

“Guarantor Institutions “

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The last few decades have seen a proliferation of constitutional institutions, especially in the Global South, that do not neatly fit within any of three traditional branches of the state. These supposedly ‘fourth branch’ institutions may include electoral commissions, human rights commissions, central banks, probity bodies such as anti-corruption watchdogs, knowledge institutions such as statistics bureaus and census boards, information commissioners, auditors general, attorneys general and so on. In this paper, I will argue that some of these new institutions are best understood as “guarantor institutions”. I will show that in a given political context, a guarantor institution is a tailor-made constitutional institution, vested with material as well as expressive capacities, whose function is to provide a credible and enduring guarantee to a specific non-self-enforcing constitutional norm (or any aspect thereof).

Section I explains why polities need credible and enduring guarantees for specific norms, and claims that the expertise, independence, and accountability of guarantor institutions are likely to be key ingredients that determine their effectiveness in serving that purpose. It also argues that constitutional entrenchment of the guarantor institution is entailed in the independence requirement. Section II shows that in order to credibly and enduringly guarantee a norm, certain primary and secondary duties need to be discharged by relevant actors in relation to the norm's content as well as its impact. It further argues that while some of these duties may be performed by institutions that possess expressive capacity alone (roughly, the capacity to speak, express, communicate), others require material capacity (i.e. the physical capacity to effect material changes in the world). Guarantor institutions, unlike integrity institutions, can shoulder primary as well as secondary duties. Furthermore, they are typically vested with expressive as well as material capacities, which is key to their classification-defying hybridity. Section III argues that guarantor institutions are constitutionalised in two respects: the norm they seek to guarantee is constitutional, and the institution itself has constitutional status. What matters for a norm or institution to be constitutional is that it is entrenched, i.e. protected from change from the ordinary political and legal processes of the polity to some extent. It is their doubly constitutional character that distinguishes guarantor institutions from ordinary regulators.

Section IV explains how some constitutional norms are non-self-enforcing, in the sense that powerful actors are likely to have the will as well as the capacity to frustrate or erase them. It also shows that the three traditional branches, whether acting severally or jointly, cannot provide a credible and enduring guarantee to all non-self-enforcing constitutional norms. Hence the need for constitutional guarantor institutions. Section V highlights that guarantor institutions are typically tailor-made to guarantee specific constitutional norms. Their specificity has important consequences for their internal design and their mode of functioning, which distinguish them from key institutions in the three traditional generalist branches. Section VI concludes. Attention to guarantor institutions by constitutional scholars may help the discipline escape its blinkered worldview, which sees judicial review as the only game in constitution-town.