Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

CONSTITUTION AND CORRUPTION AUTHORS WHO OUTLINE NATURE

Alejandro MALDONADO*

SUMMARY: I. *Introduction*. II. *Right to Power*. III. *Right of Power.* IV. *Right Before Power*. V. *Control of Power*. VI. *Transparency and Control Development Legislation*. VII. *International Commission Against Impunity in Guatemala*. VIII. *Conclusions*.

I. INTRODUCTION

Invoking quality jurists, no one better than Lenio Luiz Streck, who expresses with just vehemence the anguish over the perversion of the political system sunk in the traps of greed, both to accumulate large ill-gotten goods and to strengthen more power on top of the power that already you have He refers to social inequality, but his words would also point to decomposition:

> jurists (...) cannot continue to behave like that subject who is on the edge of Vesuvius about to erupt. The lavas (of the social crisis) will cover everyone, and instead of building barriers to prevent them from covering their houses and the city, they remain impassive, trying to straighten a Van Gogh painting on the wall.[1]

Or, put in the beautiful words of the Mexican storyteller Eraclio Zepeda —and nothing better than poetry to talk to us about the things of the world— "when the floodwaters knock down the houses and the river overflows, destroying everything, it means that many years ago days it began to rain in the moun-

* Constituent Deputy, Minister of Education, Minister of Foreign Affairs, Ambassador to the United Nations Organization (N.Y. and Geneva) to Mexico, President and Magistrate in the Constitutional Court for four periods, Vice President of the Republic (May 14, 2015) and President of the Republic from September 3, 2015 to September 14, 2016.

[1] Streck, Lenio Luiz, "Medios de acceso del ciudadano a la jurisdicción constitucional", *La protección constitucional del ciudadano*, Buenos Aires, Konrad Adenauer Stiftung, 1999.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

tains, although we did not realize it". [Lenio Luiz Streck: Means of citizen access to constitutional jurisdiction. The Constitutional Protection of the Citizen, Konrad Adenauer-Stiftung, Buenos Aires, Argentina].

Corruption in power is an evil that is too old, as is the result of a brilliant soap opera dialogue between Marco Antonio and Herod (quoted at the end of this essay) even when efforts are made to curb that perverse link.

Society qualifies, generally with good sense, the degree that corruption reaches in each system or government and demands harsh measures to combat it. The checks and balances of the constitution and ordinary laws have advanced, although unfortunately lagging behind the cunning to maintain it.

The national sphere has transcended, and thus international agreements have been concluded (for example, the Inter-American Convention against Corruption) that openly address the matter and have provided for collective measures to deal with it.

Lately, the popular action has been notable for its courage going out to the squares in protest against the signs of public corruption and this has meant a more convincing response from the control bodies, especially the judicial ones. Of course, severity or rigor cannot alternate with exhibitionism, much less with the glorification of the operators, since compliance is nothing more than a duty and obligation that rectitude itself imposes on justice.

External social controllers work with unknown efficiency, particularly due to the speed and ubiquity of social networks, which, to a certain extent, are the ones that draw the agenda of traditional journalistic media.

In this chapter on Guatemala, to which I modestly contribute, a very general mention will be made of the legislative framework that develops the constitutional and conventional precepts of probity and its necessary transparency. In particular, I will refer to the "International Commission against Impunity in Guatemala" (CICIG), originated by agreement between the Government of Guatemala and the United Nations Organization.

The invitation from the UNAM Legal Research Institute invites us to address the case from the perspective of the Constitution, which is the center of the legal-political panorama of a State in its internal performance and its links with the world.Diego Valadés —as he usually doe— can synthesize in a few words the content of voluminous branches of the legal world. In the topic that we are addressing, in two lines he offers us the necessary capitulation to locate the stages in which the sinuous decomposition can creep within the fundamental fabric of the State and the ways that he foresees

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

and activates to control that scourge. This schematic of yours covers it all: the Constitution regulates four forms of relationship with power: the right to power, the right to power, the right to power and the control of power.

II. Right to Power

The Political Constitution of the Republic of Guatemala (CPRG) contains regulations for access to public power, common to republican political systems, some of a general nature, and others of a specific type depending on the nature of the position. The supreme regulation is developed by derived legislation, both of constitutional hierarchy only modifiable by an aggravated procedure, and by ordinary or common. Added to this is the meticulous and endless task of regulatory regulations.

One of the first precautions to be taken is to avoid circumventing qualifications and qualifying formalities when accessing public power. In the form of election or appointment of certain officials, the personal requirements are established (includes the prohibitions) and the formalities and solemnities.

In usual terms, three paths open for access to power and public service: a) by popular election; b) by appointment; and c) by contract. The obvious assumption of the regulation points to efficiency for the satisfaction and benefit of the sovereign, intimately including the probity of the exercise. The positions can be management or leadership, administrative collaboration, technical advice and even control. As everywhere, some hold a mandate of political inspiration and others are contributors to the heavy burden of the administrative exercise in all imaginable areas. In matters of government and service, the philosophical predicate that nothing human is foreign is made clear. However, the breadth of the panorama that can be seen from the angle of power is conditioned by another republican principle: the governed can do what is not legally prohibited and the ruler. Only what is allowed.

The opening clause to the public service is outlined in the Constitution, both regarding the right to access and in the parameters of the supreme order of its exercise:

> Article 136. Duties and political rights:
> b) Elect and be elected
> d) Opt for public office
> e) Participate in political activities

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

Located in these first two ways of entering the public function (the electoral route and the appointment route) there are important development laws that detail the respective systems.

1. *Access to Power by Electoral Means*

The electoral option contains, in the first line, the personal requirements of the candidates that the supreme law prescribes as qualifying conditions for the corresponding positions. In this way, the deputies to the Congress of the Republic, the deputies to the Central American Parliament, the president and vice president of the Republic, and the mayors and councilors of the municipalities only have access through direct popular election. There is the exceptional provision of access to the presidency and vice-presidency of the Republic, which does not go to popular suffrage when the vacancy of the holder occurs (death, resignation, order of imprisonment) during the exercise of his mandate.

In the case of direct popular election, the Constitution orders its regulation by a law of supreme hierarchy, issued by the constituent assembly itself, in this case the Electoral and Political Parties Law. The control body is the Supreme Electoral Tribunal, whose regular and alternate magistrates are appointed by the Congress of the Republic, choosing them from a list proposed by a nominating commission.

Pursuant to this law of constitutional rank, there has been a virtual monopoly of political parties as the only public law entities empowered to propose the registration of candidates for president and vice president of the Republic, deputies to the Congress of the Republic and deputies to the Central American Parliament.

In relation to non-elective forms of appointment, laws and regulations have also been promulgated that try to accommodate the characteristic statements of each type of position with the qualities of suitable individuals according to the nature of the service required.

Access by electoral means, as explained above, in Guatemala is required at the proposal of one or several coalition political parties, for the positions of President and Vice President of the Republic, and of deputies to the Congress of the Republic and deputies to the Central American Parliament. It is not possible to launch independent candidacies, even though this does not mean that the candidate must affiliate with the party entity. Thus, the terms of the corresponding Constitutional Law regulating party

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

organization and the formulas for nominating and proclaiming candidacies become of great importance.

The Electoral and Political Parties Law, issued by the National Constituent Assembly itself, has undergone several reforms in the sense of providing the electoral authority with greater control capacity and opening a little more the participation of the affiliated bases that make up the corresponding parties. Political parties.

The history of the monopoly of political parties as exclusive nominators of candidacies for the legislative and executive bodies has faced its vicissitudes, most of them simulating a more apparent than effective democratization. From the 1965 Constitution, which, for a much smaller population, required parties to accredit at least fifty thousand members, to the current regulation (1986) which, even when the population has doubled, requires a proportionally much smaller membership. Some analysis of this quantitative reversal explains that, when, due to the demand for a stronger support of registered members, only four political parties (ideologically differentiated) functioned, when the possibility of more organizations (which reached a little more than seventy Pygmies) was opened, the power economic was always decisive to promote the candidacies of its greatest convenience. It is assumed that the multiparty system was a factor in the erosion of the traditional parties that made up the main ideological currents of the time. Likewise, the parties that achieved the favor of the media, generally in concert with the leaders of their business affinities, also had more deployment capacity.

These issues sought to find some control with regulations on political party financing, caps on campaign spending, and access to media advertising.

The Constitutional Court —endowed with the power of binding opinion for any reform to the laws of constitutional hierarchy— from its early days ruled on reform projects to the Electoral and Political Parties Law. The question was to purge two aspects of coherence and legitimacy that repressed attempts to mock constitutional precautions. One, that it would facilitate the publicity of the parties in the contest. Another, to establish controls on their financing and expenses, including the dimension of electoral propaganda.

Located in the constitutional provisions of access to positions of power, presumably purifying conditions were established for circumstances that can be foreseen as risks to incur acts of corruption. For this purpose, the Constitution determines reasons or impediments for the exercise of access to the Congress of the Republic, as provided in article 164:

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

> Prohibitions and compatibilities.
>
> a) …
>
> b) Contractors of works or public companies that are financed with funds from the State or the municipality, their guarantors and those who, as a result of such works or companies, have pending claims of their own interest.
>
> c) Relatives of the President of the Republic and those of the Vice President within the fourth degree of consanguinity or second degree of affinity.
>
> d) Those who, having been sentenced in a final judgement, have not resolved their responsibilities.
>
> e) Those who represent the interests of companies or individuals that operate public services.
>
> If at the time of his election or later, the elected is included in any of the prohibitions contained in this article, his position will be declared vacant.

It is curious, and it is a matter that at the moment has not provoked any discussion, that these qualifying requirements to opt for the Congress of the Republic have not been established for those who assume the Presidency or the Vice Presidency of the Republic. Nor were they established for candidates for popularly elected municipal positions, but they do appear in the respective Municipal Code.

The popular elective route of access to power also regulated the duration and cost of political campaigns. The first, setting times for the start or start of the contest. Regarding the cost, setting spending ceilings and the transparency of financing. There were those who thought that the determination of a period of public opening of the political-electoral offer, that is to say of the acts of proclamation of the candidacies and their advertising promotion and contact with the electorate, was not exactly the best possibility of offer of the optants, tied by a lever similar to those of races at the racetrack. Although territorially the country is not very large and its population is a little more than 16 million, it is necessary for the candidates (and also for the voters) to display their political skills as long as they need. Otherwise, they leave many advantages to public officials who make themselves known for their state activities. In addition, the media can, if they want and it is not strange, keep the favorites of their advertising financiers on stage.

Regarding controlled and healthy financing, the fines are severe and strong in terms of repressing expenses that exceed a cost ceiling of the contest. Regarding the origin of the contributions, it has led to criminal prosecution for having discovered contributions of anonymous origin or suspected of money laundering.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

The regulation of transparency and solvency contained in the Electoral and Political Parties Law, which safeguard the electoral process, in particular the provisions that try to prevent obscure financing, is not the only wall that is put up, because there are also regulations that prequalify the subject aspiring to positions (common provisions for electoral entry or by appointment) Thus, in the stage of access to power, the system establishes precautions to prevent it to subjects whose activities or trades are presumed incompatible with the management of government affairs.

Continuing with the popular electoral system as a way of entering leadership positions in the central government and in the municipalities, it was regulated by a law of constitutional hierarchy, in force since January 14, 1986. Relatively early, it was proposed in the Congress of the Republic the need to introduce reforms to said regulations, especially in terms of financing and publicity of partisan promotions of candidacies. In this regard, it is interesting to quote some fragments of the binding opinion of the Constitutional Court (of July 31, 1990, File 90-90) and that are related to the problem of corruption attached to the misuse of public power.

Two aspects dominated this initiative to reform the electoral law that emerged within the Congress of the Republic. The first, public financing of political parties; the second, the cost of political advertising for electoral purposes.

Some indicative paragraphs of the position of the court of constitutionality control are transcribed from the opinion of the aforementioned Court, which is relatively extensive.

> …There could be no constitutional violation in a regulation that fully intends to introduce corrective measures in electoral procedures, in which the interference of economic factors propitiated by strong pressure groups, which could eventually favor parties committed to financial investment.
>
> … It should be noted that such corrective measures only cover part of the problem, as long as other advantageous forms of electoral competition are not corrected (and this is a matter of the legal evolution of this new Electoral Law that is taking shape), such as advancing campaigns so far in advance that only those with the greatest resources can have a continued presence, that of using public goods significantly and intentionally for personal promotions that later lead to candidacies, and the risk of excessive power that can be transferred to social communication companies that can Influencing the proportion of the public image of candidates and parties through supposed information that is apparently unaccounted for, with which they can arbitrarily favor some and ignore others.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

> The problems raised have been resolved in other systems (...) through two basic elements: the financing of political parties during the electoral stage and the regulation of the use of the media. As for the financial aspect, in two main ways: a restrictive one, prohibiting the unilateral use of State resources or trying to prevent the influx of foreign aid; and another positive, recognizing the so-called political debt or arranging the financing of political parties, in the aspect of advertising, facilitating the access of the parties to the official media (Citation of the systems adopted by several Latin American countries was included).

Over time, reforms were approved to the Electoral and Political Parties Constitutional Law, which substantially addressed, in terms of its relationship with corruption, the point of private financing, to which an attempt was made to put limits not only on the amount but also on the transparency of the people. Or contributing companies. The purification process that awoke in the country, after the public demonstrations that occupied the great central square for weeks with the assistance of civic sectors of all social levels, motivated the Supreme Electoral Tribunal to carry out stronger inspections and impose severe sanctions, which even to the cancellation of the registration of political parties of the greatest notability for their previous capacity for mobilization and conquest of positions of popular election.

Dramatic it turned out that the President of the Republic himself, Mr. Jimmy Morales Cabrera, was the object of an alleged investigation by the Public Ministry and the International Commission against Impunity in Guatemala for a case of alleged illicit financing of his political party, during the process election to attain office. The complexity of the matter resulted from having been the Secretary General of the political party that nominated him, from where, as the sole representative, he was charged, by legal presumption, with responsibility for the entity's financial operations.

The ruler enjoying the pre-trial privilege, they asked the Congress of the Republic to lift it, in order to be able to investigate the high dignitary regarding the evidence found by the Supreme Electoral Tribunal. The matter was known by the legislative body (09-11-2017) in the environment of strong pressure, as usually happens now, from press commentators and, even more intense, from social networks. The result was 104 denying the lifting of immunity and 25 granting it. A final resolution required 105 votes, so that for just one, the case could be reconsidered again in the legislative body.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

2. *Cases of Access to Power by Electoral Means*

Congress of the Republic

Article 157. Legislative power and composition of Congress.

Legislative power corresponds to the Congress of the Republic, made up of deputies elected directly by the people by universal and secret suffrage (...)

Presidency and Vice Presidency of the Republic

Article 184. Election of the President and Vice President of the Republic.

The President and Vice President of the Republic shall be elected by the people for a non-renewable period of four years, through universal and secret suffrage.

Municipial Corporations

Article 254. Municipial Government. The municipal government will be exercised by a Council which is made up of the mayor, trustees and councilors, directly elected by universal and secret suffrage for a period of four years, and may be re-elected.

3. *Access to Power by Administrative Means*

The Political Constitution established some conditions for cases that it presumed incompatible for the performance of the positions. Thus, for certain appointments, it established incompatibility brakes. For the case:

> Article 197. Prohibitions to be Minister of State
>
> a) Relatives of the President or Vice President of the Republic, as well as those of another Minister of State, within the fourth degree of consanguinity and second degree of affinity.
>
> b) Those who, having been sentenced in a trial of accounts, have not resolved their responsibilities.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

> c) The contractors of works or companies that are financed with funds from the State, from its decentralized, autonomous and semi-autonomous entities or from the municipality, their guarantors and those who have pending claims from said businesses.
>
> d) Those who represent or defend the interests of individuals or legal entities that operate public services;
>
> In no case can the ministers act as representatives of individual or legal persons, nor manage private businesses in any way.

In general, for the appointment to high-level positions, the regulations established by the Law of the Executive Branch and other regulatory laws of each administrative unit are followed. With regard to support staff, parameters are set in the civil service legislation. Likewise, quality requirements have recently been introduced in terms of accrediting professional titles and experiences that justify entry into the bureaucratic system through temporary contracts, which, when they have been reiterated for some time, the Constitutional Court has recognized. as permanent places and not simply temporary.

If any novelty can be pointed out regarding the condition of public service in the country, it is found in the fact that the 1985 Constitution contains a section of regulations for State Workers, who are recognized the rights of association, unionization and strike. The result has been that the union organizations of public servants have acquired more power than private unionism, and, as usually happens in this condition, there have been allegations of corruption in some union leadership, even when, despite the years, nothing has been proven.

As a general principle, the path established in the civil service law (article 108 of the Constitution) or in the specific laws of decentralized or autonomous State entities was established as the access route to the public service.

> Article 207. Requirements to be a magistrate or judge.
>
> … Magistrates and judges must be Guatemalans of origin, of recognized honorability …
>
> Article 209. Appointment of judges and auxiliary personnel.
>
> … The judicial career is established. Income, promotions and promotions will be made through opposition.

Regarding minor and first instance judges, it was regulated that their appointment would be through the judicial career system, a general condition in republican-democratic systems. The question consisted of the operability of the regulatory law, which, progressively, has been reaching its

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

goals. It is important to note that the salary incentive for the recruitment and training of judges has been convenient in terms of obtaining their permanence and professional quality.

4. *Access to Power Through Nomination Comissions*

The first time that high-ranking officials were appointed in Guatemala through the system of nomination commissions happened during the de facto military government installed in March 1982. At that time, the Executive tried to appoint the magistrates of the Supreme Electoral Tribunal, proposed by the Plenary of the Supreme Court of Justice. The appointment of illustrious personalities, with a wide record of civility and independent character, ensured reliability to the system, which was later incorporated in the drafting of the Constitution, now in force, for the integration of other collegiate bodies and appointment of the Attorney General of the Republic and of the Comptroller General of Accounts. The experience has varied towards distrust, on the part of some sectors, of the effectiveness of the system.

To the constituents, the aforementioned procedure of the nomination commissions seemed an adequate mechanism to guarantee the independence of the functions, which was also established for the appointment of the Comptroller General of Accounts (Art. 233) and the Attorney General of the Republic (Art. 251). Likewise, the magistrates of the Supreme Electoral Tribunal would be appointed in this way, in accordance with the law of constitutional hierarchy that regulates it.

Thus, the system of nomination commissions for very important positions acquired constitutional rank as guarantors of the impartiality of the high-ranking officials who were responsible for the administration of justice, the impartiality of the electoral processes, the auditing of accounts, and the accusation in Criminal matters. Over time there were expressions of displeasure, supposing that de facto powers could influence the appointments via approaches of outside interests and the sponsorship of the costs of election campaigns in the respective professional associations. Trying to attenuate factors that wear down the neutrality of the nominating commissions, laws such as Decree 16-2005 were issued, which established some restrictions to avoid nepotism of the commissioners and Decree 19-2009 regulating its principles of transparency, professional excellence, objectivity and publicity of the selection process.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

In the 61st session of April 10, 1985, only one deputy of the Constituent Assembly doubted the proposed system, saying among other arguments:

> In the draft of the Drafting Commission of the Constituent Assembly, a system of election based on a nominating committee formed by deans of the Faculties of Law of the country's universities, the president of the Bar Association and a member appointed by the Supreme Court of Justice.- In accordance with the reality of the country, a proposal of that Nature is partitioned but not depoliticized, it assumes a certain corporatist character and does not guarantee a system of broad consultation. (...) Delegating to a committee of such a small proportion the proposal of the individuals of an entire State agency is extremely risky given the very small portion of popular sovereignty that it could represent.

The current recomposition of the system, produced by the massive reaction in the public square and the agility and free access to the media, could be enervating the manipulation of the application system. Always with the reservation that the emotional and easy nature of the complaint does not invert the terms of preponderance and will only produce a change of factors of media power committed to another side of the quadrant.

5. *Supreme Court of Justice and Court of Appeals*

> Article 215. Elección de la Corte Suprema de Justicia.
>
> … They will be elected by the Congress of the Republic for a period of five years, from a list of twenty-six candidates proposed by a nomination commission made up of a representative of the Rectors of the country's universities, who chairs it, the Deans of the Faculties of Law or Legal and Social Sciences of each University of the country, an equivalent number of representatives elected by the General Assembly of the College of Lawyers and Notaries of Guatemala and an equal number of representatives elected by the magistrates of the Court of Appeals and other courts to which Article 217 of this Constitution refers. … The election of candidates requires the vote of at least two thirds of the members of the Commission.

In a similar way, with a logical change, it was established for the designation of the magistrates of the Court of Appeals (Art. 218).

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

6. *Comptroller General of Accounts*

> Article 233. … The Congress of the Republic will make the election (of the Comptroller General of Accounts) from a list of six candidates proposed by a nomination commission made up of representatives of the rectors of the country's universities, who chairs it, the deans of the faculties that include the Public Accounting and Auditing career of each university in the country and an equivalent number of representatives elected by the general assembly of the College of Economists, Public Accountants and Auditors and Business Administrators. For the election of candidates, the vote of at least two thirds of the members of said commission will be required.

7. *Attorney General of the Republic*

> Article 251. Public Ministry.- … The Head of the Public Ministry shall be the Attorney General of the Republic ... shall be appointed by the President of the Republic from a list of six candidates proposed by a nominating commission made up of the President of the Supreme Court of Justice, who chairs it, the deans of the Faculties of Law or Legal and Social Sciences of the country's universities, the President of the Board of Directors of the College of Lawyers and Notaries of Guatemala and the President of the Court of Honor of said college.

8. *Other Systems of Access to Power*

A. *Court of Constitutionality*

The 1985 Political Constitution established a permanent Constitutional Court. Previously, with the 1965 Constitution, the control of constitutionality had been created by eventually integrating the court, made up of magistrates from the ordinary justice system. The new configuration picked up the essential nature of legal-political control that constitutes the agenda of this kind of jurisdiction. In this way, the Political Constitution, in its article 269, provided:

> The Constitutional Court is made up of five regular magistrates, each of whom will have their respective alternate. ... The magistrates will hold office for five years and will be appointed in the following manner:
>
> a) A magistrate for the plenary session of the Supreme Court of Justice

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

b) A magistrate for the plenary session of the Congress of the Republic

c) A magistrate for the President of the Republic in the Council of Ministers

d) A magistrate from the Higher University Council of the University of San Carlos de Guatemala, and

e) A magistrate for the Assembly of the Bar Association.

Its structure has been discussed by some commentators who, probably, have not paid the greatest attention to the nature of the cases that the Court must hear and resolve, which, as Francisco Tomás y Valiente affirmed, with his irrefutable logic, are political matters:

> It must be said, without fear of words, that the problems formulated before the Constitutional Court are raised in legal terms, but they hide —or they don't even hide: they contain— problems of political substance. ... Whoever does not understand this as a paradox, as a legal challenge, does not understand anything about the reality of the constitutional courts. For this reason, when I am asked many times if the Court is politicized, I always answer the same thing: depending on what you understand as such. If by politicization of the Constitutional Court is meant link, dependency, or influence on it by political parties or other State bodies, obviously not, emphatically not, rabidly not; but naturally, if what we understand is that the Court deals with problems whose core, whose ultimate content, whose nucleus is a problem of the model, is a problem of the limits of the State, is a problem of a political nature, obviously yes.[2]

Difficult and transcendent the function of the constitutional courts, which currently operate throughout the world, it is not possible to unify in a common scheme the form of their integration. Each nation has its own, according to its founding structure. Edmundo Vásquez Martínez (+) of singular moral and legal solvency, commented regarding the Guatemalan system:

> What is well defined and regulated in the Constitution must not be unnecessarily complicated ... Each appointing body must comply within those frameworks and must not be hidden the political-legal nature of the Constitutional Court, especially since it is in charge of controlling "political acts", that is, those whose purpose is the organization and subsistence of the State as such.[3]

[2] Tomas y Valiente, Francisco, Complete Works, Madrid, CEPC, 1997, vol. V, p. 4251.

[3] La Hora Jounal, October 2, 2000.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

The Court has functioned since the installation of the constitutional regime (1986) with six successive magistracies. During that time it has had its lights and shadows, resolving issues of high political significance and strong social tension. Its decisions have been fulfilled and, to a great extent, it has been a restorer of the constitutional order when it has been threatened. There are no known complaints of acts of corruption attributable to their decisions, although some (very few) have been questioned for their political profile, a situation that is common to constitutional courts.

B. *Human Rights Attorney*

The aforementioned Guatemalan Constitution of 1985 instituted, also for the first time in America, a Human Rights Ombudsman (*Ombusman*), with an indirect election system that had to be based on a list of three candidates, as provided in article 273:

> Human Rights Commission and Commission Attorney. The Congress of the Republic will designate a Human Rights Commission formed by a deputy for each political party represented in the corresponding period. This commission will propose to Congress three candidates for the election of a Procurator, who must meet the qualities of the magistrates of the Supreme Court of Justice and will enjoy the same immunities and prerogatives of the deputies to Congress. The law shall regulate the powers of the Commission and the Human Rights Ombudsman referred to in this article.

It would be understood that this prequalified way to decide the election of the Attorney tends to an indirect way of appointment, which reduces the partisan link by putting a filter on it that results in the fact that in the respective Commission, each minority party (which are several) has the same vote. than the majority (which are less). Presumably, the Human Rights Ombudsman, who, among his attributions, has to supervise the operations of the Law of Access to Public Information, can be a good watchdog of the transparency and solvency of the government.

C. *Monetary Board*

The Monetary Board, on which the Banco de Guatemala depends, is made up of eight members, of which four are appointed by the President of the Republic, and the others by different entities. Those appointed by

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

the Chief Executive are: the Chairman of the Board, who is also Chairman of the Bank, and the Ministers of Public Finance, Economy, and Agriculture, Livestock and Food. The rest: one by the Congress of the Republic, one by trade, industry and agriculture trade associations; one by election of the presidents of the boards of directors or boards of directors of national private banks; and one elected by the Superior Council of the University of San Carlos.

This form of integration takes care that there is no hegemony of the government in the decisions and appointments of the system and neither that there could be by the private sector. Hence, to date, no complaint has been made of acts of political or economic corruption in the institution.

The Political Constitution was reformed in 1993, being notable that they introduced in the regulation of the Monetary Board the prohibition of "authorizing the Bank of Guatemala to grant direct or indirect financing, guarantee or endorsement to the State, to its decentralized or autonomous entities or to the non-banking private entities," Likewise, it prohibited the Bank of Guatemala from acquiring the securities issued or traded in the primary market by the indicated entities. An exception was regulated: the financing that can be granted in the event of catastrophes or public disasters, "as long as it is approved by two thirds of the total number of deputies that make up Congress, at the request of the President of the Republic". This novelty was the object of strong questioning, pointing out as a practical delegation in favor of the private economic sector. The defenders of the amendment estimated that the measure was taken to avoid currency devaluations that a careless debt policy could bring to the country.

III. Right of Power

Public power is open to eligible citizens according to the qualities and procedures determined in the Constitution and the laws that develop it.

Once the formal requirements for access have been fulfilled, the conditions for the exercise of the public function follow. In legal and political doctrine, the solid and creative synthesis formulated by Ignacio Burgoa in his magisterial (now classic) *"Derecho Constitucional Mexicano",* regarding the principles of legality and responsibility that limit the powers of the direction and administration of the State.

It is often said that the organs of power can only do what is constitutionally and legally permitted. Hence, they cannot deal with what is forbidden to them either. In simple terms, the principle of legality works.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

As is typical of constitutional systems, the supreme text determines the scope of functions and powers of the respective organs of power, powers that are made explicit in the vast repertoire of constitutional and ordinary laws and are detailed in the corresponding regulatory and administrative work.

Having various meanings, corruption in public policy points to the perverse exercise of power to obtain material wealth from the people's assets and to gain a foothold in positions, directly or indirectly, for illegal and immoral gain. This risk, whose persistence and extension would deeply damage society and the effectiveness of the State, is the cause of the issuance of regulatory norms that guarantee the solvency of servers, sanction offenders or prevent the reinstatement of the incompetent. This forms a complex, extensive and difficult agenda.

In this section of the right to power (that is, once the conditional stage of his access to command has been overcome) the first constitutional norm and then the prolix legal development, determine the scope and scope of competence of each of the subjects invested with authority, by which it is known what and how it should make use of its mandate. It is here, in possession of the position, that laws and regulations controlling the correct use of entrusted responsibility have also been issued.

It is understood, of course, that the great majority of public servants carry out their tasks with integrity and honesty, and that, with or without controlling laws, they act in accordance with the ethics to which they are committed. Notwithstanding this, at the level of the Constitution, institutions have been established whose purpose is to prevent and, where appropriate, violations of the rules of conduct established by the constitutional system.

Sorted, let's say, the form of control of access to power, the Constitution (and the laws that develop its mandates) contain regulations equally vigilant of the activity of public servants, both those of popular election and those who have entered by appointment or contract .

In general terms, common to all public servants, factors that guarantee their impartiality and their loyalty to the country are conditioned or stated, as follows:

> Article 154. Public Function
>
> (pf 2º) Public officials and employees are at the service of the State and not of any political party.
>
> (pf 3º) The public function may not be exercised without previously taking an oath of fidelity to the Constitution.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

The highest-ranking norms cited, as is usual in constitutional regimes, recognize the right of individuals to access power and, at the same time, that of citizens to obtain from them the highest ethical quality of their exercise.

One of the guarantees of the rule of law and democratic representation is located in the classic principle of the separation of powers, in which one does not depend on another, even when certain links of harmonious and coordinated operation have been established. On the other hand, certain crossed controls that limit excesses that, due to hegemony, could lead to diversion. Here it is appropriate to remember the classic, and oft-repeated apothegm, that power corrupts and, when it is absolute, it corrupts absolutely. The fundamental law establishes it as follows:

> Article 141. Sovereignty.
>
> Sovereignty resides in the people who delegate it, for its exercise, in the Legislative, Executive and Judicial organisms. Subordination between them is prohibited.

1. *Legislative Agency*

The Guatemalan system of operation of the Legislative Organism contains some nuances of parliamentarism, such as its possibility of interpellation of the ministers of State and that of their defenestration in the circumstances provided for in the Constitution. In return, the presidential capacity to veto laws. The system corresponds to the form of moderation of power via its interaction and mutual moderation, which modern theory promoted from classics such as Montesquieu. In addition, judicial power appears as another of the key elements of checks and balances that in itself would be enough to stop the signs of ethical decomposition of the public service (The theoreticians could not imagine that the organs of power would establish the link of party politics, as a transversal axis that would link them).

Certain norms of the Constitution are transcribed as a reference of the legislative body and some of its capacities for its exercise:

The aforementioned article 157 of the Political Constitution attributes legislative power to the Congress of the Republic. This could be indicated as its main function, which combines both political and legal controls. The veto, essentially of a political order insofar as it can be decided by the President of the Republic based on his own assessment of inconvenience for public interests, and the declaration of unconstitutionality, which the re-

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

spective Court can declare in a sentence requested by any citizen with the sole the professional help of three lawyers. It thus turns out that the legislative power is controlled by bodies other than the parliamentarian himself.

For the performance of their political-legislative powers, the deputies have the quality and guarantees that the Constitution and its regulatory law recognize, among these the possibility of temporarily accessing other positions in the Administration. Likewise, the normal shielding of the characteristic exercise of the elected representatives, as established in the following articles:

> Article 160. Authorization for deputies to hold another office. Deputies may hold the position of minister or official of the State or of any other decentralized or autonomous entity. In these cases, permission must be granted for the duration of their executive duties. …
>
> Article 161. Deputies' Prerogatives.
>
> a) The deputies are representatives of the people and dignitaries of the Nation; As a guarantee for the exercise of their functions, they will enjoy, from the day they are declared elected, the following prerogatives: Personal immunity from arrest and prosecution …
>
> b) Irresponsibility for his opinions, for his initiative and for the way of dealing with public business, in the performance of his position
>
> All State dependencies have the obligation to keep the deputies the considerations derived from their high investiture. These prerogatives do not authorize arbitrariness, excessive personal initiative ... Only Congress will be competent to judge whether there has been arbitrariness or excess and to impose the pertinent disciplinary sanctions.

In the Guatemalan constitutional system, it was traditional for the deputies themselves to hear and resolve complaints for alleged or real crimes attributed to one of their members. This situation changed with the reforms to the Constitution, by which jurisdiction was transferred to the Supreme Court of Justice. On the other hand, it is up to Congress to hear the so-called "preliminary trial" urging against senior officials of other agencies and State entities.

> Article 165. Powers of Congress.
>
> h) Declare whether or not there is room for the formation of a case against the President and Vice President of the Republic, President and Magistrates of the Supreme Court of Justice, the Supreme Electoral Tribunal and the Constitutional Court, Ministers, Vice Ministers of State when they are in charge of the Office, Secretaries of the Presidency of the Republic, Under-

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

secretaries who replace them, Human Rights Ombudsman, Attorney General and Attorney General of the Nation.

The provisions in the Political Constitution regarding the powers of the Congress of the Republic are those of an organization of this nature, contained especially in articles 165, 170 and 171, which is not the case to reproduce because they are obvious in any semi-parliamentary system.

In the analysis of the tasks that fit into the chapter on the Right of Power, that is to say, what can or should be done from the summits of the government, parliamentary interpellation as a control mechanism, and consequent tool against corruption, will be seen in the last: IV. Control of power.

> Article 170. Specific powers of Congress
>
> b) Appoint and remove its administrative staff.
>
> This simple constitutional provision, totally typical of a State agency, is susceptible to misuse when there are no specific civil service regulations, such as qualification of positions, pertinent salaries and income, promotion, benefits and discipline systems.
>
> Article 171. Other powers of Congress
>
> b) Approve, modify or disapprove… the State Income and Expenditure Budget.
>
> c) Decree ordinary and extraordinary taxes according to the needs of the State and determine the bases of their collection.

The task of the State has one of its greatest expressions in the regulation of income and expenditure policies, insofar as valuable development goals can be achieved through them, or, on the contrary, in the wrong way, lead to the ruinous and inefficient state, incapable of reaching minimum levels of lasting equity for the generality of its inhabitants.

2. *Executive Body*

In the Guatemalan case, to begin with the first magistracy, which symbolizes the unity of the State and its internal and international representativeness, the constitutional regulation seems simple in terms of qualitative requirements. The maximum text has:

> Article: 182. Presidency of the Republic and integration of the Executive Branch.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

> … The President of the Republic is the Head of State of Guatemala and exercises the functions of the Executive Body by mandate of the people. ... he will always act with the Ministers, in Council or separately with one or more of them, he is the General Commander of the Army, represents national unity and must ensure the interests of the entire population of the Republic. ... He, together with the Vice President, the ministers, the vice ministers and other dependent officials make up the Executive Branch and are prohibited from favoring any political party.
>
> Article 185. Requirements to apply for the positions of President or Vice President of the Republic.
>
> Guatemalans of origin who are practicing citizens and over forty years of age may opt for the position of President or Vice President of the Republic.

Regarding the Ministers of State, the Constitution provides for a series of objections to their access, which are related to precautions regarding

> Article 194. Minister functions
>
> i) Ensure strict compliance with the laws, administrative probity and the correct investment of public funds in the businesses entrusted to their charge.

As is often the case, constitutional prescriptions must be developed in ordinary legislation. In Guatemala's presidential system, the functions of the head of state are or should be supervised by the revenue and expenditure comptrollers (specifically the Comptroller General of Accounts of the Nation), whose head is appointed by a nomination commission system, with which was intended to reduce partisan influence and direct presidential appointment.

The prohibitions to access the government cabinet can be explained as a precaution due to family ties, business, insolvencies that presume personal interests beyond those of the service. Of course, not everything fits as provided by the fundamental law, since the family bond does not necessarily imply a concert for the misuse of power. However, nepotism has been frowned upon as corruption, being that, in effect (and this is a purely anecdotal fact), the close relatives of the men in command, republican or monarchist, are prejudiced by social rumors that, if before they were destructive, now in the age of social networks they are fatal

3. *Judicial Body*

> Article: 203. Independence of the Judicial Body.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

Justice is administered in accordance with the Constitution and the laws of the Republic.

Magistrates and judges are independent in the exercise of their functions and are only subject to the Constitution of the Republic and the laws. Those who attempt against the independence of the Judicial Body, in addition to imposing the penalties established by the Penal Code, will be disqualified from holding any public office.

Article: 207. Requirements to be a magistrate or judge.

… Magistrates and judges must be Guatemalans of origin, of recognized honorability …

Article: 209. Appointment of judges and auxiliary personnel.

… The judicial career is established. Income, promotions and promotions will be made through opposition.

4. *Control and Supervision Regime*

Article 232. General Comptroller of Accounts.- … It is a decentralized technical institution with supervisory functions of income, expenses and, in general, of all tax interests of State agencies, municipalities, decentralized and autonomous entities, as well as any person who receives funds from the State or who makes collections. public.

Public works contractors and any other person who, by delegation of the State, invests or manages public funds are also subject to this control.

Article 233. … The Congress of the Republic will make the election (of the Comptroller General of Accounts) from a list of six candidates proposed by a nomination commission made up of representatives of the rectors of the country's universities, who chairs it, the deans of the faculties that include the Public Accounting and Auditing career of each university in the country and an equivalent number of representatives elected by the general assembly of the College of Economists, Public Accountants and Auditors and Business Administrators. For the election of candidates, the vote of at least two thirds of the members of said commission will be required.

5. *Attorney General's Office*

Article: 252. Attorney General's Office … One of his responsibilities is the advisory and consultancy function of state bodies and entities. (...) exercises the representation of the State ...

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

IV. Right Before Power

In this section, the law could be located as a condition of power that is, in turn, its positive generator. Power and right, symbiosis of reality, as Alexis Carrel locates it: "the material and the spiritual are linked in the human, in such an indissoluble and certain way, as in the statue the marble and form".

Law before power or power before law have their semantic expression in the formula: Rule of Law.

Many times we incur in the scholastic effort of definitions (which reminds me of an author who noted that no physicist bothered to look for an exact definition of electricity instead of verifying its effects) even when the relationship between power and right is evident and sensitive to the reality of time and place.

Going over the theories and definitions, the Rule of Law is taking the profiles that each sovereignty, in its circumstances, will be articulating according to its political culture and the form of citizen expression. Some components, such as the rule of law, the distribution of powers of power, the legality of administrators' actions, and the free exercise of the fundamental rights of the human person, define a Rule of Law.

If it must be understood that the authority of the State cannot intervene in the social and family life of the individual, without previously having a constitutional legal norm that authorizes it, we know that we live in a Rule of Law. If the human person is the repository of an internal jurisdiction that corresponds to his nature, honest and honest, and retains the basic decision to think and act as he pleases without offending or injuring another, it is because there is a rule of law that protects his existence. Individual and associated as she wants.

In theory, it is not necessary that each act of life (thinking and acting) of the individuals that make up the population should be specifically authorized, since it will only be limited by what has been rationally prohibited. On the other hand, that Power, that is, the governing class, can only act for what has been expressly authorized. This is the common and current formula, although it can be misleading as the positive law could be contaminated with oppressive and arbitrary rules. For this possibility, the constitutional system has foreseen not only its supremacy over ordinary laws, but also instituted an independent control body. And it does not stop there, it also recognizes the supremacy of the international conventionality of human rights, being part of the universal declarations and of the bodies in charge of its protection.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

In short: power can be controlled by the law generated by that same power: Constitutional State of Law.

V. Control of Power

The law is not only a protection system for the human personality so that it can do its will without offending others. It is also the framework of action of the public power so that it respects and guarantees the framework of action that has been expressly recognized. This is where the boundaries that the supreme law and the ordinary laws demarcate work. The Political Constitution deals with this, the correct exercise of government. It surrounds power with a multitude of controls, both direct and delegated to the legislation that develops it, including international conventionality. In a very brief way we will refer to norms of supreme hierarchy and then to the delegated legislative and finally to a specific conventional one, the agreement between the United Nations Organization and the Guatemalan government for the establishment of an International Commission against Impunity in Guatemala (CICIG).

We have noted some preventive constitutional provisions that, due to the activities, links or kinship ties of a person, are presumed to be at high risk of incurring acts of corruption in the exercise of public office. Now some repressors of the fact.

The rule that orders the legality of detention, arrest or prison centers is protected by providing: "The authority and its agents, who violate the provisions ... will be personally responsible" (Art. 10) Similarly, with respect to the prison system, it is recognized: "the infraction of any of the established norms ... entitles the detainee to claim compensation from the State for the damage caused" (Art. 19) With respect to to this condition and regarding minor offenders and their special treatment, article 21 prescribes: "Officials, public employees or other persons who give or execute orders against … in addition to the sanctions imposed by law, shall be immediately removed from office and disqualified from holding any public office or job". The above cases cited by the frequency of public corruption in the prison system. Next, some precepts of the supreme rank.

> Article 154. Public function, subject to the law. Officials are holders of authority, legally responsible for their official conduct, subject to the law and never superior to it.
>
> Officials and employees are at the service of the State and not of any political party.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

The consequences of the exercise of public service, when it causes damage to individuals (without indicating whether due to intent or negligence), imply solidarity of the State in its reparation:

> Article 155. Responsibility for violation of the law. When a dignitary, official or worker of the State, in the exercise of his position, breaks the law to the detriment of individuals, the State or the state institution he serves, will be jointly and severally liable for the damages caused.
>
> The civil liability of public officials and employees may be deducted as long as the statute of limitations has not expired, the term of which shall be twenty years.
>
> Criminal responsibility is extinguished, in this case, by the passage of twice the time indicated in the law for the prescription of the sentence.
>
> Article 156. Non-compulsory illegal orders
>
> No public official or employee, civil or military, is obliged to carry out orders that are manifestly illegal or that imply the commission of a crime.

1. *Electoral Political Regime*

223.- … Once the call for elections has been made, the President of the Republic, officials of the Executive Branch, mayors and municipal officials are prohibited from making propaganda regarding the works and activities carried out.

2. *Financial Regime*

> Article 237. General Budget of Income and Expenditures of the State. … Confidential expenses or any expense that should not be verified or that is not subject to control may not be included. This provision is applicable to the budgets of any body, institution, company or decentralized or autonomous entity.

Society qualifies, generally wisely, the degree reached in each system or government. The checks and balances of the constitution and ordinary laws have advanced, trying to counteract it. In Guatemala, one of those reinforcements that penetrated corruption networks was the operation of the International Commission Against Impunity in Guatemala (CICIG) while, with its counterpart, the Public Ministry, it was endowed with the necessary invulnerability to investigate and denounce criminal structures within the

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

organs of power. The viability of the country's agreement with the Secretary General of the United Nations Organization was made possible by the opinion of the Constitutional Court of May 8, 2007 (Advisory Opinion 791-2007).

VI. Transparency and Control Development Legislation

> There are so many laws, that no one is sure not to be hanged
>
> Napoleón

The precepts of the Constitution (and in the Guatemalan case, of the laws with constitutional rank) are developed by ordinary laws, like the common legal-political systems. So, in terms of prevention and control regulations against the misuse of public power, diverted towards corruption as direct or indirect personal gain, the State has issued a multitude of laws and regulations for its prevention and punishment. The count of these anti-corruption provisions is as numerous as the tricks that are instituted or invented to circumvent them. Evil is old but its progressiveness has been alarming.

The first of these regulations was the Probity Law (Legislative Decree 1707 of May 2, 1931), repealed by the substitution of another law of the same title (Presidential Decree 204 of January 14, 1955). The Law on Integrity and Responsibilities of Public Officials and Employees (Legislative Decree 89-2002 of February 1, 2002) currently governs. With this law, coexists a large number of laws, regulations and provisions that regulate the public function, both of its direct operators and of the people who approach it for a contractual relationship with economic value. This regulation is so numerous, complex and dispersed, that the quoted Napoleonic aphorism is not an exaggeration:

- Access to information law
- Law of extinction of domain
- Organic law of the budget
- Law of approval of the state budget (Locks)

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

VII. International Commission Against Impunity in Guatemala

In relation to the "International Commission against Impunity in Guatemala" (CICIG), the signing by the Guatemalan government and the United Nations Organization (UN) of an agreement of January 7, 2004 establishing an Investigation Commission of Illegal Bodies and Clandestine Security Apparatuses in Guatemala (CICIACS).

The President of the Republic, prior to submitting the aforementioned agreement to the Congress of the Republic for its information and ratification or non-ratification, deemed it necessary to request an advisory opinion from the Constitutional Court, asking twenty questions. The Court made a pronouncement on August 5, 2004, acquitting the twenty-question questionnaire. In a vote of the five holders, the Court issued the opinion finding several points of the Agreement that they considered incompatible with the Political Constitution of the Republic. The full text can be seen at: Advisory Opinion 1250-2004

> Taking into account the objections of the Constitutional Court, the Guatemalan government negotiated another agreement with the United Nations Organization, signed on March 6 to December 12, 2006, establishing the "International Commission against Impunity in Guatemala" (CICIG).
>
> On this occasion, the Congress of the Republic was the body that went to the Constitutional Court requesting an Advisory Opinion for which it formulated three questions:
>
> 1st. Is the content of the Agreement constitutional ...?
>
> 2a. Does the Public Ministry maintain its independence and autonomy ... in relation to the provisions of the Political Constitution of the Republic and its organic law?
>
> 3rd. Is a majority of two thirds of the total number of deputies that make up the Congress of the Republic necessary for the approval of the Agreement establishing the CICIG ...

The Court, with the unanimous vote of its five titular magistrates, issued its opinion on May 8, 2007, answering the first two questions in the affirmative and specifying that the absolute majority of its deputies was sufficient for approval by the Congress of the Republic and not the aggravated vote of at least two thirds.

In relation to the first question, the Court studied the parameters of the Constitution that recognize its supremacy and, based on this premise, it re-

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

viewed the Agreement signed by the Executive with the General Secretariat of the United Nations Organization, "whose comprehensive Reading".

VIII. Conclusions

Any Constitution will be valid and effective, even in critical and convulsive periods, to the extent that it enjoys social adherence. The constitutional sentiment to ensure that the law is respected and complied with is deeper than its own technical perfection; this is nothing more than a problem of intelligent judges. But conviction is a matter of culture and civility.

There are many factors that besiege and attack the Constitution to break or corrupt it. The inconsistencies and falsehoods of its own custodians endanger constitutionality. It is dismantled by the triviality in its management as much as the advantage or the innocence in its invocation. It is offended by those who presume it to be sectarian and servile to their interests, and it is weakened by the impatient ones who attribute social shortcomings and inequities to it.

The usual thing is to presume that it is the public power that must be watched to constrain being-in and with-the-Constitution. This is obvious and its strict control should not be neglected due to the exorbitant tendency of power.

Goran Therborn, a professor of political science at the University of Stockholm, warns of the danger of the collapse of the State because of the overload of benefits that the inhabitants expect from governments, particularly compromised by the system of partisan competition and pressure groups. Paralyzation that would come to be precipitated by the insufficiency of the state apparatus both in its real capacity to intervene and dispose of resources and by the inevitable imperfections of leadership. Thus, the discrepancy between what is claimed and what is feasible would tend to make ungovernable systems increasingly ungovernable. The danger lies in the fundamentalism that could arise, proposing ruptures that, deep down, worsen the problem. Constitutionalism has the quality of not covering up the crisis and of opening the channel to discuss it. On the other hand, radicalisms, even if they had analgesic effects, always, because they are temporary and superficial, would lead to the destruction of the very basis of social solidarity.

Care should be taken when pointing things out. Jiménez deParga clarifies it well, knowing how to distinguish between corruption in *democracy* and, as some would like, corruption in democracy. The problem with this infrac-

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

tion of social ethics is that in addition to the legal sanction that can achieve it, there must also be a social punishment, since, as the cited author says, the former may arrive late and the latter, contempt, is nuanced when a society rewards economic "success" regardless of the means to achieve it.

Conspires against the moral essence of constitutionalism the possibility of politicizing justice or pretending to execute it by paper trials. Although the sentence depends on what its etymology implies: *feeling*, we must not forget that the process is technical, equal and impartial. In political matters, which is the kernel, as Tomás y Valiente tells him, of constitutional justice, rulings must be clearly legal. Seriously affects the majesty of justice who wants to make the magistracy tribune and the toga, flag. On the other hand, those who, profane and outside the law, face legality, set themselves up as unofficial arbiters, forcing cowardly people like Pilate to fail without reason and without conscience.

<In the series "Roma" produced by HBO and directed by Jonathan Stamp, dialogues between statesmen of different personal ethics are recorded. In the first Mark Antony, assisted by the freedman Posca, agrees with Herod.>

Herod: *I was told that Roman knights don't ask for bribes. One should offer bribes as gifts. Is it so?*
Mark Antony: *Yes, that's how it is. I'm afraid we are the worst hypocrites.*
Herod: *I offer you a gift then, help me to take the throne of Judea, make my enemies yours, and I will offer you an important gift.*
Posca: *How important would the gift be?*
Herod: *How important does it need to be?*
Posca: *9,100 kilos of gold.*
Herod: *Done.*
Mark Antony: *We should have ordered more. You must ensure, of course, that you keep the Jews at bay.*
Herod: *They will do as I say or suffer the consequences.*
Mark Antony: *Congratulations; Herod, you have the full support of Rome.*
Herod: *A question. Our friends Octavio and Lepidus, do you also speak for them?*
Mark Antony: *Yes. We speak one voice.*
Herod: *So, then they won't come asking for gifts for themselves?*
Mark Antony: *No, your gift is for all of us.*
Herod: *Good. How beautiful to have such trust between friends. (Herod leaves)*
Mark Antony: (To Posca) *This is what I call a good morning at work.*

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional

Esta obra forma parte del acervo de la Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM
www.juridicas.unam.mx
https://biblio.juridicas.unam.mx/bjv
Libro completo en:
https://tinyurl.com/2h4khz8k

In a later episode, Marco Antonio, Lepidus and Octavio (adoptive son of Julius Caesar) meet in order to agree on the distribution of imperial power among the three of them, assigning themselves their corresponding political-territorial space. Octavio already knew of Antony's agreement with Herod, by telling the frustrated Posca who wanted a part of the bribe. Octavio is supposed to honestly claim the principle that all income enters the Treasury, under the supervision of a priest.

An example of the legislative prolixity in its attempt to curb crime (including corruption) is found in the constant modifications to the Penal Code or issuing specific laws, citing the most recent: Law to Prevent and Repress the Financing of Terrorism (58-2005), Approval of the Agreement on Cooperation for the Suppression of Illicit Maritime and Air Trafficking of Narcotic Drugs and Psychotropic Substances in the Caribbean Area (64-2005), Law of the Directorate of Civil Intelligence (71-2005), Approval of the Convention of the United Nations against Corruption (91-2005), Law against Organized Crime (21-2006), Law of the Penitentiary Regime (33-2006), Law of Registration of Stolen or Stolen Mobile Telephone Terminals (09-2007), Decree approving the Agreement between the United Nations Organization and the Government of Guatemala regarding the establishment of the International Commission against Impunity in Guatemala (CICIG) (35-2007), Reform the Law for the Protection of Procedural Subjects and Persons Linked to the Administration of Criminal Justice (22-2008), Law Regulating the Extradition Procedure (28-2008), Reform of the Penal Code that typifies the crime of Financial Panic (64- 2008), Law against Sexual Exploitation and Trafficking in Persons (09-2009), Weapons and Ammunition Law (15-2009), Law to Strengthen Criminal Prosecution, Law against Organized Crime (17-2009), Law on Criminal Jurisdiction in Higher Risk Process (21-2009), Domain Extinction Law (55-2010), Law to Combat the Production and Marketing of Counterfeit Medicines (28-2011), Law to Strengthen the Tax System, Combat Fraud and Smuggling (04-2012) and still.

DR © 2022. Universidad Nacional Autónoma de México - Instituto de Investigaciones Jurídicas
Instituto Iberoamericano de Derecho Constitucional