First Chapter

REMARKS ON THE SEPARATION OF POWERS

For the purposes of this study, I understand the presidential system as one where the same person exercises the leadership of the state and the government for a fixed period. The parliamentary mechanisms to which I will refer are questions, interpellations, participation of ministers in congressional debates, question of trust, motion of censure and dissolution of the congress.

To determine whether we are dealing with a full presidential system or one that is only partially so, it is necessary to compare at least five indicators related to the head of the government: the form of his election, the procedures for exercising his functions, the duration of ration of his charge, the responsibilities to which he is subject and the relationship with the head of state.

Having analyzed these factors, I excluded from the study constitutional states where there are systems whose profiles correspond to intermediate structures that qualify them as semi- or quasi-presidential, or parliamentary. For this reason, I dedicate a separate chapter to the control systems applied in Finland, France, and Portugal, for example. The basis of the comparative study that I present is made up of African, Asian, and European countries where presidential systems govern, as well as the Ibero-American countries organized according to contemporary constitutionalism.

Due to various historical circumstances, which they are not necessary to comment on now, the presidential system was affirmed in Latin America throughout the 19th century. From their origin, constitutional systems adopted a rigid position regarding the separation of powers. One of the undesired effects of that decision was the intangibility of the heads of the Executive Power.

In a paradoxical way, in many systems the principle of separation of powers made it difficult for the congresses to carry out political control. The same illustrated argument that had served to configure the autonomy of the Parliament before the monarch, turned out to be functional for the presidents to stop the control actions by the congresses. It was argued that any interference by the organs of political representation in the life of the

government violated the principle of separation of powers. This instrument to defend the freedom of the representatives before absolutism, became a substitute for democracy.

Today, our own and other experiences show that to rationalize the exercise of power, it is necessary for the political organs of the State to carry out their duties in a responsible and controlled manner; that their relationships obey a model of equilibrium that facilitates their performance for the benefit of the governed, and that the deconcentrating of their functions is carried out without diminishing their effectiveness.

In this study of comparative law, I present an overview of the adoption, by presidential systems, of various institutions that have their origin in parliamentary systems. It is a process of adjustment in which progressive adjustments to the norm are observed, accompanied by changes in the legal and political culture of societies. The intimate association between the normative and cultural processes related to the innovation of numerous presidential constitutional systems is corroborated, as postulated by Peter Häberle.[21] Similarly, regarding the effects produced by the adaptation of the institutions transferred from the parliamentary systems to presidential systems, it is very useful to keep in mind the doctrinal contributions of Dieter Nohlen, according to which the context makes the difference.[22]

I believe that context must be understood in a dual sense: it refers to the cultural environment and the legal system. Each institution interacts, in the social sphere, with the other cultural aggregates, and in the normative space, with the other institutions. For this reason, the same institution presents very different characteristics in each constitutional state. If, in addition, a diachronic analysis is introduced, which is essential when evaluating the functioning of institutions, the variations are even greater. It is essential to bear in mind these circumstances of the institutional function, to avoid the frequent assumption that the transfer of an institution from one system to another produces the same effects in the adoptive system as in the original system.

The contextual explanation of the institutional changes makes it possible to assess the effectiveness of the "grafts" that are gradually being introduced into the presidential systems. Care has been taken not to present them as a panacea, but rather they have corresponded to a phenomenon that results from the increasingly intense exchanges of political and legal ex-

[21] See, among others, *El Estado constitucional*, Mexico, UNAM, 2001.

[22] *El contexto hace la diferencia: reformas institucionales y el enfoque histó rico-empírico*, Mexico, UNAM, 2003.

periences. Although it is not an unprecedented constitutional issue, assuming that the globalization of forms of government has been a recurring fact throughout history, an increase in the speed and depth of the institutional migrations is observed.[23]

The migratory process of the systems is explained by their adaptability. All institutions vary according to the combinations of which they are part, and according to the cultural changes that take place in their environment. The sole argument that each form of organization is proper and exclusive to a system limits the adaptability of institutions. Most constitutional systems are hybrids, in the literal sense that they result from a combination of elements of different nature. There are presidential systems that are combined with unitary or federal organizations, and with majority or proportional electoral systems, as well as with unicameral or bicameral representative systems; there are those with constitutional courts, and the combinations also include different forms of guarantee for individual and collective rights. In other words, there are no formulas whose orthodoxy is based on the secrecy of systems.

On the other hand, each constitutional system has its own identifiers, regardless of the dominant pattern of its elements. What can be transferred from one system to another is the conceptual and argumentative basis of an institution; but in each constitutional space the interaction with the cultural and institutional environment produces different consequences. For this reason, we now insist on the convenience of comparative studies of cultures and legal systems. This took a long time to understand. Until now the idea has prevailed that tracing institutions is as easy as simply copying a text. It is true that there are constants, but this does not mean that all congresses or all parliaments are the same, for example. Today we can find textual expressions of the US Constitution in the Mexican one, but the similarities end there, because in each system they have produced different results.

Institutional singularities, a product of their adaptation to the environment, do not exclude the existence of standards. Although the first modern federal system is the American one, each of the now existing ones has a peculiar behavior, the same holds for other institutions. There are models whose homogeneous elements allow their identification, but congresses, constitutional courts, and the entire range of known institutions present similarities and differences depending on whether a synchronous analysis is made between different systems, or diachronic within the same system.

[23] On this subject see the useful essays collected by Choudhry, Sujit, *The Migration of Constitutional Ideas*, Cambridge, CUP, 2006.

A model is the conceptual representation of a form of organization and institutional functioning, which usually varies in space and time; allows to understand its structure and behavior, which is always dynamic. As for political systems, one of its distinctive features is fluidity. The presidential system, like any model, presents common notes, but is subject to modifications that allow it to provide satisfactory responses to the needs of each constitutional state that has incorporated it. One of the advantages of presidential systems over parliamentary systems is that they are showing a greater capacity for adaptation. On the other hand, if a model is understood to be the dominant scheme of an institution, it must be agreed that the current model is different from the one that gave rise to it. In this sense, one could speak of the classical model and the contemporary model of presidential systems.

To compare constitutional institutions is to identify the common traits and the differences inherent to the context in which each institution operates. The culture and externalities that surround an institution are unique to each system. Sometimes there is greater similarity between different institutions, in similar contexts, than vice versa. A suggestive case, in this sense, is the one that results from the principle of separation of powers.

To assess the development of control instruments in Latin American presidential systems, in particular the vote of confidence, the motion of no confidence, the dissolution of congress and the intervention of ministers in congressional debates, it is useful to have an idea of how the principle of separation of powers has been interpreted.

Latin American constitutional systems adopted a very rigid position regarding the separation of functions. One of the effects of this decision was to protect the heads of the Executive Power from acts of congressional political control. The intangibility of presidents, as a characteristic factor of many dictatorships, had its support in a rigorous configuration of the so-called "division of powers".

The beginning of the Latin American constitutional life coincided with its independence, and this followed the great French revolutionary upheaval, which in turn had important constitutional repercussions in Spain, especially in the Cadiz text of 1812. The constitutional discourse underlined the benefits of the separation of powers that in practice operated as a substitute for democracy. Thus, a persuasive argument was found to keep governments untouched; the most radical theses in this matter came from constitutionalism of the nineteenth century.

Among the outstanding notes of the French Revolution were the ideas of republic and equality, as a categorical response to monarchical absolut-

ism. In this context, it was understandable to postulate the thesis of the separation of powers, to protect the representatives of the sovereign nation from harassment by the monarchs. French parliaments have their roots in the Middle Ages,[24] and tensions with royal power caused these institutions to oscillate between submission and disobedience. When Louis XVI was forced, for financial reasons, to convene the States General, which met in May 1789, he interrupted a long recess of those States that lasted since 1614.

To guarantee the independence of the representatives, the revolutionaries adopted a provision that became one of the basic principles of 19th century constitutionalism. In accordance with article 16 of the Declaration of the Rights of Man and of the Citizen, "Any society where the guarantee of rights is not assured, nor the separation of powers is determined, lacks a constitution." In this way, separation of powers would become the dogmatic basis of constitutional formulations. However, as is well known, in their initial phase all the Constitutions addressed the essential problems for individual freedoms, but the democratic question had not emerged as a political necessity.[25]

Doctrinal criticisms of the separation of powers, such as those supported by G. Jellinek, W. Wilson, R. Carré de Malberg and H. Kelsen, are beginning to find acceptance in contemporary constitutional texts, where little by little a current is making its way which tends to overcome the rigidity originally attributed to this concept. What remains of the idea developed by Montesquieu, which finds numerous precedents in the classical Greek and Latin world, is the need to adopt mechanisms that prevent the concentration of power and that, in addition, allow the control of its exercise. A direct, strict, and unqualified reading of the separation of powers led to an advantageous situation for the holders of government power, because it made them invulnerable to the purposes of control by the collegiate representative bodies.

In many texts the expression "separation" or "division" of powers has even been abandoned. The first constitution of the hemisphere that was detached from the concept was the Ecuadorian of March 6, 1945, which chose to refer to the legislative, executive and judicial functions (articles 23,

[24] *Cf.* Shennan, J. H., *The Parlement of Paris*, London, Sutton Publishing, 1998, esp. pp. 151 et seq.

[25] At this point it is necessary to note that the Latin American Constitutions went further than their French model. In France, the rights of man did not extend to slaves, and the constitutional ban on slavery only occurred until 1848 (Article 6), while in Latin America it figured from the first fundamental norms.

55 and 84); this nomenclator was maintained in the 1946 Constitution and was replaced by the reference to the jurisdictional function from the 1967 Constitution, being preserved in the successive 1979 and 1998. Title V is entitled "Of the State institutions and the public function", and provides the following:

> Article 118. The institutions of the State are:
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> 1. The organisms and dependencies of the legislative, executive, and judicial functions.
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> 2. The electoral bodies.
>
> 3. The control and regulatory bodies.
>
> 4. The entities that make up the autonomous sectional regime.
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> 5. The bodies and entities created by the Constitution or the law for the exercise of state authority, for the provision of public services or to develop economic activities assumed by the State.
>
> 6. Legal persons created by sectional legislative act for the provision of public services.
>
> These bodies and entities make up the public sector.

In Guatemala, the Constitution promulgated on March 11, 1945 —a week after the Ecuadorian— alluded to the legislative power (article 103), exercised by Congress, to the "executive functions", corresponding to the President and the ministers (article 129), as well as the "judicial functions" performed by the courts of the Republic (article 162). The successive constitutions of 1956, 1962, 1966 and the current one of 1985 (reformed in 1993), have preserved, with some modifications, this conceptual line, even though they have added some organs.

The second Panamanian Constitution of 1946 also joined this trend, which preserves the current supreme norm, in force since 1972, and eluded the characterization of the "powers", to adopt that of State organs. The legislative body was established from article 106, the executive, from article 136, and the judicial, from 164 onwards.

The recent constitutions of El Salvador were oriented in the same direction. That of 1982 replaced the expression "public powers" with that of "government bodies", and this has been preserved in that of 1983. Title VI includes the following bodies: legislative, executive, judicial, Public Ministry and Court of Accounts of the Republic.

The Chilean Constitution of 1980, when referring to the government and the congress, avoids qualifying them as "power" and reserves this voice only for the case of the "Judicial Power" (article 73), but without referring to tripartition. It also includes other bodies to which it attributes autonomy:

the Public Ministry (article 80A), the Comptroller General of the Republic (article 87), the Central Bank (article 97).

> In turn, article 113 of the Colombian Constitution (1991), provides:
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> They are branches of the public power, the legislative, the executive and the judicial. In addition to the bodies that comprise them, there are others, autonomous and independent, for the fulfillment of the other functions of the State.
>
> The different organs of the State have separate functions but collaborate harmoniously to achieve their goals.

The Portuguese Constitution of 1976 presents a very advanced conceptual elaboration. Article 108 provides that political power belongs to the people "and is exercised in the terms of the Constitution"; article 110 specifies that the President of the Republic, the National Assembly, the government, and the courts are "organs of sovereignty," and then provides that these organs "must observe the separation and interdependence" that the Constitution postulates. In this way, the problem of plurality of powers is overcome and functional separation is consistent with relations of cooperation and control.

The Spanish Constitution of 1978 only qualifies the Judiciary as "power", as it refers to the other organs of the State such as the Crown, the *Cortes Generales* and the Government.

Another suggestive case is the South African. Article 41 of the 1996 Constitution sets out the principles of cooperative government and intergovernmental relations, in the following terms:

> 1. All spheres of government and organs of the State in their areas of competence, must:
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> a. to preserve peace, national unity and the indivisibility of the Republic;
> b. to ensure the well-being of the inhabitants;
> c. to provide the Republic with an effective, transparent, controllable and coherent government;
> d. to be loyal to the Constitution, the Republic and its people;
> e. to respect the constitutional status, institutions, powers and functions of government of each of the other spheres of government;
> f. to not assume powers or functions except those expressly conferred by the Constitution;
> g. to exercise their powers and carry out their functions without the geographic, functional or institutional competencies of the government invading other spheres of authority, and

h. to cooperate with mutual trust and good faith
  i. practicing friendly relationships;
  ii. supporting each other;
  iii. informing and consulting with each other, on matters of common interest;
  iv. coordinating their actions and standards;
  v. respecting agreed procedures, and
  vi. avoiding legally contending with each other.

By overcoming the conceptual rigidity of the separation of powers and replacing it with a more flexible scheme associated with the separation of functions and competences, the essence of the original idea of balances developed by Montesquieu and already enunciated by the Greek and Latin classics is retaken. Even when the famous French writer identifies the original sources of the balance thesis in Tacitus, everything indicates that he does not do so because he does not know the texts of Plato, Aristotle or Polybius, but because he attributes the origin of the practice to the Gallic people.[26] The principles of equilibrium were raised by Polybius with a precision unparalleled in antiquity.[27] The need for cooperation between the organs of power appears clearly when he explains the constitutional organization of Rome: "Such is the power that each party has to harm or to help each other... that in any situation this structure remains duly balanced, and it is impossible to find a constitution superior to this one".[28]

One of the tendencies that characterize the new constitutionalism is oriented in the sense of incorporating numerous organs of constitutional relevance that do not correspond to the traditional model of tripartition of power.

In a recent stage of institutional development, the relations between the organs of political power have been modified, and congresses have been

[26] Tacitus, *Germania*, 7, 8, and 11.

[27] Histories, book VI, 4 et seq. According to the theory of the cycles of Polybius, the forms of government follow one another according to their performance. The pure forms of government are corrupted and give way to being replaced by another pure form which, once distorted, is replaced by another also pure. The Polybius cycle begins with the singular government, which passes from royalty to monarchy; it continues with the collegiate, which goes from the aristocracy to the oligarchy and culminates with the collective, which passes from democracy to demagoguery and then returns to the singular and so on. The beginning of the cycle, however, seems confusing, because the first individual command, to get out of chaos, corresponds to the strongest (monarchy), evolves towards the purification of government practices, and becomes royalty, but then declines again in the form of a monarchy, and it is when it gives way to the aristocracy, as a group that rescues the arts of good government.

[28] *Ibidem*, VI, 18.

conferred an increasing number of powers of control in relation to governments. This process was consolidated since the conclusion of the Cold War. Before, during the period between the end of World War II and the fall of the Berlin Wall, Latin America was a recurrent scene of dictatorships, mostly military, that took advantage of the bipolar tensions of the time. Even in countries that did not suffer from the presence of a military dictatorship, such as Mexico, it was decided to maintain a series of limitations on electoral democracy that had an impact on the weakening of the representative system.

Thanks to a series of political and cultural changes, today most of the states that have opted for presidential systems have multiple elements of parliamentary control. This is the case in the Eurasian systems and in various countries of Islamic law, although cases such as Indonesia survive, with a traditional authoritarian presidentialism.

By adopting a new understanding of separation of functions and competences and associating it with political responsibility, the classic and modern idea of balances, preluded by Polybius and culminated by Montesquieu, is retaken, and updated.