Rivista di
Diritti Comparati

On the shoulders of a giant. A Symposium on *The Law as a Conversation Among Equals* by Roberto Gargarella

Giuseppe Martinico

The *Rivista di Diritti Comparati* is pleased to host a special symposium devoted to Roberto Gargarella's book, *The Law as a Conversation Among Equals*.[1] Gargarella is a world-class scholar who has been influencing the debate at all latitudes for years, thanks to the depth of his ideas and, I might add, also thanks to his generosity, which makes intellectual exchanges with him truly accessible and always enriching. This combination of scientific and human qualities makes Roberto Gargarella one of the most interesting voices in the global academic debate. As a result, the *Diritti Comparati* team has already benefited from these qualities in the launch interview of our Vlog, conducted on that occasion by Anna Mastromarino.[2]

On this basis, it is indeed a pleasure to be able to coordinate a group of esteemed colleagues who have kindly agreed to engage in a critical analysis of some of the key insights presented in Roberto Gargarella's book. On behalf of the *Rivista*, I would therefore like to thank Rosalind Dixon, Tania Groppi, Gábor Halmai and Sergio Verdugo who agreed to write for this symposium. Since Roberto is also a polyglot, in line with the international vocation of the *Rivista di Diritti Comparati*, we decided to hold a symposium with contributors.

The book takes its starting point from what Gargarella calls the "deterioration of constitutional democracy"[3] and allows the author to develop a series of, I would call them, thematic paths that have as their common thread, the attempt to mend the relationship between constitutionalism and democracy. This is obviously a very ambitious book, which seeks to contribute with a force of ideas to an enormous debate. It is no coincidence that Gargarella handles with great knowledge both classics of US and Latin American political thought, and details related to the most recent constitutional experiences from the most disparate corners of the world.

This garnish of knowledge, combined with the avoidance of an excessive load of bibliographical notes, makes the book a veritable mine

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[1] R. Gargarella, *The Law As a Conversation Among Equals*, Cambridge, 2022.

[2] The interview was released on 6 July 2021 and is available on our YouTube Channel at the following link: https://www.youtube.com/watch?v=syaGLlWeucY

[3] R. Gargarella, cit., p. XV.

that can be read in different ways. As I said, it is an ambitious book, but it succeeds in its aim, as our readers will see, by triggering a very interesting discussion.

It is a book designed to make people think and in this it delivers.

In this volume Gargarella comes back to many of these fundamental issues, emphasising, for instance, the importance of deliberative democracy, a concept in which decision-making occurs through dialogue and confrontation between citizens. He argues that law should be the result of a conversation between equals, where everyone has the opportunity to express their opinions and contribute to the construction of norms. Also, the principle of equality is central to the book. Gargarella claims that law should reflect a dialogue between equals and that laws should be structured to respect and promote equality among all citizens.

Gargarella starts from the assumption that traditional theories of constitutionalism focus too much on the role of judges and constitutional courts and criticises them for this. He also suggests that these theories often ignore the role of democratic dialogue and can lead to an overlap of judicial power over legislative power, limiting democratic participation.

In this respect, when dealing with the question of the last say in constitutional interpretation, Gargarella proposes that instead of entrusting judges with the task of deciding major issues,[4] these should be resolved through inclusive dialogue among citizens.

Gargarella also promotes the idea that constitutional processes should be more inclusive and open to the direct participation of citizens. This approach aims to overcome the barriers that often exclude ordinary people from participating in political and constitutional decisions, making the process more democratic and representative. Finally, Gargarella introduces his main idea according to which constitutionalism should be seen as an ongoing "conversation" between citizens, rather than as a rigid set of rules imposed from above.[5] This dynamic approach to the law allows for greater adaptability and constant updating of rules according to the needs of society.

There are plenty of ideas that this book offers, but in a nutshell *The Law as a Conversation Among Equals* proposes a vision of constitutional law that emphasises equality, democratic participation and the need for continuous dialogue among all members of society.

[4] *Ibid.*, p. 183 et seq.
[5] *Ibid.*, p. 246 et seq.

The idea of organising this symposium came to me during a very long coffee with Roberto in Florence. We talked a lot about our research, as I wrote Roberto's generosity is boundless and goes beyond the power of speech, especially with younger or junior colleagues. I am very happy that the other editors of the *Rivista* have agreed to make this idea operational and effective.

Yours truly is an old-fashioned constitutional lawyer, who does not conceive of counter-majoritarian actors as anti or counter-democratic. Personally, I have always thought that Rawls[6] was right in saying that the courts crucially contribute to democracy, understood as something not reducible to the mere majority rule, not least because, as Kelsen put it, democracy is also the protection of minorities, the preservation of which is necessary in democracy for the very existence of the majority concept.[7]

In this I believe that constitutionalism takes the demands of democracy to another level, as the Canadian Supreme Court also reiterated in its famous 1998 Reference Re Secession of Quebec,[8] which, not by chance, I have tried to describe as having a great anti-populist flavour.[9] At the same time, however, I cannot but agree with Roberto Gargarella when he emphasises how the machinery of liberal constitutionalism has components (which he calls elitist) that today need to be revised. The crisis of liberal constitutionalism and that of constitutional democracy are two sides of the same coin, no doubt. And then as a reader, I must say that I was truly "enraptured" by the depth and capacity for argumentation of the author of this book, a book that enriches the very prestigious *Cambridge Studies in Constitutional Law series*, edited by David Dyzenhaus and Thomas Poole. For all these reasons, I ideally leave the floor to our symposium authors and Roberto Gargarella's rejoinder, in the hope of having anticipated the rationale of this symposium, which will surely be enjoyed to the full by our loyal readers.

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[6] "By applying public reason the court is to prevent that law from being eroded by the legislation of transient majorities, or more likely, by organised and well situated narrow interests skilled at getting their way. If the court assumes this role and effectively carries it out, it is incorrect to say that it is straight-forwardly antidemocratic", J. Rawls, *Political Liberalism*, New York, 2005, p. 233 et seq.

[7] H. Kelsen, *Vom Wesen und Wert der Demokratie*, Tübingen, 1929, p. 61.

[8] Reference Re Secession of Quebec, [1998] 2 SCR 217, https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1643/index.do

[9] G. Martinico, *Constitutionalists' Guide to The Populist Challenge: Lessons*, in C. Closa Montero – C. Margiotta – G. Martinico (eds.), *Between Democracy and Law. The Amorality of Secession*, Abingdon, 2019, p. 87 et seq.

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ABSTRACT: This short contribution introduces the symposium dedicated to Roberto Gargarella's book The Law As a Conversation Among Equals.

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KEYWORDS: Constitutionalism – Democracy – Counter-Majoritarianism – Roberto Gargarella – Conversation – Symposium

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Giuseppe Martinico – Full Professor of Comparative Public Law, Scuola Superiore Sant'Anna, Pisa, Italy. (giuseppe.martinico@santannapisa.it)

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Conversation or Competition Among Equals*

Rosalind Dixon

In his important new book, *The Law as a Conversation Among Equals*[1], Roberto Gargarella offers a new vision for both democratic politics and democratic constitutionalism. Politics, Gargarella argues, should be more both egalitarian and participatory, and premised on a form of grassroots "conversation among equals" rather than elite Schumpeterian-style[2] competition or bargaining. Constitutionalism, in turn, should do more to enable and encourage this kind of participatory politics – through citizen assemblies as key part of a process of constitutional design and amendment, and "dialogic" models of judicial review that encourage and empower democratic participation.

Why? The current disillusion with democracy, Gargarella argues, is driven by a fundamental desire for – and indeed expectation of – voice and participation on the part of citizens, when current democratic and constitutional models remain largely non-participatory in nature. This mismatch has grown over time and is now in urgent need of redress if we are to restore faith in the democratic constitutional project.

Gargarella makes these arguments in his usual powerful and poetic way, drawing on constitutional history and theory from across the Americas (i.e., Argentina, Chile and the United States). First, he suggests that his ideas draw on understandings of constitutionalism that focus on structure over rights. Here, Gargarella's previous important work on this topic features prominently. In doing so, Gargarella aligns himself with other 19th century thinkers such as Madison, who proposed that the "only effectual safeguard to the rights of the minority, must be laid in such a basis and structure of the Government itself".[3] Second, he suggests that his ideas are a radicalization – or continuation – of Bruce Ackerman's idea of "constitutional moments".[4]

Gargarella also addresses potential critics head-on: Constitutional assemblies, he suggests, have now been adopted in a sufficient range of

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* Commissioned article. A previous version of this piece was published at the following link: https://intl.jotwell.com/conversation-or-competition-among-equals/.

[1] R. Gargarella, *The Law As a Conversation among Equals*, Cambridge, 2022.

[2] J.A. Schumpeter, *Capitalism, Socialism and Democracy*, London, 1976.

[3] J. Madison, *Speech in the Virginia Constitutional Convention* (Dec. 2, 1829), in G. Hunt (ed), *The Writings of James Madison 1819–1836*, New York, 1910, p. 361.

[4] B. Ackerman, *We the People, Volume 1: Foundations*, Cambridge, Mass., 1991.

contexts to show their plausibility as a model for large-scale democratic deliberation. Further, they are not equivalent to constitutional plebiscites. Indeed, one is structured to promote deep and deliberative conversation among participants, where the other involves a relatively shallow form of participation, based on a single vote for a bundle of ideas, many of which citizens may disagree with.

Finally, a turn to democratic deliberation does not require an abandonment of commitment to rights: Indeed, the foundation for a conversation among equals is a deep commitment to equality and self-government, and in the virtues of deliberation in promoting rights-respecting outcomes. In this sense, Gargarella takes a similar position to Jeremy Waldron[5] about the virtues of political over legal constitutional models of rights protection. But he also goes beyond political constitutional ideas and draws on public choice theory to highlight the degree to which rights may end up advancing powerful (rather than vulnerable) minorities, or even powerful government actors. Indeed, he notes my own previous argument that rights may be used to advance the interests of would-be authoritarian actors seeking to "bribe" civil society into lending support for anti-democratic or "abusive" constitutional change.[6]

These answers are persuasive. And the case Gargarella makes for dialogic constitutionalism on the part of courts is especially compelling. He also avoids the danger that one might fear arises from the title of the book – namely, the danger of treating judicial review, not just democracy, as a conversational practice. Gargarella envisages a weak, collaborative or responsive model of judicial review,[7] but also one that acknowledges the decisive and coercive nature of legal decision-making by courts.[8]

What I was less persuaded by is whether the models Gargarella presents – of elite and participatory democracy – are really the only game in town. There may in fact be true hybrid forms of elite and participatory

[5] J. Waldron, *Law and Disagreement*, Oxford, 1999.

[6] R. Dixon, *Constitutional Rights as Bribes*, in *Conn. L. Rev.*, 2018; R. Dixon – D. Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*, Oxford, 2021; D. Landau, *Abusive Constitutionalism*, in *U.C. Davis L. Rev.*, 2013.

[7] M. Tushnet, *Weak Courts, Strong Rights*, Princeton, 2008; A. Kavanagh, *The Collaborative Constitution*, Cambridge, 2023; R. Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age*, Oxford, 2023.

[8] *Cf.* R. Dixon, *Dialogue and Deference*, in G. Sigalet – G. Webber – R. Dixon (eds.), *Constitutional Dialogue: Rights, Democracy, Institutions*, New York, 2019); R. M. Cover, *Violence and the Word*, in *Yale L.J.*, 1986.

democracy that offer a viable, and attractive, third way worthy of consideration along with Gargarella's own preferred participatory model.

For instance, Chile's recent participatory constitutional model produced a constitutional draft that was ultimately rejected by a majority of voters. The same was true for the republican constitutional proposal coming out of the 1988 Australian Constitutional Convention. But that Australian proposal came much closer to being adopted, and the Convention comprised a true mix of elite (appointed) and popularly elected representation. This mix also contributed to the success of the body in creating the kind of "synthetic" agreement Gargarella touts as a solution to intractable democratic disagreement.

More important, the Australian political model is one that combines representative democratic processes with a widespread mandate for democratic participation: It has a system of compulsory voting backed by a mix of sticks and carrots. The sticks are a legal requirement to vote in all national, state, and local elections, or face a modest fine. The carrots are a work-friendly model of Saturday and postal voting, backed by social norms that support making voting enjoyable and accessible. The system also achieves more than 90% turnout at national elections. And it promotes equal access to the franchise for Australians from different racial and economic backgrounds. Instead of parties courting the party base, they seek to persuade the median voter. And instead of low-income voters being deterred from voting, they are encouraged to vote by the ease and accessibility of voting.

In addition, Australia adopts a system of ranked choice voting that minimizes extremist outcomes, and the chances that certain voters will have their vote thrown out, or "not counted". These twin features of the Australian democratic model have also helped underpin democratic non-retrogression, and a relative degree of ongoing trust for democracy in Australia.[9] Where that trust has broken down, it has also helped facilitate the election of largely non-populist independent candidates and third-party candidates whose aim is to retore democratic integrity and faith in government.

The Australian model, however, is far from the deliberative conversation among equals which Gargarella champions. Gargarella is careful to note that vigorous competition and contestation can go hand in

[9] R. Dixon – A. Gauja, *Australia's Non-Populist Democracy? The Role of Structure and Policy*, in M.A. Graber – S. Levinson – M. Tushnet (eds.), *Constitutional Democracy in Crisis?*, Oxford, 2018.

hand with the model of participation he envisages. But his ideal is deliberation not competition. And the Australian model is closer to an ideal of competition rather than conversation among equals.

Ultimately, Gargarella succeeds in making the case for a newly democratic, egalitarian politics, and an attempt to protect democracy against retrogression by reinvigorating it rather than wrapping it in constitutional cotton wool. In this sense he echoes recent arguments by Tushnet and Bugarič in favor of the virtues of pro-constitutional populism.[10]

My only question is whether that politics should be as participatory as Gargarella suggests, or rather a true hybrid of elite and citizen participation. A conversation among equals is an attractive idea, but perhaps a competition among equals has even greater promise.

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ABSTRACT: This article offers a critical analysis of The Law as a Conversation Among Equals by Roberto Gargarella. This book offers a new vision for both democratic politics and democratic constitutionalism.

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KEYWORDS: Democracy – Deliberation – Participation – Competition – Australia

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Rosalind Dixon – Professor of Law, University of New South Wales, Faculty of Law (rosalind.dixon@unsw.edu.au).

[10] M.V. Tushnet – B. Bugarič, *Power to the People: Constitutionalism in the Age of Populism*, New York, 2021.

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The Role of Undemocratic Constitutionalism in the Hungarian Autocratisation. Review of Roberto Gargarella, *The Law As a Conversation among Equals*, Cambridge University Press, 2022.*

Gábor Halmai

TABLE OF CONTENTS: 1. Preliminary Remarks – 2. Undemocratic Democratic Transition? – 3. What and Who Is to Blame?

1. Preliminary Remarks

The book discusses the oldest and, in the times of democratic erosion, still the most topical tension in constitutional theory between constitutionalism and democracy. While looking for reasons of the crisis and approaches to resolve it for the benefit of both concepts, Gargarella from the outset rejects three options: a) to hold exclusively the would-be autocratic leaders responsible, and placing all hope in their removal, b) to condemn only the institutional system and to trust in the reestablishment of the old one, and c) to blame the apathy, indifference, or distaste of 'people in general', and aspire more effective elitist solutions. The result of this book's analysis about the possible reasons of the current constitutional crisis is that it rather has to do with democratic deficit, the way leaders and institutions resist and block citizen control and decision-making power. Therefore, the author seeks after the possibilities how the people, as equals can review, reform or alter their constitutions to save the idea of constitutionalism.[1]

* Commissioned article.

[1] Such democratic critique of constitutionalism is part of the broader theory of deliberative constitutionalism challenging traditional constitutionalism in the name of democracy. See R. Levy et al. (eds.), *The Cambridge Handbook of Deliberative Constitutionalism*, Cambridge, 2018. Martin Loughlin's book, published almost at the same time as Gargarella's also considers constitutions as democratic instruments, without aiming to serve the principle of constitutionalism. See M. Loughlin, *Against Constitutionalism*, Cambridge, Mass., 2022. Emphasizing the importance of the counter-majoritarian checks of democracy by reviewing the books of Loughlin and Gargarella see Mark Tushnet, *Review*

Gábor Halmai

The Role of Undemocratic Constitutionalism in the Hungarian Autocratisation. Review of Roberto Gargarella, The Law As a Conversation among Equals, Cambridge University Press, 2022.

The limited ambition of this review is to apply the book's main claim to explain why the Hungarian government of Prime Minister Viktor Orbán's Fidesz party was able to undermine the independent checks on its power so quickly and without meaningful pushback, transforming what until 2010 looked like a stable but imperfect democracy into an autocracy.[2]

In chapter 18 of the book, Gargarella uses mostly Latin American examples when writing about democratic erosion, but some scholars analysing the failure of traditional Western liberal democratic constitutionalism in other countries of 'third wave democratisation' come to similar conclusions. For example, Cas Mudde explains the regression in Hungary (and Poland between 2015 and 2023) with the undemocratic tools of legal constitutionalism used by the liberal elite during the democratic transition in 1989-1990. He claims that the undemocratic nature of resolving the most important economic and political issues of the transition, which were also the subject of the constitution-making process became legal issues (legalisation), and were taken out of the political arena, with no serious public debate and popular control (depoliticisation).[3] The liberal nature of this process is due to the fact that the anti-communist elite wanted to copy the Western idea of both economic and political liberalism, without being sure whether the population was aware of the social costs of economic liberalism, and the institutional consequences of political liberalism, and if they were, how many of them would have opted for economic and political liberalism.[4]

Essay: For Constitutionalism, 4 September 2022, available at SSRN: https://ssrn.com/abstract=4209674 or http://dx.doi.org/10.2139/ssrn.4209674.

[2] I am not claiming that the democratic deficit is the most important reason for the backsliding, but maybe one of them. The two main causes discussed by the literature, and not unrelated to the reasons I describe here are: a) preference of economic development and the speedy increase of living standards, b) the lack of liberal democratic traditions.

[3] See C. Mudde, *Populism in Europe: An Illiberal Democratic Response to Undemocratic Liberalism*, in *Government and Opposition*, 2021, p. 577 et seq.., at 585.

[4] See, for this critique, first right after the transition, J. Szacki, *Liberalism After Communism*, Budapest, 1995; see also, subsequently, after the start of the backsliding I. Krastev – S. Holmes, *The Light that Failed. A Reckoning*, London, 2020.

2. *Undemocratic Democratic Transition?*

This undemocratic legalism or legal constitutionalism after the Hungarian democratic transition, which the first Constitutional Court not coincidentally called a 'revolution of the rule of law',[5] was used against the explicit or assumed public opinion either with reference to provisions of the new comprehensively amended constitution of 1989, or even in the absence of constitutional rules for institutional approaches allegedly more coherent with the Constitution. The first occurred in the case of the abolition of the capital punishment in 1990,[6] and the second when the Parliament decided on the indirect election of the President of the Republic. In declaring the death penalty unconstitutional, the Constitutional Court referred to the constitutional provisions on the right to life and on human dignity, while in the second case it used the questionable argument that the indirect election is more coherent with the parliamentary system of government than direct election. In both cases, the majority of the representatives of the people in the Parliament and the Constitutional Court agreed with the outcome, while the public opinion opposed it. In the case of the death penalty, almost a decade after the initial court judgment, the judges also ruled in another decision that it would be unconstitutional to hold a referendum on the capital punishment.[7] This claim of the Constitutional Court's exclusive authority to decide on the death penalty not only denies Parliament's constitutional power to amend the Constitution, but also ignores the fact that a two-thirds majority of the population still supported the capital punishment..[8]

The ignorance of the majority of public opinion and the lack of willingness to deliberate in these cases does not necessarily mean that the measure does not fit better the real interest of the public, as in the case of

[5] Hungarian Constitutional Court, 11/1992. (III. 5.) AB decision.
[6] Hungarian Constitutional Court, 23/1990. (X. 31.) AB decision.
[7] Hungarian Constitutional Court, 11/1999 (V. 7.) AB decision
[8] In 2001, 68 % supported the death penalty. The survey also indicated that younger and higher-educated people were more critical, while religious people were more ready to accept. See TÁRKI, *Közép-európai közvélemény: Lakossági vélemények a közbiztonságról és a halálbüntetésről a közép-kelet-európai országokban*, 2001, available at: https://www.tarki.hu/adatbank-h/kutjel/pdf/a556.pdf. A survey conducted in 2015 has shown a slight decrease, when 58 % of the respondents believed that the death penalty would be necessary to use against murderers: Iránytű Intézet, *A Halálbüntetés Társadalmi Támogatottsága 2015 Júniusában*, 2015, available at: https://iranytuintezet.hu/kutatas/a-halalbuntetes-tarsadalmi-tamogatottsaga-2015-juniusaban/.

the statutory introduction of a minimal (equal to one euro) fee for hospital visits, which was rejected by the then opposition party Fidesz's populist referendum in 2008; it just refers to the undemocratic way of the unpopular decision. The list of questions that could not be put to a national referendum reflects this undemocratic legal approach of the 'democratic' transition. This list originally contained the ban on referendum regarding the "obligations set forth in valid international treaties and on the contents of laws prescribing such obligations".[9] In its decision 2/1993. (I. 22.) AB, the Constitutional Court, with a binding interpretation of the constitutional provisions on referendum, prohibited all referendum seeking to amend any provision of the Constitution. The fundamental theoretical question regarding referendum that the judges had to interpret here was how it, as a manifestation of popular sovereignty, related to representative democracy, the other form of popular power. The text of the Constitution, which was comprehensively amended in 1989, established that "in the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives." The Constitutional Court first interpreted this passage as follows: "In the constitutional order of the Republic of Hungary the primary form of exercising popular sovereignty is representation." This approach essentially reflects the position that in a democratic state governed by rule of law the power derived from the people is exercised through constitutional organs, primarily representative bodies. This approach represents an entrenchment of prior policy choices against current ones, which according to the deliberative constitutionalism literature is considered as a deprivation of the ability of the today's people to govern themselves.[10]

Another issue decided against popular will was transitional justice. Without having specific survey results, it became clear that in the first years of the democratic transition measures, such as retroactive justice, lustration, compensation and access to the files of the former secret police were important issues for the general public in coming to terms with the communist past.[11] Some of these issues, like the use of retroactive justice were decided by the Constitutional Court against the will of the

[9] Article 28/C (5) point b) of the Act XX of 1949 as amended by the Act XXXI of 1989.

[10] As Mark Tushnet interprets Loughlin's and Gargarella's theory of constitutional democracy in his review, both authors say no to this deprivation. See M. Tushnet, *Review Essay: For Constitutionalism*, cit.

[11] See P. Kende, Igazságtétel, in *Beszélő*, 1992, no. 3, available at: http://beszelo.c3.hu/cikkek/igazsagtetel.

parliamentary majority; in other cases, like in that of lustration, compensation, and access to the files, the representative of the people decided in agreement with the Court against public opinion. For instance, after the 2002 scandal of the (at the time) socialist Prime Minister Péter Medgyessy, when he was forced to admit that he had worked for the country's communist-era secret police intelligence services, there was disappointment with both the national approaches of the mild lustration and the limited access to the secret police files. A survey conducted the same year showed that around 60 per cent of respondents thought it was better not to hide but to reckon with the past.[12] Fifteen years later, while the Fidesz government misused the demands for transitional justice measures for its own political justice purposes,[13] they too rejected the calls for opening the files, while in another survey the majority of respondents supported the full publicity of Communist secret police documents.[14]

3. What and Who Is to Blame?

Also due to the lack of constitutional traditions and culture, in all of the mentioned cases the Hungarian public seemed not to be receptive towards undemocratic legal constitutionalism.[15] The sad experience of Hungary's once pioneer democratic transition is that the initial measures of transitional justice, undertaken without serious public consultation and

[12] The survey result is quoted in V. László, *Gergő és az árnyéka,* in *Beszélő*, 2002, no. 10, available at: http://beszelo.c3.hu/cikkek/gergo-es-az-o-arnyeka#2002-f09-07_from_1.

[13] See G. Halmai, *Rule of Law Backsliding and Memory Politics in Hungary*, in *European Constitutional Law Review*, 2024, p. 602 et seq.

[14] Survey of Republicon Institute between April 7-19, 2017, available at: http://republikon.hu/elemzesek,-kutatasok/170430-ugynok.aspx.

[15] According to some authors, the potential of democracy in Hungary following the transition in 1989-90, (and also in the other new democracies of Central Europe), was diminished by technocratic, judicial control of politics, and the treasure of civic constitutionalism, civil society and participatory democratic government as a necessary counterpoint to the technocratic machinery of legal constitutionalism was lost. See, for this argument, P. Blokker, *New Democracies in Crises? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, London, 2013. Also Wojciech Sadurski argued that legal constitutionalism might have a 'negative effect' in new democracies and might lead to the perpetuation of the problem of both weak political parties and civil society: Id., *Transitional Constitutionalism: Simplistic and Fancy Theories*, in A. Czarnota – M. Krygier – W. Sadurski (eds.), *Rethinking the Rule of Law After Communism*, Budapest, 2005, p. 9-24.

support, did not help to reconcile the society and consolidate democracy. This also leads to the question of who is to blame for the lack of consolidation and backsliding. One possible argument is that politics has failed 'the people', who were only choosing an option that they were offered, and not the other way around.[16] This applies first and foremost to would-be autocrats, such as Viktor Orbán, who has always used populist arguments to achieve his nationalist, authoritarian aims, but also those benevolent liberal democratic parties and leaders, who imposed their ideas to the people, who were either not interested or ready to accept them. In other words, blaming exclusively the people cannot help to understand the crisis of constitutional democracy.[17]

In his latest book, *Democracy Rules*, Jan-Werner Müller also criticizes the convenient but ultimately very misleading response to democracy's decline: to blame the people.[18] He argues that ordinary folks, even if well-informed and yet plainly irrational, are always ready to be misled by demagogues; however, at the end of the day, the crucial decisions to empower dictators such as Hitler is made by parts of the conservative establishment of the day.[19] Regarding the todays right-wing populists, he claims that none of them has come to power without the collaboration of established conservative elites.[20] Müller also asserts that an increasing number of citizens at the lower end of the income spectrum no longer vote or participate in any other form in politics, and political leaders have no reason to care for those 'disadvantaged communities' who don't care to vote.[21] In Hungary the situation is even worse, since about 40% of the poorest and less educated part of the society overwhelmingly support

[16] See K. L. Scheppele, *The Party's Over*, in M. Graber – S. Levinson – M. Tushnet (eds.), *Constitutional Democracy in Crisis?*, New York, 2018, p. 495 et seq.

[17] For instance, Joseph Weiler blamed the Hungarian people for supporting Orbán: Id. – G. de Búrca, *Editorial, in International Journal of Constitutional Law*, 2020, p. 315 et seq. See, for a critique, V. Kazai, *Blaming the People is not a Good Starting Point*, in *Verfassungsblog*, 8 August 2020, available at: https://verfassungsblog.de/blaming-the-people-is-not-a-good-starting-point/?fbclid=IwAR1CJYiPF_6uFalCGgHB9TKlDTk-ppcu3ZFnfAPpyoZYxGaSE5ccpugcCnw.

[18] J.W. Müller, *Democracy Rules*, London, 2021, p. IX-XI.

[19] About major – and partly still existing - German firms' support of Hitler, see for instance the novel of É. Vuillard, *Ordre du jour*, Arles, 2017.

[20] J.W. Müller, *Democracy Rules*, cit., p. 18.

[21] *Ibid.*, p. 31. Müller refers to the term 'two-third society', coined by Wolfgang Merkel for the bottom third, which has effectively disappeared from political life completely.

Fidesz. Some of them do not vote, but some vote for the governing party without acknowledging that its policies are against their interest.[22] The phenomena is described by Claus Offe as participatory inequality, which is especially characteristic in states with high income inequality using austerity measures.[23]

This lack of participatory equality, together with the entrenched institutional system makes the Hungarian autocracy extremely resistant against democratic re-constitutionalisation. And this situation makes my outlook on Hungary as sceptical as Gargarella's general scepticism in the final chapter of the book. In addition to the inertia and lack of constitutional imagination, he mentions the ability of both the old power structures and the constituted authorities to resist, for example in Venezuela under Nicolás Maduro, which is very similar to Viktor Orbán's one-party autocracy in Hungary.

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ABSTRACT: This review article aims to apply the main claim of Roberto Gargarella's book about the oldest and, in the times of democratic erosion, still the most topical tension in constitutional theory between constitutionalism and democracy to explain why the Hungarian government of Prime Minister Viktor Orbán's Fidesz party was able to undermine the independent checks on its power so quickly and without meaningful pushback, transforming what until 2010 looked like a stable but imperfect democracy into an autocracy. The reviewer claims that the lack of participatory equality, together with the entrenched institutional system, made the Hungarian autocracy extremely resistant to democratic re-constitutionalisation. And this situation makes my outlook on Hungary as sceptical as Gargarella's general scepticism in the last chapter of his book.

[22] See the result of the Medián Institute' survey commissioned by the RTL Klub TV station on the relationship between votes and incomes before the April 3 Parliamentary election on 30-31 March with a nation-wide survey of 1531 respondents. The survey is available at the link: https://www.facebook.com/photo/?fbid=10220827131740798&set=a.1030493095277; https://www.facebook.com/median.hu/photos/a.1378324522412809/3275767579335151/.

[23] C. Offe, *Participatory Inequality in the Austerity State: A Supply Side Approach*, in A. Schaefer – W. Streeck (eds.), *Politics in the Age of Austerity*, Cambridge, 2013. Also quoted by Müller, *Democracy Rules*, cit., at p. 193.

Gábor Halmai

The Role of Undemocratic Constitutionalism in the Hungarian Autocratisation. Review of Roberto Gargarella, The Law As a Conversation among Equals, Cambridge University Press, 2022.

KEYWORDS: undemocratic constitutionalism – constitutional culture – autocratisation – Hungary

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Gábor Halmai – Part-time professor, European University Institute, Florence, Italy, Emeritus professor, Eötvös Loránd University, Budapest, Hungary (gabor.halmai@eui.eu)

RIVISTA DI
DIRITTI COMPARATI

"El derecho como una conversación entre iguales" di Roberto Gargarella e il costituzionalismo sociale del Secondo Dopoguerra: un dialogo possibile?*

Tania Groppi

SOMMARIO: 1. Un appello appassionato per salvare la democrazia – 2. Uno sguardo dall'Italia. – 3. Guardando avanti

1. *Un appello appassionato per salvare la democrazia*

Mentre gli anni '80 del secolo scorso hanno inaugurato un periodo di sviluppi costituzionali nel solco della democrazia liberale, recentemente si è aperta una nuova fase del costituzionalismo che ha messo in discussione lo Stato costituzionale di diritto. Che cosa sta accadendo alle nostre democrazie? Questa è la domanda che serpeggia nel XXI secolo, e che "ossessiona" coloro che credono che la democrazia costituzionale sia, quantomeno, la "menopeggio" forma di organizzazione del potere che l'umanità ha conosciuto.

Tale domanda – e quella strettamente collegata: che fare? – è all'origine del volume di Roberto Gargarella, che denota, come rivela l'autore nella premessa, una profonda angustia, che lo ha portato a scrivere quasi di getto il volume, pensato, come ci racconta, in una notte. Ma, allo stesso tempo, il libro ci mostra anche una passione e una speranza, che sono palpabili attraverso tutto il testo. La passione per un sistema di governo che possa effettivamente dare a ogni essere umano, fino ai più piccoli, umili, marginali, la possibilità di esprimersi in condizione di parità con gli altri: Gargarella si schiera in tal modo per una visione "dal basso" del diritto, come strumento di liberazione dall'oppressione e dall'ingiustizia[1]. Una speranza, nel senso della possibilità di modificare profondamente quei meccanismi della democrazia costituzionale che, secondo l'autore, sono alla base del suo deterioramento: egli identifica una serie di cause strutturali, che si radicano nelle origini del costituzionalismo, specie nella sua versione dei "*founding fathers*" statunitensi, indicando la strada da seguire per superare tali carenze e contraddizioni.

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* Articolo richiesto dalla Direzione.

[1] Per questa visione, G. Zagrebelsky, *Diritti per forza*, Torino, 2017, p. 64.

In questo senso, il libro è un profondo richiamo, uno di quegli appelli che ogni tanto risuonano in modo quasi profetico (per i lettori italiani, mi viene in mente il grido di Giuseppe Dossetti, negli anni 1990: "Sentinella, quanto resta della notte?"), rivolto alla comunità globale dei giuristi affinché cambi sguardo sulla crisi democratica in atto. Secondo la maggior parte degli autori, specie costituzionalisti, la crisi attuale (benché definita di solito con riferimento alla democrazia: in inglese, ad esempio, si parla di "*democratic decay*", "*democratic retrogression*", "*democratic erosion*", "*democratic backsliding*") è principalmente una crisi del *rule of law* costituzionale, inteso come l'insieme di meccanismi volti a limitare i governi e le maggioranze politiche[2]. Esso viene attaccato e svuotato non con la classica tecnica dei colpi di Stato, ma attraverso processi di tipo nuovo, che comportano uno scivolamento graduale verso regimi non democratici. Le maggioranze politiche, e i governi che esse esprimono, non sono più disposte a sopportare i limiti, il sistema di pesi e contrappesi, che sono il cuore del costituzionalismo.

Gargarella ci porta invece a riflettere sull'altro pilastro della democrazia costituzionale, ovvero la sovranità popolare, per dirci che fin dalle origini del costituzionalismo essa è stata eccessivamente circoscritta, messa in un angolo, da un sistema elitista, in cui il timore delle maggioranze nascondeva in realtà una profonda sfiducia nel popolo: il sistema dei *checks and balances* e il *rule of law* costituzionale avrebbero costituito gli strumenti operativi, i grimaldelli mi viene da dire, di una tale visione.

Assai forti, ad esempio, sono le pagine nelle quali in modo molto netto Gargarella segnala che i giuristi si sono dedicati eccessivamente ai diritti fondamentali e alle corti, trascurando le tematiche legate alla partecipazione democratica, oppure critica sentenze e autori che hanno difeso la sottrazione al principio maggioritario delle decisioni in materia di diritti umani.

È lì, in questa compressione della sovranità popolare e del principio maggioritario, in questo deficit democratico mai sanato, che per l'autore si radica la crisi attuale, nella quale il popolo cerca invano, con i limitati strumenti di cui dispone – che si riducono al voto periodico per l'elezione dei propri rappresentanti: Gargarella parla al riguardo di "*extorsión electoral*" – di far sentire la propria voce. Da qui la disillusione nei confronti di un sistema di governo che viene definito "democrazia", ma non lo è. Ciò determina non solo l'apatia politica, ma altresì il successo dei movimenti

[2] Rinvio, proprio per questa impostazione, a T. Groppi, *Dal costituzionalismo globale ai nuovi autoritarismi. Sfide per il diritto comparato*, in *Rivista dell'associazione italiana dei costituzionalisti*, 2022, no. 4, p. 65 ss.

populisti, che propongono di rimettere il popolo al centro del processo decisionale, contrapponendosi alle vecchie élite che hanno mantenuto il potere per decenni, o finanche per secoli. Sulla base di tale lettura, Gargarella propone ai giuristi di lavorare sul pilastro democratico della democrazia costituzionale, per mettere a punto una "sala macchine" (secondo una felice espressione coniata dall'autore in un precedente lavoro: "sala de máquinas" in spagnolo, "engine room" in inglese)[3] finalmente all'altezza di una vera democrazia, e che egli riconduce a strumenti partecipativi e deliberativi atti a dar vita a una "conversazione tra eguali".

2. Uno sguardo dall'Italia

A distanza di soli otto anni dall'approvazione della Costituzione tunisina elaborata dall'Assemblea costituente eletta in seguito alla c.d. "rivoluzione dei gelsomini", la Tunisia sembra aver intrapreso una preoccupante regressione costituzionale. Per il lettore italiano, almeno per me, il volume apre prima di tutto un interrogativo: di che cosa stiamo parlando oggi quando parliamo di democrazia costituzionale? È vero che si tratta di un sistema di governo basato su due pilastri o per meglio dire due sfere (quella dove operano la sovranità popolare e il principio rappresentativo, e quella dove operano le istituzioni di garanzia, in primis la giustizia costituzionale, che diventa una istituzione necessaria in tale forma di Stato)[4]. Ma risponde tale sistema, per come positivizzato nelle costituzioni del Secondo dopoguerra, alle preoccupazioni e definizioni sorte in un'epoca completamente diversa, in un contesto completamente diverso come quello angloamericano di cui parla Gargarella (più "americano" che "anglo", in realtà, dato lo spazio che rivestono nel volume, per ovvie ragioni, alcuni autori latinoamericani del 1800, oltre ai classici statunitensi, a partire da Madison e Jefferson)?

Mi spiego meglio: è vero che alcuni istituti ai quali ancora oggi facciamo ricorso, a partire dalla costituzione in senso moderno, la separazione dei poteri, il *rule of law*, la rappresentanza politica, il controllo di costituzionalità delle leggi e molti altri, traggono origine agli albori del

[3] R. Gargarella, *La sala de máquinas de la Constitución. Dos siglos de constitucionalismo en América latina (1810-2010)*, Buenos Aires, 2014; R. Gargarella,*The Legal Foundations of Inequality: Constitutionalism in the Americas, 1776-1860*, Cambridge, 2010.

[4] I due circuiti possono essere ricondotti ai due principi che la dottrina anglosassone qualifica, rispettivamente, come *democracy and liberalism*, oppure, come fa Gargarella nel volume, *democracia y constitucionalismo*.

costituzionalismo. Tuttavia, la loro configurazione è stata completamente trasfigurata da un fatto storico di dimensioni enormi, che il pugno di uomini (maschi, bianchi, proprietari, finanche proprietari di schiavi come è noto) che viene citato nel volume per descriverne la fase fondativa non potevano neppure immaginare, anzi, aborrivano: ovvero il suffragio universale, che è andato estendendosi a seguito delle lotte dei movimenti dei lavoratori e delle donne. Le novità che tale fatto storico senza precedenti ha determinato non hanno riguardato soltanto i diritti, ma anche le istituzioni, fino a determinare una nuova forma di Stato, definita dalla dottrina italiana e tedesca, come "Stato costituzionale" (o democrazia costituzionale)[5], a partire dalle costituzioni del Secondo dopoguerra in Europa (al punto che si parla di "*Postwar constitutional paradigm*")[6].

Esso si radica sul tronco dello Stato liberale di diritto di origine europea continentale, allargandosi alla partecipazione democratica dei lavoratori e innestandovi alcuni elementi del costituzionalismo statunitense[7], finalizzati a garantire i diritti e le libertà nei confronti delle maggioranze politiche democratiche e della loro principale espressione giuridica, la legge. Tutto ciò allo scopo di dare risposta al carattere pluralistico della società di riferimento: l'obbiettivo di tale forma di Stato è infatti il mantenimento della pace, della coesione sociale, della stabilità, dell'unità nelle società pluraliste, senza però negare o semplificare artificialmente la complessità e le differenze[8].

In tale ambito, il carattere, "contromaggioritario" delle giurisdizioni[9] mira ad evitare il ripetersi di quanto accaduto dopo la Prima guerra

[5] Faccio riferimento a questa nozione come elaborata dalla dottrina italiana e tedesca: v. soprattutto P. Häberle, *Lo Stato costituzionale*, Roma, 2005; P. Häberle, voce *Stato costituzionale, I) Principi generali*, in *Enciclopedia giuridica*, Roma, 2000. V. anche G. Zagrebelsky, *Il diritto mite*, Torino, 1992; G. Zagrebelsky, *Fragilità e forza dello Stato costituzionale*, Napoli, 2006; E. Cheli, *Lo Stato costituzionale. Radici e prospettive*, Napoli, 2006.

[6] L. Weinrib, *The Postwar Paradigm and American Exceptionalism,* in S. Choudhry (ed.) *The Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence*, Cambridge, 2006, p. 89. Nella consapevolezza che, anche in Europa, esiste una varietà di costituzionalismi: ad es. S. Rehling Larsen, *Varieties of Constitutionalism in the European Union*, in *Modern Law Review*, 2021, p. 477 ss.

[7] Così E. Cheli, *Lo Stato costituzionale*, cit., p. 14.

[8] Oltre che in molte costituzioni nazionali, questa visione è fatta propria dai Trattati fondanti l'Unione europea e da vari documenti delle Nazioni Unite, tra i quali i *Sustainable Developments Goals*, adottati solennemente dall'Assemblea generale nel settembre 2015.

[9] Per usare la terminologia anglosassone. Roberto Toniatti ci ha mostrato perché è più adeguato il termine "non maggioritari": R. Toniatti, *Il principio non-maggioritario quale*

mondiale, quando il tentativo di smantellare il costituzionalismo debole ed escludente fallì (Weimar *docet*) per la mancanza di strumenti di garanzia e di un equilibrato sistema di poteri. L'esperienza storica dei regimi fascista e nazista mostra, infatti, che maggioranze manipolate possono riuscire a mettere al bando, e finanche annientare, le minoranze[10].

Sintetizzando, potremmo dire che lo Stato costituzionale nella sua versione più completa si caratterizza per: 1) un processo costituente democratico, di tipo pattizio, attraverso il quale le diverse componenti della società pluralista si accordano sul fondamento del loro vivere insieme; 2) la presenza di una costituzione intesa come norma fondamentale, posta alla base dell'ordinamento e garantita dalla sua rigidità (ovvero obbligatoria per tutti i poteri dello Stato, compreso quello legislativo); 3) la garanzia costituzionale di diritti e libertà, inclusi quelli economico-sociali; 4) la garanzia costituzionale della separazione dei poteri, intesa come separazione tra circuito della decisione politica e circuito delle garanzie (magistratura e giustizia costituzionale); 5) la democrazia elettorale, ovvero lo svolgimento di libere elezioni per la scelta dei titolari del potere di decisione politica; 6) l'apertura alla dimensione universale dei diritti umani, attraverso disposizioni costituzionali che attribuiscono particolare forza giuridica ai trattati e alle convenzioni internazionali; 7) il decentramento territoriale del potere.

Allargare lo sguardo oltre le Americhe, al costituzionalismo sociale europeo del Secondo dopoguerra potrebbe a mio avviso arricchire la riflessione e attenuare una serie di critiche che in nome della democrazia vengono portate al costituzionalismo. In particolare, l'esperienza repubblicana in Italia, a partire dall'Assemblea costituente, ci mostra quella che non esiterei a definire una vera e propria "trasfigurazione" di molti dei meccanismi del costituzionalismo, a partire dalla costituzione stessa. Essa cessa di essere "un insieme di limiti formali imposti all'attività del legislatore ordinario", per assumere il carattere di "un sistema compiuto di valori sostanziali", la cui interpretazione non può essere ridotta a un'operazione di semplice tecnica giuridica[11].

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garanzia della forma di Stato costituzionale di diritto in Europa, in *Diritto pubblico comparato ed europeo*, 2020, p. 1155 ss.

[10] Al riguardo, G. Zagrebelsky, *Il "crucifige" e la democrazia*, Torino, 1994.

[11] Così, in riferimento alla Costituzione italiana del 1948, C. Mezzanotte, *Corte costituzionale e legittimazione politica*, Napoli, 2014 [1984], p. 2.

In un contesto pluralistico, la costituzione assume un carattere pattizio, rivolto all'integrazione del pluralismo[12]. Il patto costituente implica scrivere nella costituzione quello che unisce le componenti della società pluralista, sottraendolo alle maggioranze politiche di ogni giorno. Il carattere altamente democratico del processo costituente è la vera espressione della sovranità popolare. In Italia, leggere i dibattiti costituenti del 1946-1947, leggere i programmi dei partiti, immergersi nel dibattito politico e culturale di quegli anni lontani, ci fa comprendere questa pulsione profonda, questo bisogno di dare voce a chi, fino a quel momento, era rimasto senza voce. Una lettura appassionante.

Proprio per questo, la costituzione, "questa" costituzione, non mira proteggere lo status quo, ma guarda al futuro, e tutte le istituzioni sono orientate a una trasformazione della società, ovvero alla giustizia sociale[13]. Tali aspirazioni, che negli ultimi anni la dottrina del diritto comparato riconduce al "costituzionalismo trasformatore", vengono codificate in norme giuridiche, che, non senza difficoltà, lotte e arretramenti, negli anni hanno trovato ampia, benché ancora parziale, attuazione. Emblematico al riguardo è l'art. 3, comma 2, della Costituzione italiana, un vero "apripista" verso quell'eguaglianza sostanziale senza la quale nessuna "conversazione tra eguali" può esistere: esso prende in considerazione l'individuo nella realtà della sua vita e delle sue relazioni, economiche e sociali, rendendo legittimi, anzi necessari, interventi «diseguali», allo scopo di riequilibrare le condizioni di fatto in favore di quelli che «stanno in basso». Secondo tale disposizione, che non ha precedenti in costituzioni anteriori e nemmeno in quella della Repubblica di Weimar del 1919, spesso citata come primo esempio del costituzionalismo sociale[14]: «è compito della Repubblica rimuovere gli ostacoli di ordine economico e sociale, che, limitando di fatto

[12] G. Zagrebelsky, *Diritto allo specchio*, Torino, 2018. Ovviamente, occorre ricordare la lezione di R. Smend, *Costituzione e diritto costituzionale*, Milano, 1988 [1928].

[13] Vorrei rinviare in proposito ai molteplici contributi di Piero Calamandrei, come costituente e come studioso. Per una sintesi, P. Calamandrei, *Cenni introduttivi sulla Costituente e i suoi lavori*, in P. Calamandrei – A. Levi (a cura di), *Commentario sistematico alla Costituzione italiana*, Firenze, 1950, vol. 1, p. LXXXIX ss. Al riguardo, E. Bindi, *Piero Calamandrei e le promesse della Costituente*, in B. Pezzini – S. Rossi (a cura di), *I giuristi e la Resistenza. Una biografia intellettuale del paese*, Milano, 2016, p. 26.

[14] A. Giorgis, *Articolo 3, comma 2*, in R. Bifulco – A. Celotto – M. Olivetti, *Commentario della Costituzione*, Torino, 2006, vol. 1, p. 90. Infatti, l'articolo 151, comma 1, della Costituzione di Weimar stabiliva: «L'ordinamento della vita economica deve corrispondere alle norme fondamentali della giustizia e tendere a garantire a tutti un'esistenza degna dell'uomo. In questi limiti è da tutelare la libertà economica dei singoli».

la libertà e l'eguaglianza dei cittadini, impediscono il pieno sviluppo della persona umana e l'effettiva partecipazione di tutti i lavoratori all'organizzazione politica, economica e sociale del Paese».

Questo principio sintetizza l'esperienza storica in cui si radica la Costituzione italiana, quella dell'antifascismo e della critica radicale allo Stato liberale ottocentesco: come ebbe a dire Aldo Moro in Assemblea costituente, «fino dalla prima riunione la Sottocommissione s'è trovata d'accordo su un punto: che la Costituzione deve avere un significato storico e una particolare funzione storica». Sempre in Assemblea costituente, significative sono al riguardo le parole di Amintore Fanfani: «noi partiamo dalla constatazione della realtà. Perché mentre prima, con la rivoluzione dell'89, è stata affermata l'eguaglianza giuridica dei cittadini membri dello stesso Stato, lo studio della vita sociale in quest'ultimo secolo ci dimostra che questa semplice dichiarazione non è stata sufficiente a realizzare tale eguaglianza»[15].

In tale quadro costituzionale, i meccanismi di garanzia servono non come strumenti delle élite contro il popolo.ma per dare risposte al pluralismo insito in costituzioni "lunghe", costituzioni in cui "non si istituzionalizza l'unità, ma una richiesta di unità", come ebbe a scrivere Carlo Mezzanotte nell'insuperato lavoro su *Corte costituzionale e legittimazione politica*. Nell'esperienza italiana – evidenzia Mezzanotte -, la Corte costituzionale è nata "dall'aspirazione profonda alla fondazione di una nuova unità di senso: un'aspirazione che in quell'alba ancora satura delle ombre demoniache della notte, neppure il più ostinato dei relativisti avrebbe saputo condannare"[16].

La democrazia costituzionale, pertanto, cambia pelle rispetto alla democrazia maggioritaria: il "*socavamiento*" (per riprendere l'espressione di Gargarella) della regola di maggioranza non può essere definito una "negazione della democrazia", ma semplicemente una diversa forma di organizzare il potere rispetto alla regola di maggioranza. Una forma assai più complessa, nella quale convergono diversi principi, diverse forme di legittimazione, diversi poteri dello Stato. Insomma, dobbiamo intenderci su come definiamo la democrazia. L'art. 1, della Costituzione italiana, in particolare il suo comma 2, mi pare emblematico di questa nuova forma di Stato: «Art. 1 – L'Italia è una Repubblica democratica, fondata sul lavoro. *La sovranità appartiene al popolo, che la esercita nelle forme e nei limiti della Costituzione*» (corsivo mio).

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[15] I due interventi sono citati da L. Basso, *Il principe senza scettro*, Milano, 1998 [1958], p. 133.

[16] Così C. Mezzanotte, *Corte costituzionale e legittimazione politica,* cit., 67.

E per comprendere il costituzionalismo europeo del Secondo dopoguerra c'è un'altra chiave di lettura che quello americano non consente di valorizzare, e che è il vero grande assente del volume di Gargarella: sono i partiti politici di massa, che hanno plasmato la vita democratica del 1900, e sono stati i veri motori della democrazia costituzionale in Europa, nell'ambito di forme di governo parlamentari, spesso di tipo consensuale o consociativo[17]. Tantissime lacune della "sala macchine", ovvero della forma di governo (nell'Italia del Secondo dopoguerra ciò emerge con particolare chiarezza), erano soltanto apparenti, in quanto era la "costituzione materiale", di cui ci parla Costantino Mortati[18], fondata sui partiti, che si faceva carico di consentire quella "conversazione tra eguali" che le norme costituzionali scritte non prevedevano pienamente. Penso qui sì ai grandi partiti politici come quello democristiano, comunista, socialista, capaci di mobilitare milioni di persone, anche attraverso i propri giornali e feste (come non ricordare la partecipazione attiva di così tante donne e uomini alle "Feste dell'Unità"!), ma anche a quelli più piccoli, le cui sezioni, sempre vive, animate, affollate di persone e iniziative, si potevano vedere anche nei più sperduti villaggi italiani. La "Repubblica dei partiti" di cui ci ha parlato Piero Scoppola[19] si è fatta carico del pilastro democratico, nonché di supportare la implementazione dei diritti sociali, sia pure con un certo ritardo rispetto all'entrata in vigore della Costituzione[20]. In molte parti d'Italia i partiti hanno trovato un radicamento locale capillare grazie a quelle virtù civiche ben messe in luce da Putnam, che hanno sostenuto una società civile attiva, nell'ambito di un sistema di autonomie, sociali e locali, ricco e articolato[21].

Purtroppo, queste esperienze sono ignorate dal *mainstream* del costituzionalismo anglosassone, totalmente sbilanciato in favore di due casi che portano in direzioni diverse: quello degli Stati Uniti, il cui eccezionalismo emerge sempre più come "arretratezza costituzionale", e quello del Regno Unito, eccezionale per l'assenza di costituzione scritta e rigida. Ma l'Italia, la Germania, il Portogallo, la Spagna, la Grecia, ci

[17] A. Lijphart, *Le democrazie contemporanee*, Bologna,1984.

[18] C. Mortati, *La costituzione in senso materiale*, Milano, 1998 [1940].

[19] P. Scoppola, *La Repubblica dei partiti. Evoluzione e crisi di un sistema politico 1945-1996*, Bologna, 2021 (ed. originale 1991).

[20] R. Romanelli, *L'Italia e la sua Costituzione*, Bari-Roma, 2023.

[21] R. Putnam (con R. Leonardi e R. Nanetti), *La tradizione civica delle regioni italiane*, Milano, 1993. Più recentemente v. R. Cartocci, *Mappe del tesoro. Atlante del capitale sociale in Italia*, Bologna, 2007.

raccontano un'altra storia[22], una storia che, come costituzionalisti italiani, dobbiamo contribuire a narrare e a collocare in posizione di pari dignità nello scenario comparato[23]. È abbastanza paradossale che alcune esperienze del *Global South*, Sudafrica, India, Colombia, Brasile, che hanno preso molto dal costituzionalismo sociale europeo, ma in contesti assai diversi, estremamente diseguali, in assenza di una tradizione di partiti politici, con forme di governo in alcuni casi iperpresidenziali, siano oggi al centro dell'attenzione globale, quando si parla, ad esempio di temi come la garanzia dei diritti sociali o l'attivismo delle giurisdizioni costituzionali[24]. Se, nella ricerca di soluzioni alla crisi attuale, vogliamo ricostruire una storia del costituzionalismo, che includa le idee che ne sono all'origine e le esperienze che sulla base di tali idee sono state concretamente realizzate (lo chiamerei il "costituzionalismo reale"), non possiamo ignorare questa tradizione costituzionale, che ci racconta un'altra storia.

3. Guardando avanti

E oggi? Nonostante il diverso punto di partenza, credo che la proposta di Gargarella sia di grande interesse anche per noi, figlie e figli del "*Postwar Paradigm*".

Ci sono infatti diversi sviluppi che ci impongono una riflessione, mentre crescono anche intorno a noi quei fenomeni descritti da Gargarella riguardo alle Americhe, in termini di sfiducia e disincanto.

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[22] Tali esperienze sono ricondotte alla categoria del "costituzionalismo antifascista" da A. Somma, *Il diritto del lavoro dopo i Trenta gloriosi*, in *Lavoro e diritto*, 2018, p. 307 ss.; A. Somma, *L'ordoliberalismo e la cancellazione del costituzionalismo anti-fascista*, in *Critica marxista*, 2016, p. 49 ss.; Id., *Europa a due velocità. Post-politica dell'Unione europea*, Reggio Emilia, 2017, p. 37 ss.

[23] Anche scrivendo in inglese, con tutta la fatica che ciò comporta (e che mi scuso per non aver affrontato in questo breve commento). V. però almeno M. Cartabia – N. Lupo, *The Constitution of Italy: A Contextual Analysis*, Oxford, 2022 e, in prospettiva comparata, M. Dani – M. Goldoni – A. J. Menéndez (eds.), *The Legitimacy of the European Constitutional Orders. A Comparative Inquiry*, Cheltenham, 2023, e, specialmente, M. Dani, *The Democratic and Social Constitutional State as the Paradigm of the post-World War II European Constitutional Experience*, in M. Dani – M. Goldoni – A. J. Menéndez (eds.), *The Legitimacy* cit., p. 27 ss. e M. Wilkinson, *Constitutionalism in Postwar Europe: Revolutionary or Counter-Revolutionary?*, in M. Dani – M. Goldoni – A. J. Menéndez (eds.), *The Legitimacy* cit., p. 64 ss.

[24] Ma vedi ora M. Hailbronner, *Transformative constitutionalism: Not only in the Global South*, in *The American Journal of Comparative Law*, 2017, p. 527 ss.; T. Groppi, *Il posto del diritto nel costituzionalismo trasformatore. Una riflessione "oltre l'eguaglianza formale"*, in AA.VV:, *Scritti in memoria di Beniamino Caravita*, Napoli, 2024, p. 2375 ss.

In primo luogo, è venuto meno lo strumento che avevamo nella nostra "sala macchine" non scritta per consentire alla volontà popolare di determinare l'indirizzo politico, i partiti politici di massa. Questo cambia tutto e rende attuale la riflessione intorno alla necessità di sanare la frattura tra aspettative popolari e risposte che le istituzioni sono in grado di dare. Come incanalare le richieste sociali, spesso espresse in forma di protesta da parte di movimenti spontanei, è una questione aperta. Possiamo ridare linfa, e come, nell'epoca della fine delle ideologie, ai partiti politici a vocazione generale? Dobbiamo orientarci verso forme parziali di rappresentanza, a partire dalle già sperimentate forme della rappresentanza di interessi? O dobbiamo seguire anche altre strade, che si affianchino alla rappresentanza politica, e quali?

È indubbio che, come sostiene Gargarella, manchiamo di immaginazione e dobbiamo elaborare nuove soluzioni. L'Italia, proprio per la sua tradizione basata su forti partiti di massa, è particolarmente indietro su questa strada, fermi come siamo, sul piano nazionale, a un unico strumento di partecipazione popolare diretta, il referendum: uno strumento "falsamente partecipativo", che favorisce la polarizzazione, piuttosto che processi deliberativi e dialogici[25]. Con le parole di Gargarella, il referendum è una forma di "*participación sin deliberación*". Per parte sua, anche in Italia la democrazia rappresentativa può essere letta secondo la metafora di Gargarella, come un "*traje estrecho*" che, venuto meno il ruolo integratore dei partiti politici, richiede di dare voce ai cittadini attraverso altre, più sofisticate e innovative, vie: il sovraccarico di domande che si cumulano sul momento elettorale genera quasi inevitabilmente frustrazione e confusione riguardo all'indirizzo politico per il futuro, oltre a rivelarsi inutile in termini di controllo popolare (quello che Gargarella chiama il "controllo esterno") per far valere, retrospettivamente, la responsabilità politica degli eletti.

Resta rilevante la questione delle garanzie (di quello che Gargarella definisce il "sistema interno dei controlli"), che a mio avviso non possono essere considerate strumenti "elitisti", in un'epoca in cui la volontà popolare è inquinata dalle reti sociali, dalla disinformazione, dalle interferenze straniere. Anzi, ancor più che in passato, si tratta di istituti (a partire dalle corti costituzionali per arrivare alle autorità indipendenti) imprescindibili a difesa del pluralismo e della stessa partecipazione democratica tra eguali.

[25] M. Luciani, *Il referendum abrogativo. Commento all'art. 75*, in G. Branca, A. Pizzorusso (a cura di), *Commentario della Costituzione*, Bologna-Roma, 2005, p. 1 ss.; F. Pallante, *Contro la democrazia diretta*, Torino, 2020.

Benché le esperienze comparate disponibili, alle quali fa riferimento il volume, restino ad oggi alquanto circoscritte, tutto ciò ci deve ancora più incoraggiare a cercare nuove soluzioni, a tutti i livelli. Continuo ad essere convinta che il livello di governo locale, così trascurato dai costituzionalisti, resti una palestra di partecipazione, il terreno più adeguato a una conversazione tra eguali. Mi piace citare al riguardo Eleanor Roosevelt, in uno dei suoi ultimi interventi alle Nazioni Unite, nel 1953, che a mio avviso cattura bene questa nozione di prossimità: "dopo tutto, dove iniziano i diritti umani?" – si chiese – "nei piccoli luoghi vicino casa, così vicini e così piccoli da non potersi individuare su nessuna mappa del mondo. Eppure, essi sono il mondo delle singole persone: il quartiere in cui si vive, la scuola che si frequenta, la fabbrica, la fattoria o l'ufficio in cui si lavora"[26].

Nello stesso tempo, è evidente che le risposte che possono darsi in termini istituzionali, attraverso strumenti deliberativi o partecipativi, sono poca cosa rispetto alla grande sfida della nostra epoca, che è collegata al venir meno dei presupposti di una dialettica democratica, ovvero alla crescita delle diseguaglianze[27].

La democrazia ha bisogno dell'eguaglianza, almeno di una certa dose di eguaglianza. È noto[28]. Ma ancor più delle diseguaglianze di per sé, la prospettiva europea ci mostra che è la loro *crescita* – in paesi nei quali, nel XX secolo, esse erano state decisamente ridotte – a produrre conseguenze sul funzionamento della democrazia[29].

Infatti, l'aumento delle diseguaglianze, con l'accrescimento delle distanze tra individui e gruppi, indebolisce la coesione sociale e il senso di identità. Potremmo dire che la distanza, quand'è spinta all'estremo, genera una mancanza di compassione nei confronti degli altri esseri umani. Questo mina, a sua volta, lo stesso legame comunitario, favorendo la divisione e la polarizzazione[30]. Per cui il senso di appartenenza deve essere creato artificialmente. Ad esempio, attraverso l'emersione o il ritorno di forme di

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[26] M. A. Glendon, *Verso un mondo nuovo. Eleanor Roosevelt e la dichiarazione universale dei diritti umani*, Macerata, 2009, p. 408.

[27] Ho cercato di sostenere questa visione in T. Groppi, *Oltre le gerarchie. In difesa del costituzionalismo sociale*, Bari-Roma, 2021.

[28] R. Dahl, *La democrazia economica*, Bologna, 1989 [1985], p. 42; S. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, in *American Political Science Review*, 1959, p. 69 ss.

[29] T. Piketty, *Il capitale nel XXI secolo*, Milano, 2014 [2013].

[30] Questa tematica era già chiaramente evidenziata in R. Dahrendorf, *Quadrare il cerchio. Benessere economico, coesione sociale e libertà politica*, Bari-Roma, 1995, specie p. 39 ss.

«nazionalismo tribale»[31] (nutrite da un complesso armamentario simbolico e spesso orientate contro gli immigrati), finalizzate a supplire all'assenza di una «reale» base di condivisione[32].

Lo svanire della possibilità di migliorare la posizione economica propria o dei propri figli, le difficoltà della vita quotidiana derivanti dai tagli alla spesa pubblica, le incertezze di un futuro che sembra dipendere da variabili incontrollabili generano, nelle moltitudini dei cittadini delle democrazie costituzionali europee, una molteplicità di emozioni negative: risentimento, rancore, invidia, sfiducia, insicurezza, paura e finanche rabbia. Questa a mio avviso è la principale sfida. Come scrisse un grande giurista italiano, Piero Calamandrei, alla fine della Seconda guerra mondiale, poco prima di partecipare ai lavori dell'Assemblea costituente, "senza l'accompagnamento dei diritti sociali le tradizionali libertà politiche possono diventare in realtà strumento di oppressione di una minoranza a danno della maggioranza: sicché si può dire in conclusione che i diritti sociali costituiscono la premessa indispensabile per assicurare a tutti i cittadini il godimento effettivo delle libertà politiche"[33].

A differenza del mondo anglosassone, in cui il quadro costituzionale è sprovvisto di una base giuridica adeguata, in Italia, come in altri paesi riconducibili a quello che qui ho definito "costituzionalismo sociale", principi di giustizia e strumenti per realizzarli sono sanciti normativamente nella Costituzione: una Costituzione che è frutto di un processo costituente democratico. Anzi, tale nucleo configura, per utilizzare un'espressione assai di moda in questi anni, "l'identità costituzionale" italiana. In altre parole, dobbiamo «trarre dall'oblio» le norme costituzionali. Parlando di norme giuridiche, questo significa ricordare che il diritto non è una variabile indipendente nel *mare magnum* delle politiche economiche e sociali, ma ha carattere prescrittivo, cioè deve improntare di sé programmi politici, elettorali e di governo, atti normativi di ogni ordine e grado, sentenze di ogni ordine e grado[34].

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[31] Nel senso indicato da H. Arendt, *Le origini del totalitarismo*, Torino, 2009 [1948], p. 317 ss.

[32] Non si tratta certo di una novità: hanno esplorato il tema, ad esempio, E. Hobsbawm, T. Ranger, *L'invenzione della tradizione*, Torino, 2002 [1983].

[33] P. Calamandrei, *L'avvenire dei diritti di libertà*, prefazione alla ristampa di F. Ruffini, *Diritti di libertà*, Firenze, 1946, ora in *Opere giuridiche*, vol. III, Napoli, 1965, p. 183 ss.

[34] Si sofferma decisamente sul carattere prescrittivo del principio di eguaglianza sostanziale contenuto nella Costituzione italiana L. Ferrajoli, *Manifesto per l'eguaglianza*, Bari-

Insomma, difendere e rendere effettive le promesse del costituzionalismo sociale è a mio avviso l'unica via per difendere la democrazia e creare le basi per una vera "conversazione tra eguali". Difendere e sviluppare questa visione del diritto "dal basso" è il compito dei giuristi democratici e, per utilizzare il titolo di un altro, recente, libro di Gargarella, di un "diritto di sinistra"[35]. Ma si va poco lontani senza la politica, o, per essere più precisi, senza politici capaci di visione e amore per il bene comune. Utopia?

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ABSTRACT: This essay presents a critical analysis of Roberto Gargarella's book The Law As a Conversation Among Equals.

KEYWORDS: Constitutionalism – Democracy – Counter-Majoritarianism – Roberto Gargarella – Conversation

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Tania Groppi – Professoressa Ordinaria di Diritto Pubblico, Università di Siena, Italia. (tania.groppi@unisi.it)

Roma, 2019, p. 122. V. anche G. Azzariti, *Il costituzionalismo moderno può sopravvivere?,* Bari-Roma, 2013.

[35] R. Gargarella, *Manifiesto por un derecho de izquierda*, Buenos Aires, 2023.

RIVISTA DI
DIRITTI COMPARATI

The Law as a Conversation Among Equals. A Skeptical View*

Sergio Verdugo

TABLE OF CONTENTS: 1. The infrastructure of democracy – 2. The Law as a Conversation Among Equals. – 3. A conversation without political parties. – 4. Justified approaches and inferred solutions. – 5. Constitution-making and the conditions for an equal conversation. – 6. On the limits of citizens' assemblies. – 7. Conclusion.

1. *The infrastructure of democracy*

In previous years, academics, public intellectuals, and political authorities have extensively discussed how to face the crisis of democracy in the era of populism. The rise to power of politicians such as Donald Trump, Viktor Orbán, Jair Bolsonaro, and Hugo Chávez and his handpicked successor (Nicolás Maduro), as well as populist regimes such as those of Peronismo in Argentina, Modi in India, or López Obrador in México, to name a few, have triggered intense debates, including, for example, how to identify a populist,[1] whether the phenomenon of populism is taking place on a global scale or not,[2] how this phenomenon is harming the rule of law,[3] how populists can use mechanisms typically associated to constitutionalism to consolidate and advance their agendas,[4] how they copy each other,[5] how legal systems can be manipulated to allow for antidemocratic agendas to

* Commissioned article.

[1] J.W. Müller, *What Is Populism?*, Philadelphia, 2016.

[2] M.A. Graber – S. Levinson – M. Tushnet (eds), *Constitutional Democracy in Crisis?*, Oxford – New York, 2018; C.R. Sunstein (ed), *Can It Happen Here?: Authoritarianism in America*, New York, 2018; W. Sadurski, *A Pandemic of Populists*, Cambridge, 2022.

[3] T. Ginsburg – T. Moustafa (eds), *Rule by Law. The Politics of Courts in Authoritarian Regimes*, Cambridge, 2008; W. Sadurski, *Poland's Constitutional Breakdown*, Oxford, 2019; T. Drinóczi – A. Bień-Kacala, *Illiberal Constitutionalism in Poland and Hungary: The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law*, London, 2021.

[4] See, e.g., G. Martinico, *Filtering Populist Claims to Fight Populism. The Italian Case in Comparative Perspective* Cambridge, 2022; D. Landau, *Abusive Constitutionalism*, in *UC Davis Law Review*, 2013, p. 189 et seq; D. Landau – R. Dixon, *Abusive Judicial Review: Courts Against Democracy*, in *UC Davis Law Review*, 2020, p. 1313 et seq.

[5] R. Dixon – D. Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*, Oxford, 2021.

thrive,[6] what courts can do about it,[7] how to fight against the erosion of democratic regimes,[8] how the problem was exacerbated during the pandemic,[9] and so on.

In many ways, these problems of democracy are not new. Historical examples of populism, attacks against courts, and authoritarian backlashes abound. Authoritarian agendas have long led to what Fraenkel called the "dual state" in 1941. There are also sometimes justifications rooted in political theory – the political theories of influential intellectuals, such as Rousseau and the Nazi scholar Carl Schmitt, to name a couple, can be associated with approaches to the idea of *the people* that can be supportive of populist narratives.[10] If we consider crucial arrangements that support representative democracies – what Jan-Werner Müller calls the critical infrastructure of democracy[11] –, we can find that attacks against them are not new in historical terms. Focusing on correcting the infrastructure of democracy,[12] even in contrast with more optimistic approaches to mechanisms of direct democracy that offer to expand participation to deal with populism,[13] is an urgent but not new agenda.

The attack against competitive multiparty regimes, a critical element that must exist in every representative democracy, has existed since creating and using political parties was an actual possibility. In many ways, the question of how to save or recover a democratic regime entails a large number of additional questions, and, at times, they all appear to present

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[6] K.L. Scheppele, *Autocratic Legalism*, in *The University of Chicago Law Review*, 2018, p. 545 et seq; G. Halmai, *A Coup Against Constitutional Democracy: The Case of Hungary*, in M.A. Graber – S. Levinson – M. Tushnet (eds), *Constitutional Democracy in Crisis?*, Oxford – New York, 2018; P. Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia*, London, 2014.

[7] Compare T.G. Daly, *The Alchemists. Questioning Our Faith in Courts as Democracy-Builders*, Cambridge, 2017; S. Issacharoff, *Fragile Democracies. Contested Power in the Era of Constitutional Courts* Cambridge, 2015.

[8] T. Ginsburg – A.Z. Huq, *How to Save a Constitutional Democracy*, Chicago, 2018.

[9] See, e.g., P. Riberi (ed), *Pandemocracy in Latin America. Revisiting the Political and Constitutional Dimension of the Pandemic*, Oxford, 2023; T. Ginsburg – M. Versteeg, *The Bound Executive: Emergency Powers during the* Pandemic, in *International Journal of Constitutional Law*, 2021, p. 1498 et seq.

[10] See, e.g., A. Weale, *The Will of the People. A Modern Myth*, Newark, 2018.

[11] J.W. Müller, *Democracy Rules*, London, 2021.

[12] See, e.g., B.E. Cain, *Democracy More or Less: America's Political Reform Quandary*, Cambridge, 2015.

[13] See, e.g., J.G. Matsusaka, *Let the People Rule. How Direct Democracy Can Meet the Populist Challenge* Princeton, 2022.

themselves together in ways that make the discussion more challenging and raise methodological concerns we have not addressed sufficiently. Political parties are younger than modern democratic ideals – no parties existed in ancient Athens, parties were forbidden during the French Revolution, and the modern American party system was created after, not before, the establishment of the American Constitution. Still, democracy today is (still, to some degree at least) necessarily mediated by them, and for good reasons: competitive parties should check each other to the point of becoming a crucial tool of accountability. Their status as repeat players in the political system helps encourage long-term agendas. Their adherence to holistic ideological platforms helps reduce information costs for the voters. This is not only an argument that allows citizens to delegate their share of political power more confidently into a second-best scenario of having representatives making decisions for them. Lowering the costs of democracy will enable citizens to find other ways of collegiality.[14] The parties' filtering mechanisms help select candidates representing the platforms citizens care about, even avoiding populist takeovers.[15] Their shared control of the political battleground helps to keep the politicians in check when deviations from an ideologically coherent agenda happen. Rival parties can (and should) even team up against the threat of an anti-democratic group threatening their ability to remain as repeat players in the long-term game of democracy. Parties provide political expertise and experience in negotiating and achieving compromises, reducing transaction costs in the political system in order to advance reforms that citizens care about without excluding too many politically significant social sectors in the process. They establish and institutionalize think tanks and affiliated intellectuals that can help improve public policies, even beyond the short-term calculations typically associated with electoral cycles. Moreover, they can provide a forum for citizens' participation and help institutionalize political regimes in ways that reduce the risks of personalizing politics. Building on the trustee relationship between citizens and politicians, and making sure that the citizens' preferences have a tangible impact on ordinary political processes by having them understand better the platforms offered

[14] One does not need to agree fully with Talisse's argument in *Overdoing Democracy* in order to accept the view that societies partly need to heal by finding common places that social institutions can partly provide: R.B. Talisse, *Overdoing Democracy. Why We Must Put Politics in Its Place*, Oxford, 2021.

[15] See, e.g., as to how this filtering mechanism was harmed in Fujimori's Perú and in the US., S. Levitsky – D. Ziblatt, *How Democracies Die*, New York, 2018.

by the parties, while encouraging parties to try to get closer to the median voter, are crucial goals we should promote.

Of course, parties never fully achieve their potential, and, especially in an era of populism, they can function in severely flawed ways. It is not controversial to claim that parties do not perform their tasks satisfactorily today – if they ever did – in many regions of the world, and we haven't discussed enough the reasons behind this significant problem nor how to repair the party systems. In many ways, the antiparty narratives that feed into the populist and authoritarian claims can also be the responsibility of the party leaders. The question of what makes parties function in desirable ways is crucial for today's democracies. It is not enough to focus on, say, the limitations of party ban mechanisms and the limited capabilities that courts have to protect democratic principles, despite the existence of persuasive justifications for judicial interventions when critical democratic processes have been harmed or an authoritarian backlash is imminent,[16] as these types of mechanisms can only achieve so far. Institutional incentives for collaboration and creating more responsive institutions should be the focus, as well as providing opportunities for democratic opponents to regroup and put speedbumps against authoritarian agendas – fourth-branch institutions can be helpful for this.[17] To be sure, this is no easy task. The problems of state capacity in contemporary jurisdictions largely undermine the perceived legitimacy of political institutions, and the problems of party systems are one condition – not the only one – influencing that problem.[18]

It seems likely that parties can function better when the electoral losers of today can possibly and credibly win in the future, avoiding a winner-take-all situation and making politicians learn how to make the

[16] S. Issacharoff, *Fragile Democracies. Contested Power in the Era of Constitutional Courts* Cambridge, 2015; S. Gardbaum, *Comparative Political Process Theory*, in *International Journal of Constitutional Law*, 2020, p. 1429 et seq; R. Dixon, *Responsive Judicial Review. Democracy and Dysfunction in the Modern Age*, Oxford, 2022; M.J. Cepeda Espinosa – D. Landau, *A Broad Read of Ely: Political Process Theory for Fragile Democracies*, in *International Journal of Constitutional Law*, 2021, p. 548 et seq Compare with R. Gargarella, *From "Democracy and Distrust" to a Contextually Situated Dialogic Theory*, in *International Journal of Constitutional Law*, 2020, p. 1466 et seq.

[17] T. Ginsburg – A. Huq, *Democracy's "Near Misses"*, in *Journal of Democracy*, 2018, p. 16 et seq. See generally M. Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy*, Cambridge, 2021.

[18] See a version of this argument in connection with the problem of political parties in S. Issacharoff, *Democracy Unmoored: Populism and the Corruption of Popular Sovereignty*, Oxford, 2022.

most of electoral uncertainty.[19] In other words, reducing the costs for electoral losers is vital to keep competitive democracies in place. But this is, of course, not enough. We should also consider that parties should compete against other parties and be fed by social movements. However, parties should not be replaced by social movements,[20] or individuals seeking to personalize institutional channels because, then, the advantages that parties can provide to representative institutions will deteriorate.[21] Social movements do not offer a holistic approach to how society should be organized, nor a coherent ideological platform capable of reducing the information costs of democracy, nor are they repeat players that are encouraged to offer a long-term approach to their policies and strategies, nor are they competitors necessarily interested in checking and making incumbent regimes accountable – except for the behaviors that connect with their area of interest. Specific individuals leading non-institutionalized movements are prone to develop anti-party narratives against the ruling parties without having the advantages that parties can offer and presenting a danger to the channels that are supposed to process the political conflict in civilized and respectful ways. The problems that social movements and specific leaders operating in a non-institutionalized way have existed always to some degree. The party mechanisms have sometimes been enough to contain the risks involved while making the most of social movements giving visibility of a specific social demand, or specific individuals pursuing the right leadership practices that democracies can benefit from. By channeling them in institutional ways, social movements and individuals do not need to harm democracies. But when the parties stop working as they should, democratic regimes suffer. The existence of weak and fragmented parties helps to partially explain, for example, how the self-coup of Fujimori in Perú became a turning point for Peruvian politics that made the country

[19] For this reason, one of the latest books in these debates has played such an important role in explaining how political parties have evolved in the US and how the party system has lost the ability to produce loyal winners and loyal losers. See S. Levitsky – D. Ziblatt, *The Tyranny of the Minority*, New York, 2024.

[20] Elsewhere, I have shown how the risks have materialized using the case of the Chilean Constitutional Convention of 2022: see S. Issacharoff – S. Verdugo, *Populismo Constituyente, Democracia y Promesas Incumplidas: El Caso de La Convención Constitucional Chilena (2021-2022)*, in *International Journal of Constitutional Law*, 2023, p. 1517 et seq.

[21] I have elsewhere how the personalization of representative institutions in Latin America has accompanied flawed constitution-making processes: see J.M. Díaz de Valdés – S. Verdugo, *The ALBA Constitutional Project and Political Representation*, in *International Journal of Constitutional Law*, 2019, p. 479 et seq.

vulnerable to populists and authoritarians, and gradually established personalized and unstable political parties incapable of establishing a responsive political process.[22] Gridlock, populist narratives, and government interruptions have been the trend for many years in Perú. This raises the question of whether we should have a democracy without parties.[23] The question is fair because Gargarella seems nostalgic for Jefferson's alternative (RG 120), and Jefferson was not precisely a defender of political parties.[24] Nevertheless, the answer to the question of whether democracies can function without parties must be negative if no feasible and desirable alternative to political parties can be found, and the associated risks cannot be contained.

Whatever the answer to the problem of political parties is, we need to acknowledge that representative institutions cannot work well without them performing at a reasonable level. Most of the attacks we see today against democratic institutions are attacks against the parties' abilities to perform their tasks well. Think, for example, of the list of strategies developed by forms of "stealth authoritarianism," which most connect to attacks or directly or indirectly capturing the party system.[25] The establishment of dominant parties, the personalization of politics, the instrumentalization of parties as vehicles for a specific individual, the capturing of electoral commissions and electoral courts, the manipulation of electoral rules,[26] the reorganization and neglect of traditional think tanks and intellectuals fighting for more coherent ideological approaches, etc., are all attacks against party structures. As I said before, it makes sense to focus on how to respond to those attacks more effectively by finding ways to strengthen the parties and the conditions for political competition instead of finding ways to substitute them that can end up harming even more the institutional channels available to protect democratic principles. Despite their flaws and limited opportunities to strengthen them, we should not abandon that boat unless the new ship can provide sufficient mechanisms to protect such principles.

Another critical element of any democratic regime is freedom of speech, which has been routinely and constantly attacked by authoritarian

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[22] S. Levitsky – M.A. Cameron, *Democracy without Parties? Political Parties and Regime Change in Fujimori's Peru*, in *Latin American Politics and Society*, 2003, p. 1 et seq.

[23] See, in connection with the Peruvian case, O. Sanchez-Sibony, *Democracy without Parties in Peru. The Politics of Uncertainty and Decay*, Cham, 2022.

[24] J.W. Müller, *Democracy Rules*, London, 2021, p. 96.

[25] O.O. Varol, *Stealth Authoritarianism*, in *Iowa Law Review*, 2015, p. 1673 et seq.

[26] See, e.g., N. Cheeseman – B. Klaas, *How to Rig an Election*, New Haven, 2019.

and populist leaders. The fight for the rights of independent media and the opposition's freedom of speech has always been one of the most difficult – though essential – challenges for democratic regimes. Without this freedom, democratic opposition cannot be successful, rotation in power becomes less plausible, the media cannot investigate and denounce cases of corruption and other unethical behaviors, and so on. What, then, is new about the attacks that we see today compared to the attacks that parties and the media have received in the past? The era of social networks has changed how people express themselves and receive information; censorship channels have remained, and speech is not fought with other techniques that digital channels in a more globalized world allow. Populists and authoritarian leaders have found ways to support each other financially, protecting kleptocratic regimes.[27] Military assistance has become global, and the political relations of populist leaders have found support in broad campaigns.[28] The leaders can, directly and indirectly, communicate with the citizens without the need for mediation from political parties and the media; disinformation campaigns abound and have turned the parties into factions seeking specific interests and even turning them into kleptocratic associations that have helped to build what some have called a "mafia state."[29] We must find ways to protect freedom of speech and other essential liberties. Courts can play a role in this, even if insufficient.

Many have discussed how to defend ourselves against attacks from undemocratic agendas in these contexts. What is the future of democracy? How should regimes protect themselves against attacks that are gradual in nature and even legal from a formalistic perspective? In his book, Roberto Gargarella invites us to see this debate from a different perspective. Instead of focusing on how to repair constitutional democracy using arguments connected to arguments that come from the defense of robust forms of constitutionalism, he suggests switching our normative commitments with the establishment of a new regulatory ideal called "The Law as a Conversation Among Equals" that should allow us to identify the best

[27] A. Applebaum, *Autocracy, Inc. The Dictators Who Want to Run de World*, New York, 2024.

[28] *Ibid.*

[29] B. Magyar, *Post-Communist Mafia State: The Case of Hungary*, Budapest, 2016; M. López Maya, *Populism, 21st-Century Socialism and Corruption in Venezuela*, in *Thesis Eleven*, 2018, p. 67 et seq.

procedures.[30] And the answer, for him, lies far away from the traditional representational and judicial channels.

2. *The Law as a Conversation Among Equals.*

In his well-written book, Roberto Gargarella expands on his known criticisms against robust forms of constitutionalism,[31] and suggests that democratic regimes' future should not be located in the traditional institutional channels of political representation and judicial intervention. According to him, those institutional forms cannot provide effective solutions to the crisis democratic institutions are currently suffering in the era of populism and democratic decay. He also argues, expanding on arguments he has made in other works in the past,[32] that these institutional mechanisms were perhaps always flawed and rooted in reasons inconsistent with true democratic ideals. The problems that we see today are not new.[33]

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[30] I follow the 2022 Spanish version of his book: see R. Gargarella, *El Derecho Como Una Conversación Entre Iguales. Qué Hacer Para Que Las Democracias Contemporáneas Se Abran -Por Fin- al Diálogo Ciudadano*, Madrid, 2022. Hereinafter, I will use the acronym "RG" to refer to his book.

[31] See, e.g., R. Gargarella, *Scope and Limits of Dialogic Constitutionalism*, in T. Bustamante – B. Gonçalves (eds), *Democratizing Constitutional Law*, Cham, 2016; R. Gargarella, *La Revisión Judicial Para Las Democracias Latinoamericanas*, in R. Niembro – S. Verdugo (eds), *La justicia constitucional en tiempos de cambio*, Ciudad de México, 2019.

[32] See, e.g., how he has persuasively argued that the constitutional debate in Latin America should focus more on the political structures of collective decision-making instead of rights and how he has criticized the proponents for a robust regional human rights regime centred on the Inter-American Court of Human Rights. R. Gargarella, *Latin American Constitutionalism 1810-2010. The Engine Room of the Constitution*, Oxford, 2013; Id., *Latin American Constitutionalism, 1810–2010: The Problem of the "Engine Room" of the Constitution*, in P. Fortes and others (eds), *Law and Policy in Latin America. Transforming Courts, Institutions, and Rights*, London, 2017; Id., *Democracy and Rights in Gelman v. Uruguay*, in *AJIL Unbound*, 2015, p. 115 et seq; Id., *La Corte Interamericana de Derechos Humanos y la "conversación entre iguales"*, in *International Journal of Constitutional Law*, 2021, p. 1223 et seq; Id., *Latin American Constitutionalism: Social Rights and the "Engine Room" of the Constitution*, in *Notre Dame Journal of International & Comparative Law*, 2013, p. 9 et seq. See, also, S. Verdugo, *Can the Idea of a Latin American Ius Constitutionale Commune Become a Failed Promise?*, forthcoming in *European Yearbook of Constitutional Law*, 2025.

[33] See, also, R. Gargarella, *The "New" Latin American Constitutionalism: Old Wine in New Skins"* in E. Ferrer Mac-Gregor and others (eds), *Transformative Constitutionalism in Latin America: the Emergence of a New Ius Commune*, Oxford, 2017.

It is time to innovate. Unlike other critics of constitutionalism,[34] Gargarella also focuses on known forms of constitutional dialogue (RG 251-275) – against which he rightly identifies certain limits (RG 272-274) – and, more importantly, on new, experimental forms of public participation that should be considered (RG 295-312). Gargarella is, to be sure, not the first scholar to focus on dialogue[35] and experimental forms of public participation.[36] What makes his book a valuable addition to the discussion on the crisis of democratic institutions and the exploration of possible solutions is the creation of a normative ideal that drives his prescriptions.

He joins the tradition of those using thought experiments to signal the normative ideal that political systems should try to achieve (in a somehow Rawlsian fashion) by showing how decisions should be made following a dialogue that treats and respects everyone as equals, starting with the analogy of a small community of immigrants that settles in an island (RG 29-34). (Gargarella connects this analogy with Hart's work, who used a similar thought experiment for a different purpose). In that place, the immigrants will discuss and agree on the primary rules of the society, and eventually, they will need to develop secondary rules that respect the equality conditions that should be present for an honest conversation to happen. People should be able to give their points of view, persuade each other, listen to arguments, and try to achieve a solution in good faith. They should also be open to revising their decisions when new reasons appear.[37] As Rosalind Dixon has argued, it is not competition but conversation what drives Gargarella's argument.[38] This is an important point to make because

[34] The list is long. An example is the Jeremy Waldron's paper , from which I partly borrowed the title of this reaction essay: J. Waldron, *Constitutionalism. A Skeptical View* in T. Christiano – J. Philip (eds), *Contemporary Debates in Political Philosophy*, Malden, 2009. Another, more contemporary example, is M. Loughlin, *Against Constitutionalism*, Cambridge, Mass., 2022. Proponents of political constitutionalism and of popular constitutionalism can also be mentioned. Just to mention a couple, see L.D. Kramer, *The People Themselves. Popular Constitutionalism and Judicial Review*, Oxford, 2004; M. Tushnet, *Taking the Constitution Away from the Courts*, Princeton, 1999; R. Bellamy, *The Democratic Constitution: Why Europeans Should Avoid American Style Constitutional Judicial Review*, in *European Political Science*, 2008, p. 9 et seq.

[35] Other recent books are worth mentioning, though they offer a somehow different approach. See, e.g., A. Kavanagh, *The Collaborative Constitution*, Cambridge, 2023.

[36] See, e.g., A.A. Guerrero, *Against Elections: The Lottocratic Alternative*, in *Philosophy & Public Affairs*, 2014, p. 135 et seq; H. Landemore, *Open Democracy: Reinventing Popular Rule for the Twenty-First Century*, Princeton, 2020.

[37] Gargarella's conditions for his model include equality, disagreement, inclusion, deliberation, and an open dialogue that does not finish (RG, p. 35-39)

[38] R. Dixon, *Conversation or Competition among Equals*, in *Rivista di Diritti Comparati*, 2024, in this symposium.

if the purpose is not to promote a competitive multiparty system trying to convince voters to elect them and achieving partisan deals to advance their agendas, but a dialogue among citizens trying to accomplish something closer to a consensual view, then the benefits that well-functioning parties can provide become less relevant. The point will be not to save the parties against the undemocratic agendas and try to find ways to recover their genuine democratic function, but to identify alternatives to the party system. Are the parties a sinking boat that direct forms of political participation should substitute?

One of the reasons we are not getting close to Gargarella's regulatory ideal – and perhaps we have never achieved it structurally, though Gargarella cites some episodes he considers valuable – is that it connects to how representative and judicial institutions have evolved until today. Those institutions were built under an idea of constitutionalism that Gargarella disagrees with, and we cannot get a complete diagnosis of today's problem without going back to how constitutionalism works as established by those who were always skeptical of the power of the people. The checks and balances system was established to fight against the possibility of empowering citizens at large because they feared the dangers of factionalism (RG 67-71) and were trying to contain the risks of their time (RG 52-53), which are far away from the problems of contemporary multicultural democracies (RG 107). Note also that modern political parties did not exist then, even though they later became central to political institutions' operations.

According to Gargarella, the current challenges in the era of populism are not all new, nor are the causes. If we want to discuss a solution to these issues, then, we should go back and identify the institutional arrangements associated with democratic skepticism and replace the political dynamics caused by those robust versions of constitutionalism. Those institutional arrangements were also connected to the building grounds of political representation. According to Gargarella, we should stop trying to justify those institutions because they cannot achieve his regulatory ideal. Instead, we should focus on what should have been the priority in the first place: empowering people in ways that allow for a conversation among equals. Representation is a wrong solution, the argument follows, because it entails what Gargarella calls "electoral extorsion" (RG 120-133). In Gargarella's terms, electoral extorsion is inevitable because it happens in every voting procedure where citizens are asked to favor specific choices. The choices require a simplification that entails a tragic choice. In order to favor their true preferences (say, establish publicly funded healthcare insurances),

citizens must favor what they dislike (say, agree to have a monopoly of state-run healthcare providers). If politicians offering health insurances also offer the state-run system, then citizens who want the insurance will have no choice but to accept the state-run monopoly. Gargarella offers a solution to this problem – the method of a conversation among equals – and dismisses the ability of political parties to reduce the problems of electoral extorsion, which seem to be, according to him, a problematic feature of any electoral mechanism. The problem, as I will show, is that well-functioning representative institutions are not supposed to work like this. The issue of electoral extorsion is magnified precisely when representation is flawed.

I provide a skeptical approach to Gargarella's strategy in the following pages. I won't challenge, for now, the inherent desirable features of his regulatory ideal. Instead, I will argue that if we take his considerations seriously, the problems of the infrastructure of democracy won't be solved just by looking at his *regulatory* ideal and identifying its mechanisms. Moreover, the critical arrangements of democracy can suffer as a result. It could be argued that the issue is precisely not to *save* the current representative and judicial institutions. Why waste our time and resources, for example, in trying to identify solutions about how we can fight back to recover the independence of strong courts capable of defending valuable democratic principles if we are not supposed to agree with having a robust independent court with the power of strong judicial review in the first place?

For Gargarella, the point is both about design and justifications. We are not supposed to go back to a robust *constitutional* democracy but to engineer a new political system that can invigorate democratic forces. He is, to be sure, less interested in how to get there, as he says little about the actual strategy – perhaps via a constitution-making process – than in showing how collective decision-making procedures should look in the future. It would be wrong, in my view, to criticize his theory based on the real-world need to fight for judicial independence in places like Hungary, because judicial independence may – or may not – be instrumentally valuable to creating the conditions that will allow the regulatory ideal that Gargarella seeks. The point is that, eventually, a future post-Orbán constitutional court in Hungary should not try to speak on behalf of the people and substitute the citizens' preferences. The people should govern themselves freely and equally via the mechanisms that Gargarella identifies. For that reason, I believe that any criticism against Gargarella should rather focus on (1) whether the regulatory ideal should be considered as such or (2) whether the mechanisms he suggests are likely or not to be effective in

achieving something close to that ideal. I focus on (2). Before discussing the mechanisms, I must say a few words about Gargarella's political theory.

3. A conversation without political parties.

As explained before, Gargarella's proposed model considers political representation as one of the targets and not the solution. He explicitly endorses the view that representative democracy is a second best option compared to mechanisms of direct participation (RG 76, 97-102, 112-113). He claims that political representation was created as a manifestation of those skeptical of the people's rule. He, therefore, and as shown before, appears uninterested in fixing the problems of representative democracy's critical infrastructure. That would be a wrong strategy to follow, which could expand the problems of electoral extorsion, representation, and counter-majoritarian institutions (see, e.g., RG 140-145, 206, 209, 232-236). This is why Gargarella's proposal neglects or deliberatively rejects the benefits of political competition.

My main disagreement here is that representation should not be considered a second best to direct democracy. Moreover, I believe this idea does not necessarily lead us to support the Republican and anti-democratic views that existed during the generation of the American founders – who could not have imagined how the party system would grow nor how the infrastructure of representative institutions would evolve. By suggesting that representative democracy is the second best compared to direct democracy, Gargarella seems to assume that direct democracy can work well in terms of discovering the people's will – except, to be sure, of referenda, which he disagrees with (RG 245-246).[39] The people's will can hardly exist, as there is no such thing as a stable, organic, and unified collective preference,[40] and theories claiming their existence might have a dangerous interpretation exclusive to specific groups. There are good reasons to suggest that representative institutions are better placed to get closer to the

[39] Gargarella's argument against referenda is quite strong, and I tend to agree with it, despite the fact that my own approach recognizes a limited value in treating citizens as veto players. Compare R. Gargarella, *Why Are "Exit Referendums" Undesirable? The Case of Chile (2020-2022)*, *in European Human Rights Law Review*, 2023, p. 32 et seq; S. Verdugo, *Referéndum y Proceso Constituyente: ¿Extorsión Electoral o Veto Ciudadano?*, in *Actualidad Jurídica*, 2023, p. 245 et seq.

[40] Elsewhere, I expanded on my position in this debate. See S. Verdugo, *Is It Time to Abandon the Theory of Constituent Power?*, in *International Journal of Constitutional Law*, 2023, p. 14 et seq.

citizens' preferences compared to mechanisms of direct democracy – I'll come back to this point later. The point, for now, should not be how to measure those preferences better but how we can make them engage with each other in ways that find common grounds and accommodation in responsive ways. Political representation is helpful not because it is a substitute for the people's will – that cannot be done – but because it establishes a forum for achieving principled solutions that can be inclusive of everyone's views in ways that direct democracy lacks. I will later explain that citizen assemblies – apparently, Gargarella's favored mechanism – can only offer a modest contribution to the problem.

From the perspective of political and representative institutions, the political process should not be approached, as Gargarella does when discussing the problem of electoral extorsion, as a fixed two-stage process: (1) voters vote, and (2) representatives rule. According to this view, which follows a Roussonean line of criticism, citizens are free once every electoral cycle, and politicians do not need to follow their mandates if there are any. Nevertheless, in a well-functioning democratic regime, the political process is, and should be, more complex: voters vote on what mediating parties present to them after considering the options and negotiating about them openly while trying to identify the preferences of the median voter and persuading citizens at large of the benefits of their agenda. The parties then debate and compromise internally, agree on electoral alliances, and campaign to expand their political platforms in ways that never stop looking at the citizens' preferences. Sometimes, party leaders will lead changes and convince citizens to follow. After regular elections and representative institution members are elected, parties know which views are stronger than others. They then need to build alliances and achieve deals that seek to maximize their chances of being reelected while trying to continue trying to appeal to the median voter. Some proposals will be gridlocked, and others will be approved. For Gargarella, gridlock seems to be a feature associated with the existence of political parties (RG 143). Nevertheless, if we can design a system that better aligns the incentives for parties to become more socially responsive to changing social demands,[41]

[41] Consider, e.g., the discussion on T. Khaitan, *Balancing Accountability and Effectiveness: A Case for Moderated Parliamentarism*, in *Canadian Journal of Comparative and Contemporary Law*, 2021, p. 81 et seq. I offered a response based on the idea of responsiveness in S. Verdugo, *Moderated Parliamentarism, Effective Governments, and Legislative Gridlock*, in *IACL-AIDC Blog*, 2021, available at the link: https://blog-iacl-aidc.org/2021-posts/2021/05/011-moderated-parliamentarism-effective-governments-and-legislative-gridlock.

party systems can reduce the transaction costs associated with gridlock. In other words, the cause of legislative vetoes and deadlocks is not the parties themselves. Legislative inertia and deadlocks are inherent features of any system with mechanisms of accountability, and we need to find ways to revise the infrastructure of democracy in order to provide the appropriate institutional incentives for cross-party collaboration. And there are strong reasons to suggest that the types of Presidential regimes that Gargarella uses as his examples – from the US to Latin American countries – are necessarily flawed.[42] Solutions may exist to this problem without throwing away political representation.[43] Even though Gargarella is aware of the problems of presidential regimes (RG 147-160), he does not discuss more precisely how this affects parliamentary democracies or whether the causes are the same. Perhaps he does not need to, as he ultimately disagrees with any form of political representation that centers on constitutionalism.

Gargarella could argue that mine is a romantic account of political processes based on representation – I have, after all, described how representation *should* work. Nevertheless, some representative institutions work better than others, and showing an ideal scenario is helpful for that aim, like Gargarella's regulatory ideal. It also helps to understand what makes a process work better than others. The point is that to reduce the problems of electoral extorsion, we should focus on repairing the institutional incentives that have made these behaviors less likely. If the problems of democracy are not new, then we can be creative and look back, not only forward, into how to identify solutions and adapt them to present-day realities.

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[42] There is extensive literature discussing Juan Linz's well-known arguments against presidential regimes. See, e.g., J. Linz, Presidential or Parliamentary Democracy: Does It Make a Difference?' in J. Linz – A. Valenzuela (eds), *The Failure of Presidential Democracy. The Case of Latin America*, vol 2, Baltimore, 1994; J. Linz, *The Perils of Presidentialism*, in *Journal of Democracy*, 1990, p. 51; S. Mainwaring – M.S. Shugart, *Juan Linz, Presidentialism, and Democracy: A Critical Appraisal*, in Comparative Politics, 1997, p. 449 et seq; S. Ganghof, *Against Presidentialism*, in S. Ganghof, *Beyond Presidentialism and Parliamentarism*, Oxford, 2021; P. Chaisty – N. Cheeseman – T.J. Power, *Coalitional Presidentialism in Comparative Perspective. Minority Presidents in Multiparty Systems*, Oxford, 2018; S. Ganghof, *Beyond Presidentialism and Parliamentarism. Democratic Design and the Separation of Powes*, Oxford, 2022; S. Mainwaring – M. Soberg Schugart (eds), *Presidentialism and Democracy in Latin America*, Cambridge, 1997.

[43] See B. Ackerman, *The New Separation of Powers*, in *Harvard Law Review*, 2000, p. 633 ff, for an old example of the advantages of parliamentary regimes. I have also engaged in part of that debate in connection with the problems of the Chilean constitutional system. See R. Dixon – S. Verdugo, *Los derechos sociales y la reforma constitucional en Chile: hacia una implementación híbrida, legislativa y judicial*, in *Estudios Públicos*, 2021, p. 31 et seq.

Again, this is not to say that participatory mechanisms such as citizen assemblies elected by sortition methods – a solution that partly looks at the past, an ancient past where political parties did not exist – are inherently wrong. Assemblies perform better when they pursue narrower and clearly defined goals and intend to complement – and not replace – representative institutions. I will come back to this point later. For now, it suffices to say that those mechanisms are poor substitutes for political institutions when pursuing broader projects, such as constitutional replacement processes working in a constrained period of time. The citizens' assemblies are hardly likely to engage in more profound, responsive, and informed debates with enough buy-in from political stakeholders when the agendas are too open, the timetable too ambitious, and the polarization too elevated not to need mediating institutions – among other problems that may exist.

4. *Justified approaches and inferred solutions.*

Gargarella seems to be aware of the limitations of his model and does not claim that his conversational regulatory ideal can be fully achieved. He tries to show real-world examples to illustrate how we can get close to the ideal and presents his argument in non-radical ways by appealing to reasons many can accept. For example, by criticizing referenda with well-known arguments, attacking the strong versions of constitutionalism by citing the example of the US Constitution and Latin American cases, or criticizing the constitution-making processes that have accompanied the democratic decay agendas in Latin America (RG 187-193, 246-249), Gargarella makes arguments that are consistent with other versions of democratic theory.[44] For example, it is easy to agree with him and disregard the constitution-making attempts of the so-called new Latin American Constitutionalism as genuine deliberative and inclusive processes that strengthen democracy.[45] Also, one does not need to agree with Gargarella's model to be skeptical of referenda, though a more nuanced approach can invite a more cautious

[44] See, e.g., J.A. Lenowitz, *Constitutional Ratification without Reason*, Oxford, 2022; L. Trueblood, *Referendums as Representative Democracy*, Oxford, 2024.

[45] See, for example, how Alberto Coddou situates this "new Latin American Constitutionalism" in the family of constitutional thoughts that have existed in Latin America, and how it differentiates itself from other forms of constitutionalism such as Gargarella's. Alberto Coddou Mc Manus, *A Critical Account of Ius Constitutionale Commune in Latin America: An Intellectual Map of Contemporary Latin American Constitutionalism*, in *Global Constitutionalism*, 2021, p. 1 et seq.

diagnosis of the instrument. Authoritarian leaders can instrumentalize referenda,[46] referenda can easily be used to manipulate the decision-making process, it does not encourage the existence of compromises, negotiations, and common ground, they do not reflect whatever we think popular sovereignty is,[47] and they are better used with caution after "package deals" have been offered in a bipartisan way,[48] and not before, as a sort of popular veto power inviting politicians to try to identify compromises that citizens at large can accept.[49]

What is more challenging is identifying common causal mechanisms in all the examples Gargarella provides. True, most countries have been influenced by the types of constitutional ideas he rejects. From there, a long step is missing in arguing that the problem is judicial review and the electoral extorsion of contemporary democracies. Indeed, one could think that the democratic problem appears in countries with weaker forms of judicial review, and, moreover, the problem in some cases connects to how judicial review mechanisms have become incapacitated or captured.[50] The issue is not how judges intervene in many cases but how they lack independence and incentives to protect democratic values. It is also not necessarily political representation but populism acting against mainstream channels of representation. If anything, those channels are victims, and not aggressors, of the forms of populism that we see today. Like the example of the Fujimori regime, which I cited above, the statement that, in its best light, when the critical infrastructure of democracy works well, representative democracy works well, is not disproven by Gargarella's book. This does not mean, to be sure, that his normative ideal or that his prescriptions are not helpful. But it does mean it is too soon to abandon the boat of representative institutions in favor of experimental political participation mechanisms we know less about, especially if, as I will show, those experiments are also subject to risks.

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[46] A. Fruhstorfer, *Referendums and Autocratization. Explaining Constitutional Referendums in the Post-Soviet Space*, in R. Albert – R. Stacey (eds), *The Limits and Legitimacy of Referendums*, Oxford, 2022.

[47] R. Stacey, *The Unnecesary Referendum: Popular Sovereignty in the Constitutional Interregnum*, in R. Albert – R. Stacey (eds), *The Limits and Legitimacy of Referendums*, Oxford, 2022.

[48] Z. Elkins – A. Hudson, *The Strange Case of the Package Deal: Amendments and Replacements in Constitutional Reform*, ibid.

[49] L. Trueblood, *Brexit and Two Roles for Referendums in the United Kingdom*, ibid.

[50] See, e.g., W. Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, in *Hague Journal on the Rule of Law*, 2019, p. 63 et seq.

The fact that we can agree with Gargarella on some of his approaches to democracy does not mean that his prescriptions can necessarily be inferred from his more abstract arguments. The reasons can be understood with different applications, the problems can be presented in partial ways, and the mechanisms can have narrower – and more effective – applications. The main problem, if one digs deeper into his argumentative strategy, one can find arguments that underplay the value of supporting the infrastructure of democracy. Gargarella's book does not engage with them in profound ways. The lack of more extensive treatment for the benefits that political parties can give to democratic regimes is illustrative of how Gargarella is uninterested in repairing the channels of representation – which he did not value in the first place – and focuses on abandoning the ship to build a new one. Sure, one may still argue in favor of gradual paths seeking to achieve that agenda. But it is still an agenda that involves dismantling current institutions that have become crucial for democracy – there is no representative democracy without functioning parties – and that is no moderate claim to make.

5. *Constitution-making and the conditions for an equal conversation.*

Gargarella defends a broad application of his proposed model, including for constitution-making (RG 237-250[51]). His model is not the traditional elected constituent assembly, which he tends to criticize (RG 246-249), but something closer to the Icelandic and Irish experiments (RG 248-249). This is important because, according to the author, constitutional dialogue should not be reduced to exceptional situations of high politics (RG 42). Constitutional dialogue must always be possible. Gargarella's approach to constitution-making pushes us to consider a new *justification* for specific procedures that constitution-making should embrace and contemporary discussions about constituent power[52] and the post-sovereign model,[53] to name a couple of influential theories in the field, are yet to

[51] Gargarella has also expanded on this issue in R. Gargarella, *Constituent Power in a "Community of Equals"*, in *Revus*, 2020.

[52] See, e.g., J.I. Colón-Ríos, *Weak Constitutionalism. Democratic Legitimacy and the Question of Constituent Power*, London, 2012; G. Pisarello, *Procesos Constituyentes. Caminos Para La Ruptura Democrática*, Madrid, 2014.

[53] A. Arato, *Post Sovereign Constitution Making: Learning and Legitimacy*, Oxford, 2016.

engage deeply with Gargarella's ideas.[54] In order to understand Gargarella's suggestion in a more situated way, it is helpful to first say a few words about contemporary constitution-making.

Constitution-making is a complex and challenging political task where crucial political arrangements are up for grabs. The purpose is to enact a new constitutional order that can respond to essential answers that contemporary societies care about. The issues will vary from country to country – in some, for example, abortion and housing rights may become critical; in others, they may not – and the political context and existing agendas will partly condition the debates that will take place in those jurisdictions. Nevertheless, all constitutional replacement attempts have in common the need to regulate the main collective decision-making processes of the jurisdiction, which entail an expansive focus on the secondary rules of the legal system. The organs in charge of writing the constitution will need to decide on the type of political regime, on (at least some) electoral arrangements, the recognition of core political principles like the separation of powers, the way those principles will appear in specific institutional forms, whether there will be fourth-branch institutions, etc. A discussion on fundamental rights is almost inevitable, and a debate on their number, types, content, and enforcement – if any – is there to follow. Modern constitution-making processes typically include a fixed timetable with specific deadlines, mechanisms to solve controversies, debate rules, how to form majorities, and complementary participatory mechanisms. Sometimes, substantive limits rooted in international law principles or political concessions to favor those who have the power to harm or veto the process can be established as a condition to open the constitution-making process.

One of the features of constitution-making processes, as opposed to mere constitutional amendment procedures, is that they have an open agenda. Those in charge of the constituent organ – a drafting committee, a constituent assembly, a foreign power, or a military junta – can set the agenda as they progress within the process. The more stakeholders the process includes, the more items will be added to the agenda. The variety of themes and options for constitution-making, combined with the existence of a large institution (imagine an assembly) in charge of drafting the constitution and the existence of several movements, factions or parties

[54] Elsewhere, I have engaged with these types of justifications and designs. Gargarella's argument requires a separate treatment. See S. Verdugo, *Why Do We Need a New Theory for Justifying and Designing Constituent Assemblies?*, forthcoming in *Theoretical Inquiries in Law*, vol. 26, 2025.

integrating that institution, are likely to make the constitutional project resemble more an omnibus bill rather than the types of more modest and brief constitutional drafts produced during the XIXth century. For this reason, some of Gargarella's examples – including the Canadian experiments and the Irish conventions – do not qualify as constitution-making, nor can they be used as examples of permanent institutions working in ordinary ways with open agendas. What Gargarella calls an accumulation strategy is often inevitable in the context of broad collective bodies working with open agendas with diverse stakeholders.[55] This accumulation has problems that Gargarella articulated in his paper, and I agree with him. Nevertheless, this strategy results from compromises and logrolling, which are likely to exist when processes that include rival organizations or diverse movements are present. The point of the conversation among equals is to diminish this type of political dynamic, often associated with traditional politics and political parties, because it is assumed that citizens can achieve an agreement in one direction. They can even achieve a sufficient consensus and sometimes decide not to vote. Why compromise if they can identify what is more desirable to everyone? If the conversation is in good faith, the argument goes, and citizens are open-minded and can persuade each other. There won't be a need for accumulation in this scenario, or at least, that strategy will be diminished.

The problem is that constitution-making is unlikely to happen in this way. Typically, constitution-making is triggered when high stakes are elevated, and countries are experiencing a deep political crisis.[56] Conditions are not ideal because democratic and electoral institutions, including political parties and established institutions such as electoral commissions, parliaments, political parties, and courts, are unlikely to function well. The risk of a populist takeover is fed by the instability that is typically associated with these moments.[57] It is possible to call upon some citizens to create a constitution in these contexts and give them the ability to discuss the constitutional order with an open agenda. It is even possible, though

[55] R. Gargarella, *Constitution Making in the Context of Plural Societies. The "Accumulation Strategy"* in J. Elster – R. Gargarella – B.E. Rasch (eds), *Constituent Assemblies*, Cambridge, 2018.

[56] This is one of the paradoxes of constitution-making. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, in *Duke Law Journal*, 1995, p. 364 et seq.

[57] See, e.g., O. Doyle, *Populist Constitutionalism and Constituent* Power, in *German Law Journal*, 2019, p. 161 et seq; D. Landau, *Constitution-Making Gone Wrong*, in Alabama Law Review, 2013, p. 924 et seq; W. Partlett, *The Dangers of Popular Constitution-Making*, in *Brooklyn Journal of International Law*, 2012, p. 193 et seq.

probably harder, to try to isolate them from the political conflicts that undermine the possibility of enacting a genuinely inclusive constitutional proposal in the first place. However, the context and features of this solution are likely to undermine the possibilities of success. First, citizens will need to get enough buy-in from veto actors in the process or be strong enough in order to impose a constitution against those veto actors. One of the reasons the innovative Icelandic experiment failed and the Chilean Constitutional Convention did not get enough support, was the lack of party support. These examples of failure are not unique, even if other examples have been largely omitted in the literature.[58]

In the case of Iceland, which Gargarella uses as a *good* example, and some scholars have romanticized,[59] the parties were unconvinced – for good or bad reasons.[60] Despite the appearance of an elected nonpartisan constituent assembly that could gather support from the citizens, the result was not as inclusive as many have tried to show. Perhaps an accumulation strategy was avoided to a certain extent, but the document was still criticized on technical grounds[61] and even on principled grounds that do not speak well of being the result of an inclusive conversation among equals.[62]

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[58] For the types of failures that can exist in constitution-making, see, K. Zulueta-Fülscher, *How Constitution-Making Fails and What We Can Learn from It*, International IDEA Discussion Paper 2/2023, available at the link: https://www.idea.int/publications/catalogue/how-constitution-making-fails-and-what-we-can-learn; S. Issacharoff – S. Verdugo, *The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond*, in *University of Miami Law Review*, 2023, p. 1 et seq. For examples of failures of activation, see S. Verdugo – M. Prieto, *¿Cómo pueden fracasar los procesos constituyentes?*, in *International Journal of Constitutional Law*, 2023, p. 1387 et seq.

[59] H. Landemore, *The Inclusive Constitution-Making: The Icelandic Experiment*, in *The Journal of Political Philosophy*, 2015, p. 166 et seq.

[60] T.A. Eisenstadt – T. Maboudi, *Being There Is Half the Battle: Group Inclusion, Constitution-Writing, and Democracy*, in *Comparative Political Studies*, 2019, p. 2135 et seq.

[61] R. Rubio Núñez, *El proceso constituyente en Islandia: Un caso de éxito sin final feliz*, in *International Journal of Constitutional Law*, 2023, p. 1474 et seq.

[62] J. Brennan, *Response to Landemore*, in J. Brennan – H. Landemore, *Debating Democracy. Do we need more or less?*, Oxford, 2022, p. 60: "despite all these advantages, the text the laypeople produced strikes me as obviously worse […] They couldn't manage to de-establish the state Lutheran church in a country with extremely high rates of atheism and low levels of religious observance. Landemore discusses at some length why de-establishment was not a live option – many citizens wish to maintain the state church they do not attend. But that seems like a poor excuse, not a justification. Iceland's performance here was bad and they should feel bad."

In the case of the Chilean Convention of 2022 – which Gargarella did not refer to in his book – the lack of substantive representation at the level of the Convention resulted in a constitutional proposal that neglected important sectors of the country, including mainstream centrist and rightwing parties. The citizens rejected the proposal in a referendum and, even though there are good reasons to be skeptical of referendums – Gargarella criticized the 2022 referendum – and some may think that the Chilean proposal was good enough – Gargarella himself supported the proposal – the constitution-making process could hardly be considered the result of a good faith conversation that was inclusive of everyone's views. The median voter's preferences were far away from crucial aspects of the proposal – or of how the proposal was presented – and they did not connect nor felt represented by the Convention. The Convention probably ranked well in terms of descriptive representation,[63] to use Pitkin's typology,[64] but it performed badly in terms of substantive and ideological representation.[65]

Of course, it could be argued that the design of the Chilean process, or of the elected assembly in Iceland, did not reflect the ideals of the conversation among equals. Despite the fact that both were not driven by dominant party interests – independents dominated the Chilean Convention and non-partisan citizens the Icelandic process – it is still possible to claim that the problem is the use of electoral procedures. After all, Gargarella's criticisms are not only against referendums but also against political representation. In both cases, it could be argued that an electoral extorsion existed because representational processes were used and, therefore, in the end, citizens outside the Chilean Convention or the Icelandic Assembly were given a complete proposal. If this is so, then the regulatory ideal of Gargarella is far from these processes. Perhaps his examples could connect better with the Icelandic forum used before the constituent assembly was installed in Iceland as a sort of pre-initiation device, or with the Chilean attempt that took place under the Bachelet administration. If this is so, then both can be challenged as ineffective because of their inability to secure enough buy-in. In the case of the Icelandic forum, an institution composed of 950 randomly selected citizens

[63] C. Le Foulon – V. Palanza, *Elecciones a La Convención Constituyente: Innovación y Renovación*, in *Puntos de Referencia - Centro de Estudios Públicos*, 2021.

[64] H.F. Pitkin, *The Concept of Representation*, Berkley, 1967.

[65] See J. Fábrega, *Ordenamiento Ideológico En La Convención Constitucional Chilena*, in *Revista de Ciencia Política*, 2022, p. 127 et seq; S. Verdugo, *El Poder Constituyente Impopular*, in *Actualidad Jurídica*, 2022, p. 207 et seq.

who gathered to set the agenda for the constituent assembly, only a few hours were dedicated to the actual discussion, which makes it hard to argue that the arguments and proposals were well reasoned and that people from different backgrounds and preferences engaged in a good faith conversation with enough levels of depth. If anything, those higher levels of deliberation should be attached to the process overall and perhaps to the crowdsourcing techniques used,[66] but not exclusively to the forum. Moreover, even in a complicated time in Iceland, it is possible to differentiate that case from other scenarios of constitution-making because the conditions for deliberation are probably improved, as in the forum, when consensus is more accessible to achieve due to low levels of social polarization – everyone in those bodies was rejecting the party system, and parties were not part of the process – in a society that is known for its history of civic participation, and its ethnically homogeneous and highly developed composition. In the case of Bachelet's experiment in Chile, there were other problems that I will comment on in the next section.

6. *On the limits of citizens' assemblies.*

I have already explained why using randomly selected citizens' assemblies as a device with open agendas for constitution-making is not a good idea. It is, nonetheless, possible to argue that these institutions can function better when they follow a pre-established agenda that allows for a certain depth in the deliberations. In those scenarios, a key question is who sets the agenda. Scholars have reported that when there is sufficient engagement in items citizens care about, and the items are mediated by established institutions like parties or parliaments, citizens' assemblies can help build political capital to trigger a relevant change in society and even persuade legislators to adopt specific policies. The leading examples are the cases of abortion and same-sex marriage in Ireland (RG 301-302).[67]

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[66] A.A. Ninet, *Constitutional Crowdsourcing. Democratising Original and Derived Constituent Power in the Network Society*, Cheltenham, 2021.

[67] O. Doyle – R. Walsh, *Constitutional Amendment and Public Will Formation: Deliberative Mini-Publics as a Tool for Consensus Democracy*, in *International Journal of Constitutional Law*, 2022, p. 398 et seq; O. Doyle – R. Walsh, *Deliberation in Constitutional Amendment: Reappraising Ireland's Deliberative Mini-Publics*, in *European Constitutional Law Review*, 2020, p. 440, et seq. However, consider E. Carolan – S. Glennon, *The Consensus-Clarifying Role of Deliberative Mini-Publics in Constitutional Amendment: A Reply to Oran Doyle and Rachael Walsh*, in *International Journal of Constitutional Law*, 2024, p. 191 et seq.

Suppose these conditions are not met, though, the mediation of representative institutions is nonexistent, or there is not enough public interest in the items to be discussed. In that case, the conventions can fail to get enough political support. In the Irish case, the political parties played a crucial role in initiating the conventions and giving a legal form to the proposals made by the randomly selected citizens.[68] As an author has commented, "representative democracy is not always the best in finding solutions, but it's probably the best at producing – as in identifying – problems."[69] They also played a significant role in vetoing or not activating the recommendations that, in the end, failed, to the point that the positive cases cited above appear to be the exception rather than the general rule.[70] Moreover, the literature has yet to ultimately find ways to overcome some of the problems identified in the Irish conventions, which include issues of opacity and lack of attention to the risks of bias and the experts' participation.[71] To be sure, even if there are possible solutions to these problems,[72] they all invite more caution before claiming that these institutions represent some sort of will of the people and encourage us to think about how to use them in more targeted and effective ways.

It is also possible to show, as Carolan and Glennon have, that the citizens' assemblies' best case is identifying growing social consensus and not *building* consensus.[73] If this is true, then the conversation that happened internally in the assemblies and the evidence showing that ordinary citizens can change their minds in good faith,[74] is less important than the conversation that societies can have at large. The problem that this posits for Gargarella's theory is that these conversations that societies can have to accompany political processes happen informally in the context of both mainstream channels of representation and citizens' assemblies. It is unclear how citizens' assemblies are superior, especially if they are not contributing

[68] The Convention was, in a way, the result of compromise between the Fine Gael and Labour parties. See J. Suiter and others, *The First Irish Constitutional Convention: A Case of "High Legitimacy"?*, in *Participations*, 2019, p. 123 et seq.

[69] J.W. Müller, *Democracy Rules*, London, 2021, p. 86.

[70] O. Doyle – R. Walsh, fn. 68.

[71] E. Carolan, *Ireland's Constitutional Convention: Behind the Hype about Citizen-Led Constitutional Change*, in *International Journal of Constitutional Law*, 2015, p. 733 et seq.

[72] See, e.g., the recommendations and notes made by D.M. Farrell – J. Suiter, *Reimagining Democracy. Lessons in Deliberative Democracy from the Irish Front Line*, Ithaca, 2019.

[73] E. Carolan – S. Glennon, fn. 67.

[74] J. Suiter – D.M. Farrell – E. O'Malley, *When Do Deliberative Citizens Change Their Opinions? Evidence from the Irish Citizens' Assembly*, in *International Political Science Review*, 2016, p. 198 et seq.

to *building* a consensus. On the contrary, representative institutions have significant potential in building that consensus. If the party system works reasonably well, then compromises and negotiations – the old-school techniques of good politics – should do the trick. Either way, the best possible reading of the Irish experience is not one in which citizens replaced representative institutions – when that actually happened, the experiences failed – but of citizens collaborating with representative institutions in politically situated debates with precise goals.

Alternatively, it is possible to design a bottom-up process in which political parties are bypassed, and citizens are invited to organize themselves to discuss constitutional proposals. This happened under Bachelet in Chile, a process that Gargarella emphasizes as a possible example of his conversation among equal regulatory ideal, even if it failed in the end (RG 302-303). Bachelet did not have enough buy-ins from the parties and decided to organize a process hoping the parties would eventually join. But they never did, and the process failed.[75] In the meantime, citizens met at 7,964 gatherings organized by themselves following guidelines designed from above,[76] and genuine conversations happened among those who decided to participate.[77] Nevertheless, Bachelet's process was far from achieving the conditions that Gargarella identifies. First, it had a self-selection problem. No one was obliged to participate, and only those with more intense preferences decided to organize themselves. Second, there was a problem with the depth of the deliberations. Citizens were given a list of dozens of items to discuss (such as whether there should be a constitutional court and whether we should recognize the right to education) in a short timeframe (typically a handful of hours, sometimes over dinner or even cocktails). Even if there was probably a good faith type of conversation in most gatherings, the actual conversations were closer to an in-person poll on specific topics rather than an in-depth discussion. Third, Bachelet's

[75] S. Verdugo – J. Contesse, *Auge y Caída de un Proceso Constituyente: Lecciones del Experimento Chileno y del Fracaso del Proyecto de Bachelet*, in *Derecho y Crítica Social*, 2018, p. 139 et seq.

[76] Comité de Sistematización, *Encuentros Locales Autoconvocados. Resultados Cuantitativos*: <http://archivospresidenciales.archivonacional.cl/uploads/r/null/d/f/d/dfd8c34ccc917e956fb440da32b9a200874a6aa655ed79e9bf6abb484ca68552/_home_aristoteles_documentos_PC_CCO_DT_19.pdf>.

[77] For a reliable description of the process, see M.H. Viñas – J.F. García, *El proceso constituyente de Bachelet en Chile (2015-2018): razones de un fracaso (previsible)*, in *International Journal of Constitutional Law*, 2023, p. 1496 et seq.

experiment had a problem of both descriptive and substantive (ideological) representation. From a descriptive perspective, Santiago meetings (47.2%) and women (54%) were overrepresented.[78] The upper classes also were arguably overrepresented.[79] From a substantive perspective, most people participating were also more likely to agree with a constitutional change in the first place and perhaps sympathized with Bachelet herself. Fourth, Bachelet's constitutional proposal – which failed to be approved by legislators – was supposed to be based on the input of the citizens' gatherings. Nevertheless, it is almost impossible to trace Bachelet's document – written behind closed doors by experts who claim to have used the systematized input from the citizens' proposals – to the actual citizens' meetings.[80]

It could perhaps be argued that we can learn from Bachelet's experience and perfect the details of the process. Nevertheless, it is unclear how. Having such an open agenda was a problem that can only be solved if one is to cut the agenda. The lack of massive participation outside the richest neighborhoods is unlikely to be solved unless the activity turns mandatory – which would entail other problems – and the problem is more likely to grow if the experience is repeated too many times for too many items. The issue of self-selection, lack of descriptive and substantial representation, and others, are difficult to correct. Perhaps a different method should be tried.

A defender of the conversation among equals model, could claim that the important thing is not how these processes failed. After all, any process can fail, and many experiences of failures are out there. Moreover, it could be added that the regulatory ideal of the conversation Gargarella proposes is a normative standard and not a fixed methodology to follow. This is, of course, true. Nevertheless, if that is so, it is unclear what Gargarella's examples add to his argument. The other experiments he used in his book, which I have not expanded upon, have mostly failed – i.e., among

[78] Comité de Sistematización, fn. 76.

[79] I could not find official data on this, but journalists reported it. See, e.g., https://www.latercera.com/noticia/proceso-constituyente-santiago-providencia-y-nunoa-son-las-comunas-que-registran-mas-encuentros-locales/; https://ellibero.cl/actualidad/proceso-constituyente-las-10-comunas-que-mas-participaron-son-urbanas-y-de-clase-alta-pero-no-representan-al-3-de-su-electorado/

[80] The available data shows numbers counting the times a concept was mentioned. See some important methodological criticisms in L. Sierra, *Críticas a La Sistematización y Metodología Del Proceso Constitucional*, in *Debates de Política Pública - Centro de Estudios Públicos*, 2017.

others, the Australian Convention of 1998 (RG 297-298), the 2006 Ontario assembly for electoral reform and the 2005 British Columbia convention for electoral reform (RG 298-299) – which were interesting exercises of looking outside of the incumbent's interests, even if they failed. They cannot show much potential for applying his theory if the experiments he cites have limitations that constrain the possibilities and make the necessary conditions for an equal conversation difficult to achieve.

Sure, Gargarella could claim that in non-constitutional replacement procedures, the situation is less complicated, the stakes are lower, the polarization does not need to be elevated, and there are institutional ways to channel the conversation. Nevertheless, if we see fewer crises and lower stakes, the justifications for deviating from channels of representation are also lower. The use of participatory mechanisms in those contexts may be counterproductive because, when the crises are less severe and the stakes are lower, the citizens will have weaker preferences and, thus, be less inclined to participate spontaneously. If so, the lack of interest may undermine the inclusive and egalitarian conditions for the conversation among equals. Citizens need strong reasons to engage in the mechanisms Gargarella promotes. In Athens, for example, citizens participated partly because they were relieved from their regular duties and even paid to attend.[81] Having randomized assemblies may help partially solve this problem, but I am less optimistic about them than Gargarella. In the context of low-stakes issues, the problems of self-selection and lack of representativeness are likely to grow, and the lack of depth in the deliberations can risk becoming a central feature of these experiments if we use them too often and for too many items. Eventually, the public may even lose interest, and the assemblies can start operating without the necessary public attention, even lowering the accountability they need. It won't matter if the assemblies rank well in terms of descriptive representation. Substantial representation is not guaranteed, and the formation of a public will become more difficult to achieve. Following a more cautious, narrow understanding of these mechanisms makes sense. Let's use them exceptionally. It also makes sense to turn the focus to institutions of political representation, as they cannot be substituted.

[81] J.W. Müller, *Democracy Rules*, London, 2021, p. 56.

7. Conclusion.

As Dixon has argued, Gargarella's model is "not the only game in town."[82] Moreover, treating the proposal as the only game in town risks harming the critical infrastructure of democracy in ways that might make it even harder to recover. Before abandoning the ship of constitutionalism, political representation, judicial review – and fourth-branch institutions, I might add – it is worth asking whether the critical infrastructure can be repaired using even innovative solutions. Mandatory voting, independent electoral commissions, different legislative processes with more incentives for collaboration, ranked-choice voting procedures, new dynamics between the executive and legislative branches, different rules for the party system, more robust and smarter regulations for social media and the independent press, and narrower spaces for experimental participatory mechanisms seem like reasonable solutions to explore. It is too early to abandon them in favor of broad applications of experimental mechanisms we still know little about.

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ABSTRACT: In the context of the discussion about strengthening democratic regimes while facing the problems of constitutional and democratic erosion, Roberto Gargarella has offered a new regulatory ideal called "The Law As a Conversation Among Equals" to guide the discussion. He suggests placing our efforts of democratic recovery in new, more experimental forms of political participation, such as citizens' assemblies. This essay argues that Gargarella's valuable prescription for the problem may become self-defeating. If the main focus is not on helping the infrastructure of representative democratic regimes recover or heal, the focus on new experimental forms of political participation can even deepen the harm political systems are suffering. This is not to say that these new forms of political participation should always be avoided. As I will show, they should be used to complement and not replace representative institutions. I suggest a more modest, narrow, and cautious way to implement those participatory mechanisms. If the infrastructure of democracy is to be recovered, we should not avoid discussing issues such as the functioning of political parties, how fourth-branch institutions can impose limits and slow down processes of erosion while offering

[82] R. Dixon, *Conversation or Competition among Equals*, in *Rivista di Diritti Comparati*, 2024, in this symposium.

opportunities for democratic forces to regroup, and the way citizens access information and participate in the flawed marketplace of ideas.

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KEYWORDS: Constitutionalism – Democracy – Citizens' Assemblies – Roberto Gargarella – Conversation Among Equals

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Sergio Verdugo – Professor of Law at IE University Law School (sverdugo@faculty.ie.edu)

RIVISTA DI
DIRITTI COMPARATI

La "conversación entre iguales": Un debate "abierto, continuo, inacabado"*

Roberto Gargarella

SUMARIO: 1. Agradecimientos preliminares– 2. Formas procedimentales del control judicial, y concepciones de la democracia – 3. Culpabilizar al pueblo…¿o sí? Racionalidad política y democracia – 4. Derechos sociales y "sala de máquinas" – 5. Palabras finales.

1. Agradecimientos preliminares

En las páginas que siguen, voy a ofrecer algunas respuestas y comentarios a las amables reflexiones que han presentado algunos estimados colegas -Rosalind Dixon, Tania Groppi, Gábor Halmai, Sergio Verdugo- en torno a mi libro *The Law as a Conversation Among Equals*. Lo haré con un ánimo "conversacional," tratando de continuar un diálogo que -con todos ellos- tuve la suerte de empezar hace años, y tengo la esperanza de continuar por un buen tiempo.

Antes de abocarme a mis respuestas y comentarios, quiero hacer un agradecimiento a la *Rivista di Diritti Comparati*, por la oportunidad que nos ha dado, y por el espacio que ha abierto para desarrollar esta conversación. De manera muy especial, quiero agradecer a mi buen amigo Giuseppe Martinico, por su enorme generosidad, de la que he tenido la suerte de beneficiarme en muchas ocasiones. Espero saber compensar debidamente su gentiliza habitual, para conmigo.

Sobre el ideal regulativo, y la práctica de los partidos políticos: Romper el pacto de lectura

Sergio Verdugo es un ilustrado colega, con quien venimos discutiendo -y desacordando, a veces- desde hace años. Me unen con él muchísimos intereses comunes, algo que advertí, de manera especial, a partir del entusiasmo y las muchas dudas que ambos mostramos, frente al reciente proceso constitucional en Chile. Según entiendo, su mirada sobre mi emprendimiento teórico en general, y sobre *El derecho como una conversación entre iguales,* en particular, ha sido, habitualmente, escéptica. Así lo confiesa y reafirma, desde el título, en el texto que escribió sobre el libro, y que ahora

* Artículo solicitado por la Dirección.

comento. En lo que sigue, quisiera realizar algunas precisiones frente a su trabajo, con el secreto ánimo de conmover, en algo, su escepticismo.

Según entiendo, el análisis de Sergio es fundamentalmente errado, por partir de un malentendido serio en cuanto a la naturaleza y los fundamentos de mi proyecto. Conforme a su análisis, el corazón de mi trabajo tiene que ver con la creación de un "ideal normativo" novedoso, a partir del cual derivo luego mis prescripciones sobre la práctica[1]. Críticamente, él considera que en mi trabajo me muestro "desinteresado" en hacer cualquier esfuerzo por "reparar el barco" que se encuentra dañado -el sistema representativo, los partidos políticos- por lo cual opto (algo irresponsablemente) por "abandonar el mismo y construir uno nuevo". La tarea en la que, a partir de allí, me involucro implica, según él señala, "desmantelar las instituciones existentes que se han convertido en cruciales para la democracia" para reemplazarlas por otras nuevas, lo cual -concluye- "no es un reclamo moderado", o uno que merezca ser sostenido.

El núcleo de ideas que acabo de transcribir, que describe la visión esencial de Sergio sobre mi proyecto, revela la base principal de su yerro. La cuestión es la siguiente: mi proyecto se parece muy poco al que Sergio describe. Ante todo: la crisis radical que afecta al sistema representativo, y el irreversible deterioro que sufren los partidos políticos no aparecen, en mi texto, como conjeturas o descripciones algo imprecisas, sino como supuestos. Subrayo: se trata de los supuestos sobre los que se asienta mi libro. Puedo estar empíricamente equivocado, o no, en mi análisis sobre la cuestión (el estado de nuestras democracias), pero se trata de puntos de partida que, en mi trabajo, simplemente, tomo como dados[2]. Luego, y a partir de dichas asunciones, comienzo mi estudio sobre algunas de las causas probables de tales cuestiones; sus preocupantes implicaciones institucionales; y algunas formas imaginables de hacerles frente.

Obviamente, la tarea de erigir nuestro trabajo sobre ciertos supuestos y fundamentos inicialmente definidos, no resulta extraña, sino muy común,

[1] S. Verdugo, *The Law As a Conversation Among Equals – A Skeptical View*, en *Rivista di Diritti Comparati*, 2024, en este simposio. Salvo que se indique explícitamente lo contrario, los períodos citados en esta sección deben considerarse citas de este ensayo, tal como ha sido traducido al castellano por Roberto Gargarella.

[2] Sólo por mencionar un ejemplo de cuando me refiero a la cuestión, de manera explícita, en el primer capítulo del libro, sostengo que voy a tomar ciertos datos básicos de la vida política actual -el sentido de empoderamiento de la ciudadanía; la radical crítica que ella muestra frente a los representantes; la "angustia democrática", la voluntad de tomar control de los propios asuntos, etc., etc.- como " supuestos" que "nos refieren a un *cambio de paradigma en términos democráticos*..", R. Gargarella, *Law as a Conversation Among Equals*, Cambridge, 2022, p. 47.

en la reflexión académica. Se trata de una operación usual entre quienes nos dedicamos al análisis de la vida pública y sus instituciones. Dado el alcance siempre limitado de nuestros emprendimientos (por razones de tiempo, espacio, conocimientos, intereses), solemos insertar nuestra labor teórica dentro de ciertos marcos predefinidos, que invitamos a nuestros lectores a tomar como dados. No hace falta mucho esfuerzo para dar cuenta de la habitualidad e importancia de tales ejercicios: Jean Jacques Rousseau tomó como punto de partida de su trabajo a ciertos rasgos propios de la naturaleza humana, mientras que Thomas Hobbes tendió a asumir, para el suyo, los rasgos contrarios. John Locke, por su parte, presumió la existencia de un cierto contrato social; mientras que David Hume consideró como elementos dados, para su análisis social, el hecho de la escasez y ciertas disposiciones humanas. De manera similar, John Rawls tomó como base dada, para su estudio sobre la "teoría de la justicia," la existencia de una sociedad bien ordenada; etc. En tal sentido, cuando leemos a autores como los citados -entre tantos otros- lo hacemos aceptando, al menos provisionalmente, los puntos de partida que ellos nos proponen. Luego, y a partir de allí, nos internamos en el análisis crítico o reconstructivo que ellos nos ofrecen.

Por lo tanto, leemos mal a Rawls, por ejemplo, si descartamos de entrada el valor de la teoría de la justicia, diciendo "la sociedad bien ordenada, en verdad, no existe"; o desmerecemos el trabajo de Rousseau, a partir de nuestro convencimiento de que "nadie firmó nunca ningún contrato social". Reaccionando así, habremos malentendido a tales autores, y roto también el pacto de lectura que -legítimamente- ellos nos proponen. En sentido similar, yo le diría a Sergio que su crítica a mi libro también parte de romper el pacto de lectura que propongo en mi libro. Yo no "abandono" el barco del sistema representativo existente, mostrando un completo "desinterés" por repararlo; o por la ansiedad de correr hacia un mundo alternativo, más en línea con mis preferencias teóricas o ideológicas. Entiendo mi proyecto de modo muy diferente: en mi libro, *supongo* la existencia de una situación institucional trágica, cual es la crisis radical e irreparable del sistema institucional, y frente a ella me pregunto -con preocupación, angustia, escepticismo y dudas- qué alternativa institucional puede resultar aceptable y asequible; y luego busco argumentos para fundar tal alternativa.

El grueso de los comentarios de Sergio, según entiendo, tienen como fuente un malentendido como el señalado. Por tanto y, por ejemplo, cuando Sergio sugiere que en mi libro, esencialmente, construyo un "ideal regulativo" para luego, y desde ahí, disparar prescripciones institucionales,

no puedo, sino, tomarme la cabeza. No es así (irresponsablemente) como concibo y practico la actividad académica. Lo que me interesa otra cosa: pretendo explorar alternativas institucionales, frente a la "angustia democrática" que me genera el contexto de debacle institucional en el que vivo -una debacle que arrastra a mi familia, a mis amigos, y a una mayoría de mis compatriotas. A eso dedico mi actividad académica, y ese propósito es el que le otorga sentido a lo que hago. No practico la academia como deporte.

Es solo allí -una vez ubicado el contexto y definida la gravedad de la crisis democrática dentro de la cual inserto mi estudio- cuando cobra importancia, para mi proyecto, definir un cierto "ideal regulativo" (en mi caso, el de la "conversación entre iguales"). Mi expectativa es que dicho ideal (me) ayude a precisar la dirección posible de una respuesta institucional, frente a la crisis. Tal ideal regulativo no aparece, entonces, como un *deux ex machina,* como un invento que cae desde el cielo, con la pretensión de "arrasar con todo" lo existente. Muy por el contrario (y lamento que parezca necesario aclararlo): no forma parte de mi proyecto, como sugiere Sergio, ni terminar con "lo establecido"; ni emprender un ciego "ataque contra los regímenes multipartidarios competitivos"; ni "descuidar o deliberadamente rechazar los beneficios de la competencia política"; ni "abandonar (el barco) en favor de mecanismos experimentales de los cuales todavía sabemos muy poco". Es decir, no me interesa atacar nada, ni destruir nada, ni abandonar nada: lo que busco es -asumiendo la presencia de tales males- pensar y fundar algunas respuestas institucionales posibles.

En tal sentido, motiva mi trabajo teórico el convencimiento de que muchas de las "fallas" institucionales que se han producido en nuestro tiempo (muy en particular, pero no sólo, en las Américas) tienen que ver con yerros en el diagnóstico, y yerros, también, en las respuestas que ofrecemos frente a las crisis. Según entiendo, tendemos a responder a los problemas que enfrentamos, a partir de prejuicios o impulsos intuitivos, apoyados, en el mejor de los casos, en los ejemplos de derecho comparado que tenemos más a mano. Mi propuesta, al respecto, es diferente (muy marcada por el trabajo de Carlos Nino, y la tradición de la filosofía política -igualitaria- en la que él se encontraba inscripto), y consiste en ordenar y examinar críticamente diversas alternativas institucionales, conforme a ciertos ideales regulativos que procuro justificar en primer término (en el caso de Nino, el ideal de la democracia deliberativa resultó crucial, para explicar y pensar el diseño del Juicio a las Juntas militares, en la Argentina; o la reforma constitucional en la que él trabajara).

Desde ya, los supuestos que tomamos como dados, para nuestra labor teórica, también pueden resultar, en última instancia, cuestionados. No cabe duda de ello: podemos impugnar el sentido de tomar como supuesto un "contrato social", o proponer -contra Rawls- que la "teoría de la justicia" resulte testeada en contextos "no ideales" (como el de la "sociedad bien ordenada"). Sin embargo, este tipo de ejercicios de la crítica académica resultan por completo legítimos y, a la vez, diferentes del que describiéramos más arriba. Ocurre que, ahora, partimos de reconocer el perfecto derecho del autor del caso, a ofrecernos un análisis particular, enmarcado en los supuestos que ha considerado apropiado. En otros términos, resulta completamente válido cuestionar -también, y en última instancia- los supuestos de los que un cierto autor parte: lo que no puede hacerse es atacar a esos supuestos, como si no lo fueran, o fueran otra cosa, distinta de "hipótesis de trabajo".

De entre los supuestos de mi propio trabajo yo destacaría, en particular, dos de ellos: i) la crisis radical que afecta al sistema representativo; y ii) la irremediable decadencia que sacude a los partidos políticos. Se trata, según entiendo, de fenómenos vinculados entre sí, y que encuentran un robusto apoyo en la práctica que nos rodea. Sobre el primero de tales supuestos -la *crisis de representación*- señalo, en el comienzo de mi libro, que la "sociología política" a partir de la cual se pensaron y diseñaron las constituciones de nuestros países, ha cambiado radicalmente, y ofrezco algunas sugerencias al respecto (qué es lo que explica semejante cambio, y sus preocupantes consecuencias). Nuestros antecesores pudieron imaginar una Constitución capaz de garantizar la "completa" representación de una sociedad que entendían formada por pocos grupos, internamente homogéneos (la nobleza, los grandes propietarios, etc.). Dicha "pintura de la sociedad" resulta insostenible, en nuestro tiempo, en el marco de sociedades fundamentalmente multiculturales y heterogéneas. De allí la virtual imposibilidad de conseguir, institucionalmente, lo que antes se entendía posible: la "representación completa" de esa diversidad.

El mal señalado termina arrastrando, según entiendo, a los *partidos políticos*. Tal vez, y por ejemplo, a mediados del siglo XX, tuvo sentido pensar que el Partido Laborista, o el Partido Obrero, o el Partido Socialista, iba a defender los intereses de una parte significativa, tal vez mayoritaria, de la sociedad: esperablemente, los representantes obreros sabrían cuidar los intereses (homogéneos) de los trabajadores (y así, de una porción significativa de la sociedad). Lo mismo el Partido Conservador en relación con los intereses de la "nobleza"; o el Partido Liberal con los intereses de la alta burguesía. Hoy, esperablemente, los partidos políticos, y por razones

como las señaladas (la diversidad, heterogeneidad, mutabilidad de los intereses sociales) van a mostrar una dificultad radical en representar a porciones significativas de la sociedad -y, sobre todo, mantener en el tiempo esa representación.

En tal sentido, el análisis que ofrece Sergio Verdugo sobre las instituciones de nuestro tiempo (y los partidos políticos, en particular) me resulta fundamentalmente errado. Sin dudas, pueden existir cantidad de buenos argumentos para justificar la existencia de los partidos políticos. Sergio menciona a varios de ellos: los partidos políticos podrán ser "jugadores repetidos;" ellos podrán filtrar y acomodar intereses; ellos podrán proveernos de experiencia; ellos podrían ofrecernos análisis expertos; etc., etc. Otra cosa es, sin embargo, que tengamos razones para encontrar tales expectativas verificadas en la práctica política de nuestro tiempo. En tal sentido, sus afirmaciones suenan tan problemáticas como las que pudiera haber hecho algún autor, varias décadas atrás, en defensa del "buen monarca". Ese autor podría defender la importancia de contar con un buen monarca, sosteniendo que el mismo podría "ofrecer un sentido de unidad"; "vincularnos a las tradiciones e historia de nuestro país"; "llevar el sentido de responsabilidad sobre sus espaldas". Sin embargo -deberíamos decirle a ese autor de décadas atrás, como a Sergio hoy- que lo que nos ofrece son meras expresiones de deseos (o posturas normativizadas, como reconoce el propio Sergio), vinculadas con una historia ideal o superada, que no tenemos razones para pensar que volverá a repetirse, en las nuevas condiciones de nuestro tiempo.

Resulta de particular interés, en este sentido, tomar al ejemplo del proceso constituyente chileno, que utiliza Sergio, como caso para testear la fortaleza de sus afirmaciones[3]. Para Verdugo, una de las grandes falencias del primer proceso constituyente chileno (que termina con un rechazo, en plebiscito, en el 2022) tuvo que ver con la abundante presencia de "candidatos independientes" y -correlativamente- con la debilidad y escaso lugar que en tal proceso se reservara para los partidos políticos tradicionales. Ahora bien, debiera resultar obvio, a esta altura, que la radical debilidad y falta de peso que mostraron los partidos políticos, en ese entonces, tuvo mucho menos que ver con la torpeza del diseño institucional impulsado por algunos, que con condiciones políticas y sociales insoslayables: los partidos

[3] S. Issacharoff – S. Verdugo, *Populismo constituyente, democracia y promesas incumplidas: el caso de la Convención Constitucional Chilena (2021-2022)*, en *International Journal of Constitutional Law*, 2023, p. 1 ss.; S. Verdugo - M. Prieto, *¿Cómo pueden fracasar los procesos constituyentes?*, *International Journal of Constitutional Law*, 2023, p. 1 ss.

políticos (en especial los de la derecha) ganaron poco espacio y peso, en las discusiones constitucionales inauguradas entonces, en razón del profundo descrédito que padecían, lo cual obligó (en pos de la legitimidad del proceso constituyente puesto en marcha) a buscar respaldo democrático más allá de los partidos, y más en sintonía con las demandas participativas de una sociedad entonces excepcionalmente movilizada. Este tipo de condiciones son las que, en mi libro, aparecen como supuestas: una extrema fragmentación de intereses; un extendido hastío social; una crisis radical en los partidos políticos. Quiero decir: el caso práctico, reciente, que más nos ha interesado a Sergio y a mí -el de Chile y su proceso constituyente- ayuda a verificar, antes que a refutar, los supuestos de mi trabajo, a la vez que hacen un llamado a que Sergio revise algunos de los suyos. En Chile, en efecto, los partidos políticos no mostraron su capacidad para aglutinar, procesar y filtrar intereses; ni supieron transmitir su saber experto; ni fueron capaces de contribuir al debate público con su experiencia: ellos resultaron radicalmente repudiados por la vasta mayoría de la sociedad que -de modo absolutamente razonable- reconoció que tales entidades eran incapaces de garantizar cualquiera de esas virtudes prometidas.

Lo dicho resulta, reforzado (antes que moderado), cuando prestamos atención al segundo proceso constituyente chileno (el Proceso Constitucional 2023), surgido con posterioridad al pronto fracaso del primero. Ese segundo proceso se propuso, en efecto, "reparar" los errores y omisiones del primero, procurando (*contra* lo ocurrido en aquella primera ocasión) dar un lugar central a partidos políticos y comisiones de expertos (muy en línea con las búsquedas de Sergio). Sin embargo, debe notarse, el resultado obtenido no fue -como alguno pudo esperar- el éxito de una operación (que ahora sí, supuestamente) ofrecía una respuesta "responsable" o "adulta", sino un nuevo y estrepitoso fracaso[4]. Así, emprendimiento del 2023 terminó por descuidar o dejar de lado una reflexión más comprometida sobre los requisitos que podían ser necesarios para dotar de legitimidad democrática al proceso que entonces se inauguraba. Una vez más, y según entiendo, los resultados fallidos de estos procesos no refutan ni afectan, sino que por el contrario refuerzan, los supuestos que tomo como dados en mi trabajo (la radical crisis de los partidos políticos, el hastío social, etc.). En cambio, creo que tales resultados (y, en particular, el fracaso de este segundo proceso) pone en cuestión -*contra* Sergio- el peso que debe otorgarse a partidos políticos y expertos, en

[4] D. Landau – R. Dixon, *Sobre fracaso constitucional, constitucionalismo transformador y utopismo*", en *International Journal of Constitutional Law*, 2023, p. 1 ss.

eventos fuertemente necesitados de legitimidad democrática, como el relacionado con un proceso constituyente.

Un último punto que quiero mencionar se relaciona con el tipo de "alternativas institucionales" que comienzo a examinar en el final mi escrito: las "asambleas ciudadanas". Siempre he mantenido un "optimismo escéptico" frente a las asambleas, y así lo he señalado cada vez que he reflexionado sobre las mismas -también, obviamente, en *The Law as a Conversation* (cap. 19). Según entiendo, en el marco de la catástrofe institucional en el que nos encontramos, tales asambleas nos ofrecen un material de estudio de enorme interés, que incluyen algunas notas esperanzadoras, según diré. Sin embargo, obviamente, no creo que alguno de los procesos asamblearios existentes, haya sido capaz de reflejar "perfectamente" "los ideales de la conversación entre iguales". Sí me ha interesado, en cambio, llamar la atención sobre el sentido y valor de tales asambleas, y el lugar de interés que ellas pueden ocupar dentro de un "continuo" (en particular, en relación con el pobre lugar que pueden ocupar hoy nuestras instituciones representativas, dentro de dicha escala). En tal sentido, pensar en el valor de las asambleas de ninguna manera significa entender a las mismas como soluciones óptimas; como respuesta para todos nuestros problemas institucionales; y, sobre todo, como solución *única* capaz de desplazar cualquier interés por cualquier otro tipo de alternativas (como si, por ejemplo, en el libro no defendiera ciertas formas de la *judicial review;* o ciertos modos de la separación de poderes -tal como sugiere Sergio en su comentario). Lo que en mi libro destaco, sobre el sentido y valor de las asambleas (por caso, en el capítulo 19 de mi libro), es que el funcionamiento efectivo de las mismas nos ayuda a desmentir cantidad de prejuicios y presupuestos errados, muy comunes en nuestro tiempo, en relación con la racionalidad política de la ciudadanía, o la importancia y posibilidad del debate público sobre cuestiones de derechos (pienso, por caso, en prejuicios relacionados con la incapacidad de la ciudadanía para informarse sobre, o entender, temas complejos; prejuicios conforme a los cuales la ciudadanía no va a motivarse para intervenir en discusiones públicas relevantes; prejuicios acerca de la imposibilidad/impertinencia de abrir la discusión sobre "derechos fundamentales" al debate democrático, etc.). Ése es, para mí, el principal aporte de asambleas, y el que más valoro en mi trabajo. Sergio se equivoca, por tanto, al dedicar tanto tiempo y espacio a criticar el funcionamiento efectivo de las asambleas ciudadanas (toda la sección 6 de su escrito). Dicha crítica resulta irrelevante, en el contexto de mi libro, ya que mi propósito no fue nunca el de mostrar la infalibilidad, o la perfección, o el incondicional atractivo de las mismas. Mucho menos que eso, mi

propósito en cuanto a las asambleas fue en extremo modesto: lo que me interesó fue subrayar, simplemente, que la experiencia ya acumulada en torno a las asambleas nos ayuda a pensar, y a revisar críticamente, prejuicios y juicios errados, que las propias ciencias sociales han contribuido a instalar, en torno a las posibilidades reales de una conversación entre iguales[5].

2. Formas procedimentales del control judicial, y concepciones de la democracia

A Rosalind Dixon es una estimada colega, con quien venimos conversando sobre cuestiones institucionales desde hace mucho tiempo. Con ella tenemos algunos desacuerdos específicos relevantes, en torno al papel histórico de los tribunales constitucionales, y sobre todo, en torno al modo en que pensar la democracia. Ello, dentro de un amplio espectro de acuerdos que incluyen, de modo destacado, un común interés por re-adaptar a nuestro tiempo a concepciones procedimentalistas del control de constitucionalidad. Confieso que me congratula leer a Rosalind diciendo, algún tiempo luego de la publicación de mi libro, que el mismo tiene "éxito" en su ambición de avanzar un caso "a favor de una renovada política democrática e igualitaria," y también, "en el intento de proteger a la democracia contra su retroceso, por medio de la re-vigorización de la misma, en lugar de envolverla en un 'algodón constitucional'"[6].

[5] Son muchas, en todo caso, las cuestiones que quedan pendientes de discusión, y que reservo para futuras conversaciones con Sergio. Menciono, en tal respecto, solo una de ellas. El punto -relativamente menor, pero importante- concierne lo que denomino "extorsión electoral". La "extorsión electoral" que examino en mi libro refiere a una práctica común, pero no una regla propia, de los sistemas representativos y de votación. Me refiero a una "manufactura" y "manipulación" que los poderes concentrados (típicamente, los poderosos presidencialismos latinoamericanos) pueden poner en marcha, para obtener lo que, por otros medios democráticos, no podrían conseguir. Así, por ejemplo, al ofrecer "paquetes cerrados" al votante, que incluyan algo que muchos votantes desean (i.e., más derechos o protecciones sociales), y algo que ellos tienden a rechazar, pero que el poder de turno ambiciona (i.e., la reelección). Quiero decir, mis críticas al sistema representativo no anclan allí, sino en otras cuestiones y, sobre todo, mi escepticismo frente al mismo tiene menos que ver con la fuerza o exigencias de mi "ideal regulativo", que con los supuestos en los que afinco mi trabajo, y que tiendo a ver verificados en la práctica (i.e., la radical heterogeneidad de nuestras sociedades y, consecuentemente, las dificultades que existen para representarla institucionalmente).

[6] R. Dixon, *Conversation or Competition Among Equals*, en *Rivista di Diritti Comparati*, 2024, en este simposio.

Rosalind llega a esa conclusión porque, según entiendo, ella comparte, genuinamente, parte central de mi diagnóstico, y confía en algunas de las respuestas que ofrezco. Coincidimos ambos, por ejemplo, en la preocupación frente a las situaciones de "erosión democrática" y *backsliding;* y acordamos también en advertir los riesgos que genera el "desacople" (*mismatch*) existente entre las expectativas sociales que existen (de "voz y participación, de parte de la ciudadanía"), y marcos institucionales que "siguen siendo largamente no-participativos, en su naturaleza".

A la hora de pensar en instrumentos institucionales capaces de dar respuesta a los problemas de nuestro tiempo, ambos consideramos que los derechos constitucionales pueden jugar un papel importante, aunque -buscando escapar de toda ingenuidad institucional- reconocemos también los riesgos y abusos que esperablemente pueden generarse al respecto, particularmente en sociedades desiguales y con poder concentrado. A mí me interesó señalar, al respecto, el riesgo de que el poder de turno, frente a situaciones de crisis, conceda derechos mientras mantiene "cerradas las puertas de la sala de máquinas de la Constitución"[7]. Rosalind, mientras tanto, ilustró, de modo brillante, la extendida práctica presidencial de "otorgar derechos como sobornos" -"rights as bribes"[8].

De modo más relevante, y tal como ya lo adelantara, Rosalind y yo coincidimos -junto con otros académicos- en valorar un acercamiento "procedimental" al control judicial, como el que recomendara John Ely, en 1980[9]. Ambos consideramos que los tribunales tienen un papel que jugar, en la protección de nuestras democracias que -justamente- puede y debe ser consistente con la prioridad que asignamos a -consistente con la prioridad que debe tener, en nuestras democracias constitucionales- la política democrática. Como ella no profundiza en esta cuestión, en su texto (Rosalind ha dedicado su libro *Responsive Judicial Review,* enteramente, a este tema), no voy a detenerme en el punto, pero al menos quisiera aprovechar la ocasión para señalar algún matiz importante que nos separa, en esta coincidencia. En mi libro, defiendo (como ella) un rol muy activo para los jueces, frente a situaciones de "erosión constitucional," aclarando que presento tal "propuesta" como vinculada con el ideal regulativo de la

[7] R. Gargarella, *La sala de máquinas de la Constitución. Dos siglos de constitucionalismo en América Latina (1810-2010)*, Buenos Aires, 2014.

[8] R. Dixon, *Constitutional Rights as Bribes*, en *Connecticut Law Review*, 2018, p. 381 ss.

[9] J. Ely, *Democracy and Distrust*, Cambridge, 1980. Ver, en particular, R. Dixon, *Responsive Judicial Review*, Oxford, 2023; S. Gardbaum, *Comparative political process theory*", en *International Constitutional Law,* 2020, p. 1429 ss.; S. Gardbaum, *Comparative political process theory II*, en *Global Constitutionalism*, 2024, p. 1 ss.

"conversación entre iguales". Inmediatamente, sin embargo, agrego que no confío en que, bajo la estructura de incentivos constitucionales con la que contamos (y, mucho menos, a partir de los desarrollos que esa imperfecta estructura ha ido generando, con el paso del tiempo), los jueces se comprometan con un tipo de soluciones como las que ambos preferimos. Tales alternativas no se encuentran bloqueadas o prohibidas por nuestras estructuras constitucionales, pero son desalentadas por ellas. Es decir, no es dable esperar -bajo las condiciones institucionales existentes- que los jueces adopten actitudes "reconstructivas" o "protectivas" de la democracia, aunque ocasionalmente podamos encontrarnos con decisiones judiciales atractivas, y que aparezcan dirigidas en tal dirección (volveré sobre el punto más adelante).

Rosalind, en cambio, parece desentenderse de lo que llamo la cuestión de la "motivación judicial" (¿por qué deberíamos esperar, bajo las condiciones presentes, que los jueces adopten nuestra concepción favorecida? -aquí, una concepción procedimental pro-democrática). Ello cuando -insisto- los jueces han pasado a ser parte integral del problema democrático que actualmente padecemos (ya sea por el modo en que, en muchos casos, han sido cooptados por el poder político, ya sea porque advierten los amplios beneficios que pueden obtener, desde su posición de privilegio, en el marco de instituciones muy frágiles).

Y algo más -más importante y más serio- sobre lo que, en el contexto de esta discusión, no puedo abundar: difiero con su postura en cuanto al contenido o dimensión del problema central de nuestro tiempo -el problema contra el cual los jueces deberían concentrar sus energías. Por una parte, ella acierta en hacer referencia al problema del *backslinding*[10] o la "erosión democrática". Este problema -que yo llamaría, más bien,el *problema constitucional o del sistema de frenos y balances*, en lugar de, el problema de la "erosión democrática"- es, sin dudas, un problema crucial de nuestra época. Me refiero a la situación típica de Ejecutivos que, "desde adentro", socavan poco a poco la estructura de los *checks and balances*. Sin embargo, a través de esa misma operación (acertada) ella se olvida de, o deja de lado, el que es -en mi opinión- el problema más importante de nuestra era. Me refiero al *problema democrático,* que es diferente (y no debe ser superpuesto con) el citado problema constitucional. El problema democrático va más allá de los mecanismos de "*checks and balances*", y nos refiere a ciudadanos desencantados frente a la política; frustrados frente a su clase dirigente; y obstaculizados o no alentados, por el sistema institucional, para ganar poder

[10] T. Ginsburg – A. Huq, *How to Save a Constitutional Democracy,* Chicago, 2018.

de "decisión y control" (el "test de un sistema republicano," según Thomas Jefferson). Según entiendo, el problema democrático es el problema institucional de nuestro tiempo (tanto o más que el problema constitucional).

Me detengo ahora, algún instante, en un último punto que destacaría del muy breve, pero a la vez muy rico, texto de Rosalind Dixon. Me refiero al tema de la democracia y el diálogo constitucional. Aunque los acuerdos con Rosalind también llegan (sorprendentemente, o no), a las asambleas ciudadanas, y a ciertas formas "lotocráticas" de la política democrática (y eso es mucho, y es muy importante), creo que vale la pena sacar a la luz, antes que opacar, los desacuerdos que mantenemos en dicha área. A la hora de presentar lo que Rosalind denomina "la única pregunta" o duda que mantiene, frente a mis planteos, ella hace referencia a una disparidad entre nuestros enfoques que alude, a decir verdad, a una cuestión "mayor". Ella sugiere, en tal respecto, un sistema "híbrido" que no se asiente, exclusiva o fundamentalmente en la participación ciudadana, sino que combine dicha participación con formas (que reconoce como) "elitistas". A partir de allí, ella habla de su preferencia por sistemas que organicen una "competencia entre iguales", antes que una "conversación entre iguales." Aunque el planteo que realiza Rosalind es -característicamente- amigable y amable (lo que la lleva a minimizar la cuestión), su sugerencia encierra, en realidad, y como anticipaba, una diferencia de mucho peso.

La idea de promover, ante todo, una competencia entre partidos políticos, es -obviamente, y debe reconocérselo así- muy diferente de la que parece propia de una "conversación entre iguales". Ello, sobre todo, por tres razones. Primero, porque los partidos políticos nos ofrecen estructuras anquilosadas, esclerosadas, que -conforme asumo en mi trabajo- se encuentran en decadencia y difícilmente puedan volver a ser lo que fueron a mediados del siglo XX (ya he hecho referencia a esta cuestión, más arriba). Segundo porque, obviamente, la "conversación" nos refiere a una práctica de naturaleza muy diversa de la "competencia" que no es meramente intercambiable con esta última. La "conversación" se basa en la idea de que la voz de cada ciudadano es relevante e irremplazable, porque -como ya señalara- cada uno puede ofrecer un punto de vista que los demás -esperablemente- van a tener dificultades en reconocer o sopesar en su debida importancia. Consultar a esos diversos puntos de vista, en su singularidad, resulta decisivo, particularmente en sociedades multiculturales y heterogéneas como las nuestras. De tal forma, no es dable esperar que, en un sentido relevante, los partidos políticos "representen" la diversidad social existente: el clivaje "izquierda-derecha", por ejemplo, dice poco sobre lo

que cualquier ciudadano sostiene respecto de una mayoría de cuestiones (la relación público-privado; los límites de la libertad de expresión; las políticas públicas en materia de género; el rol de los sindicatos; etc.). Finalmente, y en tercer lugar, diría que la concepción de la democracia que deja entrever el breve texto de Rosalind, nos refiere a una concepción muy restrictiva de la misma, a pesar de que (como es habitual en algunos de sus últimos trabajos), ella parezca oscilar entre la defensa de ideales y propuestas que parecen estar en tensión entre sí, o apuntar en direcciones contradictorias. En los pocos párrafos que le dedica a la cuestión democrática en su texto, Rosalind habla de "sistemas de voto compulsivo"; de los niveles de presentismo (*turnout*) de los votantes en las elecciones; de la importancia de seducir al "votante medio"; del "igual acceso al sufragio"; de la "competencia" (de los partidos en las elecciones) antes que de la "conversación"; etc. Todos esos indicios reafirman (a pesar de que ella valore experiencias como las de la Convención Constitucional en Australia 1988), que su acercamiento a la democracia, insistentemente, tiene que ver con una concepción esencialmente "minimalista" de la misma[11]. En dicha concepción, la idea de democracia queda reducida fundamental (aunque, insisto, no exclusivamente) a un sistema de elecciones periódicas. Para la concepción que yo defiendo, en cambio, democracia es lo que ocurre, fundamentalmente, *entre elección y elección.*

3. No culpabilizar al pueblo…¿o sí? Racionalidad política y democracia

Compartimos, con Gábor Halmai, la mayoría de las preocupaciones institucionales que se derivan de la crisis propia de las democracias contemporáneas. Esto no es extraño dado que venimos de países y regiones (Hungría/Europa del Este; Argentina/América Latina) en donde dicha crisis ha adquirido dimensiones particularmente alarmantes. Nos angustian los fenómenos de "erosión democrática"; el "déficit democrático" que reconocemos en nuestros respectivos contextos; el discurso manipulativo que llega desde el poder (hablemos de Viktor Orbán, en Hungría; Jair Bolsonaro en Brasil; Javier Milei en la Argentina…); las falsas invocaciones al "pueblo" que hacen los líderes autoritarios (para luego imponer su propia voluntad, pero en nombre del "pueblo"); las restricciones a los derechos fundamentales; las violaciones de los intereses básicos de las minorías vulnerables, la directa persecución de grupos desaventajados; etc.

[11] A pesar de los esfuerzos en contrario que plantea, por ejemplo, R. Dixon, *Responsive Judicial Review*, Oxford, 2023.

La posibilidad de mantener un nivel de acuerdos semejante no es obvia, dentro de la comunidad política, y mucho menos dentro de un ámbito académico como el nuestro, en donde solemos enfrentarnos o distanciarnos del resto, a partir de cuestiones menores -a veces, la mera vanidad. En todo caso, dentro de ese marco de intereses y miradas compartidas, quisiera destacar una cuestión en particular, que tiene la virtud tanto de referirnos a un acuerdo importante (que une a mi línea de trabajo con la de Gábor); como la de sugerir una diferencia también relevante, en relación con su enfoque teórico. La cuestión a la que me refiero es la relacionada con *Who is to Blame?*[12], esto es decir: la pregunta relacionada con los sujetos a quienes corresponde culpar por la falta de consolidación y el *backsliding* que sufren nuestras democracias. Al respecto, Gábor realiza una serie de afirmaciones que distinguen a su postura de la que sostienen muchos de nuestros colegas. Con razón, él se resiste a "culpar al pueblo" de la declinación democrática. Citando a un trabajo de Jan-Werner Müller, sostiene que los ciudadanos del común son muchas veces engañados por demagagos; pero, sobre todo -y lo que es más importante- destaca que es el "*establishment* conservador" el que finalmente tiende a hacer posible el gobierno de los autoritarios. Junto con Kim Lane Scheppele, además, Gábor Halmai mantiene, acertadamente, que es "la política" la que fracasa en ayudar a la ciudadanía, en la vida pública, ya que deja a los ciudadanos comunes frente a opciones por completo inatractivas. Luego -concluye- cuando una de tales inatractivas opciones resulta electa, lo que corresponde hacer es señalar a los partidos políticos, antes que a los ciudadanos, por tan pobre resultado.[13]

A partir de este particular acuerdo, sin embargo, emerge un desacuerdo también relevante -al menos, en cuanto a su potencia, como fuente de nuevas diferencias. Gábor se refiere entonces la "ignorancia de la mayoría de la opinión pública"; alude a los ciudadanos como *plainly irrational*; habla de personas "siempre listas para ser engañadas por los demagogos"; las describe como "desinteresadas por votar"; y también presenta a tales sujetos como individuos que no se dan cuenta de que las políticas de gobierno afectan sus intereses; etc. Desacuerdo fuertemente con este tipo de afirmaciones, pero -debo agregar- ellas me resultan sorprendente, a la luz de otras consideraciones que introduce Gábor en su breve texto.

[12] G. Halmai, en *Rivista di Diritti Comparati*, 2024, en este simposio.

[13] Ver, por ejemplo, K.L. Scheppele, *The Party's Over*, en M. Graber – S. Levinson – M. Tushnet (eds.), *Constitutional Democracy in Crisis,* Oxford, 2018, p. 495.

Ocurre que, en la parte primera de su escrito -referida a las "transiciones democráticas no-democráticas"- Gábor critica (con razón) al "sistema institucional arraigado", y da cuenta de una situación grave que, en buena medida desmiente aquello que afirma en relación con la racionalidad política del ciudadano común, en la segunda parte. En la sección primera, en efecto, él nos comenta que fue la Corte Constitucional la que, por ejemplo -y a partir de una interpretación más bien extravagante de la Constitución, que resultaba además "contraria a la voluntad popular" - consideró que "el poder supremo" no residía en el pueblo (tal como lo establecía explícitamente la Constitución), sino en los órganos representativos. Del mismo modo, Gábor nos muestra de qué forma la Corte Constitucional, a veces en acuerdo, y a veces en desacuerdo con la mayoría parlamentaria, decidió -indebidamente- cuestiones fundamentales sobre justicia transicional, en contra del pensamiento y los reclamos -completamente razonables- de la mayoría ciudadana (por ejemplo, en favor de una mayor transparencia en el acceso a los documentos de la política secreta comunista). Quiero decir, los dos casos fundamentales que el mismo Gábor Halmai elige para ilustrar los desarrollos de la vida política de su país, desmienten, en lugar de reafirmar, lo que el sostiene, con mayor énfasis, en la segunda parte de su escrito: la incapacidad, la ignorancia, o el carácter manipulable de la ciudadanía. Sus ejemplos nos muestran otra cosa: ciudadanos razonables frente a instituciones colonizadas por el poder En definitiva, es el propio Gábor Halmai quien, en la parte primera de su escrito, socava en lugar de respaldar, lo que él mismo sostiene en la segunda parte de su trabajo.

Más allá del hecho citado (la contradicción interna que se advierte en su artículo), lo cierto es que el tipo de críticas que Gábor enuncia, en relación con la (ir)racionalidad ciudadana, se contradicen con algunas afirmaciones que, en mi libro, aparecen como supuestos fundamentales. Permítanme, por tanto, reconocer y destacar brevemente esas diferencias. Desde el primer capítulo mismo de *The Law as a Conversation*, adopto de manera explícita (lo que denomino) una posición "Milleana" en la materia, para sostener que "cada individuo es el mejor juez de sus propios intereses."[14] Una afirmación semejante no implica la necedad de considerar que cada persona es infalible, o plenamente consciente (omnisciente) sobre sus necesidades y

[14] Del mismo modo, y como señalara Robert Dahl, "en la ausencia de una fuerte demostración en contrario, cada persona debería ser asumido como el mejor juez de sus intereses", R. Dahl, *Democracy and its critics*, New Haven, 1989, p. 100.

posibilidades. Se trata, simplemente, de considerar, como lo hacía Mill -con absoluta sensatez- que "cada persona es la más interesada en su propio bienestar"[15]. Esto quiere decir, sencillamente, que aún cuando los demás pueden preocuparse, genuinamente, por la suerte de uno, ellos van a encontrar obvias dificultades para entender y sopesar, de modo apropiado, los intereses de cada uno de nosotros. Es decir, por más esfuerzo que hagan por reconocer nuestros puntos de vista, va a costarles entender de qué modo es que cada uno de nosotros *procesa* los problemas que afronta, o *cuánto peso* le asigna uno a las dificultades que enfrenta, o a las soluciones que otros les proponen para hacerles frente.[16] De este modo, mi posición sobre la cuestión se contrapone, decisivamente, con la que aparece implicada en la postura de Gábor: entendemos de manera muy diferente estas fundamentales cuestiones relacionadas con la racionalidad individual y colectiva. Dicha variación, según entiendo, tiene la potencia de extenderse a otros aspectos relevantes, vinculados con la filosofía política en la que apoyamos nuestros respectivos trabajos. Ello así, aunque los detalles de tales diferencias no queden evidenciados en esta particular porción del diálogo que desarrollamos.

4. Derechos sociales y "sala de máquinas"

Pur appartenendo a contesti culturali e geo-politici molto diverse, le esperienze descritte sono accumunate dal ricorso al referendum nell'ambito della fase di ratifica dei processi costituzionali. Con Tania Groppi nos conocemos hace pocos años, pero desde el primer momento hemos coincidido tanto en nuestra aproximación general al derecho, como en términos ideológicos. Según entiendo, ambos miramos al derecho críticamente, y desde una perspectiva (llamémosla así) fuertemente igualitaria[17]. Del escrito que presenta para este coloquio destacaría, en

[15] J. Mill, *On Liberty,* London, 2003 [1859].

[16] Conviene advertir, por lo demás, el modo en que los dos ejemplos que ofrece Gábor Halmai en su texto reafirman lo que acabo de señalar. Esto es: los ejemplos arriba referidos (que desmienten al propio Gábor) ayudan a respaldar la idea de que los ciudadanos pueden reconocer bien sus intereses -no por clarividencia, no por supra-racionalidad, no por dotes extraordinarias sino, simplemente, porque, como decía Mill, "cada persona es la más interesada en su propio bienestar", J. Mill, *On Liberty,* London, 2003 [1859].

[17] T. Groppi, *Oltre le gerarchie. Discutendo il futuro del costituzionalismo sociale*, Roma-Bari, 2021.

primer lugar, cierto diagnóstico compartido, en torno a los males (institucionales) que afectan a nuestra democracia. En particular, me interesa subrayar el común interés por pensar "la fractura que se da entre las expectativas populares y las respuestas que las instituciones están en grado de dar"[18]. En otros términos (más cercanos a los que fueran propios de la *Comisión Trilateral,* en 1975)[19] ambos estamos preocupados por "la sobrecarga de demandas" que se acumulan en los momentos electorales, y que "casi inevitablemente terminan por generar frustración y confusión". A la vez (y ahora contra la que fuera la principal respuesta institucional ofrecida desde la "Trilateral," que fuera la de restringir a la democracia) ambos proponemos el reforzamiento, o la re-vigorización de la democracia. La pregunta, obviamente, es cómo hacerlo.

En cuanto al "qué hacer," el escrito de Tania se dedica, en una extensa primera parte, a ofrecer un complemento a lo que digo en mi libro -un complemento que valoro y suscribo. Tania señala, con razón, que mi libro se concentra casi exclusivamente en el constitucionalismo americano (con particular atención en el constitucionalismo de América Latina) y, en tal sentido, descuida o no prioriza el estudio del derecho europeo -derecho éste que puede ofrecer ideas y posibilidades muy atractivas, a la hora de pensar en los problemas democráticos que estudio. Razonablemente, Tania no me "reclama" que incluya en mi libro lo que no he incluido (y no he incluido referencias sistemáticas al derecho europeo, simplemente, porque lo conozco y he estudiado menos, vis a vis al derecho americano, del que me considero experto). Lo que ella señala es que mi análisis y mis ocasionales propuestas podrían enriquecerse con una revisión más detallada de los desarrollos institucionales que se han ido dando en Europa -y, en particular, según su perspectiva, en Italia.

Más específicamente, Tania se ocupa de destacar el valor del "constitucionalismo social europeo", en general y, en particular, el carácter "profundamente democrático" (antifascista, en sus orígenes) del constitucionalismo italiano -un constitucionalismo que, desde su artículo 1, proclama estar vinculado con una "república democrática, fundada en el trabajo". A partir de allí, Tania defiende muchos de los mecanismos propios del constitucionalismo italiano y, muy en particular, "mecanismos de garantías", como la Corte Constitucional que, en su opinión, no merecen

[18] T. Groppi, *"El derecho como una conversación entre iguales" di Roberto Gargarella e il costituzionalismo sociale del Secondo Dopoguerra: un dialogo possibile?*," en *Rivista di Diritti Comparati*, 2024, en este simposio.

[19] Ver M. Crozier – S. Huntington – J. Watanuki, *The Crisis of Democracy. Report on the Governability of democracies to the Trilateral Commission,* New York, 1975.

ser considerados "instrumentos de la elite contra el pueblo" (una crítica que, en apariencia, podría derivarse de mis propios dichos), sino como una respuesta constitucional al pluralismo.

En principio, simplemente declaro que tomo su propuesta y consejo: creo que, en futuros trabajos, debería extender mi estudio comparativo a Europa, y nutrirme de los desarrollos y avances ejemplares que allí se dieron, en particular desde comienzos del siglo XX. Ahora bien, sobre los compromisos constitucionales y arreglos institucionales particulares que ella defiende en su texto -digamos, derechos sociales y tribunales activistas como la Corte Constitucional italiana- quisiera decir, al menos, dos cosas. En primer lugar, señalaría que tales creaciones no son ajenas a la tradición latinoamericana. Más bien, como Tania sabe, y como destaco en mi libro, el constitucionalismo social tiene su origen (y muchos de sus mejores desarrollos) en América Latina (i.e., con la Constitución de México de 1917). Mencionaría además, y lo que es más importante, que la jurisprudencia avanzada en la región (i.e., la elaborada por la Corte Constitucional de Colombia, que Tania conoce a la perfección) está a la vanguardia del derecho comparado sobre la materia.

Dicho lo anterior, y en segundo lugar, quisiera aclarar cuál es mi posición en la materia (una posición que estará marcada, siempre, por una clara perspectiva latinoamericana). Mi postura no es, de por sí, crítica acerca del valor de los derechos sociales, ni tampoco hostil a la labor de los tribunales constitucionales. Por el contrario, como sostengo en mi libro, considero que los derechos fundamentales deben ser entendidos como la cristalización/constitucionalización de compromisos que -en tanto comunidad- decidimos asumir históricamente (de manera habitual, luego de procesos extensos, marcados por conflictos, disputas, movilizaciones, etc.). En tal sentido, veo a los derechos sociales como conquistas importantes, que expresan un acuerdo colectivo que implica afirmar algo como lo siguiente: "como sociedad, nos comprometemos a hacer nuestros mayores esfuerzos por garantizar, a futuro, la protección de estos intereses, que consideramos fundamentales y que hemos deshonrado en el pasado". Este tipo de compromisos colectivos me resultan normalmente muy atractivos, y particularmente pertinentes, en el caso de los derechos sociales.

Dicho lo anterior, y ahora sobre los tribunales constitucionales o superiores, mi postura no es inamistosa, sino, ante todo, escéptica. Y es que i) no creo que las instituciones principales en la que delegamos el *enforcement* de esos derechos -los tribunales- se encuentren bien diseñadas (en términos de los incentivos institucionales que reciben, su modo de composición, etc.) para lograr los fines que buscamos; y ii) considero que, en particular, en las

actuales condiciones de *democratic decay,* "erosión democrática," etc., los tribunales no sólo tienen dificultades para convertirse en la solución del problema (i.e., la falta de aplicación y puesta en marcha de los derechos sociales), sino que han pasado a ser parte integral -central- del problema en juego.

Por supuesto, ello no ocurriría si -como se ilusiona Tania- contáramos con una "sociedad civil activa", y con un sistema autonómico y federal intenso, rico y articulado. Pero lo cierto es que no contamos con tales condiciones, y no es dable que tales desarrollos virtuosos se consoliden en tiempos de desigualdades económicas crecientes, y poderes de decisión que se concentran. Lo que solemos encontrar a nuestro alrededor es -lamentablemente- la peor versión, la más regresiva, de instituciones que, ya en sus orígenes, aparecían diseñadas de un modo defectuoso. Otra vez, Tania podría intervenir aquí para distinguir los orígenes elitistas del diseño institucional americano, del origen más democrático del constitucionalismo italiano. Sin embargo, y aún aceptando que el caso americano es más preocupante y grave que el europeo, en muchos casos, me arriesgaría a señalar que, con el correr del tiempo, el problema que enfrentamos ha pasado a ser fundamentalmente el mismo. Juega a favor de mi postura el hecho de que hoy veamos -en América como en Europa- repetidas escenas de desencanto político; baja participación popular en las elecciones; una radical crisis de representación; y tribunales compuestos por elites -a veces más progresistas, a veces más conservadoras; etc.

Es en puntos como los señalados donde radica mi habitual observación sobre la "sala de máquinas". Lo que sostengo es que durante décadas (sino siglos) hemos descuidado los modos en que ha quedado diseñada la sección referida a la organización del poder, en nuestras Constituciones (esencialmente, la "sala de máquinas"). Ello así, en parte, porque prestamos una excesiva, sino exclusiva atención constitucional a la inclusión de nuevos y mejores derechos (sociales, económicos, etc. -derechos, como dije, siempre necesarios), mientras que descuidamos la artesanía de la maquinaria de gobierno -descuidamos la reflexión relativa a qué herramientas institucionales necesitamos para tornar probable la activación de los derechos que -orgullosamente- incorporamos en nuestras constituciones[20].

Al respecto, agregaría que, lamentablemente, y por la razón que sea (elitismo, desconfianza, paternalismo, etc.) nuestras instituciones (judiciales) nacieron y/o se desarrollaron de formas que tienden a impermeabilizarlas

[20] A. Chilton – M. Versteeg, *How Constitutional Rights Matter*, Oxford, 2020.

frente al diálogo colectivo: ellas tienden a quedar separadas de la "conversación entre iguales". En buena medida, podría decirse, ellas nacieron con la capacidad para actuar con autonomía frente a las quejas y desafíos ciudadanos. Los modos de acceso a la justicia resultan, en general, muy limitados; los jueces se encuentran -abierta, explícitamente- separados del debate público; sus miembros no son directamente responsables, frente a la ciudadanía; los magistrados suelen ser elegidos de manera indirecta, y suelen mantenerse en sus cargos por períodos extensos. Los jueces tienen, por lo demás, plena libertad para interpretar la Constitución a su criterio (a la vez que existen teorías interpretativas para todos los gustos); gozan de amplios privilegios; cobran sueldos extraordinarios; etc. Ese marco institucional de amplio acceso a privilegios y pocos controles, resulta hoy común, en América y en Europa, para describir al Poder Judicial, y ofrece (en mi opinión) el peor esquema de incentivos posible, para esperar una actuación "progresista" o igualitaria, por parte de los jueces. En contextos institucionales frágiles, como los latinoamericanos, lo que puede predominar es la corrupción, la dependencia política de los jueces, los procesos extorsivos por parte de estos (sobre la clase política o empresaria, en busca de aún mayores privilegios), etc. Esto no es incompatible con la existencia de (coyunturales) tribunales "progresistas" e independientes, pero tal resultado -debemos saberlo- no se convertirá en la regla ni en la situación esperable o más común. En contextos institucionales más sólidos, como el europeo, algunas de las patologías esperables en América pueden resultar más excepcionales, pero muchos de los (desafortunados) resultados que mencionara, también aparecen como previsibles (jueces que viven en el privilegio y que procuran, sobre todo, mantener esos privilegios). Otra vez, no se trata de un sesgo "anti-judicial", sino de una crítica a la estructura de incentivos existentes, en nuestros marcos constitucionales.

Por lo dicho hasta aquí, mi temor y mi preocupación, frente a un escrito interesante, amigable y lúcido como el de Tania, es que el mismo termine descansando exageradamente en la buena disposición o la buena voluntad de nuestros representantes y jueces. No extraña, por tanto, que ella concluya su escrito reclamando la emergencia de funcionarios públicos "capaces de expresar amor por el bien común". De forma entendible, ella cierra su trabajo con una palabra/pregunta, que dirige hacia nosotros, pero que también orienta hacia sí misma: "¿Utopía?". Lamentablemente, debo responderle que "sí": el planteo último de su trabajo es de carácter utópico, a la luz de la imperfecta, inapropiada, inatractiva, estructura de incentivos que todavía distingue a nuestras democracias constitucionales.

4. *Derechos sociales y "sala de máquinas"*

Concluyo este breve escrito, a través del cual he procurado reaccionar, "dialógicamente", frente a las interesantes observaciones que me plantearan distinguidos y queridos colegas, como Rosalind Dixon, Tania Groppi, Gábor Halmai, y Sergio Verdugo. Asumiendo que la tarea que nos reúne, refiere a un "diálogo abierto, continuo, inacabado", en mi trabajo he ofrecido sólo algunas primeras ideas, destinadas a avanzar nuestra conversación sobre el problema que nos ocupa a todos -el problema democrático, que va de la mano de un sistema constitucional en crisis. Mis respuestas pueden considerarse, esencialmente, como incompletas: son muchos los temas adicionales que hubiera querido abordar, y que, por razones de tiempo y espacio, no he tratado. Pido disculpas por los temas que nos han quedado -que he dejado- en el camino. Confío, de todos modos, en que la conversación continuará, y guardo la secreta esperanza que el diálogo que hemos llevado a cabo en *Rivista di Diritti Comparati,* permitirá alguna mejora, en cada uno de nosotros, en relación con nuestras posiciones previas. Termino subrayando mi especial agradecimiento a Giuseppe Martinico, por la amabilidad y generosidad de su propuesta.

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ABSTRACT: In this article I offered some responses and comments to the kind reflections that some esteemed colleagues - Rosalind Dixon, Tania Groppi, Gábor Halmai, Sergio Verdugo - have presented on my book The Law as a Conversation Among Equals. I did so in a 'conversational' mood, trying to continue a dialogue that - with all of them - I was lucky enough to start years ago, and I hope to continue for a long time to come.

KEYWORDS: *The Law as a Conversation Among Equals* – constitucionalismo – democracia – desigualdad – derechos sociales

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Roberto Gargarella – Profesor de Derecho de la Universidad Torcuato di Tella y de la Universidad de Buenos Aires y lidera el proyecto de investigación, financiado por la ERC, "Institutional Changes for Democratic Dialogue" (ICDD) en la Universidad Pompeu Fabra de Barcelona (roberto.gargarella@upf.edu)