# From resistance to deliberation

## A deliberative conception of the right to resist from South American constitutions, illustrated by Chilean uprising and constituent process

Thesis submitted for the degree of PhD in Law

Juan Diego Galaz Carvajal

Trinity College Dublin

2023

## DECLARATION

I declare that this thesis has not been submitted as an exercise for a degree at this or any other university and it is entirely my own work.

I agree to deposit this thesis in the University's open access institutional repository or allow the Library to do so on my behalf, subject to Irish Copyright Legislation and Trinity College Library conditions of use and acknowledgement.

I consent to the examiner retaining a copy of the thesis beyond the examining period, should they so wish (EU GDPR May 2018).

Juan Diego Galaz Carvajal

## SUMMARY

The crisis of democracies has occupied a significant place in academic reflexion over recent years. My proposal is addressing this crisis of democracy from its institutional perspective. I will argue that part of the difficulties faced by democracies is that the existing institutional design is insufficient to mediate social demands politically. There are two main reasons for this. The first is that the political mediation prevents from responding to a plural society. The second is the exclusionary vices and practices that this institutional model suffers from.

Facing these challenges, I will propose a deliberative conception of the right to resist. I will argue that the deliberative conception of the right to resist can help complement the model of democratic representation when fails. This conception offers three characteristics. First, it would protect individuals who express their disagreements through non-institutional collective political actions. Second, it would impose on the rulers the obligation to convene a deliberative forum, to address and resolve the disagreements expressed by said actions. Third, it would contribute to a guarantee of the involvement of claimants in the search for a collective solution to the matter they are demanding, thereby giving this decision greater legitimacy, and restoring social peace.

I will deeply examine non-institutional collective political actions. I will hold that these are symptoms of the failure of the institutional design to politically address

social demands. when these demands are persistently ignored by the state bodies, the power to deliberate and resolve them is restored to individuals. in constitutional democracy individuals are entitled to protection from the power of the state and, more decisively, to decide what rights they have. this idea is present at the origin of modern constitutionalism, the right to resist guarantees it, and the deliberative perspective of this right re-emphases this characteristic. To set up this deliberative conception of the right to resist, I will situate my reflection in the South American context and illustrating it through the social uprising in Chile in 2019, and the deliberative constituent process to which it gave rise.

In conclusions, I will sustain that a deliberative conception of the right to resist can help to improve constitutional democracies. As the Chilean case illustrate, when the political design fails, the best way to return to democratic order, is open deliberative forums. The same case shows that these forums could be more inclusive. Finally, it's possible to observe that social historical demands can take a place in the discussion.

Even if the proposed constitutional text were rejected, these issues will inevitably have to be addressed. And this could be a support for the deliberative conception of the right to resist which I defend here. Ultimately, what this conception intends to promote is a public dialogue among equals; that is, a conversation about what it means to be a human endowed with rights, and how a collective life as human as possible can be enabled through the rule of law.

ACKNOWLEDGMENTS

My thesis stems from a deep conviction. We individuals can talk about what it means to be human beings, and collectively decide how common life makes that humanity probable. And in that conversation, those who have been neglected have a fundamental place. This conviction can be stated in many ways. Here I propose it in the terms of legal theory.

Developing this conviction and the language to formulate it has been an apprenticeship. The result of many dialogues and meetings for which I am deeply grateful. The first and most prominent have been with my parents Jorge and Bernardita. They taught me a way to observe the world, they allowed me to explore it, and they gave me confidence in freedom, having been born and raised in times of dictatorship. My first thanks to them.

I want to thank my brothers Gabriel and Rafael. In different moments and ways they have been present throughout this learning. Road companions and friends, they have been able to be there with advice, support and celebrations. I am also grateful to their families, Marcia, Trinidad, Simón, Domingo and Clara. Hopefully this work will help my little nephews to share this conviction.

I have had great friends. With them I have talked and discussed many of the ideas that I present here. I want to thank “Los Monicacos”, a faithful group, with an implacable humour and extraordinarily patient with my explanations and defences. I want to thank Francisca, Macarena, Hevelyn, Natalia, Paz and Constanza, who have

been a decisive support. I thank Pilar and Corra; José, Naty, Rafa and Matías; and Maria. You have been my family in Dublin.

I am indebted to the Jesuit Province of Ireland, and to the Leeson Street community. My thesis would have been impossible without their unconditional support, both in joy and in uncertainty. Patrick, with whom I worked out the first ideas of this work at Campion Hall, Oxford, and who was present throughout the whole process. To Michael, who patiently listened to my proposals, made important suggestions, read all the drafts and made corrections to perfect the slippery English. All remaining errors are my sole responsibility. To Nemo and Arun, who with their friendship gave me the confidence to go through the last stretch.

I want to thank the Trinity College Dublin Law School for its permanent support and the extraordinary spaces promoted for academic dialogue. A special place for Aileen, contagious enthusiasm and rigor. Also Kelley, always available and attentive.

Finally, a special thanks to my supervisor Oran Doyle. He trusted my subject before the outbreak in Chile. He encouraged and guided me when the pandemic imposed changes. He enlightened me with comments and suggestions, always respecting our disagreements. He demanded rigor from me through trust. I am permanently grateful.

I dedicate this work to all those who continue to wait for justice, and those who work to reduce their wait.

Table of Contents

**DECLARATION** ..... **2**

**SUMMARY** ..... **3**

**ACKNOWLEDGMENTS** ..... **5**

INTRODUCTION ..... **11**

PART I ..... **25**

**SOUTH AMERICAN CONSTITUTIONS AND TWO CONCEPTIONS OF THE RIGHT TO RESIST** ..... **25**

CHAPTER I ..... **26**

DISCONTENT WITH DEMOCRACY IN SOUTH AMERICA ..... **26**

COMMON SOUTH AMERICAN CONSTITUTIONAL CULTURE ..... 30
*The hegemony of the liberal-conservative pact* ..... *30*
Cultural homogenization ..... 32
Elitism ..... 34
CRISIS IN THE LEGITIMACY OF POLITICAL INSTITUTIONS ..... 37
*Elections: democracy as aggregation of preferences* ..... *37*
*Hyper-presidentialism: the risk of populisms* ..... *41*
*Representation: bureaucracy bargaining rights as bribes* ..... *42*
*Judicial review: political constitutional courts* ..... *45*
*Amendments and new constitutions: the untouchable 'Engine Room'* ..... *49*
CHALLENGES FROM A NEW SOCIETY TO CONSTITUTIONAL DEMOCRACY ..... 51
*Poverty and inequality* ..... *51*
*Multiplicity of identities and affiliations* ..... *53*
*Autonomy of Ancestral Nations* ..... *55*
*Extraction model and natural sources protection* ..... *57*
*News, media, and public opinion* ..... *60*
CONCLUSIONS: NEW SOCIETIES, OLD DEMOCRACIES ..... 61

CHAPTER II ..... **63**

RIGHT TO RESIST IN SOUTH AMERICAN CONSTITUTIONS ..... **63**

GERMAN INSPIRATION ..... 65
RIGHT TO RESIST IN SOUTH AMERICAN CONSTITUTIONAL CANONICAL TEXTS ..... 69
*Argentina* ..... *70*
*Paraguay* ..... *73*
*Ecuador* ..... *76*
OTHER APPROACHES: PERU AND VENEZUELA ..... 81
*Peru* ..... *81*
*Venezuela* ..... *83*
RESISTANCE AND DELIBERATED POLITICAL CHANGES: TWO EXAMPLES ..... 86
*Colombia 1990: movement of the seventh ballot and the new constitution* ..... *86*
*Bolivia 2003: From gas referendum to new constitution* ..... *88*
CONCLUSIONS ..... 89

**CHAPTER III** ..... **94**

DISOBEDIENCE CONCEPTION OF THE RIGHT TO RESIST ..... **94**

OBEYING LEGITIMATE INSTITUTIONS ..... 96
FROM OBEDIENCE TO LEGITIMATE DISOBEDIENCE ..... 101
*Disobedience and majority rule* ..... *103*

FROM DISOBEDIENCE TO RESISTANCE ..... 105
*The right to resist from the obedience perspective ..... 107*
RESISTANCE AGAINST THE STATE FORCE THAT CAUSES ILLEGITIMATE DAMAGE ..... 111
*Right to resist as last resort in cases of legal alienation ..... 112*
*The right to resist oppression ..... 116*
ELECTORATE, THE LAST COURT OF APPEAL ..... 118
CONCLUSIONS. ..... 121

**CHAPTER IV ..... 123**

**DELIBERATIVE CONCEPTION OF THE RIGHT TO RESIST ..... 123**

DELIBERATIVE PERSPECTIVE ON EARLY MODERN IDEA OF THE RIGHT TO RESIST ..... 125
THE RIGHT TO RESIST IN THE FIRST CONSTITUTIONALISM ..... 129
WHEN IS IT LEGITIMATE TO RESIST? DISAGREEMENT ON LEGITIMACY INSTEAD OF HARM ..... 134
*Deliberative approach ..... 134*
*Disagreement in place of harm ..... 138*
DISAGREEMENTS AND PROPOSALS ..... 141
NON-INSTITUTIONAL COLLECTIVE POLITICAL ACTION IN THE FACE OF THE INSTITUTIONS ..... 145
*The risks of neutralizing non-institutional political action ..... 146*
*Right to resist bearers and right to resist in action ..... 149*
*Challenging the law: disruptive does not mean violent. ..... 154*
DELIBERATIVE CONCEPTION OF THE RIGHT TO RESIST ..... 156
*Theory and model of the right to resist ..... 160*
DELIBERATING INTO THE FIRST FORUM ..... 162
CONCLUSIONS ..... 164

**PART II ..... 167**

**FROM RESISTANCE TO DELIBERATION ..... 167**

**CHAPTER V ..... 168**

**A THEORY OF DELIBERATIVE DEMOCRACY ..... 168**

INTRODUCTION ..... 168
DEMOCRACY ..... 169
*A general concept of Democracy ..... 170*
*Normative approach to democracy ..... 174*
TOWARD DELIBERATIVE DEMOCRACY ..... 176
*Ideas of democracy which activate deliberative proposals ..... 177*
Self-interest assumption ..... 177
Elitist Democracy ..... 180
Neoliberal argument ..... 182
*Origins and development of Deliberative Theory ..... 185*
Four sources ..... 187
WITHIN DELIBERATIVE DEMOCRACY ..... 192
*Concept ..... 193*
*Characteristics ..... 196*
Inclusion ..... 196
Equality ..... 198
Rationality ..... 202
Impartiality ..... 204
FROM DELIBERATIVE DEMOCRACY ..... 207
*Deliberative democracy and disagreements ..... 207*
*Deliberative democracy and common problems solving ..... 211*

**CHAPTER VI ..... 215**

**DELIBERATIVE DEMOCRACY, SOCIAL MOVEMENTS AND THE RIGHT TO RESIST ..... 215**

INTRODUCTION ..... 215
AWAKENED BY DISCONTENT ..... 216

*Deliberative Democracy and Social Movement* ... *218*
*Deliberative democracy, social movements and political legitimacy* ... *221*
DELIBERATIVE OBJECTIONS TO ACTIVISTS ... 224
*Subjecting democracy to force* ... *224*
*Promoting partial interest* ... *226*
ACTIVISTS' OBJECTIONS TO DELIBERATIVE DEMOCRACY ... 229
*Fairness is not deliberate, it is assumed* ... *229*
*Oppressive system, flawed deliberation* ... *230*
*Impose rationality* ... *232*
IMPROVING DEMOCRACY ... 234
CONCLUSIONS ... 238

**CHAPTER VII ... 240**

**FROM RESISTANCE TO DELIBERATION ... 240**

INTRODUCTION ... 240
NON-INSTITUTIONAL MOMENT: UNHEARD SOCIAL CLAIM ... 242
*From social to political.* ... *243*
*Inclusive force of resistance.* ... *245*
PRE-INSTITUTIONAL MOMENT: AGREEMENT ON DISAGREEMENT (AND HOW TO SOLVE IT) ... 246
*Agreement on disagreement and how to solve it* ... *247*
*Activist co-responsibility* ... *250*
INSTITUTIONAL MOMENT: THE FORM OF DELIBERATION ... 252
*Citizens' mini-public forums* ... *253*
*Referendum* ... *261*
CONCLUSIONS ... 264

**PART III ... 265**

**CHILE: POPULAR UPRISING AND CONSTITUTIONAL DELIBERATION ... 265**

**CHAPTER VIII ... 266**

**OCTOBER 2019: THE COLLAPSE OF THE IRON CAGE ... 266**

CONTEXT ... 268
ILLEGITIMACY OF ORIGIN ... 270
*Imposed under terror* ... *271*
*Drafted without citizen participation* ... *273*
*Ratified in a fraudulent referendum* ... *276*
THE MILITANT CONSTITUTION ... 278
*The neoliberal project* ... *278*
*Neoliberal constitution* ... *280*
*The economic constitution* ... *283*
THE UNCHANGEABLE MILITANCY ... 286
*Composition of parliament: Designated senators* ... *288*
*Binominal electoral system* ... *290*
*Supra-majoritarian quorums and representatives' blindness* ... *291*
CONSTITUTION AS AN IRON CAGE ... 296
CONCLUSIONS ... 303

**CHAPTER IX ... 305**

**CHILE : FROM RESISTANCE TO DELIBERATION ... 305**

NON-INSTITUTIONAL MOMENT: SOCIAL CLAIM ... 306
*Event background* ... *307*
Distance between social actors and the political class. ... 308
The social movement of the Mapuche people ... 310
The students' social movement ... 312
*Discredit of institutions and lack of sanction for corruption* ... *314*
*Symbolic aggression: contempt as distance from representation.* ... *315*

*The uprising and its political interpretation* ..... *318*
*Victims* ..... *322*
PRE-INSTITUTIONAL MOMENT: POLITICAL AGREEMENT ..... 325
*Agreement for Social Peace and the New Constitution* ..... *326*
*Panel of Experts* ..... *329*
*Article 135* ..... *330*
INSTITUTIONAL MOMENT: REGULATED DELIBERATION ..... 336
*Constitutional amendment to allow the adoption of a new constitution* ..... *337*
*Guarantees for historically excluded groups* ..... *339*
*Independents* ..... *340*
*Gender equality* ..... *341*
*Ancestral communities* ..... *342*
DELIBERATIVE PROCESS UNDERWAY ..... 345
*Entry plebiscite* ..... *346*
*Election of constituents* ..... *347*
Installing Constituent Convention ..... 349
Ratification Plebiscite ..... 351
**CONCLUSIONS ..... 352**
**BIBLIOGRAPHY ..... 359**

## Introduction

The objective of my thesis is to propose a deliberative conception of the right to resist. I will maintain that within a deliberative theory of democracy, this right would adopt three characteristics. First, it would protect individuals who express their disagreements through non-institutional collective political actions (NICPA). Second, it would impose on the rulers the obligation to convene a deliberative forum, to address and resolve the disagreements expressed by said actions. Third, it would contribute to a guarantee of the involvement of claimants in the search for a collective solution to the matter they are demanding, thereby giving this decision greater legitimacy, and restoring social peace.

NICPA are a symptoms of the failure of the institutional design to politically address social demands. When these demands are persistently ignored by the state bodies, the power to deliberate and resolve them is restored to individuals. This is because in constitutional democracy individuals are entitled to protection from the power of the state and, more decisively, to decide what rights they have. This idea is present at the origin of modern constitutionalism, the right to resist guarantees it, and the deliberative perspective of this right re-emphases this characteristic. To set up this deliberative conception of the right to resist, I will situate my reflection in the South

American context and illustrating it through the social uprising in Chile in 2019, and the deliberative constituent process to which it gave rise.

*Contemporary debate on democracy*

The crisis of democracies has occupied a significant place in academic reflexion over recent years[1]. Several factors have been described as the symptoms of this challenging situation around the world. Some of them are: the installation of authoritarian governments, the advance of populism[2], citizens laziness, anti-secular initiatives, the capture of the state, and the rising of illiberal governments[3].

For my thesis, I will address this crisis of democracy from its institutional perspective. I will argue that part of the difficulties faced by democracies is that the existing institutional design is insufficient to mediate social demands politically. There are two main reasons for this. The first, as Gargarella maintains, is that the political mediation devices were designed seeing a society that which does not longer exist[4]. The political

[1] Mark A Graber, Sanford Levinson and Mark Tushnet (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018); Angel E Alvarez, 'Una Visión Panorámica de La Crisis y El Desencanto Con La Democracia En América Latina: Desafíos y Oportunidades' in Angel E Alvarez (ed), *Crisis y desencanto con la democracia en América Latina* (Universidad Católica Andrés Bello 2021); Norberto Bobbio, Giuliano Pontara and S Veca, *Crisis de La Democracia* (Ariel 1985); Adam Przeworszki, *Crises of Democracy* (Cambridge University Press 2019); Tom Ginsburg and Aziz Z Huq, *Hot to Save a Constitutional Democracy* (University of Chicago Press 2018); Luigi Ferrajoli, *Poderes Salvajes. La Crisis de La Democracia Constitucional.* (Trotta 2011); María Isabel Puerta Riera, 'Crisis de La Democracia. Un Recorrrido Por El Debate de La Teoría Política Contemporánea.' (2016) XXIII Espiral, Estudios sobre Estado y Sociedad 9; Claudio Fuentes S., *La Erosión de La Democracia* (ebook, Catalonia 2019); Roberto Gargarella, *La Derrota Del Derecho En América Latina. Siete Tesis* (Siglo Veintiuno 2020).

[2] Cristóbal Rovira Kaltwasser, *Populism: A Very Short Introduction* (Oxford University Press 2017); Oran Doyle, 'Populist Constitutionalism and Constitutent Power' (2019) 20 German Law Journal 161; Oran Doyle, Erik Longo and Andrea Pin, 'Populism: A Health Chech for Constitutional Democracy?' (2019) 20 German Law Journal 401.

[3] Marc F Plattner, 'Illiberal Democracy and the Struggle of the Rigth' (2019) 30 Journal of Democracy 5; Fareed Zakaria, 'The Rise of Illiberal Democracy' [1997] Foreign Affairs 22.

[4] Roberto Gargarella, 'Introducción', *Derecho y Grupos Desaventajados* (Gedisa 1999); Gargarella, *La Derrota Del Derecho En América Latina. Siete Tesis* (n 1).

procedures presuppose a society where the positions of individuals could be homogenized. This prevents them from responding to a plural society. The second is due to the exclusionary vices and practices that this institutional model suffers from. As a result of their development, existing devices frequently fail to fulfil their function, and even contradict it.

I will address the following two related issues regarding the crisis of democracy. The first, factual, is that the existence of NICPA shows that individuals have an interest in being heard in collective matters. With this I do not rule out the possible influence assigned to citizens' laziness; rather I question its centrality. The second is that the institutional devices to mediate political rights, instead of mediating a claim being considered in political discussion, neutralize it. From this point of view, I will argue that the deliberative conception of the right to resist can help complement the model of democratic representation when the latter fails.

*The right to resist*

The right to resist has been part of constitutional democracies from their beginnings. Just as it was decisive in the adoption of democracy, it has also been decisive at different moments protecting, restoring, or improving it. In fact, the crisis of contemporary democracies has encouraged new and abundant reflection on the matter. However, the right to resist is a controversial one[5]. To explain the conceptual

[5] Fernando Aguiar, 'Derecho General a La Resistencia y Derecho a La Rebelión', *El Derecho a Resistir el Derecho* (Roberto Gargarella, Miño y Dávila 2005); Matthewww Bolton, *How to Resist* (Bloomsbury 2017); Candice Delmas, *A Duty to Resist. When Disobedience Should Be Uncivil* (Oxford University Press 2018); Costas Douzinas, *Philosophy and Resistance in the Crisis. Greece and the Future of Europe* (Polity Press 2013); Roberto Gargarella, 'El Derecho a Resistencia En Situaciones de Carencia Extrema', *El*

controversy around the right to resist, and to show the novelty of my proposal, I will present what I call the disobedience conception of the right to resist. After examining this conception, I will propose and argue for a deliberative conception.

The disobedience conception subjects the right to resist to a particularly intense understanding of the obligation to obey the law. This, even when those who must obey it express their disagreement with it, and the institutional devices fail to mediate that discontent. For this same reason, this conception analogises the right to resist to civil disobedience writ large.

Due to the above, this conception has the following characteristics. First, the argument that this is an obsolete right in current democracies. Due to the disruptive nature of its exercise, as a form of rebellion or revolution, this right could be incompatible with the rule of law[6]. Secondly, the view that the right to resist is a last resort[7], similar to the right to self-defence when the state inflicts illegitimate damage on the people. Thirdly, a recognition of its effectiveness, but in terms closer to

*Derecho Resistir el Derecho* (Roberto Gargarella, Miño y Dávila 2005); Franco Ferrari and Antonello Tarzia, 'El Derecho a La Resistencia En El Constitucionalismo Moderno y Contemporáneo. El Particular Caso Euatoriano', *El Derecho a la Resistencia en el Constitucionalismo Moderno* (Poligrafica 2011); Ermanno Vitale, *Defenderse Del Poder. Por Una Resistencia Constitucional* (Trotta 2012); Douzinas; Christopher J Finlay, *Terrorism and the Right to Resist. A Theory of Just Revolutionary War* (Cambridge University Press 2015); Tom Ginsburg, Daniel Lansberg-Rodriguez and Mila Versteeg, 'When to Overthrow Your Government: The Right to Resist in World's Constitutions' (2013) 60 UCLA Law Review 1184; Cécile Mouly and Esperanza Hernández Delgado (eds), *Civil Resistance and Violent Conflict in Latin America. Mobilizing for Rights* (Palgrave 2019); María Luisa Piqué and M Andrea Sember, 'La Paradoja Del Derecho de Resistencia' (2005) 80 Lecciones y Ensayos 487.

[6] Edward Rubin, 'Judicial Review and the Right to Resist' (2008) 97 61; Arthur Kaufmann, 'Small Scale Right to Resist' (1985) 21:3 New England Law Review 571.

[7] Roberto Gargarella, 'The Last Resort: The Right of Resistance in Situations of Legal Alienation' <http://digitalcommons.law.yale.edu/yls_sela/2>; Vitale (n 5).

freedom of expression or protest[8], with no other efficacy than a possible moral persuasion. Finally, it is understood by some that it could be a right that serves to protect existing rights or create new rights if it is exercised in the corresponding state body[9].

The deliberative conception of the right to resist purpose to take the expression of disagreement expressed by the NICPA more relevant, leading them through institutional channels to restore the legitimacy of political power. This proposal will be sustained by the following arguments. I will argue that the deliberative theory of democracy makes it possible to recover the original meaning of the right to resist, thereby overcoming the contradictions into which the perspective of disobedience falls. I will maintain that this conception allows the restoration of claimants in their capacity of those who decide what rights they will have. I will defend the case that for that right to be recognized, they don't need to be victims of unjust damage by the state. I will also assert that the place for this restitution is the deliberative forum. In this sense, I will argue that since the deliberative conception of the right to resist gives rise to claims that otherwise go unheeded, it can complement the existing model of representation, exercise control over political power, and provide greater legitimacy to political decisions.

*South America as a framework*

[8] Jurguen Habermas, 'Civil Disobedience: Litmus Test for Democratic Constitutional State' (1985) 30 Berkley Journal of Sociology 95; William Smith, *Civil Disobedience and Deliberative Democracy* (Routledge 2013).

[9] María Nazaret Ramos Rosas, 'Imprecisiones Respecto al Derecho a La Resistencia En El Ecuador' (2013) 1 Law Review 47.

One aspect that allows for a unitary study of the political legal present in South America is its common history in the adoption of constitutionalism. Like all countries of the global south, the ten independent countries of this region endorsed constitutionalism under the influence of the western northern hemisphere, particularly of ideas coming from France, Spain, and the United States[10]. Although this influence spread over time, in recent decades it has begun to fade[11], even to go into reverse.

Indeed, an original constitutionalism has emerged from the creation of institutions and procedures that respond to the local reality. What was previously an effort to adapt ideas developed in the north, gave way to the development of their own ideas using the received theoretical instrumentation. Perhaps the most prominent example of this, but not the only one, is the constitutional recognition of indigenous peoples. I will argue that a deliberative conception of the right to resist could be a contribution arising from the experience of this region: perhaps a novel contribution from the global south to the north.

I explain the deliberative conception of the right to resist as follows. In its contemporary understanding, this right was received in South America through the influence of German constitutionalism. The German doctrine upholds both the

[10] Roberto Gargarella, Sebastián Guidi and Conrado Hübner Mendes, 'Introduction' in Roberto Gargarella, Sebastián Guidi and Conrado Hübner Mendes (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022) xvii.

[11] David S Law and Tom Ginsburg, 'Elaboración Legislativa de Normas Constitucionales En América Latina, Perspectiva Cuantitativa' in Daniel Bonilla Maldonado (ed), *El Constitucionalismo en el Continente Americano* (Siglo del Hombre Editores 2016) 313.

expressly declared right to resist, as well as a right inherent to democracy that does not require declaration. Its main function could be to guarantee the protection of the constitutional order. However, the development after its adoption in the region, mainly in the canonical texts that expressly declare it[12], acquired new scope. Among the most notable innovations are, on the one hand, its capacity to guarantee other rights, and even to create new ones[13]. On the other hand, the novelty is found in the result of its exercise: the convening of a deliberative forum. This, even when this right was not expressly declared in constitutional canonical texts. For these reasons, the right to resist offers an interesting point of view to study South American constitutionalism.

*Chile as a case study*

From its return to democracy in 1990 until the October 2019 uprising, Chile was considered an exemplary country in South America. Internationally recognized for its political stability and economic prosperity, it was seen as a model of economic development and democratic practices. The enormous contrast between the projected image and the reality evidenced from the 2019 uprising is the first reason that makes it an interesting case study. Indeed, if the analysis that I propose here were carried out with respect to a politically unstable country, or one with only sporadic periods of stability, the results could be distorted. Although it is necessary to defend the right to resist for unstable contexts, a deliberative conception would make possible to broaden the scope of this right. It would be a right whose validity

[12] Argentina (1853, 1983,1994) Art. 36; Ecuador (2008, 2015) Arts. 98 and 416 n.8; Art. 45; Paraguay (1992, 2009) Art. 138

[13] Ecuador (2008, 2015) Arts. 98 and 416.

depends on certain serious institutional inefficiency. In principle, this institutional failure would not require that the entire institutional system be unstable. Rather the opposite. Timely deliberation could ensure its stability.

The case of Chile, however, allows me to advance to a different position. It is possible to maintain that, if successive governments had paid attention to the demonstrations during this long period of apparent normality, the social situation would not have escalated to its critical point. If the growing and persistent claims expressed through NICPA had been taken seriously, the institutional collapse, and its victims, would have been avoided.

This very fact offers three additional reasons of relevance to my argument. The first is the role of control over political power which a deliberative conception of the right to resist can play, even in times of apparent stability. The second is the guarantee of protection that this offers to the people against the exercise of violence by the State, distinguishing resistance, rebellion and revolution. The third is the form that is adopted to get out of the crisis: calling to a deliberative forum.

These reasons lead me to a final consideration. Chile is one of the five countries, out of ten in the region, that does not expressly recognize the right to resist in its current constitutional text. This will allow me to maintain, on the one hand, that- given the type of principles that this right seeks to guarantee- it belongs to the class of rights that does not need to be expressly recognized. On the other, the very existence is

dynamic, so its conception can be updated; for that matter, by use of contemporary theories of deliberative democracy.

*Key claims*

a) The crisis of democracy can be explained as a loss of legitimacy of political power. One way to explain this, are the limits and vices that representation has in addressing disagreements and social demands.

b) This crisis is expressed, among other things, through the decline in electoral participation, and a corresponding increase in non-institutional collective political actions.

   Following Gonzalez Marín's proposal[14], I will understand as people that part of the population of a territory that does not exercise political or economic power (the passive aspect of the notion of people); however it is endowed with political rights and duties. Following the same author, I will understand that the people, in its active sense, are characterized by creating public opinion, presenting requirements and exercising constituent power. Regarding the second characteristic, I will maintain that from the deliberative perspective this also supposes that they take an active part in the decision regarding what is required.

c) I maintain that the response to this crisis would be to assume the principles that inspire modern democracy. This means reaffirming that rights bearers have the

[14] Patricio González Marín, 'Algunas Consideraciones Sobre Los Conceptos de Pueblo y Nación En La Teoría Del Estado.' (2014) 17 Revista de Derecho Público 25, 26–40.

capability to express their discontent and, consequently, to participate in the resolution of their claim, especially when the institutions provided for political mediation fail in their purpose.

Following Rawls[15] and Waldron[16], I will argue that any society of rights is plural and that such plurality intensifies the possibility of political disagreement. I will maintain, in continuity with their ideas, that state bodies have a decisive function in public dialogue. When these institutions fail in their purpose, the original right of democracy arises: citizens have to decide directly on collective affairs. For Rawls, the electorate as the first court of appeal. For Waldron, the rights of citizens are not only to be protected by the state but to decide on the collective destiny. Finally, I will argue that it is possible to create conditions of public reason. I will advance that one way to achieve this purpose is through deliberative forums.

d) A deliberative conception of the right to resist is a constitutional way to reaffirm and guarantee this capability. Firstly, it affirms that rights bearers have the power to call to deliberation on what they claim is being persistently ignored. Secondly, it protects individuals facing the power of the state. Finally, because it allows for the convening of mechanisms through which grievances can be peaceably addressed, thereby preserving other goods of constitutionalism and the rule of law.

   The deliberative conception of the right to resist that I propose here assumes as its starting point what was proposed at the beginning of modern democracy.

[15] John Rawls, *A Theory of Justice. Revised Edition* (Harvard University Press 1999).
[16] Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999).

Particularly the one described by authors such as Locke and Jefferson. Then it differs from them since it proposes to take its exercise to deliberative forums created to address the conflict caused by the exercise of the right to resist, and not redirect it to pre-existing institutions. I will argue that this is one of the contributions of deliberative theory to the early modern idea of the right to resist. I propose that opening deliberative forums before the exercise of the right to resist offers greater democratic guarantees.

e) As a consequence of the above, democracy improves. Since individuals are heard and participate in the resolution of the conflict, what is resolved is endowed with greater legitimacy, strengthening democracy as a whole.

f) The characteristics of the deliberative conception right to resist can be observed, both in the South American constitutions which expressly establish it, and in some political practices adopted in countries where it is not present in the canonical texts.

g) The situation of Chile in the 2019 uprising, and the subsequent constituent process, clearly illustrate the conception of the right to resist that I defend. Indeed, the exercise of the right to resist through massive protests throughout the country brought the political pact to a decisive turning point: the existing institutions (political parties, parliament and the executive mainly) had to recognize themselves as incapable of mediating the demands, and restore public order. It is that moment, which I describe as the non-institutional stage, which triggers the beginning of the following stages, namely: pre-institutional, agreement on the constituent process, and then institutional, the constituent process itself.

Likewise, the form of election and composition of the Constitutional Convention allows us to observe that it is possible to balance representation by giving space and recognition to actors who do not belong to the traditional elites. Indeed, the composition of said convention guaranteed the participation of independents, opened space for social movements, guaranteed seats for native peoples, and established a rule of gender parity in the electoral result.

*The object of study and research methodology*

My object of study is the political mediation of social demands, whereby legitimate rules are adopted in the resolution of those demands; with particular attention to the case in which constitutional institutions fail, and it becomes necessary to move from (non-institutional) resistance to (institutional) deliberation. This is a multifaceted issue, with which different disciplines have dealt. Those that I have taken especially into account here have been the approximations offered by constitutionalism, sociology, and political theory. My intent has been that the contribution of each allows me to elaborate one consistent interdisciplinary vision.

The Constitutional theory has provided me with the necessary instruments to analyse constitutional institutions and procedures, concerning constitutional rights. It has also been important to compare the contributions of the South American constitutions, the current Chilean constitution, and its recent amendments. I have followed a sociological perspective to formulate the role of NIPCA through the theory of social movements. It has also been relevant to identify the social transformations which require new institutional devices. Political theory has been relevant to

conceptualize institutions and their role. In addition, it helps me to understand the history of the ideas that founded constitutionalism, their controversial nature, and their dynamism in maintaining the principles that found them.

*Structure*

My thesis is divided into three parts. The first introduces the South American political legal context and its main challenges. I then elaborate a concept of the right to resist based on its regulation in canonical texts and recent political practices in the region. Bearing this concept in mind, I analyse the disobedience conception of this right, before going on to propose a deliberative conception of it.

In the second part, I deepen the deliberative conception of the right to resist. To do this, first, I present the deliberative theory of democracy, and the possibilities that this opens with respect to the incorporation of individuals in the elaboration of the norms that they must obey. I then propose an alignment of deliberative democracy, non-institutional political actions, and the right to resist. Based on the theory of social movements, I maintain the complementarity between this class of actions and institutionalized political activity, despite certain objections that may arise from one side or the other. Finally in this part, I examine the passage from resistance to deliberation. I have divided this process into three stages: non-institutional, pre-institutional, and institutional.

In the third part, I present the Chilean case. This part is divided into two chapters. First, I present the historical context of the adoption of the current constitution and

analyse the reasons that could explain its collapse. The second examines the process that is triggered by the uprising of October 2019, and how, based on what was elaborated in my thesis, it moves from resistance to deliberation. Finally, I present some general conclusions from my work.

# PART I

## South American constitutions and two conceptions of the right to resist

# CHAPTER I

## Discontent with democracy in South America

Constitutional democracies are experiencing a period of crisis throughout the world. As the work of Graber, Levinson and Tushnet consistently shows[17], researchers from all continents are concerned about the growing deterioration of democratic institutions and practices. As these same authors document, expressions such as "Democracy in Retreat", "democratic recession", "democratic backsliding", "democratic deconsolidation", "constitutional retrogression"[18], among others, became frequently used to describe this situation.

In South America particularly, these have entered cycles of growing instability. Non-institutional collective political actions, which make their discontent known by defying existing institutional procedures, occupy an important place[19], while the devices planned to channel social and political demands are ineffective and

[17] Mark A Graber, Sanford Levinson and Mark Tushnet, 'Constitutional Democracy in Crisis? Introduction', *Constitutional Democracy in Crisis?* (Oxford University Press 2018).
[18] ibid 1.
[19] María Victoria Murillo, 'Protestas, Descontento y Democracia En América Latina' (*Nueva Sociedad*, July 2021).

frequently fail. Additionally, the governments of this region, instead of looking for new and better ways to respond to this reality, tend to defend institutions that have been shown to be ineffective[20].

My purpose in this chapter is to describe the political culture that might explain the growing discontent within South American democracies, and then show how existing institutions are constrained in mediating the discontent. For these purposes, I will take as a basis the notion of political culture proposed by Bargsted and Somma, who adopt the Almond and Verva understanding of it "as the cognitive, affective, and evaluative orientations that citizens develop towards political phenomena. […] [A] set of concepts such as political cognition, subjective civic competence, attitudes toward government, and partisanship, among others". From this conception Bargsted and Somma argue that is possible to observe contemporary political issues as "the dramatic drop in electoral participation and trust in political institutions", "the decline in party identification and identification with political ideologies", "the uprooting of the party system", and "the emergence of large-scale social movements and waves of protest", among others[21].

[20] José Virtuoso, 'Introducción. América Latina Nuevamente Puesta a Prueba.' in Angel Alvarez (ed), *Crisis y Desencanto con la Democracia en América Latina* (Unviersidad Católica Andres Bello) 14.
[21] Matías Bargasted and Nicolás Somma, 'La Cultura Política, Diangónstico y Evolución' in Carlos Huneeus and Octavio Avendaño (eds), *El sistema político en Chile* (LOM 2018) 193.

Although this political culture approach that I propose adopts some contributions of political sociology, for example in the theory of elites or pluralism, it takes precedence over it. I have two main reasons for this. The first is that the notion of political culture emphasizes the scope of political meanings that give rise to political practices. Instead, political sociology tends to emphasize the procedures[22] and underlying power relations[23], as "a matter of fact"[24] . Since my proposal wants to offer a space for dialogue and agreements, as "a matter of meanings", the first approximation seems more fruitful to me.

The second reason arises from the relationship between history and culture. Although, once again, history is not alien to political sociology[25], the role it occupies in political culture is essential. Indeed, the development of political concepts and, of course, of political ideas, is decisive for the study that I propose. Observing their origin and context of meaning will allow me to propose, coherently with them, a contemporary way of understanding them[26].

Finally, I will present some of the challenges faced by democracies in the region, to argue that is necessary to think in new ways to guarantee collective participation in political power. This will then allow me, by way of conclusion, to initially argue for the role that the right to resist could have in constitutional democracies so described.

---

[22] This approximation is especially clear in Foucault's proposal. See Kate Nash, *Contemporary Political Sociology. Globalization, Politics, and Power. (Second Edition)* (Wiley-Blackwell 2010) 27–29.
[23] An interesting sociological approach to some of the topics that I address in my work can be found in Davita Silfen Glasberg and Deric Shanon, *Political Sociology. Oppression, Resistance and the State.* (SAGE 2011).
[24] Nash (22) 3
[25] Nash (22) 33-34
[26] Lucian W Pye, 'Political Culture and Political Development' in Lucian W Pye and Sidney Verba (eds), *Political Culture and Political Development* (Princeton University Press 1969) 3–4.

To introduce the above, I had divided this chapter into three sections. The first presents some distinctive aspects of the political history of the countries of the region, and how this influences the current situation of their constitutional democracies. I will refer particularly to the role of the conservative-liberal agreement in the origins of the republics, in which homogenization and elitism occupy a decisive place.

In section two, I will present the problems that some institutions present to mediate social disagreements and demands, and their political consequences. To make the picture as broad as possible, I have selected four critical institutions in the construction of constitutional democracies, namely: elections, presidentialism, constitutional control, and constitutional amendment. Although in each there are good reasons to defend their purposes, I will concentrate on their limitations.

I will dedicate the third section to presenting some challenges that are urgent in the region, due to their high social and political impact. Although others tare important, these will allow me to more clearly illustrate the limits of both the political culture and the constitutional institutions described above. Finally, I present a series of conclusions from which I will develop the arguments of the following chapters of this first part. Basically, I will advance that the right to resist, from a deliberative perspective, can contribute to improving democratic dialogue, thereby strengthening the legitimacy of political power.

## Common South American constitutional culture

The South American subcontinent is made up of ten independent countries and four small territories that belong to European countries[27]. The independent countries, namely, Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Paraguay, Peru, Uruguay, and Venezuela, have a relatively common political history. All these territories were inhabited by native communities since ancient times, all of them were invaded by European crowns establishing colonies from the 16th century, and all of them adopted, after military campaigns coordinated by Creoles, constitutional republics. The case of Brazil is a little different, since this territory became part of the Portuguese empire, ceasing to be a colony prior to the declaration of the republic. Because of this there was no war of independence as such.

From their origins, these republics were determined politically by the liberal-conservative pact. Because of this pact, constitutions adopted and promoted a political culture whose most outstanding characteristics are cultural homogenization and elitism. These characteristics will significantly determine the political life of this region until recent times. In this section I will describe its most important aspects.

### The hegemony of the liberal-conservative pact

[27]Bouvet Island (Norway); Falkland, South Georgia and South Sandwich Islands (United Kingdom); French Guyana (France). I also leave out Guyana and Suriname, which have a different legal tradition.

As Gargarella explains, in this first South American republican period there were three important political currents in tension: liberals, conservatives and radicals[28]. For the liberals the central concern was individual autonomy, production and trade. They aimed to generate guarantees that would allow free exchange, both locally and regionally. The conservatives, for their part, defended the political structures of the old regime, seeking to guarantee their privileged position within it. In the words of Jocelyn-Holt, they saw in independence the possibility that everything would change, so that nothing would change[29]. Likewise, due to its connection with the Roman Catholic hierarchy, they appealed to the imposition of this church as official, and its moral postulates as a general rule. Finally, for the radicals, the main concern related to civil and political rights, emphasizing the education of the people and the possibility of their influencing the collective destiny. In addition, they defended the installation of a secular state.

After an initial period of advances and setbacks between these currents, by 1833 the conservative liberal pact began to be imposed. A relevant constitutional model in this regard was the constitution adopted by Chile that year. This constitution, also known as the "conservative constitution", which was in force until 1925, establishes, among other things, a strict presidential regime, a census vote, and Roman Catholicism as the official religion of the republic.

[28] Roberto Gargarella, *Latin American Constitutionlism 1810 - 2010. The Engine Room of the Constitutions* (Oxford University Press 2013).
[29] Alfredo Jocelyn-Holt, *La Independencia de Chile. Tradición, Modernización y Mito* (Pinguin 2009) 5.

Although throughout the following years this constitution, and those influenced by it, were amended, the political culture imposed by the liberal-conservative pact remained in force. In this political culture, two decisive aspects stand out. On the one hand, the attempt towards cultural homogenization and, on the other, the elitism of political activity.

*Cultural homogenization*

The attempt at cultural homogenization in the region could be described as the effort to impose, from the state: one nation, one language, one morality and one religion, namely Roman Catholic. To achieve the above, adopted constitutions deny, and even persecute, any cultural expression outside these strict margins. Thus, and despite the disagreement of some members of this church, the status of nation is denied to ancestral peoples, their languages were no longer taught, or even suppressed, civil institutions were adopted based on rigid moral ideas, and the Roman Catholic religion was declared official and unique.

Despite early attempts to find alternatives, these ideas were hegemonic in the region until the middle of the 20th century. Among other consequences, the societies of the region became highly racist, and in many cases xenophobic towards each other, while at the same time extremely discriminatory toward diverse forms of life. In a certain sense, those who did not fit the homogenizing stereotype were excluded, when not persecuted; and, in any case, they were second-class citizens.

The most prominent example is the treatment received by the members of the ancestral peoples, who in some cases were exterminated. Nevertheless, this homogenizing imposition affected various groups. Thus, for example, until the middle of the last century, women were excluded from political participation, and considered relatively incapable of managing their property if married[30].

Another example is what happened with the descendants of those brought from Africa as slaves. Although with the installation of the republics a progressive process of emancipation from slavery begins, Afro-Americans remain as a discriminated group, and are prevented from recovering their ancestral traditions and language. Indeed, racism against members of African American groups is an ongoing concern[31]. In spite of attempted corrections, such as affirmative actions or quotas reserved for representation, the political culture of exclusion has not yet been corrected.

These elements have configured a political culture based on three characteristics. The first is that discrimination has been internalized within the discriminated groups themselves. It is often the case that those who are victims of discrimination, to a certain extent reproduce it. As the case of the persecution and killing of indigenous peoples during the Fujimori period in Peru in the 1990s exemplifies, those who were

[30] Carmen Diana Deere and Magdalena León, 'El Liberalismo y Los Derechos de Propiedad de Las Mujeres Casadas En El XIX En América Latina' in Magdalena León and Eugenia Sáenz Rodriguez (eds),?*Ruptura de la Inequidad?:propiedad y género en la América Latiina del XIX* (Siglo del Hombre Editores 2005).

[31] Peter Wade, 'Estudios Afrodescendientes En Latinoamérica: Racismo y Mestizaje' (*Tabula Rasa. Revista de Humanidades*, 2017).

closer to being considered members of the persecuted groups showed greater cruelty in their treatment of the victims.

The second is that diversities can be silenced, but they do not therefore disappear. Thus, when they take up their voices again, they do so with more force and, sometimes, violence. The accumulation of discomfort produced by social exclusion tends to trigger increasingly disruptive actions. At the same time, since the political system is designed to impose this homogeneity, it is very difficult to institutionally mediate said discontent. An example of this has been the various mobilizations of the ancestral nations in the region[32].

Thirdly, the appeal to the supposed founding homogeneity of society becomes a dangerous political weapon, especially in these times, where political proposals lose the ability to bring projects together. Thus, the countries of the region become fertile ground for the emergence of populist leaderships that appeal to nationalist, xenophobic, homophobic, and misogynous ideas, as shown by the current government of Brazil headed by Bolsonaro.

*Elitism*

The liberal-conservative pact is described as an agreement between the economic and political elites in favour of their own stability. In terms of a political framework, this means designing institutions where the small group which exercises power is not

[32] Carlos Antonio Aguirre Rojas, 'Los Movimientos Indígenas En América Latina' (*Catedra: Revista especializada en Estudios Culturales y Humanísticos*, 2020).Pu Lov y Comunidades Lavkenche en la Resistencia, *Xipamün Pu Ülka! La Usurpación Forestal Del Lavkenmapu y El Proceso Actual de Recuperación* (Libros del Perro Negro 2017).

threatened by political rights, therefore limiting them[33]. From this point of view, the conservative liberal pact is an elitist pact.

Elitism rests on the idea that in every society there is an incompetent mass that is not in a position to decide on the common political destiny[34]. This majority mass must be led by a minority group that would know what to do: the elites. This has two important consequences. The first is that the will of the public must be confirmed to the extent that it coincides with the will of the elites. Thus, the stability of a government depends largely on what Ramirez has called "the consensus of the elites"[35]. The second is that political devices are designed to ensure that elites remain in that position. In this way, elitism is shielded by procedures that prevent correction of the elite's advantages with respect to the rest of the citizenry.

In South America, the elitist model is installed in power together with the birth of the republics. At the same time that the emancipation of the European crowns was being promoted, the groups that led these processes were suspicious of the capacity of the masses to govern themselves. Thus, for example, Simón Bolivar in the zone of Venezuela and Colombia, like Diego Portales in Chile, are extraordinarily critical of the possibility of recognizing the political voice of the peasant majorities[36].

[33] Gargarella, *Latin American Constitutionlism 1810 - 2010. The Engine Room of the Constitutions* (n 28) 198.
[34] Salvador Ramirez Gruzmacher, 'Comentarios En Torno a La Teoría Elitista de La Democracia' (1990) 22/23 Politica 193, 193.
[35] ibid 196.
[36] Roberto Gargarella, *The Legal Fundations of Inequality. Constitutionalism in the Americas, 1776 - 1860* (Cambridge University Press 2010) 16–17.

As a result, centralized governments were installed, strongly presidential and with very restricted access to parliamentary representation. Eventually, the government of the nascent republics was handed over to the property, educated members of a small number of families, whose social networks allowed them to participate properly in power. This mark of origin remains, with few exceptions, in the following years. Although the recognition of rights for working majorities has increased, in particular political rights, in practice there are no structural changes that redistribute power[37].

A particularly relevant aspect of the configuration of elites in the region has been the relationship between economic groups and political power. Two indicators show the problems which this presents: firstly, the increasing rates of corruption where the state is practically co-opted by economic groups; secondly, the ingrained suspicion that, even if not corrupt, economic and political leaders act for the benefit of a small group of people[38].

As a consequence of the above, the political culture in South America is marked by a growing distance between the ruling elites and those they represent. Although there have been cases where those who are not part of these elites come to power, for example Inácio da Silva in Brazil, or José Mujica in Uruguay, it has been common for them to adopt behaviour similar to that of those they intend to replace. Examples of this are the cases of Morales in Bolivia, Maduro in Venezuela, and Correa in Ecuador.

[37] Gargarella, *Latin American Constitutionlism 1810 - 2010. The Engine Room of the Constitutions* (n 28) 198.
[38] Virtuoso (n 20) 18.

## Crisis in the legitimacy of political institutions

The political culture described above has its counterpart in an institutional system that, instead of helping to correct it, rather promotes it. Although the institutional devices planned for the progressive political renewal in accordance with the updating of the principles that inspire democracy, in practice they reproduce what they could correct.

In this section I will present the problems presented by four of these devices: elections, hyper-presidentialism, representation, and judicial review. Finally, I will dedicate a section to explain, based on the above, the locked machine room idea, as proposed by Gargarella.

### Elections: democracy as an aggregation of preferences

Periodic elections are a distinctive aspect of democracy and maybe its characteristic model for legitimate political power. Through this, the legislature is judged and renewed, while political projects are confirmed, corrected, or changed according to the will expressed by the majority. Thus, the majority rule operates as a valuable resort for solving collective matters. Eventually, it is always better to count heads than to cut them off[39].

[39] Quoted by Agustín Squella, 'Libertad e Igualdad. Las Promesas Cumplidas e Inclumplidas Por La Democracia' (1989) VI Anuario de Filosofía del Derecho 253, 257.

Notwithstanding that majority rule can be decisive for the success of a democracy, it can also be a threat to it. Indeed, there is a risk when the aggregation of preferences replaces political deliberation because it reduces democracy to a mere formality; a model to protect, but not a purpose to achieve[40]. From this point of view, democracy is, in a relevant sense, the dialogue that leads to decision-making on collective issues, not simply a decision-making event.

Among the reasons why this dialogic dimension of democracy has been losing its place in democratic practices, particularly in South America, are the difficulties which arise when territories are extensive, the population is very large, and there is a common certainty that the matter will finally be decided in any case, by majority rule. Ultimately, this argument holds that if resources are scarce, it is better to use them in implementing public policies, rather than discussing them.

These reasons are understandable and should be addressed in each case, but the risks of forgetting democratic dialogue must be weighed. This is, even more, the case when, because of the above, the practices of political discussion are replaced by the rules of the market, which is becoming common in the region with neoliberal ideas of the state[41]. Indeed, when the reasons for what is in favour of all are replaced by the quantitative accumulation of support for interests, the aggregation of

[40] Bernard Manin, Elly Stein and Jane Mansbridge, 'On Legitimacy and Political Deliberation' (1987) 15 Political Theory 338, 338.
[41] Teresa Castro Escudero and Oliver Castillo, Lucio (eds), *Poder y Política En América Latina* (Siglo Veintiuno 2005).

preferences is no longer a way of promoting a general good, but rather a way of strategically distributing power.

Characteristically, the advance of this neoliberal idea of the state in South America promotes the public sphere as an elitist space for negotiation, not a forum to discuss as equals[42]. Due to this feature, the reasons for making a certain decision are not so relevant, but rather the ability to impose the satisfaction of a certain interest. Or rather, the reason why a decision is made is because it is in the interest of those who defend it. Consequently, the decisions made in the market context, which are trade-off decisions, reflect who has the greatest bargaining power to impose their terms. It is for this very reason that the exclusionary effect of the conservative-liberal pact has resorted to force to sustain itself.

Co-opted by the rules of the market, the field of politics becomes a mirror of who has more trading power, not who has the best ideas. Likewise, it becomes an exclusive space, governed by elitist interests, and not by what is in favour of all. This is problematic since the purpose of democracy is to identify the will of the people, and not to determine the will of the majority without further ado; that is, the identification of what favours the general good, not what satisfies the interests of a greater number of people[43], even if sometimes these coincide.

[42] Roberto Gargarella, *El Derecho Como Una Conversación Entre Iguales. Qué Hacer Para Que Las Democracias Contemporáneas Se Abran -Por Fin- al Diálogo Ciudadano.* (Siglo Veintiuno 2021); Gargarella, *La Derrota Del Derecho En América Latina. Siete Tesis* (n 1).
[43] Fernando Atria, 'The Form of Law and the Concept of the Political' (2020).

Because of the above, both the electoral process and political representation are degraded, losing the ability to legitimize political decisions. In the case of the electoral process, two signs show this degradation. The first is that candidates present themselves as bidders, in the sense that they try to identify the needs of specific groups to offer them their product; whether these are real needs, relative to the position of the majority groups, or created needs, driven by the candidate's own interests. Each is problematic: the first because it excludes the needs of minority groups, which should, by themselves, be the object of special attention; the second, because the needs created are generally linked to the feeling of fear or threat.

The second sign of degradation is that the voters understand themselves as customers. A customer can claim the product on offer, instead of being jointly responsible for the political decisions which are adopted. A type of relationship, therefore, ensues between the representatives and represented, where the latter remain faithful to the former if their needs, real or created, are satisfied. In this context, the discussion of collective issues becomes irrelevant, compared to the ability of a candidate's supporters to attract the largest number of votes so that this candidate, when in office, can respond to their demands.

As a result, elections, as a system of legitimation of political decisions, fail in two ways. Firstly, because voters know that the decisions made are intended to meet the needs of the groups that achieve power, they have therefore less reason to consider them legitimate or to consider them legitimate for procedural reasons only. The second, which is especially relevant for the arguments developed here, is that the

groups permanently excluded by the candidates cease to participate in the electoral processes, having no reason to do so[44]. Meanwhile, they begin to express their discontent through collective political non-institutional actions.

### Hyper-presidentialism: the risk of populisms

Presidentialism is another mark of Latin American constitutionalism from its origins[45]. This is characterized by the strong concentration of powers in the executive branch. The aspects that describe this concentration of powers are of various kinds, ranging from appointments to public positions, to the practical immovability of the president. However, the most outstanding is the concentration of the legislative and budget initiative. Through them, whoever occupies the presidential role manages to have, in practice, political control of the country.

Under political conditions of relative stability, in relatively homogeneous societies, this model can promote the effectiveness of a government program. However, this is not the South American reality. Quite the contrary, this region has been the scene of various failures of this model, where the presidents, instead of being judged, flee, leaving behind social instability. Some recent examples are Sánchez de Lozada (Bolivia), De la Rúa (Argentina), Fujimori (Peru) and Gutiérrez (Ecuador).

[44]Virtuoso (n 20) 15.

[45] Marcelo Alegre and Nahuel Maisley, 'Presidentialism and Hyper-Presidentialism in Latin America.' in Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press) 381.

The other side of this situation is the risk of the emergence of populism. The institutional design that favours control by the elites, but excludes that of the majorities, increases the risk of populist proposals[46]. Using an anti-elitist discourse and appealing to the frustration of groups that feel excluded or abused, these ideologies divide the political field into two antagonistic groups: the 'pure people' and the 'corrupt elite'[47].

As in other parts of the world, populism in South America can manifest itself in any sector of the political spectrum. Thus, the Venezuelan case is presented through a socialist project, in Brazil it appears under the inspiration of the ultra-right. In both cases, their leaders act without submitting to or threatening the political institutions, appealing to the greater cause they claim to represent.

Representation: bureaucracy bargaining rights as bribes[48]

Another aspect is the crisis in representation. Unlike elections, which are periodic events, this refers to the daily practice of decision-making which assumes that people express their own preferences through it. Given the complex operations that modern societies require simultaneously, representation offers the possibility of handing over the task of deciding to a group of people who dedicate themselves to it as full-time labour. This allows short and long-term policies to be resolved, without it being necessary to involve all stakeholders in all decisions.

[46] Oran Doyle, 'Populist Constitutionalism and Constituent Power' (2019) 20 German Law Journal 161, 161.
[47] Oran Doyle, Erik Longo and Andrea Pin, 'Populism: A Health Check for Constitutional Democracy?' (2019) 20 German Law Journal 401, 406.
[48] Rosalind Dixon, 'Constitutional Rights as Bribes' (2018) 50 Connecticut Law Review 767.

Even though representation occupies a decisive place in contemporary democracies, it is vulnerable to losing its purpose, if not contradicting it entirely. In principle, the task of the representatives is to discuss and decide, by considering the inclination of those whom they represent, what is in favour of all from their point of view. However, due to different voices in the framework that regulates representation, representatives can become an interest group. This phenomenon is closely related to elitism and could be described as the bureaucratization of political representation[49], which in South America became frequent.

The fundamental interest of political bureaucracy is to conserve its power to decide; that is, the position of influence which the investiture of the office confers on them, undermines the representation[50]. To do this, along with set rules to their advantage - i.e., unlimited re-election, decision on their budget, etc.- they have publicity and political communication devices that guarantee them visibility and support[51].

Political bureaucrats assume their position to decide as a negotiating power. Instead of weighing arguments, they are bargaining interests, including their own. Since their place depends on current political conditions, recognition of rights and modifications

[49] I adopt here the notion proposed by Pérez. Although his conception is more general than the one, I use here, the structure of the concept is similar. See: Carlos Pérez Soto, *Para Una Crítica al Poder Burocrático. Comunistas Otra Vez.* (LOM - ARCIS 2001) 83. Good syntheses on other concepts of bureaucratization can be found in Francisco Javier Bellido, 'La Burocratización Del Poder Político:Notas Sobre Sus Consecuecias En Las Democraciasi Parlamentarias' (2017) 20 Astrolabio. Revista internacional de Filosofía 1; Rodulfo Figueroa A., 'La Burocratización Del Estado.', *Las prioridades nacionales y las políticas de reclutamiento de funcionarios públicos en los países en desarrollo.* (Colegio de Mexico 1981).

[50] Pérez Soto (n 49) 90.

[51] ibid 89.

to the political framework are tolerable only insofar as they do not significantly affect their interests. Eventually, everything can be negotiated, except what allows them to remain in privilege.

Since their permanence in power also depends on there being some degree of satisfaction with their political management, one that guarantees a certain tranquillity for a certain majority, constitutional rights can be used as bribes[52], that is, as a trade-off which allows them, if necessary, to give to claimants, in exchange for not altering the current structures.

These practices seriously jeopardize the legitimacy of political decisions: firstly, because they cause the privatization of the state, putting political power at the service of the interests of a particular group. Generally sheltered in some elitist justification, the group's decisions systematically favour those who, in one way or another, can take advantage of that power without affecting it. Likewise, less influential groups are systematically excluded, especially if they claim against the way in which the political power is structured or exercised.

As a result, a political status quo is protected under the guise of legitimacy. Given that the political power conferred by representation is at least formally democratic, disruptive acts which challenge it are regarded as threats to the prevailing order. As previously explained, the establishment begins to protect itself on the grounds that

[52] Dixon (n 48).

it is guaranteeing the rule of law. Practices such as the criminalization of protest, or persecution of social leaders, are examples of the result generated by this weakness. Eventually, the representation model loses its legitimacy, to the point of no longer being able to contain discontent, neither by bribing with rights nor by force.

### Judicial review: political constitutional courts

The final device for legitimizing political decisions to be examined is the judicial review, and the bodies responsible for it[53]. The judicial review is a procedure designed to guarantee that the decisions of courts or political bodies are in accordance with the constitution[54]. Constitutional Courts, in turn, are technical and independent bodies which have constitutional jurisdiction for carrying out this procedure. In general, it can be of four types: the resolution of disputes of jurisdiction between state bodies, review of the constitutionality of the decisions of the courts of justice, acts by executive, and review of the constitutionality of the laws issued by the parliament, before or during their application.

These courts have contributed in many cases to the stability of constitutional democracies. However, they present serious difficulties when delimiting their action between strictly legal and the political decision. This is due to the, sometimes, controversial nature of constitutional concepts. The content of the constitutional

[53] A sharp reading of the judicial review in the light of deliberative democracy can be found at Christopher F. Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press 2007).

[54] The ideas in this paragraph in Carlos Nino, *The Constitution of Deliberative Democracy* (Yale University Press 1996).

concept depends on the interpreter's conception of it[55]. In this sense, the impartial conception is unlikely.

As a result of the above, constitutional courts have become an effective space for political action, where the design is maintained rather than corrected. The most eloquent cases of the above are those where constitutional courts invade the field of legislative power. A group of people who are outside the citizens' control decide on the way in which political power will be exercised[56].

The risk of this judicial activism[57] is that a body which should give legal arguments operates as a political one. Likewise, whatever the political orientation adopted by the court; these decisions further pierce the already-weakened impression that citizens have of their representatives. If individuals suspect that their representatives may act in their own interests, being tied down by counter-majority bodies only increases their discredit. Consequently, the rules adopted begin to lose legitimacy.

In this sense, the case of the Colombian Constitutional Court regarding same-sex marriage can be considered. In 2011 a request was presented asking the Court to authorize Civil Registry Officials and Notaries to register same-sex marriages. Along with accepting the request, the Court exhorted (*exhortó*) Congress to legislate on this matter, giving it a deadline by the 20th of June 2013. The deadline expired without

[55] Rawls, *A Theory of Justice. Revised Edition* (n 15) 5.
[56] Zurn (n 53) 32. See also Ran Hirschl, *Towards Jurstocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).
[57] Keenan D Kmiec, 'The Origin and Current Meaning of "Judicial Activism"' (2004) 92 *California Law Review* 1441.

legislation. By 2014 the Court was once again called to decide on the unions registered between 2011 and 2014. Finally, the Court in 2016 confirmed unions made in that interval and dictated that this form of registration would be the rule for the future.[58]

A relatively similar situation can be observed in the case of Bolivia. In this country, a referendum was called by President Morales, to consult on the possibility of reforming the constitution to allow his re-election. Although the result was negative for Morales, he appealed to the Constitutional Court, where he had most supporters, who authorized him to be a candidate again.

Finally, there is the case of the Chilean Constitutional Court. This constitutional court, whose composition depends on the political interests of the government in power, became, in practice, an additional legislative body. Indeed, given its institutional design, it became common for political groups defeated in parliament, but overrepresented in the Constitutional Court, to resort to it to prevent legislation. A relevant case, which also shows how bureaucratized elitism affects this body, was Law 20940 (2016) on union affiliation of workers.

To understand this and other cases[59], it is first necessary to keep in mind the way this court is composed. Since the appointment of its members depends on the approval

[58] See: *Requerimiento de Amparo Constitucional* Corte Constitucional de Colombia SU214-16; *Requerimiento de Amparo Constitucional* Corte Constitucional de Colombia C-577-11.

[59] A detailed description of the cases that show this practice see: Fernando Atria, Constanza Salgado and Javier Wilenmann, *Democracia y Neutralización. Origen, Desarrollo y Solución de La Crisis Constitucional* (LOM 2017).

of parliament, in practice, a rule of balance has operated, frequently altered by presidential appointments. Thus, its composition is a reflection of the capacity for political influence. Eloquent in this sense is the statement of a former congressman who, faced with a defeat in parliament, said: "it doesn't matter, we go to the Constitutional Court where we have a majority (6/4)"[60].

In the case of the law indicated above, precisely this logic operated. After fourteen months of parliamentary processing, a regulation was achieved that strengthened the role of unions before employers. However, opponents of this rule argued that this weakened the ability of workers to negotiate individually with the employer. This objection presented by the right- wing, which represents a significant part of the interests of large companies in Chile, was accepted by the court because they had a majority there[61].

Situations such as those described above weaken the political system as a whole: on the one hand, because constitutional control devices are perceived, often rightly so, as means of avoiding democratic decisions; on the other, because that same loss of prestige also leads to mistrust of the possibilities of social and political transformation through institutional channels. If, together with this, the elitist composition of state officials is considered, mistrust of them increases.

[60] Diario la Segunda, 15.10.2015. quoted in ibid 50.
[61] ibid 65.

Amendments and new constitutions: the untouchable 'Engine Room'

Since the last democratic wave in South America, that is, with the fall of dictatorships towards the end of the 20th century, most countries have adopted new constitutions or amended existing ones. Among those who adopted new constitutions are Brazil (1988), Colombia (1991), Paraguay (1992), Ecuador (1998 and 2008), Peru (1993), Venezuela 1999 and Bolivia (2009). Argentina and Chile, for their part, significantly reformed their constitutions in 1994 and 2005 respectively [62].

The origin and the ideological content which inspired these new texts are dissimilar. Thus, for example, while the constituent assembly of Colombia was summoned after a massive social mobilization, the Venezuelan was the result of a referendum called by the government. Or, while the orientation of the Peruvian constitution responds to Washington's Consensus, the Bolivian one presents a strongly anti-colonial and anti-Extractives content[63].

However, as Uprimny shows, some common aspects can be recognized, both in their progress and in their limitations. Among the former, there is the advance in the recognition of social rights, a strong commitment to Human Rights, and the recognition of the rights of the ancestral nations, either through multiculturalism or the advancement of the idea of a Plurinational state. In the second, there is still an

[62]Rodrigo Uprimny, 'Las Transformaciones Constitucionales En América Latina: Tendencias y Desafíos' in César Rodríguez Garavito (ed), *El derecho en America Latina. Un mapa para el pensamiento jurídico del XXI* (Siglo Veintiuno 2011) 109.
[63] ibid 116.

unresolved question of the democratization of political power; or, as Gargarella points out, the engine room problem[64].

As Gargarella correctly describes, the advances achieved in social matters through rights do not have a strong correlation in the transformation of the organization of existing political power. Indeed, if it is understood that the expansion of rights is also an expansion of the decision-making capacity and control of individuals over power, the results obtained in the region are very poor[65].

In this sense, the power of citizens continues to be understood as the faculty to claim or express an opinion, but not as a power that, institutionally organized, is effectively exercised. Rather, the situation often appears to be the opposite. More attributions are given to an already highly concentrated power[66]. As a result, the declarations of rights fill the constitutional texts, without producing the transformations they seek. An additional problem is that this structure leads to citizens' frustration and the accumulation of discomfort, which it is designed to prevent channelling properly and in a timely manner.

Faced with this situation, the elitist system protects itself again through what Dixon calls rights as bribes[67]. When the accumulation of social unrest implies a risk for those

[64] Gargarella, *Latin American Constitutionlism 1810 - 2010. The Engine Room of the Constitutions* (n 28).
[65] Gargarella, *El Derecho Como Una Conversación Entre Iguales. Qué Hacer Para Que Las Democracias Contemporáneas Se Abran -Por Fin- al Diálogo Ciudadano.* (n 42) 146.
[66] ibid 25.
[67] Dixon (n 48).

who hold political power, they offer rights to calm the claims, but without producing structural transformations in the way that power is exercised. In this way, as observed in the South American constitutions, the legal system is filled with declarations that do not respond to the core of control and redistribution of political power by those who must obey it.

## Challenges from a new society to constitutional democracy

The need to reflect again on the political culture and the constitutional institutions to which they give rise emerges from the challenges presented by contemporary societies. Social reality transforms political culture, and thereby challenges political institutions to respond to it. Some of these challenges are long-standing, such as facing poverty and inequality, or the recognition of indigenous peoples. Others are new, such as environmental conservation, new diversities, and the role of the media. What they all have in common is that the way to deal with them demands the inclusion of those who are affected. These are societies whose members appeal to have an active role in decisions, where elitist or homogenizing pretensions are left out, while institutions must initiate a transformation towards a more dialogic than authoritarian paradigm. I will describe some of these challenges below.

### Poverty and inequality

Poverty and inequality are a challenge for constitutional democracy, especially in the global south, where South America is located. Their existence expresses a failure to comply with the principles that inspire this democracy. Indeed, since it initially

assumes that all people are free and equal in dignity and rights, it accepts the commitment to create the material conditions for this proposition to be carried out. This implies both daily subsistence, as well as political recognition and skills for participating, as equals, in the democratic dialogue.

In this sense, the South American subcontinent is in serious deficit, and the covid-19 pandemic has aggravated it. The low level of income from salaries is compounded by the precariousness of health services, urban overcrowding, poor educational coverage, and low pensions. This, while the average inequality gap by the Gini model shows an increment[68]. That is, the higher-income sectors see an increase, and the lower-income sectors a decrease in salaries.

The political consequences of this crisis are serious. Social discontent grows at the same time as the discredit of democracy and the representatives, creating the conditions for the emergence of populist leaders. At the same time, coexistence becomes unstable, where expressions of discontent increase, and in many cases, the violence associated with it. Finally, there is the fact of the growth of criminal organizations, with the especially risky irruption of territorial control exercised by drug trafficking.

Constitutional democracy cannot offer specific answers for each of these situations, but it has the task of establishing the normative criteria and procedures that allow

[68] Alvarez (n 1) 63–64.

for them. Indeed, the establishment and protection of social rights, the adoption of redistributive principles, and the adoption of affirmative actions are pending challenges in the region. In this process, the participation of those who live in poverty and inequality is decisive. No one else can better explain their needs and consequently contribute to finding better solutions.

### Multiplicity of identities and affiliations

Constitutional representation devices and political decision-making processes were created in a context of societies where individuals' interests were relatively homogeneous[69]. These interests were normally related to the social or economic position in these societies. Thus, the interests of owners, workers, rural groups, urban groups, and so on, could be represented as a coherent unit. The continuity of this class of representation was given by the homogenized political parties following under one ideological project.

However, the societies to which this model could be applied no longer exist. Contemporary societies are complex, as are their individuals[70]. The expansion of the guarantee of rights brought to light that societies are composed of individuals who have a diversity of identities and affiliations. Although there are still some general agglutinating ideas, frequently relative to the role of the state, there is a much larger series of options which are difficult to pigeonhole in the older framework. Consequently, the diversity of demands emanating from the different affiliations and

[69] Gargarella, *El Derecho Como Una Conversación Entre Iguales. Qué Hacer Para Que Las Democracias Contemporáneas Se Abran -Por Fin- al Diálogo Ciudadano.* (n 42) 54.
[70] Amartya Sen, *Identity and Violence. The Illusion of Destiny* (Pinguin 2005) 8.

identities of individuals cannot be effectively mediated by a system which requires that this diversity be neutralized.

Because of the foregoing, important social and recognition demands remain outside the representation system, or they are used as political bribes. Thus, the recognition of a specific right must be accepted in exchange for yielding in other areas, which are not necessarily linked. Deprived of devices that allow these groups to call to deliberate on their specific claims, they are only left with demonstrations and wait for some reaction from distant representatives.

In this context, non-institutional collective political actions are, first, the expression of a complex society that does not find causes of action from existing institutional procedures. For this same reason, it is by looking for a way to make these institutional causes more flexible, so that their demands can be met, that democracy can be improved.

Since social movements are committed to democratic political commitment, what opens is the possibility of thinking about new forms of organization of political power, in terms such that it is legitimate in a contemporary context. To achieve this goal, it is not necessary to abolish existing institutions, but to correct them as required, and, above all, to understand them in the strongest deliberative way. It is about the institutions recognizing individuals as subjects of rights to be protected from the

power of the state and, above all, to decide what rights they have and under what conditions[71].

Autonomy of Ancestral Nations

The original peoples are those who inhabited the South American region prior to the installation of colonies and the current republics. Unlike other social demands, ancestral nations claim to be recognized as peoples. This implies, among other issues, land protection, autonomy for self-determination according to their own culture, speaking their own language, protection of their natural resources, the possibility of opting for their traditional medicine, and living accordingly to their religious beliefs.

Around 671 ancestral peoples inhabit the South American territory[72], whose members are more than 45 million, representing 8.3% of the population[73]. Each ancestral people have its own characteristics. In their ways of life, for example, they range from uncontacted tribes in the Amazon, through rural communities, to groups that live in large cities. Regarding the number of members, there are also important differences. Thus, while the Quechua community, present mainly in the territories of Chile, Peru, and Bolivia, has around 2.5 million members, the Kawashkar community in southern Chile only has about 500 members. It should be noted, however, that the manner of demographic measurements varies from country to country[74].

[71] Waldron (n 16) 250.
[72] OIM América del Sur, 'Pueblos Indígenas y Migración En América Del Sur. El Trabajo de La OIM y Principales Lineamientos Para La Estrategia Regional' 3 <https://www.un.org/esa/socdev/unpfii/documents/2016/UN-Agencies-Docs/OIM-Spanish-version316.pdf>.
[73] ibid 5.
[74] ibid 4.

The way in which these peoples have been constitutionally recognized, and the scope that this recognition has, varies across the countries of the region. Discounting Chile and Uruguay, which do not recognize the existence of these peoples constitutionally, the scope of this recognition is diverse, as can be seen in the next table designed by Fernández[75]:

| | References | Countries | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Ar | Bo | Br | Ch | Co | Ec | Pa | Pe | Ur | Ve |
| **Lands** | Lands' protection | X | X | X | | X | X | X | X | | X |
| **Recognition** | Recognition | X | X | X | | X | X | X | X | | X |
| | State* | Un | Pln | Un | Un | Un | In | Plc | Un | Un | Plc |
| **Politics** | Own social organization | | X | | | X | X | X | X | | X |
| | Representation system | | X | | | X | X | | X | | X |
| | Autonomy | | X | | | X | X | X | X | | |
| | Self-determination | | X | X | | | X | | | | |
| **Cultural** | Traditional Medicine | | X | | | | X | X | | | X |
| | Bilingual Education | X | X | X | | X | X | X | X | | X |
| | Official Language | | X | | | X | X | x | X | | X |

*Un= Unitarian; Pln= Pluri-national; In= inter-cultural; Plc= Pluri-cultural

[75] Juan Esteban Fernández, 'Pueblos Indígenas En Constituciones Del Mundo' 3.

Advancement in the recognition of the autonomy and self-determination of ancestral nations is necessary. However, it presents two major challenges for democracy. The first is related to the relationship between the autonomous territories and the state in general; the second, to the scope of the rules that govern within the autonomous territories. In the latter, the protection of minorities within minorities[76] is particularly significant. The affirmation of collective rights cannot go to the detriment of rights already guaranteed for groups that are generally excluded or ignored, such as children, women, or sexual minorities.

Given the importance of the foregoing and the enormous diversity of possibilities that arise, the basic standard must be political dialogue with the communities and their members. An initiation of deliberative processes which respond to needs on a case-by-case basis, would allow an adequate regulation of these and other matters. The principle is that they participate, take part in the conversation, and attend the decision of what affects them directly, as ILO 169 Convention provides[77].

### Extraction model and natural sources protection

South American territory comprises almost 18 million square kilometres. According to an ECLAC report[78], one of the most important biological and natural resource diversities on the planet is concentrated there. For instance, 22% of the forests and 28% of the water available for human consumption is preserved in its land. Also,

[76] Avigail Eisenberg and Jeff Spinner-Halev (eds), *Minorities within Minorities. Equality, Rights and Diversity* (Cambridge University Press 2004).
[77] ILO, Indigenous and Tribal Peoples Convention, 1989 (No.169) 1989.
[78] United Nations CEPAL, 'Recursos Naturales. Situación y Tendencias Para Una Agenda de Desarrollo Regional En América Latina y El Caribe' (2013).

considering the rest of Latin America and the Caribbean, the continent contains 65% of lithium reserves, 49% of silver, 44% of copper and 33% of tin. Finally, 12% of the planet's arable land is found here[79].

These characteristics have partially enabled the economic development of the countries, but they present significant challenges. On the one hand, with respect to the ownership of natural resources, and how best to extract them without depleting them or destroying the ecological environment. On the other, the protection of ecosystems, especially in the face of the overproduction of monocultures which upset the natural balance.

Indeed, issues such as guaranteeing water for human consumption, maintaining mining or agricultural production; taking care of the reserves of non-renewable natural resources, guaranteeing that the inhabitants of the territories where they are found will receive benefits and not damages for their extraction; protect the balance of ecosystems, without overexploiting land with monocultures; among other challenges, are matters to be dealt with urgently.

In this sense, Amazon deserves special attention. The Amazonian territory is a unique biome, characterized by its rainforest. Located in the northeast of the subcontinent, it has an area of 40 thousand square kilometres, and is present in Venezuela,

[79] Note d'information, 'CEPAL Publica: Recursos Naturales: Situación y Tendencias Para Una Agenda de Desarrollo Regional En América Latina y El Caribe' <https://www.cepal.org/fr/notas-informativas/cepal-publica-recursos-naturales-situacion-y-tendencias-para-una-agenda-de> accessed 13 April 2022.

Ecuador, Colombia, Peru, Bolivia and mainly in Brazil. Various native communities live in it, and it has the greatest biodiversity on the planet. In addition, it is the largest existing reserve of fresh water, and absorbs about 25% of the carbon produced annually on earth.

Situations like this pose serious challenges to contemporary constitutional democracy. Among the most important are the following. First, to establish the scope of the power that states have to provide limits and controls on private extractive activity: this, both in smaller-scale production, but especially in large industry. Second, to delimit the influence that the local population has on extractive and cultivation policies, both in the use of resources, and in the distribution of the benefits that these activities produce. Frequently, the income they produce does not remain in the territories where they are generated, even though they bear their negative externalities.

Third, and in a sense as with the previous situation, is the relationship between expert knowledge applied to extraction and cultivation policies, and the participation of individuals in these decisions. Sometimes the technical feasibility of a project encounters different factors that are valuable for the communities that inhabit the territories, such as traditional places for indigenous communities. Finally, there is the fact that some of the lands where productive activities can be developed belong to the jurisdiction of different countries. This is the case, for example, with the Amazonian territory, or with the mining areas of the Andes. The establishment of

common policies, with respect to these challenges, is a relevant issue for the future of the region.

### News, media, and public opinion

The media occupy a decisive place in democracy. Greater access to information allows both a well-founded public opinion, and adequate control of the exercise of public power[80]. However, this same expansion of access can create turmoil[81], when its veracity goes unchallenged. Indeed, as has been observed in recent electoral processes, the spread of fake news has had a significant impact. This has become a topical problem for all the democracies of the region.

The health crisis caused by the covid-19 pandemic is a good example. While the scientific community recommended strict isolation measures, the use of masks, and massive vaccination programmes, some political leaders and social organizations promoted disobedience of these procedures, often based on unscientific assumptions. These facts highlight several challenges for constitutional democracy. Among others, they raise questions about the balance between public health and civil liberties; to what extent scientific indications can be deliberated, obeyed, or even challenged; and how to guarantee, or at least make more likely, the reliability of the available information.

[80] John S Dryzek and others, 'The Crisis of Democracy and the Science of Deliberation' (2019) 363 Science 1144.
[81] Joshua A Tucker and others, 'From Liberation to Turmoil: Social Media And Democracy' (2017) 28 Journal of Democracy 46.

The uncertainty about information, together with disinformation strategies, generally carried out by promoting lies about people or promoting fear, has been shown to be effective in influencing electoral processes. It creates conditions for the manipulation of the population, provoking political fragmentation, and preventing dialogue using democratic arguments. This poses a difficult contradiction.

## Conclusions: new societies, old democracies

As in other regions of the planet, South American constitutional democracies are in crisis. One of the ways in which this crisis is expressed is in the loss of prestige of the institutions designed to mediate social demands. This, while those demands intensify and diversify. In this chapter I, have argued that among the reasons that explain this fact are, on the one hand, the result of a political culture, and on the other, the institutional design which is the result of that culture, and which preserves it. At the same time, I have maintained that this structure faces the challenge of adapting to and responding to old and new claims, in an up-to-date manner.

This description is important for the development of my argument in the following chapters. The first modern constitutionalism assumes in advance that social reality is transformed over time, and that the institutions provided for by the constitutions can slow down and even prevent that transformation. A consequence of this is that democracy can turn against its purpose.

It is to this reality that the establishment of the right to resist response. In principle, it is about the faculty that individuals have to challenge political power, if it does not

adapt or does not respond to its own purpose; that is, to be the expression of the general will of free and equal individuals that founds it. If the characterization that I have presented of the reality of the South American subcontinent is correct, one way to respond to it is to reflect again on the right to resist and its possibilities in contemporary reality.

# CHAPTER II

## Right to resist in South American Constitutions

At present[82], of the one hundred and ninety-three member countries of the United Nations, at least[83] one hundred and eighty have adopted written constitutions as their main canonical rule. Among these, twenty have an expressly established article where the "right to resist"[84] is recognized; and within this group, six have established it as a duty as well[85]. To this list could be added three countries where the "right to insurrection"[86] is considered, and one constitution where the Preamble expressly

[82] The revision of the constitutions was carried out between October and November of 2018. There is no news that these constitutions have changed in this matter.

[83] 'At least' because along with the traditional distinction between written and unwritten constitutions (which excludes here, for example, the UK) it is still possible to discuss the nature of written constitutions that expressly recognize another document – in general religious – as superior to it. This is the case, for instance, of the Somalia's Constitution in the Art. 4.1 where states: 'After the Shari'a, the Constitution of the Republic of Somalia is the supreme law of the country' or the case of the Art. 7 of Saudi Arabia's Constitution of 1992 that states: 'The regime derives its power from the Holy Qur'an and the Prophet's Sunnah which rule over this and all other State Laws'.

[84] Those constitutions, grouped according to continents, are the following. Africa: Cape Verde (1980, 1992) Art. 18; Gambia (1996, 2004) Art. 6; Ghana (1992, 1996) Art. 3.4.a.; Guinea (2010) Art. 21; Uganda (1995, 2017) Art. 3.3. America: Argentina (1853, 1983,1994) Art. 36; Cuba (1972, 2002) Art. 12. (g); Ecuador (2008, 2015) Arts. 98 and 416 n.8; Guatemala (1985, 1993) Art. 45; Paraguay (1992, 2009) Art. 138. Asia: Azerbaijan (1995, 2016) Art. 54.II and Timor-Leste (2002) Art. 28). Europe: Czech Republic (1993, 2013) Art. 23; Estonia (1992, 2015) Art. C.n.2; France (1958, 2008) Art.2; Germany (1975, 2008) Art. 20.4; Hungary (2011, 2016) Art.C.2; Lithuania (1992, 2006) Art.3; Portugal (1976, 2005) Art. 21; Slovakia (1992, 2017) Art. 32. Of the fourteen countries that have written constitutions as canonical master text in Oceania, none of them expressly guarantee the right to resist.

[85] Gambia Art. 6; Ghana Art. 3.4.a; Togo Art. 150; Uganda Art.3.3; Greece Art.120; Hungary Art.C.2.

[86] El Salvador Art.87; Honduras Art.3; Peru Art. 46.

establishes "the right and the duty to resist"[87]. Finally, there are two constitutions where resistance is considered only a duty[88].

In the South American region, the right to resist has been expressly enshrined in the constitutions of three countries: Argentina (Art. 36); Ecuador (Art.98) and Paraguay (Art. 138), while the canonical texts in Venezuela (Art.350) and Peru (Art.46) contain dispositions which have been interpreted in a similar sense. This means that half of the constitutional texts of the region have an express rule in this regard.

The objective of this chapter is to show how the right to resist is regulated in the aforementioned constitutions of the region, and the scope given to it, and to indicate the forms of its exercise, even when, as in some canonical texts, it is not expressly recognized. My purpose is to describe the validity of this right even without its being expressly recognized, and the functions assigned to it. After that, I will present the cases of Colombia and Bolivia where the exercise of the right to resist could be understood as the origin of deliberative processes with regard to the constitution.

The chapter is divided into four sections. Section I illustrates both the contemporary treatment of the right to resist, and how it was adopted from the German tradition. Section II focuses on the three constitutionally-expressed rights, in Argentina, Ecuador and Peru. Section III considers the closely analogous rights of insurrection

[87] Chad Preamble: "*Solemnly proclaim our right and duty to resist and disobey any individual or group of individuals*, [and] *any organs of the State that would take power by force or exercise it in violation of this Constitution*".
[88] South Sudan Art. 4.3.1 and Uganda Art. 3.3

and disobedience in Peru and Venezuela, while section IV shows how rights to resistance were effectively exercised in Colombia and Bolivia, without any textual basis in the constitution. Section V synthesis a concept of the right to resist which is consistent with all these examples.

## German Inspiration

The prevailing legal doctrine in Germany from the late 19th century to the mid-20th century was rationalist positivism[89]. This tradition, which was decisive in the elaboration of the Weimar constitution of 1919, stated that the right to resist belonged to the realm of the state of nature, and contradicted the very nature of the modern democratic state. The right to resist was the right to face monarchs turned tyrants. Since in constitutional democracies, it is the people who dictate the rules, it cannot be said that they become a tyrant of themselves[90].

However, the democratic assumption of power by the Nazi regime in 1933, and the manner of its defeat in 1945, challenged this theory. On the one hand, concerning criminal law, the need to judge acts of resistance to the regime when they constituted crimes prevailed. On the other, politically, there was an imperative to seek ways to make such a situation less likely to recur. For the first, jurisprudence was developed which recognized the right to resist, even if not expressly declared.

[89] Marta Salazar Sánchez, 'Positivización Del Derecho de Resistencia En El Derecho Constitucional Alemán' (1993) 20 Revista Chilena de Derecho 323, 323.
[90] ibid.

For the second, a constitutional amendment was eventually introduced, which established the right.

From the first years after the fall of the Nazi regime, the courts had to judge acts against it, individual and collective, which involved crimes, some very serious, such as homicides, kidnappings, torture, arson and so on. This situation exposed the courts to the paradox of having to sanction those who had contributed to overthrowing the regime, or at least were trying to survive under its rule. Jurisprudence began therefore to adopt the doctrine of the right to resist as an immanent right[91] to the current constitution, although unwritten. In this way, in the criminal sphere, the right to resist operated as a cause of justification[92]. Thus, even if the acts were judged as criminal, the judges could avoid imposing penalties.

Decisive in the elaboration of this doctrine was the ruling of the Federal Constitutional Court, regarding the prohibition of the German Communist Party in 1956. This ruling, which declared the Communist Party unconstitutional, consolidates the jurisprudence on the right to resist and linked it to the power to protect democracy from those who, using democratic procedures, could destroy it[93]. This second aspect, together with the fact that by that date four of the *Länder* had already established the right to resist, would lead in 1968 to its incorporation as an express part of the constitution[94]:

[91] ibid 324.
[92] Piqué and Sember (n 5) 479–478.
[93] Salazar Sánchez (n 89) 324.
[94] Bremen, 1947 (Art.19); Hessen, 1947 (Art. 147); Brandenburg, 1947 (Art. 6); and Berlin,1950 (Art.23). Ferrari and Tarzia (n 5) 21–22.

> Article 20. N.4. *All Germans shall have the right to resist any person seeking to abolish the constitutional order, if no other remedy is available*[95].

The express incorporation of the right to resist in the German constitution opened a debate on various aspects. Regarding its wording, it was argued that the same jurisprudence had established that its positivization did not alter in any way its supra-positive nature[96]. Against this, the argument of the symbolic relevance of its recognition was proposed as a way of reminding new generations of the need to be active in the protection of democracy. This statement could be considered in the sense proposed by Sunstein, regarding the expressive function of law, and its capacity to create social practices[97].

Objections were also raised from the point of view of the internal logic of the rule. Indeed, if the right to resist operates when the law fails, there is no point in establishing it legally. In Kaufman's terms: "The incorporation of the right to resist into statutory law is a contradiction in itself because it would be the fixture by statute of a right which by its nature can exist only above any statute, the regulation of something which in no way can be regulated"[98].

[95] The translations of the constitutional texts used in this chapter are those available at www.constituteproject.org and were consulted in the period of March and April 2021
[96] Salazar Sánchez (n 89) 325.
[97] Cass R Sunstein, 'On the Expressive Function of Law Special Reports' (1996) 5 East European Constitutional Review 66.
[98] Kaufmann (n 6) 573.

Faced with this logical question, a practical answer could be proposed. Following Kaufmann[99], the right to resist can be considered a class of conservative right, whose conditions of exercise suppose the suppression or serious threat of the constitutional democratic regime; so that the fact of its having been exercised can only be verified once the order is restored. Thus, the temporal distance between its exercise (when the constitutional regime is threatened or suspended), and the moment of affirming it as such (when the constitutional order is restored), safeguards the internal coherence of the right. It is precisely this characteristic that differentiates it from other actions, such as rebellion or revolution.

Finally, the question arises about what is protected by this right: individuals, or the political order? Here it is asked whether it is a right to act against state power or to protect individuals from it[100]. At this point, it is argued that it can only be understood in this second sense, since it is a right that seeks to safeguard individuals from the arbitrary action of the state. Adopting a classic idea about this right, it is understood concerning the right of legitimate defence against the criminal activities of the state[101]. Individuals have the right to resist in defiance of the law, if, and only if, it is causing them unjust harm. German analysis of the right to resist appears to favour what I characterise as the disobedience conception of the right to resist, an issue to which I shall return in the next chapter.

[99] ibid 574.
[100] ibid.
[101] ibid.

This conception is clearly stated by Kaufmann, when he proposes requirements for the right to resist to be exercised: first, there must be evident illegal damage caused by the government; second, resistance must be the last resort; third, the actions must be proportional, aimed at re-establishing the political order, and with a reasonable possibility of success; and fourth, that the actors seek the general good, and not their own interest[102].

Decisively influenced by the characteristics mentioned above, the positivization of the right to resist in the South American constitutions began to take shape. However, its written adoption presents some original aspects.

## Right to Resist in South American Constitutional Canonical Texts

The right to resist is expressly regulated in the constitutions of Argentina, Paraguay, and Ecuador. My purpose in this section is to describe each of them and show some of their effects. In the case of the Argentine constitution, I will explain how this right is related to the obligation to defend the constitution. Regarding the regulation contemplated in the Paraguayan constitution, I will highlight the right to resist the usurper, and the right to resist oppression. Finally, I will describe the Ecuadorian regulation of the right to resist. I will hold that this is the most original case under discussion.

[102] ibid 574–575.

Argentina

The 1994 Argentine Constituent Convention adopts the right to resist against those who threaten constitutional order and democracy. The first paragraph of Article 36 runs as follows:

> Article 36. This *Constitution shall remain in force even if its observance is interrupted by acts of force against the institutional order and the democratic system. Such acts shall be irrevocably void.*

The fourth paragraph of the same article provides:

> [4] *All citizens have the right of resistance against those who execute the forcible acts stated in this article.*

As seen in the first paragraph, the constitution declares its validity, even when it has been rendered ineffective through the use of force[103]. Therefore, the context of the right to resist is the threat to the constitution made by a *de facto* government. This provision, as stated in the minutes of the assembly's discussion, confronted the dictatorship which affected the country between 1976 and 1983[104]. In this way, the right to resist is provided in order to guarantee the democratic institutions supplied by the constitution.

[103] Piqué and Sember (n 5) 492.
[104] ibid 491.

This is consistent with a situation where the law does not prevail. In this sense, it would be a conservative claimable right once the constitutional order has been re-established where, eventually, it could be claimed as grounds for justification for criminally-liable actions,[105] in the same sense given in the German doctrine.

In relation to articles 33 and 21 of the same constitution, doubts appear around the need to establish this right expressly, and the class of shares that its exercise would entail, respectively. Indeed, article 33 provides what follows:

> Article 33. *The declarations, rights and guarantees that the Constitution enumerates shall not be construed as a denial of other rights and guarantees not enumerated therein, but which issue from the principle of the sovereignty of the people and from the republican form of government.*

The aforementioned article makes its doctrine of unenumerated rights, opening the possibility for the invocation of new political rights emanating from sovereignty. This is similar to the German doctrine, where the positivization of the right to resist does not alter the fact that it is an immanent right in a democracy. At this point, the discussion of the constituent assembly is illustrative: the promoters of the explicit incorporation of the right to resist recognize that it can indeed be deduced from this provision; however, they believe it is convenient to leave it declared for pedagogical

[105] ibid 501.

reasons. It is then a right claimed *ex post*; although not requiring incorporation, its wording serves a symbolic purpose.

Article 21, for its part, expressly establishes the obligation to defend, with arms, the country and the constitution:

> Article 21. *Every Argentine citizen is obliged to bear arms in defence of his country and of this Constitution, in accordance with such laws as the Congress may enact to that effect and with such decrees of the National Executive.*

This article seems to contradict what has been argued above. While Art.36 declares that the defence of the constitution is a right of citizens, this article establishes it as a duty. Two arguments can be offered to harmonize them. The first is that they can be understood as complementary. Facing inaction by congress or the executive, citizens are empowered to resist. Once these bodies take action, an obligation arises for citizens to defend the constitution.

The second argument, offered by Piqué and Sember, is that this article establishes the scope of the exercise of the right to resist[106]. Indeed, since the action referred to in both articles is the defence of the constitution, it can be argued that Art. 21 establishes what is the limit concerning the means used: the bearing of arms. It could be argued that this limit would only be achievable if the state bodies imposed it as

[106] ibid.

an obligation. The problem with this interpretation is that it would leave citizens defenceless when they want to initiate actions in defence of the constitution, when they exercise their right to resist.

As can be seen, the right to resist regulated in the Argentine constitution is intended to protect the constitution and democracy facing *de facto* (in opposition to the *iure*) governments. It is also observed that it has the form of right when it is the initiative of the citizens, and the form of obligation, when it is called by Congress or the Executive Branch, and whose scope is the use of arms. That is, it practically puts itself in a situation of external or civil war. Eventually, this right may operate as a ground of justification before the criminal justice, once constitutional order is restored.

However, the provisions of article 33 could open a way to understand it in a complementary way, not only for the extreme situation of the *de facto* government, but also within constitutional democratic life. Indeed, if the right to resist is part of those not listed that emanate from the exercise of sovereignty, it could well be understood that its exercise can be carried out by citizens to improve democracy.

Paraguay

The current constitution of Paraguay was adopted through a National Constitutional Convention in 1992. Like other countries in the region, this was the way to start a process of democratic restoration after a period of military dictatorship. However, the case of Paraguay is peculiar. In 1989, the same members of the government carried out a coup against the dictator General Stroessner, installing in his place

another dictator, General Rodriguez, from the same political sector. It was he who eventually convened the Constituent Convention.

Given the conditions in which the conventional election took place, and the electoral model chosen for it, the ruling party "*Los Colorados*" obtained a large majority of the seats with 162 (62%)[107]. However, the democratic fever[108] and the effervescence around it, made it possible to establish a series of principles and rights which are novel in the context of a dictatorial regime. Among these is the right to resist, under the terms provided by article 138:

> Article 138. *The citizens are authorized to resist those usurpers, through every means at their reach. In the hypothesis that [a] person or group of persons, invoking any principle or representation contrary to this Constitution, [should] wield the public power, their actions are declared null and of no validity [valor], nonbinding and, for this, the People exercising their right to resist oppression, are excused from complying with them.*

This article establishes the right to resist in two hypotheses: as the right to resist the usurper, and as the right to resist oppression. The first describes the appropriation and exercise of power in terms contrary to those provided by the constitution; the second, concerns the usurper's treatment of individuals, to the detriment of their rights. In 2017 the scope of this provision was readdressed, as to whether the right

[107] Luis Lezcano Claude, 'Historia Constitucional Del Paraguay (Período 1870 - 2020)' (2012) 3 Revista Jurídica Universidad Americana 173, 97.
[108] ibid 98.

to resist oppression was only against the usurper, or could be against a constitutional government[109]. Although there is no unanimity, it seems reasonable to maintain that these are two independent though connected rights. The right to resist could be invoked, therefore, when a constitutional government systematically affects the fundamental rights of individuals, appealing to legitimate defence.

A distinctive aspect of how this right is regulated is the affirmation that it may be exercised "through every means at their reach". Given that the constitution does not distinguish or prioritize peaceful means, regarding violent ones[110], there some argue that it is not necessary to demand gradual actions. Although there is no agreement on the matter, the traditional doctrine of the right to resist is consistent in maintaining that all institutional avenues must be exhausted before its exercise. Additionally, this same doctrine places the right to resist concerning legitimate defence; violence should therefore be reactive and proportional.

Another aspect that this article regulates is the legal effect of the decisions made by the usurpers, which are declared invalid[111]. As a consequence, individuals are empowered to disobey them. This express provision opens up two possibilities: either disobedience is part of the right to resist, or it is an autonomous right. While

[109] Interview with Miguel Abdon Saguier, 'La Constitución no dice que solo se puede resistir por medios pacíficos' (abril 2017) <https://www.abc.com.py/edicion-impresa/politica/la-constitucion-no-dice-que-solo-se-puede-resistir-por-medios-pacificos-1584278.html> accessed 24 April 2021.

[110] Corte Suprema De Justicia, Paraguay, Organos Constitucionales. Constitucion Nacional, Los Organos Constitucionales, Reglamentación. (División de Investigación, Legislación y Publicaciones 2007) 70.

[111] Corte Suprema De Justicia, Paraguay, Garantías Constitucionales. Apuntes Doctrinarios, Legislación Aplicable y Jurisprudencia Nacional (Centro Interdisciplinario de Derecho Social y Economía Polítca 2004) 17.

it may be interesting in terms of doctrinal discussion, this provision seems for practical purposes like an irrelevant distinction. Since what is expressly declared is the right to resist by any means, disobedience is subsumed under the right to resist.

Ecuador

The right to resist was expressly incorporated into the Ecuadorian constitution by the Constituent Assembly in 2008. Three aspects stand out from the way it is regulated. Firstly, it is expressly presented as a right to protect other rights. Secondly, it could be invoked against all state organs and against non-state organizations. Thirdly, it can be claimed in court.

Article 98 establishes the right to resist in the following terms:

> Article 98 *Individuals and communities shall be able to exercise the right to resist deeds or omissions by the public sector or natural persons or non-state legal entities that undermine or can undermine their constitutional rights or call for recognition of new rights.*

Thus described, Ecuadorian doctrine and jurisprudence have understood that it is a right to guarantee other rights[112], so it must be invoked according to the procedures

[112]Ramos Rosas (n 9) 44.

provided in Article 6 of the Organic Law of Judicial Guarantees and Constitutional Control[113]

> Art. 6.- *Purpose of the guarantees.- The jurisdictional guarantees have as their purpose the effective and immediate protection of the rights recognized in the Constitution and in international human rights instruments, the declaration of the violation of one or more rights, as well as the integral reparation of the damages caused by its violation.*[114]

Due to both reasons, its status as a right to guarantee rights, and the way in which it is claimed in court, it would be a right that completes the block of protection of fundamental rights[115]. In effect, according to Ferrari and Tarzia, it would be a maturation step that would strengthen existing guarantees, while invigorating the law[116].

Nevertheless, this perspective presents two problems. On the one hand, if it is a guarantee, there would be no reason to reinforce the existing appeal channels. On the other hand, if it allows the claim of new rights, the place to legislate them is, in principle, the Parliament and not the courts. Regarding the first, in principle there would be no reason for a court that rejects an action for the protection of constitutional rights claimed by the means provided for it, to change its mind when

[113] Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional
[114] The translation is mine
[115] Ferrari and Tarzia (n 5) 34.
[116] ibid 35.

it is done by invoking the right to resist. And if the claimed right is persistently unrecognised, what remains is resistance in traditional terms.

As for the legislative power that this article confers on the constitutional court, it is highly problematic. The creation of rights is a primarily political task. It must be the result of the deliberation of individuals and their representatives, and not the opinion of a group of judges. Partly because of this, the Constitutional Courts have lost legitimacy in the region. In addition, as Rosas maintains, the paradox may arise that the parties in a trial claim a right to resist, asking for new rights that are incompatible with each other[117].

To the problems presented by the judicialization of the right to resist, are added those which arise from the breadth of its description. The first of these concerns the determination of the active subject and the scope of its claim, since the article in question literally states that the right-bearers are individuals and communities.

For an isolated individual to claim the right to resist in a matter that he considers valuable to himself does not seem to present problems. However, due to the very political nature of the right to resist, it seems that the interpretation should aim to indicate rather that it is an individual right to collective action. The notion of community can present further difficulties, however.

[117] Ramos Rosas (n 9) 54.

In its early modern conception, the right to resist is a right that enables political relevance for the claim of a community, grouped around a common social interest. This is the case in Ecuadorian jurisprudence, with respect to trade unions, indigenous communities, peasant communities, student organizations, and others[118].

However, this right has also been invoked by companies to protect their financial interests[119]. Every company, regardless of its field, has the right to defend its economic interests by law. Nevertheless, precisely because it protects its economic interests, which are hard to redirect to social interest, it seems that the right to resist is not the appropriate constitutional right for its protection. If it is, there is a serious risk of distorting its proper political quality. The right to resist is intended to improve political conditions, not to defend private interests.

Just as the broad understanding of who can invoke this right presents problems, so does the broad description of who it can be exercised against. The formula in Article 98 includes: *public sector or natural persons or non-state legal entities.* Regarding the public sector, the broad formulation has led the doctrine to maintain that administrative, legislative, and even judicial acts can be resisted[120]. The latter is the one that produces the greatest difficulties.

Judicial sentences are the application of pre-existing rules, regardless of their hierarchy. The court, therefore, has no responsibility for its content; or at least, it

[118] ibid 50–51.
[119] Quoted by ibid 51.
[120] ibid 52.

should not have. Therefore, disagreement with a sentence should not lead to resistance toward the judiciary, but toward the political bodies which created the rules. This could additionally lead to the right to resist becoming an appeal for review of sentences, with the risk of weakening the stability of the judicial system. If every court ruling can eventually be resisted, claims would ensure *ad infinitum*.

The incorporation of natural persons, or non-state legal entities, as those against whom the right to resist can be exercised, is likewise problematic. The right to resist protects individuals from the asymmetric link that they have when faced with political state power; it also strengthens their power to decide on that power. The bonds between individuals are not of this nature. In political terms, individuals are equal, and if they establish unjust asymmetries, there are other procedures to correct them, including ordinary constitutional resorts.

As can be seen, the way in which the right to resist has been included in the Ecuadorian constitution, in its originality, presents more difficulties than solutions. Judicialization institutionally binds a right that by its very nature is extra-institutional. In this context, if it is recognized as an additional guarantee, it seems unnecessary; while in innovations such as the recognition of new rights, legislative powers can end up being conferred on a judicial body.

Something similar happens with the breadth of its description. On the one hand, the political nature of its exercise is put at risk; and, on the other, its role in favour of the

individuals in the face of state power is weakened. For these reasons, this type of positivization of this right does not seem advisable.

## Other approaches: Peru and Venezuela

Peru and Venezuela are two countries in the South American region where the right to resist is not expressly provided in their constitutions; though it has been inferred from other texts relating to relatively similar rights. In Peru, this right was formulated based on research in constitutional law, while in Venezuela it was recognized by a report from the constitutional court. In both countries, even though this recognized right was in place, the democratic order was not maintained or deepened. In Peru, it failed to prevent the coup by Alberto Fujimori; in Venezuela, it has not managed to limit the arbitrary power of Nicolás Maduro's regime.

### Peru

In the Peruvian constitution adopted in 1993, Article 46 establishes the right to the insurgency. This provision, already present in the 1979 constitution, states the following:

> Article 46: *No one owes obedience to a usurper government or to anyone who assumes public office in violation of the Constitution and the law.*
>
> *The civil population has the right to insurrection in defence of the constitutional order.*
>
> *Acts of those who usurp public office are null and void.*

The first subsection of this article confers the power to disobey both the usurper and anyone who holds public office without observing the constitutional and legal rules. The second affirms that the civilian population, a formula that excludes the armed forces, has the right to insurrection. The word “insurrection” is used to differentiate this type of action from rebellion. In the words of Luna, one of the promoters of this right in the current constitution: "with rebellion tyrannical governments are overthrown, with the insurgency the constitutional order is protected"[121].

Three important characteristics of the above should be noted. The first is that it is about actions: to disobey or to rise up, to preserve the current constitutional order. In this sense, it resembles the purpose of the right to resist as described in Argentina and Paraguay. It employs the same word - *usurper* - as the latter's constitution.

The second is that it also declares the nullity of decisions made by whoever exercises power under these conditions; a characteristic also found in the effects associated with resistance as described above. Thirdly, some authors from Peru have also understood that this right is related to the legitimate defence of individuals, in the face of possible criminal action against them. This is reinforced by the consideration that the Peruvian penal code sanctions rebellion as a crime, while insurgency is a constitutional right[122].

[121] Faustino Luna Farfán, ‘Derecho de Resistencia’ 3 YACHAQ 143, 144.
[122] ibid.

Despite these considerations, the force of this rule did not prevent the self-coup led by then-President Alberto Fujimori. This fact illustrates two relevant aspects. The first is that the effectiveness of the rule of law depends to a great extent on the democratic commitment of the rulers. The second, once that democratic commitment is broken, the right to resist is practically reduced to a justification ground in favour of those who, using violence, restore democracy.

Venezuela

The Venezuelan jurisprudence on the right to resist has as a context the attempted *coup d'état* of April 2002, against then-President Hugo Chavez. Between April 12 and 14 of that year, Chavez was held by a mobilised section of the army, while his political opponents occupied the government house. Eventually, after massive protests in the streets, he was reinstated to his position on the 15th.

In June of 2002, the Supreme Court was required to give an interpretative ruling regarding article 350 of the constitution that establishes the following:

> Article 350. *The people of Venezuela, true to their republican tradition and their struggle for independence, peace and freedom, shall disown any regime, legislation or authority that violates democratic values, principles and guarantees or encroaches upon human rights.*

In their demand, the petitioners requested that an interpretation be given to the notion of the people contained in this article, since it appears *"ambiguous, imprecise,*

*and renders it inoperative, is abstract and not consistent with the Constitution itself and its principles."*[123] These characteristics would ultimately render it "*inoperative"*, which was especially serious in the face of the country's unstable political situation. Thus, the requirement aimed to establish the conditions under which the Venezuelan people could legitimately disobey the regime, legislation or authority which violated democratic values.

In its ruling, the Constitutional Court indicated that Article 350 is provided for cases in which the constituent power is invoked; that is, when there are faults in respect of the procedures established to exercise said power, specifically when convening a Constituent Assembly[124]. Among other reasons, the Court argued that the systematic interpretation of the constitutional text required understanding it according to its location in the text. Because it is the last article after those regulating constitutional reforms, it is unequivocal that this is the context for its invocation.

Additionally, in the same judgment, the Court adds that the right to resist oppression is provided in two other articles: 333 and 138, which provide the following:

> Article 138. *An usurped authority is of no effect, and its acts are null and void.*

[123] *Interpretación Artículo 350* (2003) 24 (Tribunal Supremo de Justicia).
[124] ibid.

> Article 333. *This Constitution shall not cease to be in effect if it ceases to be observed due to acts of force or because of repeal in any manner other than as provided for herein.*
>
> *In such eventuality, every citizen, whether or not vested with official authority, has a duty to assist in bringing it back into actual effect.*

Although the court ruling emphasizes the norms included in article 350, especially the duty to protect the constitution, in the agreement of both articles, the content that has been commented on can be recognized: the presence of the usurper, the nullity of his acts as such, the people's power to disobey it, and, eventually, the right - and duty - to confront him.

This ruling became relevant again in 2017, when Chavez's successor, Nicolás Maduro, summoned a Constituent Assembly. On this occasion, his opponents alleged, the first hypothesis of the 2002 sentence was fulfilled, since in this called Maduro had not respected the rules provided by the constitution for this[125]. The most serious of these was the requirement of a referendum, ratifying the call to the Assembly. However, these claims had no effect, and Maduro, as of the writing of this work, continues as ruler, after dissolving the Constituent Assembly called by him.

These facts are similar to the Peruvian case. Fundamental rights depend on the democratic commitment of the rulers; this, is even when a Constitutional Court might

[125] 'Artículo 350: ¿última Instancia Para Frenar La Constituyente En Venezuela?' (CNN Español, 23 June 2017).

try to re-establish the rule of law. In any of the senses enunciated for its purpose: stamen in favour of democracy, grounds for justification (legitimate defence), protection of the protester or call to deliberation, it is a right that leads to a situation of failed institutions in order to re-legitimate it.

## Resistance and deliberated political changes: two examples

There are two relatively recent experiences in South American countries where social mobilizations gave rise to a constituent process: Colombia and Bolivia. In each case, massive collective non-institutional actions were carried out by the citizens, which led to institutional processes of discussion and a renewal of the constitutional pact. In both, the legitimacy of political power was restored. It could be argued that, although not formally recognized, the right to resist was exercised.

### Colombia 1990: movement of the seventh ballot and the new constitution

At the end of 1989, Colombia was in a very delicate political situation. Drug cartels imposed terror throughout the country, at the same time that they corrupted state institutions. Under these conditions, the country expected to have an important electoral process in March 1990, which considered electing six positions: senators, representatives to the Chamber, deputies of local assemblies, municipal councillors, mayors, and the presidential candidate of the Liberal Party.

During the same period, student unions began to promote the idea that profound institutional change was necessary to overcome the crisis; a change is forbidden,

however, by the 1886 constitution then in force. Thus began the promotion of an additional seventh ballot[126], whereby voters asked for a constituent assembly to be called. As this request could not be formalized, ballots were distributed to voters s to make it known that this was a majority demand.

Although there is no exact data on how many seventh votes were cast, it had the expected political effect: the president called a constituency referendum, together with the presidential election in May of that year. In this vote, the option in favour of forming a constituent assembly won an overwhelming majority, despite the large abstention[127].

With this result, the president of the Republic called for the election of the members of the constituent assembly, by December 9 of that same year. This body, made up of seventy members, functioned between February 4 and July 5, 1991, when the final document was delivered.

Although neither the 1886 constitution nor the current one expressly considers the right to resist, this example could illustrate how this right works when not written. Indeed, if it is considered that one of the functions fulfilled by the right to resist is to promote the improvement of democratic systems, a process activated through non-institutional collective political actions, this could be one such case. The novelty is

[126] Daniel Pardo, 'Qué Fue La Séptima Papeleta, El Movimiento Que Cambió Hace 30 Años (y Por Qué Sus Demandas Aún Están Insatisfechas)' (BBC Mundo, 11 March 2020).
[127] Santiago López-Calle, 'Violencia y Crisis de Los Derechos Humanos En Colombia, 1934 - 1991' (2020) 17 FORUM. Revista Departamento de Ciencia Política 43, 67.

that in this case the action is mediated by an exceptional institution, summoned to mediate the demands.

Bolivia 2003: From gas referendum to a new constitution

In 2003, the then-president of Bolivia, Carlos Sanchez de Lozada, decided to promote a gas export plan from Bolivia to Mexico and the United States. To this end, the construction of a gas pipeline was designed for the Chilean port of Mejillones, from where it would be sent to North America. This decision unleashed strong social mobilizations, mainly for three reasons. The first, was because there was a claim for ownership of the hydrocarbons. At that time there was a movement claiming that the country's natural resources should be public property. The second reason, related to the above, concerned the internal distribution policy. An important part of the population demanded guaranteed local access at a low cost, before exporting. Finally, there was a claim since it was exported through a Chilean port, with a strong anti-Chilean sentiment that originated in the War of the Pacific of 1889. After that conflict Chile appropriated what had previously been Bolivian coastal territory, leaving the country landlocked. For this reason, exporting through a Chilean port was a cause of grievance[128].

By October 2003, mobilizations across the country had intensified. The roadblocks had left some citizens isolated, and confrontations between protesters and police left people dead. Unable to take political control of the situation, President Sanchez

[128] Astrid Arrarás and Grace Deheza, 'Referéndum Del Gas En Bolivia 2004: Mucho Más Que Un Referéndum' (2005) 25 Revista de Ciencia Política 161, 161–162.

de Losada resigned, handing over power to Vice President Carlos Mesa. The latter, upon assuming office, made three calls: for a binding referendum on gas, for the establishment of a Constituent Assembly, and a reform of the Hydrocarbons Law (including the review of the privatization processes)[129].

To carry out the above, on February 20, 2004, congress approved a constitutional reform which opened the possibility of a referendum regarding the ownership of hydrocarbons and incorporation of the constituent assembly into current law. The referendum was held in July of that same year, while the convocation of the constituent assembly had to wait until the following year, when the newly-elected president Evo Morales decided to call it. The new constitution was adopted in February 2009, after a ratifying referendum.

As can be seen, the decision to open deliberative spaces allowed a progressive renewal of Bolivia's political system as a whole. Although the new constitutional regime can always be improved, it is one of the most original constitutions in the region, especially concerning the recognition of ancestral peoples and the protection of their natural resources.

## Conclusions

[129] ibid 162.

In this chapter, I have described how the right to resist is incorporated into South American constitutions under the influence of German constitutionalism. I have also presented two cases of non-institutional collective political actions which could be considered an exercise of the right to resist. From the foregoing, my purpose in these conclusions is to advance a concept[130] of the right to resist. This will be the framework that will allow me to discuss later the different conceptions that can be sustained it.

Initially, the right to resist is recognized as a right inherent in any constitutional democracy, for three main reasons. First, as an expression of legitimate defence, in the sense that no one should be forced to bear unjust damage caused by the state. Second, as an expression of self-determination. Here, as a complement to the above, the emphasis is on the protection of the constitution and constitutional order. A third, later, reason, is that the right to resist appears as an appeal to participation in decisions within a constitutional order, by those who are excluded by it. As a consequence of these reasons, the right to resist has three functions: to recover, to defend, and to improve the constitutional order. In its functions, it has the character of causal justification for acts which could be considered breaches of the law.

Due to the close relationship that the right to resist has with decisive principles for constitutional democracies, its express constitutional recognition seems unnecessary. However, there are canonical texts wherein it was deliberately

[130] Ronald Dworkin, 'Interpretative Concepts', *Law's Empire* (Oxford University Press 1998) 70.

included. This is a response to two factors. The first It is due to its expressive condition; that is, its incorporation promotes a type of political culture where individuals are aware of their rights and their responsibility to protect and promote the constitutional order. The second is related to the delimitation of its meaning, scope and means of exercise.

Confronted with the fact that it is a right inherent to the constitutional order, its constitutional delimitation opens the discussion about the need or not of its express recognition, and if so, what is the binding force of its limitation. At the same time, observing the case of Ecuador, the question arises as to which would be the appropriate state body to mediate its exercise. Giventhe very nature of this right, it can be argued that its express recognition, although it could contribute to clarifying the conditions of its exercise, could not constitute a barrier to invoking it. It is, in this sense, a right in favour of individuals, and not a guarantee in favour of political institutions.

Regarding to the state body responsible for mediating its exercise, three situations can be recognized. The first is to establish an instituted body in charge of mediating it, as is the case in Ecuador. The second is to remain silent, which would imply, at least in principle, redirecting it to the existing state political bodies. The third, as shown by the cases described in Colombia and Bolivia, is the possibility of creating a special body to mediate the demands contained in its exercise.

Observing the description of the political legal reality of South America presented in chapter I, the right to resist could contribute to improving local constitutional democracies for the following reasons.

In the first place, because in the face of highly elitist societies, where the institutional system is co-opted by these elites, the right to resist guarantees the expression of discontent or disclosure of the damage, protecting those who make it known, even when they do so in a disruptive way. The second, related to the above, is because given its non-institutional nature, it allows identifying the failures of political institutions in their mediating function. This promotes improvement, without prejudice to the rights of individuals.

In this same sense, thirdly, it opens the possibility of creating special bodies to address and resolve the issues claimed. Indeed, since a decisive issue in the political reality of South America is the loss of prestige of political institutions, the possibility of creating adequate instances for specific conflicts would allow their better discussion and resolution. The foregoing becomes especially relevant in consideration of the number and diversity of conflicts and tensions which these political systems must address.

# CHAPTER III

## Disobedience conception of the Right to Resist

Constitutionalism emerges in the context of a profound paradigm shift in the legitimacy of political power. While in the ancient and medieval world authority rested on its conformity with given laws, from earliest modernity it depended on the support of those who should obey. This change is based on the expansion and consolidation of the idea of the individual as a rights bearer, with a right not only to be protected from political power but to constitute it.

Because of the foregoing, constitutional law started to design and adopt institutions and procedures to guarantee the said rights. Later, due to the development of these devices, and their relative success in achieving their purpose, non-institutional collective political action run by rights bearers came to be avoided. In a constitutional

democracy, individuals have the primary duty to respect procedures, both to guarantee and to improve their existing rights. This is what I call here the disobedience conception of resistance.

My task in this chapter is to explain how this perspective arises, why it becomes hegemonic, and how it understands collective non-institutional political actions. To do that, I will characterise its notion of civil disobedience and the right to resist.

This chapter is divided into six sections. In section I, I will explain the early modern principle of political power's legitimacy, which describes the shift between medieval and modern thought.

In section II I will describe how the passage from obedience to legitimate disobedience is understood in this model of thought. In section III I will present the step from disobedience to resistance. Here I will present a systematic description of what I call the right to resist from the obedience perspective. I will argue that from this perspective the basis of the exercise of the right to resist is found in the fact of being the victim of unjust damage by the state.

In section IV I will delve into this criterion of recognition of the right to resist based on the contemporary proposals of Gargarella and Finlay. These arguments allow me to advance why, from a deliberative perspective, the disagreement would be enough to resist. In section VI, I will discuss the idea of "electorate as a last court of appeal" concerning the challenge of managing the exercise of this right. In a conclusion, I will summarise the obedience perspective of the right to resist, in response to

Gargarella's proposition of the right to resist as a forgotten right. Instead, I will argue that it is not forgotten but misunderstood.

## Obeying legitimate Institutions

The tension between the obedience of and disobedience toward authority, with the political meaning, that we assign to it today, came into view with early modernity. The hegemony of ancient and medieval thought held that the world was governed by a given order, whose content – its laws – were accessible to reason[131]. This notion of world order included individuals, their communities and, consequently, their political institutions. Since these institutions were discovered, not created, they enjoyed indisputable authority. As this authority depended on its relationship to the given order, to disagree and break it was considered objectively wrong and, in any case, irrational.

This changes radically when a new origin of political legitimacy[132] appears. Once subjects began to be recognized as endowed with the capability to constitute political power, they also started to endow the right to provide legitimacy, or not, to rules that govern them. In this manner, challenging laws comes to be used as a political tool, that could transform the current institutional order.

[131] This does not mean, by the way, that these beliefs have disappeared, or that depending on the case, they are not still reasonable. It simply means that they are not hegemonic, and that modern constitutional democracy requires that they not be.

[132] Here legitimacy is understood in a general and descriptive sense. That is, the individual internal belief that a just political regime is obeyed. On legitimacy see: Arthur Isak Applabaum, 'Legitimacy without the Duty to Obey' (2010) 38 Philosophy & Public Affairs 215; Fabienne Peter, 'Political Legitimacy' <<https://plato.stanford.edu/archives/sum2017/entries/legitimacy/>>.

Nevertheless, the transition from the medieval or premodern to the modern world was gradual and involved changes at different levels of human life. As Charles Taylor states, modernity means a "historically unprecedented amalgam of new practices and institutional forms, […] of new ways of living, […] and new forms of malaise […]".[133]

In political terms, the changes that it implies can be seen clearly in the causes of the war of religions[134], and in the political innovations which were necessary to prevent endless civil war[135]. This conflict, which has its core in the progressive loss of hegemony of the Roman Catholic Church in Europe, manifests the paradigm shift that gives rise to the modern state, and the need for a new constitutional order[136].

The fragmentation of the Roman church was much more than a simple religious matter. The splinter of the local churches questioned the legitimate authority of the monarch, whose power until then was vested in the Bishop of Rome. Likewise, this process opened questions about the extent of obedience due to a monarch who professes a different religion from their subjects. In parallel, religious pluralism started to create conditions for choosing one's beliefs and, in turn, the challenge of living in societies where people have different faiths. Ultimately, if there was no

[133] Charles Taylor, 'Modern Social Imaginaries' (2002) 14 Public Culture 91, 91.
[134] Quentin Skinner, The Foundations of Modern Political Thought, vol 2 (Cambridge University Press 1978) chs 4–6.
[135] John Rawls, Political Liberalism (Columbia University Press 1996) xxiv.
[136] ibid.

single way to heaven, questions about who decides the fate of the government emerged.

As a response to the challenges for coexistence, new meanings regarding the individual and the society they inhabit were formulated. The development and progressive implementation of these ideas drove processes of great political reforms, culminating in the shaping of what is now known as the modern state.

Individuals came to be seen as endowed with moral capability requiring protection from political power, as well as holders of the potential to establish and control power. Consequently, the political framework of the state begins to be, progressively, a construction determined by individuals. Meanwhile, political authority was subject to the limits of the rights of individuals. [137]

These ideas, about individuals and their political control, drove the emergence of modern constitutionalism, driven by emancipatory views at the individual and collective levels. At the core of this movement is found the conviction that no individual or group has a preferential right (by itself and before itself) to make decisions regarding the common destiny; while no person or group, at least initially, has the right to decide on the life of another individual. Along these lines, democratic constitutionalism developed principles of the self-determination of each subject and each society.

[137] Dieter Grimm, Constitutionalism. Past, Present and Future (Oxford University Press 2016) 43.

Modern constitutions, especially those written in canonical texts, adopted these principles and declared them through the language of rights. Thus, the western constitutional structure begins to rest on the conviction that everyone is the right bearer of inalienable political rights. These rights endow three fundamental guarantees: to not be arbitrarily mistreated by the state; to lead the life he/she wants without harming the rights of others; to be heard about the type of society in which she/he wishes to live[138].

To ensure these rights, or at least make their guarantee more probable, constitutions endorse a framework of institutions and procedures. By the agency of these institutions and procedures, the right bearers defend and improve their rights, while they furnish legitimacy to the political system. In such a manner, tensions between self and collective determination are managed, and conflicts between individual rights and state power are resolved.

Since a constitutional framework provides procedures for legitimate political decision-making, rights conflicts are more favourably resolved among those involved. Therefore, everyone is willing to follow the laws, even when internally he or she may disagree. Political friction does not disappear, but these procedures help to mediate it in an impartial and almost predictable way.

[138] Waldron (n 16) 250.Gargarella, 'El Derecho a Resistencia En Situaciones de Carencia Extrema' (n 5) 11.

Due to the success of this institutional model, its possibilities for improvement, and the fear that its absence provokes, theorists of politics and law became very cautious when reflecting on collective non-institutional political actions, especially if they challenge current law. An explicit recognition of citizens' right to act politically outside institutional causes, could open the door to the establishment of a situation, if not anarchic[139], at least of great instability and uncertainty. This concern remains in contemporary debates regarding constituent power.

From this point of view, it is argued that constitutions, and in a sense the entire legal system, are like the ties that bind Ulysses to the mast, to prevent him from being dragged by his passions[140]. Institutional channels would ensure that important decisions are not taken during turmoil which makes it impossible to reflect adequately on their scope; or, more grievously, that decisions are left to whoever has the greater strength to impose their point of view[141]. That is why, ultimately, subjects in a constitutional democracy are under the obligation to obey[142].

Just as the medieval and ancient world rested the legitimacy of political power upon given rules, modern and contemporary thought does so in the institutional procedures that guarantee that legitimacy. The right to resist is located precisely in the margin where that procedural legitimacy fails.

[139] Kaufmann (n 6) 574.
[140] Jon Elster, 'Ulysses and the Sirens' (1977) 15 Social Science Information 469; Jon Elster, *Ulysses Unbound* (Cambridge University Press 2000); Waldron (n 16).
[141] Smith (n 8).
[142] Rawls explain his ideas on non-institutional collective political actions in the chapter called "Duty and Obligation". See Rawls, *A Theory of Justice. Revised Edition* (n 15) ch VI.

## From obedience to legitimate disobedience

Despite the confidence in the structure of institutional mediations described above, it is still necessary to think that sometimes a part, or the whole system, may fail. My purpose in this section is to describe, in general terms, what factors help to explain this failure, and how what I have called the obedience perspective regards them. What I am interested in highlighting is what reasons can justify disobedience, how the institutions react or not to it, and finally what kind of actions disobedience involves.

Initially, not every act of disobedience is politically relevant. Some of them are offensive behaviours, which are not intended to communicate dissatisfaction. These could be considered as infractions of the legal order, which is not intended to send a message, either to the authority, or to the rest of the citizenry. I will consider here, as politically relevant, acts of disobedience whose reason is based on a claim regarding a) the loss of hegemony of the idea on which law or public policy is based; b) evidence of a bad institutional actions design or c) claim against decision-making processes, frequently based in the exclusion of those who have to obey political power. This last reason is decisive because, ultimately, all acts of political disobedience evidence the failure of the decision-making process.

From the point of view of the protester, in each of these cases, two levels can still be recognized, which I will call external and external dimensions. The internal dimension

refers to the disagreement with the current norm, and the frustration at not being able to correct it through existing institutional procedures. The external dimension refers to the expression of that disagreement and frustration through disruptive actions and proper disobedience.

The obedience perspective is usually attentive to this second dimension, neglecting the first. The reason for this is the ability of institutions to recognize their failings. Indeed, given their marked formalism, institutions are always waiting for procedures which trigger improvements. When these procedures fail in their purpose, institutions are unable to act and, on the contrary, protect themselves by force. Thus, a characteristic behaviour from the perspective of obedience is to react to disruptive actions, ignoring them.

Regarding disruptive actions, their political purpose and their effects, there are still two important considerations. The first is that these are actions that challenge the law to improve it, not defeat it. This excludes conscientious objection actions from the present analysis because they seek for a rule not to be applied, not to be changed. It also excludes terrorism, because instead of improving a regulation, terrorism tries to impose a certain political vision by force and fear, giving up deliberating about it.

The second consideration relates to the binding force of disruptive actions. Non-institutional collective political actions are frequently ignored by institutions if they do not escalate in intensity. Later, when they reach gravity, they are usually rejected

for that reason. This leaves the citizenry in a poor position *vis-à-vis* political authority. Since the peaceful claim is ignored, and the growing disruption sanctioned, all they have finally is their capacity for moral persuasion, aside from their political arguments. They are left to the benevolence of authority, and not to the force of their rights as citizens.

## Disobedience and majority rule

The legitimacy of the decisions of the political power and, therefore, its binding force, rests on the fact that they have been adopted through institutional processes; these are, in turn, legitimate. Therefore, the obligation to obey mandates emanating from political power does not rest on a simple formal reverence toward institutions, but on what they mean concerning coexistence between free and equal people.

One device that democracy has to give legitimacy to collective decisions is the rule of the majority. Although majority rule does not define democracy, it occupies a relevant place when it comes to resolving disagreements, allowing for the case that the decision adopted represents the general will. That is why to ask about disobedience is in some sense to ask about the nature and limits of majority rule[143].

Indeed, following this line of the argument, it is possible to defend the claim that protestors challenging the law are not challenging the political authority but the voice

[143] ibid 293.

of the majority. What must be determined, therefore, is to what extent the will of a majority, expressed by procedures which guarantee equality and freedom, can be challenged by a minority. And, consequently, to what extent the state must impose the terms of that majority will, before turning its actions against those who are also under its protection.

Facing this situation, the disobedience perspective chooses to take a position in favour of the challenged institutions. Given that the institutions receive a mandate from the majority by electoral means, this mandate cannot be revoked except by the same means. On the contrary, surrendering to the non-institutional claim is to weaken the rule of law and to hand over the decisions to those who disturb the public order.

Based on the aforementioned arguments, the perspective of disobedience has serious reservations about acts of disobedience and, when it accepts them, subjects them to a regime of very strict requirements. This allows one to argue that the perspective of obedience places the burden of proving the legitimacy of the claims on those who protest, privileging the defensive position of the institutions[144]. Thus, the demonstrations of those who wish to express themselves in this way should be public, non-violent, conscious, and so on.[145]

[144] Rawls, *A Theory of Justice. Revised Edition* (n 15).
[145] ibid 320.

The reversal of this position in favour of the state, towards a position that privileges those who protest, only happens when the state exercises illegitimate violence. In this case, however, what is activated is the right to resist.

## From disobedience to resistance

The right to resist has been the subject of a long discussion in recent years. Due to its incorporation into canonical constitutional texts and its disruptive exercise[146], it has become relevant to discuss its nature, meaning and scope. For example, within the tradition of democratic constitutionalism there is relative consensus that its exercise is disruptive *vis-à-vis* the established political power; nevertheless, its relationship with other forms of collective actions which promote political changes, such as revolution and rebellion, is less clear[147].

There are similar difficulties in delimiting its purpose and, consequently, the legitimate means for its exercise. Thus, discounting the case of Kantian traditions that deny it in principle[148], there is a strong division between those who recognize that the right to resist is only legitimate in facing situations of tyranny[149], or oppression[150],

[146] Movements like Greek "aganaktismenoi", Spanish "indignados", French "banlieues", or uprising in Egypt have provoked in an important reflection. See Douzinas (n 5) ch The Age of Resistance. In South America for instance Brazilian "Movimento dos Sem Terra", Argentinian "piqueteros" and several cases of indigenous movements. See Mouly and Hernández Delgado (n 5).
[147] Tony Honoré, 'Right to Rebel' (1988) 8 Oxford Journal of Legal Studies 34; Ginsburg, Lansberg-Rodriguez and Versteeg (n 5).
[148] Vitale (n 5) 24.
[149] Honoré (n 147); Ginsburg, Lansberg-Rodriguez and Versteeg (n 5); Kaufmann (n 6).
[150] Mouly and Hernández Delgado (n 5); Vitale (n 5).

or breach of state obligations[151], or all the above[152]. Probably the main agreement on this topic is that individuals, and minority groups, are protected by the principle and right of legitimate defence[153].

Regarding the means, and precisely because of this defensive nature, the discussion focuses on the place of violence in its exercise. Even when there is a certain agreement on its character of defiance of the law, mostly through disruptive actions, it is more complex when its expression emerges in violent forms, causing it to be confused with terrorism. Therefore, some consider that, given that it's necessarily a violent exercise[154], the right to resist is intended to end the current constitutional system of the territory where it is invoked[155].

Due to the above, the idea prevails that it is a right that is activated when constitutional democracy as a whole has failed. It is not just a threat to the constitutional order, but a sign of its absence, and the situation of rebellion. Therefore, Honoré's influential work describes it as a "remedial right"[156]. Based on the doctrine of just war, he states that people tend to avoid and postpone large-scale political conflicts. Then, the fact of their exercise shows that they are fighting a

[151] Finlay (n 5); Gargarella, 'El Derecho a Resistencia En Situaciones de Carencia Extrema' (n 5).
[152] Gargarella, 'The Last Resort: The Right of Resistance in Situations of Legal Alienation' (n 7).
[153] Some authors explain the right to resist from the "just war" doctrine. Following the opinion held here, this would be the foundation of the right to rebellion rather than the right to resist. See Honoré (n 147); Finlay (n 5).
[154] It is worth highlighting the idea of nonviolent resistance proposed by Ermanno Vitale. As will be seen in the next section, the Italian author states that resistance must be nonviolent 'in order to see clearly'. In a similar sense, the proposal for social transformation proposed by Atria. Vitale (n 5) 127; Fernando Atria, *La Forma Del Derecho* (Marcial Pons 2016) 454.
[155] Kaufmann (n 6); Ginsburg, Lansberg-Rodriguez and Versteeg (n 5).
[156] The expression 'remedial right' is used by Finlay to explain the idea of Honoré. See Finlay (n 5) 31; Honoré (n 147).

defensive war against abuses on a large scale, where the right to resist tends to restore political order.

Although this argument is persuasive, basing the right to resist on the doctrine of just war has several problems. First, resistance and rebellion are not the same. Rebellion is intended to replace the entire political order by violent means, while the right to resist, from a historical perspective, is intended to improve an existing system, not necessarily by force. Furthermore, precisely because of the health of contemporary democracies, it is necessary to differentiate them.

The second problem presented by this argument, related to the first, is that it does not recognize nuances between obedience and anarchy. Non-institutional collective political actions are a more complex phenomenon, which cannot be understood only from the legal tension between obedience and disobedience.

Finally, these definitions leave out the functions that contemporary law has given to the right to resist within the constitutional order. Despite the differences that exist in the purpose it pursues and the causes that activate it, the truth is that it shows new ways of being understood. These novelties are hardly systematically incorporated into theories that are based on what I have called the obedience perspective.

The right to resist from the obedience perspective

From the historical development of ideas, the understanding described above is the result of a process of reflection that arises in the political thought of early modernity. In fact, the right to resist was decisive in shaping modern states and promoting modern constitutional democracies. It is argued that the process of emancipation of the people to adopt the system of republics was largely due to the adoption of this right. An exemplary case is the universal declaration of the rights of man and the citizen in France.

Nevertheless, despite this leading role in the origins of modern constitutionalism, it becomes, as Gargarella states, a "forgotten" right[157]. Among other reasons, this is due to the diversification of sources of authority, the fragmentation of the interests at stake, and the institutionalization of controversies. Eventually, once participation in constitutional democracies came to be mediated by institutions, this right became mostly unnecessary, and only legitimate in the extreme case of arbitrary damage caused by the state.

An explanation of this foundational role and subsequent disappearance can be found in Franklin's work[158]. He argues that from a historical perspective, one of the most significant differences between modern constitutionalism and medieval constitutionalism is that the former has institutionalized devices to exert control over the government. That is why, since institutions supply citizens' needs[159], non-

[157] Gargarella, 'El Derecho a Resistencia En Situaciones de Carencia Extrema' (n 5) 15.
[158] Rawls, *A Theory of Justice. Revised Edition* (n 15) 338. Quoting Julian Franklin, Constitutionalism and Resistance in the Sixteenth Century: Three Treaties (Julian Franklin, Pegasus 1969) 11–15.
[159] In a similar sense, although reaching the provocative (and debatable) conclusion that the right to resist is replaced by the judicial review see: Rubin (n 6).

institutional political actions, should not have a relevant place in a well-ordered society as a matter of principle. Thus, while pre-modern constitutionalism had the right to resist as a way of exercising control over the sovereign monarch, in modern constitutional law, where institutions have a more relevant place, civil disobedience occupies its place[160].

According to this point of view, the right to resist is already outside the constitutional system, or in any case at its external limit. In this manner, the right to resist appears only as an exceptional resource, when the state causes unjust and prolonged harm to those who have legitimately practised civil disobedience. Given this position, it is finally described as the acceptance of facticity or unleashed violence. As Rawls states:

> Yet, if justified civil disobedience seems to threaten civic concord, the responsibility falls not upon those who protest but upon those whose abuse of authority and power justifies such opposition. To employ the coercive apparatus of the state to maintain manifestly unjust institutions is itself a form of illegitimate force that men have in due course the right to resist.[161]

The first thing to consider is that from this point of view, the right to resist is chronologically after civil disobedience and has a gradual relationship with it. In this sense, civil disobedience, exercised legitimately, is a requirement for exercising the

[160] Rawls, *A Theory of Justice. Revised Edition* (n 15) 338.
[161] ibid 343.

right to resist. This perspective supposes, in this context, that the permanence in time of this act of disobedience reaches a moment where it begins to threaten civic concord, which is violence.

At this point, the responsibility for this disruptive situation no longer falls on those who protest, but on the state that imposes its decision. Those who disobey enjoy legitimacy, and the intransigent position of the state becomes an abuse of authority and power. It is a form of illegitimate force whenever the state uses its coercive power to maintain an openly unjust situation. The legitimacy of the protesters' demands reduces their responsibility for the rupture of civic coexistence and displaces it to authority.

The decisive point of this position is that given this critical situation, "in due course" the original demand of those who disobey completely disappears. While the people's claim was based on the internal experience of deficit, what really matters is the state's action in the arbitrary use of force. That is to say, the right to resist is not activated by backing the claim of those who disobey, but against the damage caused by the state. Thus, they are assisted by the right to resist because they are protected by the principle of self-defence.

Thus, this perspective forgets that individuals are rights bearers, not only to be protected from the power of the state, but, in the first place, to constitute such power. The practical problem that this bias produce is that it reduces the right to resist to its disruptive characteristics: state violence, and legitimate defence of the

protesters. In which case the management of the conflict, and the resolution of the disagreement which founded it, become very difficult.

### Resistance against the state force that causes illegitimate damage

The fact that the obedience perspective of the right to resist has been reduced in scope within democratic discussion has not prevented its exercise from being invoked still. On the contrary, non-institutional collective political actions which imply a challenge to the laws are almost a part of daily life in democratic societies.

In view of this, the political and constitutional theory has seen the need to delve into the critical aspect of this right: when is the "due course." This question has enormous importance, because it is about establishing at what moment, or under what conditions, the state is arbitrarily using one of its fundamental attributes, such as the monopoly of force against the people; and, consequently, when the people can legitimately challenge it.

Adopting related schemes, the descriptions of these conditions attempt to be clear and precise, delimiting as fully as possible the possibility of legitimizing disruptive civil actions. To explain why this perspective fails to manage the conflict of the exercise of this right- even in the cases where its legitimacy is defended- I will explain and criticize two influential perspectives: firstly, the one proposed by Roberto

Gargarella[162] called 'the last resort in cases of legal alienation'[163]; secondly, and more recently, 'the right to resist oppression'[164] by Robert Finlay.

Right to resist as last resort in cases of legal alienation

Gargarella's starting point is the idea of "legal alienation", which is the case when the law damages people. It is alienation because the rules appear as something estranged from those who have the obligation to obey them. This alien character is decisive, because if someone were a victim of damage caused by a law in which he or she agreed, in principle they would not be under the conditions to resist. They are not "victims of the law"[165] if they approved this law.

Although in his work the notion of "legal alienation' varies slightly in some points, the distinction between what Gargarella finally calls 'procedural requirement' and 'substantive requirement'[166] always remains. The first points out the role of citizens' participation in the harmful norm, and the second describes the content of the burdensome norm. He adds that even though it could be argued that one of these

[162] As will be shown in the next section, Gargarella assimilates disadvantaged groups with groups that suffer damage. We believe that evidencing a distinction between the two allows to establish a politically relevant graduality between the conditions that justify the resistance, for instance, disagreement, disadvantages, and harm.
[163]Gargarella, 'The Last Resort: The Right of Resistance in Situations of Legal Alienation' (n 7); Gargarella, 'El Derecho a Resistencia En Situaciones de Carencia Extrema' (n 5). See also Ginsburg, Lansberg-Rodriguez and Versteeg (n 5).
[164] Finlay (n 5).
[165] Gargarella, 'The Last Resort: The Right of Resistance in Situations of Legal Alienation' (n 7) 1.
[166] Gargarella, 'El Derecho a Resistencia En Situaciones de Carencia Extrema' (n 5) 26.

requirements should be a "sufficient condition" to show a situation of legal alienation, he suggests that the conditions "tend to go hand in hand."[167]

Thus, in his initial version he identifies the first condition as that which appears when a norm is dictated in terms which do not represent the will of the majority, but which appear as an external norm to those who must obey it. In the same period when he wrote this description, the second condition was described as content which goes directly against the majority interest of the community. Later, in a re-elaboration of his proposal, Gargarella postulates that the procedural requirement is met when "the community has not participated meaningfully in the decision that affects it". The substantive requirement is met with the existence of "serious damages", even if these do not affect the majority interest[168].

Additionally, Gargarella states that the international model of poverty measurement can be used as an objective system to establish these damages. In fact, those who are in a situation of severe poverty according to the United Nations standards of Human Development, are victims of a violation of fundamental rights by the state[169]. Therefore, he adds, they are exempt from the obligation to obey the law, and consequently legitimized to challenge the state through the right to resist.

---

[167] ibid.

[168] "[I]n short, the idea - which I will take here as a presupposition - was that the legal order was not worthy of respect when its norm inflicted serious offenses on the population (substantive condition) or were the result of a process in which said community was involved in a way significant (procedural condition)"Gargarella, 'The Last Resort: The Right of Resistance in Situations of Legal Alienation' (n 7) 1.

[169] Gargarella, 'El Derecho a Resistencia En Situaciones de Carencia Extrema' (n 5) 26.

He concludes that if the state does not offer the minimum guarantees for the very subsistence of people in decent conditions, it does not have the legitimacy to demand that citizens obey their mandates[170]. Additionally, any action that is not conducive to remedying the situation of these people, as well as any attempt to repress the claims based on this situation, is an action of illegitimate coercive power to enforce them to remain in an openly unfair situation, as Rawls established[171].

Within the scheme which proposes the obedience conception, Gargarella's proposals are probably the most attainable, for two main reasons. Firstly, because it places the right to resist within the ordinary life of constitutional democracies. Although he proposes it as a "last resort"[172], the truth is that the reality to which he appeals would mostly make this last resort frequent rather than extraordinary.

The second aspect in which Gargarella succeeds is the relationship which he establishes between the right to resist, and participation in the decision-making process. In this sense, it opens the possibility of a slightly more participatory dimension, although one which is not deliberative enough.

Nevertheless, there are three problems with his position. The first is that, although he acknowledges the lack of participation, he does not affirm, alongside this, that it is a strong failure of the decision-making process, which must be changed by right bearers. This leaves those who resist no way out, other than morally persuading the

[170] ibid 37.
[171] See Chapter III Section IV
[172] Gargarella, 'The Last Resort: The Right of Resistance in Situations of Legal Alienation' (n 7).

authorities toward peace, or imposing themselves by violence; similar, in a sense, to what happens with civil disobedience. It is a legitimate action, but it does not impose any obligation on the state. The difference is that it is now designated improperly as a right. or, at least, a right devoid of a different correlative obligation to stop the arbitrary damage.

This generates the second problem: how to establish when the damage is objectively serious enough to allow the imposition of terms on those who resist, without the need for any institutional mediation? Or which is the same, at what point can protesters force the state to obey them, even though they are a minority? Likewise, the affirmation that some objective determination of damage authorizes protestors to impose their point of view without institutional mediation (deliberation), can provoke a highly chaotic situation[173].

Finally, even without considering resistance as a sign of the failure of the decision-making process, and even accepting objective damages as legitimate support for own claim, the difficulty remains in establishing what those objective parameters will be, and who will determine that objectivity. The suggested parameters may seem reasonable, but this would be possible only with respect to material aspects; while they are hardly applicable to other situations, especially those which involve strong moral disagreements[174]. This understanding of the right to resist, therefore, has

[173] Smith (n 8).
[174] Waldron (n 16).

serious difficulties in mediating the conflict of its exercise and resolving the reasons why it has been invoked.

The right to resist oppression

More recently, Finlay introduces a distinction between the right to resist and the right to resist oppression. This differentiation, decisive in his approach to the problem, seeks to overcome the situation of balance between those who claim to be holders of the right to resist, and the rest of the population, which remains under the obligation to obey[175] majority rule.

In effect, as he explains, the right to simply resist without qualification is not enough to impose it over majority rule. The reason for this is that the only sufficient reason to unbalance the relationship of common obedience due to the law in favour of those who claim, is a serious damage. That is why Finlay explains this right as properly a "resistance to oppression". The resistance to the existence of insurmountable damage by the state over a group, which makes the relationship extraordinarily asymmetrical, turns disobedience in favour of the oppressed.

To show this more clearly, he establishes four relatively objective conditions which describe situations of oppression. Briefly, these four conditions, not copulative, nor excluding each other are: domination, harm, discrimination, and injustice. It is not

[175] Finlay (n 5) 34.

the subject of this work to discuss these categories[176]. What is under consideration is the possibility of resisting by disagreement, that is, before the damage. What is relevant, again, is the establishment of the need for harm to be able to exercise the right to resist, and the requirement for this notion of damage to be delimited as strictly and as clearly as possible.

Unlike Gargarella's proposal, Finlay chooses to place the right to resist in more generic situations. In this sense, he contributes notably, by categorizing situations that would qualify as oppressive, giving to the right to resist a more directly emancipatory nature. This distinction contributes substantively to its purpose, which is to differentiate it from terrorism. Those who resist, unlike those who are terrorists, are driven by a just cause[177].

However, his proposal presents difficulties similar to those of Gargarella. Along with the challenge of determining the situations that are invoked, there is a risk of imposing even more unjust situations than the existing ones: for example, the case of those who demand the separation of neighbourhoods, invoking the right to live in a space where racial diversity does not affect them. At the very least, it is not easy to determine who is the legitimate holder of this right.

Additionally, it seems reasonable to think that these situations are better mediated as soon as they emerge in their form of disagreement, without waiting to become a

[176] ibid 20–21.
[177] Honoré (n 147); Finlay (n 5).

victim of such damages. In this sense, the right to resist could be anticipated in its invocation, recognizing that all the issues it establishes always have a gradual nature, and that it is always more difficult to get better resolutions before they reach their highest levels of severity.

## The electorate, the last court of appeal

One of the difficulties facing the understanding of the right to resist from the disobedience perspective is that it cannot mediate the conflicts which activate it, even in cases where this position considers its exercise legitimate. This is due, in part, to the problem that this perspective has incorrectly identified the deficit that activates its exercise. It is also partly due that it is a right without clear correlative obligation. Thus, its exercise would leave the societies delivered to near total confusion and instability.

This is so, because this understanding of the right to resist envisages mediation when the situation has already arrived at a very difficult stage. The state which should mediate conflicts and use the monopoly of force to do so, has become part of the conflict, precisely by using that force. Eventually, it has become illegitimate, both in the content of its mandates, and in the decision-making process.

The authors who address the right to resist either sidestep this aspect, or redirect the discussion to the state in a circular way, without clearly explaining how things would now change. Although institutional mediation is indeed decisive in resolving

these conflicts, it is equally important to establish the possible terms of institutional mediation when they are delegitimized.

In this regard, it is important to consider the ideas that Rawls expounds in his reflection on civil disobedience: "The final court of appeal is not the court, nor the executive, nor the legislature, but the electorate as a whole".[178] Although it does not explain how this process could be carried out, he establishes an important principle that should guide the action of the state, and the type of obligation that the exercise of the right to resist imposes on it.

Indeed, if non-institutional collective political action means a direct criticism of the institutions, it seems correct to start by assuming that they are unable to offer an answer. Then, as it has been since early modernity, the power to decide returns to the legitimate sovereign, the people, whom Rawls formalizes through their civic role as an electorate. From this statement, it is possible to infer that the obligation imposed on the state by the exercise of the right to resist, is the obligation to create the conditions which enable the electorate to resolve the controversial issue. That is because of the exercise of the right to resist evidence the failure of the current institutions to manage the conflict. Faced with such a situation, the institutions are obliged to appeal to the electorate. Otherwise, they would exercise increasingly illegitimate power[179]. It is also an obligation because the political power depends on the support of the electorate. Democracies, to be such, require that they be

[178] Honoré (n 30); Finlay (n 34).
[179] ibid 343.

legitimized by those who are required to obey them. Consequently, where the right to resistance has been exercised, democratic institutions must convene the electorate to restore their legitimacy.

This being correct, it is convenient to observe the scope of the reference to a “Court” and its characterization as “the last”. This description opens two relevant questions. First, if it is an electoral assembly that decides, it is convenient to name it as such. Citizens gathered in this kind of forum do not adjudicate rights as the judiciary does, but rather deliberate on the collective destiny, in particular about grievances suffered by a group of citizens. This also makes it possible to overcome the difficulty that this forum was only limited to declaring who at the time legitimately acted: either the state or the protesters. If the conversation ended there, the issues causing the resistance would remain far from resolved.

The second question, related to its “last” condition is whether given it is a forum for political deliberation, it would be appropriate to call it first and not last. To summon the people to deliberate on their fundamental agreements and the terms of coexistence, is precisely to return to the origin of the constitutional state, not to approach its exit door. This consideration allows it to be argued inversely, that it should be called a first measure, rather than before actions that claim repeatedly, over time, the exercise of political power. The timely installation of the first deliberative forum also ensures that citizens will be heard before they are harmed.

## Conclusions.

Promoting the legitimation of political framework through institutions and procedures has been one of the great achievements of modern constitutional democracies. However, success in this purpose has brought excessive confidence in institutional processes, and an exacerbated fear of non-institutional collective political actions. Theories that manifest both conditions share what I have called the disobedience perspective.

In this chapter I argued that from its origins, modern thought rests on two main principles regarding individuals: they must be protected from the power of the state, and they must participate in the constitution of said power. Therefore, the form of political power depends, to a certain extent, on the form that individuals want to give it, and its legitimacy on the extent to which these same individuals recognize it.

Constitutionalism adopts both principles and establishes rights, procedures and institutions that make their guarantee probable. Consequently, due to its non-institutional character, the right to resist began to be considered as very exceptional: that is, as a collective non-institutional action in legitimate defence in the case of unjust damage caused by the state.

I also explained that the disobedience perspective fixes its attention on the state's reaction in the face of civil actions expressing demands, rather than on the content demanded. Its emphasis rests, then, on the protection of individuals and the

restitution of public order, more than on what is claimed. I argued that there are three main reasons for this: wrong identification of the deficits that activate this right; therefore, a narrow comprehension of the meaning and scope of the right to resist; generating, as a result, extraordinary difficulties when it is exercised to mediate conflict.

Finally, the disobedience perspective asserts that the right to resist appeals to the electorate as a last court. In this aspect, the perspective of disobedience maintains that given the failure of the institutional devices, the controversial issue needs to be resolved by summoning the electorate, instead of the ordinary state bodies.

# Chapter IV

## Deliberative conception of the Right to Resist

> *Outside of the chimeric invention of pure contractual theory, resistance is therefore always disobedience, an integral and immanent part of democratic process, the collective body's way of being virtuous and rational, and through which the permanent (and necessary unless politics is to become a desert populated by sheep or automata) relation of tension between exercising sovereignty and the moltitudinis potentia's instances of self-preservation is kept alive. (Laudani, [56])*

My objective in this chapter is to argue in favour of an alternative understanding of the right to resist from what I call a deliberative perspective. The point of view which I defend here emphasizes that rights bearers are those who constitute, and consequently legitimize, the political power that they should obey. I base my proposal on the proposition that individuals are rights bearers, who are not only to be protected from the power of the state but are also to establish what rights they have and how they are to be exercised. I will argue that the latter can be prioritized.

This chapter is divided as follows. In section I the meaning of the right to resist in early modernity is explained. Differentiating it from the right to rebellion, I will describe its role in improving the existing political system, and the influence it has in the development of the ideas that inform the first constitutionalism.

In section II I will advance an understanding of the reception of these ideas in early constitutionalism. For this, I will highlight the role that collective political non-institutional actions play, as a healthy factor in emerging republics. In Section III I will explain why civil disobedience is insufficient from a constitutional point of view. In section IV, I delve into the reasons that explain why persistent disagreement, and not unjust damage caused by the state, is a sufficient reason to exercise the right to resist. In section V I propose a way to understand the relationship between disagreements and proposals. I will argue that this relationship is key to understanding the right to resist deliberatively.

In section VI I try to deal with the objection that is usually raised against the validation of non-institutional collective political actions. This section is divided into three subsections. First, I present arguments to explain the risks of neutralizing non-institutional political actions. In the second, I advance how the right to resist in action could be understood, explaining how it does not threaten democracy, but rather is a possibility for its improvement. In the third subsection, I will argue that disruptive actions do not imply supporting violence.

In section VII I will present a systematic proposal of the deliberative conception of the right to resist. To do this, I will propose a model of the right to resist based on the theories of Frydrych and Hohfeld. In section VIII I will argue that the forum which deliberates the reasons which activate the right to resist is properly the first assembly. Finally, I will offer some conclusions.

## Deliberative perspective on the early modern idea of the right to resist

What distinguishes the pre-modern political paradigm from the one called modern, is that the former based the legitimacy of the ruler on given rules, while the latter founded it, at least progressively, on the authority of those who should obey political power. The divisions between the European Christian churches, and their confrontation with the hegemony of the Roman Catholic Church, gave rise to new matters in political theories. When subjects do not profess the monarch's religion, it is necessary to know the scope of their obligation to obey him[180], and to establish a society where this pluralism can be lived in relative peace.

These questions about obedience and disobedience triggered a radical change when they opened a new field. While late medieval scholasticism was focussed on establishing when, how, or why it would be legitimate to disobey the ruler[181], early modern thinking begins to formulate questions about who legitimately holds political

[180] In terms of Laudani: "[A] multiplicity of theories of obedience to God produced an objective condition of political disobedience in society." See Raffaele Laudani, *Disobedience in Western Political Thought* (Cambridge University Press 2013) 43.
[181] Harro Hopfl, Jesuit Political Thought. The Society of Jesus and the State, c.1540-1600 (Cambridge University Press 2004).

power, when, how, why, and who is entitled to reassign it[182]. Since political power, which previously laws had assigned to the monarchs, was now referred to the people, individuals not only had to obey constituted power, but they could also participate by constituting it[183]. Arguably, the theoretical basis for the paradigm shift from obedience to participation was established here.

This change in political paradigm had its correlation with the theory and practice of rights. As Franklin points out[184], given the absolute structure of political systems during this period, non-institutional control occupied a decisive place in the correction of government practices. The control, which was previously attributed to given laws, is progressively displaced to the will of the subjects. Consequently, they needed a reason to legitimate their actions and devices to make this possible.

Since procedures and institutions to mediate political control were not yet developed, the devices to do so were non-institutional collective political actions. The reasons to justify these actions were formulated from the right to resist and the right to rebellion. The first was intended to be a balance to the power exercised by the monarch. The second empowered a change from the usurper monarch by deputizing for him; in more extreme cases, to assassinate him if he became a tyrant.

[182] Gargarella, 'The Last Resort: The Right of Resistance in Situations of Legal Alienation' (n 7) 9.
[183] Pablo Font, El Derecho de Resistencia Civil En Francisco de Suárez (Comares 2018).
[184] Julian Franklin, Constitutionalism and Resistance in the Sixteenth Century: Three Treaties (Pegasus 1969); Quoted in Rawls (n 10) 338.

In the treatment of the right to resist, beyond the specific distinctions for each Christian tradition involved in this discussion[185], three relevant commonalities should be highlighted. The first is that the legitimacy of the monarch's power depends on the fact that he acts in favour of the interests of those who should obey him. By the same token, if the monarch operates for his own benefit, or against the people subject to his mandate, he becomes illegitimate. The above opens the possibility, at least theoretically, of affirming that the people may have an interest that is not only different from that of the ruler, but also higher. Additionally, since that collective good was no longer determined by given laws, it would be possible that the same subjects might confer to establish it. These propositions would promote the subsequent idea of popular will.

The second is the case of the monarchy, becoming illegitimate, losing sovereignty, and the people recovering it. The idea of submission to the ruler, illustrated by the image of "voluntary servitude"[186], was progressively replaced by the conviction that the cessation of sovereignty from the subjects was not permanent. Thus, some important relationships between individual freedom and collective self-determination began to settle into place. Although the monarchy was still preserved as a system of government, the writers already believed that the people could

[185] The different lines within the Christian traditions are identified with the different countries. For a classification, see Gargarella, 'El Derecho a Resistencia En Situaciones de Carencia Extrema' (n 5). Although from the point of view of moral philosophy, an equivalent classification can be found in John Rawls, Lectures on the History of Moral Philosophy (Barbara Herman ed, Harvard University Press 2000) 9.

[186] Estienne de la Boétie, The Discourse of Voluntary Servitude (1576). See also Raffaele Laudani, Disobedience in Western Political Thought (Cambridge University Press 2013) 33

eventually choose an alternative[187] model. People would eventually change their government model, if a new one offered better guarantees for mediating the tension between individual and collective self-determination.

The third common aspect is that people (or a very small group initially) could depose a king if they saw the need to safeguard the monarchy. The need to protect political institutions authorizes action against the person holding the position[188]. Along with the decisive implications of the distinction between a natural person and political office, it is necessary to highlight the faculty of confirming someone, or not, in a political charge. Just as those who must obey can demand that political decisions go in their favour, and regain sovereignty if this does not happen, with this same power they could also depose the ruler if he put political stability at risk.

As can be observed, all the features listed above relate to the right to resist; they exceed the mere exercise of some control over political power; rather, they show an early claim to constitute it. These actions do not have, so to speak, the sole purpose of preventing excesses. The right to resist was an early expression of people's participation, establishing the conditions under which they are willing to obey political power.

It is also important to underline that in this stage the exercise of the right to resist was not intended to change the whole political system, but rather to improve it. In

[187] The alternative models that are in sight are those proposed by Aristotle, including democracy. See: Font (n 183).
[188] G. Buchanan, De iure apud Scotos (Edinburgh, 1579) quoted by Laudini in Laudani (n 180) 45.

this sense, it is a non-institutional device that is not disruptive in terms of radical transformation, as was the right of rebellion. Thus, the right to resist did not initially attempt to change the government from a monarchy to a democracy, even though this was a theoretical possibility; its exercise enabled the achievement of better conditions within the existing political system.

## The right to resist in the first constitutionalism

This understanding of the right to resist in the first constitutionalism can be illustrated by its reception by the first theorists, such as John Locke[189] and Thomas Jefferson; in particular, how this right is part of the concerns of these authors, both to justify uprising against the monarchical or colonial power, and in its relevance to the common life of the new states which were being formed[190].

The verification of both aspects is relevant. The processes of emancipation in the Americas are often described in terms of the exercise of the right to resist by colonists, or their American descendants, against the European crowns. Put in these terms, the right to resist would have been necessary only as a justification for political emancipation, and then subordinated to institutions disposed of by nascent constitutions. Its meaning would be like an instrumental right for constituting new

[189] It should be noted that John Locke does not depart radically from the idea of natural law. Rather it happens that, following the doctrine of the first modernity, it considers that individuals are endowed with a natural right to self-determination. See John Rawls, Lectures on the History of Political Philosophy (Samuel Freeman ed, Harvard University Press 2008) ch Lectures on Locke. See also Julian Franklin, John Locke and the Theory of Sovereignty. Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution (Cambridge University Press 1978).
[190] Gargarella, 'El Derecho a Resistencia En Situaciones de Carencia Extrema' (n 5) 43–45.

states. However, as was contended, there are good arguments for understanding the role of the right to resist differently. If the emancipatory processes indeed meant radical ruptures with the existing system of government, to constitute a substantively different one, what was exercised was the right of rebellion, not the right to resist. This distinction is already recognizable in the constitutional thought of early modernity.

If this is so, a different idea of the place of the right to resist could be advanced. On the one hand, it can be affirmed that the emancipation of the Americas was based on the right to rebellion, in a sense very similar to what is currently considered, for example, in the Preamble of the Universal Declaration of Human Rights[191]; that is, as a fundamentally emancipatory right in terms of collective self-determination of groups, or against tyranny. On the other, it could be sustained that the right to resist is incorporated into this new political situation in its traditional means: controlling and legitimating current state power by those who should obey it. Additionally, it appears that there are no relevant reasons to think that both the right to resist and the right to rebellion have been considered abolished by the adoption of institutional procedures to mediate participation and obedience. What happens is that the opportunity for their exercise becomes less likely.

[191] "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law," Declaration of Human Rights, 1948. Available in https://www.un.org/en/universal-declaration-human-rights/

Discussions about the political capabilities of citizens in nascent constitutional democracies can clarify the issue. Although initially recognized as an elitist group, the principle of participation was extraordinarily important in the thinking of the first theorists of the modern state. As Waldron points out, they considered people not only as rights-bearers, to be protected from an eventual abuse of state power, but also as subjects capable of thinking about rights[192]. The moral power which affirms people as holders of rights which must be protected, also affirms that they are able to participate in the determination of what rights they have, and under what conditions. Consequently, explains Waldron, it can be said that within the liberal tradition, participation is 'the right of rights'[193].

This is probably why Jefferson observed that 'a revolt every so often' is something healthy for the republic[194]. From his point of view, using the expression of Honoré[195] explained in the previous chapter, resistance is not only medicinal in a therapeutic sense, but a vitamin. That is to say, it does not only try to heal pathologies; rather, it strengthens the body so that it does not suffer them. For this reason, the fact that citizens could periodically carry out non-institutionalized collective political actions is not something foreign to their idea of a republic. The involvement of individuals in collective affairs contributes to the core legitimacy of the modern democratic republic. As explained before[196], this conviction was decisive for the emergence of

[192] Waldron (n 16) 250.
[193] ibid 8.
[194] Thomas Jefferson, Political Writings (Cambridge University Press 1999) 108; quoted by Roberto Gargarella in Gargarella, 'El Derecho a Resistencia en Situaciones de Carencia Extrema' (n 6) 45.
[195] Honoré (n 147) 35.
[196] See Chapter IV.

the modern state. Consequently, if democracies move away from this purpose, they move away from the idea that founded them, approaching deformed ways of it. For example, illiberal democracies[197].

Additionally, it should be noted that for modern law the right to resist is an inalienable right[198]. That is, it belongs to that class of rights that cannot be waived through the contract that civilized society founds. This becomes even more evident, given its proximity to one of the fundamental principles of these societies: government depends on the consent of the subjects. In this sense, it is possible to understand the consideration that Locke makes regarding the patience that citizens have with bad governments and the consequent importance of listening to them when they express their discontent, even through non-institutional actions.

Although my purpose here is not to make a detailed history of these ideas, it is possible to argue that the adoption of the obedience perspective was justified by absolute confidence in the civilizing value and responsiveness of institutional processes. In this sense, Hobbes' proposition may be illustrative, when he judges that life outside the institutional framework can be "lonely, poor, unpleasant, brutal and short"[199]. Thus, constitutional systems have allowed the development of better living conditions, even for those who are part of minority groups, or who have neither power nor strength.

[197] Plattner (n 3); Zakaria (n 3).
[198] Atria, *La Forma Del Derecho* (n 154) 50–51.
[199] Thomas Hobbes, Leviathan, the Matter, Forme and Power of a Common-Wealth (Oxford University Press 1881) 91.

However, the adoption of this position brought two consequences that weaken the principles it claims to defend. Firstly, it creates conditions whereby political institutions cannot recognize in a timely manner their own loss of legitimacy. Since every civil political action outside of procedures is considered *a priori* unlawful, institutions have a strong argument to ignore claims against them, even when their own procedures are part of the problem. Secondly, and for this same reason, the institutions influenced by the obedience perspective fail to identify the deficit which activates non-institutional collective political actions. While those who protest are claiming against the content of a political decision, this perspective attends more to the way in which that claim is made known. Thereby, instead of attending to the demand of rights bearers, political institutions choose to protect themselves.

As a result, constitutional democracies become what the theory of deliberative democracy diagnoses as elitist democracies[200]. State power is exercised avoiding the questioning of those who must obey, employing apparently democratic arguments and resources. Despite expressing interest in protecting the rule of law, it rather gives the impression, as Mangabeira Unger states, that they are hiding a dirty little secret: their suspicion of democracy[201]. Eventually, they prefer to impose the terms of a decision, even if those who should obey it manifestly and over time disagree.

[200] Nino (n 54) 79.

[201] Roberto Mangabeira Unger, What Should Legal Analysis Become? (Verso 1992) 72. The way in which Waldron treats this idea may not do enough justice to Unger's proposal who emphasizes the "fear of political action". See: Waldron (n 4) 8.

In this context, I argue that the right to resist as a call for deliberation, appears as something less dangerous and more desirable. It can be healthy for democracy and can strengthen the legitimacy of political power when this is weakened. The forgotten legacy of the first thinkers of modernity and the constitutional republics allows me to advance this. Additionally, the fact of being considered a right, and not only legitimate disobedience, endows the subjects with the power to demand the right to deliberate on political disagreements. It means, in the sense explained above, formally endowing the citizenry with a control device, when there are persistent and unheard disagreements about the way in which political power is exercised. It also prevents citizens from requiring unjust harm to be heard.

## When is it legitimate to resist? disagreement on legitimacy instead of harm

The task of this section is to discuss the unfair state damage as a requirement to exercise the right to resist. I will argue that the existence of a disagreement on the way in which political power is practised - persistently disregarded by the ruler- should be sufficient to be able to exercise the right to resist. This does not exclude its status as last resort in extreme cases. Rather, leaving it confined to these extreme cases ends up contradicting democratic principles. Accepting that it is exercised in the face of persistent disagreement allows avoidance of the damages that would eventually justify it.

### Deliberative approach

In general terms, deliberative democracy[202] is based on the purpose of recovering the assumption that the legitimacy of political decisions depends, decisively, on the deliberation of those who should obey them[203]. It is a recovery, because this idea is part of the founding principles of modern political thought[204]. Adopting this position involves affirming certain characteristics which define constitutional democracy. Among them, the following stand out.

Firstly, individuals can have a proactive, and not only reactive, attitude towards common issues also regulated by rules. Since this perspective assumes that when citizens discuss something about political power, they are getting involved as rights-bearers, who have to legitimize what they should obey. It also means that they have something to say or discuss, and not are limited to accepting or rejecting instructions. They are the protagonists of political decisions.

It is due to the above, as a second characteristic, that this perspective seeks the active involvement of citizens in collective affairs, as a fundamental aspect of a healthy democracy. It is expected that constitutional democracy tends to incentivize individuals to engage in public affairs, with special interest when these issues directly affect them. The reason for this is not only formal, but normative. Political decisions are in principle better if those who are affected by them take part in the decision-

[202] An exhaustive description of deliberative democracy is found in chapter V
[203] Jon Elster (ed), Deliberative Democracy (Cambridge University Press 1998).
[204] Some authors of deliberative theory maintain that this character is typical of classical democracies. Although this context existed dialogue, for the reasons explained in section I, deliberation as such can only exist once modern thought is installed. See ibid 2–4.See also: Lane Davis, 'The Cost of Realism: Contemporary Restatements of Democracy' (1964) 17 The Western Political Quarterly 37.

making process[205]. This is because they can say how these decisions would affect them, providing valuable information to decision-makers. Therefore, constitutional rights and institutions should be understood in terms which expand and guarantee citizen involvement in public issues, rather than reducing it.

This idea can also be observed from the point of view of legitimacy. In general terms, legitimacy refers to an attribute that individuals recognize in political power, synthesized as the "reason to obey"[206]. In Waldron's terms: "*capacity of a political and legal system to generate support for the implementation of laws and policies, including by those who opposed these for substantial reasons"*[207]*.* The more a rule is recognized as legitimate, the better arguments can be offered to maintain that it is of higher quality than its alternatives. The main characteristics of deliberative democracy enhance the quality of decision-making, namely: reasonableness[208], impartiality[209], and particularly, inclusion and equality,[210] are all related to participation[211].

[205] J Luis Martí, *La República Deliberativa. Una Teoría de La Democracia* (Marcial Pons 2006); Jon Elster, 'Deliberation and Constitution Making', *Deliberative Democracy* (Jon Elster, Cambridge University Press 1998); Manin, Stein and Mansbridge (n 40). (Manin, Stein, & Mansbridge, 1987).
[206] Nino (n 54) 138.
[207] Jeremy Waldron, 'Control de Constitucionalidad y Legitimidad Política' (2018) 27 Diakoin 7, 16. Highlight from the original. [Original in Spanish, the translation is mine]
[208] Joshua Cohen, *Philosophy, Politics, Democracy. Selected Essays.* (Harvard University Press 2009) 29.Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press 2004).
[209] Seyla Benhabib, 'Toward a Deliberative Model of Democratic Legitimacy' in Seyla Benhabib (ed), *Democracy and Difference* (Princeton University Press 1996).
[210] These arguments are deepened in sections 3 and 4 of chapter V: "Within Deliberative Democracy" and "From Deliberative Democracy".
[211] J Luis Martí, *La República Deliberativa. Una Teoría de La Democracia* (Marcial Pons 2006); Jon Elster, 'Deliberation and Constitution Making', *Deliberative Democracy* (Jon Elster, Cambridge University Press 1998); Manin, Stein and Mansbridge (n 40). (Manin, Stein, & Mansbridge, 1987)"Because the members of a democratic association regard deliberative procedures as the source of *legitimacy*, it is important to them that the terms of their association not merely *be* the result of their deliberation

These ideas can be synthesized in the idea of epistemic legitimacy proposed by Nino[212]. Legitimation of political power for epistemic reasons means, first, that common rules dictated in a democracy provide reasons to believe that there are good reasons for an action or decision, but they are not, in themselves, the reason to act or decide[213]. Rules adopted under deliberative conditions are more likely to refer to reasons that it would be reasonable to support.

The epistemic quality of a decision taken in deliberative terms varies and is evaluated by individuals concerning the epistemic quality of their reflection[214]. Every individual who faces a rule contrasts his/her reasons for obeying with the reasons to which the rule refers. This is so, because the more people involved in adopting a norm, the better its epistemic quality. In other words, deliberative processes enhance the ability of individuals to be more involved in decisions, increases their possibility of having greater epistemic legitimacy, and therefore better solutions.

Along with promoting the engagement of individuals in political discussion and better decisions, this perspective also assumes that discussion can be conducted based on liberty, observing reasonable terms, among equals[215]. Freedom operates in two ways: no one has to be constrained to adopt a foreign position, and everyone must

but also be *manifest* to them as such" (Cohen, Philosophy, Politics, Democracy. Selected Essays, 2009, p. 22) (Italic in the original)

[212] Nino (n 54) 134–143.

[213] ibid 135.

[214] ibid.

[215] Cohen, *Philosophy, Politics, Democracy. Selected Essays.* (n 207).

be able to express their convictions. Reasonableness involves expressed reasons that should be understandable and impartial enough and exclude disqualifications in personal or moral terms. Eventually, equality assumes that everyone has something to say about what is discussed, and no voice has priority over the others.

Finally, this conception assumes that citizens are more inclined to respect institutional procedures than to challenge them; therefore, in Locke's[216] terms, people are much more willing to endure a great deal of injustice for a long time before they revolt against it. This general guiding criterion demands to be taken very seriously when individuals challenge the rules based on political claims.

Disagreement in place of harm

Considering the above, it can be argued that the deliberative point of view rejects the damage requirement in two senses. Firstly, this could present a contradiction with the idea of rights bearers which underlies constitutional democracy. Secondly, because of its potential risk to the constitutional order.

Regarding the first, as has been persistently maintained, affirming that individuals are rights bearers, means that they are the ones who decide on political power, and not the other way round. If the above is correct, at least in principle, it implies that any action which defies norms, especially those that have political content, must be

[216] John Locke, *Two Treaties of Government*, vol V (Rod Hay, McMaster University Archive of the History of Economic Thought 1823) 204.

attended to with special care by the rulers. This is a guarantee in favour of the citizens and controls over the institutions when they cannot detect their problems.

In this regard, it is possible to see why the damage requirement is problematic; it eventually shifts the axis of the matter, weakening the original claim. If the right to resist is founded only on the principle of legitimate defence, once exercised the relevant issue is not what is claimed, but rather the question of the legitimacy of the state or disruptive protestors. Thus, the state causes a double lack of protection. On the one hand, it disregards the claim of the subjects; on the other, it deflects the discussion towards the legitimacy or illegitimacy of the protestors' actions and the state's reaction.

In this manner, the damage requirement gives fragile protection to individuals, and stronger protection to whoever has political power. This is not to say, by the way, that it is not important to maintain damage as a critical standard; but rather, that it must be sharpened by fixing its base in persistent disagreement.

This problem can be seen when its risk to democracy is explained. If the right to resist is based on the existence of unjust damage, the correlative obligation that the state has is to stop causing that damage, and perhaps, to compensate the victims. However, this right does not create any obligation on the state bodies to pay attention to what is claimed. In other words, after its exercise, the situation of protestors could remain the same. Or, if changes are achieved, it is thanks to the

moral force of the dissidents, or because of the disruption of their actions, and not due to political deliberation.

The situation may be more critical if it is a government with authoritarian overtones, or with so-called 'illiberal democracies'[217]. In these cases, the damage standard allows states and rulers to act against individuals who are claiming their legitimacy. At the same time, it inhibits those who consider that the claim is fair.[218] Just as the requirement that claims must follow institutional procedures allows repression of protest actions, the damage requirement provides a wide margin for such repression to be intense. The argument for the persuasive use of state force to control protests is often vague. Under the assumption that its use must be sufficiently intimidating, it is difficult to determine the certain degree of damage which is necessary. Thereby police forces are empowered to act at their own discretion, opening a space for arbitrary and unnecessary violence.

Eventually, the severity of these situations could end up being mediated by the judiciary[219]. Although the judicial decision may bring the state's action under control, it cannot resolve what is claimed. In other words, the problem for the protesters remains in the same conditions of origin. The judiciary is not the body in charge of reviewing political matters, therefore even with its sanction, the situation regarding the claim does not change. At this point, the meaning of the Lockean assumption

[217] Marc F Plattner, 'Illiberal Democracy and the Struggle of the Right' (2019) 30 Journal of Democracy 5; Fareed Zakaria, 'The Rise of Illiberal Democracy' [1997] Foreign Affairs 22.
[218] Aguiar (n 5) 58.
[219] Political contention by parliament is not at issue here. For the purposes of this argument, they are part of the bodies that ignore the claim. If they acted, there would be no need to resist.

about citizens' willingness to endure unjust situations in the republic is distorted. They do not support mistreatment and abuse because they are freely willing to do so, but because the state is forcing them to do so.

A deliberative conception of the right to resist, as proposed here, allows the disagreement between citizens and rulers to be taken seriously. Taking it seriously means that the word of individuals, even more so when expressed collectively in the form of a political claim, must be treated with special attention by the ruler and the state. The state should not protect itself from claims, but rather create the conditions for them to be mediated by dialogue. This is decisive for a strong conception, even for the viability, of constitutional democracies.

### Disagreements and proposals

From the deliberative perspective it could be argued that the right to resist emerges when the state systematically disregards a persistent expression of disagreement concerning the mandates of political power, on the part of those who should obey. This perspective is to be understood as a call to deliberation, which does not necessarily involve violent actions. In this section, I will discuss what kind of disagreements, in what terms, and why, are at stake, together with a proposal which seeks to improve constitutional democracy.

Political norms or public policies fail, or are challenged, for two main reasons. Firstly, because of content- the idea that underlies them loses hegemony- or practice-

showing that the norms are deficient in their institutional design[220]. A general way in which the above can be said is that the rules are challenged because of the deficit they cause in the lives of those who should obey them. Individuals affirm that there is a normative content with which they disagree, or which directly harms them, while they are powerless to correct through institutional channels.

Like all political concepts, this general idea of 'deficit' becomes visible to the opposition. This means that deficits are experienced, and consequently explained, in relation to a non-deficit situation[221]. Those who claim, do so with a greater or lesser awareness that there is another situation where they would be better off.

This is so, because the deficit is not experienced in the abstract, but in concrete reality. It is a fact which is contested by a counterfactual possibility. To become aware of that specific deficit, it is necessary to know, or at least assume, that there is another non-deficit possibility. For example, in the case of the civil rights movements in the United States, or the women's suffrage movement, these did not claim against abstract deficits, but in opposition to a specific situation, visible and possible. The African American population wanted to enjoy the same rights as the Euro-American population. Likewise, women wanted to enjoy the same right to vote as men.

For this reason, the disagreement on which the right to resist is founded, is at the same time an expression of a deficit, and a proposal of what would make the deficit

[220] Atria, Salgado and Wilenmann (n 59).
[221] Atria, *La Forma Del Derecho* (n 154) 454.

less likely. This is important because both characteristics make the claim politically intelligible under deliberative conditions. It enables the recognition of why the disagreement exists, and it allows arguments in favour of the situation that would resolve it. This same characteristic allows to subtract the deliberative dialogue from the defence of substantive ideas of justice, to take it to the sphere of equal and reasonable deliberation on matters that affect a part of the population.

Atria explains and, in a sense, broadens the possibilities for the deficit concept described above, through the exercise of turning the institution against the institution[222]. In his opinion, every institution, by the mere fact of being such, is an expression of a deficit; that is, it is intended to make probable a more human life than would be the case if this institution did not exist. However, he adds, all institutions have two dimensions an emancipatory and an oppressive[223]. Its emancipatory dimension is shown when it achieves its purpose, and the oppressive dimension is when it contradicts its own purpose.

From this perspective, what protesters seek is to turn the emancipatory dimension of the institution against its oppressive dimension. The example given above can explain this point. The civil rights movement did not want to suppress these rights, but to broaden their scope. Turning the institution against the institution implied that the same rights claimed could eliminate the deficit meant by discrimination in

[222] ibid 451.

[223] It is important to note that the word oppression here is used in a different sense than that assigned by Finlay. While the requirement established by Finlay appeals to the will or result that causes an arbitrary damage or restriction of rights, in this context it describes a characteristic of institutions by the mere fact of being such.

recognition. Something similar happened with the suffragette movement: it did not seek to eliminate the right to vote but wanted to expand its reach by eliminating exclusionary discrimination.

This explanation entails the requirement, from a deliberative perspective, that disagreement be formulated on reasonable and impartial terms[224]. Reasonable means, initially, that it is disclosed in such terms that the reasons that explain it and the suggested means of correcting it can be intelligible and verifiable. Impartial, also initially, means that these arguments will be offered in terms of what is in favour of the general good and not just self-interest. While reasonableness appeals to the internal consistency of the arguments offered, impartiality appeals to the democratic quality of its purpose.

It is important to note that, even when all disagreements involve some degree of self-interest, it should be able to answer the question about how the general interest is involved, how the oppressive side of the institution may be identified, and what kind of solution could correct the existing deficit in emancipatory terms.

The fact of putting the arguments about the disagreement in a deliberative forum, while observing the conditions described above, also operates as a control over the purpose of those who exercise the right to resist, and those who are not involved in the deficit. As will be argued more extensively in the following chapter, in contexts

[224] Both concepts will be more deeply explained in the next chapter.

of deliberation this is the control which Elster calls "the civilizational force of hypocrisy"[225].

Under conditions of public deliberation, the explicit defence of self-interest tends to be punished. Faced with this, cynical participants tend to disguise their self-interest by adopting impartial positions as their own. As a result, the public discussion improves. It is good that even cynics contribute to strengthening that which in principle is in favour of all, and it is good that if they stop doing so, they will be revealed as such.

The process from resistance to deliberation recognizes different stages[226]. The identification of the disagreement and the way in which could be deliberatively solved corresponds to the second of these. The important thing here is to establish that this identification is decisive, so that the conflict made known by the exercise of the right to resist can be solved in accordance with democratic principles. In particular, it is important to guarantee the physical integrity of those who claim against political power.

### Non-institutional collective political action in the face of the institutions

One of the greatest difficulties with the right to resist from the obedience perspective, is that the practice of this right supposes collective non-institutional

[225] Elster, 'Deliberation and Constitution Making' (n 210) 111; Martí (n 210) 55.
[226] See Chapter VII

generally disruptive political actions. For this reason, this perspective provides, at least formally, legal arguments that are intended to prevent, if not repress, this type of action. In this section I will discuss the risks to constitutional democracy which this position implies, and how these non-institutional collective political actions can be understood in terms of the possibility of improving democracy, rather than threatening it.

## The risks of neutralizing non-institutional political action

The obedience perspective makes it possible for states and rulers to rely on apparently democratic arguments, to neutralize political actions which criticize them; that is, by requiring individuals to always and in every case to express their discontent and seek political transformation through institutional procedures. To maintain this, impartial protection of the rule of law is generally invoked.

Nevertheless, it should not be necessary to attribute, at least in principle, moral or political purposes to recognize the difficulties of this position. It is enough to establish that the institutions of political power could not able to realize their own loss of legitimacy. This is a relevant problem, which the obedience perspective does not manage correctly.

This situation is problematic in two complementary ways: firstly, because of the type of political culture to which it gives rise; secondly, for the type of actions for which

the state is empowered, especially when the requirement of being a victim of damage is added. I will explain both below.

Regarding the political culture to which it gives rise, the obedience perspective tends to place institutions in a preferential place with respect to people. This political decision brings a discourse about right and wrong, even about good and bad, which turns against those who use a non-institutional expression of disagreements. Thus, those who agree to submit unconditionally to the procedures are the good ones, while those who protest disruptively are the bad ones. This proposition, in addition to being an argument that works in favour of the *status quo*, hinders dialogue for resolving collective issues, and diverts attention from what is claimed to the way in which the claim is expressed.

The danger of the *status quo*, especially when political decisions are questioned for a long time, is to make political stability an illusion. The imposition of conditions of submission, where people have to accept what they disagree with, could finally provoke an uprising. Eventually, in this context, it becomes very difficult to distinguish political violence from claims for legitimate political changes.

Likewise, this division makes dialogue on common issues much more difficult. Indeed, dialogue and deliberation are much more likely when the ideas of the adversary are considered inaccurate, incomplete, or even erroneous. Not so, however, when they are associated with evil. It is possible to suppose that no

reasonable person would endorse, at least not publicly, either those considered bad, or the evil that they promote.

Finally, the obedience perspective allows a strategic evasion of the claimed matter, appealing to the way the claim is expressed. Although not every means can legitimately demand attention, there is any case the responsibility to distinguish one thing from the other, especially when those who claim to do so are from a disadvantaged or minority position.

Regarding the actions with which the state is empowered, the effect may be the same, or more serious. Indeed, since the state is recognized as the one who administers the monopoly of force to guarantee public order, it can use this argument to repress, even persecute, those who criticize it. In this way, undemocratic political conditions can be covered by a veil of democratic constitutional formality. This is the case of illiberal democracies[227].

The disobedience perspective thereby ends up reinforcing the mistakes of political institutions. On the one hand, it creates a political culture where the non-institutional discrepancy is rejected, by the mere fact of being such. On the other, it transfers power to the state to act in accordance with that culture. By contrast, the deliberative perspective which I defend here, promotes timely dialogue, paying attention to the disagreement, and involving citizens in its resolution. This gives rise

[227] Zakaria (n 3); Plattner (n 3).

to a political culture that allows collective decisions to be renewed according to the dynamism of social transformations and promoting political institutions which serve that purpose.

Right to resist bearers and right to resist in action[228]

The deliberative perspective which I defend admits the possibility that non-institutional collective actions, and the right to resist exercised through them, can improve constitutional democracies. This is so, among other reasons explained so far, because through these actions a disagreement can be made known, its resolution can be promoted with the incorporation of those who claim it, and the state be put to the service of that purpose.

However, it is still necessary to determine who are the holders of this right, and how in fact it is exercised. I will explain this trough the development of the theory of social movements, and the political role that corresponds to them in contemporary constitutional democracies. I will argue that this theory allows us to give political shape to what emerges as social demands, offering a framework of content to be deliberate.

In the social sciences, non-institutional collective political actions have mainly been described and analysed in association with the phenomenon of social movements.

[228] A more complete description of the stages from resistance to deliberation outlined here is presented in section III of chapter VII.

Even though such movements started almost from the beginning of modern states[229], the study of them, and consequently their political recognition, is relatively recent. In fact, it was only after the mobilizations of civil rights in the United States during the sixties, and then the student movement in France in 1968, that new understandings of social movements started to arise[230].

Up to now sociologists described this kind of non-institutional collective action as "dramatic behaviours"[231]. This denomination referred, without distinctions, to a wide range of actions that periodically put the order of the state under threat. As Smelser explains, these actions were described as seditious riots and revolutions, which were driven by furious mobs, without rational explanations[232]. What the thinkers had in view were the experiences of both the French and Russian revolutions, as a threat to order by collective forces gone out of control[233].

From the nineteen sixties something changed in this analysis. In part challenged by the academic support for these actions, and in part due to the persuasive force of the movements themselves, sociologists started to accept that these collective behaviours have some rationality. This is based on strong social and political content, which cannot be reduced to merely emotional or sentimental reactions. Thus, what

[229] Laudani (n 180).
[230] Reva B Siegel, 'Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the Facto ERA. 2005-06 Brennan Center Symposium Lecture' (2006) 94 California Law Review 1323.
[231] Neil Smelser, Teoría Del Comportamiento Colectivo (Fondo de Cultura Económica 1989) 13. Quoted by Gabriel Salazar, Movimientos Sociales En Chile. Trayectoria Histórica y Proyección Política. (Uqbar 2012) 410. See also Herbert Blumer, 'Collective Behavior' in AM Lee (ed), New Outline of the Principles of Sociology (Barnes & Noble 1951).
[232] Smelser (n 230).
[233] Salazar (n 230) 408.

was previously situated outside political and social discussion, now became its core[234]. From these new approaches, explanations began to assume non-institutional collective political actions as free, creative, and purposeful[235] ways to citizen expression. A novel type of social actor was emerging, with stress on political discussion within the ordinary political framework and claim for changes.

The most important distinction between social movements and mobs is that social movements are not spontaneous. In fact, one of the social movements' features is that they require organization of resources[236]. That means that they articulate material (i.e., what is used to announce their claims) and immaterial resources (i.e., symbols, behaviours, stories, values), within a narrative that provides a frame for their demands. Eventually, both the movement's viability, and the possibility of obtaining its expected results, depend decisively on its organization of resources.

This "rational engine"[237] has its starting point in the identification of *deficit*[238] and seeks to promote, as McCarty and Zald explain, 'changing some elements of the social structure and/or reward distribution of society'[239] to solve it. This declaration of deficit, as was said before, has a double dimension. On the one hand, it is a claim against the mandate of political power, and the decision-making which gave rise to

[234] Ron Eyerman and Andrew Jamison, Social Movements. A Cognitive Approach (Oxford University Press 1991) 17. Quoted by Salazar (n 230) 410.
[235] Alain Touraine, Sociología de La Acción (Ariel 1969) 13–16. Quoted by Salazar (n 230) 411.
[236] John D McCarthy and Mayer N Zald, 'Resource Mobilization and Social Movements: A Partial Theory' (1977) 82 American Jurney of Sociology 1212.
[237] Salazar (n 230) 412.
[238] ibid 414.
[239] McCarthy and Zald (n 235) 1217–1218.

the said mandate. On the other hand, it expresses an alternative institutional form where that deficit becomes less probable. The first is the reason why the challenge of political authority follows a non-institutional route[240]. The second is their proposal.

The success of social movements rests in their capacity for persuasion, and not in their potency for defeating political power. In this sense, social movements challenge hierarchical political structure[241] by communicating their immaterial resources. It appeals to the anticipatory character of their proposal, today which shows the desirable society of the future[242]. In other words, they demonstrate an ability to show that overcoming the deficit will create better conditions for all, since it implies expanding the emancipatory conditions of the existing institutions. It is for this very reason that its purpose is to improve the existing constitutional democracy, not to overthrow it.

This contemporary understanding of social movements has been progressively addressed by the theory of law, particularly when their claims involve constitutional changes[243]. Indeed, one of the most salient characteristics of contemporary constitutional democracies, and a point of greatest tension, is its adaptability when facing new social realities. The emergence of social movements is explained, at least in part, by the rigidity of the institutional devices that allow this adaptation. Additionally, and related to the above, is the fact that this process of permanent

[240] Salazar (n 230) 416.
[241] ibid 422.
[242] ibid 415.
[243] Siegel (n 229) 1327.

renewal is decisively determined by the dynamics of political or legal inclusion and exclusion. This is so, as Pateman explains, because by its own institutional nature the liberal state sometimes presents serious difficulties in guaranteeing inclusion, even when it claims to promote it[244]. Social movements emerge as a non-institutional way of reversing that exclusion.

The deliberative idea of the right to resist is in that tension: the right to resist as a call to deliberation, as a call to be considered in the political discussion, and as the possibility to resolve common issues by those who are directly affected by them. This correlation between inclusion and deliberation is decisive in correctly weighing the disruptive character of the protestors' actions, and differentiating them from others who are not protected by the right to resist.

Indeed, since those who belong to social movements demand to be incorporated into the political discussion, they are incompatible with those whose actions seek to impose terms, and, even more, who are looking to destroy the current political order. On the contrary, if they are demanding to be considered, their purpose will be fulfilled through the improvement of the current political order. At the same time, since it is a call for deliberation, they are incompatible with those whose actions tend to establish political order by force.

[244] Carole Pateman, The Problem of Political Obligation. A Critique of Liberal Theory (Polity Press 1985) 171.

Challenging the law: disruptive does not mean violence.

The characteristic of collective non-institutional actions is that they do not follow the formal procedures established to channel their political demands. However, this does not mean that all these actions imply an act of disobedience, nor does disobedience necessarily imply violence. Eventually, even if the actions were formally violent, this does not mean that is necessarily politically reprehensible.

The first thing to consider is that the repertoire of actions for social mobilization is diverse. Although its most visible expression is demonstrations using public spaces, there are others. For instance, the advancement of social networks has increased the ways of expressing adherence to a social cause and discontent. Thus, wearing identifying signs, adopting certain eating or consumer behaviours, and joining causes on virtual platforms, among others, have become frequent ways of protesting. Clearly, none of them involves disobedience or any infraction. If they were taken seriously in deliberative terms, they would probably not become troublesome.

Demonstrations in public spaces, likewise, are not necessarily disruptive. Although occupying avenues to march or hold demonstrations in squares can hinder ordinary life, this cannot be described, without further ado, as an act of disobedience or defiance of the law. On the contrary, these are actions expressly protected by law, which imposes an obligation on governments not only to accept them, but also to guarantee that they can be carried out in safe conditions. Although the cases of using

public spaces *as* a form of political action and not *to* publicize political demand are different, the fact that they are part of common democratic life still subsists.[245]

If at this point these expressions of disagreement were taken seriously and institutionally mediated, they would probably not escalate in intensity. But, if the institutional mediations do not take account of the collective demand, social mobilization may be sharpened, and may eventually challenge the law. These actions are unacceptable when their objective is to harm civilians or private property. However, when it is exercised against public property or police officials, it should be viewed with a little more care.

Indeed, although both behaviours are undesirable, it must be considered that their purpose is not to harm, but to make known their discontent with the ignoring of their claims. Just as those who protest do not seek to defeat the police, neither do they have the sole purpose of preventing the use of public goods. It is, in many cases, an extreme reaction that expresses deep frustration for being obligated to do something with which they disagree. Likewise, the fact remains that institutions and procedures have failed to mediate disagreement, as expressed by a group of people who must have legitimate political power.

In the same way that political disobedience is not necessarily violent, neither is the purpose of social or political organizations that promote this type of actions. As

[245] Jürgen Habermas, 'Civil Disobedience: Litmus Test for Democratic Constitutional State' (1985) 30 Berkeley Journal of Sociology 95.

explained above, the characteristic of social movements is precise that they are not improvised. On the contrary, their possibility of success depends largely on the organization of resources. If necessary, this reluctance to listen to mobilized rights bearers activates a greater organization and solidarity.

The conflict is exacerbated when complaints are not addressed over time, while the attempted imposition of what is considered illegitimate remains. Given these circumstances, the disruptive nature of the demonstrations is likely to intensify, and in reaction to it, the violence of the state actions. While the strength of this confrontation increases, disruptive civil action becomes more acute. Eventually, the dialogue to resolve it becomes more difficult. Likewise, the core of the confrontation shifts, from what was been claimed, to violence.

Even though under these circumstances it is still possible to make a call for deliberation, and even looking like the most reasonable solution, the effects in terms of civic co-existence are difficult and slow to repair. Faced with this, it is reasonable to argue that the right to resist, as a call to deliberation, should be recognized from the initial and least disruptive stages of its manifestation.

## Deliberative conception of the right to resist

One of the greatest difficulties in defining the right to resist and its scope, is that it is easily confused with other forms of disruptive collective political action. For this reason, I will here begin proposing a differentiation of the right to resist from civil

disobedience, revolution, and rebellion. Then I will suggest a theory and model of the right to resist from a deliberative perspective.

Civil disobedience is a kind of protest that, under some circumstances, admits a legitimate challenge to the current law. Smith has developed its relationship with the deliberative theory of democracy[246]. In this context, he develops an understanding of civil disobedience as a moral right. From his point of view, through civil disobedience the state is required to respect protesters and to enter dialogue, by police negotiation, judicial censorship, or political debate[247].

From the point of view that I am defending, Smith's proposal presents two difficulties. The first is the idea of moral rights. The second is the dialogue between protestors and state bodies. Regarding the first, it is necessary to return to the idea of individuals as right bearers in constitutional democracies. In this context, the fact that individuals have the right to be those who decide, collectively, which rights they have is not a moral appeal, it is juridical. When individuals complain, they are not trying to morally persuade the authorities to do them a favour, they are exercising a right that imposes on the authority the obligation to listen and respond. Put in Smith's terms, in the face of this class of actions, the law would be in favour of the state, imposing on those who protest the obligation to be morally persuasive. This bias in favour of the state is typical of the disobedience perspective that I described earlier.

[246] Smith (n 8).
[247] ibid 136.

The second difficulty arises from not adequately considering the existence of a persistent disagreement. Those who protest make it known that they have been constantly ignored. Thus, civil disobedience is, to a large extent, an action whose cause is the failure of institutional channels to deal with situations of disagreement. This being the case, what is appropriate is that those who protest return to talk with other citizens, about what these bodies should do in that specific case. From the perspective of deliberative democracy, this dialogue is not with the organs of the state. The state's obligation is to generate the conditions for deliberation.

Thus, if civil disobedience is a moral right which does not endow the right bearers any power, nor does it impose any obligation on the state but on the contrary, rest its effectiveness on the moral persuasion of the ruler, it is reduced to an almost symbolic activity.

The right to resist in the terms described here allows for a resolution of this contradiction. Since collective non-institutional political actions which express a disagreement with the legitimacy of political power are protected by a right, this implies that the state is legally bound to a particular behaviour. In this case, it must provide conditions for deliberating on the disagreement. As a result, along with resolving the controversial issue by those who are involved, the legitimacy of political power and constitutional democracy is strengthened.

In a similar sense, this deliberative purpose that seeks to improve the current political system is what distinguishes the right to resist from rebellion and revolution. Rebellion, regardless of the moral or legal considerations that may justify it, does not on principle attempt to improve a current political system, but to change it. Likewise, even when the rebels experience the deficit of a current political system, they do not intend to deliberate about it, but to establish an alternative on their own political terms. In this manner, rebels use violence strategically to replace the government and political systems, without appealing to the contrary opinion. At least, they do not claim to resort to formal devices to legitimate their actions.

Something similar can be said about revolution. Revolutionaries do not want, in principle, to improve a current political system, but to establish another in its place. This is so, because, like the rebels, they consider their adversaries as enemies in a morally or ideologically. That is, they are not someone with whom there is only a disagreement, but they have radical differences about what the political framework must be. This moral rejection of the adversary, in addition to the objective dangers that it means for co-existence, makes deliberation practically impossible.

It is still possible to imagine a case in which both a rebellion and revolution sought to establish a democratic constitutional regime. Even in this circumstance, they would not cease to be rebellion or revolution respectively. A decisive characteristic of the right to resist in a deliberative sense is the existence, at least formally, of current constitutional democracy. This is because the purpose of resistance is precisely to improve it, and not change it for a different one.

Since the right to resist is explained as a call to deliberation, those who invoke it necessarily affirm the legitimacy of constitutional democracy. That means, consequently, that they promote a fundamental continuity with the principles that inspire this system of government; where reforms, or even ruptures, seek to improve it, and not neutralize it, let alone destroy it.

Theory and model of the right to resist

Following Frydrych, rights can be characterized using theories and models[248]. The former describes the purposes of the rights, that is, what they wish to protect or guarantee. The latter establishes relative normative positions regarding general duties, prohibitions, or commandments. Using both these classifications, the deliberative perspective can describe the right to resist as follows.

From the point of view of a theory of rights: the right to resist seeks to guarantee that subjects effectively control the agreements on political power when the procedures created to do so have failed. Given that this control of political power is recognized by everyone, but exercised within the political community, what is required is to call the other individuals to deliberate. Thus, the purpose of the right to resist is to guarantee that political power will be legitimized by those who will obey it, especially when institutions miscarry in their task. It seeks guarantees and

[248] David Frydrych, 'Rights Modelling' (2017) XXX Canadian Journal of Law & Jurisprudence 125.

promotes ways to adjust the expression of individuals to the actions of political power.

Viewed from the perspective of rights modelling, the right to resist can be characterized as what Hohfeld describe as a claim[249]. Given the case of the failure of the institutional procedures that give legitimacy to the decisions of the political power, rights bearers have a claim that imposes two duties on the state. Firstly, the duty to create the conditions for a civil deliberation on the topic discussed. Secondly, and consequently, the duty to implement what is decided in this deliberation.

Facing this call for deliberation, the rest of the rights bearers have a Hohfeldian privilege that operates in two ways. The first is that they may or may not participate in this summons to deliberation. If they do not, it is an expression of disagreement with the disagreement and the majority rule is safeguarded.

The second sense in which the rest of the individuals enjoy a privilege is in the deliberation itself. Once the deliberative process has begun, they are not forced to accept the demands of those who protest. During deliberation they can expand, correct, or reject the solution which is claimed by protestors. This decision will be endowed with legitimacy, because is the decision of those who are involved in deliberation, and not because it is the will of those who claimed. Thus, the electorate as the final court of appeal for those who exercise the right to resist as mentioned by

[249] Heidi M Hurd and Michael S Moore, 'The Hohfeldian Analysis of Rights' (2018) 63 The American Journal of Jurisprudence 295; Leopold W Rosdorff, 'Hohfeld's Theory of Fundamental Legal Concepts: A No-Revision' (1973) 16 Logique et Analyse 259.

Rawls, becomes more correctly intelligible, if it is described as the first deliberative assembly. In this forum, citizens do not pass sentences, but rather seek a way to collectively resolve common issues.

Finally, it should be noted that this is an inalienable right[250]. This is recognized from the context in which it is determined. Since it is understood that the political dimension of society is constituted based on the consent of the governed, individuals hold certain rights that are inalienable, because these are the ones which guarantee the possibility of constitutional agreement. In other words, it is a type of right that, for political society to be such, must subsist regardless of the conditions of the constitutional agreement reached.

## Deliberating into the First Forum

In this section I will explore the meaning and scope of considering the electorate as the first deliberative assembly. I will explain why, from the deliberative perspective, the appropriate reaction for the right to resist must be the a call for a deliberative forum, which resolves common issues in a way which is consistent with the sense of the democratic principles defended here.

As was advanced in the last chapter, when Rawls explained who has to decide on the issues related to limits of the institutional framework, civil disobedience, or

[250] Atria, *La Forma Del Derecho* (n 154) 50–51.

resistance, he states that "*The final court of appeal is not the court, nor the executive, nor the legislature, but the electorate as a whole*"[251]. In that part I argued that Rawls' approach is correct, in the sense that actions that challenge the law in terms of a political claim can hardly be mediated by political bodies, because their legitimacy is also being questioned.

I also argued that the description as "last" and "court" is imprecise. Firstly, the electorate is not the last body in a democracy facing political issues, but the first. Secondly, the electorate does not act as a court, but properly as a forum. The reason is that they in this instance deliberate on political, not juridical, issues.

This last idea is one of the most important in the theory of deliberative democracy: restoring individuals as those who, through deliberation, give legitimacy to the decisions of political power. If this is valid for normal circumstances, that is, of low conflict, then it is more appropriate in circumstances where the disagreement affects the legitimacy of the procedures, and they are themselves under question.

Deliberative procedures offer two resources that can be decisive in these circumstances. On the one hand, they allow mediation of the conflict of disruptive political actions. On the other, by means of this mediation, they allow the development of collective solutions for the disagreements caused by conflicts. In this

[251] Rawls, *A Theory of Justice. Revised Edition* (n 15) 342.

way, they not only resolve the current situation, but make conflict less likely in the future.

This constructive nature makes it even more important that the deliberators must be considered forums. Indeed, although in a certain sense the spaces for deliberation assign rights, nevertheless they have as their decisive factor the establishment of the conditions under which those rights can be guaranteed. They do not replace the existing representative bodies in this task, rather they complement their work by involving in the resolution of those who are directly affected by the problems.

In a similar way, these deliberative devices tend to remove controversial issues from the sphere of political negotiation. That is, the conflict is less likely to be managed by the strategic actions of the representatives, who may be determined by interests which are different, from those who directly experience the deficit. On the contrary, it is possible to anticipate that those who are closer to the experience of the deficit, are more likely to deliberate on the best way to resolve it. At the same time, the reasons why it is necessary to adopt new measures to resolve the situation become more intelligible for those who are engaged in deliberation.

## Conclusions

In this chapter I argued that the right to resist, from the deliberative perspective, can be understood as an inalienable right to call deliberation to (re-)legitimize political power. To support the above, the following arguments were offered.

Firstly, from a historical perspective, it can be recognized that the right to resist emerges as a way of exercising control over political power, and then legitimizing its decisions. These characteristics differentiate it from the right to rebellion. The right to resist seeks to improve an existing political system, and not replace it.

Secondly, I explained that constitutionalism is based on the idea that individuals are rights bearers in a double dimension: the right to be protected from state power, and the right to establish what rights they have. I have shown how this idea is present in early constitutionalism, and how it underlines the importance of citizen involvement in collective affairs, which can be considered collective non-institutional political actions. And it is an inalienable right, that is, it cannot be suspended by contract.

Thirdly, I considered the conditions of its exercise. I argued that there must be persistent disagreement of a political nature. This disagreement is frequently based on an idea of how that disagreement can be resolved. It is precisely this proposed solution that must be deliberated.

Fourthly, I presented an understanding of non-institutional collective political actions, based on the contemporary ideas of social movements. In this part I showed the development of their understanding, and the complexity that they imply today. Their political relevance, and the challenge that they still imply to constitutional law, were also established. This also allows me to affirm the need for a right because, unlike disobedience, it imposes an obligation on the state.

Fifthly, I characterized the right to resist according to two criteria. The purpose of the theory of rights is to guarantee that individuals determine the power which they should obey. Regarding its modelling, it is a claim which imposes an obligation on the state to generate conditions for deliberation. In addition, the other citizens retain a privilege in two ways: to participate, or not, in the deliberation; and regarding what points they accept, reject, or correct in the deliberation itself.

Finally, I explained the idea of the electorate as the first forum. Taking individuals seriously, as those who should give legitimacy to political power, implies that they must deliberately resolve disagreements about the exercise of power. The proper space for this is the forum, the first place for legitimizing political power.

# PART II

## From resistance to Deliberation

# Chapter V

# A Theory of Deliberative Democracy

## Introduction

In the first part I have argued that the right to resist as a call to deliberation, can contribute to improving contemporary democracies. This, is mainly due to its ability to give individuals a voice again, when they are ignored by the political authorities, regarding matters that concern them and that they are dissatisfied with.

The adoption of this conception of the right to resist requires a notion of deliberative democracy that makes it possible. In this chapter I propose an approach to the concept of deliberative democracy, the characteristics that differentiate it from other conceptions of democracy and the consequences that these have in deliberative democratic practices.

In section I, I'll present a general concept of democracy and the normative approach to it. In section II, which I called 'Toward deliberative democracy', I will examine the process of gestation of the deliberative theory. Then I will describe the ideas on

democracy that activate the deliberative proposals and the diverse sources from which the deliberative theory was developed.

In section III, 'Within deliberative democracy', I will develop a concept of deliberative democracy describing its main characteristics. Regarding the concept, I will adopt Elster's methodological distinction between its democratic and deliberative dimensions. I will also explain its distinctive characteristics namely: inclusion, equality, reasonability, and impartiality.

In Section IV, 'From deliberative democracy', I will explore two consequences of deliberative assumptions. The first, will be the relationship between deliberative democracy and disagreement; the second, is the way in which deliberative democracy helps in solving common problems.

## Democracy

All political concepts are contested[252] and democracy is no exception[253]. Rather, it is probably a prominent example of a controversial one. Those political concepts are controversial means, firstly, that their content is determined by the conception given to them by the interpreter[254]. Thus, while concepts delimit a general framework of

[252] Martí (n 210) 21; Manin, Stein and Mansbridge (n 40).
[253] Regarding democracy as contested concept see Frank Cunningham, *Theories of Democracy. A Critical Introduction* (Routledge 2002) 3. About political contested concept see Atria, *La Forma Del Derecho* (n 154) 284; Atria, 'The Form of Law and the Concept of the Political' (n 43).
[254] Atria, 'The Form of Law and the Concept of the Political' (n 43); Atria, *La Forma Del Derecho* (n 154).

significance, conceptions provide the sense and scope that can be assigned to them[255]

It is due to this controversial characteristic that different, or even contradictory, practices may result from appeal to the same concept. With respect to democracy, one can observe societies, or at least governments and their adherents, which claim to be democratic, in circumstances where their practices arguably ignore or even contravene the general understanding of the principles that inspire this kind of government[256].

Given the above, the critical study of democracy requires an examination, considering at least two issues. On the one hand its conceptual framework, in which the principles that inspire it are considered. On the other, the type of democracy to which the different conceptions give rise. Both elements are relevant because they allow us juding, so much so that democracy in fact exists, and how could be improved.

A general concept of Democracy

The concept of democracy is theoretically defined by three necessary elements[257]. First is that it is a method of collective decision-making. The second is that the

[255] (Rawls, TJ, 5).
[256] Zakaria (n 3); Plattner (n 3).
[257] These ideas in Tom Christiano, 'Democracy' <<https://plato.stanford.edu/archives/fall2018/entries/democracy/>>. See also Cunningham (n 252).

participants take part in this decision-making in terms of freedom and equality. The third is that what is resolved will affect those who participate in the decision. That is, their participation in the decision process is significant with respect to a relevant collective affair.

These elements account for the fundamental principles which order modern democracies. Adopting a democratic system means accepting that individuals are holders of the right to determine their life plans and to participate in defining collective destiny. They are right bearers, not only to be protected from the influence of political power on their lives, but also to decide what are the attributes of that political power and under what conditions.

Along with what was said, majority rule is usually considered a fundamental content of the concept of democracy[258]. The reason is that it would be the best way to resolve collective disagreements between free and equal individuals, without handing over the power of individual veto implied by the unanimity claim. Nevertheless, overemphasizing the role of majority rule can be counterproductive to democracy itself.

Majority rule contributes to democracy, but the existence of a majority rule does not mean that democracy already exists. The existence of procedures which apply majority rule can be invoked as democratic certification in societies that could

[258] Norberto Bobbio, 'La Regla de Mayoría: Límites y Aporías', *Teoría General de la Política* (Trotta 2009) 462.

doubtlessly be considered such. Therefore, majority rule will be considered here as the most characteristic democratic method to resolve persistent disagreements in collective decision-making. However, although its use is in some cases necessary, it is not a sufficient condition for a society or its practices to be considered democratic[259].

Observing the three basic elements of democracy and the majority rule as its characteristic decision-making method, various conceptions of democracy have been developed. These conceptions are determined by historical and cultural factors within the states that adopt it as a government system. There is no pure democracy under ideal conditions. Quite the contrary, several circumstances such as identities and power are decisive determinants of each conception of democracy and its practices. As Medearis states, democracies bear the imprint of "untamable wars, sclerotic bureaucracies, racial caste systems, and runaway markets"[260].

Due to these historical constraints, the notions of democracy are dynamic. This means that just as democracy is carried out in different ways according to places, it is also varying according to time. Factors such as cultural change and technological advances affect the conception of democracy and how to put it into practice. Likewise, rules or practices which can be considered sufficient in one type of democracy at one moment, could be seen as deficient in another.

[259] ibid 463.
[260] John Medearis, *Why Democracy Is Oppositional* (Harvard University Press 2015) 2–3.

In any case, each conception of democracy is allowed to subsist while decisions made through it are considered legitimate[261]. Whatever the differences that democracies may have considered place or time, depends decisively on the support of their citizens if it intended to remain such. That means, initially, that the decisions of the political powers are accepted by those who should obey them, despite only partially agreeing or even disagreeing with it[262]. Therefore, the quality of democracy, its institutions, and practices, must be evaluated on its ability to achieve legitimate political agreements and resolve disagreements, within the framework that describes its concept[263].

The consideration of institutions or procedures should therefore begin by evaluating the degree of their legitimacy vis-à-vis the individuals subject to them. In turn, the degree of legitimacy is determined, or at least conditioned by, the capacity of these institutions and practices to carry out the principles which inspire them. Or, to paraphrase Gargarella's expression, check if democracy keeps its promise. In this context, the normative theory of democracy evaluates democracy at both levels: its consistency with the general principles that inspire this system of government, and the suitability of the institutions and procedures to carry them out.

[261] About the concept of legitimacy used here, See Chapter III.
[262] Waldron (n 206) 16.
[263] For Atria : " Democratic institutions must be discussed and evaluated in their aptitude to make probable the emergence of general will rather than the will of the majority" Atria, 'The Form of Law and the Concept of the Political' (n 43) 5. For reasons that are explained throughout this chapter, this proposition has a similar meaning to the one which I proposed here. Nevertheless, my difference with Atria is that his approach is from the previous strategy while mine is from the result.

The normative approach to democracy

Normative theories argue about the adequacy of human behaviours to the principles that would lead them to the best life possible[264]. In the ancient world these appealed to external principles that ordered the existence of individuals and communities, referring to nature or God[265]. Since modernity, the identification and determination of these principles have been the subject of discussion by diverse political philosophical currents. Although the central line in the western world has been marked by liberalism, from Locke to Rawls, this discussion has been enriched with other contributions, such as the Frankfurt School[266], communitarianism[267], and postmodern deconstruction[268].

Beyond the theoretical differences which each of these currents presents, they have in common the purpose of arguing about what the individual is, and how individuals ought to live in a society in the best way possible, according to their own characteristics. That is why they focus on the study of social facts and the institutions which make that life possible[269]: among them, the nature, purpose and justification of government and democracy[270].

[264] Steve Buckler, 'Normative Theory' in David Marsh and Gerry Stoker (eds), *Theory and Methods in Political Science* (3rd edn, Palgrave Macmillan 2010) 156.
[265] ibid 157.
[266] ibid 164–167.
[267] ibid 167.
[268] ibid 170.
[269] James Bohman, 'Realizing Deliberative Democracy as Mode of Inquiry: Pragmatism, Social Facts, and Normative Theory' (2004) 18 Journal of Speculative Philosphy 23.
[270] Gerry Stoker, 'Introduction: Normative Theories of Local Government and Democracy' in Desmond King and Gerry Stoker (eds), *Rethinking Local Democracy* (Macmillan 1996) 2.

Along these lines, the task of the normative theory of democracy is to evaluate the diverse conceptions of democracy, and argue which of them is morally better, or at least preferable, with respect to others[271]. Its method consists of tracing the relationship between democratic principles and the results obtained by democratic institutions intended to carry them out. From this, normative theory develops propositions about how democracy could improve its practices to better realize its principles.

Within the normative theory of democracy, there are various topics which, although closely related to each other, can be differentiated: discussion of why democracy is desirable as a model of political government; the institutional conditions which make it desirable, and practically more likely. Finally, the characteristics of the legitimate authority of political power within democracies, and the scope of such legitimacy facing citizens are considered[272].

When evaluating the merits of one or another notion of democracy, normative theories judge their foundational moral ideas of the individual, their institutional practices, and, eventually, the type of society to which they give rise[273]. For this reason, a normative analysis must take a position on principles, explaining their scope and arguing in favour of the preponderance of some over others[274].

[271] Christiano (n 256).
[272] Joshua Cohen, 'Procedure and Substance in Deliberative Democracy', *Democracy and Difference* (Princeton University Press 1996) 95.
[273] Christiano (n 256) 3.
[274] Bohman, 'Realizing Deliberative Democracy as Mode of Inquiry: Pragmatism, Social Facts, and Normative Theory' (n 268).

In the case of deliberative democracy, it adopts a conception of democracy whose organizing principles rest on the fact that citizens can (or should) solve their common affairs through the public use of reason[275]. This implies that beyond any differences the deliberativists may have, they affirm a common conceptual framework, stated as follows: "*public deliberation of free and equal citizens is the core of legitimate political decision-making and self-government*"[276].

Likewise, from the point of view of the normative theory of democracy, a deliberative proposal must argue first why the deliberation of free and equal citizens is a preferable model of the legitimacy of political decisions to others. Then, deliberative theory must argue what type of institutions make this probable, what makes their proposal desirable, and why those institutions provide legitimacy to their decisions.

## Toward Deliberative Democracy

The fact that political concepts are controversial means that every political conception, both in its origin and in its development, has a competing conception. Therefore, political concepts only become fully intelligible when the concepts to which they react are explained. It is necessary to know the opponent, to understand the meaning and the scope of each political content.

[275] ibid 23.
[276] ibid.

In this section I will present, firstly, the ideas against which deliberative proposals begin to be articulated, and secondly their development process until they become a systematized theory.

Given that there are different levels and disciplines involved in what provokes deliberative reflection, and among deliberative proposals as a reaction, I will keep following distinctions in terms that allow us to observe the differences and similarities between them. In my opinion, this allows for maintaining the dynamism of the dialogue which originated deliberative theories, favouring the development of new ideas from them, like the one I argue in my work.

## Ideas of democracy which activate deliberative proposals

Deliberative democracy begins to take form in reaction to three ideas which acquired a prominent influence throughout the 20th century: the presumption of self-interest, democratic elitism, and the neoliberal state. These three are interrelated and in a certain sense synthesized in the proposal of neoliberal democracy. However, it is appropriate to differentiate them into three different levels. Self-interest presumption is an idea about individuals and their behaviours, elitism is a result of certain political practices, while neoliberal proposals are ideas about the state.

### *Self-interest assumption*

One challenge of modern thought has been to establish normative principles by which to judge the behaviour of individuals and societies. From the end of the

nineteenth century and especially in the twentieth century, hegemonic anthropology has been that proposed by utilitarianism. At its core, this philosophical current postulate that rational individual acts are those which are in the person's self-interest[277]. This means that the individual chooses what maximizes well-being and reduces suffering. Consequently, the rational collective choice would be the one that manages to satisfy the greatest possible amount of individual good, even if that implies that a minority fails to satisfy its own.

One of the main reasons why utilitarian thinking, and related rational choice theories, achieved such a strong influence in public affairs, was their extraordinary effectiveness in describing, and eventually predicting, individuals' behaviours[278]. If it is possible to anticipate what individuals would choose, and if it is possible to measure the collective scope of that choice, it is possible to make decisions without the need for further intervention by the subjects. Additionally, from this point of view it is possible to argue in the direction of ruling out other types of decisions for being irrational[279].

[277] Julia Driver, 'The History of Utilitarianism' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2014) <<https://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>>.
[278] According to Rawls, the only alternative to which the brilliant solidity of utilitarianism gave rise was the intuitionism. That is, a theory of very specific scope. Perhaps for this reason in his Theory of Justice he tries with a rational choice model, which he then makes a self-criticism. This point is important because Manin starts his influential work on deliberative democracy from the deliberative deficit he identifies in Rawls. See Rawls, *A Theory of Justice. Revised Edition* (n 15); Manin, Stein and Mansbridge (n 40).
[279] Andrew Hindmoor, 'Rational Choice' in David Marsh and Gerry Stoker (eds), *Theory and Methods in Political Science* (Palgrave Macmillan 2010) 52.

Similarly, since rational conduct of the individuals means that their preferences will be determined by what is in their own interest[280], the only way to mediate collective affairs, given the case of disagreement, is to negotiate those interests. Given that in such negotiation it is highly unlikely that the individuals will arrive at an agreement, because everyone will be defending their own interest, the differences must be resolved by voting following the majority rule[281].

The type of democracy which arises as a consequence of the self-interest assumption is one where dialogue weakens, and the distance between the representatives and those represented increases. If individuals attend the public sphere for strategic purposes only, the discussion is sterile. If the representatives can anticipate (or even manipulate) the behaviour of the voters, it is no longer necessary "to listen" to them, but only to get information "about" them[282]. Finally, if the general good is achieved

[280] On the notion of interest in deliberative models see Martí (n 210); Elster, 'Deliberation and Constitution Making' (n 210); Jane Mansbridge and others, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' (2010) 18 The Journal of Political Philosophy 64; John Ferejohn, 'Deliberation and Citizen Interests' in Andre Bachtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press 2018).

[281] James Bohman, 'The Coming of Age of Deliberative Democracy' (1998) 6 The Journal of Political Philosophy 400.

[282] World commotion reached in case called "Facebook-Cambridge Analytica". This showed that the Cambridge Analytica, a British political consulting firm, obtained information from more than 82 million people in the United States, without their consent, through their accounts on the social network Facebook. This information was used to send personalized information in favor of a particular candidate during the US elections. Carole Cadwalladr and Emma Graham-Harrison, 'Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach' *The Guardian* (17 March 2018) <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> accessed 30 July 2020.

with the maximization of individual interests, the opinion of minorities[283] is no longer important, and the common good becomes impossible[284].

Faced with the above, deliberative democracy argue the assumption that individuals can act impartially, and therefore defend rationally what goes in everyone's favour, even if it affects self-interest. Deliberative democracy will also argue for the egalitarian incorporation of minorities in collective decision-making, especially in those that directly affect them.

*Elitist Democracy*

A second characteristic aspect of twentieth-century democracies is their elitism. This trend is explained by the Platonic objection to democracy, the sophistication of legislative activity, and electoral commodification. The Platonic objection to democracy[285] criticises majority rule, taking as a premise that not all people are suitable to elect rulers, nor prepared to be so. Since democracy does not have a substantive control criterion, and depends on decision-making by preference aggregation, there is always the risk that someone who does not have adequate personal characteristics will be appointed as ruler[286].

---

283 "When a group of equals individuals face disagreements about issues which involves the common interests there three ways: arguing, bargaining and voting […] and preferences are subject to three operations: aggregation, transformation, and misrepresentation" Elster, *Deliberative Democracy* (n 203) 5.

284 On skepticism towards the possibility of democracy see Gerry Mackie, 'All Men Are Liars: Is Democracy Meaningless?' in Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press 1998). On the common good Bohman, 'The Coming of Age of Deliberative Democracy' (n 280).

285 Christiano (n 256).

286 Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge 1994) 290.

In a similar sense, it is argued that the quality of collective decisions depends on the expertise of those who must adopt them. This required knowledge is of a double type: on the one hand, proficiency in official work, and on the other, competence in the disciplines related to the task. Consequently, societies should accept governance by an elite whose occupation is to devote itself professionally to politics[287]. A group of people who is prepared to make the best decisions for the whole, especially when citizens are often apathetic towards collective affairs.

Both ideas found a strong echo in those who propose to adopt market logic in the political sphere. The assumption is simple: if the market is the most efficient way to allocate goods, it must, by analogy, be the best way to assign political power[288]. If the electoral race is conducted according to the rules of economic competition, the result will be that the candidates' proposals will be improved and adapted to capture the greatest support. In this way, the market point of view optimizes the preference assignment, promoting that the best available is chosen, since it satisfies the greatest number of individual interests, offered by those who are best prepared to do so. [289]

Faced with the above, deliberative theory proposes that the principle of legitimacy of democracy is participation in the discussion of rules by those who must obey them. This does not mean a naive position regarding the skills required for debates and leadership. Rather, it is about affirming the principle of the moral equality of all

[287] ibid 285.
[288] Hindmoor (n 278) 45.
[289] Schumpeter (n 285) 269–273.

individuals, especially in deciding what will affect them directly. The quality of democracy must be assessed for its ability to guarantee this principle.

Regarding professional politicians and the understanding of the democratic sphere from the logic of the market, deliberative criticism identifies two problems. The first is the bureaucratization of democracy, that is, the alienation of the capacity of decision-making in favour of a group, the bureaucrats, who, eventually, could act in favour of their own group interest. The second is that democracy as economic negotiation, along with the risk of the dangerously emptying political discourse of content using slogans, turns rights into bribes[290]. Indeed, the elites in power may end up handing over rights in exchange for remaining in their privileged position.

*Neoliberal argument*

Neoliberal democracy assumes the ideas of self-interested individuals and the use of economic models to define and mediate political action[291]. It proposes, additionally, that the state has to be reduced to its minimum expression. This is both in its sphere of administrative actions and in the guarantee of social rights.

One of the most important ideas to support this vision is the notion of society as a spontaneous order[292]. Linked to the classical economic theory of markets, this doctrine postulates that individuals are self-interested agents who tend to create

[290] Dixon (43)
[291] James M Buchanan, 'Genesis' (2012) 152 Public Choice 253, 254.
[292] Fernando Atria, 'Socialismo Hayekiano' [2010] Estudios Publicos.

conditions of exchange that reach their own break-even. The task of the state, therefore, is to guarantee that this order can be operated without intervening in its balance. If the freedom of agents is protected, they will spontaneously turn into an order that will tend to the optimum efficiency in the distribution of goods and power.

The political consequence of the above is that the state must be minimal, ensuring ideal conditions of the transaction, but not intervening in the quality of life of individuals. Likewise, the state must limit itself to providing what is more efficient if it is centrally coordinated than if each agent is self-satisfied[293]; in general, coordination rules, and security for people and private property.

For the same reason, regarding people's quality of life, this doctrine asserts that the state must refrain from providing services. Or, in case doing so is a necessity, it must be at the lowest possible cost for the tax coffers. Because of this prohibition on the provision of services related to social rights, the neoliberal state is understood as the political antonym of the welfare state.

It should be noted that the practical coherence of this position is based on propositions that appear contradictory. Indeed, as Atria remarks, while on the one hand the prohibition of state intervention is based on Nozick's claim about individual rights-bearers as limitations on other's actions, on the other the prohibition on the

[293] Fernando Atria, *Veinte Años Después. Neoliberalismo Con Rostro Humano* (Catalonia 2013) 79.

state providing social rights is based in Hayek's idea that the people's rights are not the core of political theories[294].

However, it is precisely in what gives coherence to this apparent contradiction that deliberative criticism begins. The neoliberal proposal does not operate within the political category in the sense that there is something which is in the common interest. Without a possible common interest, there is also no co-responsibility on what is shared in politically relevant terms.

From this point of view, self-interested individuals tend to hang out in groups with others who share similar interests. These groups, in turn, are the organizations that represent these interests in the public sphere. If this group is left in a disadvantaged or subordinate situation, for reasons that they did not choose, it is simply part of the process of the spontaneous generation of societies. At this point, the will of individuals regarding the type of society in which they would like to live is irrelevant. The neoliberal proposal assumes that individuals have to accept the social product that individual freedom moved by self-interest establishes[295].

Against this, the deliberative theory will propose that the state has the obligation to generate the conditions for the adequate deliberation of individuals. This obligation covers both the spaces for forums, as well as other social and political conditions that

[294] ibid 77.

[295] In this regard, neoliberal considerations meet the theses proposed by social Darwinism. See Rodolfo Leyva, 'No Child Let Behind: A Neoliberal Repacking of Social Darwinism' (2009) 7 Journal for Critical Education Policy Studies 364.

allow adequate participation. Likewise, it proposes that the transformations arising from these forums will enjoy greater legitimacy, strengthening cohesion and political stability.

Origins and development of Deliberative Theory

Some authors maintain that the theory of deliberative democracy proposes the rediscovery of a decisive aspect that is part of the idea of democracy from its classic formulation[296]. Although this proposition is correct in nominal terms, the way in which it can currently be understood depends on the modern paradigm shift: that individuals are responsible for the constitution of political power that they should obey. While within the ancient world individuals (or a part of them) deliberated to find out given or natural laws, now deliberation is orientated to affirm the people's will.

Because of the above, it is possible to assert that deliberative democracy recovers the classic concept of political deliberation and then, understanding it in its modern sense, offers a conception appropriate to contemporary political reality. In other words, observing the challenges that plural societies present to democracy, and the responses offered by the current hegemonic models, it seeks to recover the meaning of one of the basic principles of modern political thought: "*outcomes are*

[296] Elster, *Deliberative Democracy* (n 203); Gutmann and Thompson (n 207); Martí (n 210).

*democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals*"[297]

However, this synthesis is not the starting point, but rather the one of arrival. The process of reflection and systematization of this theory has involved different disciplines at different times[298]. This dialogue has given shape to what is now considered one of the predominant ideas in contemporary discussion on democracy[299]. To show the richness of the various perspectives involved and their progressive engagement in a single theory, and its origins I will be present in four stages[300].

It is important to note that what is presented here consecutively is not intended to support the existence of a strictly chronological process. Rather, it seeks to establish how, from the observation of the political deficit of the three ideas described above, responses from several sources were offered at different times, which finally crystallized into a systematic theory. So, the reason for differentiating them is to be able to identify their dynamism and think about their possible development.

[297] Cohen, *Philosophy, Politics, Democracy. Selected Essays.* (n 207) 23.
[298] Florida classify those approach as philosophical, legal-constitutionalist, social theory, political theory and political science. Antonio Florida, 'The Origins of the Deliberative Turn' in André Bachtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press 2018).
[299] ibid.
[300] There are several ways to periodize the history of deliberative democracy theory. For the purposes of this work, the interesting thing, together with theoretical development, is to observe the political reality to which it responds. For other classifications see ibid 35–36; Martí (n 210) ch I.

*Four sources*

The first stage could be termed, using Marti's expression, as discontent with democracy[301]. The crucial diagnosis that determines this stage since the mid-20th century, is that democracy was becoming a routine of formal legitimizing power, without the proper concern of citizens[302]. The most significant fact observed was the loss of interest of citizens in collective affairs, not only attributable to laziness, but also to the lack of spaces to express themselves, or the sterility of the existing ones[303].

Davis was visionary about this phenomenon[304]. She, together with noting the decreasing citizen participation, claims that the accentuation of this reality can weaken the moral quality of citizens. In her opinion, the task of democracy is to resolve collective issues, and, in a certain sense, pedagogical, since it morally educates citizens. To reverse this fact, the recovery of deliberation into government began[305].

It is important to note that in this period, massive non-institutional collective political actions took place, both in the United States and in France. However, given the little progress in the study of social movements and deliberative democracy, they were

[301] Martí (n 210) ch 1.
[302] Davis (n 204).
[303] Bohman, 'The Coming of Age of Deliberative Democracy' (n 280).
[304] Davis (n 204).
[305] In terms of Joseph Bessette is to "oppose the elitist or "aristocratic" interpretation of the American Constitution", quoted in Bohman, 'The Coming of Age of Deliberative Democracy' (n 280). In a similar way Nino (n 54). Bohman extends his arguments in similar terms to those made here.

not recognized properly as legitimate means of political action. This recognition came rather late in the development of this theory.

The second stage can be characterized as one in which, criticisms of the conceptions of democracy as outlined in the previous section, especially the presumption of self-interest and democratic elitism. Additionally, the insufficiency of participatory democracy for improvement is verified.

Three related topics could be highlighted at this point: discussing the presumption of self-interest, affirming the epistemic possibility of a deliberate agreement, and arguing the greater legitimacy[306] of said agreement. With respect to the self-interest presumption[307], they began to deal with both anthropological issues, that is, justify those subject behaviours were not necessarily, neither only, self-interested[308]; and to propose how a dialogue could take place in impartial terms. On the one hand, anthropological, ideas such as reciprocity[309], the civilizing force of hypocrisy[310] and the prohibition of self-exclusion[311] begin to be elaborated. On the other, mostly practical, the idea of inclusion[312], publicity of the arguments and equal access to information became more relevant.

[306] Manin, Stein and Mansbridge (n 40).
[307] Mansbridge and others (n 279). (Mansbridge, 2006)
[308] According to Rawls, the only alternative to which the brilliant solidity of utilitarianism gave rise was the intuitionism. That is, a theory of very specific scope. Perhaps for this reason in his Theory of Justice he tries a rational choice model, which he then makes a self-criticism. This point is important because Manin starts his influential work on deliberative democracy from the deliberative deficit he identifies in Rawls. See Rawls, *A Theory of Justice. Revised Edition* (n 15); Manin, Stein and Mansbridge (n 40).
[309] Rawls, *A Theory of Justice. Revised Edition* (n 141); Manin, Stein and Mansbridge (n 247).
[310] Elster, 'Deliberation and Constitution Making' (n 210).
[311] Atria, *Veinte Años Después. Neoliberalismo Con Rostro Humano* (n 292).
[312] John Elster, 'The Market and the Forum: Three Varieties of Political Theory' in James Bohman and William Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (MIT Press 1997).

Regarding the epistemological possibility of deliberation and, consequently, the legitimacy of collective decisions obtained throughout it, Cohen's work [313] stands out[314]. He argues that a distinctive aspect of reflection on deliberation is its constant questioning about the possibility of reaching agreements in a plural society. In this sense, the argument regarding the possibility that individuals act in a non-self-interested way has to be complemented with arguments about the possibility and scope of agreements, when individuals have conflicting ideas even when arguing in favour of the common good.

Faced with the above, epistemic reflection adopts the path of legitimacy. Although in a plural society, it is unlikely to reach an agreement on substantive issues, it is possible to obtain agreement that there are good reasons to adopt a certain measure. In Nino's terms, epistemic legitimacy does not appeal to the regulated content itself, but to the assumption that there are good reasons why that regulated should be obeyed[315]. Thus, the examination of epistemic legitimacy rests on the transparency of the reasons underlying the agreement, and its persuasive force of who should follow the mandate.

[313] Marti highlights a curious anecdote about this point. While Joshua Cohen expressly acknowledges in his work that he takes Bissette's expression, he also states that he never consulted the text where he formulated it. Joshua Cohen, 'Deliberation and Democratic Legitimacy', *Philosophy, Politics, Democracy. Selected Essays* (Harvard University Press 2009). See: Martí (n 210) 14.
[314] Florida (n 297).
[315] Nino (n 54) 138.

A rule with sufficient epistemic legitimacy should, in principle, provide sufficient reason to be obeyed by those who only partially agree or even disagree with it. Thus, the deliberative process is one that gives epistemic legitimacy to decisions on collective issues in which there is disagreement. That is why I argued deliberative theory could be defined, at least in part, as the theory of political agreements and legitimacy.

The next moment could be called theoretical systematization. A characteristic of a deliberative theory is its interdisciplinarity. This implied, and implies, that it is necessary to establish a theoretical framework within which the different specialities can collaborate. It is here that deliberative ideas find their echo and inspiration in the theories of Rawls, and Habermas. Despite their differences[316], or even thanks to them, these authors become the main references for placing deliberative proposals in a broader framework.

The fruitful discussion that these authors develop around the possibilities of political dialogue and the importance that this has in giving binding force to decisions on collective affairs[317] contributes to developing the theory of deliberative legitimacy. Likewise, the limits that these theories present in the face of the plural reality of

[316] Elster states that at this point there is an agreement between Rawls and Habermas. "Yet the arguments advanced by Habermas and Rawls do seem to have a common core: political choice, to be legitimate, must be the outcome of *deliberation about ends among free, equal and rational agents."* Elster, *Deliberative Democracy* (n 203) 5. (Italic in the original). About discussion between Rawls and Habermas see: Zsuzsanna Chappell, *Deliberative Democracy. A Critical Introduction.* (Palgrave 2012); Smith (n 8); Florida (n 297).
[317] Chappell (n 315) 24–26; Smith (n 8) 15–21.

contemporary societies have been an impulse to reflect on the extension of deliberation to various forms of rationality or expression[318].

Finally, there is a stage of deliberative devices that make theory viable. Even if the postulates of deliberative democracy were theoretically defensible, it should offer an alternative to the decision-making models based exclusively on the negotiation of interests and adding of preferences[319]. The contributions of Fishkin[320] and Dryzek[321] were consolidating this field through the incorporation of empirical results. These same results were feeding the theoretical reflection and opened the discussion to new questions.

At this point, the distinction between micro and macro-scale deliberation was introduced[322]. The first, refers to deliberative processes on issues that concern small territories or specific groups, where participants can take an active part in the discussion, or the relationship between them and those who deliberate on their behalf is close. Macro deliberation, for its part, refers to a broader process, both territorially and the number of actors involved.

[318] See the collection of essays in Eisenberg and Spinner-Halev (n 76).
[319] (Elster, Deliberative Democracy, 1998, p. 5). For Cunningham "The contrasting approach [is] sometimes identified as 'liberal and sometimes as that of social choice'. See (Cunningham, 2002, p. 163)
[320] James S Fishkin, 'Making Deliberative Practical: Public Consultation and Dispute Resolution' (2011) 26 Ohio State Journal On Dispute Resolution 611.
[321] Dryzek and others (n 80).
[322] Chappell (n 315) 10.

Additionally, it was necessary to argue in favour of a type of state that guarantees deliberative conditions. These conditions are at two levels. At a general, or structural level, it must be a state that provides the material conditions for individuals to be able to deliberate, such as, for instance, adequate education to understand the issues and express their points of view[323]. At a specific level, it must provide the conditions that allow participation in the deliberation when it happens: transportation, accommodation, food, and so on[324].

Considering all the contributions indicated above, the deliberative theory has been consolidated. Thus, deliberative democracy theory has become an autonomous and complex system of thought which is still in development. Nevertheless, within the same deliberative tradition there are controversial differences and positions on what has energized it. What is relevant is that a concept has been elaborated and a set of characteristics adopted, that allow it to be differentiated from other contemporary theories.

### Within Deliberative Democracy

There are many conceptions of deliberative democracy[325]. The reasons for differences among them are mainly related to the disciplinary approach and the aspect that each one emphasizes. In this section I will present a concept of

[323] Jack Khight and James Johnson, 'What Sort of Political Equality Does Deliberative Democracy Require?' in James Bohman and William Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (MIT Press 1997) 279.
[324] ibid 302.
[325] Elster, *Deliberative Democracy* (n 203); Gutmann and Thompson (n 207); Martí (n 210); Cohen, 'Deliberation and Democratic Legitimacy' (n 312); Florida (n 297); Cunningham (n 252); Manin, Stein and Mansbridge (n 40); Bohman, 'The Coming of Age of Deliberative Democracy' (n 280).

deliberative democracy synthesizing the meeting points between them, describing a framework within which to define what is part of this tradition. Then, I will present some characteristics of the deliberative scope. I will propose that through them it is possible to judge whether a proposal belongs to this tradition.

## Concept

Definitions of deliberative democracy can be found in almost all works of the main theorists in this field. Thus, for example, Bohman and Rehg point out that deliberative democracy "refers to the idea that legitimate law-making issues (…) [which] evokes ideals of rational legislation, participatory politics, and civic self-governance"[326]. Meanwhile, Dryzek indicates that under deliberative democracy conditions "individuals should accept [collective] decision only if it could be justified to them in convincing terms"[327] .

Gutmann and Thompson define deliberative democracy "as a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future"[328].

---

[326] James Bohman and William Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (MIT Press 1997) x.

[327] John S Dryzek, *Deliberative Democracy and Beyond. Liberals, Critics, Contestations* (Oxford University Press 2000) v.

[328] Gutmann and Thompson (n 207) 7. For other definitions see Cunningham (n 252); William H Simon, 'Three LImitations on Deliberative Democracy: Identity Politics, Bad Faith, and Indeterminacy' in Stephen Macedo (ed), *Deliberative Politics. Essays on Democracy and Disagreement* (Oxford University Press 1999); Nino (n 54); Florida (n 297); Chappell (n 315); Martí (n 210).

As can be seen, each of these examples proposes an aspect as an axis for understanding deliberative democracy. Thus, while Bohman and Rehg adopt the perspective of a form of law-making which evokes certain principles, Dryzek sustains his approach according to the persuasive force of decisions, while Gutmann and Thompson endorse the definition concerned with the reasons given and openness to the provisional nature of the decisions taken.

The one who offers a definition that allows coverage in general terms of the deliberative proposal is Elster. He divides the concept into democratic and deliberative parts. The democratic part is that which considers "decision making with the participation of all who will be affected by the decisions or their representatives", while the deliberative part "implies decision making using arguments offered *by* and *to* participants who are committed to the values of rationality and impartiality"[329].

Regarding the democratic dimension, the concept proposed by Elster maintains what was described in the initial part of this chapter. Basically, democracy is participation in decisions by those who will be affected by them. However, it should be noted that the representational aspect is stressed. One of the characteristics of the deliberative conception of democracy is that, along with recognizing the importance of representation, it remains in a strong sense subordinate to its relationship with those who will be affected by decisions.

[329] Elster, *Deliberative Democracy* (n 203) 5. Italic in the original.

This analysis is due to the fact that the diagnosis from which deliberative democracy starts is the risk of elitism, where the representatives disassociate themselves from those represented. Here something similar happens with respect to majority rule. Both majority rule and representation occupy a very important place in a democracy, but neither of them guarantees democracy by itself. With respect to the deliberative dimension, Elster proposes the centrality of argumentation as an ideal means of the decision-making process and affirms the values that inspire this exchange of arguments: rationality and impartiality.

Despite the simplicity and conceptual clarity offered by Elster's definition, it leaves out three components which are part of the deliberative discussion, and which are relevant to the approximation that I propose here, namely: disagreement, equality, and legitimacy. Indeed, assuming the decisive fact of persistent disagreement, deliberative democracy is intended to give legitimacy to the decisions of political power, ensuring that it is adopted under conditions of equality.

Seen from the argument that I have developed throughout the work, it can be affirmed that institutional procedures repeatedly flout equality, they lose their own legitimacy, and activate the right to resist. In response to the above, deliberative theory allows the installation of deliberative forums, whose procedures create conditions for a recovery of legitimacy. A legitimacy which rests decisively on the degree and quality of involvement of individuals in making these decisions. ‘Degree’ indicates the power attributed to individuals to propose a topic for discussion, and to participate in its debate and its decision. ‘Quality’ refers to the access they have

to relevant information, the impartiality of the argumentation offered, and the equality of treatment during deliberation.

Characteristics

The characteristics that I have described as the degree and quality of deliberation are those that would allow the deliberative proposal to normatively evaluate its legitimacy. This both with respect to existing democracies, and what they could improve on their own terms. Synthetically these characteristics are inclusion, equality, rationality, and impartiality.

*Inclusion*

Regarding the question about who should participate in the deliberation, the most general and extended answer is *all those who will be potentially affected by the decision on what will be deliberated*[330]. As Martí well explains, given the general nature of this statement, it does not adequately resolve the problems that may arise due to over or under inclusion[331]. In fact, this rule should include those who are contingently affected, for example, the visiting tourist, and raises questions about the inclusion of those who are not directly affected, for example, people who live very far from the place where a highly polluting plant is to be installed.[332].

[330] Martí (n 210) 78. (The translation is mine).
[331] ibid 79.
[332] ibid.

In order to solve this question, and following Manin and Bohman[333], both a legal and a political territorial criterion should be considered first. The legal criterion establishes the requirement of citizenship, that is, satisfying the legal requirements which link individuals with a sovereign territory provide a political voice: age, nationality and, as the case may be, not having been sentenced to any custodial sentence or to restrictions in the right to vote.[334]

The territorial political criterion is to live in the territory where what is deliberated will be applied. This is, where appropriate, delimiting the scope to the administrative subdivisions of each sovereign territory. Following Bohman's example, deliberation on matters relating to a primary care centre in a given commune should, at least in principle, involve only those who attended it, given their place of residence[335].

Both criteria are perfectly reasonable in conditions of homogeneous societies when what is being deliberated affects everyone in a relatively similar way. Nevertheless, they are less effective in situations of more complex deliberation, when what is deliberated affects minorities or frequently excluded groups. It is worth asking to what extent it is legitimate for the majority to deliberate on the rights of minorities, especially when it has been the rules adopted by those majorities that cause exclusion[336]. Additionally, it is important to note the issue related to the "minorities within minorities", that is, those who are victims of exclusion within the excluded

[333] Manin, Stein and Mansbridge (n 40).
[334] Martí (n 210) 79.
[335] ibid.quoting Boham, footnote 4
[336] Eisenberg and Spinner-Halev (n 76).

groups. In this case, the hegemonic groups within the excluded groups could prevent the incorporation of other people into the deliberation, to preserve that hegemony[337].

Finally, the question regarding deliberation on matters that affect different jurisdictional territories or countries is also open. There are certain types of issues that go beyond political territorial boundaries, and it can be a very serious problem if decisions regarding them are fragmented. An example of this trans-territorial deliberation is the Amazon biome situation. This ecosystem, essential for the subsistence of the planet, covers at least five different jurisdictional territories, each with different public policies. Additionally, more than one hundred and fifty different ancestral communities inhabit the territory, who, beyond all other discussions, should be the first to decide. This is a matter on which deliberative theory must continue to advance.

*Equality*

The meaning and scope of the principle of equality in complex societies are widely discussed, insofar as the purpose of a more egalitarian one cannot be to have a more homogeneous one. This is because differences in society are not necessarily the result of inequalities. In a society that tends to be egalitarian, individuals tend to be "differently different"[338].

[337] See Chapter VI.
[338] Sen (n 70).

The equality that deliberative democracy is about is political. This means that initially all individuals must be under the same conditions so as to influence[339] the determination of what collective issues should be discussed, and to participate under the same conditions of their discussion[340]. In some sense the egalitarian nature of decision-making is what endows them with legitimacy[341].

I propose is that political equality involves adopting substantive equality and formal equality. Substantive equality declares that all individuals are endowed with the same moral power to identify ends, rank them, and offer reasonable arguments to defend their points of view. This aspect of equality appeals to the articulating principles of modern democracies: individuals are rights bearers, in a strong sense, because they are recognized for the power to establish what rights they are holders of and under what conditions.

Formal equality establishes the criteria by which substantive equality is carried out under deliberative conditions. Located in the field of political practice, formal equality has the purpose, on the one hand of reducing arbitrary inequalities and, on the other, extending the immaterial and material conditions of equality[342] .

[339] Khight and Johnson (n 322) 279.
[340] ibid 281.
[341] ibid 279.
[342] ibid 288.

The assumption from which formal equality starts is that there is an asymmetric distribution of power and resources[343]. The issue then is that the said distribution does not generate advantages or disadvantages that may result in privileges, with respect to one or the other position in the political discussion. Two aspects stand out regarding this. The first is to guarantee equal access to information. This includes expert advice[344] on those complex technical issues that may be outside common knowledge[345]. The second regards the possibilities of spreading one's ideas. This implies ensuring that the asymmetry in access to advertising is reduced. It is about all the arguments being debated, not just those that can resonate as a force. It also implies, decisively, the ability to propose what is to be deliberate.

Other categorization, along the same line, the reduction of the immaterial and material conditions of inequality refer mainly to three aspects: that the individuals can formulate autonomous preferences, that they can manage the cultural resources in which the debate takes place, and that they have developed cognitive capacities to present their points of view[346].

The ability to formulate autonomous preferences is identified based on the independence of individuals from external influences that can determine their choices. This refers both to material dependence (labour, economic, clientelist, etc.) and moral force that members of the forum can exert on dissident ideas. At this

[343] ibid 293.
[344] ibid.
[345] Gutmann and Thompson (n 207) 5.
[346] Khight and Johnson (n 322) 299.

point, equality is expressed through the freedom that assists everyone in expressing their points of view without retaliation. Even though there are no ideal conditions for democracy and thus for deliberation, special care must be taken to highlight those situations where they are at real risk.

Thus, an adequate understanding of the cultural resources of the deliberative context is critical. In relatively homogeneous deliberative forums, it is more likely to be reduced, because the cultural and often normative code is reduced. However, in complex societies the coexistence of different cultural references may be the very cause of what must be deliberated[347]. This is one of the challenges for deliberative democracy, in terms of proposing possibilities for deliberative dialogue even in these circumstances.

Finally, the development of cognitive capacities that make deliberation possible presents a long-term challenge for democratic societies. The current cognitive ability of individuals is the result of nutritional conditions and early cognitive stimulation[348]. This means that deficits suffered in the past are hardly corrected in the present and appear as a permanent disadvantage. In my opinion, it is because of this that deliberative democracy walks very closely with the guarantee of social rights. The

[347] Magdalena Dembinska and Françoise Montambeault, 'Deliberation for Reconciliation in Divided Societies' (2015) 11 Journal of Public Deliberation; Dryzek and others (n 80).
[348] Khight and Johnson (n 322).

more access to health, nutrition, housing, and education is guaranteed, the better quality will be the deliberation of individuals[349].

*Rationality*

For some promoters of deliberative theory, rationality is its most important characteristic[350]. According to them, the exchange of reasons in terms that are understood by the members of the deliberative forum, and their discussion and resolution in terms of impartiality, is what distinguishes this conception of democracy from others. Additionally, they maintain that this process not only produces justified, therefore better decisions, but also promotes a society of mutual respect[351].

If affirming rationality as the central character of the deliberative model implies that models other than western-European are less rational or directly irrational, this seems an exaggerated proposition[352]. If, on the contrary, it means affirming that the deliberative characterization of rationality is decisive for articulating the proposal in general, it seems perfectly defensible.

Indeed, rationality in deliberative theory is linked on the one hand with equality, and on the other with impartiality. Articulating both is then the basis for the legitimacy of

[349] Finally, it should be added that deliberative procedures have been introduced that tend to reduce material disadvantages and allow for greater conditions of autonomy. This is, for example, guaranteeing transportation, food, and accommodation during the forums.
[350] Gutmann and Thompson (n 207) 3.
[351] ibid 4.
[352] Jorge M Valdez, *Deliberative Democracy, Political Legitimacy, and Self-Determination in Multicultural Societies* (Westview Press 2001).

what is resolved. The relationship of rationality with equality has two fundamental elements. The first is that all individuals participating in deliberation are able to communicate their beliefs regarding the matter under discussion. This communication is made through the expression of reasons related to an end that, from the point of view of the individual expressing himself, is desirable. This is the aspect that promotes mutual respect[353].

In addition, rationality implies that, along with the ability to identify ends, there is the ability to rank them. The hierarchy of reasons involves weighing and communicating substantive aspects that are in view. It is, therefore, an appeal to adopt the proposal that has the best reasons and not the one with the greatest number of them[354].

Just as rationality is related to equality, it is also related to impartiality. That is, it operates as a control regarding the appeal to resources other than dialogue and, within the dialogue itself, that the arguments are, at least in principle, in favour of all. Regarding the first, the important thing about rationality is that it excludes some means of solving disagreements and at least delays others. Regarding the second, it is established in the principle of impartiality explained later.

The ways of resolving disagreement that does not appeal to the rationality of the interveners are diverse. Perhaps the most characteristic is to deliver the solution at

[353] Martí (n 210) 101.
[354] ibid 65.

random, like flipping a coin[355]. On the contrary, any form of dialogue that allows the exchange of arguments, either directly between the participants, or with the contribution of a third party that helps mediate and objectify the discussion is, in principle, acceptable by deliberative theory.

Just as there are ways to resolve disagreements that deliberative theory excludes, there are others that delay; characteristically, the appeal to majority rule. Even though the deliberative theory does not reject the application of this rule, prevents it from being applied without prior and adequate political dialogue, in deliberative terms. This, as the experience of the 20th century has shown, voting without deliberation ends up disfiguring the principles that inspire democracy.

*Impartiality*

Impartiality is linked externally with publicity, internally with reasonableness and normatively with legitimacy[356] . Publicity operates as control of impartial reasonableness which in its turn provides legitimacy to political decisions. In effect, publicity implies that the reasons offered in the deliberation are known to all those involved and stated in such terms that they can be accessible to them[357]. This further implies, regarding equality and rationality, that the participants in the deliberation

[355] This includes the case where the participants have deliberated to resolve the matter in this way. The rational appeal to irrationality is a renunciation of rationality itself. However, it remains that in certain contexts this practice is acceptable, such as the decision of which side each team will occupy on the field of play and which side will start the game.
[356] Benhabib (n 208) 69.
[357] Gutmann and Thompson (n 207) 4.

are able to understand reasons and, even if they are not experts in certain matters, to grasp the fundamental aspects involved in making a political decision[358].

The second sense in which publicity controls impartiality, is that it allows evaluation of the interests defended in the arguments that are proposed. What corresponds to the deliberative forum is to evaluate the impartiality of the motivations of the participants and, with respect to it, the weight of the arguments[359]. In this context, impartiality implies defending positions that are in everyone's favour. Or, where appropriate, showing the self-interest involved

It is disputed whether individuals agree to defend impartial ends for self-interested motivation, or because there is a possibility that they honestly promote the general interest. Although deliberative evidence teaches that individuals may seek the general interest with their decisions, the model cannot be naive regarding self-interested agents[360].

This makes publicity more important since it allows what Elster calls "the civilizing force of hypocrisy" [361]to come into play. Since selfish ends are deliberately punished, cynics tend to adopt arguments that are in everyone's favour. In this way, democracy improves. It is good, therefore, that even cynics defend impartial arguments and that if they stop doing so, they will be exposed as such.

[358] ibid 5.
[359] Martí (n 210) 98.
[360] Mansbridge and others (n 279).
[361] Elster, 'Deliberation and Constitution Making' (n 210) 111.

This control is eventually decisive for the legitimacy of political decisions. Indeed, the more information one has about the reasons invoked in the debate, and the more these reasons are exposed to public scrutiny, the greater legitimacy of the adopted decision. As Benhabib explains, the state can claim power for itself "because their decisions represent an impartial standpoint said to be equal in the interest of all"[362]

In a similar sense, what Gutman and Thomson call the principle of economy of moral disagreement is in operation[363]. These authors indicate that during a deliberative discussion, public scrutiny tends to favour the reasons that are exposed, trying to minimize the differences with opposing ideas. The reason for this is that deliberation is dynamic, a process where arguments could be relaxed in the direction of the possibilities for agreement. Since the reasons opposite to one's own are better known, common points can be found through which to advance the dialogue.

Finally, and related to impartiality, the principle of non-self-exclusion can be invoked[364]. Although it does not operate in absolute terms, since it can be argued in favour, for example, of a rule that establishes affirmative actions (or in general of positive discrimination), this principle regulates the possibility of imposing burdens on others that the proponent would not be willing to put up with. In this way, it operates as a limit by subjecting the arguments to the scrutiny of the maxim of a treat to others as you would like to be treated yourself.

[362] Benhabib (n 208) 69.
[363] Gutmann and Thompson (n 207) 7.
[364] Atria, *Veinte Años Después. Neoliberalismo Con Rostro Humano* (n 292) 80.

## From Deliberative Democracy

The theory of deliberative democracy could be understood as a theory of disagreement and legitimacy, whose purpose is to resolve collective affairs. In terms of equality, this characterization is significant for the task of this thesis because, the right to resist can be understood as one based on persistent and ignored disagreement about the legitimacy of political power. Consequently, the purpose of this right is, firstly, to activate deliberation as a way of resolving the disputed matter, rather than imposing a specific solution, although by the way it incorporates some proposal for it. Given this purpose, in this section I will argue about the relationship between deliberative democracy and disagreement, to present deliberation and common problems solving.

### Deliberative democracy and disagreements

Since a modern society of rights guarantee the fact of pluralism, it accepts along with it the fact of disagreement[365]. Given the characteristics of complex societies, the fact of the disagreement is practically irreducible, especially regarding substantive arguments for or against rules. Therefore, the political power is expected to be legitimate, more than properly fair.

In a democratic society there are two levels of disagreement. The first is related to the individuals who are part of the society, which is properly disagreement in political

[365] Waldron (n 16); Gutmann and Thompson (n 308).

ideas. The second refers to individuals (or a group of them) with respect to the state decisions, which properly a disagreement in the way in which political power is exercised. Although both levels of disagreement are communicated, for the purposes of the present argument it is necessary to distinguish them.

Both types of disagreements can be differentiated for two reasons: individual consciousness and symmetry. Regarding individual consciousness, when the disagreement is between individuals it is supposed that all of those who are involved have the moral ability to autonomously formulate arguments[366]. This means that what identifies this kind of disagreement is not, in the first place, the fact that they have different substantive arguments to defend their views, but the same power to offer such arguments.

When disagreements are between individuals and the state, by contrast, one of the parties in conflict, the state, is not endowed with autonomous reason. The state does not formulate its own arguments but adopts those that the individuals assigned to it. In this sense, it is appropriate here to clarify the statement from Gutmann and Thompson when they affirm: "[deliberative democracy] certainly does not accept as equally valid whatever reasons and principles citizens and public officials put forward in defence of their own interests"[367]. Indeed, just as deliberative democracy does not accept, beforehand and without discussion, any argument as equivalently valid, neither should deliberative democracy accept that public officials, in the exercise of their role, argue in favour of their own interest. In their actions as officers, they have

[366] Gutmann and Thompson (n 308) 16.
[367] ibid 17.

no other interest than that which is collectively expressed by the rules that regulate their mandate.

The second reason that differentiates the levels of disagreement is that disagreement between the individuals occurs, or at least is expected to occur, in symmetrical terms. It is a discussion between equals, where the weight of the arguments must prevail, without any coercion. When a disagreement occurs between individuals and state power the relationship is asymmetric. Individuals face an entity that is not only devoid of the ability to reason, but additionally has a monopoly on force to impose its own terms.

It is due to the above that the disagreement between individuals is properly a disagreement between political positions, while the disagreement of individuals with the power of the state is with respect to their legitimacy. The arguments defended by individuals can be considered correct or incorrect but, since they have no strength to prevail, there is no legitimate judgment on them. Contrarily, with respect to the mandates of political power, they can be considered correct or incorrect, but in both cases, it is still possible to judge whether they are legitimate or illegitimate. Given the case, there may be mandates that are considered correct but illegitimate or vice versa.

Distinguishing these types of disagreement is relevant in another sense. While any disagreement between citizens should be resolved in deliberative forums, this becomes a strict requirement when what exists is a disagreement regarding the

legitimacy of state power. Since the political power has not the ability to formulate reasonable arguments, but the force to impose actions, what corresponds is to call the citizens to deliberate about this power. Said in the terms argued in this work, since individuals resist claiming the illegitimacy of state power, what should result from this is a deliberation with other individuals regarding that power.

Within this deliberative context, is still necessary to make some distinctions within the reasons why individuals disagree. By identifying the kinds of disagreement that individuals may have and their causes, it is also possible to observe how deliberative democracy can help resolve them or, at least, allow coexistence to be possible when they persist.

As Gutman and Thomson propose, there are three main reasons why people disagree[368]: a scarcity of resources (or incomplete information), limited generosity (or self-interest) and deep moral disagreements. Facing scarcity of resources, deliberative forums are the propitious place to exchange the available information and understand more fully the other's point of view. This problem can likely be solved in this space, where there is adequate communication of the information and willingness of the participants to understand and be persuaded. In a similar way, deliberative forums can help to control self-interest arguments, appealing instead to impartial arguments.

[368] ibid 1.

Finally, facing deep moral disagreements, even though these are difficult, if not impossible to solve, deliberative forums create conditions for moral discernment. In this context it is possible to "clarify the nature of a moral conflict, helping to distinguish among the moral, the amoral, and the immoral, and between compatible and incompatible values"[369]. Incorporating these distinctions and nuances into the dialogue can help to define one's own positions, identify the points of disagreement and, just as important, the possibilities of agreement, even if not in its entirety. Eventually, common practical issues can be resolved, even with serious moral disagreements.

Deliberative democracy and common problems solving

The task of deliberative democracy is to give legitimacy to political decisions, regarding collective matters on which there is a disagreement among those who must obey them. In this sense, it is not a simple theoretical discussion about conceptions of concepts[370], but also, in a relevant way, it is about solving practical issues. Considering this, my purpose in this part is to establish, firstly, what is deliberated and then, if there is something that should be left out of the deliberation.

The first consideration is to insist that the matters subject to democratic deliberation are political and not adjudication of rights as a court. Thus, even when a collegiate court deliberates to decide, it does so to apply the norm, resolving a specific case in accordance with it, and not to defend the judges' political preferences. This explains

[369] ibid 43.
[370] Martí (n 210) 121.

why for controversial political issues, such as the right to resist, citizens operate as the first forum of deliberation, and not as the last adjudication court.

The second consideration is that the political issues to be deliberated are stated in terms of a political proposal. This means two things. On the one hand, is a political purpose to be pursued and, consequently, the means to be obtained. On the other is that the proposal is presented with reasonable arguments that make it desirable for the whole. Both the ends pursued and the suitable means to achieve them can be deliberated separately, but the ends have a logical priority.

The discussion of ends usually involves substantive arguments, which appeal to particular beliefs. At this point, the reasonableness of the arguments offered works as a control and facilitator of the dialogue in normative terms. Thus, what has to be discussed is not the reasonableness of the beliefs of those who intervene, but rather the reasonableness of the preferences derived from them. In this discussion, the requirement of reasonableness allows the interests involved in the preference being defended to be revealed. That is, it activates impartial control on proposals, which is not applicable, at least initially, to the beliefs which support it.

At a different, though related level, is the deliberation on the adequacy of the proposed means on agreed ends. Here reasonableness acts as a two-way control. Along with rule consistency between ends and means; that is, if those means are adequate for those agreed purposes, it supervises efficiency; that is, whether among, the adequate means available, they achieve the optimal expected.

Given what is being deliberated, the scope of the deliberation, and whether there are issues that should be excluded from the scope of democratic deliberation, needs to be resolved. Since democratic deliberation is limited to the political sphere, in principle pre-political rights and what is part of the private sphere are excluded. Aside from the difficulties that exist in drawing the limits in either case, what is relevant is that excluding the former, deliberative collective determination is protected, while in the safeguard of the latter, self-determination is guaranteed.

The political sphere in the above sense is regulated by the constitution, whose norms incorporate pre-political rights and establish the limits of the private field. It also considers the conditions under which they can be crossed even against the will of those who inhabit under their rules. The extraordinary importance of political rights and privacy issues has led some to argue that the constitution must establish matters that cannot be deliberated. Regardless of if these rules can be an adequate legislative technique, from a deliberative perspective their effect eventually is only to emphasize the value assigned to these issues at the time of the constitution's adoption. This is so because if what is expected in deliberative theory is that the constitution itself is the object of deliberation, a later deliberation on a constitution can remove what is not to be discussed. This does not prevent that when defining the rules on deliberation, aspects are established that are, in advance, not modifiable.

The foregoing is valid both for matters of a technical nature, such as, for example, handing over to specialized bodies the deliberation of matters within their competence, i.e., Central Bank, health agencies, etc., as for matters of a moral or value nature. One of the decisive characteristics of deliberative democracy is that it allows for the accompaniment of the dynamism of societies. Faced with this, there is no strong reason to maintain that the solutions reached today are the most appropriate for the future, nor that the values affirmed today in the constitutional texts are the final ones; even though many of them are part of the deposit of humanity that has allowed them to be such.

Thus, from the deliberative perspective, and beyond the political reasons for making it desirable or not to discuss certain matters, what is relevant is that individuals are rights bearers, not only to be protected by state power, but preferably to decide what rights they have, and under what conditions. With this, they constitute, ultimately, the society in which they want to live.

# Chapter VI

## Deliberative Democracy, Social Movements, and the Right to Resist

### Introduction

My objective in this chapter is to present the relationship between deliberative democracy, social movements, and the right to resist. Based on the arguments presented in the previous chapters, my general task is to offer a systematic understanding affirming the political importance of collective non-institutional political actions, of deliberative democracy in mediating them and of the right to resist strengthening this mediation.

For this, this chapter is divided into three sections. In section, I will present the relationship between social movements and deliberative democracy. I will suggest that the theory of social movements allows for a more extensive understanding of collective non-institutional political actions. This understanding opens the possibility

of considering them a relevant actor to improve democracies, particularly from a deliberative perspective.

In section II I will present two deliberative objections to activists. The first of these is related to the use of force to promote political causes. The second is to activist action relates to promoting partial interests. In section III I will describe the activist objections to a deliberative approach. The first objection is that the substantive arguments that activists would defend should not be deliberative but assumed. The second relates to acceptance of the institutional system that manages deliberation. The third is regarding the imposition of a uniform rationality to be able to deliberate.

In section III I will argue how the right to resist could facilitate the relationship between social movements and deliberative democracy. This is because both rest on the principle that the legitimacy of a political mandate depends on those who are subject to it. Secondly, both emerge in response to the failure of existing institutions and procedures that seek political legitimacy. Thirdly, both deploy pre-institutional or extra-constitutional devices to restore and conserve democratic legitimacy.

## Awakened by Discontent

The emergence of the early reflections on deliberative democracy was practically simultaneous to the formulation of modern theories on social movements. However, despite both were observing the same political reality, their diagnoses were different, even contradictory. For the former, western democracies were suffering

from citizen apathy. For the latter a new and very active collective political actor was emerging.

The distance between the two perspectives remained for a time. The main reason for that was the focus adopted to solve the situation. While deliberative theory seeks formulas to improve institutions, the theory of social movements sought to give voice to political actors outside of them. In this context, each was seen almost as a threat to the other. If deliberative progress could imply over-institutionalizing collective political action, the recognition of social movements would mean weakening institutions that give social stability.

Nevertheless, both perspectives eventually tended to meet, and, in a sense, became complimentary. I argued that the reason for that, is that both aim to mend the same fact: the loss of legitimacy of political power. Likewise, both propose that the way to rectify this problem is the active incorporation of those who must endow this power with legitimacy. Additionally, both consider that the existing institutional procedures are insufficient for this purpose, so it is necessary to look for alternative or additional ways to achieve it. Thus, while deliberative democracy provides the more ductile institutionalized form of institutional political action, social movements act as the most institutionalized form of non-institutional political action.

One of the central theses of my work, is that this complementarity becomes stronger and legally relevant with respect to a deliberative understanding of the right to resist. Indeed, it is the right to resist that enables this more institutionalized form of non-

institutional action to activate the most appropriate form of institutional procedure in the mediation of political legitimacy issues. From the point of view of the theory of law, activists involved in a social movement are holders of the right to resist; deliberation and deliberative democracy provide the forum where what activates the right to resist is discussed.

## Deliberative Democracy and Social Movement

Observed from the point of view of the philosophical theories that support deliberative democracy, collective non-institutional political actions are not completely alien to their origins. Despite the differences explained above, for Rawls and Habermas, collective non-institutional political actions were part of the context of their reflection. For the first, the civil rights movement in the United States, for the second, the student mobilizations of May '68. That is why both authors elaborate ideas related to collective non-institutional political actions based on the notion of civil disobedience[371].

Nevertheless, unlike what happens with these proposals, which see in these actions an anomalous or any case exceptional situation, theorists of social movements see in them the emergence of a new political actor. It is important to note that this does not mean that collective non-institutional pollical actions did not previously exist. In fact, movements for labour rights, women's rights or indigenous emancipation are

[371] Rawls, *A Theory of Justice. Revised Edition* (n 15); Habermas (n 8).

long before. What happened is that, with the important contributions of sociology, they began to be considered a valid political voice. The theory of social movements explains and defends that those who take to the streets were not simply a mob driven by emotions or seeking anarchy, but a relatively organized group showing their discontent and calling for substantive social change.

Closely related to the previous one, and in some sense because of that, the progressive assumption that societies are complex must be considered, not only because societies are made up of a diversity of groups, but also because individuals themself are complex. Within the society of rights each individual has different identities and affiliations which vary in intensity according to their context and may even appear outwardly contradictory. As Sen[372] and others later[373] explain, this social reality has to be observed carefully and the political means must adapt to respond to it. For instance, a single individual can be in favour of the decriminalization of abortion, against flexible immigration laws, promote a welfare state, oppose the recognition of indigenous peoples and so on. As can be seen, this type of diversity has serious difficulties to be subsumed in homogeneous representativeness. In fact, social movements partly highlight the problems of representation, and parts can contribute to correcting them.

This fact has various political consequences, of which two should be highlighted here. The first is the fact of disagreement. That is, plurality in complex societies makes the

[372] Sen (n 70).
[373] Eisenberg and Spinner-Halev (n 76); James Bohman, *Public Deliberation. Pluralism, Complexity, and Democracy* (MIT Press 1996).

reaching of agreements on different kinds of issues less likely, or that agreements reached will last. Therefore, the decisive criterion is legitimacy, rather than substantive justice. Legitimacy is in turn provided by those who, in due course, must obey the agreement. The second, and because of the previous one, is that the traditional systems of legitimation of political power have become ineffective in achieving it. Or, which for that matter is pretty much the same thing, who have lost their own legitimacy.

One way to explain this loss of legitimacy, or legitimizing capacity, is to look at the thinking that has given rise to the practices of liberal democracies. In fact, as Gargarella explain, western liberal democracies, influenced by the politics of the United States, rest on the idea that it is possible to homogenize political positions[374]. These homogenizations, mediated by representation, allowed individual preferences to be brought to the parliamentary forum and collective issues to be decided. Thus, in a markedly binary model, political parties were left or right, capitalist, or socialist, pro-worker or pro-owner, and so on.

However, as social movement theorists very well detect, this model collapses in the face of complex democracies and, here is argued, deliberative democracy suggests a way out. Indeed, since deliberative theory proposes that the legitimacy of political decisions depends on their being discussed, in inclusive terms, by those who will submit to them, it opens the possibility of overcoming this problem. Additionally,

[374] Gargarella, 'Introducción' (n 4).

involving individuals in decision-making, makes them responsible for their actions. That is, it is not just about demanding certain measures from the political power, but also being responsible for the quality of the measures that are taken[375].

In this manner, the engagement between deliberative democracy and social movements begins to be collaborative. While the first allows the creation of deliberative forums sufficiently flexible to incorporate the diversity which characterizes complex societies, the second offers sufficient institutionalization for non (necessarily) organized and excluded groups to be part of political decision-making. Thus, as Della Porta and Doerr[376] states, nowadays "social movements are important for deliberative democracy and vice versa"[377]

Deliberative democracy, social movements and political legitimacy

The most outstanding aspect of this reciprocity is the increasing inclusion as a common end. It is through this characteristic aspect that both are linked to the formal conditions of legitimacy for collective decisions described in the previous chapter: namely, equality, rationality, and impartiality, along with inclusion.

[375] As will be seen in Chapter VIII, one of the effects of political exclusion is that individuals and movements demand political measures as if they were requesting the provisions of a benevolent king, and not as if they were the ones who had the power to decide their rights.
[376] Donatella Della Porta and Nicole Doerr, 'Deliberation in Protests and Social Movements' in André Bachtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press 2018).
[377] ibid 392.

Deliberative democracy rests on the idea that the legitimacy of political decisions depends on their being taken by those who should obey them. Even though it doesn't seek unanimity, it looks to be as inclusive as possible. Social movements, meanwhile, arise as a claim for the lack of legitimacy of a decision by political power, at the same time as a call for improvement by taking activists' voices into account[378]. In this manner, deliberative democracy is presented as the best way, at least for now, to mediate the claims of social movements.

Deliberative inclusion operates in three effects, mostly complementary, which are decisive in order to achieve political legitimacy. The first one is related to the impulse for discussion[379]. What social movements frequently indicate, along with dissatisfaction with a given public policy or law, is the immobility of the bodies in charge of discussing issues that involve activists. In this sense, inclusion operates as a guarantee of equality.

The second effect, which is effective participation in that dialogue, operates similarly[380]. This does not necessarily imply that all the people who are part of the movement are directly involved in the discussion, but rather that the arguments are taken into account. Social movements contribute to the improvement of deliberation

[378] Jane Mansbridge, 'Using Power/Fighting Power: The Polity' in Seyla Benhabib (ed), *Democracy and Difference* (Princeton University Press 1996).
[379] Ricardo Fabrino Mendoça and Selen A. Ercan, 'Deliberation and Protest: Strange Bedfellows? Revealing the Deliberative Potential of 2013 Protests in Turkey and Brazil' (2015) 36 Policy Studies 267.
[380] As Della Porta and Doerr shows, the literature on the relationship between social movements and deliberative democracy only begins in the 1990s. See (Porta & Doerr, 2018). See also (Smith, 2013).

incorporating more voices into public debate and clarifying preferences[381], which makes for rationality and impartiality.

Finally, as a third effect, social movements open public discussion to some rationalities that are not necessarily hegemonic[382], expanding the reach of modern democracies[383]. This effect is crucial for complex democracies as described above. In a sense, deliberative democracy, in dialogue with social movements, can give rise to new forms of democracy, or at least, democratic coexistence. Since deliberative democracy allows differentiation of levels of dialogues, scope, and models of adoption of legitimacy, it opens the possibility of having democratic systems that account for the complexity of contemporary societies and their conflicts[384].

As can be seen, the dialogue between deliberative democracy and social movements can be fruitful for the renewal of contemporary democracies. Nevertheless, from both points of view there are differences and precautions. In these aspects, the limits of theories faced with the difficult task- of mediating non-institutional political action through institutions that know how to account for what is demanded- appear. This will be the task of the next two sections.

[381] Della Porta and Doerr (n 375) 392.
[382] Iris Marion Young, *Inclusion and Democracy* (Oxford University Press 2000); Iris Marion Young, 'Communication and the Other: Beyond Deliberative Democracy', *Democracy and Difference* (Princeton University Press 1996).
[383] Medearis (n 259) 21.
[384] Benhabib (n 208).

## Deliberative objections to activists

Deliberative democracy has as its purpose a dialogue among equals, who offer impartial and rational arguments. Affirming this means excluding all forms of coercion from the debate, since this threatens, if not nullifies, the possibility of an egalitarian discussion. At the same time, this supposes that the people in the deliberative forum give fair-minded arguments, promoting what goes in favour of all. In this section I will show that there are deliberative arguments which suggest that both impartiality and the absence of coercion are difficult to achieve with respect to social movements.

### Subjecting democracy to force

The first reason offered for looking more critically at the relationship between deliberative democracy and social movements is that the latter appeal to coercion to impose their political terms. Accepting that social movements take the floor in this way would mean to "*supplant the democratic process as means of making and implementing authoritative decisions*"[385].

From this point of view, activists are seen as unreasonable people, even extremists.[386] What they really seek is to exercise power[387], and power in a

[385] Smith (n 8) 102.
[386] Iris Marion Young, 'Activist Challenges to Deliberative Democracy' (2001) 29 Political Theory 670, 675.
[387] Peter Levine and Rose Marie Nierras, 'Activists' Views of Deliberation' (2007) 3 Journal of Public Deliberation 1 <https://www.publicdeliberation.net/jpd/vol3/iss1/art4?utm_source=www.publicdeliberation.net/jpd/vol3/iss1/art4>.

democracy is exercised through the institutions provided for it. To accept their actions would be to accept falling into a democracy without mediation and being controlled by force.

Once coercion is accepted in democratic dialogue, it even permeates the deliberative process to which it could give rise, neutralizing what characterizes deliberation. Even though it is not clear when a collective public demonstration begins to be coercive on individuals who do not participate in it[388]. For this reason, what would correspond is to unlink any possibility of deliberation that is a response to coercive actions.

Although there is total agreement among the deliberativists that violence is unacceptable in a deliberative process, there are differences regarding the scope of this objection. Indeed, deliberation processes cannot be intramural[389] but must be part of the really existing democratic discussion. Expecting it to be totally alien to collective non-institutional demonstrations, accepting only ideal relationships between citizens, is a reductionism[390] . Additionally, it is possible to argue that not all coercion is violent, and a degree of it is the impulse of all political activity[391].

In effect, the impulse of political activity is precisely the friction of coexistence. From it, the issues that need to be discussed are identified. This is also the way for the excluded to stress the system to be inclusive. In a sense, any political change depends

[388] Mansbridge (n 377).
[389] Medearis (n 259) 22.
[390] ibid 24.
[391] Mansbridge (n 377) 46; John Medearis, 'Social Movements and Deliberative Democratic Theory' (2005) 35 British Journal of Political Science 53, 56.

on a certain coercive capacity. It is because of the above that the scope of coercion must be examined in each case, considering, first, the content of what is demanded, before how it is made known.

Promoting partial interest

A second aspect that requires careful observation of activists' participation in deliberative forums is the assumption that they would not be willing to participate impartially. The reason for this is that their actions would not be aimed at achieving achievements relative to the common interest[392], but towards their own group claims.

This can be especially recognized in the nature, often substantive, that supports social movements' proposition. This feature would make the expected results in a sense non-debatable [393]. Given this characteristic, it happens that even within deliberative contexts they can operate as polarization groups[394], influencing or determining deliberation in strategic terms that favour their own interest. They can even intimidate the forum members, whether they were supporters or opponents, inhibiting the possibility of changing their own positions within the dialogue[395].

[392] Young, 'Activist Challenges to Deliberative Democracy' (n 385) 674.
[393] Levine and Nierras (n 386) 1.
[394] Cass R Sunstein, 'The Law of Group Polarization' in James S Fishkin and Peter Laslett (eds), *Debating Deliberative Democracy* (Blackwell Publishing 2003) ch 4.
[395] Robert B Talisse, 'Deliberativist Responses to Activist Challenges. A Continuantion of Young's Dialectic' (2005) 31 Philosophy and Criticism 423, 430.

This precaution is relevant, since the quality of normative justice resulting from the substantive ideas that inspire them cannot be assumed in advance. Beyond the general belief that social movements can have an emancipatory drive, as many cases show, it is also possible that there are movements which drive racist, xenophobic, or other types of discrimination[396].

Thus, general exclusion, or at least strict caution in dealing with the relationship of social movements to deliberative democracy, operates as a protection of the system as a whole. It is a way of guaranteeing autonomy that allows adaptation and accommodation of preferences[397] during deliberation: promoting, on the one hand, the capacity (and willingness) to form a free opinion, and on the other the conditions for it to be expressed in a common agreement.

This objection is probably one of the strongest and most difficult to overcome in the engagement of activists in deliberative processes. Suspicion about the transparency of their intentions and the intransigence of their positions can make deliberation collapse into one of its decisive aspects. However, there are several arguments to address this objection.

Neither activists nor those who organize and promote deliberation are neutral. Although from somewhat equidistant points, each promotes a political agenda that

[396] ibid 347.

[397] (Cohen, Philosophy, Politics, Democracy. Selected Essays, 2009, pp. 27-28) The idea of "adaptative preferences" in Jon Elster, Sour Grapes. Studies in the Subversion of Rationality. Cambridge University Press, 1983, p.110.

awaits certain results[398]. In the same way that the activist would seek a closed end, which would be the adoption of the policy that they defend, the deliberativist would seek an open end, which would be a decision adopted by the deliberative forum. In view of this, there is no substantive reason to suppose a priori that the position of one or the other takes precedence.

An alternative solution is to focus on a dialogical conception of reasonableness[399]. This means that the reasonableness of the arguments offered by each other within a deliberative process is determined by the concrete reality of the interlocutors, and not in general or abstract terms. In other words, the reasonableness of each deliberative process is strongly determined by the type of relationship that involves the actors included. In this way, the conditions of deliberation must be determined by those who will participate in them.

Along with helping to overcome the problem of partial participation, this model allows the possibilities of deliberation to be broadened, assuming the complexity of contemporary societies and including generally excluded groups, since they cannot or would not be required to express their positions through the already existing hegemonic rationality. At the same time, it can help to protect minorities within the minorities[400].

[398] Levine and Nierras (n 386) 1.
[399] Talisse (n 394) 429.
[400] Eisenberg and Spinner-Halev (n 76).

## Activists' objections to Deliberative democracy

Just as within deliberative theory there are concerns regarding the incorporation of activists into deliberative forums, among activists there may be a reluctance to participate. Perhaps the main reason, which in a certain sense determines the following, is that activists would be inspired by untranslatable principles, whose application in the terms claimed by them is not subject to debate. Additionally, activists would be unwilling to submit to the deliberative institutional procedures created by those who are responsible for their oppressive condition and to accept the terms of their rationality or oppressive language. The latter is expressed as an exclusive inclusion. I will review each of these objections.

### Fairness is not deliberate, it is assumed

The first reason, which refers to the invocation of principles, argues that there are certain causes that should not be subject to deliberation, but simply accepted as substantive. From this, any behaviour that involves a weakening or questioning of what is being defended implies an unacceptable transaction. In this sense, it is an all-or-nothing position, which is incompatible with a deliberative process. In the most extreme cases this objection is presented as an almost insurmountable difficulty, to which the deliberative processes have no answer[401], not, at least, until there is a willingness to deliberate.

[401] Talisse (n 394) 437.

However, it is also possible to verify that in a context of high conflict and even intransigence, deliberations have taken place to resolve disagreements[402]. The reason for this deliberation takes place not on the principles that inspire a certain cause, but on the possibilities of solving practical situations which activate it, in a way that is recognized as legitimate by those involved. In other words, the principles that inspire the actions are not deliberated, but the respective solutions to the problems that are claimed.

Additionally, it is necessary to consider that deliberation is given a certain framework, which is a constitutional democracy. Its purpose is to improve it, and that process of improvement is progressive within its own possibilities. This does not imply, by the way, that the urgency of situations where people require prompt and effective responses should be ignored. It means that the effectiveness and timeliness of these responses may be more likely, the more they are discussed. For this, the participation of those who suffer is essential in order to persuade on the situation denounced.

An oppressive system, flawed deliberation

Related to the above, although slightly different, is the objection regarding the forum for deliberation. For the activist, there is no possibility of engaging with the structure which creates or promotes what they believe injustice[403]. Additionally, they would not be willing to deliberate with those who are responsible for their unfair situation.[404]

[402] Dryzek and others (n 80); Dembinska and Montambeault (n 346).
[403] Young, 'Activist Challenges to Deliberative Democracy' (n 385) 671.
[404] ibid 673.

Since the deliberation conditions are proposed and guaranteed by those who are part of the establishment, everything resolved could involve consolidating their position of power. This is so, because those who administer the unjust structure caused by their situation will not be willing to lose the privileged position that their power gives them. [405]

Indeed, the reason why activists resort to non-institutional political actions is precise because they are unaware of existing procedures. These procedures are, from their point of view, also responsible for the situation for which they are claiming. [406] In this way, they argue, it is not possible to participate in the deliberation without ending up compromising with the system that excludes them.

Like the previous objections, this one is difficult to overcome in abstract terms, since it depends decisively on the deliberative conditions adopted in each case. What deliberative theory can advance, is the affirmation of the principles of formal legitimacy and, each deliberative forum fixes the way in which these criteria are respected in the adopted procedures. Indeed, if activists participate in determining the issue to be discussed and designing the procedures for its development and adoption, it becomes more likely that it will achieve its objectives, endowing decisions with legitimacy.

[405] Talisse (n 394) 431; Young, 'Activist Challenges to Deliberative Democracy' (n 385) 102.
[406] Talisse (n 394) 432.

Impose rationality

The third objection is not related to the deliberative forum, but to the cultural terms in which this deliberation takes place: that is, the hegemonic rationality, or discourses[407], which are predominant for the purpose of carrying out the deliberation. Since adopting deliberative norms supposes privileging a type of discourse[408], it is arguable that this could decisively determine the contents and scope of what is deliberate, and the decision taken.

This is so, because these discursive forms and their rationality imply preserving, when not imposing, exclusion or inclusive exclusion[409]. The exclusion is because those who do not share it are taken away or remain outside the deliberative sphere. They are not considered. Inclusive exclusion, because it forces the renunciation of one's own rationality or discursiveness to be part of the deliberation. To be taken into account means, at least in part, giving up one's identity.

In this same sense, there is no important reason to suppose that under deliberative conditions the reasons that cause social mobilization will be altered. On the contrary, it is most likely that the forum will reproduce the characteristics of the society of which it is a part [410]. Beyond the intentions of those who promote deliberation, the capacity to correct aspects that operate at the fundamental ideological levels of societies is lacking[411].

[407] Young, 'Activist Challenges to Deliberative Democracy' (n 385) 685.
[408] Young, 'Communication and the Other: Beyond Deliberative Democracy' (n 381) 124.
[409] Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life* (Stanford University Press 1998) 21.
[410] Talisse (n 394) 432–433.
[411] ibid 432.

This can be clearly seen in the situation faced by the indigenous communities whose ancestral territories are ruled by republics[412] and in the feminist movement[413]. The former claim that accepting deliberative conditions means these communities giving up their own ways of making legitimate collective decisions, their own language and even their understanding of reality and the community in it. The latter plead that it means submitting to a model that has been designed by and for patriarchy, to remain a hegemonic voice.

Again, faced with these important questions, the theory of deliberative democracy can only appeal to the principles that inspire it and offer alternatives to be verified in deliberative practice. At this point, what Medearis states can clarify the main point in the discussion:

> "For what is at stake is the structure of major institutions and social relations (*not just deliberative forums*), their distribution of power (*not just deliberative chances and capacities*), and broad inclusion on equal terms in political contention (*not just in deliberation*)"[414].

Indeed, the deliberative theory proposal, in this sense, could be considered as a set of practices that could give rise, in the medium or long term, to a substantively new

[412] Cillian McBride, 'Deliberative Democracy and the Politics of Recognition' (2005) 53 Political Studies 497.
[413] Benhabib (n 208) 81.
[414] Medearis (n 390) 69.Italics in the original.

democracy. The principles that inspire it and the practices that make its development probable can be affirmed. From these principles and practices, it can also be argued that these democracies would be different and closer to the ideas that found them.

## Improving democracy

Modern constitutions and, consequently, contemporary democratic systems, were designed with relatively homogeneous societies in mind; or, at least, societies where individual positions could be politically homogenized[415]. Societies are divided between left and right projects, owners, and employees' interests, and so on. However, the democratic practice of rights came to question, if not to contradict, that assumption. Individuals endowed with the right to be themselves (and not be discriminated against because of it), began to demand political recognition to live according to their own originality[416].

Eventually, demands arose in terms that the homogenizing institutional model does not manage efficiently. The emergence of social movements made it possible to diagnose the failure of political procedures to update the political system in accordance with social changes. However, the possibility that the renewal of democracy comes from non-institutional political actions continues to be contested. The most frequent recrimination is that it risks unleashing Ulysses.

[415] Gargarella, 'Introducción' (n 4) 14.
[416] On originality and recognition see Taylor, Kimlika.

On the contrary, I argued here that these kinds of non-institutional political actions are not only not a threat to democracy, but they occupy an important place regarding its improvement. This does not mean, by the way, that democracy depends on non-institutional political actions, but rather that democracy must accept that these forms of action are part of it, and that its potential for expansion greatly depends on its capacity to listen to and include them.

To explain this, I want to return to the reflection proposed by Medearis highlighted above.

> "For what is at stake is the structure of major institutions and social relations (*not just deliberative forums*), their distribution of power (*not just deliberative chances and capacities*), and broad inclusion on equal terms in political contention (*not just in deliberation*)"[417].

This reflection sums up clearly what it means to adopt deliberative forms within a democracy and how the recognition of the right to resist can correct the distribution of power in institutions and social relations, therefore promoting inclusion in equal terms within political contention. However, I suggest that the order of the factors can be argued in reverse. It is inclusion in egalitarian terms, which help corrects the distribution of power and, consequently, rethink institutions and social relations.

[417] Medearis (n 390) 69.Italics in the original.

From the point of view of deliberative democracy, an acceptance that individuals are endowed with the right to challenge political power when they disagree with its results implies first a claim for inclusion when institutions fail to provide it. In fact, what activates rethinking current democracy, is not, or not firstly, a simple curiosity about the working of institutions. On the contrary, it is the voice of those who experience its deficit effects. Likewise, the possibility that the right to resist opens for democracy is to give a voice to those who have been deprived of it. In this sense, as Medearis points out, the issue is not only deliberation, but those who are part of it being heard and, above all, defining what should be deliberated.

It is for this same reason that the starting point is the collective demands of individuals, and not the institutional perspective. Institutions frequently fail to see their own deficits, and social relations tend to remain covered by them. Only when activated by collective non-institutional means can democracy effectively correct itself, especially when its institutions are in part the cause for and reason for the preservation of the deficit situation. Thus, the right to resist allows individuals to regain lost political control, and to do so by invoking inclusive, egalitarian, rational and impartial deliberation.

Understood in the above terms, it is more likely that the deliberative forum can effectively fulfil the function of redistributing power. Indeed, as Medearis very well warns, this is a substantive aspect of deliberation. But what he does not take sufficient account of, is that deliberation is about legitimate as well as political power.

In this sense, deliberative chances and capacities are the means to create conditions for legitimation, and not only for deliberation.

If the above is correct, the possibility of legitimately redistributing political power can be strengthened by the greater intensity of the protection of the claim when this power is considered illegitimate. Thus, by means of the right to resist, the chances and capabilities are not only extended with respect to participation in deliberation but, more importantly, with respect to expressing disagreement with the legitimacy of power distribution.

It is along the same lines that one can understand, therefore and not as a starting point, the change in institutions and social relations. Indeed, what strictly changes institutions and social relationships is the way in which power is exercised, and not vice versa; or not in a sense that is relevant to those generally excluded from the exercise of power. Therefore, deliberative forums are not the end, but the possibility for this power to be effectively redistributed, and relationships and institutions improved or corrected.

In this regard, the right to resist operates as a guarantee. Institutions and social relations are not only normative abstractions, but existing systems of operations. Consequently, the correction does not depend exclusively on the rules issued, but on the practices adopted by the people who are affected by or participate in them. If these people concur in establishing what the legitimate content of these institutions and relationships will be, and they are co-responsible for their proper operation, it is

more likely that they are not only legitimate, but effective in their purpose. As Cohen notes, legitimacy in social terms is the result of practice and the habit of doing things together[418].

In this manner, paraphrasing Medearis, the argument could be presented as follows. What is at stake in the contribution of the right to resist in the improvement of democracy, is an expansion of the opportunities and capabilities of inclusion, on equal terms, in political contention regarding legitimacy; guaranteeing, as a result, a legitimate redistribution of power, so that the questioned institutions and social relations are renewed.

## Conclusions

Although social movements and deliberative democracy may mutually favour each other, they also face important challenges. The task of this chapter was to argue from a theoretical point of view, how the right to resist deliberatively understood can contribute to facilitating this relationship and contribute to improving democracy.

The argument developed is that deliberative democracy and the right to resist share at least three important common points. First, both rest on the principle that the legitimacy of a political mandate depends on those who are subject to it. Secondly, both emerge in response to the failure of existing institutions and procedures that

[418] Deirdre Curtin, 'Framing Public Deliberation and Democratic Legitimacy in the European Union' in Samantha Besson and José Luis Martí (eds), *Deliberative Democracy and its Discontents* (Ashgate 2006) 136.

seek political legitimacy. Thirdly, both deploy pre-institutional or extra-constitutional devices to restore and conserve this legitimacy.

Here I argued that the right to resist can play a communicative function between non-institutional collective political actions and deliberative institutional forums. This is so since the right to resist has two complementary faces. Its non-institutional face allows it to represent collective non-institutional actions facing institutions, while its institutionalizing face allows it to activate deliberative spaces.

In this communicative function, the right to resist operates as a guarantee for activists and the state. Regarding activists, it is a guarantee that they will be heard in terms of individuals who have the power to decide what rights they have, and that what is resolved will be binding. Concerning the state and the rest of the political community, it operates as a guarantee delimiting the scope of the conflict and making activists co-responsible for the solution. As a result, democracy is renewed and strengthened. Renewed, because deliberative devices allow democratic procedures to be adapted to truly existing societies. Strengthened, because the decisions taken in these forums are endowed with greater legitimacy.

# Chapter VII

## From Resistance to Deliberation

### Introduction

I argued so far that to resist and to deliberate are complementary actions. Since resistance can, and in a sense must, activate deliberation, it can be argued that there is a cause-and-effect relationship between them. However, for the relationship to operate in these terms, there must be a transition from non-institutional collective actions to an institutional collective decision, which in turn should allow the transition from social demand to political deliberation.

This chapter aims to advance how this relationship between resistance and deliberation could operate when the procedures to endow legitimacy on political power fail. I will also argue that, although the situations in which this occurs are usually seen as isolated events, viewed they show more than flaws, but a problem

faced by constitutional democracy. Given this, an approach from deliberative theory to the right to resist may be a way to improve these defects of contemporary democracy.

The development of the arguments described above rests on three premises which run through the entire chapter. The first is that political processes are dynamic, and the institutions of constitutional law have to be created and recreated in the face of the tension between the constitution and democracy. Here is where my argument is situated. The second premise is that those who appeal to the right to resist in defiance of the law through non-institutional collective political actions, are seeking to improve democracy, and that they have the right to do so. Seen in this way, their actions are not a threat, but an opportunity to re-design institutions that fail; or, where appropriate, to create new ones. The third is the gradual nature of the process of loss and recovery of political legitimacy. Just as institutions do not suddenly become illegitimate, nor do social movements organize instantly, neither does the deliberative process happen speedily.

Considering the above premises, I will develop the central argument of this chapter in three sections, which could also be considered in three stages. Section I describe the non-institutional moment. Here I will describe the transition from social to political argument and how the right to resist can operate as an inclusive force in contemporary democracies. In section II I will describe the pre-institutional moment, which in turn has two aspects in consideration here: the agreement on the disagreement and the co-responsibility that emanates from those who participate in

this agreement. In section III, I will describe the institutional form of deliberation. Here I will explain citizen assemblies and referendums.

### Non-institutional moment: unheard social claim

What distinguishes non-institutional collective political actions protected by the right to resist, is that the demands which drive them are likely to be deliberate, not their disruptive nature, even if they were. What makes this right effective is that it compels the political power to convene a deliberative forum to discuss and resolve what is claimed. In turn, what is claimed for deliberation is related to the way in which laws or public policies resolve social issues. Eventually, what characterizes deliberation is that those who will be affected by the resolution are included in it, and that they do so in terms of equality, rationality, and impartiality.

Since the right to resist is individual in the title but collective in its exercise, the most probable form of exercise is through social movements in the broad sense[419]. The main reason is that the gestation of these movements is related, and in a certain sense is also caused, by the failure of laws and policies, and decision-making to improve them. Along with this, the development of social movements is characterized by the formulation of their claim on the political deficit and the provision of solutions for it. In this manner, they propose what issue has to be discussed, why, and how it could be solved.

[419] In general sense here is understood any collective non-institutional political action that has a reasonable demand to be deliberated in a political forum. See Salazar (n 230).

Considering the above I argue that the right to resist is properly the power of non-institutional collective political actors, mainly social movements, to call to public deliberation on their claim, when the procedures for the legitimate resolution of social issues break down. This failure consists in not adopting the appropriate conditions to listen and mediate the disagreement of those who should submit to them. In turn, deliberation allows for creating, improving, or abolishing a public policy or a law when it is deficient. As a result, what is adopted in deliberative conditions is provided with greater legitimacy, and democracy is strengthened.

From social to political.

Everything political is social, but not everything social is political. Nevertheless, all that is social can become political. Several aspects distinguish the social sphere from the political. The first is that within the political sphere claims are general in terms of how they deal with the state's exercise of power. In a broad sense, the political is the sphere where the power of the state acts on collective issues, either by legally regulating them, or by promoting public policies[420].

The social, for its part, also responds to collective issues, but in a more restrictive sense. It appeals to the reality of communities that share interests and needs that are not necessarily universalizable. In this same sense, the social refers to practices

[420] The ideas exposed here can be complemented, but not replaced by what Tilly has called Contentious Politics. The main reason for this is that Tilly's proposal tends to observe a sum of events, rather than a continuity of processes. See Sidney Tarrow, 'Contentious Politics' in Donatella Della Porta and Mario Dani (eds), *The Oxford Handbook of Social Movements* (Oxford University Press 2017).

that are not of their nature regulated by the legislator and which are economically autonomous from the state. Thus, the appeal to the social implies the appeal to sectoral interests, whose unity depends on a common identification or affiliation. Consequently, social demands differ from political ones in the scope of their results. While the social request demands something in favour of the group of belonging, the political demand, at least in principle, appeals to what is in favour of all.

The transition from the social to the political assumes that demand from a particular group appeals to the exercise of state power in its favour, and that this exercise is, at the same time, in favour of the whole collective project. In turn, for the demand to be intelligible to other individuals, it must be stated in terms accessible to all. In this sense, the deliberative theory provides an adequate structure by proposing that matters be stated in reasonable and impartial terms. This also allows for a focus on political conceptions, offering reasons to adopt some of them and defining what are the actions that derive from them.

There is an additional argument which is especially relevant to the one developed here. Within a democracy any expression of political power, law, or policy, can be resisted, but not every expression of discontent with political power implies the exercise of the right to resist. This distinction is important. If activists are only protesting, what they are doing is asking for solutions to their situation. If the activists claim their right to resist, they are asking for a forum where they can discuss how to solve what they are demanding. In the first case, they are subjects who expose a need that must be met. In the second, they are sovereigns who call for discussion about

what type of society they want to inhabit. In this sense the right to resist converts a social demand, something claimed, into a political matter, something to be democratically deliberated.

In this way, the right to resist can contribute to solving social issues in inclusive political terms. It is relevant that this is a right, because imposes on the ruler the obligation to call to deliberate on what is claimed, promoting a timelier solution. Therefore, the refusal by the political power to open these forums of deliberation creates conditions of unrest, that are finally expressed through outbursts. Understood as a call for deliberation, the right to resist promotes social peace and prevents claims from being overshadowed by the actions that make them known, which makes it very difficult to identify the social issue involved and, consequently, to provide an adequate political solution.

The inclusive force of resistance

In modern democracies, people are more willing to endure unfair situations for a long time, before rising up against them. If this is valid for individuals in general, it is even more so with respect to those who have been historically silenced or excluded. It may be the case, that the political system itself rests on hegemonic ideas imposed by dominant groups, rather than supported by the individuals who live under them.

In this context, the exercise of the right to resist can reinforce the inclusive force of deliberative democracy, which is already present in the claim of social movements. This characteristic allows for an emphasis on deliberation on equal terms. This means

not only the power to be considered within the deliberative forum but also, decisively, the ability to establish what should be discussed. From a deliberative perspective, individuals are equal, not only because they are all subject to common rules, but because of the power of equal participation to dictate them.

Along with this, since activists are incorporated in the deliberation of collective solutions for the issues that involve them, they are strongly linked to what has been resolved. In this way, inclusion in a double dimension operates. On the one hand, they propose and discuss collective affairs. On the other, they must assume responsibility concerning the resolution. This corrects the widespread practice of seeing government as an alien authority before which claims are brought and activates a real involvement of individuals regarding what they have the responsibility to decide.

Finally, even though this does not guarantee complete impartiality- a concern for the deliberative approach with respect to activists- it certainly makes it more likely to be achieved. Since the arguments within the deliberative forum are exposed to public scrutiny, formal controls of legitimacy operate. Thus, beyond the concrete result obtained in the deliberative process, it is possible to anticipate that democracy improves, if those who have been excluded participate in the decision about what concerns them.

### Pre-institutional moment: agreement on disagreement (and how to solve it)

Once the institutional devices in charge of endowing political power with legitimacy lose their own legitimacy, the relationship between the state, as power, and civil society, as those who must obey it, loses its normal communication through institutional procedures. In this context, political power argues that outside the institutional causes there is anomie[421] and tries to impose its rules by force to regain social peace. In these circumstances, social groups may legitimately challenge this imposition, claiming that the peace to be imposed means for them to continue to be subjected to a deficit situation, when not under violence[422]. The purpose of this section is to show how the right to resist can help this interval of counter-institutional crisis, redirecting it to a deliberative institutional space.

Agreement on disagreement and how to solve it

The passage from the pre-institutional to the institutional moment is characteristically mediated by the agreement on the disagreement and the way to resolve it. This is the formalization of a tacit and pre-existing agreement: both those who resist and those who mediate the exercise of political power are committed to democratic principles. So, the disagreement is not about democracy, but about the rules that allow it to develop, a matter that must be deliberated. It is a pre-institutional agreement, because it must be ratified by the state bodies which must guarantee its implementation. In this sense, it is a political agreement which acquires legal force once it is ratified by the corresponding state bodies.

[421] Carlos Peña, *Pensar El Malestar* (ebook, Random House Mondadori 2020); *Chile En Crisis: Entrevista al Analísta Político Carlos Peña* (Directed by T13) <https://www.youtube.com/watch?v=rrtBEuUaDxM>.

[422] Carlos Pérez Soto, 'Violencia Del Derecho y Derecho a La Violencia' (2012) 20 Derecho y Humanidades 73.

Since it is a political agreement, it must be signed by the disagreeing parties. On the one hand, those who are spokespersons for social mobilizations and, on the other, political actors who can guarantee that the agreement will be ratified by the body with powers to do so. Here the mediating role corresponds to the political leaders. In this mediating role, they may also consider the creation of technical teams that allow the terms of the agreement to be fulfilled, as well as people or institutions external to the conflict that operate as guarantors.

Agreement on disagreement, and the way it will be resolved, is unlikely to be unanimous, and cannot aspire to be. What it should be is legitimate and with respect to that legitimacy, majority. This legitimacy is decisively determined by those who resist, but not only by them. For this reason, it may be advisable to submit the agreement on the disagreement to a referendum, both to define what to be deliberated, and to establish the body that should do so.

The content of the agreement depends on the conditions under which the disagreement occurs. It depends on a specific conflict in a particular society. For this reason, it cannot be resolved based on general rules, but rather according to those adopted in each context. However, some principles, criteria and procedures can be defined, which contribute to considering the agreement as reasonably legitimate by those who must act within its rules.

In the first place, the principles that guide any deliberative process should be taken into consideration. That is, the agreement must be designed to be inclusive, egalitarian, rational and impartial in its terms. Then, what these principles should guide is the determination of the following fundamental aspects: what is it that will be deliberated, and where appropriate, what solutions are considered. These points can be introduced by a brief description of the situation that leads to this approach.

The deliberative process that is intended for the implementation, and the state bodies in charge of guaranteeing it, must then be established with the greatest possible precision. These aspects include how it will be decided, who will be part of the deliberation, in what terms the deliberation will take place, and how disagreements will be resolved. At this point, one can follow the suggestion of minimal democracy that, as Elster observes, is sufficiently effective and formalized in handing over control to citizens over political leaders[423]; effective in a way that excludes simple rituals in participation, formalized, in a way that excludes it from being under the control of the rebels.

The definition of the above implies a double commitment among subscribers. The first is to accept the institutionalization conditions to resolve what is claimed. The second is to submit to each other whatever is resolved after that institutionalized process. Although the signing of this type of agreement does not imply that the process is resolved, it does imply that the path to do so opens up. Always, throughout

[423] Elster, 'Deliberation and Constitution Making' (n 210) 98.

the process, there may be difficulties, but in this agreement, the itinerary is set that will make a solution likely.

The process must be clear and specify at least three fundamental aspects: deadlines, forms of ratification and consequences. Within this framework, specific aspects can then be specified for the development of the deliberation. It is also convenient to set control devices on the process, so that emerging differences can be resolved.

Activist co-responsibility

A deliberative idea of democracy presupposes a strong conception of individuals as rights bearers, whereby they are protected from the power of the state, but more decisively, they determine what rights they want to have. This conception of individuals assumes that when they take place in the discussion of collective affairs, they are bound by them in a double sense: in the first place, because they have concurred with their will to endow them with legitimacy; in the second, because they become co-responsible for the realization of what has been resolved.

This idea of co-responsibility is also an expression of a decisive aspect of democracy: collective political will. Deliberative forums seek to adopt a decision that, for the best reasons, appears as what goes in favour of everyone. This contrasts with the idea that what is resolved responds to a dominant idea, such as the appeal to the will of the majority[424]. The aggregation of preferences does not produce a link with what

[424] This difference between the general will and majority will in Atria, 'The Form of Law and the Concept of the Political' (n 43).

has been decided. It is the solution of others that is imposed on who is defeated. Deliberation, on the other hand, involves those who take part in the decision. They are willing to respect it even without fully agreeing. As a practical consequence, those who resisted are now jointly responsible for the application of what has been resolved.

The scope of this argument can be explained by briefly revisiting the idea of the right to resist deriving from legal alienation as proposed by Gargarella, discussed in chapter III. As explained in the second version of Gargarella's argument, the lack of participation in decisions which affect those who resist may justify the right to resist. However, this does not suggest, at least not explicitly, that because of the exercise of the right to resist they should be incorporated in the resolution of what affects them. In this way, the right to resist is an expression of discontent over an unsatisfied demand, and not a claim to be an active part of public affairs.

From the deliberative perspective proposed here, what is decisive is not if the ruler hit what has to be given to citizens so that they do not claim. Much less that it is limited to not hurting them. What is relevant is that the individuals exercising the right to resist actively participate in defining how the issues involving them are resolved, thus claiming a right which presupposes their co-responsibility on common issues.

Finally, this understanding of the right to resist allows for the renewal of democratic institutions and practices, based on the inclusion that redefines the distribution of

political power. Exercising the right to resist by calling to deliberation correcting political decisions also implies deliberating on the best way to make decisions going forward. This makes it possible to improve democracy as a whole.

### Institutional moment: the form of deliberation

The deliberative forum that arises in response to the right to resist is institutionalized in accordance with the reality in which this right is exercised. This forum belongs to the class of exceptional institutions, which the theory of law studies and describes in general terms, but on each occasion in which it is required, it adopts specific characteristics. I will describe two models which correspond to what the doctrine has called mini-public forums, whose most notorious examples are the constituent assemblies and the citizen assemblies.

Given that, my purpose here is to describe what a deliberative forum could be like regarding the exercise of the right to resist, elements of one and the other of these institutions will be used interchangeably; this is on the understanding that, given the specific case where it is necessary to implement one or the other, the aspects that provide greater legitimacy will be intensified.

Notwithstanding the foregoing, there are two principles that seem decisive for the legitimacy of these institutions, particularly when they mediate the exercise of the

right to resist. The first one is that it must be an ad-hoc institution[425]. Since the right to resist is based on the loss of legitimacy of the existing institutions, it seems reasonable that legitimacy should be replaced by an institution created for this purpose, as far as possible from contingent political practices. This does not exclude democracies from incorporating permanent devices, but rather emphasizes that it is a situation where these devices have failed, and fresh ones are required. It is an institution that emerges from the collective commitment to political principles, for a limited purpose, at a specific time.

The second is that the proposals from the forums must be subject to ratification by means of a referendum. In this sense, as will be explained at the end of this section, it is a single institution[426] that has two or in some cases three, moments. The first, although not essential, is a referendum to ratify the agreement on the disagreement; second, the moment of deliberation in the assembly; third, and always, a referendum to ratify or reject what is resolved by the assembly.

Citizens' mini-public forums

The decision to institutionalize deliberation to resolve a disagreement is a commitment, by those involved, to democratic political principles. It is about staying with the idea that controversial issues can and will be resolved by those involved in

[425] Oran Doyle and Rachel Walsh, 'Constitutional Amendment and the Democratic Mediation of Political Disagreement: Assessing the Impact of Deliberative Mini-Publics' (*SSRN*, 15 July 2020) 28 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633359>.

[426] John Parkinson, 'The Role of Referendums in Deliberative Systems', cited in Oran Doyle and Rachel Walsh, 'Deliberation in Constitutional Amendment: Reappraising Ireland's Deliberative Mini-Publics' [2020] *European Constitutional Law Review* 1, 2.

them, participating in free, inclusive, equal, and impartial terms, in what is relevant to the discussion and the decision adopted. These democratic principles must be clearly expressed, both in the composition of the citizen's assembly and in its way of functioning.

Regarding its composition, in general, two ways of its composition can be identified. The first one is through open voting. The advantage of this system is that, by using a proportional system, it can guarantee the adequate representation of various political points of view. However, it presents a series of difficulties which should be considered. The first difficulty is that it is a model that can be more easily co-opted by the representatives under question. Given the visibility of their job, the practice in electoral processes, and the networks created to win seats, their chances of obtaining the available seats are greater than those of common citizens.

Additionally, it does not guarantee that certain groups are not over-represented, which forces the creation of additional rules to guarantee a more adequate representation, at the risk of losing the legitimacy of the assembly. Thus, for example, it is necessary to incorporate gender parity rules, and guarantee seats for native peoples and independents outside of political parties.

A second way to compose an assembly of citizens, is by means of the designation following criteria of statistical proportionality, with respect to the groups that inhabit the territory where the deliberation takes place. This modality, whose most famous

example is Ireland[427], is based on the demographic description of the population based on age, sex, place of residence and social class. Considering these criteria, representatives are selected randomly, with each group summoned by lot to take part in the deliberation.

The advantage of this form of composition, along with offering a more exact image of the reality of the society where it is deliberated, as Doyle and Walsh point out, is that the lack of representation works as a guarantee of impartiality in the deliberation[428], in the sense that members are less exposed to manipulation by external political interests. However, the biggest problem for this model is the unpredictability of the political opinion of its members. That is, even when they can represent sectors according to the criteria set out above, there is no prior guarantee that this correlates with their ideological composition.

Three devices can help correct this distortion if it occurs. The first is deliberation itself. Throughout the process of information, dialogue, and deliberation, it is possible to expect, if not great changes, at least some adjustments. The second device, suggested by Doyle and Walsh, is a piece of ex-post information on the ideological orientation of the citizen assembly[429]. Making these inclinations public, after the results of their proposals are available, although it may put their legitimacy at risk, increases the possibility that this distortion will manipulate the decision of the voters in the ratification or rejection of the proposals. The third correction device is

[427] Doyle and Walsh (n 425).
[428] ibid 23.
[429] ibid 30.

the ratifying referendum. This process, essential in the deliberative mini-forum process, allows voters to have the last word on the proposal. It should be noted that it is precisely this act that gives political force to the decision adopted, and not the assembly as such.

Regarding the functioning of the citizens' assembly, structural and internal procedures aspects can be distinguished. The first is related to the tasks given and the time to develop them. The second is related to publicity and the way to adopt agreements and resolve disagreements. The latter has a decisive function regarding the legitimacy of the deliberation and is the way to reduce the impact of external pressures on the deliberation.

The entrusted task is defined by the agreement on the disagreement. As anticipated, it is recommended that it be a limited area, and that it has the type of solution that is being discussed, preferably on public policies[430]. Additionally, the incorporation of expert voices on controversial issues, who can deliver points of view and arguments from various disciplines, has proven to be very effective[431].

Given the above, the scope of the freedom that the assembly has to design its own agenda or decide how to implement it has been exhaustively prescribed[432]. When the convocation of these assemblies is the result of the exercise of the right to resist, it seems advisable to reduce these attributions to the minimum possible. Once the

[430] Elster, 'Deliberation and Constitution Making' (n 210) 100.
[431] Doyle and Walsh (n 425) 21.
[432] ibid 12.

institutional process has started, any uncertainty about the procedures and issues to be debated can deprive the space of legitimacy. By the same argument, the period of operation must be established before its start. Even, if possible, the frequency of their meetings and the topics delivered to each session. In this way, it is more likely to provide certainty about what to expect and maintain citizen control over the deliberation.

Regarding the procedural aspects, these must be established before the start of operations, in particular: how the issues will be discussed, how agreements will be adopted, and how disagreements are to be addressed. In the discussion process, the "learn-hear-deliberate" model has proven to be effective[433]. In practice, first, the participants are informed by the same means of the most important aspects of the debate and, if necessary, also listen to the interest groups involved. The next step, with the experts and among the members of the assembly, is to enter a dialogue to clarify and weigh the arguments. More than a process of persuasion, it is about elaborating their own positions. Finally, submission of the deliberation of the matters to the knowledge of the assembly is proposed.

In this last stage, a preference aggregation model will have to be applied to establish which positions have the most support. A discussion in this regard is whether the vote of each member of the assembly should be public or not. In principle, any vote cast by an elected representative must be public, so that those who elected him can

[433] ibid 22.

observe his/her behaviour. Different is the situation of the nominated representatives. In this case, although the publicity of their positions is still desirable, this can be a limit for them to accept the task of deliberating.

The strong relationship between publicity and legitimacy is not necessarily replicated in the same terms when the relationship is between publicity and the best available decisions. Even the reason why public control over deliberation operates as a guarantee that democratic principles are respected, and therefore make the procedure legitimate, can itself be counterproductive. Advertising changes the interlocutor of the speech of the members of the assembly[434], while in private discussions the interlocutor is the other members, with whom they can show openness to their arguments. When the discussions are open public opinion becomes the interlocutor, in particular the adherents of a given position. Consequently, they tend to be more intransigent in their arguments.

In other terms, although the public discussion is very important, the possibility of reaching agreements in a deliberative forum means that the dialogue takes place among those who have been chosen to carry it out. This is a space that, although it takes public opinion into account, is for private dialogue between the representatives. This is because normally nobody likes to change their mind while they are being observed. Once the agreement is obtained, they must give an account of its result and the reasons that support it. At this time, it returns to public

[434] Elster, 'Deliberation and Constitution Making' (n 210) 107.

discussion. It should be noted that it is impossible for all the points discussed to satisfy all people. Eventually, the weight of these differences will come to bear in the ratification referendum.

If this is an issue that affects all deliberative processes, it becomes especially complex after exercising the right to resist. Considering that one of the reasons for resisting is the loss of legitimacy of the proceedings, it seems reasonable to expect sufficient publicity of the assembly, particularly on the way it discusses and makes decisions. At the same time, given the disruptive and sometimes coactive nature that the exercise of this right supposes, it also seems reasonable that those who take part in the deliberation may be as far as possible from these pressures.

There is no exact formula to resolve the above; however, some criteria can be established that can allow a balancing of the tensions. First, deliberation can be seen as a process. Although it may seem obvious, this consideration makes it possible to establish criteria of legitimacy at various stages that successively strengthen decision-making. Thus, for example, an important starting point to consider is the ratification of the agreements on the disagreement by those who must then approve or reject the process.

This same should be considered in the form of the composition of the deliberative forum. The legitimacy problems that it can present in this regard can hardly be corrected later. This legitimacy will depend on the matter discussed and, in particular, on those who will be affected by what is considered. Finally, the

transparency in the way in which agreements are adopted and disagreements are resolved. This is valid for the majority rule that is determined, as for the results of the votes when they are carried out, even if the vote of each member of the assembly is not made public.

Regarding the publicity of the sessions, an absolute rule should be that all information accessed by the members of the assembly must be public. This is so, because the way in which this discussion is accompanied, and in a sense continued, by the people interested in the deliberation, is fundamental for its legitimacy. Something similar must be said with respect to the sessions where the members of the assembly pose their questions on the matters being debated. As important as the information they receive is how they appropriate it.

Regarding the publicity of the deliberation and the vote, the following should be considered. The deliberations of the assembly must be public, but that does not imply that its members cannot have private spaces for dialogue. The decisive thing in deliberation is the arguments involved in the discussion, more than who supports each one. However, this rule is not absolute when the members of the assembly are elected by popular vote. Given this situation, voters have the right to know which way each member of the assembly votes, even at the risk of losing deliberative capacity. Something different happens with composition by statistical designation. In this case, it is enough that the arguments supporting each of the positions are clear and public. So, it becomes public what those who voted had in mind, without the personal option of each one is relevant.

At the end of this process, and within the term provided for it, the resolution of the assembly is submitted for ratification trough a referendum. It is at this time that the effectiveness of the deliberation and the legitimacy of the proposals developed by the assembly will be verified.

Referendum

Whether referendums weaken or strengthen democracy and, in the case of the latter, on what terms they might do so, has been intensively debated[435]. The reasons for dealing with caution are diverse. Observed from the point of view of the forms of direct democracy, the referendum appears as a device which leaves the electorate at the mercy of, and sometimes manipulated by majority wills, who can make serious decisions without offering much explanation. Recent cases such as the referendum in the United Kingdom to leave the European Union[436], or the one carried out in Colombia to approve the Peace Agreement, seem to justify these apprehensions. Something similar can be seen in certain reactions generated by the possibility of emancipatory referendums as in Scottish or Catalonian, or the unification referendum as in the island of Ireland[437]. Although there are important advances in the conversations about their scope and possibilities, the discussion continues.

[435] John Parkinson, 'The Roles of Referendums in Deliberative Systems' (*Representation*, 2 June 2020) <https://doi.org/10.1080/00344893.2020.1718195>.
[436] Jeremy Richardson and Berthold Rittberger, 'Brexit: Simply an Omnishabmbles or a Major Policy Fiasco?' 27 Journal of European Public Policy 649.
[437] 'Working Group on Unification Referendums on the Island of Ireland' (*The Constitution Unit*, 26 November 2020) <https://www.ucl.ac.uk/constitution-unit/research/elections-and-referendums/working-group-unification-referendums-island-ireland>.

The referendum cannot, therefore, be considered a form of deliberation, but rather a complement to it[438]. Its function is not to replace dialogue, but to offer a tool to know the opinion and, if necessary, resolve common issues, regarding what has already been deliberated. It is deliberation that defines, in advance, the political content of what will be voted on, and not the other way around[439]. The referendum should clarify rather than obscure, and deliver certainty rather than uncertainty. The referendum process is defective if after its completion it is impossible, or very difficult, to decipher the political content of the results.

The general conditions for the above can be divided into two groups: formal and substantive. The first is relative to the electoral process and its binding force, and the second concerns the content of that which is to be submitted to a referendum and the effects of the resolution. The concurrence of these requirements will guarantee the referendum in the fulfilment of its purpose. Each one should be reviewed separately.

There are two formal requirements: an electoral system, whatever its territorial scope, which offers all the guarantees of the right to vote. Firstly, in general, an impartial body that implements the process, resolves eventual disputes, has a voter registry, and that guarantees the objectivity of the process. This prevents the resolution from being challenged in its formal legitimacy.

[438] Parkinson (n 434) 487.
[439] ibid 487–488.

The second formal requirement is that the resolution will be fulfilled. That is, its blinding force will be recognized. This requirement is closely linked to the second content requirement, which is clarity of its effects, and thus avoidance of situations of open or uncertain mandate[440]. However, it also has a strictly formal dimension, that is, if it is clear what is resolved, this will be fulfilled. An example to the contrary can be seen in the case of the referendum called by Evo Morales, asking whether the people wanted or not a constitutional reform that would allow him to stand for the second re-election[441]. Although the result was negative, Morales challenged the result in the Constitutional Court, where he was politically dominant, and which authorized his re-election[442].

Regarding the content requirements, it is necessary to distinguish the type of referendum in question. A referendum whose purpose is to establish whether or how it is necessary to deliberate is different from one that seeks to ratify something that has already been deliberated. In the first case, it is important that the agreement on the disagreement, and the way to resolve it, is as precise as possible. Since it is a process of assigning power to deliberate, its scope and deadlines must be established with the greatest care. The same applies to the composition of the space and its attributions. When these aspects are not addressed, the power given to these assemblies can overflow or problems with deadlines.

[440] Richardson and Rittberger (n 435).
[441] Jaime Cárdenas García, 'Report about the Bolivian Referendum of 2016' (2017) 50 Boletín Mexicano de Derecho Comparado.
[442] *Reclamación de Inconstitucionalidad y Contradicción Intra-constitucional* No. 20960-2017-42-AIA (Tribunal Constitucional Plurinacional).

In the case of a referendum to ratify something that has already been deliberated, the deliberation process must be accounted for. In this sense, it must be clear what is being approved and rejected, and what are the effects of each of these options. This can be assured with a good involvement in the previous deliberative process, such as by the clarity and transparency with which the arguments supporting one or the other option are presented.

This type of referendum, when ratifying a process carried out in an assembly, can also be seen as a test the deliberative process itself. Contrasting, for example, the result of the vote within the citizens' assemblies in Ireland, with the result in the ratifying referendum, practically the same results can be found.

## Conclusions

In this section, I presented the stages of a deliberative process imposed by the exercise of the right to resist. The first, non-institutional stage is characterized by the identification of the conflict and the actors involved. The second, which I called pre-institutional, is characterized by the adoption of an agreement that allows the claim to be resolved, actively involving those who claim.

The third stage, institutional, is the one where deliberation takes place, matters submitted for discussion are resolved and what is proposed by the deliberative forum is ratified. Here, both the composition of the forum and its operation, as well as the use of referendums, make it possible to give legitimacy to the measures adopted.

# PART III

## Chile: popular uprising and constitutional deliberation

# Chapter VIII

## October 2019: the collapse of the Iron Cage

> *"The metaphor of 'iron cage' is applied to a device made up of two main elements: political laws of constitutional rank, drawn up between 1977 and 1989, and a party system, which was formed since 1983. The objective of this installation is preserving neo-capitalism from the vicissitudes and uncertainties of democracy. It constitutes the updated form of 'protected democracy', the last of its appearances and the most significant, because it is the factual, the existing one."*[443]

The Human Development Report on Chile in 1998 is perhaps the first document where the question of a new constitution for the country was posed[444]. After an exhaustive analysis of the Chilean social political reality at that time and considering the way in which local society was experiencing the transition to democracy, the report concluded that it was necessary to rethink the "social pact." It was necessary,

[443] Tomás Moulian, *Chile Actual. La Anatomía de Un Mito.* (LOM - ARCIS 1997) 47. [Translation is mine]
[444] Programa de Naciones Unidas para el Desarrollo (PNUD), 'Informe Sobre Desarrollo Humano Chile 1998' (1998) 223.

they said, because society requires the adaptation of its political framework to the needs and demands of the new subject[445]. Nevertheless, the report noted that the current institutional system was not designed to adapt to changes, but, on the contrary, to prevent them. To explain the above, the authors took the metaphor of the "iron cage" proposed by Tomas Moulián and transcribed in the epigraph which gives the title to this chapter.

My purpose in this chapter is to introduce the Chilean case, explaining how the current Chilean constitution lost its legitimacy from three points of view: origin, ideology, and procedures for amendment. These three aspects will then allow me to illustrate the "iron cage", and delineate the relationship between the right to resist, non-institutional collective actions, and deliberation.

This chapter is divided into five sections. Firstly, after a brief recount of the Chilean constitutional history, I will analyse the spurious origin of the current constitution. I will consider three aspects: the context of oppression; la junta [446] self-attribution of constituent power, and the irregular plebiscite in which the constitutional text was approved. In Section II I will examine the neoliberal economic and social ideas imposed by the regime, and how these were constitutionally protected. In Section III I will criticize the obstacles to its amendment. In particular, the composition of the

[445] ibid.

[446] *Junta* (*Board*) is the governmental body created after the 1973 coup and was made up of the commander-in-chief of the armed forces, commander-in-chief of the navy, commander-in-chief of the air force, and a major general of the carabineros (Chilean police). Even when they had decided to alternate the position of president of the *Junta*, the commander-in-chief of the army assumed that position for the 17 years that the regime lasted.

Senate was envisaged, by means of designated senators, a binomial electoral system, and supermajority laws. In section IV I will explain how what is described in the preceding sections coincides with the notion of the "iron cage", and what its effects are on the political reality that it intends to regulate.

## Context

Chilean constitutional history has been determined by three important canonical texts. According to their years of adoption these are the constitutions of 1833, 1925, and 1980. The first of these entered into force after several constitutional attempts that followed the independence process began in 1810. This was the text that gave institutional shape to the nascent republic. As an outstanding example of the conservative-liberal pact, on the one, hand it established a strong central government, with concentrated presidentialism and elitist representation[447]. On the other, it established Roman Catholicism as a unique and exclusive religion of the state, promoting, in addition, the submission of indigenous peoples to the Chilean legal system[448].

The constitution of 1833 remained in force, with some amendments, until the beginning of the 20th century. Its weakening began at the end of the 19th century, the decisive event being its failure to generate conditions to mediate the conflicts

[447] Pablo Ruiz-Tagle, *Cinco Repúblicas y Una Tradición* (LOM 2016) 90.
[448] ibid 64.

which led to the 1891 civil war. This crisis was followed by a period of political instability that was resolved with the adoption of the 1925 constitution.

The 1925 constitution adopted a more liberal position than its predecessor[449]. Although it preserved centralist institutions concentrated in the executive, it allowed the progressive incorporation of individual rights, particularly of previously excluded groups. Under its validity, for example, labour rights were declared, and the vote of women was recognized, while educational and health coverage was expanded. This is what Heisse called "social democracy"[450]. At the same time, the separation of the Roman Catholic Church from the state was established and religious freedom was guaranteed.

In 1970, under the mandate of the said constitution, Salvador Allende was elected president. As the leader of the "Popular Unity" political alliance, he promoted an agenda of social transformation called the Chilean Way to Socialism. In the context of the Cold War, this project aroused both interest and suspicion. On the one hand, there was national and international interest in what was a unique experience in the world at that time. On the other, there was fear that this meant the advance of Soviet socialism on the continent.

The three years of Allende's government lasted were turbulent. At the international level, there was the strong intervention of the United States to destabilize the

[449] ibid 136.
[450] Quoted by ibid 142.

country to overthrow him[451]. To do this, the United States had internal allies who carried out a smear campaign and an economic boycott. Internally, the government progressively lost its ability to create political agreements. Thus, there was a growing political polarization and social divisions, even within the political alliance in the office[452]. By 1973, the country had become difficult to govern.

In this context, planning for the *coup d'état* began. Eventually, on September 11 of that year, the armed forces attacked the government palace and took control of the executive and legislative powers. From then on, a bloody civic-military dictatorship was installed that governed the country over the next seventeen years. The dictatorial government, under the command of the generals who made up the "*Junta*", drafted and imposed the constitution in force from 1980 to date.

## Illegitimacy of origin

There are three main reasons for the spurious origin of the current constitution and, consequently, questions about its legitimacy from the beginning. Firstly, the social and political conditions prevailed in the country during its elaboration and adoption. Secondly, the bodies in charge of writing and fixing it, were strongly elitist and subjected to the ultimate ideological control of the Junta. Finally, the irregular voting process that took place in the ratification referendum.

[451] ibid 165; Armando Uribe, *El Libro Negro de La Intervención Norteamericana En Chile* (Siglo Veintiuno 1974).
[452] Gabriel Salazar, *Conversaciones Con Carlos Altamirano. Memorias Críticas* (Debate 2013) 349–350.

It should be noted that appeal to the origin's illegitimacy is a novelty in Chilean constitutional history. The two main constitutions that preceded it, 1833 and 1925, could have been challenged for similar reasons[453], and yet they had long periods of enforcement. Nevertheless, it would be a mistake to interpret this fact as if the elites who wrote the old constitutions better interpreted the will of those who should submit to the constitutions. Rather, it seems to be that at that time those who had to obey them could not enforce their positions[454]. Thus, one way of explaining the difference between the current process and previous ones is the citizenship of social mobilization. That is, those who must obey the constitution are able to resist it if they do not consider it legitimate, provoking, through social demand, a political change.

Imposed under terror

From the coup on September 11th 1973, the civic-military dictatorship imposed a regime of terror. Invoking the National Security Doctrine[455], which declared the presumed existence of an internal enemy, arbitrary arrests, summary executions, and various forms of torture were carried out. Between 1973 and 1980, when the constitution was adopted, twenty-eight thousand eight hundred thirty-seven

[453] Ruiz-Tagle (2019) Ossa (2020).
[454] Salazar (2012).
[455] Jorge A Tapia Valdés, *El Terrorismo de Estado. La Doctrina de La Seguridad Nacional En El Cono Sur* (Nueva Imagen, 1980) 123.

political arrests were made in which torture was recorded[456], while the number of missing people exceeds a thousand.

Along with the persecution of political adversaries, the Decree Law No.77[457] the dictatorial regime ordered the dissolution of left-wing political parties and the seizure of all their property by the state. The same fate would befall all social organizations promoting doctrines that could be considered Marxist. Ultimately, only the Catholic Church was outside these prohibitions, although not without threats, at least toward that part of its membership defended politically persecuted people[458].

The same decree that prohibited political parties established the prohibition of spreading any idea that could be considered contrary to the project of the Junta. This, in practice, meant a censorship regime that would be in force until 1988. This measure, along with preventing the discussion of ideas, allowed state agents to act with total impunity, frequently resorting to fake news to cover up their own crimes[459].

Finally, there was the collusion of the judiciary. By seizing control of the state, the Junta dissolved the Congress but kept the courts in operation. However, instead of offering guarantees to citizens against the arbitrary actions of the state, the courts

[456] Comisión Nacional sobre Prisión Política y Tortura, 'Informe de La Comisión Nacional Sobre Prisión Política y Tortura' 177.
[457] D.L. Nº77 Declara Ilícitos y Disueltos los Partidos Políticos que Señala 1973.
[458] Patricio Orellana and Elizabeth Q Hutchison, *El Movimiento de Derechos Humanos En Chile, 1973 - 1990* (CEPLA 1991).
[459] Gastón Tagle Orellana, 'Prensa Escrita y Policía Secreta En CHile (DINA/CNI) Durante La Dictadura: La Reformulación Del Discruso En El Caso Marta Ugarte' (2018) 8 Historia 396 285.

became its accomplice. The most eloquent example is the systematic rejection of *habeas corpus* actions filed against arbitrary detentions and torture[460]. This abandonment of their functions was recognized by the president of the Supreme Court in 2013[461].

All these factors meant that citizens not only did not have the possibility of discussing the contents of the constitution, but they were also forced to accept its contents. at risk of their physical integrity and their lives. These circumstances remained as an indelible mark on the current constitution, beyond the declarations of rights that it may contain; and were, until its collapse, the reason why the constitution, instead of being a symbol of union, provoked deep division.

Drafted without citizen participation

One of the first measures adopted by the dictatorial regime was to declare itself a holder of the constituent power. The first expression of this appears in the Constitution Act of the Governing Junta[462] promulgated in Decree Law No. 1 on September the 18th[463]. Article No.1 in this act declares that this body "takes supreme command of the nation" and that assumes the "(...) patriotic commitment to restore

[460] OAS, Inter-American Commission on Human Rights. Report. May 08, 1985. https://www.cidh.org/countryrep/Chile85sp/Indice.htm

[461] Juan Pablo FIgueroa, 'Corte Suprema Reconoce "Graves Acciones y Omisiones" En Dictadura, Pero No Pide Perdón' (*CIPER*, 9 June 2013) <https://www.ciperchile.cl/radar/corte-suprema-reconoce-%E2%80%9Cgraves-acciones-y-omisiones%E2%80%9D-en-dictadura-pero-no-pide-perdon/>.

[462] D.L. Nº1 Acta de Constitución de la Junta de Gobierno 1973.

[463] It should be noted that this day is traditionally celebrated as the national holiday, in memory of the council that created the first local Ggovernment Junta, which began the independence process. This fact shows the refoundation purpose that was present throughout the regime.

broken Chile, justice and institutional framework, aware that this is the only way to be faithful to national traditions, the legacy of the Fathers of the Nation and the History of Chile, and to allow the evolution and progress of the country to be vigorously directed along the paths that the dynamics of the present times demand of Chile (...)"[464].

Since the foregoing was not explicit enough, on November 12 of the same year the regime promulgated Decree Law No. 128, called "Clarification of the meaning and scope of Article No.1 of Decree Law No. 1 of 1973". This clarification establishes that the Junta is the head of the Constituent, Executive and Legislative Power[465]. This constituent power[466] would be exercised by the four generals together, and the old constitution will remain in force in everything that is not modified by them[467]. Finally, in Decree No.788 of December 4, 1974[468], the rules on the exercise of this constituent power of the Junta were issued; in particular, affirming the primacy of its rules when the provisions adopted by them conflict with those of the constitution of 1925.

[464] D.O.
[465] D.L. Nº 128 Aclara sentido y alcance del Artículo 1 del Decreto Nº1 de 1973 1973.
[466] The notion of constituent power adopted by the military junta is provided by attorney Jaime Guzmán. This, a follower of Schmitt's ideas, in the terms that the Spanish scholar Sánchez Agesta understands to defend Franco's dictatorship, falls on the one who has the factual force to impose order in moments of exception. Based on the above, he understands that it is not a commissary dictatorship, but one that owns the absolute power to reconstitute the political order. Renato Cristi, *El Pensamiento Político de Jaime Guzmán* (LOM 2011) 42.
[467] D.L. Nº 128 Aclara sentido y alcance del Artículo 1 del Decreto Nº1 de 1973 vv 1–2.
[468] D.L. Nº 788 Dicta Normas sobre el Ejercicio del Poder Constituyente. 1974.

Founded on the above, on November 12, 1973[469], the creation of a Study Commission for a New Constitution was published in the Official Gazette. The purpose of this commission, whose members were appointed by the rulers, was to draft a proposal for a new constitution for Chile. This, according to the guidelines provided by the Junta. The work of this commission spanned five years. Eventually, on October 5, 1978, after 417 working sessions, a constitutional draft was delivered to the government[470]. The State Council was then commissioned to review the proposal and present a report, with suggestions confirming, correcting, or adding precepts. This Council had been created in 1975 by means of Decree Law 1.319, published in January 1976[471], and its task was to advise the activities of the head of state. Its members were former presidents, former generals, former ministers, and several representatives from different sectors of civil society, appointed by the Junta.

The State Council worked on the review between November 1978 and July 1980, presenting its report on August 6 of that year[472]. This document begins with a diagnosis of the causes of the Chilean institutional crisis that made the army's action necessary. Then it offers a broad overhaul of the Study Commission's proposal,

[469] D.L. Nº 1.065 'Designa Comisión para que estudie, elabore y proponga un anteproyecto de una nueva Constitución Política del Estado' 1973 8.

[470] Minutes of meetings and proposals available at 'Constituciones Políticas y Actas Constitucionales' (*Biblioteca del Congreso Nacional de Chile*) <https://www.bcn.cl/historiapolitica/constituciones/detalle_constitucion?handle=10221.1/60446> accessed 14 October 2020.

[471] It should be noted that, although established as Decree Law, the content of these provisions are the first established as Constitutional Act according to the rules of D.L. 788 named above. See Acta Constitucional Nº1 Crea Consejo de Estado 1976. See also: D.L. Nº 788 Dicta Normas sobre el Ejercicio del Poder Constituyente.

[472] Instituto de Estudios Generales (ed), 'Informe Del Consejo de Estado al Presidente de La República Incluyendo El Voto de Minoría y La Opinión Disidente. 2 de Agosto 1980', *Textos Comparados de la Constitución Política de Chile. Sometido a Plebiscito por la H. Junta de Gobierno por D.L. Nº3.646 de fecha 11 de Agosto de 1980 y de la Constitución Política de la República de 1925. Con las modificaciones introducidas a su texto al 11 de septiembre de 1973* (Editorial Universitaria 1980).

explaining how the presidential government could be strengthened to prevent further crises like the one experienced between 1970 and 1973.

With these documents in a view, the Junta decided on the terms of the constitutional text. Although the degree of agreement between the proposals of the Study Commission and the State Council was significant; in those matters where there was disagreement, the final text leaned mostly in favour of what was proposed by the Study Commission. The final project was presented publicly on August 11, 1980. The night before, in a speech broadcast on television, the Junta assumed full responsibility for the presented text, thanking those who helped, and those who declared what they considered appropriate[473]. In the same speech, the referendum of approval or rejection of the constitution was called for September 11 of that same year.

Ratified in a fraudulent referendum

The referendum held in September was irregular and fraudulent. Firstly, it did not comply with any guarantee for the proper exercise of the right to vote. Since all political activities were prohibited, organizations that defended the rejection of the project had no opportunity to campaign for this option.

[473] ibid 9.

Indeed, within the conditions of terror described above, the regime authorized only a single public event in favour of the option of rejecting the constitution. At this meeting, known as "caupolicanazo"[474], the main speaker was former president Eduardo Frei, who later died in unclear circumstances. Just as meetings were prohibited, the space for propaganda on television was denied, and only brief radio spots were authorized; this, while the government unfolded a massive campaign, which included meetings, televised ads, radio, and national press coverage.

Secondly, there were several irregularities in the voting process itself[475]. The first of these was the absence of electoral registration. The only way to control voters was with a sticker on the identity card and an ink mark on the finger. However, both were very easily removable, so that one person could vote many times. Along with that, there was no impartial Scrutiny Association, since this was composed of judicial officials appointed by the regime. They rejected, therefore, any allegation of polling irregularities, and decided partially in favour of the government proposals.

It should be noted that for the members and supporters of the civic-military dictatorship, holding this referendum responded to a reason of prudence, but not of legal necessity. As the professors of constitutional law at the Catholic University asserted in a public statement on August 24th, the military Junta had the “original

[474] This is in reference to the place where the meeting took place, Caupolican Theatre.
[475] A detailed description of the electoral fraud of the 1980 process can be found at Claudio Fuentes S., *El Fraude* (Heuders 2013).

constituent power", which therefore did not require ratification by a plebiscite[476]. Eventually, the constitution was adopted with 65.71% of the preference.

## The militant constitution

Between the adoption of the current constitution and its collapse, multiple amendments were made to it. However, none of them corrected the core of their proposal: the neoliberal project[477]. The disenchantment with this model stems from the fact that the state is prevented from providing goods and services. This has the effect that all services, even critical ones such as health, education, and social security, are delivered according to the rules of the market. The perspective that determines these areas, therefore, is not that of social rights, but of a product whose access is determined by the purchasing power of individuals. The purpose of this section is to show how the neoliberal influence originated in Chile, what was its main ideas, how these were reflected in the constitution, and their role in its collapse.

### The neoliberal project

The beginning of the influence of neoliberal ideas in Chile is in an agreement celebrated between the Faculty of Economics of the Catholic University and the University of Chicago in 1956[478]. The purpose of this agreement, called the "Chile

[476] Cited in: Ruiz-Tagle (n 446) 143.
[477] ibid 235.
[478] Ladrillo pág. 7 Leonidas Montes 123

Project"[479], was to train Chilean academics in the liberal doctrines that were being developed in this University, which emerged as an alternative to those which were then hegemonic in this field[480]. Indeed, at that time in Latin America the main economic conception assigned a very active role to the state, especially in the provision of certain services and control over certain productive sectors. By contrast, the doctrines developed at Chicago University advocated creating the conditions for the economy to regulate itself. This meant handing over the initiative to individuals and reducing state action to a minimum.

The first attempt to include these ideas in a government program was through the candidacy of Jorge Alessandri in 1970. On this occasion a group of trained economists, known as the "Chicago boys", presented a programme for economic development. Alessandri lost the election to Salvador Allende, and with that the program was left without execution. However, a few days after the coup which overthrew President Allende, when the Junta was establishing itself in government, the program reappeared under the name of "*El Ladrillo*"[481] (The Brick).

This program expresses its intention to radically change economic policies, "taking advantage of the fact that the government is impartial, objective and widely supported"[482]. It also adds that these measures constitute a harmonious whole, so

[479] Ibid. 123
[480] Ibid. 123
[481] This name is given due to the size and weight of the typed copies. Sergio de Castro, *'El Ladrillo' Bases de La Política Económica Del Gobierno Militar Chileno.* (Centro de Estudios Públicos 1992).
[482] ibid 22.

they must be applied as a whole and as soon as possible[483]. The latter was called "shock policy", expressly endorsed by Milton Friedman, a prominent figure in Chicago's doctrine, on his visit to Chile in 1975[484].

The purpose of the shock policy was to lower inflation and activate economic growth through a vigorous economy[485]. For that, Friedman suggested reducing fiscal spending by 20% or 25%, mainly by laying off workers in this area, and reducing the obstacles to private markets, in particular by making labour rules as flexible as possible[486]. Additionally, to promote progress going forward, the size of the government and its sphere of influence in the economy needed to be reduced[487], with special attention to the provision of services. As proposed, the state had to guarantee that the initiatives were handed over to the private sector and would only act secondarily[488]. The ideas for making further progress described by Friedman are found in almost exact terms in "The Brick." These include delivering the provision of health services[489] and the administration of pension funds[490] to the market, allowing the state to assign amounts for humanitarian or social solidarity reasons only[491].

Neoliberal constitution

[483] ibid.
[484]Milton Friedman, *Milton Friedman En Chile. Bases Para Un Desarrollo Económico* (Fundación de Estudios Económicos BHC ed, Editorial Universitaria 1975) ch 2. See also: ibid 57–63.
[485] Friedman (n 483) 15.
[486] ibid 28.
[487] ibid 32.
[488] ibid 35.
[489] Castro (n 480) 125.
[490] ibid 131–134.
[491] ibid 125.

The part of the Chilean constitutional doctrine that adheres to the ideas of the current constitution considers that the activities of the state must be guided, and restricted, by the principle of subsidiarity[492]. Although this principle is not expressly declared in the constitutional text, which has also been part of the discussion[493], its adoption is understood to be contained in Article 1, paragraph three, whose literal tenor is as follows:

Article 1:

"*The State recognizes and protects the intermediate groups through which society organizes and structures itself and guarantees them the necessary autonomy to comply with their own specific purposes*"[494].

Starting from the economic and social ideas that inspired the drafters of the constitution, the principle of subsidiarity is understood in its negative sense. That is, the state must refrain from acting in areas whose coverage has been or can be given to private parties. Some add, additionally, that if the state were to intervene, it

[492] Given that at the time this work is being written the process to adopt a new constitution is beginning, it is unnecessary to go into detail in the discussion whether or not this is its guiding principle. For the purposes of the arguments developed here, it is enough to establish the understanding given by the promoters of the ideas of the current constitution. To understand the state of the discussion at the beginning of the constituent process see: José Francisco García G. and Sergio Verdugo, 'Subsidiariedad: Mitos y Realidades En Torno a Su Teoría y Práctica Constitucional' in Pablo Ortúzar (ed), *Subsidiariedad. Más allá del Estado y del Mercado* (Instituto de Estudios Sociales 2015); Ignacio Covarrubias Cuevas, 'Subsidiariedad y Estado Empresario (Análisis Crítico de La Jurisprudencia Más Relevante)' (2016) 66 *Revista de Derecho Público* 251; Rodrigo Vallejo Garretón, 'La Constitución Económica Chilena: Un Ensayo En (De) Construcción' (2016) 14 *Estudios Constitucionales* 247; Rodrigo Vallejo Garretón and Diego Pardow Lorenzo, 'Derribando Mitos Sobre El Estado Empresario' (135AD) 35; Pablo Ruiz-Tagle, 'Principios Constitucionales Del Estado Empresario' [2000] *Revista de Derecho Público* 49.

[493] Ruiz-Tagle (n 491); Vallejo Garretón and Pardow Lorenzo (n 491).

[494] Constitución Política de la República de Chile v 1. The translation used in this work is the one available at 'Constitute' (*Chile 1990 (rev. 2015)*) <https://www.constituteproject.org/constitution/Chile_2015?lang=en> accessed 23 October 2020.

cannot for this reason cease trying to have that area handed over to private companies as soon as possible.

Although, this interpretation has a strong economic approach, giving rise to the doctrine of the entrepreneurial state, in terms of principle it has had a relevant effect on the possibility of the state's initiatives in social spheres. It has been understood as a limitation upon the state to guarantee social rights, such as health, education, and social security. Indeed, this preponderant role of the principle of subsidiarity, together with the absence of the principle of solidarity, determined a restrictive interpretation of the principle of Common Good, as a constitutionally entrusted task to the state in Article 1, paragraph four[495].

The foundation of this interpretation, held by a majority in the first years of the constitution's validity and strongly contested towards its collapse, was mainly originalist: that is, what the constituents, the Commission of studies of the constitution, would have intended when incorporating this provision. By consulting the minutes containing the discussion of the Commission, it can be deduced that the will of the constituent was to limit the action of the state in areas of private activity as much as possible.

[495] [Art. 1. Paragraph 4]*The State is at the service of the human person and its goal is to promote the common good, for which it must contribute to create the social conditions which may allow each and every one of the members of the national community to achieve their greatest possible spiritual and material fulfilment, with full respect for the rights and guaranties established by this Constitutions*.

This view is reinforced by the teleological and systematic perspective of this principle: the first, relates to the purpose pursued by the constituent, and the second relating to the internal coherence of the entire text based on that purpose. Since the decision to incorporate it in the aforementioned terms is intended to give rise to a type of society where the state does not intervene, or if do it, it must be as little as possible, its application implies interpreting all other constitutional norms in a sense consistent with that purpose. It is precise because of this last argument that the doctrines of the economic constitution, economic public order, and the entrepreneurial state were developed.

The economic constitution

The doctrine of the economic constitution is a way of systematically understanding the constitutional provisions, as they relate to economic activity. They postulate this as a constitution within the constitution. The purpose of the economic constitution is to guarantee economic public order[496], that is, try to maintain conditions that allow a neo-liberal economic regime, whereby the private sector can develop their activities with the least intervention of the state. Therefore, the doctrine of the entrepreneurial state is proposed, which establishes the conditions under which this minimal intervention of the state would not violate the economic constitution.

[496] Esteban Pereira Fredes, 'Orden Público Económico: Una Propuesta de Conceptualización' (2008) 13 Derecho y Humanidades 157.

The axis of these doctrines is structured from the relationship between the state's abstention and the right to free economic initiative, and non-discrimination in the exercise of that freedom. This is regulated in numbers 21 and 22 of article 19:

Article 19: *The Constitution guarantees all persons:*

*No. 21 The right to develop any economic activity that is not contrary to morality, public order, or national security, respecting the laws that govern it.*

*The State and its bodies may develop entrepreneurial activities or participate in them only if a qualified quorum law authorizes it. In that case, those activities shall be subject to the ordinary legislation applicable to individuals, notwithstanding the exceptions that, for justifiable reasons, the law establishes, which shall be, likewise, of qualified quorum.*

*No. 22 The non-arbitrary discrimination that the State and its bodies must give in economic matters.*

*Only by virtue of a law, and provided that it does not mean that discrimination, direct or indirect benefits in favour of any sector, activity or geographical zone may be authorized, or special charges that affect one or the others may be established. In the case of franchises or indirect benefits, the estimated cost of these shall be included annually in the Budget Law*;

The norm provided for in Article 19, number 21 expressly establishes the individual freedom to develop any economic activity, within the limits described therein. At the

same time, according to the second paragraph, the state appears restricted from carrying out this type of activity. It is a restriction since it accepts the hypothesis of participation if it is approved by a qualified quorum law. This means, in accordance with article 66, paragraph three, an absolute majority of senators and deputies in office. Although supra-majority quorums are a common part of constitutional technique, this provision subjects possible state action through public policy to a dual veto power possibility. The first is to reach the expected majority. The second is that it is enough with the absence of parliamentarians for it to operate as a rejection.

When these types of devices permanently block the initiatives considered valuable by those who must obey them, they not only generate discomfort, but also deprive the rules and procedures of their legitimacy. This would be the case, I argue, where the reiteration of disapproval on the part of the parliamentarians could be redirected to deliberation.

The exceptional character of state action is reinforced by the mandate of Article 19, number 22 referred to above. In effect, the non-discrimination rule has been interpreted in practice, as a non-intervention mandate, whose scope includes its regulatory function. As a result, the laws that generally seek to regulate certain productive sectors, or provide the supervisory bodies with more effective tools, have been rejected by the constitutional court. This happened with a reform that sought to prohibit education as a lucrative activity, among other relevant causes[497].

[497] Atria, Salgado and Wilenmann (n 59) 194.

What is important to note is that these rules, which are an expression of a specific way of understanding the economy and the role of the state in relation to it, are constitutionally imposed and protected. This is the case, even though the hegemony of these rules can be disputed, both by the context in which they were adopted, and by the type of society to which they gave rise. That is, a society where the only way to reverse the discontent was a massive mobilization which caused the entire iron cage to collapse.

## The unchangeable militancy

All constitutions have ruled whose modification is more difficult than for ordinary laws, and the Chilean constitution of 1980 is no exception. The problem emerges when the system of rules to amend it is designed precisely to prevent its amendment; or better yet, to prevent its amendment on important matters for old political hegemonies. This purpose was expressly stated by Jaime Guzman, a constitutionalist with prominent influence on the dictation of the current constitutional text, when he said "if the opponents were to rule, they would be constrained to follow an action not so different from the one that one would yearn for, because - worth the metaphor - the range of alternatives that the pitch in fact imposes on those who play on it, is sufficiently reduced to make the opposite extremely difficult"[498]. In fact,

[498] Jaime Guzmán, "El Camino Político", *Realidad* 7 (1979) 19. Cited by Fernando Atria, *La Constitución Tramposa* (LOM 2011) 35.

because it was extremely difficult to do something different, the constitution collapsed.

This purpose can be clearly identified in the relationship between the composition of the parliament provided for by the constitutional text, and the quorums that protect the rules that regulate important aspects of neoliberal doctrine[499]. The first, mainly[500] through the appointed senators and the binomial electoral system. The second is through a series of supra-majority quorums, to change laws.

Two precautions should be taken into consideration when starting this section. The first is relative to the moment in which this text is written. After the events that began in October 2019 and the October 2020 referendum, it seems indisputable that the institutions in charge of endowing political decisions with legitimacy had failed. Given this, the illustrative purpose of this section must be highlighted. The present focus is on describing which institutions failed, and why. This distinction is relevant, since the purpose of this work is to show that institutions and procedures which fail to give legitimacy to decisions activate the right to resist, not to establish what type of institution would not fail.

[499] Daniel Pastor, 'Origins of the Chilean Binominal System' (2004) XXIV Revista de Ciencia Política 38, 42.

[500] Other authoritarian devices were incorporated into the original constitutional text and progressively removed. Among them were the prohibition of parties with ideas related to class struggle, the function of guarantor handed over to the National Security Council (where the armed representation was greater than the civilian). These will not be treated, since the most relevant for this work are those related to representation.

The second is with respect to the institutions chosen for evaluation. The right to resist is activated for political reasons, and it is bodies of this type that must react. This generally excludes the judicial apparatus. It is for this reason that I review the composition of the representative bodies and the constitutional limits so that they adequately fulfil their task, leaving out the role of the Constitutional Court.

Composition of parliament: Designated senators

Designated Senators were introduced to the 1980 constitution in Article 45 and were in force until the 2005 reform. The original provision contemplated the appointment of nine seats in the Senate, plus the right of former presidents to be lifelong senators. Along with the twenty-six senators elected by electoral means, the following were added: two former ministers of the Supreme Court, chosen by this same Court; a former Comptroller of the Republic, also elected by the Supreme Court; a former Commander in Chief of the Army, one from the Air Force, one from the Navy, and one from the Police (Carabineros), elected by the National Security Council. Finally, a former University Chancellor (Rector)m and a former Minister of State, both appointed by the President of the Republic.

The formula of designated, or institutional, senators was a novelty in the Chilean constitutional tradition. Although in the constitution of 1833 the election of senators was given to electors designated by the deputies, from 1925 their election was by popular vote. The justification for incorporating this body of senators was to give to Senate a supra-political character. Through the incorporation of people with proven

track records of public service, it was argued, the president could be offered a space closer to the council than to political competition. This was also the reason for them to be appointed by different constitutional bodies.

Regardless of whether it is desirable for a body of this nature to have legislative powers, in fact this provision operated as a control over political reforms, leaving the possibility of making relevant political decisions outside the democratic scope of representation. Since the Chilean parliament is bicameral, to have undemocratic control of one of these chambers was, in practice, to have control of the parliament. This becomes critical if it is considered that the most important reforms require a majority in both houses. Thus, since a third of the members of the Senate were outside of electoral control, the reforms requiring that quorum were independent of the voters during the first fifteen years of return to democracy.

Additionally, along with being an elitist institution that acts as an obstacle to adequate political representation, designated senators had a symbolic charge that discredited the parliament and democracy itself. The fact that parliament could be made up of those who had suppressed it for seventeen years, among them, the dictator himself with the status of lifetime senator, was aggressive for a significant part of the population. In fact, the exclusion of these senators was closely linked to the fact that as of that year, those who would begin to be designated for these quotas would cease to exercise a majority in favour of the ideas adopted by the dictatorship.

Binominal electoral system

The binominal system was a model for the allocation of parliamentary seats, whose purpose was to guarantee quotas for under-represented lists, even if other candidates obtained a larger vote. This system required that there be two seats per electoral district and forced the creation of lists with more than one candidate. The ballots of the candidates on each list were added together, resulting in the election of the candidate with the highest vote on each list, unless one list manages to duplicate the vote of the other. In this way, even when the two candidates on a list have the highest majorities, if they fail to double, the one with the fewest votes is left out.

This can be illustrated with the case of the election of senators for constituency 7 in eastern Santiago in 1989[501]. In this election, two lists competed: "Concertación" (left wing) and "Democracia y Pogreso" (right wing). The candidates were Zaldívar and Lagos, and Guzmán and Otero, respectively. The election result yielded the following results: Zaldívar 408,227 votes (31.3%), and Lagos 399,721 votes (30.6%), obtaining 61% of the preferences as a list. On the other list, Guzmán obtained 224,396 votes (17%) and Otero 199,856 votes (15.3%), receiving 32.5% of the preferences. Since the first list failed to duplicate the second, the seats were assigned to the most voted candidates on each list: Zaldívar and Guzmán, leaving out Lagos, who had almost twice the ballots of Guzmán.

[501] This case of study in Pastor (n 498) 47.

It is striking, as Pastor points out, that this system was not contemplated in the first version of the Organic Law on Elections issued by the Junta on May 6, 1988, but this specific rule was incorporated in October after they lost the plebiscite[502]. This means that after knowing that from now on the dictatorship's supporters will be a minority, they introduced a distortion to the representation that allowed them to increase their power; this, in a model that, additionally, did not establish limits for re-election.

The consequences of this distortion, which was only replaced by D'Hondt's proportional model in 2017, not only affected legislative activity, but also created bureaucratic practices in political parties. In fact, the system made it possible for candidates to have their quotas almost guaranteed, so that the parties chose who to appoint without paying much attention to the opinion of the voters. Additionally, smaller, or regional parties were permanently excluded. Consequently, the representation of the parliament was low and elitist. Illustrative of this loss of representativeness was its position in the face of the events from October 2019, and the massive vote in favour of the constituent body being made up of people elected for it, and not by representatives in office.

Supra-majoritarian quorums and representatives' blindness

A final reason for disputing the legitimacy of the current constitution is the supra-majoritarian laws which it establishes. It is argued that through them it has been

[502] ibid 44.

possible to maintain the social and political system designed by the dictatorship, without being able to modify it substantially. Although this argument is correct, it is insufficient. The design of the institutions, including the regulatory statute, makes it very difficult for changes to be implemented. But the practices of the representatives should not be overlooked. This is what here I called institutional blindness. Indeed, while it is true that the representatives were subject to and in a certain sense bound by rules of very difficult reform, it is also true that the institutional system allowed them to argue, at the time of the collapse, that they did not see it coming.

In view of the above, the analysis of the supra-majority rules must be carried out not only from the way in which the political parties or bodies counter-balance power, but more decisively, how they respond to the individuals who must endow them with legitimacy. In other words, what made the constitution collapse is not the existence of rules that are difficult to modify by themselves, but rather that when challenged as to its legitimacy, the political process does not pay attention to the people subjected to them, until the institutions are unable to contain the malaise.

To explain the above, article 5 of the current constitution can be used as a starting point:

Article 5:

*The sovereignty resides essentially in the Nation. It is exercised by the people through plebiscites and periodic elections and, also, by the authorities that this Constitution*

*establishes. No segment of the people or any individual may claim its exercise to himself*.

In view of this provision, one way of explaining what was happening in Chile, and what broke out in October 2019, is that the principle contained in this provision defied the rules set forth therein. Regardless of the discussion of who is the people and who is the nation, it can be argued that the principle of sovereignty establishes that the legitimacy of the rules depends on who must obey them. Then it adds that this is exercised, as a rule, through plebiscites, elections, and representatives.

Understood in this way, what happened in Chile was that those endowed with the principle of sovereignty challenged the legitimacy of the rules set for its exercise. Neither plebiscites, periodic elections, nor the authorities established by the constitution managed to fulfil their purpose of giving legitimacy to the authority of the state.

Regarding plebiscites, there is no possible analysis since the regulation foreseen for their convocation was never used. In effect, until the November 2019 reform which created the procedure to adopt the new constitution, the only plebiscite provided for by the current constitution was foreseen in art. 128. Here power is given to the president to call a plebiscite, if both houses insist on a constitutional reform that had been rejected in whole or in part for presidential promulgation. Additionally, a rule that makes the bias of the constitution especially noticeable, Article 15 provides that any other call for both plebiscites and elections is expressly prohibited. That is, the

constitution is designed to balance powers between political parties and state organs, but it diminishes, if not expressly excludes, the importance of individuals as a part of it.

With respect to the problems presented by the electoral system, both the distortions that were put into representation, as well as the practices to which these distortions gave rise, may be reasons to explain its failure. These distortions can also be understood as a way of making the protection of the supra-majority quorums even stronger, since in practice, it prevented them from being configured by electoral means. However, that single reference to the power distributed among the institutions does not account for the most serious problem: the exclusion of devices that redirect the discussion to the sovereign in the case of disagreement between these bodies.

The protesters' claim, in the first place, concerns not being sufficiently considered in decision-making, despite their having made their discomfort known for a long time. A first explanation may be that the super-majority rules prevented the representatives, who saw what was happening, from acting in a timely manner. A second, is that the constitution was designed to exclude the voice of individuals, unless for the formality of voting periodically. This exclusion creates conditions for non-institutional political actions.

From this point of view, then, the problem with the constitution is not that it has supra-majoritarian rules. The problem is that when any rule is challenged, the

constitution does not provide devices that give voice to those who have to legitimize its rules. So, the challenge facing constitutional democracy is not just to improve the political party system, or have more flexible rules, but to adapt to a type of society where institutional solutions that elitist results are destined to collapse.

In this sense, Verdugo[503] is right when he points out that the problem of the constitution cannot be reduced to establishing supra-majority laws. That is ultimately the task of the constitutions, and it will be necessary to discuss their convenience or not, regarding what matters. Where his analysis goes wrong is by establishing too rapidly a relationship between the existence of these types of rules and legal and political stability.

In effect, what gives stability to the rules, whatever their nature, is that they are endowed with legitimacy by those who will obey them. In turn, the way to give legitimacy to any decision of the political power is for those who will have to obey it to participate in its deliberation. In this case, if the rule is one of those whose modification is more difficult, there is even more reason for it to be subjected to a higher standard of legitimation. Otherwise, what is achieved is a democracy where people are reduced to protecting themselves from a rigid state, no longer recognized as those who must decide what rights they have, and under what conditions. Consequently, stability is a fiction which will sooner or later it is made evident through non-institutional collective political actions.

[503] Sergio Verdugo, 'The Justificacion of the Amove Moyority Rules of a Quorum of Constitutional Organic Acts' (2012) XXXiX *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso* 295.

## Constitution as an Iron Cage

Charles Taylor adopts the image of the iron cage, in terms previously stated by Marx and Weber, to describe the individual's powerlessness in facing the power of the market and the state. To the extent that both areas of social life are governed by instrumental reason, promoting fragmented and atomized societies, every effort to reform them falls into "[t]he mills of democratic politics [which] ineluctably grind such small islands of resistance into powder"[504].

Taylor adds that this hegemony of instrumental reason ends up imposing what Tocqueville called "soft despotism"[505]. This is so, because under the guise of democratic political forms, an order is imposed and maintained which cannot be modified by popular will. Nevertheless, Taylor's diagnosis is not pessimistic. On the contrary, he argues that despite everything freedom is not equal to zero[506]. In human beings there have always been nuclei of resistance to protect it. This would be the case, for example, of non-institutional political actions, such as those which act in defence of the environment. In these, he explains, a new type of political action can be recognized, which can amend, transversally, the paradigm of modern instrumental reasoning[507].

[504] Charles Taylor, *The Malaise of Modernity* (House of Anansi Press 1991) 150.
[505] Ibid. 22
[506] Ibid. 20
[507] Ibid. 150

What Taylor states as a critical position within moral philosophy, appears in Moulián's terms as a social legal fact which describes Chile in 1997. According to him, after seven years after the return to democracy, Chilean society was living in an iron cage because the constitutional institutions and the party's political model enforced during the dictatorship, were still guaranteeing the neoliberal order imposed at that time. That, even if most people wished to change it.

In a similar way to the "soft despotism", referred to by Taylor, Moulián argues that as result the Chilean population is living under "protected democracy"[508]. This expression, which was frequently used during the dictatorship, especially after the enforcement of the constitution in 1980, refers to the ideal of political stability. It tends to create conditions so that democratic discussion does not influence, much less alter, the government's decisions. Thus, the argument which up to 1990 had been used to impede democratic dialogue and changes, was used from that year on to protect the neoliberal idea of social order and its development.

The iron cage institutional structure described by Moulián remained in force until the constitutional collapse in 2019. But to explain its failure, it is not even necessary to have a critical opinion on the neoliberal model, or to appeal to the spurious constitutional origin. Undoubtedly both these aspects are relevant; but the decisive factor was that the constitution prevented its own reform, even when the people called for it. In other words, the fact that neoliberal ideological contents could not be

[508] Moulian (n 442) 47.

modified by the amendment processes provided for the constitution, made its adoption under dictatorship more relevant, and the repudiation of the whole constitution became more intense. The iron cage became visible not so much because of what it contained, but because of its preventing change when there was a purpose to do so.

This distinction between illegitimacy of origin, content, and amendment procedures, helps the argument that the social uprising of October 2019 was the exercise of the right to resist. The legitimacy of the constitutional provisions that regulated the Chilean social, political, and economic order began to be questioned from the early 2000s. The failure of the means to correct it, including the constitutional reform of 2005, which did not substantively alter the imposed order, merely increased the illegitimacy of the amendment processes.

It is this last aspect that ends up activating the right to resist and, consequently, making the call to deliberation the only way to resolve the political legitimacy crisis. The prolongation of the demonstrations, their massiveness and, in some cases, the increase in intensity in the repertoire of protest, together with the lack of legitimacy of the institutional channels, forced a pre-institutional agreement, to institutionally create conditions to deliberate a new Constitution. This pre-institutional agreement, called the "Agreement for Peace and New Constitution"[509], was institutionalized in

[509] Various, 'Acuerdo Por La Paz y La Nueva Constitución' <https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo_por_la_Paz.pdf> accessed 2 May 2021.

Parliament through a constitutional amendment which created the devices for adopting a new constitution.

To explain the decisive role of the failure of the institutional devices to manage political demands, it is illustrative to consider the characteristics proposed by Suarez, in explaining why the Chilean constitution of 1980 was an iron cage. In his detailed study on the constitutional dogmatics that inspired the 1980 text[510], he points to five characteristics:

1. The previous existence of an autocratic, totalitarian, or authoritarian regime.
2. The existence of a constitution that has had to be accepted as a lesser evil than a previous regime with a tendency to maintain its principles foundational in time.
3. The existence of a democratic transition pact, in which policies agree to are in a political and legal situation unequal.
4. The acceptance, by the originally weaker forces, of the fundamental bases of the previous prevailing constitution.
5. The consolidation of disproportionate counter-majority institutions that are expected to be modified, as the process of transition to democracy is "deepening"[511].

[510] Christian Suárez Crothers, 'La Constitución Como Celda o "Straightjacket Constitution" y La Dogmática Constitucional' (2009) 1 *Revista UNIVERSUM* 248.
[511] ibid 250.

Although this description helps to explain the Chilean constitution in this way, it does not clearly establish when constitutions, in general, are iron cages. This is so, because in his description Suarez appeals to the factual circumstances which surrounded its adoption when the analysis must focus on the institutional result. This does not mean that factual context does not need to be considered; rather, from a normative perspective the analysis should target institutions, and the kind of democracy that constitutional rules give rise to.

Considering the above, the requirements listed by Suárez can be reduced to two: the existence of certain constitutional foundational principles, that is, an ideological or militant content, as provided in (2); and constitutional institutions that prevent them from being subsequently modified, as described in (5). These two elements make up the iron cage; but the second is decisive for the purposes of explaining the right to resist. This is so, because ultimately the content of every constitution is not neutral. In general, the adoption of certain ideas in a constitution implies the exclusion of others. Whether it is adopted by democratic means, or whether it is imposed by a dictator, it is an expression of hegemonic ideas, either by culture or by force.

This leads to the conclusion that the only necessary and sufficient condition to call a constitution an 'iron cage' is to prevent political amendments when its foundational ideological hegemony is lost. The other characteristics may offer good reasons to explain its lack of legitimacy, and the need to modify it. However, the institutional limits imposed to protect its ideological position, whatever it may be, are what causes its eventual collapse. Likewise, individuals have the right to resist, in this case

constitutional rules, when these prevent them from adopting the rights and institutions that they consider, in due course, appropriate to obey. This right to resist, again for this case, means calling for deliberation on both things: the contents of the constitution, and, consequently, the means of amendment from now on.

The deeper issue at this point is how the relationship between the constitution and democracy is mediated. Every constitution is a decision made in the present, which intends to bind, by strong rules, the behaviour of the individuals of the future. For this very reason procedures to amend those rules should also be considered, when the individuals of the future, where appropriate, consider them illegitimate.

When these procedures fail, the disobedience perspective on the right to resist would impose the duty to obey, to the extent that they harm the individual. On the other hand, the deliberative perspective, as defended here, argues that it is enough that the claim of illegitimacy has not been persistently heard by the ruler, to raise the right to resist and call for deliberation. In fact, the Chilean case shows that forcing individuals to obey only intensified resistance and postpone a deliberative exit, with the serious risk that the people who claim will be irreparably damaged.

In addition to this institutional perspective, it is necessary to observe the behaviour of political representatives. Indeed, as Moulián explains, the iron cage is not configured exclusively by the rules established in the constitution, but also by the practices to which it gives rise.

One of the vices that can affect political practice is the bureaucratization of representatives. Although this is not immediately attributable to constitutional rules, it is the representatives' adaptation to the rules that determines their practices and, in the medium or long term, shapes the political culture. The most eloquent example of the failure of representation inside the iron cage is the reaction of the elites in the face of the social uprising. Indeed, when Chilean cities were full of people claiming, they commented in their defence that "we did not see it coming"[512]. Thus, the constitution as an iron cage, consists of institutions that allow representatives to claim ignorance regarding the claims of the people, to such an extent that they only become aware of them when the constitution has collapsed.

Finally, the Chilean constitution of 1980 presents a curious paradox: the collapse of the constitution is due to the success of its devices which were expressly designed to prevent substantive changes to it. That is, from the internal perspective of the constituent, its failure was due to its success. This paradox, as well as showing that it is a particularly strong iron cage, explains why the only alternative is to adopt a new constitution. The intensity of the social impact produced by the ideological options which the current constitution adopts, together with the institutional design to protect it, make correction practically impossible. In addition, the memories with

[512] This expression became topical after a government minister expressed it through the media and it was later used by different political actors, including intellectuals. See: https://confidencial.com.ni/santiago-bajo-sitio/; https://www.24horas.cl/programas/estadonacional/karla-rubilar-no-vimos-venir-que-la-rabia-era-acumulada-y-que-tenia-sustento-3701028. Perhaps this point can be argued from the doctrine of wilful blindness.

which it carries from its origin make the fact that its total change was approved becomes understandable and necessary.

## Conclusions

In this chapter I analysed the origins of the current Chilean constitution, its ideological content, and the reasons for its difficult amendment. From the above I argued why it can be understood as an iron cage. In this regard, I argued that the main reason for its collapse is its institutional design, which, in practice, prevented it from being corrected in a timely manner. Paradoxically, its successful design for the prevention of profound transformations was what led to its failure.

This argument allows me to advance the illustration of the role played by the right in resisting in the face of ineffective political reform procedures. The persistent inability of the political system to take social demands seriously caused the accumulation of discontent that led individuals to resist. Once institutional procedures lost legitimacy, non-institutional collective actions to express disagreement increased. At this point, the only possible political way out was to provide a different deliberative forum to return to discussing the constitution.

Seen this way, the Chilean case is shown as a relevant example of the situation in which the right to resist operates, and as will be seen in the next chapter, the deliberative way of reacting to its exercise. Although this case illustrates a situation in which the general constitutional system is pushed to the limit, it can well be argued

that the same resistance-deliberation structure can be applied to situations of a smaller magnitude, or in specific territories within the state. Indeed, any rule or public policy that generates persistent disagreements among those who must obey it and whose correction procedure fails, may eventually be resisted, and eventually deliberated.

# CHAPTER IX

## Chile : From resistance to deliberation

Throughout this work I have argued for a deliberative conception of the right to resist. I have kept that this perspective would allow non-institutional collective actions to be mediated through devices created to address disagreements and re-legitimize political power. My purpose in this chapter is to illustrate this process from resistance to deliberation, by observing the case of Chile from October 2019 to date.

To present the above, following the stages of this process described in chapter VII, I divided this chapter into four sections. In section I will describe the non-institutional moment, what was between October 18, 2019, when the uprising took place, and November 15, 2019, when the Agreement for Peace and the new Constitution was signed. In Section II I will analyse the pre-institutional moment based on a study of the aforementioned Agreement and the work of the panel of experts to which it gave rise. In section III I will examine the constitutional amendment that regulate the process, particularly the incorporation of groups which were normally excluded or

underrepresented groups are explained, namely: independents, women, and indigenous peoples. In Section IV I will describe current constituent deliberative process under way and the steps that still come at the time of finishing writing this work. I have decided to make some detailed descriptions throughout this chapter. This allows to observe in concrete people and facts, what I have previously described in a theoretical way.

## Non-institutional moment: social claim

Seen only as an event, the non-institutional moment of the social demands raised in Chile would have to be framed between October 18 and November 15, 2019. However, focusing attention on this short period is insufficient for understanding the magnitude of the crisis. Neither the increase in the fare of the capital's subway ticket, which started the mobilizations, nor the ability to convene the students who carried them out, are able to explain the massive protests, mostly peaceful, throughout the whole country.

The foregoing calls for even greater attention, if one considers that Chile had experienced thirty years of almost uninterrupted economic boom and political stability[513]. Despite being one of the countries with the most unequal income distribution, the most disadvantaged groups had seen a considerable improvement in their quality of life, especially in relation to preceding generations. Increased

[513] Corporación Latinobarómetro, 'Informe Chile 2020' (2020) 9.

access to higher education, quantitative improvement in the quality of housing, and higher consumption expectations, allowed the president to claim, a few weeks before the uprising, that Chile was an oasis in the region[514]. However, within a few days this optimism disappeared like a mirage. Burning subway stations, crowds in the streets, and the violent reaction of the police against protestors, transformed the landscape of the country.

More than a year after these events, various essays have been written to explain it[515]. Perhaps the only undisputed fact is that political power was unable to redirect social demands through common institutional channels. This was, eventually, what created the conditions to approach the crisis in a totally new way within the political history of Chile: by calling to citizens to deliberate on the constitution[516].

## Event background

[514] Angélica Baeza, 'Piñera Asegura Que "En Medio de Esta América Latina Convulsionada, Chile Es Un Verdadero Oasis Con Una Democracia Estable".' *Diario La Tercera* (8 October 2019) <https://www.latercera.com/politica/noticia/pinera-asegura-medio-esta-america-latina-convulsionada-chile-verdadero-oasis-una-democracia-estable/851913/>.

[515] Eugenio Tironi, *El Desborde. Vislumbres y Aprendizajes Del 18-O* (ebook, Planta 2020); Alberto Mayol, *Big Bang. Estallido Social 2019. Modelo Derrumbado - Sociedad Rota - Política Inútil* (ebook, Catalonia 2019); Hassan Akram, *El Estallido. ¿Por Qué? ¿Hacia Dónde?* (ebook, El Desconcieto 2020); Benjamín Ugalde, Felipe Schwember and Valentina Verbal (eds), *El Octubre Chileno. Reflexiones Sobre Democracia y Libertad* (ebook, Democracia y Libertad 2020); Gloria De la Fuente and Danae Mlynarz (eds), *El Pueblo En Movimiento. Del Malestar al Estallido* (ebook, Catalonia 2020); Mario Garcés Durán, *Estallido Social y Nueva Constitución Para Chile* (ebook, LOM 2020); Fuentes S. (n 1); Eduardo Cavieres Figueroa, *Octubre 2019. Contextos y Responsabilidades Políticas y Sociales.(1998-219 y Más...)* (ebook, Ediciones Universitarias de Valparaíso 2020); Carlos Ruiz Encina, *Octubre Chileno. La Irrupción de Un Nuevo Pueblo* (ebook, Random House Mondadori 2020); Hugo E Herrera, *Octubre En Chile. Acontecimiento y Comprensión Política: Hacia Un Republicanismo Popular* (ebook, Kantankura 2019); Peña (n 420).

[516] In Chile, however, there were attempts at self-convened constituent assemblies that did not have the support of the governments at the time and did not prosper. See: Gabriel Salazar V., *Del Poder Constituyente de Asalariados e Intelectuales (Chile, Siglos XX y XXI)* (LOM 2009).

From a social point of view, the unrest accumulated in the Chilean population which explains the events as of October 2019 responds to at least three reasons, closely related to each other. The first, and more general, is the distancing of the political class from social demands. The second, the loss of legitimacy of political institutions due to corruption cases and the way in which they were addressed. The third, significant, although less relevant than the previous ones, is related to the way the authorities referred to the fundamental needs of the population. Each of these will be reviewed in what follows.

*Distance between social actors and the political class.*

From a certain point of view, the return to democracy in Chile was due to the coordinated action of social movements and the political class[517]. While the former exerted pressure in the streets, the latter negotiated institutional exits. This lasted from 1983, when the national days of protest began, had a milestone in 1985, when the pact to call a plebiscite by 1988 was signed, and culminated with the democratic presidential election in 1990.

However, late in the return to democracy, called the transition period, this alliance begins to deteriorate. The distance between social movements and the political class was expressed in the decrease in electoral participation, while social protest

[517] Manuel Antonio Garretón M., 'La Ruptura Entre Política y Sociedad. Una Introducción' in Manuel Antonio Garretón M. (ed), *La gran ruptura* (LOM 2016) 16. See also: Manuel Antonio Garretón, "Chile despertó: antecedentes y evolución del estallido social en Chile", in De la Fuente and Mlynarz (n 514) 54–55.

increased[518]. This meant, among other things, that people were not neglecting their social or political concerns, but rather that their distrust in existing institutional framework progressively increased

By the year 2010, various social movements were organized in Chile, unrelated to the representations of the political parties. Among the most prominent were the movements for the rights of the LGTBI+ community, the feminist movement, a movement against the pension system called no + AFP and environmental movements, especially for the protection of water. There were also attempts at territorial control by individuals, the most important cases being Aysén[519] and Freirina[520]. In the first, citizens blockaded the city and took control through a citizen assembly. In the second, they were organized in parallel to the current institutional framework, so as to protect the environment.

Two of these movements in particular allow to illustrate the failure of institutional channels and the accumulation of discontent, due to their duration in time and their symbolic force: the Mapuche people since 1997, and the student protest from 2006, especially since 2011. In both instances a break is observed, between those who raise social demands, and the capacity of the representatives to mediate their claims. In

[518] Axel Callís Rodríguez, 'La Participación Electoral En La Crisis de La Representación' in Gloria De la Fuente and Danae Mlynarz (eds), *El Pueblo en Movimiento. Del malestar al estallido* (Catalonia 2020) 407–408.
[519] José Luis M Valdivia, Daniel Fauré and Javier Karmy, *La Rebelión de La Patagonia. Imágenes y Testimonios Del Levantamiento Popular En La Región de Aysén (Febrero-Marzo) Del 2012)* (Editorial Quimantú 2014).
[520] Cory Duarte-Hidalgo and others, 'Acción Colectiva, Antagonismos y Resistencia Comunitaria En El Conflicto Socio-Territorial de Freirina' (2020) 22 Revista Eleuthera 170.

both it is also observed that successive governments decide to impose the obligation to obey, instead of opening spaces for authentic deliberation on what was demanded.

*The social movement of the Mapuche people*

In its recent history, the distancing and later conflict between Mapuche communities and the current state's institutions dates back to 1997, when the first burning of trucks took place in the town of Lumaco[521]. This act constituted the first direct action of the Mapuche communities, organized around the Coordinadora Arauco Malleco (CAM), and expressly rejecting the institutional channels established in previous years.

Indeed, in 1989, the then presidential candidate Patricio Aylwin met in Nueva Imperial to ask the Mapuche communities for their support. The agreement was that in his mandate a new institutional framework would be created for indigenous peoples. And so he did. In 1990, once invested as president, he dictated Supreme Decree N.30, which creates the Special Commission for Indigenous Peoples[522] (CEPI, for its acronym in Spanish). Eventually, this Commission presented three proposals: the creation of National Corporation for Indigenous Development (CONADI, by its acronym in Spanish), the adoption of ILO Indigenous and Tribal Peoples Convention

[521] Fernando Pairicán Padilla, 'Lumaco: La Cristalización Del Movimiento Autodeterminista Mapuche' (2013) 17 Revista de Historia Social y de las Mentalidades 35.
[522] Decreto Supremo 30. Crea Comisión Especial de Pueblos Originarios 1990.

N.169, and a constitutional amendment to recognize indigenous peoples. Of these, the first was endorsed by Congress, and the Commission was created in 1993. The second had to wait until 2009, and the third never happened under the current constitution.

Once the operation of CONADI started, one of its tasks was to mediate conflicts related to the lands used for forest production, which were claimed by the Mapuche people. Although at the beginning the talks seemed to prosper, by 1994 the tensions between this organization and the central government increased. The claim was that through various political manoeuvres, the government, instead to support restitution of land and protection of its natural resources, was protecting the interests of the timber and electrical industry.

The decisive event was the authorization for the construction of a hydroelectric plant in Ralco[523] in 1995. This, despite its being in ancestral Mapuche territory, expressly protected by the indigenous law in force. The repeated failure of institutional efforts weakened the credibility of CONADI and its members, who ended up resigning from their positions. In these circumstances, some Mapuche organizations had by 1997 become autonomous from the institutional channels, and began direct action. The first of these was the arson attack in Lumaco.

[523] Federación Internacional de los Derechos Humanos, 'Informe Mision Internacional de Investigación. Chile. La Otra Transición Chilena: Derechos Del PUeblo Mapuche, Política Penal y Protesta Social En Un Estado Democrático.' 8 <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CHL/INT_CCPR_NGO_CHL_89_8344_E.pdf>.

In subsequent years, despite governmental and international commissions which made suggestions for the recognition of indigenous peoples[524], successive governments increased the number of militarized police, causing a growing increase in Mapuche resistance actions[525]. The insistent abuses and criminalization of this people led to them becoming an icon of the resistance. In the years prior to the uprising of 2019, two events were decisive. The first was the discovery of a police operation to fabricate evidence and falsely accuse Mapuche community members[526]. The second was the murder of Camilo Catrillanca by the police, and the attempt to cover it up by political actors and the police themselves[527]. Eventually, in protests beginning in October the Wenufoye (Mapuche flag) was raised in most demonstrations, not only in the territories where they live, but in protests across the whole country[528].

*The students' social movement*

[524] Among the most prominent are: "PNUD, Desarrollo Humano en Chile. Nosotros los chilenos: un desafío cultural" (2002); Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, Sr. i Stavenhagen, presentado de conformidad con la resolución 2005/56 de la Comisión: Misión Chile. (2003) and "Informe de la Comisión de Verdad Histórica y Nuevo Trato con los Pueblos Indígenas" (2005).

[525] Nicolas Rojas Pedemonte and Omar Miranda, 'Dinámica Sociopolítica Del Conflicto y La Violencia En Territorio Mapuche. Particularidades Históricas de Un Nuevo Ciclo En Las Relaciones Contenciosas' (2015) 30 Revista de Sociología 33.

[526] Nicolás Sepúlveda and Mónica González, '"Operación Huracán": Testimonios y Confesiones Confirman Que Fue Un Montaje.' *CIPER* (13 March 2018) <https://www.ciperchile.cl/2018/03/13/operacion-huracan-testimonios-y-confesiones-confirman-que-todo-fue-un-montaje/>.

[527] Pablo Basadre, 'Muerte de Catrillanca: Así Se Inventó La Versión Falsa de Carabineros' *CIPER* (02 2019) <https://www.ciperchile.cl/2019/02/01/muerte-de-catrillanca-asi-se-invento-la-version-falsa-de-carabineros/>.

[528] Fernando Pairicán Padilla, 'La Bandera Mapuche y La Batalla Por Los Símbolos' *CIPER* (11 2019) <https://www.ciperchile.cl/2019/11/04/la-bandera-mapuche-y-la-batalla-por-los-simbolos/>.

The second case illustrating the failure of institutional procedures to address social demands is that of students. Two milestones of their mobilizations demonstrate this. The first is in 2006, when the students claimed for the Organic Constitutional Law of Education (LOCE, for its acronym in Spanish), which allowed for-profit education. After massive protests, a political negotiation allowed the issuance of a new Organic Law. However, the Constitutional Court declared that prohibiting profit in education was unconstitutional[529] .

The other milestone was the 2011 mobilizations demanding free, public, and quality higher education. The claim originated from the fact that students had to take out a loan to pay for their studies, causing a high level of indebtedness. Unlike as with previous mobilizations, they did not accept that the negotiation be carried out by the elected political representatives, insisting instead on the student representatives negotiating with the executive branch. After lengthy negotiations in the midst of massive protests, guarantees were secured for students who were part of lower-income groups to study at a university if they met a series of requirements. It was also mobilized students who eventually started the protests that would trigger the events from October 2019.

Both movements, Mapuche and student, became icons of the October uprising: the first, as a symbol of a history of resistance against the abuses of political power; the

[529] Fernando Atria, *Derechos Sociales y Educación: Un Nuevo Paradigma de Lo Público* (LOM 2014).

second, as those who were encouraged once again to challenge the government and "awaken" the rest of the citizenry.

Discredit of institutions and lack of sanction for corruption

Another factor explaining the accumulation of unease and the manner in which it ended up being expressed, was the growing discredit of the institutions in the country. Distrust in the government increased from 66% in 2014, to 95% in 2019[530]. Regarding political parties, distrust increased from 92% to 97% in the same period[531]. But this did not only affect political activity. The army went from having 52% of distrust to 75%, while the police had 56% of great confidence and reached 83% of distrust during the same years[532].

The reasons for this are diverse, but cases of corruption, and the way to deal with them, occupy a decisive place. In recent years there have been cases of great public notoriety related to the fraudulent financing of political parties by private companies. To do so, they registered in the accounting ballots for services that were never rendered. Thus, not only did the members of these parties benefit, but the treasury was also defrauded. Despite the seriousness of the events, and the exorbitant

[530] CEP Chile, 'Encuesta CEP. Graficador' (*Encuesta CEP*) <https://www.cepchile.cl/cep/site/edic/base/port/graficador.html> accessed 17 June 2021.
[531] ibid.
[532] ibid.

amounts involved, the vast majority of those implicated went unpunished, or with ridiculous penalties[533].

During this same period, other businessmen were found out who gave guidelines to a group of parliamentarians to adopt a fishing law that favoured them[534]. Again, except for one of those involved who was sanctioned, all the others went unpunished. A similar situation occurred with the armed forces and the police[535]. Deviations of public funds for the private use of their generals were made known, for very high amounts and for a long period of time. There is still no one sanctioned for these crimes.

All these events created an atmosphere of deep suspicion and mistrust. As expressed in the slogan, "Let everyone go", referring to the need to replace not only institutional structures, but also those who are part of them.

Symbolic aggression: contempt as distance from representation.

[533] For example, the case of the owners of a company who, after defrauding the treasury, were sentenced to pay fifty percent of the value of the defrauded amount and attend ethics classes.Paulina Toro, 'Dueños de Penta Deberán Asistir a Clases de Ética' (*La Tercera*, 9 July 2018) <https://www.latercera.com/politica/noticia/duenos-penta-deberan-asistir-clases-etica/237259/>.

[534] Ana María Sanhueza, 'Caso Corpesca: La Empresa Es Condenada Por Soborno y En Exsenador Por Fraude y Cohecho' (*pauta.cl*, dic 2020) <https://www.pauta.cl/politica/orpis-se-salva-de-delito-tributario-pero-no-de-coecho-y-fraude-al-fisco>.

[535] Gabriela Pizarro, 'Corrupción En Carabineros: Las Más de 40 Alertas Que Nadie Quiso Escuchar' (*CIPER*, 16 March 2017) <https://www.ciperchile.cl/2017/03/16/corrupcion-en-carabineros-las-mas-de-40-alertas-que-nadie-quiso-escuchar/>; El Mostrador, 'Mauricio Weibel Estima Que Entre Milicogate y El Pacogate Se Habrían Defraudado $50 Mil Millones' (*El Mostrador*, 9 August 2021) <https://www.elmostrador.cl/dia/2021/08/09/mauricio-weibel-estima-que-entre-milicogate-y-el-pacogate-se-habrian-defraudado-50-mil-millones/>.

A third factor, along with the distancing between social movements and political representatives, and the growing loss of prestige of the institutions, relates to the way the political authorities expressed themselves. Although they do not have a direct relationship with the unfolding of the events, the press picked up the statements of government officers prior to the outbreak, which would have increased the social unrest[536].

The most prominent examples are related to sensitive areas for the population, such as health, feeding and education. As for health, there is the statement of the former undersecretary of healthcare networks. When asked why people had to arrive at the health centres at dawn and then spend long hours waiting to be treated, he commented:

> "Patients always want to go to a medical centres early, some of them, because not only do they go to see the doctor, but it is a social element, a social life"[537]

[536] El Desconcierto, 'Las Iincendiarias Frases Del Gabinete de Piñera Que Detonaron La Crisis Social' *El Desconcierto* (19 October 2012) <https://www.eldesconcierto.cl/nacional/2019/10/19/las-incendiarias-frases-del-gabinete-de-pinera-que-detonaron-la-crisis-social.html>; Rodrigo Retamal, 'Cuando Las Declaraciones Juegan Una Mala Pasada: El Listado de Frases Polémicas de Los Ministros y Subsecretarios de Piñera' *Diario La Tercera* (8 October 2019) <https://www.latercera.com/politica/noticia/gobierno-pinera-frases-polemicas/852188/>; Verónica Marín, 'Bingos, Patines y Otros "Malos Ejemplos": Cuando Las Frases de Ministros Complican a Sus Gobiernos' *Emol.cl* (24 July 2018) <https://www.emol.com/noticias/Nacional/2018/07/24/914384/Mal-ejemplo-Cuando-las-frases-de-los-ministros-complican-a-sus-gobiernos.html>.

[537] Retamal (n 535).

Regarding the increase in the price of the basic food basket, the response of the former economy minister was as follows:

> "For the romantics (...) that the flowers have had a decrease in their price: so those who want to give flowers this month, the flowers have fallen by 3.6% "[538]

Referring to the conditions of the public secondaries schools, the former minister of education commented:

> "It is common to hear groups that protest demanding that the State take care of problems that belong to all of us. Every day I receive complaints from people who want the Ministry to fix the roof of a school that has a leak, or a classroom that has a bad floor. (…) And I wonder, Why don't they have a bingo? Why do I have to go from Santiago to fix the roof of a Gym?".[539]

Both the content of the statements and those presented above, as well as the contempt with which they were said, aroused the anger of protesters. If the living conditions of some protesters were already precarious or abusive, these expressions of ministers of state, all members of the country's economic elite, promoted social discontent and anger.

[538] ibid.
[539] ibid.

The uprising and its political interpretation

The efficient cause of the October events was the mobilization of high school students, due to the increase in the subway ticket in Santiago. On October 4, 2019, the panel of experts that set these rates had announced an increase of 30 Chilean pesos (US $ 0.04)[540], which led to their actions. In protest, secondary students began to evade payment, amid demonstrations at the stations. In response, the government sent the police, who acted excessively in many cases. This confrontation predisposed other people in favour of the students, and these began to evade as well. The slogan was: "evade, do not pay, another way to fight".

By October 17, the repertoire of protest actions sharpened dramatically. Along with the demonstrations in the capital's subway stations, barricades, destruction of public property, and looting began in different cities of the country. People of all ages began to join the students' demonstrations and, largely through social networks, marches were called and slogan "It's not thirty pesos, it's thirty years" was adopted. This in a reference to the thirty years since the return to democracy, and was the phrase that unified the movement at the national level.

On the night of October 18/19, the mobs in the streets and the damage to public spaces reached their critical point. The protesters, instead of retreating, resisted by all means the police officers trying to disperse them. In view of this, the President

[540] Comisión del Alto Comisionado de Naciones Unidas para los Derechos Humanos, 'Informe Sobre La Misión a Chile 30 de Octubre - 22 de Noviembre de 2019.' 6.

declared a constitutional state of emergency. This meant the armed forces taking control of public order, restrictions on freedom of assembly and movement, and a curfew from 6pm.

As of that night, attempts to narratively conduct the crisis began from the different sectors. The government, particularly the president, adopted a belligerent position. In his speech after having declared constitutional state of exception, he added: "we are in war with a powerful enemy, who is willing to use violence without limits"[541]. Although this statement was eventually rejected the next day by the general in charge of state of emergency when said: "I am a happy man, I am not at war with anyone"[542], the outbreak media framing was adopted, installing the idea that the country facing unexpected, fast and very violent events.

One of the reasons for supposing the existence of this enemy, with the sole intention of destroying, was that the Chileans had no reason to be dissatisfied. Indeed, given the economic growth experienced by Chile in recent decades, the only reason that could explain this facts were an internal campaign of the left parties, and the intervention of Chile's allies in the region[543]. In particular, Venezuela was accused of

[541] Juan Pablo Andrews, 'Presidente Piñera:"Estamos En Guerra Contra Un Enemigo Poderoso"' *Diario La Tercera* (20 October 2019) <https://www.latercera.com/politica/noticia/presidente-pinera-estamos-guerra-enemigo-poderoso/870658/>.
[542] Héctor Basoalto, '"La Verdad Es Que No Estoy En Guerra Con Nadie": General Iturriaga Se Desmarca de Dichos Del Presidente Piñera' *Diario La Tercera* (21 October 2019) <https://www.latercera.com/nacional/noticia/la-verdad-no-estoy-guerra-nadie-general-iturriaga-se-desmarca-dichos-del-presidente-pinera/870824/>.
[543] *Lanzamiento Libro 'El Otro: 18 de Octubre 2019' de Luis Larraín* (Directed by Libertad y Desarrollo Chile, 2020) <https://www.youtube.com/watch?v=uSfyS6IB3xE>.

intervening in the country. Thus, seen as a war, the reaction should be to impose force.

Another interpretation, which started from a similar economic premise, proposed by Peña who sustain that the demonstrations were founded in a "generational impulse"[544]. This idea argued that the new generation was dissatisfied, and had received uncritical support from adults who did not dare to set limits on them. Thus, groups had been created which appealed to their own subjectivity as the general sense of justice.

Two other elements complete Peña's analysis[545]: firstly, expectations generated by the President in his campaign regarding the expansion of consumption and well-being; secondly, the fact that this new generation, the most educated in the history of Chile, had not managed to obtain the symbolic recognition which professional titles granted when they were an exclusive matter. The protests were due therefore to impulsive mobs, who lived in *anomie*, unable to reasonably mediate their own expectations. The foregoing would be confirmed by the fact that the causes presented were diverse and dissimilar, with no account or proposals.

[544] *Chile En Crisis: Entrevista al Analísta Político Carlos Peña* (n 420).
[545] Peña (n 420). Herrera holds ideas in a similar sense, but attributes the discontent generated by the uprising to the political influence of sectors of the left, postulating that there would be a "deliberative" line that supposes a people mobilized in that direction. See Herrera (n 514).

A third position, supported by this study, indicates as the cause the institutional crisis and the loss of prestige of the political class as a whole[546]. In response to this situation of uprising because of discontent, the country had to move towards a new social pact, expressed through the adoption of a new constitution. The reasons offered to support the foregoing were of various kinds. It was argued from the sense of abuse felt by a majority of the people. It was argued that it was impossible to correct the situation with the current rules, which, along with being illegitimate, prevented it. The loss of prestige of the political class was argued, and the need to incorporate new actors into the public discussion. All these reasons would be repeated later during the electoral campaign for the constitutional plebiscite, whose result seems to have proved them right.

While this discussion took place, the demonstrations increased in size and in some cases, in violence. The most significant mobilization happened on October 25, when, in a record number of more than a million people, to march through the most important avenue of the capital. In the following days the protests continued, while the complaints of human rights violations by the police and the organization of the protesters increased. Likewise, organized support groups began to be created in the same mobilizations. Among them, the health groups that cared for the injured and affected by tear gas, along with the "front line" charged with defending the protesters from the police, became iconic.

[546] These ideas can be found at De la Fuente and Mlynarz (n 514); Garcés Durán (n 514); Fuentes S. (n 1); Ruiz Encina (n 514); Akram (n 514).

Finally, it is worth highlighting the role that the feminist movement had in social mobilizations, as of November. The collective *Las Tesis* had a performance that was part of a larger work, which, due to the social uprising, had to be suspended. This piece, called "a rapist on your way", denounced the mistreatment of women, particularly by the police. It was finally played in the streets and caused an impact that exceeded Chilean borders, becoming an anthem of feminist resistance around the world. In the case of the Chilean process, it made visible the decisive place that women occupied in the mobilizations, their demands, and the risks that a macho society imposed upon them. It may be supposed that these interventions increased the likelihood of the constituent convention ultimately being composed with gender equality.

### Victims

Between mid-October and the end of November 2019, the most serious human rights violations occurred since Chile returned to democracy[547]. As stated in the reports made by the Chilean Institute of Human Rights (INDH), ratified by the report of the visit of a commission of the United Nations High Commissioner for Human Rights (OHCHR): “These violations include the excessive or unnecessary use of force that resulted in arbitrary deprivation of life and injuries, torture and ill-treatment, sexual violence, and arbitrary detentions”[548].

[547] Instituto Nacional de Derechos Humanos, ‘Informe Anual. Sobre La Situación de Los Derechos Humanos En Chile En El Contexto de La Crisis Social. 17 Octubre - 30 Noviembre 2019’ 5.
[548] Comisión del Alto Comisionado de Naciones Unidas para los Derechos Humanos (n 539) 31.

Although the state's repressive response to the protests occurred throughout the country, the largest number of victims was concentrated in the metropolitan region[549]. Of a total of 11,180 injury victims registered at the end of November, 3,969 correspond to this region[550]. Likewise, of the aforementioned total number of victims, 9 were less than one year old, 1,346 were minors, 8,813 were adults, while there is no information of the age on 740 cases[551]. For its part, the Ministry of Justice reports a total of 2,792 police officers injured in the same period[552].

According to the OHCHR report, 26 people died in the context of the mobilizations starting in October[553]. Of these, 4 were the responsibility of state agents and 1 died in their custody, being declared a suicide; the INDH has filed six homicide complaints against state officials[554]. Within the remaining cases, 12 were investigated as deaths in the context of arson caused by looting, of which 4 there are well-founded suspicions of the participation of security forces. 3 cases of death by bullets, and 2 more attributed to suicide, are being investigated. Finally, 2 whose cause of death was being run over, and 1 due to a heart attack[555].

Regarding very serious injuries caused by state agents, there is 1 case of a person who was left in a vegetative state due to a beating by the police[556]. Among the very

[549] ibid.
[550] Instituto Nacional de Derechos Humanos (n 546) 31.
[551] ibid.
[552] Comisión del Alto Comisionado de Naciones Unidas para los Derechos Humanos (n 539) 13.
[553] ibid 11.
[554] Instituto Nacional de Derechos Humanos (n 546) 27.
[555] Comisión del Alto Comisionado de Naciones Unidas para los Derechos Humanos (n 539) 11.
[556] Instituto Nacional de Derechos Humanos (n 546) 27.

serious injuries there are 51 people wounded by gunshots, 1,554 by pellets, 198 by unidentified firearms, and 180 by small bullets[557]. A practice that was also found was the use of non-lethal weapons by the police to cause eye damage. As of the date of the referred reports, there have been more than 350 cases of eye damage, among them more than 40 with consequences of mutilation of one eye[558]. Two of them, Gustavo Gatica and Fabiola Campillay, were left blind.

Regarding inhuman or degrading treatment, the INDH is currently representing 1,442 cases, of which 603 correspond to torture[559], while 803 are of sexual connotation[560]; among the latter, 27 were committed against children and adolescents[561]. Finally, 1,365 arbitrary arrests have been registered[562].

The facts described and documented above show the possible scope of obstinate permanence in imposing order against non-institutional mobilizations, instead of listening to their demands. This also illustrates, dramatically, the scope of interpreting the right to resist as one that is activated when the state causes unjust damage. Indeed, this case shows the hypothesis, long discussed in this study, that the state only seizes once it has harmed individuals.

[557] Comisión del Alto Comisionado de Naciones Unidas para los Derechos Humanos (n 539) 14.
[558] ibid.
[559] ibid 18.
[560] Instituto Nacional de Derechos Humanos (n 546) 46.
[561] ibid.
[562] ibid 60.

## Pre-institutional moment: political agreement

By the early morning of November 15, 2019, uncertainty was rife in the country. The mobilizations continued in the streets, and the rumour of a possible *coup d'état* spread. The only information available to this date on the days prior to the agreement are those published by a virtual newspaper in October 2020[563]. According to the chronicle recorded there, on the night of November 12, the president would have had three options: send the Army to take control on the streets, reach an agreement with the opposition, or resign.

The same media report that the first option was considered, but the president was dissuaded by the opposition of some ministers, and the refusal of the armed forces to act. The second one was initially regarded as more complicated, but it was the one ultimately chosen, since quitting had been ruled out from the beginning. That same night, therefore, the minister of the interior began to have meetings to reach an agreement that would allow the political exit. The chronicle concludes with the phrase with which the minister opened the meeting with the opposition representatives: "Today for all intents and purposes is September 10, 1973 and it depends on us that tomorrow is not September 11"[564]. This, in reference to the last coup that had taken place in Chile.

[563] Cristian Bofill, 'A Un Año de La Noche Más Tensa de La Crisis de Octubre: El Diálogo de Piñera Con El Jefe Del Ejercito' *Ex-Ante* (12 November 2020) <https://www.ex-ante.cl/https-www-ex-ante-cl-la-noche-mas-tensa-de-la-crisis-de-octubre-el-dialogo-de-pinera-con-el-jefe-del-ejercito/> accessed 9 June 2021.
[564] ibid.

From this moment, the pre-institutional moment had two stages. The first is contained in the Agreement for Peace and the New Constitution. This document sets out the purpose and outlines the procedure. The second is the discussion and proposal of the Panel of Experts. Their responsibility was to find a way to institutionalize the Agreement in legal terms. Additionally, certain limits to deliberation were introduced. This pre-institutional stage finish with the sending of the Panel of Experts' report to be discussed and approved in parliament.

### Agreement for Social Peace and the New Constitution

The Agreement for Social Peace and the New Constitution is a one and a half page document. It has an introductory paragraph and twelve descriptive points in which the fundamental arrangements on the constituent process were established. Finally, there are the signatures of the representatives of ten political parties, of all sectors, and one autonomous deputy.

The opening paragraph of the Agreement is an eloquent description of the situation in the country, and the purpose of the document:

> Given the serious political and social situation in the country, *attended to the mobilization of citizens* and the call made by H.E. President Sebastián Piñera, the undersigned parties have *agreed on an institutional solution* whose

objective is to seek peace and social justice *through an unobjectionable democratic procedure*[565].

By observing the highlighted phrases, it is possible to recognize the passage of resistance to deliberation argued in this work. This is the need to mediate non-institutional collective actions promoted by citizens through a new institutional agreement, which offers democratic guarantees. It is a political pre-institutional agreement, to generate the political conditions that can respond to social demands, in order to restore legitimacy to political power.

Since it is an agreement obtained after long and exhausting negotiations, it resolves all the relevant issues, but in an untidy way. To make it more accessible, I will propose an order will based on the three stages of the procedure adopted.

The first stage corresponds to a referendum, to consult whether or not the public wants to adopt a new constitution and, if so, which body would be in charge of doing it. The date was set for April 2020[566] and the questions to be contained in the ballot were established:

a) Do you want a new Constitution? Approve or Reject

b) What type of body should draft the new Constitution? Mixed Constitutional Convention or Constitutional Convention

[565] Various (n 508). The highlight is mine
[566] ibid N.2.

Regarding the constituent body, two options were proposed. On the one hand, a Mixed Convention, made up of equal parts by parliamentarians in office and by citizens elected for the purpose. On the other, a Constituent Convention, made up entirely of members elected for the purpose.

The second stage considers the election of the members of the constituent body and its operation, if approved. Regarding the election, it is established that it will take place together with municipal and regional elections, following the rules established for the election of deputies. Likewise, it establishes the cessation of public officials who present candidacies to the constituent body, and their inability for one year to run for public office, once their task as a member of the convention has ended.

With respect to the constitutional body's operation, the Agreement established its exclusive competence in the drafting of the constitution, with the prohibition of influencing other organs of the State. It establishes the quorum of its agreements as two-thirds of its members in office and the prohibition of alteration. Additionally, it provides that once the body is constituted, it must dictate its internal operating rules following the said quorum. Finally, as for its term of operation, it is fixed at nine months, with the possibility of extending it once for three months, and that it will dissolve, even if its task were not accomplished.

The third stage is the ratification plebiscite of the constitutional project presented by the constituent body, and the effects if it is approved. Regarding the first, it

establishes that voting will be mandatory for citizens (which was indicated twice), and that it may not be carried out sixty days before or sixty days after another popular vote. Regarding the second, it establishes that the new constitution will come into effect from its promulgation and publication, organically repealing the current constitution.

In addition to setting the procedure in the terms described above, two agreements were established regarding subsequent steps. Firstly, the appointment of a Panel of Experts, of equal composition between the ruling party and the opposition, whose task will be to make the agreement legally operational. Secondly, the commitment that the parliamentarians belonging to the parties that concur with the agreement will approve the necessary reforms to implement it.

### Panel of Experts

In accordance with the provisions of point 10 of the Agreement, on November 26 a panel of experts was formed. It was made up of seven government representatives, and seven from the opposition. Its task was to prepare a draft constitutional amendment which would make technically viable what is contained in the said agreement.

On December 6, 2019, after five discussion sessions, the Panel presented its proposal, with unanimous approval. Along with giving constitutional support and

bequeathing the political agreements of the Agreement, it proposed how to regulate other aspects of the electoral and deliberative process.

In their document called Proposed Text of Constitutional Amendment, they suggest that the current Chapter XV, which deals with constitutional amendment, should be called "Constitutional Amendment and the Procedure to Adopt a New Constitution of the Republic"[567]. It suggests incorporating thirteen articles, Art. 130 to Art. 143, which regulate the process of adoption of a new constitution.

Along with the elements that have already been mentioned as part of the Agreement, suggestions include the following: regulation of the electoral campaign, electoral calendar, inabilities to be a candidate for constituent body, internal structure of the constituent body, salary of the constituents, and a procedural control device, delivered to the Supreme Court.

Article 135

The most noticeable aggregation of the Panel, however, was to establish limits to what the convention can discuss, which were not in the Agreement of November 15. The final paragraph of Article 135 establishes the following:

Art. 135

[567] Mesa Técnica, 'Propuesta de Reforma Constitucional Acuerdo Por La Paz y Nueva Constitución"' <https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_cronograma-3>.

[Final Paragraph] *The text of the New Constitution that is submitted to a plebiscite must respect the character of the Republic of the State of Chile, its democratic regime, the final and enforceable sentences and the international treaties ratified by Chile which are in force*.

The establishment of limits prior to the exercise of constituent power is already problematic, at least theoretically. But this provision becomes even more confusing since its contents are expressly excluded from those that may be appealed through the judicial remedy planned for possible conflicts within the Convention. In effect, article 136, as proposed by the Panel and adopted in the constitutional amendment, establishes a judicial review against the infringement of the rules of procedure, not the contents, which can be presented before the Supreme Court. At the same time, the final paragraph of this article establishes the following:

Article 136

[Final Paragraph] *The claim referred to in this article may not be filed with respect to the final paragraph of article 135 of the Constitution.*

In strictly procedural terms, the situation posed by these articles appears as an example of a contradiction, a typical vice present in the drafting of constitutions in South America. On the one hand, it establishes a limit on the contents that can be debated, then it establishes that the contents cannot be claimed, but only the procedures, so as finally to expressly exclude the limited contents from what can be claimed. In the formal sphere, therefore, it always seems that the rule of non-

intervention in the content triumphs, leaving the rule of content limitation as a symbolic statement or, perhaps as a suggestion.

The interpretation of the content of the provision of Article 135 also presents serious difficulties. These were well recorded in the epistolary discussions in a newspaper, held between various constitutional law professors at the beginning of 2021. The exchange began with a column published by Fermandois under the title "Limits clause: framework and orientation"[568]. He starts his column with the following statement: "In the search for a better Constitution, the Convention has a very open and free pitch, but it cannot change the pitch."[569]

In his opinion, following article 135, these limits would be political and legal. The first is expressed by the need to maintain a republic and a democracy  On the content of both concepts, he says, there would be sufficient agreement in constitutional doctrine and political theory. Regarding the legal limits, he adds that both the international treaties in force and the final judgments are sufficiently detailed, and have sufficient legal force to be imposed as limits to the constituent exercise.

After citing other similar constituent processes as examples, and the need to guarantee legal certainty, he argues that international treaties in particular impose objective limits which the convention cannot transcend. This relates to all current

[568] Arturo Fermandois, 'La Cláusula de Límites: Marco y Orientación' *Diaro El Mercurio* (Chile, 16 January 2021).
[569] The reference to the limits imposed by "the pitch" echoes the phrase of Jaime Guzmán regarding the limits imposed on opponents by the 1980 constitution. See previous chapter.

treaties, concerned with economy, borders and so on, and not only to human rights. Finally, he proposes that, although the constitutional process does not contemplate ways to protect itself in the face these substantive reforms, "surely the rule of law will have suitable ways to repair that which would be an indelible defect of origin in the new Constitution".

The following day, Contreras, Lovera, and Salgado discuss the above arguments[570]. Starting with the supposed limit imposed by international treaties, they clarify that the proper interpretation of the rule of Article 135 is as a statute of competence. This is in accordance with the rule of the principle of non-intervention in the competence of the other organs of the state, as established in the first paragraph of the same Article 135:

> Article 135
>
> [First Paragraph] *The Convention may not intervene or exercise any other function or attribution of other bodies or authorities established in this Constitution or in the laws.*

In this sense, the adequate interpretation is that its content aims to declare that the Convention is prevented from adopting, rejecting or correcting current treaties. They add that this does not prevent the convention adopting decisions which later impose on the new legislature the obligation to correct or terminate Chile's participation in

[570] Pablo Contreras, Domingo Lovera and Constanza Salgado, '¿Cláusula de Límites?' *Diaro El Mercurio* (Chile, 18 January 2021).

certain treaties. They reinforce this argument in a subsequent letter[571], asserting that the international commitments signed by Chile operate as ex-post controls. That is, the convention is free to decide, even considering the legal responsibilities that this decision could raise. However, these are not a limit, but rather a burden that the state should bear for the decision it adopts.

In second place, the same authors point out that the rule of article 136 imposes the absolute prohibition of claiming on the contents established by the Constituent Convention. This is particularly with regard to the provisions of the final paragraph of Article 135. Finally, they add that this is reinforced by the express rule on Article 136, Paragraph 7, which establishes that no court has the competence to hear matters which arise during the work of the Convention, except for the appeal against procedural failures in the Supreme Court. This is in respond to the suggestion that a form of control could be invented, which is not expressly provided for by the established procedure. That would be against the law.

Although Fermandois does not respond to the objections presented above, he does respond to another letter entering the debate whose author is Contesse[572]. In his letter, Contesse shows his surprise at the change of opinion presented by Fermandois. In effect, as he explains, when Fermandois was part of the Panel of Experts, he proposed the bases of the aforementioned Article 135, expressly stating that it is not a limit to the work of the Convention, in session on November the 27th.

[571] Pablo Contreras, Domingo Lovera and Constanza Salgado, 'Cláusula de Límites' *Diaro El Mercurio* (Chile, 21 January 2021).
[572] Jorge Contesse Singh, 'Cláusula de Límites' *Diaro El Mercurio* (Chile, 19 January 2021).

This same idea, adds Contesse, would have been repeated by Fermandois in the December 2 session. In addition, if it is a rule that cannot expressly be claimed in court, it has a simple programmatic or guiding nature. In his reply[573], Fermandois, establishes that the programmatic nature of a legal provision does not deprive it of its binding force, and declares that he would not have said what is attributed to him. Answering this last letter[574], Contesse insisted that it was Fermandois said that it was not a question of limits, and that it was a programmatic norm.

Whether or not the terms claimed were used, it can be seen that Contesse's statements are supported by the records of the Panel's sessions. Indeed, as recorded in the records of the Library of National Congress[575], both in the sessions of November 27 and December 2, Fermandois indicates what is attributed to him. However, abandoning any interpretation with originalist pretensions, this fact is merely illustrative, and does not form part of the rule other than as a point of origin.

With respect to the substantive aspect of these provisions, it seems that the differences should be resolved by appeal to the express text, with a restrictive and systematic interpretation, rather than by extensive interpretations. Reading the rules

[573] Arturo Fermandois, 'Cláusula de Límites' *Diaro El Mercurio* (Chile, 26 January 2021).
[574] Jorge Contesse Singh, '¿Cláusula de Límites?' *Diaro El Mercurio* (Chile, 27 January 2021).
[575] These records are available at *Sesiones Mesa Técnica Constituyente* (Directed by Biblioteca del Congreso Nacional) <https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_cronograma-2> accessed 11 June 2021. As for the first statement, it is recorded at 43:12, of the November 27 session. As for the second, in 2:27:43 of the session of December 2. It should be noted in the December session, Fermandois refers to the rules of article 135 as limits (2:12:06) and that the discussion was on this provision in different terms than those that were finally drafted. It also affirms that these are principles that offer legal guarantees and not that impede the transformative movement of the Convention (2:27:28).

in the first sense, therefore, it seems natural and obvious that the provisions of Article 135's final paragraph cannot be otherwise than a declaration of deference requested from the Convention, without binding force. This is because its compliance cannot be prosecuted before any Court, and because the principle of autonomy triumphs in the discussion of the contents of the Constitutional Convention.

### Institutional moment: regulated deliberation

At the institutional moment, the pre-institutional agreements are backed by the power of the state. The current institutional framework was used to create procedures that guarantee and conduct the deliberative process in the agreed terms. At this time, the stages of the deliberative process and their forms of control were formally established. In the Chilean case, this was the constitutional amendment which included, in legal terms, the contents of the Agreement.

However, the itinerary of configuration of the deliberative process, now under parliamentary institutional discussion, there are two remaining issues which should be highlighted. The first is that the processing of the constitutional mediation was accumulated with other constitutional amendments proposed previously. Some of them show the incipient effort to incorporate deliberative devices.

The second is the particular guarantees for the participation of women, independents and indigenous peoples. One of the outstanding characteristics of deliberative theories is precisely their concern to guarantee the incorporation of

frequently-silenced voices. The amendments which allowed their incorporation present an example, and mark a standard of democracy to which the new constitutional democracy can give rise.

Constitutional amendment to allow the adoption of a new constitution

The draft constitutional amendment was presented by the President for parliamentary discussion on December 16. To speed up the process, he put "urgency" on it, which gave parliament thirty days to resolve it. For the purposes of its legislative processing, this project was accumulated with seven other pre-existing ones.

Indeed, according to the history of the law registered in the Library of the National Congress, the first antecedents of this bill dates from 2011[576]. This bill proposed the regulation of open plebiscites to address issues of national interest, in terms similar to that of the popular initiative of law, but in an only advisory nature. That same year, and only two weeks after the previous bill, the same group of deputies presented a project to incorporate the possibility of convening a Constituent Assembly into the current Constitution. Like the previous project, this one considers the citizen claim have to fulfilled the quorum of five hundred thousand citizens' signatures.

[576] Biblioteca del Congreso Nacional, 'Historia de La Ley N. 21.200' (24 December 2019) <https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/7711/>.

In 2015, the Chamber of Deputies insisted once again upon a constitutional amendment project that broadens the powers of the President of the Republic to call a plebiscite. This amendment sought to expand the powers of the president, who according to the current constitution can only call a plebiscite in the event that parliament rejects a constitutional reform proposed by the executive. That same year, two months after the previous one, by the same deputies, a complete constitutional project was presented for parliamentary discussion.

Later, the 2017 proposal is part of the constituent process promoted by the then-president Michelle Bachelet. As part of her government programme, she promoted a deliberative process to adopt a new constitution. This process considered a series of local self-convened meetings that followed a consultative pattern, and a systematization of everything obtained. With this, a new constitution project was designed for discussion by the Congress. For the above to be institutionally valid, Chapter XV of the current constitution had to be amended in order to give Parliament the power to discuss a constitution. That amendment was presented on April 3, 2017. Although it was unsuccessful, the president sent the draft constitution emanating from this process to parliament, before handing over her mandate.

On April 1, 2019, it was proposed to give the parliament power to call a plebiscite on the need for a new constitution, and the possibility of a Constituent Assembly in the event of citizenship approval. The second, presented a week after the outbreak on October 28, proposed a constitutional amendment which empowered the President

and the Congress to summon citizens to a plebiscite on the need for a new constitution, and, if approved, to decide on the body that would write it.

The series of projects described above show the route adopted by the November Agreement. These projects also show that there were political sectors who were aware of what was happening in the country, and that a timely solution would perhaps have avoided much unnecessary personal damage. Finally, it also anticipates which proposals could be made to incorporate permanent deliberative devices in the new constitution, especially those that give individuals the opportunity to deliberate, once certain quorums have been obtained.

Guarantees for historically excluded groups

Even before the approval of the constitutional amendment that would regulate the constituent process, the discussion began on how to guarantee the presence of independents, gender equality, and representation of ancestral nations. Although they were discussed before in the Panel of Experts, their incorporation into its proposal was ruled out because they were not matters expressly addressed in the November Agreement. Eventually these three topics were initially discussed in the same constitutional amendment project, but only legislation on independent lists and gender equality came to be regulated. The seats reserved for indigenous peoples were the subject of different law.

Independents

One of the distinctive aspects of the social mobilization, as of October, was the loss of legitimacy of the representatives linked to political parties. In view of this, discussion began to include the possibility of independent lists in the constituent electoral process. Legislative discussion of this started on December 18, 2019[577], even before the promulgation of the constitutional reform that regulated the process to adopt a new constitution.

Law 21,216 which regulates the participation of independents in the constituent electoral process was enacted on March 20, 2020. It establishes three types of participation of independents: independent on party list, independent off list and independent lists.

The independents on the party list did not need to get additional support for their candidacy, since the recognition of the party that gave them the quota was applied. The independents off the list, for their part, had to get the support of at least 0.2% of the number of voters in the last election, with a minimum of 300 signatures.

Finally, the lists of independents had to present the support of at least 0.5% of the total votes cast in the last election. In this case, the support received by each of the members of the list was added together in order to reach that proportion.

[577] https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/7733/

Additionally, the lists of independents could carry an additional candidate to the number of places that were disputed in their respective district.

Ultimately, two lists of independents were presented to the constituent election: "Lista del Pueblo" (List of the People), which obtained 25 seats, and "Independientes por una nueva Constitución" (Independents for a New Constitution), which obtained 11 seats. Additionally, 11 seats which were obtained by independents outside pacts, which means that 47 of the 155 seats are held by independents.

Gender equality

Also regulated by Law 21,216, the electoral provision for gender equality implies guaranteeing that no sex will have a representation of less than 45% or more than 55% in the constituent body. For this, correction devices were established, both in the composition of the lists and in the electoral results[578].

Regarding the composition of the lists, two rules were adopted. The first is that if the list has an even number of candidates, these must be in equal numbers of men and women. With an odd number, the candidates of one sex cannot exceed those of the other by more than one. The second is that in the list they must be headed by a woman, and men and women enumerated alternately.

[578] https://www.bcn.cl/leyfacil/recurso/paridad-de-genero-e-independientes-en-el-proceso-constituyente

Respecting the correction of the results, it was established that in districts electing an even number of representatives, there must be the same number of each sex. For an odd number, one sex cannot exceed the another by more than one representative. In the event of imbalance, the following procedure is to be applied. The candidate with the lowest vote of the over-represented sex yields his or her quota to the highest-voted candidate of the under-represented sex of the same political party. If not from the same party, this rule applies to candidates from the same list. The same procedure applies to similar situations in the case of independent lists. Eventually, the constituent convention was made up of 78 men and 77 women.

Ancestral communities

The discussion on the seats reserved for the original communities began together with the discussion of gender parity and incorporation of lists of independents. However, it was eventually handed over to another regulation which took longer. Finally, on December 21, 2020, Law 21,298 was approved, which established 17 seats reserved for indigenous peoples[579].

Currently, the existence of ten indigenous peoples are legally but not constitutionally, recognized in Chile. Each of them were referred to a territory according to the current geopolitical division of the country, where the number of seats depended on

[579] https://www.senado.cl/ya-es-una-realidad-escanos-reservados-para-pueblos-originarios-en-la/senado/2020-12-15/170538.html

the number of members in each native community[580] . From north to south they are as follows:

North:

- Aymara people, in the Regions of Arica y Parinacota, Tarapacá and Antofagasta. 75,743 people registered in the electoral roll. 2 seats in the Convention.
- Quechua people, in the Regions of Arica y Parinacota, Tarapacá and Antofagasta. 7,661 people registered in the electoral roll. 1 seat in the Convention.
- Lincan Antay (Atacameño) people, in the Region of Antofagasta. 22,569 people registered in the electoral roll. 1 seat in the Convention.
- Chango people, in the Regions of Antofagasta, Atacama, Coquimbo and Valparaíso. 1,954 people registered in the electoral roll. 1 seat in the Convention.
- Diaguita people, in the Regions of Atacama and Coquimbo. 53,887 people registered in the electoral roll. 1 seat in the Convention.
- Colla people, in the Regions of Atacama and Coquimbo. 9,182 people registered in the electoral roll. 1 seat in the Convention.

Centre and Centre-South

[580] https://www.servel.cl/nomina-de-pueblos-indigenas-elecciones-abril-2021/

- Rapa Nui people, in the Region of Isla de Pascua (Eastern Island). 3,623 people registered in the electoral roll. 1 seat in the Convention.
- Mapuche people, in the Regions of Metropolitana, Valparaíso, Libertador General Bernardo O'Higgins, Maule, Ñuble, Biobío, Araucanía, Los Ríos, Los Lagos and Aysén. 1,063,980 people registered in the electoral roll. 7 seats in the Convention.

South

- Kawashkar people, in the Regions of Magallanes and Antártica Chilena. 528 people registered in the electoral roll. 1 seat in the Convention.
- Yagán (Yámana) people, in the Regions of Magallanes and Antártica Chilena. 170 people registered in the electoral roll. 1 seat in the Convention.

To be candidates for the constituent convention, the members of the ancestral communities had to prove their status as such before the National Indigenous Development Corporation (CONADI by its acronym in Spanish), to be registered in their respective territory and to have the support of communities or respective indigenous peoples organizations. For the purposes of recognition as a member of each of these peoples, the principle of self-identification was used. This means accepting the declaration of the individual, which, if the individual is not registered, should be granted by affidavit.

For its part, the Electoral Service created a special registry with indigenous peoples, with its own electoral roll. Those who were part of this registry could only vote for

candidates belonging to their public, for which special votes and ballot boxes were arranged. This same Service was in charge of applying the gender parity rules in the lists and results of this election.

Eventually, 22% of the indigenous census turned out to vote[581]. Among other reasons given to explain the above were the lack of information, the impact of the pandemic, and the fact that many of the members of these communities live in isolated places which made it difficult to travel to the voting centres.

Both the incorporation of independents, as well as gender equity and guaranteed seats for native peoples, are ways of endowing the deliberative process with greater legitimacy. These measures allow the reality of the electorate to be better represented, while preventing the political parties from co-opting the elections. Additionally, it is likely that this composition allows the creation of benches within the constitutional convention that go beyond the traditional partisan division, favouring the deliberative character of their discussions, and giving initiative and voice to diverse proposals.

## Deliberative process underway

[581] https://www.latercera.com/politica/noticia/solo-un-22-del-padron-indigena-voto-para-elegir-a-los-17-escanos-reservados/RT2COQ3YFJG2PICUXP2OTBXIVA/

At the time of writing, the institutional deliberation process has taken two significant steps: the initial plebiscite, and the election of constituents. This section will briefly describe what has happened, and what is emerging from this point.

Entry plebiscite

According to the constitutional text initially approved, the entry plebiscite was scheduled for April 26, 2020. However, due to the health emergency caused by Covid-19, it had to be postponed to October 25 of the same year.

A fact that should be highlighted, once the election campaign and deliberation have begun, is the change of positions in some actors and political sectors. Indeed, on the one hand, leftist groups that had opposed the Agreement for Peace and the New Constitution, decided to join and support the option "approve"[582]. On the other, right-wing groups and representatives who had declared in favour of the "approve" option, changed their position and began to promote the "rejection" option [583].

The above can be understood in two senses. The first is that it illustrates how deliberative conditions and dialogue permit correct preferences in the direction of

[582] Partido Comunista de Chile, 'Chile Digno Entregó Propuestas Al Servel Para Un Plebiscito Constitucional Participativo, Seguro y Democrático' (20 September 2020) <https://pcchile.cl/2020/09/20/chile-digno-entrego-propuestas-al-servel-para-un-plebiscito-constitucional-participativo-seguro-y-democratico-2/>.

[583] El Mostrador, 'Cambio de Opinión: Diputado Bellolio Asegura Que Ahora Votará Rechazo En El Plebiscito Constituyente' *El mostrador* (17 July 2020); Alberto González, 'La "Voltereta" de Allamand: Cómo Pasó de Apoyar Una Nueva Constitución a Anunciar Su Rechazo' *Biobio Chile* (9 January 2020) <https://www.biobiochile.cl/noticias/nacional/chile/2020/01/09/la-voltereta-de-allamand-como-paso-de-apoyar-una-nueva-constitucion-a-anunciar-su-rechazo.shtml>.

what is believed to be in everyone's favour. The second sense is that it confirms the entity explained by the civilizing force of hypocrisy. What was held with a merely strategic interest, when exposed to deliberation, became visible. This analysis, in any case, must be done case by case.

Eventually, the referendum achieved a very high turnout of 49,2% (7,562,173 ballots), especially considering the health situation, and that voting was voluntary. This fact gave greater legitimacy to the triumph of the approval option and the constituent convention, which obtained 78,28% and 79% of the preferences, respectively.

Election of constituents

According to the initially agreed electoral calendar, the members of the constituent convention should be elected on October 25, 2020. On the same day, mayors, councillors and, for the first time, regional governors would also be elected. However, due to sanitary precaution restrictions, it was postponed twice. Eventually, the election was held on May 15-16, 2021.

Four aspects marked the deliberative and electoral process prior to the election. The first was that, unlike what happened in the entry plebiscite, where the left and progressive blocs had a relatively common discourse, they were now on different electoral lists. The second was the incorporation of lists of independents. This fact implies a process of dialogue and prior discussion that is novel for the democratic

history of the country. For the first time, the hegemony of the parties was challenged by citizens trained in various disciplines and personal and work careers. This enriched the dialogue and opened the possibility of representing the diversity that exists in the country.

The third aspect, related to the previous one, was that unlike traditional electoral processes, it was practically impossible to statistically anticipate the behaviours of the electorate, given the diversity described above. Indeed, some analysts anticipated that, as a result of the dispersion of votes caused by this diversity, it was likely that the Convention would finally be dominated by candidates linked to the rejection option[584].

The fourth, and what ended up being a surprise, was the breakdown of the relationship between the amount of money to finance the candidates' campaign, and their electoral success[585]. History teaches that the candidates with the most resources often won. However, this rule was not followed in this election. In fact, candidates who had enormous resources lost to those who did not have a third of them. One way of interpreting this is that the incorporation of candidacies outside

[584] Fernando Rojas, '"Era Imposible Proyectar": El Mea Culpa de Los Encuestadores Tras El Fail de Los Sondeos Previos a La Elección' *Diario La Tercera* (24 May 2021) <https://www.latercera.com/la-tercera-pm/noticia/era-imposible-proyectar-el-mea-culpa-de-los-encuestadores-tras-el-fail-de-los-sondeos-previos-a-la-eleccion/USQITALFE5DVNE7XQTQ4Q7A34U/>.

[585] Nicolás Sepúlveda, Lucas Cifuentes and Cristóbal Ríos, 'Elección Constituyente: Las Campañas Millonarias Que Fueron Derrotadas Por Candidaturas Casi Sin Fondos' *CIPER* (17 May 2021) <https://www.ciperchile.cl/2021/05/17/eleccion-constituyente-las-campanas-millonarias-que-fueron-derrotadas-por-candidaturas-casi-sin-fondos/>.

the hegemony of the parties allowed people to vote by personal identification, instead of other political reasons.

Eventually, the election results were a more accurate reflection of the composition of Chilean society, in at least three relevant senses: electoral, political and social. In electoral terms, the convention is made up of supporters of approval and rejection in proportionally similar terms, close to 80% and relatively 20%. Regarding the political, all coalitions are represented, including the independents and ancestral nations, without any having a sufficient majority to impose their terms or veto given by the 2/3 voting rule.

Lastly, in social terms, within this same political diversity, various social realities are represented[586]. An enormous diversity of political trajectories, trades, professions and interests will form part of the constitutional discussion. This promises a fruitful dialogue, where diverse visions and sensitivities are incorporated, even within the same political blocs, generating benches outside of them for some relevant issues.

*Installing Constituent Convention*

On July 4, 2021, at 10 am, the inaugural session of the Constitutional Convention was convened. Following the constitutional mandate, in the first session the president

[586] Yasna Mussa, 'Opinión: Después de 41 Años, Chile Escogió La Diversidad' *The Washington Post* (18 May 2021) <https://www.washingtonpost.com/es/post-opinion/2021/05/17/resultado-elecciones-chile-nueva-constitucion-2021-convencion-constituyente/>.

and vice-president would be chosen. To coordinate this process, the presence of the Rapporteur of the Elections Qualifying Tribunal Carmen Gloria Valladares and her team was summoned.

After a series of incidents both outside and inside the building where the ceremony took place, the vote was started. The result was the election of Elisa Loncón, representative of the ancestral Mapuche people, as president. She, at a historic event, gave the first part of her speech in her native language. The first decision adopted was to call the convention for the following day and start the design of a work schedule.

In the following three months, as provided in the schedule, rules relating to the operation were adopted until the issuance of the internal regulations. To this end, 15 subcommittees were created, whose tasks included, among others, practical matters of internal operation, rules of representation and participation, and the rules for process.

Eventually, on October 8, the convention regulations were approved. It provides for the creation and composition of 8 thematic commissions related to constitutional content. In addition, it creates subcommittees for the coordination of the contents and internal coherence of the text. Thus, on October 18, 2021, the discussion of the text that will be presented for ratification by the citizens began.

Ratification Plebiscite

The convention irreversibly ends its operation on July 4, 2022. After this, there is a period of 60 days to call a referendum, where the vote will be mandatory, to ratify or reject. In the case of the former, it will enter into force once promulgated by the president of the republic. In the second case, the current constitution would remain in force.

# CONCLUSIONS

Constitutional democracies are facing a crisis around the world. In my thesis, I have addressed two of the central aspects of this reality. The first is the growing complexity of social demands. The second is the inability of institutional devices to respond to them adequately and in a timely fashion. I argued that this can be explained, on the one hand, because the institutional devices were designed with a view to a society which no longer exists. Given the increased plurality of rights in societies, disagreement intensifies, while the diversity of claims is difficult to be represented as unities. On the other hand, the institutional design tends to favour a political culture which frequently gave rise to vicious practices. In its mildest case, the distance between representatives and represented is noted. In the most serious, we see an elite which uses political power for its own benefit.

As a consequence of the above, the decisions of political power lose legitimacy. Eventually, the procedures designed to generate legitimate outcomes also lose their own legitimacy. A symptom of this can be observed in the decrease of institutional political participation, while non-institutional collective political actions increase. This same fact allowed me to note that the decisive fact would not be the lack of interest

of individuals in collective affairs, but rather, the inability of institutional devices to mediate existing interests.

Considering the situation thus described, I maintained that constitutional democracy could be improved by revisiting its founding principles. At the same time, I argued that the right to resist could be reconsidered, in order to promote those same principles. For both purposes, I turned to the deliberative theory of democracy. Concerning constitutional democracy, this theory allowed me to argue that the legitimacy of political decisions, and their quality, depends decisively on the involvement in the decision-making of those who must obey them. I argued that a crucial aspect of constitutional democracy is that individuals are rights bearers, who need to be protected from political power, and to decide what rights they have. Regarding the right to resist, the deliberative theory allows me to address non-institutional collective political actions. I argued for the importance of conducting them in deliberative forums, summoned to solve what causes disagreements. In this sense, I defended this right as one which could complement institutional procedures when they fail.

Founded in these ideas I substantiated a deliberative conception of the right to resist. To show its novelty, I contrasted it with what I called the disobedience conception of this right. The main themes were as follows. The deliberative conception of the right to resist strengthens the power of individuals to summon deliberation when what they persistently claim is being ignored. In this sense, this conception considers the exercise of the right to resist less exceptional than the disobedience conception. At

the same time, deliberative conception promotes the protection of those who protest, especially in the face of state violence. This conception, unlike the disobedience conception, rejects the notion that individuals must be harmed by the state in order to be heard. For the same reason, deliberative conception advocates timely rules adaptation in accordance with social transformations. By contrast, the disobedience conception emphasizes, or allows for, the defence of public order even over the opinion of those who are subject to it.

Finally, the deliberative conception provides the creation of deliberative forums to discuss what is claimed. Through these forums, the active inclusion of minority or historically-excluded groups is promoted, while also ensuring that those who will be affected by the decision participate in its adoption. This way of approaching the exercise of the right to resist allows claims to be mediated by dialogue, without leaving democracy at the discretion of force, or the use of rights as bribes. This is perhaps one of the greatest contributions of the conception that I propose, since the disobedience perspective does not have a clear proposal on how to manage the exercise of this right.

I argue that, thus understood, the right to resist contributes to an improvement of democracy. Since individuals are heard and participate in the resolution of the conflict, what is resolved is endowed with greater legitimacy, strengthening democracy as a whole. At the same time, it allows individuals to exercise effective control over the exercise of political power. Eventually, this conception of the right to resist restores to individuals the power to decide on collective destiny, when

political power fails to do so, either because of an institutional deficit, or because of the very vices that the institutional design allows.

The concept of the right to resist and the deliberative conception which I proposed, have its source in the way in which this right has been received, legalized, and practiced in South America. According to its reception, it is a right whose content has been dynamic. This can be seen in its different conceptions within the twentieth century, progressively defined as a cause of justification, as an expressive right, as a protective right, or as a right which allows the creation of other rights. Regarding its legalization, three main functions have been expressly assigned to it: to restore, protect, and/or enhance constitutional democracy. In each, its axis is to guarantee the rights of individuals. At the same time, also in terms of its adoption, it has been detached from other regulations that do not specifically mention it and established as a right that does not need to be expressly declared.

This last characteristic is relevant regarding the practice of the right to resist. It means that it is possible to recognize it in some collective actions, even when it is not expressly considered in the legal system. I argued that the social demands expressed by non-institutional collective political actions, whose purpose is to amend a political decision, and which have been persistently ignored, could eventually be an expression of this right. This can be deduced, as I showed, from the cases of Bolivia, Colombia, and Chile. These same cases allow me to justify how this right could enhance democracy, confirming its potential to convene deliberative forums. In short, from the perspective of the South American tradition, I maintain that it is a

right that does not need to be written in canonical texts, whose function could be to trigger a political deliberative process on unheard social demands.

The theoretical justification of the deliberative conception of the right to resist, and even its empirical verification, still required a practical systematization. This is what I called the passage from resistance to deliberation. The creation of conditions for institutional political discussion, on demands that have been made known by non-institutional means. As a consequence of this, I maintain, legitimate and legally binding solutions can be agreed upon concerning what was demanded. To explain this process, I established three stages. The first is the non-institutional, whose characteristic is to make a demand openly known. The second is the pre-institutional, which is determined by the agreement on the disagreement, and the way in which it is to be deliberated. The third is institutional. Here, the issue demanded is discussed and resolved, and, ultimately, the solution is ratified.

I illustrated both the theoretical justification of the right to resist, and the deliberation to which it may give rise, by examining the Chilean case. The decisive aspects of my thesis can be supported with respect to the social uprising by the October 2019 and the constituent process to which it gave rise. First, those who exercise the right to resist challenge the law because they seek to improve democracy, not to defeat it. Secondly, timely attention to this kind of claim allows a better solution of it, and guarantees the rights of those who protest. In particular, it protects their physical integrity from the violent action of the state. Thirdly, the deliberative forum created to respond to these demands shows the inclusive force

of the right to resist. This is expressed in the incorporation of a minority or historically-excluded groups. Finally, there are the stages from resistance to deliberation, and the effectiveness of ratification devices to give legitimacy to the process, both in defining the content of the deliberation, the composition of the forum, and the adoption (or not) of its results.

Because I finish writing this thesis while the deliberative process in Chile is still underway, I would like to add a final reflection on the expressive nature of this process. It is possible to argue that thanks to social movements, certain democratic commitments have been adopted which will likely be irreversible in Chilean political practice. Each of them was evidenced during the political process triggered in 2019; four of them stand out in a special way.

First, the recognition of the diversity of the cultural and national composition of the country, and the need to deconcentrate and decentralize political power, in relation to the self-determination of the native peoples, as well as the autonomy of the regions. Second, the serious inequality in the country, and the need to recognize and guarantee social rights, particularly in the areas of health, education, pensions and housing. Third, the historical discrimination against women and sexual minorities, the need for an express declaration of their rights, and affirmative actions to promote those rights. Fourth, the risk to the environment and natural resources, the need to protect them, to promote their sustainable use, and to guarantee their enjoyment for future generations.

Even if the proposed constitutional text were rejected, these issues, among others, will inevitably have to be addressed. And this could be a support for the deliberative conception of the right to resist which I defend here. Ultimately, what this conception intends promote is a public dialogue among equals; that is, a conversation about what it means to be a human endowed with rights, and how a collective life as human as possible can be enabled through the rule of law.

# Bibliography


Agamben G, *Homo Sacer. Sovereign Power and Bare Life* (Stanford University Press 1998)

Aguiar F, 'Derecho General a La Resistencia y Derecho a La Rebelión', *El Derecho a Resistir el Derecho* (Roberto Gargarella, Miño y Dávila 2005)

Aguirre Rojas CA, 'Los Movimientos Indígenas En América Latina' (*Catedra: Revista especializada en Estudios Culturales y Humanísticos*, 2020)

Akram H, *El Estallido. ¿Por Qué? ¿Hacia Dónde?* (ebook, El Desconcieto 2020)

Alegre M and Maisley N, 'Presidentialism and Hyper-Presidentialism in Latin America.' in Conrado Hübner Mendes, Roberto Gargarella and Sebastián Guidi (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press)

Alvarez AE, 'Una Visión Panorámica de La Crisis y El Desencanto Con La Democracia En América Latina: Desafíos y Oportunidades' in Angel E Alvarez (ed), *Crisis y desencanto con la democracia en América Latina* (Universidad Católica Andrés Bello 2021)

Andrews JP, 'Presidente Piñera:"Estamos En Guerra Contra Un Enemigo Poderoso"' *Diario La Tercera* (20 October 2019) <https://www.latercera.com/politica/noticia/presidente-pinera-estamos-guerra-enemigo-poderoso/870658/>

Applabaum AI, 'Legitimacy without the Duty to Obey' (2010) 38 Philosophy & Public Affairs 215

Arrarás A and Deheza G, 'Referéndum Del Gas En Bolivia 2004: Mucho Más Que Un Referéndum' (2005) 25 Revista de Ciencia Política 161

'Artículo 350: ¿última Instancia Para Frenar La Constituyente En Venezuela?' (*CNN Español*, 23 June 2017)

Atria F, 'Socialismo Hayekiano' [2010] Estudios Publicos

——, *La Constitución Tramposa* (LOM 2011)

——, *Veinte Años Después. Neoliberalismo Con Rostro Humano* (Catalonia 2013)

——, *Derechos Sociales y Educación: Un Nuevo Paradigma de Lo Público* (LOM 2014)

——, *La Forma Del Derecho* (Marcial Pons 2016)

——, 'The Form of Law and the Concept of the Political' (2020)

Atria F, Salgado C and Wilenmann J, *Democracia y Neutralización. Origen, Desarrollo y Solución de La Crisis Constitucional* (LOM 2017)

Baeza A, 'Piñera Asegura Que "En Medio de Esta América Latina Convulsionada, Chile Es Un Verdadero Oasis Con Una Democracia Estable".' *Diario La Tercera* (8 October 2019) <https://www.latercera.com/politica/noticia/pinera-asegura-medio-esta-america-latina-convulsionada-chile-verdadero-oasis-una-democracia-estable/851913/>

Bargasted M and Somma N, 'La Cultura Política, Diangónstico y Evolución' in Carlos Huneeus and Octavio Avendaño (eds), *El sistema político en Chile* (LOM 2018)

Basadre P, 'Muerte de Catrillanca: Así Se Inventó La Versión Falsa de Carabineros' *CIPER* (02 2019) <https://www.ciperchile.cl/2019/02/01/muerte-de-catrillanca-asi-se-invento-la-version-falsa-de-carabineros/>

Basoalto H, '"La Verdad Es Que No Estoy En Guerra Con Nadie": General Iturriaga Se Desmarca de Dichos Del Presidente Piñera' *Diario La Tercera* (21 October 2019) <https://www.latercera.com/nacional/noticia/la-verdad-no-estoy-guerra-nadie-general-iturriaga-se-desmarca-dichos-del-presidente-pinera/870824/>

Bellido FJ, 'La Burocratización Del Poder Político:Notas Sobre Sus Consecuecias En Las Democraciasi Parlamentarias' (2017) 20 Astrolabio. Revista internacional de Filosofía 1

Benhabib S, 'Toward a Deliberative Model of Democratic Legitimacy' in Seyla Benhabib (ed), *Democracy and Difference* (Princeton University Press 1996)

Biblioteca del Congreso Nacional, 'Historia de La Ley N. 21.200' (24 December 2019) <https://www.bcn.cl/historiadelaley/nc/historia-de-la-ley/7711/>

Blumer H, 'Collective Behavior' in AM Lee (ed), *New Outline of the Principles of Sociology* (Barnes & Noble 1951)

Bobbio N, 'La Regla de Mayoría: Límites y Aporías', *Teoría General de la Política* (Trotta 2009)

Bobbio N, Pontara G and Veca S, *Crisis de La Democracia* (Ariel 1985)

Bofill C, 'A Un Año de La Noche Más Tensa de La Crisis de Octubre: El Diálogo de Piñera Con El Jefe Del Ejercito' *Ex-Ante* (12 November 2020) <https://www.ex-ante.cl/https-www-ex-ante-cl-la-noche-mas-tensa-de-la-crisis-de-octubre-el-dialogo-de-pinera-con-el-jefe-del-ejercito/> accessed 9 June 2021

Bohman J, *Public Deliberation. Pluralism, Complexity, and Democracy* (MIT Press 1996)

——, 'The Coming of Age of Deliberative Democracy' (1998) 6 The Journal of Political Philosophy 400

——, 'Realizing Deliberative Democracy as Mode of Inquiry: Pragmatism, Social Facts, and Normative Theory' (2004) 18 Journal of Speculative Philosphy 23

Bohman J and Rehg W (eds), *Deliberative Democracy. Essays on Reason and Politics* (MIT Press 1997)

Bolton M, *How to Resist* (Bloomsbury 2017)

Buchanan JM, 'Genesis' (2012) 152 Public Choice 253

Buckler S, 'Normative Theory' in David Marsh and Gerry Stoker (eds), *Theory and Methods in Political Science* (3rd edn, Palgrave Macmillan 2010)

Cadwalladr C and Graham-Harrison E, 'Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach' *The Guardian* (17 March 2018) <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> accessed 30 July 2020

Callís Rodríguez A, 'La Participación Electoral En La Crisis de La Representación' in Gloria De la Fuente and Danae Mlynarz (eds), *El Pueblo en Movimiento. Del malestar al estallido* (Catalonia 2020)

Cárdenas García J, 'Report about the Bolivian Referendum of 2016' (2017) 50 Boletín Mexicano de Derecho Comparado

Castro S de, *'El Ladrillo' Bases de La Política Económica Del Gobierno Militar Chileno.* (Centro de Estudios Públicos 1992)

Castro Escudero T and Oliver Castillo, Lucio (eds), *Poder y Política En América Latina* (Siglo Veintiuno 2005)

Cavieres Figueroa E, *Octubre 2019. Contextos y Responsabilidades Políticas y Sociales.(1998-219 y Más...)* (ebook, Ediciones Universitarias de Valparaíso 2020)

CEP Chile, 'Encuesta CEP. Graficador' (*Encuesta CEP*) <https://www.cepchile.cl/cep/site/edic/base/port/graficador.html> accessed 17 June 2021

CEPAL UN, 'Recursos Naturales. Situación y Tendencias Para Una Agenda de Desarrollo Regional En América Latina y El Caribe' (2013)

Chappell Z, *Deliberative Democracy. A Critical Introduction.* (Palgrave 2012)

*Chile En Crisis: Entrevista al Analísta Político Carlos Peña* (Directed by T13) <https://www.youtube.com/watch?v=rrtBEuUaDxM>

Christiano T, 'Democracy' <<https://plato.stanford.edu/archives/fall2018/entries/democracy/>>

Cohen J, 'Procedure and Substance in Deliberative Democracy', *Democracy and Difference* (Princeton University Press 1996)

——, 'Deliberation and Democratic Legitimacy', *Philosophy, Politics, Democracy. Selected Essays* (Harvard University Press 2009)

——, *Philosophy, Politics, Democracy. Selected Essays.* (Harvard University Press 2009)

Comisión del Alto Comisionado de Naciones Unidas para los Derechos Humanos, 'Informe Sobre La Misión a Chile 30 de Octubre - 22 de Noviembre de 2019.'

Comisión Nacional sobre Prisión Política y Tortura, 'Informe de La Comisión Nacional Sobre Prisión Política y Tortura'

'Constituciones Políticas y Actas Constitucionales' (*Biblioteca del Congreso Nacional de Chile*) <https://www.bcn.cl/historiapolitica/constituciones/detalle_constitucion?handle=10221.1/60446> accessed 14 October 2020

'Constitute' (*Chile 1990 (rev. 2015)*) <https://www.constituteproject.org/constitution/Chile_2015?lang=en> accessed 23 October 2020

Contesse Singh J, 'Cláusula de Límites' *Diaro El Mercurio* (Chile, 19 January 2021)

——, '¿Cláusula de Límites?' *Diaro El Mercurio* (Chile, 27 January 2021)

Contreras P, Lovera D and Salgado C, '¿Cláusula de Límites?' *Diaro El Mercurio* (Chile, 18 January 2021)

——, 'Cláusula de Límites' *Diaro El Mercurio* (Chile, 21 January 2021)

Corporación Latinobarómetro, 'Informe Chile 2020' (2020)

Corte Suprema De Justicia, Paraguay, *Garantías Constitucionales. Apuntes Doctrinarios, Legislación Aplicable y Jurisprudencia Nacional* (Centro Interdisciplinario de Derecho Social y Economía Polítca 2004)

——, *Organos Constitucionales. Constitucion Nacional, Los Organos Constitucionales, Reglamentación.* (División de Investigación, Legislación y Publicaciones 2007)

Covarrubias Cuevas I, 'Subsidiariedad y Estado Empresario (Análisis Crítico de La Jurisprudencia Más Relevante)' (2016) 66 *Revista de Derecho Público* 251

Cristi R, *El Pensamiento Político de Jaime Guzmán* (LOM 2011)

Cunningham F, *Theories of Democracy. A Critical Introduction* (Routledge 2002)

Curtin D, 'Framing Public Deliberation and Democratic Legitimacy in the European Union' in Samantha Besson and José Luis Martí (eds), *Deliberative Democracy and its Discontents* (Ashgate 2006)

Davis L, 'The Cost of Realism: Contemporary Restatements of Democracy' (1964) 17 The Western Political Quarterly 37

de la Boétie E, *The Discourse of Voluntary Servitude* (1576)

De la Fuente G and Mlynarz D (eds), *El Pueblo En Movimiento. Del Malestar al Estallido* (ebook, Catalonia 2020)

Deere CD and León M, 'El Liberalismo y Los Derechos de Propiedad de Las Mujeres Casadas En El XIX En América Latina' in Magdalena León and Eugenia Sáenz Rodriguez (eds), ?*Ruptura de la Inequidad?:propiedad y génro en la América Latiina del XIX* (Siglo del Hombre Editores 2005)

Della Porta D and Doerr N, 'Deliberation in Protests and Social Movements' in André Bachtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press 2018)

Delmas C, *A Duty to Resist. When Disobedience Should Be Uncivil* (Oxford University Press 2018)

Dembinska M and Montambeault F, 'Deliberation for Reconciliation in Divided Societies' (2015) 11 Journal of Public Deliberation

Dixon R, 'Constitutional Rights as Bribes' (2018) 50 Connecticut Law Review 767

Douzinas C, *Philosophy and Resistance in the Crisis. Greece and the Future of Europe* (Polity Press 2013)

Doyle O, 'Populist Constitutionalism and Constitutent Power' (2019) 20 German Law Journal 161

Doyle O, Longo E and Pin A, 'Populism: A Health Chech for Constitutional Democracy?' (2019) 20 German Law Journal 401

Doyle O and Walsh R, 'Deliberation in Constitutional Amendment: Reappraising Ireland's Deliberative Mini-Publics' [2020] *European Constitutional Law Review* 1

——, 'Constitutional Amendment and the Democratic Mediation of Political Disagreement: Assessing the Impact of Deliberative Mini-Publics' (*SSRN*, 15 July 2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633359>

Driver J, 'The History of Utilitarianism' in Edward N Zalta (ed), *Stanford Encyclopedia of Philosophy* (2014) <<https://plato.stanford.edu/archives/win2014/entries/utilitarianism-history/>>

Dryzek JS and others, 'The Crisis of Democracy and the Science of Deliberation' (2019) 363 Science 1144

Duarte-Hidalgo C and others, 'Acción Colectiva, Antagonismos y Resistencia Comunitaria En El Conflicto Socio-Territorial de Freirina' (2020) 22 Revista Eleuthera 170

Dworkin R, 'Interpretative Concepts', *Law's Empire* (Oxford University Press 1998)

Eisenberg A and Spinner-Halev J (eds), *Minorities within Minorities. Equality, Rights and Diversity* (Cambridge University Press 2004)

El Desconcierto, 'Las Iincendiarias Frases Del Gabinete de Piñera Que Detonaron La Crisis Social' *El Desconcierto* (19 October 2012) <https://www.eldesconcierto.cl/nacional/2019/10/19/las-incendiarias-frases-del-gabinete-de-pinera-que-detonaron-la-crisis-social.html>

El Mostrador, 'Cambio de Opinión: Diputado Bellolio Asegura Que Ahora Votará Rechazo En El Plebiscito Constituyente' *El mostrador* (17 July 2020)

——, 'Mauricio Weibel Estima Que Entre Milicogate y El Pacogate Se Habrían Defraudado $50 Mil Millones' (*El Mostrador*, 9 August 2021) <https://www.elmostrador.cl/dia/2021/08/09/mauricio-weibel-estima-que-entre-milicogate-y-el-pacogate-se-habrian-defraudado-50-mil-millones/>

Elster J, 'Ulysses and the Sirens' (1977) 15 Social Science Information 469

Elster J, 'The Market and the Forum: Three Varieties of Political Theory' in James Bohman and William Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (MIT Press 1997)

Elster J, 'Deliberation and Constitution Making', *Deliberative Democracy* (Jon Elster, Cambridge University Press 1998)

—— (ed), *Deliberative Democracy* (Cambridge University Press 1998)

——, *Ulysses Unbound* (Cambridge University Press 2000)

en la Resistencia PL y CL, *Xipamün Pu Ülka! La Usurpación Forestal Del Lavkenmapu y El Proceso Actual de Recuperación* (Libros del Perro Negro 2017)

Eyerman R and Jamison A, *Social Movements. A Cognitive Approach* (Oxford University Press 1991)

Federación Internacional de los Derechos Humanos, 'Informe Mision Internacional de Investigación. Chile. La Otra Transición Chilena: Derechos Del PUeblo Mapuche,

Política Penal y Protesta Social En Un Estado Democrático.' <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CHL/INT_CCPR_NGO_CHL_89_8344_E.pdf>

Ferejohn J, 'Deliberation and Citizen Interests' in Andre Bachtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press 2018)

Fermandois A, 'La Cláusula de Límites: Marco y Orientación' *Diaro El Mercurio* (Chile, 16 January 2021)

——, 'Cláusula de Límites' *Diaro El Mercurio* (Chile, 26 January 2021)

Fernández JE, 'Pueblos Indígenas En Constituciones Del Mundo'

Ferrajoli L, *Poderes Salvajes. La Crisis de La Democracia Constitucional.* (Trotta 2011)

Ferrari F and Tarzia A, 'El Derecho a La Resistencia En El Constitucionalismo Moderno y Contemporáneo. El Particular Caso Euatoriano', *El Derecho a la Resistencia en el Constitucionalismo Moderno* (Poligrafica 2011)

Figueroa A. R, 'La Burocratización Del Estado.', *Las prioridades nacionales y las políticas de reclutamiento de funcionarios públicos en los países en desarrollo.* (Colegio de Mexico 1981)

FIgueroa JP, 'Corte Suprema Reconoce "Graves Acciones y Omisiones" En Dictadura, Pero No Pide Perdón' (*CIPER*, 9 June 2013) <https://www.ciperchile.cl/radar/corte-suprema-reconoce-%E2%80%9Cgraves-acciones-y-omisiones%E2%80%9D-en-dictadura-pero-no-pide-perdon/>

Finlay CJ, *Terrorism and the Right to Resist. A Theory of Just Revolutionary War* (Cambridge University Press 2015)

Fishkin JS, 'Making Deliberative Practical: Public Consultation and Dispute Resolution' (2011) 26 Ohio State Journal On Dispute Resolution 611

Florida A, 'The Origins of the Deliberative Turn' in André Bachtiger and others (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford University Press 2018)

Font P, *El Derecho de Resistencia Civil En Francisco de Suárez* (Comares 2018)

Franklin J, *Constitutionalism and Resistance in the Sixteenth Century: Three Treaties* (Julian Franklin, Pegasus 1969)

——, *John Locke and the Theory of Sovereignty. Mixed Monarchy and the Right of Resistance in the Political Thought of the English Revolution* (Cambridge University Press 1978)

Friedman M, *Milton Friedman En Chile. Bases Para Un Desarrollo Económico* (Fundación de Estudios Económicos BHC ed, Editorial Universitaria 1975)

Frydrych D, 'Rights Modelling' (2017) XXX Canadian Journal of Law & Jurisprudence 125

Fuentes S. C, *El Fraude* (Heuders 2013)

——, *La Erosión de La Democracia* (ebook, Catalonia 2019)

Garcés Durán M, *Estallido Social y Nueva Constitución Para Chile* (ebook, LOM 2020)

García G. JF and Verdugo S, 'Subsidiariedad: Mitos y Realidades En Torno a Su Teoría y Práctica Constitucional' in Pablo Ortúzar (ed), *Subsidiariedad. Más allá del Estado y del Mercado* (Instituto de Estudios Sociales 2015)

Gargarella R, 'Introducción', *Derecho y Grupos Desaventajados* (Gedisa 1999)

——, 'El Derecho a Resistencia En Situaciones de Carencia Extrema', *El Derecho Resistir el Derecho* (Roberto Gargarella, Miño y Dávila 2005)

——, *The Legal Fundations of Inequality. Constitutionalism in the Americas, 1776 - 1860* (Cambridge University Press 2010)

——, *Latin American Constitutionlism 1810 - 2010. The Engine Room of the Constitutions* (Oxford University Press 2013)

——, *La Derrota Del Derecho En América Latina. Siete Tesis* (Siglo Veintiuno 2020)

——, *El Derecho Como Una Conversación Entre Iguales. Qué Hacer Para Que Las Democracias Contemporáneas Se Abran -Por Fin- al Diálogo Ciudadano.* (Siglo Veintiuno 2021)

——, 'The Last Resort: The Right of Resistance in Situations of Legal Alienation' <http://digitalcommons.law.yale.edu/yls_sela/2>

Gargarella R, Guidi S and Hübner Mendes C, 'Introduction' in Roberto Gargarella, Sebastián Guidi and Conrado Hübner Mendes (eds), *The Oxford Handbook of Constitutional Law in Latin America* (Oxford University Press 2022)

Garretón M. MA, 'La Ruptura Entre Política y Sociedad. Una Introducción' in Manuel Antonio Garretón M. (ed), *La gran ruptura* (LOM 2016)

Ginsburg T and Huq AZ, *Hot to Save a Constitutional Democracy* (University of Chicago Press 2018)

Ginsburg T, Lansberg-Rodriguez D and Versteeg M, 'When to Overthrow Your Government: The Right to Resist in World's Constitutions' (2013) 60 UCLA Law Review 1184

González A, 'La "Voltereta" de Allamand: Cómo Pasó de Apoyar Una Nueva Constitución a Anunciar Su Rechazo' *Biobio Chile* (9 January 2020) <https://www.biobiochile.cl/noticias/nacional/chile/2020/01/09/la-voltereta-de-

allamand-como-paso-de-apoyar-una-nueva-constitucion-a-anunciar-su-rechazo.shtml>

González Marín P, 'Algunas Consideraciones Sobre Los Conceptos de Pueblo y Nación En La Teoría Del Estado.' (2014) 17 Revista de Derecho Público 25

Graber MA, Levinson S and Tushnet M (eds), *Constitutional Democracy in Crisis?* (Oxford University Press 2018)

——, 'Constitutional Democracy in Crisis? Introduction', *Constitutional Democracy in Crisis?* (Oxford University Press 2018)

Grimm D, *Constitutionalism. Past, Present and Future* (Oxford University Press 2016)

Gutmann A and Thompson D, *Deliberative Democracy and Disagreement. Why Moral Conflicts Cannot Be Avoided in Politics, and What Should Be Done About It.* (Harvard University Press 1996)

——, *Why Deliberative Democracy?* (Princeton University Press 2004)

Habermas J, 'Civil Disobedience: Litmus Test for Democratic Constitutional State' (1985) 30 Berkley Journal of Sociology 95

Herrera HE, *Octubre En Chile. Acontecimiento y Comprensión Política: Hacia Un Republicanismo Popular* (ebook, Kantankura 2019)

Hindmoor A, 'Rational Choice' in David Marsh and Gerry Stoker (eds), *Theory and Methods in Political Science* (Palgrave Macmillan 2010)

Hirschl R, *Towards Jurstocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004)

Hobbes T, *Leviathan, the Matter, Forme and Power of a Common-Wealth* (Oxford University Press 1881)

Honoré T, 'Right to Rebel' (1988) 8 Oxford Journal of Legal Studies 34

Hopfl H, *Jesuit Political Thought. The Society of Jesus and the State, c.1540-1600* (Cambridge University Press 2004)

Hurd HM and Moore MS, 'The Hohfeldian Analysis of Rights' (2018) 63 The American Journal of Jurisprudence 295

Instituto de Estudios Generales (ed), 'Informe Del Consejo de Estado al Presidente de La República Incluyendo El Voto de Minoría y La Opinión Disidente. 2 de Agosto 1980', *Textos Comparados de la Constitución Política de Chile. Sometido a Plebiscito por la H. Junta de Gobierno por D.L. N°3.646 de fecha 11 de Agosto de 1980 y de la Constitución Política de la República de 1925. Con las modificaciones introducidas a su texto al 11 de septiembre de 1973* (Editorial Universitaria 1980)

Instituto Nacional de Derechos Humanos, 'Informe Anual. Sobre La Situación de Los Derechos Humanos En Chile En El Contexto de La Crisis Social. 17 Octubre - 30 Noviembre 2019'

Interview with Miguel Abdon Saguier, 'La Constitución no dice que solo se puede resistir por medios pacíficos' (abril 2017) <https://www.abc.com.py/edicion-impresa/politica/la-constitucion-no-dice-que-solo-se-puede-resistir-por-medios-pacificos-1584278.html> accessed 24 April 2021

Jefferson T, *Political Writings* (Cambridge University Press 1999)

Jocelyn-Holt A, *La Independencia de Chile. Tradición, Modernización y Mito* (Pinguin 2009)

Kaufmann A, 'Small Scale Right to Resist' (1985) 21:3 New England Law Review 571

Khight J and Johnson J, 'What Sort of Political Equality Does Deliberative Democracy Require?' in James Bohman and William Rehg (eds), *Deliberative Democracy. Essays on Reason and Politics* (MIT Press 1997)

Kmiec KD, 'The Origin and Current Meaning of "Judicial Activism"' (2004) 92 *California Law Review* 1441

*Lanzamiento Libro 'El Otro: 18 de Octubre 2019' de Luis Larraín* (Directed by Libertad y Desarrollo Chile, 2020) <https://www.youtube.com/watch?v=uSfyS6IB3xE>

Laudani R, *Disobedience in Western Political Thought* (Cambridge University Press 2013)

Law DS and Ginsburg T, 'Elaboración Legislativa de Normas Constitucionales En América Latina, Perspectiva Cuantitativa' in Daniel Bonilla Maldonado (ed), *El Constitucionalismo en el Continente Americano* (Siglo del Hombre Editores 2016)

Levine P and Nierras RM, 'Activists' Views of Deliberation' (2007) 3 Journal of Public Deliberation <https://www.publicdeliberation.net/jpd/vol3/iss1/art4?utm_source=www.publicdeliberation.net/jpd/vol3/iss1/art4>

Leyva R, 'No Child Let Behind: A Neoliberal Repacking of Social Darwinism' (2009) 7 Journal for Critical Education Policy Studies 364

Lezcano Claude L, 'Historia Constitucional Del Paraguay (Período 1870 - 2020)' (2012) 3 Revista Jurídica Universidad Americana 173

Locke J, *Two Treaties of Government*, vol V (Rod Hay, McMaster University Archive of the History of Economic Thought 1823)

López-Calle S, 'Violencia y Crisis de Los Derechos Humanos En Colombia, 1934 - 1991' (2020) 17 FORUM. Revista Departamento de Ciencia Política 43

Luna Farfán F, 'Derecho de Resistencia' 3 YACHAQ 143

Mackie G, 'All Men Are Liars: Is Democracy Meaningless?' in Jon Elster (ed), *Deliberative Democracy* (Cambridge University Press 1998)

Mangabeira Unger R, *What Should Legal Analysis Become?* (Verso 1992)

Manin B, Stein E and Mansbridge J, 'On Legitimacy and Political Deliberation' (1987) 15 Political Theory 338

Mansbridge J, 'Using Power/Fighting Power: The Polity' in Seyla Benhabib (ed), *Democracy and Difference* (Princeton University Press 1996)

——, 'The Place of Self-Interest and the Role of Power in Deliberative Democracy' (2010) 18 The Journal of Political Philosophy 64

Marín V, 'Bingos, Patines y Otros "Malos Ejemplos": Cuando Las Frases de Ministros Complican a Sus Gobiernos' *Emol.cl* (24 July 2018) <https://www.emol.com/noticias/Nacional/2018/07/24/914384/Mal-ejemplo-Cuando-las-frases-de-los-ministros-complican-a-sus-gobiernos.html>

Martí JL, *La República Deliberativa. Una Teoría de La Democracia* (Marcial Pons 2006)

Mayol A, *Big Bang. Estallido Social 2019. Modelo Derrumbado - Sociedad Rota - Política Inútil* (ebook, Catalonia 2019)

McBride C, 'Deliberative Democracy and the Politics of Recognition' (2005) 53 Political Studies 497

McCarthy JD and Zald MN, 'Resource Mobilization and Social Movements: A Partial Theory' (1977) 82 American Jurney of Sociology 1212

Medearis J, 'Social Movements and Deliberative Democratic Theory' (2005) 35 British Journal of Political Science 53

——, *Why Democracy Is Oppositional* (Harvard University Press 2015)

Mendoça RF and Ercan SA, 'Deliberation and Protest: Strange Bedfellows? Revealing the Deliberative Potential of 2013 Protests in Turkey and Brazil' (2015) 36 Policy Studies 267

Mesa Técnica, 'Propuesta de Reforma Constitucional Acuerdo Por La Paz y Nueva Constitución"'
<https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_cronograma-3>

Moulian T, *Chile Actual. La Anatomía de Un Mito.* (LOM - ARCIS 1997)

Mouly C and Hernández Delgado E (eds), *Civil Resistance and Violent Conflict in Latin America. Mobilizing for Rights* (Palgrave 2019)

Murillo MV, 'Protestas, Descontento y Democracia En América Latina' (*Nueva Sociedad*, July 2021)

Mussa Y, 'Opinión: Después de 41 Años, Chile Escogió La Diversidad' *The Washington Post* (18 May 2021) <https://www.washingtonpost.com/es/post-opinion/2021/05/17/resultado-elecciones-chile-nueva-constitucion-2021-convencion-constituyente/>

Nash K, *Contemporary Political Sociology. Globalization, Politics, and Power. (Second Edition)* (Wiley-Blackwell 2010)

Nino C, *The Constitution of Deliberative Democracy* (Yale University Press 1996)

Note d'information, 'CEPAL Publica: Recursos Naturales: Situación y Tendencias Para Una Agenda de Desarrollo Regional En América Latina y El Caribe' <https://www.cepal.org/fr/notas-informativas/cepal-publica-recursos-naturales-situacion-y-tendencias-para-una-agenda-de> accessed 13 April 2022

OIM América del Sur, 'Pueblos Indígenas y Migración En América Del Sur. El Trabajo de La OIM y Principales Lineamientos Para La Estrategia Regional' <https://www.un.org/esa/socdev/unpfii/documents/2016/UN-Agencies-Docs/OIM-Spanish-version316.pdf>

Orellana P and Hutchison EQ, *El Movimiento de Derechos Humanos En Chile, 1973 - 1990* (CEPLA 1991)

Pairicán Padilla F, 'Lumaco: La Cristalización Del Movimiento Autodeterminista Mapuche' (2013) 17 Revista de Historia Social y de las Mentalidades 35

——, 'La Bandera Mapuche y La Batalla Por Los Símbolos' *CIPER* (11 2019) <https://www.ciperchile.cl/2019/11/04/la-bandera-mapuche-y-la-batalla-por-los-simbolos/>

Pardo D, 'Qué Fue La Séptima Papeleta, El Movimiento Que Cambió Hace 30 Años (y Por Qué Sus Demandas Aún Están Insatisfechas)' (*BBC Mundo*, 11 March 2020)

Parkinson J, 'The Roles of Referendums in Deliberative Systems' (*Representation*, 2 June 2020) <https://doi.org/10.1080/00344893.2020.1718195>

Partido Comunista de Chile, 'Chile Digno Entregó Propuestas Al Servel Para Un Plebiscito Constitucional Participativo, Seguro y Democrático' (20 September 2020) <https://pcchile.cl/2020/09/20/chile-digno-entrego-propuestas-al-servel-para-un-plebiscito-constitucional-participativo-seguro-y-democratico-2/>

Pastor D, 'Origins of the Chilean Binominal System' (2004) XXIV Revista de Ciencia Política 38

Pateman C, *The Problem of Political Obligation. A Critique of Liberal Theory* (Polity Press 1985)

Peña C, *Pensar El Malestar* (ebook, Random House Mondadori 2020)

Pereira Fredes E, 'Orden Público Económico: Una Propuesta de Conceptualización' (2008) 13 Derecho y Humanidades 157

Pérez Soto C, *Para Una Crítica al Poder Burocrático. Comunistas Otra Vez.* (LOM - ARCIS 2001)

——, 'Violencia Del Derecho y Derecho a La Violencia' (2012) 20 Derecho y Humanidades 73

Peter F, 'Political Legitimacy' <<https://plato.stanford.edu/archives/sum2017/entries/legitimacy/>>

Piqué ML and Sember MA, 'La Paradoja Del Derecho de Resistencia' (2005) 80 Lecciones y Ensayos 487

Pizarro G, 'Corrupción En Carabineros: Las Más de 40 Alertas Que Nadie Quiso Escuchar' (*CIPER*, 16 March 2017) <https://www.ciperchile.cl/2017/03/16/corrupcion-en-carabineros-las-mas-de-40-alertas-que-nadie-quiso-escuchar/>

Plattner MF, 'Illiberal Democracy and the Struggle of the Rigth' (2019) 30 Journal of Democracy 5

Programa de Naciones Unidas para el Desarrollo (PNUD), 'Informe Sobre Desarrollo Humano Chile 1998' (1998)

Przeworszki A, *Crises of Democracy* (Cambridge University Press 2019)

Puerta Riera MI, 'Crisis de La Democracia. Un Recorrrido Por El Debate de La Teoría Política Contemporánea.' (2016) XXIII Espiral, Estudios sobre Estado y Sociedad 9

Pye LW, 'Political Culture and Political Development' in Lucian W Pye and Sidney Verba (eds), *Political Culture and Political Development* (Princeton University Press 1969)

Ramirez Gruzmacher S, 'Comentarios En Torno a La Teoría Elitista de La Democracia' (1990) 22/23 Politica 193

Ramos Rosas MN, 'Imprecisiones Respecto al Derecho a La Resistencia En El Ecuador' (2013) 1 Law Review 47

Rawls J, *Political Liberalism* (Columbia University Press 1996)

——, *A Theory of Justice. Revised Edition* (Harvard University Press 1999)

——, *Lectures on the History of Moral Philosophy* (Barbara Herman ed, Harvard University Press 2000)

——, *Lectures on the History of Political Philosophy* (Samuel Freeman ed, Harvard University Press 2008)

Retamal R, 'Cuando Las Declaraciones Juegan Una Mala Pasada: El Listado de Frases Polémicas de Los Ministros y Subsecretarios de Piñera' *Diario La Tercera* (8 October 2019) <https://www.latercera.com/politica/noticia/gobierno-pinera-frases-polemicas/852188/>

Richardson J and Rittberger B, 'Brexit: Simply an Omnishabmbles or a Major Policy Fiasco?' 27 Journal of European Public Policy 649

Rojas F, '"Era Imposible Proyectar": El Mea Culpa de Los Encuestadores Tras El Fail de Los Sondeos Previos a La Elección' *Diario La Tercera* (24 May 2021) <https://www.latercera.com/la-tercera-pm/noticia/era-imposible-proyectar-el-mea-culpa-de-los-encuestadores-tras-el-fail-de-los-sondeos-previos-a-la-eleccion/USQITALFE5DVNE7XQTQ4Q7A34U/>

Rojas Pedemonte N and Miranda O, 'Dinámica Sociopolítica Del Conflicto y La Violencia En Territorio Mapuche. Particularidades Históricas de Un Nuevo Ciclo En Las Relaciones Contenciosas' (2015) 30 Revista de Sociología 33

Rosdorff LW, 'Hohfeld's Theory of Fundamental Legal Concepts: A No-Revision' (1973) 16 Logique et Analyse 259

Rovira Kaltwasser C, *Populism: A Very Short Introduction* (Oxford University Press 2017)

Rubin E, 'Judicial Review and the Right to Resist' (2008) 97 61

Ruiz Encina C, *Octubre Chileno. La Irrupción de Un Nuevo Pueblo* (ebook, Random House Mondadori 2020)

Ruiz-Tagle P, 'Principios Constitucionales Del Estado Empresario' [2000] *Revista de Derecho Público* 49

——, *Cinco Repúblicas y Una Tradición* (LOM 2016)

Salazar G, *Movimientos Sociales En Chile. Trayectoria Histórica y Proyección Política.* (Uqbar 2012)

——, *Conversaciones Con Carlos Altamirano. Memorias Críticas* (Debate 2013)

Salazar Sánchez M, 'Positivización Del Derecho de Resistencia En El Derecho Constitucional Alemán' (1993) 20 Revista Chilena de Derecho 323

Salazar V. G, *Del Poder Constituyente de Asalariados e Intelectuales (Chile, Siglos XX y XXI)* (LOM 2009)

Sanhueza AM, 'Caso Corpesca: La Empresa Es Condenada Por Soborno y En Exsenador Por Fraude y Cohecho' (*pauta.cl*, dic 2020)

<https://www.pauta.cl/politica/orpis-se-salva-de-delito-tributario-pero-no-de-coecho-y-fraude-al-fisco>

Schumpeter J, *Capitalism, Socialism and Democracy* (Routledge 1994)

Sen A, *Identity and Violence. The Illusion of Destiny* (Pinguin 2005)

Sepúlveda N, Cifuentes L and Ríos C, 'Elección Constituyente: Las Campañas Millonarias Que Fueron Derrotadas Por Candidaturas Casi Sin Fondos' *CIPER* (17 May 2021) <https://www.ciperchile.cl/2021/05/17/eleccion-constituyente-las-campanas-millonarias-que-fueron-derrotadas-por-candidaturas-casi-sin-fondos/>

Sepúlveda N and González M, '"Operación Huracán": Testimonios y Confesiones Confirman Que Fue Un Montaje.' *CIPER* (13 March 2018) <https://www.ciperchile.cl/2018/03/13/operacion-huracan-testimonios-y-confesiones-confirman-que-todo-fue-un-montaje/>

*Sesiones Mesa Técnica Constituyente* (Directed by Biblioteca del Congreso Nacional) <https://www.bcn.cl/procesoconstituyente/detalle_cronograma?id=f_cronograma-2> accessed 11 June 2021

Siegel RB, 'Constitutional Culture, Social Movement Conflict and Constituional Change: The Case of the Facto ERA. 2005-06 Brennan Center Symposium Lecture' (2006) 94 California Law Review 1323

Silfen Glasberg D and Shanon D, *Political Sociology. Oppression, Resistance and the State.* (SAGE 2011)

Simon WH, 'Three LImitations on Deliberative Democracy: Identity Politics, Bad Faith, and Indeterminacy' in Stephen Macedo (ed), *Deliberative Politics. Essays on Democracy and Disagreement* (Oxford University Press 1999)

Skinner Q, *The Foundations of Modern Political Thought*, vol 2 (Cambridge University Press 1978)

Smelser N, *Teoría Del Comportamiento Colectivo* (Fondo de Cultura Económica 1989)

Smith W, *Civil Disobedience and Deliberative Democracy* (Routledge 2013)

Squella A, 'Libertad e Igualdad. Las Promesas Cumplidas e Inclumplidas Por La Democracia' (1989) VI Anuario de Filosofía del Derecho 253

Stoker G, 'Introduction: Normative Theories of Local Government and Democracy' in Desmond King and Gerry Stoker (eds), *Rethinking Local Democracy* (Macmillan 1996)

Suárez Crothers C, 'La Constitución Como Celda o "Straightjacket Constitution" y La Dogmática Constitucional' (2009) 1 *Revista UNIVERSUM* 248

Sunstein CR, 'On the Expressive Function of Law Special Reports' (1996) 5 East European Constitutional Review 66

——, 'The Law of Group Polarization' in James S Fishkin and Peter Laslett (eds), *Debating Deliberative Democracy* (Blackwell Publishing 2003)

Tagle Orellana G, 'Prensa Escrita y Policía Secreta En CHile (DINA/CNI) Durante La Dictadura: La Reformulación Del Discruso En El Caso Marta Ugarte' (2018) 8 Historia 396 285

Talisse RB, 'Deliberativist Responses to Activist Challenges. A Continuantion of Young's Dialectic' (2005) 31 Philosophy and Criticism 423

Tapia Valdés JA, *El Terrorismo de Estado. La Doctrina de La Seguridad Nacional En El Cono Sur* (Nueva Imagen, 1980)

Tarrow S, 'Contentious Politics' in Donatella Della Porta and Mario Dani (eds), *The Oxford Handbook of Social Movements* (Oxford University Press 2017)

Taylor C, *The Malaise of Modernity* (House of Anansi Press 1991)

——, 'Modern Social Imaginaries' (2002) 14 Public Culture 91

Tironi E, *El Desborde. Vislumbres y Aprendizajes Del 18-O* (ebook, Planta 2020)

Toro P, 'Dueños de Penta Deberán Asistir a Clases de Ética' (*La Tercera*, 9 July 2018) <https://www.latercera.com/politica/noticia/duenos-penta-deberan-asistir-clases-etica/237259/>

Touraine A, *Sociología de La Acción* (Ariel 1969)

Tucker JA and others, 'From Liberation to Turmoil: Social Media And Democracy' (2017) 28 Journal of Democracy 46

Ugalde B, Schwember F and Verbal V (eds), *El Octubre Chileno. Reflexiones Sobre Democracia y Libertad* (ebook, Democracia y Libertad 2020)

Uprimny R, 'Las Transformaciones Constitucionales En América Latina: Tendencias y Desafíos' in César Rodríguez Garavito (ed), *El derecho en America Latina. Un mapa para el pensamiento jurídico del XXI* (Siglo Veintiuno 2011)

Uribe A, *El Libro Negro de La Intervención Norteamericana En Chile* (Siglo Veintiuno 1974)

Valdez JM, *Deliberative Democracy, Political Legitimacy, and Self-Determination in Multicultural Societies* (Westview Press 2001)

Valdivia JLM, Fauré D and Karmy J, *La Rebelión de La Patagonia. Imágenes y Testimonios Del Levantamiento Popular En La Región de Aysén (Febrero-Marzo) Del 2012)* (Editorial Quimantú 2014)

Vallejo Garretón R, 'La Constitución Económica Chilena: Un Ensayo En (De) Construcción' (2016) 14 *Estudios Constitucionales* 247

Vallejo Garretón R and Pardow Lorenzo D, 'Derribando Mitos Sobre El Estado Empresario' (135AD) 35

Various, 'Acuerdo Por La Paz y La Nueva Constitución' <https://obtienearchivo.bcn.cl/obtienearchivo?id=documentos/10221.1/76280/1/Acuerdo_por_la_Paz.pdf> accessed 2 May 2021

Verdugo S, 'The Justificacion of the Amove Moyority Rules of a Quorum of Constitutional Organic Acts' (2012) XXXiX *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso* 295

Virtuoso J, 'Introducción. América Latina Nuevamente Puesta a Prueba.' in Angel Alvarez (ed), *Crisis y Desencanto con la Democracia en América Latina* (Unviersidad Católica Andres Bello)

Vitale E, *Defenderse Del Poder. Por Una Resistencia Constitucional* (Trotta 2012)

Wade P, 'Estudios Afrodescendientes En Latinoamérica: Racismo y Mestizaje' (*Tabula Rasa. Revista de Humanidades*, 2017)

Waldron J, *Law and Disagreement* (Oxford University Press 1999)

——, 'Control de Constitucionalidad y Legitimidad Política' (2018) 27 Diakoin 7

'Working Group on Unification Referendums on the Island of Ireland' (*The Constitution Unit*, 26 November 2020) <https://www.ucl.ac.uk/constitution-unit/research/elections-and-referendums/working-group-unification-referendums-island-ireland>

Young IM, 'Communication and the Other: Beyond Deliberative Democracy', *Democracy and Difference* (Princeton University Press 1996)

——, *Inclusion and Democracy* (Oxford University Press 2000)

——, 'Activist Challenges to Deliberative Democracy' (2001) 29 Political Theory 670

Zakaria F, 'The Rise of Illiberal Democracy' [1997] Foreign Affairs 22

Zurn CF, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press 2007)

*Interpretación Artículo 350* (2003) 24 (Tribunal Supremo de Justicia)

*Requerimiento de Amparo Constitucional* Corte Constitucional de Colombia SU214-16

*Requerimiento de Amparo Constitucional* Corte Constitucional de Colombia C-577-11

Decreto Supremo 30. Crea Comisión Especial de Pueblos Originarios 1990

ILO, Indigenous and Tribal Peoples Convention, 1989 (No.169) 1989

Acta Constitucional Nº1 Crea Consejo de Estado 1976

Constitución Política de la República de Chile

D.L. Nº 1.065 'Designa Comisión para que estudie, elabore y proponga un anteproyecto de una nueva Constitución Política del Estado' 1973 8

D.L. Nº 128 Aclara sentido y alcance del Artículo 1 del Decreto Nº1 de 1973 1973

D.L. Nº 788 Dicta Normas sobre el Ejercicio del Poder Constituyente. 1974

D.L. Nº1 Acta de Constitución de la Junta de Gobierno 1973

D.L. Nº77 Declara Ilícitos y Disueltos los Partidos Políticos que Señala 1973