the origin of the separation of powers and of the independence of the judiciary.

4 The American Experience

On the other hand – and this is the second ironic note of this narrative – it is often said that Montesquieu inspired himself on the British constitutional experience to propose to France a system of separation of powers that would only be enacted on the other side of the Atlantic with the approval of the United States Constitution in 1787.

If Montesquieu himself assumes the inspiration in the British political system – a system that he directly experienced during the time he lived in England – his influence on the Founding Fathers is also an undeniable fact – and, consequently, on the whole of the American constitutional process. The articles I, II, and III of the Constitution approved in Philadelphia are dedicated, respectively, to the legislative power (Congress), to the executive power (President), and the judiciary (Courts). If the nucleus of the United States Declaration of Independence seems clipped from the pages of John Locke, the first articles of the oldest Constitution in force do not hold, given the content of *De L'Esprit des Lois*, much more than the realization of a couple of unoriginal ideas: the division of the power in three branches, aiming to avoid its abuse.

It is a fact that Montesquieu did not live time enough to savor the impact of his work in the early days of American constitutionalism. However, his name is extensively quoted in the *Federalist Papers*, published by Hamilton, Jay and Madison, to convince New York citizens to vote favourably on the ratification of the Federal Constitution. Notably, *Paper* no. 47, above-mentioned, features vast paraphrases of the *De L'Esprit des Lois* and dedicates itself with great detail to thoroughly examining the relationships between the different powers in the British Constitution and the Constitutions of the existing American States, to conclude that the axiom of the separation of powers had never implied that *"the legislative, executive and judiciary departments, are by no means totally separate and distinct from each other"*[14], but rather bearing important points of interaction.

Therefore, in the British experience, treatises, signed by the Head of State, have the authority of legislative acts. The King appoints all the judges. The Supreme Court of

[13] Ibid, p. 398.

[14] A Hamilton et al. (2001) p. 250.

Appeal of the kingdom is inside the upper house of the Parliament. Furthermore, a limited branch of the legislative power serves as Private Council of the monarch. For their part, in several American Constitutions, the executive magistrate has veto power on the works of the legislative magistrate. The senates of the States, a part of the legislature, are also courts for the trial of specific crimes committed by executive and judiciary members. Finally, a significant portion of the government employees is appointed with the blessing of one of the branches of the legislative power. Ultimately – and in an overly minimalist interpretation – what matters for the advocates of the American Constitution is that the *whole* power exercised by one department is not in the hands of those who have the *whole* power of another department.[15] Montesquieu has never set the bar this low. However, his considerations on the ambivalence of each of the powers that simultaneously have the *"faculté de statuer"* – to do its part – and the *"faculté d'empêcher"* – to impede the remaining powers to do what they should not, thus controlling their impulses[16] – are famous considerations.

Paper no. 48 is also important because it reflects the belief in the political and functional superiority of the legislative power – an idea inherited from Montesquieu – and, simultaneously, of its greatest hazard. Indeed, *"the legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."*[17] Moreover, *"in a representative republic (…), where the legislative power is exercised by an assembly (…), it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions."*[18] If ever there were any doubts about this, it would suffice to think that *"the legislative department alone has access to the pockets of the people."*[19] This argument weighs like heavy stones in a country that united itself and declared independence to avoid paying the taxes levied by the British sovereign.

To counter this hazardous stronghold of the legislative branch, subsequent *Papers* later advocate the use of various antidotes: first, the internal subdivision of the legislative branch itself in two houses (sort of separation of powers inside the separation of powers); second, a veto power (albeit not absolute) of the executive magistrate on the works of the legislative magistrate; third, the originality of the federal structure of State itself, in which *"the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments."*[20]; forth, the social pluralism. If the first and second antidotes are still clearly affiliated with Montesquieu's work, the third and fourth already forge what will be the path of Alexis de Tocqueville.

Finally, *Papers* no. 67 to 77 are explicitly dedicated to the executive power – election, nature, and competencies – and *Papers* no. 78 to 83 extensively emphasize the importance of the independence of courts to a limited Constitution and the need for instruments of

15 Ibid, pp. 250 e 251.
16 CL Montesquieu (1951) p. 401.
17 A Hamilton et al. (2001) pp. 256–257.
18 Ibid, p. 257 and p. 263.
19 Ibid, p. 258.
20 Ibid, p. 270.

guarantee of that independence in the plan of the personal and functional status of the judges.

The irony that the American Constitution was the first to enshrine Montesquieu's doctrine becomes even denser because – in the New World – there were no monarchs to assume the executive power nor aristocrats to sit in the upper house of Parliament. For this reason, the constituents saw themselves forced to adapt the organogram designed by Montesquieu by placing an elected President in the place of the King and creating a Senate to take the place of the House of Lords in the legislative branch. The last thing the Americans wanted was a king and a nobility class. Moreover, it is worth remembering that they had declared independence precisely to get rid of the King of England, his court, and the extensive list of archbishops, bishops, dukes, counts, barons, sheriffs, bailiffs, reeves, and other lords who stubbornly continued to pervade the British social fabric (since John Lackland had been forced to sign the Magna Carta in 1215).

Montesquieu was a firm monarchist, but the first historical realization of his thinking was, in fact, profoundly republican.

5 The Other Side of Montesquieu

Furthermore, Montesquieu was not a true democrat – far from it – and the first materialization of his thinking into a concrete political project was very democratic, at least for the standards of that epoch.

Contrary to other illuminist authors – such as Hobbes, Locke, and mostly Rousseau –, Montesquieu did not believe in the intrinsic equality of all men. He thought that bicameralism was a demand of human nature and the only way to guarantee the freedom of such men who have the right to occupy a distinct social position. This side of Montesquieu is certainly his least known – and his darkest side: aristocracy occupies a place of its own, and the people as a whole are not apt to exercise the political power; thus, only an elite extracted from among the people can and must represent it.

In fact, in his own words, *"in such a state there are always persons distinguished by their birth, riches, or honours: but were they to be confounded with the common people, and to have only the weight of a single vote (…), the common liberty would be their slavery (…). The share they have, therefore, in the legislature ought to be proportioned to their other advantages in the state; which happens only when they form a body that has a right to check the licentiousness of the people (…)."* To this aristocratic vein, consistent with the affluent family he was born into, Montesquieu adds yet another elitist vein when referring to the lower house of Parliament: *"the legislative power is therefore committed to the body of the nobles, and to that which represents the people, each having their assemblies and deliberations apart, each their separate views and interests."*[21]

This form of political representation of the people is not only the result of the practical impossibility of implementing, in big States, a government system in which all members of the people participate – in essence, a self-government system or, as Rousseau will later defend, a direct democracy – but it constitutes a requirement for the rationality (if not the salubrity) of public life. Such progressive forms of governing would always

[21] CL Montesquieu (1951) pp. 400–401.

be subject to significant inconveniences, even in small States. On the one hand, *"the great advantage of representatives is their capacity of discussing public affairs. For this the people collectively are extremely unfit, which is one of the chief inconveniences of a democracy."*[22] Therefore, the concept of representation adopted is the antipode of what is currently called mirror representation: a parliament that is a faithful reflection of society as a whole. On the other hand, not even in the election of the people's representatives is it beneficial for the whole third state to vote. It is true that *"all the inhabitants of the several districts ought to have a right of voting at the election of a representative"*. However, it is crucial to have no illusions: from this group should be excluded all that *"are in a so mean situation as to be deemed to have no will of their own"*[23].

Therefore, it should now be clear that the primary purpose of Montesquieu when he assembled his schema of the separation of powers was not to build a democratic government – not in its entirety, not even within the legislative – but to build a mixed or combined government. In other words, a government system in which each of the three powers has its own source of legitimacy and in which, consequently, the monarchic, aristocratic, and democratic elements must coexist peacefully.

The executive power has a monarchic legitimacy, the legislative power benefits simultaneously from an aristocratic legitimacy in the upper house and democratic legitimacy in the lower house. As for the jurisdictional power, Montesquieu does not say so but being himself a judge and aristocrat, it is normal for him to think that a certain aristocracy should control it, if not by birth, at least by merit or knowledge. This was, in fact, the reality of his time, when the so-called "judiciary parliaments" were occupied by an elite, which even challenged the determinations of absolute monarchs (and, in some cases, paid the price for such audacity).

About this last point, it should be noted that under the inspiration of the British experience, Montesquieu opens the door to popular legitimacy of the judicial function, which the American legal system will use, but not the continental European legal systems (they will merely follow it occasionally). In reality, this legal institution takes on a double function: on the one side, it fulfills individuals' fundamental right to be judged by their peers (a right that becomes more important when societies are more fragmented); on the other side, it allows to democratically justify the concrete exercise of the administration of justice. Notably, it allows calling the political community, globally resented with the practice of a crime, to the trial of the one who offended them.

In summary, therefore, despite recognizing that the Founding Fathers also had their anguishes about the merits of democracy – as demonstrated by the intricate schema assembled for the election of the President, which had the purpose of controlling the weight of popular will in the choice of the incumbent of such an important position – it does not detract from the fact that the separation of powers made a democratic journey across the Atlantic. Despite having been thought to reinterpret a monarchy as a mixed regime, the separation of powers ended up founding a democratic republic.

[22] Ibid, p. 400.
[23] Ibid, p. 400.

6 Rousseau's Legacy

The model of separation of powers judiciously designed by Montesquieu not only had an impact in the USA. Although a little later, it had great influence in France too.

From then on, it will also have inspired a large number of States on the European continent, as they were swept by the respective liberal revolutions – and throughout the world, whenever were elaborated the first written constitutions in each country. Portugal and Brazil were no exception, with the particularity that in the Brazilian Constitution of 1824 and in the Portuguese Constitutional Law of 1826 that replicates it a fourth power was added to the three identified by Montesquieu. A new authority called the *moderating power*, immediately inspired by Benjamin Constant, and which is still to this day an important part of the Lusophone juspublicist culture.

However, Montesquieu's doctrinal influence in his own country went hand in hand with the vibrant thinking of Jean-Jaques Rousseau, a Swiss-born author who – and this is another great irony of this history – did not believe in the separation of powers.

It is a fact that Montesquieu and Rousseau converged on the thesis of the supremacy of the legislative power over the others, but for the thinker of Geneva, the people, acting by a qualified majority, could do everything. They had to be able to do everything. Popular sovereignty, by definition, does not admit any limits, whether they arise from the existence of fundamental rights, whether they result from the principle of separation of powers, or whether they are inherent to the need (albeit practical) of establishing mechanisms for political representation.

For Rousseau, the people's sovereign will cannot be legitimately constrained. The majority rule, according to which the people take all their deliberations, is not a simple decision-making rule. It is a rule of truth: majority is synonymous with reason, freedom, and, consequently, truth. The minority is wrong and lives as a prisoner of that wrong, and therefore has no rights and not only can be but must be subdued by the majority. This is the meaning of the famous Rousseau's paradox according to which, by being forced to obey the general will (which is ultimately defined by the majority), the minority is only being forced to be free. In his own words, *"subjugating men in order to make them free."*[24]

Obsessed by the problem of a *"man was born free, and everywhere he is in chains,"* Rousseau constructs a whole model of governance in which *"each of us puts his person and all his power in common under the supreme direction of the general will; and we as a body receive each member as an indivisible part of the whole."*[25] Furthermore, he states that this fundamental pact, *"instead of destroying natural equality (…) substitutes moral and legal equality for whatever degree of physical inequality nature has put among men."*[26]

Simply, *"the social pact gives the body politic absolute power over its members; and (…) it is this same power, directed by the general will, that bears the name of sovereignty."*[27] This will that is insistently called *"general"* – because it transcends the

[24] JJ Rousseau (1964) p. 310.
[25] Ibid pp. 289–290.
[26] Ibid p. 294.
[27] Ibid pp. 305–306.

sum of the particular wills of each of the elements of the community – *"is always right, it never needs to be rectified"*[28]. It is expressed in the legislative power, conceived as *"a superior kind (…) able to see all human emotions, while feeling none";* as an *"extraordinary man,"* as a *"wise man",* or even as an *"almost divine"*[29] being. Consequently, *"we must no longer ask who has the right to make the laws"* since each one of them is nothing but the *"acts of the general will."* As such, by definition, the law cannot *"be unjust, since no one can be unjust towards himself."*[30]

Even at the end of his most popular political book, Rousseau briefly mentions *De L'Esprit des Lois*, but given the transcriptions just made, it is clear that it is not the author of the theory of the separation of powers that interests him, but rather the sociologist of the climate's theory, who focuses on the good legislator and the art he must have to take advantage of the good characteristics of his people and to counteract the bad ones.[31] It is true that even further on, Rousseau distinguishes between force and will – *"under the name of executive power and the latter under that of legislative power"* –, but the conclusion could only be one: *"nothing is done, or should be done, unless they are in accordance."*[32]

There is nobody better than the legislator to know how to execute the law. Besides, after so much praise for the legislator, who can genuinely qualify himself as power other than him? If the idea of the separation of powers is compatible with an unequal position of those powers, this is not the case if the relationship is of absolute and total subjection (of everything else) to the sovereign legislator.

In any case, Article 6 of the Declaration of the Rights of Man and of the Citizen, of 1789, has definitively registered in the French constitutional heritage the axiom according to which *"Law is the expression of the general will"* and, along with it, the vision (or prejudice) that the work of the legislator is the source of Law par excellence, if not the only source of Law that reason can accept as valid. Article 4 of the Constitution of year I (1793) would further reinforce this with two adjectives: *"Law is the free and solemn expression of the general will"* – or would it not be this French Constitution, of short and troubled cogency, the one that most directly inspired itself on the thought of the philosopher from Geneva.

7 The French Experience

In the French constitutional practice, this idea of the political and even moral superiority of the law and the legislative power, very much rooted in Rousseau's thought, is thus ideologically intertwined with the paradigm that Montesquieu had constructed of the principle of the separation of powers: a model that is clearly unbalanced in favor of the legislative power, in which there is a primary power that drafts the laws and two secondary, subordinate powers that faithfully apply those laws.

[28] Ibid p. 311.
[29] Ibid pp. 312–313, 314 and 318.
[30] Ibid p. 328.
[31] Ibid, p. 333.
[32] Ibid, pp. 334–335.

The differences between one author and the other do not thus concern the hegemony of the legislative function, which is consensual, but the degree of loyalty – if not servility – and the degree of autonomy of the other powers in relation to the general and abstract prescriptions of the legislator. However, the question arises in differentiated terms in relation to the executive and the judiciary powers – the latter, moreover, apparently absent from Rousseau's work.

As far as the former is concerned, one should recall the weight that the so-called principle of legality had in the development of French Administrative Law, which spread to the entirety of continental Europe and remained for many years (if not until the present). Principle well known for its endless discussions on levels of binding and discretion – reminiscent of the *"prerogative"* that Locke attributed to the monarch – on the law as the limit or basis for administrative action, on the (material) distinction between law and regulation, et cetera.

In any case, this principle of legality is nothing more than an expression of the supremacy of the legislative over the executive and of the ambition to subordinate an administrative machine (led, at least formally, by the king) to a democratic power – an attempt to domesticate, through the affirmation of the law, a power that had been autocratic all along. The purpose is to democratically legitimize a function of the State whose history of arbitrary actions and abuses loses itself in time – and, as is well known, bad habits die hard. To achieve this goal, it is critical that the liberal idea of fundamental rights – especially life, freedoms, and property – stand as individual spheres of free action, spaces of autonomy preserved from the intrusion of public power and in which, therefore, this one cannot intervene without the people's consent. In other words, if there is no specific law approved by the people's representatives in Parliament.

It is a fact that in the first amendments to the US Constitution – the American *Bill of Rights* of 1791 – fundamental rights begin precisely by being formulated against the legislator – *"Congress shall make no law…"* –, but it is also certain that liberals, in general, never stopped seeing the law as an instrument to safeguard the freedom of citizens. Moreover, if they made some mistakes along the way, one of them was precisely trusting the law too much, assuming that its author was more enlightened and less susceptible to biases than he actually was.

As for the judiciary, it is commonplace to say that Montesquieu portrays the function of judges in a minimalist way, almost humiliating to the judges themselves. Even disregarding here the passages about the non-permanence of (jury) courts – so that the power to judge is not bound *"to any particular state or profession"* and so that the one feared is the magistrature and *"not the magistrate"* – the judiciary is successively described as *"invisible and void," "somehow null,"* as the *"mouth that pronounces the words of the law"* and, finally, as a power interpreted daily by *"mere passive beings, incapable of moderating either its force or rigour."*[33]

Whatever the best explanation for these words of Montesquieu, it is clear that being a judge himself, and having valued the judiciary to the point of making it substantively autonomous from the executive power, in absolutely innovative terms, they can only be understood based upon mental reserve or extreme political prudence. In fact, it would

[33] CL Montesquieu (1951) pp. 398, 401 and 404.

not be easy to speak of a *"judicial power"* in 1748, not so much because of the adjective "judicial", but above all because of the noun "power".

On the one hand, throughout royal absolutism – Louis XV reigned in France at the time – any power other than that exercised directly by the sovereign, however irrelevant it might claim to be, would always be an opposing power. Not by chance, *De L'Ésprit des Lois* was published in Geneva (and not in Paris) and without reference to its author name. Precautions that did not prevent it from being considered a pernicious book and placed in the Index only a couple of years after its publication – although it does not contain many ideas on matters of faith. On the other hand, there are some historical episodes in which the so-called judicial parliaments, despite being in a certain way an extension of the royal power to administer justice, became notable for resisting absolutist monarchs – the Parliament of Paris, for example, annulled the wills of Louis XIII and Louis XIV. Therefore, prudence recommended not to present judges as having a power of their own, but rather to underline the importance of calling upon the community to exercise justice (through juries), and to assure the lords of the realm that they would be judged by their peers, so as not to subject them to envy.[34]

In short, in Montesquieu's view, the best way to affirm the judiciary was to pretend that there were no judges. It is not suitable for them to be *"continually (…) under the view"*[35] of the people – and the truth is that even today, the presence of judges outside the walls of the courts, mainly in the mediatic sphere, requires prudence and still generates much discomfort.

In any event, this balance between veneration of the law and the legislator, on one side, and suspicion towards the courts and especially judges, on the other side, has marked until now the French understanding of the separation of powers, with two very particular manifestations. The first reflects itself in the refusal to submit the (post-revolutionary) executive power to the control of (ordinary) courts, in a logic according to which judging the Administration is still a form of administrating – with the consequent creation of special courts to solve disputes between private individuals and public authorities, i.e., administrative courts, with a peculiar status of conditioned independence. The second consists of the persistent refusal of a genuine system of constitutional review of laws, with the participation of the courts in general. A blockage that only the Fifth Republic has partially overcome with the establishment of a *sui generis* mechanism of concentrated, preventive, and semi-political constitutional review.

8 Sieyès's Attempt

This last point on the constitutional review of legislation is, in fact, central to the strategic interpretation of the models for implementing the separation of powers in the different constitutional experiences.

Despite dividing each of the powers into faculties to enact – *"the right of ordaining by their own authority"* and faculties to prevent – *"the right of annulling a resolution taken by another"*[36] –, in Montesquieu's theory, there is no place for the judiciary to review the

[34] Ibid, p. 404.
[35] Ibid, p. 398.
[36] Ibid, p. 401.

validity of laws in relation to any higher legal parameter, be it the fundamental law or the prescriptions of natural law. How bold, indeed, would it be for a null power to call into question the work of the legislative power! The relationship between the judiciary and the legislative power is essentially one of subordination. The separation exists between the legislative and executive power and between the latter and the judiciary.

Not even the incisive considerations of the famous Abbé de Sieyès, written on the eve of the Revolution, transformed this state of affairs, even though he made the distinction between constituent (original) power and constituted (delegated) powers quite clear. Indeed, in chapter V of his *Qu'est-ce que le Tiers État?*, Sieyès begins by making a public appeal: *"if we do not have a constitution, one must be made, and the nation alone has this right."*[37] A few pages after, he insists: *"he nation exists before everything, it is the origin of everything. Its will is always legal, it is the law itself. Above it only 'natural right' exists."* He then continues with the thesis, according to which, *"if we want to get an exact idea of the series of 'positive' laws that can only emanate from its will, we find, in the first line, the constitutional laws. (…) These laws we call fundamental (…) because the bodies that exist and act by them cannot touch them."* And he ends with the following conclusion: *"in each of these parts, the constitution is not the work of the constituted power, but of the constituent power."*[38]

Sieyès further explains – as well as in his *Préliminaire de la Constitution Françoise*, a booklet that has almost faded into oblivion[39] – that the power of the *"ordinary representatives"* of the people is limited to questions of government. By contrast, the power of the *"extraordinary representatives"* is *"all that the nation wishes to give them"*[40] – and, because *"extraordinary representation is nothing like the ordinary legislature,"* naturally *"the General States, even if assembled, have no competence to make any decision about the constitution."*[41]

Notwithstanding the author's decisive weight in the revolutionary process, especially in defense of the political position of the third estate, these meditations were not sufficient to forge in the French legal doctrine the belief that the constitution – as a regulatory text, and not just as a political proclamation – is equipped with a force superior to that of other laws and that, above all, this supremacy must be assisted by practical mechanisms of guarantee. In France, by tradition, fundamental law and ordinary law tends to go hand in hand.

9 Hamilton's Audacity

In contrast, on the other side of the Atlantic, American constituents have had from the very beginning a clear awareness of the Constitution's hierarchical superiority and of the need to trust the courts the constitutional power to review the legislation.

The most celebrated decision in the entire history of constitutional justice – *Marbury v. Madison*, delivered in 1803, only 16 years after the Philadelphia Convention – certainly

[37] A Sièyes (2002) p. 50.
[38] Ibid, p. 53.
[39] A Sièyes (2002).
[40] Ibid, pp. 56–57.
[41] Ibid, pp. 57–59.

did not arise by chance. Quite the contrary. In *Paper* no. 78, notwithstanding the formal deference initially maintained towards the ideas of the great Montesquieu, Alexander Hamilton ultimately makes a crystal-clear defense of the courts' general competence to review the constitutionality of laws, perfectly aware of the profound theoretical and practical consequences of such recognition.

Hamilton stems from a comparative analysis of the dangerousness of the three powers. Furthermore, it is already known that *"the executive not only dispenses the honours, but holds the sword of the community; the legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse."*[42] Of the judiciary it is said, as the French oracle might have said, *"to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments"*[43] – thus allowing the famous expression later taken by Alexander Byckel, "the least dangerous branche."

However, two paragraphs later, Hamilton, after stating that *"the complete independence of the courts of justice is peculiarly essential in a limited constitution."* contradicts almost everything he said before, advocating in a clairvoyant manner that this limited character, in practice, cannot be preserved *"no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void."* Entirely aware of the scope of his words, he refers to the *"perplexity"* that is caused by the idea of attributing to the courts the power to*"pronounce legislative acts void, because contrary to the constitution"* since such a doctrine suggests the idea of *"superiority of the judiciary to the legislative power."* Nevertheless, what is certain is that Hamilton does not falter for a second and argues that there is no clearer principle than that according to which *"every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that (…) the servant is above his master; that the representatives of the people are superior to the people themselves."*[44]

Much more judicious than asserting that the *"legislative body are themselves the constitutional judges of their own powers"* is, therefore, the interpretation according to which the *"the courts were designed to be an intermediate body between the people and the legislature, in order (…) to keep the latter within the limits assigned to their authority."* Thus, if *"the interpretation of the laws is the proper and peculiar province of the courts,"* the Constitution is also a law – it is, of course, the *"fundamental law"* – and it is in that capacity that it must be *"regarded by the judges."*[45]

Before turning his attention to the professional status of judges – and the importance of their independence and no-removability to guarantee the supremacy of the Constitution – Hamilton still has time to answer the essential question: does this system of judicial review of the constitutionality of laws mean the *"superiority of the judicial to the legislative power"?* The answer is absolutely orthodox: *"it only supposes that the*

[42] A Hamilton et al (2001) p. 402.
[43] Ibid, p. 402.
[44] Ibid, p. 403.
[45] Ibid, p. 403–404.

power of the people" – meaning the sovereign people who approve the Constitution – *"is superior to both."* Indeed, *"that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former."*[46]

The so-called paradox of constitutionalism – "we are under a Constitution, but the Constitution is what the judges say it is" – may well have been formulated only in the beginning of the twentieth century, by Charles Evans Hughes, one of the most distinguished Chief Justices of the Supreme Court. However, the one who gave rise to this paradox was, in fact, Alexander Hamilton in 1788.

10 Tocqueville's Observations

This last point does not serve to give an account of the labors of Hercules that constitutional doctrine and justice have had to (supposedly) dismantle the paradox left to us by Hamilton. It serves, instead, to report one last episode, which is symbolically important, in this history of encounters and disagreements between the referential creator of the separation of powers and his two main creations, in the US and France.

Between 1831 and 1832, a Frenchman named Alexis de Tocqueville – like Montesquieu, an aristocrat and magistrate – visited the US and methodically observed, during his time there, the American legal and political reality. In the work in which he critically compiled the results of his observations – *De la Démocratie en Amérique*, published in two volumes in 1835 and 1840 – Tocqueville stresses that the Americans *"have kept all the distinctive characteristics common to the judicial power,"* and that these are essentially three: they serve as arbitrators of disputes since they can *"deliver a verdict only when there is a lawsuit."*; they *"can never get involved except in a particular case"*; and it *"must always wait to be apprised"* before acting.[47]

Even though he *"perfectly resembles the magistrates of other nations,"* the American judge nevertheless possesses *"an immense political power."*[48] To the rhetorical question about the origin of this power, Tocqueville answers bluntly: *"the cause is this single fact: the Americans have recognized the right of judges to base their decisions on the constitution rather than on the laws. In other words, they have allowed them not to apply laws that would appear unconstitutional to them."*[49]

If this right provides a reasonable explanation for the social prestige of American judges and their weight in public life, it is also true that it derives from the very concept of Constitution that has always characterized their constitutional experience. More precisely: in France, the Constitution is an *"immutable work"*; in England, it can be constantly modified – *"or rather it does not exist at all"*; and in the US, *"it forms a work apart that, representing the will of all the people, binds legislators as well as ordinary citizens; but it can be changed by the will of the people following established forms and in cases for which provisions have been made."*[50] Therefore, in one fell swoop,

[46] Ibid, p. 404.
[47] A Tocqueville (1981) pp. 168–169.
[48] Ibid, p. 169.
[49] Ibid, p. 169.
[50] Ibid, p. 169.

the author introduces the concepts of a rigid, flexible, and semi-rigid Constitution and bases the judicial review of legislation precisely on the express provision (in Article 5) of a procedure for constitutional amendment. In other words, the ability of the people to amend their Constitution discards the paradox of constitutionalism – or, at least, prevents the most severe cases of interpretative blockage from dragging on for a long time.

Tocqueville further explains his thinking: if *"in France, the courts could disobey the laws on the grounds that they found them unconstitutional, the constituent power would actually be in their hands, since they alone would have the right to interpret a constitution whose terms no one could change. They would therefore take the place of the nation."* It is true that, *"denying judges the right to declare laws unconstitutional, we indirectly give the legislative body the power to change the constitution (…) But better to grant the power to change the constitution of the people to men who imperfectly represent the will of the people"* – that is to say, the Members of Parliament – *"than to others who represent only themselves" – rectius*, the judges.[51]

Differently, in the US – leaving aside the British example, where it is challenging to separate constituent power and legislative power – *"the nation can always reduce magistrates to obedience by changing its constitution."* Nevertheless, until that eventually happens, he assumes that *"from the day when the judge refuses to apply a law in a trial, it instantly loses part of its moral force. Those who have been wronged by the law are then alerted that a way exists to escape the obligation to obey it; trials multiply, and it becomes powerless. Then one of these two things happens: the people change the constitution or the legislature revokes its law."*[52]

It is evident that the possibility of approving amendments to the Constitution does not definitively overcome the paradox of constitutionalism – American constitutional history, by the way, provides several examples of this –, but it is also important to underline that Tocqueville tries to mitigate the problem through a prudent defense of the constitutional review.

In fact, he only defends a concrete and dispersed review – long before, should we say, the abstract review was invented by Kelsen and enshrined in the Austrian Constitution of 1920. In his careful words, the judge's duty to constitutional review should be limited to cases in which *"he must judge the law in order to be able to judge the trial. When he delivers a verdict on a law, outside of a trial, he goes completely beyond his sphere and enters into that of the legislative power."*[53] – even if only to act as a negative legislator. Only in the concrete review does the judge act in this capacity – not in other forms of abstract analysis, when he calls the law into question outside his decision-making process.

11 Epilogue

We will never get very far if we do not know the path where it all began, where we have been, and where the paths we follow may take us.

[51] Ibid, p. 170.
[52] Ibid, p. 171.
[53] Ibid, p. 172.

After all, we are dwarfs on the shoulders of giants like Hobbes, Locke, Montesquieu, Rousseau, Madison, Hamilton, Sieyès or Tocqueville. We are humbled heirs to a long constitutional tradition of more than 250 years old, with numerous declinations, but which has even deeper roots, in Greek philosophy, in Roman Law and the different moral canons of Christianity.

There are no systems of separation of powers in the abstract. There are only the original archetypes – that we have tried to describe as accurately as possible – and those models that in concrete terms have been developed and enshrined in different Constitutions, in multiple languages, in all continents.

However, in any of them, it is up to the judges – under the watchful eye of an open society of Constitution's interpreters, as suggested by Häberle – to define the scope of the separation of powers and the exact meaning of the judiciary's independence – the most separated of all the three powers –, which cannot fail to be felt by all of us as a heavy responsibility. It is for all those judges who faithfully honor this responsibility – with their daily work and many times bravely facing obstacles and all sorts of pressures – that this text pays tribute.

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