

## Introduction

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Remembering that this year marks the golden anniversary of the publication of *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* in 1975, offers us a suitable occasion to examine our democracies and their permanent and seemingly perpetual crises. It would appear that the more democratic a country is, the more susceptible it becomes to pressures. It's worth noting that these pressures often come not from outside but from within. Moreover, it turns out that democracies die not at the hands of their antitheses but by themselves or rather through themselves. Even though we were accustomed to recognizing the tensions between constitutionalism and democracy, we characterized the relationship as symbiotic, to such a degree that the tendency was to assume they were constitutional democracies: where there is constitutionalism there is democracy and vice versa.

Thus, the different texts analyze the problems of our contemporary democratic and constitutional states of law, *i.e.*, constitutional democracies. This is based on the close relationship between constitutionalism and democracy, as well as recognizing existing tensions. On one hand, especially the problem of the omnipotence of the majority, which can give rise to a tyranny of the dominant majority—not necessarily numerical—over the minority or minorities. On the other hand, the problem generated by the counter-majoritarian attribution granted to supreme courts or constitutional tribunals to control through judicial means the constitutionality of acts

by bodies elected by popular vote, both from congress or parliament, and from the president of the Republic.

The contributions remind us of the classics of the division of powers from John Locke and Charles Montesquieu to the famous controversy between Hans Kelsen and Carl Schmitt about who should be the guardian or protector of the Constitution, and review contemporary literature. After some of the recent reforms to the Political Constitution of the United Mexican States, new questions will arise, including: Will it be enough to elect judges to respond to the counter-majoritarian objection? Will it be appropriate to eliminate the Autonomous Constitutional Bodies (OCAs) to reconcentrate power in the head of the executive? Will strong presidentialism return? Will democracy degenerate, either into demagoguery, populism, or plainly into its antithesis, *i.e.*, autocracy? Will populist tendencies continue, including punitive populism? Will populism mark a new era or will it be a mere stage or facet of democracy?

The different contributions to this discussion address these issues to a greater or lesser extent, and more specifically:

Roberto Gargarella, from the University of Buenos Aires (Argentina), in "Four readings on the constitutionalism-democracy relationship. In defense of the "conversation among equals"", examines the relationship between constitutionalism and democracy. To do this, he explores four readings to rethink and even resolve the old tension between both: 1) against democracy; 2) in favor of constitutionalism (or "for constitutional restoration"); 3) against constitutionalism; and 4) in favor of democracy (or "for democratic restoration"). After critically analyzing each of the alternatives, Gargarella advocates for the latter as the most plausible, corresponding to his defense of the "conversation among equals."

Next, Itzel Mayans Hermida, from the Mora Institute (Mexico), in "*Una conversación entre iguales* by Roberto Gargarella: critical comments to address the tension between constitutionalism and democracy", critically responds to Gargarella's proposal on this relationship. While she agrees with the diagnosis on the

need to strengthen deliberative democracy and its quality through the implementation of direct democracy mechanisms, she raises some doubts and reservations about the desirability of reconsidering the suitability and content of fundamental rights. This is not only because they are the result of historical citizen battles and as such important civic achievements, but because of the oppressive and even regressive implications this may have.

Gabriel Encinas, from FAU Erlangen-Nuremberg (Germany), who is now on a stay at Oxford University (United Kingdom), in "Legal reasoning under dialogic and procedural turns", returns to the question of whether democracy can be reconciled with judicial review of constitutionality, by contrasting contributions in the field of legal argumentation from both dialogic constitutionalism and the procedural turn, and even attempts to integrate both. Thus, he clearly identifies the problem with the central core of Jeremy Waldron's critique against judicial review of constitutionality as a counter-majoritarian mechanism. He reviews the reactions and responses offered, as well as their eventual reintegration, based on a critical reconstruction of these concepts to reinforce the possibility of democratic control.

In my contribution, *i.e.*, "Limited Democracy, Interpretation and Constitutional Supremacy in Hans Kelsen", I return to the problems of the constitutional and democratic state of law, with special attention to the constant pressure to which constitutional democracies are subjected, based on a review of the Viennese jurist's thinking. Although Kelsen advocates for a pure theory of law, he rejects autocracy and defends democracy. Likewise, he resists the idea of an unlimited democracy and adopts a limited form. This is based on the defense of the guarantee of the principle of constitutional supremacy and the need to control all acts of creation-application of law, through legal and constitutional interpretation.

Fernando Atria, from the University of Chile (Chile), in "The age of democracy, the age of populism", discusses the close correlation between democracy and the democratic institutions that support it and vice versa. He does this based on a realistic under-

standing of democracy, as defended by Kelsen himself in his *Essence and Value of Democracy*. With this, he suggests that there is an unexpected continuity between democratic theory and “populist” criticism. The provocation should lead us to question and even review the possibility or impossibility of democracy in our time. In other words, the obligatory question is: whether populism inaugurates an era in itself; or whether populism is merely another phase of democracy.

For his part, Alejandro Nava Tovar, from the Autonomous Metropolitan University-Azcapotzalco (Mexico), in “Towards the critique of punitive populism”, critically presents the main theses of the concept of punitive populism. In this regard, he recognizes that it is a complex phenomenon, which intersects criminal policy with politics, criminology, and even moralism in social networks. In his critical outline, both of the concept and of the legislative and penal measures typical of punitive populism, he also presents a normative proposal aimed at reducing its effects.

Francisco M. Mora Sifuentes, from the University of Guanajuato (Mexico), in “Judges as a State Gatekeepers? On Populism, Democracy and Rule of Law in Mexico”, critically analyzes the relationships between these concepts, based on the controversial reform to the Mexican Constitution, in judicial matters, published in the evening edition of the Official Gazette of the Federation (DOF), on September 15, 2024. This reform represents for him the triumph of populist rhetoric for two main reasons: on one hand, by removing all judges so that they are now elected by popular vote, it nullifies the judicial branch as an impartial and independent body and disrupts the principle of separation of powers; and, on the other hand, by establishing the Judicial Discipline Tribunal, it introduces a mechanism of political control, which conditions the actions of the judicial branch.

Finally, Ángeles Guzmán, from the Autonomous University of Nuevo León (Mexico), in “Challenges in guaranteeing human rights regarding the dissolution of the INAI”, critically analyzes another reform to the Mexican Constitution, in matters of organic

simplification, published in the evening edition of the DOF, on December 20, 2024. This reform extinguishes seven OCAs. Among them the National Institute of Transparency, Access to Information and Protection of Personal Data, better known as INAI. Thus, the text evaluates the impact on the institutional and technical autonomy necessary for the protection of human rights associated with information, such as access, transparency, and protection of personal data.

Earlier versions of the texts comprising the discussion were presented in different academic spaces, such as Special Workshop 104: "Is Democracy Under Pressure?", of the XXXI World Congress of the International Association for the Philosophy of Law and Social Philosophy (IVR) "The Rule of Law, Justice and the Future of Democracy", Seoul, South Korea, July 12, 2024. In the permanent seminar of PAPIIT Project IG300922 "The Problems of the Constitutional and Democratic State of Law" and even in a series of closed seminars, by invitation, during the first days of November 2024. In these, in addition to speakers, some people who were invited to discuss these participated, including: Alejandro Sahuí, from the Autonomous University of Campeche (Mexico); Oscar Ucha Bonilla, Autonomous Metropolitan University-Cuajimalpa (Mexico); and Ariadna Valdés Gómez, Universidad del Valle de México (Mexico).