148

Political Guarante* as a Constitucional Principle

Diego Valadés

DERECHO CONSTITUCIONAL

* 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.

Diciembre de 2010

15 pesos

CONTENIDO

I. 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 work of John Rawls and Amartya Sen, while Bruce Ackerman, Norberto Bobbio, Luigi Ferrajoli and Peter Häberle have greatly influenced constitutional theory. In this paper, 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 they and other specialists have expounded show that without functional constitutional institutions, democratic exercise of power finds insurmountable obstacles.

Despite the levels institutions in consolidated constitutional States have reached, it has been observed that these States need to go back to the 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 Sen[1] regarding the theory of justice, and by Bruce Ackerman[2] 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 insti-

The Author is Researcher at the Institute for Juridical Research at the Universidad Nacional Autónoma de México.

[1] "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. 87ff.

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

tutions. 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: *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 rights.[3] 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 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. *Politicalicy 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 most 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 not foreseen 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 controls in a Constitutional State.

As the *principle of 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 that principle 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 could 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.

[3] "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. 171ff.

II. 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.[4]

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 Constitution; *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 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 their being grounded in the supreme law.

The original task of constitution-making is the only one not conditioned by a preexisting order, while decisions of the derived task of constitutional amendment constitution-makingare 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 it 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 the how it is done: in the name 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 type of State: 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 leguibus solutus est*.

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."[5] Bobbio pointed out that Betti's mistake consisted of confusing

[4] *Contributi ad un dizionario giuridico*, Turín, G. Giapichelli, 1994, pp. 273ff.
[5] Quoted by Bobbio, *op. cit.*, p. 263

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.

III. 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 are 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, rights, 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-makingconstitution-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 used 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 kind of languages. *Constitution-makingConstitution-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-makingvaries 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.

IV. 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.[6] 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*.[7]

[6] *Derechos y garantías*, Madrid, Trotta, 1999, p. 25.

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

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 legislature, accepting that the monarch could dispense with this requirement only under extraordinary circumstances and that once surmounted would submit said appointments to Parliament for their confirmation.[8] 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."[9] 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.[10] 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 power to investigate the government. However, this power was acquired in 1792 after an investigation carried out 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

[8] *Idem*, pp. 699.
[9] *Idem*, pp. 841ff.
[10] *Idem*, pp. 798.

hand, based on the same principle, the power granted to the president to order a congressional recess has never been exercised.

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 a *filibuster*, which is also present in certain parliamentary systems.

V. 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 admit a case ground 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 with the implied contradiction. These principles always have a juridical nature. If otherness were admitted in the body of laws, 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

key to this procedure of adjudication appears in Paulus's famous assertion: *non ex regula ius sumatur, sed ex iure quod est regula fiat.*[11]

As Theophrastus noted, applying principles conforms to the impossibility of the law to foresee matters that occur unexpectedly.[12] The use of the principles of adjudication confers to judges margins of discretion that are only admissible in constitutional States.

One constitution-making principle is that of legality, which was introduced 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 his "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 entire 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 necessary to weigh between the principle of prior knowledge of the law (legality) and the principle of the right to justice.

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

[12] 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.

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 important risks: 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 branch*. Thus, the balance among the branches of power is protected. In some systems, the ordinary jurisdictional function and the constitutional control are performed by the same body, 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[13] 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 regression 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 inner workings of those 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 constitutional and legislative principles, and the former are affected when the latter do not attain the highest possible level of coherence.

[13] In a meaning that resembles that of constitutional common law in the United States of America.

VI. Ponderation and secularity

The problem of weighing principles is solved, theoretically, by using one of two types of operations: the prevalence of an ethical value or the prevalence of a logical reason. If what prevailed were considered a moral law or an ideological stance, it would not be a secular State, but a confessional or a fundamentalist one in which ideological, religious or political convictions would be imposed by coercive means.

Government officials lead their personal lives according to their ethical standards, but in the performance of their duties, they should not impose their moral perspectives on third parties, presenting them as general principles of law.

The Renaissance concept of the *reason of State* replaced that of the *confessional State*. The *confessional State* began to take shape in the Western world in 330 with Constantine's edict establishing Catholicism as the official religion. Once it was consolidated, on February 28, 380, Theodosius, Graciano and Valentinus stated that all people under their authority were obligated to believe in Catholicism and practice the corresponding rites. Between 381 and 392, a complex system of sanctions was developed for people who disregarded that obligation. In contrast, the *reason of State* appeared as part of the concept of the modern State based on secularity.

The deliberation of principles in a secular State should only be a legal operation and not a moral choice. The secularity of the State abides by a constitution-making principle that determines the operations of the bodies of power. The members of these bodies are free to choose and practice whatever their convictions and beliefs may dictate, in terms of their personal decisions. However, officials' beliefs and convictions should not transcend to institutional decisions to be imposed as a co-active rule on the governed, the justiciable and the administrated.

Every subjective law requires a guarantee, that is, a legal procedure that ensures its fulfillment.[14] If we understand secularity as a constitutional principle and therefore a right of the governed and an obligation of the bodies of power, what *guarantee* procedure ensures its validity?

The imposition or prohibition of religious criteria is an extreme that corresponds to a totalitarian State that regulates both its citizens' behavior and conscience: a State that does not leave room for any dissension. On the other hand, a secular State only regulates behavior without interfering in the beliefs and convictions of its citizens.

In general terms, the decision-making mechanisms used in a constitutional democracy can be placed under one of two broad headings: direct and representative. The first, in which most of the decisions are taken by the subjects themselves, consists mainly of referenda and plebiscites; initiatives, public action and recalls are variations of these forms of participation.

Representative instruments, in turn, imply two basic types of institutions attendant to election processes and forms of responsibility. Voting is an act exercised freely, regularly, personally, knowledgeably and autonomously by each citizen and the responsibility is the obligation of diligence, coherence, prudence and transparency with which elected officials fulfill the duties citizens have entrusted to them by means of a direct or indirect decision. When either of these

[14] See note 1.

components regarding voting and the responsibility is lacking, representative institutions display a significant want of legitimacy and diverse consequences.

The secular State is better guaranteed by representative democratic procedures than by direct ones. This is due to several reasons: they are permanent and not circumstantial; they are revisable and not definitive; they are regular and not unforeseen. Thus, representative procedures offer a known, regulated, predictable and constant point of reference, unlike a democratic procedure that is direct, but random, because it does not follow institutional patterns of control and continuity.

Direct procedures are sometimes used to demote representative procedures. In a scenario of debilitated permanent procedures and occasional direct procedures, the importance of the guarantee of secularity is diminished.

Direct democratic procedures can be compatible with representative ones when established as reserve mechanisms to be used in extreme cases. But these circumstances cannot be specified and therefore the opportunity of calling on voters depends on the political decisions made by congress, the government or both. If it is a parliamentary decision, it is more likely that a vote is only called for when representatives try to evade shouldering the political cost of a controversial measure. In this case, legislators can affect their own prestige if it is believed they are afraid to make a decision. If the government makes the summons, it has at its disposal a weapon that can continuously threaten congress. This in turn alters the relationship of control and reduces the inducement to cooperate. If it is a shared decision, it gives rise to unpredictable outcomes that can affect the balance of the relationship. In this case, the government and the assembly would be vulnerable to political challenges or intimidation because either one can issue a call to citizens without proper legal grounding simply to show the other party that, based on sensible foresight, would refuse to second an unwarranted citizen consultation.

There is sufficient empirical evidence on the vulnerability of direct appeals in dealing with law-making or political decisions. The impact of the media, the manipulation of collective response, the segmentation and even the polarization to which it can lead a community to, do not guarantee the secularity of a State.

Power is protean and the guarantees for a secular State cannot be absolute. The efforts made to build up these guarantees must take this limitation into account so that the mechanisms adopted can be subject to ongoing evaluations and reviews.

VII. The Constitution and the *Principle of Hope*

After the three political revolutions of the 17th and 18th centuries: the Glorious, the American and the French revolutions, constitutions were designed based on constructs, which in turn gave way to general principles and specific rules.

Contemporary constitutionalism was established on the constructs of *the people* and the *social contract*. Jurisprudence has given different substance to each of these constructs to then obtain a wide range of legal-political systems and forms of government based on the general principle known as sovereignty, with its *popular*, *national*, and *parliamentary* facets. The important social revolutions of the 20th century, which include those of Mexico, Russia, China and

the decolonizing revolution that extended throughout Africa and Asia, also contributed to enrich the experience.

On the other hand, the revolutionary origin of modern constitutionalism, the objectives of which aim at limiting the exercise of political power and extending personal and private rights, gave way to the realization of various expectations.

As to the power processes, political societies have acted differently in terms of the present and the future. As to the present, regulating politics is governed by identifying an *agonistic principle* articulated by three main dimensions: the struggle for power, the struggle against power and the struggle within power. In contrast, in looking toward the future, politics is inspired by what Ernst Bloch calls the *principle of hope*,[15] which is based on collective expectations of freedom, well-being and justice. According to Bloch, anticipating the future is what leads to building utopias.

If hope is one of the motors of history, it also strengthens the content of constitutions, which include two main sets of principles: those that make it possible to regulate agonistic processes and those that foresee free, equal, equitable and fair coexistence in the future. For both goals to be reached, society must have a democratic governability that comes from a legitimate, responsible and controlled power.

Society needs legal instruments to resolve its conflicts and in this case, law is understood as simply a "should be." However, the community also demands referents to have confidence in its progress. These referents must be tied in with the present perception of the situation in the future. For today's society, the laws follow a logical structure, while the outlook for the future does not identify the law as a "should be," but as a simple and straightforward state of things to which we aspire. The versatility of the Constitution consists of, among other things, the fact that in addition to governing the present, it can define the future. Hence, legal analysis of its content is complemented with the observation of the regularities that define a collective adherence to the law. At this methodological intersection, we find that the tendency for detailed norms, which by definition are restrictive, moves constitutions away from the perception that they are instruments that may open the way for the future.

Society acts as constituted in that it regulates the issues of its present and it projects itself as constitutive in the degree to which it maintains an open regulatory perspective. This constitution-making process is updated by the reforms carried out by legislators and judges. To the extent to which this work is obstructed by extremely detailed constitutional precepts, the Constitution stops fulfilling the function of a legal instrument to move toward the future.

Part of the constitution-making activities is guided by the *principle of hope*. But a distorted perception of the functions and possibilities of the constitution can produce Arcadian fantasies that soon fade away and become a *constitutional disillusion*. The phenomenon defined by Émile Durkheim in the 19th century as *anomie* and which shares some points in common with the concept of *ungovernability*, used since the second half of the 20th century. Anomie alludes to the institutional crises prior to the disillusion regarding the *constitutional State*. Thucydides had already employed the term *anomie*[16] to warn of the risk that a legal system might not be enough to

[15] *The Principle of Hope*, Cambridge, MIT Press, 1986, Vol. I, pp. 4ff. and Vol. II, pp. 471ff.
[16] *The History of the Peloponnesian War*, II, 53.

safeguard the coexistence in the *polis*. This is a recurrent concern that implies the constitutional State's need to ensure that the expectations of its citizens are fulfilled in the present and does not deter citizens from fostering more for the future.

In view of the failures or pitfalls of conventional politics, societies have taken refuge in constitution-making policy. This is a way of looking to the future for solutions to the prevailing problems of the present. The models adopted often work and corrections are made occasionally so that they may continue to be effective. However, there are also accounts of ineffectual experiences because there is always the risk that the cultural complexities of contemporary societies may incorporate factors that make it difficult to identify and implement the instruments that uphold the *principle of hope*.

When the *principle of hope* is no longer present in constitution-making activities or in the widespread perception in a society, skepticism can replace hope. Sociologist Arturo González Cosío has observed that when this happens, history is minimized and the future becomes a present in which social relationships are resolved agonistically. The constitutional consequences of a non-regulated struggle are generally accompanied by an individualistic or at least a very concentrated exercise of power.

One of the factors to make the *principle of hope* deposited in constitutional codes feasible consists of the positivity in constitutions. This was a great challenge written constitutions faced, that is, those that did not come about from a generalized conviction identified as a custom. To respond to this challenge, forms of jurisdictional defense of the Constitution have been developed and have resulted in the proven experience of specialized courts.

However, the results are not homogenous in every place these courts have been established. The relationship between norm and normality in the terms of Hermann Heller, between law and culture as suggested by Peter Häberle, or between text and context according to Dieter Nohlen's theory explain the disparities in the results of constitutional courts. A synchronic analysis shows that the institutions themselves can give divergent results in different places and a diachronic analysis shows that these same divergences can even be seen in the same State.

One of the causes that affect the functional nature of constitutional courts is that political parties tend to *colonize* them. In this case, these courts are no longer the bearers of the *principle of hope* that transpires from the future to the present and the struggle for power comes into play.

The first notable expression of the *principle of hope* in modern constitutional systems was the enunciation and then its *guarantee* of the fundamental rights. Over time, instruments of *guarantee* were adopted internationally and today part of the *principle of hope* has been successfully conveyed to a supranational field. Latin America and Europe have done a good job in terms of progress. Africa is waiting to take the steps to consolidate the jurisdiction of human rights throughout the continent.

Nowadays, what we have to define is to move on to the next level. The defense of a national constitution can continue to become international. Today, conflicts focusing on fundamental rights are jurisdictional matters but disparities among branches of power are still considered national domain. The hypothetical neutrality of constitutional courts is not a reality within the reach of all constitutional States and the lack of this guarantee may thwart the *principle of hope* and in turn, the *constitutional sentiment*, resulting in the abovementioned *disillusion*.

VIII. Constitutions of principles and Constitutions of details

Contemporary constitutional models are imbued with rhetoric and attention to detail. It is common to find precepts drawn up to the tenor of a political proclamation while others abound in minutiae typical of ordinary laws or even minor regulations. In this panorama, it is possible to predict that the length of constitutions suffering these types of problems will reach the point of becoming dysfunctional because the need for them to adapt by progressively evolution will transform them into disjointed and cumbersome codes that will force to create a new type of text. This process is etched in a cultural environment that conditions the attitudes of the political agents and the recipients of the law; but the context does not abide by any kind of genetic programming nor is it immutable.

If a theoretical effort were made to identify principles with the highest possible level of generalization for the purpose of turning ordinary lawmakers and constitutional judges into those responsible for *updating* the constitution, most precepts in contemporary constitutions could be contained under the following headings:

1. Sovereignty (public, national, parliamentary) is Imprescriptible.
2. People are free, dignified and equal.
3. People have the right to well-being and to justice.
4. Social relationships are ruled by equality and fairness.
5. Sanctions are based on the law and cannot be disproportionate, retroactive, transcendental or arbitrary.
6. Wealth is an object of distribution.
7. Political power is democratic, republican and representative.
8. The exercise of power is responsible, limited, decentralized and temporary.
9. In extraordinary cases, the exercise of certain rights can be restricted for a short period of time.
10. Legislators are governed by standards of competence and of procedure, and judges rule on matters in dispute objectively and promptly without contending that the laws are obscure, ambiguous or inadequate.

Clearly a Constitution cannot be drawn up with such verbal concision or conceptual extent because it would give legislators and judges too much latitude of discretionary power. But if the aim were a *constitution of principles*, the standard would not be far from such general statements as those referred to in these ten points.

In its original versions, constitutionalism opted for general statements, thus setting down the bases for other norms to be developed in further detail. The original constitution-making technique followed a relatively simple pattern: after being defined by the assembly majority, the components of the supreme law were arranged according to the distinct standards of the systems of government and of powers´ distribution of their choice. Other components ensued in matters of fundamental rights, their guarantees and jurisdictional organization.

In the 20th century, another form, which in conventional terms can be identified as "*authored drafted constitutions*" emerged. In other words, these texts were the result of a project entrusted to a person or a group of experts. For instance, the Weimar Constitution project fell on Hugo Preuss and the 1920 Austrian Constitution was left mainly in the hands of Hans Kelsen. An analogous method was that of constitutional commissions in the case of the 1948 Italian Constitution, authored by a commission presided by Meuccio Ruini and an influential drafting committee that included the eminent legal scholars Piero Calamandrei and Constantino Mortati; and the 1958 French Constitution, which was entrusted to a select group headed by Michel Debré. One feature of these constitutions is the consistency of their contents.

Democratic complexity has imposed a growing need for negotiation to define constitutional texts and the central figures of these deliberations have been prone to demand an amount of detail that goes beyond the traditional conciseness of constitutional provisions. In recent years, drafting constitutions has followed a controversial procedure that consists of introducing particularities of a quasi-regulatory nature, especially in countries that are undergoing the transition from authoritarianism to democracy.

This pattern of long-windedness distorts the purpose of constitutions, which cease to be very general laws and capable of adapting to changing circumstances and become very specific laws that act as obstacles to cultural and political changes. The so-called programmatic standards that characterized post-world war constitutionalism had a very valuable adaptive role, which furthered social welfare and constitutional justice. However, they have given way to laws that prove to be inhibitory to legislators and restrictive for judges due to the meticulous detail of their content.

The differentiation proposed by James Bryce, which is based on flexible and rigid constitutions depending on the degree of difficulty to reform them, has given way to a new form of flexibility and rigidity, but now regarding the regulatory thoroughness to which numerous constitutions incline. The more detailed the constitution, the more necessary and frequent reforms are made. The most minutious the texts are the most unstable.

This phenomenon tends to become generalized in systems marked by difficult relationships among political agents and is less frequent in systems that enjoy consolidated democracies. To a large extent, this type of constitution-making denotes a contradiction because it hinders the intended purpose: building governable democratic systems.

When the goal consists of preventing agreements between political parties from being modified due to changes in the composition of congress in each legislature, instead of having compromises set out in ordinary legislative precepts, a decision is made to include them in the Constitution. Thus, circumstantial understandings become long-term impositions and their amendment is only possible by means of another constitutional reform. Consequently, a new form of constitutional rigidity emerges, one that is associated in this case with the details set forth in the law to assuage distrust between political parties. To avoid interpretations that go against the interests of political leaders, criteria similar to that guiding the high level of precision in criminal law are included in the Constitution. It is no accident that with this position, constitutional statutes provide for jurisdictional bodies to punish a number of political behaviors.

Every representative system bases itself on the existence of political parties and it is common for the composition and stability of governments to retain a connection to the way in

which these political organizations reach understandings. However, incorporating every government agreement in the Constitution impairs the purpose of the supreme law while it stands in the way of politics. The paradox in this case lies in that to respond to political demands, the Constitution needs to change, but to preserve the legal effect of the Constitution, politics needs to become more rigid.

In fragile constitutional States, it is common for political powers to consider their commitments binding and immutable only if they are transferred to the constitutional norm. This means that the Constitution must be reformed frequently because every small change in the political pacts has an impact on the wording of previous agreements. The possibility of political agents adapting their acts according to what is required by the circumstances is hindered by a casuist constitutional law. This transposition of functions of politics and law does not benefit one or the other because it places the regulatory stability of the Constitution against the fluid nature of politics.

No definition in of Constitution includes the role it has assumed in States in which democracy has yet to be consolidated. The standard purpose of the Constitution deals with its generality and timelessness, but in precarious democracies, political parties' interest to safeguard their reciprocal understandings threaten to place the Constitution in a secondary position to that of circumstantial interests.

What model should a Constitution invoke? Trust in institutions encourages the adoption of general provisions. In places where the opposite is true, the prevailing strategy is restrictive, which translates in to detailed texts. This tendency creates negative interactions between the various constitutional institutions because it impedes an opportune solution of the political tensions that constantly arise in complex societies. A Constitution drafted according to a regulatory model can lose touch with reality and is therefore exposed to constant infringements. Otherwise, it has to be subjected to continuous adjustments imposed by arising demands. In both cases, it affects the normative nature of the Constitution. In the first case, its artificial rigidity leads to behavior that goes against the Constitution while in the second case its quasi-regulatory content makes it the object of modifications that are so frequent that it no longer is a cultural referent. This type of constitutions of regulatory content imposes aggregative dynamics that lead to contradictions between institutions and even between principles.

IX. POLITICAL *GUARANTYISM*

Guarantyism (*garantismo*) has started a school of thought in constitutional justice, expanding the scope of the rights of the justiciable. The work of the interpreter of the law, "whether judge or legal scholar", consists of, among other things, overcoming the gaps and antimonies of the legal system by using the existing guarantees "or by introducing those developed by theory."[17] This doctrine has turned out to be very productive in terms of subjective rights that lacked effective instruments for their enforcement.

[17] Ferrajoli, Luigi, *El garantismo y la filosofía del derecho*, Bogota, Universidad Externado de Colombia, 2000, p. 64ff.

It is fitting then to consider whether the same manner of guarantee is open for adoption in the political arena to expand the rights of the governed. If in the jurisdictional domain it has had a positive response in making the rights of people and groups viable, is it possible that more could be done in the area of politics? This would naturally be in a constitutional State, the only political organization based on a system of *public freedoms* and of *political responsibilities*, the same sphere in which *garantista* judges and legal scholars discharge their duties. Their work in this field could not be carried out in an authoritarian environment, which by definition allows very little room, if any, for fundamental rights.

In a constitutional State, there are a free electoral system and a responsible representative system. Hence, the constitutional interpretation made by the representatives establishes additional *guarantees* for the political rights of the governed. It is commonly believed that representatives have law-making powers within their reach and that therefore it is by exercising this activity that the scope of the constitutional provisions can be interpreted. This is one option, but not the only one. Just as contemporary judges have a much more comprehensive task that that considered by theory and archetypal constitutional statutes, the same happens with so-called *legislators*. Legislating is still one of the duties of legislators, but in contemporary constitutionalism, the exercise of political control is just as important as law-making activities.

Strict legislative tasks tend to become very technical. The main objectives of laws adhere to political definitions, but the work of drafting laws is usually entrusted to experts who do not use to take on the additional role of elected legislators. In contrast, the non-transferrable political work of contemporary representatives is that of controlling the exercise of power. Even in constitutional States, increased political power places in the hands of the incumbents of the bodies in power, instruments that would allow them to go beyond the reasonable performance of their duties. Just as the law cannot foresee all possible problems, political controls cannot predict the myriad of behaviors to thwart the limitations the Constitution imposes on those in power. What is more: it is not even desirable to establish very casuistic constitutional systems because, as noted above, these systems limit judges' interpretive activity and diminish the institutional adaptive options.

In many systems, political controls are so regulated that in practice they are irrelevant. This denotes limitations for political representatives and implies a real lack of protection for the governed because it encourages the impunity of those in power and creates a negative perception of the Constitution in citizens who now question its effectiveness.

There is no institutional solution without some adverse effects. A distorted *judicial guarantyism* could lead to excessive activism and judges can be placed in the temptation of politicizing the court system. In contrast, numerous cases of political parties' infiltrating judicial bodies have been observed in Europe and in Latin America as a reaction against judges' growing influence on political issues. Another adverse effect is that lawmakers tend to inundate the Constitution with minute technicalities to further limit judges' argumentative freedom. This affects judges and put the justiciable at a disadvantage.

In terms of controls, the negative effects of the principle of *political guarantyism* would go hand in hand with the way in which it is put in practice. If the controls are applied in a way that they hamper government activity, the governed will see their right to good government diminished. Institutional design is not enough to ensure good results; the interactions between all

the institutions should also be taken into account. An *in vitro* analysis of each institution offers many insights on the best and the worst of its design, but day-to-day operations are subject to many types of relationships between all the institutions.

Various arguments that advocate the principle of *guarantyism* in jurisdictional activities can be applied to political control activities. If it is common for gaps and conflicts of authority to take place in the rules that govern social relationships, this will also be frequent in the rules that apply to processes of political control. There is, however, an important difference between both phenomena: in the first case, discrepancies are settled by a judge while in the second case the contenders themselves must set the rules to solve their differences.

This political contention is exposed to random arrangements based not on arguments, but on the imposition of criteria that may depend on the number of representatives, the dynamism of their spokespeople or an assemblage of mutual impositions and concessions. A process of this kind could detract from the rationality needed by the political forces.

To overcome this pitfall, it should be taken into account that the agreements between those in power for the purpose of overcoming gaps and antinomies in the statutes regulating their conduct and their relationships go from the political arena to the judicial one in the same degree in which reciprocal rights and obligations are stated.

If we accept the fact that only constitution makers can act without juridical referents and that in matters of adjudication, judges are always guided by rational arguments, it is considered necessary for the solution of political differences also to have available instruments that foster rationality.

Resolving conflicts by self decision is a precarious formula because it is subject to unpredictable changes. Therefore, those in power need bodies suited to surmounting the gaps and antimonies are found in the rules governing their interaction. Constitutional jurisdiction and electoral jurisdiction have already solved certain facets of this relationship, but in many constitutional States there are still political control issues that do not always have the procedures that allow them to find legal solutions.

The general mechanics of political controls are found in contemporary constitutions, but the manifold nuances that arise from political activity cannot be reduced to strict formulae unless, as mentioned above, we commit the error of drafting exhaustive constitutional texts. If it is decided that a more generalized constitutional law is desired to enforce the principle that power controls power, it is highly advisable that in addition to the existing judicial bodies, new forms of State councils be considered. Consultative bodies are required so that those in power learn of the theoretically formulated solutions that can be employed when controversies on the use of political control originate from gaps or antinomies in the corresponding laws.

This type of bodies, which in some systems have shown good results in terms of prior control over constitutionality, can be invested with the authority to resolve controversies or clarify doubts on constitutional principles related to political control issues. This means a possible guarantee to citizens in terms of their right to good government, which is another constitutional principle.

Precarious political controls obstruct the constitutional State. *Political guarantee* principle consists of giving all citizens the reassurance that the heads of the bodies of power will com-

ply with the rules of legitimacy, competency and effectiveness; if not, aside from the instruments of judicial punishment, when unlawful acts occur, measures of political reparation will be expedited.

X. Final considerations

A constitutional State is characterized by a set of *guarantees*. The rational exercise of power corresponds to a series of instruments that arise from controlling power. The fundamental rights preceded its *guarantees*, but in turn, those rights were only formulated when instruments to control power were already at hand. Without a power subject to controls, it would have been impossible to gain access to building up those fundamental rights, and without *guaranteeing* those rights, the concentration of power would have led to a relapse into absolutism.

Modern constitutionalism has provided an intermediate solution between the concentration of and atomization of power. As mixed systems in which Polybius found the ideal solutions for a Constitution, the representative system is a combination of elements that translate into the rationalized expression of an *interim elitism formed of replaceable protagonists*. Within what could be called *political verism*, it should be recognized that representative systems are a way of legitimizing a reasonable concentration of power. Without balances that make the rights of the majority compatible with those of the minority, and without controls that conserve the rationale of the representative model, there would be a leaning toward pathological derivations like those which Michelangelo Bovero calls *cacocracia* [the government of the worst], or a distribution of the shares of power that transforms political parties to a corporate model.

Contemporary interpretations of contractualism point toward protecting the rights of the minorities. Even the majorities oscillate accordingly to the type of interests people identify with. The system *par excellence* that allows a suitable fit between the majority and the minorities is the representative system, as long as controls are used to *guarantee* the rationality of power to in turn provide a platform that supports fundamental rights and their respective *guarantees*.

Interaction between political and judicial *guarantees* is what preserves the constitutional State despite the complexities of power. The monism that is evolving in the direction of the precedence or prevalence of a single type of *guarantees* can affect balanced institutional design. For analytical purposes, it is advisable to examine each institution separately, but in the functional order, all institutions interact with each other, strengthening, neutralizing or even thwarting their individual effects. Hence, there is a need for the principle of a constitutionalism of responsibility that strengthens and consolidates the other expressions of contemporary constitutionalism.