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THE THEORY OF THE SEPARATION OF POWERS, THE DEVELOPMENT PROCESS AND ITS APPLICATION TODAYABSTRACT

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ABSTRACT

The guarantee of freedoms can be only in liberties and democratic states. In particular, the states based on the start of the constitutionalist movements and the provisions of the 1789 French Declaration have to build their modern states on the axis of the theory of separation of powers. Although it was Locke and Montesquieu who systematized the theory of separation of powers, it is certain that the contribution of medieval thinkers on this issue could not be underestimated until the modern age. In fact, the number of those who state that the theory of separation of powers of many thinkers is based on the ancient Greek philosophers and that the starting point goes back to ancient times is not to be underestimated. However, at the time it was systematized, the question comes to mind, is it the same as the predicted form and the one used today? In the period when the theory was systematized, there was no such thing as a political party, especially in Western Europe, and in the thoughts of the jurists, the monarch, who held all power, had a struggle to increase the effectiveness of the parliaments, which are the representatives of the people, against this power, and to establish a balance system against the arbitrary rule of the monarch. Of course, with the emergence of political parties over time and having an effective role in the state order, it is striking that it turned into a form of conflict between the ruling party with the majority votes and the opposition party bloc remaining in the minority. In this article, although it is important how the separation of powers theory was in previous ages and whether there is a difference in understanding and use today, I think it is a subject that needs to be examined. The article aims to analyze the current situation by examining the ideas of medieval and modern age thinkers, starting with the views of ancient thinkers about this theory.

Keywords: The Theory of the Separation of Power, French Declaration in 1789, Montesquieu's Theory , Modern and Democratic State, Political Parties Order

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INTRODUCTION

One of the foundations of classical constitutional law, and even the second-ranked theory after the representative regime, is undoubtedly the theory of separation of powers. The theory of separation of powers aims to limit the state power by dividing it within itself and thus to secure the fundamental rights and freedoms of individuals.

In order to limit the theory, state power; He separates three branches, the legislative, the executive and the judiciary, and argues that each of them should be given to three separate organs. In the modern sense, the theory of separation of powers is identified with the name of the French philosopher Montesquieu, and according to this, it is expressed metaphorically as the separation of state power into three powers: If a point is withdrawn by equal forces from three different directions, it will remain stable, and if the state power is withdrawn by three different forces in accordance with the same logic, it will remain stable.

Therefore, state power is defended on the grounds that if it is withdrawn by three separate forces in accordance with the same logic, it will remain stable. The theory of separation of powers, which forms the basis of modern states, actually foresees the separation of functions and organs in terms of administration. The identification of constitutionalism and separation of powers is based on Article 16 of the French declaration of human and civil rights in 1789.

THE DEVELOPMENT PROCESS OF THE SEPARATION OF POWERS THEORY

A. Antique Period

Ancient Greek thought's both philosophical and intellectual history should be based on the names of Socrates, Plato and Aristotle. In ancient Greece, the city-state was designed as a political, social, economic, religious and independent unity or organism, and a community relationship was established by dissolving the society within the State. In other words, as a result of the understanding of absolute dominance and control among the members of the society of the city-state - up to their private lives - people's commitment to the state has increased. (Kutlu, 2001, pp. 17-18). On the other hand, if we look at the important thinkers

of the period, Plato, a student of Socrates, in a period when the struggles between classes reached wide dimensions and democratic tendencies were on the rise, B.C. his ideas are very important because he lived in Athens between 427-347 years and managed to write his name in history with golden letters in directing the humanities with his ideas. According to Plato, the state is like an organism and people are like the cells that make up that organism. Therefore, people are seen as a means, not an end. (Güriz, 2015, p. 153). Plato, declaring the concept of community as the necessity of establishing the community because people have to meet their needs such as food, drink, shelter, and clothing, explains the division of labor, which is a natural and social necessity, as follows: It consists of the producers - intermediaries - the day laborers, the second class of protectors - the warriors, and the third class of rulers. (Platon, Eyüboğlu , & Cimcoz, 2017, p. 54).

Plato, who believes in innate inequality, bases people's innate abilities while making class distinctions. In this way, people will specialize in the field in which they are talented, and as a result, the society will grow. In other words, the producers who produce the needs of the people in the society, the intermediaries that ensure the exchange of these values in the society, and the people who participate in the production with their bodily strength, that is, the daily workers, will constitute the first class of the society. They are given the right to property and the right to found a family. (Ibid. p. 55-60). Plato, who made up the second class, described the protectors and warriors in a broad way, briefly stating that the duty of these people was to ensure the continuation of the state, that is, to protect the state against attacks that may come from foreigners and to ensure the execution of laws within the state. The best of the guardians will also be able to become rulers. The third class of rulers believe that the importance of the rulers for the state is the same as the brain organ is for the human body. He stated that their duty is to preach and implement laws and to deal with the education of citizens. Of course, these people who will rule the state are also required to be philosophers and to have philosopher-level knowledge.

Plato accepts the existence of hierarchy among the three classes she mentioned and argues that the members of the classes should not change classes in terms of the peace and stability of the state. Plato, who expressed his opinion on many issues such as goodness, evil, righteousness, welfare, especially education, art, equality, law, state and

management, from his own point of view and tried to create his own state, said that there were five types of government and therefore five types of people. believes. At the forefront of these administrations is the aristocracy, which he placed and adopted. Afterwards, he classifies and defines as timocracy, oligarchy, democracy and tyranny. Plato gave place to the subject of separation of powers in his work called “laws”. Accordingly, the state should be governed by a committee called "law enforcement officers".. This committee consists of thirty-eight people. People who are prominent in the society in terms of intelligence and character and who are between the ages of fifty and sixty have duties such as protecting the law, keeping the property records of citizens, and punishing excessive and fraudulent earnings. The second body was the “advisory council” consisting of 360 people. All four classes elect ninety candidates on separate days. The council is divided into twelve groups and is responsible for taking care of the city's (bazaar-market) affairs and public order at equal times of the year. The third body, the “high council”, consists of the ten eldest (senior) members of the society's leading clergy and law keepers, who gather at dawn every morning. The task of this assembly is designed to ensure that laws are made, to research and find what the best laws can be. Apart from the bodies mentioned above, people with the status of civil servants are charged with carrying out the works. (Göze, 2013, pp. 35-39).

While examining the Greek state, Aristotle states that there are three good forms of government and that with their deterioration, three bad governments will occur. The rule of one person in the common good and lawful is the Monarchy (Kingdom), the rule of the few is the Aristocracy, and the rule of all citizens for the good of the whole community, that is, the good government of the middle class is Politeia. (Aristoteles & Translator Tuncay, 1975, s. B.3 C.8 pp.81). When a deviation or mismanagement is seen in these systems; Monarchy turns into Tyranny, Aristocracy into Oligarchy, and Politeida into Democracy. Aristotle especially cared about the Politeia, that is, the good management of the middle class majority, and brought it to the fore. Philosopher, who is of the opinion that it is a form of government that combines the good aspects of oligarchy and democracy, said that the moderately wealthy class consists of more virtuous people, they have the ability to act in moderation, and the rule of equal and similar people is actually important for the state, defends the view that these features are only found in the

middle class. (Djuric, 1970). Aristotle makes the distinction between law and law enforcement indirectly. He used the term constitution in his work named Politics, according to which constitution means the regulation of powers and duties. The duties and powers of the persons who will participate in the administration of the police state are determined by the constitution. Within the scope of the separation of the state administration function, citizens express their thoughts that they can take office as a member of the legislature or as a judge.

b. Roman Period

Polybius, who lived between 200-120 B.C. and put forward his thoughts in his work called Istoriai, is accepted as the father of today's mixed or hybrid government systems. Close to Plato's views on governments, she considered governments in a cycle from bad to good and then worse again. As a form of mismanagement, tyranny based on the unlimited power of one person, monarchy based on reason and logic, aristocracy in the minority administration that takes care of the happiness and well-being of the people, and oligarchy, the rule of the nobles who are greedy for money, and finally, it has classified democracy, which is the rule of the people based on equality and freedoms, as forms of government. (Skarikj & Ivanov, 2006, pp. 409-421). According to the philosopher's thought, the best form of government is a mixed government, which consists of the good sides of all forms of government. The Roman political system at that time was designed to reflect this very idea. So much so that, while the consuls had the executive power, the people had the control power, and the senate had the powers to decide on financial matters, to supervise, to send and receive envoys. Therefore, when we look at the powers of the consuls, it is clear that the monarchy is dominated by the aristocracy in terms of the powers of the senate, and it is in a mixed structure with the democratic management features in terms of the power of the people. Polybius expressed the view that the mixed constitutional order could be disrupted, albeit with a delay.

Marcus Tullius Cicero, who lived between 106-43 BC, is one of the important statesmen and thinkers raised by the Roman. Cicero was also the most outstanding thinker among the representatives of the Stoic school of philosophy in Rome. According to Cicero, a person should live in accordance with moral principles and know how to restrain his passions and desires when necessary. Man should live honorably, everything that

is honorable and leads to virtue is in accordance with nature, and everything that is devoid of honor and virtue will also contradict nature. Man expresses the supreme being with moral values as well as having the freedom of will. Cicero accepts the principles of natural law as an unchangeable principle at all times and in all places. In other words, natural law existed before there was written law, and it supports the thesis of the existence of natural law even before the state was established. (Kambovski, 2010, pp. 71-72). Based on the monarchy, aristocracy and democracy systems, Cicero made the analysis that the three systems have weaknesses and that the best, ideal form of government can only be reached by forming a "mixed form of government" by combining the good aspects of these three forms of government. Such a mixed constitution will only be the best form of government that will not lead to disintegration and deterioration. The philosopher tried to establish a balance between the two powers by sharing the power between the people and the senate, and defended the view that the monarchy would be appropriate for the preservation and continuity of stability.

c. Medieval Thoughts

This period has the characteristics of the period in which Feudalism reigned. Sovereignty in the feudal state is not monopolized by the King, that is, rights and powers such as legislative, executive, judiciary and tax collection are shared between the landed feudal lords. The king, too, ultimately had the status of a feudal lord and had equal rights with other lords (primus inter pares). In this system, where there was no central authority, feudal lords (seigneurs) had the authority to set and enforce rules within the boundaries of the manor. In this context, the seigneurs had judicial, financial and administrative powers over their lands. In the feudal system, in the hierarchical order, the King was at the top, the landed feudal lords were in the second place, and the third class was the knights, who could be called landless nobles. The feudal order of society had prepared a suitable ground for the establishment of the supremacy of the Church. (Poggi, 2016).

On the other hand, as the cities started to grow, the bourgeoisie class began to emerge. After the bourgeois class, consisting of merchants and industrialists, came under the protection of the King, city life began to intensify even more. Thus, this new class, which began to have the powers

held by the feudal lords, completely abolished the serfdom institution in the European continent in the 15th century. (Akyılmaz, 2015).

The most important source that influenced the medieval political thought was Christianity. While examining the political thoughts of the Middle Ages, it would be useful to briefly include the ideas of Thomas d'Aquino, a Christian thinker who will shed light on the future. Thomas d'Aquino lived between 1225-1274 and tried to reconcile Aristotle's ideas with Christian dogmas. The philosopher, who wrote the Summa Theologica (summary of theology), is a work of special importance among his other works. According to the philosopher, since man is a rational creature, he has the ability to regulate his behavior according to reason, and therefore he advocated the idea of accepting that the will is free. The mind is the only criterion and the only power for a person to achieve good or bad. Thus, what is called a law will be an order or rule of reason. Just as the mind directs the human will, the divine mind also directs the divine will. Starting from this, Thomas d'Aquino believes in the existence of three kinds of laws. At the top of the hierarchical scale, the sum of the rules that come from the will of God, not through reason, but through the holy books through revelation, that is, the "immortal law", the second place is the "natural law" (the part of the divine mind that reflects on the beings constitutes the natural or natural law) and at the bottom, the rules made by the human mind, namely the "positive law". (Kambovski, Filozofija Na Pravoto, 2010, pp. 77-84). Thomas d'Aquin, who was greatly influenced by the ideas of Aristotle, explains the necessity of a mixed government as follows: accepted the monarchy as the best form of government because it is in accordance with the idea of unity in the universe, that is, there is only one power holder at the top, political administration, which consists of a democratic form of government, will be successful because certain people use certain powers, and because the aristocratic government has the authority (right) to elect the person who will use the power. He argued that the law aimed at ensuring the common good should be an element that limits the legislator, and that it is also possible to remove the power user who abuses it (the party giving the power to use the power can be the people, or it can be dismissed by a superior authority, which states that the representative of the superior authority on earth is the Papacy).

The Magna Carta Libertatum (Great Charter), which constitutes an important turning point in the development of the parliamentary

government system in the historical process, and which was the first written document restricting the authority of the state in favor of freedoms, in the 13th century, in the 1215s, in which the Monarch's powers were restricted. It is the first document that has a vital importance in terms of freedoms and the theory of separation of powers and is actually put into practice. King John the Homeless got into a fight as a result of his disagreement with the Papacy and lost the fight. After this defeat, feudal lords and barons started their struggle by revolting against the King and as a result Magna Carta Libertatum was signed. Thus, the Magna Carta, signed in favor of a certain class, is the first historical document that limited the monarch, embodies very important principles such as separation of powers and the rule of law, and guarantees fundamental rights and freedoms.

d. Modern Era Thoughts

If we look at the general characteristics of this period, which emerged in the European continent and has a great importance in terms of today's thoughts, the renaissance movement, which means "rebirth", emerged in the Italian city-states and caused a mental change in the members of the leading intellectual strata of the society. In other words, based on the famous thesis of Pythagoras, the Greek thinker of the time, that “man is the measure of all things”, there was a focus on human nature and achievements instead of the power and secrets of God. The dogmas of Christianity and the authority of the Church were broken, and human beings were rediscovered and gained the quality of being the most important being. (Akyılmaz, Siyasi Tarih, 2015, pp. 31-32). Afterwards, it became very influential in Germany, France, England and Northern European countries, together with the Reformation movements against the Catholic Church. Thus, the awareness and mentality change that the Renaissance and Reformation movements brought about in Europe laid the groundwork for the French Revolution that would take place in 1789. (Göze, Siyasal Düşünceler ve Yönetimler, 2013, pp. 135-138). In terms of the theory of separation of powers, our subject will be examined in this section as the ideas of John Locke and Montesquieu have a different importance.

By pioneering the liberal state system, John Locke served as the standard bearer of the "*Liberal School*" not only during his lifetime but

also for many years after his death, and inspired all thinkers who defended popular sovereignty and natural rights. According to Locke, the state was established as a result of a contract that people made afterwards, and the parties to this contract are those who govern and are governed. The main purpose of the state is to secure freedoms. These rights are the right to life, that is, the right to life, the right of property, that is, the right to property, and the rights to liberty (liberty), and he argued that it is the duty of the state to secure them. (Locke & Trl. Doc. Dr. Bakırcı , 2018, pp. 105-135). Locke, who said that man, a social creature, is born equal and free, said that the desire to punish caused the social contract to be made as a result of some people's attempts to attack other people's personal rights, freedoms and property by violating natural law.

By making a social contract, people will agree to build a society for living in happiness, security and peace with each other. With this agreed social contract, the duty of the power left to the state after the people became a community, the death penalty and the punishment of various simple crimes, it revealed the necessity of enacting the laws that will regulate these punishments, protecting the property right, fulfilling the executive and doing all these for the general (common) good. (Güriz, Hukuk Felsefesi, 2015, pp. 187-188). Locke, who defends the view that the body that represents sovereignty at the level of the state is the legislature, and that the executive function should belong to the legislature as well as the making of laws (that is, he favors the legislature), defends the administrative system based on the separation of powers of three organs, namely the legislative, executive and federative organs. (Locke & Trl. Doc. Dr. Bakırcı , Yönetim Üzerine İkinci İnceleme 105-128, 131-135, 2018, pp. 153-156). He argued that the legislative body, the Parliament, should be in continual meeting and that the protection and expansion of the basic freedoms of the people who are members of the society should be done through the law. Locke said, “The purpose of law is not to abolish or limit liberty, but to preserve and extend it. Where there is no law, there is no freedom. There is a constant need for an executive body to implement the laws made. This task will be undertaken by the executive body, which operates in a continuous manner, which oversees the laws in force. According to Locke, who is designing a third body as a federative body, the task of this body is the power to make war and peace and sign treaties with foreign countries.(Ibid).

As forms of government, he envisaged democracy (if the society establishes the political order, makes the laws and elects the people to implement it), aristocracy (in case the legislative power is governed by a certain minority) and monarchy (makes the distinction between hereditary and elective monarchy) and the use of legislative power by one person.(Ibid. pp It is accepted that Montesquieu is the architect of the separation of powers theory as legislative, executive and judicial separation of powers and its application today. Montesquieu, who lived between 1689 and 1755 and is considered to be one of the most important thinkers of the enlightenment period and the founder of political science, presents the theory of separation of powers in a unique way in his work called The Spirit of Laws.(Montesquieu & Trl. Günen, 2017).

Examining the concept of freedom in the state order, Montesquieu describes freedom as a society where laws exist, that a person can only do what he wants and cannot be forced to do what he should not want. Saying that freedom is the right to do whatever the laws allow, Montesqueiu explained that if a person did something prohibited by the laws, he would not be completely free again, and the reason was that other people would have the same right. (Göze, Siyasal Düşünceler ve Yönetimler, 2013, p. 207). He defends the idea that freedom will only be in moderate governments and that this form of government will only take place on the condition that abuse of power is prevented. In that case, the abuse of power will mean "stopping the power with power or power with power" and only in this way freedom will be in question. (Montesquieu & Trl. Günen, Kanunların Ruhu Üzerine, 2017, p. 197). He examined the issue of the limitation of power with power, that is, the separation of powers, in the Spirit of Laws, in Book XI, Issue 6, under the title of “On the state structure in England”. On the other hand, he both examined the British political structure and put forward the theory of separation of powers.

Legislative power makes, changes and abrogates laws; the executive power decides on war and peace, is responsible for the external and internal security of the country, on the other hand, it sends representatives to foreign countries and receives incoming representatives; The third power, the judiciary, punishes crimes and resolves disputes between individuals. In this way, citizens will not be afraid of other citizens, and a government with freedom will be formed where everyone feels safe and finds peace. Montesquieu argues that there can be no freedom in situations

where the legislature, executive and judiciary are intertwined or merged or gathered in one hand. (Montesquieu & Trl. Günen, Kanunların Ruhu Üzerine, 2017, pp. 197-205). In a free state, the free man governs himself, so the legislative power must be in the people as a whole. However, according to Motesquieu, who tries to explain with examples, such an opportunity is not available in large and large states, and since situations that may cause many inconveniences will arise in small states, the people will be able to do whatever they want by electing their representatives.

The representatives of the people differ depending on whether they are elected by the people of the region or by people belonging to a certain view, and it is of the opinion that the people should not interfere too much in the legislative affairs and that it would be more appropriate for the representatives to decide by their own will. (Montesquieu & Trl. Günen, 2017, pp. 202-203).

Legislative power has the power to make laws and checks whether the laws are well implemented or not. Next to the assembly consisting of representatives of the people, a second assembly will take place representing the nobility. Both assemblies have been designed in such a way as to prevent the decisions to be taken against them by considering the interests of the groups they represent. Membership of this second council will pass from father to son. It consists of the notables of the society in terms of wealth, glory and honor, and they will have the authority to participate in the legislative processes in order to protect their rights. However, the power to decide on financial matters such as tax matters will be decided by the assembly formed by the representatives of the people. (Göze, 2013, pp. 207-209).

Montesquieu gives the executive power to the monarch. He explains the reason as follows; if the executive is given to a few people coming out of the legislative body, the legislative and executive powers will be intertwined (unification is in question) and a situation may arise that will endanger freedom. That is, he states that he is against the parliamentary government system and parliamentary government systems. While explaining the judicial power, the judiciary emphasizes that judges should not have duties and powers other than to enforce the law, and that "judges should be the mouth of the law". Although the judiciary is not a permanent body, he believes that judges can change by citing the model in the Ancient Greek period and it would be right to be chosen from among the

society. In summary, Montesquieu defended a different thesis by keeping the legislative, executive and judicial powers at the same level. Mentioning that there are three types of government, Montesquieu classifies them as republic, monarchy and despot or tyrant government. The government in which the whole or a part of the people is dominant is the republican government. The republic divides the ruling power into two as democracy and aristocracy, based on the criterion of whether the sovereign power is in the hands of the people or in the hands of the few. Monarchy, on the other hand, argued that one person is the lawful good rule of the monarch or prince, while despotism is the lawless, arbitrary rule of one person.

In terms of the establishment of today's modern democratic society and democratic state governments, Montesquieu is accepted as a cornerstone in terms of governmental systems and constitutionalism formed on the axis of separation of powers theory, and the de facto inclusion of the theory of separation of powers in the constitutional document is accepted as the initial declaration of the 1776 Virginia Constitution. “The legislative, executive and judicial branches will be separate and distinct so that the organs cannot exercise each other's powers, but the local court judges have the right to be elected to either of the two chambers of the legislature”. (Özbudun, 2017, p. 15), in addition, the theory of separation of powers was included in Article 16 of the 1789 French Declaration with the following expressions: “There is no constitution in a society where rights are not guaranteed and separation of powers is not made.”

CONCLUSION

The principle of separation of powers, which is one of the indispensable principles of the rule of law, has been thought and put into practice as a basic principle as the abuse of power and the assurance of freedoms that may arise at any moment. This idea, which has become the symbol of the struggle against absolute monarchy, has successfully completed this task and has been playing an important role in legal and political fields for more than three hundred years. This principle, which maintains its importance today, has not lost its meaning and importance, but it has been expressed by the academic circles that Montesqiue moved

away from his philosophy of thought and showed stubs from its purpose and meaning over time. Especially with the political parties taking their place in the legal order, it has been effective in the principle of separation of powers and has evolved into an order that was not taken into account before. (Anayurt, 2020, p. 359).

The emergence of political parties and their involvement in the democratic system have greatly deformed the principle of separation of powers, especially in the parliamentary government system, which envisages the exit of the executive from the legislative majority, and the mutual equivalence of the control mechanisms has been shown as the reason why they remain as written rules on paper. In accordance with the principle of separation of powers, the fulfillment of functions by different organs, that is, in terms of legislative and executive, the organs that set and implement the rules differ. However, in today's practices, the general rule-making function and the management function are mixed. Especially in parliamentary regimes that adopt the soft separation of powers, these functions are intertwined and the powers of law-making and government have become concentrated in the same body, namely the executive. Martin Loughlin states that this situation arises from the fact that today's states have become 'administrative states' and that the breadth of administrative authority affects the principle of separation of powers and destabilizes it. (Loughlin, 2010, p. 453).

It is noteworthy that constitutional lawyers especially agree that political parties render the system of separation of powers ineffective. In this context, Gözler further stated that in practice, both the legislative and executive power are in the hands of political parties. (Gözler, 2016, pp. 221-222). In fact, some academic circles, on the basis of the unity and indivisibility of sovereignty, state that there is not a separation of powers, but a separation of functions and organs. (Özbudun, Anayasalcılık ve Demokrasi, 2017, pp. 144-145). Both the legislature and the executive can create dangerous and undesirable situations by showing a tendency to abuse their power and go to extremes. Therefore, it may be possible to prevent this and to solve it with mechanisms that will make the organs dependent on each other. In this way, with the establishment of usage mechanisms, the danger will be prevented to a large extent.

As a result, especially in parliamentary regimes, the legislative and executive relations and their interaction mechanisms have shifted to the

power-opposition relationship. Therefore, this loss of meaning of the principle of separation of powers has led traditional constitutionalism to seek new constitutionalism. In this context, while traditional constitutionalism works on the basis of the separation of powers for the limitation of power and the protection of freedoms, the new constitutionalism doctrine is based on the strengthening of mechanisms such as the supremacy of the constitution, the constitutional judiciary and the independence of the judiciary. (Gill & Cutler, 2014). The theory of separation of powers, which forms the basis of modern states, actually foresees the separation of functions and organs in terms of administration.

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