

## EDITORIAL

### **Transformations of the Law and State: A Space for Reflection of *Novum Jus***

Throughout its evolution process, the modern State has striven to establish a separation of powers and a legal control that will enable the enforcement of rights. There has also been, in the history of modernity, a considerable increase in ownerships, particularly in the field of human rights. These rights are reflected in the domestic legal system and the countless treaties that have appeared in the context of public international law, particularly from the United Nations.

Now then, in the face of the relationship between the individual, freedom and the executive power, the constitutional State promotes the need to set limits to the executive power in order to prevent any abuse that may occur in the exercise of power and to prevent the emergence of totalitarian regimes. To this end, a system of guarantees and procedures incorporated in the constitutional charters was established, aiming to strengthen the new contemporary model of constitutional state and to protect individuals from possible abuse of power:

Guarantees and formal procedures are precisely what individual and social freedom protects, insofar as they are a means of defense against attacks directed against individuals and social groups in the name of material contents, or of supposed values, established or internalized as absolute; they are thus revealed as institutions of freedom, having little to do with formalism or even positivism. The suppression of freedom in totalitarian regimes never begins with a scrupulous respect for formal guarantees and procedures, but rather with their breaking in the name of a superior material and prepositional right, either to “true religion”, to the “popular community of members of the same species” or to “proletariat”.<sup>1</sup>

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<sup>1</sup> Ernst Wolfgang Böckenförde, *Estudios sobre el Estado de derecho y la democracia* (Madrid: Editorial Trotta, 2000), 42.

The constitutional state notes that, in order to enforce individual and social rights, a series of guarantees must be established, reflected in principles and procedures aimed at implementing the law, the explicit recognition of the supremacy of freedom, and political control to prevent the emergence of arbitrary systems. Nowadays, these principles are present in a large number of international treaties on human rights and in the constitutional frameworks of the Western States that constitute the guarantor model or guarantee model.

This model is closely linked to the legal and political system of the modern state and has, in one way or another, evolved with it, such that the crises or the transformations of the nation state have led to changes in the guarantor model. Overall, we can say that a system of legal guarantees consists in the development of a system of principles, norms and legal institutions whose purpose is to subject public powers to the law and, as a result, prevent the concentration of power, state authoritarianism or totalitarian regimes. Thus, the guarantee system sets limits and controls to the power of the public.

The guarantee system, which is now highly valued in the constitutional state, dates back to the 19<sup>th</sup> century, when a guarantee system intended to protect individual rights and freedom was first created in the rule of law. This system was based on the principle of legality and on *habeas corpus*.

Then, in the context of a social state subject to the rule of law, a new sense of the legal and the role of the state was built, which entailed complementing the principle of legality and *habeas corpus* with other instruments that enable the enforcement of social rights; in particular, these new mechanisms are reflected in issues related to freedom and protection of association.

Finally, in the constitutionalist model, the guarantees system acquires its maximum expression by incorporating the international treaties on human rights into the constitutional norm, and thus broadening the range of protection of rights and promoting constitutional justice in those of courts of justice, which will serve as guarantors when a citizen activates the system of guarantees.

It is worth delving into the principle of legality, which is the first link in the system of guarantees. The principle of legality appears with the modern State, and it is, in its origin, related to the criminal area. Thus, its purpose was to establish clear limits to the State's management of social deviance or social control. Legality gave

power the obligation to indicate, by means of the law, the penalties to be applied in the case of a deviant conduct; thus, the purpose was to avoid the arbitrariness of the Executive and Judicial powers, since, under the axiom *nulla poena et nullum crimen sine lege*, the judge was subjected to enforcement of the law, while the legislator was subjected to the construction of a legal system that establishes procedures and penalties in advance. Thus, the principle of legality establishes a separation of political interests and moral conceptions and entrusts the legislator with the task of creating the legal norm, and guarantees the protection of the citizens' freedom.

The principle of legality, which was originally linked to the penal system—positive law—, is thus transferred to a wider area linked to the protection of individual and social rights and becomes a constitutive element of the rule of law, which imposes formal limits and substantial limits to the power emanating from the State.

After the end of World War II, in the mid-twentieth century, a series of international institutions were promoted, including the United Nations (UN), which was created in 1945 with the main goal of guaranteeing and protecting the enforcement of human rights, and particularly of civil and political rights. Then, in 1968, in the context of the Conference of Human Rights in Teheran, social and cultural rights were included as part of human rights. This set of individual and social rights will be part of the agenda of international law<sup>2</sup> and of the domestic law of constitutional States.

A major element in this stage of guarantees is the creation or strengthening of international institutions with global or regional systems for the protection of human rights, such as the International Criminal Court, the Hague Tribunal, the Inter-American Court of Human Rights, and the European Court, among others. Non-governmental organizations (NGO) also appeared, being equally important both in the national and international context. These new scenarios share a common language related to the promotion, defense and enforcement of rights and to making sure guarantees are met in the States.

Finally, if the constitutional State model was developed in Europe at the end of World War Two, in Latin America it appeared with the constitutional reforms that took place over the course of the 90s. These reforms encouraged the incorporation

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<sup>2</sup> To further delve into the international agenda, particularly regarding public international law, see Balakrishnan Rajagopal, *El derecho internacional desde abajo. El desarrollo, los movimientos sociales y la resistencia del Tercer mundo* (Bogotá: ILSA, 2005).

of ethical and political issues in the constitution, such as substantive equality, dignity, fundamental rights, recognition and differentiation, all of which are principles that transform the validity of the legal norm and the constitution by acquiring this binding legal effect.

In the constitutional State, the validity of the contemporary norm is given not only by the proper procedural development for its creation, but the legal norm must also comply with the substantive principles established in the constitution and in international treaties, so that this limits the legislative power and gives a new meaning to legal positivism.

In fact, the system of rules on production of standards—usually established at a constitutional level in our laws—does not consist only of formal rules on competition and on the legislative process. It also includes substantial standards such as the principle of equality, as well as fundamental rights, which limit and bind the legislative power in different ways by excluding or imposing certain content. Thus, however formal or valid, a norm—e.g. a law that violates the constitutional principle of equality—may well be invalid and, as such, it may be annulled by contrast with a substantial rule on its production.<sup>3</sup>

The guarantor model acquired a major role in the entire Western legal system. This dynamism occurred after World War II and it is the result of a complex composition between legal positivism, constitutional law and international human rights law. The result of this combination is the constitution of formal and substantial, national and international legal ties in the system of legality.

The normative systems of all Western States currently have the principles and values built from the context of human rights, the result of which can recently be seen in the constitutional reforms that took place in the 90s in Latin America, which conceive human rights and the guarantee system as central elements of the political charters:

Precisely because fundamental rights are guaranteed for everyone and subtracted to market and politics availability, they form the realm of the undecidable and

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<sup>3</sup> Luigi Ferrajoli, *Derechos y garantías* (Madrid: Editorial Trotta, 2002), 21.

not undecidable; and they act as factors, not only of legitimation but also, and above all, as legitimation factors of decisions and non-decisions.<sup>4</sup>

As a result of this new system of guarantees, the powers in the state subject to rule of law are limited by fundamental rights, principles that have been the outcome of an international political debate which led to the Universal Declaration of Human Rights (1948) and to the International Covenant on Civil and Political Rights (1966).

The expansion of entitlements in the international and national framework have raised new discussions on human rights; particularly, among civil and political rights in relation to economic, social, and cultural rights. Different positions regarding the level of relation amidst the different human rights covenants and the level of enforceability by legal means have been raised around the subject. Some fields believe that civil and political rights are fundamental rights and that this is reflected in the level of legal enforceability, as they are of mandatory compliance at all times and all places, and the judge is bound to enforce and respect these fundamental rights, while social rights are of beneficial and programmatic nature and, therefore, not legally enforceable.

Our approach is that of the independence, indivisibility, and universality of rights, such that we understand human rights—both civil and political and economic and social— as fundamental rights.

Fundamental rights are:

All those subjective rights to which ‘all’ human beings are universally entitled by virtue of having the status of persons, or of citizens, or of persons capable of acting, understanding ‘subjective right’ as any positive expectation (of benefits) or negative expectation (not to suffer harm) ascribed to a subject by a legal rule; and ‘status’ as the condition of a subject for which provision is also made by a positive legal norm as a precondition of his suitability to hold entitlement to legal situations and/or be the author of the acts that are their exercise.<sup>5</sup>

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<sup>4</sup> Ibid., 24.

<sup>5</sup> Ibid., 3

In the current constitutional order, jurisdictional guarantees have the function of allowing the enforceability of any right.

All this dynamic of contemporary law, cannot be understood from the claim of autonomy of law, because it implies an analysis of context that integrates several social disciplines. The *Novumjus* journal intends to analyze the law according to this reality, and to this end, the legal sociology and political science contribute with the conceptual and methodological tools in order to understand the *transformations of law and State*.

Jorge Enrique Carvajal Martínez  
Director

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