

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

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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 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.

* Commissioned Article.

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=syaGLIWeucY>

³ R. Gargarella, cit., p. XV.

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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.

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 Rawls⁶ was right in saying that the courts crucially contribute to

⁴ *Ibid.*, p. 183 et seq.

⁵ *Ibid.*, p. 246 et seq.

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

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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.

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

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

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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 Amoralism of Secession*, Abingdon, 2019, p. 87 et seq.