1. Introduction

Vincenzo Zeno-Zencovich

This volume explores one of the most important topics in the field of public law and legal theory which for nearly three centuries has occupied the minds and the writings of political theorists and lawyers in different legal contexts: the separation of powers.

In addressing a classical topic in the sphere of public law, the book adopts an original perspective: the authors were asked to reflect on the current challenges to the separation of powers starting from the recent English translation of Giovanni Bognetti's book *Dividing Powers*.¹

In his book, Giovanni Bognetti pointed out, with his usual open-minded approach and adopting a comparative perspective, that the traditional tripartite structure of the separation of powers had undergone a significant process of fragmentation and that the "powers" were at least five, adding to the original ones, those of the administration and of constitutional courts.

It would be conceited to present, in only a few pages, some new thoughts on an issue which is analyzed and debated in extreme detail and with great richness of cultural background and ideas.

I want to set out a few points of discussion that will be more specifically analyzed in the following chapters, and which all find a solid starting point in Bognetti's book.

1. THE CONTEXT

It is obvious to underline that the classical identification of the three powers and the stance in favor of their separation are not some kind of an eternal rule of mankind but are born out of a very specific historical, geographical and cultural context, that fully justified those conclusions and rendered them successfully applicable in Western countries for at least a century and a half. But nowadays, gradually but distinctly, the context has significantly changed under several fundamental aspects:

¹ G. Bognetti, *Dividing Powers. A Theory of the Separation of Powers* (Wolters Kluwer, 2017).

- (a) **The role of the State.** In the last 70 years, the role of the State (meaning its various institutions) has dramatically increased, including: social services, infrastructures, control and planning of the territory, environment and external relations, etc. This requires the exertion of powers that are differently organized from the past, with constant overlapping and fusion.
- (b) **Demography.** Extraordinary progress in the medical field, coupled with efficient and widespread health services, has dramatically reduced mortality rates and increased life expectancy. However, these millions of new citizens are not only healthy and long-living, they are also educated, have a rising income and are engaged in businesses, requiring the creation of legal entities. Despite the recurrent rhetoric on the “rich getting richer”, millions of stakeholders influence the organization of the State, claiming rights, privileges, protection and services. The articulation of power requires a structure which is coherent with such a broad and active constituency.
- (c) **Time to decide.** New technologies – not only of transport but especially of telecommunications – have speeded up all social and economic processes. This has an immediate consequence on the decision-making process; i.e., the way power is exerted. In a substantially stable society, where decisions are taken by a limited number of people belonging to homogenous groups, the “T factor” has limited importance. In contemporary societies, exposed to continuous changes and exchanges (scientific, technological, economic and climatic, etc.), the exertion of power is effective only if timely. Hence, its significance is that “faster” powers have an advantage over “slower” powers, and they erode their competencies.
- (d) **Multilevel powers.** The classical theory of powers and of their separation is based on State sovereignty, exclusive and self-sufficient. A power that is shared is not a power. Power that is delegated to some external institution substantially reduces its import. In contemporary societies, where international cooperation is essential, not only are powers shared and delegated, but often they are transferred to international institutions and although States can, exercising their sovereignty, withdraw them, in practice the procedures to do so are extremely complex and time consuming. Although on paper it is possible, in practice, it is a nightmare: as is evident in the case of Brexit which is a perfect example before us.

This fragmentation is common not only to the Member States of the European Union – which figures as the richest regional area of the world in terms of GDP – but also to traditionally isolationist countries, such as the US, whose policies – and therefore powers – are tied down by the multiplicity of inter-

national economic organizations to which it belongs, such as the World Trade Organization (WTO), International Monetary Fund (IMF), and World Bank (WB). Powers that are fragmented and diluted probably do not require to be divided, but one can and should ask oneself as to what extent they influence the effectiveness of traditional domestic partitions.

2. THE INTELLECTUAL CHALLENGES

Bognetti's book confirms that the problem of separation of powers is a happily inextricable mix of ideology, theory, culture and legal technique, and is in line with the glorious tradition of the liberal-democratic thinkers from Benjamin Constant, to Alexis de Tocqueville, then to John Stuart Mill and finally to Hans Kelsen. This is a tradition that attempts to set a firm ground on which the Constitution must be built and developed, always searching to balance fidelity to the original intent of its framers with the need for slow and well-meditated changes. The balance between powers, therefore, is always seen as a search for the probably impossible balance between public good and individual rights.

In the last seven decades, in which the Western world has been fortunately freed from internal wars and has gradually, although painstakingly, annexed new territories to its creed, social and economic conflicts have been mostly "jurified". The law, in its multiple facets, including constitutions, acts of Parliament and administrative regulations, is widely used as peaceful means to confer privileges to groups of citizens or even to non-citizens. Governance – i.e., the exertion of power – is expressed through the production of norms.

Law-making, in its multiple facets and in the variety of instances, is a never-ending process of balancing different interests. It is a form of institutional service for which the State – at every level – receives in payment taxes and other dues. This results in an extreme fragmentation of norms, rendering unclear both their content and hierarchy. The norm-producing powers increase in number and in output with the result that the traditional distinction between the legislative and the administrative powers are blurring: Parliament issues legislative acts with a very narrow and precise scope. Government (national, local and specialized branches) enacts general provisions, which only on their face can be qualified as purely "administrative". One can easily detect a strong competition between these various instances, which is quite physiological in democratic systems, especially when the political colors of Parliament, national government and local government are different, social constituencies vary, and elections get closer.

While the original framers of the theory of separation of powers were mostly concerned – and sometimes obsessed, as in the US – with the so-called "tyranny of the majority", in the present-day, in affluent and pluralistic societies, the risk is the opposite: small, very vocal and well-organized minorities

are constantly at work to obtain benefits and privileges that require a formal and institutional seal.

In this race to satisfy various stakeholders, the challenge is not so much the traditional check-and-balance approach but the respect of the boundaries of each power's competencies. At the same time there are important aspects that need to be considered: the protection of the public good which is generally left without a voice, the limits to public expenditure which burdens the tax-payer and the multiplicity of benefits conferred to the different groups which generate inequalities.

The inflation of normative production and the ever-so-frequent collision between competing interests enhances the role of adjudication. Dispute resolution bodies – in the first place, the judiciary – become ultimately the decision-makers, especially when the rule they state is applicable not only to the parties of the case but to all those for whom analogous conflicts arise.

The paradox is that the more legislatures and government bodies engage in the production of norms, the more they are transferring ultimate powers to the judiciary which often does not – and cannot – have an overall view of the multiple interests that are at stake, and that might be external to the specific conflict brought in front of it.

Further, the traditional partition of powers is upset by the centrifugal tendency of great business entities which have to operate on an international scale and therefore require – for reasons of efficiency and cost reduction – a common set of rules subtracted, as much as possible, to national – i.e., fragmented – regulation. The dimension of a power depends also on the number and size of entities that are subject to it. Therefore, this “escape from national law-making” significantly reduces the dimension, both subjective and geographical, of power.

This loss of control is obvious in two areas: first is that of international business agreements – whether for the production of goods or the construction of infrastructures, or for financial activities – which tend to flee from national law and jurisdiction; second is that of telecommunication services which are rendered worldwide through the multiple electronic networks and which feel free from most external controls.

So, while in the domestic arena various powers expand their scope and role, entities can create a “world-of-their-own” based on self-government and internal remedies. From this latter perspective, one can register the emergence of a new power: arbitration institutions and courts.

Finally, on an even wider level, it is necessary to point out that after centuries of export of Western models of partition of powers and the developments of more sophisticated systems of checks-and-balances, one is faced with a strong competition – coming from Eastern and Far-Eastern countries – based on an “output approach”. While in the Western traditional approach,

the starting point is that of “input democracies” where the foremost aspect is that of general participation of citizens in elections and in government, this new model significantly downsizes the importance of these moments, which are mostly rhetorical and procedural, and looks at what it actually delivers in wealth, welfare and international ranking. Thus, the profound effects on “separation of powers” theories can easily be imagined.

Given the intellectual challenges posed by the principle of the separation of powers, a reflection on the current and future transformations of the separation of powers is key: this book traces a comparative and theoretical itinerary in the most pressing and intriguing aspects of the separation of powers in our contemporary constitutional systems.