PABLO RIBERI / KONRAD LACHMAYER (EDS.)

Philosophical or Political Foundation of Constitutional Law?

Perspectives in Conflict

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Foreword

As co-editors of the book of the International Seminar on Constitutional Theory (CITC-2011), it is our great pleasure to present you the direct results of passionate discussions held in the city of Córdoba, Argentina. This book is the reflection of an excellent human and academic experience. Outstanding scholars from American and European universities were all together in Córdoba, Argentina in August 2011.

In an attempt to shed light on meta-dogmatic constitutional issues, first-rate professors of constitutional law, constitutional theory, political philosophy and philosophy of law came together in order to discuss the foundations of the constitution, let alone some contemporary constitutional topics as well. Some simple questions were addressed, such as what institutions, rules and procedures are overwhelmingly necessary within current constitutional law. Why some institutions, rules and procedures are almost invariably under scholars' suspicious or discontent. In answering to these questions, there were converging responses and analyses which dealt with central categories and/or recurrent terms in the field such as, "rights", "control", "emergency" or "political representation". Besides, taking into account several challenges related to constitutional construction on the subnational or supranational level, we have also enjoyed deeply wise papers on topics related to the so called globalized constitutional law.

In short, CITC-2011 participants and attendees discussed passionately; expressed a wide range of points of view and different perspectives as regards to the foundations of the constitution and of constitutional law. And the outcome was immensely positive to all involved. The generosity of our guest scholars, make possible to accomplish this goal. Furthermore, we have all learnt together; not only when our personal beliefs faced and survived harsh criticism but also when they had to be revised due to the strength of the arguments against them. Many thanks to everyone, one way or another, made this possible. I hope readers can at least experience some of the joy we who took part in the CITC-2011 discussions did.

Córdoba – Vienna, September 2014

Pablo Riberi / Konrad Lachmayer

I. Theoretical Framework

An uncertain dilemma: philosophical or political foundations for the Constitution?

Pablo Riberi

> Have you thought there could be but a single supreme?
> There can be any number of supremes –
> one does not countervail another,
> any more than one eyesight countervails another,
> or one life countervails another.
>
> *Walt Whitman*, Leaves of Grass (1860)

I. Foreword

In order to analyze the dilemma underlying the CITC-2011 debate, it seems appropriate to start wondering about the historicity of the Constitution. In fact, before doing so, it would be sensible to agree on what a Constitution is. Is it only a fundamental law or does it have a more significant political, cultural and moral value? It seems curious, but beyond presumably true ontological truths, or before possible epistemic-philosophical certainties, we unavoidably find ourselves overwhelmed by such hypothetical commitments. Indeed, there is a double layer of intuitions loitering here. Let us put it this way: if the Constitution were not immersed in history; in the meanderings of shared time, people's common social practices would not be legitimately saddled to constitutional values, principles and rules. Values, principles and rules – acknowledged for many years of repetitive practices –, are indeed, in the makings of a given Constitution. As I have already sketched in another text: unlike other juridical words, most of the concepts used in the Constitution have soaked their meaning in ordinary people's life experiences. Legislator's patient or nervous handwriting only shapes the blood-ink that the people have previously trusted to him.[1]

It is obvious that the Constitution's transient nature can only be appreciated from subjective points of view. Therefore, following Comanducci's

[1] See Riberi, Pablo, *"Derecho y Política: Tinta y Sangre",* pp. 240–249,in VVAA – edited by Gargarella, Roberto –, *La Constitución en 2020,* Siglo XXI Editores, Buenos Aires, 2011.

insights, it is appropriate to distinguish between a theoretical constitutionalism and an ideological one.[2] For the purposes of this paper, the latter one looks more attractive indeed. And in a particular sense, I want to point this out as a somehow biased ideological load at stake. Coming from a theoretical constitutionalism, conversely, there is a steady intent to conceal the subtle connection between everyday behaviors regulated by the Constitution and non-reflexive popular awareness of them which, *ex-hypothesis*, may (or not) be in accordance with the said established order.

In this case scenario, the digression proposed by Bruce Ackerman is not irrelevant. He refers to several matrixes of constitutionalism which are likely useful to a particular understanding of the underlying constitutional order. No doubt, this is important. Ackerman states that in order to better acknowledge sound grounds and concrete contents in the Constitution, it is necessary to speak of at least three historical-type kinds of constitutionalisms: 1. *"dualist-revolutionary"* (eg: American, or the French way); 2. *"transitional"* – eg: continental European legal thinking that grew after WWII); 3. And finally, there is a *"pragmatic"* one, which is in between the other two groupings. Great Britain's unique constitutional experience has embodied this paradigm.[3]

If we bear in mind those constitutional experiences which came about after post-colonial emancipatory revolutionary processes, the truth is that – in countries like Argentina –, a constitutional DNA closer to the dualist-revolutionary are very telling of the political grounds of such Constitutions. In fact, this has been like that simply because any time before the Constitution could be enacted, previously undifferentiated colonial borders, barely tells us of a blurry national identity. The "constitutional moment", then, helped to overcome many disruptive events of internal fights which, all things considered, bring about secular political-state forms of non-national unity under a single Constitution.

However, the basic dilemma underlying the debate in most of the lectures presented in this book is whether the Constitution needs political

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[2] See Comanducci, Paolo, *"Formas de (Neo)constitutionalismo: un Análisis Metafórico"*, pp. 82–83, VVAA – edited by Carbonel, Miguel –, *Neoconstitucionalismo(s),* Editorial Trotta, Madrid, 2005.

[3] This analysis of factors was presented by Bruce Ackerman: *"Principles: Universal, Particular"*;plenary session on December 9, 2010, VIII Constitutional Law International Congress, held at Palacio de Minería in Mexico City between December 6 and 10, 2010.

foundations or, on the contrary, if it needs to fulfill normative-philosophical demands to fit or conform. Can the Constitution – fundamental rule – be examined avoiding practices and collective ways of random compromising and dispute? This is a key question at stake.

It is not crystal clear – even to the most rigorous perspectives – whether the assessment of public constitutional reason must be monologically defined or controlled by one and only one philosophical matrix of truth or justice. The speculative existence of an ideal kind "checklist" of properties: particular traits and requirements which constitutional designers, law-makers and State officials must bear in mind, seems to be difficult to accept. As a matter of fact, here is where most of the problem lies. It is so because it is very unlikely to persuade all members of a civilized community that a given set of normative solutions proposed by legal scholars, savvy experts and philosophers – of various backgrounds and characters –, must always be preferred over other competitive ideas brought by ordinary folks. Unsatisfying conclusions drawn from pluralistic deliberative-dialogic processes are steeply inclined to challenge and/or resist the pundit assessment of legal experts.

The above mentioned differences, accordingly, allow for a conceptual counterpoint between those multiple versions of the so-called legal or philosophical constitutionalism and the rather democratic/republican/popular takings of the so-called political constitutionalism.[4] Beyond all subtleties, the truth is that legitimacy claims brought by both positions are absolutely incompatible. The objective assessment of contents on one side vis à vis the relying openness to democratic procedures and to organs embodying people's will on the other side, set the two thoughts apart. If the former struggles for agreements and the immobile permanence of certain rights, principles and values scrutinized by an abstract clarifying reason; the latter, instead, strives to preserve institutional mechanisms and instances of reproduction of public disagreement.

As regards this distinction, it is important to pay attention to two associated elements; one is empirical while the other is conceptual. Firstly, the idea of "Politics" – at the core of "political constitutionalism" – brings about an unavoidable representative dimension; it yearns for a specific collective will which gives unity to practices, procedures and rhetoric games

[4] See, Bellamy, Richard, *Political Constitutionalism,* p. 176, Cambridge University Press, UK, 2007.

which, somehow, make sense in a vicarious development of deliberation and institutional decision making within statehood. Then, when solving or wrapping of interpersonal disputes among free and equal subjects, constitutional organic rules are supposed to hasten the actual presence of a syncretic political being: the State.

Secondly, it is also certain that any Constitution will hardly relinquish its normative grammar of sense. In every case, beyond the mere descriptions of organic and/or functional competences, the normative dimension of its utterances are always overwhelming to people. Within a realm of potential resilience, then, political and legal statements associated with constitutional authority provide generic expectations of reciprocal toleration and good will. By definition, constitutional rules and principles cannot avoid supra-ordering themselves in their systemic relations among other norms. It is plain, therefore, that they have a rare performative capacity which allows them to define absolutely all involved semantic fields of authority, validity and legality in a given constitutional order.

It is very awkward to speak about democratic legitimacy if we are not able to give value to all collective desiderative practices and manners which strengthen ongoing state policies and governmental decisions. Regardless of their content, this is the way it works. Neither is it possible to do so if we do not acknowledge that in spite of being imperfect, those outcomes are worthy of a positive "prima-facie" normative credit. The obedience to a constitutional authority depends on such insight. Those who are called upon to read and apply constitutional norms are therefore empowered to keep safe this asset.[5]

Before going deep into the dilemma between philosophical or political grounds for Constitutional Law, a good strategy would be to focus our attention on a basic question, namely: are there different genealogies of claims and/or practical foundations to justify the Constitution? To tell the truth, this is where an unavoidable division of possibilities seems to lie. Certainly, if the only way to hold the normative value of a Constitution were to rely on a theory of justice and/or the postulation of certain stone-crafted individual rights, it would seem that only correct philosophical speculation can lead us to reach that objective.

Now, if the primary goal were the civilized justification of constitutional norms to ensure higher levels of responsibility and social coopera-

[5] See, Schawer, Frederick, *Las Reglas en Juego,* p. 293, Marcial Pons, Madrid, 2004.

tion, just formal and procedural political instances of negotiation and compromise could help achieving imperfect though stable collective constitutional agreements. My intuition says that communication games and practices in their political dimension would be the best tools to give certainty and legitimacy to those fundamental practices and rules. Then, in the end, it is democratic public will, rather than the very Constitution, what gives grounds to the duty of political obedience to the Constitution. Civic deliberation and citizens' participation pull together current values and principles while a constitutional order develops its meaning in time. Political-constitutional experience shows us how restless moral, legal and political statements are constantly being besieged and confronted. And this is so until they finally put down roots and crumble inside the constitutional order in force.

We should not disregard the fact that institutionalized deliberative practices within the State aim principally at clarifying legal and political decisions. People's civil lives heavily rely on transparent settings. Naturally, any acceptance and consolidation of constitutional values, principles and rules, unavoidable needs to undergo high levels of popular consensus. All things considered, however, the plain validity, appropriateness and/or objectivity in fair procedures – and state decisions in general – are not themselves enough to satisfy sound democratic expectations of many disadvantage members of society.[6]

Indeed, here arises a very complex and puzzling practical issue. What if separately -or all together- both the opinion of the majority and/or the opinion of scholars are wrong? This a key point in this academic debate. Pushing forward the problem we could go even further. Although the appeal to majoritarian mathematic of beneficial outcomes and the reliance of an ideal paradigm of public reason are leading rhetoric resources in constitutional thought, the core question is whether any of such claims are sound enough as to provide certainty or consolation to those disadvantage? Needless to say that both stances: the procedural-democratic claim and the philosophical appropriateness of decision contents are inclined to overlap and fight fiercely for hierarchy, although they are at ran-

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[6] As regards this idea, Waldron has an insightful reference to Aristotle's "doctrine of the wisdom of the multitude". He notes that *"[...] the connection between DWM and a constitutional order respectful of the rule of law is not merely contingent"*. See Waldron, Jeremy, *The Dignity of Legislation,* p. 99, Cambridge University Press, 1999.

dom very likely to interact with each other, as is often the case, to ramble reckless in the very same disorientation.

The tension of both viewpoints is inevitable. Accordingly, insofar as political-deliberative products could be subjected to epistemic conditions of validity from the very State branches, my feeling is that philosophical reason or legal conformity would inevitably attempt to contain and displace the political-democratic aspirations springing from the principle of popular sovereignty. Even when dogmatic belief in unblemished constitutional values, principles and rules could have been supported by majorities –and minorities as well –, the truth is that from the very moment free and equal citizens relinquish their own constitutional preferences to transcendental conditions of authority, the political meaning of popular sovereignty is definitively undermined before the uncontrolled judgment of scholars and juridical experts.

Along civilized history of people, the Constitution has become the bearing wall for peaceful resolution of civil conflicts. Freedom and equality of ordinary individuals as fundamental assumptions of constitutional agreement had led to other incidental ambitions further developed within the grammar of constitutionalism. Civil freedom and equality are therefore like magnetic poles or the focuses of an ellipse which needs both of them in combination to work out a complex normative set of constitutional meaning. They guide the normative development of associated constitutional categories, such as people's autonomy and dignity, as well as an increasing number of fundamental rights. The personal fulfillment has been a political and moral drive for trust, participation and civic commitment on the part of many citizens. Needless to say, without trust, or good will among people, it is not possible to envision peaceful social cooperation at acceptable levels.

Nevertheless, if the primary aim of constitutional order were not civic participation, solidarity and social cooperation but simply maximizing individual freedom, then it is clear that philosophy could well replace politics. Philosophy seems to behave like a more coherent and fertile theoretical source to justify generic forms of authority and compliance. The concept of "limited government" and "reasonable range of rights", is obviously stronger from a theoretical-philosophical point of view. Unlike democratic politics, liberal philosophical views, conversely, are inclined to emphasize a body of more universal and cosmopolitan objectives, principles and values.

In opposition to this view, some people have debated and get involved in political practices of civil participation and, in general, they become aware of the sovereign nature of their positive freedom. Respect and tolerance to plural ideas of a moral good – along with compromised or final viewpoints on the common interest – are clearly incompatible with the existence of a single chart of truth and justice. As renewable fuel, multiple and competitive objectives, principles and political values brings light to ongoing freedom and equality quests. And when this is the prevailing trend, majoritarian democratic-deliberative procedures take on a special meaning, which is: there is no better alternative to strengthen loyalty to normative solutions – though unstable and imperfect – than keeping full popular control of the Constitution. Naturally, when politics dominates the makings of the Constitution, all scholarly statements, the sharpest metaphysical remarks – no matter how valuable they are – must inevitable undergo free and egalitarian popular scrutiny.

II. Philosophy or Politics

Philosophy and Politics, among other issues, share together a common relevant constitutional agenda. The importance of "disagreement", for instance, is somehow their main common concern. However, both disciplines deal with disagreement in very different ways.

There are other common features between philosophy and politics which only appear to be in joint tenancy. This is because both disciplines have shown a competitive tendency against each other. Aristotle, in his *Politics*, warned that when a question is philosophical, whatever its sense, it can only be answered in philosophical terms. Having said this, then, normative statements attempting to regulate fair civil relations; normative propositions which account for contents on justice enlightened by philosophical reason –whether natural or conventional – inevitably, come to crystallize beliefs, preferences, or interests within stable patterns of universality.

In the Western World, history teaches us that no matter the seriousness of the debate, faced with inquiring into the most basic legal, economic, ethical, moral-normative problems, philosophy will always unleash elitist controversy. Even though abstract and general normative grasps are likely to trigger sceptical or uncompromised views, in the long run, as