

## FINAL REMARKS

As a method, comparative law is one of the best instruments available for institutional design. In this study, in addition, I have incorporated some elements of historical and sociological analysis to appreciate the effective performance of the institutions. It would seem pretentious to have explored all the tendencies towards parliamentarization that presidential systems present; what I have wanted to show is that it is not an idiosyncratic behavior, in which only constitutional systems grouped in a certain geographic area participate, but rather a generalized response to find solutions to one of the most pressing problems that must resolve the constitutional state: governability.

There are clear constants that are noticed wherever reforms or new constitutional texts are debated: harmonizing the different political expressions within a plural society, or that tries to be so; control the acts of power and provide conditions for an effective exercise of governmental action. The first of these aspects has to do with public liberties and social equity; the second, with avoiding authoritarian relapses and avoiding the distortions caused by corruption, bureaucratic hypertrophy, and excesses of power; the third, with the real possibility of offering the satisfiers that concern the state: legal and physical security; individual and collective justice; political and economic stability; benefits and social development.

It has been common for constituents to analyze the success or failure of other analogous companies, and to engage in the discussion of legal, political, and social theories from which specific forms of constitutional organization can be derived. The review of other people's experiences, or of one's own antecedents, has been present in almost all the great constituent debates. When these experiences have not been found in a stage close to the moment in which the deliberation takes place, the gaze has turned to the classical world.

Unlike those foundational or original constituent processes, at present, doctrinal or historical references are not always found in constituent debates. Instead, it alludes to what is happening in other systems and the specific demands that political agents pose to each other are analyzed. The interest in knowing what happens in other systems is evident, even if they are

geographically and even culturally distant. Somehow the phenomenon of globalization, of a communicational and economic essence, also transcends the universe of institutions.

Hence, it is necessary to identify the changes that are taking place in the forge or reform of contemporary constitutions. One can see how the constants to which I alluded are shaping a new aspect of the constitutional state. It is not that one engages in irrepressible pragmatism, or that one acts without sources of inspiration or bases of conviction; generally, a democratic mood prevails, or at least a democratizing appearance. What is attempted is to resolve the complex issues of political coexistence, social development, and governmental efficacy. It is for these reasons that I tried to identify the parliamentary institutions that have been incorporated into the presidential systems, and to note how this trend has intensified in the last four decades.

The *pragmatic variant* consists in that the constituent exercises have been detached from the original matrices of the systems. Adducing the *purity* of a system or the application of a doctrine, such as fencing to avoid institutional change, is something that happens infrequently. Arguing, for example, that the incorporation of the vote of confidence or the motion of no confidence affects the presidential system, or that it violates the principle of separation of powers, is irrelevant when what is being examined is how to make the exercise more rational power.

It is true that sometimes you hear the echo of the old constituent debates, but when things are looked at better, the conclusion is reached that the constituents of Philadelphia, imaginative and enlightened as they were, could not have dictated the only ways possible to make a presidential system functional. When Locke and Montesquieu are reread, and even their classical precursors, Aristotle, Polybius, and Seneca, their greatness cannot be ignored, but neither can the only possible key to shaping public power be attributed to them. Furthermore, when article 16 of the Declaration of the Rights of Man and of the Citizen of 1789 is invoked, it cannot be ignored that the same Assembly that proclaimed and reiterated it in 1791, also adopted a constitution where, in application directly from that precept, it was said that “the person of the king is inviolable and sacred” (Chapter II, Article 2).

It turns out that the constituents of Philadelphia and the French revolutionaries, such as the enlightened philosophers or the forerunners of the classical world, could not foresee certain institutions characteristic of our time. Political parties, electoral litigation, constitutional justice, international tribunals, and many other contemporary legal realities have emerged to

complement, not to distort, the accumulative process of experiences and knowledge that allow the construction of a new type of state. Advocating for the immutable purity of systems is legal, as a doctrinal or political position, but it does not find support in contemporary institutional reality, nor is it necessarily the best option to provide an institutional channel for the democratic state.

When the reception of institutions from other systems is carried out trying to avoid the effects of negative institutional interactions, the advances become affordable. This form of fertilization has been used in other stages and today it is part of the common heritage of institutional systems. For example, constitutional courts emerged within parliamentary systems, but have found greater diffusion in presidential ones; the constitutionalization of political parties is also typical of parliamentary systems, but it has spread to presidential systems, with significant advantages for the consolidation of the constitutional state.

Democracy is known to be a peaceful procedure for electing rulers who are deemed legitimate. It can be said, equally, that the presidential and parliamentary systems are ways of organizing power in each state. Although I have a predilection for the presidential system, and I find the advantages to which I have referred in this study, I do not believe that the British or the Swedes, to mention two cases, could gain something by adopting it, and if instead they would lose a lot.

The preferable system is one that can be improved through an exercise of intelligence and collective responsibility. Innovations that generate insurmountable contrasts in the cultural environment in which they are produced and that are based on processes that are incomprehensible to their addressees are counterproductive. Building a parliamentary system to remedy the defects of a presidential system is very absurd. Who could design a good parliamentary system, about which they have no experience, if they cannot correct a bad presidential system, with which they are familiar? In other words, if what is known cannot be corrected, how can we build what is unknown. I am in favor of the rationalization of the processes of power, not of the irrationality of substituting at its roots what may well be amended.

Furthermore, when models are imported that lack implantation in a cultural milieu, there is a negative effect: the new instruments are only known to a few. This concentration of knowledge is contrary to any democratic project since it has exclusionary consequences for the other members of society. When a political system is built only for those initiated into the new institutions in place, the results are far from what could be wanted and expected.

This does not happen when parliamentary instruments of control are adopted by presidential systems, for various reasons. In the first place, because the worst that can happen is that they are not used, and things remain as they were. If the ministers do not make use of their right to occupy the parliamentary rostrum, or the representatives do not ask or question, it means that the change was only skin-deep. Even so, institutions remain latent in life, and at any moment new circumstances may arise that activate them. Second, this type of institution has the virtue of functioning as a vector of democratic education. Society begins to familiarize itself with one of the essential forms of democracy: public deliberation. This fact means going from a *passive democracy*—only characterized by the freedom and objectivity of suffrage (in the best of cases)—to an *active democracy*, where citizens recognize themselves as the center of the debate.

There are numerous forms of direct democracy whose adoption is compatible with a representative system. Those who believe in the benefits of the representative system, including myself, must admit that to preserve the representative system it is necessary to include instruments typical of direct democratic systems, because the democratic culture is strengthened by stimulating public deliberation. Only it should be done, as in the parliamentarization of presidential systems, without triggering negative interactions.

The concentration of power, on the part of any body, exacerbates the propensity to subordinate others, and fosters excess power with its corollaries of arbitrariness and corruption. Hence, the rationalization of the presidential system contributes to attenuate the components of personal domination and the excesses to which it is prone in the exercise of power.

Well-balanced constitutional designs make it possible to correct the behavior of institutions, but they are by no means infallible, and a large part of their success depends on the appropriate interaction with other factors. Among the elements external to the normative system, which make up the set of constitutional externalities, the most relevant are the cultural context, the operation of the economic system and the general demands on the institutional apparatus. The traditions, behaviors, and perceptions of society contribute to shaping the characteristics of institutions.

The economic system, in constant interaction with the political system, can generate deformations in the power structure or can contribute to its success. It is evident, for example, that the distribution of wealth in the United States, Great Britain, Germany, or France, to mention only a few countries, gives their respective constitutional bodies a more comfortable space in their performance and development, than that available in places

where the high concentration of wealth gives the circle of economic power a greater capacity to influence political decisions.

All forms of concentration or deconcentration of power (economic, media, union, intellectual, ecclesiastical, etc.), are *constitutional externalities*, alien to the structure, organization and functioning of the organs of power, which project their effects on the behavior of institutions.

Only a part of the power relations is subject to the constitutional requirement; beyond the political space regulated by law, there is another broad network of interests that, depending on their position, magnitude, ability, and decision to take risks, influence, sometimes in opposing and exclusive senses, to guide institutional action. For this reason, in the process of parliamentarization of the presidential systems, the results are very different. In states that come from an authoritarian tradition, with a high concentration of income and a low cultural level, the effect of constitutional changes could be of low impact; on the contrary, in systems where there is a democratic tradition, a lower concentration of income and a high cultural level, even slight changes produce sensible results.

In these cases, the reforms adopted by States with a lower level of legal and political development have another function: to set the direction to be followed by society, in the sense of increasing its cultural level, and to reform, over time, the other factors that act as externalities in relation to the constitutional system. If the institutional changes are not used to promote other adjustments in the context, it would succumb to the surrounding conditions and the negative effects of the concentration of power would be perpetuated. Conservative attitudes generate other types of outcomes because they prevent a gradual adaptation of the institutions and their environment, and ultimately produce very closed systems that end up restraining, in a factual way, the rest of the social actors.

*Constitutional externalities* have a greater record in open systems; In closed systems, the hegemonic force of political power is imposed or prevails over other agents. This process is not always understood, and therefore two positions are incurred, antithetical, equally unsuccessful: the conservative, which in the face of the scarce possibilities of achieving reasonable changes, prefers to maintain the status quo, and the radical, which due to analogous considerations he believes that reforms must be so resounding that change is inevitable. In both cases a similar result is unleashed: the renewed concentration of power. If the power does not change, it hardens; If it changes in a drastic sense, to impose itself on the environment, it also tends to rigor. The two extremes often lead to a similar fate, regardless of the intentions of their promoters. Except for revolutionary changes, the apparatus of power

can only be mobilized, successfully for its promoters and without risk for its recipients, by making it more rational and reasonable.

Constitutional theory has not yet identified how the adaptation of institutions to the context occurs, and vice versa. This is a highly complex issue in which at least two aspects must be analyzed: institutional interactions, within the constitutional system, and constitutional externalities. This need has been overshadowed by the study of constitutional models, which do not always include a holistic perspective that encompasses the design of institutions and ongoing cultural processes, the patterns of behavior that are intended to be corrected or induced, and the magnitude, direction, intensity, and duration of the resistances that may be faced.

Policy decisions, like political decisions, are often supported based on agreements and persuasive media actions. Sometimes, when they respond to express demands from society or a sector with a special interest in regulatory decisions, a third factor also occurs: spontaneous acceptance and even adherence to change. All this, however, does not always occur, and sometimes the opposite situation arises: the benefits of the rule are not easily understood by its recipients, or they involve costs that most agents refuse to pay. Under these conditions, wear and tear falls only on the promoters of the measures, and those who did not subscribe to them reserve themselves to later capitalize on any resulting advantages.

In a variant of Gomes Canotilho's thesis, it can be said that in presidential systems, political power relies on three possible forms of organization and functioning: *monist*, where the presidency is dominant; *dual*, where there is the greatest possible symmetry between the presidency and Congress, and *triadic*, where the presidency, the government, and the congress are distinguished with their respective areas of competence. The first of these forms corresponds to a highly concentrated model, such as the Mexican one; the last, to a very decentralized model, adjacent to the parliamentarian, such as the Portuguese. In the central zone there remains the possibility of balancing, as far as possible, the relationship between the organs of political power. I emphasize that this is sought *as far as possible*, because the very nature of a collegiate, plural body, without operational powers, whose decisions are usually of a general nature, which discusses in public view and exhibits its contradictions, has a lower level of cohesion, secrecy, and discipline than the government, even if it is exercised in the cabinet and presents traits of pluralism. Government deconcentration is strengthened when, in a presidential system, a cabinet government is adopted. This does not mean that there is a duality between president and government; the president is still head of state and government, but in government functions he has collabo-

rators who also answer to the representative body. The constitutional norms that transfer to the collaborators the indemnity that only corresponds to the head of state, are not adapted to the rationality of a democratic and republican system. For these purposes, I understand *as democratic the system that has legitimacy in terms of its origin, and republican the one that acts in accordance with the law*. In one case the interest of the people, the demos, is present, and in another the interest of the state itself, the *res publica*. The presidents are linked by their democratic origin and their republican performance; his collaborators, who have not been elected but appointed, are only bound to the republican performance of their function.

Presidents cannot be subject to the political control of congresses because it is not within the power of the representatives of the nation to alter the electoral decision of the nation itself; on the other hand, in a republican system there should not be any limitation that limits the control actions of the representatives of the nation in relation to the assistants of the president. The intangibility of the head of state only extends to his collaborators in authoritarian regimes.

It is advantageous for every ruler that the institutional loyalty of his collaborators is associated with two levels of control: that exercised by the president, and that which, from another perspective and with other forms of perception, is carried out by national representatives. The rulers are exposed to the fact that, in the cryptic exercise of power, they themselves are victims of the concealment of the truth by their ministers; this has been a constant of power. When this possibility is reduced to a minimum, those who are at the apex of power have instruments that give them greater capacity to lead and amend in relation to those who receive their trust.

The political construction of Machiavelli did not go in that direction, because the nascent state demanded a very concentrated power, whose success was subject to the personal capacity of the prince. But the *modern prince* must cope with a multiplicity of factors that were not foreseeable five centuries ago for the classical prince; the complexity of the state has reached levels that were unpredictable, and if certain aspects of the political mechanics noted by the Florentine genius are still in force, many others have appeared and demand a different way of conceiving power. The idea of strength or weakness of the rulers, therefore, cannot be measured according to the scale established at the dawn of the modern state.

Today, we can point out that the monistic and triadic extremes imply weakness for the presidential institution. In the first case, the extreme concentration of power makes him vulnerable, which, while granting him pow-

ers to act without counterweights, also makes him responsible for all the mistakes and deviations of power incurred by his collaborators, about whose actions he does not have effective means of information and correction; in the second case, his weakness results from not operating the government's devices, and whoever manages them does not enjoy the advantages offered by an investiture that comes from the popular democratic decision. In the intermediate space, of a dual structure, balanced in rational and reasonable terms, there is the possibility of a democratic power whose strength depends not on secrecy and concentration, but on openness and concertation.

The strength of a system is related to the stability of the institutions and the reliability of the agreements. Political understandings become volatile when they lack an institutional reference that gives them certainty and makes them durable. The success of a government requires, among other things, a long-term program that has stable support, at least equivalent to a legislature. Otherwise, each decision is subject to negotiation, and each negotiation may be more eventful than the preceding one. Alliances would vary continuously, making their outcomes unpredictable. This situation would affect the necessary loyalty of those who offer political support and even those who oppose it, and it would prevent the drawing up of a master plan to which government action would be subject. If this risk is not overcome through the proper design of institutions, it is difficult for there to be governance.