

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

Sergio Verdugo

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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

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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-Kacała, *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 democracy¹¹ –, 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

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

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

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 dialogue³⁵ 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. Landmore, *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 extortion" (RG 120-133). In Gargarella's terms, electoral extortion 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 extortion, 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 extortion 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 extortion, representation, and counter-majoritarian institutions (see, e.g., RG 140-145, 206, 209, 232-236). This is why Gargarella's proposal neglects or deliberately 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 extortion, as a fixed two-stage process: (1) voters vote, and (2) representatives rule. According to this view, which follows a Rousseauian 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 *LACL-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 extortion, 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.

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 Powers*, Oxford, 2022; S. Mainwaring – M. Soberg Shugart (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 extortion 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.

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 Unnecessary 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 Paralyzed 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 237-250⁵¹). 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 power⁵² 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 grounds⁶¹ and even on principled grounds that do not speak well of being the result of an inclusive conversation among equals.⁶²

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 extortion 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

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.

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.

Sergio Verdugo

The Law as a Conversation Among Equals. A Skeptical View

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

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

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