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Constituent power in a “community of equals”

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Abstracts

English Slovenščina
In this article, I use an ideal example related to what I call “a community of equals” to explore the difficult problems involved in the idea of constituent power. After presenting my version of this “egalitarian community,” I discuss some theoretical controversies that have emerged around the same matter, focusing on the work of Bruce Ackerman, Joel Colón-Ríos, Yaniv Roznai, and more particularly, Andrew Arato. I argue that discussions about constituent power should neither remain confined within the old paradigm of “sovereign constitution-making,” nor become exclusively studied under the alternative paradigm of “post-sovereign constitution-making.” Constitutionalism needs to recover its democratic character if it wants to keep its egalitarian promise intact.

Ustavodajna oblast v »skupnosti enakovrednih«. Izhajajoč iz idealnega primera, povezanega z »skupnostjo enakovrednih«, avtor v tem besedilu razišče probleme, povezane z idejo ustavodajne oblasti. Najprej predstavi svojo različico te »egalitarne skupnosti«, nato pa razpravlja o nekaterih teoretičnih polemikah, ki so se razvile okoli problema ustavodajne oblasti. Pri tem se osredotoči na dela Brucea Ackermana, Joela Colón-Ríosa, Yaniva Roznaija ter še posebej Andrewa Arata. Trdi, da razprave o ustavodajni oblasti ne bi smele ostati ujete v staro paradigmo »suverenega ustavotvorja«, prav tako pa ne smejo postati izključno del alternativne paradigme »post-suverenega ustavotvorja«. Namesto tega avtor zatrjuje, da mora ustavništvo ponovno najti svoj demokratični značaj, če naj obdrži obljubo egalitarnosti.

Index terms

Keywords: constituent power, democracy, deliberation, egalitarianism
Ključne besede (sl): ustavodajna oblast, demokracija, deliberacija, egalitarizem

Full text

1 Introduction

1 In chapter V of *The Concept of Law,* legal philosopher Herbert Hart explored the emergence of “primary” and “secondary” rules through the example of a primitive, imaginary community. He said (Hart 1961: 91):

> It is, of course, possible to imagine a society without a legislature, courts, or officials of any kind. Indeed, there are many studies of primitive communities which not only claim that this possibility is realized but depict in detail the life of a society where the only means of social control is that general attitude of the group towards its own standard modes of behavior in terms of which we have characterized rules of obligation.

2 In this paper, I employ a similar thought experiment in order to start reflecting upon the difficult problems involved in the idea of constituent power.[1] After presenting my version of this “original” community, I discuss some theoretical controversies that have emerged around the same matter in recent years.

3 Instances of constitutional creation represent exceptional moments. The emergence of these “constitutional moments” –to use Bruce Ackerman’s terminology- carry both great promise (that of becoming the highest expression of collective self-realization) and great threat (that those exceptional capacities are employed to curtail individual and collective freedoms). Paying attention to the crisis that affects modern political systems, some authors insist on underlining the exceptional importance of the democratic promise usually attached to constituent assemblies. Listening to the lessons of modern political history, many others insist on calling our attention to the risks posed by those assemblies, namely political oppression. Andrew Arato is an exemplar of a scholar who learnt the lessons of history. Consequently, his writings on constituent power are driven by the fears brought about by new waves of political authoritarianism. Arato talks about “the adventures of the constituent power”, and proposes replacing “the already deeply compromised, yet still influential Schmittian subject of such adventures” by a “pluralistic liberal as well as democratic *pouvoir constituant*” (Arato 2017: 418). In this paper, I use the example of the “community of equals” to critically examine the complex topic of constituent power, situate Arato’s view within the prevailing academic discussion on the matter, and offer some objections from an opposing perspective that is more in line with the democratic horn of this debate.

2 A “community of equals”

4 As anticipated, I want to begin this exploration by describing a situation like the one that Hart imagined – a situation that I shall describe as a “community of equals”. This community of equally situated individuals consist of a group of friends who decide to start a new life under new rules, trying to leave behind the “tyrannies” of modern, contemporary life; they want to live together, and work together cooperatively, as true friends. As a result, they decide to move to the countryside, far away from the city. They are going to cultivate their own land and live through the fruits of their own work.

5 Members of this community of equals understand, however, that they need certain basic, formal rules to organize their life together. As Hart (1961: 92) put it, while describing his own imagined community:

> It is plain that only a small community closely knit by ties of kinship, common sentiment, and belief, and placed in a stable environment, could live successfully by such a regime of unofficial rules. In any other conditions such a simple form of social control must prove defective and will require supplementation in different ways.

We can now start thinking about what members of this community of equals would do to regulate their own lives. In other words, we can start thinking about the way in

which members of this community would use their constituent power. Let us begin thinking, like Hart, about the creation of “primary rules”, this is to say the rules that either forbid or require certain actions and can generate duties or obligations. It seems obvious to me that during this initial period -let us call it “time-one”- all members of the community have an equal right to deliberate and decide which basic rules to choose to regulate their community: they are friends, they are fundamentally equal, and they are about to decide how to organize their life together for the coming years.

7 What specific rules could these people choose? In principle, it seems that they have complete freedom to select any rules they want. For the sake of simplicity, imagine that they choose a (“primary”) rule saying that “all those over 18 years old must work in the shared lands”, or another stating that “nobody is required to work on Sundays”. Clearly, “all those potentially affected” by these or other similar rules may reasonably claim a right to be heard (say, the right to offer their own views and to discuss the views of others) on the matter. The selected rule may result under or over-inclusive, too demanding, not demanding enough, or may be mostly favorable to those having certain skills or those belonging to a certain religion, etc.

8 Now, could this community of friends change its basic rules after having adopted them in time-one? Imagine, for instance, that some of the old members of the community express their desire to provide formal education to their children. Suppose that, given that all adults are working hard in the plantation (in agreement with the established rules), nobody has the time and energy to perform additional work as a teacher or professor. Consequently, members of the community may decide to adjust some of their original rules to make room for the new demands. They are now going to change their initial distribution of labour. Could someone object to this decision? Could someone reasonably claim that such adjustments are in fact precluded because people already used and exhausted their constituent power? I do not think so. There is no authority superior to theirs as members of the “community of equals” have their self-governing powers intact. Nobody, I submit, can prevent them from rethinking what they wrote or modifying their initial agreement in the way they wish. In a community of equals, where people have different ideas and take each other seriously, the different members tend to think together, discuss together, and decide together, giving each other the opportunity to correct their previous omissions and mistakes. The entire point is to have a better life together, respecting each other.

9 But, what if members of the “community of equals”, at time-one, decided to make certain (constitutional) changes impossible, that is, decided to prevent certain future adjustments? What if they had decided, at time-one, to abdicate their powers to change certain rules? There are many things to say in this respect, but in the following paragraphs I shall only be able to refer to a few of them. To begin with, it is true that given the scope of their powers nothing prevents members of the community from adopting any kind of rule, including one saying that certain rules are unchangeable. However, it also seems clear that members of the “community of equals” should always have the chance to amend their wrongs if they realize that they made a mistake or adopted an inadequate decision at time-one. Why couldn’t the same people who wrote a certain rule at time-one use the same procedure at a future stage to correct their initial failures and improve their way of life?

10 To say this is compatible with declaring that we care especially about certain goods and interests and consequently decide to provide extra protections to these goods and interests. For instance, given the lessons learnt from history, we could make it clear that in our community nobody is authorized to cause serious harm to others and, as a consequence, establish sanctions for those who inflict those harms.

3 Institutionalizing the “community of equals”

11 Let us continue examining the possible evolution of the “community of equals.” Most probably, and little by little, our initially small community will grow. The number of members will probably increase, either because we have children or because other people -perhaps excited by the way our project works- ask us to join our community. This increase in numbers will certainly come together with an increase in the needs, differences, and conflicts among the members of our community, which may make our “old” (say, conversational, egalitarian and horizontal) methods of solving conflicts impractical.

12 Consequently, at this point it may become necessary to create some “secondary rules” - rules establishing procedures through which “primary rules” can be introduced, modified, or enforced. As Hart put it, the introduction of “secondary rules” may be necessary in order to confront three of the different problems derived from the existence of “primary rules”. The first is the problem of “uncertainty”. In Hart’s (1961: 92) words, “if doubts arise as to what the rules are or as to the precise scope of some given rule, there will be no procedure for settling this doubt, either by reference to an authoritative text or to an official whose declarations on this point are authoritative”. The second is the problem related to the “static character of the rules”, this is to say, the fact that we lacked “means … of deliberately adapting the rules to changing circumstances”. Third, is the problem of “inefficiency”, which derives from “the diffuse social pressure by which the rules are maintained”, and which originates “disputes as to whether an admitted rule has or has not been violated” (Hart 1961: 93-3). In what follows I will consider just a few of the many questions posed by the decision to adopt “secondary rules”.

13 My first observation concerns the *relationship between original and delegated authorities*. The fact that members of the “community of equals” decided to create, say, a “judicial organ” or a “legislative branch” in order to alleviate their duties, should in no way be understood as an abdication of their authority and powers. They are organizing this community to improve their way of life, and in that process they may find it reasonable to organize a division of labor that allowed them to continue doing the things they wanted to do. The “delegated” authorities should then follow the directives received from the “original” authorities and act according to the procedures that were established for their labor. Now, once they have accepted their functions, they have no right and no reason to take the place of those who appointed them (nobody offered them that possibility), or ignore their superior authority, or act as if their actions were unconstrained. In extreme cases of tensions or contradictions between their own will and the community’s authority, one could expect-delegated authorities should consult the opinion of those who appointed them. If not, members of the “community of equals” could just recall their authority and solve the conflict according to their own criteria (seemingly, this was Thomas Jefferson’s solution to the matter).[2] To illustrate this point let us think, for instance, about a case where the “community of equals” required all adult members to work in their common lands. A family then complained before the local authorities because they could not find a schoolteacher for their son, and the established authorities simply dismissed this petition by arguing that it was not supported by the prevailing “primary rule”. Facing this situation, the “community of equals” could get together, in an extraordinary meeting, and decide to change the existing rule to make it more flexible and adapt it to the new circumstances. Expectedly, this back and forth between “delegated” and “original” authorities should be developed in a “conversational way,” this is to say in a way that would allow “original” and “delegated” authorities to “continue their conversation” about how to deal with public affairs. They need to be able to recognize their new problems and their old mistakes, and also need procedures that help them find solutions to those difficulties.

14 The whole situation raises at least two additional and significant issues, which I should briefly consider. One of these issues refers to the problem of *legal interpretation*. Herein, I shall only say, first, that this more developed institutional structure (the one that includes “secondary rules”) is supposed to work in ways that honor the fundamental, conversational, and egalitarian commitments that have always

characterized the community. In this community, conflicts are not solved through violence or the mere imposition of authority, but through collective dialogue –in the community of equals it has always been like this. For this reason, the institutional structure needs to be designed in ways that make the continuation of the ongoing collective conversation possible. The structure of controls must be organized so as to alert members of the community about the presence of injustices, or cases of unfairness, or even simply misunderstandings about the rules that organize their life together, and help them solve those conflicts in ways that respect the principles that organize the community –principles of equality, equal respect, collective dialogue, etc.

15 The other issue has to do with *institutional abuses*. It seems clear that the risk of institutional abuses increases dramatically when the “community of equals” delegates its authority. These new (delegated) authorities come to enjoy enormous powers (some of them having the capacity to decide on matters that affect the life and liberty of others; some of them in control of the budget; some others enjoying significant coercive powers) within the context of an institutional structure that gives them ample liberties. In fact, these “representatives” or “delegated” officers come to exercise their ample powers under conditions that make it difficult for “We the People” to reassume its original authority. Moreover, the system of political representation has not developed in an attractive way: we know (history has taught us) how difficult it is to make representatives accountable and how difficult it is to ensure the representation of the diversity of interests, viewpoints and demands that characterize modern societies.

16 Unsurprisingly, all these difficulties tend to get much more complicated in contexts characterized by the presence of fragile institutional structures or profound economic inequalities, which usually work together and reinforce each other. In those situations, abuses tend to become the rule more than the exception, and the entire institutional structure (this is to say our constitutional democracies), tend to deteriorate almost irreparably.[3]

17 Given the high political value of what is at stake, and the enormous margins of discretion finally enjoyed by our public officers, “We the People” come to confront at least two rather obvious and extremely serious risks. On the one hand, we face the risk of getting high public officers that, invoking democracy (invoking the democratic will of the community), create a Constituent Assembly so as to erase existing checks and strengthen their own powers. On the other hand, we run the risk of the controlling authorities, particularly judicial officers, invoking the Constitution –its identity, its real meaning, its implicit meaning– in order to advance their own interests, even if it is at the cost of undermining democracy.

18 I would like to conclude this introduction by raising two issues concerning the “connection” between my ideal picture of the “community of equals” and our actual institutional life. First, the ideal example provides a normative standpoint that allows us to critically examine our actual practice and suggest changes to it. It seems clear to me that given the huge distance that separates the ideal world and our reality, there is a long way to go in adjusting and re-shaping our institutions in feasible ways. Second, towards the end of this article I will refer to some real-life examples (i.e., citizens assemblies and participatory Constitutional Assemblies) that suggest that a lot can be done in the direction of having more inclusive and deliberative “collective conversations” on public matters. Those actual experiences suggest that the goal of starting an “ongoing collective conversation on public issues” does not just belong to the realm of impossible utopias.

19 In what follows, I shall start connecting the ideal and the real by critically examining different institutional proposals, developed by contemporary constitutional scholars, from the perspective of a “community of equals”. Specifically, I shall use the ideal of a “community of equals” to examine four different democratic approaches to the notion of “sovereign power” offered by Bruce Ackerman, Andrew Arato, Yaniv Roznai, and Joel Colón-Ríos.

4 Constituent power: contemporary issues

4.1 Constitutional moments and “informal” constitutional reforms

20 Issues related to constituent power and the scope and limits of constitution-making processes have received enormous attention in recent decades. One of the most innovative approaches to the matter came from American legal scholar Bruce Ackerman. Ackerman began studying the subject trying to make sense of the substantive (constitutional) reforms introduced by the “New Deal” and the strong resistance that these changes received, at least initially, from the judicial branch. In his important work on the subject, Ackerman admitted that the reforms promoted during the New Deal implied the introduction of constitutional changes, but at the same time defended the validity of those (informal) amendments (Ackerman 1991). His point was that Constitutions could not only be reformed through the formal procedures established by the same Constitution, but also informally, through processes of “higher lawmaking”. These changes would take place during “constitutional moments,” that is, during periods of heightened concern and deliberation about the Constitution. (Ackerman 1991; Choudhry 2008).

21 From the perspective that was here developed, Ackerman’s view is certainly attractive: it provides an original and appealing description of how actual societies may create and change their basic law –one that avoids unnecessary obscurities, mythologies, and legal dogmatisms. The ideal of the “community of equals” seems to get along well with Ackerman’s theory in many respects, for example, in the way it recognizes the superior authority of “We the People,” in the distinction it proposes between “constitutional politics” and “normal politics”, and in its flexible approach to constitutional change. There are, however, also significant differences between the “community of equals” and Ackerman’s view. For instance, the ideal that was here presented would transcend Ackerman’s dualism between “normal” and “constitutional” moments (it would urge us to recognize the presence of “intermediate” constitutional moments, rather than a binary and extreme opposition between, say, situations of “normal political life” and “wholly exceptional political moments”). In addition, the ideal of the “community of equals” does not consider situations of “normal politics” (say, situations where people do not mobilize or take an active role in politics) as the mere product of the people’s preferences (say, as the product of the people’s political apathy). Assuming that political apathy is in fact the “endogenous” product of a counter-majoritarian political system, it would encourage people to engage in politics and/or create institutional incentives for promoting their political participation. In other words, the ideal of the “community of equals” would challenge many of the implicit conservative (or pro-status quo) elements present in Ackerman’s approach.

4.2 Unconstitutional constitutional amendments

22 Ackerman’s theoretical view has both improved our understanding of constitutionalism and stimulated our discussions about the scope and limits of constitutional reforms. In line with these developments, the issue of constitutional amendment has begun to receive extraordinary attention within the last few years (see for example Albert 2009; Dixon & Landau 2015; Isacharoff 2011; Roznai 2017). In a recent interview, Yaniv Roznai, one of the leading figures in this discussion, summarized the matter in the following way:

> The problem of ‘unconstitutional constitutional amendments’ has become one of the most widely debated issues in comparative constitutional theory, constitutional design, and constitutional adjudication. [There is an] increasing tendency in global constitutionalism to substantively limit formal changes to constitutions. The challenges of constitutional unamendability to constitutional theory become even more complex when constitutional courts enforce such limitations through substantive judicial review of amendments, often resulting in the declaration that these constitutional amendments are ‘unconstitutional’.4

23 As expressed in his main work on unconstitutional constitutional amendments, Roznai’s main hypothesis is that, “any organ established within the constitutional scheme to amend the constitution, however unlimited it may be in terms of explicit language, cannot modify the basic pillars underpinning its constitutional authority so as to change the constitution’s identity” (Roznai 2017: 11). For Roznai, the power to amend the Constitution (a “secondary constituent power”) entails strong limitations - some of them “explicit” and some of them “implicit”. The “explicit” limitations would be (in principle, but only in principle) easy to recognize, given that they are openly defined by constituent authorities and, therefore, usually incorporated into the constitutional text. Meanwhile, “implicit” limitations would be more difficult to discern. These would be limitations related to the “basic principles” of the Constitution –for instance those that define its “identity” (Roznai 2017: 119).

24 Now, from the perspective of the “community of equals”, the result of Roznai’s proposals is still unattractive. We can agree with him on the fact that the delegated power is a constrained power, and we can also declare, with him, that those constraints need to be respected and enforced. However, the ideal of the “community of equals” would urge us to pay special attention to the actual functioning of our institutional system. In particular, the ideal of the “community of equals” would call our attention to the institutional risks derived from Roznai’s recommendations (Roznai seems to be aware of the significant difficulties generated by his approach). To begin with, his suggestions about “implicit” limitations to our amending powers seem clearly threatening. Without clear directives in this respect, we open the possibility that judicial authorities use their powers arbitrarily, precisely in relation to an issue that requires our greatest care and attention. This problem obviously extends to his views on “explicit” limitations: these latter limitations also need to be interpreted and tend to be particularly difficult to interpret, which promises to create additional, and very serious, institutional difficulties. As Michael Hein stated in his review of Roznai’s work, “[I]f, say, 'human dignity, democracy, and the rule of law are declared unamendable' (as, for example, in the German Basic Law), how can we unequivocally identify what these principles mean and whether an amendment draft violates them or not?” (Hein 2017: 292). In my view, the institutional risks generated by Roznai’s suggestions are unnecessarily high, and also particularly serious, given the sensitive domain in which they are supposed to be applied (i.e., issues related to the scope and limits of the power of the different branches), and even more clearly in the context of our existing institutional fragilities.

4.3 Post-sovereign constitutionalism

25 My previous criticisms of Roznai’s views were based on a strong skepticism in relation to the working of our institutional system, particularly in the context of very unequal societies. This skepticism, which derives from the teachings of history, urges us to be extremely cautious and to make all of the necessary efforts to avoid a new wave of discretionary decisions (by the controlling institutions). It is precisely within this context that Andrew Arato's work on constituent power becomes so interesting and valuable. In fact, if there is one concern that seems to be guiding Arato’s work on the matter, it would be his concern with the production of authoritarian abuses. Actually, Arato began to write about these issues with an eye poised on the transition processes

that were taking place in Eastern Europe after the fall of the “Soviet imperium”. He feared that “inspired in an old notion of the *pouvoir constituant,* a movement…could lead to the rejection and suppression of all constituted legality and thus put the recently organized civil society at the mercy of a new discretionary power” (Peruzzotti & Plot 2013: 14). As a consequence, his analysis and institutional recommendations began to revolve around what he called “post-sovereign” constitution-making. To understand0020his view on the matter, it may be necessary to distinguish it from the approach against which it is contrasted, namely the “sovereign” constitution-making paradigm.

26 For Arato, sovereign constitution-making involves “the making of the constitution by a constitutionally unbound, sovereign constituent power, institutionalized in an organ of government, that at the time of this making unites in itself all of the formal powers of the state, a process that is legitimated by reference to supposedly unified, pre-existing popular sovereignty” (Arato 2017: 31). In his criticisms of the “organ-sovereignty-approach” Arato was mindful of a long theoretical tradition, which he roots in Maquiavelli’s reference to a violent founder, Rousseau’s view about the “sovereignty of the people”, and Sieyès and Carl Schmitt’s defense of state sovereignty (Barczentewicz & Schneider 2017: 220). The Schmittian alternative appears as Arato’s *bête noire*. As he puts it in one conclusive paragraph of his book (Arato 2017: 418), his own proposal seeks to replace “the already deeply compromised, yet still influential Schmittian subject of such adventures [adventures of the constituent power] by a pluralistic liberal as well as democratic *pouvoir constituent*”. For Arato (2017: 419), “revolution can and should be freed of the burden of sovereign constitution making, of the danger of sovereign dictatorship”.

27 The “post-sovereign” paradigm that Arato is trying to advance, is based on the exclusion of “any single agency, institution or individual that claims to embody the sovereign power and authority of the constituent people” (Arato 2017: ix). His approach is more in line with what Claude Lefort called an “institutionalization of conflict”. This view would require the presence of many different institutional actors participating at different levels and at different points of a “multi-stage” process, where none of those actors exercise a decisive influence. The South African 1993-7 constitution-making process, which included initial roundtable negotiations, an interim constitution, and a new constitutional court, appears here as Arato’s favorite example.

28 Now, from the perspective of an egalitarian, collective dialogue, it is clear that Arato’s approach implies a choice for constitutionalism (and the limitation of powers), over democracy. The whole idea of thinking and discussing collectively, among a diverse and heterogeneous people, which plays a central role in the “community of equals”, seems to be dissolved in the name of preventing abuses. Arato wants to avert the threatening specter of “organ sovereignty” with its unbound, unlimited, unconstrained power. From the perspective of the “community of equals”, this seems an undoubtedly crucial, but still limited goal: our egalitarian ideal demands public decisions be based on an inclusive deliberative process. If collective dialogue plays such a central role within the model of the “community of equals”, it is because of the certainty that collective debate would best maximize our ability to decide impartially, this is to say in a manner properly respectful of the interests of all affected parties. To return to our previous example, we would not have learned about the particular needs of some members of our community if these members did not have the chance to voice their demands in the decision-making process. Thus, one could anticipate that we would likely have insurmountable difficulties recognizing the demands of certain indigenous communities if we lacked the chance to hear their voices in an appropriate public forum. In fact, it was only when workers found an actual place in constituent assemblies that their views and demands began to receive constitutional recognition (this is what happened in Mexico 1917, for example, when –for the first time in history members of the working class were allowed to participate in a Constitutional Convention). Let me clarify my point: I am not trying to say that the only way for a certain group to get its voice heard is by allowing this group to take part in a

Constitutional Convention. What I am saying, is that we need to design our institutional system in ways that allow and favor the different voices, claims, and complaints in society to be heard, to participate “meaningfully”, and to decide in the public forum.

29 Arato’s favored “multi-stage” process promises to greatly reduce the risks of power abuses, but only at the cost of seriously undermining democracy –an element that plays a central role in the “community of equals’” approach. Arato’s approach does not give us clear ideas regarding who these people (those who participate at the different stages of the constituent process) are, who they represent, or what legitimacy they have. In addition, the “multi-stage” process seems unable to guarantee proper instances of collective deliberation among (a fair representation of) “all the potentially affected” or ensure that the diversity of voices existing in society will get the place they deserve in the constitutional debates. Most probably, and according to the lessons that we can derive from the “multi-stage” processes that we came to know, the voices of the disempowered would continue to be unattended by these different bureaucratic and weakly representative institutions.

30 A similar line of criticism is put forward by Melissa Williams. For Williams (2019: 163-164),

> Arato’s well-developed institutional model of post-sovereign constitution-making falls short of a full-blown normative theory of constituent power because it lacks the crucial conceptual piece of representation that played such a potent role in Schmitt’s theory. What are the normative criteria that should apply to the multiple representative institutions (the round tables and constituent assemblies) that share constituent power? On what ground can they claim legitimate authority to exercise constituent power?

31 Melissa Williams also properly affirms that “the normative claim to legitimacy” cannot simply rest “on the democratic quality of the constituent assembly, the openness of the constitution-making process to the contestatory challenges originating in the wider public sphere, the people out of doors, and the power of both to change the constitution” (Williams 2019: 164). The fact is that “[from] a democratic point of view” the legitimacy of the conventions and round tables is ‘clearly lacking’ … [w]hy is the round table a legitimate representation of the people at all even if we accept the Lefort inspired idea that the people must be represented in a multiplicity of institutional forms in order to resist the temptation of reading its identity as settled or unitary?” (Williams 2019: 164).[5] In sum, the question is how to reconcile Arato’s “multi-stage” proposal and a strong notion of (deliberative) democracy.

4.4 Weak constitutionalism

32 My criticisms to Arato’s influential and important work confirm that the “community of equals”’ example prefers the democratic over the constitutionalist approach to constituent power. In this respect, the view that I propose resembles the one advanced by Joel Colón-Ríos in his book *Weak Constitutionalism*.

33 According to the particular democratic approach to constitutionalism advanced by Colón-Ríos, a democratic community should neither privilege “the supremacy of [correct abstract principles] through a constitution that is difficult or impossible to challenge”, nor simply defend “the supremacy of the legislature by allowing it to alter the constitution by simple majority rule”. For this view, democracy is mainly expressed through “constituent episodes in which new or radically transformed constitutions are produced through the most participatory mechanisms possible” (Colón-Ríos 2012: 11). Weak constitutionalism “does not insist on the preservation of particular constitutional forms, but seeks to create the conditions of possibility for their occasional democratic transformation” (Colón-Ríos 2012: 11). This renewed approach to constitutionalism would “allow us to think about … certain episodes of heightened popular support for constitutional change that warrant and require the use of extraordinary and

participatory procedures [because] there are times in the life of a constitutional regime when democracy should trump constitutionalism” (Colón-Ríos 2012: 168).

34 I tend to agree with this view, and more generally, with Joel Colón- Ríos’ approach to constitutionalism. I agree with the place his theory reserves for democracy, with the importance that it assigns to popular participation and mobilization, with the idea that “democratic legitimacy requires…mechanisms that facilitate the exercise of the people’s constituent power when fundamental constitutional changes are needed” (Colón-Ríos 2012: 182), and with the idea that referendums, plebiscites, and the like do not properly satisfy the demands of participatory democracy, particularly because they do not facilitate the people’s “proposing, deliberating and deciding” on constitutional matters (Colón-Ríos 2012: 91). We need more opportunities for horizontal and inclusive citizen deliberations, which neither the roundtables we know, nor the traditional system of direct democracy, ensure in a significant way.

35 Despite these agreements, my view differs from Colón-Ríos’ democratic view in at least the following two ways. The first difference relates to a point that is also present in Arato’s criticisms against Colón-Ríos’ view. For Arato, Colón-Ríos’ “radical-democratic model” seems problematic because (among other reasons), “the popular constituent power is ever ready to enter the political sphere in procedurally undetermined and unlimited forms” (Arato 2017: 411). He illustrates this criticism using some of the opinions presented by Colón-Ríos himself regarding Latin American constituent assemblies. I share Arato’s concern in this respect, even though I do not think that the problem he mentions is inherent to the structure of Colón-Ríos’ argument. My point is this: following the previous analysis about the “community of equals,” I tend to be much more skeptical regarding the possibilities of “constitutionalism from below”. I agree with that objective (having a constitution-making process driven “from below”), and I would personally support such experiences “from below” in the case they took place. However, I tend to be suspicious about the chances of creating successful “constituent assemblies from below”, particularly in the context of deeply unequal and unjust societies – like most Latin American societies today. My skepticism was not shared by Joel Colón-Ríos, at least when he wrote his book on *Weak Constitutionalism*. In fact, in the section dedicated to “constituent assemblies convened from below”, and after describing his ideal model of constituent assemblies, he concluded, “[t]his is, in fact, the way in which the constitutions of Venezuela, Ecuador and Bolivia conceive of this extraordinary body” (Colón-Ríos 2012: 162). I do not see reasons for optimism, and –I must confess– I did not find those reasons a decade ago when I was writing about those experiences (Gargarella 2013). In the context of unjust and unequal societies, where political power is also distributed unequally, we have no reason to expect political authorities to promote radical constitutional changes – particularly changes that curtailed, rather than increased, their own assigned powers. One question to Joel Colón would then be: could we have expected –say, by the end of the 20th Century– to obtain egalitarian outcomes from extremely non-egalitarian structures? Was it then reasonable to expect a more democratic distribution of power, from assemblies that were finally controlled from above? (I am asking this because Joel Colón was more optimistic than many of us, regarding the promises made by Latin America’s “participatory constitutionalism”, at the end of the 20th and the beginning of the 21st Century).

36 Secondly, and against what Colón-Ríos maintains, my impression is that the main work for democracy lies “at the level of daily governance”, through inclusive acts of collective participation, public discussion, and political decision. And this should be so particularly in the light of recent experiences of “constitution-making from below” (such as those that Colón-Ríos takes as the main illustrations of his view). Once and again, those experiences have shown that the great principles and rules that were agreed “at the level of the fundamental law”, such as the aboriginal, anti-market principle of sumak kawsay, were then violated in actual practice, “at the level of daily governance” (I shall come back to this example below). The surprising and challenging anti-market principles that were incorporated into some Latin American Constitutions

in recent years were then totally subverted by the traditional institutional structures in charge of interpreting and enforcing such principles (for instance, Ecuador’s Constitutional Court considered that the sumak kawsay principle was in fact compatible with the practice of “fracking” and other brutal forms of extraction of natural resources). In sum, we should call for more opportunities for collective participation and discussion in the daily life of our democracies; we should maintain the collective, daily, ongoing conversation about our constitutional fundamentals alive.

5 An ongoing, unfinished conversation

37 According to the view that have I presented in this paper, our actual political conversations should try to “mimic” an ideal conversation like the one defined by the “community of equals”. Our ongoing conversation requires an institutional structure that makes a collective, reflective, egalitarian, and inclusive dialogue possible. This institutional structure should encourage members of our community to get together, exchange arguments, protest, and demand what they believe is just and what they think they deserve. Also, and very significantly, this institutional structure should include numerous instances of control and checks upon power: our brutal political history taught us tremendous lessons in this respect. We know that, in the absence of a proper structure of checks and balances, every instance of power is likely to become the object of unacceptable abuses. But for similar reasons and following similar historical lessons, we also know that those instances of control also entail serious risks, in this case related to the undermining of the democratic principle.

38 At present, we face a very difficult institutional panorama, where authoritarian leaders tend to impose their will in the name of democracy and controlling authorities tend to undermine democracy in the name of the Constitution. Within this context, the perspectives of the ideal of a “community of equals” are worrisome. In the prevailing context of “democratic fatigue,” “democratic erosion,” and “democratic backsliding” (Ginsburg & Huq 2018; Graber, Levinson & Tushnet 2018; Levitsky & Ziblatt 2018) the only reason for hope comes –I suggest- from the numerous deliberative assemblies that have been taking place in different parts of the world in recent years. I am referring to examples such as the Constitutional Convention of Australia in 1998; the Citizen Assembly on Electoral Reform in British Columbia (Canada), 2005; the Citizen Assembly on Electoral Reform in Ontario (Canada), 2006; the Dutch Citizen Forum, 2006; the Constitutional Reform in Iceland, of 2009; the Constitutional Convention of Ireland, of 2012; and the Citizen Assembly of Ireland, 2016.

39 These examples offer some important lessons, which we should take seriously (lessons that go beyond some of their most interesting features, including the use of mechanisms of lottery, or the presence of lay citizens in place of experts and professional politicians). What these experiences demonstrate is, first, that it is possible to institutionalize the mechanisms of deliberative democracy, a possibility that many years ago too many theorists depicted as an abstract and rather absurd utopia. They also showed the importance of establishing democratic procedures, and the radically different results that derive from processes of informed, transparent, collective debates and other instances of popular intervention in politics - from the mere acclamation to what the leader does, to referendums and plebiscites that are not preceded by informed debates, and that prevent people from discussing and deciding the details of the proposals under consideration.

40 Finally, these recent instances of inclusive deliberation are important because they help us refute some polemic claims that have unfortunately managed to gain broad adherence within the social sciences. First, they help challenge the idea that common citizens cannot gain information and knowledge and then make reasonable and rational decisions over complicated technical issues (i.e., the electoral system). Second, they help us challenge the idea that people are not usually motivated to participate in politics

–that they are not interested in participating in discussions about complex public issues. Third, they overturn the idea that deliberation is useless because people don’t change their initial views, particularly as regards issues where their identity or religion is at stake (claims that were notably denied by the Irish or Argentinean debates on abortion and gay marriage). In addition, they help debunk the idea that deliberation is impossible in the context of politically polarized and socially divided societies.

41 Discussions about constituent power need to be substantially revised. They should neither remain confined within the old paradigm of “sovereign constitution- making,” nor become exclusively studied under the alternative paradigm of “post-sovereign constitution-making.” Constitutionalism needs to recover its democratic character if it wants to keep its egalitarian promise intact. The bad news is that recent decades of “democratic erosion” cast doubts on the possibility of re-igniting the democratic engines of constitutionalism. The good news is that, in part as a response to that “democratic erosion”, in recent years we have seen the emergence of significant and successful deliberative assemblies. It is still not clear, however, which one of these counter-acting forces will finally prevail.

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Notes

1 My “community of equals” also draws from Gerald Cohen’s 2009 wonderful book *Why not Socialism*, and the “camping trip” example he presents in that work.

2 See also King 2019.

3 Of course, I understand that these claims, as many others in this very short review, assume many things and would benefit from further elaboration. Unfortunately, I cannot carry out that additional work at this stage. But I take it that many of my assumptions, here and in other cases, simply derive from the “lessons coming from history” -say, in the same way that John Rawls would derive the importance of “ensuring the widespread ownership of productive assets and human capital” from the (historical) assumption that otherwise “a small part of society” would end up “controlling the economy, and indirectly, political life as well” (Rawls 2001: 139).

4 Daly 2017.

5 Arato (2019) admitted appreciating the force of these criticisms, with only some reservations.

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