

## Talks from the World Law Congress – Democracy and Rule of Law: Two Sides of the Same Coin



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### Reasons of the Democratic Backsliding

Since the end of the Second World War, democracy began to be understood as the only form of power compatible with human dignity. Later, after the fall of the Berlin wall and the decline of dictatorships in Latin America, democracy seemed to be the only possible political system. It is true that then, as now, the meaning of democracy was under discussion. In fact, it can be understood as a decision-making process merely formal or, differently, it can also require other substantive exigencies linked to equality and social justice. However, both visions of democracy share common elements: they acknowledge that there is no democracy if popular sovereignty is not recognized, if the right to political participation is not attributed to citizens and if political pluralism does not exist.

The problem is that this type of democracy, which was common to all countries of the western orbit, is now receding. To analyze this problem in depth is not possible in these few pages; Perhaps it

is enough to quote that, according to the *Democracy Index* elaborated by the Intelligence Unit of *The Economist*, 2019 was “a year of democratic setbacks and popular protests”: the average global score for democracy was the worst since the Index was first produced in 2006 (Intelligence Unit 2020, p. 4).

This contribution has two aims. Firstly, it analyses if one of the reasons for the democratic backsliding is that the interdependency which exists between the three descriptors that qualify the contemporary constitutional state (social, democratic, and under the rule of law) has not been sufficiently taken into sufficient account. Secondly, it proposes that, that perhaps the only way to overcome the crisis is to underline the relationships between these characteristics.

It is clear the necessity of improving the link between democracy and welfare state and to restore some social benefits that suffered severe cuts during the economic crisis that began in 2007. Moreover, the heavy impact of COVID-19 on the most vulnerable segments of the population increases the urgency of new social aids and services from the public powers. However, in this historical moment, it is vital to stress a connexion that some political discourses seem to ignore: the one that exists between democracy and the rule of law. As it will be analyzed in the next lines, the links between them are so close that they should be seen as two faces of the same coin.

## Democracy as an Exigency of the Rule of Law

Nowadays, democracy is an essential requirement of the rule of law. Since the end of the Second World War, the merely formal vision of the rule of law has been overcome. Now, to declare the submission of citizens and public powers to the laws of the parliament is not enough, because laws can be unjust and can violate minorities' rights. Contemporary constitutions follow a thicker view of the rule of law. Not only do they insist that laws be applied equally to citizens and public powers and that independent judges ensure their enforcement, but, currently the rule of law also demands that laws be elaborated according to democratic proceedings and with respect for fundamental rights (García Pelayo 2009, pp. 3027–3039).

There are many examples that demonstrate that the democratic vision of the rule of law is an integral part of the common constitutional heritage. One of the most outstanding is the *Report on the Rule of Law* adopted by the Venice Commission in 2011. The document recognizes that is not easy to find a common definition of the rule of law because there are different systems and traditions, such as the German *Rechtsstaat* and the French *Etat de Droit*. However, the *Report* concludes that a consensus can now be found for the necessary elements of the rule of law, elements which are not only formal but also substantial or material. In fact, legality requires a transparent, accountable, and democratic process for enacting the law. Furthermore, the law must respect human rights, non-discrimination, and equality (Venice Commission 2011, p. 9).

New forms of authoritarianism are arising on both sides of the Atlantic. Even in deep-rooted democracies, the pandemic generated by COVID-19 is increasing the power of governments at the expense of parliaments, and fundamental rights (such as freedom of movement and assembly) are suffering. Perhaps, the neglect of the elements of the democratic concept of the rule of law has facilitated the expansion of these phenomena. Therefore, the best way to deter these tendencies

is to insist on their importance and to demand compliance.

## Rule of Law as an Exigency of Democracy

The other side of the coin that was mentioned at the end of the first paragraph of these pages is a democracy, which only exists when there is a rule of law. In our time, popular sovereignty, political participation, and pluralism are still necessary elements of democracy, but they are not enough. Democracy also demands compliance with the laws that we have given ourselves.

Democratic law is not an external limit that constrains the formation of the will of the people. On the contrary, the only democratic will is the one that is created, acts, and respects the law.

First of all, it must be underlined that the very democratic idea of the people is a creation of the law. Beyond the margins of the law, there are many social groups that can be envisioned in different ways. For example, we can speak of the population if we simply count the inhabitants of a certain territory; moreover, we can speak of nations if we consider some common characters that unify social groups, such as culture, language, or history. However, the people are much more than this. In a democratic state, the people are composed of individuals who enjoy a set of rights and duties before the public power and other citizens; this status forms precisely what is defined as citizenship, which is a creation of the law (Biglino 2018, pp. 61–64).

Secondly, the law establishes the way in which people make decisions. In contemporary democracies, the people act directly, via referendum, or thorough representatives. Those proceedings are legitimate only when the democratic legislator has previously established who votes, how to vote, and on what to vote. In short, only the law guarantees that the popular will has been formed and expressed in a transparent and objective manner. Only full compliance with the law legitimates the popular decision (Venice Commission 2002, pp. 24–30).

Finally, the law delimits the content of the popular will. In fact, the supreme law of the

land, that is, the constitution, not only restricts the action of the public powers but also the decisions that can be taken by the people. It is true that some political parties or social sectors may not agree anymore with certain constitutional provisions because they consider that these norms do not align with new social demands. This dissent is fully legitimate in pluralistic systems because it is inherent to freedom of expression. However, in order to change these constitutional norms, the people must amend the constitution, following the proceedings established by the constitution itself.

Until recently, these principles, which are essential to the rule of law and to the idea of democracy, seemed to be well established. Nowadays, they are challenged by populism. There are many forms of populism, but all of them share a common element: the charismatic leader appeals to the popular will, not always expressed through elections, to legitimate his own decisions. This kind of behavior forgets that democracy is not only to vote, but to vote in the forms prescribed by law and respecting the limits established by the constitution, by European law, and by international treaties on human rights.

One last remark to end these lines: The crisis of democracy must be faced by the decision-making institutions and by the political parties which support them. The role of lawyers is quite limited in comparison because they do not have the power of decision. However, they can analyze the fabric of reality, identify its threads, and, when necessary, tie up its loose ends.

## Cross-References

- [Constitution, Interpretation](#)
- [Constitutional Amendments, Constitutionality](#)
- [Democracy and Rule of Law](#)
- [Ideologies of Populism: History, Evolution, and Present Constitutional Implications](#)
- [Rule of Law: Concept](#)

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## Essential Reading

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