

## Constitutionalism and Democracy

### An Institutional Problem of Structural Nature

I am writing this book during difficult political times (and I am writing it at this particular moment largely because of them). We live in the era of the “Arab Spring,” “Black Lives Matter” in the United States, and the rise of *Syriza* in Greece and *Podemos* in Spain, not to mention the “They all must go” movement in Argentina (“*Que se vayan todos*”). It is a time of massive demonstrations and protest against current authorities in Catalonia and Ecuador, a time when millions have descended to the streets to demand President Piñera’s resignation in Chile. Many of our constitutional democracies seem haunted by the same specter, that of “democratic fatigue” or “discontent.” Citizens seem fed up with their government institutions and tired of those who represent them in it. The notion of “democratic fatigue” and the related sense that democracy is being “eroded from within” to the point of being hollowed out are commonplace in the current social science literature. No longer are we as worried by the prospect of democracies “dying in a single blow” as was typical in the recent postcolonial era of military coups and dictatorships. Rather, we now talk about the “slow death” of our democracies through a gradual “dismantling” of their institutions by leaders who have consolidated their power in a series of arguably legal moves.

The outcome of progressive degradation in the government system is familiar (and is what generates the “fatigue”). There is a tendency to move from a government “of the people, by the people, for the people” to a government “of a few people, controlled by a minority, at the service of the privileged.” Our institutional system (and I say “our” with the constitutional model in mind that has been adopted in most Western nations since the end of the eighteenth century) resembles a system that has been “captured.”<sup>1</sup> Utterly perplexing stories are told all over of authorities who

<sup>1</sup> As will be seen, this work is largely comparative. The “heart” and center of the comparative analysis is American constitutionalism (American as in from North and South America, not only the United States) yet the ramifications of the analysis, to the degree I am able, will be traced beyond the Western hemisphere.

behave simply and unabashedly however they want, as if the rules they have to follow have been suspended, as if the boundaries on their power did not exist – authorities who proudly wear constitutional robes and democratic trappings while spouting human rights discourse. Moreover, they go unflinchingly about their business in a bureaucratically efficient manner, with an eye on best practices, proper attire, and the requisite array of erudite legal references.

I am writing this book in the face of a disheartening landscape and am trying to facilitate critical reflection on the situation in which we find ourselves – a reflection that is meant to help clarify our ideas and reexamine the settled truths we unthinkingly repeat. I am particularly interested in pushing back against a tendency coming from the social sciences to relate the democratic crisis underway with the actions of some reckless leader currently in power (say Jair Bolsonaro, Nicolás Maduro, Daniel Ortega, Viktor Orban, or Recep Erdogan) or with the breakdown of an institutional system that has been corrupted (as in Argentina, Colombia, Mexico, or Peru where dozens of parliamentarians and political leaders have been convicted). This kind of approach – which I will argue is mistaken – leads many prominent authors in the current generation of social scientists to focus their efforts on bringing about a change of leader (Impeach Trump!), adjusting the “old model” (to restore checks and balances, recuperate effective controls, or reestablish institutional “escape valves”). Or they focus their efforts on reinvigorating the sense of civic responsibility and duty in order to resolve, more or less definitively, the political “dramas” of our times.

I will argue that these efforts are useless for several reasons that will be subjected to a fairly meticulous examination over the course of this book. Above all, I will argue that it is mistaken to blame the apathy, indifference, or distaste of “people in general” (to the degree that the population’s views can be generalized) toward politics on a lack of engagement or desire to participate in political decision-making. Rather, I hold, the apparent indifference should be understood as an endogenous product of the institutional system itself; that is, something about the way the system is arranged produces or at least aggravates it. The protests and demonstrations that take place on a daily basis from Seattle to Washington, DC belie the notion of generalized political apathy as it is traditionally understood in the United States – and so did the thousands of volunteers who went from neighborhood to neighborhood knocking on doors to support Barack Obama’s presidential campaigns. Whether or not these examples are convincing, what can be observed is not a population disinterested in

politics, but an institutional system that currently represents the only effective channel of democratic participation and yet discourages regular voting. Similarly, the hollowness of the notion of “apathy” that was used for decades to describe the political context in countries like Brazil or Argentina has also been revealed by frequent, massive demonstrations by sectors of the population actively demanding respect for their rights. These demonstrations take place despite the limitations imposed by very restrictive institutional systems that characterize the region (the most restrictive of which being the Chilean model put in place by the dictator Augusto Pinochet forty years ago that remains intact today). Again, if citizen engagement is lacking, the cause has to do with the institutional arrangements that discourage or prevent it.

This is why I emphasize so strongly the importance of avoiding *the conflation of democratic and constitutional problems* – something that, I believe, we continue to do. The type of crisis we are facing has more to do with a *democratic deficit* (the way our institutions resist and block citizen control and decision-making power) than with the specific processes within the constitutional system by which each branch of the government checks and balances the others. I do not deny that this internal system is being undermined, but the recent impairments are rooted in deeper problems that date back from long ago.

The problems we are facing go well beyond personal ambitions and political circumstances. We need to look past the current political situation and leaders. I would like to show that changing the leadership or making “technical adjustments” to the current system will not enable us to regain what we lost or eliminate what causes our revulsion and fatigue. I would like to focus on structural factors related to the institutions we have. Among those institutions, I will center my examination on those that are germane to constitutional democracy, not because I take the “constitutional bases” as necessarily our most important institutions, but rather because I feel that they deserve special attention and careful study, which they have largely failed to attract.<sup>2</sup>

<sup>2</sup> Part of the problem is that much of political theory and legal sciences neglects the theoretical and philosophical examination of the institutions that create law. That is why Jeremy Waldron begins his most recent book by addressing this area of reflection. The book starts with a criticism of Isaiah Berlin’s political philosophy that ignored the role of institutions (in the Anglo-Saxon world, particularly England, Waldron observes, political theory is studied as a branch of ethics instead of a discipline that normatively examines institutional structures), and ends by praising Hannah Arendt’s constitutional politics (Waldron, 2016).

In this regard, throughout this work I will repeatedly return to the idea that the original institutional system has been completely overwhelmed (to give a sense of the environment in which I am writing this book, at the moment extraordinary demonstrations are rocking Chile, Ecuador, Bolivia, and Spain). The institutional scheme no longer appears capable of carrying out even a portion of what it promised at its foundational moment – the promise on which its legitimacy stands.<sup>3</sup> To make sure my point is clear, not even were the current institutional system functioning perfectly could it

<sup>3</sup> Let me clarify, and give some more precise content, to the idea of the “broken promises” of modern constitutionalism that I just mentioned. I will do so by mentioning, albeit briefly, three interrelated arguments: one historical, another constitutional, and the other socio-logical. First of all, I believe that my basic claim finds significant historical support – at least, clearly, in the history of the Americas, which is at the center of my study. In the struggle for independence, in the Americas, the revolutionary leaders used to raise very radical ideals, such as the ideal of self-government. Undoubtedly, they needed to endow their struggles with popular support and social legitimacy. The fact is, however, that after their victory they could not sustain their claims – something that generated early social tensions. As Gordon Wood put it (quoting Fisher Ames), shortly after the end of the Independence Revolution, “the people [began to turn] against their teachers the doctrines which were inculcated in order to effect the late revolution” (Wood 1969, 397; see also Wood 1991). In Wood’s words, the Revolution had “shattered traditional structures of authority, and common people increasingly discovered that they no longer had to accept the old distinctions that had separated them from the upper ranks of the gentry. Ordinary farmers, tradesmen, and artisans began to think they were as good as any gentleman and that they actually counted for something in the movements of events. Not only were the people being equated with God, but half-literate plowmen were being told even by aristocrats like Thomas Jefferson that they had as much common or moral sense as learned professors” (Wood 2002, 131). I found support to similar claims, concerning Latin America’s history, in Gargarella 2010 and 2013.

In addition, the first constitutions that were written, after independence, tended to strengthen this critical, tense situation. All the new constitutions appealed to great principles (freedom, equality, etc.) and many among them used a radicalized rhetoric, of the Rousseauian type (in Latin America, this was something very common in many of the first constitutional documents, such as those we find in Venezuela, Uruguay, and Mexico). Again, then, there was a break between what the law said and what the actual political practice offered. The break between constitutional rhetoric and practice was, in a way, inevitable: the new constitutions tried to establish the foundation of a new political-institutional order, and this objective seemed incompatible with (something like) the maintenance of a permanent deliberative state in the society. It is also true, however, that in the unfair social context that prevailed in many of these countries – a context that was characterized by the presence of deep and unjustified inequalities – the elites that drafted the new constitutions took advantage of the situation to consolidate their privileges or shield them from possible attacks. The concentration of power that continues to prevail in so many countries, or the discouragement of political participation, are clearly the product of that situation. In the end, as expected, the prevailing political-economic inequality was translated into constitutional inequality. (This was my argument in Gargarella 2010.)

make good on its early ambitious promises. I am referring to its inclusive promise – “full representation”; to its promise of respect for the rights of overlooked minorities; and its promise to recognize the sovereignty of the people’s voice. As we will see, countless changes have taken place since the foundational moment – changes in circumstances and in thinking. These changes have been so profound that we should not be surprised that the situation we face is dramatically expressed in terms of overwhelmed institutions and an alienated society. The institutions are no longer capable of meeting the expectations of their initial aspirations and promises while the society increasingly sees them as alien, distant, and removed.

### 1.1 The Democratic Objection is Still There

“When he woke up, the dinosaur was still there.”

– Augusto Monterroso

The concrete institutional problems that I identified as characteristic of our time are rooted in causes that transcend both our current dilemma and the cast of political actors currently on stage. For that reason, I hope you will allow me to take a few steps back. My approach in this book requires a certain distance for the sake of perspective and a thorough analysis.

Practically speaking, constitutional democracy as we know it has displayed certain traits from its outset – over two centuries ago – that should concern us. These traits threaten to make our worst fears reality. The risk is that constitutionalism, instead of reinforcing freedom – both personal and collective – may be used to broaden the liberty of some at the expense of the liberty of others. This is the type of problem to which we refer when we speak of the *tension between constitutionalism and democracy*.

As will be shown, the first problem of our constitutional legal tradition is that, from its outset, its framers have been reticent, if not unwilling, to grant the general populace a protagonist role in civic matters. Instead, they sought to limit, not foster what Thomas Jefferson called the “direct

Finally, I would mention a sociological argument that is bound to appear repeatedly in this book: what I will call the “dissonance” argument. The point (presented decades ago, in a different version, by Samuel Huntington) refers to the political and institutional tensions that are generated when societies change in depth (e.g., in their number, social composition, heterogeneity, expectations) while the institutions that govern them remain basically the same after centuries (Crozier et al. 1975; Huntington 1983). The current tension between social expectations and institutions, as I understand it, is based in part, and in part reinforces, the preexisting social tensions that marked the life of regional constitutionalism.

and constant control by the citizens.”<sup>4</sup> Our constitutional legal tradition was thus marked by *distrust* of the common citizens’ capacity for political virtue – what Michael Sandel would call “democracy’s discontent.”<sup>5</sup>

This distrust can be detected in the notion that only certain people have the ability to recognize what comprises the “public interest” that law should serve (the “representatives” of the people rather than the people themselves; trained “judges” rather than ordinary citizens). Such elitist presumptions were characteristic of the predominant discourse at the “founding moments” of modern constitutionalism, yet they neither disappeared over time nor grew obsolete, like laws passed in a bygone era that we simply forget. The initial “distrust” was translated, from the outset and ever since, into a system of institutions that remains intact. In some cases, the framers expressed anti-majoritarian intentions unabashedly. A severe case is that of Jaime Guzmán, the juridical architect of Pinochet in Chile, whose 1980 constitution was explicitly devised to prevent the conservative minority’s adversaries from dislodging them from power – reducing constitutionalism to a small cage to keep democracy under control.<sup>6</sup> We live by mechanisms for governance designed upon these types of premises, premises that justify the democratic objections of today and yesteryear against the scheme in place: the *democratic objection* that arose alongside constitutionalism has never dissipated, while constitutionalism itself has been consolidated.

<sup>4</sup> Jefferson to John Taylor, May 28, 1816, in Jefferson 1999, 208.

<sup>5</sup> This state of affairs is alarming because the first promise of law itself is that it will serve each and every one of us inasmuch as we stand as equal citizens before it. Law rises above other rules because its rules are written collectively for everyone and in everyone’s name, with the ultimate aim of improving conditions for everyone. That is precisely where the beauty of law lies: to acquire its respectability, legitimacy, and support – the consent of everyone – law must be written in universal terms (i.e., “everyone has the right to” express themselves freely, acquire property, and so forth) which every single citizen can invoke. Universality is what makes it possible for everyone to recognize the law and accept it. Notwithstanding, depending on when, where, and by whom the law is written, respect for this criterion may falter or even vanish. To take an example from the founding moment of the United States Constitution, we could cite the framers’ decision to exclude the problem of slavery, such that the institution was allowed to continue hidden from the face of the law. Similarly, including numerous clauses in the constitution that protect the right to property and market values increases the risk that the law be used to bolster an unjust and unequal system because its language is facially neutral and nondiscriminatory.

<sup>6</sup> At that time, Guzmán himself asserted: “The Constitution must ensure that if [our] adversaries come to rule, they are constrained to follow an action not so different from what one would yearn for, [so that] the range of [available alternatives become] sufficiently reduced” (Guzmán 1979).

What is worse, the constitutional system of checks and balances has not mitigated the democratic deficit over time. Instead, the problem has deepened, which only reinforces the validity of the democratic objection. Matters have worsened, as we will see, in at least two important ways. To begin with, the institutional situation is much worse, because the societies in which we live have evolved so much since the days of the framers. The societies that the “founding fathers” had in the backs of their minds when they drew up the original constitutions differ starkly in terms of composition, looming dangers, internal conflicts, and the divisions upon which social identities are formed. Secondly, and this point is more relevant to my argument in this book, we are coming off the “victory” of democracy as the dominant paradigm over communism, when more than ever people subscribe to its values. Never before has the citizenry been as “empowered,” following the current jargon, to intervene and participate capably in decisions on public matters that concern it. What I am trying to say is that the institutions designed on the basis of distrust toward the masses now clash with a citizenry that demands trust, one that will no longer lower its voice, bow its head, and go sit and wait at home. Addressing the discrepancy between what the institutions were designed to do, what they promised to deliver, and what society expects of them has thus become imperative. The gravity of the situation is compounded by the unfortunate circumstance – the circumstance that, in a way, drove me to write this book – that the most heralded theorists within the constitutional tradition, the ones that recognize the democratic “fatigue” or “erosion” afflicting us, nevertheless superimpose the issue of democratic deficit on questions of constitutionalism. The resulting theory thus proposes constitutional solutions (“tightening screws” in the “engine room” of the constitutional system) for problems whose root is of another order – the nature of our democracy itself. As a result, even in the best of cases, the democratic deficit causing our anguish goes on, untouched and intact.

After more than two hundred years, the democratic objection to the original constitutional framework remains, without doubt, as strong as it ever was. Like the dinosaur in Monterroso’s short story (often considered the shortest story ever told), we have woken up but the “democratic objection” has not left. Despite decades upon decades spent in debates and refutations, the simple, even obvious objection still stands, right where it has been from the start. For that reason alone, we have the right to ask ourselves why the decisions on the matters that are most important to us are left to others to make, in our name, and in spite of our disagreements with them. We argue and haggle until we can shout no



more, so we take a break, and when we start up again, the democratic objection is right where we left it.

## 1.2 Of History and Ideas

What I have been describing, in terms of the institutional limitations that beleaguer us, points to an issue that is especially relevant for my argument in this book. I am referring to the “mismatch” between our institutions and the expectations and demands that the citizenry has of and places on them. We will delve into this issue in more detail in the next chapter, but to put it briefly, the institutions of which we currently dispose do not respond very well to our needs or our expectations. The mismatch is likely produced by many factors but, for the purpose of this work, I will emphasize two in particular: causes rooted in the historical paths our nations have followed and ideological reasons; that is, reasons related to ideas about objectives and regulation. Without going into them deeply at this point, I would like to provide some preliminary considerations.

### 1.2.1 “History”

Regarding the historical reasons for the discrepancy that concerns us here, among the many explanations for the choice of constitutional institutions with which we find ourselves, one in particular focuses on the history of constitutionalism itself. Many of our most important institutions were created in response to the specific problems our ancestors confronted during an era or historic moment. At the time, they may have represented the best response available, considering the circumstances in which they were deemed necessary, but that does not mean that they would necessarily continue to be adequate for the new problems to come brought by changing times.

In my opinion, the Argentine jurist Juan Bautista Alberdi wrote brilliantly about these matters. He recognized the importance of designing constitutions that addressed the problems – the “dramas” or “tragedies” – facing society at the time. In this regard, the starting point for his reflection on constitutionalism differed significantly from that of many other jurists of his time, for whom constitutionalism represented a long-term project. For them, the idea was to elaborate a constitution that would crystallize society along the lines it established and, for that reason, it made sense to elaborate a “rigid” charter to make changes or reforms more difficult. Against that predominant vision, Alberdi



proposed an understanding of constitutionalism in terms of the “dramas” of the time. Different eras faced different dramas, thus requiring different constitutional responses. For different, perhaps even more interesting reasons (related to collective self-government), Thomas Jefferson would also adopt a vision of constitutionalism much more grounded in the immediate context. Jefferson went as far as suggesting that the constitution be modified every nineteen years, the period that according to his calculations corresponded to generational turnover. Each generation, he maintained, should have its own constitution. Similarly, Article 28 of the Declaration of the Rights of Man and of the Citizen adopted by France in 1793 established that “A people has always the right to review, to reform, and to alter its constitution. One generation cannot subject to its law the future generations.”

Alberdi’s thinking followed a comparable, sympathetic, and ultimately similar line. He praised the constitutional theorists who had preceded him in America, theorists whom many of his contemporaries criticized. Alberdi extolled his predecessors for correctly conceptualizing the problem: they had recognized that constitutions are born of and in response to the “dramas” of the moment, and the constitutions they produced had done just that.<sup>7</sup> Alberdi asked himself:

All the Constitutions enacted in South America during the war of independence were complete expressions of the needs that dominated their time. That need consisted in putting an end to the political power exercised by Europe in America, which began during the conquest and continued during the time of colonialism . . . Independence and external freedom were the vital interests that concerned the legislators of the time. They were right: they understood the needs of their time, and they knew what to do.

(Alberdi 1981, 26)

In other words, Alberdi praised the first American constitutionalists because they understood the need for, first and foremost, independence. Body and soul, they devoted themselves to consolidating independence through a constitutional framework. With this understanding in mind, it should not be hard to anticipate the question he posed to the jurists of his own generation. He asked his contemporaries to consider the needs of

<sup>7</sup> As Brinks and Blass have argued, “las Constituciones son catálogos de esperanzas y temores, antes que afirmaciones de certeza o manifiestos” (“Constitutions are catalogs of hopes and fears, rather than affirmations of certainty or manifestos”) (Brinks & Blass 2018).

the new era, the “dramas” that they needed to resolve. Naturally, he also offered an answer. Alberdi declared:

At that time, what was required was to consolidate independence through the material and moral enhancement of our peoples. The main goals of that time were political goals: today we need to concern ourselves with the economic goals.

(Alberdi 1981, 123)

What was needed, therefore – in his personal opinion – was populating the country in order to confront – as he would famously argue – the drama of the “desert.” This involved promoting immigration to provide an adequate labor force, developing commerce with other nations, and establishing legal frameworks for contractual obligations that, together, would lead to economic development. All of these required a completely new and distinct constitutional ordering. Above all, I want to draw attention to the aspect of Alberdi’s reasoning that is most relevant to this work, and I want to do it in an “Alberdian” way. I want to focus on the “mismatch” that Alberdi implicitly identified between the original constitution of Argentina and the “dramas” facing his generation in order to shed light on our own dilemma. Part of the institutional problem we are facing is related to a central aspect of Alberdi’s intuition. It is possible that our institutional arrangement has become obsolete, but not for the simple reason that it was created hundreds of years ago, or because so much has happened since then. Rather, it is simply not equipped to recognize and address the urgent, even dire “dramas” that mark the present day. We must answer for ourselves the question Alberdi posed to his contemporaries: What are the distinctive aspects of our era, the demands, needs, expectations, and calamities, that should be identified and addressed by the highest law of the land – constitutional law? Is it time for us to pay serious attention, finally (and through constitutional means), to the “drama” of inequality in which we have long been mired?

### 1.2.2 “Ideas”

In addition to foreshadowing some of the crucial historical factors behind our current dilemma that this book explores, I also want to give an indication of the ideological terrain to be covered, for the heart of this book is especially centered on the ideas (or principles and promises, if ideas is too vague) upon which modern constitutions rest. I am going to argue that modern constitutions are the fruit of a certain way of