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“The Economy, Stupid”: Notes on a Continuing Conversation**

“La economía, estúpido”: notas para seguir conversando

For Roberto Gargarella

ABSTRACT

Roberto Gargarella has always placed distribution of access to political and economic power at the center of the analysis. This article focuses on his argument that participation might be able to improve material inequality. It argues that inequality can be confronted directly or indirectly, and that sometimes, participation is not the best mechanism for addressing inequality. The article draws on case studies from Japan and the Philippines to illustrate its argument.

KEYWORDS

Latin America, constitutions, comparative constitutional law, participation, Japan, Philippines.

RESUMEN

Roberto Gargarella siempre ha colocado la distribución del acceso al poder político y económico en el centro del análisis. Este artículo se centra en su argumento de que la participación podría mejorar la desigualdad material. Sostiene que la desigualdad puede ser enfrentada directa o indirectamente y que, a veces, la participación no es el mejor mecanismo para abordar la desigualdad. El artículo utiliza estudios de caso sobre Japón y Filipinas para ilustrar su argumento.

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PALABRAS CLAVE

América Latina, constituciones, derecho constitucional comparado, participación, Japón, Filipinas.

SUMMARY

Introduction. 1. Defining Democracy: A White Flag. 2. Direct or Indirect? Rights as Insufficient. 3. Participation as the Panacea? 4. Asian Solutions. 4.1. Japan and Land Reform. 4.2. The Philippines and Participatory Democracy. Conclusion. References.

[E]ven though keeping within the bounds of legality, a few families might own the land, thus having the exorbitant right to render the whole of humanity tributary to their will by this monopoly. In other words: the fate of the overwhelming majority of humanity would depend on the goodwill of a very small minority, in such a way that the right to live, which is consecrated by God and which is the first of all rights, would be subordinated to the right to landownership, which is consecrated by whom? By man!

Joseph Charlier, 1848

Surveying Latin America over the *longue durée*, economic inequality has been a persistent fact in virtually every country, despite the region's internal diversity. Today it remains the most unequal region of the world, even as there has been modest progress in this century. This profound inequality underpins Gargarella's magisterial overviews of the history of constitutionalism in the region.¹ His programmatic approach places distribution of access to political and economic power at the center of the analysis.

Consider some basic facts: half of the twenty countries in the world with the highest GINI coefficients are in Latin America.² With the exception of South Africa, the richest and largest economies on the list are all from the region, including Brazil, Colombia and Mexico. While there has been some growth in the size of the middle class this century, 30% of the region's population still lives below the poverty line.³ And by some measures, such as the concentration of wealth in the top 1%, inequality may be widening.⁴

1 GARGARELLA, R. *The Legal Foundations of Inequality. Constitutionalism in the Americas 1776-1860*. New York: Cambridge University Press, 2010; GARGARELLA, R. *Latin American Constitutionalism, 1810-2010. The Engine Room of the Constitution*. New York: Oxford University Press, 2013.

2 UNDP. *Humanity Divided: Confronting Inequality in Developing Countries*. New York: 2013.

3 CEPAL. *Panorama Social de América Latina 2019*. Santiago: Naciones Unidas, 2019. Available at: <https://www.cepal.org/es/publicaciones/44969-panorama-social-america-latina-2019>

The question for public lawyers and constitutionalists is what, if anything, can be done using our toolkit? From Haiti's *Constitution of Saint Domingue* of 1801 to Chile in 2019, where a small increase in subway fares provoked a massive "social explosion",⁵ Americans south of the Rio Grande have struggled to find a public law that can address structural problems related to wealth and inequality. The role of public law is summed up in the English-language title of Gargarella's 2010 book: *The Constitution of Inequality*. As he notes in a recent essay, "The constitutional model that still prevails in Latin America concentrates political authority in the hands of the Executive; seems ineffective from the viewpoint of political stability; is based on an unattractive approach to democracy; and does not contribute to the enforcement of the numerous social, economic and cultural rights that it generously consecrates."⁶

This essay tries to answer the question of what public law can and cannot do. It uses an impressionistic comparison with East Asia, where in the second half of the twentieth century, broad based growth occurred that reduced inequality and expanded the middle class. This was, I argue, accompanied by a particular vision of public law. I do not assert that this vision was or is transferable, and it may depend on deep traditions of meritocratic selection that are unavailable in other parts of the world. But it does provide some information about the dynamics of change, and the role of constitutions in triggering it.

This essay is organized as follows. I first consider the role of the economy in definitions of democracy, recalling a recent debate Gargarella initiated in his review⁷ of my book with Aziz Huq, *How to Save a Constitutional Democracy*.⁸ Here, I partly surrender to Gargarella, certainly for purposes of the issue at hand, but I also see us as on the same side of a deeper methodological choice: should inequality be tackled directly or indirectly? Liberals like me and Gargarella both seem to prefer the latter approach, through which constitutional structures are designed to facilitate redistributive movements. Others, particularly in the

4 There is a vibrant debate in the literature on the sources of inequality. Long-run explorations attribute it to the colonial legacy, as if the genetic inheritance of Spanish colonialism doomed the region. But this is contested. Williamson (2015) argues that inequality was not particularly low in the pre-industrial era, and that it is primarily a feature of the 20th century. Luquerna (2017) agrees and provides thorough data. In the constitutional sphere, Gargarella (2010) points to the synthesis between conservatism and liberalism as a result of specific political struggles in the 19th century, not the product of some deterministic inheritance from Spain.

5 CASTELLS, M. *Explosiones sociales*. In *La Vanguardia*. 2019. Available at: <https://www.lavanguardia.com/opinion/20191025/471186542407/explosiones-sociales.html>

6 GARGARELLA, R. *Latin America: Constitutions in Trouble*. In GRABER, M. et al. (ed.), *Constitutional Democracy in Crisis?* New York: Oxford University Press, 2018, 177.

7 GARGARELLA, R. Review of Tom Ginsburg and Aziz Huq, *How to Save a Constitutional Democracy*, The University of Chicago Press. In *Revista Derecho del Estado*. N.º 44, 2019, 397-406.

8 GINSBURG, T. and HUQ, A. *How to Save a Constitutional Democracy*. Chicago: University of Chicago Press, 2018.

Bolivarian tradition, see constitutions are purely instrumental devices through which to accumulate power, and then force redistribution through illiberal means. The second section considers this issue of direct versus indirect confrontation of inequality. I focus on Gargarella's mantra of participation, arguing that it is not always capable of achieving all he would wish.

The next section considers two Asian case studies in which "the social problem" was confronted in the 20th century: Japan and the Philippines. The argument is that the former confronted the problem indirectly through the constitution, while the latter took a much more direct approach. But Japan succeeded in overcoming stark levels of inequality while the Philippines did not. We then speculate, very tentatively, on implications of this comparison for a public law of substantive equality.

1. DEFINING DEMOCRACY: A WHITE FLAG

Democracy, of course, is an "essentially contested concept"⁹ and scholars have identified hundreds of subtypes. My position is that the definition adopted should fit the scholarly problem at hand, and this seems to be Gallie's own view: "politics being the art of the possible, democratic targets will be raised or lowered as circumstances alter".¹⁰ As Gargarella notes in his review,¹¹ Huq and I¹² tend to adopt a thin and procedural definition of liberal democracy that brackets the economic question. I defend the choice in that context, in which our primary explanandum was democratic backsliding. A relatively thin definition, with fewer components, allows for comparison across multiple contexts, while adding components to a definition increases differentiation.¹³

As citizens of a rich country with a large (if rapidly declining) middle class, we are perhaps predisposed to define democracy in a relatively thin, liberal sense: elections and the turnover of power, along with a very small number of core rights and the bureaucratic rule of law that are essential to enable those elections function. We could adopt an even thinner definition: Adam Przeworski¹⁴ says that elections alone are the definitional feature of democracy, while others add the core rights.¹⁵ One of our claims is that the bureaucratic rule of law is an essential part of any core definition, as it both

9 GALLIE, W.B. *Essentially Contested Concepts*. In GALLIE, W.B., *Philosophy and the Historical Understanding*. London: Chatto & Windus, 1964.

10 *Ibid.*, 186.

11 GARGARELLA. *Review of Tom Ginsburg and Aziz Huq, How to Save a Constitutional Democracy*, cit.

12 GINSBURG and HUQ. *How to Save a Constitutional Democracy*, cit.

13 SARTORI, G. *Concept Misformation in Comparative Politics*. In *American Political Science Review*. N.º 64, 1970, 1033-1053.

14 PRZEWORSKI, A. *Crises of Democracy*. New York: Cambridge University Press, 2019.

15 COLLIER, D. and LEVITSKY, S. *Democracy with Adjectives: Conceptual Innovation in Comparative Research*. In *World Politics*. N.º 49, 3, 1997, 430-451.

incentivizes peaceful transfer of power, ensures the integrity of elections, and allows the implementation of different social programs chosen by the people through their representatives. For our specific analytic purpose, a liberal definition of democracy seemed to be a good enough concept.

Gargarella argues that this thin definition will not do, and criticizes Schumpeterian definitional approaches. Can the economic question really be bracketed in constitutional analysis? The liberal answer has always been yes—and this is part of Gargarella's critique—but we are in a stage of constitutional life that the answer must be, for most countries, no. The reason is that power is not neatly segmented between political and economic spheres. Looking at the world's heads of state today, I count a disproportionate number of billionaires, whose ranks include Pinera, Putin, and a set of at least nine monarchs in Europe, the Middle East, and Thailand. Even more importantly, consider the ability of wealthier citizens to have a larger voice in the democratic conversation. And this conduces to permanent exclusion of citizens at the lower end of the wealth distribution. As Khaitan¹⁶ notes, equality of liberty is a key precondition for liberal legitimacy, but when a group is permanently shut out of power, this legitimacy is threatened. In his view, "Neoliberal democracies, sooner or later, become plutocracies."¹⁷ Neoliberalism is not liberalism, to be sure, but rather a specific set of economic policies that might or might not be adopted by a democratic polity. But the large increases in the shares of top wage earners seem to be a structural feature of many countries these days. Hence there is a large challenge to liberalism, posed by neoliberalism.

Let us then add, as a definition of a normatively desirable concept of democracy, some degree of economic redistribution such that differences between rich and poor do not impede the ability of the latter to participate in politics.¹⁸ Adopting such a view for present purposes means that I am surrendering to Gargarella in this definitional battle over the thickness of our concept of democracy. As we shall see, however, he and I are on the same side of a deeper issue about public law and inequality.

2. DIRECT OR INDIRECT? RIGHTS AS INSUFFICIENT

Adopting a thicker definition of democracy highlights the need for constitutional structures to both empower and restrain economic activity, just as they both empower and restrain political power. This leads to the next question: how should this be done? Should the constitution squarely address inequality directly or indirectly? A standard liberal answer is to say that it should do

16 KHAITAN, T. *Political Insurance for the Poor?* In *Global Constitutionalism*. N.º 8, 3, 2019, 536-570.

17 *Ibid.*, 548.

18 ANDERSON, E. S. *What is the Point of Equality?* In *Ethics*. N.º 109, 2, 1999, 287-337.

so only indirectly. Wealth should be regulated through the fiscal system, but that system should be subject to control of the political process. Whereas the private spheres of religion, property and conscience are to be constitutionally protected from majoritarian decision-making, the level of redistribution in any given society should be decided through collective political processes. This in turn requires facilitating a certain level of equal participation in the public sphere, itself necessary to get an accurate aggregation of the collective choice of the people. Inequality is addressed only indirectly: instead we need to ensure a transparent, fair political process, and then redistribution may happen through the ballot box. But of course, it may not, as some critics of liberalism have long pointed out.

Will indirectly addressing the economic question be enough? Progressives and radicals say no. Instead, they prefer direct constitutional intervention to reduce inequality. One standard answer from the constitutional lawyers' toolkit is to provide an array of social and economic rights that can then be enforced, usually in courts, to improve distribution and restrain wealth. Alternatively, one could frame these social and economic policies as Directive Principles, which state particular goals for the government, not judicially enforceable. As Khaitan¹⁹ argues, there are many ways to incentivize redistribution other than judicial enforcement, including demanding that parliament issue an annual report on progress in meeting directive principles. Constitutions can also regulate property in quite detailed ways that anticipate some redistribution. An example is Section 25 of South Africa's Constitution, a complicated provision which both protects property rights but also aims to undo prior dispossessions that occurred early in the 20th century, and to facilitate land reform. The Constitution also has non-eviction rights for tenants in Section 26.²⁰ Such clauses are examples of directly confronting entrenched structural inequalities, in a way that takes into account the political interests of current landholders as well.

Surely this direct approach is also subject to criticism. There is a temptation in constitutional thought to act directly: to name the new social problems and target behavior toward them. But the limits of the constitutional form are very real. Constitutions are pieces of paper whose main mechanism of implementation is coordinated action by actual human beings and organizations. Social constitutionalism works, if ever, because of its impact on individuals and collectives seeking to advance claims. Where the constitution mobilizes people, they may be able to use its structures effectively. Where it does not, the constitution will remain a relatively dead letter, at least as far as redistribution is concerned. And so, while the literature on social and economic

19 KHAITAN. *Political Insurance for the Poor?*, cit.

20 GINSBURG, T. and DIXON, R. *The South African Constitutional Court and Socio-economic Rights as "Insurance Swaps"*. In *Constitutional Court Review*. N.º 4, 2018, 1-29.

rights has examples of successes, there is also much critical work about the failure of these pieces of paper to deliver meaningful change.²¹

The taxonomic variation in Latin America's constitutional history is a rich one, and full of solutions that seek to tackle the social problem directly. The Bolivarian constitutions of Bolivia, Ecuador and Venezuela all provide examples in their own way, and arguably the first two had some success in reducing inequality, so that they are both in the lower half of South American countries along this measure. But it is also the case that the recent reduction in Gini coefficients this century has occurred in countries adopting diverse constitutional approaches, including Chile, Bolivia and Argentina. Gini coefficients have remained stubbornly high in places like Mexico and Colombia. This divergence suggests that redistributive rhetoric and a powerful apex court are not enough to overcome deep structural inequalities.

Latin American constitutions are distinctive for having more rights than those in other regions. Gargarella²² places great importance on the Mexican Constitution of 1917, and the coalition it brought into power, with long textual commitments to social and economic rights. This was a critical moment for the transition away from the liberal-conservative synthesis that had dominated the region's approach in the 19th century. Gargarella identifies it as initiating the phase of "social constitutionalism" with long and elaborate lists of constitutional rights. These were later borrowed by other countries in the region, and in turn Latin America was the leader among regions of the world, adopting the American Declaration of Human Rights several months before the Universal Declaration of Human Rights. The Mexican Constitution also devoted significant attention to the central issue of land, promising a program of land reform that was then realized in part two decades later.²³

Gargarella's position on these rights is mixed. Even as he celebrates the Mexican constitution and the revolution in rights that it begat, he is still concerned ultimately with the need for enforcement from what he calls the "Engine Room" of the Constitution. As he notes, "constituents have demonstrated a notable obsession with incorporating more rights, something that has not been matched by a similar obsession with improving—or changing, where

21 UPRIMNY, R. *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*. In *Texas Law Review*. N.º 89, 2011, 1587-1609; LANGFORD, M. (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*. Cambridge: Cambridge University Press, 2009; CHILTON, A. and VERSTEEG, M. *How Constitutional Rights Matter*. New York: Oxford University Press, 2020.

22 GARGARELLA, R. *The "New" Latin American Constitutionalism: Old Wine in New Skins*. In VON BOGDANDY, A. et al. (ed.), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*. New York: Oxford University Press, 2017, 211-234.

23 GROTE, R. *The Mexican Constitution of 1917: An Early Example of Radical Transformation Constitutionalism*. In VON BOGDANDY, A. et al. (ed.), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune*. New York: Oxford University Press, 2017, 149-170.

warranted—the organization of power”²⁴. In that sense, Gargarella, like the liberals, does not think direct attacks on inequality are sufficient. He is not a Marxist and his answer does not reduce to economic determinism. Instead, in his writings, he has consistently emphasized the failure of *institutions* to deliver, and the inability of the machinery of constitutional democracy as currently practiced to encourage participation and to solve problems. His participatory and inclusive approach is an indirect solution, in which citizen connection to politics will produce fairer outcomes.

In this critique, one detects a visionary thinker, who sees, though does not fully describe, a world of political institutions that are responsive and vigorous, that deliver a social order in which people live in dignity and participate in collective problem solving. Such a world might be achievable, but it has not been realized in this particular world, in this particular hemisphere, in these particular two centuries.

3. PARTICIPATION AS THE PANACEA?

Redesigning the “Engine Room” requires us to look at constitutional design writ large. Excessive centralization and concentration of power is a major problem. The single most important reform in the Gargarella framework would be a move away from the hyper-presidentialism, in which executive power becomes a massive prize and crowds out incentives for responsive politics. This call in turn suggests decentralization of power down to levels at which it can be exercised responsibly. Various experiments in citizen participation, from the *cabildos* of Chile’s ongoing constitutional reform process, to random selection of citizen assemblies in British Columbia and Ireland, illustrate the ability of institutional design to solicit input from citizens.²⁵ Deliberative polling, developed and advanced by Fishkin,²⁶ has been used all over the world, and he makes a strong epistemic case for its use.

But participation is no panacea. There are at least three reasons not to over-idealize. First, while the experiments in citizens assemblies and deliberative polling have been extremely interesting, and show the power of small groups to deliberate, it is not clear that they can become a *regular* or routine part of democratic governance. The Irish Citizens’ Assembly for example, was convened in 2016 to deliberate about major and controversial issues which had deadlocked the political system. Citizens deliberated and came up with proposals that were then sent to referendum. It is a great suc-

24 GARGARELLA, R. *The “New” Latin American Constitutionalism*, cit., 224-225.

25 LANDEMORE, H. *Open Democracy: Reinventing Popular Rule for the Twenty-First Century*. Princeton: Princeton University Press, 2020.

26 FISHKIN, J. *Democracy when the People are Thinking*. New York: Oxford University Press, 2018.

cess story. But the efficacy of such experiments might depend precisely on their episodic nature. It is well and good to call for ongoing participatory governance but it is not yet clear that people will sustain the interest. Other institutions of direct democracy, such as the referendum, were introduced as participatory innovations, but have found themselves subject to various abuses. In California, for example, direct democracy has led to multiple initiatives on various topics at the same time, and has induced the elected representatives to avoid their own duty of deliberating, sending questions to the public instead. Initiatives and referenda are subject to abuse, and in any case, we observe apathy, inequality and polarization even in societies with such constitutional mechanisms.

Secondly, sometimes the public inputs are not particularly attractive. We are living in highly polarized times. Empowering the public to give their views and adopt popular policies will sometimes lead to unattractive policies. It will lead, in many countries, to the revival of the death penalty, for which public support far outpaces the elite consensus on abolition. It will likely lead to many policies that target or demonize outsiders. It might lead to policies that endanger the planet or call into question basic science. It might empower illiberal demagogues, whose cult of personality will inform the deliberation itself.²⁷

Third, these efforts may not easily scale up to the level of an entire country. Problems of aggregating public inputs in a decentralized system are real and genuine, and have received inadequate attention. Decentralization as a development strategy has had some genuine successes. But it is also subject to large variances at the national level as policy in different parts of a country looks different. Take the issue of regional wealth inequality, a central issue in virtually every Latin American country, in which wealth is concentrated in the capital city and lowland coastal regions, and remote highlands tend to be poorer. The economic forces producing such a configuration are well known. But will they be resolved simply by increasing citizen participation? The fact is that different regions of a country have different interests, and substantively different preferences about the appropriate level of wealth redistribution and income transfers. These clashes of interest are exactly the kinds of issues that political systems must resolve. Constitutional democracy with some genuine social and economic rights provides a way of minimizing the costs borne by the losers in this political process. But it in no way determines who will win the primary battle, which is where inequality is structurally embedded.

27 ALBA, D. and FRENKEL, S. *Medical Expert who Corrects Trump Is Now a Target of the Far Right*. In *NY Times*. 2020. Available at: <https://www.nytimes.com/2020/03/28/technology/coronavirus-fauci-trump-conspiracy-target.html?action=click&module=Spotlight&pgtype=Homepage>

4. ASIAN SOLUTIONS

How then, might we actually change the world? Can changing the engine room result in policies that reduce inequality and increase participation? I turn now to the experience of East Asia, which produced phenomenally successful societies in the second half of the twentieth century. These societies experienced *shared* growth that raised incomes of the median citizens.²⁸ As I shall show, participation in the sense that deliberative theorists promote was not a major element of the way this occurred. This section considers two different Asian countries that had to grapple with inequality: Japan and the Philippines. I choose these two countries in part because both confronted large problems of inequality, particularly with regard to land allocation, similar to what is faced throughout Latin America. Despite certain similarities, however, the two countries chose very different approaches to tackling inequality. Japan largely relied on a model of liberal democracy of the type I tend to favor, where the Philippines adopted more participatory strategies. Japan is now a rich and successful democracy, while the Philippines remains poor and unequal. Indeed, it might be described as a Latin American country in the middle of Asia.

4.1. *Japan and Land Reform*

Postwar Japan has been one of the great success stories of liberal constitutional democracy. From the ashes of World War II, Japanese built a phenomenally rich economy and a democracy that has endured for 75 years. It is so stable as to be boring. The story of the constitutional founding, whereby a small group of Americans working for the Supreme Commander of the Allied Powers, Douglas MacArthur, drafted most of what became the 1946 Constitution in just a couple of weeks, has been told often and told well.²⁹ This is sometimes considered the paradigm of the “Imposed Constitution”.³⁰ Indeed, having outsiders write constitutions is no longer politically viable in an era of nation-states, though may have some theoretical advantages in terms of disinterest.³¹ Imposition allowed, for example, the introduction of gender

28 World Bank. *The East Asian Miracle: Economic Growth and Public Policy*. New York: Oxford University Press, 1993.

29 ROBINSON, D. and MOORE, R.A. *Partners for Democracy: Crafting the New Japanese State under MacArthur*. New York: Oxford University Press, 2002.

30 LAW, D.S. *Imposed Constitutions and Romantic Constitutions*. In ALBERT, R. et al. (ed.), *The Law and Legitimacy of Imposed Constitutions*. New York: Routledge, 2019. Imposed in this sense is different from what Gargarella (2018) calls “imposition” by one domestic faction of its views on another.

31 LANNI, A. and VERMEULE, A. *Constitutional Design in the Ancient World*. In *Stanford Law Review*. N.º 64, 2012, 907-49.

equality in a highly patriarchal society, a goal which has taken decades of social change to implement.

My interest is in how this imposed constitution addressed situations of profound economic inequality that obtained before its adoption. Prewar Japan had been capitalist economy, but dominated by a small number of industrial groups known as *Zaibatsu*. It also had highly concentrated land ownership, in estates that had accumulated in the early years of the Meiji era. MacArthur himself, in his instructions to the drafters, had prioritized ending the feudal system, which presumably included large land-holders whose tenants were in a subordinate relationship with them.

MacArthur's administration was staffed with American lawyers who had come of age during the "New Deal" period, when social redistribution reached its apex in the United States. They were committed to the idea that government could solve problems, and their diagnosis of Japanese society was one that Gargarella would celebrate, for they recognized that a concentration of economic power was incompatible with democracy. One of their immediate steps was to break up the *Zaibatsu* conglomerates and sell the shares to the public, in a so-called "democratization of securities."³²

In terms of agricultural land, Charles Kades, one of the main figures in the effort, proposed what became known as the "red clause" of the draft Constitution. This provided that all land ultimately belonged to the Japanese state. But this clause was immediately rejected by the Japanese government interlocutors who were to shepherd the draft through the newly elected Diet. From their point of view, nationalization of all land would be communistic and incompatible with Japanese society. But the idea of land reform was certainly present during constitutional debates.

The actual text of the Constitution says relatively little about land or redistribution. Article 29 on the right to property first states that the right to hold property is inviolable, thus eliminating communism as a viable form of economic governance. It then provides for a social limitation clause, namely that property rights are "defined by law, in conformity with the public welfare." It further provides for taking of property upon payment of just compensation. It is kind of a standard-form property clause.

However, with the encouragement of the Occupation authorities, the Government carried a major land reform of farmland, in which the price paid by the government was not the market rate, but a fixed formula based on projected future earnings of the farmers. Such an approach was necessitated in part because of the lack of market prices in the particular social conditions of the postwar occupation. But by tying the government formula to farmer income, the Government took advantage of the fact that prices for

32 KINOSHITA, M. *Democratic Economic Reform and Constitution: A Case Study of Japanese Economic Reform after World War II*. Manuscript, 2020.

crops were controlled by the Occupation authorities. In addition, there was high inflation. Thus the actual price paid to the landlords for expropriation was quite low in real terms. When landlords challenged the compensation as being unconstitutionally confiscatory, the courts rejected their challenge, in keeping with what would become a long pattern of judicial deference to government action in Japan.

Scholarly debate on the constitutionality of the land reform program was fierce. However, one prominent scholar, Sakae Wagatsuma, drew on what I might call a Gargarella-type approach to defend the land reform. “What is the ideal that runs through the new Constitution? Needless to say, it is the democratization of our country.... across all political economic and cultural spheres.”³³ This makes inequality what Gargarella,³⁴ following Alberdi, might label the “central drama” of the constitution. Noting that in a democracy, there would naturally be pluralist disagreement about specific policies, Wagatsuma went on the note that “with regard to the democratization of the economy, the meaning with which all people agree is obvious. It is that all people are able to gain sufficient fruits from their economic activities by their labor” with equal opportunities for enjoyment. In other words, Wagatsuma drew on the overarching principle of democracy to justify a confiscatory economic policy directed at redistribution.

The rest is history. Postwar Japan rested on a solid foundation of rural voters, who formed the backbone of the Liberal Democratic Party that has governed the country virtually uninterrupted ever since. The power of small farmers who were created by the land reform has grown extraordinarily. But the key point that the democratic constitution facilitated a one-time redistribution which led to a society dominated by the middle class.

It is worth noting that Japan in this period was a liberal democracy, but not one that drew on new mechanisms of popular participation. Electoral politics was vigorous but also the primary mechanism of public participation. During much of the period, key decisions were made in Tokyo. A communist party existed for the entire period but never had much electoral success.

The public law underpinning this story is one in which conventional development theory was not followed. The state, most scholars understand, played a major role in giving overall direction to the economy. Bureaucrats were relatively high status, and were given large amounts of discretion. Administrative law was weak and empowering of “administrative guidance”, a practice in which bureaucrats could direct private sector action without

33 WAGATSUMA, S. *Nouchi-Kaikaku wa Kempo-Ihan ka?* [Is Land Reform Unconstitutional?]. M. Kinoshita (transl.). In *Houritsu Times*. N.º 2, 1948, 20-28.

34 GARGARELLA, R. *When Is a Constitution Doing Well? The Alberdian Test in the Americas*. In GINSBURG, T. and HUQ, A. (ed.), *Assessing Constitutional Performance*. New York: Cambridge University Press, 2016, 99-133.

formal legal authority to do so. There was no administrative procedures law, and so little public participation in decision making.

The constitution, to be sure, did contain a wide array of rights. But many of these were implemented in ways that were fundamentally different from what the text (sometimes adopted from the US Constitution or that of Weimar Germany) would imply. In particular, rights to welfare were not often adjudicated. The liberal rights of freedoms of speech and association, along with property rights were accepted. But there was not a thicker set of constitutional requirements as one might expect. And the welfare state that did exist, which was modestly redistributive, was not grounded in constitutional law or major social movements. Judges were not defending social and economic rights to any great extent.

In short, Japan's is a story of transformation, and reduction of inequality, without any of the mechanisms of the new transformative constitutionalism, within a liberal constitutional democratic framework. And it worked. Indeed the period between the 1950s and 1989 was the greatest economic performance of human history, with the exception of China since 1989.

Of course, the context was very different than Latin America today. Japan's 19th century project of constructing modernity involved a homogenization of the populations, such that it was constructed as a single group without ethnic or linguistic difference. A sense of social solidarity was promoted actively, as a kind of "invented tradition" of communitarian harmony. Naturally there were indeed very serious conflicts, involving labor, land rights and gender, as well as debates over the proper role of the United States. But these were resolved amicably. Liberal democracy was sufficient to resolve the social problem in this context.

4.2. The Philippines and Participatory Democracy

The Japanese story can be contrasted with the Philippines, whose history is similar to and indeed entwined with that of Latin America. Claimed for Spain by Magellan in 1521, the country was governed from the Viceroyalty of New Spain in Mexico. An independence movement began in the 1870s and exploded in a full-blown revolution in 1896. With the Spanish American War in 1898, the United States gave initial succor to the revolutionaries, but upon Spain's defeat, annexed the territory. This gave rise to a brief but bloody war between the United States and the Filipino revolutionaries. The country then became a territory of the United States. In preparation for independence, a commonwealth was established in 1935, with a ten-year sunset, but Japan's occupation of the country in World War II cut that short. The country's formal independence occurred in 1946.

Gargarella's history of Latin American constitutionalism could apply fairly well to the Philippines. The social structure was highly unequal, and

the economic structure based in a system of haciendas, with rural notables owning vast tracts. American reformers, under the first Governor General, future President William Howard Taft, sought to implement a land reform, but this ran squarely into the opposition of traditional elites, who successfully mobilized their peasant clients against it. In short, the Philippines upon independence was a poor and highly unequal country.

After independence, the populist administration of Ramon Magsaysay ran on a program of land reform. Major progress was made under President Diosdado Macapagal (1961-1965). However, he was defeated by Ferdinand Marcos in 1965, who then declared martial law in 1972. The next 14 years were a period of dictatorship corresponding with developments in Latin America in the same period. There were tens of thousands of acts of torture, and at least 3200 extrajudicial killings. Congress was closed, the media censored, and opposition figures harassed. Opposition figure Benigno Aquino was assassinated at the airport upon his return to the country in 1983.

The major development in the current republic was the so-called People Power Revolution of 1986, known locally by the name of the street on which protestors gathered, Epifanio de los Santos Avenue (EDSA). The protests followed a massive election fraud committed by Marcos, in which the opposition coalesced over Corazon Aquino, Benigno's widow. Aquino's government immediately adopted a transitional constitution, leading to the adoption of the current permanent Constitution of the Philippines in 1987. This constitution features much progressive language and provides for several rights, but generally takes the approach of designating these as state duties rather than enforceable rights.³⁵ It requires the state to undertake both agrarian and urban land reform programs.³⁶ Notably it also gives constitutional status to civil society organizations, whose role is to be respected.³⁷ A Human Rights Commission was established, with powers of investigation and the ability to provide legal remedies.

In short, the Philippines was well ahead of Latin America in pursuing the strategies of transformative constitutionalism. It had a genuine popular movement that transformed the country and led to the establishment of a redistributive, participatory constitution. But the results have been largely disappointing. Today the country has the highest GINI coefficient in Asia; at

35 See, e.g., Article II, Sec. 9 ("The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full employment, a rising standard of living, and an improved quality of life for all.") and Sec 15 ("The State shall protect and promote the right to health of the people and instill health consciousness among them.")

36 Article XIII, Sec. 4-10.

37 Article XIII, Sec. 15 ("The State shall respect the role of independent people's organizations to enable the people to pursue and protect, within the democratic framework, their legitimate and collective interests and aspirations through peaceful and lawful means.")

44.4 as of 2015 it ranks around the same level as Bolivia and Ecuador. Other developing countries in Asia, such as Indonesia and Thailand, do much better, with coefficients in the 30s. The economy looks a lot more like those in Latin America than its Asian neighbors.

A recent detailed assessment of the performance of the Constitution since 1987 is sobering.³⁸ It notes remarkable progress in establishing the institutions of democratic governance, and the passage of inclusive legislation. Independent bodies ensure accountability and electoral integrity. The courts have frequently sided with civil society, labor and indigenous peoples. Furthermore, there has been genuine attention to decentralization, one of the core goals of the 1987 Constitution, and this has produced a sense of active participation in local.³⁹

But certain core goals have not been achieved. The Constitution seeks to prohibit political dynasties at the local and national level, but implementing legislation to define the phenomenon has never been passed. According to Mendoza et al.,⁴⁰ 70% of district representatives in the 15th Congress (2010–2013) were from a political dynasty, and that these areas corresponded with worse development outcomes. Local politics are highly personalistic.

The current President, Rodrigo Duterte, is a right-wing populist who has overseen a campaign of extrajudicial killings that has surpassed even the Marcos era, but his targets are low level drug dealers rather than political opponents. While the Philippines seems to be a hyper-presidential system, it actually does exhibit some constraints, and there have been multiple impeachment attempts, with one President actually being removed for corruption. Several proposals to remove term limits have failed. So, there are real constraints on power.

Of central concern to our analysis, the "direct" constitutional strategy of demanding economic reforms has been ineffective. Quoting Atienza *et al.*:

[T]he impact of land reform on alleviating poverty has been only modest because of, among others, imperfect targeting and under-targeting of the poorest agrarian reform beneficiaries. Some even contend that the Comprehensive Agrarian Reform Program has made agrarian reform beneficiaries worse off and created an altogether new class of 'landed poor'. Many farmers are pushed to sell or mortgage their lands to commercial farms or other beneficiaries. There is thin compliance given that land reform legislations were passed in pursuit of the constitutional mandate. However, these laws are detached from economic realities, especially

38 ATIENZA, M.E.L. *et al.* *Constitutional Performance Assessment of the 1987 Philippine Constitution*. Stockholm: International Institute for Democracy and Electoral Assistance, 2019.

39 *Ibid.*, 36.

40 MENDOZA, R.U.; BEJA E.L. Jr.; VENIDA, V.S. and YAP, D.B. *Inequality in Democracy: Insights from an Empirical Analysis of Political Dynasties in the 15th Congress*. In *Philippine Political Science Journal*. N.º 33, 2012, 132-45.

in the rural areas where people have shifted their attention from farm ownership to overseas Filipino workers' remittances as a vector of upwards social and economic mobility.⁴¹

It is obviously too much to attribute the persistence of inequality to the failure of a constitutional text. But I argue that it is surely relevant that a constitution, adopted three and a half decades ago in a country with very similar economic structure to that of Latin America, which gave full voice to aspirations for citizen participation, has not managed to overcome structural inequalities. That neighboring countries with very different constitutional traditions, such as authoritarian Thailand and corrupt Indonesia, have done better, suggests that participatory and inclusive politics are not enough to address economic issues. This should give us pause before adopting the Gargarella vision of participation as the solution.

Indeed, when contrasted with Japan, one implication is that external imposition might be the necessary condition to effectuate massive reform. I do not go so far, for such an argument is a sensitive one. But for present purposes, it is enough to point out that the "direct" approach to redistribution did not do as well as the "indirect" approach.

CONCLUSION

Asia and Latin America are very different regions of the world. But the two countries we have examined each had to confront profound inequalities in a democratic constitutional framework, and thus provide a lens to think about how the "Engine Room" interacts with inequality. Limited conclusions can be drawn from two case studies, but the paired comparison suggests that simply opening up the Engine Room may not facilitate systemic change. What Japan did was to create a middle class through land reform, which in turn made liberal constitutional politics possible.

The "social problem" is an enduring one in constitutional thought, going back to the Ancient Greeks. Relations among the social classes, and a constitutional bargain among them, has been the central concern of constitutional makers ever since.⁴² But in many countries, including in the rich world, the "Middle Class Constitution" seems to be declining in favor of the concentration of wealth in recent years. This means that we are all becoming Latin America to some extent.

41 ATIENZA *et al.* *Constitutional Performance Assessment of the 1987 Philippine Constitution*, *cit.*, 34.

42 SITARAMAN, G. *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic*. New York: Alfred A. Knopf, 2017.

Or are we? There are examples of societies that have tackled inequality. The direct approach is favored by many constitutional thinkers, who argue for robust social and economic rights, directive principles, and land redistribution. Liberals, on the other hand, favor more indirect approaches, providing the structures of political competition, in which coalitions can bargain over the division of the social pie. Liberalism seems too thin to address inequality in an era of profound concentration of wealth, and Gargarella proposes participation as a solution instead. In this, Gargarella and liberals have something in common, namely that they recognize that *politics* rather than legal tinkering are the ultimate guarantor and channel by which inequality must be addressed. Direct approaches are insufficient without indirect approaches that change the political structure.

The contrasting experiences of redistributive land reform in Japan and the Philippines are illustrative. The latter's program was constitutionally sanctioned, and has been reported to be ineffective. The former's program pursued under the unusual circumstances of an occupation, which allowed liberal politics to take the fore. The landowners were simply too politically weak to interfere, and the result was a mainly egalitarian society in which most people were middle class.

In short, a thicker conception of democracy, in which equality is a goal, cannot ultimately be implemented *directly* through constitutions. Instead, indirect mechanisms that involve the political process are the only way to actually tackle inequality. Rights might be a part of the package, but only to the extent they induce collective mobilization in the political process. Participation may be part of the package, but might lead to regressive results. After all, I write from a country in which large vibrant political movements are as likely to reflect populist demagoguery as they are progressive social reform.

REFERENCES

- ALBA, D. and FRENKEL, S. *Medical Expert who Corrects Trump Is Now a Target of the Far Right*. In *NY Times*. 2020. Available at: <https://www.nytimes.com/2020/03/28/technology/coronavirus-fauci-trump-conspiracy-target.html?action=click&module=Spotlight&pgtype=Homepage>
- ANDERSON, E. S. *What Is the Point of Equality?* In *Ethics*. N.º 109, 2, 1999, 287-337.
- ATIENZA, M. E. L. *et al. Constitutional Performance Assessment of the 1987 Philippine Constitution*. Stockholm: International Institute for Democracy and Electoral Assistance, 2019.
- BERMEO, N. *On Democratic Backsliding*. In *Journal of Democracy*. N.º 27, 1, 2016, 5-19.
- CASTELLS, M. *Explosiones sociales*. In *La Vanguardia*. 2019. Available at: <https://www.lavanguardia.com/opinion/20191025/471186542407/explosiones-sociales.html>

- CHARLIER, J. *Solution of the Social Problem or Humanitarian Constitution, Based upon Natural Law, and Preceded by the Exposition of Reasons (1848)*. In CUNLIFFE, J. and ERREYGERS, G. (ed.), *The Origin of Universal Grants*. London: Palgrave Macmillan, 2004, 103-120.
- CHILTON, A. and VERSTEEG, M. *How Constitutional Rights Matter*. New York: Oxford University Press, 2020.
- CLÉMENT, D. *Human Rights or Social Justice? The Problem of Rights Inflation*. In *International Journal of Human Rights*. N.º 22, 2, 2018, 155-169.
- COLLIER, D. and LEVITSKY, S. *Democracy with Adjectives: Conceptual Innovation in Comparative Research*. In *World Politics*. N.º 49, 3, 1997, 430-451.
- COMISIÓN ECONÓMICA PARA AMÉRICA LATINA (CEPAL). *Panorama Social de América Latina 2019*. Santiago: Naciones Unidas, 2019. Available at: <https://www.cepal.org/es/publicaciones/44969-panorama-social-america-latina-2019>
- FISHKIN, J. *Democracy when the People Are Thinking*. New York: Oxford University Press, 2018.
- GALLIE, W.B. *Essentially Contested Concepts*. In GALLIE, W.B., *Philosophy and the Historical Understanding*. London: Chatto & Windus, 1964.
- GARGARELLA, R. *Latin America: Constitutions in Trouble*. In GRABER, M. et al. (ed.), *Constitutional Democracy in Crisis?* New York: Oxford University Press, 2018, 177-190.
- GARGARELLA, R. *Latin American Constitutionalism, 1810-2010. The Engine Room of the Constitution*. New York: Oxford University Press, 2013.
- GARGARELLA, R. *Review of Tom Ginsburg and Aziz Huq, How to Save a Constitutional Democracy, The University of Chicago Press*. In *Revista Derecho del Estado*. N.º 44, 2019, 397-406.
- GARGARELLA, R. *The “New” Latin American Constitutionalism: Old Wine in New Skins*. In VON BOGDANDY, A. et al. (ed.), *Transformative Constitutionalism in Latin America. The Emergence of a New Ius Commune*. New York: Oxford University Press, 2017, 211-234.
- GARGARELLA, R. *The Legal Foundations of Inequality. Constitutionalism in the Americas 1776-1860*. New York: Cambridge University Press, 2010.
- GARGARELLA, R. *When Is a Constitution Doing Well? The Alberdian Test in the Americas*. In GINSBURG, T. and HUQ, A. (eds.), *Assessing Constitutional Performance*. New York: Cambridge University Press, 2016, 99-133.
- GINSBURG, T. and DIXON, R. *The South African Constitutional Court and Socio-economic Rights as “Insurance Swaps”*. In *Constitutional Court Review*. N.º 4, 2018, 1-29.
- GINSBURG, T. and HUQ, A. *How to Save a Constitutional Democracy*, Chicago, University of Chicago Press, 2018.
- GROTE, R. *The Mexican Constitution of 1917: An Early Example of Radical Transformation Constitutionalism*. In VON BOGDANDY, A. et al. (ed.), *Transformative Constitutiona-*

lism in Latin America. The Emergence of a New Ius Commune. New York: Oxford University Press, 2017, 149-170.

JUNQUERA, P. A. *Functional Inequality in Latin America: News from the Twentieth Century.* In BERTOLA, L. and WILLIAMSON, J. (ed.), *Has Latin American Inequality Changed Direction? Looking over the Long Run.* Cham: Springer, 2017.

KHAITAN, T. *Political Insurance for the Poor?* In *Global Constitutionalism*. N.º 8, 3, 2019, 536-570.

KINOSHITA, M. *Democratic Economic Reform and Constitution: A Case Study of Japanese Economic Reform after World War II.* Manuscript, 2020.

LANDEMORE, H. *Open Democracy: Reinventing Popular Rule for the Twenty-First Century.* Princeton, Princeton University Press, 2020.

LANGFORD, M. (ed.). *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law.* Cambridge: Cambridge University Press, 2009.

LANNI, A. and VERMEULE, A. *Constitutional Design in the Ancient World.* In *Stanford Law Review*. N.º 64, 2012, 907-949.

LAW, D. S. *Imposed Constitutions and Romantic Constitutions.* In ALBERT, R. et al. (ed.), *The Law and Legitimacy of Imposed Constitutions.* New York: Routledge, 2019.

MENDOZA, R. U.; BEJA E. L. Jr.; VENIDA, V. S. and YAP, D. B. *Inequality in Democracy: Insights from an Empirical Analysis of Political Dynasties in the 15th Congress.* In *Philippine Political Science Journal*. N.º 33, 2012, 132-145.

PRZEWORSKI, A. *Crises of Democracy.* New York: Cambridge University Press, 2019.

ROBINSON, D. and MOORE, R. A. *Partners for Democracy: Crafting the New Japanese State under MacArthur.* New York: Oxford University Press, 2002.

SARTORI, G. *Concept Misformation in Comparative Politics.* In *American Political Science Review*. N.º 64, 1970, 1033-1053.

SITARAMAN, G. *The Crisis of the Middle-Class Constitution: Why Economic Inequality Threatens Our Republic.* New York: Alfred A. Knopf, 2017.

UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP). *Humanity Divided: Confronting Inequality in Developing Countries.* New York, 2013.

UPRIMNY, R. *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges.* In *Texas Law Review*. N.º 89, 2011, 1587-1609.

WAGATSUMA, S. *Nouchi-Kaikaku wa Kempo-Ihan ka?* [Is Land Reform Unconstitutional?]. M. Kinoshita (transl.). In *Houritsu Times*. N.º 2, 1948, 20-28.

WILLIAMSON, J. G. *Latin American Inequality: Colonial Origins, Commodity Booms, or a Missed 20th Century Leveling?* NBER Working Paper 20915, 2015.

WORLD BANK. *The East Asian Miracle: Economic Growth and Public Policy.* New York: Oxford University Press, 1993.