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THE ELITES' DETACHMENT FROM THE PEOPLE AND PEOPLE'S DETACHMENT FROM THE CONSTITUTION

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ABSTRACT

The contribution argues that the issue of popular detachment from the constitution should draw attention from constitutionalists far more than the populist mantra of the elites' detachment from the people. To that end, the article goes back to the establishment of a constitutional tradition in continental Europe, namely of a legitimacy relying on a permanent correspondence of popular values with constitutional principles, and explores the reasons of its crisis, frequently perceived as a 'constitutional retrogression'. The author includes both the waning of a long-sighted perspective on politics and the rise of a communicative system, which challenge constitutional democracies on cognitive grounds, with consequences that go far beyond the populist narrative.

KEYWORDS

Democracies, constitutional tradition, populism, constitutional identity, communicative system.

INTRODUCTION

In the political as well as in the scholarly debates on populism, the elites' detachment from the people was the mantra that set the stage for the populist surge. Even more recent analysis of the 'constitutional retrogressions' affecting contemporary democracies rest on the same assumption. It is time to inquire into whether the elites' detachment from the people has hidden the latter's detachment from the constitution. The issues of populism and of the constitutional retrogressions could thus be inserted in a wider and more convincing background. However, such inquiry deserves attention, given its strict connection with the roots of constitutional democracies.

Although usually referred to contemporary democracies worldwide, these issues will be here referred only to the continental Europe's experience, given the author's greater familiarity with it.

Post-totalitarian constitutionalism in continental Europe marked a watershed with the past, introducing in those countries the regime of constitutional democracy, whose main features were already known in the Angloamerican world. In this regime, the people's sovereignty is far from being an absolute conception, both because of the institutional limitations that it is required to bear, and because of the very notion of people's identity that it presupposes. It is rather the people's values that are the key factor of the constitution's legitimacy.

Next is the issue of the transformations, and eventually of the waning of these values over time. A constitution presupposes a certain balance between stability and change. More precisely, it can ensure stability provided that its principles are likely to deal with changes occurring through different generations and political majorities. A crisis could, however, intervene not only when people demonstrate their hostility to those principles, but also when these appear increasingly remote. For a number of reasons, we live in an age in which this may be the case. Analysis of constitutional retrogressions and/or of the populist surge should not obliterate that point.

POST-TOTALITARIAN CONSTITUTIONALISM AND THE FORMATION OF A CONSTITUTIONAL TRADITION IN EUROPE

With the end of World War II and the collapse of totalitarian regimes, Constituent Assemblies convened in France, Italy, and, although with strong limitations due to the military permanence of the Allies, in West Germany, with a view to approve a new constitutional text. The same happened in Greece, Portugal and Spain in the 1970s, and in most Eastern European countries after the fall of the Berlin wall (1989). These constitutions put the premises for grounding a continental Europe's constitutional tradition.

Unlike the UK, where a democratic system was maintained, all these countries had experienced a regime that marked a watershed in individual not less than in collective life, going beyond the different philosophical roots and institutional systems that characterized Nazism, Fascism and Communism. It was Giovanni Gentile, an Italian philosopher close to Fascism, that designated as 'totalitarian' a system where "everything is in the State and nothing that is either human or spiritual exists, or is valuable, outside the State"¹. Unlike the absolutist or the authoritarian regimes of the past, which confined themselves to the repression of dissent, the totalitarian ones needed active

¹ Giovanni Gentile, "Fascismo (dottrina del)," *Enciclopedia Italiana*, Vol. XIV (Istituto dell'Enciclopedia Italiana, Roma, 1932), 835.

consent from the people, not least because in the previous democracies universal suffrage had brought large sectors of the population into the public sphere, qua electorate. Apart from terroristic police control and the creation of a single mass party, hierarchically organized and closely interwoven with the state bureaucracy, active consent to the dictators was obtained through a massive propaganda. Given novel technological devices, the political power could then blur the previous divide between the public and the private sphere, and enter into the conscience of individuals with a view to gain consent.

The rise of those regimes was mainly due to the failure of the previous democratic ones in maintaining stability and popular trust in the political institutions: in the old *Rechtstaat*, in spite of parliament's crucial importance for granting democracy, legislation was conceived as an abstract act, separate from actual popular needs as well as from the individual's rights.

The post-World War II Constituent Assemblies were thus confronted with the issue of how to establish a "never more" attitude toward totalitarianism without simply re-establishing the order whose failure had provoked the rise of dictators. The 'concreteness' of the former vis-à-vis ordinary citizens, namely, the public power's capability of blurring the public/private divide by interfering with the conscience of individuals, was of course the main threat to be avoided. But this was not a good reason for reviving the 'abstract' version of sovereignty which characterized the pre-totalitarian tradition².

While remaining at the centre of democratic life, parliament was no more considered capable of ensuring fundamental rights. The new continental system set down fundamental rights *ex ante* in a constitutional text even more extensively than in its old version. But both the meaning and the function of that text were meanwhile changed.

THE NEW MEANING AND FUNCTION OF THE CONSTITUTION

In the pre-totalitarian order, the constitution's main function consisted in describing the machinery of government, without threatening the sovereignty of the state, whose major expression, at least in the French Revolutions's tradition hugely diffused also elsewhere, was parliament's primacy over other authorities.

Under the new post-totalitarian order, constitutions were not simply superimposed on the legislation and on other sources of law, as the highest expression of the state's will. In that case, the ultimate ends of the national community would still lie wholly in the hands of the state. At the same time, both the entrenchment of the constitution's amending procedure and the establishment of constitutional review over legislation would have been conceived as merely formal devices, with the effect of leaving unchallenged the location of political power.

In the post-totalitarian perspective, the constitution's connection with the state was fundamentally re-shaped. Rather than as a mere source, albeit supreme, of the state's law, the constitution is reputed as the very foundation of the state's legitimacy. In this circumstance any subject, including the state, is prevented from determining the community's ultimate ends, while these are expressed as substantive principles enshrined in the constitution. Meanwhile, the state itself ceases to be viewed as a monolithic subject; instead, it is viewed as a set of public institutions whose constitutional legitimacy does not depend on a pre-determined hierarchical position, but varies according to their respective functions.

² Cesare Pinelli, "The Formation of a Constitutional Tradition in Continental Europe since World War II," *European Public Law* 263 (2016).

The contextual establishment of constitutional review over legislation, empowering courts to interpret the constitution, corresponds to such rationale. When interpreting the constitution, not only are courts unconstrained by the original intention or further rules of statutory interpretation; they also take into account the future consequences of their own decisions. Conversely, the procedure of constitutional amendment is meant *inter alia* to give legislators a final chance to evaluate the implementation of the provision which is subject to repeal. Therefore, while structuring the respective functions of, and the interplay between, the authorities that are variously enabled to pursue constitutional principles, including the principle of democracy itself, post-totalitarian constitutions laid down the premises for combining tradition and change, namely the two terms of the post-Enlightenment dichotomy.³

But this picture is no mere holistic paradigm. On the contrary, the constitution itself presupposes conflicts among different authorities as physiological to its own development. With the establishment of constitutional review over legislation, the so-called 'counter-majoritarian difficulty' was raised, namely, the question of an unelected authority as the court in striking down the product of democratically elected authorities. However, such establishment was itself felt as necessary for limiting the possible 'tyranny of the majority'.

Under the new constitutions, both these questions are left open as questions of legitimacy that translate into diverging interpretations of the power's structural divide as settled in the constitution, and of the conflicting conceptions of power that the constitution embodies. On functional grounds, conflicts in which the rule of law stands in opposition to democracy appear thus physiological within the framework of these constitutions. Judicial interpretation of constitutional provisions is left unconstrained until amendments on the matter are not enacted, and their meaning might in turn be shaped by judicial decisions over time. Conflicts of that sort are presumed as open-ended, since constitutions do not designate a depositary of the final word, or genuinely authoritative constitutional interpretations, or decisions.

In light of these elements, post-totalitarian constitutions might be viewed as attempts to demonstrate how a new beginning can be conceived without forgetting the past and, vice versa, how awareness of the past can temper an excess of faith in the future. The provision of their core principles of dignity, freedom and equality does not contradict such an assumption, with a view to orient, rather than to plan, social changes and economic developments. The constitutions' framers were fully aware of their poor predictive capacity. But they laid the premises for the formation of a distinct constitutional tradition, whose achievements should be appreciated as far-reaching, given the endurance of those constitutions and, strictly related, the civilization of the political conflicts that was thus achieved vis-à-vis the turbulent experience of the past. It is in this sense that the formula 'constitutional state' is used by the constitutional theorists of the European Continent. It is no accident that such use has been generalized since the 1990s, coinciding with the acknowledgment that a constitutional tradition had been formed.⁴

³ Cesare Pinelli, "The Combination of Negative with Positive Constitutionalism in Europe," *European Journal of Law Reform* 1 (13) (2011): 34.

⁴ *Ibid.*, 266.

THE PEOPLE'S VALUES AS A KEY FACTOR OF THE CONSTITUTION'S LEGITIMACY

Under democratic constitutions, the people compose a community sharing something more than the procedures that make it an electorate. They share a certain set of values that are constitutionally translated into principles. It is the presumption that the translation corresponds to the people's credence – or the 'expectation' that people have about the laws under which they live – that confers legitimacy to the constitution.⁵ "It is the very purpose of our Constitution", wrote Justice Brennan, "to declare certain values transcendent, beyond the reach of temporary political majorities".⁶ These values transcend the political majorities of the moment, without being considered metaphysical, or morally indisputable, truths; in fact, they may count as evaluations of the common interest, provided that they are projected beyond mere political contingencies.

Accordingly, the people are presumed sovereign on the ground that they are provided with the choice of repudiating the values they shared when the constitution was formulated. It is the very constitution's endurance that depends on that choice. Whenever constitutional principles fail to reflect the people's utmost cherished values, the constitution ceases as well to exert its function of ensuring the stability of a certain legal order.

The constitution's relationship with the people is thus grounded on a conventionalist premise, namely, the translation of popularly perceived values into constitutional principles. While remaining free, whichever choice of the people regarding their further adherence to those values is thus provided with a term of reference. In this sense, sovereignty can no more be intended as omnipotence even with respect to the people's ultimate power of denying the constitutional principles' congruence with their own present values. But why it is so?

The point is that democratic constitutions have abandoned the pretense of possessing time, be they the Lycurgus's eternal constitution or the opposite claim reflecting a revolutionary epoch, that each generation should master its own future. The amending procedures may demonstrate this point, as well as the poor predictive capacity of constitutional principles. While structuring the interplay of the authorities that are variously enabled to pursue these principles, democratic constitutions rely on time. Memories of the constitutional past are thus differentiated, and transformative virtues and self-correction among citizens are correspondently enhanced, with a view to preparing the future.⁷

Constitutions exert an integrative together with a normative function, although different accounts may of course be afforded of the relationship between these functions. For some, "a written constitution's normative force depends ultimately on whether it works to recall a people to itself over time: a means by which a people re-collects itself and its fundamental commitments."⁸ For others, "a constitution will have an integrative effect if it embodies a society's fundamental value system and aspirations, if a society

⁵ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996), 447.

⁶ William J. Brennan, "The Constitution of the United States: Contemporary Ratification," *S. Tex. L. Rev.* 27 (1986): 436.

⁷ Yasuho Hasebe and Cesare Pinelli, "Constitutions": 18; in: Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds.), *Routledge Handbook of Constitutional Law* (London and New York: Routledge, 2013).

⁸ Jed Rubenfeld, *Freedom and Time. A Theory of Constitutional Self-Government* (Yale University Press, 2001) 177.

perceives that its constitution reflects precisely those values with which it identifies and that are the source of its specific character.”⁹ Therefore,

a constitution can confer identity only as long as the system it has established is perceived as being a ‘good’ one. If the society living under this system does not see the system as good, it will reject the very constitution that gives the system a binding character and protects it with its instruments of power.¹⁰

IDENTITY AS SAMENESS AND IDENTITY AS SELFHOOD

A key distinction transcending the specificity of popular identity was advanced by Paul Ricoeur between an *idem* identity, as the identity of something that is always the same which never changes, and an *ipse* identity as sameness across and through change.¹¹ Relying on that distinction, Michel Rosenfeld assumes that self-identity “can either connote sameness or selfhood” even while “conceived as belonging to a collective self.”¹² Being a social construct regarding what each community thinks of itself, a people’s identity may vary according to whether it ascribes to the people the pretense of looking the same through different generations, or the possibility of recognising its own distinct self from all other selves despite the changes which occurred to it through different generations. In the latter case, the place and function of constitutional identity, as distinguished from the national, “is determined by the need for dialectical mediation of existing, evolving, and projected conflicts and tensions between identity – or, more precisely, identities – and differences that shape the dealings between self and the other within the relevant polity committed to constitutional rule and favourably disposed toward the aims of constitutionalism.”¹³

Democratic constitutions presuppose, and even to a certain extent promote, the notion of people’s identity in the sense of selfhood. Their conception of time should be connected in this respect with the recognition of social, political, and religious pluralism, whose intrinsic dynamic both structures and enhances changes of opinions, habits, and beliefs within the people over time. The scope of the constitution’s integrative function should be considered coextensive with that dynamic, provided that “difference as a structural principle of democracy requires consensus about fundamental values and procedures. Where fundamental consensus is lacking, difference turns into violence and destruction.”¹⁴ The constitution’s stability is thus believed to depend on the flexibility of its formulation, as well as occurring with the balance between majoritarian democracy and the rule of law.

A partially different perspective emerges from the opinion that democratic politics depends on the invocation of a ‘We’ whose boundaries

are not drawn once and for all, its identity is never fixed, the self of self-legislation remains to be formed by and in the legislation it gives itself. The legal

⁹ Dieter Grimm, “The Concept of Constitution in Historical Perspective,” in *Constitutionalism. Past, Present, and Future* (OUP, 2016), 148.

¹⁰ *Ibid.*, 149.

¹¹ Paul Ricoeur, *Soi-même comme un autre* (Seuil, 1990).

¹² Michel Rosenfeld, “Constitutional Identity”: in: Michel Rosenfeld and Andras Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (OUP, 2013) 757.

¹³ *Ibid.*, 761.

¹⁴ Alexander von Brünneck, “Comment: Difference and Democracy from the Constitutional Law Perspective”: in: Kolja Rabe and Annika Sattler (eds.), *Difference and Democracy. Exploring Potentials in Europe and Beyond* (Campus, 2011) 80.

institutionalisation of the sensitivity for this dialectic can be found in constitutional democracy's insistence on both majority rule and rights of minorities.¹⁵

The latter, in particular, provides minorities with "the opportunity to defer any fixation of the identity of the people".¹⁶

A collective self as identified *through* diversities emerging among the people should not be confused with a collective self as identified *with* those diversities. The former hypothesis presupposes self-reflexivity, which is possible as far as a distinct self can ultimately be distinguished from all the other selves. This possibility, as already mentioned, is ensured from a common adherence to the constitution's fundamental values, not just to its procedures.

The hypothesis of a collective self as merely identified with diversities denies the possibility of self-reflection. It results from post-modernist accounts of pluralism as a never-ending flux of different experiences, contrary to a contemporary constitutionalism depicted as intrinsically embedded in the statist tradition.¹⁷ Such accounts are at best inaccurate, neglecting the clear distance separating that constitutionalism from the monistic structure affecting the traditional state on the European continent. Hence derives a 'false opposition' that impedes an understanding of "the subject(s) of both the plurality of legal norms at stake and the plurality of corresponding constitutional constraints. It is not a matter of choosing the one over the many or *vice versa*, but of explaining who the many are and how they ought to relate in the absence of ultimate authority of the constituted orders."¹⁸

On the opposite side of the spectrum stand populist appeals to the people. These rely on the principle of popular sovereignty at the expenses of the rule of law and of respect for political or cultural minorities. But, first and foremost, in this case 'popular sovereignty' presupposes necessarily the notion of an homogeneous people that remains the same across and through change. In this perspective, it is not the people's attachment to certain values that affords legitimacy to the constitution. It is rather the nature of a certain people. For populists,

the people means everybody in society, but excludes the elites, which are rejected as corrupt, incompetent or self-interested. 'The people' according to this vision is the 'real people', the people of the street, the people of the bar, the people who are denied a say, the sovereign whose power has been hijacked for the profit and benefit of the few. The populist programme is to bring back those marginalised and excluded, to make the people's voice heard.¹⁹

At first sight, the populist claim of acting in the people's name against the elites revives the Schmittian divide between friend and enemy, namely between 'we the people' and 'the others', that nurtures his idea of an authentic people contrasting the fiction of representation.²⁰ And yet, under populist regimes, free elections are held in formal compliance with the representation principle and the majority rule.

¹⁵ Luigi Corrias, "Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity," 12 *EuConst* 12 (2016): 24.

¹⁶ *Ibid.*, 24.

¹⁷ See Nico Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (OUP, 2010) and James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (CUP, 1995).

¹⁸ Samantha Besson, "The Truth about Legal Pluralism," *EuConst* Vol. 8 (2012): 358–59, reviewing Krisch, *Beyond Constitutionalism* (n 16).

¹⁹ Yves Mény, "Elite vs People," in Giuliano Amato, Benedetta Barbisan and Cesare Pinelli (eds.), *Rule of Law vs Majoritarian Democracy* (Hart, 2021), 134.

²⁰ Ben Stanley, "The thin ideology of populism," *Journal of Political Ideologies* 13(1) (2008): 103.

The imaginary homogeneous people as suggested by populists reflects their 'thin ideology',²¹ that mirrors the virtual world running parallel to the real in our time far better than the desiccated political legacies of their adversaries. Such world's fictions clearly differ from that hidden behind previous appeals to the people's will as well as from the artificial concepts of constitutionalism.

Populist appeals to the people can thus coexist with the formal acceptance of a representation principle that has lost its ultimate function of ensuring competition between political views of the people's interest. The same occurs with the majority rule, that no more presupposes respect for minorities, nor requires external control through rule of law mechanisms, and can thus be deceptively reduced to a winner-take-all rule.²²

CONSTITUTIONAL RETROGRESSION

The aforementioned circumstances of populism can and do produce constitutional retrogressions, such as dismantlements of interbranch checks, perpetrated inter alia in Poland and Hungary through court-packing operations and modifications of the competences or of the financial independence of constitutional courts. These provoke an erosion of the rule of law notwithstanding the observance of formal legality.²³ In the same vein we see the increasing use of constitutional amendment or replacement aimed at making "a state significantly less democratic than it was before," namely, a regime with "a relative absence of accountability and a lack of rights protection."²⁴

Constitutional retrogression consists in "a simultaneous decay in three institutional predicates of democracy: the quality of elections, speech and associational rights, and the rule of law."²⁵ More subtle threats to democracy emerge here than those posed by totalitarianism, since at least formally free elections continue to be held. It is this feature that qualifies these regimes as 'hybrid', or as standing in-between constitutional democracy and the totalitarian state. Fundamental rights may therefore be seriously restricted, independence may be jeopardised for the judiciary and non-majoritarian authorities, but elections are taken, whatever their democratic quality might be:

These regimes generally satisfy international actors in that they are sufficiently democratic to avoid sanctions and other consequences – elections are held, and they are not mere shams. There is enough electoral competition for opposition forces to compete and occasionally win. But at the same time, the deck is systematically stacked against those trying to unseat incumbents through a variety of means.²⁶

But why do constitutional democracies appear helpless vis-à-vis the populist surge? Populist parties or movements are not legally contrasted, nor should they be contrasted under constitutional principles. Even in Germany, whose Basic Law allows the Federal Constitutional Court to declare the dissolution of any political party that seeks to undermine or abolish the free and democratic order or to endanger its existence (Article 21

²¹ *Ibid.*, 106.

²² Cesare Pinelli, "The Double Fiction of the People," in Giuliano Amato, Benedetta Barbisan and Cesare Pinelli (eds.), *Rule of Law vs Majoritarian Democracy* (Hart, 2021), 147.

²³ Gabor Attila Tóth, "Constitutional Markers of Authoritarianism," *Hague Journal on the Rule of Law* Vol. 11, Issue 1 (2018): 57.

²⁴ David Landau, "Abusive Constitutionalism," *University of California* Vol. 47, Issue 1 (2013): 195 and 200 respectively.

²⁵ Aziz Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA L. Rev.* 78 65 (2018): 117.

²⁶ Landau (n 23), 199.

BL), the court refrained from adopting such a measure against such an ultranationalist party as the NPD,²⁷ thus declining "to provide further fodder for the populists' familiar narrative that the establishment systematically suppresses the voice of 'the people'."²⁸ As affirmed by the FCC's President, reactions to the populist challenge should derive primarily from the political process itself.²⁹

Article 7 TEU does not provide restrictions of the populist governments' conduct as such, referring to the existence of systemic violations by a Member State of the 'common values' enumerated in Article 2 TEU, including "the rule of law and respect for human rights." However, its enforcement mechanisms rest ultimately in the hands of national governments as represented in the European Council. Their current inertia should be blamed vis-à-vis what has been called "the purposeful destruction of the rule of law inside EU member states."³⁰ At any rate, it is due to political reasons, rather than legal.

The idea that responses to populism should come from politics itself reflects the core principle of pluralism, which constitutional democracies could not renounce without betraying themselves. It is respect for pluralism, together with the rule of law, that impedes whichever degeneration of majoritarianism into the winner-take-all rule, thus rendering inter alia unpredictable the electoral outcome.

In contrast, populist regimes deny in practice the reversibility of political power, with the majority in charge willing to rest in power by all means. Pluralism is there variously obstructed because it might hamper such possibility, not because it contrasts with an ideological tribute to the people's will.

Respect for pluralism engenders a structural asymmetry in terms of power, which gives populists a competitive advantage on their adversaries. However, absence of legal reactions against populist parties or governments does not tell us enough about why constitutional democracies appear helpless vis-à-vis the challenge that is thus at stake. To this end, the crucial issue is that of how the people are conceived in these democracies, and then into whether such conception can interpret the social transformations we are assisting at.

THE WANING OF A LONG-SIGHTED PERSPECTIVE ON POLITICS

Constitutional retrogression, among other things, reflects a quest for securitarian measures, but constitutional texts are generally spared from being revised. Even the 2011 Hungarian Constitution, the sole one to be enacted under a populist regime in Europe, pays lip service to the ECHR, thus contradicting the ethno-nationalist version of identity which it foreshadows.³¹ Populist regimes circumvent, rather than abolish, the rule of law, and exhibit a formal acceptance of the representation principle.

These elements put into question the current assumption that makes dependent the Constitution's legitimacy on the people's adherence to a set of values as translated

²⁷ Federal Constitutional Court, 17 January 2017, *Neue Juristische Wochenschrift* 611, on which see Lasse Schultdt, "Mixed Signals of Europeanization: Revisiting the NPD Decision in Light of the European Court of Human Rights' Jurisprudence," *German Law Journal* Vol. 19, Issue 4 (01 July 2018): 817-844.

²⁸ Alexander Pirang, "Renaissance of Militant Democracy?" (27 March 2017) // www.lawfareblog.com

²⁹ Andreas Voßkuhle, "Demokratie und Populismus," *Der Staat* 120 (2018): 134.

³⁰ Jan Werner Müller, "Reflections on Europe's 'Rule of Law Crises': in: Poul F. Kjaer and Niklas Olson (eds.), *Critical Theories of Crisis in Europe. From Weimar to the Euro* (Rowman & Littlefield, 2016), 162.

³¹ See inter alia Andras Pap, "Who Are 'We the People'? Biases and Preferences in the Hungarian Fundamental Law": in: Zsuzsanna Fejes, Fanni Mandák & Zoltán Szenté (eds.), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law of Hungary* (L'Harmattan, 2015), 55 ff.

into constitutional principles, which only the emergence of alternative values among the people could deny. It is as if popular commitment to constitutional democracy could vanish without being substituted with the belief in alternative values.

The hypothesis requires further exploration. Long-term changes deserve attention in this respect, such as the crisis of representative democracy and the advent of a new communicative system. The former is itself a multi-faceted issue, including distrust for democratic politics, the crisis of the political accountability mechanism, and the emergence of a new criticism of the representation principle. These phenomena are hugely discussed in current literature, although not always with the awareness that the crisis of democratic politics was similarly caught decades ago. In particular, Otto Kirchheimer's well-known formula of the 'catch-all party'³² reflected a broader picture comprehending reduction of politics already to individual personalities, the waning of political opposition, disconnection of party leaders from the mass population and depoliticisation of the latter.³³ Even the crisis of parliament as the archetypical democratically legitimised institution was certified some time ago:

During the rise of constitutional government since the eighteenth century, much has been placed in the ability of democratically elected parliaments to deliver a form of government that meets the high hopes placed in them. Today, there is a wide consensus that these hopes have not been sufficiently fulfilled. There is a commonly held notion that parliaments are too weak, that they lack constitutional authority or that the heyday of parliamentary control is behind us.³⁴

According to these accounts, the crisis of representative democracy not only persists, but it can also be interpreted as creating the premises for changing popular perception of common values, to the extent that these require a temporal perspective.

The point is that representative democracy encapsulates a specific notion of time. Citizen-voters choose their own representatives for a mandate usually lasting five years, without being entitled to recall them in the meantime, but having the chance of evaluating their conduct through the ballot box at the next election. Citizen-voters are thus, in principle, able to hold representatives, and decision-makers more generally, to account. The whole cycle of representative democracy and political life is intended to realise the principle of political accountability. The rule that electors are prevented from recalling their chosen representatives during the five-year mandate is therefore not to be seen simply as a limitation, but also as an opportunity for evaluating how representatives have converted their own interpretation of the electors' interests into concrete policies.

Party failings, the reduction of politics to individual personalities, and, additionally, the increasing complexity of government, do play a role in putting such a mechanism at risk. Furthermore, most citizens judge politicians from afar and experience politics as spectators, and combine "a substantial level of cynicism about politics with occasional outbursts of moral indignation as to its failings and frustrations."³⁵

³² Otto Kirchheimer, "The Transformation of Western European Party Systems": in: Joseph LaPalombara and Myron Weiner (eds.), *Political Parties and Political Development* (Princeton University Press, 1966), 177–200.

³³ Andre Krouwel, "Otto Kirchheimer and the Catch-All Party," *West European Politics* Vol. 26, Issue 2 (2003): 31 ff.

³⁴ Anthony W Bradley, Katia S. Ziegler and Denis Baranger, *Constitutionalism and the Role of Parliaments* (Hart, 2007), 1.

³⁵ Colin Hay, Gerry Stoker and Andy Williamson, *Revitalising politics: have we lost the plot?* (Hansard Society, 5–6 November 2008), 16.

What annihilates political accountability is the fact that public debates are disconnected from a reasoned confrontation between programmes or policies concerning the future of the country, and needing time to take shape and then to be evaluated by the voters. Today those debates are structured in terms of individual events, and through a series of fleeting media-driven perceptions.³⁶ Unsurprisingly, representatives tend to construct a successful image before the electors, irrespective of what it means in political terms. Relieved from the burden of being evaluated according to their policies, and instead obsessed with daily opinion polls, they concentrate on instantiating the electors' current preferences, rather than their interests over the life of a legislature.³⁷

The good reasons for a long-sighted perspective on politics are thus denied,³⁸ with the effect that the crisis of political representation differs radically from those that periodically characterised its bicentennial life.

THE NEW COMMUNICATIVE SYSTEM AND 'THE ETERNAL PRESENT'

Unlike a mediated form of politics, which deprived a populist leader of the means to make the people identify with him, in the age of social media "politicians find the missing direct link with the people through the Internet," where they can bond together by a simple finger touch, and politics is "more or less demystified and become transparent."³⁹ For the moment, online decision-making processes are provided with scarce democratic credentials, thus posing further the question of how "the function of democratic learning embedded in the multistage process of constitutional governance" can deal with "the pervasive simultaneity of political communications," with the following "instantaneous decision-making style, displacing the stepwise and deliberative political tempo that is critical to norm translation and internalization in constitutional governance."⁴⁰

Populists are thus provided with unknown opportunities for imposing their style of politics as well as for shaping the political agenda. Hence a competitive advantage, that should be added to the already mentioned asymmetry between respect for pluralism characterising constitutional democracies, and the tendency of populist governments to obstruct plurality of voices, projects, and memories.

However, the impact of the new communicative system on democracy goes far beyond the populist rise. Today opinions on political questions flow continuously on the web and social media, which deeply shape public opinion. First and foremost, individual political opinions and further individual data are at the disposal of "giant firms" that are reputed to be "so dominant in their markets and so close to governments that they break most of the rules of what economists understand by the free market."⁴¹ The advent of the new communicative system, no less than the global financial market, engenders a dramatic shift in the realm of power from democratically elected authorities to private companies, which attempts of regulation appear for the moment inadequate to deal with.

³⁶ But see already Jean-Marie Guéhenno, *La fin de la démocratie* (Flammarion, 1993).

³⁷ Yves Mény and Yves Surel, *Par le peuple, pour le peuple* (Fayard, 2000), 75 ff.

³⁸ Guy Hermet, *Les populismes dans le monde. Une histoire sociologique. XIXe-XXe siècle* (Fayard, 2001), 50.

³⁹ Ming-Sung Kuo, "Against instantaneous democracy," *I•CON* 17 (2019): 560.

⁴⁰ Ibid., 564 and 567 respectively.

⁴¹ Colin Crouch, *The Strange Non-Death of Neo-Liberalism* (Polity, 2011), 75.

It has been observed that “while worrying incessantly about the menace of populism, elitist liberal democrats don’t see large concentrations of private power in the hands, for example, of Big Tech (Google, Facebook) or Big Finance as threats to freedom, or as narrowing or even manipulating human choices.”⁴² Shouldn’t the remark involve though populist governments as well? Or are these prone to contrast large concentrations of private power in the people’s name? Global corporations have little to be worried about regarding both the reciprocally fierce adversaries of the moment. It is those committed to constitutional democracy’s principles that should be worried about unchecked global powers, and gather their efforts for finding measures aimed at limiting the latter.

Meanwhile, the new communicative system conforms common imagination to immediate concerns or impulses, contracting both the sense of the past and that of the future. It should be recalled that “our freedom is temporally extended. A people must have law from the past, and it must project law into the future, to be self-governing. We can achieve liberty only by engaging ourselves in a project of self-government that spans time.”⁴³ The so-called ‘eternal present’ is thus likely to annihilate freedom, through which value-ridden dimensions of human experience can be both perceived and mutually exchanged.

A further symptom of the increasing irrelevance of values among the people should be added to the crisis of political representation. Here lies the kernel of the democracy’s malaise, which has to do with a deep transformation affecting cognitive learning processes, and, therefore, the whole dimension of our living together:

By continuing to attribute to persons, interests, powers or systems the agency and responsibility of crises [.....], there can be no entry into the new dimension of intelligibility and non-intelligibility imposed by the irruption of the ‘world’ at the boundaries of social communication and its non-mediated contact with it.⁴⁴

This all poses a cognitive challenge to constitutionalism. The hypothesis of a popular remoteness from values questions the assumption relating the constitution’s legitimacy to the presumption of peoples’ adhesion to constitutionally embedded values. At the same time, current developments show that the constitution’s normative function can formally survive the extinction of the integrative. Democracy’s malaise exonerates populists from the burden of erecting a new building. They can just erode the substance of a democratic constitution’s principles, and exploit its rules and procedures until the sole vestige of free election remains of it.⁴⁵

CONCLUSION

Both the populists’ substantialist claim of acting in the name of the people and their formal, and instrumental, tribute to democracy’s rules depend on, and at the same time fuel, a seemingly harmless disconnection of the real people from the constitution. Some suggest instead an opposition between ‘populists’ and ‘anti-populists’, or ‘elitist liberal democrats’, as reflecting “radically different conceptions of how democracy

⁴² Robert Howse, “Epilogue: in defense of disruptive democracy – A critique of anti-populism,” *International Journal of Constitutional Law* Vol. 17, Issue 2 (2019): 649.

⁴³ Jed Rubenfeld, *Freedom and Time. A Theory of Constitutional Self-Government* (Yale University Press, 2001), 177.

⁴⁴ Jean Clam, “What is a Crisis?”: in: Poul F. Kjaer, Gunther Teubner and Alberto Febbrajo (eds.), *The Financial Crisis in Constitutional Perspective. The Dark Side of Functional Differentiation* (Hart, 2011), 215.

⁴⁵ Cesare Pinelli, *supra* note 22, 155.

should operate in the contemporary Western European political landscape – both valid, but very much at odds with one another.”⁴⁶ Reference is made to the balance between the ‘democratic’ and the ‘liberal’ pillar of constitutional democracies, which each camp argues has been tipped too far in one or in the opposite direction.⁴⁷

This perspective is centered on the political conflict of the moment, and corresponds fairly to the dichotomy ‘people vs. elite’ which populists have imposed at the centre stage of the political and even of the academic debate. The issue is thus neglected of how the people’s attitude toward the constitution has evolved in times of democratic malaise. The elite’s detachment from the people should appear *prima facie* less relevant, and worrying, than the risk of people’s detachment from the constitution. The hypothesis that the latter depends on a waning of long-sighted approaches, blurring as such whichever constitutional vision, needs further reflection, with the related question of how the cognitive challenge will be addressed that the communicative system poses to constitutional democracies.

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⁴⁶ Benjamin Moffitt, “The Populism/Anti-Populism Divide in Western Europe,” *Democratic Theory* 5(2) (2018): 2.

⁴⁷ *Ibid.*, 9.

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