

Foreword

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In recent decades, the legal/political academic debate has often focused on the tension between the notions of democracy, constitutionalism, and the state, as well as on the strains and deterioration of contemporary liberal democracy. The factors contributing to such phenomena are several and complex and their analysis lies outside the scope of this foreword. Nevertheless, it is still possible to provide a few hints and short reflections, which have also to do – albeit not exclusively – with the pressures and challenges of globalisation. It is worth noting that this theoretical debate has significant and substantial repercussions on the way of life and structure of contemporary societies. If a number of core tenets of liberal democracy are being questioned in an unprecedented manner, it is also because the once familiar post-war consensus can no longer be taken for granted.

The authors of the essays collected in this special issue of *Athena* have addressed some of the well-known issues mentioned above from new angles, which provide some food for thought and encourage even deeper engagement. Before presenting an overview of the individual contributions,

we would like to highlight the importance of at least three cross-cutting themes: the alleged crisis of liberal constitutionalism; the renewed debate on the self-defeating nature of democracy; the role of the state.

1. Crisis or Revival of Liberal Constitutionalism

In the volume edited by Mark Tushnet, Mark Graber and Sanford Levinson, *Constitutional Democracy in Crisis?* (2018), a few crucial elements of the crisis of constitutionalism and liberal democracy, often referred to as 'democratic backsliding', are highlighted. Broadly speaking, it is argued that the crisis deeply affects our understanding of the state, governance, rule of law or legality, and politics. It is worth noting that, depending on the perspective and the value preferences of the author, different concepts are alleged to be at risk. Some scholars, such as Ginsburg and Huq (2018) and Gargarella (2018), read the crisis of liberal constitutionalism as a crisis of democracy and politics. In other works, published in the same period, the focus shifts, for example, on the absence of the state (Pettit 2023), or the attack on the rule of law (King 2024). Other scholars, such as Khaitan (2019), retort that, rather than undermining the notions of legality or the state, this crisis has a political nature, more specifically related to the accountability of the executive power. Clearly, then, analyses can diverge considerably and this results in uncertainty as to the appropriate remedies.

Yet the wide variety of opinions and theoretical approaches does not prevent us from pinpointing the main causes for concern among scholars. In the first place, the pressure of globalizing markets has brought about or exacerbated asymmetries among sections of the population, as well as among levels of government, from the local to the supranational. In the second place, the shift from a unipolar to a multipolar world is modifying the parameters which have underpinned legal and political choices thus far. One of the main aspects of this shift is the increase or recrudescence of wars in areas in which the consolidation of democracy was assumed to facilitate peace processes.

In the third place, technological developments have questioned or prompted a rethinking of familiar legal principles and categories, such as, for example, freedom of speech, the notions of personhood and representation. A classical topic for reflection is the question whether the sophisticated tools provided by artificial intelligence may promote or lead to a fragmentation of the public sphere

Moreover, climate change confronts us with the need to devise institutions and mechanisms of decision-making that are capable of balancing effectiveness and protection of individual rights. It is plausible that governance and accountability principles and institutions may have to be reimagined in light of the environmental issues to which scientific experts constantly alert us.

Democratic backsliding, the rise of populism and identity politics can thus be considered either separately or in conjunction with the challenges listed above. Deepening partisan division, the diffusion of so-called authoritarian and abusive constitutionalism, the trend towards bolstering the executive at the expenses of the judiciary and the legislative, the widening alienation of large swathes of the electorate may in fact result from a combination of factors that are associated in one way or another with those challenges.

Liberal constitutionalism is antagonized by alternative models, which propose a different understanding of checks and balances, as well as a direct, immediate, almost affective relationship between the head of the executive/leader of the governing party and the people. Criticism coming from different sides sometimes points towards a reformulation of the interplay between constitutionalism and democracy both from an institutional and a substantive perspective.

2. Democracy: The Enemy of Itself?

A further problem is that, in the face of global external and internal challenges, liberal democracy may not be able to meet all demands arising

from complex societies and instead produce flawed policies (Tushnet et al. 2018, 4). After all, a democratic decision-making process that is based on discussion and on the free and indiscriminate exchange of ideas needs time, but there are doubts as to the extent to which this process is still fit to respond to urgent and increasingly technical issues. Nevertheless, we cannot ignore that this hardly concealed weakness also constitutes democracy's strength. Indeed, liberal democratic governments aim to respond to new or unforeseen problems with decisions that, while seeking to be effective, do not betray the two tenets of equal political liberty and the dignity of the person. The intrinsic value of democracy lies precisely here: in the consistency of the means versus the ends.

As a matter of fact, from an outcome-oriented, effectiveness-focused perspective, illiberal regimes, whether or not they are equipped with a constitutional framework, could be deemed to fare better, at least if some standards of assessment are adopted (Uitz 2015, Pinelli 2011, Levitsky and Ziblatt 2018). Conversely, from an input-oriented, legitimacy-enhancing viewpoint, the clearest threat is posed by so-called populism. Fully exhaustive definitions of populism are difficult to provide, and, in many respects, the use of the label 'populism' should be cautioned against. Nevertheless, one useful definition could be that provided by Mudde and Kaltwasser: "[populism is a] thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, 'the pure people' and the 'corrupt elite,' and which argues that politics should be an expression of the 'volonté générale' (general will) of the people" (2017, 6). As a result:

[the populist challenge] 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 (Pinelli 2011, 15).

This set of considerations leaves us with the lingering question of why, if at all, liberal democracy is worth preserving, and what conditions are necessary to uphold its traits. The challenges posed by populism certainly bring to the fore contemporary obstacles when it comes to resolving political (as well as social and economic) disagreement. We cannot dismiss the basic idea that in a liberal democracy politics is characterized by conflict, which must be governed, regulated, and channelled into positive action. Institutions, including political parties, seem to accomplish such task poorly. Furthermore, the ability of populist movements to portray themselves as expression of the “general will” encourages us to question the representative systems that have been adopted thus far. Assuming that a vigorous and healthy liberal democracy needs a common set of values to survive, a procedural understanding of democracy cannot suffice, and we are prompted to reflect on the conditions that are necessary, both at the national and supranational level, to enable convergence on a shared core of values.

3. Why Dismiss the State?

The last decade has also seen a rebirth of the discussion on the question whether or not the statist paradigm as a repository of values, a political entity and an epistemic framework, is losing its centrality and/or is affected by the need to reformulate the classic concept of sovereignty on which it has traditionally relied upon. That said, the continuing relevance of the state and its capacity to deal with global and transnational problems has been emphasized by many scholars (Pettit 2023, just to cite one of the most recent publications on the subject). In other words, the once diffused 'optimism' and excessive haste in looking at the development of transnational polities such as the European Union as a harbinger of the dismissal of state sovereignty has been replaced by a more cautious attitude, one which recognizes the relevance of key state tasks, for example in the economic and in the social field. Renewed attempts to conceptualise the complex character of globalizing

trends and reimagine the role of the state in the new legal-political landscape often avoid falling into the trap of anti-global sceptics, while at the same time emphasizing the benefits of the statist paradigm as a legitimating apparatus.

Ultimately, no analysis of contemporary constitutionalism can be complete without taking into account the developments of law beyond the State – whether it be in a negative light, or in a more transnational-friendly vocabulary. However, equally, no claim of legitimacy can be put forward by transnational legal and political constellations by merely transcending the substantive, symbolic and conceptual reservoir of what we today still call the state.

4. The Contributions in this Special Issue

These themes emerge in the writings collected in this volume in an intersectional manner. Giuseppe Martinico problematises the populist concept of political identity, as generating peculiar strategies of constitutional legitimisation. He refers to the Schmittian-inspired conception of constituent power, which is the equivalent of naked power, characterised by a strong decisionist component. Constituent power is often associated with a revolutionary and violent moment of manifestation of a community's identity, legitimised eternally outside historical events. Apart from the fact that not all constitutions are born in this way, several contemporary authors have dismissed this conception of constituent power, in favour of a more discursive conception of constituent process. Others, however, including Martinico, note that the empty space left by constituent power is being filled and legitimised again by populist ideology, which places constitutionalism and democracy in a conflictual relationship. Martinico also analyses, in cases such as Hungary, how populism leverages constitutional amendments, subjugating it to the protection of the moral, religious, and historical identity of the people and preventing constitutionalism from restraining the sovereign will of the majority of the people.

Johan van der Walt explores the intrinsic challenges that liberal democracy faces in times of rising fascisms and climate crisis. The author's aim is to shed light on how these two distinct threats, especially the one posed by climate politics, puts a strain on the very concept of liberal democracy. Among the challenges, which liberal democracies struggle to address adequately, stands out the call for *immediate* action. Democratic political procedures based on open-ended discussion, however, can be anything but instantaneous. To what extent, then, is the liberal democratic ideal of "government by discussion" still fit for purpose? More generally, this article represents an opportunity to reflect on the relation between (scientific) knowledge and politics in liberal democracies, and the extent to which seemingly indisputable knowledge risks undermining the inherent traits of liberal democracies, giving leeway for intolerant forms of government. The article solicits different questions: what room is left for decision-making procedures based on public debate, when political decisions are instead inspired by an absolutist understanding of reality? And how do we interpret the purported democratic right to contest scientific claims? After all, isn't dissent an inherent element of democracy? By urging us to reflect upon the epistemic premises of a liberal democracy (traditionally grounded on the idea that there exists no absolute truth), Van der Walt's article ultimately points out how certain threats and issues risk depriving liberal democracy of its essence, namely its tolerance of difference and its embrace of open-ended discussion.

Flavia Freidenberg's article starts from the undeniable premise that democracies are strongly threatened, but even so, they still resist. In order to demonstrate its capacity for resilience, the author grounds her research on a quantitative study of the electoral and liberal dimension of democracy in 18 Latin American countries since 1978. The study aims to assess the extent to which these two dimensions have advanced or backslided over the years, highlighting how when one dimension is receding, the other one is often being resilient. Democratic political systems can, in fact, generate variations between these two dimensions, such that the recession of one of them does

not necessarily entail a general tendency towards democratic backsliding. Indeed, the multidimensional approach that Freidenberg uses in her study explains the complexity and the dynamicity of political systems, and ultimately stresses the underlying idea that neither the concept of “backsliding”, nor the ideal of “democracy”, can be trivialized in such a way as to think that there can be a generalized process of democratic backsliding or a generalized process of democratization for all countries in all dimensions. This research offers a valid contribution to further reflect on the capacity of democracies to handle adversity and to find within themselves the very same tools they need to reverse or, better yet, to resist backsliding.

Donald Bello Hutt, for his part, counters the false diagnosis that the demise of the liberal state is now final. Rather, he highlights the ideological negligence of the functions that the state still preserves and should preserve. In this sense, both the state and constitutionalism are characterised by their commitment to avoid arbitrary power, thus adhering to a certain conception of the rule of law. According to Bello Hutt, all classic social contract theorists, i.e. Hobbes, Locke, and Rousseau, emphasise the need for a polity to enable citizens to plan their lives with some degree of certainty. He concludes that, even though some states do not respect this mandate to act in a non-arbitrary manner and there are several alternatives to the state for the purposes of implementing the rule of law, nevertheless constitutionalism and the statist framework are inextricably intertwined: one cannot exist without the other.

Finally, Sara Canduzzi offers a review essay on Michel Rosenfeld’s latest work, *A Pluralist Theory of Constitutional Justice. Assessing Liberal Democracy in Times of Rising Populism and Illiberalism* (2022). Starting from the premise that in recent years liberal constitutionalism has been criticised as unable to promote and achieve justice, Canduzzi sees in Rosenfeld a potential and strong argument to re-evaluate the efficiency of liberal constitutionalism facing a pluralist and globalised world, as opposed to populist or authoritarian alternatives. Rosenfeld envisions liberal constitutions as legitimated and justified if and only if they can promote a

minimum of distributive justice, which he defines as ‘justice essentials’. Thus, the author proposes a substantive alternative to a more traditional political and philosophical liberalism, incapable of facing deep pluralism and disagreement if only it relies on hierarchically superior values such as individual freedom. Rosenfeld’s *comprehensive pluralism* seems to be, for Canduzzi, a better answer in terms of embracing more competing ideologies and avoiding what he calls a relativistic war. Notwithstanding, she believes that this theoretical effort still needs further elaboration: it is not clear to which conception of liberal constitutionalism Rosenfeld is referring and, as a result, which conception of distributive justice he ultimately advocates.

References

- Gargarella, R. (2022). *The Law As Conversation Among Equals* (Cambridge University Press).
- Huq, A., Ginsburg, T. (2018). How to Lose A Constitutional Democracy, in *UCLA Law Review*, vol. 65, 78-165.
- Khaitan, T. (2019). Constitutional Directives: Morally Committed Political Constitutionalism, in *Modern Law Review*, vol. 82, no. 4, 603-632.
- King, J. (2024). The Rule of Law, in R. Bellamy and J. King (eds.), *The Cambridge Handbook of Constitutional Theory* (Cambridge University Press).
- Levitsky, S., Ziblatt, D. (2018), *How Democracies Die* (Crown Publishing).
- Mudde, C., Kaltwasser, C. (2017). *Populism: A Very Short Introduction* (Oxford University Press).
- Pettit, P. (2023), *The State* (Princeton University Press).
- Pinelli, C. (2011). The Populist Challenge to Constitutional Democracy, in *European Constitutional Law Review*, vol. 7, 5-16.
- Tushnet, M., Graber, M., Levinson, S. (2018). *Constitutional Democracy in Crisis?* (Oxford University Press)

Uitz R. (2015). Can you tell me when an illiberal democracy is in the making?
An appeal to comparative constitutional scholarship from Hungary, in
International Journal of Constitutional Law, vol. 13, 279-300.

