A Fourth Branch of the State? On Constitutional Guarantors in the UK – UK Constitutional Law Association

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> It is believed to be one of the chief merits of the American system of written constitutional law, that *all the powers* intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial.
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> *Kilbourn v Thompson (1881) 103 US 168, 190 (emphasis added)*

In its Report setting the agenda for a likely Labour government after the next elections, the Brown Commission has set out an ambitious programme of constitutional reform. In a previous post, I examined its recommendation in relation to a fully elected second chamber to replace the House of Lords. In this post, I will examine its recommendations concerning bodies that comparative constitutional scholarship calls 'fourth branch' or guarantor institutions. The Report recommends the setting up of three new independent constitutional guarantors: an Integrity & Ethics Commission to enforce the code of ministerial conduct, an Appointments Commission for merit-only appointments to public bodies, and an Anti-Corruption Commissioner. It also recommends further empowerment of the Equality and Human Rights Commission to provide evidence on the implementation of the new proposed social rights, 'with a remit, membership and staffing substantially altered to give it capacity to do so.' It seeks to offer a new constitutional mandate to the UK Infrastructure Bank and rename it as the British Regional Business Investment Bank.

These recommendations will add to or significantly transform the existing putative guarantor institutions (such as the Electoral Commission, the Equality and Human Rights Commission, the Information Commission, and the Boundaries Commission) created to police certain key constitutional norms of the UK constitution (including free and fair elections, probity, integrity, equality, transparency, etc). I call them *putative* guarantors because it is not clear that these institutions are legally or politically entrenched in the UK. Several other jurisdictions, however, are increasingly recognising that these constitutional guarantors are distinct from ordinary regulators (such as those regulating the energy sector or professional standards), and sit outside the three traditional branches of the State. Key to their imagination as *constitutional* guarantor institutions in comparative practice is the entrenchment of their non-partisanship, independence, mandate, budgets, staffing, and other such features which governments of the day are likely to want to undermine. In keeping with Diceyan rejection orthodoxy, however, there remains considerable resistance in the UK towards accepting their conceptualisation as *constitutional* guarantors.

In this blogpost, I will draw upon two recent papers. In the first of these papers, I had defended the conceptual claim that *in a given political context, a guarantor institution is*

a. a tailor-made constitutional institution,

b. vested with material as well as expressive capacities,

c. whose function is to provide a credible and enduring guarantee

d. to a specific non-self-enforcing constitutional norm (or any aspect thereof).

In a forthcoming second paper, I defend the normative claim that *in order to effectively guarantee the relevant norm, the design of guarantor institutions should pro tanto seek to optimise all of the following:*

a. Sufficient expertise and capacity to perform their functions effectively,

b. Sufficient independence from political, economic, or social actors with an interest in frustrating the relevant norm it is meant to guarantee, and

c. Sufficient accountability to bodies with an interest in upholding the relevant norm.

In this blogpost, I will extend these claims to (i) give a comparative account of the rise of guarantor institutions in some other jurisdictions (especially in the Global South), and (ii) argue that if they are to perform their constitutional roles, constitutional guarantors must be regarded as sitting outside the three traditional branches and as distinct from ordinary regulators.

Guarantor Institutions in Comparative Practice: A Potted History

When South Africans embarked upon the task of crafting a new Constitution after the end of Apartheid, they faced the dilemma of ensuring that the body entrusted with drafting its text had broad democratic legitimacy, and also that any elected majoritarian assembly would not ignore—or worse, be hostile to—the legitimate interests and concerns of the white minority. The impasse was resolved by adopting a multi-step framing process: (i) the leaders of the outgoing white minority government and the liberation forces representing the hitherto disenfranchised minority (chiefly the African National Congress) agreed upon certain key principles, such as universal suffrage and minority protection, and promulgated this agreement as an interim constitution in 1994; (ii) a national assembly was elected on the basis of universal franchise to draft a permanent constitution *within the parameters* set by the elites in the interim constitution (the permanent constitution being promulgated in 1996); and (iii) a neutral arbiter—a new Constitutional Court—was required to certify whether the draft constitution was compatible with the interim constitution before it could come into force. One of the provisions of the interim constitution required that:

> The independence and impartiality of a Public Service Commission, a Reserve Bank, an Auditor-General and a Public Protector shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the public service.

Along with other 'state institutions supporting constitutional democracy'—such as the Electoral Commission and the Commission for Gender Equality—chapter 9 of the South African Constitution of 1996 established the office of the Public Protector. It was empowered

‘to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice’. In its certification judgment, the Constitutional Court held, inter alia, that the provisions in the 1996 Constitution failed to ensure the independence and impartiality of the Public Protector because the officer could be removed by a simple majority of votes in the national assembly. Therefore, it held that the removal provision was incompatible with the interim constitution. The independence of the office from the ruling party was strengthened in light of the Court’s judgment. The Constitution now allows for-cause removal of the Public Protector by the President after a finding of misconduct, incapacity, or incompetence by a committee of the national assembly and a resolution to that effect passed by two thirds of the members of the national assembly (s 194).

Fast forward a couple of decades: the Zuma Presidency had put a question mark on the health and the very survival of the fledgling democracy in South Africa. One of the allegations against President Zuma was that he had used state funds for a lavish upgrade of his residence in 2009. The Public Protector Thuli Madonsela investigated the matter upon receipt of complaints from the public. Her report in 2014 found that the expensive upgrade far exceeded any security need of a sort that had been officially cited as justification and that it amounted to a breach of the government’s code of ethics, and ordered Zuma to pay back the excess spending. A parliamentary investigation that followed was controlled by members of his own party, and exonerated Zuma, who had refused to pay back as ordered by the Public Protector. When the matter reached the Constitutional Court, it found that the President as well as the National Assembly had failed to uphold their constitutional duties. These duties included the duty to ‘assist and protect [chapter 9] institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions’ (s 181(3)). The Court found that Zuma had breached this duty by failing to comply with the order of the Public Protector. This judicial finding triggered an impeachment proceeding in the national assembly, which was unsuccessful. The President survived, but barely.

In late 2017, the Public Protector—after yet another inquiry—found *prima facie* evidence implicating Zuma in state capture efforts by the Gupta family. She recommended that a full commission of inquiry into state capture be instituted. After another bruising battle in the courts, where Zuma unsuccessfully tried to avoid having to establish the commission of inquiry, mounting public anger and street protests, and successive no-confidence votes gaining greater support from his own backbenchers (even though they fell short of the necessary majority to oust him), the embattled President ultimately resigned in early 2018, instead of facing yet another impending no-confidence vote.

This is admittedly a simplified narrative of a very complex political state of affairs. It still communicates the crucial role that the Public Protector’s office played—with considerable support from the Constitutional Court—in catalysing Zuma’s ultimate ouster, and arguably pausing, if not reversing, democratic deconsolidation in South Africa. South African-style

‘chapter 9 institutions’ have since been adopted across jurisdictions in sub-Saharan Africa and South Asia. Frequently housed in a distinct dedicated chapter in a constitutional code (such as chapter 15 of the Kenyan Constitution of 2010), these institutions do not neatly fit within any of three traditional ‘branches’ of the constitutional state. Classed within a placeholder ‘fourth branch’, these awkwardly hybrid institutions arguably include electoral commissions, human rights commissions, central banks, knowledge institutions (such as statistics bureaus and census boards), probity bodies (such as anti-corruption watchdogs, information commissioners, and auditors general), broadcasting regulators, (independent) attorneys general and so on. As is often the case, even as constitutional practice in regard to these institutions has proliferated, constitutional theory has started paying attention to them as a distinct set of institutions only recently. These institutions guarantee norms mandated by the constitution (rather than merely permitted by it), and they enjoy a measure of (legal or political) entrenchment in the system.

Pioneering Southern jurisdictions like South Africa (Constitution of the Republic of South Africa 1996, ss 181-194), Kenya (Constitution of Kenya 2010, ss 233, 248–254), Nepal (Constitution of Nepal 2015, ss 238–265, 284), and Sri Lanka (Constitution of Sri Lanka ss 54–61F, 103–104J, 111D–111M, 153-156) did not invent guarantor institutions. Indeed, in many old democracies, they exist as sub-constitutional statutory bodies or ‘independent agencies’ working within the executive branch, albeit separated internally from the political executive to varying degrees. What these jurisdictions did differently was to *constitutionalise* their separateness, by placing guarantor institutions outside the three branches and offering them a measure of entrenchment against the executive *as well as* the legislature (and, by implication, the ruling/majority party). It is quite possible that *some* independent institutions in more established democracies (say, the Australian Electoral Commission) do indeed function as—and are treated by other constitutional actors like—guarantor institutions (in the sense that their partisan independence is entrenched as a matter of political practice if not law).

Constitutional Guarantors or Ordinary Regulators?

Guarantor institutions perform executive, and (often) legislative and judicial functions. The hybrid character of their functions, however, is not sufficient for their classification outside the three traditional branches. Contemporary states have a host of regulators who are recognised as being located well within the executive branch despite combining quasi-judicial, and occasionally legislative, powers alongside administrative ones, and enjoying varying degrees of autonomy from the partisan higher executive. Unlike the generalist bureaucracy, these regulators also tend to have specialist expertise in the matter under their regulatory concern. These more or less independent regulatory agencies can be classified based on the subject matter they tend to regulate:

- public utilities (water, energy, transport, telecoms)
- welfare provisions (health, housing, justice, education, social services)

- professional standards (law, medicine, veterinary medicine, engineering, accountancy, built environment)
- the economy (banking, finance, insurance, competition)
- business standards (food, products, health and safety, environment, labour)
- criminal justice (policing, investigation, prosecution)

Functionally, these regulators may also perform a combination of primary and secondary duties. To the extent that 'independent agencies' of the sort found in the US can enjoy considerable independence (at least from the political executive, although not the legislature), what really distinguishes a guarantor institution from such independent regulators is not functional modalities but the *constitutional status* of the underlying norms they seek to effectuate as well as their own status as constitutional institutions. Ordinary regulators are either (i) not constitutionalised at all (professional standards regulators often fall in this category), or (ii) themselves not entrenched as institutions even though the norm they protect is constitutional (welfare regulators in jurisdictions that recognise social rights but do not entrench their institutional operators fall in this category, as do many criminal justice regulators), or are (iii) themselves entrenched constitutionally, while the underlying norm they protect can be changed easily by the government of the day. This last category is rare because the constitutional character of the institution often implies the constitutional character of the norm it is designed to protect; possible examples may include public service appointment commissions that ensure that the extant criteria for appointments to public offices are strictly and impartially applied, even as governments of the day may fully determine what these criteria might be. As such, ordinary regulators are unable to provide credible and enduring guarantees. Only if the norm *as well as* the institutional regulator is constitutionalised, are we dealing with a guarantor institution.

Note that by constitutionalisation, I mean a *relative* degree of political and/or legal entrenchment, such that any change in the status or content of a constitutional norm or a constitutional institution would require broad cross-party consensus, or at least some opposition buy-in. Allowing the ruling party to mould guarantor institutions to its own whims is tantamount to allowing a player to not only act as a referee during the game, but also write the rules of the game *while playing the game*. British law and politics, however, has not moved towards entrenching these putative guarantor institutions, despite their key mandates to defend fragile constitutional norms such as probity, transparency, free and fair elections, and so on. The problems created by treating British guarantors as ordinary regulators have been all too obvious in recent years: the erosion of the independence of the Electoral Commission by the Elections Act 2022; the Speaker's Committee on the Electoral Commission's declaration that the government's draft statement setting the objectives of the Electoral Commission as 'not fit for purpose'; the substantial budget cuts to the Equality and Human Rights Commission; delay in the appointment of the Anti-Slavery Commissioner, the

limited mandate of and the frequent resignations by frustrated Independent Advisors on Ministerial Interests—the list of governmental transgressions against constitutional guarantors is a long one.

British law and politics seem to be moving towards accepting at least some non-self-enforcing norms as constitutional, albeit imperfectly. However, there is no apparent movement towards a simultaneous constitutionalisation of independent and empowered institutions that can truly guarantee the enforcement of these norms. How putative guarantor institutions might be constitutionalised in the UK system is a matter that needs serious consideration. But non-self-enforcing constitutional norms cannot be left to the mercy of the three traditional branches for the simple reason that they either have reasons to undermine them or lack the capacity to uphold them. No democracy can function without such rules of the game. The recommendations in the Brown Report concerning the creation or reform of putative guarantor institutions don't go far enough in considering ways in which they may be entrenched against partisan capture in the British context. In keeping with the evolving British tradition on constitutionalisation, some combination of political entrenchment tools (including dedicated parliamentary committees, special oversight of guarantor independence by the proposed upper chamber, mechanisms like s 19 HRA, etc) and legal entrenchment tools (strong judicial presumption in favour of guarantor independence and non-partisanship) may be the path towards realising a modicum of entrenchment for British guarantor institutions.

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