Justice and Democracy: Two Centuries of Unfinished Discussion (With a Coda on Chile)

Justicia y democracia: Dos siglos de inacabada discusión (Con coda pensando en Chile)

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INTRODUCTION

In what follows, I would like to reflect on the long and unfinished dialogue that has been developing, for decades, around the justification of judicial review.

As we will see, from the very moment that one begins to think about the possibility of judges invalidating legislation, the power of judges imposing their criteria on the meaning of the Constitution, above politics, begins to be questioned. From then until today, from the center and from the periphery in which many of us find ourselves, we have been talking about and debating critically, sometimes irritatingly, about the scope, limits and possibilities of judicial review. I will now present a brief reconstruction of the theoretical dispute that has taken place on the matter, from the late 18th century to the present day. To do so, I will divide the evolution of this troublesome argument into 5 stages or movements –which, like any other classification, are somewhat arbitrary–. I offer this classification as a provisional proposal, relating each of these stages to one or more judicial decisions, some authors, and some particular points of discussion, which will help us to better recognize –or so I hope at least– the evolution of this conversation.

THE FIVE STAGES

i) The foundational moment

The foundational moment of the debate around judicial review appears in the United States at the time when what would later become the first Federal Constitution of that country was being finished. At that time, many of the critics of what was still a draft Constitution (which needed to be ratified in all the different states before becoming the nation's Constitution), began to focus part of their objections on what they saw as an affront to the Federalist spirit that inspired (and that had, in fact, originated) the constitutional conversation. For many, the decision to have a common court –a Supreme Court– with the power to invalidate the decisions that could be adopted within each of the states of the Union, was an intolerable insult. There were several *Anti-Federalist* critics (as they were called) of this budding arrangement, who

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fought the *Federalist* initiatives at every step. Among such critics, one of the most prominent and who most insistently objected to the proposed judicial structure, signed his articles as *Brutus* (a political activist whose identity is still not entirely clear).

Faced with that line of criticism, Alexander Hamilton was the first to recognize the seriousness of those concerns, and to try to meet them. Hamilton would address such concerns in a magnificent text, now known as *Federalist No. 78*. In it, with extraordinary lucidity (and beyond his errors and conservative biases) Hamilton tried to account for all the criticisms that he recognized as relevant against the constitutional design proposed by the Federalists in matters of judicial organization. Among the many subjects that he deals with there, with exemplary depth and conciseness (the provenance and training of judges; the reasons for their tenure; the relationship between the different branches of power; the forms of judicial appointment, etc.), Hamilton also refers, for the first time, to the "democratic" criticism insinuated by "Brutus" against judicial review. It is Hamilton, then, who, before anyone else, comes out to offer a forceful reply to the alleged lack of legitimacy of judges to review the validity of legislation. He states then, almost in passing (and thinking of the objections of "Brutus", although without mentioning him):

> the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power.

Hamilton then offered the first great response to critiques of judicial review. And it was a great response for the character of his argument, which in a pioneering way tried to account for the "democratic" problem. What Hamilton argued, in fact, was that there was nothing anti-democratic in the judicial invalidation of legislation, as long as said invalidation was based on the contradiction between the questioned legislative act and the Constitution. And that, due to the fact that it was the Constitution, and not the laws, that contained the true "will of the people." In a system of constitutional supremacy –Hamilton concluded– it was simply obvious that the will of the people expressed in the Constitution should prevail, rather than the "delegated" will of the legislature, occupied by mere occasional deputies of the people. In his words:

> If there should happen to be an irreconcilable variance between the two [the Constitution and the laws] that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Expressed there, in those few lines, Hamilton's argument would run successfully, triumphantly, almost unquestioned, through much of the early constitutional discussion in the Americas. This is so, in particular, beginning with the reception of said argument, in 1803, in the historic decision written by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137. Marshall's opinion, more than Hamilton's argument, was what went down in history, but the truth is that everything important that Marshall noted in his decision was already

contained in Hamilton's reasoning which, at any rate, Marshall crowns in his opinion, arguing that,

> It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

Notably, with *Marbury v. Madison*, the debate that opened up intensely in 1787 around judicial review ends up being violently closed, as if the previous discussion had been unwarranted, or had been definitively resolved through conclusive proof of the argumentative errors of the critics of the time. In Robert Cover's terms, *Marbury v. Madison* appears as a *jurispathic* decision that was imposed by suppressing alternative readings, instead of enriching the then nascent and still vigorous debate.[1] Until late in the 19th century, this debate would remain basically dormant, which allows us to speak of this first and great foundational stage of the discussion on judicial review as a stage of interrupted debate after Marshall's decision.

ii) The consensus begins to crack. The "Lochner era" and the rebirth of the interventionist state

The second great stage of this discussion opens when the overwhelming silence imposed by *Marbury v. Madison* begins to crack –something that starts, saliently, at the end of the 19th century, that is, almost a century after the debate first opened. There are many reasons that allow us to understand the breakdown of that consensus, but some of them have to do with the leading role that the executive and legislative branches claimed for themselves in the face of a *pax economica* that had deteriorated over the years. Indeed, between the end of the 19th and the beginning of the 20th centuries, the old social and economic order –which was summarized in Latin America in the notion of *Order and Progress*– has deteriorated, and social conflict begins to intensify, perhaps unexpectedly, in the most varied geographical areas. This breakdown of the old order seems to call for the active intervention of the State, the only agent capable of coordinating efforts and wills in pursuit of the reconstruction of a society in crisis.

In the United States, the "welfare state" was born at that time –which would promote the policies of the so-called *New Deal*– intending to face the situation of social crisis through strong government intervention in the economic organization of the country. Notably –and this is the point that I am most interested in highlighting now– the judiciary moved to the forefront at that time in order to stop the "regulatory onslaught" of the state. Time after time, since then, the United States Supreme Court invalidated political initiatives –initiatives usually resulting from an agreement between the legislative and executive branches, which came to have wide popular support. The fact that, for years, it was the judiciary –embodied by the Supreme Court– that prevented the implementation of the New Deal; opposed presidential initiatives (President

[1] COVER (1983).

Roosevelt's in particular); and dangerously delayed the exit from the crisis, generated a strong wave of questioning directed at the renewed and active practice of judicial review.

The case that encapsulated the anti-political/anti-regulatory spirit of the time was the one decided in *Lochner v. New York*, 198 U.S. 45 (1905). This case inaugurated a remarkable series of decisions aimed at invalidating (in almost two hundred cases) different efforts by the state to intervene in the economy. What happened in the United States took, finally, to its most emphatic expression (and one of the most serious ones) a phenomenon that in similar terms was taking place, more or less at the same time, in other countries around the world (in Argentina, for example, in those years, quite similar events took place, with a state increasingly regulating the economy, and a Court –chaired by Antonio Bermejo– which, in the name of "founding" ideals, and an originalist reading of the Constitution, persisted for years in delaying the consolidation of the "interventionist state"). Finally, the "judicial onslaught" would end in failure and –in the United States and around the world– the goal represented by the New Deal would eventually prevail. In this regard, the decision in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, issued in 1937 (more than 30 years after *Lochner*), would mark definitively the end of the previous era –the so-called "Lochner era." The anti-statist majority that had prevailed in the Court since "Lochner" gave way to a new one, open and sensitive to the efforts of the regulatory state.

In academic terms, the old consensus around the *Hamilton-Marshall* line also ended up cracking in those years, accompanying the collapse of the old economic order allegedly founded on the Spencerian/Smithian *laissez-faire* state. In the breakdown of the old consensus, positions such as those defended by James Thayer in his famous 1893 article "The Origin and Scope of the American Doctrine of Constitutional Law" were crucial. In this work, in a pioneering and almost solitary way, Thayer advanced an important criticism against the intentions of the judiciary to impose its authority and criteria on politics.

Thayer's criticism harkened back to Justice Marshall's argument in *Marbury v. Madison*, claiming it was necessary to complete and correct his reasoning. Thayer asked himself what could make a decision as dramatic as invalidating legislation acceptable. In his answer, he argued that such a decision could only be accepted in cases in which there is no doubt about the unconstitutionality of the statute, where it is "so manifest as to leave no room for reasonable doubt." This simple principle is what gives rise to the so-called doctrine of "manifest error." The basis on which Thayer relied to maintain this restrictive criterion was very simple as well. In his view, the Constitution "often admits of different interpretations," leaving the legislator a "range of choices," all of which are rational. The judge, then –the argument continued– cannot expect, before the legislature, that the position that appears most appropriate (to him, as a judge) must prevail. Only in the event that the legislative act clearly exceeds the framework of reasonable interpretations of the Constitution can the judge challenge and invalidate what the legislature has done.

Within United States law, the position defended by Thayer gained increasing support over the years. In the academic field that went hand in hand with so-called *legal realism*; and in the judicial sphere, with the numerous decisions that came to support the socio-economic regulations enacted during the New Deal. Judges of extraordinary renown such as Learned Hand, Felix Frankfurter or, very especially, Oliver Wendell Holmes are among those who

adhered to similar criteria, leaning towards the rule of presumption in favor of the majorities.[2] All the magistrates mentioned appear basically united by their common claim in favor of a certain restraint of the judiciary in its task of custodian of the Constitution. Throughout their writings and opinions, they have strengthened a trend characterized by its assertion of a clear presumption in favor of the views of the democratic legislator. Politics –and not the judiciary– was called upon to decide and prevail in contexts of economic crisis as deep as the one mentioned.

iii) Social activism against legislative discrimination. The Warren Court and "Brown v. Board of Education"

As we can see, the first great moment in the debate on judicial review was the "foundational moment," which had centered around the *Marbury v. Madison* decision: it was the stage at which judicial review was affirmed as a solid and unquestionable response, in the face of the first concerns advanced in the name of legislative authority. The second moment in that debate –we saw as well– had to do with a movement of rupture, where that initial consensus ("Hamilton-Marshall") ended up cracking, particularly after the stubborn refusal of the judiciary to authorize interventions –reasonable and permissible from every point of view– of politics into the economic sphere. Thus, while the first stage had been aimed at consolidating the practice of judicial review, even in the face of the democratic argument, in the second, the power of the democratic argument seemed to be reborn until finally imposing itself in its claim for the primacy of politics: in a democratic society –the claim seemed to be– it was the voice of the citizens, summarized in the nation's Congress, what should take precedence when deciding on public matters. In the third great stage that we are going to explore now, the previous "anti-judicial" agreement seemed to be turned "upside down". We are now at a time when some activist and pioneering courts are beginning to systematically challenge racial discriminations created, protected, or upheld by politics. This risky and courageous judicial behavior of confronting unfair legislative efforts –often directly racist– caused an enthusiastic adherence in legal scholarship which promptly, and without further justification, began to endorse a position directly opposed to the one (hostile to judicial activism) that it had defended until a few years earlier.

If the "flagship" decision of the previous stage had been *Lochner*, capable of leaving a mark on an entire era of unjustifiable judicial activism, the new stage was marked by *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), which also came to symbolize by itself a whole new era, this time –apparently– of necessary, demanded and justified judicial activism.

[2] In his well-known dissent in *Lochner v. New York*, Justice Holmes argued that the court was deciding the case merely on the basis of its adherence to a peculiar economic doctrine that the majority of the country did not hold. "If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement [with an economic theory] has nothing to do with the right of a majority to embody their opinions in law". "I think that the word liberty in the Fourteenth Amendment is perverted –Holmes concluded– when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law".

Brown was the most representative case of those decided by the Court presided by Earl Warren –the "Warren Court"– which was characterized by its numerous decisions favorable to equality and civil rights. Such decisions not only curbed segregation policies in public schools (*Brown v. Board of Education*); but also enshrined a right to privacy which was not clearly stated in the United States Constitution (*Griswold v. Connecticut*); invalidated compulsory prayer or compulsory reading of the Bible in public schools (*Engel v. Vitale*; *Abington School District v. Schempp*); prevented the undermining of minority voting by the arbitrary redesign of electoral districts (*Baker v. Carr*); and defined the right against self-incrimination (*Miranda v. Arizona*); among many other momentous decisions.

The doctrine that was "born and grew up" with *Brown* and the Warren Court was broad and diverse, and, in a way, it continues to lead the discussion to this day (though, as we'll see, with many fractures since then). Once again, and thanks to the impact of seeing the courts leading an alleged crusade for the protection of minorities, many academics went on to embrace and decisively justify judicial activism in the invalidation of political decisions. The book that, at the time, stirred the waters of theoretical discussion around judicial review, putting the issue in the foreground once again, was *The Least Dangerous Branch,* by Alexander Bickel, published in 1962. In that work, Bickel offered a justification for judicial review that began, however, recognizing the serious problem at stake: the invalidation of legislation by the courts meant an affront to the popular will of the "here and now", which needed to be justified, rather than simply accepted. It was Bickel, in this book, who put permanently on the agenda the "counter-majoritarian difficulty" that affects the judiciary. After the publication of Bickel's book, perhaps the most sophisticated and interesting legal response of all those that appeared then in defense of an intense judicial review, was that offered by the American legal philosopher Ronald Dworkin.[3] In his first writings on the subject, mainly, Dworkin justified an extensive and profound mode of adjudication, which he illustrated with the image of an imaginary "Judge Hercules" intent on protecting disadvantaged minorities; that "took rights seriously", and that acted guided by a firm (though dubious) distinction between "rights" and "policies". In later writings, Dworkin would change that rather extreme formulation, tone down some of his assertions, and qualify his emphatic support for judicial review, in order to present in the end a "conditional" defense of it.[4] In any case, his theoretical view in favor of active judicial review would lead the constitutional scholarship of the era. Many other authors, among whom I would highlight Owen Fiss –also widely influential in Latin America– followed Dworkin from a position clearly aligned with what was the "initial dream" of courts that were egalitarian and advocated for disadvantaged minority –a dream fueled by the Warren Court's particular activism.[5]

Toward the end of this stage –in 1980– John Ely published a very important book –*Democracy and Distrust*– in which he would present a *procedural* defense of judicial review. Ely based this renewed defense of judicial review on United States legal history, and, in particular, on the criteria advanced by the Supreme Court itself in "the most cited footnote" in the history of said case-law –footnote four–, found in *United States v. Carolene Products*, 304

[3] For example, in DWORKIN (1977, 1985, 1986).

[4] For example, in DWORKIN (1996), in which he offers "a moral reading of the Constitution".

[5] FISS (1976, 1978).

U.S. 144, 152, from 1938. This procedural defense of judicial review –which dazzled even remarkable political philosophers, such as Jürgen Habermas– gained a special appeal.[6] This was so perhaps because it offered strong reasons to show why the kind of judicial activism that prevailed during the "Lochner era" was unacceptable, but also, simultaneously, to demonstrate why the type of judicial activism typical of the "Warren Court" could prove defensible. Basically, what Ely argued is that judicial invalidation of legislation was unacceptable when it was aimed at replacing the "substantive" dictates of politics (e.g., an economic policy, such as those of the New Deal), but acceptable if it came to protect the "procedures" or "rules of the game" of democratic politics (e.g., ensuring that all "democratic" players can play the game of politics). Like a referee in a soccer match, the judge's task was beyond reproach if it allowed the game to be played in accordance with the requirements of soccer regulations, but impermissible if it attempted to alter the result of the match because they disagreed with it.

iv) The consensus breaks down again: "Taking the Constitution away from the courts"

A few years after it appeared, the "new consensus" that developed with the help of the "Warren Court", ended up breaking down. There were many reasons that assisted this new and definitive rupture, but a decisive motivation, undoubtedly, had to do with the changes taking place within the Supreme Court itself –changes that can be represented by the change from the "Warren Court" to the Court commanded by Justice Rehnquist. The fact that the highest court in the United States was re-colonized, with violent urgency, by judges with conservative views, promoted to those positions by politicians who were also conservative –we are in the time of Ronald Reagan and Margaret Thatcher– demonstrated the fragility on which the previous agreement rested. Finally, what was becoming increasingly clear is that the actions of the Warren Court spoke less of the virtues of judicial review than of the value of such review when it was occasionally left to judges ideologically committed to views that were egalitarian and protective of minorities. The conservative hegemony that began to take hold in the 80s showed in the most crude way that there was nothing "innate" or "inherent" to judicial review that would guarantee or in any way allow us to imagine the stability of a type of judicial intervention in principle very attractive, like the one that was displayed during the *Brown* years. The fact was, finally, that a temporary political majority, with conservative views, could fill the Court with conservative judges, and thus promptly dismantle any illusion of having a judiciary aligned with the protection of the most vulnerable.

Irritated by the conservative outlook that was beginning to color all public life, or bothered by a justification of judicial review that had proven fragile and ultimately disappointing in practice, many scholars began to attack this new, illusory consensus that the "Warren Court" had helped nourish. Not by chance, it is at this stage that the critical legal studies movement (CLS) was born, which picked up many of the emblems that the "legal realism" of the 30s had put in place. Stemming from work of the CLS, talk of judicial discretion, and of "law as politics" began once again. There are many authors who stand out within this CLS revival –Duncan Kennedy, David Kennedy, Mark Tushnet, among many others. The main theses of the movement would be summarized in an article that appeared in the *Harvard Law Review*, which

[6] HABERMAS (1992).

was later published as a book in 1986, authored by Brazilian professor Roberto Mangabeira Unger –*The Critical Legal Studies Movement*. Unger would summarize well the unease caused by the degraded institutional developments of the time, referring to the "discomfort with democracy" which he presented as a characteristic idea –a "dirty little secret"– of the political life of the end of the century.[7]

It is in these years, also, when two powerful books are published that convey very well the radical criticism that then began to congeal against judicial review. I am thinking, on the one hand, of a book published in 1999 by Mark Tushnet (one of the founders of CLS): *Taking the Constitution Away from the Courts*. In the same year, a new book was published written by another one of the great authors and leaders of the "anti-judicial onslaught" of the time, Jeremy Waldron. I am thinking, in particular, of his book *Law and Disagreement*, which summarizes years of work by the author critically reflecting on judicial review.[8] According to Waldron, in heterogeneous societies, marked by genuine value "disagreements" (disagreements, in particular, about the meaning of our most important public or constitutional commitments), and composed of individuals "equal" in terms of their moral dignity, judicial review (and its claim to decide finally all those disagreements) was "offensive" or outright "insulting" –as Waldron wrote in some of his early works on the subject.[9]

As I understand it, many of us joined the discussion on judicial review at this stage (late 80s), full of new critical reflections around it. In Latin America, in fact, the prevailing constitutional scholarship seemed to, essentially, ignore the debates on the matter –in my opinion, out of disdain, or convenience, as the doctrine was firmly established on the "*Marbury v. Madison* consensus". I mean that Latin American scholarship seemed to rest calmly on the first and distant agreement reached on the matter, that had taken shape at the end of the 18th century: since then, our legal scholars seemed to assume that the discussion on the subject was solved, fundamentally settled. Very few authors in the region helped break, little by little, that lethargic consensus. In particular, I would highlight the profound constitutional scholarship of Carlos Nino, who in a span of a few years would publish some significant works on the matter –writings that were adequately descriptive of the ongoing discussion, and at the same time critical of it. In his later writings, Nino seems to embrace a revised and attentive view, which he builds starting from the procedural stance advanced previously by John Ely.[10] Personally, and with the help of Carlos Nino's teachings and writings, I gradually joined that discussion that was already mature in the international arena, and still very incipient in Latin America. In 1991 I finished my doctoral dissertation at the University of Buenos Aires –a dissertation that, as I understand it, was one of the first works in the region that critically reprised the scholarly discussions around the "countermajoritarian difficulty" that were in vogue at the time. That dissertation, published several years later (in 1996), took a radically critical stance on judicial review, very much in line with positions such as those of Tushnet and Waldron which nevertheless played a very marginal role in my book at the time. Rather, my position on the

[7] UNGER (1996), p. 72.

[8] WALDRON (1999a), and also WALDRON (1999b).

[9] WALDRON (1993).

[10] E.g., NINO (1992, 1993).

matter was, in particular, based on studies on deliberative democracy such as those that Nino himself had brought to and made known in the region.

v) From "the end of the last word" to the deliberative turn: a limited justification of judicial review

I will now focus on what I will provisionally present as the "latest" significant stage in the discussion on the justification of judicial review. This stage, to a large extent, seems to elaborate the previous one: the "radical attack" against judicial review now appears refined and polished, particularly –but not exclusively– in the light of complex theories of democracy, of constitutional interpretation, and political science studies on judicial motives (and the "judicialization of politics"). We find here an already established and mature debate on the subject, in which a remarkable number of non-English language authors are already participating, and actively, among whom I would mention –leaving out undoubtedly a number of other brilliant participants in this discussion– the Spanish Juan Carlos Bayón and Víctor Ferreres (with a strong presence and influence in the region); Micaela Alterio; Helena Alviar; Paola Bergallo; Miguel Godoy; Juan González Bertomeu; Conrado Hubner Mendes; Isabel Jaramillo; Julieta Lemaitre; Sebastián Linares; Roberto Niembro; Xisca Pou and Jorge Roa.[11] At this point I would like to pause for a few moments to explain how it is that we arrived at this situation of a "widened debate", and where I think the debates are moving presently.

Within this vast discussion, already very nuanced and sophisticated, I would highlight in particular a series of debates which I believe had a significant impact on the development of our reflections. I am referring to debates that took place especially in the 90s, related to the role that citizens had, had had, and in any case deserved to have, in addressing and effectively deciding on the most important public issues, which were in contrast with critical studies on the role that the courts had, had had, and in any case deserved to have, in this matter. This line of work had found a spectacular boost at Yale University, starting from that which Professor Bruce Ackerman had advanced since 1991 on the role of *we the people* in constitutional creation and interpretation.[12] Other professors from the same university contributed decisively to the development of this line of thought. I am referring, in particular, to the writings by Professors Reva Siegel and Robert Post, founders of what came to be called *democratic constitutionalism*. Through their works (which continued Ackerman's, but were also clearly anchored on Robert Cover's) they helped to understand the way in which social movements, such as the civil rights movement or feminism, had played, could play, and deserved to play a leading role in shaping the contents and meanings of the law.[13] On the other hand, works such as Gerald Rosenberg's 1991 book, helped reappraise what the effective role of the courts of the "glorious" times (like the Warren Court at the time of the *Brown* decision) had been: what was becoming increasingly clear was that, without the active intervention of politics, no

[11] ALTERIO y NIEMBRO (2017); ALVIAR y LEMAITRE (2016); BAYÓN (1998); BERGALLO (2005); BERTOMEU (2011); FERRERES (2007); GODOY (2017); HÜBNER MENDES (2011, 2013); JARAMILLO (2008); LINARES (2008); NIEMBRO (2019); POU (2011); ROA (2019).

[12] ACKERMAN (1991).

[13] POST & SIEGEL (2004, 2007); SIEGEL (1996, 2004).

egalitarian or socially transformative decision promoted from the bench could become possible. "Court-centered" and "top-down" decisions had not had and could not be expected to have fairy-like transformative powers, which some scholarship had wanted to attribute to them.

Along with all the previous works, I would like to emphasize, especially, the influence coming from another line of research. I am referring to works that were listed under what came to be called popular constitutionalism. Within this field we can include, for example, writings such as those by Larry Kramer,[14] Jack Balkin,[15] and Richard Parker,[16] among others. Kramer's research, very attentive, particularly, to the constitutional history of the United States, helped recognize that, from the beginning (from what we call the "foundational moment" of the discussion) judicial review was recognized as a problem that was hard to accept and justify, rather than as an obvious solution to all major public conflicts –this is the case, especially, when such review was carried out in the way that became dominant since *Marbury v. Madison*, that is, with courts claiming for themselves the "last word." The contributions of "popular constitutionalism" to the issue ended up being very illuminating in this regard, particularly when distinguishing two issues that deserved to be analyzed separately, and not as if they were the same: judicial review, and the courts having the last word. Authors such as Kramer helped all the participants in this debate to distinguish between these aspects, which usually overlap, and to recognize that the real problem at hand –based on our shared democratic concerns– had to do with the latter –courts claiming for themselves the last interpretation of the Constitution– and not with the former –the existence of non-political controls over political bodies.

The distinction proposed by advocates of "popular constitutionalism" had, in fact, a very significant impact, as I understand it, both in English- and Spanish-language scholarship. For example, partly as a result of this kind of distinction, two of the main critics of judicial review in the English-language world –Tushnet and Waldron– began revising their initial critiques in relevant, though by no means complete, ways. Tushnet published in 2008 a book on "weak courts" and "strong rights," in which he distanced himself from the radical position of "taking the constitution away from the courts": now, Tushnet recognized the possibility of more sensible and moderate exercises of judicial review, consistent with his democratic concerns. Similarly, Waldron no longer considered judicial review as an "insult" toward majorities, but rather restricted his criticism contextually, relating it to the presence of a series of specific conditions (thus, his famous 2009 work "The Core of the Case"). Waldron, like Tushnet, recognized that there were possible forms of judicial review, *without the last word*, that were compatible with our more established democratic intuitions.[17]

Many of us have converged on a place similar to those reached by Tushnet or Waldron, but starting from different principles and theoretical commitments, which would also lead us to reach conclusions that are partly different from theirs. In my case, as I pointed out earlier, the studies by Carlos Nino were fundamental, trying to link the theory of deliberative

[14] KRAMER (2004, 2005).

[15] BALKIN (1995).

[16] PARKER (1993).

[17] GONZÁLEZ BERTOMEU (2011).

democracy with the analysis of judicial review. In several of his works, as was said, Nino championed a procedural understanding of judicial review (a view that was able to distinguish, along clear and democratic principles, between the tasks of judges and politicians), but from a deliberative conception of democracy –-which had significant consequences for Ely's theory, which seemed to rely, like a good part of North American legal theory, on a restrictive, "pluralist" conception of democracy.[18]

My reformulations on the matter, then, had to do not only with innovations such as those contributed by Nino, but also with a new line of political reforms and judicial decisions, of which I had more detailed knowledge only in those years. On the one hand, by that time (the beginning of the 20th century), an impressive literature had already developed, driven above all from Canada, and related to "judicial dialogue" –a literature that had begun to spread extraordinarily since the enactment of the 1982 Charter of Rights. The Charter, let us remember, included the famous *notwithstanding clause*, intended to give "voice" back to Congress, after an unfavorable judicial decision (in this sense, it was a reform that questioned the idea of a judicial "last word"). At the end of my doctoral dissertation published in 1996, I already referred to the subject, with genuine expectations, and presented the "notwithstanding clause" as a "promise of a way out" of the discussion, which I mentioned auspiciously (at the same time, I alluded to the alternative of the judiciary "sending back" to the legislature). However, only several years later I came to familiarize myself in some detail with this clause and the literature around it, which put at the center of the debates what was beginning to be called "dialogic constitutionalism". This literature relied on the experience of Canada, but grew from there, beyond its borders, to find another key point of reference in (what was called) the "new Commonwealth model" of judicial review –a "new model" promoted by many Commonwealth countries, traditionally hostile to traditional judicial review, but now open to experimenting with "Charters of Rights".[19] Many of us paid intense attention to these developments, which promised to place judicial review –at last– within the domain of a deliberative democracy: we now knew that, in fact, it was possible to pursue judicial review in a deliberative way, "giving the last word back" to politics.

Along with this kind of institutional innovations and reforms that allowed us to rethink the "old discussion", a whole series of judicial decisions came down that –better than any theoretical alternative– demonstrated that in practice it was possible to exercise the task of judicial review in a way compatible with the demanding requirements of a robust democratic theory, such as deliberative democracy. Perhaps the most significant judicial decision of this new era –the decision that, in a way, inaugurated this new cycle of reflection– was the one issued by the famed South African Constitutional Court in *Grootbom* 2001 (1) SA 46 (CC).

[18] Nino's "revision" involved, above all, restricting the ability of politics to make "substantive" decisions –Nino understood that questions of private morality (which were left under the exclusive control of each individual) should be set aside there. At the same time, and also starting from that renewed foundation –deliberative democracy–, Nino believed that judicial control over procedures also needed to be reconsidered –Nino began to imagine not only a more intense judicial control over political debates, but also more deliberative forms of judicial intervention.

[19] In the extensive literature on the subject, some highlights are, to name a few, DIXON (2007); GARDBAUM (2013); HOGG & BUSHELL (1997); HOGG, BUSHELL & WRIGHT (2007); PETTER (2003); ROACH (2001, 2004); YOUNG (2012).

The case in question dealt with an urgent and very worrying social issue (illegal land occupation), which the South African Court decided in a "modest" and at the same time "revolutionary" manner. The Court recognized that at stake in the case were (constitutionally enshrined) social rights that were being infringed upon by political authorities, and at the same time made it clear that it was politics that had to address and redress those infringements of rights. Thus, and contrary to a majority of legal scholarship that refused to recognize constitutional status to social rights, the Court affirmed the value of those rights, and stated that in the case they were being infringed upon by political authorities (by not guaranteeing the unlawful occupiers the right to housing that the Constitution recognized). On the other hand, and against those who claimed that, in any case, such rights were non-enforceable, the Court held that they should indeed be respected and guaranteed in practice: the Constitution did not mention such rights only in a rhetorical way. Moreover, against those who claimed that any intervention by the courts in the matter could only mean an unacceptable –undemocratic– intrusion into the sphere of action that belonged exclusively to politics, the Court showed the possibility of a perfect response: it made it clear that the right in question was operational, and that it should be secured, but at the same time held that it was politics that had the obligation to ensure it, and not the judiciary itself. The case was a tremendous setback for a significant part of legal scholarship which, in some cases, admitted to having been mistaken or having failed to recognize the possibilities of judicial activism in matters of social rights implemented in a way compatible with a respect for the higher democratic authority of the political branches (the example of Sunstein [2001] was particularly salient in this regard).

Since then, the South African Court, and some other courts across the "Global South" (including, in a especially salient way, the higher courts of Colombia, India and Costa Rica, and sometimes others such as those of Argentina, Mexico or Brazil) have given ample evidence of constitutional imagination and creativity, in order to combine their intervention in difficult and socially pressing cases with a respect for politics, and adjusting to the demands of deliberative democracy. Initiatives and practices such as that of *meaningful engagement* in South Africa; "public hearings" and "roundtables" convened by several Latin American courts; exhortative decisions; or the unconstitutional state of affairs used by the remarkable Constitutional Court of Colombia (among many other innovations), helped change the landscape, and allowed a radical renewal in the scholarly debate on judicial review. The "deliberative turn" had occurred, and the idea of courts that entered into "dialogue" with the other branches, or provoked or organized citizen discussions, or appealed to "dialogical" remedies in their opinions, became an everyday reality.[20]

[20] DIXON (2007); RODRÍGUEZ-GARAVITO (2011); TUSHNET (2009). Personally, I tried to collect several of the main scholarly contributions on the matter that I was aware of in GARGARELLA (2014); I reflected critically on several such experiences and theoretical developments in GARGARELLA (2015); and I am completing a manuscript on the subject, which I have not yet published, GARGARELLA (2019).

CODA THINKING OF CHILE: A NEW -SIXTH- STAGE THAT OPENS?

At this point, I would simply like to raise some questions and doubts related to the possibilities of connecting the previous reflections with cases such as that of Chile, which is currently on the cusp of a significant constitutional change. Personally, it seems to me important, I consider it possible, but reckon it is unlikely, that Chile will reorganize its judicial structure so that it functions in a more "conversational" way, that is, more in line with the requirements of an inclusive public debate. Today we know that scenarios such as those posed by "dialogic constitutionalism" are no longer part of a constitutional utopia (there are many contemporary experiences that show the feasibility of similar reorientations, as discussed above). We also know that there are good theoretical reasons to encourage the development of "dialogical" institutional practices (some of these reasons have been explored above). I would even venture to say the following: today, we find in Chile certain social conditions which, in principle, seem appropriate for the development of constitutional dialogue. I am thinking, in particular, of a citizenry that is "active", "mobilized", and that shows interest, willingness, and the ability to get involved in the debate on issues of immediate constitutional relevance. The "unlikeliness" I mentioned in my previous comment has to do with other issues, related to certain unfavorable material conditions –current levels of inequality– and to a history of authoritarianism and concentration of power (elements, all of these, which are common, although to different degrees, throughout the region). In that regard, among the conditions that seem to conspire against the emergence and consolidation of a more "dialogic" constitutionalism I would mention, above all, certain unfavorable institutional factors currently present in Chile –some of them repairable, and others more difficult to solve. Among the repairable constitutional deficits, I would mention, for example, a Chilean Constitution such as the current one, which is very "Spartan", or too austere in matters of rights –something that, hopefully, will be remedied in an upcoming constitutional reform. There are, however, other deficits, still present in the Constitution, and which will not be easy to repair in the future, even with some constitutional reforms (in the event that arrangements are implemented in order to decentralize the current organization of constitutional power). The fact is that Chile not only shows a history of established (hyper-)presidentialism (capable of blocking or jeopardizing any serious attempts to enforce hypothetical new social rights). Chile's constitutional framework offers as well (which is most serious for what concerns us here) an elitist and vertical judicial organization, which is combined with severe difficulties of access to the courts (a restrictive *standing*) by the most disadvantaged. In this context, the development of dialogical practices is not impossible, but it certainly faces difficulties: in such an institutional framework, those developments will depend in the end, to a high degree, on the more or less discretionary will (the "good will") of the officials involved. And, as James Madison taught us, no institutional system can be considered well designed if the best outcomes expected depend on the willingness of those in charge to implement them.

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