

# ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION



VOLUME 4.1 /2024

THE FRAGILITY OF CONTEMPORARY LIBERAL DEMOCRACY

§§§

MASSIMO FICHERA, MICOL PIGNATARO AND FRANCESCO RIZZI BRIGNOLI (EDS.)

## Table of Contents

<i>Foreword</i>	1-X
<b>ARTICLES</b>	
<b>G. Martinico</b> , <i>Identity Politics and the Militarisation of Constitutional Law</i>	1-22
<b>J. Van der Walt</b> , <i>The Fragility of Liberal Democracy Faced with Fascism and Climate Politics</i>	23-67
<b>F. Freidenberg</b> , <i>Democracy in Latin America: Between Backsliding and Resilience</i>	68 -109
<b>D. Bello Hutt</b> , <i>Cut off the King's Head? Constitutional Democracy and the State Against Arbitrariness</i>	110-135
<b>BOOK REVIEWS</b>	
<b>S. Canduzzi</b> , <i>A Pluralist Theory of Constitutional Justice. Assessing Liberal Democracy in Times of Rising Populism and Illiberalism</i>	136-156

*Publisher*

CIRSIFD – AI  
Alma Mater Studiorum  
University of Bologna  
Via Galliera, 3 40121  
Bologna (Italy)

*Publication Service*



**AlmaDL**Journals  
Open Access Scientific Journals

by AlmaDL University of Bologna Digital Library



If not differently stated in the Volume, all materials are published under the Creative Commons Attribution 4.0 International License.

Copyright © 2024, the Authors



# ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

## EDITORIAL BOARD

### DIRECTORS' BOARD

EDITOR-IN-CHIEF: Gustavo Gozzi (University of Bologna)

Alberto Artosi (University of Bologna), Giorgio Bongiovanni (University of Bologna), Susanna Maria Cafaro (University of Salento), Orsetta Giolo (University of Ferrara), Geminello Preterossi (University of Salerno)

### ASSOCIATE EDITORS

Roberto Brigati (University of Bologna), Massimo Fichera (Maastricht University), Annalisa Furia (University of Bologna), Matteo Galletti (University of Florence), Claudio Novelli (University of Bologna), Raimondello Orsini (University of Bologna), Chiara Valentini (University of Bologna), Annalisa Verza (University of Bologna), Giorgio Volpe (University of Bologna), Michele Ubertone (Maastricht University)

### ASSISTANT EDITORS

Ilaria Ferrara (University of Ferrara), Riccardo Fornasari (University of Bologna), Aytekin Kaan Kurtul (Huddersfield University), Micol Pignataro (University of Bologna), Francesco Rizzi Brignoli (University of Bologna), Marta Taroni (University of Chieti-Pescara), Martino Tignocchi (University of Milan)

### MANAGING EDITOR

Luigi Sammartino (University of Insubria, University of Milan)

### EXECUTIVE EDITOR

Francesco Cavinato (University of Bologna, University of Padua)



# ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

## SCIENTIFIC COMMITTEE

Robert Alexy (University of Kiel), Carla Bagnoli (University of Modena and Reggio Emilia), Francesco Belvisi (University of Modena and Reggio Emilia), Yadh Ben Achour (United Nations – Human Rights Committee), Damiano Canale (Bocconi University), Rossana Deplano (University of Leicester), Pasquale De Sena (University of Palermo), Alessandra Di Martino (University of Rome “Sapienza”), Javier Espinosa de los Monteros Sanchez (University of Anahuac), Matthias Klatt (University of Graz), Josep Joan Moreso (Pompeu Fabra University – Barcelona), Andrea Morrone (University of Bologna), Luigi Nuzzo (University of Salento), Baldassare Pastore (University of Ferrara), Giorgio Pino (University of Roma Tre), Corrado Roversi (University of Bologna), Alessandro Serpe (University of Chieti-Pescara)



# ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

VOLUME 4.1  
2024

## Table of Contents

*Foreword* 1-X

### **ARTICLES**

---

**G. Martinico**, *Identity Politics and the Militarisation of Constitutional Law* 1-22

**J. Van der Walt**, *The Fragility of Liberal Democracy Faced with Fascism and Climate Politics* 23-67

**F. Freidenberg**, *Democracy in Latin America: Between Backsliding and Resilience* 68-109

**D. Bello Hutt**, *Cut off the King's Head? Constitutional Democracy and the State Against Arbitrariness* 110-135

### **BOOK REVIEWS**

---

**S. Canduzzi**, *A Pluralist Theory of Constitutional Justice. Assessing Liberal Democracy in Times of Rising Populism and Illiberalism* 136-156





# Foreword

MASSIMO FICHERA

*Associate Professor, Maastricht University (The Netherlands)*

✉ [massimo.fichera@maastrichtuniversity.nl](mailto:massimo.fichera@maastrichtuniversity.nl)  <https://orcid.org/0000-0001-9935-640X>

MICOL PIGNATARO

*PhD Candidate, University of Bologna (Italy)*

✉ [micol.pignataro.2@unibo.it](mailto:micol.pignataro.2@unibo.it)  <https://orcid.org/0000-0002-4451-6899>

FRANCESCO RIZZI BRIGNOLI

*Post-Doc Fellow, University of Bologna (Italy)*

✉ [francesco.rizzi11@unibo.it](mailto:francesco.rizzi11@unibo.it)  <https://orcid.org/0000-0002-9285-6396>

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.



# ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

---

## Identity Politics and the Militarisation of Constitutional Law

GIUSEPPE MARTINICO

*Full Professor of Comparative Public Law, Sant'Anna School of Advanced Studies (Italy)*

✉ [giuseppe.martinico@santannapisa.it](mailto:giuseppe.martinico@santannapisa.it)

 <https://orcid.org/0000-0002-2003-3745>

### ABSTRACT

In this article, I shall focus on the legal consequences of one of the most obvious features of populisms: identity politics. In particular, I shall explore how populists in power use constitutional law to identify and fight the alleged enemy, thus confirming their Schmittian flavour. In Schmitt, public law becomes part of a constitutional narrative that represents the people as forged by a static identity that goes back to the mythological origin of the legal system. This reconstruction is based on an organicistic reading of the concept of the people. This identitarian public law makes instrumental use of the moral argument, the historical argument and the religious argument. Populists in government tend to militarise constitutional law in many ways and in this article I will focus on two strategies: one that looks *backwards*, consisting of the instrumentalisation of the argument of constituent power; and one that looks *forward* and leverages the use of constitutional amendment.

**Keywords:** populisms, constitutional law, identity, militarisation of constitutional law, constituent power

ATHENA

Volume 4.1/2024, pp. 1-22

Articles

ISSN 2724-6299 (Online)

<https://doi.org/10.6092/issn.2724-6299/19151>



## 1. Plan of the Article

In this article, I shall focus on the legal consequences of one of the most obvious features of populisms: identity politics. In particular, I shall explore how populists in power use constitutional law to identify and fight the alleged enemy (Antal, 2022), thus confirming their Schmittian flavour. In Schmitt, public law becomes part of a constitutional narrative that represents the people as forged by a static identity that goes back to the mythological origin of the legal system. This reconstruction is based on an organicistic reading of the concept of the people. This identitarian public law makes instrumental use of the moral argument, the historical argument, and the religious argument. As Corrias - relying on the works by Rosenfeld (Rosenfeld, 2010) - suggested that “the typical populist reading of identity in terms of sameness comes with (dubious) normative connotations, like the alleged purity of a national identity and the appointment of elements which are (supposedly) hostile to and thus a threat to this purity” (Corrias, 2016, 23). Populists in government tend to militarise constitutional law in many ways and in this article I will focus on two strategies: one that looks *backward*, consisting of the instrumentalisation of the argument of constituent power; and one that looks *forward* and leverages the use of constitutional amendment.

## 2. On the Genetic Violence and the Instrumentalisation of the Constituent Past

Constitutions are traditionally described as sacred documents produced by the genetic unity represented by the constituent power. In my view constituent power can be seen as a fiction with a normative claim. Describing the constitution as the product of a monolithic will of the nation serves to explain why we should obey it since here obedience is linked to a kind of mythical past located, ideally, outside of history. However, some years ago, Elster

reflected upon the importance of fear and violence in constitution making, starting from the premise that: “contrary to a traditional view, constitutions are rarely written in calm and reflective moments. Rather, because they tend to be written in period of social unrest, constituent moments induce strong emotions and, frequently, violence” (Elster, 2012, 7)<sup>1</sup>. In that essay, Elster analysed the cases of the American and French revolutions, but these are considerations that can also be applied to other experiences that are very rich in provision aimed to dispel the fear of the past, for instance, to what Mortati called the constitutions “born from the Resistance” (Mortati, 1973, 222)<sup>2</sup>. The social unrest characterising many constituent moments cannot be captured by the fiction of constituent power that claims that behind the genetic moment lies the unity of the nation or people. So, in reality, constituent power also operates a work of removing historical truth, because constitutions often tend to codify the worldview of the faction that won the conflict. What the fiction of the constituent power *de facto* does is to legitimise not only the constitution that arises, but also the violence of the conflict that gave rise to it, as if it were a mat under which to hide the dust.

If we are lucky, the victorious side will be the democratic one that agrees to include, with the procedures described by the new constitution, former enemies, making them citizens for all intents and purposes as long as the fundamental values set out in the constitution are respected. This is, for instance, the paradigm followed by post-World War II constitutionalism, which feeds on eternity clauses and, in some cases, discovers the weapon of militant democracy to avert a return to the totalitarian past. Another

---

<sup>1</sup> Choudhry argued that: “Theorists who explain and justify constitutional practice through historical examples deploy an account of a pristine past. Bruce Ackerman's theory of ‘constitutional moments,’ which is a leading account of the phenomenology of extra-legal constitutional change in the United States, is an illuminating illustration...we should revisit Ackerman's historical account. Ackerman claims that the Civil War amendments were produced through this special, and peaceful, constitutional process. But entirely absent from his analysis is that these amendments were adopted in the immediate aftermath of what remains the bloodiest war in American history” (Choudhry, 2012, 1908).

<sup>2</sup> By “constitutions born from the Resistance,” Mortati also referred to other documents, for instance, the French (IV Republic) and the German Constitutions (Mortati, 1973).

consequence of this way of proceeding, which makes constitutions descend from an original political, cultural and value unity, is that constitutions are often depicted as characterised by an absence of contradictions. This, too, is a fiction: constitutions, as the literature on “constitutional dilemmas” (Zucca, 2007) reminds us, may well have contradictions within them. Moreover, as Luciani said, even if they perceive themselves as eternal and outside of history (Luciani, 2013), constitutions are human creations and therefore fallible. Beyond its being fiction, constituent power should not be taken too seriously, not least because it lends itself to dangerous instrumentalisation, as the Schmittian twist on the phenomenon demonstrates. Moreover, comparative law shows that the constituent moment rarely presents itself in the form pictured by Schmitt. A particularly symbolic historical example is the federal Constitution of the United States, often described as emblematic of the popular role in the constitutional genesis. As Morgan explained very well, that “We the People” opening the US Constitution did not crystallise an already existing (federal) people, but was the premise that was used for the invention of popular sovereignty (Morgan, 1988). It is no coincidence that, for example, the so-called anti-federalists opposed the formula that opens the preamble to the federal Constitution. For them, only the peoples of the states existed as argued among others, by Patrick Henry<sup>3</sup> and, later, John Calhoun, the champion of the Compact theory. For these authors and politicians, the

---

<sup>3</sup> “I have the highest veneration for those gentlemen; but, sir, give me leave to demand, What right had they to say, We, the people? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask, Who authorized them to speak the language of, We, the people, instead of, We, the states? States are the characteristics and the soul of a confederation. If the states be not the agents of this compact, it must be one great, consolidated, national government, of the people of all the states. I have the highest respect for those gentlemen who formed the Convention, and, were some of them not here, I would express some testimonial of esteem for them. America had, on a former occasion, put the utmost confidence in them – a confidence which was well placed; and I am sure, sir, I would give up any thing to them; I would cheerfully confide in them as my representatives. But, sir, on this great occasion, I would demand the cause of their conduct. Even from that illustrious man who saved us by his valor [George Washington], I would have a reason for his conduct: that liberty which he has given us by his valor, tells me to ask this reason; and sure I am, were he here, he would give us that reason. But there are other gentlemen here, who can give us this information. The people gave them no power to use their name. That they exceeded their power is perfectly clear. It is not mere curiosity that actuates me” (Henry, 1788).

origin of the constitutional compact was the will of the states as confirmed by the letter of Article VII of the US Constitution, which refers to the agreement “Constitution between the states so ratifying the same”<sup>4</sup>.

As a matter of fact, the decision to include the formula “We the People” in the federal constitutional preamble was made by the Committee of Style to avoid inserting the names of the states before they ratified the Constitution (Bassani, 2011, 48). Since there was - until the 14th Amendment, at least - no federal citizenship and since, according to the proponents of the Compact theory, only the people of the states existed, the states themselves were seen as the defenders of their rights (since the federal Bill of Rights was seen as only applicable to the federal level). The states were, in some cases, endowed with older constitutions than the federal one and in the protection of rights in general were seen as more mature actors than the federal level.

The American experience, then, shows us very clearly that constitutions seldom reflect the existence of a pre-existing people characterised by cultural, linguistic and value homogeneity, as supporters of the constituent power theory suggest. More frequently, instead, constitutions participate in the formation of the identity of the constitutional subject, shaping it through the inclusive procedures outlined in the fundamental charter. This reveals the inclusive potential of constitutional procedures and constitutionalism. The latter is often reduced to a set of limits that insist on political power, but this representation also forgets the importance of constitutional forms (Cartabia, 2019), which facilitate the transition from the multitude to the people understood as a political subject characterised by the same constitutional values and principles.

---

<sup>4</sup> Art. VII US Constitution



### 3. The Schmittian Idea of the Constituent Power and its Current Forms

Probably the concept, so widespread in the relevant literature, of the constituent power as pure power operating in a legally empty space is due to Carl Schmitt (Schmitt, 2008 [1928], 126), who famously distorted and manipulated Sieyès' thought (Rubinelli, 2020, 23), but this view, actually, does not correspond to Sieyès' idea that natural law was "prior to the nation and above the nation" (Sieyès, 1789; Dogliani, 1996), understood as the bearer of constituent power. In this context, natural law ideally represented a constraint (or an external limit) on the will of the nation. Nowadays, constituent power rarely appears in its revolutionary forms; in this, as has been argued, constituent power has been replaced by the constituent process (Häberle, 1987), a set of procedures that guarantee a gradual, incremental, and inclusive transition to the new constitution. The classic example is provided by the 1996 South African constitution. Indeed, the South African case demonstrates that constituent authority can then operate within a horizon of legality (Jacobsohn and Roznai, 2020).

Today, as stated at the beginning of this article, constituent power should be conceptualised as a legal-historical fiction behind which there is a normative claim. Indeed, behind the correspondence between the constitution and the constituent power there is the necessity to conceive the constitution as the product of the will of a pre-existing political entity (the people) which "serves" as a source of legitimacy for the constitution itself, helping us conceive the constitution – product and then limit to the constituent power – as "democratic"<sup>5</sup>.

---

<sup>5</sup> "When the discourse moves from the descriptive to the normative, it changes and becomes the claim that the constituent power in modern societies should be the people, for democracy is tied to the people and the legitimacy of legal authority depends on a democratic foundation" (Galligan, 2008, 353).

The fiction of the constituent power is seen as necessary in order to justify and legitimate the rupture with the past and the new constitutional design present in the fundamental charter:

We attribute this power to the people. We behave as if the constitution is a product of the popular will. The fiction helps to bring the act in line with the requirements of democratic legitimacy. However, the term “fiction” should not be misunderstood as a mere imagination. It makes a difference whether the constituent power is or is not attributed to the people. If the fiction is taken seriously it establishes a relationship of accountability between the government and the people which in spite of its fictitious basis has real consequences (Grimm, 2016, 1).

Another confirmation of the fact that we are describing a historical-legal fiction is given by a historical argument: frequently, the constitutions and the revolutions behind them – understood in a technical sense, as a break in the chain of validity *à la* Kelsen (Kelsen, 1945, 115) – have been a product of the action of the *élite*. Indeed, as Mortati highlighted, there are forms of constituent power that can have elitist features (Mortati, 1945 [2020], 110).

The obsession with the constituent power and with a constitutional moment has led to the description of the United Kingdom as the only example of an evolutionary (i.e. non-revolutionary) constitutionalism in Europe, but actually many other experiences, provided with written constitutions, are in a problematic relationship with the “constituent power”. The German and French case (1958) are two other examples of this problematic trend (Möllers, 2007). Many other EU Member States, then, do not have a document formally termed as a constitution (Sweden, the Netherlands).

Another example is represented by the Eastern European countries characterised by constituent processes that are atypical because they were influenced by the international community.

These are well-known reflections that have led scholars to wondering about the possible exhaustion of constituent power (Dogliani, 1996), its redundancy or the possible passage from the idea of constituent power to that of constituent process.

On this subject, there are different theoretical positions, but they share the idea that the constitution does not always and necessarily presuppose a pre-existing cultural and political identity; on the contrary, legal norms (particularly constitutional norms) often contribute to creating homogeneity by preparing procedures and favouring inclusion. In other words, as has been effectively said, “inclusiveness is the contemporary mechanism for ensuring that a constitution actually is an exercise of the constituent power” (Tushnet, 2018, 26). One could therefore ask if it is not necessary to abandon, rather than rehabilitate, the concept of constituent power in order to achieve a complete democratisation of post-totalitarian constitutionalism (Verdugo, 2023).

Constituent power only makes sense if it is seen as a fiction that serves to legitimise the constitution and pivots on an ideal unitary moment at the origin of this document. Constitutionalism seeks to legitimise the constitution by favouring inclusiveness.

Contemporary constitution-making processes must be inclusive in some general sense. Satisfying that requirement at both the drafting and the adoption stages raises some interesting general questions (Tushnet, 2018, 26).

Against this background, inclusiveness serves a multiple purpose: to make the transition peaceful, to give voice to the pluralism of values present in a society, to prevent only one dominant view of society from prevailing. Moreover, in a context characterised by the growing importance of the international community, constituent processes under constitutionalism often cannot deviate from those values and rights that respond to a kind of general international consensus.

This brings me to those approaches that have sought to understand constituent power in a procedural or discursive manner (Fichera, 2021; Ferrara, 2023), as a phenomenon that does not end only in the genetic moment of the system but runs through the entire life of the constitutional system. This approach has the merit of linking the democratic nature of the constitutional system to the ability to include those minorities that were, for example, excluded from the foundation of the constitutional order. If seen from this point of view, in fact, even the constitution of the country we now consider the most democratic par excellence, the United States, is deficient from a democratic point of view, as it was written by white men as emphasised by legal and constitutional historians (Hirshman, 2022; Blackhawk, 2023).

A good example of this inclusive and discursive approach was in my view the one behind the 2023 Australian Indigenous Voice referendum in Australia, an initiative which aimed at recognising Indigenous Australians in the constitutional document by setting up the Aboriginal and Torres Strait Islander Voice. This body was conceived to “make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples”<sup>6</sup>. As we know this attempt did not work and the proposal was rejected on 14 October 2023.

But how do populists use constituent power? Arato explained this point very well and emphasised the rediscovery of his Schmittian version. Their approach characterised by extreme majoritarianism makes the populists see constitutions as obstacles, as straitjackets, because of their radical or extreme majoritarianism.

As scholars have pointed out, populists do not normally acknowledge the distinction between constitutional and non-constitutional politics, since they do not conceive the constitution as neutral. This is consistent with that particular constitutional tradition that is Jacobin, as Corrias pointed out

---

<sup>6</sup> Constitution Alteration (Aboriginal and Torres Strait Islander Voice) 2023, [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bId=r7019](https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7019)

(Corrias, 2016). This approach reveals a sort of legal scepticism that can be traced back to what Blokker calls “legal resentment”<sup>7</sup>. This element is connected to what Arato calls the “regeneration of the people” (Arato, 2013, 143) and to populism’s tendency “to occupy the space of the constituent power” (Arato, 2017). This also explains why populists tend to perceive limits and procedures as obstacles in the path of establishing the democratic principle. The recourse of constituent power is used as a vehicle for legal resentment and mobilisation to challenge the limits of constitutional procedures seen as undemocratic. Moreover, populists depict courts and independent agencies as biased and non-neutral since “independent judges and courts are understood as an illegitimate constraint on majority rule, and hence legal means are to be employed to counter this situation” (Blokker, 2019, 547). In conclusion, since populists are allergic to counter-majoritarian dynamics, for them the only possible form of constitutionalism is a “weak” one, i.e. a type of constitutionalism that abandons eternity clauses and super-majorities and recognises the virtues of permanent constituent power.

Colón-Ríos (partly echoing one of Negri's well-known theses – Negri, 1999 – returned to the subject, laying the groundwork for what Arato, not surprisingly, called “the best attempt I know to redeem a strong, populist notion of the constituent power”<sup>8</sup> (Arato, 2012, V).

For Colón-Ríos, a truly democratic constitutionalism should renounce placing limits on constituent power, since “only a conception of constituent power according to which its exercise can be triggered at any moment in the

---

<sup>7</sup> “Legal resentment, so I argue, is a crucial dimension of the populist constitutional programme, and comes forth out of a distinctive populist reading of liberal constitutionalism. The populist approach regards liberal constitutionalism as both a mindset and a practice. The latter could be aptly described as the post-Second World War ‘default design choice for political systems across Europe and North America’, in the form of a constitutionalism that ‘typically hinges on a written constitution that includes an enumeration of individual rights, the existence of rights-based judicial review, a heightened threshold for constitutional amendment, a commitment to periodic democratic elections, and a commitment to the rule of law’. In this, the populist criticisms are not unlike those that have emerged in academic debates on ‘new constitutionalism’ and judicial review. Populists tend to be critical about the strong and independent nature of apex courts, the role and form of judicial review, and the extensive and entrenched nature of individual rights” (Blokker, 2019, 549).

<sup>8</sup> See the *endorsement* by Andrew Arato of the book by Colón-Ríos, 2012, V.

life of a constitutional regime can be made consistent with the basic thrust of the democratic ideal”<sup>9</sup> (Colón-Ríos, 2012, 8).

These approaches, perhaps not consciously, end up being perversely fascinated by the “Schmittian ghost” (Dogliani, 1996, 270) of constituent power, understood as unlimited and loose, and see in it the full expression of democracy.

#### **4. The Use of the Constitutional Amendment**

When dealing with populism in power, scholars have mainly focused on the phenomenon of unconstitutional constitutional amendments (Roznai, 2017) or the abuse of emergency powers (Gardiner, 2022). These are important phenomena, but they are only the tip of the iceberg. Particularly in established democracies, the erosion of the counter-majoritarian chains of constitutionalism often occurs in a more subtle manner as I tried to explain elsewhere (Martinico, 2021).

The relationship between constitutional reform and populism is complex and does not always follow a clear logic. Constitutional amendment is one of the tools of constitutional law used by populists, but it is not the only one. Faraguna explains it well in an essay:

Populists in power usually stay away from constitutional amendment and tend to prefer constitutional replacement, or unilateral major constitutional changes, as in the cases of Venezuela, Ecuador and Turkey (Landau, 2018: 527). Constitutional replacement may be preceded by specific amendments, removing any possible constitutional hurdles to the populist project of constitutional replacement. This was the case in Hungary. However, constitutional

---

<sup>9</sup> Colón-Ríos himself, perhaps aware of the consequences of his theoretical proposals, clarified, in a footnote, that the concept of populism used in his book should not be understood as referring to “dictatorships covered by a thick layer of democratic rhetoric”, but “as a way of describing a regime based on democratic self-rule” (Colón-Ríos, 2012, 52).

amendment is not always available as a constitutional tool (in the sense used by Blokker's 'instrumentalism'; see Blokker, 2019) serving populists' projects of constitution-making (Fraguna, 2020, 105).

However, these considerations do not mean that populists in government do not use constitutional amendments. In Hungary, for example, once a very large majority was achieved, the Fundamental Law was amended. Fraguna explains this with the populists' pragmatic preference for constitutional substitution, which is perfectly in line with the theoretical framework I have mentioned in the previous section.

Constitutional law, in this context, becomes a tool through which to petrify the image of the enemy (Antal, 2022), according to a dynamic of weaponisation of constitutional law.

The defining characteristic of the Hungarian Fundamental Law is its strong constitutional identity: the political identity of the supermajority has become constitutionalized. This identity image has a number of positive elements (i.e., elements that have been defined as desirable, a kind of fundamental characteristic of the public law system). These include Christianity, active memory politics, national cohesion, various aspects of sustainability... in addition to the explicitly strong positive constitutional identity elements, the constitutional power intended that negative identity elements should be at least as strong as the positive ones (in many ways even stronger and more important in the daily political struggles relying constitutional identity) ...the negative constitutional identity has been presented in the original constitutional conception, which started to unfold in 2010, but also since 2015 (embedded in the amendments to the Fundamental Law) the constitutional enemy formation pervades public law and political debates. Three basic strands of Constitutionalised Image of Enemy (CIE) have emerged (and this reflects the constitution-power's view

of history and the past): (1) antiCommunism framed in actual political framework; (2) anti-immigration; (3) anti-gender as the opposition to non-heterosexual forms of coexistence (Antal, 2022).

This occurs through the instrumentalisation of the (moral, religious, historical) argument of tradition. In this context, the constitution becomes, above all, an instrument of government that loses its counter-majoritarian flavour and constitutionalism is perceived as a device of depoliticisation that places obstacles in the way of the sovereign will of the people. Rights - and this brings us to anti-individualism, one of the key features of illiberal populisms - are perceived as factors of fragmentation that undermine solidarity and community values. The result of these considerations can be labelled identitarian public law in light of the importance that identity politics and homogeneity have in it. Identitarian public has a clear Schmittian flavour and has led to the weaponisation of constitutional law and, indeed, in Schmitt public law became part of a constitutional narrative that represents the people as forged by a static and homogeneous identity that goes back to the mythological origin of the legal system (Schmitt, 1988 [1923]). As recalled at the beginning of the article, identitarian public law makes instrumental use of the argument of tradition to identify the values that can be opposed to the enemies, i.e. those who cannot be traced back to the “real” people.

A striking example is provided by certain provisions of the Russian Constitution of 1993, last amended in 2020. Article 67.1 (2) and (3), introduced in 2020, provides that “the Russian Federation, united by thousand-year history...The Russian Federation honors *the memory of defenders of the Fatherland*, provides protection of the *historical truth*. Diminution of the heroic deed of the people defending the Fatherland is precluded” (emphasis added).

Another example is Article R.4 of the Hungarian Basic Law according to which “the protection of the *constitutional identity and Christian culture of Hungary* shall be an obligation of every organ of the State” (emphasis added).



To understand Orbán’s view on Christian democracy and on the role of the EU, it is useful to analyse the text of a speech he gave in 2019:

International interpretation can best be summed up in the claim that what must operate in the world are liberal democracies – especially in Europe. These must construct and implement a kind of liberal internationalism, from which a liberal empire must emerge. The European Union is none other than an embodiment of this [...] liberal democracy was viable up until the point when it departed from its Christian foundations. For as long as it protected personal liberty and property it had a beneficial effect on humanity. But the content of liberal democracy changed radically when it began to break the bonds that bind people to real life: when it questioned the identity of a person’s sex, devalued people’s religious identity, and deemed people’s national affiliation superfluous. And the truth is that in Europe over the past twenty or thirty years this has become the spirit of the age (Orbán, 2019).

From this perspective, liberalism is seen as undermining traditional values, in particular Christian ones, and the EU has become part of this threat. According to illiberal counter-narrative, Hungary must preserve its special nature and culture; in other words, its identity<sup>10</sup>. Against this background, the EU is seen as the source of a dangerous homogenisation that affects traditional values and national identity.

Legal intimations of these approaches can also be found in the case law of some national constitutional courts, for instance in some of the judgments of the Hungarian one based on the instrumentalisation of Article 4.2 Treaty on EU (TEU).

---

<sup>10</sup> “Populists, too, understand constitutional identity in the sense of sameness. However, they do not only claim that both authors and addressees of the constitution should be understood as one and the same (which is something most democrats also do). Instead, the populist understanding of the identity of the people is reductive in the sense that it tends to narrow down identity to sameness and radicalise this notion” (Corrias, 2016, 23).

It is interesting to look at the Hungarian case law to see how the Hungarian Constitutional Court manipulated the concept of national identity stemming from Article 4 TEU by reading it as an isolated concept, and how it read it in light of its own concept of constitutional identity. This case is a perfect example of how instrumental the illiberal reading of the EU Treaties may be:

According to Article 4 (2) TEU, ‘the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’. The protection of constitutional identity should be granted in the framework of an - informal cooperation with EUC based on the principles of equality and collegiality, with mutual respect to each other, similarly to the present practice followed by several other Member States' constitutional courts and supreme judicial bodies performing similar functions. *The Constitutional Court of Hungary interprets the concept of constitutional identity as Hungary's self-identity and it unfolds the content of this concept from case to case, on the basis of the whole Fundamental Law and certain provisions thereof, in accordance with the National Avowal and the achievements of our historical constitution – as required by Article R) (3) of the Fundamental Law. The Constitutional Court establishes that the constitutional self-identity of Hungary is a fundamental value not created by the Fundamental Law – it is merely acknowledged by the Fundamental Law. Consequently, constitutional identity cannot be waived by way of an international treaty – Hungary can only be deprived of its constitutional identity through the final termination of its sovereignty, its independent statehood. Therefore, the protection of constitutional identity shall remain the duty of the Constitutional Court as long as Hungary is a sovereign State. Accordingly, sovereignty and constitutional identity*

*have several common points, thus their control should be performed with due regard to each other in specific cases”<sup>11</sup> (emphasis added).*

Here, the Hungarian Constitutional Court first started with Article 4.2 TEU (which employs the concept of national identity). Second, it used the concept of constitutional identity, coupling it with the preservation of sovereignty (a term which is not used in Article 4.2. TEU). Third, it read the concept of constitutional identity in light of Article R.3, thus offering an alternative reading of the same concept.

In so doing, the Hungarian Constitutional Court completely disregarded the fact that in Article 4 TEU, national identity must be read in line with the concept of sincere cooperation stemming from its paragraph 3. In other words, the alternative reading of constitutional identity offered by the Hungarian Constitutional Court is in patent conflict with the meaning of Article 4.2 TUE invoked by the Hungarian judges. This example shows how instrumental and cherry picking the populist understanding of the relevant EU law provision is.

After the judgment, the notion of constitutional identity was codified in the Hungarian Constitution in 2018 with the approval of the Seventh Amendment which led to the already mentioned Article R.4. This provision has been constantly invoked in the most recent case law of the Hungarian Constitutional Court in which the constitutional identity argument is used to justify the violation of the common values under Article 2 TEU<sup>12</sup>. In this way, the populists in power use the identity argument to distinguish the good citizen (belonging to the people-majority) and the enemy of the people, according to exclusionary dynamics that cannot be reconciled with the

---

<sup>11</sup> Hungarian Constitutional Court, Decision 22/2016 , <https://hunconcourt.hu/dontes/decision-22-2016-on-joint-exercice-of-competences-with-the-eu/>, par. 62-66.

<sup>12</sup> Hungarian Constitutional Court, Decisions 32/2021 and X/477/2021, [https://api.alkotmanybirosag.hu/en/wp-content/uploads/sites/3/2021/12/32\\_2021\\_ab\\_eng.pdf](https://api.alkotmanybirosag.hu/en/wp-content/uploads/sites/3/2021/12/32_2021_ab_eng.pdf) and [https://images.dirittounioneuropea.eu/f/sentenze/documento\\_46Ilb\\_DUE.pdf](https://images.dirittounioneuropea.eu/f/sentenze/documento_46Ilb_DUE.pdf)

pluralism of constitutionalism. Although I focused on the Hungarian case, similar evidence can be found in other experiences (Vanoni and Vimercati, 2021). Against this background, the constitution is not only reduced to a mere instrument of government, but also ends up being applied only to members of the majority, as revealed by former President Trump's instrumental use of the First Amendment in the US experience. Indeed, it is possible to find in his speeches evidence confirming that in his constitutional counter-narrative that enemies of the people should not be allowed to benefit from the First Amendment; for instance, Trump attacked free media by saying that:

One of the things I'm going to do if I win, and I hope we do and we're certainly leading. I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected<sup>13</sup>.

At the same time, the First Amendment was recalled by his defence after the events on Capitol Hill. This argument is also present in the trial memorandum<sup>14</sup>.

This reveals how instrumental and cherry picking Trump's approach to the Constitution is as these lines clearly reveal a sort of double standard according to which constitutional freedoms apply to those who belong to his political faction (the real people).

---

<sup>13</sup> <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866> (last accessed on 8 December 2021).

<sup>14</sup> Trial Memorandum of Donald J. Trump, 45th President of the United States of America, 2021, available at <https://context-cdn.washingtonpost.com/notes/prod/default/documents/9fc7df1f-2945-4be7-80bc-7e0f928c78b2/note/4430abec-b677-4bfd-9232-d45145aca1cb.#page=1>

## 5. Final Remarks

In this short article I have tried to highlight two ways in which the populists in power use the categories of constitutional law according to an identity-excluding vision.

This emphasis on identity politics mainly characterises right-wing populisms, but there are cases of left-wing populisms that actually take up this aspect by declining it in a non-ethnic manner. This is the case, for example, with Marco Rizzo, the post-communist leader of *Democrazia Sovrana e Popolare*<sup>15</sup> in Italy or Sahra Wagenknecht in Germany. Right-wing and left-wing populisms often coincide with the view of constitutionalism as a mere set of non-democratic constraints.

This demonstrates once again how, while failing to construct a true constitutional theory, populisms act by borrowing and exploiting concepts and instruments of constitutional law, giving rise to a true constitutional counter-narrative (Martinico, 2021).

In this article, I dealt with the abuse of the constituent power and of the constitutional amendment. While I focused on the description and conceptualisation of the challenges related to the use of the constitutional argument by populists, there are of course strategies that could be advanced in order to resist the abuses (Landau, 2013) committed by populists, by insisting for instance on the constitutional design in order to equip the system with some super-majoritarian tools, starting with the codification of some eternity clauses. At the same time, however, we should realise that the defence of the values of constitutionalism cannot be reduced to a conservative approach of the constitution or to the mere defence of the *status quo* (Arato and Cohen, 2021; Alterio, 2019). Without the support of civil society, counter-majoritarian actors risk being captured by the political power in the

---

<sup>15</sup> Rizzo defines himself as a “right-wing communist” and conceives himself as against the battles for civil rights (especially of LGBT couples), defined as “mass distraction”. On other occasions he has also declared himself against immigration and in favour of a naval blockade. Rizzo is one of the best-known exponents of left-wing sovereigntism, which, not surprisingly, often uses similar arguments to right-wing sovereigntists (Barana 2023).

long run, that is why it is necessary to engage with populist claims in order to adopt a critical approach (Martinico, 2021) and to transform “mounting distrust into an active democratic virtue” (Alemanno, 2017, 103).

## References

- Alemanno A. (2017). *Lobbying for Change: Find Your Voice to Create a Better Society* (Icon Books).
- Alterio A. M. (2019). Reactive vs structural approach: A public law response to populism, in *Global Constitutionalism*, 270.
- Antal A. (2022). The Constitutionalised Image of Enemy in the Hungarian Fundamental Law,  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4287382](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4287382).
- Arato A. (2013). Political Theology and Populism, in *Political Theology*, 143.
- \_\_\_ (2017). How we got here? Transition Failures, their Causes, and the Populist Interest in the Constitution ,  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3116219](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3116219), 6.
- Arato A. and Cohen J. L. (2021). *Populism and Civil Society: The Challenge to Constitutional Democracy* (Oxford University Press).
- Barana F. (2023). Rizzo, il compagno Kojak in corsa per la Provincia: «Io comunista di destra. I diritti civili? Distrazione di massa»  
<https://www.iltquotidiano.it/articoli/rizzo-il-compagno-kojak-in-corsa-per-la-provincia-io-comunista-di-destra-i-diritti-civili-distrazione-di-massa/>.
- Bassani L.M. (2011). *Gli avversari della Costituzione americana: 'antifederalisti' o 'federalisti autentici'?*, in *Gli Antifederalisti. I nemici della centralizzazione in America (1787-1788)* (IBL Libri).
- Blackhawk N. (2023). *The Rediscovery of America: Native Peoples and the Unmaking of U.S. History* (Yale University Press).
- Blokker P. (2019). Populism as a Constitutional project, in *International Journal of Constitutional Law*, 537.

- Cartabia M. (2019). Nelle forme e nei limiti della Costituzione, paper given at the conference “*Democrazia degli interessi e interessi della democrazia. Migliorare la qualità della decisione pubblica*”.
- Choudhry S. (2012). Civil War, Ceasefire, Constitution: Some Preliminary Notes, in *Cardozo Law Review*, 1907.
- Colón-Ríos J. (2012). *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge).
- Corrias L. (2016). Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity, in *European Constitutional Law Review*, 6.
- Dogliani M. (1996). Potere costituente e revisione costituzionale nella lotta per la costituzione, in G. Zagrebelsky, P. P. Portinaro, J. Luther (eds.), *Il futuro della costituzione* (Einaudi), 253.
- Elster J. (2012). Constitution-making and violence, in *Journal of Legal Analysis*, 7.
- Faraguna P. (2020). Populism and Constitutional Amendment, in G. Delledonne, G. Martinico, M. Monti, F. Pacini (eds.), *Italian Populism and Constitutional Law. Strategies, Conflicts and Dilemmas* (Palgrave), 97.
- Ferrara A. (2023). *Sovereignty Across Generations: Constituent Power and Political Liberalism* (Oxford University Press).
- Fichera M. (2021). The Idea of Discursive Constituent Power, in *Jus Cogens*, 149.
- Galligan D. J. (2008). The Paradox of Constitutionalism or the Potential of Constitutional Theory?, in *Oxford Journal of Legal Studies*, 343.
- Gardiner P. (2022). Conflating the Powers of the Commissarial and the Sovereign Dictator in Tunisia, <https://verfassungsblog.de/conflating-the-powers-of-the-commissarial-and-the-sovereign-dictator-in-tunisia/>.
- Gold H. (2016). “Donald Trump: We're going to 'open up' libel laws”, *Politico*, <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>.

- Häberle P. (1987), Die Verfassungsgebende Gewalt des Volkes im Verfassungsstaat, in *Archiv des öffentlichen Rechts*, 55.
- Henry P. (1788). We the People? or We the States?,  
<https://www.redhill.org/speech/we-people-or-we-states>.
- Hirshman L. (2022). *The Color Of Abolition: How a Printer, a Prophet, and a Contessa Moved a Nation* (Mariner Books).
- Jacobsohn G. J. and Roznai Y. (2020). *Constitutional Revolution* (Yale University Press).
- Kelsen H. (1945). *General theory of law and state* (Russell & Russell).
- Landau D. (2013). Abusive Constitutionalism,  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2244629](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244629).
- Luciani M. (2013). Dottrina del moto delle costituzioni e vicende della Costituzione repubblicana, <https://www.rivistaaic.it/it/rivista/ultimi-contributi-pubblicati/massimo-luciani/dottrina-del-moto-delle-costituzioni-e-vicende-della-costituzione-repubblicana>.
- Martinico G. (2021). *Filtering Populist Claims to Fight Populism: The Italian Case in a Comparative Perspective* (Cambridge University Press).
- Moglen E. (1993). The Incomplete Burkean: Bruce Ackerman's Foundation for Constitutional History, in *Yale Journal of Law & the Humanities*, 531.
- Möllers C. (2007). We are (afraid of) the people: Constituent Power in German Constitutionalism, in M. Loughlin and N. Walker, *The paradox of constitutionalism: Constituent power and constitutional form*, eds. (Oxford University Press), 87.
- Morgan E. (1988). *Inventing the People: The Rise of Popular Sovereignty in England and America* (WW Norton & Company).
- Mortati C. (2020). *La teoria del potere costituente* (Quodlibet).
- \_\_\_ (1973). *Lezioni sulle forme di governo* (Cedam).
- Negri A. (1999). *Insurgencies: Constituent Power and the Modern State* (University of Minnesota Press).
- Orbán V. (2019). Prime Minister Viktor Orbán's speech at the 30th Bálványos Summer Open University and Student Camp,



[www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-30th-balvanyos-summer-open-university-and-student-camp](http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-30th-balvanyos-summer-open-university-and-student-camp).

Rosenfeld M. (2010). *The Identity of the Constitutional Subject Selfhood, Citizenship, Culture, and Community* (Routledge).

Roznai Y. (2017). *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press).

Rubinelli L. (2020). *Constituent Power. A History* (Oxford University Press).

Schmitt C. (1988 [1923]). *The Crisis of Parliamentary Democracy* (The MIT Press).

\_\_\_ (2008 [1928]). *Constitutional Theory* (Duke University Press).

Sieyès E.J. (1789). *Qu'est-ce que le Tiers état?* ,  
<http://www.leboucher.com/pdf/sieyes/tiers.pdf>

Tushnet M. (2018). *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar Publishing).

Vanoni L.P. and Vimercati B. (2021). Identity Politics and Constitutional Disagreement: The Rise of the “New” Populisms and Nationalisms in the Fragmented European Landscape, <https://rivista.eurojus.it/wp-content/uploads/pdf/Vanoni-Vimercati-per-caricamento-2.pdf>

Verdugo S. (2023). Is it time to abandon the theory of constituent power?, in *International Journal of Constitutional Law*, 14.

Zucca L. (2007). *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford University Press).

# ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

---

## The Fragility of Liberal Democracy Faced with Fascism and Climate Politics

JOHAN VAN DER WALT

*Professor of Philosophy of Law, University of Luxembourg (Luxembourg)  
Extraordinary Professor of Law, University of the Free State (South Africa)*

✉ [johan.vanderwalt@uni.lu](mailto:johan.vanderwalt@uni.lu)

🌐 <https://orcid.org/0000-0001-6747-8752>

### ABSTRACT

This article engages with the particular fragility of liberal democracy in current times. The particularity at stake here concerns the two major challenges that liberal democracy faces today, notably the rising allure of fascism (mostly AF hereafter) and the rise of climate politics (mostly CP hereafter). The article is not concerned with the external threats that fascism and climate politics pose for liberal democratic law. It engages with the way that any endeavour to deal with these threats threatens liberal democracy with the internal self-destruction of its essential ideals and principles.

**Keywords:** liberal democracy, fascism, climate change, Greta Thunberg, politics

This article has benefitted from questions and comments by many colleagues and friends during workshops and seminars at the Universities of the Free State and Stellenbosch (in September 2023) and the Universities of Alberta and British Columbia (in January 2024), all of whom I cannot thank by name here. A special word of thanks is nevertheless due to Shaun de Freitas, Henk Botha, Richard Mailey and Julen Extabe for organizing those events. A very special thank-you is due to Frank Michelman, Hans Lindahl and Neil Walker for reading an earlier draft of the text and for comments that prompted me to insert a number of additional clarifications in the final draft. Remaining weaknesses of argument or interpretive inaccuracies I take strictly for my own account.

ATHENA

Volume 4.1/2024, pp. 23-67

Articles

ISSN 2724-6299 (Online)

<https://doi.org/10.6092/issn.2724-6299/19162>



## 1. Introduction

This article engages with the particular fragility of liberal democracy in current times. The particularity at stake here concerns the two major challenges that liberal democracy faces today, notably the rising allure of fascism (mostly AF hereafter) and the rise of climate politics (mostly CP hereafter).<sup>1</sup> The main focus will be the latter challenge, but addressing the former is also important for two reasons. AF obviously threatens liberal democracy gravely and an incisive understanding of the gravity of this threat is crucial for an incisive understanding of the specific vulnerability of liberal democracy in the face of this threat. But understanding the threat of AF to liberal democracy is also important for another reason. Grave as this threat is, it is not nearly as grave as the threat that CP poses for the concept and ideal of liberal democracy. In other words, coming to terms with the gravity of AF also serves as a basis of comparison that allows one to come to terms with the much greater gravity of CP's threat to liberal democracy.

The article pursues these aims in five steps. *Section 2* highlights the “dithering” of liberal democracy in the face of AF and CP with reference to two recent examples, one taken from German politics, the other from British politics. *Section 3* looks closer into the nature of the two threats that AF and CP pose to liberal democracy so as to highlight the similarity and difference between them. It is in this section that the greater gravity of the CP threat becomes clear. *Section 4* engages with the ethical-political dilemma of the liberal democratic response to AF and CP. It shows again why the dilemma is greater in the case of the latter. In the case of the latter, liberal democracy is bound to get entangled in a conception of the relation between knowledge and politics that goes fundamentally against its grain. That is why *Section 5* turns squarely to dominant conceptions of the relation between

---

<sup>1</sup> The term “populism” that we predominantly use to refer to rising far-right movements often reflects an unwillingness or hesitance to call a spade a spade. Many of these movements already have many if not all the essential characteristics of what used to be called fascism in the dark decades of the twentieth century. However, if some readers would find it “too early” to consider “fascism” an accurate term for the pervasive right-wing populisms afoot in the world to today, I never plead with them to indulge my use of the term as a shorthand alert to a grave development for which “populism” also no longer comes across as an apposite term.

knowledge and politics in Western thought. It does so by returning to the triangular constellation of epistemological-political positions that Western political thought inherited from Greek philosophy. Of concern in this triangle is the legacies of Plato, Aristotle and Protagoras. *Section 5* also extends its articulation of this triangular knowledge-politics constellation to a reflection on the relation between key developments in 20<sup>th</sup> century theories of science and knowledge, on the one hand, and liberal democratic theory, on the other, with Richard Rorty, Karl Popper, Thomas Kuhn, John Rawls, Frank Michelman and Alessandro Ferrara as its key points of reference. *Section 6* then takes the consolidating step. It draws the arguments articulated in the earlier sections together and puts forward a coherent understanding of the essential dilemma of liberal democracy in a time of AF and CP. In the course of doing so, it also proposes a formulation of a liberal democratic response to AF and CP that might steer clear of irresponsible dithering without falling foul of the liberal democratic commitment to open-ended discussion. The response proposed remains fragile, no doubt, perhaps too fragile to stand a chance. But this fragility is liberal democracy's essential or intrinsic fragility. Liberal democracy has never been and will never be able to shed its fragility like a skin. Fragility is too deeply woven into its spine, as Ernst-Wolfgang Böckenförde pointed out years ago with his now famous dictum.<sup>2</sup>

---

<sup>2</sup> See Böckenförde, 1976, 60: *“Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann. Das ist das große Wagnis, das er, um der Freiheit willen, eingegangen ist. Als freiheitlicher Staat kann er einerseits nur bestehen, wenn sich die Freiheit, die er seinen Bürgern gewährt, von innen her, aus der moralischen Substanz des einzelnen und der Homogenität der Gesellschaft, reguliert. Andererseits kann er diese inneren Regulierungskräfte nicht von sich aus, das heißt mit den Mitteln des Rechtszwanges und autoritativen Gebots zu garantieren suchen, ohne seine Freiheitlichkeit aufzugeben und – auf säkularisierter Ebene – in jenen Totalitätsanspruch zurückzufallen, aus dem er in den konfessionellen Bürgerkriegen herausgeführt hat.”* Here is a slightly changed Deepl translation: “The liberal, secularised state lives on presuppositions that it cannot guarantee itself. That is the great risk it has taken for the sake of freedom. On the one hand, it can only exist as a liberal state if the freedom it grants its citizens is regulated from within, from the moral substance of the individual and the homogeneity of society. On the other hand, it cannot seek to guarantee these internal regulatory forces of its own accord, i.e. by means of legal coercion and authoritative command, without giving up its freedom and reverting – on a secularised level – to the totalitarian claim from which it emerged during the confessional civil wars.”

There is one more aspect of the liberal democratic fragility in the face of both fascism and climate politics that I will only mention here before moving on. The whole line of thinking developed here is still premised, for now, on the idea that liberal democracy, either alone or in collaboration with other non- or anti-liberal political regimes, can still respond to the climate crisis with an effective political act or course of action that one could call sovereign. A devastatingly acute recent article of Neil Walker alerts one to the reality that this assumption may not be warranted at all. Not only has liberal democracy always been a congenial host for a climate-disastrous property regime, and not only has it all along been conditioned by this property regime. It is today increasingly supplanted by modi of self-regulation that this regime has installed for itself under the aegis of transnational institutions associated with the global expansion of neoliberalism (Walker, 2023b, 142 -147). In what follows, I will simply be assuming, against the odds that Walker clarifies so soberingly, that a liberal democratic sovereignty – frail and marginal as it has become in the world today when one looks at basic statistics<sup>3</sup> – may still offer a response to the climate crisis of our time. It is with this assumption still in place that this article will be looking at the *intrinsic* (as opposed to extrinsic) challenges that liberal democratic sovereignty faces in a time of rising fascisms and a possibly apocalyptic climate crisis. An incisive assessment of the continued plausibility of this assumption and a proper response to Walker will have to remain on the agenda for another day.

Here is the plan, for today then, in thumbnail format: *Section 2* should be considered a descriptive contextualisation of an overarching argument with four

---

<sup>3</sup> Walker, 2023a, 11 highlights the following sobering statistics: “What emerges from the most recent (2021) Democracy Index, is that only 21 of the world’s 167 independent polities – which is 12.6%, and only 6.4% of the world’s population, live in ‘full democracies’. Flawed democracies account for another 53 (31.7%) of countries, and another 39.3% of the global population. This means that, according to the Index, less than half of countries (44.3%) are basically democratic, and less than half of the world’s population (45.7%) live under basically democratic conditions. And of the rest, as many as 59 (35.3%) covering 37.1% of the population (the majority in China) are classified as fully authoritarian regimes, while 34 (20.4%) of countries covering 17.2% of the world’s population live in hybrid or semi-authoritarian regimes.” See also Walker, 2023c.

prongs. *Section 3* (first prong) will compare the respective threats that AF and CP pose to liberal democracy. *Section 4* (second prong) takes a close look at the essential political ethics at stake in the liberal democratic response to AF and CP. *Section 5* (third prong) extends the inquiry into the political ethics of liberal democracy to an epistemological-political inquiry into the relation between knowledge and liberal democratic ethics. *Section 6* (fourth and main prong) ties the whole argument together for purposes of a coherent understanding of the liberal democratic response to AF and CP and an incisive regard for the fragility of this response.

## 2. Dithering Liberal Democracies

Already in my book *The Concept of Liberal Democratic Law (CLDL hereafter)*, I suggested that Greta Thunberg is not a liberal democrat, and perhaps justifiably so (Van der Walt, 2020a, xii). The suggestion – not worked out further in the book – was clearly enough that climate change may be confronting human political organization with challenges to which liberal democracy cannot respond adequately. Thunberg manifestly confronts liberal democracy with a call to immediate action that dispenses with democratic political procedures that always seem to postpone this call. The democratic process can stall and slow down action for ages, often cynically so for short term interests. Liberal democracy, in other words, appears to be a dithering form and practice of politics, and Thunberg no longer tolerates this dithering.

This article pursues an incisive understanding of that which climate activists are bound to consider “liberal democratic dithering.” This section begins this pursuit by highlighting two recent examples of this “dithering,” one taken from German politics, the other from British politics. They so happen to also relate respectively to the problems of rising fascism and apocalyptic climate change that we have identified above as the most significant threats to liberal democracy in our time.

In by-elections in the United Kingdom in July 2023, the Labour Party was expected to sweep away the Conservative Party in all of three traditional Tory

strongholds. They eventually did so in only two of them. In the third, the Uxbridge and Ruislip by-election, the Tories narrowly held their constituency. Keir Starmer, the labour leader, attributed this loss to the plan of the Labour Mayor of London, Sadiq Kahn, to turn the whole of London into a low-emission zone, a plan against which significant popular protest became manifest in the weeks leading up to the election. Starmer's subsequent "food for thought" remark suggested a clear willingness to backdown from environmental commitments, were they to render Labour's chances of winning the general elections in 2024 less likely. His Tory opponent, Rishi Sunak, was quick to follow suit. Sunak quickly identified backing-down on climate commitments as a strategic opportunity for improving the Tories' dismal prospects for the 2024 elections.<sup>4</sup> This is how backing-down on long term climate commitments overnight became a strategy for vote-winning in the very short term in the UK.

This development in recent UK politics is bound to elicit utter dismay regarding democracy among all those who are convinced by a *knowledge claim* that future life on earth is threatened by a humanly induced planetary apocalypse. Of concern in this development is not the pathologically cynical disregard for long term common concerns of humanity that we have come to associate with the name Donald Trump. Trump's brutal withdrawal from the Paris agreement and his general climate-sceptic stance was indeed induced by the pathological cynicism of a deranged person, as have become abundantly clear in retrospect, but the gambling with environmental concerns between Starmer and Sunak does not seem – or is not supposed – to fit this bill. This is regular British parliamentary politics, the long-time revered liberal institution that Nelson Mandela lauded so graciously in his address to the court during the Rivonia trial. A theorist of liberal democracy may well need to pause and reflect on the question of how the United States, another long-time revered political liberal institutional framework with no one less than Hannah Arendt among the faithful reverends, could have allowed a deranged person to become its President. I will not do so here. I will focus instead

---

<sup>4</sup> See McKie et al., 2023.

on the banal indifference to climatological concerns in ordinary British politics, once one of the flagship liberal democracies of the world. At the time of the climate-indifferent jousting between Starmer and Sunak, this democracy had also just recently removed an at best marginally less-toxic-than-Trump politician from power. How this kind of derangement could have entered their once trust- and respect-worthy political institutions is a question that must therefore also haunt British liberal democrats today. But again, the contest between Starmer and Sunak is supposed to reflect a return to normal democratic politics, and it is this normal politics that is today playing ball with the demands of climate change on us, as if we have lots of time on our hand.

Recent state elections in Germany provide another example of banal politicking with essential societal and normative concerns. This example relates to the other major threat to liberal democracy current today, namely rising fascism. The German example shows that banal politicking is not restricted to venerable old liberal democracies whose institutional standards and practices may perhaps be said to have slipped somewhat lately. A not so old liberal democracy that, to the contrary, has to face up to a history of disastrous institutional failures is showing itself ready to risk its liberal democratic institutions once again. Programmatically concerned with erasing the dishonourable reputation that it earned for itself during the first half of the 20<sup>th</sup> century, Germany surely went out of its way during the second half of that century to prove and show itself to be an exemplary liberal democracy. Not so any longer. Already in 2018, after a series of dismal election performances that came to a head with the state elections in Thüringen, the Christian Democratic Union (CDU) party in Thüringen showed willingness to collaborate with the far-right *Alternative für Deutschland* (AfD) party to whom they were losing votes at an astounding rate. They did so for purposes of preventing the leftist party *Die Linke* from winning the state elections. Leading figures of the CDU at national level then still responded with dismay. The then just recently retired national chair of the party, Angela Merkel, vociferously distanced herself



from this willingness to collaborate with the AfD, a party with visible links to known Neo-Nazi personalities and groups in Germany.<sup>5</sup>

Things have obviously changed in the four short years since then. The national leader of the CDU, Friedrich Merz, recently announced that the CDU is prepared to work with the AfD. Having faced severe criticism for this move, he more recently backtracked by saying that the cooperation with the AfD would only happen at local and not at national level, as if that offers consolation. Merz still leaves us with the disconcerting fact that it took only 78 years for a major German political party to show itself willing again to take risks with political energies of the kind that caused havoc in Germany, Europe and the world between 1933 and 1945.<sup>6</sup> One is well inclined to ask: what next? We know not only from Germany's past but also from recent developments in the United States where unscrupulous flirtation with this kind of politics can lead. How long will it take for a crowd of fascist weirdos to gather enough gall to storm the Bundestag if Germany's centre-right political parties continue to afford credibility to the far-right?

The two examples put forward here testify to the disconcerting way in which liberal democratic standards of political discourse and practice (and indeed of government in the UK) are falling apart in countries that claim to be liberal democracies. The sad testimony of the United States, only indirectly invoked above, makes this picture considerably bleaker. The question arises whether liberal democrats should continue to tolerate this decay and for how long. Committed liberal democrats are anything but revolution-mongers. They tend to stick to existing rule of law arrangements as long as they can. Reckless and zealous promotion of revolutionary change is not their way (see Rawls, 1997, 766 – 767). They are all too aware of the abyssal destruction to which reckless revolt can lead. Their ability to always give more time, and to talk things through once more, has been disparaged in striking fashion by Carl Schmitt. Instead of engaging in a decisive battle, bourgeois liberalism always endeavours to start a discussion (*[versucht] statt*

---

<sup>5</sup> For a discussion of and journalistic references to this development, see Van der Walt, 2023a, 112 – 114.

<sup>6</sup> See Taylor, 2023.

*dessen eine Diskussion anzuknüpfen*), he famously asserted with reference to Donoso Cortes (Schmitt, 1996b, 63 – 64). Committed liberal democrats would nevertheless not be averse to claiming as a virtue exactly that which Schmitt derided. For them, the capacity and willingness to give more time and talk things through again and again, are key elements of their political ethics (see Van der Walt, 2020b, 113 – 149). But liberal democrats worthy of the name cannot simply talk on and give more time indefinitely while liberal democracy is falling apart under their noses. There may well come a time when they too may be obliged to stop talking. The moment that this time comes will always be the moment in which liberal democrats have to face the deep paradox of their political ethics and vision. The pursuit of their own fundamental ideals would then demand a contemplation of the limits and non-application of these very ideals. This is where the fragility of liberal democracy becomes most conspicuous, and it is this fragility that Ernst Wolfgang Böckenförde contemplated when he articulated his famous dictum (see footnote 2).

The planetary climate crisis into which we have descended has exacerbated this fragility in an *unprecedented* fashion. The climate crisis appears to threaten liberalism's core ethic of tolerant and open-ended discussion in a way that no former threat ever did. Of concern here is the core ethic of liberalism, namely, its willingness to give time and to keep talking *for as long as possible*. Amid the climate crisis in which humanity and non-humanity finds itself today, this "as long as possible" appears already expired. The climate crisis deprives liberal democrats of the ethic of open-ended talking, given the endless politicking to which the latter appears to give license. Thunberg knows that. She has turned a deaf ear to the endless talking about emission targets that is honoured only in breach. For her, all of this is just "blah, blah, blah" (see Carrington, 2021). She is insisting that things must change forthwith, and she *knows* what this change must entail. She believes her knowledge demands acquiescence *now*. It is no longer an invitation for democratic deliberation. It is an endeavour to instigate a revolutionary compliance with demands of knowledge that are no longer debatable. For this reason, she can no longer be a liberal democrat.

*CLDL* acknowledged the possibility of times in which liberal democrats may be called upon to also “join the barricades.” The question will of course always be: when? And to the extent that the identification of the “when” will not give way to sheer irrationalism, the question of the “when” will always be concerned with a unique claim to knowledge, a knowledge of a situation that assumes a cognitive grasp of urgency and necessity that demand immediate action. This unique knowledge generally does not sit well with liberal democracy. Perhaps it never does. We come back to this point in sections 3, 4 and 5. Suffice it to anticipate that discussion here by just observing that climate-change not only challenges our understanding of political knowledge. It also challenges our concept of knowledge as such. And it does so more devastatingly than any earlier threat to liberal politics and open-ended epistemic inquiry did in the past.

More devastatingly than ever before? Yes. The political liberal ethic of waiting for “as long as possible” can adjust to severely adverse conditions. It lives and has lived for long times amidst human rights violations that it considers anathema. It may even decide to compromise with outright oppression and worse. How long have “exemplary” liberal democracies not continued to trade blithely with China, notwithstanding ongoing oppression of the Uyghurs that has a hardly ignorable genocidal dimension? And let these democracies not forget the sins they commit themselves. American liberals have lived through four years of a brutally anti-liberal presidency without revolt. The prudence of having done so and of possibly doing so again surely remains debatable among liberal democrats. Fascism, totalitarianism and oppression are evidently not red lines that liberals cannot shift pragmatically and prudently.<sup>7</sup> The climate crisis is very different in this respect. The redline drawn by the climate crisis is not something that can be shifted in the hope of better times to come. The climate crisis tells us that *time is up*. Hence Thunberg’s dictatorial stance. She, and those with her, *knows* or *claims to*

---

<sup>7</sup> Talking of redlines, let us not forget Barack Obama’s “redline” regarding the use of chemical weapons in the Syrian civil war. See Paris, 2017; Taddonio, 2015.

*know that time is up.*<sup>8</sup> Their claim is to really *know* the situation in which we find ourselves.

Where does her (their) knowledge come from? It comes from widely shared scientific assessments of the climatological change on planet earth and its causes. An overwhelming majority of scientists with solid scientific credentials concur in their assessments of the matter. There is little space in the circles of science for climate-scepticism. There are, however, still many climate-change deniers around among layman politicians. Unprecedented heat waves, wild-fires and looming water shortages may well be slashing their numbers by the day, but a significant number of them – invariably motivated by their own immediate interests – are still around and in disconcertingly powerful positions at that.<sup>9</sup> These climate-sceptics insist on their democratic right to contest the knowledge claims of scientists, and as long as they continue to do so in sufficient numbers, the liberal democratic dithering exemplified by Keir Starmer and Rishi Sunak will persist. The measures to be taken in response to the climate crisis therefore remain open to debate and liberal democratic political manoeuvring.

The situation that we have been describing in this section can be summed as follows: humanity faces, once again, the ageless stand-off between an intolerant politics that claims undoubtable knowledge as justification for its intolerance, on the one hand, and a tolerant politics that inversely claims a lack of such knowledge as the ground of its tolerance, on the other. Section 5 will return squarely to this stand-off and to the relation between knowledge and politics that it raises. It traces the roots of this stand-off to the different philosophical stances of Plato, Aristotle and Protagoras. If we want to come to terms with Thunberg, we must come to terms with the roots of the

---

<sup>8</sup> The scientific knowledge on which Thunberg and her generation are insisting are surely making its way squarely into the reasoning of major courts of the planet. See fn. 16 below.

<sup>9</sup> Examples abound. For two recent ones, see the reports on the former Australian Prime Minister Tony Abbott and the recently elected US House speaker Mike Johnson by Pengelly & Levine, 2023, and Butler, 2023. In France, leading climate-change experts count the former President Nicolas Sarkozy, the current President Emmanuel Macron, the former Prime Minister Eduard Philippe and the leader of the centre-right *Les Républicains* among the soft-sceptics, politicians who do not deny climate change or that it is caused by human conduct, but water down its urgency in order to prioritize other governmental concerns or relativize France's contribution to global carbon emissions. See Goar, 2023.

stand-off between knowledge and tolerance in the history of Western political and philosophical thought. We shall nevertheless take two further steps before turning to the perennial triangle on which Plato, Aristotle and Protagoras have premised Western political thought. We shall first take a closer look at the essence of the challenge which liberal democracy faces in a time of AF and CP (Section 3), and the reasons why this challenge cannot but expose the intrinsic fragility that always conditions liberal democracy as an arrangement of power and a form of politics (Section 4).

### 3. Fascism and Climate Change Politics: Two Quests for Reality

Fascism and climate politics are two very different kinds of politics. The former is invariably ethnicist if not downright racist in orientation. The latter's outlook is invariably cosmopolitan. They nevertheless have one characteristic in common. Both are "quests for reality." This common characteristic makes it quite possible that the one can morph into the other. This morphing is not likely to happen on the front of decidedly cosmopolitan climate-political movements, but the possibility of a morph or merge is far from unthinkable on the front of fascist movements. There is nothing that prevents the latter from including an uncompromising climate politics into its comprehensive world view.<sup>10</sup> The disinclination of the former to become fascist does nevertheless not imply that it cannot come to pose a deeply perturbing threat to liberal democracy. There is no reason *whatsoever* to suggest that this has already happened or is in the process of happening, but CP has the potential of becoming "totalitarian" or "fundamentalist" in ways that would render it irreconcilable with liberal democracy. Much of what follows in the next sections of this article constitutes an endeavour to understand and respond to this threat. The rest of this section will expound the reasons for assessing both AF and CP as quests for reality with which liberal democracy cannot compete, given its core commitment to the suspension of quests for reality in politics.

---

<sup>10</sup> Bernard Schlink's recent novel, *Die Enkelin* (Schlink, 2021), gives a very realistic portrait of such a merge among far-right political movements in Germany.

The premises for assessing AF in terms of a quest for reality in what follows are drawn from intriguing contentions of Hermann Heller and George Orwell with which I have engaged extensively elsewhere and will invoke only briefly here.<sup>11</sup> Heller's contention concerns his criticism of Hans Kelsen's positivist theory of law. Kelsen's positivism, contended Heller, was representative of a merely technical conception of law that had lost its connection with the absolute and abyssal grounds of life – *seine Beziehung zum Absolutem, zum tragenden Grund und Abgrund des Lebens*. As such it contributed to or aggravated the “hunger for reality” of the Weimar youth – *einer nach sittlichen Begründungen suchenden und wirklichkeitshungrigen Jugend* – that drove them into the arms of the “neo-feudalism” (Heller's word for the fascism in the offing at the time) that was raising its head in the Weimar Republic (see Heller, 1992, 450 – 451).

Orwell's contention is drawn from his review of Hitler's *Mein Kampf*. The review explains the rise of fascism in Germany and elsewhere in Europe in the 1930s in terms of a “need for struggle and self-sacrifice.” Orwell wrote: “[H]uman beings don't only want comfort, safety, short working hours, hygiene, birth control and, in general, common sense; they also, at least intermittently, want struggle and self-sacrifice, not to mention drums, flags and loyalty-parades” (Orwell, 1940).

This is precisely what Hitler offered the German people, Orwell continued: “Hitler has said to them, I offer you struggle, danger and death, and as a result a whole nation flings itself at his feet” (*Ibid*).

The resonance between Heller's invocation of the “absolute and abyssal grounds of life” and Hitler's offer of “struggle, danger and death” is unmissable. And Orwell was perfectly correct to interpret this offer with reference to a need for “self-sacrifice.” Sacrifice, we learn from the classic anthropological studies of Henri Hubert, Marcel Mauss and Roger Callois, is the essential link with which primitive societies sustained their connection with the “sacred grounds” of their existence (see Hubert and Mauss, 1968; Callois, 1950; Van der Walt, 2023d; Van der Walt, 2005).

---

<sup>11</sup> For the engagement with Orwell, see Van der Walt 2020b. For the engagement with Heller, see Van der Walt, 2023b.

The quest for this link, the quest for reality, is no less present among current strands of fascism than it was among the reality-hungry Weimar youth and the people who eventually flung itself at Hitler's feet. It is this quest that informs the increasing yearning for *the real people*, the *reality of the people*, afoot in the world today. This yearning spurs an increasing resistance to all the "alienating" mechanisms of representative democracy which frustrate the "real" voice of the people.

Liberal democracy has little to offer as far as this sacrificial quest for reality is concerned. It is a form of politics that pivots on the realisation that politics in pluralist societies (the condition of all modern societies in the wake of the Reformation and the shredding of universalist revolutionary ideals in the course of the nineteenth century) can neither hope nor afford to be "quests for reality." This is so because any unambiguous identification of reality demands a unitary and consolidated mechanism of identification that pluralist societies simply do not offer. In modern societies, the quest for unambiguous reality cannot but culminate in an unforgiving clash between different quests for reality. It is this clash that liberal democracy strives to avoid. For this reason, liberal democracy is the quintessential modern political retreat from the "absolutism of reality," as Hans Lindahl puts it in a most profound study (see Lindahl, 1998). The identification of reality always comes with an absolutist claim. It would not be an identification of reality if it did not. This necessary avoidance of absolute claims to reality in modern politics is precisely what is at stake in Rawls' conception of a public reason that retreats from comprehensive world views. Sometimes Rawls' articulation of public reason still comes across as a last faint echo of a reality quest, and some readings of his work tend to amplify this echo. We turn to this echo and its amplification in Sections 4 and 6. Suffice it to note here that this article puts forward a different reading of Rawls' project. It reads Rawls as a most forceful but not perfectly consistent endeavour to model the political on the basis of a retreat from the "absolutism of

reality” which Lindahl discerns in the work of Claude Lefort and Hans Blumenberg.<sup>12</sup>

Again, liberal democracy cannot compete with fascism’s quest for reality, because it is in principle premised on not playing the reality card in politics. Here lies its essential fragility in the face of fascism. Its most essential virtue commits it to leaving a field undefended where a whole history of western politics always played for the highest stakes. Hence perhaps its meagre success rate, to which Neil Walker points our attention (see fn. 3). Its prospect of defeat is nevertheless significantly grimmer in the face of CP than it is in the face of fascism, I shall now argue.

Liberal democracy’s grimmer prospect of defeat, or rather, its prospect of grimmer defeat in the face of CP, concerns the forfeiting of its essential virtue, the virtue of not playing the reality card in politics. CP also plays the reality card, but it plays a very different reality card in a very different way, and liberal democracy cannot withdraw so easily from CP’s game than it can in the case of fascism. Let us begin to unpack the matter at issue here by resetting our language. It is not contra-intuitive to consider AF in terms of gaming,<sup>13</sup> but CP is not into playing games. When it puts down its essential reality card it does so to announce, in fact, the absolute reality of the end of gaming on planet earth, the absolute reality of a humanly induced climate crisis that threatens to render the planet uninhabitable. The card it puts down is not hazardously or capriciously drawn from a deck of other playable cards. It is the one and only card that comes with the endorsement of rigorous scientific inquiry. CP is fundamentally motivated by a claim to scientific

---

<sup>12</sup> See fn. 29 and accompanying text for the essence of the “last-minute” inconsistency that Rawls loads or might be loading on his own shoulders. If the case for this inconsistency sticks, it would saddle the invocation of public reason with a last resort claim to reality that I would prefer to understate as far as hermeneutically and exegetically possible, given the remarkable moves Rawls makes to avoid this reality claim.

<sup>13</sup> One need not and should not consider everything Schmitt wrote stamped with the fascism to which his personal politics committed him. But it is sobering to note that the thinker who contemplated the political in terms of the serious case that warrants drawing the line between the friend and the enemy (Schmitt, 1996a, 26 – 37), also considered this serious case in terms of a respectful duel – a gaming, in other words – between big and noble men (Schmitt, 1997, 114 – 116, 284). If the serious case of the political is ultimately nothing but a game, fascism can surely be counted as one of its exemplary instances. There is no reason to believe Schmitt thought otherwise.



knowledge regarding an absolute reality, the reality of a humanly induced climatological crisis with apocalyptic proportions. This is the reality card or reality claim from which liberal democracy cannot withdraw so easily, if at all. And here lies the risk of forfeiting its most defining credential and therefore also the most worrying fragility that it has ever faced in its relatively short history. The rest of this article will address this essential fragility of liberal democracy in a time of scientific CP. It will do so along two lines of thought: 1. CP draws liberal democracy into a politics of truth and a conception of scientific truth that goes against its deepest grain. 2. Liberal democracy is not likely to outlast CP in the way it has outlived the fascisms of the past, because the era of CP will last as long as the Anthropocene – here simply understood as the capacity of humans to control the fate of the planet – lasts.

#### **4. The Life and Times of Liberal Democracy**

The willingness to give things time, I have suggested above, is a key characteristic of political liberals. Their basic inclination – an inclination duly backed up by a sincere commitment to liberalism – is to avoid, *for as long as possible*, political decisions that terminate discussion of pressing matters. In what follows, I will unpack this inclination and commitment with reference to John Rawls' emphasis on a "call to civility" and an "appreciation for burdens of judgment" as core elements of political liberal ethics (see Rawls, 1996, 54 – 62, 119, 121, 217, 226, 236, 253). It is here – in this call to civility and appreciation of burdens of judgment – that one finds the core of Rawls' avoidance of a quest for reality in politics. Or so I shall argue.

The notion of an overlapping consensus regarding core principles of public reason is commonly perceived as the centre piece of Rawls' theory of political liberalism. A careful reading of his texts nevertheless makes it clear that he does not consider this overlapping consensus a simple "given." Rawls does not understand the overlapping consensus that informs public reason an unfailing presence that guarantees liberals the resolution of all their divisive conflicts. When

it manages to become “given” to some extent, it does so only because liberals consistently *give* it to one another; give it to one another by appreciating their respective burdens of judgment and heeding a call to civility when divisive conflicts show up the residual *non-givenness* of their consensus. If the notion of an overlapping consensus regarding core principles of public reason is indeed the centre piece of Rawls’ conception of public reason, that centre piece is held in place by an ethics of giving and forgiving that allows liberals to sustain an on-going discussion of pressing matters for *as long as possible*.<sup>14</sup>

Why this phrase “as long as possible”? It evidently suffers from a conspicuous criterion-deficit and therefore does not answer but repeats an agonising question. Moreover, the phrase is also conspicuously un-Rawlsian. When one takes Rawls as your point of departure, as I am indeed doing here, one would rather expect recourse to the phrase “as long as reasonable.” This is the recourse that leading Rawls scholars like Alessandro Ferrara and Frank Michelman take. Assuming for argument’s sake that these scholars might endorse my reading of Rawls’ invocation of a “call to civility” and an “appreciation of burdens of judgment” in terms of an ongoing ethics of giving and forgiving, they would much rather resort to the phrase “as long as reasonable” for purposes of marking the limit or outer boundary of this ethics. This ethics of giving and forgiving or give and take can go on, they suggest, for as long as it remains within the bounds of the “still reasonable” that they and Rawls denote with the phrase “at least reasonable.” This “at least reasonable,” they argue, is the most we can hope for under circumstances of divisive pluralism. In other words, the criterion of the “at least reasonable” is also the “most reasonable for us” (Ferrara and Michelman, 2021, 51 – 72). Michelman refers to liberalism’s “Goldilocks predicament” in his engagement with the questions raised by this “at least reasonable” and the “most reasonable for us.” Political liberalism relies on core principles of public reason. The normative content or demand of these principles must not be applied too thickly, lest it forecloses the ongoing give-and-take of liberal politics that is a *sine qua non* for a

---

<sup>14</sup> See Van der Walt, 2021, 2023b and 2023c for previous elaborations of this argument and the references to Rawls that sustain it.

liberal society or liberal democracy. It can, however, also not be applied too thinly, lest it forfeits its own normativity and basically capitulates in the face of whatever politics may come to oppose it (Ferrara and Michelman, 2021, 170 – 174; Michelman, 2022, 193 – 197).

Along with my reading of Rawls' "call to civility" and "appreciation of burdens of judgement" in terms of an ethics of giving and forgiving, or give and take, I will also expound this ethics in terms of Michelman's Goldilocks problem. I will nevertheless avoid recourse to his, Ferrara's and indeed Rawls' invocation of the "at least reasonable" and the "most reasonable for us." I will opt, instead, for the simple expression "for as long as possible," notwithstanding the criterion-deficit from which this expression all too clearly suffers. The reason for doing so is this: the "as long as possible" does not only pose agonising questions. It also hosts a significant benefit as far as a candid response to these questions is concerned. It avoids a question-begging element with which Rawlsian invocations of the "at least reasonable" and the "most reasonable for us" appear to be surreptitiously reconciled, and it does so by making this question-begging element flagrantly evident.

Of concern is the *conspicuousness* of the "criterion-deficit" of the phrase "as long as possible." By leaving this criterion-deficit as conspicuous as it does, the "as long as possible" avoids the allusion to an already-available criterion with which the ethics of give and take can be measured. The invocation of the "at least reasonable" and the "most reasonable for us" does little to avoid this allusion, if it avoids it at all. And by not avoiding it – by suggesting there is an already-available criterion with which the ethics of give and take begins and ends, it actually negates the need for this ethics. It ultimately makes it impossible to read Rawls' "call to civility" and "appreciation of burdens of judgment" in terms of an ethics, for ethics has no significant role to play when essential criteria of conduct are already well in place. It reduces ethics to the moral imperative to stick to criteria that everyone involved has already endorsed as duly applicable. This is precisely the question-begging element of the "as long as reasonable" that the very conspicuous criterion-deficit of the "as long as possible" seeks to avoid. And in doing so, it also seeks to

steer clear of the last-resort claim to reality – the reality of public reason as “at least reasonable” and therefore “most reasonable” for us – that might be haunting Rawls’ conception of public reason in the final analysis.

It is important to underline what is at stake in the insistence to read Rawls’ “call to civility” and “appreciation of burdens of judgement” as an ethics. Of concern is not the simple moral correctitude and uprightness to stick to principles already applicable (and therefore real), but the ethical openness to others – indeed to their burdens of judgment – that allows, for as long as *humanly* (not just reasonably) possible, for a process (or procedure) of perhaps arriving at principles that everyone can eventually come to consider applicable. In the reading of Rawls that I am offering here, his “call to civility” and “appreciation of burdens of judgement” concern an ethics, not a morality. Morality (the sticking to established *mores*) is surely not an unimportant consideration, but it only becomes applicable and possible later, that is, after an ethics of give and take has created stable enough conditions for it. Were one to reduce the call to civility and appreciation of burdens of judgement to a morality – to a steadfast sticking to already established principles<sup>15</sup> – one would attribute to Rawls the Platonism to which we pay attention to in Section 5. As will become clear below, I believe Rawls and especially Michelman give us enough reason to avoid such a reading.

But here is the rub: the fragility of liberal democracy that this paper addresses concerns the seemingly inevitable termination of this ethics and its transformation into an exacting and unforgiving morality in times of rising fascisms and climatological collapse. As we shall see, this inevitability is exponentially more pressing in the case of the latter than it is in the former. The latter is the bigger problem, and it is therefore the overriding concern of this paper. To understand why this is so, we first need to briefly restate the Goldilocks problem in terms of a temporal “as long as possible” as opposed to the normative “as long as reasonable.” If liberal democratic principles are going to be applied too thickly (too intolerant

---

<sup>15</sup> Merely coping with them, in other words, as if the call to civility and appreciation of burdens of judgement were not constitutive of whatever principles one could consider established, but a simple matter of coping with the way in which these principles constrain more desirable comprehensive worldviews.

of difference), the ongoing give-and-take that condition them (these principles) will halt all too soon. The process of give and take will come to an end *before* the “as long as possible” has duly run its course. If it becomes too thin (too tolerant), the “as long as possible” will run the risk of the “no longer possible” (the risk of liberal political public reason ending in self-termination).

In other words, the climatological crisis that “appears” (this very word will become problematic, as we will see below) to threaten the very future of humanity on planet earth today, raises liberalism’s Goldilocks problem in an unprecedented fashion. It confronts political liberalism with a veritable expiry of the “as long as possible” in a way that none of the major questions liberalism had to face in the past ever did. Let us take flagrant violations of first- and second-generation fundamental rights as the major problems liberalism had to face in the past. These violations might soon pale in comparison with that which is now in the offing.

To begin with violations of first-generation rights, violations of basic human dignity, liberty and equality: There is no liberal democratic state on planet earth that has not been averse to calling “time’s up” in response to these violations. There is no liberal democratic state on planet earth that has not been indefinitely tolerant of significant human rights violations on both own and foreign soil in the hope of better times to come. Always with reasons, of course, reasons that many a liberal have endorsed and will still endorse in the name of prudence and caution. Refusing to tolerate these violations a moment longer (calling time’s up) may well lead to greater catastrophe and harm, went the argument. When it comes to the violation of second-generation rights, the liberal democratic record of tolerance is even more startling. Barring a handful of (mostly Scandinavian) exceptions, there is no liberal democratic state on planet earth that has not been tolerant of devastating poverty and squalor, caution and prudence – banal economic caution and prudence, at that – again being the standard justification.

The climatological crisis inverts the principle-caution constellation of past human rights violations in liberal democracies. It is no longer possible to justify the compromising of principles by invoking the avoidance of bigger trouble, because there is no bigger trouble imaginable than the ruination of life on earth that

“appears” to be in the offing today (again, we will come back below to take a closer look at this word “appear”). It is ironic that the rights that liberal democracies have hitherto considered the least enforceable (in view of the negative impact of their enforcement on open democratic deliberation), the so-called “third generation” rights under which the right to a healthy and stable environment always used to be counted, might become the most exacting and unforgiving right in times ahead. We may soon face a remarkable inversion of our table of “first”, “second” and “third” generation rights.

Imagine the worst catastrophe that liberal democrats may come to face, barring the complete destruction of inhabitability on planet earth. Imagine a fascist movement pulling off a coup d'état and turning a once liberal state into a totalitarian fascist one. Political liberals become persecuted, and they know that many of them are being murdered and tortured daily. Even under these circumstances may many of them still consider it prudent not to engage in suicidal resistance. They may well consider it prudent to wait acquiescently for the opportune moment in which non-suicidal resistance would become possible again. Or they may eventually decide to fight this fascist usurpation in a way that will also require them to suspend core liberal democratic values (the fight will not get anywhere without entering a state of exception that suspends several if not all fundamental rights). If they do, they will do so in the hope of returning to normal democratic standards in the wake of the fight. The climatological crisis is different. It does not allow for any kind of “waiting for better times.” It is apocalyptic in a way that none of the crises liberal democracy had to face in the past were apocalyptic. It would therefore appear to deprive liberal democrats of their core ethic of liberal democratic tolerance. Tolerance is always a kind of waiting.

Hence also the assessment of Greta Thunberg in *CLDL*. Thunberg is no liberal democrat. She considers herself to be living in an exceptional time, a time in which liberal tolerance of different opinions on climate change is no longer tolerable because *the time is up*. Hers is evidently a dictatorial revolutionary vision that proscribes further debate on essential issues. How can the theory of liberal democracy come to terms with her and why is it important to do so? To come to

terms with her, one needs to understand the knowledge claim that she is raising, as already pointed out above. Thunberg is relying on scientific assessments of the climate crisis as the ground for her intolerance. What has it meant, until recently, to rely on scientific assessments of a situation, and what does it mean today, now that we “appear” (again that word!) to have an apocalyptic climate crisis on our hands? This is the question to which Section 5 turns, taking recourse to the perennial Greek triangle, that is, the three key epistemological positions that Plato, Aristotle and Protagoras bequeathed to Western claims to knowledge.

Why is it important to come to terms with Thunberg? Is she not, after all, just a media personality with little impact on the workings of government and law in our time? Anyone who would think so just needs to look at the climate change cases that are being decided by major courts around the world today. Thunberg and her generation are increasingly successful at moving judiciaries to subject democratic politics – dithering democratic politics, they all basically suggest – to scientific assessments of the urgency of action.<sup>16</sup> These scientific assessments increasingly sidestep the whole Goldilocks problem that Michelman identifies at the heart of liberal democratic constitutional adjudication. According to Thunberg and her generation, the idea that the right to a stable environment should not be applied too thickly so as not to jeopardize the freedom of democratic debate and dissent is exactly that which has become untenable in our time, and the judiciaries of the world are increasingly heeding their call to action.

Are political liberals themselves beginning to heed this call, notwithstanding the fact that it is ushering in a juristocratic mode of scientific politics that they ought to consider anathema? And if they are, are they doing so in the hope of returning

---

<sup>16</sup> For the United States see *Massachusetts v. EPA*, 49 U.S. 497 (2007), *Held v. State of Montana*, CDV-2020-307, 14 August 2021. For the Netherlands, see *Urgenda Foundation v. The State of the Netherlands*, The Supreme Court of the Netherlands, case 19/00135 (20 December 2019). For the Czech Republic, see *Klimatická žaloba ČR v. Czech Republic*, Municipal Court in Prague 14A 101/2021 – 248. For Belgium, see *VZW Klimaatzaak v. Kingdom of Belgium and Others*, Brussels Court of First Instance, No. 167, 83, 2015/4585/A. For Pakistan, see *Ashgar Leghari v Federation of Pakistan*, Lahore High Court, 25501/2015. For Germany, see *Neubauer v Germany*, BVerfG, BvR, 2656/18. As current PhD research of Patrick Lentz at the University of Luxembourg points out, all these cases take prevailing scientific consensus regarding climate change and the reasons for it as secure knowledge that exacts urgent and relatively determined political action.

to regular liberal democratic politics one day? If the answer to both these questions is positive, they may well need to prepare themselves for a long wait. The era of dictatorial climate politics may well last considerably longer than any fascist or other dictators that liberals needed to fight or sit out in the past. Given the unprecedented time spans in play here, they may do well to revisit the ancient roots of the questions they will be facing. This is what section 5 will do presently. Before we turn to it, it is important to add one last clarification regarding *the two sides* of the unique fragility that liberal democracy faces in our time.

Liberal democrats who are convinced of the utter urgency of the politics that Thunberg and company are pursuing may consider themselves compelled to suspend (not free to suspend or not to suspend) the liberal democratic ethic of open-ended discussion. Liberal democrats who are not so convinced of this urgency may soon be compelled in dictatorial fashion to “tolerate” this suspension for a longer time than they had to do during similar suspensions in the past. In the end it comes down to the same thing, like two sides of the proverbial coin: Liberal democrats will either have to tolerate their own suspension of liberal democratic ethics (live with themselves for imposing this suspension on others) or tolerate the suspension of this ethics that others impose on them (and tolerate themselves – live with themselves – for this toleration).<sup>17</sup> Of concern here is a liberalism beyond

---

<sup>17</sup> It is important to stress that the problem that liberal democratic ethics faces here does not concern the coercive imposition of a decisive political programme or policy on those who do not assent to it. Liberal democratic ethics – surely as articulated by Rawls and Michelman – is fully reconciled with the inevitability of such coercive impositions. The Rawlsian and Michelmanian understanding of political liberalism is surely squarely focused on the question why and when such impositions can duly be considered legitimate. It is therefore also not for reasons of the substance of her political vision and wanting to impose it on others that *CLDL* suggests that Greta Thunberg is not a liberal democrat. Many political liberals are surely deeply convinced by her political vision and fully prepared to impose it on those who are not convinced. Such impositions are standard in democratic politics. The problem that liberal democratic ethics faces here concerns something else. It concerns the scientifically informed suspension of liberal democratic procedures and processes in order to make those impositions without further delay, given the urgency of the matter. To be sure, the Rawlsian conception of political liberalism is also fully reconciled with the overriding of liberal democratic procedures in the case of urgent concerns with civil order and survival. As Michelman puts it in a recent text (Michelman, 2024, xx, somewhat adapted here): “[In a situation, call it Hobbesian, of cultural breakdown, [sustenance of] conditions of amicable civil order [is] to the liberal-minded even prior in importance to a regard for rights that only such an order can implement. Paraphrasing Rawls, the question then would be about application of a prior principle of survival/security “to [the liberal] philosophy itself.” There can be no doubt,



liberalism, a liberal tolerance of the illiberal or anti-liberal that one may infer from Rawls' and Michelman's application of "philosophy to itself."<sup>18</sup> This liberalism beyond liberalism, however, is probably the most fragile liberalism one can imagine.

For a longer time than they had to do in the past? Indeed, much longer than one can foresee right now. History affords some hope that fascisms and other anti-liberal threats to liberalism will come and go. But the ability of human beings to render the earth inhabitable, the constant threat of this actually coming to pass, and the need for an illiberal containment of this threat are bound to stay with them until the age that has become known as the *Anthropocene* has come to an end.<sup>19</sup> One is talking about immense time scales here, and this warrants going back to a moment that Western philosophers may well want to consider a key milestone in the history of this *Anthropocene*.

## 5. The Perennial Greek Triangle: Plato, Aristotle and Protagoras

The historical context to which Plato responded with his idealist philosophy of two separate worlds, the ideal and the sensory, is well known. The context was the decay of *isonomia*, *sophrosune* and *phronesis* in Athenian politics. *Isonomia*, *sophrosune* and *phronesis* were the great political virtues for which the Greeks are known and revered to this very day.<sup>20</sup> In contrast to the Mycenaean tyrants whose palatial authority was rooted in myth, the Greeks developed a completely new form of politics, a form of politics of which shared decision-making guided by the principle of moderation was the key

---

however, that this kind of situation confronts political liberalism with its own limits and therefore surely with an existential crisis and paradox. One is back with Böckenförde's observation regarding liberalism having to suspend liberalism to sustain (any future possibility of) liberalism.

<sup>18</sup> See Rawls, 1996, 154; Michelman, 2022, 191; and Michelman's response to Neil Walker in Michelman, 2023; as well as my interpretation of this response in Van der Walt, 2023a.

<sup>19</sup> I am writing here, without even remotely measuring up to it, under the deep impression of (unpublished) work on the end of the Anthropocene that Hans Lindahl is currently doing. See also fn. 30 below.

<sup>20</sup> See Vernant, 2013; Winter 2020.

element. This transformation in politics was corroborated by a profound socio-cultural change in which the heroic ethic of the outstanding and daring warrior, the ethics of individual excellence and excess, gave way to a cooperative ethics among equal citizens. The ethics of the heroic warrior never disappeared completely though, and the civil war saw it coming back with a murderous vengeance. The Athenian popular assembly retreated at the last minute from a decision to commit genocidal atrocity in their dealings with Mytilene, and finally failed to do so in the case of Melos (for a more elaborate discussion of this history, see Van der Walt, 2020a, 42 – 45).

This was the historical background of Plato's idealist philosophy, to which one important detail must be added: the condemnation of Socrates in 399 BCE. The death of Socrates by the hand of Athenian democracy was the last straw that inspired a philosophy that turned its back on democratic deliberation between philosophically unschooled laymen. Hence the idea of a philosopher king whose selfless reign would be informed by direct knowledge of the ultimate truth of all things, a knowledge gained after a lifetime of ascetic study that activated an ancient memory (*amnamsis*). It is important to note two essential characteristics of this knowledge. The first concerns its immediate immersion in truth, its direct access to the forms or ideas that structure the universe. The second concerns the dictatorial consequences of this immersion.

Trust Richard Rorty to give one a concise and acute description of the immediate immersion and direct access to truth of Platonic knowledge:

[W]e may think of both knowledge and justification as privileged relations to the objects those propositions are about. [If we do so], we will want to get behind reasons to causes, beyond argument to compulsion from the object known, to a situation in which argument would be not just silly but impossible, for anyone gripped by the object in the required way will be unable to doubt or to see an alternative. To reach that point is to reach the foundations of knowledge. For Plato that point was reached by escaping from the

senses and opening up the faculty of reason – the Eye of the Soul – to the World of Being. (Rorty, 1980, 159).

What Rorty highlights here is the non-hypothetical – ἀνυπόθετον – status that Plato (1935, 510B6) ascribed to the foundations of true knowledge.<sup>21</sup> Those foundations are in no need of hypothesis or argument and do not allow for either. Further to this, all knowledge rigorously based on them are likewise not in need of argument let alone persuasion. Hence also the inevitable dictatorial nature of this knowledge, and the dictatorial nature of the philosopher king’s governance. Plato did not shy away from the startling implications of this dictatorial knowledge. Immersed in or directly in contact with the ultimate truth of things as the eye of the philosophical soul was, according to him, the government of the philosopher king would not need written laws and should, ideally, not rely on any. To the contrary, immediate dictation of unmediated and therefore unadulterated truth would only be hampered by the defects of writing, were it bound to written laws.<sup>22</sup>

Jacques Derrida (1967, 41) once observed that Hegel was the first “thinker of writing” (*premier penseur de l’écriture*). Of concern in this observation was of course not writing in the common sense that we attribute to it (written as opposed to spoken language), let alone Hegel’s recognition in some or other text of the importance of writing as a mode of communication. Of concern was Derrida’s grand thesis about writing as the primary mode of language, given the way all language is conditioned by temporal deferrals

---

<sup>21</sup> I relied on Baltzly, 1996, 33 – 56; Bailey, 2006, 101 – 126; and Wedgwood, 2018, 48 – 49 for guidance on Plato’s ἀνυπόθετον.

<sup>22</sup> This quintessential dictatorial view is implicit throughout the *Republic*, but expressly articulated in *The Statesman*. See Plato, 1925, 295A – D. *The Laws* would seem to reflect a significant turn in Plato’s thinking away from the *legibus solutus* dictatorial stance in the *Statesman* toward an endorsement of rulers bound by law and of laws that are not just enforced coercively but also persuade citizens to obey them. See Plato, 1926, 715C, 885E. Some scholars affirm this turn (see Morrow, 1941), others are reluctant to do so (see Lisi, 2013), while others (see Woozley 2010) believe the rule-of-law stance was not only already present in the *Statesman*, alongside the dictatorial view, but also Plato’s actual philosophy of law regarding the real world (the dictatorial view only pertaining to the ideal state and the ideal ruler). Be it as it may, it is the standard conception of Plato’s dictatorial philosopher king that I am taking as my model here, without arguing (or having to argue) that the matter was exegetically as simple as this.

which the apparent immediacy of the voice belies. In other words, with his observation about Hegel and writing, Derrida commended Hegel as one of the first of Western metaphysicians to recognize the temporal deferrals on which the consummated emergence of any idea turns. Derrida was of course not himself concerned with any consummation of ideas, but we need not go into that now. Assuming for argument's sake that he was right in considering Hegel a "philosopher of writing" in the way he (Derrida) meant it, he was at least wrong, on his own terms, to consider him "the *first* philosopher of writing." If a regard for the time that truths or ideas take to become manifest makes one a "thinker of writing," that achievement can already be attributed to Aristotle. The argument that ideas (indeed Plato's ideas) require time to become manifest on earth was the heart of Aristotle's response to Plato on both of the two counts that we invoked above, the immediacy of philosophical truth, as such, and the immediate dictatorial enforcement of that truth by the philosopher king on *everyone else*. It is important to remember that the philosopher king is essentially alone, because his colleagues prefer to remain in the heaven of ideas until called back, against their will, for their term of governmental service on earth.

One must nevertheless note a certain incongruence in Plato's philosophy of the two worlds before we look more closely at the temporal and written status of philosophical insight and governance in Aristotle's thinking. The idea of the philosopher king returning from the ideal to the sensory world in order to govern the latter on the basis of knowledge of the former ruins the strict separation between these two worlds that standard interpretations of Plato's work have almost invariably considered him to contemplate. If these two worlds were so entirely separated as Plato is generally assumed to have argued, and at least sometimes undoubtedly did, the philosopher would have had no business back on earth, so to speak. His knowledge would be entirely useless over here. If knowledge of the ideas is to have any pertinence in the sensory world, the latter must in some way be amenable to the former. The

former must be able to move the latter.<sup>23</sup> This was of course the essence of the problem that Aristotle detected in Plato's thinking. Plato gives no explanation of the way in which the ideas move the phenomena, he wrote.<sup>24</sup> Well, this is not entirely correct, might one reply in Plato's defence. The idea of the philosopher king returning to the sensory world to govern in dictatorial fashion suggests clearly that the sensory *can be coerced* to accord with the ideal. In other words, *sheer* coercion would seem to be the link between the ideal and the phenomenal world in Plato's philosophy that Aristotle was searching for.

If Aristotle failed to acknowledge this link between the phenomenal and the ideal in Plato's philosophy, it may well have been because of an understandable refusal or reluctance to consider coercion an adequate link, or a link at all. Coercion would leave the sensory world essentially unchanged. The moment the coercion stops, the sensory would fall back into non-conformity with the idea. Aristotle evidently looked for a more lasting and indeed more transformative effect of the ideal on the sensory. Hence his teleological remodelling of the relation between the ideal and the sensory in terms of a potentiality-actuality dynamic. Things cannot and need not be coerced into conformance with their ideal essences. They grow into this

---

<sup>23</sup> Taking issue with Plato's distinction between knowledge and belief (knowledge concerns the ideal forms, belief concerns the sensible world), Gail Fine (2003, 66 – 84) points out passages in Book V of the *Republic* to show that the distinction is not at all as strict as the two-world interpretation of Plato's philosophy suggests. Some passages invoke knowledge of the sensible world that is not mere belief, and some invoke belief regarding the forms that does not yet constitute real knowledge. Acceptance of the coherence of these passages requires that one retreats from the two-world understanding of Plato's work, argues Fine, something that she is "quite willing" to do (see 84). Gadamer, emphasizing the shift from a Pythagorean *mimesis* to a Parmenidean *methexis* (participation) between idea and phenomenon in Plato's thinking – a shift, especially discernible in the *Parmenides* dialogue, that discarded the idea of a *chorismus* or complete separation between them – also questions the accuracy of the two-worlds understanding of Plato's philosophy, thereby suggesting the gap between him and Aristotle was not as wide as it is often perceived. See Gadamer, 1978, 9 – 23 and 76 – 92. Be it as it may, what one gains here on the side of exegetical accuracy, one loses on the side of making sense of more than two thousand years of political thought. There is little point in considering the whole history of Western political thinking an exegetical error.

<sup>24</sup> Aristotle, 1933, I, 991a–991b: καίτοι τῶν εἰδῶν ὄντων ὁμοῦ οὐ γίγνεται τὰ μετέχοντα ἂν μὴ ἢ τὸ κινῆσον.

conformance, when they do (they may also not, as the world “potentiality” clearly suggests). They actualise their potentiality in the course of time.<sup>25</sup> This is where Derrida’s “writing” – a dynamic of differential deferrals – can be considered to enter Aristotle’s philosophy. To be sure, as in the case of Hegel, it is a “restricted economy” of writing. The very identification of *specified potentialities* that await their actualisation over time already implies an initial presence of potentiality that is not itself subject to time.

Cast in Derrida’s terms: Aristotle’s “writing” – actualisation over time – commences with potentialities already given, potentialities that are not themselves subject to temporality, not themselves the outcome of “writing.” The immediacy of Plato’s ideas is evidently still present in Aristotle’s potentialities, more *actively* present at that. This “active presence” of the ideas in the sensory world would seem to spare Aristotle’s political philosophy the need to resort to coercive imposition of the ideas. His is a thoroughly naturalistic political philosophy. Under favourable conditions, political existence grows into its ideal or essential form in the same way nature does. This growth of form takes time, but unlike coerced form, it does not simply disappear again when coercion stops. Political virtue must be cultivated in the course of time, but once cultivated, it does not simply evaporate. Like education, *paideia*, it is time consuming but lasting in a way that suspends the need for constant coercion.

Back to the rub now, back to the problem introduced and highlighted before this delving into Plato and Aristotle commenced: The time is up, Thunberg tells the politicians of this world in an undeniably Platonic fashion. Indeed, if the climate crisis is indeed a crisis, if she *knows* it is a crisis, she also *knows* there is no time left to let our political wisdom grow into a general

---

<sup>25</sup> See Aristotle, 1934: [K]nowledge has to become part of the tissue of the mind, and this takes time - δεῖ γὰρ συμφορῆσαι, τοῦτο δὲ χρόνου δεῖται. I have no exegetical evidence for the specific point about Aristotle’s rejection of the coercive link between the ideal and the phenomenal world that I propose here. The argument rests on a simple syllogism: 1. Plato’s political philosophy evidently enough (exegetically so) turned on a coercive link between the idea and the phenomena. 2. Aristotle discerned no link in Plato between the idea and the phenomena. 3. So Aristotle did not consider coercion such a link.

acceptance of this knowledge. To put it bluntly: it is simply too late for Aristotle. Climate change would “appear” (that word again) to demand a return to Plato. And when we say this, we have not even begun to address the problem of liberal democracy in a time of climate change. Aristotle’s politics takes time, already too much time, it would seem, but it only takes a fraction of the time liberal democracy needs. Aristotle was no liberal democrat. His concern with an aristocratic cultivation of the virtues through education was a softer dictatorship, but it remained a dictatorship, as anyone excluded from the already selected order of virtues (the already present and duly identified potentialities of the political) would have testified. It was the natural potential of slaves to be slaves, of women not to be citizens, and so forth. The surreptitious dictation and dictatorship behind the identification of these natural potentialities would not easily have been missed by those thereby duly dictated.

A search for a proto-liberal-democrat among the Greeks will therefore not lead one to Aristotle. His was an aristocratic, overtly anti-democratic and evidently deeply conservative philosophy steeped in a complete set of vested interests. A search for a liberal democrat among the Greeks can only lead to the one philosopher who expressly affirmed democracy as the only viable form of politics among free and equal citizens. That philosopher was Protagoras. A closer look at Protagoras is instructive for our understanding of liberal democracy, but it is also deeply disconcerting. For if we no longer have time to be Aristotelians, we very definitely no longer have time to be Protagorians.

Aristotle proposed to the Athenians a form of politics that pivoted on already present virtues that could be effectively cultivated in time, that is, within measurable periods of time. Protagoras proposed to them a form of politics of which the key gesture was its infinite deferral of consummate virtue, that is, of any conclusive articulation of political virtue *in time*. Of concern was his interpretation of the myth of Epimetheus and his *homo mensura* maxim. These two key elements of his thinking were closely related.

The former held that all human beings only received a fragmentary glimpse of the justice the gods contemplated for them. The sacred whole – the godly comprehension of everything – would never be restored again. The measure according to which things would be measured among humans would henceforth always remain a *human* measure. Hence Protagoras’ “*homo mensura* statement”: the human being is the measure of all things, of things in as much as they exist and in as much that they don’t.<sup>26</sup>

This insistence on the relativity of all human insight was nevertheless not accompanied by a relativist justification of superior force. It was accompanied, instead, by a cooperative understanding of democratic politics in which everyone would be invited to take part. His was an understanding of *isonomia* that had no anchor in transcendence, neither in the transcendent transcendence of Plato’s ideas, nor the immanent transcendence of Aristotle’s potentiality. All that this *isonomia* could ever hope to achieve, suggested Protagoras, was an indefinite continuation of political cooperation on terms everyone could accept. Among the Greek philosophers, no one ever came closer than Protagoras to Michelman’s description of political liberal constitutionalism as a proceduralisation that “[vaults us over unliquidated differences.]” (Michelman, 2003, 6-8). But it is exactly here that the fragility of liberal democracy in our time becomes so bitterly evident. If we do not even have time left for Aristotle’s still “timely” actualisation of potentialities, where will we find time for Protagoras’ and Michelman’s timeless exchange of fragmentary and conflicting visions of justice?

Why this elaborate engagement with the ancient Greeks if contemporary science “appears” (that word again) to converge on the view that we have very little time left? Here’s the answer: engagement with these three ancient philosophical positions on knowledge and politics affords one a very time-efficient way of coming to grips with the epistemological status of this

---

<sup>26</sup> Here is the statement as recorded by Diels (1912, II 228) and bequeathed to posterity by Plato, 1921, 152a, and Laertius, 1925, IX 51: πάντων χρημάτων μέτρον ἄνθρωπον εἶναι, τῶν μὲν ὄντων, ὡς ἔστι, τῶν δὲ μὴ ὄντων, ὡς οὐκ ἔστιν. For a more elaborate engagement with the statement and scholarship on it, see Van der Walt, 2020a, 64 – 68.



scientific convergence and the implications it has for our understanding and practice of politics. Let us begin with the standard understanding of scientific knowledge that has been holding sway ever since Karl Popper and Thomas Kuhn (to invoke here just two of the major beacons) came to stress the irreducibly hypothetical status of all scientific knowledge. Scientific theories can never be verified, claimed the former, they can only be falsified (Popper, 2013). Scientific theories emerge from a constant stand-off between normal and abnormal science, dominant and marginal scientific communities, claimed the latter (Kuhn, 1970). The great Platonic dream that guided much of Western philosophy and science over two millennia ended here. Here commenced the scientific conversation of mankind that Rorty identified and celebrated as the only alternative to the Platonic quest for absolute and un-hypothetical knowledge.

This turn in the theory of the natural sciences was a bonanza for the historical humanities and the theory of liberal democracy. Insight into the open-endedness of the natural sciences commenced to corroborate the open-endedness of all things human which the historical humanities stressed, and on which the theory of liberal democracy finally came to turn towards the end of the twentieth century. John Rawls was one of the water shedding milestones. For many his philosophy was still representative of Aristotle's soft Platonism (most notably among them Habermas, 1995). For others, prominently among them Michelman, Rawls' main concern was a Protagorean proceduralisation (so I read Michelman) of divisive tensions in the "conversation of mankind," both among political liberals, on the one hand, and among liberals and other decent peoples, on the other (see Rawls, 1996 and 1999). This open-ended discussion of mankind among liberals and other decent peoples of the world evidently turned on the hope that the scientific or scientific totalitarianisms of the early and mid-twentieth century – most of them variations of "scientific" Marxism but let us not forget Hitler's scientific

understanding of National Socialism<sup>27</sup> – were a thing of the past. The key question that we have up to now been preparing to ask, however, is this one: Can the open-ended conversation of mankind survive the scientific claim that we are running out of time on earth? Does this claim not signal the triumphant return of a Platonic claim to knowledge, with all the dictatorial and totalitarian implications always concomitant to it?

## **6. Concluding Remarks: Plato, Schmitt and the Failure of the Political**

How long can the open-endedness of Popperian and Kuhnian conceptions of science be maintained if contemporary climatological research confronts the conversation of mankind with a hypothesis that the time is up, or rapidly running out? Can the scientific conversation of mankind remain open-ended when the hypothesis concerns the end of the conversation? Is the continuing insistence on the unproven hypothetical status of all science not perhaps the fatal mistake that currently plays into the hands of climate change sceptics and affords licence to dithering liberal democratic political practices of the kind we described at the beginning of this article? And what would recognition of this mistake mean for the open-ended conversation of mankind envisaged by liberal democracy, the open-ended tolerance of divisive dissent “for as long as possible”?

Let us consider again the categorical difference between the most pressing and second most pressing crisis that liberal democracies currently face on planet earth pointed out above. Liberal democrats may wisely tolerate the complete displacement of liberal democracy by fascist political usurpations in the hope that better times will or might return, times in which non-catastrophic resistance to fascism and authoritarianism may become possible

---

<sup>27</sup> See Supiot, 2007, 56. The link between scientism and 20<sup>th</sup> century totalitarianisms is a constant theme in Supiot’s work, a theme that he also extends to the scientific market ideology of our time. See in this regard especially Supiot, 2010.

again. The climatological disaster that life on earth “appears” to face today threatens to deprive liberal democrats of any sense of temporality or provisionality that may justify their suspension of liberalism. For the remainder of the Anthropocene, the ability of the human being to render the earth inhabitable will never be undone again. The real or “apparent” threat of this inhabitability may therefore, sooner or later, not only preclude any further debate on the question of climate change “for now,” but it will also preclude the re-opening of this debate for as long as the Anthropocene lasts. There is absolutely no justification – not even the thin rationale of self-preservation in the interim – for tolerance that plays Russian roulette with its own apocalyptic (as opposed to temporal) demise. In other words, climate change may come to deprive liberal democracy of its essence, its essential tolerance of difference and its embrace of open-ended discussion. It may well do so forever. It signals the expiry of the “as long as possible.” This is the shredded heart of the fragility that threatens liberal democracy in our time, perhaps for the very last time.

Throughout this article I have alerted the reader to the words “appear” and “apparent.” The Popperian and Kuhnian turn in the understanding of scientific inquiry and the insistence on the irreducible hypothetical status of all critical areas of scientific inquiry have turned us all into phenomenologists. From the perspective (there we go again) of phenomenology, knowledge and understanding of one’s environment are irreducibly perspectival, that is, articulated from the perspective of some or other historical situatedness. It is this perspective that ultimately turns all aspects of reality into appearances. How long can political liberal humanity still afford to maintain and sustain the perspective of the perspective? How long before we have no choice but to return to Plato’s rejection of perspective, of appearances, of frameworks of argument and persuasion, and of written laws that hamper immediate action in the face of crisis? How long before imminent apocalyptic disaster becomes absolute knowledge that proscribes discussion and argument? How long before it becomes un-hypothetical knowledge?

Might this return to Plato still be avoided? One does not know. Whether climate scepticism and the dithering of democracies that invariably accompany it may one day be avoided on the basis of merely hypothetical knowledge is a question that one must consider. There is one sound argument in favour of a positive answer. The risk of complete climatological collapse may at some point in time (perhaps when current conceptions of a 1.5 °C rise in global temperatures will already come across as a quaint relic of the past) become so evident that the following *argument* might become sufficiently persuasive and effective to bring enough of us to our senses:

Yes, there is no absolute scientific proof that human consumption of the earth is a cause of the climatological changes that we “appear” to be facing. But the threat of apocalyptic disaster appears to be such that we can no longer take chances. We have to do whatever seems sensible to do to avoid it. We cannot assert, but we have to assume or presuppose the non-hypothetical and non-phenomenological status of the knowledge that might guide us towards an entirely different way of living on earth that may avoid the disaster we currently appear to face.

Whether this obviously Kantian argument (Kelsenian as far as the theory of law is concerned) is forceful enough to bring enough climate sceptics to different insights and effectively terminate the current dithering of liberal democratic politics is the biggest question that humanity in general and liberal democracies in particular are facing today. Eventual acceptance of this Kantian (Kelsenian) argument seems very unlikely as yet. The endeavour to forge a non-negotiable point of departure out of knowledge that lacks absolute grounds has a long history of yielding under pressure. All that one can say with adequate certainty is this: this argument may well become the last stand of a humanity that once considered itself free, and of a form of politics that once went by the name of liberal democracy. Failure of this argument may well usher in the return of Plato’s philosopher king with his un-hypothetical

knowledge. And with Plato, of course, we will basically have returned then to the Mycenaean tyrants and their mythological insight into the secrets of the universe.

Scholars of Greek philosophy have often been intrigued by the paradoxical proximity between Plato's philosophy of absolute knowledge, on the one hand, and the embeddedness of this philosophy in the most ancient myths of ancient Greece, on the other.<sup>28</sup> This is remarkable, because the proximity between myth and the notion of absolute knowledge is less paradoxical than it may appear at first glance. Horkheimer and Adorno's seminal exploration of the transformation of myth into science and science into myth is a helpful reminder in this regard (Horkheimer and Adorno, 1992), but it is surely not difficult for post-Popperians and post-Kuhnians to comprehend instantly that the notion of absolute science is itself nothing but a myth. It is this myth from which Rorty and the whole spectrum of open-ended humanities and open-ended science (Popper, Kuhn and many others) endeavoured and perhaps managed to free us, at least for a while. It is this freedom that John Rawls envisaged when he made the appreciation of burdens of judgement and the call to civility – both expressions so evidently underlining the irreducible freedom to dissent and to think differently – the heart of his theory of political liberalism. Open-ended freedom of scientific inquiry and political discourse are the core conditions of liberal democracy. They are the mainstays of a discursive existence, the mainstays of the freedom to resist mythological authority

*[...] for as long as reasonable, add Rawls, Michelman and Ferrara, thereby making some allowance, it seems, for a non-discursive constraint of reason on liberty, a constraint that ultimately cannot but suspend the call for an appreciation of burdens of judgement and civility.*

---

<sup>28</sup> For a glimpse of the busy scholarship in this field, see Edelstein, 1949; Latona 2004; Richardson, 1926; Sease, 1970; Segal, 1978; Voegelin, 1947; Wright, 1906; Barret, 2001; Frutiger, 1930.

The reason for adding this non-discursive constraint is understandable, for liberty has a way of getting itself into deep trouble. It has a way of destroying itself freely, as if hating itself, Jean-Luc Nancy once observed: *la liberté se détruit en toute liberté, comme une haine initiale d'elle même* (Nancy, 1988, 164). This invocation of a “reasonable” limit to liberty is nevertheless questionable in view of the argument developed in this article. It risks invoking reason as a known or knowable reality that effectively constrains liberty, as if the invocation of and submission to reason are not themselves expressions or articulations of liberty that may or may not materialise. The problem that results from this invocation of reason as a constraining reality is twofold. The first concerns the way it would disqualify the whole reading of Rawlsian conceptions of liberal democracy offered above. Most notably, it would disqualify the reading of Rawlsian liberalism as an endeavour to resist and avoid quests for reality of the kind afoot in AF and CP. This would of course be my problem, not theirs, Rawls, Michelman and Ferrara may reply. The second problem is nevertheless one that they would not be able to discard so easily as my and not their problem. It concerns the question why this constraining reality of “the at least reasonable” has been so utterly ineffective in the history or histories of liberal democracy. Should one insist on this invocation of a “reasonable” constraint on liberty, one is bound to end up having to explain reason’s pervasive and ceaseless compromise with unreason, that is, the “reasonable” acceptance of the unreasonable.

In a (perhaps somewhat desperate) endeavour to avoid this explanation of reason’s compromise with unreason, an explanation that is bound to get one entangled in Platonic distinctions between the ideal of liberal democracy and its imperfect (if not dismal) practices on earth,<sup>29</sup> this article ventures a

---

<sup>29</sup> This entanglement, once entered, cannot but expose an inconsistency in Rawls’ theory of political liberalism already pointed out early in Section 4 above. Taken as a real and extant (after reasonable agreement) criterion of judgment, I observed there, “the at least reasonable” negates the need for ethics. In other words: enter the ideal world of real reason, exit the need for a call to civility and an appreciation of burdens of judgment. This inconsistency may appear repairable if one would water down the call to civility and appreciation of burdens of judgement to a mere matter of moral coping, that is, of coping morally with the undesirable

different articulation of a constraint on liberty that one may consider non-negotiable. Instead of endorsing the very vaguely but still undeniably Platonic invocation of a *reasonable* compromise with the unreasonable (exactly the predicament of Plato's philosopher king re-entering the cave), it puts forward a normatively less ambitious idea. It puts forward the idea of compromising, *simply for as long as humanly possible*,<sup>30</sup> with that which liberal democrats *must consider unreasonable for as long as they remain liberal democrats*. Instead of defining the criterion that will determine the "for how long," the alternative offered here leaves it flagrantly undefined, and purposefully so. It does so because it candidly accepts that any critical decision of a form of life to resist that which threatens its very existence is no longer classifiable in terms of reason and unreason. Here emerges the most worrying convergence between political liberal and Schmittian conceptions of the political that liberals have to digest.<sup>31</sup> There is, however, one fundamental difference between these two conceptions of the political that can never be fuzzed or erased. For Schmitt and Schmittians, this moment of the decision without

---

reality (in the real world, that is) of having to give up comprehensive for the sake of public reason (see fn. 14 above). It nevertheless is not. If the "eye of the soul" (see the Rorty quote above) is really opened to the share of extant public reason (the essential part of it that ultimately counts) that is effectively "at least reasonable" to everyone, it would cancel or terminate the need for any "moral coping." Clinging to comprehensive reason in the face of public reason is, after all, not something like weakness of the flesh that must be overcome with moral effort. It concerns attachment to a competing claim to reason that the dialectically enlightened "eye of the soul" would discard without further ado (remember Socrates: no one does wrong *knowingly*). In other words, public reason, if real, however "thinly" so, would be sufficient and effectively comprehensive whenever it really matters. Exit again the need for a call to civility and an appreciation of burdens of judgement. Rawls' invocation of a call to civility and an appreciation of burdens of judgement constitutes an acknowledgement that public reason is not "of this world." This makes it one of the most forceful theories of liberal democracy on offer today, I observed above (Section 4). No doubt, it is strong tobacco, and it is quite understandable that Rawls and Rawlsians would *sometimes* want to mix a sweetener – the idea of the "at least reasonable" – into it. But this sweetener not only weakens it. It ruins exactly that which distinguishes it from all other brands on offer. The *sometimes* emphasized here of course implies a *not always*. For this *not always*, see Rawls, 1996, 240 – 241, and Michelman, 2023, 6 – 8.

<sup>30</sup> We also need to think about the restrictiveness of this expression "humanly possible," as invaluable comments on this paper by Hans Lindahl pointed out to me. We may most likely get nowhere as long as we continue to think of the crisis we are facing as a human or humanitarian crisis.

<sup>31</sup> For an instructive exploration of the relation between Schmitt and political liberalism, see Ferrara, 2023, 103 – 123.

criterion – the decision that *creates* the criterion – is the very essence of the political. For political liberals and liberal democrats, this moment is the utter failure of the political. It is the moment in which they feel *compelled* to suspend their fundamental ethic of *always giving things more time*; of giving things time “for as long as it is humanly possible to do so.” Here lies the essential fragility of liberal democracy that this article has in mind, the essential fragility from which liberal democracy never escapes (Böckenförde already noticed it). The exceptionality of this fragility in a time of climatological crisis concerns the grim realisation that there is or appears to be (take your increasingly meaningless pick) no more time to give.

Political liberals have lived with all sorts of fascisms and other abuses of fundamental rights for longer than Rawlsian intimations of “the at least reasonable” ever could have permitted them to do. They have been giving much more time than their own reason permitted, surely always in the hope of better times to come. Climate change may well put an end to this liberalism beyond liberalism.<sup>32</sup> It may turn liberal democrats into that which they have always hoped to avoid *for as long as possible*, indeed *forever*: into Schmittians and Platonists at that.<sup>33</sup> The sovereign decision of the most

---

<sup>32</sup> See again the text at fn. 18 above.

<sup>33</sup> Between Schmitt and Plato, we will never be able to answer the question whether the moment of the sovereign decision is the source of absolute knowledge (Schmitt) or vice versa (Plato). Right now, the answer may not matter much. Due regard for this inversibility of the Schmittian and the Platonic casts light on the question whether the climate crisis that we are facing can really bring about the dramatic transformation of the fundamental epistemological framework that underpins our understanding of scientific knowledge invoked in this article. It is difficult for Kuhnians or Popperians or phenomenologists in general to imagine that we will ever arrive at a post-Kuhnian, post-Popperian or post-phenomenological epistemological framework that may in many respects be reminiscent of pre-Kuhnian, pre-Popperian or pre-phenomenological epistemological thinking. But thinking that this is impossible surely underestimates the extent to which these epistemological frameworks are themselves conditioned by and exposed to historical vicissitudes that may render them obsolete. The epistemology (or epistemologies) of our time that came to stress the open historicity of knowledge may very well itself become a “victim” of that historicity. To return to Schmitt and Plato: the historical intervention of a sovereign decision can quite imaginably suppress all conceptions of the open-ended historicity of knowledge to effectively restore Plato’s vision of eternal essences. I stress this in response to pertinent questions masterfully posed to me by Hoi Kong during a presentation of this article as a paper at the University of British Columbia on 20 January 2024.



serious of serious cases may lead them all to accept, as absolutely indisputable knowledge, the scientific claim that time is up, or running out fast.

## References

Aristotle (1933) [ca. 350]. *Metaphysics* (Harvard University Press Loeb Library).

\_\_\_ (1934) [ca. 340]. *Nicomachean Ethics* (Harvard University Press Loeb Library).

Baltzly, D. C. (1996). To an Unhypothetical First Principle in Plato's Republic, in *The Philosophy Quarterly*, vol. 13, n. 2, 149 – 165.

Bailey, D.T. J. (2006). Plato and Aristotle on the Unhypothetical in Oxford Studies, in *Ancient Philosophy*, vol. XXX, 101 – 126.

Barret, J. (2001). Plato's "Apology": Philosophy, Rhetoric, and the World of Myth, in *The Classical World*, vol. 95, n. 1, 3 – 30.

Böckenförde, E.-W. (1976). *Staat, Gesellschaft, Freiheit, Studien zur Staatstheorie und zum Verfassungsrecht* (Suhrkamp).

Butler, J. (2023). Former Australian PM Tony Abbott says climate warnings are 'ahistorical and implausible', in *The Guardian*, 1 November 2023; [https://www.theguardian.com/australia-news/2023/nov/01/former-australian-pm-tony-abbott-says-climate-warnings-are-ahistorical-and-implausible?CMP=Share\\_iOSApp\\_Other](https://www.theguardian.com/australia-news/2023/nov/01/former-australian-pm-tony-abbott-says-climate-warnings-are-ahistorical-and-implausible?CMP=Share_iOSApp_Other).

Callois, R. (1950). *L'Homme et le Sacré* (Gallimard).

Carrington, D. (2021). 'Blah, blah, blah': Greta Thunberg lambasts leaders over climate crisis, *The Guardian*, 21 September, <https://www.theguardian.com/environment/2021/sep/28/blah-gretathunberg->

- leaders-climate-crisis-co2-emissions#:~:text=Blah%2C%20blah%2C%20blah%2C%E2%80%9D,have%20not%20led%20to%20action.
- Derrida, J. (1967). *De La Grammatologie* (Les Éditions de Minuit).
- Diels, H. (1912). *Die Fragmente der Vorsokratiker II* (Weidmannsche Buchhandlung).
- Edelstein, L. (1949), The Function of the Myth in Plato's Philosophy, in *Journal of the History of Ideas*, vol. 10, n. 4, 463 – 481.
- Ferrara, A. (2023). *Sovereignty Across Generations* (Oxford University Press).
- Ferrara, A. and Michelman, F. I. (2021). *Legitimation by Constitution* (Oxford University Press).
- Fine, G. (2003). *Plato on Knowledge and Forms* (Oxford University Press).
- Frutiger, P. (1930). *Les Mythes de Platon: Étude philosophique et littéraire* (Librairie Félix Alcan).
- Gadamer, H.G. (1978). *Die Idee des Guten zwischen Plato und Aristoteles* (Carl Winter Universitätsverlag).
- Goar, M. (2023). Réchauffement: les climatologues face à l'armée du doute, *Le Monde*, 6 October, 9 – 10.
- Habermas, J. (1995). Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism, in *The Journal of Philosophy*, vol. 92, n. 3, 109 – 131.
- Heller, H. (1992). 'Recht, Staat, Macht', in H. Heller, *Gesammelte Schriften II* (J.C.B. Mohr, Paul Siebeck).
- Horkheimer, M. and Adorno, T.W. (1922) [1944]. *Die Dialektik der Aufklärung* (Fischer Wissenschaft).
- Hubert, H. and Mauss, M. (1968). Essai sur la Nature et La Fonction du Sacrifice, in Mauss, M., *Œuvres I. Les Fonctions Sociales du Sacré* (Les Éditions de Minuit).
- Kuhn, T. (1970). *The Structure of Scientific Revolutions* (University of Chicago Press).

- Latona, M. (2004). The Tale is Not My Own (οὐκ ἐμὸς ὁ μῦθος): Myth and Recollection in Plato, in *Apeiron: A Journal for Ancient Philosophy and Science*, vol. 37, n. 3, 181 – 210.
- Laertius, D. (1925) [ca. 200 - 250]. *Lives of Eminent Philosophers II* (Harvard University Press Loeb Library).
- Lindahl, H. (1998). Democracy and the Symbolic Constitution of Society, in *Ratio Juris*, vol. 11, n. 1, 12 – 27.
- Lisi, F. L. (2013). Plato and the Rule of Law, in *Méthexis*, vol. 26, 83-102.
- McKie, R. et al. (2023). Dropping Green Pledges would be Political Suicide, Sunak and Starmer Warned, *The Guardian*, Saturday 22 July, [https://www.theguardian.com/environment/2023/jul/22/green-pledges-sunak-starmer-byelections?CMP=share\\_btn\\_link](https://www.theguardian.com/environment/2023/jul/22/green-pledges-sunak-starmer-byelections?CMP=share_btn_link).
- Michelman, F.I. (2003). Constitutional Legitimation for Political Acts, in *The Modern Law Review*, vol. 66, n. 1, 1 – 15.
- Michelman, F. I. (2022) *Constitutional Essentials*, 2022 (Oxford University Press).
- \_\_\_ (2023). Response to the Contributors, in Balkinization Symposium on Frank Michelman, *Constitutional Essentials. On the Constitutional Theory of Political Liberalism* (Oxford University Press), <https://balkin.blogspot.com/search?q=Constitutional+Essentials>.
- \_\_\_ (2024). Response, in *The Luxembourg Symposium on Constitutional Essentials, Philosophy & Social Criticism* (Forthcoming, 2024).
- Morrow, G. R. (1941). Plato and the Rule of Law, in *The Philosophical Review*, vol. 50, 105 – 126.
- Nancy, J-L. (1998). *L'expérience de la liberté* (Galilée.)
- Orwell, G. (1940). Review of Adolph Hitler's Mein Kampf, in *New English Weekly*, 21 March, <https://gutenberg.net.au/ebooks16/1600051h.html>.
- Paris, G. (2017). Le jour où Barack Obama avait effacé sa « ligne rouge » sur la Syrie, *Le Monde*, 07 April, [https://www.lemonde.fr/international/article/2017/04/07/le-jour-ou-barack-obama-avait-efface-sa-ligne-rouge-sur-la-syrie\\_5107363\\_3210.html](https://www.lemonde.fr/international/article/2017/04/07/le-jour-ou-barack-obama-avait-efface-sa-ligne-rouge-sur-la-syrie_5107363_3210.html).

- Pengelly, M. and Levine, S. (2023). "Election denier, climate skeptic, anti-abortion: seven beliefs of new US House speaker Mike Johnson," *The Guardian*, 25 October, [https://www.theguardian.com/us-news/2023/oct/25/who-is-mike-johnson-house-speaker-election-denier-climate-anti-abortion?CMP=share\\_btn\\_link](https://www.theguardian.com/us-news/2023/oct/25/who-is-mike-johnson-house-speaker-election-denier-climate-anti-abortion?CMP=share_btn_link).
- Plato (1921) [ca. 390]. *Theaetetus* (Harvard University Press Loeb Library).
- \_\_\_ (1925) [ca. 370?]. *The Statesman* (Harvard University Press Loeb Library).
- \_\_\_ (1926) [ca. 347]. *The Laws* (Harvard University Press Loeb Library).
- \_\_\_ (1935) [ca. 380]. *The Republic* (Harvard University Press Loeb Library).
- Popper, K. (2013) [1934]. *Logik der Forschung* (De Gruyter).
- Rawls, J. (1996). *Political Liberalism* (University of Columbia Press).
- \_\_\_ (1997). The Idea of Public Reason Revisited, in *Chicago Law Review*, vol. 64, 765-767.
- \_\_\_ (1999). *The Law of Peoples* (Harvard University Press).
- Richardson, H. (1926). The Myth of Er (Plato, Republic, 616b), in *The Classical Quarterly*, vol. 20, nn. 3/4, 113 – 133.
- Rorty, R. (1980). *Philosophy and the Mirror of Nature* (Basil Blackwell).
- Schlink, B. (2021). *Die Enkelin* (Diogenes).
- Sease, V. W. (1970). The Myth in Plato's Theory of Ideas, in *The Southwestern Journal of Philosophy*, vol. 1, nn. 1/2, 186 – 197.
- Segal, C. (1978). "The Myth Was Saved": Reflections on Homer and the Mythology of Plato's Republic, in *Hermes*, vol. 106, n. 2, 315 – 336.
- Schmitt, C. (1996a) [1932]. *Der Begriff des Politischen* (Duncker & Humblot).
- \_\_\_ (1996b) [1922]. *Politische Theologie* (Duncker & Humblot).
- \_\_\_ (1997) [1950]. *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Duncker & Humblot).
- Supiot, A. (2007) *Homo Juridicus. On the Anthropological Function of the Law* (Verso).
- \_\_\_ (2010). *L'esprit de Philadelphie. La Justice Sociale face au marché total* (Seuil).

- Taddonio, P. (2015). “The President Blinkered”: Why Obama Changed Course on the “Red Line” in Syria”, May 25,  
<https://www.pbs.org/wgbh/frontline/article/the-president-blinkered-why-obama-changed-course-on-the-red-line-in-syria/>.
- Taylor, P. (2023). “Will Europe’s centre-right parties accept defeat or sell their souls to the hard right?”, *The Guardian*, Monday 28 August 2023,  
<https://www.theguardian.com/world/commentisfree/2023/aug/28/europe-centre-right-parties-european-parliament>.
- Van der Walt, J. W. (2005). *Law and Sacrifice* (Routledge).
- \_\_\_ (2020a). *The Concept of Liberal Democratic Law* (Routledge).
- \_\_\_ (2020b). The Gift of Time and the Hour of Sacrifice, in B. W. Nail and J. Ellsworth (eds.), *Law’s Sacrifice. Approaching the Problem of Sacrifice in Law Literature and Philosophy* (Routledge).
- \_\_\_ (2021). Liberal Democracy and the Event of Existence, Seen from a not-so-Rickety Bridge Between Rawls and Merleau-Ponty. Reply to my Critics, in *Etica & Politica / Ethics & Politics*, vol. XXIII/2", 521 – 576.
- \_\_\_ (2023a). Introduction. Balkinization Symposium on Frank Michelman, *Constitutional Essentials. On the Constitutional Theory of Political Liberalism* (Oxford University Press),  
<https://balkin.blogspot.com/search?q=Constitutional+Essentials>.
- \_\_\_ (2023b). Rawls, Habermas and Liberal Democratic Law, in *Netherlands Journal of Legal Philosophy*, vol. 52, n. 1, 16 – 46.
- \_\_\_ (2023c). Reply to my Critics, in *Netherlands Journal of Legal Philosophy*, vol. 52, n. 1, 134 – 156.
- \_\_\_ (2023d). *The Literary Exception and the Rule of Law* (Routledge).
- Vernant, J.-P. (2013)[1962]. *Les origines de la pensée grecque* (PUF Quadrige).
- Voegelin, E. (1947). Plato's Egyptian Myth, in *The Journal of Politics*, Vol. 9, No. 3 (August), pp. 307-324.
- Walker, N. (2023a). Populism and Constitutional Democracy: Feature or Bug?, *University of Edinburgh School of Law Working Paper*, No. 2023/01.

\_\_\_ (2023b). Sovereignty, Property and Climate Change, in *The Edinburgh Law Review*, vol. 27, n. 2, 129-156.

\_\_\_ (2023c). The Authoritarian Alternative. In Balkinization Symposium on Frank Michelman, *Constitutional Essentials. On the Constitutional Theory of Political Liberalism* (Oxford University Press), <https://balkin.blogspot.com/search?q=Constitutional+Essentials>.

Wedgwood, R. (2018). Plato's Theory of Knowledge, in D. O. Brink, S. Sauvé Meyer, C. Shields (eds), *Virtue, Happiness, Knowledge: Themes from the Work of Gail Fine and Terence Irwin* (Oxford University Press), 33 – 56.

Winter, S. (2020) Keeping Faith with Nomos in *Touro Law Review*, vol. 36, no. 1, 345 – 366.

Woozley, A. (2010). Plato and the Need for Law, in *The Philosophical Quarterly*, vol. 60, no. 239, 373 – 395.

Wright, J.H. (1906). The Origin of Plato's Cave, in *Harvard Studies in Classical Philology*, vol. 17, p. 131 – 142.

# ATHENA


CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

---

## Democracy in Latin America: Between Backsliding and Resilience

FLAVIA FREIDENBERG

*PhD Researcher, National Autonomous University of Mexico (Mexico)*

✉ [flavia@unam.mx](mailto:flavia@unam.mx)  <https://orcid.org/0000-0001-9905-0777>

### ABSTRACT

Democracy is strongly threatened, but, even so, it still resists. Although comparative literature is divided between pessimists and optimists (Freidenberg and Saavedra Herrera, 2020), or between those who see its setbacks (Bermeo, 2016; Diamond, 2020; Haggard and Kaufman, 2021) and those who highlight its resilience (Freidenberg 2024; Merkel and Lührmann 2021; Boese et al. 2021; Lieberman et al., 2022; Freidenberg 2023; or Levitsky and Way 2023), this research critically assesses the health of democracy, especially in two dimensions: electoral and liberal for 18 Latin American countries since 1978. The main argument contends that there is no single trend indicating global backsliding or, on the contrary, a generalized advancement of democracy, but rather, in any case, there are changes in different directions within the two main dimensions. While the liberal dimension is receding, the electoral dimension is being resilient. Backsliding is identifiable in relation to loss of basic commitments and the elites' disloyalty to democracy; difficulties in maintaining the currency of the Rule of Law, pluralism, respectful coexistence, and the independence of institutions; strategic manipulation of the formal rules and difficulties of access to resources and welfare; while advancements are visible in stability and cleanliness of elections, autonomy and professionalism of electoral arbitrators; alternation of power and the fact that those who govern lose elections; active participation of pro-democracy citizens; efforts for the inclusion of underrepresented groups and the building of parity democracies, among others.

**Keywords:** evaluation of democracy, democratization, backsliding, resilience, Latin America

This research was initially developed at the Center for Political and Constitutional Studies (Spain). This is part of the Observatory of Electoral Reform in Latin America of Legal Research Institute of the National Autonomous University of Mexico. It has been done thanks to the Program of Support for Research and Technological Innovation Projects (PAPIIT) of the National Autonomous University of Mexico given to the project "The resilience capacity of democracies: elections and politics in pandemic times" ["La capacidad de resiliencia de las democracias: elecciones y política en tiempos de pandemia", Code: IN302122], directed by Flavia Freidenberg. I thank Carlos Guadarrama Cruz for his support in the systematization of data, and Julieta Suárez-Cao, Karolina Gilas and Yanina Welp for their suggestive comments to a previous version of this text.

ATHENA

Volume 4.1/2024, pp. 68-109

Articles

ISSN 2724-6299 (Online)

<https://doi.org/10.6092/issn.2724-6299/19152>



## 1. Introduction

Many democracies in the world are being threatened, but, even so, they still resist. Although democratic regression has been clearly described in research from different regional contexts (Bermeo, 2016; Waldner and Lust, 2018; Diamond 2020; Haggard and Kaufman, 2021, among others), in recent years it has become clear that some democracies have had a greater capacity than others to resist these setbacks without losing their democratic conditions, and still —some of them— have been able to return to being democracies after having gone through some kind of "grey area". This phenomenon shows that contemporary democracies can be resilient and much more solid than they seem (Merkel and Lührmann, 2021; Brownlee and Miao, 2022: 133; Levitsky and Way, 2023), thus substantially recovering some or several of the conditions allowing for them to continue being a democracy.

One way to observe this phenomenon is by assessing whether holding elections with integrity has remained the heart of representative democracy. People use elections as a mechanism to say, “enough is enough of the same representatives as always”, to choose “savior leaders”, and/or convinced that there is some room to go beyond stagnation, transform their realities, and even overcome the crises they face. If a society does not receive the benefits of living in democracy, what does it have to lose if it bets on change, even if this means moving towards something uncertain (as in Argentina with the election of Javier Milei in 2023), or does it mean rejecting elites who have lived off privileges and have made democracy backslide in recent years (as in the Guatemalan election of 2023)? As Przeworski (2019) argues, democratic elections are “those that maintain the [democratic] seduction and allow cultivating the hope that things can change”. Hence, having an instrument enabling citizens to participate, to be represented, and to generate the social change they intend to effect is fundamental for democracy.



The possibility of freely electing whomever we want should never be something contrary to democracy, even if the result displeases us or does not coincide ideologically with our world view. The problematic question does not lie there, but it lies in the fact that, when accessing power, these leaderships promote ideas or build narratives that delegitimize the institutions allowing for them to win elections, and discursively denigrate their adversaries, as if they were not entitled to participate (Freidenberg, 2024).<sup>1</sup> What is debatable is that these leaders promise —from the margins of the system— to dismantle democracy in the name of democracy, and that, once in power, they make decisions that alter the legal frameworks, rules, practices and basic guidelines of democratic coexistence. This is what comparative literature has defined in recent years as “democratic backsliding” (Haggard and Kaufman, 2021).<sup>2</sup>

Having said that, some of the countries that had more recently regressed in their essential components have shown some recovery. This means that they had the capacity of democratic resilience, i.e., the possibility of “resisting and maintaining the capacity to perform the basic functions of the democratic system” (Lieberman et al., 2022, 7). Although some countries have had the ability to sustain their democratic activities without experiencing significant

---

<sup>1</sup> In several countries of the region, in recent decades, the citizenry has chosen leaders who, in their narratives, promised to achieve changes. Some of them, such as Rafael Correa in Ecuador in 2006, Andrés Manuel López Obrador in Mexico in 2018, Jair Bolsonaro in Brazil in 2019, Nayib Bukele in El Salvador in 2019 and, recently, Javier Milei in Argentina in 2023, won the elections with the support of broad majorities seeking change within democracy. Those same leaders, in their campaign speeches, used statements contrary to the institutions that allowed for them to access power and, once in office, took decisions that led to democratic backsliding and to the erosion of several key indicators of the liberal dimension of democracy (see Freidenberg, 2024).

<sup>2</sup> Several examples support these claims. In Ecuador, during the decade of the Correísta government, levels of political pluralism were reduced, polarization increased and institutions were co-opted (Bermeo, 2016); in Mexico, the government of the Fourth Transformation promoted an electoral reform in 2022-2023 that sought to dismantle, remove autonomy and financially drown the electoral arbiter (the National Electoral Institute, the autonomous agencies and the local public electoral bodies) (La Política OnLine, 2023; Ríos Figueroa, 2022); or in El Salvador, Nayib Bukele modified the rules, denigrated and persecuted opponents, promoted “iron fist” policies that have violated human rights, co-opted institutions and generated mechanisms altering constitutional norms with the intention of remaining in power (Acevedo Medrano, 2022; Freidenberg, 2024), to name a few.

changes or setbacks in their central dimensions (such as Uruguay or Costa Rica), thus accounting for their capacity for “systemic resilience”, there have been dramatic setbacks (shocks or very strong crises) in other countries that have only been remedied as of late in the last few years with a processes of “democratic reversal” (as in Poland, Honduras, Ecuador, Brazil, Guatemala or Bolivia).

The objective of this research is to evaluate, forty years after its establishment, the health of democracy in 18 Latin American countries, using a multidimensional definition of democracy (Coppedge, Gerring and Lindberg, 2012, 99).<sup>3</sup> This research deals with defining what is retreating, what is resisting, and to which extent the democracies that have retreated have managed to recover, and how they have done so. Unlike other investigations which refer to changes *of* the political system, in this paper we analyze changes in degree *inside* the system under two central dimensions—electoral and liberal—with the intention of evaluating the advancement and/or backsliding in each dimension. This research shows the differentiated—and even contradictory—variations that can be generated within the democratic political system. Unlike the changes between political systems that varied from authoritarianism to democracy or vice versa, this research specifically analyzes the changes that occur gradually in institutions, attitudes, and procedures within the systems.

Based on several databases, such as the datasets from the Varieties of Democracy Project (V-Dem), and those of the Observatory of Political Reforms in Latin America (#ObservatorioReformas), the analysis takes into account that some of the basic components of a democracy can be eroded, while others can resist. The main preliminary argument is twofold. First, it is argued that there is no single trend that indicates a one-way, generalized democratic backsliding for all countries in all dimensions, and at all the

---

<sup>3</sup> The political systems studied are: Argentina, Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama, Paraguay, Peru, Nicaragua, Uruguay and Venezuela.

assessed moments over the last four decades, nor is there a determined and unidirectional progress towards greater democratization. The findings show changes in different directions in the various dimensions for the countries analyzed, thus challenging which decisions to take in order to measure such changes. Second, the resilience of some democracies is demonstrated when realizing that, while the liberal dimension is receding, the electoral dimension continues to resist.

The text is divided into four sections. First, it presents a series of conceptual and methodological tools for evaluating democracies. Second, the assessment of Latin American democracies is presented from a multidimensional perspective, giving an account of the erosion of liberal democracy and of the resilience capacity of electoral democracy. Third, a series of elements are identified that allow for the articulation of the relationship between the two dimensions; and fourth, a virtuous circle — centered around electoral integrity, institution strengthening and civic education— is proposed as part of the work of democratic reinvention that Latin American countries should carry out.

## **2. The Health of Democracies: What to Evaluate and how to do it?**

### *2.1. Methodological Obstacles in the Assessment of Democracy*

The task of assessing the health of democracies is captivating and faces several theoretical and methodological obstacles. One of the first hurdles has to do with the decision of defining which attributes distinguish democracy as a political system from those which do not (Schmitter and Karl, 1991; Geddes, 1999).<sup>4</sup> They seem like democracy, but are not. The diversity of patterns is enormous (Diamond, 2004; Carothers, 2002), given that it is no

---

<sup>4</sup> These characteristics are: concentration of power in a few people (a single leader, group, organization, party); personalization of authority (both effective and symbolic); arbitrary, difficult, and selective access to means and resources; political decisions that are systematically adopted in favour of the same group; and instability of legal norms and arbitrariness in their interpretation (Vallès, 2010; Linz, 1978).

longer a question of mere dichotomous categories (democracy vs. non-democracy), but there is rather a full and much more complex grey zone (Carothers, 2002), which warns about a theoretical and methodological discussion that must be even more delimited.<sup>5</sup> Hence, the problem of the definition of democracy has become more complex, to the point where the nature and particularities of the object of study have been changing, and emerging entities have been receiving new names (Sandu and Popescu-Zamfir, 2021, 4) and adjectives (Collier and Levitsky, 1997).

A second methodological problem lies in the difficulties of establishing temporal limits of democratization. According to Paxton (2000), the way in which democracy is defined and operationalized can affect the delimitation of periods, together with the nature of political change and the understanding of the causes of democratization and de-democratization. The literature has not yet been able to process the way in which the “time variable” crosses the different phases that integrate democratization (Schedler, 2004; O'Donnell et al., 1986; Mainwaring and Pérez-Liñán, 2013), nor to clearly specify which are the necessary —and sufficient— conditions for a democratic system to enjoy good health.

Even when there are several standards and measurement tools referring to the dichotomous distinction between political systems (Linz, 1978; O'Donnell et al., 1986; Linz and Stepan, 1996), it is still not entirely clear what happens in-between both poles and, much less, what happens inside each political system. Sometimes it is a weakened version of the concept of democracy — since not all its attributes are fully satisfied— or, much worse, it is another (undemocratic) political system altogether, or it might be the case of a

---

<sup>5</sup> In some dramatic cases, the systems of procedural democracy have become “hybrid regimes” (Schmotz, 2015; Diamond, 2004; Bunce, 2000), “ambiguous regimes” (Diamond, 2004), “competitive authoritarianisms” (Levitsky and Way, 2015), “electoral authoritarianisms” (Schedler, 2002), or “grey zones” (Carothers, 2002); and, even in some other cases, albeit having become full democracies, some systems have significantly regressed within democracy (while still remaining so), as recently observed in democracies considered fully consolidated (such as, for example, the United States) (Levitsky and Ziblatt, 2018), among others.

different version that is not democratic, but also not non-democratic (like hybrid regimes).<sup>6</sup> The difficulty entails how to define the turning point that makes a democracy go in one direction or in another, move from one phase to the other, or develop capabilities to face setbacks and recover. How many elections must be held to be able to consider that electoral democracy is institutionalized and has sufficient conditions to withstand the challenges posed by a regression? Or how much loss of liberal democracy can electoral democracy bear? As Vargas Cullell (2019) asks: “What determines the abandonment of one state of equilibrium, the step into another, or the beginning of a period of imbalances?”

A third obstacle has to do with how to overcome the myth of the linear progressivity of democratization (Fukuyama, 1992; Carothers, 2002). A common trend has been to consider —explicitly or implicitly— that the growth of democracy had to be linear,<sup>7</sup> and that the process of democratization consists of a series of phases that countries are gradually completing to achieve full democracy. Contrary to this belief, countries may have experienced winding paths that have led them to different phases, and these paths are not necessarily linear, nor do they go from one political system to another (Bermeo, 2016). Experience shows that procedural democracy may have been achieved, and that it will be routinized over time; that the minimum level of democracy could be in the process of being blended, thus heading into another uncertain thing; or that full democracy might never be achieved directly.

---

<sup>6</sup> While these systems were initially defined as democracies that were not (yet) consolidated, the idea that not all hybrid regimes were on the road to democracy began gaining ground over time. These “hybrid regimes” have some attributes of democracy, such as periodic elections and legitimate Constitutions, but at the same time they have attributes of non-democratic systems because they make decisions that erode legal norms and employ subtle measures that limit rights and freedoms; they leave limited space for pluralism —conditioning the actions of the opposition, political parties and independent civil society— and they even allow frequent abuses of the law at the hands of government officials.

<sup>7</sup> As Julieta Suárez-Cao suggested to me in a first reading of this text, this linear vision is associated with structural theories, for example, those that link economic development with democracy, while theories that are more focused in agency can better see the comings and goings of democracy.

A fourth methodological obstacle is concerned with the tension between subjective measurement (based on perceptions of elites, experts, or citizens) and objective measurement (based on objective data). Any measurement is not innocuous and has to do with whether it is more convenient to start from variables/criteria related to the attributes of democracy (Polity, V-Dem, among others); measure it by exploring the support, trust, or satisfaction that citizens place in it (Barometer of the Americas, Latinobarometer, among others), or on what comes out from the perception and/or judgments of experts (US Democracy Index, V-Dem, Freedom House). This makes the inferences that can be drawn from one evidence group and the other distinct, which could result in different outcomes regarding the state of the dimensions and the differences between what happens and what is perceived to occur in the two dimensions of democracy (Little and Meng, 2024; Freidenberg and Saavedra Herrera, 2020).

A fifth obstacle has to do with how to determine what is the shock or substantive critical juncture that has to be considered to measure whether a democracy has finally managed to recover—or not—or, given the case, if it has been able to develop some kind of resilience to reverse its setbacks. To build resilience, a traumatic event must be faced. Hence, critical situations that make political actors adapt (or not) to adversity and can make democracy survive (without it ceasing to be a democracy) must be evaluated. At the moment, there is still not enough data on how they do it; besides, there is no medium scope theory that helps to understand various situations of backsliding and resilience, but, in fact, it is already known that the system can have different kinds of resilience depending on the type of setback.

The delimitation of the characteristics of democracy is key, given that it conditions what is viewed and how it is viewed, and whether such characteristics are dichotomous categories or questions of degree and intensity. Even though the evaluations carried out have been generally focused on electoral conceptions of democracy and on one or two empirical dimensions (rights, attitudes, practices), directly or indirectly conditioning the

outcome of the evaluation (Mainwaring and Pérez-Liñán, 2023; Freidenberg and Saavedra Herrera, 2020; Munck, 2010), the assessment of resilience processes ventures into new challenges in understanding the democratization process.

## 2.2. *The Multidimensional Definition of Democracy*

This research employs a definition of democracy as a specific set of procedures regulating access to political power, where the government must be able to respond to the preferences or demands presented by the citizenry, under the principle of equal opportunities; where citizens must be able to manifest publicly, whether individually and/or collectively, at the same time of receiving equal treatment (Dahl, 1971, 13). This work chose to employ a multidimensional approach, following the theoretical and methodological proposal of the Varieties of Democracy Project (V-Dem), which allows distinguishing different planes or arenas of action of the political system, among which two are proposed for assessment: the electoral dimension and the liberal dimension, since these are the ones that have advanced the most in Latin America. In this way, this research complements the minimalist and procedural definition of democracy with other elements (such as political control between institutions, Rule Law, civil liberties, and the expansion of social rights).

Even when the dimensions seem to overlap, both are measuring differentiated but complementary issues. Based on multi-method strategies, there is an attempt at identifying how a political system achieves democracy, remains in it, backslides inside it or, given the case, resists these setbacks and reverses such process by demonstrating resilience capacity. The *electoral dimension* evaluates the ability to hold quality elections; the ability of autonomy and professionalism of the electoral authorities to ensure those elections meet quality standards, and the ability of citizens and elites alike for sustaining elections. This dimension is based on the fulfillment of a series of political rights —which provide opportunities of citizenry expression and its

political participation— and on the fulfillment of certain procedures — elections— that contribute to the prevention of violence and to the regulation of social conflict (Przeworski, 2019, 219; Schumpeter, 1947; Lipset, 1959). The electoral dimension contains the main mechanism to decide who gets access to positions of popular representation and who holds power in a community of unequal; moreover, it is the minimum ground on which the other four dimensions (liberal, deliberative, egalitarian or participatory) that integrate the multidimensional concept are based on.

Although the idea of polyarchy contributes to generate some consensus regarding what should be understood as “an indispensable minimum of democracy” (Munck, 2010), the procedural definition remains incomplete, because it has difficulty in including a whole series of freedoms and rights that are fundamental to accessing and exercising democracy. For example, there have been leaderships that, even when having won in competitive, free and fair elections with all the indicators of electoral integrity, during their candidacies promoted illiberal causes or ideas, encouraging fear, dividing society, seeking to dismantle the institutions that allowed for them to compete, and proposed setbacks with regards to human rights and the Rule of Law through the use of discriminatory, sexist and misogynist discourses attacking and stigmatizing groups that make up social or symbolic minorities. For this reason, it is necessary to observe the *liberal dimension*, which analyzes the capacity of actors and institutions for upholding compliance with the Rule of Law that permits controlling respect for civil societies. This dimension is measured by decisions and behavior in a number of arenas that have to do with the functioning of institutions, as well as with how political actors relate to each other and to those institutions.

Each of these dimensions is assessed based on a series of variables and indicators. There are surely more variables and indicators that should be considered and that may be even more interesting to measure the capacity of democratic resilience, but given this research’s magnitude, I selected some variables and indicators as an analytical exercise that helps us better



understand backsliding, as well as resilience. In this sense, I believe that three variables contribute to empirically measure the electoral dimension of democracy (quality elections, capacity of the authorities, and ability of citizens and elites to sustain elections),<sup>8</sup> while an additional variable helps to understand the liberal dimension of democracy (ability to uphold republican principles) (see Table 1).<sup>9</sup>

This research assesses the extent to which cases that had established democracies in the third wave of democratization have suffered setbacks, and to what extent they were able to recover from backsliding. Observation makes it possible to identify changes based on differences between dimensions: as one-dimension progresses, another may regress and, when applicable, reverse the process. The so-called “democratic backsliding” implies “the progressive erosion of the institutions, rules and norms that result from the actions of duly elected governments” (Haggard and Kaufman, 2021, 27), and can be manifested in each or all of the dimensions in different forms, whether explicit or subtle, in several rhythms and speeds, and it can lead to very diverse results.<sup>10</sup> Backsliding describes changes *of* the political system or

---

<sup>8</sup> The need to land the concept led Dahl (1971) to propose the term “polyarchy”, which has amounted to having a moderately strong definition, albeit a procedural one of democracy (Diamond, 2004, 118). In polyarchies, authorities are elected through competitive processes; elections are free, fair, and clean; freedoms are respected; suffrage is universal, so that all citizens can vote and be voted without exception or restrictions; alternative sources of information and institutions must exist to ensure that government policies are truly dependent on the votes and preferences of the citizenry (Dahl, 1971, 13-15). This dimension is measured through the Electoral Democracy Index (EDI) (Coppedge et al., 2023), built to know to what extent rulers respond to citizenry.

<sup>9</sup> The liberal dimension is measured through the Liberal Democracy Index (LDI) (Coppedge et al., 2023). This dimension analyses how individual and minority rights are protected by assessing limits to government, such as the observance of constitutionally protected civil liberties, a strong Rule of Law, and an independent Judiciary Power and effective checks and balances that limit the exercise of the Executive Power.

<sup>10</sup> In recent years, several researches have suggested a series of indicators to measure democratic backsliding, such as: a) erosion of norms and strategic manipulation of elections (Bermeo, 2016; Brownlee and Miao, 2022; Levitsky and Ziblatt, 2018; Corrales, 2020); b) carrying out of coups that promise democracy (Bermeo, 2016); c) behavior of political leaders who exploit or mishandle the chronic vulnerabilities of democracy (Bartels, 2023); d) aggrandizement of the Executive Power (Bermeo, 2016); e) pernicious or emotional polarization (Somer et al., 2021); and f) erosion of centrist parties and emergence of extremist parties, among others.

changes *in* the system. When this happens, democracy breaks down and the political system is changed (from a democratic to a non-democratic one).

The fact that democracy recovers from these setbacks implies some kind of “democratic resilience,” that is to say, “the ability of a political system, its institutions, political actors and citizens to prevent or react to internal or external challenges, without losing its democratic character” (Merkel and Lührmann, 2021, 872).<sup>11</sup> This exercise is paramount, given that it allows us to identify whether political systems have been able to keep their basic components. From this approach, democracies can maintain mechanisms and institutions that guarantee their citizenry’s freedom and equality over time (Morlino, 2005, 260), as well as activate the possibility of self-correction to address external or internal shocks that stress such mechanisms. Observing resilience means evaluating how the system (rules, actors, groups, institutions) is able to overcome and/or adapt to crises (and to have flexibility in order to face them without breaking), to continue meeting the requirements that a procedural democracy demands, and to have the necessary tools to respond to junctural and systemic problems, as well as problems stemming from change that they face in the long run.

**Table 1**  
**Measurement**

	<b>Electoral Democracy</b>	<b>Liberal Democracy</b>
<b>Organization in charge</b>	Varieties of Democracy Project (V-Dem)	Varieties of Democracy Project (V-Dem)
<b>What does it measure?</b>	Procedural dimension of democracy	Liberal dimension of democracy
<b>Question asked</b>	“To what extent is the ideal of electoral democracy achieved in its fullest sense?”	“To what extent is the ideal of liberal democracy achieved?”
<b>Operationalization</b>	An interval scale is used	An interval scale is used

<sup>11</sup> This ability can be manifested in three ways: a) systemic; b) resistance to minor setbacks; and c) of a critical or dramatic nature, implying reversion to the conditions the system had in democratic matters before such setbacks (Freidenberg, 2024).

<b>Strategies</b>	Quantitative analysis	Quantitative analysis
<b>Measurement</b>	0 to 1	0 to 1
<b>Data collection instrument</b>	Mid-level indices	Mid-level indices
<b>Categories</b>	It is calculated based on the Electoral Democracy Index (v2x_polyarchy), built by measuring five mid-level indices, also calculated in V-Dem, which are: Freedom of Association Index (v2x_frassoc_thick); Clean Elections Index (v2xel_frefair); Freedom of Expression and Alternative Sources of Information Index (v2x_freexp_altinf); Elected Officials Index (v2x_elecoff); Share of Population with Suffrage Index (v2x_suffr).	It is calculated based on the Liberal Democracy Index (v2x_libdem), built from mid-level indices: the Liberal Component Index (v2x_liberal), as well as the Electoral Democracy Index (v2x_polyarchy).  For it to be a measure of liberal democracy, the index also takes into account a level of electoral democracy.

Source: Own elaboration based on V-Dem.

### 3. Data Analysis

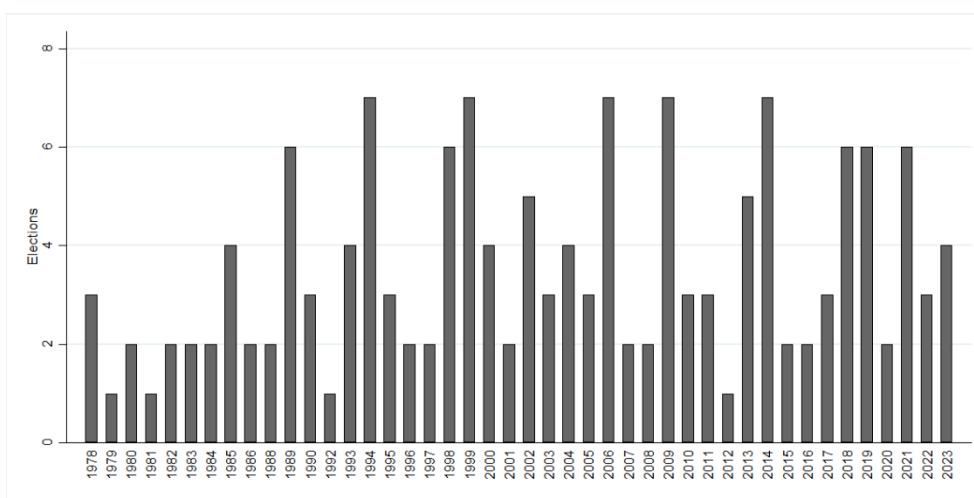
#### 3.1. *What Exactly is Resisting? The Strength of the Electoral Dimension of Democracy in Latin America*

##### a) *Election Quality*

Even when most of the political systems of the third wave of democratization (Huntington, 1991) did not succeed in becoming democratic (Diamond, 2004; Carothers, 2002), the democratization process is more alive than ever. The setting in motion of democracies involved creating and/or dusting off (or drafting from scratch) constitutional frameworks that would ensure a series of rights and guarantees, under the aspiration of establishing political systems that secured certainty in the rules and uncertainty in the results (Przeworski, 2019). It also meant a series of learnings about what it meant to live in democracy.

Never have so many countries had such an extensive period of democracy, in which elections have become the most institutionalized routine act for decision-making. Since the start of the third wave of democratization in the late 1970s, elections have been routinized in the region. The “Presidential Incumbents in Latin America” database of the Observatory for Political Reforms in Latin America (#ObservatorioReformas 1978-2023) records the years in which national elections were held in each of the 18 countries considered in the study. On an aggregate basis, between 1978 and 2023, 154 elections were held for the Executive Power (Graph 1). This routinization is important because it allows for the assessment of the stability of democracies. Elections facilitate the existence of democracy and, in addition, when faced with crises, these are resolved in a democratic manner.<sup>12</sup>

**Graph 1**  
**National elections in Latin America (1978-2023)**



Source: Own elaboration with information from the “Presidential Incumbents in Latin America” database (1978-2023).

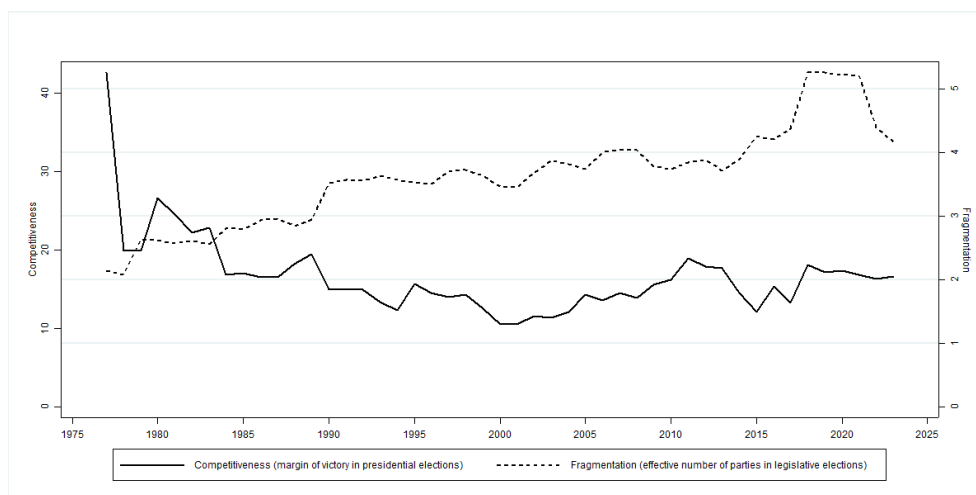
Note: The graph considers 154 presidential elections since the beginning of democracy in 17 Latin American countries in the period from 1978 to 2023.

<sup>12</sup> Of these, only six were not carried out in the established constitutional period (Argentina 2003; Bolivia 2005 and 2020; Ecuador 2023; Peru 2001; and Venezuela 2000).

These processes have taken place in competitive and pluralistic frameworks. The competitiveness structure of party systems has been changing since the (re)introduction of democracy. Since the late 1970s, levels of pluralism have been increasing in the 18 countries of the region. In aggregate terms, the level of legislative fragmentation of party systems has increased from 2.15 (1977) to 5.22 (2020), falling in recent years to 4.17 (2023) (#ObservatorioReformas, 1978-2023) (Graph 2). While some countries have carried out reforms to open competition to non-partisan candidacies, in most cases parties have monopolized political representation at the national level with more or less stable patterns of competitive interactions.

The average effective number of legislative parties (ENP) per country allows for the observation of the differences among cases in the analyzed period. The four countries with the highest average number of effective parties in the period are Brazil (8.59), Chile (6.04), Ecuador (5.16), and Guatemala (4.26), thus showing that there have been systems of “extreme pluralism” (Sartori, 1976/1992), which implies a highly polarized system in antagonistic fields with centrifugal competition and anti-system actors. Afterward, there are systems of moderate pluralism, where the ENP falls in a range from 3.0 to 3.9 (Argentina, Bolivia, Colombia, Costa Rica, El Salvador, Panama, Peru, and Venezuela), while a third group of countries are those that have more bipartisan type systems (or bipartisan and medium), with an ENP between 2.0 and 2.9 (Honduras, Mexico, Nicaragua, Paraguay, Dominican Republic, and Uruguay).

**Graph 2**  
**Competitiveness and Fragmentation of Latin American Party Systems**



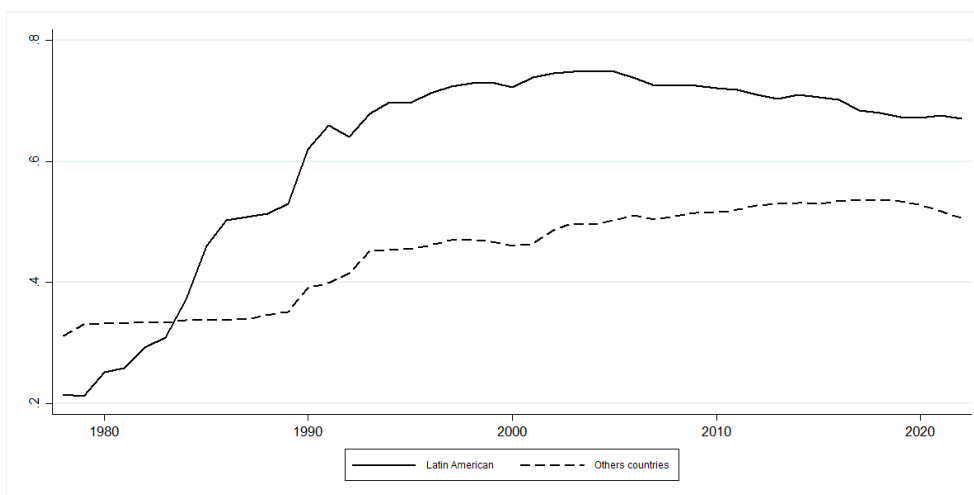
Source: Own elaboration based on data estimated by the #ObservatorioReformas (1978-2023).

Another indicator that reinforces the idea of the institutionalization of elections as a mechanism for distributing power has to do with the alternation of seats in popular elections. That is to say, the fact that the rulers go back home peacefully, that power rotates among the elites, and that leaderships are renewed, accounts for the health of the elections and, with it, of democracy. Incumbents who win elections repeatedly are not necessarily a potential risk source to democracy. The problem arises when they control the State's resources in their favor, and when elections are inequitable among the different options. From the 154 presidential elections held between 1978 and 2023, the incumbents won 58 times and the challengers won 83. This means that, in most cases, the one who was in power, the incumbent, lost, either with the same presidential candidacy or with that of another candidate, but of the same party (#ObservatorioReformas, 1978-2023).

Although there are different alternatives to assess the quality of these electoral processes, the Clean Elections Index (CEI) of the Varieties of Democracy Project (Coppedge et al., 2023) is a tool that allows to understand how elections are conducted and to what extent those elections are free and

fair.<sup>13</sup> Data shows that the quality levels of the elections have been increasing in aggregate terms in the countries of the region. According to this index, in the 18 countries that held national elections, the value of 0.215 in 1978 has increased to 0.671 in 2022, a value above the average of 0.506 (on the scale of 0 to 1), compared to the 184 countries in the world where the quality of elections is also evaluated (Coppedge et al., 2023) (Graph 3). In the last four decades, the perception about the cleanliness of elections in Latin American countries has been above the world average.

**Graph 3**  
**Clean Elections Index in Latin America and the World**



Source: Own elaboration on of V-Dem Dataset version 13 (Coppedge et al., 2023).

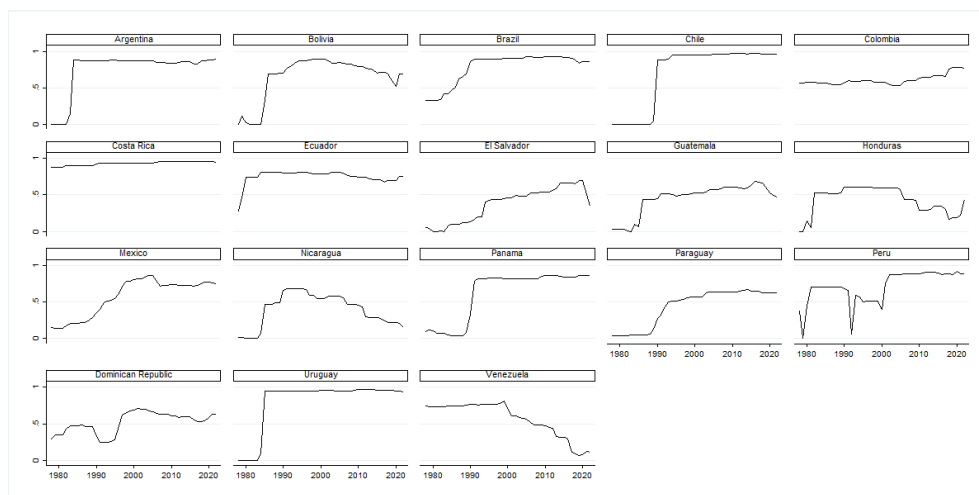
In most countries, elections continue to have the capacity to distribute power, despite the fact that the State has had difficulty in ensuring the exercise of the legitimate monopoly of physical coercion throughout the territory (as in Mexico, Brazil, Honduras, Guatemala, Ecuador, Argentina or El Salvador);

<sup>13</sup> For the elaboration of this index, V-Dem uses the following question: “To what extent are the elections free and fair?”. The following indicators are employed in its composition: autonomy of the electoral management body (v2elembaut); capacity of the electoral management body (v2elembcap); election voter registry (v2elrgstry); election vote buying (v2elvotbuy); elections and other voting irregularities (v2elirreg); election government intimidation (v2elintim); non-state electoral violence (v2elpeace); and free and fair elections (v2elfrfair). The index is measured in a range of 0 to 1 (Coppedge et al., 2023).

the presence of parastatal groups that control or manipulate the State (paramilitaries, mafias or organized crime); the strategic manipulation, irregularities and bad practices in elections (Birch, 2011; Corrales, 2020; Freidenberg, 2024); the rooting of informal practices (such as clientelism, vote buying or cronyism); and the rise to power of candidates with authoritarian attitudes claiming to be savior leaders and healers to others (Acevedo Medrano, 2022; Przeworski, 2022; Bermeo, 2022; Brewer-Carías, 2010).

Despite all this, a group of countries has achieved high levels of assessment of cleanliness in the elections and has done so in a stable manner over a long period of time (Argentina, Chile, Costa Rica, and Uruguay). Among them, Costa Rica, and Uruguay feature values above 0.9 percentage points, the closest to the highest value of the Index. This group is followed by countries that have been increasing clean elections values over time, and that have also faced several conflicting situations regarding electoral governance (such as Brazil, Colombia, El Salvador, Guatemala, Mexico, or Paraguay), although they were able to solve these difficulties later (Graph 4).

**Graph 4**  
**Clean Elections Index in 18 Latin American Countries**



Source: Own elaboration based on of V-Dem Dataset version 13 (Coppedge et al., 2023).



The case of Peru requires special attention because it exhibits contradictions within the electoral dimension. While the Clean Elections Index shows that election quality has been achieved, the problems remain in the elites' disloyal behavior towards political actors, and towards the arbiter and the electoral processes as well (Barrenechea and Vergara, 2023). Meanwhile, in Honduras, Ecuador, Dominican Republic, and Bolivia positive upturns have been manifested in measurement during recent years. Finally, data shows that there are countries where the levels of clean elections have been falling substantially since the 2000s, as in Nicaragua and Venezuela, and that both can no longer be considered as democracies in any of the dimensions analyzed (Coppedge et al., 2023).

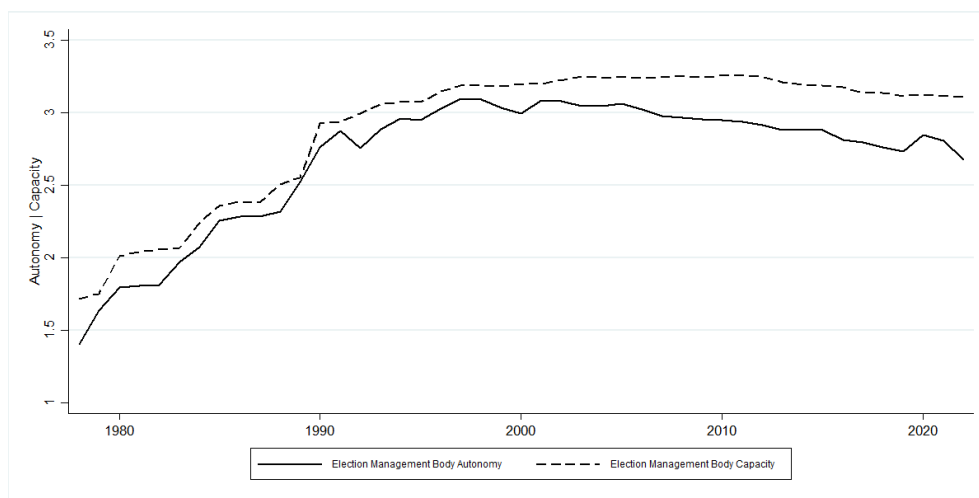
*b) The Ability of Electoral Authorities to Organize Elections with Integrity*

Electoral bodies have become more professional and increasingly autonomous from parties and other political groups in most Latin American countries over the past four decades. The challenges they have faced have not been few, even in recent years during the handling of the pandemic, but still most of these bodies have been learning their task and have increased their electoral governance and independence skills. Data shows a parallel growth of the two key indicators that measure the assessment of experts on the actions of electoral bodies (Graph 8). The levels of autonomy for applying electoral laws and administration rules in an impartial manner have been improving positively since 1978, when they had a value of 1.40 in a scale from 1 to 4 for the 18 countries analyzed, increasing to 3.09 (1997) and 3.03 (1999), but decreasing to 2.64 (2022).

The electoral bodies have also had resources and staff to manage the elections. Since the beginning of the democratization process, its average value was of 1.74 (1978) and 1.77 (1979) for the 18 countries, successively increasing until 2003, when it obtained a score of 3.29, maintaining those values approximately until 2022, when a minimum decrease of 3.11, on a scale of 1 to 4, was observed (Graph 8). This assessment occurred while the

handling of the pandemic was still being addressed, given the health crisis generated by SARS-CoV-2, thus evidencing that there are some institutional deficiencies with regards to the use of resources and to the management and sanctioning capabilities of bad practices, irregularities, and other illiberal actions of political actors in the countries of the region.<sup>14</sup>

**Graph 5**  
**Electoral Management in 18 Latin American Countries**



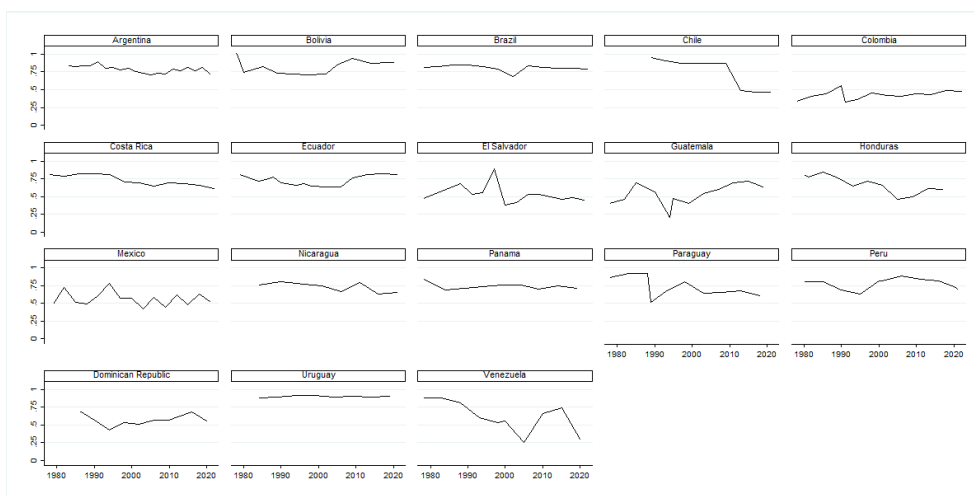
Source: Created on the basis of V-Dem Dataset version 13 (Coppedge et al., 2023).  
Note: Autonomy | Capacity axis values are in ordinal scale (original).

<sup>14</sup> The V-Dem Electoral Management Body Capacity indicator measures whether the body has staff and other resources to manage national elections within the electoral management bodies. The question “Does the Electoral Management Body have sufficient staff and resources to manage a well-organized national election?” is used for its elaboration. The codification expresses the following answers: 0: No. There are obvious deficiencies in staff, financial, or other resources affecting the organization throughout the territory; 1: Not really. Deficiencies are not evident, but even so they still seriously compromise the organization of administratively well-organized elections in many parts of the country; 2: Ambiguous. There could be serious deficiencies that compromise the organization of elections, but it could also be a product of human errors and coincidences or other factors beyond the control of the Electoral Management Body; 3: Mostly. There are partial deficiencies in resources, but these are not serious or widespread; and 4: Yes. The Electoral Management Body has adequate staff and other resources to manage an election well. For its composition, this indicator uses the response theory model of the Bayesian item (Coppedge et al., 2023).

*c) The Ability of Citizens and Elites to Sustain Elections*

The role of the citizenry in elections is crucial in assessing the capacity for electoral resilience. Participation, that is, the percentage of registered voters who cast a vote, has been decreasing in Latin American countries in the last four decades, according to official results (IDEA International, 2023). The average participation between 1978 and 2022 has been of 69.40 percentage points (Graph 6). Although in the first elections after the restoration of democracy the participation levels exceeded 70 points, the levels have had a critical moment in 2003, with only 50.31 points, having rebounded by 2022 by 62.43 percentage points. This is no minor issue, given that institutions need an active citizenry to be legitimate.

**Graph 6**  
**Electoral participation of citizens in Latin America**



Source: Created based on of the Voter Turnout Database by IDEA International.  
Note: Values are expressed in proportions.

The belief in the ability to change elections is related to the perception that citizens have of democracy. If they do not believe that elections can do something, it makes no sense for them to participate. In some countries where there has been backsliding in the liberal dimension, the assessment of democracy substantially improved after electing leaderships. For example, the election of Evo Morales in Bolivia came with a level of support for

democracy of 45.2%, and a year after his election such support had increased to 61.7%. In Ecuador, only 43.1% of those interviewed expressed support for democracy in 2005. After the election of Rafael Correa, that figure rose to 56.7% in 2007 and, ten years later, support for democracy reached 64.5%. In Mexico, support for democracy was 37.7% in 2017, while after the election of López Obrador in 2018 it increased, reaching 42.9% in 2020. Finally, a year before the election of Nayib Bukele in El Salvador, only 27.7% of respondents believed democracy was preferable to any other form of government in 2018 and, a year later, the percentage reached 46.1% (Latinobarometer, 2022).

Another indicator of resilience lies in the acceptance of results on the part of citizens (Freidenberg 2024). One way to measure it is through the perception regarding the absence of protests and violent demands related to electoral results provided by the V-Dem Project (Coppedge et al., 2023). This indicator, measured in 18 Latin American countries, gives an account that, on average, the elections did not generate protests, as was noted in 151 of the remaining countries that answered the survey. Meanwhile, in 16 countries there is disagreement with the idea that violent episodes have occurred; in Bolivia the respondents did not know what to say; and Honduras is the only country where it has been accepted that elections generate protests and violent demands.<sup>15</sup>

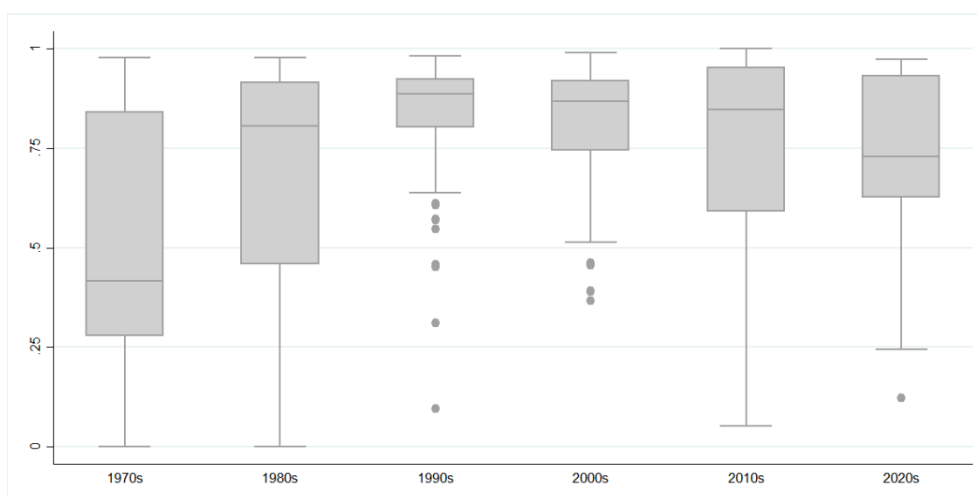
The estimations of the V-Dem experts assert that there have been several stages regarding the way in which loser candidacies accepted or not the results of presidential elections in Latin America (Coppedge et al., 2023). Although until the 1990s the acceptance was high, even stabilizing in values ranging between 0.80 and 1 for 2013, from that moment on, values began to decrease, being 2019 when the lowest value (0.58) of the whole period occurred (Graph 7). This means that losing candidates, in some countries, began to refuse to

---

<sup>15</sup> The acceptance of the results on the part of the citizenry is analyzed by the question: “Did the elections trigger violent protests?”, which admits five possible answers: 1. Totally agreed; 2. Agreed; 3. Neither agreed nor disagreed; 4. Disagreed; and 5. Totally disagreed (V-Dem).

accept electoral results, while before then they did not do it or, at least, not in such a mobilizing and violent way for the political system.<sup>16</sup>

**Graph 7**  
**Elites and adverse outcomes**



Source: Own elaboration based on V-Dem Dataset version 13 (Coppedge et al., 2023).

Note: Normalized values between 0 and 1 are shown for the variable “Election losers accept results”.

Democracies —which are being strongly questioned— have also allowed more people to access more rights and have made elections more inclusive. Through the approval of the constitutional principle of gender parity, or through various affirmative action measures, parity democracies are being built (Freidenberg and Gilas, 2022). In this way, institutions have been enriched by the entry of groups that had historically been underrepresented and even excluded from candidacies and decision-making processes.<sup>17</sup> These changes have entailed a powerful transformation in the descriptive

<sup>16</sup> To measure the level of acceptance of losing candidates in election results, the following question is used: “Did the losing parties and candidacies accept the result of this national election within three months?”. Standard values between 0 and 1 were used in its composition, where 1 represents greater acceptance and 0 less acceptance.

<sup>17</sup> For example, in 17 of the 18 countries analyzed in the last three decades, more than 45 reforms to the electoral regime in issues pertaining gender have been promoted to facilitate women to compete more equally with men (#ObservatorioReformas, 1991-2023). Only Guatemala has not promoted changes in the electoral regime’s rules regarding gender, thus being the only country of the 18 analyzed that has not approved quotas nor gender parity in the registration of candidacies (See Freidenberg and Gilas, 2022).

representation of national Congresses, where women reached a regional average of 35.8 percentage points in 2023 (ECLAC, 2023), being the largest number in the constitutional history of the region, despite the fact that there is still work to be done in order to make them a parity actor.

In summary, democracy resists in the electoral dimension through concrete conditions, such as the routinization of elections as a central mechanism for social change in the democratic process, their high levels of integrity, and their use as an instrument of control over those exercising power (incumbents); the levels of autonomy and professionalism of the electoral management bodies; certain levels of support from the citizenry towards democracy, albeit satisfaction being very low; and the efforts to include underrepresented groups and build parity democracies.

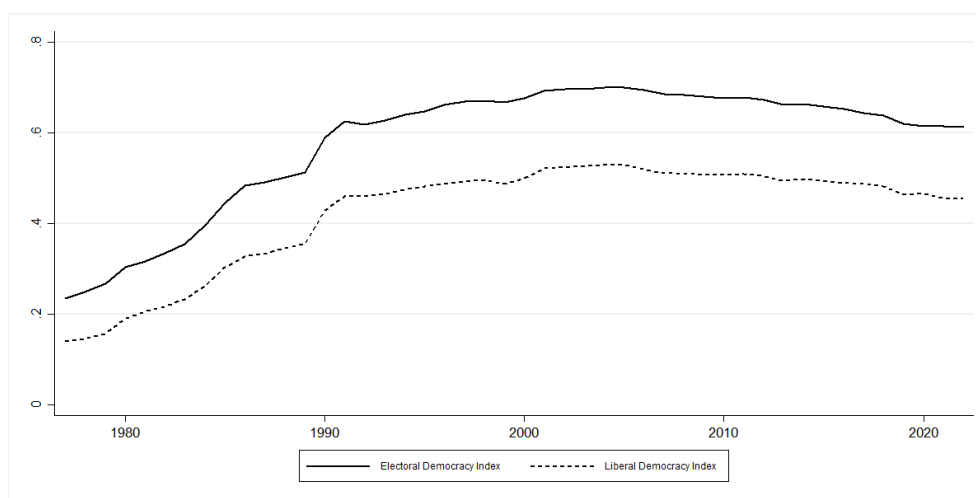
### *3.2. What Exactly is Backsliding? The Erosion of the Liberal Dimension of Democracies*

Unlike what used to happen in previous decades, currently the most common pattern of regression is no longer a dramatic break in democracy through a coup d'état, but a slow and progressive weakening of the essential institutions of democracy (Bermeo, 2016). Many of the measures that restrict freedoms, limit autonomous agencies of opposition forces, or take away capacities of institutional action are seemingly innocuous decisions, and do not necessarily involve serious democratic violations. In practice, these decisions, little by little, subtly erode the legitimacy of institutions, and are aimed at strengthening the power of those already in office.

Despite being the most institutionalized of all [ $> 0.5$ ], liberal democracy has found itself to be increasingly more eroded in recent decades, dropping from 0.5 to 0.3, in a range of 0 to 1, for 18 countries in the region (Graph 8). Data shows that while in 1977 the Electoral Democracy Index (EDI) was, in average terms, 0.235 for the 18 countries analyzed —gradually and linearly increasing until 2005, when it arrived at 0.701—, it then began to reduce until reaching 0.612 in 2022 (Appendix I). This value is high compared to the

average of the rest of the almost 180 countries analyzed in the V-Dem study, given that such average was 0.484.<sup>18</sup> In contrast, the Liberal Democracy Index (LDI) has never reached these levels, since the highest score has been, in average terms, of 0.529 in 2004 and 2005, having started in 1977 at 0.141 and locating itself at 0.455 in 2022 (Appendix II).

**Graph 8**  
**Comparison Between the Electoral Dimension and the Liberal Dimension of Democracy in Latin America**



Source: Own elaboration based on V-Dem Dataset version 13 (Coppedge et al., 2023).

What do these figures mean? In practice, maintaining the Rule of Law, together with the respect for freedom of the press and freedom of expression, has been progressively weakened (as what happened in Ecuador in 2007-2017, in Guatemala during 2020-2023, or in El Salvador since 2019, among other cases) with threats, media accusations, and persecutions of journalists, who were forced to go into exile in many instances, while others were imprisoned (as in El Salvador from 2019 to 2023, in Guatemala during 2020-2022, in Venezuela since 2013, or in Nicaragua since 2021); by undermining the conditions of pluralistic competition, thus generating inequities in access

<sup>18</sup> In 2022, the average value of the Electoral Democracy Index for the 18 Latin American countries was below the average value in Europe and Oceania, where the index reached values of 0.73 and 0.67, respectively (V-Dem), but well above the world average.

to resources (as in El Salvador 2019-2023, Nicaragua since 2021, Venezuela since 2013, among others), and undercutting the autonomy of the judiciary and other autonomous agencies (as happened in Mexico 2018-2023, Brazil 2019-2023, among other cases) (Graph 9).<sup>19</sup>

Moreover, many laws passed by legislative majorities have jeopardized the institutions allowing for the separation of powers (as in Ecuador during 2007-2017, in El Salvador since 2019, in Venezuela since 1999, among other cases), thus increasing the personalization of power in the executive (as in Ecuador during 2007-2017, in Mexico from 2018, El Salvador from 2019, Venezuela from 1999, among others), and seeking to control resources that permit the functioning of accountability bodies (Mexico, Guatemala, El Salvador, Venezuela or Ecuador) or autonomous agencies, even putting pressure on electoral arbitrators in terms of party autonomy and their level of professionalization (as is currently happening in Mexico, in Ecuador, Peru, El Salvador or Guatemala).<sup>20</sup>

*Graph in the next page*

---

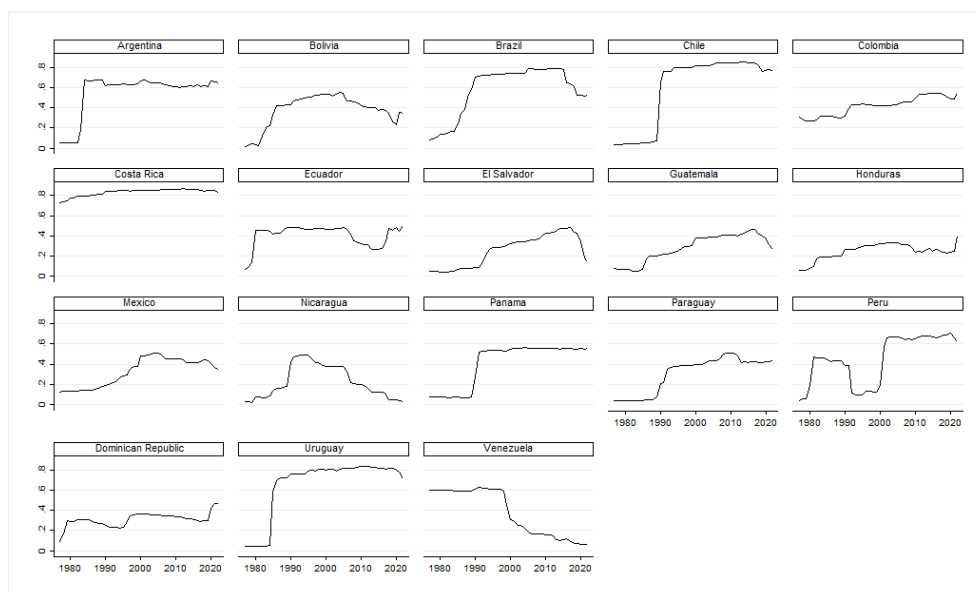
<sup>19</sup> The recent work of Ríos Figueroa (2022) shows the tense relationship between the executive and judiciary powers in Mexico between 2018 and 2022.

<sup>20</sup> According to the Latinobarometer Report (2023, 1), the weakness of the executive powers is underscored, since 21 presidents were convicted of corruption and 20 did not finish their term, while some have forced their stay in power breaking the rules of reelection (as happened in El Salvador with Bukele).



### Graph 9

#### Erosion of the Liberal Dimension of Democracy in Latin America



Source: Own elaboration based on V-Dem Dataset version 13 (Coppedge et al., 2023).

Most of the times, the erosion of the liberal dimension comes from electing leaderships with an anti-political narrative that intends to save people from “the usual politicians”. Anti-pluralist leaderships are “those actors who lack commitment to democratic norms” (Lührmann, 2021, 1017). Hence, populism is an identity choice alternative within democracy (Freidenberg, 2007), although that means democracy is delegated to “healers” (Przeworski, 2019) promising magical solutions to solve the citizenry’s problems. Just as Zakaria (1997) showed years ago for other regional contexts, Latin Americans use elections as a public decision-making mechanism, even though they prefer people who have values contrary to democracy as rulers.

The anti-pluralist and/or illiberal leaders use “anti-institutional” languages (they speak using “I”, and not in the name of institutions) and a friend-enemy appeal (enemies of the State, enemies of the people, among others) (Calvo and Aruguete, 2023). They are legitimized by the support of important majorities in the polls, promoting hate speech towards opposition minorities from the presidential podium, fostering delegitimizing attitudes about specific

people (journalists, intellectuals, social movement activists, opposition leaders), about autonomous institutions, or anyone who criticizes government decisions and/or policies (as in Venezuela, Ecuador, Brazil, El Salvador, or Mexico). Some measures appear to be harmless, but in practice they “break legal frameworks” (Romero Ballivián, 2021, 16).<sup>21</sup>

These leaderships feed and enhance pre-existing divisions that distance individuals from each other, radicalize positions, and fuel a “we” against “them” rhetoric (Freidenberg, 2023; Calvo and Aruguete, 2023; Welp, 2022b). Besides, they do something that affects democracy: controlling the narrative with regards to what is a true democracy, under the supposed division between a “good people” and a “bad people”. The dispute is political, discursive, and symbolic. These decisions of the leaderships reveal little respect for the principles of democracy, but also evidence instrumental, fragile, and superficial commitments with central elements of democracy on the part of political actors and citizens (Romero Ballivián, 2021, 16; Fernández Ramil, 2021).

The strategic manipulation of formal rules (changing rules, controlling time, procedures, and deadlines) also evinces a regression of democracy. Data from the #ObservatorioReformas (1977-2022) show a certain accommodation of electoral rules to make those who govern retain their spaces of power. While there are differences between countries, data provides an account of some 297 reforms in 18 countries over the last four decades to more than 11 critical dimensions of electoral systems. The reformist

---

<sup>21</sup> Some measures may enjoy broad social and political acceptance, and even underpin an administration (the closure of the Peruvian Congress by Alberto Fujimori in 1992; the closure of the Ecuadorian Congress promoted by the government of Rafael Correa and the Constituent Assembly of 2008); provoke a strong polarization and divide society (Manuel Zelaya’s “fourth ballot box” project and its overthrowing in Honduras in 2009; the Plan B electoral reforms and the attack on electoral institutions in Mexico in 2022); or be perceived as unacceptable and corner its promoter (the closure of the Guatemalan Congress by Jorge Serrano in 1993; the initiative of Pedro Castillo to dissolve the Peruvian Congress, establish a “government of exception”, and rule through decrees until a new Parliament with constituent powers was elected). See Romero Ballivián (2021), Fernández Ramil (2021), Corrales (2020), Bermeo (2016), among others.

hyperactivity of several countries (Ecuador, Mexico, Peru, or Dominican Republic) generates uncertainty about the rules of the game and undermines the fairness of the contest (Freidenberg, 2023), although not necessarily all these reforms involve strategic manipulation of elections and/or of the rules that determine the way in which competition occurs.

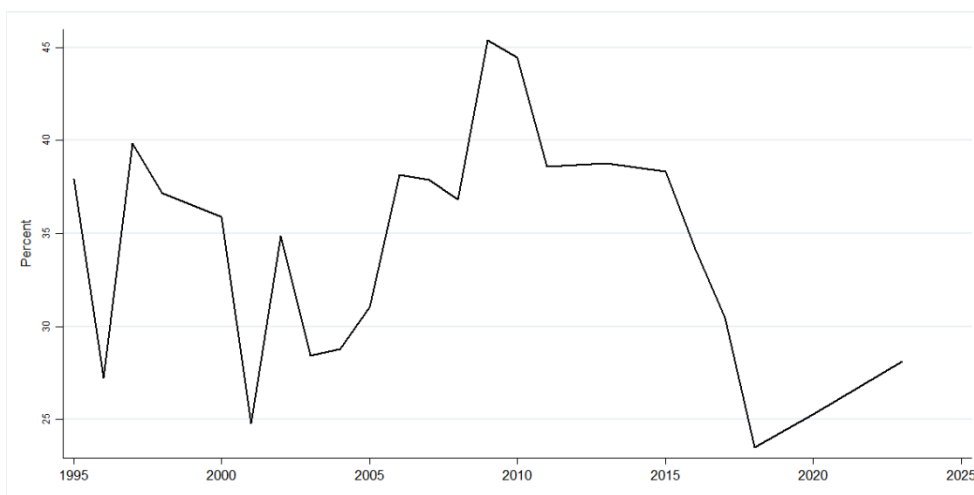
Even though people have become increasingly more politicized, the plurality of civic space has become smaller while political polarization has escalated. There are individuals who prefer not to talk about politics with whom they do not know how they think; people self-censor, silence their voices, speak in small bubbles, and they neither want to debate their friends or families. Although public policies are the responsibility of governments, the attribution of responsibility is transferred, directly or indirectly, to the political system. Citizens blame poor results on democracy (and not necessarily on their governments), and support democracy less and less (Latinobarometer, 2023).<sup>22</sup>

In addition, the citizenry exhibits to be less and less satisfied with the political system and, even in 2022, that satisfaction manifested its greater decline compared to previous periods (Graph 10). Data shows some erosion of the commitment to democracy of citizens and elites, and/or to the functioning of institutions (Coppedge et al., 2023; Freedom House, 2023), in an asymmetrical manner, whether left or right, particularly within more and more radicalized sectors of some countries (as has happened recently in El Salvador, Honduras, Guatemala, Brazil or Mexico).

---

<sup>22</sup> According to the “Latinobarómetro” survey (2023), carried out among 19,205 people in 17 countries of the region, only 48% support democracy as a political system, which marks a decrease of 15 percentage points since 2010 (63%). The survey also provides an account of the preference and attitudes in favor of authoritarianism, since 17% of Latin Americans support the idea that “an authoritarian government can be preferable”, compared to 15% thirteen years ago. In any case, there are significant differences between countries, pointing out the high levels of support in Uruguay (69%), Argentina (62%), or Chile (58%) compared to meager results in countries like Mexico, Dominican Republic, Guatemala, or Paraguay.

**Graph 10**  
**Citizenry Satisfaction with Democracy in Latin America**



Source: Own elaboration based on the “Latinobarometer” Report (2023).

Note: The percentages of *very satisfied* and *rather satisfied* answers are shown to the question: “In general, would you say that you are *very satisfied*, *rather satisfied*, *not very satisfied* or *not at all satisfied* with the functioning of democracy in (COUNTRY)?”

#### **4. Something Remains, Something Recedes, and Something Resists: Understanding Resilience Capacity in Democracies**

Democracy is at greater risk in some countries than in others. While in some countries it enjoys good health, as in Uruguay, Costa Rica, or Chile, in others it has regressed (El Salvador), and in a few other countries some of its central elements are at stake after certain conflicts (Ecuador). The setbacks have meant loss of consensus about the democratic contract and elites' disloyalty towards the values of democracy; difficulties in maintaining the currency of the Rule of Law, pluralism, and independence of institutions; strategic manipulation of formal rules and drawbacks in securing access to resources and well-being for citizens. For example, in Nicaragua and Venezuela, electoral democracy has already lost the battle, and in El Salvador there are increasingly deeper problems to activate the electoral resilience of democracy.

In these countries, elections have not been able to correct authoritarian tensions that erode the system, thus promoting “pernicious polarization” and leading to democratic rupture. In contrast, other political systems have had the capability of sustaining democracy through electoral resilience. Paradoxically, this is what permits to continue saying that this political system is a democracy: the fact that autocrats arrive to power using the democratic ladder and that it is elections that remove them from it. Opportunities for resilience are perceived in these situations. When democracies are capable of building and maintaining mechanisms and institutions allowing them to activate the possibility of self-correcting to respond to external or internal shocks that stress such mechanisms, they have resilience capacity.

In this framework, competitive, free, and fair elections, professional and autonomous authorities, and elites and citizenry, both participatory and committed to the basic values of pluralistic competition, are fundamental to prevent democratic backsliding. When all this happens, resilience capacity is manifested. Elections work as a protective tool against attempts to erode the essential values of democracy. These are powerful tools to mitigate democratic erosion. Precisely, as Sandu and Popescu-Zamfir (2021, 8) point out, they are “buffers” that can limit “authoritarian antibodies”, and thereby contribute to block the political system from backsliding.

Electoral democracy has assisted in the reconstruction of country minimums for those that had regressed in the liberal dimension, for example, what happened in Ecuador after the *correísta* period (2006-2017); in Brazil with the capacity of the Brazilian State, through the Itamaraty (Ministry of Foreign Affairs) and the Superior Electoral Tribunal of Brazil, for ensuring that results were respected and guaranteeing the integrity of the 2022 elections; or in Colombia after the strong social explosion that involved mobilizations throughout the country and was decompressed with the election of Gustavo Petro in 2022. Despite this, in other cases, such as Venezuela or Nicaragua, elections have not (yet) been able to activate democratic

resilience, since both countries have ceased to be democracies (and it seems that El Salvador is following on the same footsteps).<sup>23</sup>

Resilience does not mean the absence of conflicts, but that the system can deal with them. Evidence shows that democracy —despite everything— still manages to achieve its objectives. In some countries, democratic political actors are being capable of implementing mechanisms for the citizenry to exercise its right to choose; for adapting to various temporal junctural crises, even dramatic ones, without facing backsliding that would paralyze or break democracy; and they continue to meet, at least, the requirements of procedural democracy.

## 5. Preliminary Conclusions, Agendas, and Future Actions

Democracies have the capacity to handle adversity, overcome it, or, as the case may be, make it less toxic and destructive. Hence, a term has been taken from ecology and psychology to indicate the possibility that democracy can resist, reverse backsliding and tackle crises. The idea of resilience allows to identify the opportunity that an institution, an organization, or a political system must face challenges and emerge strengthened after a given crisis. When applied to societies and organizations, resilience highlights the importance of internal capacities as a means of coping with crises. That is what this research attempts to show.

While the liberal dimension seems to have been abandoned in several countries of the region, competitive and free elections with integrity are continuously being held. This is no small matter, particularly when the main detractors of the values, rights and practices involved in the liberal exercise of democracy come from public power (like, for instance, presidents, opposition groups, and even sectors of the citizenry). Not only is there less and less political pluralism, but, in addition, there are almost no plural civic

---

<sup>23</sup> Precisely, the most reliable indicator of non-resilience would be a shift from a political system to a non-democratic one.

spaces—in person and/or digital— where those who think differently coincide. A future research agenda, which is already being carried out, has to do with having methodological and empirical tools that allow us to better define when and how far democracies have receded, what is the event or shock determining backsliding, and how and when resilience is activated.

Democracies need to provide a virtuous circle that will contribute to strengthen their resilience capacity. It is about working under conditions that improve the integrity and institutional shielding of elections, of electoral governance and representatives, by investing in State capacities and political parties (Welp, 2022a);<sup>24</sup> by building pluralistic democratic coexistence spaces, and ensuring the distribution of universal public goods, both material and symbolic, in an equitable manner to citizens (Freidenberg, 2023).

Even though this debate is not new, it forgets what democracy is not: a system for just a few, where a leader—or a small elite— determines who can and cannot participate, and where processes are only valuable when “I” win. Calling systems that permit this type of practices democracies is a conceptual and political confusion that deceives about the meaning and essence of democracy (Freidenberg, 2023). Democrats urgently need to be honest and recognize that not anything goes or is valid. Democratic politics is the one that must peacefully manage conflicts around ideas, resources, identities, and policies, and for that to happen we need to return to the “norms of courtesy” (Levitsky and Ziblatt, 2018). The fight against autocracies depends on citizens that, convinced of their power, ensure that no one can limit their rights, even if in practice it is the elites who end up having the capacity (and the decision) to maintain this situation.

It is seemingly a paradox, but those same democracies—which had cost so much effort and, besides, are being intensely questioned by sectors that do not fully fit into the liberal logic of democracy—are the ones that guarantee the possibility of expressing different ideas. Many actors criticize the system

---

<sup>24</sup> Some have tried to support the belief that democracy is possible without parties, but this is not true. Peruvian evidence gives an account to this respect.

while in power, after having won elections and under the legitimacy given to them by citizen support in the polls. In practice, citizens are sick and tired, but not disinterested. What is more, in some countries, families have become politicized because of the outbreak of disruptive leaderships. This politicization also involves clashes with respect to key thematic axes and implies new expectations of change regarding transformations that still need to be carried out.

The political, social, economic, and media elites have to perform an exercise in self-criticism about their responsibilities in those cases where democratic backsliding has occurred and identify the skills that have been developed in other cases where it has been possible to build resilience against setbacks. This ability of making power rotate and leaderships renew is fundamental, and must be taught in formal education, but also actively and informally to the citizenry. Democratic backsliding is not the responsibility of autocrats alone; other opposition leaderships are also responsible by boosting anti-democratic discourse, in the same way as the media has done.

Together with the elites, the citizenry also urgently needs to embark upon this exercise of self-criticism. People should rethink how to make the struggle for democratic values and peaceful coexistence become once more the “only possible game in the city”, as warned by Linz (1978). In this sense, the research agenda should seek to better identify the specific conditions in which democracies protect themselves, develop actions to address critical situations and overcome them. Through in-depth case studies, the conditions allowing for the survival of political systems that have experienced dramatic critical situations —throwing institutions and actors into crisis— should be identified. In this sense, democracies require still more collective intelligence, public investment, and immaterial resources to make a citizenry —which has not yet benefited from democracy— understand and defend its intangible value. The answer to the problems of democracy is, then, more democracy.



## References

- Acevedo Medrano, N. (2022). “El Salvador: de régimen híbrido a autoritarismo competitivo”, *Agenda Pública | El País*, 4 may, <https://agendapublica.elpais.com/noticia/17943/salvador-gimen-hibrido-autoritarismo-competitivo>.
- Barrenechea, R. and Vergara, A. (2023). “El vaciamiento democrático en Perú... y más allá”. *Nueva Sociedad*, (May), <https://nuso.org/articulo/Peru-democracia-vaciamiento/>.
- Bartels, L. M. (2023). *Democracy Erodes from the Top: Leaders, Citizens, and the Challenge of Populism in Europe* (Princeton University Press).
- Bermeo, N. (2016). “On Democratic Backsliding”, in *Journal of Democracy*, vol. 27, no. 1, 5-19.
- Bermeo, N. (2022). “Questioning Backsliding”, in *Journal of Democracy*, vol. 33, no. 4, 155-159.
- Birch, S. (2011). *Electoral Malpractice* (Oxford University Press).
- Boese, V., Edgell, A.B., Hellmeier, S., Maerz, S.F., and Lindberg, S.I. (2021). How democracies prevail: democratic resilience as a two-stage process, in *Democratization*, vol. 28, 885-907.
- Brownlee, J. and Miao, K. (2022). Debate: Why Democracies Survive, in *Journal of Democracy*, vol. 33, no. 4, 133–149.
- Bunce, V. (2000). Comparative Democratization. Big and Bounded Generalizations, in *Comparative Political Studies*, vol. 33, no. 6/7, 703-734.
- Burnell, P. and Calvert, P. (1999). The resilience of democracy: An Introduction, in *Democratization*, vol. 6, no. 1, 1-32.
- Brewer-Carías, A. R. (2010). *Dismantling Democracy in Venezuela: The Chavez Authoritarian Experiment* (Cambridge University Press).

Calvo, E. and Aruguete, N. (2023). *Nosotros contra ellos. Cómo trabajan las redes para confirmar nuestras creencias y rechazar las de los otros* (Siglo XXI).

Carothers, T. (2002). The end of the transition paradigm, in *Journal of Democracy*, vol. 13, 9-18.

Comisión Económica para América Latina (CEPAL). (2023). Observatorio de Igualdad de Género de América Latina. Santiago de Chile, <https://oig.cepal.org/es>.

Collier, D. and Levitsky, S. (1997). Democracy with Adjectives: Conceptual Innovation in Comparative Research, in *World Politics*, vol. 49, no. 3, 420-451.

Coppedge, M., Gerring, J., and Lindberg, S. (2012). Variedades de democracia (V-Dem): un enfoque histórico, multidimensional y desagregado, in *Revista Española de Ciencia Política*, vol. 30, November, 97-109.

Coppedge, M., Gerring, J., Knutsen, C.H., Lindberg, S., Teorell, J., Altman, D., Bernhard, M., Cornell, A., Fish, M. S., Gastaldi, L., Gjerløw, H., Glynn, A., God, A. G., Grahn, S., Hicken, A., Kinzelbach, K., Krusell, J., Marquardt, K. L., McMann, K., Mechkova, V., Medzihorsky, J., Natsika, N., Neundorf, A., Paxton, P., Pemstein, D., Pernes, J., Rydén, O., Römer, J. von, Seim, B., Sigman, R., Skaaning, S.-E., Staton, J., Sundström, A., Tzelgov, E., Wang, Y., Wig, T., Wilson, S., and Ziblatt, D. (2023). "V-Dem [Country-Year/Country-Date] Dataset v13", Varieties of Democracy Project (V-Dem). <https://doi.org/10.23696/vdemds23>.

Corrales, J. (2020). Democratic backsliding through electoral irregularities: The case of Venezuela, in *European Review of Latin American and Caribbean Studies*, no. 109, (January-June), 41-65.

Dahl, R. (1971). *La poliarquía* (Tecnòs).

Diamond, L. (2004). Elecciones sin democracia. A propósito de los regímenes híbridos, in *Estudios Políticos*, vol. 24, no. 1, 117-134.

Diamond, L. (2020). Breaking Out of the Democratic Slump, in *Journal of Democracy*, vol. 31, no. 1, 36-50.

- Fernández Ramíl, M.A. (2021). Declive de la democracia en América Latina: desafíos de comprensión, in Instituto Interamericano de Derechos Humanos (ed.), *La democracia latinoamericana en una encrucijada: crisis y desafíos* (Instituto Interamericano de Derechos Humanos).
- Freedom in the World Report. (2023). *Freedom House Reports*, <https://freedomhouse.org/report/freedom-world/2023/marking-50-years>.
- Freidenberg, F. (2007). *La tentación populista en América Latina* (Editorial Síntesis).
- Freidenberg, F. (2023). And, despite everything, they resist! The resilience of Latin American democracies, in *LASA Forum*, vol. 54, no. 2, <https://forum.lasaweb.org/>.
- Freidenberg, F. (2024). *La resiliencia democrática: América Latina en perspectiva comparada*, Manuscript under preparation.
- Freidenberg, F. and Gilas, K. (Eds.) (2022). *La construcción de las democracias paritarias en América Latina*. Instituto Nacional Electoral, Instituto Interamericano de Derechos Humanos e Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México.
- Freidenberg, F. and Saavedra Herrera, C. (2020). La democracia en América Latina, in *Revista de Derecho Electoral*, vol. 30, July, 1-42.
- Fukuyama, F. (1992). *The End of History and the Last Man* (Free Press).
- Geddes, B. (1999). What Do We Know about Democratization after Twenty Years?, in *Annual Review of Political Science*, vol. 2, 129-148.
- Haggard, S. and Kaufman, R. (2021). The Anatomy of Democratic Backsliding, in *Journal of Democracy*, vol. 32, no. 4, 27-41.
- Huntington, S. (1991). *La tercera ola. La democratización a finales del siglo XX* (Paidós).
- IDEA International. (2023). *Voter Turnout DataBase*, <https://www.idea.int/data-tools/data/voter-turnout-database>.
- Latinobarometer Database. (2023). *Informe. La recesión democrática en América Latina*, <https://www.latinobarometro.org/lat.jsp>.

- Latinobarometer Database. (2022). *Informe. Santiago de Chile*, <https://www.latinobarometro.org/lat.jsp>.
- Levitsky, S. and Way, L. (2023). Democracy's Surprising Resilience, in *Journal of Democracy*, vol. 34, no. 4, 5–20.
- Levitsky, S. and Way, L. (2015). The Myth of Democratic Recession, in *Journal of Democracy*, vol. 26, no. 1, 45-58.
- Levitsky, S. and Ziblatt, D. (2018). *Cómo mueren las democracias* (Editorial Ariel).
- Lieberman, R. C., Mettler, S., & Roberts, K. (Eds.) (2022). *Democratic Resilience: Can the United States Withstand Rising Polarization?* (Cambridge University Press).
- Linz, J. J. (1978). Crisis, Breakdown and Reequilibration, in Linz, J.J. and Stepan, A. (Eds.), *The Breakdown of Democratic Regimes* (Johns Hopkins University Press).
- Linz, J. J. and Stepan, A. (1996). *Problems of Democratic Transition and Consolidation* (Johns Hopkins University Press).
- Lipset, S. M. (1959). Some Social Requisites of Democracy: Economic Development and Political Legitimacy, in *American Political Science Review*, vol. 53, 245-259.
- Little, A. and Meng, A. (2024). Measurement of Democratic Backsliding, in *Political Science and Politics*, January.
- Lührmann, A. (2021). Disrupting the autocratization sequence: towards democratic resilience, in *Democratization*, vol. 28, 1017-1039.
- Mainwaring, S. and Pérez-Liñán, A. (2013). Lessons from Latin America: Democratic Breakdown and Survival, in *Journal of Democracy*, vol. 24, no. 2, 123-137.
- Mainwaring, S. and Pérez-Liñán, A. (2023), Why Latin America's Democracies Are Stuck, in *Journal of Democracy*, vol. 34, no. 1, 156-170.
- Merkel, W. and Lührmann, A. (2021). Resilience of democracies: responses to illiberal and authoritarian challenges, in *Democratization*, vol. 28, no. 5, 869-884.

- Morlino, L. (2019). *Cambios hacia la democracia. Actores, estructuras, procesos* (Universidad Autónoma de Querétaro and Siglo XXI Editores).
- Munck, G. (2010). Los orígenes y la durabilidad de las democracias en América Latina: avances y retos de una agenda de investigación, in *Revista de Ciencia Política*, vol. 30, no. 3, 573-597.
- Observatorio de Reformas Políticas en América Latina (#ObservatorioReformas) (1977-2023), Instituto de Investigaciones Jurídicas, UNAM, and Organization of American States.
- O'Donnell, G., Schmitter, P. and Whitehead, L. (1986). *Transitions from Authoritarian Rule: Prospects of Democracy* (Johns Hopkins University Press).
- Paxton, P. (2000). Women's suffrage in the measurement of democracy: Problems of operationalization, in *Studies in Comparative International Development*, vol. 35, no. 3, 92-111.
- Przeworski, A. (2019). *¿Por qué tomarse la molestia de hacer elecciones? Pequeño manual para entender el funcionamiento de la democracia* (Siglo XXI Editores).
- Przeworski, A. (2022). *Las crisis de la democracia* (Siglo XXI Editores).
- Ríos Figueroa, J. (2022). El Poder Judicial ante el populismo y la erosión democrática. El caso de México, 2018-2021, in *Revista Estudios Políticos*, vol. 198, 187-217.
- Romero Ballivián, S. (2021). Rumbo al medio siglo de la transición: los claroscuros de la democracia en América Latina, in Instituto Interamericano de Derechos Humanos (Ed.), *La democracia latinoamericana en una encrucijada: crisis y desafíos* (Instituto Interamericano de Derechos Humanos), 11-32.
- Sandu, D. and Popescu-Zamfir, O. (2021). Argument and methodological explanation, in Sandu, D. and Popescu-Zamfir, O., *Democratic Resilience Index. A pilot project in Romania, Hungary, and the Republic of Moldova* (Global Focus Report), 4-8.
- Sartori, G. (1992) [1976]. *Partidos y sistemas de partidos* (Alianza).

- Schedler, A. (2004). La incertidumbre institucional y las fronteras borrosas de la transición y consolidación democrática, in *Estudios Sociológicos*, vol. 22, no. 64, 25-52.
- Schedler, A. (2002). Elections Without Democracy: The Menu of Manipulation, in *Journal of Democracy*, vol. 13, no. 2, 36-50.
- Schmotz, A. (2015). Hybrid Regime, in Kollmorgen, R., Merkel, W., & Wagener, H.J. (Eds.), *Handbuch Transformationsforschung* (Springer), 561-567.
- Schmitter, P. C. and Karl, T. L. (1991). What democracy is... and is not, in *Journal of Democracy*, vol. 2, Summer, 75-88.
- Schumpeter, J. (1947). *Capitalism, Socialism and Democracy* (Harper).
- Somer, M., McCoy, J. L. and Luke, R. E. (2021). Pernicious polarization, autocratization and opposition strategies, in *Democratization*, vol. 28, no. 5, 929-948.
- Vallès, J. M. (2010, 8th). *Ciencia Política. Una introducción* (Ariel).
- Vargas Cullell, J. (2019). *Democratización y Des-democratización: Estados, Ciudadanías y las nuevas Tecnologías del poder*, Lecture given at EAFIT University, Medellín, December 6<sup>th</sup>, <https://estadonacion.or.cr/democratizacion-y-des-democratizacion-estados-ciudadanias-y-las-nuevas-tecnologias-del-poder/>.
- Waldner, D. and Lust, E. (2018), Unwelcome Change: Coming to Terms with Democratic Backsliding, in *Annual Review of Political Science*, vol. 21, no. 1, 93-113.
- Welp, Y. (2022a). Sin partidos la democracia no funciona, con estos partidos tampoco, in *Nueva Sociedad*, vol. 298 (March-April).
- Welp, Y. (2022b). *The Will of the People. Populism and Citizen Participation in Latin America* (De Gruyter).
- Zacaría, F. (1997). The Rise of Illiberal Democracy, in *Foreign Affairs*, vol. 76, no. 6, 22-43.

**Appendix I**  
**Average Electoral Democracy Index (EDI) across 18 Latin American Countries**

Year	Index	Year	Index	Year	Index	Year	Index
1977	0.235	1988	0.503	1999	0.667	2010	0.677
1978	0.249	1989	0.514	2000	0.677	2011	0.678
1979	0.267	1990	0.589	2001	0.694	2012	0.673
1980	0.305	1991	0.625	2002	0.696	2013	0.661
1981	0.317	1992	0.618	2003	0.697	2014	0.664
1982	0.335	1993	0.628	2004	0.700	2015	0.659
1983	0.355	1994	0.641	2005	0.701	2016	0.652
1984	0.396	1995	0.646	2006	0.694	2017	0.643
1985	0.445	1996	0.662	2007	0.685	2018	0.638
1986	0.484	1997	0.669	2008	0.683	2019	0.620
1987	0.490	1998	0.671	2009	0.680	2020	0.614
						2021	0.615
						2022	0.612

Source: Created on the basis of V-Dem Dataset version 13 (Coppedge et al., 2023).

Note: Scale goes from 0 to 1.

**Appendix II**  
**Average Liberal Democracy Index (LDI) across 18 Latin American Countries**

Year	Index	Year	Index	Year	Index	Year	Index
1977	0.141	1989	0.355	2001	0.521	2013	0.495
1978	0.146	1990	0.428	2002	0.524	2014	0.497
1979	0.157	1991	0.460	2003	0.526	2015	0.493
1980	0.190	1992	0.460	2004	0.529	2016	0.489
1981	0.206	1993	0.465	2005	0.529	2017	0.488
1982	0.217	1994	0.475	2006	0.520	2018	0.482
1983	0.233	1995	0.481	2007	0.511	2019	0.464

1984	0.262	1996	0.487	2008	0.510	2020	0.466
1985	0.303	1997	0.493	2009	0.507	2021	0.455
1986	0.327	1998	0.496	2010	0.507	2022	0.455
1987	0.333	1999	0.488	2011	0.509		
1988	0.345	2000	0.499	2012	0.504		

Source: Created on the basis of V-Dem Dataset version 13 (Coppedge et al., 2023).

Note: Scale goes from 0 to 1.



# ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

---

## Cut off the King's Head? Constitutional Democracy and the State Against Arbitrariness

DONALD BELLO HUTT

*Associate Professor, University of Valladolid (Spain)*

✉ [donald.bello@uva.es](mailto:donald.bello@uva.es)

 <https://orcid.org/0000-0003-2979-6631>

### ABSTRACT

Constitutional democracies are increasingly perceived as limited devices. Against invitations to reducing their influence and size, these pages highlight one aspect or function that the State and constitutionalism share and which turn them into valuable instruments: avoidance of arbitrariness. I here argue that a central feature of both institutions is a commitment to making sure that citizens must lead lives that can be planned with some degree of certainty and reasonableness.

**Keywords:** state, constitutionalism, democracy, arbitrariness

ATHENA

Volume 4.1/2024, pp. 110-135

Articles

ISSN 2724-6299 (Online)

<https://doi.org/10.6092/issn.2724-6299/19172>



## 1. Introduction

The institutions of constitutionalism and the State share a commitment to creating conditions under which citizens may lead their lives with some degree of certainty. A commitment, that is, to avoiding arbitrariness.

The claim matters in times when both constitutionalism and the State are said to be in crisis. The State, we read today, no longer wields sovereign power, if by sovereign we still mean the absolute and perpetual power of a republic (Bodin [1576] 2014, I.VIII). What is more, we are often told that we should welcome this state of affairs. The invite has been accepted by legal and political theorists of sundry stripes. The days of the sovereignty of the modern State, we are told, are and should be behind us (e.g., Herzog, 2020). And then, on the other hand, we have the crisis of constitutionalism. First, a crisis of what one could term “traditional” constitutionalism, a view we have inherited since the early modern period according to which a constitution is meant to curb political power. The power exerted by modern states is far too great (“There is no power on earth to be compared to him”, in Hobbes’s use of the book of Job) to be let loose, so that constraining it became the hallmark of liberal constitutionalism. This model has been questioned by those we could call “democratic” constitutionalists. The tag covers a number of positions and opinions described in several ways (republican, political, deliberative, dialogical, popular, global, etc.), but they all share a critical stance towards the notion that constitutionalism is and should be solely and foremostly about limiting political power. Constitutionalism, according to these views, must channel rather than curb power, and it must do so through democratic means.

Whatever their shape, constitutional democracies are increasingly perceived as limited devices, for while we should keep political power in check and while there is still faith in democracy, the challenges faced by contemporary societies can no longer be dealt with using the same old tools

(Atria, 2016; Gargarella, 2022, 282). The initial concerns for which constitutionalism emerged, today take the back seat in the face of issues such as climate change, populism, global inequality, global capitalism, the risk of nuclear war, and so on; matters which seem to threaten human existence in ways hitherto unparalleled.

Against such bleak prospects, these pages highlight one aspect or function that the State and constitutionalism share: avoidance of arbitrariness. A central feature of both institutions is a commitment to making sure that citizens must lead lives that can be planned with some degree of certainty and reasonableness. Individuals cared for this when constitutionalism and the State became fashionable, when constitutionalism entered the history of politics, since constitutional democracy has been chosen as a mode of governance, and we still do today.

The argument is in three parts. I begin with some ruminations on traditional constitutionalism and its emphasis on limiting political power. I then discuss contemporary versions of constitutionalism and their critical stance towards the traditionalist camp. Strictly speaking and as varied as those versions are, they all show a concern about controlling potentially arbitrary uses of political power. This leads us to the conclusion that however different traditionalists and democratic constitutionalists may be, non-arbitrariness is a concern for both (section 2). I continue discussing how the modern State exhibits exactly that same concern with arbitrariness, even in its most absolutist version. I offer an impressionistic view of Locke's, Rousseau's and Hobbes' conceptions of the State to show that a preoccupation with non-arbitrariness is a major reason why individuals would be inclined to sign a social contract to create the State. I take Hobbes' view as one that which, for all the powers and prerogatives it grants to the sovereign, it nevertheless creates the institutional conditions for that power to be exerted non-arbitrarily (section 3). After this, I suggest that the State and Constitutionalism are connected; that they do not vary independently (section 4). The argument leads up to the conclusion that contemporary attacks on the State undercut the

capacity of constitutional government to cope with pressing contemporary challenges such as the ones mentioned above. Invitations to getting rid of the State are counterproductive if we care about non-arbitrariness (section 5).

Before I begin, I should warn readers that I do not focus here on the mismatch between claims that state sovereignty is or should be gone and actual instances showing that such claims neglect the role the state plays today in world politics. To be clear, I believe that the state is currently strong, alive and kicking. Yet, philosophy remains to a large degree inattentive to these developments, and the fact that the state is strong does not entail that it will behave in desirable fashions. The pages that follow should be read against the light of those considerations.

## 2. Constitutionalism and Avoidance of Arbitrariness

The twofold description of constitutional theories – traditionalists and democrats - I have offered above is perhaps too stringent. While “democratic constitutionalists” do indeed tend to account for their preferred views of constitutional phenomena as distinct, as offering a more compelling description and evaluation of constitutionalism, the dividing line between them is not as sharp, at least regarding the aspects I here emphasise.

Constitutionalism has traditionally been associated with limitation to majoritarian decision-making. As Mill put it, “the people ... may desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power” (Mill, 1989, 8). Constitutionalism is a way of instantiating such precaution. There is no need, I think, to give a fully-fledged explanation of what traditional constitutionalism is all about. It will suffice, I hope to cite Justice Jackson’s remark in *West Virginia State Board of Education v. Barnette*:

The very purpose of a Bill of Rights was to withdraw certain subject from the vicissitudes of political controversy, to place them beyond

the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections.<sup>1</sup>

The remark is an instance of a traditional view of what constitutionalism is about and for and what the function of a constitution is. It is equivalent to what Bellamy refers to as “legal constitutionalism”. A view that “constitutions enshrine and secure the rights central to a democratic society”, which defines a constitution as

a written document, superior to ordinary legislation and entrenched against legislative change, justiciable and constitutive of the legal and political system. It contends that a constitution of this kind, not participation in a democratic politics *per se*, offers the basis for citizens to be treated in a democratic way as deserving of equal concern and respect (2007, 1).

I side with Habermas in that whereas according to this traditional vision, constitutionalism and democracy stand in a paradoxical union, in union they nonetheless stand. The connection is, according to Habermas, evident in the way in which we conceive of how fundamental rights and liberties are brought about. The story is well-known. Individual rights typically championed as liberal conquests against the public, against the State, emerge as the result of public interactions, public conquests. And vice versa. They are, in Habermas's parlance, co-original (1996). Voting, mobilising, deliberating – in short, democracy – are then the conditions for the very existence of those rights we hold dear. Again, and vice versa.

I agree. I underscore this not to do away with theses still emphasising that the essence of traditional versions of constitutionalism is the limitation of

---

<sup>1</sup> United States Supreme Court, *West Virginia State Board of Education v. Barnette*, 1943, 319.

political power, democratic or otherwise, but to draw attention to the underpinning of the different accounts falling under the tag “democratic constitutionalism”; attention, that is, to the fact that *pace* Locke and natural rights lawyers more generally, constitutional rights, even conceived of in their most liberal versions, owe their existence and maintenance to the political process. Now, while these two perspectives diverge in their focus and stand to some degree in tension to each other, the divergence occurs at a certain level of abstraction that does not give full account of why both groups endorse one version or the other. Raise the divergence to a higher level and you find agreement on a rather important point: both traditionalists and democratic constitutionalists care about avoiding arbitrariness in the ways power is exerted over individuals.

You may think that this is not a major discovery. And you may be right. Political theories of different stripes converge on sundry aspects. One prominent aspect in the case traditional and democratic constitutionalism is often institutionalisation. Members of both groups endorse, for example, separation of powers, believe in enfranchising constitutional rights and liberties, in some versions of judicial review of legislation, and other matters. Fair enough. Non-arbitrariness may be just another example of contingent convergence.

I must be adamant that one should not be overly schematic or present the distinction as a sharp one, for the reflections above do not turn the liberal-democratic distinction into a spurious one. Both camps do exhibit major differences. These divergences are better seen from the “democratic” side of the divide. Different versions of “democratic constitutionalism” have correctly placed distinct accents on the different aspects of traditional constitutionalism that they see as troublesome. Republicans and political constitutionalists put their finger on the problems raised by the conception of freedom pervading traditionalism (e.g., Tomkins, 2005; Bellamy, 2007).

Globalists question whether traditional constitutionalism is suited to dealing with matters of rights and freedoms outside the boundaries of

domestic law (Lang Jr & Wiener, 2017). Popular constitutionalists question the traditionalist stress on courts as strongholds of constitutional rights and liberties (e.g., Kramer, 2004a). And so on. And these differences are not superficial.

Yet, and as I mentioned above, there is one important point of convergence between these two strands: their stress on the avoidance of arbitrariness. While this desideratum is not the only one pursued by traditional constitutionalism, it enjoys pride of place. It is central in John Locke's *Second Treatise*, a tract meant to convince us that no legitimate government can arise without the consent of its eventual addressees and without respect for pre-political rights to liberty, property, and person. No government is entitled to breach or encroach upon these individual rights for they are not the result of their say-so in the first place, nor they are brought about by legal fiat. Respect for these natural rights expresses itself through law-making processes that respect the liberty of subjects. Power exerted otherwise is despotic: "absolute, arbitrary power one man has over another, to take away his life whenever he pleases. This is a power, which neither nature gives, for it has made no such distinction between one man and another, or compact can convey" (2012, § 172).

Locke has inspired contemporary liberals claiming that the main evil against which individuals should be protected from is arbitrary power. According to this view, the function of a constitution is to curb political power so that citizens may be able to plan their lives in advance with some degree of certainty towards the future.

Democratic constitutionalists express a similar concern, even if they question the traditionalists' emphasis on the need to limit *any* kind of political power, democratic or otherwise. As I have mentioned above, this questioning of traditionalism in constitutional theory has taken several forms. However, there are some commonalities. For example, many of the writers that could be included in this camp think that our constitutions should not only recognise and enshrine so-called first-generation rights and freedoms but also social or

democratic rights (Waldron, 1999; Bellamy, 2007; Gargarella, 2010; Bellamy, 2012). One reason for this has already been mentioned above in Habermas' terms. However, the point can be expressed without using Habermasian language.

The exercise of liberal rights and freedoms typically enshrined in modern constitutions, such as the right to life, free speech and so on, requires material conditions, the absence of which renders these rights dead letter. Material conditions such as health, education and so on, are not mere expectations, but actual demands that individuals can make on others and, in particular, on the State. This latter feature partly explains why democratic constitutionalists reject solipsistic characterisations of rights and instead underscore their social nature; their being brought as the result of collective action. A second area of agreement emerges from this commitment to social rights. That is, that virtually every democratic constitutionalist rejects strong forms of judicial review of legislation. Given that the primacy of constitutional rights over every day democratic decision-making cannot be explained without considering the social nature of the former, democracy pervades both sides of the equation. It then becomes increasingly difficult to champion institutional models granting a great deal of decision-making power to courts on the basis that these institutions are above the frail of everyday politics. Not so. If rights are social and therefore political, the final word on the determination of their content and limits should be given to political institutions. (Bello Hutt, 2021)

As I mentioned, there are several strategies by which different strands of democratic constitutionalism justify their preferences for a certain conception of rights or a certain version of institutional design. The point I want to stress, just as I have with traditional constitutionalist, is that coincidences on the endorsement of social rights and weak forms of judicial review signal a broader agreement on an objective placed at a higher level of abstraction: avoidance of arbitrariness.

Two prominent examples of democratic constitutionalism where this concern with avoiding arbitrariness is pressing, are republican and political



constitutionalism. Political constitutionalists endorse both features described above and are committed to a republican notion of freedom according to which a free person is she who does not live under the potential exercise of the arbitrary will of another (Tomkins, 2001; 2005; 2010; Bellamy, 2007; Lovett, 2016). A free person is then one who is not subject to domination or subordination. Moreover, this conception of freedom imposes certain duties on citizens, who are tasked with contributing to the creation of the conditions under which the polity is to be maintained and safeguarded. It involves, that is, an attitude in the public domain, typically described as civic virtue. Thus understood, this conception of freedom signals a connection between social rights and weak forms of judicial review on the one hand, and avoidance of arbitrariness on the other, for freedom from domination is tantamount to being bound by norms and practices whose creation and eventual application is in some sense reasonable or susceptible of being tracked back to the assent of their addressees because they themselves are creators and recipients of the rights they are entitled to. If such is the case, citizens can be said to be guided by reasonable and thus non-arbitrary norms.

This goes for political constitutionalists endorsing the republican narrative.<sup>2</sup> But it also goes for other strands of democratic constitutionalism. Consider, for example, popular constitutionalism and its critique of traditionalism and its insistence on giving the Supreme Court the final word in the interpretation of the constitution.<sup>3</sup> For popular constitutionalist, the final say in the determination of what counts as constitutional should be, to use Mark Tushnet's expression, taken away from the courts and placed in the hands of the people themselves. Reasons offered for this contention have been historical as well as philosophical. Larry Kramer (2004a), for example, has examined the United States constitutional history and revisited certain commonplaces regarding the power held by the Supreme Court, questioning

---

<sup>2</sup> *Pace* Michaelman 1988.

<sup>3</sup> See, for example, Friedman, 2003; Kramer, 2004a; 2004b; Braveman, 2005; Tushnet, 2006; Kramer, 2007; Pozen, 2010; Schwartzberg, 2011; Donnelly, 2012.

the notion that *Marbury v Madison*, or the Federalist 78, or Sir Edward Coke's decision of the so-called *Bonham's* case should be taken, as they typically are, as explanations for the power that the Court today claims to have. Others, most prominently Tushnet, argued that judicial supremacy in the interpretation of the Constitution generates pernicious incentives for both the people and their representatives, who forgo their roles as constitutional interpreters on the assumption that providing meaning to the charter is a matter for the courts. Tushnet's vindication of the people's involvement in the interpretation of what he calls the "thin" constitution, the fundamental guarantees of equality, freedom of expression, and liberty contained in a constitutional charter, are of a kind that the people, ordinary citizens, can commit to, speak of, discuss, and interpret in ways that non-political institutions like the court cannot (1999, 12). It is a way of understanding what fundamental rules and practices guide citizens' common political action while still giving political institutions a role in determining the content of the "thick" parts of the document. The relationship between these thick and thin domains of constitutional content is meant to protect the freedom of citizens, for giving courts the power to establish what counts as constitutional weakens the commitment and responsibilities that political institutions and citizens may feel toward constitutional values and institutions. Courts do have their role in determining what the thick constitution allows or bars individuals and institutions from doing, but extending that competence to the domain of the thin constitution entails entrusting courts with the task of determining the content, meaning and scope of hard-core moral and political values under the guise of legality, on pain of losing some things in the way of democracy and freedom. And this entails arbitrariness.

Other democratic constitutionalists such as Jeremy Waldron have claimed that while there is warranted room for weak forms of judicial review of legislation (200, 1354), how it is set up should be expressive of respect for the equality and freedom of individuals. That equality and freedom are manifested in political systems that choose to give citizens the possibility to

decide about the scope and content of their basic rights and obligations under circumstances of political disagreement. Strong judicial review shifts the vocabulary by which citizens may tackle the differences they may legitimately have from the language of politics and morality to discussions framed in terms of legalese, precedent, text and judicial interpretation (2009; 2011). Moreover, it “disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights” (2006, 1353). The upshot of combining these two issues is well-portrayed as arbitrariness. Giving a small number of judges the possibility, not only to decide upon the meaning and scope of fundamental rights, but to place their judgement as the final say in that process, and to do so in a way that hinders their possibility to grapple with the actual reasons accounting for why their rights are to be understood in one way rather than another, entails that they will be governed by norms, rules and practices that can be hardly said to track their own conceptions about what constitutional rights and obligations mean.

And so, for all their differences, traditional and democratic constitutionalism meet halfway in their concern for doing away with arbitrariness in the exercise of constitutional power. This rather modest claim must be complemented with an examination of what role does the State play in putting that idea into action and, consequently, what does the reduction or retreat of the State entail for constitutionalism.

### **3. The State and Avoidance of Arbitrariness**

I now want to explore an institutional angle of constitutionalism: the modern State. I do this because the State is an intrinsic institutional part of constitutionalism. And this entails that changes in the anatomy and functioning of the former will have bearing on the latter. Now that we hear and read that the sovereign power of the State is fading into the shadows, it is worth asking what effects this has on constitutionalism.

I contend that there is a connection and that if we care about constitutionalism and the limitation of arbitrary exercises of political power, we should care about the State.

And so, in this section, I will reflect on that connection around the problem of arbitrariness. I claim that all conceptions of the modern State – or at least some of its most influential ones – are in some important ways tied to the constitutionalist project of avoiding arbitrariness in the exercise of power. That both constitutionalism and the State put the avoidance of arbitrariness at the centre of their most basic functions suffices to take both concepts as part of a common project whose realisation calls for their joint presence and action. The conclusion, explored in section IV, is that reducing the State entails the reduction of constitutionalism, irrespective of the form it assumes.

That the modern State is concerned with the avoidance of arbitrariness in the exercise of power is clear in some of the most classic figures in the history of constitutional thought, foremostly Locke and Rousseau. But things are not as obvious when it comes to studying the history of this institution. Famously, Thomas Hobbes conceived of a form of State equipped with so many and so great prerogatives that he makes it difficult for us to argue in its favour on the grounds of reasonableness, commitment to the rule of law, certainty, predictability, and other values that are part of the very stuff of what non-arbitrary government entails. Put in Runciman's terms, the Hobbesian state is then one where "there is always the risk of arbitrariness" (Runciman, 2021, 27).

In what follows I will outline Locke's and Rousseau's reflections on the State and its commitment to non-arbitrariness, and then Hobbes's more complex answer to the question of what the role of the State is. For all of them, non-arbitrariness emerges from the very process of *constituting* the polity through the social contract. Hobbes included. While impressionistic, the depictions show that the modern State is marked by a functionalist commitment to non-arbitrariness, even when – as it is the case with Hobbes – the prerogatives granted to sovereigns are extreme and make the road

towards that end more difficult. The modern State may be absolutist, but even then, it is oriented towards making life minimally predictable.

The easy case is Locke. As it is well known, in his *Second Treatise*, he sought to ground the notion of a legitimate government on the consent of the governed. Political power emerges from the consent of those affected by the exercise of sovereign power and it is warranted when it is exerted within the limits of the law of nature, which in turn is an expression of the rights individuals have before the existence of the polity to whose creation they consent. Legitimate government is then government subject to limitations imposed by natural law regarding the respect for person, liberty and property. Should the government breach those boundaries, for example, by taking away property rights without the consent of the governed, citizens can then wield their right to resist and to “resume their original Liberty” (§222).

The moral of the story in Locke’s *Second Treatise* is that every exercise of political power by a sovereign is guided by a normative structure that the sovereign is in no position to alter, let alone reduce or eliminate. That normative structure comprising pre-political rights functions as a justificatory background against which the sovereign may act. Thus, the sovereign must have recourse to a story whereby its decisions can be accounted for as manifestations of the rights and liberties subjects consented to being protected by the polity instead of doing so on their own. That idea, the notion that the sovereign must always act in light of reasons compatible with the ones subjects had when abandoning the state of nature, can be seen as an expression of a conception of political freedom framed as avoidance of arbitrariness. Locke’s own words in the *Second Treatise* show this when he describes the state of nature as “inconvenient” given that everyone in such state “has the *Executive Power* of the Law of Nature”, which puts them in the “unreasonable” position of being “Judges in their own Cases”, “partial to themselves, and their Friends”. It makes them, that is, arbitrary. And so, Locke defined freedom as liberty “to dispose, and order, as he lists, his Person, Actions, Possessions, and his whole Property, within the Allowance

of those Laws under which he is; and therein not to be subject to the arbitrary Will of another, but freely follow his own” (§ 57).

The same goes for Rousseau, whose version of the social contract aims at bringing about a polity that wards against the negative effects of social conventions detrimental to the freedom of individuals, the most important of which is the individuals’ acceptance of regimes of property rights allowing for unlimited accumulation of private goods. Reading the *Second Discourse* and the *Social Contract* as two stages of a single narrative leads us to see the first as a nostalgic story about how human relations were before small communities decided to accept the very Lockean claim by someone that her work – droving a stake on the ground – entitled her to the private enjoyment a piece of land and fruit it bears. Whereas Locke interprets this as warranting the enjoyment of a pre-political, natural right to private ownership, Rousseau thinks that there is nothing natural in the process, but merely a bad choice. Things would have been different and better had those who observed this individual claiming something for herself stopped to think for a moment and questioned him or her:

What crimes, wars, murders, what miseries and horrors, would the human race have been spared by someone who, pulling up the stakes or filling in the ditch, had cried out to his fellows humans: “Beware of listening to this imposter. You are lost if you forget that the fruits are everyone’s and the earth is no one’s (2014, 91).

Rousseau reminds us, in a rather sardonic fashion, that “the wise Locke” was right in claiming that “where there is no property, there can be no injury”, and invites us to understanding why. The reason is not that property is itself pernicious to human flourishing, for we must also remember that Rousseau considers that there was a time that took place after property was introduced, where “though men had become less patient, and natural compassion had already suffered some alteration, this period of the development of the human faculties, holding a just mean between the indolence of the primitive state and

the petulant activity of egoism, must have been the happiest and most durable epoch” (2014, 97). Property is the seed of inequality. But more is required, namely a normative structure that moves from facts to norms, from the mere fact of appropriation to a right of private ownership.

And so, one understands Rousseau’s contention in his *Discourse on Political Economy* that “the right of property is the most sacred of all the rights of citizenship, and even more important in some respects than liberty itself” (1997, 23). For under circumstances where property has already been accepted by individuals is that the Genevan wants to stir the course in a direction that somewhat resembles that happy and durable epoch. We then understand that the *Social Contract* takes men as they are and laws as they can be because it seeks to convince us that that government is made legitimate when it is in a position to control the pernicious effects that unlimited accumulation produces among individuals. A community that has entered a social contract whose terms allow for unlimited accumulation by some individuals renders others prey to the whims and unaccountable preferences and actions of others. It leaves them in a state of arbitrariness.

Now, the hard case in this story is Hobbes. Chapter 18 of *Leviathan* lists the prerogatives of sovereigns by institution. One only needs to skim the chapter to realise that whoever exerts those powers is under no relevant legal control. State power wielded by the sovereign is unbound, and does not need to give an account of its actions to one. Therefore, it is arbitrary.

The point is that even in its most absolutist version, the State is meant constrained – admittedly in Hobbes’s case most likely only in principle – by its function to curb unchecked powers of the kind that make life unpredictable and hence arbitrary.

This is a standard reading of *Leviathan*. I thus need to briefly elaborate on the suggestion that the rights and prerogatives Hobbes is willing to give to the sovereign representative need to be interpreted against the light of the reasons why individuals living in a condition of natural liberty would be willing to sign a social contract comprising such extensive powers. This question leads

us to conclude that, as much as Hobbes did grant the sovereign almost unlimited authority because the issue to which he was trying to contribute, namely the ending of civil war, was serious enough to require strong measures, he was in fact concerned with making the case for changing one state of complete arbitrariness – the state of nature – for another where individuals would lead lives with some degree of predictability – the civil state.

The point is that the standard interpretation of Hobbes which says that sovereigns are arbitrary, is inconsistent with the broader narrative explaining why and how the Commonwealth is brought about in the first place. The first thing to pay attention to, before the emergence of the State, is that subjects live in conditions of natural liberty, a state without a common power “to keep them all in awe”, and that such condition, which is war, is a tract of time “wherein the Will to contend by Battell is sufficiently known”. Such knowledge puts individuals in continuous disposition to fight, even if actual quarrels never materialise. Why is this tract of time and disposition equivalent to war? Because in such a state individuals live under conditions of anxiety and uncertainty that trigger a certain psychological disposition to look at others as enemies. In such a State there is no possibility of life planning, industry, culture, navigation, etc. What characterises war is not knowing what the actions of others mean and entail, and what one’s own actions will entail for others and for oneself (Hobbes [1651], 1991, 89-90).

And so, reading Hobbes’s project as one pushing for a move from an arbitrary state of nature to an arbitrary civil State puts us in a strange position whereby subjects seem to be willing to change one condition of fear and uncertainty for another one. This is an odd thing to argue for. For while Hobbes tends to insist on the frightening character of a *Leviathan* authorised to kill you if needs be, we should keep in mind the function such fear or impression is supposed to fulfil. And the function is to avoid that life becomes solitary, poor, nasty, brutish and short. Life in the civil state cannot be equivalent to that, as terrible as the sovereign could be. Mind you, that may,



in fact, be the case. But – and this is a central concern for Hobbes – even when the Sovereign is authorised to kill you, at least you know that. At least you can plan your life, as miserable as it could be under the sword of the State, for at least you know that certain consequences will follow from your actions. If the sovereign systematically acts in a way that he cannot even guarantee that, there are no incentives for subjects to enter a pact that pretty much amounts to keeping life unbearable because uncertain. It may be a miserable condition, living in a civil State. But it is never as miserable as the state of nature (Hobbes [1651], 1991, 128). Some comfort!”, you may think, and you would once more probably be right. But Hobbes does warn you that life in the civil state may be miserable; he never promises otherwise. The only thing for sure is that living under conditions of natural liberty is worse because it is arbitrary.

In conclusion, contractarians, even Hobbes, share the view that a basic function of the polity is set up the conditions under which individuals may plan their lives towards the future with some degree of certainty — to live under non-arbitrary rules.

Next, I will reflect on whether the commitment to non-arbitrariness expressed by the different strands of constitutional theory I have discussed in the previous section and the function that contractarians expect the State should fulfil of allowing individuals to plan their lives in advance with some degree of certainty are related. Moreover, I will comment on the consequence that may unfold for constitutionalism from reducing the size of the State or from declaring its passing.

#### **4. Constitutionalism and the State**

Commentators of different political and philosophical stripes meet halfway in asking for the disappearance of the State. Foucault once avowed that “[w]hat we need is a political philosophy that isn’t erected around the problem of sovereignty, not therefore around the problems of law and prohibition. We

need to cut off the King's head: in political theory that has still to be done" (2005, 121). Placed on the opposite ideological side, Hayek pursued similar ends: "Though [the ideal of the Rule of Law] can never be perfectly achieved, since legislators as well as those to whom the administration of the law is entrusted are fallible men, the essential point, that the discretion left to the executive organs wielding coercive power should be reduced as much as possible, is clear enough" (2007, 112). Or as a commentator of Hayek's work once put it, "the point is that the individual must know, in advance, just how ... rules are going to work. He cannot plan his own business, his own future, even his own family affairs, if the 'dynamism' of a central planning authority hangs over his head" (Chamberlain, 2007, 254)

The two previous sections suggest that we should pass on Foucault's invitation, even if only for the sake of avoiding arbitrariness. The suggestion has been hitherto twofold, and its components taken independently. Constitutionalism and the State are concerned with arbitrariness. But we need to know whether they vary independently.

Constitutionalism – democratic or otherwise – is connected to the State in non-negligible ways. And this means that doing away with the State entails in some degree doing away with constitutionalism. Understanding how these two categories relate to each other matters for how we address claims about the role that constitutionalism generally and constitutions more specifically may play, if at all, in addressing contemporary societal challenges.

While constitutions can function as signs or expressions of the occurrence of the emergence of the State it is not obvious that they always are. Social contracts – in the contractarian sense – are hypothetical or metaphorical devices meant to account for the existence of society, its institutions and its laws and obligations, on the grounds of voluntary manifestations of the will of its members to bring the polity about. And these pacts have not been signed anywhere by anyone. This is why Hobbes, Locke, Rousseau, and more contemporarily Rawls, insisted, with different emphasis, on hypothetical consent. Additionally, constitutions change all the time. They are reformed

everywhere more or less every 19 years in average and, even if when they keep their text intact, their content changes through interpretation. The United States Constitution and the Israeli Basic Norms are cases in point (Jacobsohn & Roznai, 2020). If these constitutions were equivalent to what contractarians call a social contract, then the society to which these pacts gave rise would change as well in its identity. Two constitutions, two States, as it were. But the point of a social contract is that it creates, in Hobbes's parlance, a Commonwealth with "and artificial eternity of life". Constitutions have more modest expectations, as evidenced by the fact that they contemplate the seed of their own demise, as it were, incorporating in their text procedures for their amendment. Yet, they also exhibit traces or samples of the State's claim to having an eternity of life. Consider three. First, preambles. While constitutional preambles are not legally binding, these sections are meant to state in prose the fundamental principles of the polity. They include, for example, narratives about how a country's shared history and normative commitments are spelt out, and such commitments are made explicit in non-legal jargon. That is, although their content is usually snubbed by lawyers as irrelevant for addressing actual cases. They express, oft-times directly invoking *the people* as the authors of the text, commitments, goals, histories and other value-laden narratives that indicate that the authors of the text at hand form a polity that gives itself a set of rules by which to live.

The same goes for the introductory chapters of a constitution. Although different countries frame these sections differently, there are common elements to them. They tend to make clear what the source of political power is, where it emanates from, the form of the State, the form of government, where the limits of sovereign power lie, etc. These elements function as interpretive tools against which the thick constitution, to use Tushnet's terms once more, can be given meaning. Different charters give such sections different titles or labels. For example, fundamental constitutional principles (Italian Constitution, Colombian Constitution, section II of the German Constitution), the basis of institutionality (Chilean Constitution),

preliminaries (Spanish Constitution), Basic principles of the form of government (constitution of Sweden).

This is key to grappling with the question of whether the commitment that both constitutionalism and the State have towards avoiding arbitrariness in the exercise of power is merely contingent. I surmise it is not. Whether constitutions create the State or whether the polity predates its formal recognition through constitutional law or, put differently, whether the exercise of constituent power is tantamount to an exercise of community creation, is a difference of degree. If the first choice obtains, then talk of constitutionalism and the State becomes redundant. Constitutions are, in this vein, partial reflections of the State, and therefore their concern with arbitrariness is not really *their* but *its*. If the latter, then constitutions map onto and are instrumental to the State's fulfilment of its functions only partially. It means that the State is a much wider phenomenon, encompassing domains of political reality for which a constitution is much more limited in accommodating for.

Constitutions, under this view, turn some domains of the State into positive law, but the State would be broader than the constitution. If so, then the declarations one traditionally finds in preambles as well as in the more programmatic aspect of the rights and liberties that constitutions typically enshrine, become not creations of the law but declarations, a recognition that those exerting constituent power make of some reality that is broader than what the text of the charter includes.

Notice that in both cases the Constitution maps onto the State it governs, either partially or fully. And this means that the state of constitutionalism, democratic or traditional, is tied to the state of the State. Once we appreciate this relation between the parts involved, we have the resources to understand why reducing the size of the State entails an affront to our search for avoiding arbitrariness in the exercise of power.

This is, admittedly, a relation that takes place in a limited or circumscribed domain. Avoiding arbitrariness is one among sundry other goals informing

constitutionalism and the State. Many of these other goals, principles, values and so on could and most likely will outweigh it for several different reasons. Avoiding arbitrariness is a goal that is better understood as part of the domain of legitimacy, as one among a host of reasons the law can give its addressees to accept its content even, and perhaps, especially when they disagree with it, because they can always find comfort in the nature of the procedures leading up to its enactment. In turn, this means that there may be other considerations of a more substantive kind that can be separated from procedural considerations, at least analytically. For example, rights, justice, fairness, and others.

The circumscription of this domain suggests that the connections between constitutionalism and the State take place at a rather basic or minimal level and that they are fragile. After all, many States fall short of their duty to act non-arbitrarily. But there is one normatively relevant conclusion. That is, every constitutional polity is constituted as a State, and non-arbitrary law-making and government action is to be measured against the fundamental task every State – even the Hobbesian State – is mandated to pursue or at least not to deviate from, namely acting non-arbitrarily.

## 5. Conclusions

In speaking of non-arbitrariness, I have been writing about the character of constitutional actions adopted by the State. It is time to put a name to this. That the State and constitutionalism are committed to acting non-arbitrarily entails that they are committed to what is a basic tenet of the legal and political ideal we traditionally refer to as the rule of law.

This, I admit, says more about the structural conditions upon which the rule of law and not of men should obtain. It says that for it to get off the ground, a community committed to being governed by laws and not by the preferences, wills and particular interests of individuals is one that should be organised as a State and governed by a constitution. It says less about how to

solve the disagreements between traditionalists and democrats in the constitutionalist camp and about which demands should society impose on the State beyond the rather basic and fundamental one that it should not be arbitrary. Whether morality, justice, rights, democracy and so on are part of the most basic elements of our political and constitutional imagination, or whether they are mere supplements to constitutionalism and the State, are questions that require a good deal of reflection. Much more than the one I can provide here, alas.

What are we to do, at this point, with Foucault's and Hayek's invitation to do away with the State? If my suggestion above is correct, it follows, perhaps not that the rule of law will be lost. There may be other ways of making sure that citizens live under non-arbitrary regimes or regimes guaranteeing freedom to their members. Both Hayek and Foucault thought so. The former even gave arguments and proposals for turning that ideal into something feasible, all in the direction of augmenting the size of the market in those areas left vacant by Government, trusting that the rule of law will be better secured through institutions emerging spontaneously. Foucault fell short in this respect, merely inviting us to imagine new forms of political organisation, generally hesitant to recommend solutions himself, wary of the danger that normative theorising is expressive of the values of a specific class (1977).

So, there may be alternatives to the State. The problem is that while we imagine these alternatives, buying into invitations to reducing its size or to getting rid of it almost all of it, entails, if my story here holds, jeopardising constitutionalism. I am not sure who would be willing to take such route. Hayek thought, as other libertarians do as well, that the rule of law is safeguarded with minimal intervention by government and by conceiving of society as an aggregation of individuals rather than as a community, practically eliminating the term "State" from his vocabulary (Kukathas, 2015). This is no mere linguistic choice, but a well-thought-out complex idea whose complete analysis requires more space than the one I can use here. For now, it suffices to say that the well-known application of such ideas to the

political realm in the 1980s resulted in the dismantling of the State the widening of market forces, the weakening of welfare systems and the increase of private power. Libertarians may see this process as one where a certain kind of freedom and a certain conception of the rule of law have been secured. A discussion could be opened on this front. What is less certain is that the left would have welcomed such developments. Cutting off the King's head has led up to the processes mentioned above, against which the left, or rather a Foucaultian left, struggles today. If constitutionalism means limitation of arbitrariness, it needs the State.

### References

- Atria, F. (2016). *La forma del derecho* (Marcial Pons).
- Bellamy, R. (2007). *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press).
- \_\_\_ (2012). Rights as Democracy, in *Critical Review of Social and Political Philosophy*, vol. 15, no. 4, 1-25.
- Bello Hutt, D. (2021). Making What Present Again? A Critique of Argumentative Judicial Representation, in *Canadian Journal of Law and Jurisprudence*, vol. 34, no. 2, 259 - 281.
- Bodin, J. (2014) [1576]. *The Six Books of the Commonwealth*, (Harvard University Press).
- Braveman, D. (2005). On Law and Democratic Development: Popular Constitutionalism and Judicial Supremacy, in *Syracuse Journal of International Law and Commerce*, vol. 33, no. 1, 41-49.
- Chamberlain, J. (2007). Foreword to the 1944 American Edition of Hayek's 'The Road to Serfdom'. In F. Hayek (ed.), *The Road to Serfdom* (The University of Chicago Press), 253-254.
- Donnelly, T. (2012). Making Popular Constitutionalism Work, in *Wisconsin Law Review*, 159-194.

Foucault, M. (1977). On Popular Justice: A Discussion with Maoists. In C. Gordon (Ed.), *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (Pantheon), 1–36.

\_\_\_ (2005). Truth and Power: An Interview with Alessandro Fontana and Pasquale Pasquino, in C. O'Farrell (Ed.), *Three Foucault's Major Works* (Sage), 109-133.

Friedman, B. (2003). Mediated Popular Constitutionalism, in *Michigan Law Review*, vol. 101, no. 8, 2596-2636.

Gargarella, R. (2010). *The Legal Foundations of Inequality* (Cambridge University Press).

\_\_\_ (2020). *La derrota del derecho en Latinoamérica. Siete tesis* (Siglo XXI).

\_\_\_ (2022). *The Law as a Conversation Among Equals* (Cambridge University Press).

Habermas, J. (1996). *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, W. Rehg, Trans. (M.I.T. Press).

Hakey, F. (2007). *The Road to Serfdom* (Routledge).

Herzog, D. (2020). *Sovereignty, RIP* (Yale University Press).

Hobbes, T. (1991) [1651]. *Leviathan or the Matter, Forme and Power of a Common Wealth Ecclesiastical and Civil* (Cambridge University Press).

Jacobsohn, G., & Roznai, Y. (2020). *Constitutional Revolution* (Yale University Press).

Kramer, L. (2004a). *The People Themselves. Popular Constitutionalism and Judicial Review* (Oxford University Press).

\_\_\_ (2004b). Popular Constitutionalism circa 2004, in *California Law Review*, vol. 92, 959-1012.

\_\_\_ (2007). "The Interest of the Man": James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, in *Valparaiso Law Review*, vol. 41, no. 2, 697-754.

Kukathas, C. (2015). Hayek and the State. In D. Dyzenhaus, & T. Poole (Eds.), *Law, Liberty and State: Oakeshott, Hayek and Schmitt on the Rule of Law* (Cambridge University Press), 281-294.



- Lang Jr, A., & Wiener, A. (Eds.). (2017). *Handbook on Global Constitutionalism* (Edward Elgar).
- Locke, J. (2012). The Second Treatise of Government, in P. Laslett (Ed.), *Two Treatises of Government* (Cambridge University Press), 264-428.
- Lovett, F. (2016). *A Republic of Law* (Cambridge University Press).
- Martí, J. L. (2010). A Global Republic to Prevent Global Domination, in *Diacritica*, vol. 24, no. 2, 31-72.
- Mill, J. S. (1989). On Liberty, in S. Collini (Ed.), *On Liberty and other writings* (Cambridge University Press), 1-115.
- Pozen, D. (2010). Judicial Elections as Popular Constitutionalism, in *Columbia Law Review*, vol. 110, 2047-2134.
- Rousseau, J. J. (1997). Discourse on Political Economy, in J. J. Rousseau, & V. Gourevitch (Ed.), *The Social Contract and other later political writings* (Cambridge University Press), 3-38.
- \_\_\_ (2014). Discourse on the Origin and Foundations of Inequality Among Men, in J. T. Scott (Ed.), *The Major Political Writings of Jean-Jacques Rousseau* (The University of Chicago Press), 37-152.
- Runciman, D. (2021). *Confronting Leviathan: A History of Ideas* (Profile).
- Schwartzberg, M. (2011). Should Progressive Constitutionalism Embrace Popular Constitutionalism?, in *Ohio State Law Journal*, vol. 72, no. 6, 1295-1316.
- Tomkins, A. (2001). In Defence of the Political Constitution, in *Oxford Journal of Legal Studies*, vol. 22, no. 1, 157-175.
- \_\_\_ (2005). *Our Republican Constitution* (Hart Publishing).
- \_\_\_ (2010). The Role of the Courts in the Political Constitution, in *University of Toronto Law Journal*, vol. 60, 1-22.
- Tushnet, M. (1999). *Taking the Constitution Away from the Courts* (Princeton University Press).
- \_\_\_ (2006). Popular Constitutionalism as Political Law, in *Chicago-Kent Law Review*, vol. 81, 991-1006.
- Waldron, J. (1999). *Law and Disagreement* (Oxford University Press).

\_\_\_ (2006). The Core of the Case Against Judicial Review, in *The Yale Law Journal*, vol. 115, 1346-1406.

\_\_\_ (2009). Judges as Moral Reasoners, in *International Journal of Constitutional Law*, vol. 7, no. 1, 2-24.

\_\_\_ (2011). Do Judges Reason Morally?, In G. Huscroft (Ed.), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press), 38-64.

# ATHENA

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

---

## A Pluralist Theory of Constitutional Justice. Assessing Liberal Democracy in Times of Rising Populism and Illiberalism

MICHEL ROSENFELD, OXFORD: OXFORD UNIVERSITY PRESS, 2022, 320 PP. ISBN  
9780198862680

SARA CANDUZZI

*Ph.D. Student, University of Edinburgh (United Kingdom)*

✉ [s.canduzzi@sms.ed.ac.uk](mailto:s.canduzzi@sms.ed.ac.uk)

🆔 <https://orcid.org/0009-0003-3233-2149>

### ABSTRACT

*A Pluralist Theory of Constitutional Justice. Assessing Liberal Democracy in Times of Rising Populism and Illiberalism* advances a theoretically rich and extremely engaging case for the suitability of liberal constitutionalism to achieve justice in contemporary globalized and pluralistic societies. While acknowledging that actual liberal constitutional models have oftentimes failed to effectively address some of the most significant challenges of our time, the book offers a valuable contribution to the debate by shedding light on the potential of liberal constitutionalism, when taken in its ‘ideal’ form, as well as its conceptual superiority over competitors such as illiberalism, populism, and authoritarianism. In doing so, the author Michel Rosenfeld relies on the notion of comprehensive pluralism as a conception of the good in its own right that ought to be incorporated within liberal constitutionalism in order to secure and improve the ability of the latter to meet the demands of justice. While the author’s case for comprehensive pluralism is extremely compelling, the connection that the book seeks to establish between the requirements of justice under comprehensive pluralism and the liberal constitutional model requires further discussion.

**Keywords:** liberal constitutionalism, comprehensive pluralism, constitutional theory, distributive justice

ATHENA

**Volume 4.1/2024, pp.136-156**

*Book Reviews*

ISSN 2724-6299 (Online)

<https://doi.org/10.6092/issn.2724-6299/19207>



## 1. Introduction

In the last few years, liberal constitutionalism has come under serious attack on several fronts. At the political level, the populist agenda has been advocating for the rejection of the liberal constitutional model, which is accused of exacerbating the distance between the people and their institutions (Blokker, 2019) and of ignoring the preferences of “actually existing democratic publics” (Scheppelle, 2019, p. 316). In the academic context, many scholars have also started to increasingly question the merits of liberal constitutionalism and to take its limits and potential for reform seriously. Adding to the voices of its traditional critics (Schmitt, 1932; MacIntyre, 1981; Eisenstein, 1981; MacKinnon, 1989; Sandel, 1998), academics from different fields and traditions, including political and legal theorists, comparative constitutional lawyers (Dowdle and Wilkinson, 2017), European Union scholars (de Búrca, 2018; Komárek, 2023), as well as proponents of Global Constitutionalism (Eisler and others, 2022) and academics from the Global South (Dania, 2023), have all begun to pay much closer attention to the shortcomings of liberal constitutionalism. Some have even advanced the hypothesis that what we are currently witnessing might be the start of liberal constitutionalism’s ‘demise’ (Ginsburg, Huq and Versteeg, 2018). Many of the concerns with the future of liberal constitutionalism that are currently being expressed in the literature have to do with the model’s quite disappointing performance in promoting and achieving justice. This emerges both from a legal perspective, with scholars observing – for instance – that liberal constitutionalism’s commitment to the protection of constitutional rights through the judicial activity of courts has so far proven rather ineffective (Chilton and Versteeg, 2018), and from a material standpoint, especially once we consider the proven inadequacy of most liberal constitutions in tackling the problem of economic inequality (Dixon and Suk, 2018).

It is against this backdrop that Michel Rosenfeld's latest book, *A Pluralist Theory of Constitutional Justice. Assessing Liberal Democracy in Times of Rising Populism and Illiberalism*, advances a theoretically rich and extremely engaging case for the liberal constitutional model's aptness to achieve justice in contemporary globalized and pluralistic societies. While acknowledging liberal constitutionalism's failure, in the last decades, to effectively address some of the most significant challenges of our time, the book offers a valuable contribution to the debate by shedding light on the *potential* of liberal constitutionalism, when taken in its 'ideal' form, as well as its conceptual superiority over competitors such as illiberalism, populism, and authoritarianism.

Rosenfeld's main thesis can be summarised as follows. He starts from the premise that only those constitutions that are capable of delivering and advancing a certain minimum of distributive justice, which he refers to as the 'justice essentials', are worthy of legitimation and justification. This, in turn, makes the task of determining what these justice essentials require a crucial step for the purpose of assessing a constitution's ability to implement them and its overall legitimacy. However, a similar endeavour is made particularly complicated by the existence of widespread disagreement in contemporary constitutional units concerning the delimitation of the minimum of justice that ought to be incorporated into the constitution. Rosenfeld's answer to this conundrum lies in the notion of comprehensive pluralism, which is deemed to provide adequate grounding for the justice essentials (p. 228) and to normatively legitimate an ideal version of liberal constitutionalism that, in his view, is the "the optimal potential guarantor of the justice essentials" (p. 292) and should hence be pursued by contemporary *actual* liberal constitutional democracies.

## 2. Methodology and Structure of the Book

In presenting his pluralist theory of constitutional justice, Rosenfeld expressly commits to methodological neutrality (p. 3) and decides to adopt, for the majority of his analysis, a largely descriptive approach. This allows him to engage in an intriguing investigation of the historical and theoretical context of liberal constitutionalism while also addressing the criticism that has been advanced against such model. In fact, Rosenfeld's goal for the book is to verify whether the liberal model may be at least partially responsible for facilitating the worsening of distributive injustices in the world, and if liberal constitutionalism can or ought to be recalibrated to promote justice, intended not only as material welfare but also in identitarian and representational terms. Quite interestingly, he expressly states his intention to do so without suggesting any *a priori* determination of what the 'right' answer to these questions might be (p. 3).

To conduct his analysis, Rosenfeld relies on a series of conceptual tools that function as heuristic models. These are drawn from a counterfactual 'ideal' form of liberal constitutionalism, in which the constitution is capable of dispensing a certain minimum of distributive justice while also maintaining harmonization between a functional constitutional unit, or '*demos*', and its recognition-based identitarian imprint, or '*ethnos*', and a workable equilibrium between universal, singular, and plural identities (as already presented in Rosenfeld, 2009). In Rosenfeld's terminology, the universal relates to those attributes that refer to *all* the actors within a relevant polity, such as democratic self-government, the rule of law, and the protection of fundamental rights (p. 10). The individual, instead, focuses on the singular person intended both as an abstract citizen and as their own person, with a "unique history, heritage, experience, and set of challenges and aspirations" (p. 10). In this framework, the '*demos*' must partake in both of these dimensions, while the '*ethnos*' "must figure as an amalgam between the singular and the plural" (p. 10). The latter assumes special relevance in

contemporary polities – which are multicultural and plural in nature – and it refers to the accommodation and recognition of different communities both *among* and *within* groups of people (p. 11).

The role that these concepts seem to play in Rosenfeld's theory is threefold, and they reflect the structure of the book.

First, they provide standards against which to isolate the main challenges faced by contemporary liberal constitutionalism. In the first two chapters of the book, Rosenfeld observes that liberal constitutionalism's capacity to satisfy the requirements of distributive justice appears to be increasingly impaired by globalisation, a sense of inequity and alienation from the law, as well as the rise of intransigent politics and the various crises and emergencies that have fostered conditions of stress in several constitutional units during the course of the last few decades. All of these transformations symbolise current departures from the 'ideal' liberal constitution, as under these conditions citizens struggle to perceive law as self-given and laws rarely manage to account for the universal, the singular, and the plural (p. 40), hence projecting a sense of illegitimacy. In particular, the tribalisation of politics encouraged by populist discourses is found to be incompatible with the goal of promoting justice insofar as it casts some of the people as the 'whole' and the rest as 'enemies', hence regarding the partial as the universal, largely ignoring singularity and eliminating pluralism (p. 62).

Secondly, these conceptual elements are used to *assess* the way in which the interplay between liberal constitutionalism and justice has been traditionally grounded in legal philosophy. In the second part of the book, which spans over four chapters, Rosenfeld proceeds to evaluate several influential philosophical accounts against their ability to succeed along the two axes that, in his view, may lead to the justice essentials: the harmonisation of '*ethnos*' and '*demos*' and the balance between the universal, the singular, and the plural. All of the theories considered in these chapters are found to fall short in at least one of these dimensions, hence leading Rosenfeld to conclude that none of these traditional accounts on the link between justice

and liberal constitutionalism provide a fully satisfactory justification for the justice essentials (p. 227).

Finally, the dialectic between ‘*demos*’ and ‘*ethnos*’ and the tension between the universal, the singular, and the plural at the constitutional level provide normative guidance in pointing to what Rosenfeld considers to be the most promising approach in the quest for the justice essentials: comprehensive pluralism, intended as a commitment to pluralism “all the way up and all the way down” (p. 26). This element is not an original contribution of *A Pluralist Theory of Constitutional Justice*. In fact, Rosenfeld has written extensively on the notion of comprehensive pluralism as a conception of the good in its own right, which prescribes a set of fixed and non-negotiable norms but nonetheless seeks to accommodate as many other conceptions of the good as possible, as long as they are compatible – although not necessarily consistent – with comprehensive pluralism itself (Rosenfeld, 2012; Rosenfeld, 1999; Rosenfeld, 1997a; Rosenfeld, 1997b). In this book, comprehensive pluralism is deemed to be better suited to achieve an equilibrium between the various dimensions of constitutional identity than any of the previously considered philosophical accounts (p. 248). It is exactly because of this feature that comprehensive pluralism is more adequately equipped to pave the way towards the requirements of the justice essentials (p. 276-277 and p. 288). Once we assume the perspective of comprehensive pluralism, Rosenfeld concludes, it becomes clear that the liberal constitutional model remains the one that is most likely to achieve the justice essentials (p. 285). As such, comprehensive pluralism can and *ought* to be incorporated within liberal constitutionalism in order to secure and improve the ability of the latter to meet the demands of justice (p. 228 and p. 292).

### **3. Constructing a Pluralist Theory of Constitutional Justice**

To fully grasp the way in which all these theoretical and conceptual elements fit together under a highly sophisticated unitary and coherent constitutional



project, it is useful to refer to the content of each chapter in more details. This also helps understand the complexity of Rosenfeld's argument, which is presented in a consequential fashion, with each chapter focusing on the goal of exploring a segment of the broader theoretical framework.

One of the main substantive claims of the first part of the book, which deals with the current challenges faced by liberal constitutions in the pursuit of justice, is the need to *constitutionally* guarantee the goal of economic redistribution. This constitutes a crucial requirement to ensure that the justice essentials are met in contemporary constitutional democracies (p. 67). In fact, in Rosenfeld's view, failure to minimise material inequalities is ultimately doomed to result in failure to approximate distributive justice in *all* its dimensions – including recognition and representation – and at all levels of the universal, the singular and the plural (p. 74).

To justify and reinforce this intuition according to which material conditions play a particularly important role in the quest for the justice essentials at a constitutional level, Rosenfeld proceeds, in the second part of the book, to investigate those theories that may broaden our understanding of how law interacts with morality, ethics, politics, and economics, hence going beyond what Rosenfeld refers to as mere 'justice according to law' (p. 125).

For this purpose, in chapter three, Hans Kelsen's pure theory of law and Sigmund Freud's account of group identity are presented in dialogue. The latter is invoked to rescue the former's inability to establish a sense of authorship and identity in relation to the law, while nevertheless succeeding in imposing at least a minimum of formal distributive justice in ruling *through* law – especially at the universal and individual levels (p. 110). However, Freud's theory is also considered inadequate to bridge the gap between the universal, the singular, and the plural due to its prioritisation of the individual in the process of internalisation of law through group psychology (p. 121).

Overall, the broader point that this chapter allows Rosenfeld to make is that law and justice seem to have no *intrinsic* relation, as justice under the law or the constitution is only capable of providing a bare *minimum* of justice (p.

125). On the contrary, the justice essentials largely depend on what happens ‘*beyond*’ law, relying for example on requisites of identification and common loyalty (p. 128).

This finding serves as the starting point for chapter four, where Rosenfeld proceeds to explore theoretical contributions that bridge the gap between law and justice through politics and economics. In fact, if proven to be able to advance justice ‘*beyond the law*’, these could then be used to inform the *content* of law and constitutions and move towards the justice essentials (p. 130). Nevertheless, the analysis of several theories leads to the conclusion that, more often than not, the influence that politics and economics exercise on law seems to hinder law’s ability to produce justice, rather than to enhance it (p. 131). This is confirmed by some of the theories themselves, as Rosenfeld observes how both Carl Marx’s dialectical materialism and the work of critical legal scholars conceive of law as an instrument of oppression that leads to divisive politics and is intrinsically disconnected from the notion of justice (p. 131). At the same time, this conclusion is also reinforced by Rosenfeld’s critical analysis of other authors, who do try to link economics or politics to law in the quest for justice but, in Rosenfeld’s view, ultimately fail to do so. This emerges in particular with reference to law and economics theorists, who are deemed to succeed in subsuming law under *a* conception of distributive justice but are accused of settling on an idea of justice aimed at wealth maximisation that is unpersuasive and does not necessarily coincide with the justice essentials (p. 150). For Rosenfeld, in fact, the justice essentials are *not* exhausted by economic factors, and they encompass broader legal and constitutional matters, such as dignitarian ones (p. 150). In a similar vein, Carl Schmitt’s theory of the political is presented as detrimental for the justice essentials as it opens the way to systematic identitarian recognition-based distributive injustices (p. 139).

Overall, this chapter concludes that, together with the bare minimum of procedural justice provided by law, in contemporary pluralist and ideologically divided societies we need *at least* some iterations of justice

‘beyond’ law that transcend political and/or economic justice alone (p. 159). This is because economics and politics are inherently contestable, meaning that they fail to obtain consensus within a constitutional unit, and hence tend to frustrate rather than to advance justice (p. 146 and 158).

The problem of contestability that emerges with reference to these approaches is exactly what motivates Rosenfeld’s change of perspective in chapter five, where he considers theories that begin their enquiries with a self-standing conception of justice. Because they aim to *authoritatively* settle the contents of the justice essentials for all those who are part of the relevant constitutional unit (p. 161), these theories are putatively considered to be better suited to achieve the justice essentials. Nevertheless, these philosophical accounts, which are described as going from the ‘universal’ to the ‘singular’ (p. 195), seem to be affected by other kinds of limitations. For instance, Rosenfeld acknowledges that a Kantian perspective has the merit of successfully severing the notion of justice from a conception of the good and equating the legitimacy of laws and constitutions to their ability to obtain *formal* equality, hence reducing the problem of obtaining consensus on a specific substantive theory of justice (p. 163). However, a similar approach only manages to ground the necessary unity of the universal, while it fails to account for the singular and the plural (p. 165-166). In fact, Kantian morals require an abstract understanding of individuals, leaving aside any identitarian elements (p. 165).

Similar problems emerge with reference to procedural theories of justice, such as the ones advanced by John Rawls and Jürgen Habermas, especially to the extent that they require the exclusion of any metaphysical perspectives – to which the identity of individuals may nonetheless be deeply intertwined – to obtain a unifying concept of justice (p. 168). Rosenfeld also observes that these theories are not as purely proceduralist as they claim to be. At a closer look, they seem to assume substantive positions that may be incompatible with some elements of the justice essentials. For instance, according to Rosenfeld, Habermas’ refusal to include identitarian claims within the

constitution leads to a fatal neglect of two essential dimensions of the justice essentials: representation and recognition (p. 182).

Overall, Rosenfeld concedes that these conceptions of justice rightly point to the need to identify some normative grounding that is above the different contested understandings of the good for the purpose of binding together the community of communities within the relevant constitutional unit. However, they either fail to advance a version of the universal that may be compelling for all, hence leaving the problem of contestability open and failing to account for the plural by excluding segments of the relevant population, or they leave the singular aside due to the extreme levels of abstraction that they require (p. 196).

Such concern for the individuation of an ideal level or type of individualism that is compatible with the minimum of constitutional justice triggers the enquiry at the centre of the sixth chapter, which is also the last strictly doctrinal one. Here, Rosenfeld turns to those academic contributions that may, at least *prima facie*, provide a theoretical account able to avoid desingularisation by centring the understanding of the link between law and justice on the singular, rather than on the universal (p. 197). The authors explored in this chapter, though, fall short in their discussion of the plural and the universal. First, Jacques Derrida's theory is considered unable to account for those cases in which accommodating the singularity of one may detract from the singularity of others (p. 211). Then, Giorgio Agamben's focus on the polity's '*ethnos*' and symbolism in constitutional legitimation is shown to ultimately fail to bring different collective units under a singular community of communities (p. 220). The general conclusion that can be drawn from this analysis seems to be that in order to be compatible with the justice essentials, individualism must be *egalitarian* and capable of leaving room for the plural (p. 222).

At the end of part two of the book, Rosenfeld observes that, since they all fail to establish the necessary harmonisation of '*ethnos*' and '*demos*' and equilibrium between the universal, the singular, and the plural, none of the

approaches examined in part two of the book seem to be able to provide any workable criteria to determine what the justice essentials require in the context of liberal democratic constitutions. As such, they cannot offer any guidance or standards to assess contemporary liberal constitutions' ability to promote justice. On the contrary, these theories seem bound to either renounce *tout court* the possibility of full justice at the constitutional level or to foster disagreement over what constitutes justice by failing to accommodate relevant competing conceptions of the good within more broadly encompassing normative frameworks (p. 223). It is against this backdrop that part three of the book is dedicated to the goal of advancing an alternative and arguably more fruitful approach that starts from the perspective of the *plural*. This, it is submitted, should create sufficient common ground to agree on a mutually acceptable constitution within each particular constitutional unit that is compliant with the justice essentials (p. 228).

In chapter seven, Rosenfeld advances his most normative claims in constructing his case for turning to comprehensive pluralism, which entails some forms of intransigent anti-pluralist fixed minimum that is however designed to lead to a pluralist maximum that may advance the justice essentials through a combination of process-based and substantively driven considerations (p. 228). Contrarily to all the other approaches considered, in fact, comprehensive pluralism is deemed to strike the required balance between '*ethnos*' and '*demos*', while also establishing the necessary equilibrium between the universal, the singular, and the plural. On the one hand, it allows to distinguish between constitutional and national identity, and it ensures that all relevant groups within the constitutional unit are represented proportionally (p. 234). It also considers the contextual differences in material conditions, identities, and antagonisms within each constitutional setting (p. 246). On the other hand, comprehensive pluralism is concerned with the goal of providing the best possible mutual accommodation among proponents of different perspectives of the good, and it seeks to establish whether certain

attributes of singularity are favoured to the detriment of others or if certain groups are being unacknowledged or underrepresented within the constitutional unit (p. 234). This is due to the fact that, even though comprehensive pluralism may lead to prefer some theories of material distributive justice over others, it also prescribes that all of them deserve *consideration* in the constitutional unit. That, Rosenfeld concedes, does not necessarily mean that comprehensive pluralism can never give rise to institutional arrangements that may practically result in new inequities (p. 247). However, in relying on the “dignity of diversity” (p. 248) as a hierarchically superior unifying normative imperative that recognises everyone’s right to express one’s singularity and secure collective paths towards self-realisation, comprehensive pluralism does provide procedural steps aimed at resolving disagreements and obtaining more equitable resolutions of conflicts (p. 247).

Finally, in chapter eight, Rosenfeld uses the theoretical lenses of comprehensive pluralism to try and answer the overarching questions of the book concerning the determination of what the justice essentials require in any particular constitutional setting and the suitability of liberal constitutionalism to promote such minimum of justice. In this last chapter, Rosenfeld’s theory finally comes together under comprehensive pluralism, which seems to offer the necessary normative guidance that other theories explored in the previous chapters could not deliver. In fact, comprehensive pluralism points to some *categorical* preconditions for the achievement of the justice essentials that need to be added to the contextual elements and rely on a set of fixed norms concerned with the interplay between singularity, identity, solidarity, autonomy, choice among plural alternatives, as well as social and political cooperation with outsiders regardless of their own conception of the good (p. 270). Furthermore, the core of comprehensive pluralism incorporates norms that constitutionally guarantee the minimum of material welfare necessary for each person to have access to classical liberal rights, core group rights and democratic procedures and representation (p.

273). Coherent with this normative core, Rosenfeld suggests that any constitutional model that may reveal apt to incorporate such elements within its own theoretical framework would then be consistent with the goal of pursuing at least a minimum of material justice (p. 277). Once these aspects are constitutionally enshrined, then the pursue of justice above such minimum needs to be left to the extra and infra-constitutional means: in fact, Rosenfeld observes, constitutions alone cannot achieve total justice due to their role of preserving the constitutional order (p. 270).

It is at this point of the analysis that, considering the requirements of the justice essentials under comprehensive pluralism, Rosenfeld draws the conclusion that the model that is more likely to obtain them seems to be liberal constitutional democracy. This, in fact, is conceptually fit to achieve the justice essentials due to its unique ability to consider the singularity of the individual citizen while also keeping in mind the plurality of collective allegiances and pursuits of different groups (p. 286). It must be observed that, in a previous chapter, Rosenfeld concedes that illiberal *constitutional* populism may also be, at least in principle, able to achieve the justice essentials, as long as it is democratic, the right to vote is equally accorded to citizens and members of the 'elite', and the focus is on redressing distributive inequalities (p. 136). However, the objection here is mostly empirical, in the sense that, in practice, the possibility of this happening seems very modest (p. 138). In a similar vein, if we move away from the abstract theoretical level, it must be also recognised that many current liberal democracies fail to deliver on the justice essentials as well. Nevertheless, Rosenfeld concludes, this finding should not be taken as an *intrinsic* weakness of liberal constitutionalism, but rather as a contingent deficiency that could be overcome through adaptations and reforms inspired by comprehensive pluralism itself (p. 285 and 292).

#### 4. Is There a Normative Case for Liberal Constitutionalism in the Pursuit of Justice?

*A Pluralist Theory of Constitutional Justice* successfully manages to offer an original contribution that does not merely identify the challenges faced by liberal constitutionalism, but also seeks to provide a practically implementable theoretical account that is ultimately aimed at reforming, rather than abandoning, the liberal constitutional model in the pursuit of justice. However, due to the ambition of the project, which rests on an impressive analysis of many philosophical positions, some of Rosenfeld's substantive claims for a theory of constitutional justice seem to come across as slightly underdeveloped in comparison to the rest of the analysis. In particular, while the case for comprehensive pluralism is definitely convincing, the conceptual connection that Rosenfeld seeks to establish, at the very end of the book, between comprehensive pluralism and liberal constitutionalism could have benefitted from further elaboration.

On the one hand, in fact, Rosenfeld successfully reinforces some of the claims that he already advanced in his earlier work in suggesting comprehensive pluralism as an alternative to philosophical and political liberalism. This is because philosophical liberalism is, in Rosenfeld's view, inextricably linked to *limited* pluralism (Rosenfeld, 1997b, p. 216) and monistic in nature, meaning that it affords hierarchical normative priority to certain values only, such as individual liberty. Exactly because it considers its own values as overriding, philosophical liberalism fails to provide any normative guidance to resolve disagreement among competing, and oftentimes conflicting, conceptions of the good. For Rosenfeld, this is particularly problematic not because the values that the liberal tradition perceives as overriding are not worth pursuing, but due to the fact that this rigidity has the effect of preventing liberalism from advancing those very same objectives that it seeks to achieve (Rosenfeld, 1997b, p. 215). In contemporary polities, in fact, plural identities may conflict but nonetheless



have to coexist with one another, which is why it is essential to be able to accommodate a more productive dialogue between proponents of different conceptions of the good. Against this backdrop, comprehensive pluralism emerges as a superior alternative to philosophical and political liberalism because it has “the ability to appeal to different values to varying extents” (Rosenfeld, 1997b, p. 217), and its only overriding value consists in the “greatest possible inclusion of competing ideologies without risking mere mutual disengagement or a thoroughly relativistic war of all against all” (p. 26). In doing so, because it is a guarantee “against intentional interference by the self against the other” (Rosenfeld, 1997b, p. 217), comprehensive pluralism turns out to be much more effective in advancing the liberal values than liberalism itself.

On the other hand, in *A Pluralist Theory of Constitutional Justice*, Rosenfeld takes this argument a step forward by claiming that the superiority of comprehensive pluralism over philosophical and political liberalism extends to the legitimation of liberal constitutionalism as well. There are two main ways in which this thesis is supported throughout the book.

The first one is structural, and although it plays a smaller role in Rosenfeld’s overall argument, it is nonetheless worth considering to fully grasp the broader point that the author is trying to make. For Rosenfeld, differently from philosophical liberalism, liberal constitutionalism is not monistic. In fact, it is potentially consistent with a spectrum of post-metaphysical perspectives beyond liberalism itself, including pluralism, republicanism and, to a certain extent, communitarianism (p. 4). What this means for a theory of constitutional justice is that, even though liberal constitutionalism seems inherently committed to advance a certain minimum of distributive justice (p. 3), it is not intrinsically connected to any fixed definition of what this minimum of justice entails. Hence, liberal constitutionalism and comprehensive pluralism share the same essential feature of rejecting philosophical monism. As such, because of this structural affinity, comprehensive pluralism seems better suited than philosophical liberalism to

serve liberal constitutionalism in the quest for the justice essentials and to provide a basis of legitimation for contemporary liberal constitutionalism (p. 26).

While this reasoning appears to be sound from an argumentative perspective, what seems to be missing in this analysis is a more precise identification of the *kind* of liberal constitutionalism that Rosenfeld is concerned with. In fact, at a closer look, the version of this model that he seems to have in mind in the book is actually much more structurally similar to philosophical liberalism than it may appear at first sight. Just like philosophical liberalism monistically rejects any conception of justice that does not afford priority to the value of individual liberty, the ‘ideal’ of liberal constitutionalism that features in Rosenfeld’s theory assigns normative priority to the pursuit of a minimum of justice that must be consistent with two necessary requirements: a proper harmonisation of ‘*ethnos*’ and ‘*demos*’, and the right balance between the universal, the singular, and the plural. Achieving an equilibrium between these elements is, in a sense, the ‘monistic’ core of Rosenfeld’s version of liberal constitutionalism that should guide the pursuit of justice, as it points to those hierarchically entrenched values that cannot be pushed aside or recalibrated against competing conceptions of what justice ought to entail. In fact, it is exactly because of the failure to establish a workable balance between these dimensions that illiberal and populist iterations of constitutionalism are ultimately found to be incompatible with the ideal liberal model of constitutionalism under Rosenfeld’s account (p. 16). As such, liberal constitutionalism and philosophical liberalism seem to both rely on a monistic overriding commitment to a specific normative conception of justice that is not intrinsically and necessarily paired with a relativist moment, as it is in the case of comprehensive pluralism instead.

Nevertheless, it is important to recognise that the core argument advanced by Rosenfeld to make his case for comprehensive pluralism is actually a substantive one, which is somehow connected to this ‘monistic’ core of its ‘ideal’ of liberal constitutionalism. In fact, Rosenfeld observes,

comprehensive pluralism is capable of identifying a minimum of constitutional justice that guarantees the equilibrium between ‘*ethnos*’ and ‘*demos*’ and between the universal, the singular, and the plural. On the contrary, philosophical liberalism creates a certain unbalance towards singularity, while also conceiving the individual in excessively abstract and partial ways. That is why comprehensive pluralism is better equipped to deliver on those requirements for the justice essentials that liberal constitutionalism strives to achieve, and hence emerges as the superior alternative to approximate the ‘ideal’ version of liberal constitutionalism.

This constitutes a highly compelling argument that overall succeeds in grounding Rosenfeld’s claim that comprehensive pluralism should replace philosophical and political liberalism as the normative foundation and justification for liberal constitutionalism – or at least, for the kind of liberal constitutionalism that Rosenfeld has in mind. However, he then proceeds to further rely on these findings to advance an additional claim: not only comprehensive pluralism provides a better form of legitimation for liberal constitutionalism, but it also supports the conclusion that liberal constitutionalism should be preferred over its competitors, particularly illiberalism and populism, in the quest for justice. Liberal constitutionalism is, in Rosenfeld’s words, the conceptually apt alternative in approximating the requirements of the justice essentials under comprehensive pluralism. It is at this point of the book that the connection between all these elements would have probably required some further elucidation, as what Rosenfeld seems to argue here is that the ultimate ‘rescue’ of liberal constitutionalism should be predicated upon the fact that the latter is the most promising avenue for advancing the justice essentials as identified under comprehensive pluralism. This is, however, hardly surprising considering that comprehensive pluralism itself emerged as the superior alternative in pointing to the requirements of the justice essentials exactly because of its ability to better serve and strike the necessary balance between the values associated with the ideal version of liberal constitutionalism. In other words, it is evident that the

best model to obtain the demands of comprehensive pluralism will be the liberal constitutional one, if the criteria that led to pick comprehensive pluralism over other philosophical accounts are drawn from an ‘ideal’ version of liberal constitutionalism itself. There is, in this sense, a certain circularity in the argument once we consider that an ‘ideal’ version of populism or illiberalism would hardly focus on the goal of harmonising the ‘*ethnos*’ and the ‘*demos*’ of a constitutional unit, nor they would prioritise the balance between the singular, the universal, and the plural. It is only natural, if the criteria are drawn from an ideal version of liberal constitutionalism, that the theoretical perspective that is most likely to closely approximate them, *i.e.*, comprehensive pluralism, will then point to liberal constitutionalism itself as the most promising candidate for advancing the cause of justice as identified according to those very same standards.

Broadly speaking, when evaluated against standards that are derived from the liberal constitutional tradition, it is very likely that non-liberal forms of constitutionalism will fall short in abiding by those requirements. When compared to the book’s purported objectives, a similar methodology seems difficult to reconcile with the commitment to neutrality expressed at the beginning of Rosenfeld’s work. Moreover, this circularity may feed into the increasingly discussed tendency, especially among comparativists, to refer to non-liberal models mainly through the gaze of liberal constitutionalism, which has historically led scholars to discuss the characteristics of non-liberal constitutionalism by simply “cataloguing the presence or absence of canonical structural-liberal features” (Dowdle and Wilkinson, 2017, p. 2). In the last few years, academics have started to point out how most non-liberal constitutional orders do not actually perceive themselves merely “in negative terms against liberal beliefs or institutions” (Walker, 2020, p. 305), but rather evaluate their constitutional practices through the lenses of their own particular culture, tradition, history, and identity. Rosenfeld himself is committed to tackling these risks in *A Pluralist Theory of Constitutional Justice*, as he expressly states his intention to resist any *a priori*

determinations concerning the model that is to be preferred in the pursuit of justice. He effectively accomplishes this for most of his analysis, and he largely succeeds in presenting the values and core normative beliefs of illiberal and populist practices from the perspective of their own constitutional project. That is exactly why, to avoid falling into this methodological trap at the very end of the book, it would be beneficial to further develop the reasons why liberal constitutionalism should be preferred over its alternatives, without necessarily recurring to requirements that are drawn from liberal constitutionalism itself. In summary, even though Rosenfeld ultimately manages to bring all the conceptual and analytical elements together under a unified theory of constitutional justice, the connection that he seeks to establish, in the last chapter, between comprehensive pluralism and liberal constitutionalism could be strengthened and made much more significant by further differentiating between the reasons that normatively justify the two. This would also probably lead to a more robust case for the liberal constitutional model than the book's current conclusion that liberal constitutionalism is merely *not less likely* than any of its alternatives to advance the cause of the justice essentials (p. 286).

## 5. Conclusions

Overall, *A Pluralist Theory of Constitutional Justice* is an intriguing and deeply relevant addition to the field of constitutional theory that combines a rigorous and sophisticated descriptive philosophical analysis with a compelling and workable substantive theory of constitutional justice. Comprehensive pluralism emerges as a valid and promising alternative to the traditional model of philosophical and political liberalism, as the author succeeds in demonstrating its aptness to tackle several of the challenges associated with our contemporary globalised societies. Although there are still some doubts as to whether, in practice, liberal constitutional democracies will succeed in assuring and promoting the justice essentials, the book

provides its readers with mostly hopeful expectations for the future of constitutional justice, while also leaving the door open for the possibility to further advance the quest for justice *beyond* the constitution.

## References

- Blokker P. (2019). Populism as a constitutional project, in *International Journal of Constitutional Law*, vol. 17, no. 2.
- Chilton A. and Versteeg M. (2018). Courts' Limited Ability to Protect Constitutional Rights, in *The University of Chicago Law Review*, vol. 85, no. 2.
- Dania S. (2023). Demystifying the liberal-post liberal divide: The 'North–South' debate on constitutionalism, in *Jindal Global Law Review*, vol. 14, no. 1.
- de Búrca G. (2018). Is EU Supranational Governance a Challenge to Liberal Constitutionalism?, in *The University of Chicago Law Review*, vol. 85, no. 2.
- Dixon R. and Suk J. (2018). Liberal Constitutionalism and Economic Inequality, in *The University of Chicago Law Review*, vol. 85, no. 2.
- Dowdle M.W. and Wilkinson M.A. (eds.) (2017). *Constitutionalism beyond Liberalism* (Cambridge University Press).
- Eisenstein Z. R. (1981). *The Radical Future of Liberal Feminism* (Longman).
- Eisler J., Havercroft J., Shaw J., Wiener A., and Kang S. (2022). The Pendulum Swings Back: New Authoritarian Threats to Liberal Democratic Constitutionalism, in *Global Constitutionalism*, vol. 11.
- Ginsburg T., Huq A.Z., and Versteeg M. (2018). The Coming Demise of Liberal Constitutionalism?, in *The University of Chicago Law Review*, vol. 85, no. 2.
- Komárek J. (2023). Why Read The Transformation of Europe Today? On the Limits of a Liberal Constitutional Imaginary, in J. Komárek (ed.), *European Constitutional Imaginaries: Between Ideology and Utopia* (Oxford University Press).

- MacIntyre A. (1981). *After Virtue* (Notre Dame University Press).
- MacKinnon C.A. (1989). *Towards a Feminist Theory of the State* (Harvard University Press).
- Rosenfeld M. (1997a). A Pluralist Look at Liberalism, Nationalism, and Democracy. Comments on Shapiro and Tamir, in *Constellations*, vol. 3, no. 3.
- \_\_\_ (1997b). *Just Interpretations: Law Between Ethics and Politics* (University of California Press).
- \_\_\_ (1999). Comprehensive Pluralism is Neither an Overlapping Consensus Nor a Modus Vivendi: A Reply to Professors Arato, Avineri, and Michelman, in *Cardozo Law Review*, vol. 21.
- \_\_\_ (2009). *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community* (Taylor & Francis).
- \_\_\_ (2012). *Law, Justice, Democracy, and the Clash of Cultures: A Pluralist Account* (Cambridge University Press).
- Sandel M.J. (1998). *Liberalism and the Limits of Justice* (Cambridge University Press).
- Scheppele K.L. (2019). The opportunism of populists and the defense of constitutional liberalism, in *German Law Journal*, vol. 20, no. 3.
- Schmitt C. (2007) [1931]. *The Concept of the Political* (University of Chicago Press).
- Walker, N. (2020). Liberal Nationalism's Precarious Prospects, in U. Belavusau and A. Gliszczynska-Grabias (eds.), *Constitutionalism Under Stress. Essays in Honour of Wojciech Sadurski* (Oxford University Press).





**ATHENA**

CRITICAL INQUIRIES IN LAW, PHILOSOPHY AND GLOBALIZATION

[HTTPS://ATHENA.UNIBO.IT/](https://athena.unibo.it/)

[ATHENA@UNIBO.IT](mailto:ATHENA@UNIBO.IT)