

JAHRBUCH
DES
ÖFFENTLICHEN RECHTS

NEUE FOLGE

DAS ÖFFENTLICHE RECHT DER GEGENWART

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ÖFFENTLICHEN RECHTS
DER GEGENWART

NEUE FOLGE / BAND 60

HERAUSGEGEBEN VON

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ISBN 978-3-16-151793-8 / eISBN 978-3-16-159063-4
ISSN 0075-2517

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliographie;
detaillierte bibliographische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

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Das Buch wurde von Gulde-Druck in Tübingen aus der Bembo-Antiqua belichtet, auf alterungsbeständiges Papier gedruckt und von der Buchbinderei Spinner in Ottersweier gebunden.

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Abhandlungen

Political Guarantee¹ as a Constitutional Principle

by

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1. Preliminary Considerations

Contemporary constitutionalism has put special emphasis on the search for justice. This is understandable for many reasons, which will not be reiterated here. One consequence of this position entails developing theories that center on problems of adjudication.

Among the most brilliant contributions of our time to the concept of justice we find the works of John Rawls and Amartya Sen, while Bruce Ackerman, Norberto Bobbio, Luigi Ferrajoli, and Peter Häberle have greatly influenced constitutional theory. In this essay, I took into account some of the solutions these authors have pointed out or suggested, especially in the field of justice and of the constitutional State. The theories these and other specialists have expounded show that without

¹ The meaning of the term *guarantee* in this paper is a safeguard instrument that ensures the effectiveness or enforcement of a right. It is similar to the concept of remedy, understood as a mean by which a right is enforced or the violation of a right is prevented.

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functional constitutional institutions, democratic exercise of power finds insurmountable obstacles.

Despite the level institutions in consolidated constitutional States have reached, it has been observed that these States need to go back to basics. Today, for instance, the electoral systems of the United States and the United Kingdom exhibit significant flaws, and the political control institutions have many unsolved problems in various States, especially those organized according to presidential or presidential-parliamentary models. These problems are accentuated in the operations of the representative institutions.

The fiduciary nature of a constitutional pact implies, among other things, parliamentary discussion and approval of government programs. This expansive phenomenon assumes that during the deliberation of State social policies, negotiation, and coordination strategies are applied according to the best options offered for the well-being of the largest number without affecting others at the same time. Another relevant aspect in terms of the integration of the collective will in congresses deals with the way constitutional and legislative agreements are built and the effects of the procedures adopted.

As to the means of distributing available funds, a social choice theory has been notably advocated by Amartya Sen³ regarding the theory of justice and by Bruce Ackerman⁴ on aspects of constitutional theory. The remote precedents of social choice also influenced the design of electoral systems to attenuate – as much as possible – deviations that lead to under – and overrepresentation.

On the other hand, a widespread current in contemporary constitutional doctrine is inquiring into the mechanisms to adequately guarantee the rights of minorities. In political procedure, the power of veto was conferred to the minority in the early phases of constitutionalism, in particular for the purpose of preserving the constitutional pact.

In addition to the instruments of social choice and judicial guarantees, I believe it is necessary to identify the effects these theories have in the scope of operations of representative institutions. I am convinced that the instruments designed for justice can find support or difficulties in congresses, depending on how representative its composition is and how responsibly it operates.

Miguel Carbonell has summarized the general guidelines of Ferrajoli's school of constitutional thought as follows: *constitutionalism of cosmopolitan democracy*, which involves territorial dimension; *constitutionalism of freedom, equality and liberty*, which entails social rights, and *constitutionalism of private rights* for matters dealing with the horizontal effects of basic right (*drittwirkung*).⁵ I believe the complementary aspect of this contemporary constitutionalism is the *constitutionalism of responsibility*, that is, that concerning the obligations of those holding high level government positions and those carrying out political representation activities. The constitutional contract

³ "The Possibility of Social Choice", Nobel Prize Lecture for Economic Sciences, Stockholm, December 8, 1998; *The Idea of Justice*, Cambridge, Harvard University Press, 2009, pp. 87 ff.

⁴ *Social Justice in the Liberal State*, New Haven, Yale University Press, 1980, pp. 277 ff.

⁵ "La garantía de los derechos sociales en la teoría de Luigi Ferrajoli", in *Garantismo*, ed. by Carbonell, Miguel and Salazar, Pedro, Madrid, Trotta / Instituto de Investigaciones Jurídicas de la UNAM, 2005, pp. 171 ff.

would be incomplete if rights of electoral freedom did not correspond to the elected officials' and their appointees' obligations of political responsibility.

In this essay, I present an outline of what I call *the political guarantee as a constitutional principle*. This guarantee consists of the effectiveness of governments' political responsibility. *Political guarantee* is more attainable in representative systems than in direct democracy systems in which a majoritarian criterion without any nuances prevails and is furthermore very exposed to manipulating interference from the elite that control the media.

In a Constitutional State the political power must be exercised in a limited, controlled and responsible way. Where that exercise lacks limits, controls or responsibilities, there cannot be a Constitutional State.

In a Constitutional State political power is regulated in three ways: rules concerning the struggle to attain political power (electoral system); rules concerning defense against established power (judicial system), and rules concerning the struggle within the political power structure (governmental system). The lack of explicit regulation does not imply the absence of political controls, since in a Constitutional State there are general principles concerned with liberties, rule of law and fairness.

Constitutional States apply any of the following models related to political control: they regulate control systems in detail; they adopt only general provisions or they have no specific control measures at all. Even in the first case there is still room for unforeseen circumstances and, therefore, none of the models would be entirely satisfactory.

No matter what rules omit, it is not valid to conclude that the exercise of power is not subject to any kind of political control in a Constitutional State.

As political guarantee I understand the set of particular rules and general principles applied by the representative bodies aimed at the exercise of political control.

The goal of the *political guarantee* is to determine, without exception, the limits, controls and political responsibilities in the exercise of political power. Nevertheless, cultural conditionings may affect the standard patterns of political controls and promote obstructive actions. To avoid these possibilities it would be convenient to design consulting instances to provide analysis of comparative law and jurisprudence that contribute in solving doubts or softening confrontation between the political branches of power.

2. The Principles of the Constitutional State

The aim of this essay is not to analyze the various concepts on the nature of these principles or to repeat the doctrinaire considerations about its legal or extra-legal aspects. Instead, I want to focus on the functions attributed to the principles based on the classification system formulated by Norberto Bobbio.⁶

Bobbio identifies five functions of the principles: *interpretive* to determine the scope of the constitutional provisions; *integrationist* to complement what is not provided for in the law; *directive* that corresponds to the programmatic statements in the Constitu-

⁶ *Contributi ad un dizionario giuridico*, Turín, G. Giappichelli, 1994, pp. 273ff.

tion; *restrictive* through which legislators determine the extension of the constitutional laws and *constructive*, which corresponds to the task of systemization put into effect by doctrine.

It is the legislators' function to set the specific scope to a constitutional principle and it corresponds to the constitutional jurisdiction to determine its validity. For judges, remitting to *general principles of law* does not mean it gives a coercive nature to a non-regulatory statement. In the case of a constitutional State, only the law is subject to be applied co-actively. The problem of lawfulness of the principles is an issue that decides the theory of the Constitution: in a constitutional State, neither lawmakers nor judges exercise their functions without being grounded in the supreme law.

The constitution-making function is the only one not conditioned by a preexisting order, while decisions concerning to constitutional amendment are limited by a reform procedure. I will not touch upon the issue of whether that reform procedure can in turn be reformed because it is not the object of this study. What I want to stress is that the task of constitution-making does make possible to confer juridical content to a non-normative statement.

This is what occurs, for instance, with the principle of sovereignty. If we understand sovereignty as the power to create and apply laws, historically we find four ways of justifying its exercise, depending on whose name it is done: of an individual, of a tradition, of a metaphysical argumentation or of a group.

As to its positioning, the seat of sovereignty corresponds to the political regime: deposited in a person, absolutism; in a group or party, totalitarianism or authoritarianism, depending on the case; in an elected assembly, corporatism or parliamentary democracy, depending on the case; or in a community, direct democracy or representative democracy, depending on the case. Only some of these forms of power structure correspond to what is accepted as a constitutional State.

From the perspective of constitution-making, the decision to adopt one of those forms of the principle of sovereignty is unrestricted and before becoming constitutional law, it is only a political statement that binds no one. In this sense, it is possible to paraphrase Ulpian's principle to say: *constituens legibus solutus est*. However it is understood that there is a constitutional State only when sovereignty is vested in the people and is exercised in its name.

Emilio Betti denied the legal nature of the principles and held that they are "orientations and ideals of legislative policy," "directive criteria for interpretation and programmatic criteria for the progress of legislation."⁷ Bobbio pointed out that Betti's mistake consisted of confusing the *informative principles* of law with strictly juridical principles. Nor should these informative principles be confused with *constitution-making* principles because the orientations and criteria are based on pre-existing norms, while the constitution-making function is underived.

⁷ Quoted by Bobbio, *op. cit.*, p. 263.

3. The classification of principles in a constitutional State

From among the many criteria that can be adopted to serve as a basis for a classification, in this case I use one that addresses the relationship between principles and constitutional order. Constitutional principles include *constitutive principles*, which define the content of the supreme law and the *constituted principles*, which guide the activities of lawmakers, judges and administrators.

Constitutional-making principles can also be divided into those of *content* and those of *procedure*. The first are based on a type of contractualism, whether it ascribes the foundational pact on changing from a situation of unrestricted freedoms to another of controlled rights, or, to the contrary, considering that in an unorganized stage there were no liberties and these are the purpose of ordering collective life. However the contractual construct is adopted, what is observed in constitution-making is the intention of rationalizing the relationships of power within a collective group by means of the law.

As to the *constitutional-making procedure*, the dominant principle is deliberation. Without this, there is no way in establishing a constitutional State. Thus, the contractual principle, which has many manifestations (sovereignty, freedom, fairness, equality and legal certainty, for instance), and the deliberative principle, which in turn assumes multiple factors (fairness, tolerance and trust, for example) are the substantive and procedural elements that make it possible to exercise the constitutive function of a constitutional State.

Once constituted, this State model establishes the basic statements so that legal operators can have common reference points and a shared language that allows them to define their common ground, identify their differences and solve their conflicts. Of these operators, those in power are legislators, judges and administrators, and those afore power are the governed, the justiciable and the administrated, depending on the role each person assumes for each type of situation.

According to these criteria, *constitution-making making principles* have a *foundational function* while the *constituted principles* have an *organizational function* when exercised by lawmakers, an *adjudicative function* when judges are involved, and a *governing function* when applied by administrators. A series of principles is developed for each of these functions, some of which may be common to all functions and others specific to each one.

From this array of principles, the ones that have been studied most have been those regarding adjudication. However, confusion sometimes arises because the types of principles under study are not differentiated.

Making a distinction between these types of principles is important for analytical purposes because they are expressed in different kinds of languages. *Constitution-making principles* are usually imbued with political language since the deliberation used to create these principles employ less rigid meanings of words. In contrast, stricter language serves to solve specific conflicts and experts use the most precise language for analysis. Lawmakers are found in the middle ground in terms of the vagueness of the language used as they replicate deliberative processes in making laws. It is therefore supposed that laws are drafted with different levels of precision depending on the degree of technical requirements or programmatic designs. It is not the same, for

example, to regulate ways of generating and using atomic energy or bacterial health standards in water basins, than it is to regulate commercial advertising or political propaganda. The more specific the regulated matters are the most precise the legislative language is, and vice versa. Law making language constitution-making varies depending on whether technical or social processes are being regulated. Empirical studies show that the use of principles is more frequent in the case of the latter.

4. Developing Constitutional Principles

Constitutional principles have been the key to guaranteeing basic rights. According to Luigi Ferrajoli's definition, *judicial guarantism* allows to identify the instruments that make possible the "maximum efficiency" of these rights.⁸ Developing this technique of guaranteeing constitutional rights is incumbent on judges. Judges' arguments are based and grounded on the Constitution.

However, judges are not the only members of the State that contribute to guaranteeing constitutional principles. Peter Häberle holds that a constitutional State is backed by an open community of constitutional interpreters and therefore both those citizens and their political representatives can implement political decisions driven by the public's best interest. These measures contribute to the validation of the laws in force and define the democratic, republican and secular structure of power.

Guarantism is a theory that emerged from the field of fundamental rights, but offers keys to extend it into the domain of politics. Individual and collective rights go beyond the relationships with the bodies of power or with other individuals. The rights that derive from public freedoms and from political representation are correlated to the political responsibilities of government officers. A system that only provides for the rights of the governed, but not the responsibilities of those who govern, lacks the legal guarantees that validate the political regime.

Several institutions have been created by way of legal-political arguments based on the extensive interpretation of constitutional principles and precepts. This is the *garantista* activity carried out by congresses and parliaments.

The United Kingdom offers some examples that portray how guarantees for the effectiveness of rights of political responsibility have been established to protect public freedoms.

In the British parliamentary debate, the concept of *constitutional principles* first came to light in the 18th century. On discussing the John Wilkes case (1763) in the House of Commons, one of the "the fundamental principles" of the constitution was held to be that of *the independence of parliament*.⁹

In a later controversy regarding William Pitt's ministry (1784), the figure of *constitutional principle* was used to express a vote of confidence for the cabinet, accepting that the monarch could dispense with this requirement only under extraordinary circumstances and that once surmounted would submit said appointments to Parlia-

⁸ *Derechos y garantías*, Madrid, Trotta, 1999, p. 25.

⁹ Stephenson, Carl, and Marcham, Frederick George, *Sources of English Constitutional History*, N. York, Harper and Row, 1937, pp. 679 ff.

ment for their confirmation.¹⁰ This *principle* consisted of the House of Commons' ascertaining, in the name of the people, that those responsible of governing possessed the abilities needed to perform their duties.

The principle of *parliamentary sovereignty* was made evident in the debate on the 1909 budget. At this time, it was stated that although the Constitution rests upon certain laws and numerous customs, which can change over time and even become "dormant, moribund, and for all practical purposes dead."¹¹ This argument was used in this case on the Crown's right to veto a finance bill, a right used for the first time during the reign of Elizabeth I and fallen out of use since. The House of Commons anticipated that in the future, the threat of vetoing the budget would lead to the censure of the minister who advised the crown to veto a bill.

As to the *principles of adjudication*, the case of *Wason v. Walter* (1868) was significant in terms of its connection to parliamentary activities.¹² The issue under debate consisted of an individual who was suing a newspaper for damages caused by publishing a parliamentary debate. This was the first time an issue regarding freedom of expression and access to information was discussed by the lords and gave place to one of the strongest arguments ever in favor of public freedom. The lords held that between the right of people's privacy and society's right to information, the latter prevailed. However, the lords stated it was with the proviso that unless the identity of those involved was relevant, the name of the individuals should be omitted in the public information given of the debates. The aim was to thus reconcile the rights of individuals and of the political community. Until then, both houses of Parliament prohibited their debates from being published, but this ruling set a new criterion that was considered in harmony with the new times according to which the houses should limit themselves to demand accuracy in terms of the information published about their debates.

In the United States, congressional activity has also created ways of guaranteeing the constitutional principle of political responsibility. The Congress, for instance, did not have the right to investigate the government. Yet, this power was acquired after an investigation carried out in 1792, regarding the defeat of General Arthur St. Clair by the Miami and Shawnee Indians. The congress pointed out that it lacked the power to investigate government actions, but argued that having information was necessary to be able to legislate.

Nor does the U.S. Constitution grant the president the power to introduce laws. However, since the administration of Theodore Roosevelt, the interpretation of Article II-3 has been extended. This legal precept compels the president to inform the congress regularly of "the state of the Union." At the same time, it empowers the president to "recommend to [the Congress's] consideration such Measures as he shall judge necessary and expedient." Although presidents do not introduce bills directly, they do exercise obvious *legislative leadership*. The principle of balance between the branches of power has led to the creation of this kind of procedure. On the other hand, based on the same principle, the power granted to the president to order a congressional recess has never been exercised.

¹⁰ *Idem*, p. 699.

¹¹ *Idem*, pp. 841 ff.

¹² *Idem*, p. 798.

Another noteworthy aspect consists of defending the rights of the minority. In the case of the U.S. system, the political practice guarantees the right of the minority through what is known as *filibustering*, which is also present in certain parliamentary systems.

5. Discretion and constitutionality

In the sphere of jurisdictional activity, there are cases of conflicting laws that under certain circumstances can be resolved by invoking a principle or weighing its prevalence among the various laws. Judges are presented with controversies based on positive law provisions; if not, the case is not admitted. The arguments of both parties can allude to principles, but always with the assumption that it is grounded on the laws in force. Even though rulings can invoke abstract reasons to adjudicate rights, no court admits a case grounded solely on its hypothetically affecting a principle.

In contrast, a conflict between principles may arise in the constitution-making process and the coherent juridical grounds found in the Constitution offer a way to resolve said conflicts. Discrepancies on matters of principles arise, for instance, when a constitutional text contains principles that exclude each other, as in the case of establishing public freedoms and political power without any control at the same time.

Because of their flexibility, principles *adjust* the scope of the rules. Rules establish prohibitions, permissions or obligations, while principles make it possible to adapt the scope of these prohibitions, permissions and obligations to the circumstances. What makes principles so flexible is its particular manner of wording. The issue, therefore, resides in the language used. Very open formulae are used to draft principles, especially in jurisprudence. In law-making, in contrast, it tends to be the opposite.

The difference between constitutional principles and rules is formal since both are norms. All principles can be regulated in detail under a deductive procedure, and all rules can be generalized to the highest level of abstraction through an inductive procedure.

Only constitution-making principles lie outside the positive order. Ordinary legislators and judges always make reference to *constituted principles*. Otherwise, the supremacy of the constitution, in the name of which established bodies act, would be made nugatory. These principles always have a juridical nature; if otherness in regard to the body of laws were admitted, it would suggest that the Constitution is not a supreme law.

The presence of principles is explained as a way to resolve conflicts between laws. Resolving conflicts between laws bases itself on three traditional criteria: hierarchy, chronology and specialty. For cases of conflicts between principles, the predominant criterion is that of ponderation. Conflicts that are presented for jurisdictional resolution always present claims based on the laws in force. When judges cannot emit a ruling based on the first three criteria, they turn to a principle which prevalence allows the identification of the corresponding rule to settle the *lis*. If a specific rule does not exist or is inadequate, the principle is applied to each particular case. The early

key to this procedure of adjudication appears in Paulus's famous assertion: *non ex regula ius sumatur, sed ex iure quod est regula fiat*.¹³

As Theophrastus noted, applying principles conforms to the impossibility of the law to foresee matters that occur unexpectedly.¹⁴ The use of the principles of adjudication confers judges margins of discretion that are only admissible in constitutional States.

One constitution-making principle is that of legality, which was established by the *Bill of Rights* in 1689. Later adopted during the Enlightenment, it featured in the French revolutionary constitutionalism. The Constitution of the United States of America introduced an important distinction to this principle by empowering jurisdictional bodies to rule according to law and equity (Article 3, Section 2). With this, it went beyond that proposed by Montesquieu, who voiced his many reservations about the court system. According to the well-known Chapter 6 of Book XI of *The Spirit of the Laws*, judges should not legislate because it would lead to an abuse of power. They should not be professionals (in the sense of permanence) to avoid an undesired monopoly. They should, instead, become "invisible" and limit themselves to being "the mouth that pronounces the words of the law." All this advice corresponded to one basic concern: "judicial power, so terrible to mankind." With that in mind, Montesquieu also stated that when the power of the people wants to accuse someone, it could not "demean itself" and consign him before judges, who are their "inferiors," but take it to the higher instance: before the nobility, who have neither the same passions nor the same interests of the people.

The law cannot foresee all the controversies that arise from interaction in complex societies, which is why Montesquieu erred in terms of the limited duties he assigned to judges. Through experiences and successive amendments, the evolution of constitutionalism led to the same conclusion as that of Theophrastus in the ancient world: judicial work is a source of law. For the growing discretionary power of judges to coincide with the structure of the contemporary constitutional State, an essential requirement is necessary: a controlled, and therefore responsible, exercise of power.

Mechanisms of control of power pertain to the guarantees of the political rights of citizens. To the degree in which these guarantees do not exist or are not well constructed, some political rights lack validity. The absence of these guarantees also hinders investing the court system with a broad scope of authority to adjudicate law; the lack of guarantees for the political rights have a negative effect that can spread throughout the judicial system.

The increasing powers granted to judges are the result of the evolution of constitutionalism, which is in turn the consequence of a constitutional principle: the right to justice. In a constitutional State all conflicts must be resolved according to law. In this case, no exception whatsoever is admissible. To apply this criterion it is also often

¹³ *Digest*, 50, XVII, 1. This can be translated as "the right is not derived from the rule, but the rule is established by the right."

¹⁴ Pomponius, *Digest*, 1, III, 3. This same concept is included in the work of Alfonso X: *Partidas*, 70, XXXIII, 36. Another example from the Middle Ages is found in the 1348 Ordinances of Alcalá de Henares, in which the following precedence of laws was established to rule "disputes": the laws of Alcalá, the *Fueros*, the *Partidas* and "the law books made by the ancient scholars." See García Gallo, Alfonso, *Textos jurídicos antiguos*, Madrid, Artes Gráficas, 1953, pp. 307–8.

necessary to weigh between the principle of prior knowledge of the law (legality) and the principle of the right to justice.

Since ancient times it was believed that knowledge of the law was an imperative for social life. Hence, epigraphic practices extended to consigning laws in such a way that would be lasting and in public places. Endowing judges with the authority to apply *general principles* which wording and binding are not always known by the parties to a trial, comes about from the Constitution makers' decision in the understanding that even more important than the recipients' knowledge of the law is the certainty that under no circumstance justice shall be denied to anyone, not even arguing obscurity or the non-existence of a specific law that applies to the case. This is an example of a principle that supports the role of adjudication.

The discretionary powers require a series of constitutional safeguards that prevent or at least attenuate two risks: the excess in judges' use of these powers and the temptation of subordinating judges by means of parties' political wiles.

The most widespread measure employed to avoid the first problem consists of imprinting a new dimension on the constitution-making principle of the *separation of powers*, transforming it into a *specialization of controllable functions*. Although acceptable theoretical bases for it are still pending, this principle explains emergence of *bodies of constitutional relevance*. In matters of justice, there is a progressive trend of instituting constitutional courts, in addition to the traditional *judicial department*. Thus, the balance among the branches of power is protected. In some systems the same body performs the ordinary jurisdictional function and the constitutional control, but experience has shown that this is not the best option.

Specialization prevents the concentration of power in a single body and facilitates the development and consolidation of jurisdictional functions. The principles applied by ordinary judges and by constitutional judges tend to have different scopes. For example, the principle of contractual freedom is applied in civil courts while the principle of *in dubio pro reo* usually pertains to criminal cases. In turn, the *garantista*¹⁵ function of constitutional courts is set apart from other tasks of adjudication in ordinary justice.

If one makes the error of confusing all the possible levels of administration of justice, potential excesses in its discretionary nature can compromise the suitability of the jurisdictional function and create regressive constitutional tendencies that would weaken judicial bodies or restrict their powers. The first party to be affected would be the justiciable, but in the end, this phenomenon would denote a relapse of the general conditions of a constitutional State, which provides the State with public liberties and equality.

The second problem that arises from deficiencies in the design of the controlling function of constitutionality is interference from party politics in the makeup and neutrality of the courts. This phenomenon deforms the bodies involved in the functions of justice by politicizing its members and even the workings of these institutions.

Thus, it is apparent that the principles of adjudication – essential for the concepts of equality and of justice in open, plural and complex societies – are closely related to

¹⁵ In a meaning that resembles that of constitutional common law in the United States of America.

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Bearbeitet von Roland Schanbacher, Richter am Verwaltungsgericht

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