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Historical account and transcendental facts of the division of powers in Mexico

Relato histórico y hechos transcendentales de la división de poderes en México

CORNEJO-ÁVALOS, Abrham Azael† & GÁNDARA-FLORES, Antonio

Universidad de Guadalajara. Centro Universitario del Norte. México.

ID 1st Author: *Abrham Azael, Cornejo-Avalos* / **ORC ID**: 0009-0003-7227-7850, **CVU CONAHCYT ID:** 1272960

ID 1st Co-author: *Antonio, Gándara-Flores* / **ORC ID**: 0009-0009-2334-7916, **CVU CONAHCYT ID:** 1272959

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Abstract

The term "power" has multiple meanings, it can express the absence of obstacles or inconveniences that could otherwise affect others. When the term power is considered in the sense in which it is used in the Mexican Constitution, it is taken as a synonym for authority that dictates, commands, disposes, orders and sanctions by means of theoretically limited powers or attributions conferred by it; finally, it is a form of denomination that is preferably political, therefore avoiding private interests. There have been different constitutional reforms which have been transcendental for the good performance of government by means of exercising the constitution. These reforms gave different emphases in the way of exercising the powers of each of the branches of government, to such an extent that at some point in 1836 there were four branches of government in which the executive branch took attributes from the legislative, these branches did not enjoy full autonomy and institutional freedom because they were always subordinated or conditioned by the latest decisions made by the Conservative Power.

Power, Historical evolution, Division of Powers, Constituent Power, Legislative Power, Executive Power, Judicial Power, Supreme Conservative Power, Fourth Power

Resumen

El término "poder" tiene múltiples significados, puede expresar la ausencia de obstáculos o inconvenientes que de otra manera podrían afectar a otros. Cuando se considera el término poder en el sentido en que se utiliza en la Constitución Mexicana, se toma como sinónimo de autoridad que dicta, manda, dispone, ordena y sanciona mediante facultades o atribuciones teóricamente limitadas conferidas por ella; finalmente, es una forma de denominación preferentemente política, por lo que evita intereses particulares. Ha habido diferentes reformas constitucionales que han sido trascendentales para el buen desempeño del gobierno mediante el ejercicio de la constitución. Estas reformas dieron diferentes énfasis en la forma de ejercer las facultades de cada uno de los poderes del Estado, a tal grado que en algún momento de 1836 existían cuatro poderes del Estado en donde el poder ejecutivo tomaba atribuciones del legislativo, estos poderes no gozaban de plena autonomía y libertad institucional ya que siempre estaban subordinados o condicionados por las últimas decisiones tomadas por el Poder Conservador.

Poder, Evolución histórica, División de Poderes, Poder constituyente, Poder Legislativo, Poder Ejecutivo, Poder Judicial, Supremo Poder Conservador, Cuarto Poder

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* Author's correspondence (E-mail: miriam.mery@uadec.edu.mx)
† Researcher contributing as first author.

Introduction

The term power has multiple meanings; it can express the absence of obstacles or inconveniences in order to impose itself on others. When the term power is considered in the sense in which it is used in the Mexican Constitution, it is taken as a synonym of authority that dictates, commands, disposes, orders and sanctions in the exercise of powers or theoretically limited attributions that it confers; finally, it is a form of denomination that is preferably political, thus avoiding a private interest. There have been different constitutional reforms that have been transcendental for a good governmental performance through the constitutional exercise. These reforms have given different emphasis to the way in which the powers of each of the powers of the nation are exercised, to such an extent that at a certain time in 1836 there were four constituent powers in which the executive power took attributions from the legislative power, these powers did not enjoy full autonomy and institutional freedom because they were always subordinated or conditioned to the latest decisions taken by the Conservative Power.

Background and Transcendental Changes in the Division of Powers

Throughout the ages, the division of powers has undergone changes in legislation with the intention of counteracting a single power. The division of powers is a doctrinal principle projected in history from Aristotle to Montesquieu, who were concerned with the division of powers, deducing its principles from a concrete historical reality. From the comparison between various constitutions of his time, and taking into account the city-state realised in Greece, Aristotle differentiated the deliberative assembly, the group of magistrates and the judicial body from the various combined forms. Locke and Montesquieu formulated the modern theory of the division of Powers, for Locke, the human frailty the temptation to abuse the Power would be very great, if the same persons who have the power to make the laws had also the power to execute them; for they could dispense themselves from obeying the laws they formulate and accommodate the law to their private interest. (Tena, 2013. p. 212)

Montesquieu says in a sentence that has become the core of the system so that power cannot be abused, being necessary that power stops power. (Tena, 2013) The limitation of public power, through its division, is in Locke, and above all in Montesquieu; when the legislative power and the executive power are found in the same person or in the same body of magistrates, it is no guarantee of freedom, nor when the judicial power is not separated from the legislative and executive power. The new destiny given to the separation of powers, by placing it at the service of liberty, was inspired Locke and Montesquieu by the conquest of public liberties in which the English people had engaged their history.

For Locke, inspired by his theory of the division of powers, the legislature, which makes general rules, the executive, which implements them through execution, and the federative, which is in charge of foreign affairs and security, it was Coke's idea that the difference of functions and organs, if only the judges and not the king could rule on civil and criminal cases, meant that the jurisdictional function was entrusted to an organ independent of the monarch and independent of the governmental function of the monarch. And if the king was under the law, then the law emanating from Parliament was alien and even superior to the will of the sovereign. The absolute supremacy of the law advocated by Coke gave rise alternatively, in the following years, to royal and parliamentary absolutism and the dictatorship of Cromwell, which made it possible to realise that it was necessary to establish a harmonious formula of balance between the power that made the law and the power that executed it (Tena, 2013. pp. 213, 214). (Tena, 2013. pp. 213, 214).

Montesquieu respected the legislative function, as Locke had explained it, although without noting the king's intervention in parliamentary activity, which was peculiar to the English system. After distinguishing the three classes of functions. Montesquieu conferred them on three different bodies, with the aim of preventing the abuse of power.

Montesquieu states that in 1776 the first constitutions of the States that would form the American Union appeared, and all the constitutional documents of continental Europe and America accepted the division of powers as an essential element of their organisation.

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And not satisfied with instituting the three Powers, some of the early constitutions formulated the principle doctrinally. Thus the Massachusetts Constitution of 1780 declares that the reason for separating the Powers into a legislative, an executive and a judicial branch is to ensure that their government is of laws and not of men.

"In the present age in which we live today, the theory of the separation of the functions of power is nothing new; it was duly enshrined in the Declaration of the Rights of Man and of the Citizen in 1789", and is currently inscribed in all democratic constitutions, According to traditional theory, it is divided into executive, legislative and judicial powers. This classic division, initiated by Montesquieu, is still in force in the majority of countries' constitutions; in our country, Article 49 of the Political Constitution enshrines the principle of the division of power into executive, legislative and judicial functions.

The Mexican Constitution enshrines the division of the three branches of government, the Legislative, Executive and Judiciary, and implements their collaboration by two main means, making it necessary for the validity of a single act to require the participation of two branches or granting one of the branches some powers that are not peculiar to that branch, but to one of the other two. (Tena, 2013. pp. 216, 219).

All of Mexico's constitutions have enshrined the division of powers, but they have not done so in an identical manner, as the variants that have existed refer to two criteria, the first referring to the formal importance of the organs among themselves and the second referring to the number of them. Thus, in the constitutional history of our country, it can be seen in its different constitutions and fundamental laws that the intention has always been to maintain a separation of the established powers, with the purpose of balancing them so that each of them obtains its own autonomy and independence; that is why there are different constitutional antecedents that have evolved over time.

It should be mentioned that, from the Constitution of Apatzingán of 1814, historically considered by the Nation as the first political constitution of Mexico, elaborated and promulgated by the General Constituent Congress of the Nation, in turn and as main precursor José María Morelos y Pavón, López Rayón among other historical characters that participated in its emergence.

Article 11 of the Constitution in question stated: "...three are the powers of sovereignty: the power to make laws, the power to enforce them, and the power to apply them to particular cases". ... (Calzada, 2014, p. 177). This is how sovereignty was related to the division of powers, that is, in this Constitution the concept of sovereignty was totally linked to the exercise of the three powers, in addition, in Article 44 of the same document, two corporations were created called Supreme Government, which is interpreted as corresponding to the Executive Branch and the other Supreme Court of Justice, which is the Judiciary, Here what is relevant is to see how over time the names of many government institutions have changed and that today they are still in force but known by another name, such is the case of the three powers currently known as the Legislative, Executive and Judicial Branches, Calzada, (2014):

"... the representative body of the sovereignty of the people will remain with the name of supreme Mexican Congress. Two corporations will also be created, one with the title of Supreme Government (Executive Branch), and the other with the title of Supreme Court of Justice (Judicial Branch)." (p. 177).

In this Constitution of Apatzingán of 1814, as previously described, we find significantly in the two aforementioned numerals those two interpretations that the constituent in turn highlighted the link that existed between sovereignty and the division of powers, as well as the names that at the time were given to each power.

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On the other hand, the Constitution of 1824, created on 31 January 1824 but ratified on 4 October of the same year by the Constituent General Congress, is considered a social and Constitutional experiment, since it contained or was made with a mixture of Hispanic and American antecedents of the respective constitutions of Cadiz of 1812 and the then current constitution of the same time of the neighbouring country of the United States of America, taking them as references and examples in their different and respective systems of constitutional government.

Thus, with regard to the constituent powers, this first constitution of 1824 in its Article 9 stated, "The Supreme Power of the Federation is divided, for its exercise, into Legislative, Executive and Judicial; and two or more of these may never be gathered in one corporation or person, nor may the Legislative be deposited in one individual" (Calzada, 2014, p. 177). It is precisely where the division of powers is constitutionally established as such with the names of Legislative, Executive and Judicial, enshrining that two or more powers could not be gathered in a single corporation or person, it should be remembered that in Mexico there were many projects or preliminary drafts of Constitutions, but really the history of the country only recognises as such three main documents, the Constitutions of 1824, 1857, and the current Constitution of 1917, leaving aside or unnoticed as previously mentioned the Constitutions of Apatzingán of 1814, the conservative centralist Constitution of 1836 as preliminary drafts that were fundamental for the realisation or consolidation of the first three mentioned. Now, in the Constitution of 1836 called the Constitutional Bases and Laws of the Mexican Republic, also known as "the Seven Constitutional Laws", was one of the most conservative constitutions enacted in Mexico, the second constitutional law of this document establishes the organisation of a supreme conservative power, which would be deposited in five individuals who are granted powers of the utmost importance to control or supervise the other powers. The contrast with the Constitution of 1824 is seen in its second title referring to the form of government, which is that of a popular and federal representative republic, which establishes that its constituent parts are states and territories, whereas the Constitution of 1836 proclaimed the territorial division into departments that are managed by a central government.

In this order of ideas, it was a couple of waters to find that from this document a fourth constituent power was created and it is relevant and significant how transcendental it was in its functioning and attributions at the time, since a system of four constitutional bodies was established, that is, apart from the three Powers that are known today, another one was created that history itself narrates was the one that subdued the traditional ones, called the Supreme Conservative Power, which was conferred and deposited in five individuals whose most outstanding powers were: declaring the nullity of laws and decrees, declaring the nullity of the acts of the Executive Power and those of the Supreme Court of Justice, declaring the physical or moral incapacity of the President of the Republic, suspending the Court of Justice, suspending the sessions of the General Congress for up to two months, even to the point that this Supreme Conservative Power had the constitutional power to re-establish any of the three Powers when they had been dissolved due to revolutionary issues. Sánchez, (2007).

"...in addition to the three powers that we know, he created another one that subjugated the traditional ones: the Supreme Conservative Power. In the second law, he established the profile of that innovation, as follows:

...Article 1.- There will be a supreme conservative power which will be deposited in five individuals, one of whom will be renewed every two years, with the first, second, third and fourth time, the one designated by lot, without entering into the draw the one or those who have been appointed to replace him or them. From the fifth time onwards, the oldest shall be drawn. (p. 404).

The Supreme Conservative Power established and proclaimed in the centralist Magna Carta of 1836 can be summarised as having been created with the purpose of being an intermediary between the other three Powers and to watch over their actions so that the limits of their attributions were not exceeded, It is worth mentioning that the subjects in charge of this power were conservatives, giving them powers that historically were considered unconstitutional, as they exceeded their functions, keeping the three Powers under subjection, that is, they did not enjoy full autonomy and institutional freedom, as they were always subordinated or conditioned to the final decisions taken by the Conservative Power.

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It is reiterated once again that the Constitution of 1836 was the fundamental basis for the immediate draft that would later give life to the consummation of the Federal Constitution of the United Mexican States of 1857, sanctioned by the Constituent General Congress on 5 February 1857, drafted during the presidential term of Ignacio Comonfort, it was a totally liberal constitution, arising from the ideas of the Plan of Ayutla. It established freedom of expression, freedom of assembly and freedom of conscience. It prohibited titles of nobility and corporal punishment, as well as the death penalty, because it already had liberal overtones that tried to focus on obtaining human rights for the governed, as there were already rigorous forces in the administration of justice that were surpassed with excessive force of power towards society, that is, excessive abuses of authority, referring to the division of powers as mentioned by Sánchez (2007):

The Political Constitution of the Mexican Republic of 1857, which abolished the Senate of the Republic despite having enshrined the Federal State form, stands out. By integrating the Legislative Branch with an assembly of deputies, it gave such strength to this body that the presidents of the Republic at that time, including Benito Juárez, faced severe difficulties in exercising their offices (p. 405).

This Constitution really reaffirmed the division of powers and the exercise of their functions, it has great influence in terms of the rebirth and consecration of fundamental rights, as well as the proclamation of different laws that changed the course of government, to mention a few and as an example; The Juarez Law, whose objective was to take away the privileges of the Catholic Church and the military, the Churches Law, which arose to prohibit ecclesiastical charges, among other things, this document has an emphasis on defending individual guarantees and enforcing the rights of the governed, It expressly alludes to the freedom of transit, association and worship, and has great importance or interference in determining the definitive separation between church and state, eliminating the vice-presidency and the senate and proclaiming that education will be provided by the state itself to the greatest extent possible.

On February 5, 1917, sixty years later, Venustiano Carranza, who was the President of the Mexican Republic at the time, promulgated the Constitution that still governs us today and is the current Constitutional document, similar to the ideas of the Constitution of 1857 but with other ideologies a little more focused on the development of the country and its governed, the current Constitution established and reaffirmed positions such as: the federal system, the separation of powers, non-reelection, a Legislative Branch in two Chambers, and a Permanent Legislative Commission, it is worth mentioning that unlike its predecessor, i.e. the Constitution of 1857, the current one gave great strength to the Executive Branch, since in constitutional articles 29, 49 and 131 it was expressly interpreted that extraordinary powers to legislate could be delegated to the executive, Tena, F. (2009):

In the explanatory memorandum to the First Chief's bill, it was criticised that "without the slightest obstacle, the Head of the Executive Power had been given the power to legislate on all kinds of matters, having been reduced to delegating powers.

To put an end to this situation, an addition to Article 49 was presented in the draft and approved by Congress, the second part of which was worded as follows: "Two or more of these powers may not be combined in a single person or corporation, nor may the Legislative be deposited in an individual, except in the case of extraordinary powers of the Executive of the Union, in accordance with the provisions of Article 29". (p. 239).

The last sentence of the last two lines of the aforementioned quote is the one that produced the initiative of the Executive to intervene in legislative matters, that is to say, to carry out its own legislation, since Article 29 of the Constitution delegated legislative powers to the president, such was the power and the exercise of the same that Tena, F. (2009):

...seven days after the Constitution came into force, on May 8, 1917, Congress granted President Carranza legislative powers in the field of Finance, without a fixed time for its exercise, that is, without observing the formalities of article 29... (p. 240 and 241).

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With this unprecedented situation, the Executive in 1917 undoubtedly violated one of the most important constitutional precepts regarding the division of powers, such as article 49 of the Constitution, which expressly stated and still states that the powers of two or more powers cannot be deposited in a single person or corporation, but this addition to the last paragraph of article 29 of the Constitution is what the Executive used to justify its legislative exercise. Tena, F. (2009).

Years later, the Supreme Court issued a decision, justifying that delegation in terms so broad as to cause astonishment. The Court said: "The decree of 8 May 1917, which granted the Executive extraordinary powers in the field of finance, enabling it to issue all the laws that should regulate the functioning of the Federal Public Treasury, did not limit those powers to the issuance of the Revenue Law and the Expenditure Budget, and although the Congress of the Union has issued such budgets for the fiscal year 1923, this does not mean that the powers of the Executive to issue the other laws necessary for the functioning of the Treasury, creating permanent revenue funds, which are considered when enacting the revenue and expenditure laws, which have a transitory character, ceased; and the issuance by the Congress, of such budgets, incapacitated the Federal Executive to legislate only in respect of them, during that year.". (p. 241).

With this freedom granted by the legislature to the executive, the latter acted for an indefinite period of time in bad faith to a certain extent in the exercise of two constitutional attributes, that of legislating and executing at the same time, something which, constitutionally speaking, throughout the history of the Constitutions mentioned in this article, it is difficult to find any other action of this nature that has been consummated, And it was not until a reform to article 49 of the Constitution was pronounced, which, through its interpretation, definitively pronounced the definitive exercise of the division of powers, that is to say, that each power would dedicate itself to its strictest natural function, that of legislating and executing, respectively. Tena, F. (2009):

Under these conditions, after the situation described above had prevailed for more than twenty years, on the initiative of President Cárdenas, which became a constitutional reform on 12 August 1938, the following paragraph was added to Art. 49, in its final part: "In no other case shall the Executive be granted extraordinary powers to legislate". The case referred to in the addition is that of the paragraph immediately preceding it, i.e. the case of the exception in Article 29 (p. 242).

Finally, with the addition to article 49 in its final part, as mentioned in the previous quote, is that it puts an end to such a transcendental historical event where for years the Executive power was endowed with the power to exercise legislative functions, or at least by the own efforts of the executive, which for questions of the norm embodied in the constitution and interpretations of the same, it was enveloped with the power to do so, notwithstanding this, Congress vindicated itself by making the necessary reforms and additions to solve and compensate such a situation, so now the Executive Branch is clearly still empowered to legislate, but article 49 of the Constitution clearly states that this power will only be given in accordance with the provisions of articles 29 and 131 of the Constitution, the first of which limits it to legislate or suspend constitutional rights or guarantees in the event of a serious disturbance of the public peace that puts society in general in imminent danger; The second of the aforementioned articles expressly mentions that legislative power may be given to the executive only in cases of mere urgency regarding the regulation of international trade, the country's economy or any other purpose that is beneficial to the country, thus limiting the cases in which the executive may intervene in purely legislative functions.

Methodology to be developed

The methodology used in this research is based on the technique of historical documentary analysis of the literature, where only certain important fragments of the main theme have been compiled in a punctual manner, and with this it becomes a descriptive research approach, as these studies show, narrate, review or identify facts, situations, features, characteristics of an object of study, but no explanations or reasons are given for the situations, facts or phenomena.

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Results

As a final result we can allude that through the arduous and exhaustive research we found historical accounts of the bibliographic literature analysed here that were of great transcendence and importance throughout history on the Division of Powers, certain facts that were precursors to give a true idea to the governmental institution analysed so that it would evolve and develop through time with better efficiency and effectiveness in its functions in front of society.

Conclusions

When talking about Constitutionalism in the country of the United Mexican States, it is necessary to go back to the historical background that has shaped the direction and form of government that the nation has had, with specific regard to the issue of the division of powers, through this detailed analysis and scrutiny of the different constitutional documents that have contemplated this form of government, different historical events have been clearly identified, which to a great extent were transcendental to find the guideline and the good governmental functioning through the constitutional exercise of the aforementioned division of powers throughout this document: Executive, Legislative and Judicial powers.

Thus, the constitutions analysed, as well as the historical figures who intervened in them, always and at all times gave different emphases on the form of exercise in terms of the powers of each of the powers of the nation, to such an extent that at a certain time in 1836 there were even four constituent powers, and so on, different events have been presented, some good, others bad, which have been building the political life of the country, and it has only been through political changes and the passage of time itself, where the same legislations have tried to strategically evolve the exercise and the endowment of faculties that the Political Constitution gives to these three main organs of government, with the ultimate aim of really obtaining a system or form of government worthy for the country and its governed where the legislations are beneficial for the construction and development of the Nation.

Because it is worth mentioning that this division of powers and form of government has been distinguished that for its exercise and good functioning must be based on the autonomy, freedom, sovereignty in the exercise of its functions in each of the three powers.

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