

THE AUTONOMY OF NON-ELECTED PUBLIC BODIES AND THE NATURE OF POPULIST GOVERNMENTS

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The issue of autonomy of non-elected public bodies from political branches requires a brief account of how the principle of separation of powers was firstly combined with that of democracy. It is such historical background, rather than theoretical or logical premises, that explains how these principles melt together in constitutional democracies, as well as the challenges which autonomy of non-elected authorities are there currently meeting.

According to a Montesquieu's celebrated dictum, "There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals" (*Esprit des lois*, Book XI, Chap. VI). While referring to the risks of concentration of powers into the same body "whether of the nobles or of the people", Montesquieu relied on the ancient doctrine of the mixed government which Polybius had derived from the Roman Republic, where each branch was expected to represent a certain social class.

The American and the French Revolution dissolved this feature of the mixed government, denying whatever principle of dynastic legitimacy and preventing noblemen from being represented in parliament. Few decades later, being aware of such change, Tocqueville warned however that a government entirely composed of elected authorities would result in a 'tyranny of the majority', and hoped for balancing democracy with an 'aristocracy of talents and virtues' which could rely on its own merits rather than on right of birth. Aristocracy, he asserted, is 'more skilful in the science of the legislator than democracy can be', emphasizing that

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those who govern do not have ‘interests contrary to the mass of the governed’, since their virtues could then become ‘almost useless’ and the talents ‘fatal’ (de Tocqueville, A., *Democracy in America* (University of Chicago Press 2002)).

Since then, the issue was posed of how ‘aristocracies of talents and virtues’ could be inserted in a democratic system whenever interests of elected authorities counter those of citizens. The issue exhibited a broader scope than that concerning ‘the least dangerous branch’, as Alexander Hamilton had depicted the judiciary at the time of the US Constituent Assembly. It also regarded public goods whose achievement might be better pursued through the intervention of non-elected bodies different from courts.

Unlike the US, where the first independent agency was established for the sake of granting market competition in 1890 (Sherman Act), in Europe and in Latin America introduction of such bodies occurred only in the 20th century, and with greater difficulties.

In Western continental Europe, it was only in the aftermath of the totalitarian demise that the new constitutions of these countries fully recognized the democratic principle and, on the other hand, followed Tocqueville’s suggestion that an ‘aristocracy of talents and virtues’ could balance the ‘tyranny of the majority’. Not only independence of judges from the political branches was thus ensured, but constitutional review over legislation was also established with the aim of ensuring effective protection of fundamental rights. While remaining at the centre of democratic life, Parliament was no more conceived as the exclusive, or even the highest, institution capable of granting fundamental rights. To the contrary, these rights should bind not only administrative bodies and the judiciary, but also statutory law. With the establishment of constitutional review over legislation, the question was raised as to the courts’ legitimacy in striking down the product of democratically elected authorities. However, the Tocquevillian ‘tyranny of the majority’ raises no less of a question of legitimacy than the Alexander Bickel’s ‘counter-majoritarian difficulty’. The point is that both these questions translate into diverging interpretations of the power’s structural divide as settled in the constitution, and of the conflicting conceptions of power that the constitution embodies. On functional grounds, conflicts in which the rule of law stands in opposition to democracy appear thus physiological within the framework of democratic constitutions, to the extent that these recognize the rights of citizens outside the realm of politics, and in the meanwhile give citizens the chance to maintain the legitimacy of such realm through the exertion of their own political rights. The spheres of democracy and of the rule of law

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are structurally divided in terms of power because such division is reputed instrumental to the exertion of citizens' fundamental rights.

A new balance was thus reached in constitutional democracies among public authorities. It was certainly more sophisticated and demanding than that imagined by Montesquieu or Madison, although it pursued the same end of limiting an excessive concentration of powers.

We experiment everywhere that threats to constitutional democracy may lurk outside the perimeter of what has traditionally been labelled as 'violation of civil liberties'. Unlike such acts as closing down a newspaper, phenomena such as governing parties virtually monopolizing access to the media through patronage deals or proxy arrangements, or state/party/business ties creating vast resource disparities between incumbents and opposition, may not be viewed as civil liberties violations. We should be aware that "the use of political power to gain access to other goods is a tyrannical use. Thus, an old description of tyranny is generalized: princes become tyrants, according to medieval writers, when they seize the property or invade the family of their subjects" (M. Walzer). Nowadays, the use of political power to gain access to other goods constitutes an infringement of citizens' political rights. Since their exercise is necessary for free elections, protective devices preventing such infringements need to be included among the attributes of democracy.

The worldwide rise of independent authorities different from courts is believed to respond to such need. These authorities are indeed called to protect certain public goods, be it free market competition, financial stability, fair access to public services or to the media, or the genuine choice of electors, from undue interventions of elected authorities. We can easily hear a Tocquevillian echo about the importance that those who govern do not have 'interests contrary to the mass of the governed', since their virtues could then become 'almost useless' and their talents 'fatal'.

In a different reading, the diffusion of independent authorities is due to the fact that, when the problems faced by society require long-term solutions, politicians have few incentives to develop policies the success of which is likely to come after the next elections (G.D.Majone). Delegation of certain policies to central banks or independent authorities amounts here to a transfer of powers to decision-makers removed from election returns, and, at the same time, better equipped than politicians to act on the basis of expertise. Rather than on the presumption, lying at the core of the rule of law, that unrestricted majorities would infringe minorities' and citizens' rights, the legitimacy of independent authorities appears here founded on functional reasons, namely on pursuing efficiency-oriented policies which electorally accountable branches of government are

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unable to deal with. Given the high complexity of contemporary government, political rulers are unlikely to be provided with the necessary talents and virtues in every field, which technically equipped members are instead expected to ensure within single *ad hoc* bodies. The legitimacy of independent authorities might then rest on their capacity of pursuing certain public goods better than elected authorities.

These thesis, that might partly be combined, are however challenged by the accountability issue. Definitely, independent bodies are subject to many other forms of accountability and derive their legitimacy from other sources than the electoral process. All these mechanisms serve specific goals and no alternative source of legitimacy is sufficiently comparable to political accountability to replace it entirely, even though they all play an important complementary role. The lack of democratic legitimacy, or ‘counter-majoritarian difficulty’, is the Achille’s heel of independent authorities even more than of constitutional courts.

To what extent, then, the lack of democratic legitimacy overrides the arguments that independent bodies are more capable than the elected ones in pursuing certain public goods and/or concur in avoiding concentration of power in the hands of the latter? In constitutional terms, it could be argued, public goods are goods that should be achieved in the interest of the governed. And, once demonstrated that these goods are better achieved by independent bodies than by elected authorities, there should be sufficient ground for concluding that the former deserve to be preserved, even if they are non elected.

The issue cannot however be settled only on constitutional grounds, nor within a dialogue between scholars and public officials. It requires a broader understanding, that necessarily involves the public opinion. Here comes the major difficulty, both because of the technical language adopted by the independent or supervisory authorities, and because of their structural remoteness from the public. Furthermore, the simplified language of the media is far from contributing to a real comprehension of the issues at stake. Finally, I have not mentioned yet ‘the elephant in the room’ of our discourse, namely the populist wave which is affecting constitutional democracies worldwide.

In the last decades, the rise of populist leaders and parties has occurred not only in countries affected by the ‘third wave of democratization’ (S.Eisenstadt) but also in those characterized by longstanding democratic traditions. Once in charge, populist leaders rely solely on the “will of the people” to justify their claims to be upholding democracy, without observing (and, indeed, sometimes manipulating) the other principles

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and institutional devices deemed necessary for establishing or maintaining democracy.

During the Cold War, the expectation was that democratic countries would be threatened by authoritarian regimes, i.e. from the outside. Instead, with the worldwide spread of democracy following the fall of the Berlin wall, threats to democracy are now appearing from within democratic countries. These threats do not simply consist in the rise of populist leaders and in the increasing concentration of media ownership. A greater cause for concern is the fact that both these phenomena tend to be justified with arguments relying on constitutional principles themselves. Concentration of media power is e.g. justified on grounds of economic freedom, regardless of whether it damages freedom of information. Populist leaders also tend to misrepresent parliamentary procedures or the independence of the judiciary, and to claim that they themselves are above other powers because they have been legitimised by the will of the people.

In the practice, whenever they win the elections, populists adopt a winner takes-all approach that is at odds with the premises of constitutional democracy. And the popular reaction to such approach is usually weak, or at least weaker than advocates of constitutional democracy may expect.

Unsurprisingly, independent authorities are under attack as well. In the populist narrative, the power of these authorities is substantially illegitimate on the ground that they are not elected by the people. And, whenever populists win the elections, be it parliamentary or presidential, they tend to render irrelevant the functions of independent or supervisory authorities, or to appoint new members who are prone to their commands (similarly to the court packing plan), if not to dismantle altogether those bodies that might counter their wishes.

So far, I attempted to demonstrate that the establishment of non elected authorities aimed at pursuing certain public goods can be justified in constitutional terms to the extent that such authorities prove to be more adequate than the political branches in pursuing those goods. Such way of legitimising the role of independent or supervisory authorities rests on the presumption that in constitutional democracies it is citizens' rights and the values attached to citizenship, such as democracy, dignity, equality, and liberty, that are paramount. Accordingly, the functions assigned to public authorities depend on their capability of granting citizens' fundamental rights and/or of pursuing certain public goods, rather on whether public authorities are popularly elected.

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The populist wave, I added, is likely to threaten such assessment, not only because of the winner take-all approach which populist governments tend to adopt, but also because, in spite of their obsessive appeal to the people's will, they discredit among the people the values that are meant to ensure the priority of citizens' needs over those of power in a constitutional democracy.

It is worth adding that the scope of the populist challenge varies according *inter alia* to the non elected authority against which it is addressed. The closer are the tasks of such authority to the very functioning of democracy, the broader it becomes the scope of the populist challenge. Given these premises, threats on independence of electoral authorities represent an utmost danger for the very essence of democracy.

Although, in democratic countries, not always electoral management is conferred to independent authorities, their establishment always reveals a pressing need to entrust an impartial body, rather than government's officials, with the function of monitoring compliance with electoral law. Conversely, abolition of an electoral authority whose impartiality is widely acknowledged, or curtailment of its functions, reflects clearly the intention of concentrating power in the hands of the President or of the majority.

In such cases, attention should be driven on the value which the electors themselves are used to attribute to their choice. The greater they expect their genuine choice to be respected from public authorities, the more they should feel attached to the need for granting such choice through the intervention of independent electoral bodies, and therefore react against government's manoeuvres aimed at abolishing these bodies or at curtailing their functions. However, these popular feelings are far from frequent in many national contexts. It is rather public disaffection toward democratic procedures that prevails.

Awareness of the issue's importance emerges from the European Conferences of Electoral Management Bodies, annually co-organised by the Venice Commission and local EMBs in different European countries, the next one of which will be held in Bratislava on June 27-28. The EMB Conferences' primary aim is to pool and share knowledge and expertise on international standards, domestic legislation and good practice in the electoral field in general. Interestingly, the conclusions of the last EMB Conference, held in Oslo on April 19-20 2018, state *inter alia* that "In recent years the role of social media in elections has considerably increased; social media represent a powerful tool of communication and exchanges. However, the legal framework regulating media coverage of elections was not designed for social media and needs to be addressed. Misinformation, disinformation and "fake news" during electoral cam-

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paigns are a major challenge for democratic elections and compromise the level playing field amongst political contestants. Countering them, however, should not be at the expense of freedom of expression. Data-driven electoral campaigning on social media, based on segmentation and profiling of users, is a growing phenomenon which should be better regulated, in order to ensure transparency and data protection, lest public trust and a level playing field be compromised”.

According to a recent Report of the Electoral Integrity Project, “There is widespread concern in many countries about low or falling turnout, public disaffection, party polarization, and the failure of elections to ensure legitimate outcomes. Electoral malpractices continue to undermine contests around the world, from overt cases of violence and intimidation to disinformation campaigns, cybersecurity threats, barriers to voting, and the under-representation of women and minority candidates.” The 2018 Italian elections are taken as an example of how “Despite high quality elections overall, politicization of media regulation, lack of media diversity, and harsh libel laws may undermine the ability of Italian citizens’ to make informed political choices, particularly as the problems associated with fake news and misinformation grow more severe”.

However, these features are not typical of a single country. A striking contradiction emerges particularly where governments claiming to act in the people’s name put under threat the independence of electoral authorities, notwithstanding these are reputed to maintain the genuineness of the electors’ choices, and therefore of the people *qua* electorate. While opposing a vague and fictitious concept, ‘the people’, to the constitutionally organized people *qua* electorate, populism is clearly at odds with democracy. Why, then, it seems to meet so frequently with success among the public? A key factor of that success is due to the parallel growth of disinformation campaigns and distorted media messages, that poison most contemporary democracies. It is the connection between the populist wave and the increasing distortions of information that constitutes the greatest danger for the very maintenance of democracy. Awareness of such danger is the first step for gathering the efforts of those who believe that democracy’s maintenance goes hand in hand with respect for the rule of law, including the legal guarantees of transparent and credible election processes.