Argentine Constitutional Development[1]

Creation and Application of the Federal Constitutional System *in Focus*[2]

by

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[1] Peter Häberle rightly notes that "constitutional development" refers to "every constitutional development all over time". He identifies a wide range of functional levels in "constitutional development". He certainly mentions, among others, constitutional interpretation and change (See Häberle, Peter: *Teoría de la Constitución como ciencia de la cultura*, Tecnos, Madrid, traducción e introducción de Emilio Mikunda, 2000, pp. 40/65). Consequently, and without refuting other means by which constitutional development is objectified, this essay offers and explains the reasons why ordinary tasks of constitutional development must remain within the scope of constitutional interpretation, as well as those other reasons why extraordinary tasks should remain within the scope of amendment, a process related to constitutional moments.

[2] According to Professor Bidart Campos, "The Constitution of a Democratic State holds the following nature: it has normative force in its entirety, in any and all of its parts, in its contents, as well as in its implicit aspects". Bidart Campos, Germán J.: *El Derecho de la Constitución y su fuerza normativa*, Ediar, Buenos Aires, 1995, p. 20.

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1. Theoretical Context

The Federal Constitution of Argentina – hereinafter referred to as CA – was sworn on July, 9, 1853, within the whole Confederation of provincial states – with the only exception of the people from the province of Buenos Aires: it was not until 1860[4] that this province signed the pact. To start with, the word "people" refers to that portion of population possessing "political rights". Thus, people's participation[5], though deeply limited and restricted due to procedures applied in 1853, left no chance to be questioned. Since then, it is possible to affirm in the world of Law that the Constitutional Convention held in 1853 has acted on behalf of the Argentine people, even if such an assertion might involve certain doubts about some dangers which that Constitution implied for democracy. Anyway, this first remark does not entail a second one: that the interpretation of our constitutional present may inexcusably demand the interpretation of certain keys to our constitutional past.

The CA was amended in 1860, 1866, 1898, 1949[6], 1957, and 1994; this last amendment representing the deepest and widest change in what concerns the original constitutional rules.

This text presents a guiding idea acting as framework for the whole essay: it is only the original constitutional power[7] emanating from the citizens that constitute the People, the power capable of creating the Constitutional Law necessary to organize a democratic State – provided that it is clearly understood that the word "people" implies nothing in itself, for ultimately, decisions are individually adopted by those citizens that make it up[8]. I believe that referring to the merits of public debate and participation is not exactly the same as advocating or, even worse, being able to secure, the results of such a debate. The Basic Law plays a key role in community life, since it

[4] The inclusion of the people of the province of Buenos Aires meant a decisive contribution to the consolidation of the Argentine State. Consequently, any further reference – see 2 *ut infra* – to "1853 as the key moment for the Argentine constitutional democracy" should be understood as "1853–1860", since – even if in 1860 there was just an amendment – from a legal point of view, it was the consolidation of the original constitutional power that took place that year, thus ending a process started in 1853. It is then accurate to state that the Argentine founding text belongs to the 1853–60 period. However, for economy of expression, it shall be hereinafter merely referred to as "1853".

[5] Bidart Campos, Germán J.: *Tratado elemental de Derecho Constitucional*, t. I-A, ed. amp. y act., Ediar, Buenos Aires, 2000, p. 610.

[6] Sampay, Arturo: *Las Constituciones de la Argentina, 1810–1972*, Eudeba, Buenos Aires, 1975, p. 535. The provisional government proclaimed on 4/27/1956 that the CA dating from 1853 and as amended in 1860, 1866, and 1898 was again in force – thus excluding the 1949 amendment, without prejudice to the acts and procedures considered definite before 9/16/1955.

[7] To be conceptually clear, it should be noted that the phrase "original constitutional power" involves, at least, two meanings: it refers in its first sense to the kind of acts settling or amending the first constitution. In its second meaning, "power" refers to the State organ exerting constitutional powers. In order to avoid misunderstandings, this phrase will be used here in its first meaning, to designate the function that denotes certain activity having in itself the essential force to "constitute" a State.

[8] Bobbio, Norberto: *Teoría General de la Política*, Trotta, Madrid, 2003, pp. 408/410.

represents the greatest effort ever known to discipline the democratic power by providing it with its own path. It is in this sense that law represents though slightly, perhaps, the reason ruling the force[9].

The reference to such a situation does not imply that after a century and a half, democratic and constitutional lives still remain a tradition for the Argentine people. Political expectations and constitutional ideals of Law have not kept to the same rules of the game or pace for one hundred and fifty years. This historical fact does not discredit the original decisions adopted by the people in 1853, an original constitutional cycle which was not completed until 1860.

Let us describe now the scope of the basic political decision adopted by the Argentine people. Such analysis will be based on significant reasons, namely: in what sense is the CA a *lato sensu* instrument to ensure and frame democracy; and, once this constitutional power to arrange the political process is stated, what are the constitutional definitions of its own system which, under the role of constitutional guarantees, seek to ensure the application of or to foresee the amendment to the Fundamental Law.

I identify here diverse levels of analysis.

First, it is discussed in what sense it is possible to suggest that democracy is a conceptual rule alluding to a specific mode of production within the constitutional system.

Secondly, if democracy is to be protected by the constitution, we will study here the way in which the Argentine constitutional system responds, from a structural point of view, to its own expectations of immanence and transcendence by means of constitutional guarantees, specially created to safeguard its rules.

Thirdly, if the analysis of every part of the CA proves that interpretation – by means of judicial review – and amendment are irreplaceable tools for its continuity and/or change, mechanisms used in the application of those tools should be described as paradigms of constitutional development.

These three questions are dealt with in the following sections of this essay. In addition to the analytical development of the topic, significant relationships between them will also be analyzed here, in order to corroborate finally the unity of meaning in the proposition herein suggested. They are developed from a strongly theoretical point of view, which is not certainly a very comfortable one. Since, and without advancing any of its contents, it is clear that there is something unsettling from the very beginning. I am referring here to the manifest – and in many cases scandalous – gap between the constitutional rules and their violation or infringement, strictly referring to the intricate itinerary of democracy in Argentina.

[9] I upheld in another text the micro thesis according to which "Law is the reason of force", and I identified there two conceptual basic views. Thus, in a weak meaning, Law is coercion from the prevailing order; reason is used to describe the method of coercion, the words compounding the speech of Law. Law, the reason of force in a radical sense, represents its desirable as well as expectable foundation; reason is used to justify or demonstrate every statement in favor of a right or fair resort to force. This comparison displays an interesting counterpoint (Ferreyra, Raúl Gustavo: *Notas sobre Derecho Constitucional y garantías*, Ediar, Buenos Aires, 2001, pp. 19/73).

2. Democracy, the Conceptual Rule of State Order

I. Definitions

Many definitions of democracy have been elaborated by contemporary academic literature[10]. Excluding the undeniable confusion herein stated, it should be specially noted that democratic legitimatization is the prevailing aspect of this essay. Legitimatization means the acceptance and practice of the democratic procedure in itself, as well as of the rules created in compliance with it[11]. Such acceptance can be described from the inner point of view of a citizen accepting the rules and voluntarily behaving according to them, as well as from the external point of view of those rejecting the rules by finding them just as signs of a potential punishment. Moreover, a third opinion could also be added: the situation of an observer who is merely interested in complying with rules without accepting them. This observer describes from the outside the way in which the members of the group internally perceive these rules[12].

II. Democracy and Legitimatization

As a rule of legitimatization, democracy may be described by a minimal definition: it is a decision controlling the political direction of a community. It means taking sides. According to this reading, democracy is clearly an introductory rule to the very constitutional game.

Hans Kelsen's ideas are interesting to identify two ways of creating the state judicial order: democracy and autocracy. This is a differentiation based on the idea of political freedom. When what prevails within a community organization is the self determination principle, governed by the plurality rule taking for granted the existence of a minority – according to contemporary vocabulary –, such an order is called democratic. Thus, democracy is the mode of creating the legal order. Kelsen's theory includes the statement that participation in government, i.e. in the creation and application of general rules constituting the community, is the essential feature of democracy. Consequently, democracy is basically the government of the people, where equality in political freedom represents the main value sought by democracy. Democratic procedure, characteristic of the procedure by means of which judicial order is created, is based on equality in political freedom, which demands an option for the rule of plurality to be rationally developed[13].

This idea of democracy as a path, the purest expression of which is mainly placed where the state judicial order is directly created by those who beforehand decide to

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[10] See, for instance, the collection of adjectives related to "democracy" in Collier, David y Steven Levistsky: *Democracy within adjectives: conceptual innovations in comparative research*, World Politics, 49, The Johns Hopkins University Press, 1997.

[11] Compare Garzon Valdes, Ernesto: *Derecho, ética y política*, Centro de Estudios Políticos y Constitucionales, Madrid, 1993, pp. 573 & ff.

[12] Hart, H.: *El concepto de Derecho*, Abeledo Perrot, Buenos Aires, 1992, pp. 113 & 249.

[13] Kelsen, Hans: *Teoría General del Derecho y del Estado*, Imprenta Universitaria, México, 1958, 2a edición, trad. de Eduardo García Maynez, pp. 335/360.

subject[14] themselves to it – minimally, at least – is a smallest definition, precisely because it just suggests the origin of the process. Its chance of success is unknown. For the moment, it seems to be the most practicable and feasible idea, the least anguishing, and may be the least desperate one. Therefore, democratic procedure is differentiated from other ways of governance and creation of the state activity: it is – assuredly – the least implausible model.

III. Democracy and Background of the Constitutional Legal System

The study of Constitutional Law is just the study of the way in which the State must be subject to Law. According to Bobbio: "power and Law" are two sides of the same coin, but only the power of the State creates Law, and only the Law can limit that power[15]. At the apex of the legal system, the constitutional system – as well as the rest of the legal system – lies an essential element of power relations[16]. The people's fundamental decision preexists the state legal conformation. This original constitutional power is sovereign and unqualified. It is sovereign because it holds the monopoly within the land of the state and the independence in the relationship with other states. It is unqualified because it is not originally restricted by Law.

In this sense, democracy is a way to refer to the people. So described, democracy is a language, it provides a basic criterion to guide and identify, in turn, the State organization. In spite of its simplicity, favoring this position implies accepting the thesis that the power to constitute the structure of a community lies in the people. This means that the government is the people.

This conception of democracy, mainly defined by the supremacy of the citizen's will, is nevertheless likely to determine the complexity and sophistication of state life, and to manage even without a written document to organize the community, this being the case of Great Britain, for instance. I do not believe that the British lack of a written constitution might mean that they just consider it an academic exercise. It means that may be some day, the predominating public opinion will strongly desire it and that the idea will end then by prevailing[17]. However, even though this might never happen, it would be very difficult to suggest the absence of democratic legitimacy in what concerns the community organization in Great Britain, considering that such a dimension – such as it is referred to in this essay – involves the ideal of a political process of legal production in which every citizen enjoys identical freedom to deliberate and take part in the process of elaboration and enforcement of decisions.

It is right to state that the democratic rule may be useful as a basic criterion to identify those rules making up the system, and plays an important role to determine what takes part and what takes no part of the system, i.e. it is a rule of recognition. According to H. Hart, the rule of recognition is a rule of unquestionable identification of the

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[14] Kelsen, Hans: *Teoría General del Derecho y del Estado, op. cit.*, p. 337.

[15] Bobbio, Norberto: *El futuro de la democracia*, Planeta-Agostini, Buenos Aires, 1994, p. 14.

[16] Compare Aarnio, Aulis: *Lo racional como razonable*, Centro de Estudios Políticos y Constitucionales, Madrid, 1991.

[17] Compare Wheare, K.C.: *Las Constituciones Modernas*, Labor, Barcelona, 1975, p. 17.

primary rules of obligation[18]. Even though it is not a peaceful question, the rule of recognition is a rule of concept or definition working as an initial basic statement of the legal system: in this understanding, the last rule resorted to – the rule of recognition – will operate by itself as an axiom, not requiring then any subsequent reason[19]. Although there might be different contents attributed to a rule of recognition, according to the position herein stated, one of its possible meanings is closely related to the elementary principle of democratic conception. Therefore, "the democratic rule of recognition" outlines a specific mode, so as to guide community life, which may include – although not necessarily – its constitutionalization by means of a written document.

The constituent elements of the democratic rule of recognition are[20] (even at risk of committing tautology by such an enumeration): the plurality rule, no tyranny, deliberation, elections, and respect for fundamental rights.

According to the way in which the question was developed here, an important approach arises now: from the very beginning, the rule of recognition constitutes then its own context, i.e. it acts upon the system itself. Whether it is stated in the Constitution or not, it will always refer to a normative power of Law. To be sure, there are politically possible and feasible worlds, even when they lack a constitution. It remains impossible, though, to think of a modern State, deeply complex in its structure, which lacks a basic rule ready to provide the essential criterion to identify the applicable Law. This assertion works as an essential link for the debate to be developed in the following section. Diverse approaches to one topic will be analyzed there: is it necessary or not to have a constitution in order to channel the democratic procedure ?

IV. An Interval: Different Conceptions of Constitutional Democracy

Recent studies putting aside those approaches by means of which the democratic State[21] as a form of political orientation is denied, stated in general terms that the union or association between democracy and constitution may bring about three models of constitutional democracy[22]: dualist constitutional democracy, monistic constitutional democracy and rights foundationalist constitutional democracy.

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[18] Hart, H.: *op. cit.*, pp. 118, 121, 127, 135, & ff.

[19] Thus, Eugenio Bulygin says that, even if Hart's terminology tends to suggest that the rule of recognition is a rule of conduct (a prescribing rule) and not a conceptual one, he believes the contrary: he thinks that the rule of recognition has a definitional content to the extent that it provides criteria to identify valid legal statements of the system, lacking thus all normative value (Bulygin, Eugenio: "Sobre la Regla de Reconocimiento", in AA.VV., *Derecho, Filosofía, Lenguaje, Homenaje a Ambrosio L. Gioja*, Astrea, Buenos Aires, 1976, pp. 31/39).

[20] Certainly, the "democratic" rule of recognition is just a kind within the available rules of recognition.

[21] For a study of the origin and history of the expression "democratic State", see Valades, Diego: *Problemas del Estado de Derecho*, Instituto de Investigaciones Jurídicas, UNAM, México, 2002, pp. 18 and 53.

[22] Compare Schmitt, Anette: "¿Necesita la democracia una Constitución protegida?", in AA.VV, *El papel relevante del Derecho*, Pablo E. Navarro y Cristina Redondo, comp., Gedisa, Barcelona, 2002, pp. 247–271; Ackerman, Bruce y Carlos Rosenkrantz: "Tres concepciones de la democracia constitucional", in AA.VV., *Cuadernos y Debates*, n° 29, Centro de Estudios Políticos y Constitucionales, Madrid, 1991, pp. 13–31; Alonso, Gabriela, her prologue to *La política del diálogo liberal*, Gedisa, Barcelona, 1999, pp. 9–45.

A. The Promises of the Dualist Constitutional Democracy[23]

This approach differentiates, in a radical way, between two kinds of political decisions with different levels of legitimacy. It refers in first place to decisions adopted by the people themselves; and on another level, to decisions adopted by government. According to its authors, the dualist model seeks to challenge ordinary political representation without depriving it of its legitimacy. Thus, they say, there are great events in political life in which the People – in capital letters – take more direct and authoritative part than during normal times in which they cast their vote just to choose between political opponents. Those great events are plainly known as "constitutional moments"[24]. Those other moments in which it is the government and not the people who makes decisions, are known as ordinary moments[25].

B. Pretensions of Purity by Monistic Constitutional Democracy

In contrast to dualism, constitutional monism as a democratic theory and, consequently, as a theory of constitutional interpretation, is not systematically described by academic literature[26]. This model rests on the idea that the differentiation between decisions made by the government and decisions made by the people makes no sense. Monists consider exactly the same the legitimacy of both kinds of actions. Assuming that there is no more relevant authority for State life than a Parliament democratically elected, this conception rests on its own arguments.

C. The Dogma of the Enlightened Faith in the Rights Foundationalist Constitutional Democracy

The rights foundationalist approach is also strongly committed to democracy. Such a conclusion would close the debate among the three theories, but this is not the case. Foundationalists are committed first to fundametal rights and only then to democracy. Protection works at two times in foundationalists' thesis, because it states that the only way to preserve every and all of the opportunities of individuals' autonomy *vis-a-vis* the potential tyranny of pluralities seems to be the institutionalization of a " fun-

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[23] Ackerman, Bruce: *Constitutional Politics/Constitutional Law*, 99 Yale Law Journal, 453, 1989.

[24] Ackerman, Bruce: *La política del diálogo liberal*, Gedisa, Barcelona, 1999, p. 150.

[25] Ackerman, Bruce: *We The People*, Foundations, I, The Belknap Press of Harvard University Press, London, 1991. As it will be stated later (see section 2.V), it was decided here to add to the phrase "constitutional moments", used for instance by Ackerman in 1989 and 1999 (*op. cit.*), the word "original", being then the final version of this essay "original constitutional moments". This option seeks to refer to the founding aspects and the scope of constitutional settlement and amendment. At the same time, as it will be developed in detail *ut infra* 2.V.D., constitutional moments completely overlap the judicial process of constitutional amendment. Therefore, I do not agree to any informal way of amendment taking place outside the frame provided by article 30 of the CA.

[26] Compare Ackerman, Bruce y Carlos Rosenkrantz: *op. cit.*, p. 19.

damental rights' preserve"[27], a non transactional sphere, unlikely to be decided even by a plurality.

V. Aspects of Democratic Legitimatization in the Federal Constitution of Argentina[28]

We will analyze in this section what is the conception of constitutional democracy that better describes the way in which the constitutional pact established the obligation to protect or to secure the people's decision, a conception that had become the golden rule of the Argentine federal system.

A. Democracy in Constitutional Language

The constitutional text approved on May 1, 1853, and sworn by the people of the provinces on July 9, 1853, expressly stated the form of the State. Although the normative message contained in article 1 of the CA declares that "the Argentine Nation adopts for its government the federal form", it used to be and it is still peacefully construed that federalism was not adopted as a form of government, but as a legal form of the Argentine State, establishing thus the specific relationship between power and land. From another point of view, the form of the State, in which political orientation overshadows its legal structure, is democracy, but it was not expressly mentioned by the CA in its original text dating from 1853.

Constitutional amendments taking place in 1860, 1866 and 1898 did not employ the word democracy. It was not until the constitutional amendment carried out in 1957 that this concept was added – as an adjective – to the CA, in its article 14A[29]. The constitutional amendment pursued in 1994 adds the word "democracy" in a quite recurrent way: articles 36[30], 38[31] and 75 (sections 19[32] and 24[33]). Nowadays, the word

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[27] Compare Garzon Valdes, Ernesto: *Derecho, ética y política, op. cit*., p. 407.

[28] It is worthy to remember note 4 to follow the line of thought of analysis of "1853 as the key moment for the Argentine constitutional democracy".

[29] Art. 14A of the CA: "Labor in its diverse forms shall enjoy the protection of the law, which shall ensure to workers: free and *democratic* organization of labor union".

[30] Art. 36 of the CA: "This Constitution shall rule even when its observance is interrupted by acts of force against the institutional order and the democratic system. These acts shall be irreparably null. […]He who, procuring personal enrichment, incurs in serious fraudulent offense against the Nation shall also attempt against the *democratic* system, and shall be disqualified to hold public office for the term specified by law […]".

[31] Art. 38 of the CA: " Political parties are fundamental institutions of the *democratic* system. Their creation and the exercise of their activities are free, so long as they respect this Constitution, which [hereby] guarantees their *democratic* organization and operation".

[32] Art. 75 of the CA: "The Congress shall have the power", sect. 19: "To pass laws on the organization of and basis for education which […] assure […] the promotion of *democratic* values and the equality of opportunities and means without any discrimination whatsoever; and which guarantee the principles of free and equitable public education by the State and the autonomy and self-sufficiency of the National universities".

[33] Art. 75 of the CA: "The Congress shall have the power", sect. 24: " To approve treaties of integration which delegate competence and jurisdiction to international organizations under conditions of reciprocity

democracy appears six times in our constitutional language: four times to refer to an essential attribute of the established order or system (see arts. 36 – twice –, art. 38 and art. 75, sect. 24); another time to make reference to a particular way of unions' organization (see art. 14A); and the last time, it is expressed as a value (see art. 75, sect. 19). It is clear that the most significant expression arising from this empirical context is "democratic system or order".

Strictly speaking, the definitions provided for by the amending constitutional power in 1994 clearly state that democracy is the ruling principle of the CA. Thus, as it clearly arises from article 36, the CA is the rule channeling the process of community state organization; once this purpose is reached, it becomes again the guiding rule for the whole activity of the state. Briefly, democracy plays a double role in the essential organization of community life in Argentina. It is the shaping and fostering rule for the Basic Law process of configuration. Then, popular participation – pursuing its own rules and mechanisms to obtain results and reach agreements –[34] is the backbone that really guides the application of constitutional provisions.

The image of democracy depicted by the 1853 Constitution was very weak. It was not until the XXth century, in 1916 precisely, that a President was elected by universal, egalitarian and obligatory (male) suffrage. Therefore, if the rule of Constitution is described on the basis of the existence or not of universal suffrage, Argentine constitutional democracy does not merge as a unique idea[35]. In short, from 1853 to 1916 our regime was not of pluralities – if we understand by pluralities the acknowledgment of political rights for the whole citizenry of a country. From 1916 – with the exception of repeated military disruptions – until now, democracy – understood as a political decision of a community adopted by its pluralities and whose vital energy is conveyed by suffrage – has become the prevailing orientation of state life.

B. The Power Constituting the Essential Organization of the State

The Preamble of the CA, "We, the representatives of the people of the Argentine Nation, assembled in General Constituent Congress by the will and election of the provinces which compose it […]" is a simplified but virtuous way to draft the beginning of the text[36]. The Preamble has a relevant role to conceive a correct interpretation of the link between power, democracy and constitutional legal system. The Preamble's normative dimension is out of question, for it was added to the text by the original

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and equality, and which respect the *democratic* order and human rights. Any rules enacted pursuant thereto have higher standing than laws".

[34] Rosatti, Horacio Daniel*: "Defensa del Orden Constitucional"*, in AA.VV., Reforma de la Constitución, Rubinzal-Culzoni, Santa Fe, 1994, p. 42.

[35] Vanossi, Jorge: *El Estado de Derecho en el constitucionalismo social*, 3a ed., Buenos Aires, Eudeba, 2000, p. 114.

[36] From a dogmatic point of view, for the relevant role played by constitutional preambles, see Häberle, Peter: *El Estado Constitucional*, estudio introductorio de Diego Valadés, traducido por Héctor Fix-Fierro, Universidad Nacional Autónoma de México, México, 2003, Instituto de Investigaciones Jurídicas, Serie Doctrina Jurídica, Número 47, pp. 274/278.

constitutional power as an introduction to the constitutional plan[37]. CA's aims are therein expressed.

Many different propositions can be elaborated on the opening phrase of the CA. One of them – may be the most innovative one – refers to the interpretation of the entitlement of the original constitutional power, of the power with normative constitutional authority. Without solemnly stating it – in contrast with other constitutional texts[38] – the underlying idea there is that the whole power comes from the People.

It will be reasonable to question whether the People the Preamble refers to is strictly and exclusively composed of the electoral body, i.e. that part of population having political rights[39]. The constitutional text has more than a dozen of thousands obviously ambiguous words. This being the reason for constitutional understanding to rarely offer a sole accurate reading. Weak as it may be, this *rara avis* is stated in a short sentence: "We, the representatives of the people …". Seeking to understand the meaning of this constitutional provision, I think that "We, the representatives …" identifies a founding decision by the Argentine people, a decision predetermined by reason, i.e. the wonderful effort to reach self government.

No doubt, the expression "the people of the 'Nation'" referred to in the Preamble allows us to read and construe it as the people of the State, rejecting thus the option to construe "people" as a synonym for nation. The meaning of nation must be identified with the concept of state, considered the legal organization of a community[40]. It refers to the Argentine State, which was born and constitutionally organized in 1853, although the process of the original constitutional power giving birth to the State lasted until 1860, the constitutional moment in which the recalcitrant province of Buenos Aires finally entered the Confederation.

C. About Models of Constitutional Democracy

I have already described in subsection IV three conceptions of constitutional democracy. I would like to consider now which is the model of democracy that better describes the basic structure of the Argentine system.

Previously, it is necessary to call the reader's attention to a range of some primary remarks; otherwise, the whole reasoning would just become an intellectual exercise lacking real basis, which does not make good sense here, of course.

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[37] Sagues, Néstor: *Elementos de Derecho Constitucional*, t. I, Astrea, 3a ed., 2002, Buenos Aires, p. 252.

[38] For instance, I) art. 20 of the Fundamental Law of Germany, drafted in 1949, states: 1) The Federal Republic of Germany is a democratic and social federal state. 2) All state authority emanates from the people […]" II) The Preamble of the Constitution of the United States of America starts by: "We the people of the United States […]". The difference with the Argentine Preamble lies in that in the American text, the presence of the people appears – from the point of view of language – with no mediation: "We the People …". Naturally, from a political point of view, the Founding Fathers carried out properly the "legal mediation". III) The Constitution of the Republic of Italy drafted in 1948 states in its art. 1: "[…]. The sovereignty belongs to the people […]".

[39] Compare Bidart Campos, Germán J.: *Manual de Derecho Constitucional Argentino*, Ediar, Buenos Aires, 1980, p. 95.

[40] Gelli, María Angélica: *Constitución de la Nación Argentina, comentada y concordada*, La Ley, 2a ed., Buenos Aires, 2003.

Unfortunately, stability is not the outstanding feature of the Argentine constitutional system. Military *coups d'état* broke it up repeatedly. However, the system has also suffered from other kind of pathologies[41] – such as measures based on economic emergency notoriously traditional in Argentina – which, without completely breaking it up, have also undermined the whole system. Let us see.

The constitutional legal system was broken up by military *coups d'état* taking place in 1930, 1943, 1955, 1962, 1966, and 1976. All these disruptions of the constitutional order were to some extent supported by civil citizens who offered infrastructure and assistance in each *coup*. The result has been institutional ruin. In these unfortunate occasions, everybody having the necessary and suitable force to impose the Law was able to do so, without considering the democratic legitimacy of such procedure. Judicial acts arising from military dictatorships are not emergency acts. They are antidemocratic acts, independently of the fact that they might be declared part of the State Law. A revolution changes the rule of recognition in a system, as well as the legal system itself. The acts performed by a *de facto* government do not represent a constitutional emergency. They suppose a violation of the constitutional order that leads to the complete collapse of the previous system.

The "political and economic emergency" is hardly associated with the law of the prevailing revolution. It has been in force since 1920, approximately. Almost every constitutional government has resorted to it. Its most evident result has been the interruption or frustration – according to the case – of the subjects' rights stated in the Constitution. The Fundamental Law provides for a finite emergency; but there is another kind of emergency lacking legal features, which deprives everything of its lawfulness[42], due to the grievous distortion it produces to the rule of recognition. It brings – as immediate and evident proof – the non observance of constitutional fragments. This economic emergency described as "infinite" (since it has no end)[43], causes the conceptual rule to stop being democracy: it is not the people's decision that decides the alteration of its own fundamental rights.

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[41] For pathologies affecting legal systems, see Hart, H.: *op. cit.*, pp. 146/153.

[42] Compare, Bianchi, Alberto: "La emergencia desjuridiza", in *Debates de actualidad*, Asociación Argentina de Derecho Constitucional, Rubinzal-Cul zoni, 2002, XVII, n.° 187, pp. 23/27.

[43] It has almost happened in every decade since 1920 that the Supreme Court of Justice of the Argentine Nation – hereinafter referred to as CSJN – issued – at least – one pronouncement on emergencies and Constitution. Broadly speaking, the doctrine of the CSJN has supported the legal adoption of extraordinary measures the main feature of which are restrictions of time and reasonableness on the exercise of rights. [Fallos: 136: 121 "Ercolano c/ Lanteri de Renshaw (1922); 172: 21 "Avico c/ De la Pesa" (1934); 199: 483 "Inchauste c/ Junta Nacional de Carnes (1944); 243: 467 "Russo c/ Delle Done" (1959); 264: 416 "Fernández Orquin c/ Ripoll" (1966)] It should be added that, even if restrictions on rights are accepted as an answer to the crisis sought to be mitigated, such restrictions must necessarily observe justice and equity barriers, for the means chosen cannot distort the essence of the legal relationships settled under the old *regime*. It is also worthy to note that there have been many situations in which *de iure* political powers have resorted to the "emergency" state affecting thus certain rights beyond constitutional authorization. This pathological fact produced deep uncertainty, for it implied the existence of more than one rule of recognition to determine the membership of certain provisions to the legal system. The Court has nevertheless supported those cases in decisions such as Fallos 313: 1533 "Peralta" (Peralta doctrine) (1990). This doctrine challenges the standard criterion to check the unity and identity of the constitutional political system.

D. Uses of the Dualist Theory

Let us resume the line of thought of this work where we left it, in order to examine now some good reasons to hold that the dualist theory – in a moderate version, though – is a quite useful framework to grasp the relationship between democratic power and Constitution in Argentina, or – even more briefly – its constitutional democracy.

It was appropriately stated that the basic distinction proposed by the dualism between people's decision and government's decision seems to be quite similar to the classical distinction between original constitutional power – i.e. the power that creates the constitutional system – and ordinary constitutional power, responsible for its interpretation and application. It should be noted, however, that for the radical version of dualism, the highest constitutional legitimacy does not exclusively belong to the original constitutional power. There might be, according to this approach, many situations in which, for instance, it becomes possible to amend the Constitution of the United States outside the framework carefully described in Article V. In its most extreme version, the dualist position resorts to certainly sophisticated arguments to declare the constitutional amendment possible by means of an informal procedure of change, provided that such an amendment gives rise to a higher constitutional event ordained by the people's will[44].

There is no middle way for dualism; there are essential and accidental topics. The accidental topics make up the ordinary agenda of government. On the contrary, decisions made by the people are not an everyday fact, they are extraordinary decisions, for they remain outside the ordinary process of political action. When extraordinary events take place, mass citizenship insists on doing something else than electing the members of its government. Those occasions, during which the people speak with a different tone than during ordinary political situations, are referred to by dualism – as it has already been mentioned *ut supra* – as "constitutional moments". To be more specific, since this expression is due to the fact that during those moments the people exert its sovereignty – as opposed to the delegated power, normally exerted by elected representatives – I opt here for the term "original constitutional moments" to convey the idea of the exercise of the power that constitutes or settles the first constitution or its amendment.

I take advantage here of the description of these rare "original constitutional moments" and, admitting the conceptual weaknesses that this way of speaking may produce – see *ut infra* – I identify in them two outstanding features: the product or result of the deliberative activity pursued in such moments, and the peculiar circumstances in which – as a context – this constitutional speech may be inserted. Summing up: product and context.

Yes, roughly speaking, there are two key moments in the embryology of legal constitutional systems: creation[45] and application; the first of these ideas being strongly as-

[44] See Ackerman, Bruce: *We the People, op. cit.*, pp. 267/269. The author suggests that the Americans have, for two centuries, built up two different systems for higher lawmaking: the classical and the modern models. Against this argument, Tribe, Lawrence: *American Constitutional Law*, Foundation Press, New York, 2000, vol. 1, 3a ed., pp. 106/110.

[45] The word "create" has in the Real Academia Española Dictionary five entries. One of the them refers to the fact of producing something out of nothing. This entry is not taken into account, for being inconsi-

sociated with original constitutional moments. Surely, what is to be understood by creation[46] of a legal system is a largely controversial question[47]. Something similar happens in what concerns its application. In order to avoid any diversion from the main line of thought, I will just include here some definitions likely to be later strictly related to "original constitutional moments" and "ordinary constitutional moments".

With no prejudice to what has already be stated here, one of the aspects of this debate is not so dense: it is the aspect referring to the settlement of the first constitution. Of course, I do not seek to go so far so as to state the existence of full agreement about the fact that it would be an act of "pure creation", provided that we understand by creation[48] the formation of something new, whether by spontaneous or controlled means. It is true, however, that the debate on the creation and application of the Law becomes much smoother when what is under consideration is the production of the constitution itself than when the analysis is related to the legal process of creation and application of other parts of the legal system[49]. Within these frames – in spite of the fact that it is a very controversial question – it should be noted that the creation of the constitutional system in Argentina, i. e. its settlement, the foundation of the highest legal fabric, the introduction for the first time of normative provisions of general scope[50], has a true date: 1853.

The four corners of the constitutional text passed on by the Argentine Confederation in 1853 included a Preamble and 107 clauses. Being conceptually clear, the original constitutional power's creed was spread on something more than twenty pages. Probably, the explicit aims expressed by the Preamble better show the ideology of the original constitutional power: "constituting the national union, ensuring justice, preserving domestic peace, providing for common defense, promoting general welfare, and securing the blessings of liberty"[51]. In normative code, the constitutional plan was the tool to channel democracy (*in fieri*) and to decisively contribute to the organization task. This does not let us imagine, however, that the Constitution assumed the existence of a citizenry having an homogeneous thought about the ideals inspiring democracy. This proposition is confirmed by one of the provisions contained in the Preamble: "preserving domestic peace". It simply shows the existence of an undeniable need for channeling disagreements within the rule inaugurated by the Constitution. The Constitutional Convention did not speak unlawfully; it spoke on behalf

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stent with the theory on the evaluation of reality guiding this essay. Such an ontological chart is based on the following suspicions: there is an external world supposed to be exclusive to the knowing subject and composed of real things likely to change, but where nothing comes from nothing; nothing is reduced to nothing, everything changes. (Compare Bunge, Mario: *Ciencia, Técnica y Desarrollo*, Sudamericana, Buenos Aires, 1997, pp. 156 & ff.).

[46] Kelsen, Hans: *Teoría General del Derecho y del Estado*, México, *op.cit.* pp. 156 & ff.

[47] Bulygin, Eugenio: "Los jueces, ¿crean Derecho?, in AA.VV., Jorge Malem y otros, comps., *La función judicial. Etica y democracia.* Gedisa, Barcelona, 2003, pp. 23/37.

[48] Compare Bunge, Mario: *Diccionario de Filosofía*, Siglo Veintiuno, México, D.F., 2001, p. 41

[49] Compare, Kelsen Hans: *Teoría Pura del Derecho*, Porrúa, México, 1998, pp. 244 & ff.

[50] Bulygin, Eugenio: "Sentencia Judicial y Creación del Derecho", in Carlos Alchourron y Eugenio Bulygin: *Análisis lógico y Derecho*, Centro de Estudios Políticos y Constitucionales, Madrid, 1991, pp. 366 & 367.

[51] Compare Bidart Campos, Germán J.: *Manual de la Constitución reformada*, t.1, Ediar, Buenos Aires, 1996, pp. 296 & ff.

of the people and/or, even better, it spoke from the people, but with the evident purpose of avoiding and eliminating civil struggles.

Though questionable from a historical point of view, 1853 can be described as an original constitutional moment, for it clearly shows that the Argentine people's free deliberation produced the Constitution: a collection of normative provisions providing for the highest arrangement of the State force.

The original constitutional decision dating from 1853–1860 promotes democracy, for it is based on the people's decision. All over Argentine history, the tension has not been produced between democracy and constitution, but between those who sought to undermine constitutional democracy (or who did not understand it) and its supporters. Naturally, the huge challenge lies in finding, day after day, appropriate conceptions between democracy and constitution. The durability of the CA well over a century and a half – mishaps included – gives an idea of the *sine die* continuity of the founding key moment dated in 1853–60. The stronger the crisis in Argentina for these 152 years all over which the deviation from the Constitution has produced ravages, the stronger the need of carefully following the path of its letter. Therefore, with no absolutism at all and without seeking the founding decision adopted in 1853–60 to be perpetual, it arises as a self evident truth that the original commitment to channel democracy as a rule of community life – though likely to be changed – permanently deserves the consent of the "living" – or Posterity, like in the Preamble. Living generations have organized new practices since 1853. The essential decision adopted in 1853–60 – with the only exception of democracy foes – has turned it easier the idea that the "living" are able to govern themselves.

Rarely will it be possible to challenge the idea that the Constitution fixed two different ways to lawfully create and apply general provisions, according to the hierarchy of the product. On one hand, the higher lawmaking, the constitutional production: essential bases and grounds to settle community coexistence – in an "entrenched" way, generally – by means of a Constitutional Convention held for that purpose (compare art. 30 of the CA). This production takes place under very special circumstances, even if they are the different generations, one after the other, who engage in a "mutual dialogue" to devise the durability or not of the original commitment. I think that this kind of conversation[52] between generations is the most persuasive and best suited way to reject a statement suggested as a paradox of constitutional democracy[53]: "each generation wishes to be free to compel its successors, without feeling itself obliged by its ancestors". On the other hand, once Constitutional Law is created, it requires ordinary decisions to be adopted by government – by the "authorities of the Nation", as they are referred to in the Second Part of the CA –, for once created, Constitutional Law needs a power capable enough of energetically applying the rules predetermined by its system and, if necessary, of resorting to force to impose its definitions on.

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[52] Ackerman, Bruce: *Constitutional Politics/Constitutional Law, op.cit*. For a similar argument, see the work by German Constitutional Law Professor Peter Häberle, to whom the Constitution is a "pact of generations", by means of which the people's constitution takes place in a tangible way for the cultural science. Häberle, Peter: *El Estado Constitucional, op.cit*, p. 15.

[53] Elster, Jon: *Ulisses and the sirens*, Cambridge University Press, 1979, p. 94, quoted by Moreso, José Juan: *La indeterminación del Derecho y la interpretación de la Constitución*, Centro de Estudios Políticos y Constitucionales, Madrid 1998.

E. Objections to Dualist Theory

It is interesting to mention certain observations about the theoretical understanding proposed by dualism. In this context, the expression "original constitutional moments" is not very far from certain ambiguity; it is not possible to remain indifferent or silent *vis-a-vis* this situation. This understanding requires an important adjustment. In fact, if in some moments it is to be understood as "minimal term of time", the constitutional itinerary is a permanent succession of moments. Thus, the concept vanishes. This observation is not a mere intellectual observation. If overlooked, a very simple speech could show the fact that there would be some moments in which it is reasonable to suppose that the constitution exerts its influence on them, and some other moments in which it does not (ordinary moments). Therefore, the consequences of not appropriately making an acute precision could be dangerous. Specifically if, as it will be assumed later[54], every political decision is to be conceived and enforced under the framework provided for in the Constitution, and not against it.

I keep in this contribution the line of reasoning governed by the idea of "original constitutional moments" but I understand by moments, important portions of time as compared to other fragments of time, during which an extraordinary popular movement argues about the creation (or not) of higher law. It has, I believe, the sensitive task of emphasizing the importance of constitutional creation and review. Carefully considering the matter from this approach, it is possible to bring to light that the only kind of higher lawmaking captured by the concept is the creation which does not exceed the program settled by the CA. Consequently, "original constitutional moment" is a concept only available if it just comprehends the hypothesis of constitutional configuration and its amendments, i.e. foundation and transformation, change or amendment, of the Basic Law. Secondly, it is not possible then to state that every decision adopted by the people, which obviously implies higher lawmaking but adopted outside the hypothesis provided for in the CA for its amendment, is likely to remain enclosed within the conceptual orientation herein stated.

F. 1853–2005: Key Moments. Report

It might be useful to summarize the ideas developed in this section. The line of reasoning has pursued the following path:

First, the original constitutional power expresses the essential political decision.

Second, the original constitutional power founding the Argentine State has a true date: 1853.

Third, democratic legitimacy of the CA is demonstrable.

Fourth, on a normative level, the Preamble of the CA harbors this democratic legitimacy through a very simple expression: "We, the representatives of the people …".

Fifth, it is very difficult that the theory of the original constitutional power in Argentina might offer definite images. The series of constitutional disruptions originating in military *coups d'état* or caused by the endemic emergency the country suffers

[54] See 3.II, *ut infra*.

from have produced significant decay in the concept of people as a special subject – composed by its citizens – to which it is attributed the paradigmatic power to create the constitutional system. Naturally, when we make an attempt to seek democratic legitimacy within such processes, the notion of original constitutional power completely fades away. Only a deep and bitter flavor remains, because we find out that, ultimately, the original constitutional power is not held by those who want to or are chosen to hold it, but by those who are able to settle one order or another, merely by force.

Sixth, taking into account all the necessary conceptual precautions, it is possible to state that for little more than 150 years the Argentine people have adopted democracy as the genetic modality of the legal system, without including – as it has already been noted – the word "democracy" in the constitutional text drafted in 1853. From the very beginning, Argentine democracy chose to be protected by the Constitution. In this context, and in other words, the CA is the figure of democracy. I insist on this point: a weak figure, of course. If we take into account that all – absolutely "all" – the citizens likely to be considered potentially equally free in one moment have so been, this argument tends to collapse.

Following the plan of work proposed in 1, we have to move now to the outstanding features of the basic rule of the Argentine legal system, and to its link with democracy in its surroundings and with constitutional guarantees in its interior.

3. Federal constitution: The Basic Rule of the Legal System

I. Constitutional Defense

The Constitution drafted in 1853[55] and later amended is still in force, fixing thus the limits to values and legality within the state community. The Constitution is a vital turning point in the history of Argentine democracy. It discloses the last – but not definite – step taken by the process of State political construction, initially started by the revolutionary achievement in 1810, followed then by the declaration of independence on July 9, 1916, and by further constitutional attempts. It also settles the bases for the support and movement of the whole state building, the precedents of which were the Federal Pact entered into in 1831, the San Nicolás de los Arroyos Agreement, dating from 1852 and the remarkable constitutional draft written by Juan Bautista Alberdi[56].

The CA will be considered the supreme law of the whole legal system, provided that the practices arising out of its transgression or disruption be not only considered illegal, but also ineffective. Consequently, the normative force of the CA, i.e. its true effectiveness, mainly depends on the formulation of its "own" guarantees.

A strict conception of "constitutional guarantees" leads to their perception as tools turning the standards of the system into thoroughly effective rules, under any circumstance of mode, time, and place, and faced with any will or force, no matter how

[55] Badeni, Gregorio: *Tratado de Derecho constitucional*, t. 1, La Ley, Buenos Aires, 2004, p. 126 & ff.

[56] Alberdi, Juan Bautista: *Bases y puntos de partida para la organización política de la República Argentina*, Sopena, Buenos Aires, 1957.

powerful or vigorous it might be. Defending the constitution, a task its guarantees have been created for, basically means to preserve it against transgressions or attempted disruptions of constitutional order.

It is possible to state that the constitution of a democratic State is or will be more or less worthy according to the worthiness of its guarantees, no more, no less; that is to say, according to the level of safeguard supplied by the instruments therein provided for by the system organized by the constitution to protect itself as a whole.

II. Constitutional Guarantees

A. Guarantees included in the Constitution

The concept of constitutional guarantees refers to a central idea: that "politics should be constitutionally appropriate", rejecting thus the idea that the constitution can be politically adapted, according to the taste and wish of those who eventually represent the will of the electoral body.

The study of the federal constitutional system in Argentina leads to the following enumeration of the parts making up the subsystem called constitutional guarantees.

i. Separation of Tasks Among Ordinary Constitutional Powers[57];

ii. Constitutional Amendment[58];

iii. Emergencies and Constitutional Self Defense[59];

iv. Progressive Development of Constitutional Individuals' Rights by Means of Regulations Issued by Congress[60];

v. Standard of Rationality, Minimal Level of Acceptance, and Republican Duty[61];

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[57] Separation, allocation, and balance of the tasks to be performed by the branches of the State, with the only purpose of restricting power and of submitting governors to the rules provided for in the Constitution (see, for instance, arts. 1, 29, 33, 44, 87, and 116 of the CA).

[58] The Amendment process is set forth in art. 30 of the CA: "The Constitution may be totally or partially amended. The necessity of reform must be declared by Congress with the vote of at least two-thirds of the members; but it shall not be carried out except by a Convention summoned to that effect". In what concerns the role and specific performance of amendment as a constitutional guarantee, see 4.III, *ut infra*.

[59] The basic plan of emergencies for Constitutional Law of powers is as follows: a) declaration of state of siege (e.g. arts. 23 and 75, sect. 29 of the CA); federal intervention of a province or of the City of Buenos Aires (e.g. arts. 5 and 75, sect 31 of the CA); it is also worthy of inclusion within this "guarantist" approach of constitutional law the normative formula regulating the "rule and effectiveness of the constitutional order against any act of force seeking to interrupt it", as well as the express establishment of the citizenry's right to offer resistance to those committing acts of force against the constitutional rule (see, in this sense, art. 36 of the CA).

[60] From the point of view herein described, "constitutional guarantees" constitute constitutional rules when they assure that the surroundings of fundamental laws shall only be regulated – if necessary – by a law emanating from the legislative branch (e.g. legislative powers that the CA confers to the Congress in arts. 75, 28 and related provisions of the CA). A considerable number of decisions by the CSJN follow this position: see Fallos 312: 496 "Portillo, Alfredo s/ infracción art. 44 ley 17.531" (1989), among many others.

[61] It refers to the principles providing for and precisely stating the need of a rationally accountable exercise of State powers, requiring a minimal standard of reasonableness of the acts or omissions performed by officers responsible for the different branches of a constitutional government (arts. 1, 28, and 33 of the CA).

vi. Interpretation and Judicial Review of Constitutionality[62];

vii. Congressional Control[63].

The range of constitutional guarantees shows that they refer to the scope of action of public powers, and in particular, of the Executive and Legislative powers, being its purpose to prevent normative provisions of lower rank issued by an ordinary constitutional power from developing fundamental rights in a way that deprives them of the content and effectiveness the constitution had originally given to them. Therefore, these are guarantees addressed to the political community as a whole, and not to a specific person or group of persons – even if individuals can certainly resort to them when they consider it appropriate to their rights.

B. Constitutional Rights' Guarantees

On the same level as "guarantees of the law of the constitution", the essence of "constitutional guarantees or constitutional rights' guarantees" is made up of the legal technique specialized in providing effectiveness to rights and/or to the normal development of institutional life. From another point of view, they can be described as the reactive and defensive-natured tools offered to citizens in order for those citizens to resort to them when a fundamental right or the power's organization appears to be violated or threatened. This resort seeks to preserve the right or to recover the balance of powers[64].

C. Organic Guarantee for the Preservation of Fundamental Rights: the Ombudsman[65]

D. Supranational Guarantee for the Preservation of Fundamental Rights, As Provided for by Constitutional Law[66]

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[62] See 4.II, *ut infra*.

[63] The varied range of congressional political controls is provided for in arts. 53, 59, and 60; 99, sect. 3 and 11; 75, sect. 8, 22, 25, 26, 21; 29; 31; 32; 71; 104; 101; 83; 76; and 100, sect. 12. Senate's exclusive control: art. 99, sect. 4, 7, and 19.

[64] Briefly, the "specific guarantees" for the preservation of constitutional rights or of the constitutional system may be: a) motion to dismiss based on unconstitutionality, which can be raised in any kind of process, by stating the incompatibility between a regulation and the Constitution or the interpretation of a constitutional rule; b) summary proceedings regarding constitutional guarantees, see e.g. art 43 of the CA; c) extraordinary federal appeal, e.g. art 14 of Statute No 48; or d) principles constitutionally rooted providing for certain procedures (e.g.: principle of lawfulness in criminal law), or e) principles encouraging certain "guarantees", such as defense at trial of persons and rights, according to art. 18 of the CA.

[65] The constitutional amendment carried out in 1994 recognized constitutional status to the Ombudsman. Compare art. 86 of the CA. In the same sense, Javier Pérez Royo believes that the Ombudsman's constitutional guarantee provided for the Spanish Constitution in its art. 54, deserves the adjective of organic constitutional guarantee, lacking a better option (*Curso de Derecho Constitucional*, Marcial Pons, Madrid, 1999, p. 343).

[66] The constitutional amendment carried out in 1994 recognized constitutional status to the provisions of the American Convention on Human Rights – hereinafter referred to as CADH –, under art. 75, sect. 22 of the CA. Intensifying a trend which had been sustained since 1984, after the 1994 constitutional

III. Excursus from the Effectiveness of Constitutional Guarantees

Constitutional guarantees can be effective or ineffective, but they will never be useless, for they are necessary tools to reduce the gap between the constitutional rule and the ordinary act performed or regulation passed on by a public officer. Sometimes they accomplish this purpose. Other times, they prove themselves to be ineffective, originating thus a process likely to break up the correct organization of the Constitutional Law. Thus, it is possible to suggest a new constitutional typology: vulnerable and invulnerable constitutions. The first belong to communities where trends to magic and irrational solutions prevail. There, constitutional provisions can be put aside if they hinder the policies to be adopted at a certain moment. Rarely are policies deemed to be politically constitutional; there will always be an attempt to impose the law of those exercising the force in the community. On the contrary, invulnerable constitutions belong to societies whose organization shows a natural trend toward the compliance with the basic rules of the constitutional game, provided that they imply the chance for every citizen to fulfill his life plan as by each one of them conceived.

The problem of the effectiveness or ineffectiveness of constitutional guarantees is, mainly, whether they are apt to set in motion the mechanisms likely to force – in cases of non compliance – constitutional provisions to be applied by the persons to whom they are addressed.

To summarize, there are two moments in the life of every legal constitutional system: the extraordinary constitutional moments, i.e. when the system is created or amended and the ordinary moments, during which it is regularly interpreted and applied. The constitutional amendment is the guarantee backing the idea that original constitutional decisions, political decisions by nature – for so is the creation of Constitutional Law – remain under the responsibility of the electoral body electing those who attend the Constitutional Convention. The interpretation of the constitution, particularly by means of judicial review, acts as guarantee for the constitution to remain as the supreme rule of the system.

Drawing such a sharp division between the domain of constitutional creation and of interpretation for which magistrates are particularly responsible, means – at least – a

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amendment the jurisdiction on protection of human rights does not belong exclusively to the Argentine State, for it is possible to resort to the supranational jurisdiction to seek the restoration of a legal rule protected by the CADH. This is not a frequent or ordinary situation, it does not proceed unless a wide range of strict requisites be met, being mainly and among others: the obligation of having completed first the procedures set forth by domestic law, according to the general principles of International Law widely known. It might be possible to predicate, from a weak point of view, of the jurisdiction provided for the preservation of fundamental rights to be concurrent, for the power to seek the protection of fundamental rights on grounds of the mechanisms of protection stated by the Convention allows such an interpretation. It is possible to assert then that the access to the supranational jurisdiction represents a guarantee for the protection of constitutional rights. See Spota, Antonio Alberto: "La jurisdicción internacional de los derechos humanos como garantía de la Constitución; origen, jurisdicción y competencia de las opiniones consultivas emitidas por la Corte Interamericana de Derechos Humanos", contribution included in *Revista Argentina de Derecho Constitucional*, Ediar, Buenos Aires, 2000, pp. 129/140. More recently, Szarangowicz, Gustavo: "La garantía de acceso a la jurisdicción supranacional: uno de los medios más idóneos para alcanzar la efectiva vigencia sociológica de los derechos fundamentales constitucionalmente tutelados", in Lecciones y Ensayos, No 79, Departamento de Publicaciones, Facultad de Derecho, Universidad de Buenos Aires, LexisNexis, Abeledo Perrot, Buenos Aires, 2004, pp. 187/215.

reduction – at the level of the Argentine topic theory – of the hypothesis of vulnerability.

4. Preservation and Change of Original Constitutional Rules: Judicial Interpretation and Amendment[67]

I. The Constitution: A Path for Democracy. Constitutional Guarantees and Defense

There is a double flow between democracy and constitution. Democracy works in the background of the system; but it is the system that provides it with its path and – in a certain way – seeks to guard it.

The constitution is by definition secured in turn by one of its main components: constitutional guarantees. However, the descriptive information about the constitutional structure is not enough to grasp the effectiveness or ineffectiveness of its enforcement. This means that the definition of constitutional guarantees – the basic anatomy of which is described in 3, *ut supra* – differs from the real dimension of each one of those mechanisms. We will examine this last topic in this section.

II. Constitutional Guardian and Interpretation

The main consequence of the constitutionalization of democracy is, for now, that the existence of the constitution itself is conditioned to the effectiveness of constitutional guarantees. The idea of a lasting constitution is closely related to two of its guarantees: interpretation and amendment[68].

Interpreting the constitutional system means, in first place, reading its text to give sense to the provisions which compose it. However, a constitutional text can be construed not only by identifying its vocabulary, but also – and mainly – by perfectly knowing the grammar of the constitutional language therein used, basically, the language that recognizes constitutional rights and guarantees, and arranges the allocation of powers and consequent controls of state duties[69].

It is usually suggested – and I find it appropriate – that judicial review is the most important fragment of judicial interpretation; they are both essential tasks of the power to administer justice, in the understanding that jurisdiction is a delegation set forth by the people in the original pact. The connection between interpretation and control is very close: when a low rank rule or act is submitted to a test of constitutionality, and such a rule or act is determined by the test to be incompatible with the constitution, the judiciary shall necessary pronounce an interpretation by deciding whether there is a conflict or not.

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[67] It should be noted that this statement strictly refers to judicial interpretation, for in what concerns processes of interpretation, this contribution shares Häberle's thesis: "there is not *numerus clausus* interpreters of the Constitution" (See Häberle, Peter: *El Estado Constitucional*, *op. cit.*, p. 150).

[68] Compare Perez Royo, Javier: *Curso de Derecho Constitucional, op. cit.*, p. 146.

[69] Compare, Vernengo, Roberto: "Interpretación del Derecho", in collective work *El Derecho y la Justicia*, Trotta, Madrid, 1996, p. 251.

One of the peculiar features of constitutional interpretation – logically conveyed to judicial review – is its notoriously undetermined but determinable character. This original undetermined condition of origin – proving the level of complexity involved in the interpretation task – does not connote a lack of restrictions nor the fact that every interpretation be, in principle, allowed.

Constitutional Law – as well as the whole Law – is not an instrument of mathematical precision, it is rather what has been correctly called an instrument of open fabric. However, though constitutional language does not present a univocal meaning, this is not a serious nor enough obstacle to deny for certain hypothesis that the meaning of constitutional provisions is appropriately determined by the context in which it is to be applied[70], i.e. by the true possibility of demonstrating that certain consequences – because certain facts directly fall within its scope of application – are clearly obtained out of the strict application of the appropriate constitutional rule.

The CA does not contradict this rule: it is a finite text because the amount of interpretations to be originated in it is also finite. By finite we understand that the Argentine constitutional text – as well as any other constitutional text – is exhaustible and has not a single external part. Therefore, it is possible to thoughtfully assume in this sense the existence of a constitutionally possible world, strongly predetermined by the original constitutional system[71]. The constitution, as the original system of a legal system – which, among other things, imposes order – divides subconstitutional legal systems into two groups: possible and impossible systems. The fact that some or many rules of the constitutional system present as main feature the likelihood to allow more than one possible interpretation, does not lead to believe that there might not be incorrect interpretations nor – what is even worse – that the duty to apply Law might be confused with the duty to constitute, to create it, in a conclusive and radical sense. Certainly, legal solutions which are incompatible with the original constitutional system can not be expected to belong to it.

The Argentine constitutional system of judicial review of low rank legislation – an essential chapter of judicial interpretation –, which tends to follow – in general terms – the American system[72], arises out of the interpretation of arts. 1, 18, 19, 21, 31, 33, 43, and 116 of the CA. Lacking this constitutional guarantee, the Constitution lacks a permanent guardian or protector. The conception of a constitutional world, as a prescriptive fact originating a previous community commitment, cannot be separated from its effective judicial application. The "judicial guarantee of the constitution", or "judicial

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[70] Compare Moreno, José Juan: *La indeterminación del Derecho y la interpretación de la constitución, op. cit*., pp. 184, 231, and 232.

[71] Compare Moreso, José Juan: *La indeterminación del Derecho y la interpretación de la constitución, op. cit*., p. 180.

[72] Recently, Francisco Fernández Segado published a very interesting essay: "La obsolencia de la bipolaridad modelo americano/modelo europeo-kelseniano como criterio analítico del control de constitucionalidad y la búsqueda de una nueva tipología explicativa", where, including abundant bibliography, he highlights the globalization of constitutional justice. He states there, without forgetting the impossibility to cover the heterogeneity of the systems of judicial review exisitng nowadays, that it is possible to recognize a progressive move of judicial review of laws – lack of conflict – toward judicial review of the enforcement of laws – conflict of individuals' interests which implies the previous existence of conflict –. (*Anuario Parlamento y Constitución*, Cortes de Castilla La Mancha, Universidad de Castilla La Mancha, N° 6, España, 2002.)

review or control" is the most suitable component of the system to secure that the constitution be always applied as the highest provision of the state legal system, supporting thus the hierarchical aspect of such system.

Nevertheless, it is important to remember a necessary and undisputed distinction between the duty to determine the meaning of a constitutional rule by avoiding the inclusion or application of the lower rule which conflicts with it, and the duty to create the constitutional rule itself. Such a statement means that, on one side, there are organs of interpretation and application; and on the other side, there are organs of creation and conclusion of the constitutional system. Therefore, though the compliance with the rules of the game of a constitutional system is a vital task for its permanence by means of interpretation, this does not lead to the idea of eternity. Furthermore, to be honest, when meanings are not attributed any more, remaining chances are not many. They are quite limited.

III. Constitutional Creation and Amendment

Differentiating original constitutional power from ordinary powers is a key step in every legal order. The original constitutional power has the exclusive duty to configurate and settle the Constitutional Law; the ordinary power has as its main task exerting government in compliance with the principles and rules of the constitutional legal system, but without creating them.

The power to amend the constitution and its content offers a new point of destination for the process of a State's political configuration. According to Bobbio – see 2.III, *ut supra* – this is the reason to state that the power to amend the constitution, generally subject to rules previously fixed, expresses a political power, for it creates Constitutional Law. The constitutional change[73] producing substantial alterations within a text has an important characteristic: it always produces something new, the amended constitution; therefore, the reform by means of extension, contraction, or review of the system, gives rise to a new range of provisions.

Consequently, a wide range of reasons leads us to suggest that the constitution should not be dissociated from the time and the reality to which its provisions are di-

[73] It would not be wrong to suppose here the constitutional change to be able to include every event and process undergone by a constitutional text, all over the time. However, strictly speaking, the thesis herein developed stands for the idea that the change under analysis is the "formal change" of the constitutional normative system, which implies a change in the text as a result of voluntary and determined actions, ruled by the Constitution itself. In such circumstances, the constitutional amendment may imply: a) extension, when a provision is added to the whole text; b) contraction, when a provision is removed from the whole text; c) review, when a provision is removed from and a new provision is added to the text, the last being incompatible with the first. (See Alchourron, Carlos: "Conflictos de normas y revisión de sistemas normativos", in Alchourron, Carlos y Bulygin, Eugenio: *Análisis lógico y Derecho*, Centro de Estudios Políticos y Constitucionales, Madrid, 1991, p. 301.)

In this framework, the theory of constitutional change is the theory of constitutional amendment, excluding thus any other circumstance, such as a revolution, break, transgression, or mutation, which cannot be included within the concept of "formal procedure of approval", as Peter Häberle states in reference to the process of amendment itself. (Häberle, Peter: "Desarrollo constitucional y reforma constitucional en Alemania", in *Pensamiento Constitucional*, Pontificia Universidad Católica del Perú, Fondo Editorial, 2000, Año VII, Perú, p. 17.)

rected, for it is precisely that reality that is subject to historical evolution and change. If, in the view of diverse and changeable historical circumstances, the constitution seeks to protect its normative force without altering its identity, the only possible way to do it, is by means of amendment. The people are the subject entitled to change or modify it when, by virtue of a free and democratic essential political decision, find it appropriate and necessary to do so. Therefore, it is convenient to think of amending the constitution every time that, by means of consensus, it becomes possible to determine that it is necessary, favorable, and appropriate, instead of distorting it through meaningless – partial or absolute, depending on the cases – interpretations which deprive it of its natural claims of normative terms arising out of its clauses.

In order to ensure the evolutionary capacity of constitutions, the duty to amend them by allowing their changes to be responsibly considered, seems to be the best path.

In what concerns the scope of amendment to the CA, the document includes two basic statements on the subject: in first place, as it is set forth in the Preamble, the representatives of the Argentine people were those who ordained, decreed and established this constitution. The truthfulness of this statement, playing an essential role in the Argentine constitutional system, has never been denied, though it was disrupted up in many occasions. Therefore, and according to this description, it is not difficult to reach the conclusion that, if the State political Constitution is deemed to be a decision by the people, so should be the amendment. In that case, the constitutional plan is to be decided by its creator: the electoral body. Is it not reasonable to state that significant political decisions on community life are to be submitted by referendum to every citizen? Obviously, this proposition gives rise to an open question: why is democracy the most detailed plausible solution? The answer could be: in any case, until its advantages are not dismissed, that there is no room to suggest that the opinion of some citizens might be better than the opinion of a plurality, provided that we consider such a proposition – and not other – one of the capital principles supporting political democracy.

Consequently, ordaining, decreeing, and establishing a Constitution – as the Argentine Preamble states – does not imply a prohibition against further fundamental laws to be established in the future. If it is only the people's power that creates the Constitutional Law necessary to organize a State, it is possible that when it leaves such an instrumental task, Constitutional Law stops being the reason ruling the force, becoming then a coercive power itself. Constitutional Law is an effort to limit power; if this distinction vanishes, the idea that the public power is exerted by the people through suffrage vanishes too.

Secondly, it is the process of constitutional amendment – and its content – the practice likely to originate a new point of destination in the process of State political building. It is an inherently political question: the creation of the Basic Law. Article 30 of the CA clearly and appropriately opens this door to the future: "The Constitution may be totally or partially amended. The necessity of reform must be declared by Congress with the vote of at least two-thirds of the members; but it shall not be carried out except by a Convention summoned to that effect". There is no chance, from an empirical point of view, of summoning the "Convention" referred to by art. 30 without summoning the people, i.e. without listening to what they have to say.

The decision to take sides with an "entrenched" sort of constitution means that the Basic Law should not – in principle – be amended in compliance with the mechanisms

stated for the production of ordinary legislation. This reference to an "entrenched" constitution is a direct and immediate consequence of the principle of supremacy of the Constitution set forth in art. 31 of the CA.

Briefly, a constitutional amendment is a process producing a change in the content of a system, but without producing its destruction, since continuity is kept[74].

5. Time to Summarize

I find it necessary to point out clearly here the way in which the three domains considered in this contribution are connected to each other.

First, the challenge to the guiding idea may not let us go any further: the defense of the original constitutional duty (creation of Law) might be pulverized if we accept that an organ different from a Constitutional Convention elected by the people may have the power to create law. The moment of constitutional creation, i.e. the birth of the original criteria determining the political coexistence of a society, demands a debate the freedom, extent, deepness, serenity, and consensus of which seem to be only attainable by the people's democratic deliberation. In other words, what in those original constitutional moments seems to be really affirmed is the individual freedom each citizen enjoys to take part – or not – in the process of configuration and orientation of the State's will. From this point of view, sovereignty has an upward direction, it comes from the individuals who, in their capacity as citizens, make up the people[75].

If we understand by democracy a form of State[76] in which collective will is generated by those who are subject to it, i.e. by the citizens making up the people[77], this constitution appears to be an instrument likely to shape the power, seeking at the same time to restrict it. Popular participation and power engineering, i.e. democracy and constitution[78], were united in Argentina in 1853. From a political point of view, the CA was a mega-commitment in which contracting parties – those who were able or allowed to become so, but not all of them – had different contracting forces: this evidence does not vanish, however, the reciprocal advantage which seems to be obtained from the rational pact on community organization – even though there are also certain disadvantages herein already stated.

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[74] The legal system can be seen as a sequence of groups of rules (normative systems), in which the unity of this sequence – as well as the identity of the legal order – would be given by the identity of the criteria applied to identify the normative groups belonging to the sequence, e.g.: the content of the rule of recognition. (Compare Alchourron, Carlos y Eugenio Bulygin: "Sobre el concepto de orden jurídico", in *op .cit.*, pp. 395 & ff.)

[75] Bobbio, Norberto: *Teoría General de la Política, op.cit.*, p. 440. Peter Häberle's considerations on democratic theory as legitimacy take a similar path. He thinks that "people" is a meeting of citizens and that "democracy" is the government of citizens, and not of the people in a Rousseaunian sense, in which the people consider themselves absolute and almost divine. Therefore, citizens' democracy is for Häberle more realistic than people's democracy. (See Häberle, Peter: *op.cit.*, p. 159.)

[76] Bidart Campos, Germán J.: *Tratado Elemental de Derecho Constitucional*, t. I-A, *op. cit*, p. 637.

[77] Kelsen, Hans: *Esencia y valor de la democracia*, trad. de Rafael Luengo Tapia y Luis Legaz Lacambra, Ed. Labor, Barcelona, 1934, p. 30.

[78] Compare Nino, Carlos Santiago: *La Constitución de la democracia deliberativa*, Gedisa, Barcelona, 1997, p. 4.

The CA was not and is not an idol of erudition. With no need to move back too far in time, a magnificent judgment – though critical – will say that it means – and meant – a wonderful effort to limit power. From a democratic point of view, of course, i.e. asserting the citizens' freedom to decide the establishment or change of constitutional rules.

I do not find it necessary to discuss whether the representatives to the Constitutional Convention held in 1853 considered themselves democrats; neither do I find it essential to discuss which was the scope of democracy to them, whether it was absolutely or moderately worthy of respect. What really interests here is the prospect of democracy as an idea for the institutional configuration of Argentina.

Vindicating democracy as a genuine procedure of lawmaking production – in a restricted way at the beginning – was undoubtedly a revolutionary idea; a revolutionary, but weaponless idea. Since that moment, the evolution of democracy has led us to state as its principal meaning the fact of being the government by all, by majorities and minorities, by poor and wealthy citizens.

Democracy can be used to identify the rule of recognition of the system; autocracy being always a danger, of course. In the Argentine case, saying that the CA constitutes a juridification of democracy, that democracy *ipso facto* causes the legitimization of the system, is a statement to be construed in a weak sense. The fact that more than one hundred and fifty years have elapsed for this attempt to become a reality, and that this reality has not completely arrived yet, clearly means that seeds take long time to grow. Although it has not yet happened in the expected way, the pathologies the legal system suffers from, as well as the State crisis, undeniably constitute a challenge, making us aware of the meaning of this problem. Defining a politically constitutional policy, comprehensive and thoughtful, is a great challenge. Once this purpose is attained, legal stability would not take long to prevail. Nowadays, the constitutional democracy system in Argentina is undergoing a very peculiar process. In general terms, there is an important consensus which has been consolidating since 1983. But, at the same time, the crisis of representation seems to undermine the foundations of such process. That is to say , consolidation and crisis, provided that they do not imply a strong contradiction between them, are – at least – significant enough to describe a scene of considerable confusion. The noisy failure inherited by the whole Argentine citizenry from *de facto* governments as an unwillingly solely and entirely liability, has made democracy – in its most rudimentary definition: decision by the people plus limited government – celebrate by the end of the year 2005 its twenty second birthday of uninterrupted enforcement. This does not mean that constitutional democracy lacks visible foes likely to challenge its stability.

Another observation should be noted here. As it is rightly stated, the concept of original constitutional power is vitally significant in practice; in fact, associated with the idea that the only body entitled to exert the original constitutional power is the people, the concept is suitable enough to promote democracy and to commit men to its preservation and defense[79].

However, juridification of democracy is proven to be a process which does not end in the Constitution, it rather begins with it. The concept of the normative force of the

[79] Compare Carrio, Genaro R.: *Notas sobre Derecho y Lenguaje*, *op. cit.*, p. 258.

Constitution – as well as the natural effectiveness it implies – demands by itself the existence of constitutional guarantees guarding it against potential violations, for the particular status of constitutional rules, i.e. its high rank condition within the state normative system, demands a special competence to be preserved by itself.

Finally, despite the *aggiornamiento* proposed by the amendment performed in 1994 by introducing new ways of democratic participation – popular initiative and *referendum* –, the constitutional method determines that the Law is to be created and applied by the people's representatives, previous participation by the people themselves. Consequently, in this context, and to be brief , there are two hierarchies of political decisions, having, each of them, a different degree of legitimacy: a) decisions made by the people; b) decisions made by government[80]. Decisions of the first kind constitute the Basic Law of the system; those of the second kind, are interpretation and application rules. I do not overlook the fact that by this the constitutional amendment passed on August, 22, 1994, strongly stressed presidential powers, causing thus a new pathology to the system of government. Since Argentine people are not made for the Constitution, the Constitution has to be made for the Argentine citizens. By saying this, I have no iconoclastic intention in affirming that constitutional development, by means of an amendment, is absolutely indispensable to provide the system of government with stability and to eliminate at once presidential absolutism.

The decision adopted by the original constitutional power at the moment of the system creation, is intrinsically associated with two guarantees duly established in the Constitution: judicial review and amendment. In what refers to constitutionality and judicial review, tasks to be fulfilled refer to interpretation, i.e. conferring meanings; constitutional criteria are therein applied. Amendment is a rule of change of the constitutional system. It renders the legal system more dynamic, by setting forth procedures which allow rules to be changed within the order by itself predetermined.[81]

[80] Compare Ackerman, Bruce: *La política del diálogo liberal*, Gedisa, Barcelona, 1999, pp. 150/158; Akkerman, Bruce y Carlos Rosenkrantz: *op. cit.*, pp. 15/31.

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