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THE LAW AS A CONVERSATION AMONG EQUALS

In a time of disenchantment with democracy, massive social protests, and the “erosion” of the system of checks and balances, this book proposes to reflect upon the main problems of our constitutional democracies from a particular regulative ideal: that of the conversation among equals. It examines the structural character of the current democratic crisis and the way in which, from its origins, constitutions were built around a “discomfort with democracy.” In this sense, the book critically explores the creation of different restraints upon majority rule and collective debate: constitutional rights that are presented as limits to (and not, fundamentally, as a product of) democratic debate; an elitist system of judicial review; a checks and balances scheme that discourages, rather than promotes, dialogue between the different branches of power; etc. Finally, the book proposes a dignified constitutional democracy aimed at enabling fraternal conversation within the framework of a community of equals.

ROBERTO GARGARELLA is Professor of Constitutional Law at the University of Buenos Aires and a senior researcher at the National Scientific and Technical Research Council (CONICET). He has published numerous books and articles, including *The Legal Foundations of Inequality* (2010), *Latin American Constitutionalism* (2013), *The Latin American Casebook: Courts, Constitutions, and Rights* (with J. F. Gonzalez-Bertomeu, 2016), and *Constituent Assemblies* (with J. Elster et al., 2018).

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PREFACE

The idea for this book came to me over the course of a few exciting yet strange hours one sleepless night in April 2019. By the end of the night, I felt sure of the path the book would follow and the content it would cover from start to finish. All that was left, so I thought, was the writing. In other words, I needed to start writing a book that was already finished. Curiously, this had never happened to me before. During this unique moment of unexpected lucidity, I also realized that I needed to change my surroundings in order to find some isolation, which meant leaving Argentina for at least a month, to devote myself entirely to the task of, at the very least, laying the foundations of the book, which I could complete on my return.

I felt it would be necessary to write a book on a subject that has long tormented me – the deterioration of constitutional democracy in our time. Moreover, the project I envisioned would look back on everything I have learned in thirty years of studying the primary elements of constitutionalism, such as political representation, checks and balances, judicial review, and protections for individual rights and minorities. I had in mind a concrete ideal to orient the project the same way compasses point north (or south): the law as conversation among equals. For the rest, I hoped to develop my ideas in critical dialogue with a recent theoretical current on the same subject that enjoys considerable prestige. In my opinion, this current confuses elements of constitutional theory with problems that have more to do with democracy. It proposes constitutional fixes (repairing faulty judicial review, for example, or restoring effective checks and balances) as if those were capable of compensating for the democratic deficit that ails us. Unfortunately, such fixes that adjust the constitutional structure without addressing the severe inadequacy of our democratic systems do not and cannot succeed. Our main problem these days actually has to do with democracy.

The silver lining of the generally dark and worrying panorama that drove me to write this book involves a number of recent phenomena that allowed me to recognize and assert the feasibility of my ideal of law as conversation among equals. These manifestations negate the traditional retort that such an ideal for social structure is no more than a utopian abstraction or illusion that can only work in the scenario of meetings held behind closed doors. We have now seen (and will later examine) examples of deliberative assemblies that have taken place in many Western countries. These include (which is even more relevant for my argument) inclusive, thorough public debates over controversial topics (such as abortion in Catholic countries like Ireland and Argentina). These examples reveal, for starters, the value, meaning, and importance of democratic dialogue – even in societies divided by political convictions or beliefs – around questions related to basic rights (a possibility that predominant political and legal theory, with its insistence on separating questions related to rights from democratic debates, has rejected). However, the significance of these examples goes further, for they also demonstrate that such experiments can produce real results. They show that public discussion is not only possible but can even prove effective in heterogenous, institutionally deficient societies.

In early October 2019, having wrapped up my classes and most of my other professional obligations for the year, I left for the United States. There I encountered supportive scholars with whom I could converse whenever necessary plus a network of excellent libraries where I could work for hours on end. Three in particular, the libraries at the University of Columbia (when I was uptown), at New York University (when I was downtown), and the New York Public Library (near Grand Central), made my stay one of austere yet intense happiness.

To my surprise, after a few weeks of working long hours that flew by, I finished the first draft of the book. Unexpectedly, long before planned, and as if the book had written itself, or as if someone had dictated it to me. I had not had to struggle with my ideas to disentangle my thoughts and make the arguments clear. (During those days in the US, Jon Elster confessed to me that it also happened to him sometimes: writing “downhill” – that is, sliding quietly. And he suggested me to stop writing when the exercise turned “uphill” – when writing became difficult or unpleasant). It was as if someone was reading the book to me and I was trying so hard to keep up that I entered into a sort of trance.

One last clarification about the book. This is a book aimed at discussing ideas, in which I present thoughts and arguments that I have been

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P R E F A C E

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maturing – with more or less fortune – for decades. To facilitate my writing and your reading, I decided not to burden it with scholarly quotes, references, and footnotes. This choice greatly facilitated my writing, making it – I believe – more fluid and lighter. I hope it also helps your reading and engagement with the discussions I present.

ACKNOWLEDGMENTS

At this point, and only at this point, I would like to express my gratitude to several of the people who helped me. I thank Carlos Díaz and Caty Galdeano for the friendly support that made the book possible. I thank Martin Abregú and Mirna Goransky for putting me up without asking anything in return. My thanks to Vicky Murillo and family, for always being there for me. I would like to thank the friends who kept me company during my stay: Christian Courtis, Jorge Contesse, César Rodríguez Garavito, Sergio Chejfec, Roberto de Michele, Patricio Navia, David Sekiguchi. I would like to thank Sebastian Guidi, Fernando Bracaccini, Patricio Kenny, and Emiliano Catán for their help. I would like to thank the scholars who met with me: Adam Przeworski, Jon Elster, Owen Fiss, Robert Post, Helene Landemore, Lewis Kornhauser, Joseph Raz, and Jeremy Waldron. Very special thanks to David Dyzenhaus, for his immense generosity and for the great opportunity of teaching a seminar on the book with him for the University of Toronto. I would also like to thank Leonardo Filippini for encouraging me to pursue this idea and to my friend Siri Gloppen, for her support and encouragement. Thanks so much Brad Hayes for a wonderful, “active,” and “participatory” translation! And thanks to Vanina Domizzi for the corrections. I would like to thank my friends in Argentina who give everything meaning to me. Thanks Paula for her curiosity. Thanks to my parents, my brothers and sisters, my extended family, and my nephew Juan. Thank you all.

This book is dedicated to the memory of my father, Nicola, an Italian immigrant