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Constitutional Roots of Democracy

di FRANCESCO BILANCIA

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ABSTRACT

ITA

Con l'espressione "Le radici costituzionali della democrazia" si intende assumere che la democrazia è, in qualche modo, una conseguenza del consolidarsi degli istituti del costituzionalismo o, per lo meno, che essa sia profondamente radicata nelle ideologie del primo. Pertanto l'analisi si propone in primo luogo di riflettere sulle molteplici connessioni esistenti tra democrazia e stato di diritto, procedendo contemporaneamente in prospettiva storica, culturale, ideologica, così come sociale e ovviamente giuridica. Sul presupposto che i principi dello stato di diritto e della *rule of law* abbiano fatto la loro apparizione nella storia costituzionale inglese e nei sistemi politici occidentali molto tempo prima della democrazia. Quindi si procederà mettendo a tema il concetto di "democrazia costituzionale", quale strumento per la più chiara comprensione dei fondamenti giuspolitici della democrazia.

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The expression "Constitutional Roots of Democracy" implies that somehow, democracy is a consequence of constitutionalism or, at least, it is deeply grounded in its ideologies. Accordingly, we will, first, highlight the multiple existing connections between democracy and the rule of law, which may be exemplified in the historical, cultural and ideological perspectives, as well as social and, of course, legal ones. The first

point being that the rule of law made its appearance in English constitutional history and in western political systems far before democracy. We will then discuss the concept of “constitutional democracy”, as a tool for understanding the legal foundation of democracy.

CONSTITUTIONAL ROOTS OF DEMOCRACY

di *Francesco Bilancia*

SOMMARIO: 1. *Constitutionalism «ancient and modern»*; 2. *Rule of Law and Democracy in Medieval England*; 3. *Social and Legal Roots of Democracy*; 4. *Is Constitutional Democracy on the Wane?*²

1. Constitutionalism ancient and modern

When dealing with the relations between democracy, constitution and constitutionalism in previous works, I went through the discovery and definition of elements of what I will try to describe in the following as “*constitutional democracy*”.

When someone is asked to analyse and reflect on the topics underlined with the expression of “*Constitutional Roots of Democracy*”, it has to be implied that somehow *democracy* is a consequence of constitutionalism or, at least, deeply connected with its ideologies. This will be, then, our starting point.

It has to be therefore focused on the relationship between democracy and constitutionalism, highlighting there connections and discussing their interplay on different layers, such as the historical, cultural and ideological, social and, of course, legal ones. The first point being, as I will specify soon, that the rule of law as a distinguishing feature of constitutionalism made its appearance in western political systems far before democracy. Both in legal history as well as in political and legal thought.

As a matter of culture, as well as in classic legal thought, this issue was already present in the so-called Aristotelian constitution, i.e. *politeia*. For it was conceived in opposition to *democracy*, this last considered a degenerated system simply relied on People’s consent to a demagogic authority.

As it is well known, we have also to deal with the change of perspective on the reflections about democracy as far as we move through the historical evolution of its concept within the analysis of philosophers

and political thinkers. Democracy, as well as monarchy and aristocracy, along with the corresponding degenerated forms of demagogy, tyranny and oligarchy since Aristotele up to Machiavelli¹, have been analysed and treated as descriptive concepts, recalling the reality of any specific regime. In other words, those labels served essentially to identify each regime as if they were construed and working as natural-political phenomena. Adversely, the contemporary concept of democracy stands as legal phenomenon, whose rules and institutional tools both operate as prescriptive and normative². Once democracy was considered just one of the different political systems, to be chosen by the ruler if able to give legitimacy and efficiency to its government. Now, on the contrary, that seems to be a political regime prescribed by constitutional law chosen to shape and to limit the political power through rules and procedures. Accordingly, the action of government is formalised and developed through rules aiming to shape a proper institutional system, which keeps itself, and is maintained, within the limits of the constitution.

Along this analysis it will then be concluded, that the legitimization of a democratic authority in the contemporary constitutional dimension has to be founded just by the *form* and *shape* of the rule of law, as well as representative politics is nowadays conceived through the constraints and the limits of the Law.

It is the Law, it should be said Constitutional Law, what gives legitimacy to the authority of political institutions, and lead the people to accept its constraints. To let *the many* acquiesce to the will of the majority, although they could be not part of it, even in a representative democracy. Where, of course, the Will of the People is able to become the contents of Law only once conveyed through a formal proper legal procedure accepted by *all*, as prescribed by law. Thus, any outcome is well accepted, also by those dissenting, insofar as it is the natural result

¹ Through the fundamental thoughts of San Tommaso d'Aquino, see A. HARDING, *Medieval Law and the Foundations of the State*, Oxford UP, 2001, 1 ss.

² A. HARDING, *Medieval Law*, cit., 304 s., remind us as Thomas More, half of sixteenth century, started to «view the polity from the angle of the common welfare rather than of the government of princes».

of the law-making process. As John Stuart Mill puts it «the most important liberty of the nation, (is) that of being governed only by laws assented to by its elected representatives»³.

To start from the beginning, let us move back from the historical emergence of the rule of law principle.

As Charles Howard McIlwain⁴ puts it, «the most *ancient*, the most persistent, and the most lasting of the essentials of true constitutionalism», the real inheritance of constitutionalism is the «limitation of government by law...the law instead of will», in opposition to despotic government. In addition to this, the *modern* ideas of constitutionalism, born and matured after the revolutions (1689, 1776, 1789), brought the will of the people, their interests, through the active presence of their representatives, to become the contents of that law⁵. What's more, «until to this legal negative *potestas irritans* there was added a positive political control of government exercisable by the representatives of the people in Parliament; until legal responsibility was supplemented by political responsibility»⁶. Without neglecting the relevance of legal limits even against the «popular state», since even in a democratic regime,

³ J.S. MILL, *Considerations on Representative Government*, 1861, now by The Floating Press, 2009, 128 s. See, also, J. PLAMENATZ, in E.S. GRIFFITH, J. PLAMENATZ, J.R. PENNOCK, *Cultural Prerequisites to a successfully Functioning Democracy: A Symposium*, in *The American Political Science Review*, Vol. 50, 1/1956, 125, «To be a democrat is to believe that men should always, what ever the differences between them, be willing to make a settlement on two conditions: that all parties to a dispute have a right to put forward their demands and to have proper account taken of them in the settlement, and that they all (while this first condition holds) admit their duty to accept the settlement at least until it can be legally revised». Or, as J.R. PENNOCK, *ibidem*, 132, puts it, «Only when participants in a democratic organization of any kind feel assured that the rules will be adhered to are they likely to accept willingly decisions that affect their interests adversely. Democracy is like a game: unless the participants adhere to the rules it fails of its purpose and will soon break down completely».

⁴ C.H. MCILWAIN, *Constitutionalism Ancient and Modern*, Ithaca, N.Y., Cornell University Press, 1940, 10 ss., 22 s., 144.

⁵ *Id.*, 23, 145 s.

⁶ *Id.*, 136, 146.

«the problem of law *versus* will remains the most important of all practical problems»⁷. But we will come back to this point, to the fundamental importance of legal and constitutional limits to democratic power/will, further ahead⁸.

2. Rule of Law and Democracy in Medieval England

In his essay *The Medieval Roots of Democracy* Jørgen Møller⁹, points out in his opening remarks that «in the West *state-building and liberal constitutionalism preceded by centuries the development of political accountability*, which eventually – after much struggle and many setbacks – took the form of election-based democratisation»¹⁰. It is well known, indeed, that the rule of law in the form of legal constraints on king's power became a feature of Western Europe's monarchies, assuming the part, at the same time, of a limiting and a legitimating tool. In English medieval history this was already shaped through the presence of barons joined together in an embryonal Parliament, so that we can agree with Brian M. Downing when he writes that England «entered the eighteenth century with the medieval legacy of parliament»¹¹.

Opening his essay on *Magna Carta, the Rule of Law and the Reform of the Constitution* in a recently edited book on the *Modern Legacy*¹² of that document, Vernon Bogdanor starts by quoting this sentence read on *The Economist* in 2013, in an article on the so-called Arab Spring: «The imperfect democracy we enjoy in the West has its roots in the Middle Ages. The signing of the Magna Carta in 1215 by the English

⁷ ID., 149.

⁸ See, also, T.R.S. ALLAN, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, Oxford UP, 1993, 23 ss.

⁹ J. MØLLER, *The Medieval Roots of Democracy*, in *Journal of Democracy*, 26, n. 3/2015, 110 ss.; see also the commenting notes on this issue by F. FUKUYAMA, *The Importance of Equality*, *ibidem*, 124 ss.

¹⁰ J. MØLLER, 110 ss., as already F. FUKUYAMA, *The Origins of Political Order: From Prehuman Times to the French Revolution*, New York: Farrar, Straus and Giroux, 2011, emphasis added.

¹¹ B.M. DOWNING, *The Military Revolution and Political Change. Origins of Democracy and Autocracy in Early Modern Europe*, Princeton UP, 1992, 184.

¹² R. HAZELL, J. MELTON (ed.), *Magna Carta and its Modern Legacy*, Cambridge UP, 2015, 23.

King John can be held as a good starting point»¹³. Of course Bogdanor clarifies that «although Magna Carta is by no stretch of the imagination a democratic document, it does contain one fundamental principle, which resonates throughout British history: the principle that government must be subject by law»¹⁴. To conclude, on this point, that «Both Britain and the United States had governments subject to the law long before they became democracies...long before Britain was a democracy, government had been regulated by the rule of law»¹⁵.

So that Parliamentary institutions had already existed for a very long time when they started somehow to be representative, although not yet *democratic* in contemporary meaning as there was no «concept of universal citizenship rights»¹⁶ yet. As Møller puts it «The survival of corporatist structures – especially parliaments – meant that these institutions were available to be democratized when pressures to extend suffrage grew in the nineteenth and twentieth centuries»¹⁷. Created during the middle ages as evolutionary instruments of the rule of law¹⁸, these institutions in so far made the birth and growing up of democracy pos-

¹³ I do not think is even necessary to remind origin, historical meaning and political value of the Magna Carta of 1215 and its reissuing among centuries. See, among many, J.C. HOLT, *Magna Carta*, 3 ed., Cambridge UP, 2015, an amazing historical reconstruction also relevant for details, collected documents and report of historical relics.

¹⁴ R. HAZELL, J. MELTON (ed.), *Magna Carta*, cit., *ibidem*, and 28 s.

¹⁵ ID., 28, discussing the role of the Magna Carta as a constitutional document and its later influence on the development of «English fundamental laws», assuming as a starting point the *Agreements of the People drawn up in the years 1647 to 1653 by the Levellers*. But on these questions see the important contribution by D.J. GALLIGAN, C. PALMER, *Patterns of Constitutional Thought from Fortescue to Bentham*, in D.J. GALLIGAN, *Constitutions and the Classics*, Oxford UP, 2014, 1 ss., 21 ss.

¹⁶ R. HAZELL, J. MELTON (ed.), *Magna Carta*, cit., 111 s., «constitutionalism or at least state modernity (the rule of law, civil society, and political accountability) preceded democratization».

¹⁷ *Op.cit.*, 116.

¹⁸ Among which, since the 9th century in Europe, «legal procedures for the trial of disputes», due process and a slow but continuous development of a quasi-professional judiciary started to limit the King's power of doing arbitrary justice, A. HARDING, *Medieval Law*, cit., 31 ss., and 45 ss., 203 ss. for the consequent evolution of the administration of justice as transformation parallel to that of medieval social and political structure, with the appearance and consolidation of feudalism and the important changes in medieval economy and in the parliamentary institutions.

sible, as they were able to embodying social and political changes carried out by the progressive extension of the franchise, up to the contemporary universal suffrage.

Therefore, «Western Europe's unique medieval constitutionalism», meant as «institutions, procedures, and arrangements (like) parliaments, independent judiciary, rule of law (all) limiting the strength of the crown» can now be considered as the origins of what centuries later will become «liberal democracy»¹⁹. We must recognize indeed, that the democratization of political (state) institutions could occur thanks to the previous existence of a constitutional framework, of legal institutions, of rules and legal procedures, of limits to political sovereignty which, of course, are a legacy of medieval roots of the contemporary constitutional thoughts, of «the import of European medieval institutions»²⁰. Similarly, democratization could take place through the enlargement of the representative structure of institutions already existing by the time of the expansion of political equality. Where the former, the legal structure of the English government as mixed and shared government, could develop as the natural historical evolution of the previous medieval institutions, starting from the origins of the English Parliament²¹. While the latter took place as consequence of the revolutionary change of perspectives determined by the advent of equal citizenship as the founding principle of liberal democracies, whose roots were founded on the cultural transformations and the historical and political events occurred in England 1689, as then in American Colonies 1776, and France 1789. We could, then, conclude on this point that not only democracy has

¹⁹ B.M. DOWNING, cit., resp. 16, 9 s., 251 ss. Downing expressively writes of «Medieval Origins of Constitutional Government», 18 ss., 157 ss., 168 ss.

²⁰ B.M. DOWNING, cit., 5, 251 ss.

²¹ J.R. MADDICOTT, *The Origins of the English Parliament, 924-1327*, Oxford UP, 2010; M. LOUGHLIN, *Foundations of Public Law*, Oxford UP, 2010, spec. 17 ss., 243 ss., 317; A. HARDING, *Medieval Law*, cit., 255 ss., on the permanent conflicts along the middle ages Europe between King and Parliament in the evolution of the system of government, the succession to the Crown, the disputes on the law-making powers and on tension between Law and the King; *ibidem*, 306 ss., 328 ss., about the achievement of the statute law as the Law made by the King in Parliament, a constitutional rule which will have two potential dimensions: one to raise against common law and the judiciary by the King and his Law-making power; one, on the contrary, to raise against the King himself, «because laws made with the consent of Parliament *must rule and govern the state and not the prince after his own liberty and will*... Thus a princely state would become the *mixed state*», let us say up to Charles trial and execution, in 1649, *ibidem*, 334 s., 339 s.

constitutional roots and foundation, if «the constitutional nature of English government... dates back at least to the signing of Magna Carta»²², but also a revolutionary one²³.

We do not have here enough time and space to discuss another important issue about the constitutional roots of democracy, such as the role of *secularization* for constitutionalism, first, and democracy, eventually²⁴. As McIlwain wrote, «had there been no religious schism» (eighteen century) «...medieval constitutionalism, might well have been utterly swept away by the rising tide of national power concentrated under the new Renaissance Monarchy»²⁵. Assuming secularization as one of the most important features of Modernity, we should now turn to focus our attention, on its historical and analytical dimension respectively discussed in Gianbattista Vico²⁶, Max Weber and Carl Schmitt's works. The topic shall be excluded from the purposes of this work²⁷, though. While, for the time being, in discussing on the roots of democracy, it will be sufficient to keep in mind the fundamental transformation in west world thought, brought out by the secularization of politics and the new foundation of the concept of sovereignty occurred in the aftermath of the Thirty Years' War and the Peace of Westphalia. The aforementioned events stand as essential conditions for the arising of liberal legal orders possible, especially in those European countries where the rule of law was consolidated, and Parliaments already existed²⁸.

²² B.M. DOWNING, cit., 157, 26 ss.

²³ D.J. GALLIGAN, C. PALMER, *Patterns of Constitutional Thought*, cit., 1 ss.

²⁴ See, e.g., A. HARDING, *Medieval Law*, cit., 323 ss.

²⁵ C.H. MCILWAIN, cit., 95 s., but see all chapter V.

²⁶ M. SANNA, V. VITIELLO (a cura di), *La scienza nuova. Le tre edizioni del 1725, 1730 e 1744*, Bompiani, Milano, 2012.

²⁷ For an analysis of the consequences of secularization on political, social and economic layers see B.S. GREGORY, *The one or the many? Narrating and evaluating Western secularization*, in *Intellectual History Review*, vol. 27, n. 1/2017, 31 ss., also considering negative outcomes brought out by loss of common values and rise of fractionism.

²⁸ C. BOIX, *The Roots of Democracy*, in *Policy Review*, 135, feb-mar 2006, 18 s.

3. Social and Legal Roots of Democracy

The starting point of this analysis is founded on the assumption of the necessity for a constitutional legitimacy of political power, let us say of government, to give rise to a democratic regime. Quoting Seymour Martin Lipset «if a political system is not characterized by a value system allowing the peaceful “play” of power – the adherence by the “outs” to decisions made by the “ins” and the recognition by “ins” of the rights of the “outs” – there can be no stable democracy»²⁹. This achievement is possible thanks to the common identification of all citizens in a constitutional framework, where all cleavages and conflicts are openly legitimised and taken over; or at the opposite, by the exercise of violence by the rulers.

Mostly, for a general acceptance of governmental policies it is essential that government itself, is prevented from threatening the fundamental values and life conditions considered as part of the common existential dimension of any group. In other words, the certainty of law, as well as legal, economic and political stability need to be guaranteed. The following factors may represent indeed a challenge for democratic institutions, as well as for democracy itself. Groups or minorities related to values incompatible with those embodied in the constitutional system; deep-rooted tensions between political institutions and social structures; serious divide among fractions of the populace on religious, social, political or economic questions; relevant decay of effectiveness of the legal framework³⁰.

We will deal with this topic further on, while it is useful to recall that, what populism does on such cleavages is to fan the flames. Populism feeds strong critical pressures and struggles for dis-integration, and it is fed by them. Therefore, conflict becomes the place where to find immediate political consent irrespective of the costs of institutional instability. The very latest tool to manage the outcome then becoming the use of authoritative powers. With an in-out political game, stressing those ideological divides where no mediation is ever possible, there

²⁹ S.M.I. LIPSET, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, in *The American Political Science Review*, Vol. 53, No. 1 Mar., 1959, 71.

³⁰ *Id.*, 88 s., «in all democratic systems is (inherent) the constant threat that the conflicts among different groups which are the lifeblood of the system may crystallize to the point where societal disintegration is threatened».

could be no accommodation other than separatism and fractionism pushed to the extreme. With a strong emphasis on the “will of the people” and alienation from democracy.

This also «depends in large measure upon the ways in which the key issues which have historically divided the society have been resolved»³¹, as any society is culture, «any social system, is the end-result of a unique series of historical accidents»³². It should be now probably clear that we are here referring at the well-known Tocqueville’s analysis about social foundations of democracy, and the importance of intermediate associations and corps between state and citizens as legitimating tools of state institutions and politics in contemporary «mass democracy»³³.

Among the multilayer roots of democracy the cultural issue is, in that sense, also relevant. With no «responsible citizen participation in community life»³⁴, no respect for others and the institutions, no shared believe on the importance of a common social and legal framework to assure unity of the political community notwithstanding the many divides throughout society there could not be democratic stability. Democracy, People’s power, need citizens acting responsibly. Since Aristotle’s *Politeia* real democracy cannot be dealt with in its appropriate way without people’s maturity (this has also been reminded us many times by Denis Galligan). This implies respect for law and legal processes, for accepted rules, «being law-respecting citizens of democracy»³⁵.

For democracy being effective, citizens’ active participation to political and institutional life needs to be guaranteed³⁶. Constitutional protection of equality and freedoms are needed³⁷ too: as freedom of speech,

³¹ ID., 86.

³² A.R. RADCLIFFE-BROWN, *On the Concept of Function in Social Science*, in *American Anthropologist*, New Series, 37, part. 3, n. 1, 1935, 394 ss., 400 ss.

³³ *Democracy in America*, 1840, trans. by H. Reeve, vol. 2, London, 1862, 128 ss., 138 ss. See also Vol. 1, 298 ss., about the notorious question of the tyranny of the majority.

³⁴ E.S. GRIFFITH, *Preface*, in E.S. GRIFFITH, J. PLAMENATZ, J.R. PENNOCK, *Cultural Prerequisites to a Successfully Functioning Democracy: A Symposium*, cit., 101 ss.

³⁵ J. PLAMENATZ, in E.S. GRIFFITH, J. PLAMENATZ, J.R. PENNOCK, *Cultural Prerequisites*, cit., 121, 120, 125.

³⁶ D.J. GALLIGAN, C. PALMER, *Patterns of Constitutional Thought*, cit., 5.

³⁷ J.R. PENNOCK, *op.cit.*, 131 s.

press, political association and assembly. As well as secularity³⁸ in the institutional and legal system. All these features shall be intended as sources of pluralism, which has also to be granted through a plural institutional system as plural are supposed to be the social and political ones.

Once again the constitutional roots of democracy are at stake. Their meaning is different, though, since they are intended as legal rules shaping forms and limits, providing for «institutional structure and legal framework that organize democracy»³⁹. In this way, we come back to our starting point, speaking of «constitutional democracy» to better understand the importance of the legal foundation of democracy⁴⁰. The Italian Constitution speaks of people sovereignty exercised in the forms and within the limits of the Constitution (art. 1). This means through legal institutions and procedures designed in order to define forms and limits of political action⁴¹. Democracy, i.e. constitutional democracy, has to act *legally*, which means through a legal process. The rule of law has not to be considered overwhelmed by democracy, as the former is still intended as a limit to the political power. Which is also a legitimizing tool for political power, being the law, and the constitution, a limit to the will of the people, as once they were to the will of the king. What is worrying, moreover, is that the expression “will of the people” is frequently misused to hide “government’s power”. Which brings us back again to stress the relevance of constitutional constraints on democratic institutions too. Not surprisingly, similarly to what happened with reference to monarchies; both being legitimate regimes in the spirit of their different times.

That is why provisions like the aforementioned ones, have been considered a constant element of constitutions since the beginning of constitutional ideology and theories, whatever the historical and political origins of such constitutions. The topic of origins and meaning of the

³⁸ J.R. PENNOCK, *op.cit.*, 133 ss.

³⁹ R.H. PILDES, *The Legal Structure of Democracy*, in G.A. CALDEIRA, R.D. KELEMEN, K.E. WHITTINGTON (EDRS), *The Oxford Handbook of Law and Politics*, Oxford UP, 2008, 323.

⁴⁰ I already dealt with this topic in my previous work *The Constitutional Dimension of Democracy within a Democratic Society*, in *Italian Journal of Public Law (IJPL)*, 1/2019, 7 ss.

⁴¹ See the interesting study by D.J. GALLIGAN, *The Sovereignty Deficit of Modern Constitutions*, in *Oxford Journal of Legal Studies*, Vol. 33, 4/2013, 703 ss., investigating democracy through the analysis of «the place of the people in the constitutions of democratic nations».

relations between written constitutions and the constituent power have also been analysed and discussed in many scholarly writings⁴².

As well as the electoral system and its machinery should be conceived as part of the rule of law, although not at a constitutional level. Indeed, to be fairly consistent with the rule of law «an electoral system should treat similarly-situated political parties equally, so that each party receives the same percentage of legislative seats as the other would receive if it had received the same percentage of the vote»⁴³. This brings our analysis to another important topic⁴⁴ that is the fundamental legitimizing role in democracies played by minorities, whose acquiescence and consensus to decisions and laws set forth by the majority is the basic tool of constitutional effectiveness⁴⁵.

Another important issue on studies about democracy is, finally, economic development and income equality – or at least not intolerable inequality – as conditions for fulfilling democratic institutions stability⁴⁶. As «Generally speaking, democracy will be possible only if both winners and losers – that is, if all voters and their representatives – live under some relative equality of conditions». And «Economic development and industrialization go hand in hand with the expansion of education»⁴⁷, as social fragmentation brings with it the decay of basic con-

⁴² M. LOUGHLIN, N. WALKER (EDRS), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*, Oxford UP, 2007, on which the interesting review by D.J. GALLIGAN, *The Paradox of Constitutionalism or the Potential of Constitutional Theory?*, in *Oxford Journal of Legal Studies*, Vol. 28, n. 2/2008, 343 ss.; ID., *The Sovereignty Deficit*, cit., 707 ss., on the meaning of «the sovereignty of the people...the people as the ultimate political power» and its involvement in the constitution-making processes.

⁴³ R.H. PILDES, cit., 327, with an interesting analysis on gerrymandering. See also, on this topic, S. ISSACHAROFF, *Gerrymandering and Political cartels*, in *Harvard Law Review*, 2002, 593 ss.

⁴⁴ See, e.g., C. SCHMITT, *Legalität und Legitimität* (1932), it.tr., *Legalità e legittimità* (1932), in ID., *Le categorie del 'politico'*, Bologna, 1972, 234.

⁴⁵ See my references to Gaetano Salvemini and Hans Kelsen works in mine *The Constitutional Dimension of Democracy*, cit., 12.

⁴⁶ See, among many, S.M.I. LIPSET, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, cit., 69 ss.; C. BOIX, *The Roots of Democracy*, cit., 3 ss., 18 ss.

⁴⁷ «The factors of industrialization, urbanization, wealth, and education, are so closely interrelated as to form one common factor. And the factors subsumed under economic development carry with it the political correlate of democracy», S.M.I. LIPSET, cit., 78 ss.; C. BOIX, cit., 8, 9 ss.

ditions for democracy to last and grow in peace, stability and prosperity. But we cannot deal with this perspective of analysis here.

4. Is Constitutional Democracy on the Wane?

The last part of this work moves from what has been recognized as the contemporary crisis of democracy and democratic institutions⁴⁸. Where the role of the People has changed, moving back from being the basic reference of the political system, the real and concrete agent of the constitutional institutions of democracy, to a more limited function of tool for legitimacy of government's authority. Consent, simple acquiescence to government by the People, then, instead of their effective participation⁴⁹. As stated by John Stuart Mill, «representative institutions are of little value, and may be a mere instrument of tyranny or intrigue, when the generality of electors are not sufficiently interested in their own government to give their vote...or vote at the beck of someone who has control over them»⁵⁰.

In leaving governmental powers in the hands of someone who is able to grasp the acquiescence of passive citizens, outside any constitutional constraint, the People lose any qualifying relevant role for democracy, letting them being just an instrument of legitimation for a despotic power. Where, of course, «The passive type of character is favored by the government of one or a few the active self-helping type by that of the many»⁵¹, then a despotic government will always go in search of acquiescence without concrete and mature participation; as «Irresponsible rulers need the quiescence of the ruled more than they need any activity but that which they can compel»⁵². As reported by Mill «The

⁴⁸ See, e.g., M.A. GRABER, S. LEVINSON, M. TUSHNET (EDS), *Constitutional Democracy in Crisis?*, Oxford UP, 2018; T. GINSBURG, A. ZHUQ, *How to Save a Constitutional Democracy*, University of Chicago Press, 2018; and the interesting review of them both written by M. LOUGHLIN, *The Contemporary Crisis of Constitutional Democracy*, in *Oxford Journal of Legal Studies*, Vol. 39, n. 2/2019, 435 ss.

⁴⁹ J.S. MILL, *Considerations on Representative Government*, cit., for «the political machinery...needs, not their (the People, ndr) simple acquiescence, but their active participation», 11.

⁵⁰ ID., 15.

⁵¹ ID., 82.

⁵² ID., 82, 94.

power in society which has any tendency to convert itself into political power is not power quiescent, power merely passive, but active power»⁵³. Whether this power is on the side of the People itself or, on the contrary, on the opposite side of government acting not on behalf but somehow against the People or, at worse, threatening minorities and single individuals⁵⁴. What is relevant within democracy is not the People as a whole, but every citizen⁵⁵.

Whatever the possible reasons for the rise of populisms in contemporary democracies as those collected by Martin Loughlin as «factors that are hollowing out the established institutions of constitutional democracy»⁵⁶, what is here at stake is the changing conception of constitutional democracy, its «degradation». In Loughlin's words «what is now commonly labelled 'populism' is its antagonism to most varieties of constitutional democracy. Claiming to express the authentic voice of the people, populists are critical of constitutional devices that filter majority views through such institutional sieves as electoral colleges, unelected second chambers, expert commissions, judicial scrutiny mechanisms and transnational networks»⁵⁷.

Where these dynamics have been reinforced because as representative democracy and its institutions should have assured the fulfilment of the interests of the common people, important transformations on their outcomes have, on the opposite, determined the, always stronger, consolidation of «regime(s) captured by wealthy elites»⁵⁸. Systems that are «not...constitutional democracies»; those are «at best an oligarchy, at worst a plutocracy»⁵⁹. But no constitutional decay would have occurred if the protesting reaction to the establishment and the negative

⁵³ ID., 22.

⁵⁴ ID., 161, 168.

⁵⁵ J.S MILL, *op.cit.*, 69, 74 s., so eventually justifying the fundamental role of representative government 86 s., 107 ss., 135. See, also, D.J. GALLIGAN, *The Sovereignty Deficit*, cit., 714 ss.

⁵⁶ Globalization, massive migrations, unequal distribution of wealth and social chances divide at first, M. LOUGHLIN, *The Contemporary Crisis*, cit., 442 ss.

⁵⁷ *Ivi*, 444.

⁵⁸ ID., 445. See also the interesting thoughts set forth in historical perspective by J.P. McCORMICK, *People and Elites in Republican Constitutions, Traditional and Modern*, in M. LOUGHLIN, N. WALKER (EDRS), *The Paradox of Constitutionalism*, cit., 107 ss.

⁵⁹ M. LOUGHLIN, cit., 445.

popular attitudes against the institutional machinery and counter-majoritarian instruments of democratic systems had had no endorsement by political leaders. Although, eventually, political movements challenging the legitimacy of «the structures of constitutional democracy» are rising up all over the world, probably indicating «a crisis of liberalism rather than of democracy»⁶⁰. Which moves a different, even worse, challenge to constitutionalism, putting in the irresponsible hands of some politicians a business, really risky to handle.

As Denis Galligan puts it, the analysis of the constitutions should move from «...the role that (they) play in the social, economic, and political order» considering also «the historical formation and development of key constitutional concepts». Constitutions «essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented». His remarks now raise specific important questions: a) which concept and role of b) what kind of constitutions will be the achievements of politics in present times? How contemporary social and political issues driven by populist leaders will reshape the constitutional dimension of next tomorrow in an historical perspective?

⁶⁰ ID., 453.



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