Democracy and the Western Legal Tradition

Mauro Bussani
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Introduction

The availability of democracy is usually presented as a prerequisite for any evaluation, be it political, economic, or legal, of any country, and as an imperative to pursue (with or without Western help) for all societies that do not enjoy it.

Here it cannot be discussed how political scientists define democracy and the bases for those definitions, nor can it be debated whether the ‘just’ is inherent in notions of democracy.1 What is evident in the global arena, however, is that besides those who consider the non-democratic societies to be pathological, there are those who view our democracies as local expressions of a particular culture and those who, for given places and ages, discuss the merits of different forms of government, including those of an autocratic or epistocratic nature.2 Nowadays the latter views recur in particular in and about east Asian and Islamic societies.3 It is difficult to challenge any of these perspectives without being dogmatic and in a way that respects the cultural differences of the ‘others’. Yet one can start by noting two points. First, entrusting power to a wise or an autocratic elite presupposes agreement about the ‘wisdom’ and the qualities of these elites, which, in turn, requires a useful synthesis of this wide-ranging debate can be found in the contributions collected in R. Dowding, R. E. Goodin, and C. Pateman (eds.), Justice and Democracy (Cambridge University Press, 2004).

1 A useful synthesis of this wide-ranging debate can be found in the contributions collected in R. Dowding, R. E. Goodin, and C. Pateman (eds.), Justice and Democracy (Cambridge University Press, 2004).


3 For the debate and for further, essential, references, see M. Bussani, Il Diritto dell'Ocidente: Geopolitica delle regie globali (Turin: Einaudi, 2010), 149 ff., 185 ff.

social body generally sharing homogeneous values. These are requirements that one cannot take for granted for the long term, particularly today, in the majority of known societies. Second, in non-democratic forms of government, there are no guarantees of the rulers’ culture and preferences remaining in step with the changing needs of the society. The lack of adaptation to societal needs, on the one hand, does not deter authoritarian shifts aimed at imposing the ruler’s views on the social body, and, on the other hand, makes it certain that its inner flexibility and receptiveness to change make democracy preferable ‘over time’.4 This ought to be considered as crucial, and also biologically inevitable, if each generation, and each of us, accepts that it answers to the next and subsequent generations like a tenant to the landlord.

But the above is just a part of the argument, even for our purposes. The desirability of democracy is one thing; its internal structure is another. A fully developed discussion of non-democratic systems, and the Western aspiration to transform them, must take into account the basic elements of our democratic societies, and the very threads from which the fabric of our democracy is woven. Doing so will unveil arguments that go in an opposite direction to that pursued by both the detractors of democracy and those who believe that democracy is an easily exportable commodity. This requires us, however, to draw on the reservoir of knowledge made available by comparative law and to investigate the grounds on which mainstream arguments thrive today. This requirement is critical, even though it is usually met through analyses which are (attractive, but from our perspective) relevant only to a certain extent.

Law and democracy

Let us start by asking about the foundations, or, better, the prerequisites, which – from a legal point of view – have made it possible to establish and to develop our democracies.

It would be naive to indulge in the idea that democracy is only located on the level of the (changeable) constitutional forms. Evidence of the limited relevance, within our specific analysis, of any discussion of the centrality of constitutional frameworks, may come straightforwardly from the comparison with Islamic countries – that is, a kind of society criticized by Westerners for their lack of democracy. In the West, as well as in the Islamic world, there is invariably a level of ‘constitutional’ legality which is higher than the will of each single parliament or government. When these bodies, in Islamic societies as well as in the West, issue any law, they do so in their capacity as organs bound by ‘superior’ laws, principles, and values, those embedded, respectively, in our constitutions and in the Shari’a. The crucial point is represented by the content and, even more, by the way in which the superior constitutional structure operates, which in the West is the way(s) we know, and ‘there’ is given by the complex interaction between the Shari’a and the state-posed law, the siyāsa. This is why much more than just their mere existence, or their written provisions, makes our constitutions not just a ‘sacred’ text, but an instrument for political battles transferred to legal grounds and then disputed or disputable before the (secular) courts.5

Going back to our question, an intuitive answer invokes the models for the selection of the rulers. This answer is incontestable, but it is not sufficient in itself: the ways in which rulers are selected are quite variable, and may overlap with those in force in non-democratic societies. This is why one has to turn to more consistent legal foundations. The search for the latter brings to the surface the great principles of equality and of freedom of expression. But in addition to, and earlier than, these principles, history has assigned a prominent role to the (bundle of phenomena which in the long run have produced) free accessibility to, and effective protection of, property rights, which have proved to be a reservoir of duties, of rights, and, especially, of communicative resources. These resources, over time – and with the recurring risks of abuses, at the expense of non-owners or small-owners – have been able to direct to the individual, and then radiate from her, values and claims which ended up shaping the individual’s legal subjectivity towards other members of society, as well as towards the public powers themselves. In fact, it is not by chance that the protection of property rights has historically been tied to the idea according to which the rights belong to the individual as such, and not because of her membership of a family, a tribe, or a religious, ethnic, or political group. The recognition that rights and duties belong to the individual is further connected with the principle that responsibility is personal, and not to be ascribed to a group. And the latter principle is mirrored by the acknowledgement of the intangibility of the private sphere of each individual, whose protection, in turn, developed along the lines of that afforded to property rights.6

As to the question about the prerequisites of democracy, a second answer is closely linked to the above. Looking at the way in which it is understood in the West, democracy reveals itself as a complex of rights and duties. Legal systems, as implemented by the law-applying institutions, guarantee that these rights and duties are respected on a day-to-day basis, both by individuals and by public institutions. It is the latter guarantee which is a fundamental feature of our democracies. In particular, the very fact that public institutions, too, have become (over time) subject to the control of the law enables the democratic circle to open and close around individual persons. In order to discover, evaluate, and develop their own preferences, and make their own political choices, individuals need the ‘communicative’ resources which, in our societies, are provided by the common awareness that every person is able effectively to defend his or her rights against anybody.7

18.3 Specialism and secularism (popes and kings, millers and fullers)

Another essential clue to the understanding of ‘our’ democracies is that the Western mindset assigns to justice and the law an autonomous space, 6 A. Gambaro and R. Sacco, Sistemi giuridici comparati, 2nd edn (Turin: Utet, 2002), 58.
beyond the areas of the purely political, the purely moral, or the purely religious. An autonomy which has over the time shown a parallel dynamism on both sides of the Channel, experiencing cyclical restrictions and erosions, but which has always trusted history with the role of ridiculing any attempt at its definitive suppression. Justice and law, in turn, are not meant as metaphysical perspectives, or conceptual nomenclatures, written texts, prisons, and taxes, but as widespread mentality, deep-rooted tradition, a daily vision of what legality is, and by whom and in which ways it is to be administered.9

This social and cultural framework is another fundamental prerequisite among those with which history entrusted us, for each of our democracies. Unequivocally, from the twelfth century, one can grasp the autonomy10 of the legal space in a bi-univocal correspondence with the widespread conviction that the administration of the law must be assigned to a class not of theologians or ideologists, but of technocrats - the jurists. These are professionals who carry out their activities on the basis of a specialist knowledge, which is cultivated by the professionals themselves, and perceived by lay persons as independent from the incumbent ruler, be they a politician, a king, or a religious leader. Legal culture's specialization and secularism, acting together as a filter to the will of God and king, have represented the fertile ground able to receive, grow and spread over all our societies, when history has made it possible, the seeds of liberty and of equality - as prerogatives that belong to the individual and not to any other power, and that are best protected not by the sovereign or the Church, but by the law.

9 Individually, almost none of these factors was unique to the West. The combination of them was, however, and this is what gave the West its distinctive quality. S. P. Huntington, The Clash of Civilizations and the Remaking of the World Order (New York: Simon & Schuster, 1996), 72. See also U. Mattei, 'Why the Wind Changed: Intellectual Leadership in Western Law', (1994) 42 American Journal of Comparative Law 195.
10 A notion which, clearly, 'does not mean neutrality of the law nor subtracting from the theater of history: in a very human reality like the legal one neutral areas are indeed, if not unthinkable, at least extremely limited. Autonomy is therefore a relative notion... and it means only that the law is not the expression of this or of that regime or of the forces which refer to it.' P. Grossi, L'ordine giuridico medievale (Bari and Rome: Laterza, 1996), 51 (author's translation). On the alternating fortunes, and the different configurations, that the autonomy met with over the centuries, see, e.g., Berman, Law and Revolution, 49 ff.; C. van Caenegem, An Historical Introduction to Western Constitutional Law (Cambridge University Press, 1995), 34 ff.

None of the above results would have been possible if the forces which guided the evolutions of our history, including economic history, had not needed the law as we know it, and had not promoted its development.11 Nor would it have been possible if another motor of our civilization, Western Christianity, had not supported, since the time of Pope Gregory VII12 (with some lapses to be sure), the evangeline rule which encourages respect towards Caesar.13 But all these circumstances would not have been sufficient had the legal technocracy not been able to shape claims and duties independently from the crown and the cloth. The legal technocracy acted as an effective 'insulating' device with respect to the pressures of political and religious powers. This contributed to building and spreading that frame of mind, that baggage of cultural reflexes, which over time allowed Magna Carta, the Golden Bull of King Andrew II,14 King Podiebrad,15 and, later, the Illuminists, British parliamentarians, Madison and Co. (and all other efforts to minimize the impact on our societies of the arbitrariness of rulers), to make legitimacy prevail over sovereignty of any nature.

Specialism and professionalism are also significant in another way. They have become organizational factors of Western legal systems, which happened from 'the bottom' as well as from 'the top' of our societies. First, because the day-to-day perception of what is technically 'lawful' slowly soaked up the concept of what is abstractly 'just' - as was already the case for the millers of Potsdam and, before, for the artisans of Figeac, the fullers of Gent and all the other initiators of the proto-union struggles of the
1200s and 1300s. Second, because on the one hand, specialized legal knowledge became indispensable for describing the legal system, and, on the other, the very functioning of the legal system depended on the work and the culture of the secular jurists – not of the politicians or the ministers of religion.

This latter perspective also accounts for the variety of institutional structures, categories, and nomenclatures one can find in Western societies themselves. Suffice it to think of the distances between monarchies and republics; between systems which are markedly free-market oriented and those which aim at ‘social market’ models; between common law countries and those whose tradition is ‘romanistic’ or ‘civilian’. Paradoxically, all these differences are possible precisely because in the Western tradition the autonomy of the legal dimension from fleeting political choices has affirmed itself as a fundamental and widespread value. Thus the law’s autonomous evolution has been able to continue irrespective of the similarities and the divergences which history brought to our societies, our political institutions, and our economies.17

18.4 Law between ‘purity’ and totalitarianisms

At the basis of our interpretation of the relationships between democracy and the law there is thus a sort of circularity between individual rights and freedom, secularism and professionalism, and communicative resources and widespread mindsets.

Nobody can fail to acknowledge (as has already been pointed out) that each of the results we are talking about is both the seed and the fruit of a combination of economic, religious, and social factors. Nor can one overlook the fact that the above account fits closely the evolution of private law – which plays the role of effective and authentic connective tissue of the fundamental relationships ‘with’ goods, and ‘between’ the individuals.18

In matters such as administrative or constitutional law the influence of political factors can certainly be much more important. However, it is worth stressing that the law is – everywhere – the social infrastructure of public and private conduits; that in our democracies the law is also the fundamental ground for the exercise of power; and therefore that, in the West, the ruler in office can be legitimately chosen, and function, only according to the law. Thus it is this technical and cultural framework that sets the background for any discussion of the ‘political’ dimension of the law.

The above also explains how misleading – in our perspective – the positivistic debate (this too, et pour cause, an all-Western debate) about the abstract ‘purity’ of the law having its own purpose in itself turns out to be. Purity arguments, on the one hand, deny the obvious – the law is positioned everywhere in a dynamically working one-to-one relationship with the civilization to whose shaping it contributes and of which it is an expression. On the other hand, and consequently, these arguments also prove to be incapable of realizing how often the law is enmeshed in sets of values, whose aims are only apparently neutral.19 Those could be ‘natural’, moral, or religious values20 (for the transcendentalism of which the most evident problem – on top of the fact that these same values can already be expressed differently when crossing a border – is, even in the West, the rate of sharing in societies whose members are less and less ready to gather the wide gamut of their life choices under a compact vision of transcendence21). Or they could be the values which sustain a ‘customary’ law, whose pace of development allows at best keeping the status quo. This is why those who remind us that the battle of values in any society is also fought on the field of the law are not mistaken; nor are they wrong when they insist that legal systems in their

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generality are 'contested sites of meaning, where dominant ideas and values provide the framework for contestation and for advancing alternative understandings and practices.' But what change, across time and places – and it is a critical fact – are the different legal cultures widespread in societies. What changes is the capacity of the jurists, secular or otherwise, to contribute to, or resist, the twists and turns imposed on the rules by those who govern the society. In the West, unlike anywhere else, this capacity was consolidated through the means of a secular technocracy, becoming the main characteristic of the relationships between power and the individual, and constituting a firm support for the role that the law has been able to play so durably in our societies.

Among the many possible examples, there is one which is particularly worth mentioning here. Without the autonomy of the law, as interpreted above, it becomes difficult to explain the resilience of the legal tradition, and of the widespread mentalité underpinning it, to the rise of European totalitarian regimes, a resilience which until now has signalled a reliable promise to overcome any autocratic episode: a sort of biotic serum against totalitarianism which Western law, on its own, of course, lacks the means to prevent, but has so far had the strength to relegate to history quite quickly. It is by these means that we can understand the relative ease with which democracy earned its place in Italy and in Germany after the Second World War. It is for these same reasons that associating, without an analysis such as this one, the Italian or the German experiences and the Iraqi or Afghan course towards democracy appears to be an argument much more inclined to the grotesque, than to any possible opportunism.

Wherever democracy prevailed, it did so after a demanding and costly struggle, whose winners did not simply aim – as too often happens around the world today – to level the legal ground for the adoption of market devices. But this victory could not have been won had the battlefield not been cleared of the political and religious transcendentalism, and had the legal tradition we mentioned, its techno-structure, and its professionals not been available. These winning conditions must be emphasized as the most reliable indicator of what the West is, as compared to what it is not, and as the key difference between those places where democracy could take root within a reasonable time, and those where the road to it risks leading into a cul-de-sac, or to rather long and bumpy detours.

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23 As is confirmed, e.g. in eastern Europe, by the reunion of today's law with the Romanistic tradition typical of those systems up to the emergence of the communist regimes (C. Ajani, Diritto dell'Europa orientale (Turin: Utet, 1996), 70-162), but also from the substantially untouched force of the German Civil Code, dated 1896, before and after the Nazi period, and that of the Spanish Civil Code, dated 1889, before and after the Franco regime, as well as by the technical continuity between the Italian Civil Code of 1865 and the 'fascist' one of 1942, still in force.


25 See also M. Bussani, Il diritto dell’Occidente: Geopolitica delle regole globali (Turin: Einaudi, 2010), 52 ff., 185 ff., 205 ff.

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