

The Populist Challenge to Constitutional Democracy

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Populism and time – Democracy and representation – The open mandate and party democracy – Democracy and non-majoritarian institutions – Populist challenge as symptom of constitutional democracy's malaise

INTRODUCTION

Is there a populist challenge to constitutional democracy? And if so, where does it come from? Furthermore, are constitutional democracies likely to meet it without changing their own features?

Before entering into these questions, a tentative definition is needed of the terms 'populism' and 'constitutional democracy'.

I will refrain from contributing to the longstanding enterprise of finding the 'true concept' of populism. Isaiah Berlin claimed that that concept suffers from a Cinderella complex, being a shoe in the shape of populism, but no foot to fit it; since then, scholars have adjusted different feet to that shoe, in vain. With an apology for its imperfection, I will designate populism as an ideology claiming that 'the political class' has lost contact with the 'real will of the people,' and promising to give it voice through new leaders, movements or parties.

So far, we might ask ourselves where the challenge to constitutional democracy comes from. Political theorists' answers vary according to the supposed proximity of populism to that democracy. For some, the sources of populism 'are to be found in tensions at the heart of democracy,' namely 'two styles of modern politics,' the 'redemptive' (*vox populi vox dei*) and the 'pragmatic' ('ballots not bullets') face of democracy.¹ For others, populism should be conceived 'as an internal periphery of democratic politics,' consisting in 'a region where the distinction between inside and outside is a matter of dispute and cannot be thought

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¹ M. Canovan, 'Trust the People! Populism and the Two Faces of Democracy', *XLVII Political Studies* (1999) p. 2 et seq.

outside a polemic.² The distance between democracy and populism is further increased by stressing that the latter reflects Schmitt's view of 'the substantial homogeneity of the identity and the will of the people,' and that 'populism, by its nature, should be seen as a dangerous threat to democracy.'³

These diverse assumptions rely heavily on styles of politics, collective perceptions of democracy, and political thought. Combinations and tensions between the 'democratic' and the 'liberal pillar' of constitutional democracy are seen through the lens of these elements, with the sometimes explicit aim of purporting an 'ideal-typical analysis' of the issue.⁴

My approach, rather, has to do with constitutional democracy as a form of government combining principles and institutions corresponding to different modes of legitimacy, namely popular election of political representatives and the rule of law in the sophisticated version available with the introduction of constitutional justice and the further institutional settings characterizing contemporary constitutionalism in Europe and elsewhere. Constitutional democracy results from continuous adjustments of these potentially conflicting principles and institutions, which are open to diverse interpretations and, thus, conflict. Given these adjustments, constitutional democracy has proved to be sufficiently flexible for absorbing even destructive tensions. Nevertheless, such flexibility is not to be taken for granted, nor should it be excluded that a structural imbalance between the democratic and the liberal pillar might result from these adjustments.

Whether the populist challenge appears as potentially destructive or, to the contrary, constructive, constitutional democracy needs to be viewed against that background. An understanding of the issue, therefore, requires a brief reference to the functioning of this mode of politics, not less than to the collective perceptions on which populism tends to rely for the attainment of its objectives. The inquiry is limited to European countries, due to their institutional connections and their increasingly common constitutional discourses.

POPULISM AND TIME

Party failings, the decline of political participation and the media's capability of shaping the public debate appear among the current factors of the populist challenge.

² B. Arditì, *Politics on the Edges of Liberalism* (Edinburgh University Press 2007) p. 2 et seq. See also P-A. Taguieff, *L'illusion populiste* (Berg International Editeurs 2002) and E. Laclau, *On Populist Reason* (Verso 2005).

³ K. Abts and S. Rummens, 'Populism versus Democracy', *Political Studies* (2007) p. 407 et seq.

⁴ Abts and Rummens, *supra* n. 3 at p. 420.

A recent report on the state of democracy in the UK, the most mature European democracy, admits 'the prevalence, and inadvertent nurturing of, an anti-political culture. Contemporary political disaffection is not, we suggest, a story of the decline of civic virtue, nor is it a story of political apathy – it is one of disenchantment, even hatred, of politics and politicians.' People experience politics, it is added, as spectators and through the eyes and ears of the media, with the result that they 'combine a substantial level of cynicism about politics with occasional outbursts of moral indignation as to its failings and frustrations.'⁵ Most citizens, it is argued elsewhere, are judging politicians from afar and through a distorted lens. In mature democracies they have little if any direct involvement in politics.⁶

According to other scholars, the fact that '[n]ever before in the history of post-war Europe have governments and their political leaders – at the national level – been held in such low regard,'⁷ depends on a situation in which each party tends to become more distant from the voters that it purports to represent while at the same time tending to become more closely associated with its political competitors, thus paving the way to populist mobilizations.⁸ This assumption captures one of the main factors of the populist wave. The increasing convergence among the protagonists of the political system once representing ideologies and social classes marking the traditional right/left divide throughout the 20th century, is likely to compose before the electors the image of a 'political class' distant from their interests and values, and consequently reinforcing populism.

At the same time, the decline of ideologies and social classes of the past century has been accelerated by, and complemented with, the advent of communicative systems that are believed to structure the public debate in terms of singular events rather than of principles, thus supplying the awareness of a common future with mediatically driven perceptions.⁹ Contrary to the press, the communicative systems of our age are far from favouring a reflexive attitude with respect to external events. They rather tend to de-structure the previously known perception of time. That perception is itself the product of history and culture, and is likely to change due to the wonderful adaptability of human beings to external events. Our ancestors had a perception of time different from ours, and ours will differ from that of future generations. But, for the moment, we do not know enough of that. What we know, or are reasonably able to reconstruct, is the impact of the new

⁵ C. Hay et al., *Revitalising Politics: Have We Lost the Plot?*, (Hansard Society 5-6 November 2008).

⁶ G. Stoker, *Why Politics Matters* (Basingstoke 2006). See also N. Tenzer, *La société dépolitisée* (PUF 1990), and V. Camps, *El malestar de la vida pública* (Grijalbo 1996).

⁷ P. Mair, 'Polity-Scepticism, Party Failings, and the Challenge to European Democracy', Uhlenbeck Lecture 24 (Netherlands Institute for Advanced Studies 2006).

⁸ P. Mair, *supra* n. 7 at p. 23 et seq.

⁹ See, e.g., J.M. Guéhenno, *La fin de la démocratie* (Flammarion 1993).

communicative systems on our perception of time as structured in the public sphere: the 'eternal present' prevails over the sense of the future not less than that of the past.

On the other hand, the new communicative systems tend to transform politics from a reasoned confrontation between programs concerning the future of the country into a competition between personalities. This, in certain contexts at least, favours leaders acquiring and maintaining electoral consent based on the immediate impression they exert on the people, without any attention being paid to whether or not their promises correspond to the policies they have advocated.

The assumption that policies need time to take shape, and then to be evaluated by the electors, is thus challenged. Representatives and political parties are relieved of the burden of being evaluated according to the policies which they have chosen, and, rather, tend to concentrate on the construction of a successful image before their electors, irrespective of its political meaning. Obsessed by daily opinion polls, they mirror the current preferences of the electors, rather than representing their interests for the duration of the mandate. This provides a further chance for populist leaders, who claim their attachment to democracy by solely relying on the popular will without paying attention to reasoned policies.

These phenomena need to be taken into account for an understanding of the rise of populism. But they appear insufficient for inquiring into how that rise might exploit the tensions, respectively, between political representation and popular choice, and between democratic majoritarianism and liberal constitutionalism, accompanying the development of constitutional democracy.

DEMOCRACY AND REPRESENTATION

Until the eighteenth century, democracy was generally associated with the gathering of citizens in assemblies and public meeting places, on the presumption that it was exclusively suited to small scale societies. Rousseau believed Geneva to be the ideal place for democracy, and even Montesquieu, although favourable to federal solutions, conceived republics only to be of small dimensions.

The invention of representative democracy reversed this presumption. As one of its best-known advocates put it, 'by ingrafting representation upon democracy' a system of government is created that is capable of embracing 'all the various interests and every extent of territory and population.'¹⁰ Representative democracy could, then, be valued 'as the grand discovery of modern times,' in which 'the solution of all difficulties, both speculative and practical, would be found.'¹¹

¹⁰T. Paine, *The Thomas Paine Reader* (Penguin 1987) p. 281.

¹¹James Mill, quoted in G.H. Sabine, *A History of Political Thought* (Harvard 1963) p. 695.

These optimistic views were due to the fact that the representative system was conceived against the background of the formation of the nation-state, and of the corresponding size that political communities were taking. But that system was not without costs, at least from the perspective of democracy as government of the people.

‘What sort of reason,’ objected Edmund Burke before his electors of Bristol, is that

where those who form the conclusion are perhaps three hundred miles distant from those who hear the arguments? To deliver an opinion, is the right of all men; that of constituents is a weighty and respectable opinion, which a representative ought always to rejoice to hear; and which he ought always most seriously to consider. But *authoritative* instructions; *mandates* issued, which the member is bound blindly and implicitly to obey, to vote, and to argue for, though contrary to the clearest conviction of his judgement and conscience, these are things utterly unknown to the laws of this land, and which arise from a fundamental mistake of the whole order and tenor of our constitution.... You choose a member indeed; but when you have chosen him, he is not member of Bristol; but he is a member of *parliament*. If the local constituent should have an interest, or should form an hasty opinion, evidently opposite to the real good of the rest of the community, the member for that place ought to be as far, as any other, from any endeavour to give it effect.¹²

In his speech to the people of the State of New York, James Madison depicted the representative system to be ‘necessary as a defense to the people against their own temporary errors and delusions,’ namely ‘when the people, stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament and condemn.’¹³

Irrespective of the variety of arguments and constitutional contexts, including that of the French Revolution, political representation was then constructed on the basis of the principle that a member of parliament is not subject to repeal in the course of his mandate. While distinguishing the representative from direct democracy, where electors are to the contrary enabled to repeal their MP through recall, this rule lies at the core of the criticism that the representative system only indirectly gives a chance of popular intervention in public affairs, being, therefore, inadequate for ensuring a genuine democracy. In the last two centuries, such criticism was common to various theoretical approaches and served various

¹²E. Burke, ‘Speech to the Electors of Bristol, 3 Nov. 1774’, in *The Founders’ Constitution*, Vol. 1 (The University of Chicago Press 1987) p. 447.

¹³J. Madison, ‘The Senate (continued), Independent Journal’, March 1, 1788, in *The Federalist No. 63*.

political purposes, including the recent assumption that representation is incompatible with liberty since it delegates the political will of the people, to the prejudice of genuine self-government and autonomy.¹⁴

Since the last decade of the 18th century, the prevalence of the representative over rival systems in the landscape of liberal regimes appears nonetheless hardly disputable. Not only did the rule prohibiting the imperative mandate, irrespective of whether it was an explicit rule of constitutional law, resist various political and theoretical attacks, but, first and foremost, it proved to adapt itself to historical changes affecting the very notion of democracy. Perceived as an ideology so long as the franchise was limited and its extension was sponsored by democratic movements, democracy appeared as a form of government with the advent of universal suffrage and of the organisation of political parties aimed, *inter alia*, at choosing candidates for the elections.

THE OPEN MANDATE AND PARTY DEMOCRACY

These changes reversed for ever the oligarchic system in which the prohibition of the imperative mandate for members of parliament was originally affirmed. Political parties, it was inferred,

should make it impossible for the Members of Parliament to arrive at independent decisions in the sense presupposed under the classical representative-parliamentary democracy. Here, the members cease to be representatives of the people as a whole. They become mere delegates who can be dismissed if they go beyond the instructions given them by those who have nominated or elected them.

In turn, Parliament would be transformed 'from the liberal representative corporation which it originally was into a dependent plebiscitary expedient dominated by the parties as the mouth-piece of the organized people in the modern democratic mass-party state.'¹⁵

Given the fact that the popular will was expressed and formed through political parties, the prohibition of the imperative mandate appeared a relic of the past. Hans Kelsen went even further by suggesting that parties, instead of being forced to send to Parliament a certain number of deputies for discussing the most diverse issues, might delegate there their own experts according to the issues at stake.¹⁶

¹⁴ B. Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984) at p. 145.

¹⁵ G. Leibholz, 'Democracy, Representation and the Electoral Issue' (1943), in *Politics and Law* (Sijthoff-Leyden 1965) at p. 56.

¹⁶ H. Kelsen, 'Vom Wesen und Wert der Demokratie' (1929), in *La democrazia* (il Mulino 1995) p. 92-93.

Notwithstanding these provisions and suggestions, the rule prohibiting the imperative mandate was confirmed by the European post-World War II Constitutions, including those recently approved in Eastern Europe with the advent of, or the return to, democracy. Also, where such provision is not explicitly laid down, like in the UK, MPs are not considered delegates of their constituencies. The fact that they may win their seat on the basis of manifesto pledges made by a political party to the electorate, does not imply that individual electors are entitled to compel their MP to follow manifesto policies.¹⁷

The extraordinary longevity of the prohibition of the imperative mandate might be explained on the ground that, in the 'democratic mass party state,' it acquired the function of preventing parties from repealing MPs countering their own decisions or guidelines. On the other hand, it might be noticed that electors are, in principle, able to hold representatives to account to the extent that the latter remain in charge during the entire legislature. Without the rule prohibiting the MP's imperative mandate, electors would be free of changing their representatives whenever they wish, but, at the same time, would renounce the opportunity of evaluating how representatives converted their interpretation of the common interest into certain policies. While rendering parliamentary tenure instrumental to the political power's accountability, not less than to its exertion, that rule might be considered to convert a limitation into an opportunity for electors.¹⁸ The rule might thus reflect a specific notion of time, the time of democracy as practiced in contemporary States.

Populism, to the contrary, claims immediate responses to the 'people's will', denying the good reasons of a longer time perspective of politics,¹⁹ and favouring the notion of representation as resemblance of the representative to the elector. What counts here is not the activity and the time needed for its exertion, but the personality of the representative.²⁰ Nonetheless, contemporary populist movements and parties are far from proposing alternative solutions to representation as practiced in constitutional democracies, nor necessarily favour the referendum, in spite of it frequently being believed as restoring democracy to the people. To the contrary, they regularly participate in elections and accept the rules of the representative system. Aware of its crisis, which is the very source of its success, populism seeks to maintain that system by depicting the political parties expressing its

¹⁷ P. Leyland, *The Constitution of the United Kingdom. A Contextual Analysis* (Hart 2007) at p. 87.

¹⁸ This corresponds with the perspective developed by Stephen Holmes in advocating the Madisonian conception of constitutional democracy: S. Holmes, *Passions and Constraint. On the Theory of Liberal Democracy* (The University of Chicago Press 1995) p. 228 et seq.

¹⁹ G. Hermet, *Les populismes dans le monde. Une histoire sociologique. XIXe-XXe siècle* (Fayard 2001) p. 50.

²⁰ Y. Mény and Y. Surel, *Par le peuple, pour le peuple* (Fayard 2000) p. 75 ss.

legacy as an aristocratic class. Current party failings, together with the decline of their ideologies and the mediatically driven perceptions of the public sphere, are likely to nourish this view.

It has been observed that the democratic legitimacy of populist parties depends 'on whether they target the representative system as such and want to foster the illusion of a direct rule of the people, or whether their criticisms serve the realization of a more responsive democratic system.'²¹ But is this the real alternative which we are confronted with? Beyond their propaganda, the immediate aim of populists appears altogether similar to that of traditional political parties, namely obtaining the majority of parliamentary seats. Furthermore, wherever they have gained that majority, populist parties have immediately ceased to target the representative system as such. To the extent that it consists in exploiting the crisis of that system with the aim of obtaining electoral consent, without propounding the premises of a different system, the populist challenge reflects an inner tension of democracy, rather than an external threat to it.

However, we do not know where that tension is likely to lead. In particular, we do not know whether populists will have to learn how to govern highly complex societies and whether they will acquire the long-term objectives characterizing the traditional political parties, or whether their notion of representation as mere resemblance of the representative to the elector will prevail over the longstanding notion of political representation, thus obscuring the sense of its institutional mechanisms, such as the open mandate.

DEMOCRACY AND NON-MAJORITARIAN INSTITUTIONS

So far, we have discussed the ambivalence of populist parties *vis-à-vis* political representation. The question of how they deal with the longstanding tension and the related provisory adjustments between democratic majoritarianism and liberal constitutionalism, give rise to different considerations. Before examining the issue, a brief account is needed of the institutional aspects of that tension, and particularly of the increasing role of non-majoritarian institutions within the framework of constitutional democracies.

It is worth recalling that, under the influence of the French Revolution, the role of these institutions became almost irrelevant in continental European, due to both the suspicion for the courts of the *ancien régime*, and the presumption that the law, as expression of the general will, would ensure the best protection of citizens' rights. Judges were thus conceived as mere servants of the law.

²¹ Abts and Rummens, *supra* n. 3 at p. 420.

The subsequent failure of parliamentary regimes in countering totalitarianism and the very totalitarian experience, marked a watershed with the past in those countries. Although remaining at the centre of democratic life, Parliament was no more perceived as its unique source nor as capable of granting the guarantee of fundamental rights *per se*. A sophisticated version of the rule of law was thus introduced through the introduction of judicial review of legislation – aimed at ensuring the effective protection of these rights. At the same time, the separation of powers principle acquired further dimensions on the vertical and on the horizontal level, impeding *inter alia* the formation of a monolithic power through the diffusion of a pluralistic version of democracy. These substantive principles were enshrined into constitutions intended to endure, irrespective of contingent expressions of public powers, including political decisions of the majorities of a certain legislature. Politics was thus conceived as constitutionally limited by the interventions of judges and constitutional courts.

Over the last decades, the role of the judiciary has increased in various respects: the independence of central banks *vis-à-vis* political institutions was enhanced, and further non-majoritarian institutions, such as independent authorities, were established at the national level. At the same time, the EU's legitimacy was grounded on the efficacy of the supranational decision-making process rather than on popular consent.

However, the growth of non-majoritarian institutions encompasses phenomena related to various modes of legitimacy. The expansion of the judiciary goes back to the abandonment by the courts of the deference towards legislatures, of which the symptoms were already discernible forty years ago. The novelty of the last decade, rather, consists in the mutual interactions and dialogues between national and European courts. But, for the moment, their constitutional legitimacy seems unchallenged: although questioning the crudest forms of judicial activism, politicians refrain from serious attempts of curbing the courts.

The recent creation of further non-majoritarian institutions is, instead, likely to provoke the attacks of politicians – particularly of populist parties. We should first ask ourselves why these institutions were established.

When the problems faced by society require long-term solutions, so the argument goes, politicians have few incentives to develop policies the success of which is likely to come after the next elections. Delegation of certain policies to central banks or independent authorities is then needed, amounting to a transfer of powers to decision-makers removed from election returns, and, at the same time, better equipped than politicians to act on the basis of expertise.²² Distrust of

²² D. Majone, 'Europe's "Democratic Deficit": the Question of Standards', *European Law Journal* (1998) p. 10 et seq.

politics derives here from presumed fallacies of electorally accountable branches of government in dealing with long-term policies, rather than from the presumption, lying at the core of the rule of law, that unrestricted majorities would infringe minorities' and citizens' rights. Contrary to the courts, the legitimacy of independent authorities thus appears to be founded on functional reasons, namely on pursuing 'efficiency-oriented policies'.²³

However, apart from the question of whether functional reasons suffice to legitimate independent authorities on constitutional grounds, these authorities are usually held accountable, on informal grounds, to the economic or social groups directly involved by their decisions, to the 'stakeholders' but not to the general public. Moreover, the proliferation of non-majoritarian institutions was promoted by national rulers, not because of the belief that such institutions were better equipped in driving long-term policies, but because these policies, in spite of their long-term effects, were expected to endanger electoral consent. In these conditions, the fact that an altogether huge power was given to institutions that are not to be held accountable to the people appears not less significant than the benefits associated to their technical capacities.

These elements fuel the attacks of populists towards the 'establishment', including financial technocracies, and further institutions of the celebrated 'multi-level governance.' The main victim is the European Union. This does not simply depend on the 'democratic deficit.' It rather depends on the fact that Member States tend to leave to the EU the burden of adopting unpopular decisions, and, at the same time, to maintain the traditional image of 'Brussels' as a technocratic organization, in spite of the crucial role played by national governments (through the Council and other intergovernmental institutions) in its decision-making process. The absence of true European mediatic circuits and political parties further discourage the formation of a European public opinion. Finally, the post-'9/11' security threats create a political climate which undoubtedly runs counter the chance of a supranational dimension of citizenship.

Not surprisingly, these difficulties are exploited by populist parties, regularly claiming that 'Europe' is against the 'people's will', and advocating a politics of fear of the alien that goes far beyond the need of ensuring security both in the national and in the European space.

²³ See, e.g., D. Majone, *supra* n. 22 at p. 28.

THE POPULIST CHALLENGE AS SYMPTOM OF THE CONSTITUTIONAL DEMOCRACY'S MALAISE

The attitude of populists towards the institutions of constitutional democracy appears differentiated according to their diverse modes of legitimacy. While they are not likely to question the representative system as such, they attack non-majoritarian institutions on the ground of their lack of democratic legitimacy. This attitude is evident from the experience of countries where populist parties have obtained the majority of parliamentary seats. Once in office, populists claim that Parliament is the sole legitimate authority to be obeyed in a democracy, thus threatening the credentials of non-majoritarian authorities.

Rather than amounting to mere propaganda, this aversion appears as the symptom of a malaise of constitutional democracies. Since the democratic pillar is still based on the popular election of the representatives through party selection, and sometimes of the president of the Republic, *vis-à-vis* the remarkable growth of non-majoritarian authorities, the conclusion appears justified that the space reserved to politics and to the people has shrunk considerably.²⁴ The fact that we have 'gone too far' in creating non-majoritarian authorities,²⁵ together with the rise of supra-national organisations such as the EU, has engendered, as anticipated in the introduction, a structural unbalance between the democratic and the liberal pillar – the popular and the aristocratic side of government. How, then, might constitutional democracies redress such unbalance without renouncing their own identity?

While simply relying on popular sovereignty, the populist solution appears fascinating for huge sectors of the electorate, tired of the complexity of contemporary government. But, at the same time, it appears unrealistic in the light of that complexity, since it would require the abolition of the EU and of the non-majoritarian authorities, namely a return to the national state as it was structured a century ago.

This is not to say, however, that the populist challenge should not be taken seriously. To the contrary, it forces us to inquire into whether the rise of non-elected authorities and organisations corresponds necessarily to an oligarchic degeneration of constitutional democracies. It is true that, in the last decades, that rise has strongly increased the gap between power and accountability, the former being transferred from parliaments or governments to authorities and organisations removed from open political processes. But, as we have seen, this process was not due to fate. It derived, especially as concerns the EU, from choices of national rulers aimed at escaping the mechanisms of accountability without, as much as

²⁴ Mény and Surel, *supra* n. 20 at p. 51 et seq.

²⁵ Mény and Surel, *supra* n. 20 at p. 58.

possible, losing their power. This dynamic is still likely to be redressed, through the creation or the enhancement of democratic processes of governance at the European not less than at the national scale. Rulers dislike being held accountable. But the cost of their inertia corresponds increasingly to the pressure of populist parties.

