On the Origins of the Difficulties Faced by Constitutional Democracies (with an Appendix on Democracy, Constitutionalism, *Rechtsstaat*, Rule of law: Some Historical-conceptual Aspects)

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ABSTRACT

The difficulties faced by Western democracies are one of the most hotly debated topics in contemporary legal and political discourse. This text attempts to identify the origins of these difficulties by highlighting two main aspects: the loss of balance between the constituent elements of constitutional democracies (sovereignty and limits to sovereignty, freedom and solidarity) and the impact of globalisation on national political systems. The analysis of these two aspects, preceded by an examination of some of the main political, social and legal transformations, highlights, on the one hand, the progressive detachment of political choices from constitutional objectives and, on the other hand, the drastic reduction in the decision-making spheres and tasks of states and the very sharp increase in economic, financial and legal constraints on residual decisions. The current process of deglobalisation does not seem to be leading to greater decision-making and intervention space for national democracies. In the appendix, based on R. Bin's analysis, the German/European model of the Rechtsstaat and the Anglo-Saxon model of the rule of law are compared in order to show that the former has its origins in a focus on social aspects that is lacking in the latter.

Le difficoltà delle democrazie occidentali sono uno dei temi più discussi nella riflessione giuridico-politica contemporanea. Il testo cerca di individuare le origini di queste difficoltà individuando due aspetti principali: la perdita dell'equilibrio tra gli elementi costitutivi delle democrazie costituzionali (sovranità e limiti alla sovranità, libertà e solidarietà) e l'impatto della globalizzazione sui sistemi politici nazionali. L'analisi di questi due aspetti, preceduta da una disamina di alcune delle principali trasformazioni politiche, sociali e giuridiche, mette in luce, da un lato, il progressivo distacco delle scelte politiche dagli obiettivi costituzionali e, dall'altro lato, la drastica riduzione degli ambiti decisionali e dei compiti degli Stati e il fortissimo aumento dei vincoli, economici, finanziari, giuridici, sulle decisioni residue. L'attuale processo di deglobalizzazione non sembra condurre a un maggiore spazio decisionale e di intervento per le democrazie nazionali. Nell'appendice vengono confrontati, sulla base dell'analisi di R. Bin, il modello tedesco/europeo del *Rechtsstaat* e quello anglosassone della *rule of law* al fine di mostrare che il primo ha alla sua origine un'attenzione per gli aspetti sociali che manca al secondo.

KEYWORDS

democracy, constitution, globalisation, discipline

democrazia, costituzione, globalizzazione, disciplina

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1. *Introduction*

Writing about the difficulties of democracies and their origins is an activity that runs the risk of being like carrying coals to Newcastle or owls to Athens[1]: these are topics that have been extensively analysed and are the subject of a flourishing literature[2]. However, an investigation into their origins may be useful, perhaps even necessary, to better understand the transformations undergone by contemporary democratic systems, to try to assess whether these transformations are leading to a definitive change or only a trend, and to outline possible responses to these difficulties and changes[3].

In this contribution, we will attempt to evaluate these processes in light of the structure of constitutional democracies and, therefore, of the «degenerations in what have long been considered strong democracies» (Calhoun et al. 2022). The analysis of the origins will focus on two aspects that can be seen as central and that refer to the «global and domestic pressures on liberal democracy»: on the one hand, the dual nature (dual system of legitimacy) of constitutional democratic systems and the progressive loss of their balance and, on the other hand, the influence of globalisation on the legal, decision-making and social structure of these systems[4].

The paper is structured as follows: the second paragraph will attempt to provide, on the basis of recent political, legal and socio-economic literature, a schematic list of the main changes that have taken place in constitutional democratic systems. The third paragraph will attempt to explain the reasons for the need to use the term constitutional democracy and to evaluate the changes with respect to that of liberal democracy. The fourth paragraph is devoted to the first source of the difficulties, namely the transformations that have led to the imbalance in the dual structure of constitutional democratic systems: these are, in particular, the changes in the sphere of political representation and in the relations between powers. The fifth paragraph will examine the role of globalisation in shaping democracy: this is a decisive role that profoundly affects the

[1] Use the image of redundancy, Zamagni 2022.

[2] See, *ex multis*, Calhoun et al. 2022, Runciman 2018, Harper 2022, Levitsky, Ziblatt 2019, Balkin 2017, van Beek (ed.) 2019, 2022, Bermeo 2016, Diamond 2015, whose titles refer to degeneration, end, crisis, retreat, threat, pressure, recession and constitutional ruin.

[3] Klingemann et al. 2022, 448, see a division in their research into two moments: «The first is descriptive: Is there evidence to assume that democracies have undergone a substantial change in the past two or three decades? The second question deals with the consequences of such changes. Are there any reasons to believe that these consequences constitute a crisis or a challenge to democracy?».

[4] The basic idea, Jönsson 2022, 12, is that «the evolution of democracy in individual countries is determined not only by domestic factors but also by global circumstances».

decision-making sphere and causes a major change in the structure and social conditions. The conclusions outline the possible lines of evolution for democracies: the trend, which is not definitive, is towards a transition to an electoral/majoritarian democracy with plebiscitary tendencies and attenuated constitutional safeguards[5].

2. *The Main Changes*

The transformations of democratic constitutional systems can be grouped into general areas which, although overlapping, have a dimension that is respectively a) political (particularly in the sphere of representation), b) social, c) political-institutional and legal. a) *Political representation*: i) one of the most significant aspects is the crisis of the political party as an instrument of political participation and a link between society and the state. With the transformation of mass parties[6] into catch-all parties[7] and then cartel parties[8], parties (particularly in Europe) are gradually losing these roles and their legitimacy. In the first case (catch-all), parties abandon their ideology ("de-ideologisation") and tend to propose similar political programmes: this leads, partly as a result of the greater importance of the media, to the strengthening of the role of leadership and its personalisation[9]; in the second case, the party changes its reference point ("relocalisation"), which becomes the state and no longer society. This shift from social actor to state actor (Melpignano 2023, 92) makes the party a «vote-seeking and office-seeking organisation» aimed, in a self-referential framework (Zolo 1992), at "maximising results" and consensus. This occurs through an «invasion of the state by parties and their subsequent infiltration into certain sectors of society» (through "clientelism and patronage")[10], with «the verticalisation of functions and the concentration of resources at the centre and in the leadership», a "top-down dynamic" for decision-making, an "instrumental relationship" between party members aimed at achieving a «direct advantage (remuneration)» or «indirect advantage (honours, extra-political career, material benefits)», and a tendency towards short-term political choices. The result is the loss of legitimacy of the party, now considered "unrepresentative" and lacking «a democratic and participatory internal life»[11]. ii) Electoral *disaffection* and *detachment* from institutions. Very briefly, there is an "undeniable negative trend" (Ignazi 2019, 225) in electoral participation in Europe (albeit with varying decreas-

5 Pedullà, Urbinati 2024, speak of "elective autocracy".

6 According to Ignazi 2019, 167, 169, the «typical characteristics of a mass party» are: «many members, 24-hour activism, self-sacrifice and militancy, attentive and responsible leaders, honesty and integrity, etc.» This becomes the general model to the extent that «the "good party" by definition is the mass party: any other configuration is merely a corrupt form of that model» and that «the myth of the mass party still holds».

7 Ignazi 2019, 167, according to which this occurs when the «cultural, social and political premises» of the mass party cease to exist, i.e., with reference to Kirchheimer 1966, «the era in which there were rigid class divisions and more differentiated denominational structures».

8 Ignazi 2019, 203, who, with reference to Katz, Mair 1995, emphasises that «the dynamic [...] underlying the emergence of the cartel party» lies in «the acquiescence of parties in cooperating with each other and with vested interests through state mediation, combined with their detachment from the most vital sectors of society». There are other names for the cartel party, such as professional-electoral party, franchise party, and company party.

9 Ignazi 2019, 180-181, notes that «the autonomisation of the leadership and its incipient personalisation [...] led to the demobilisation of members» and, at the same time, freed «the ruling groups from internal party constraints, both horizontally vis-à-vis the party's collegial bodies (central committees, executive committees, etc.) and vertically vis-à-vis the grassroots».

10 Ignazi 2019, 304, according to which «this "colonisation" did not recede in the era of neoliberalism: it adapted, moving from the economic sectors and insinuating itself into the administrative and bureaucratic sectors and other public spheres, which were in any case controlled by the parties».

11 Ignazi 2019, 269, 200, notes that «parties appear to be self-referential, distant and proto-oligarchic organisations, disconnected from society and far removed from the needs of the people» and also "unreliable" and "problematic".

es and situations) and a different incidence of democracy support indices[12]. The latter generally record three related aspects, the first relating to democracy as an ideal/value and the other two to democracy as a regime in the sense of its coincidence with the ideal and its performance, i.e. its ability to provide effective treatment of the «basic functions of government». The first index in liberal/constitutional democracies is generally high and stable, the second is declining[13], while the third (performance – instrumental acceptance), which should be considered "of key importance", is often very low[14]. The latter index, which is particularly significant «in countries suffering from major economic and political problems» and in cases of «dissatisfaction with the regime», can probably lead, if low, to «the emergence and strengthening of populist parties» (Klingemann, Canan-Sokullu 2022, 385-286). iii) *Populism*. This is one of the most important and most studied phenomena of political transformation in democratic systems, which has developed significantly in its contemporary form since the 1990s. A concise definition of populism is that «all forms of populism include some kind of appeal to "the people" and a denunciation of "the elite"». More explicitly, populism is seen as «a thin-centred ideology that considers society to be ultimately separated into two homogeneous and antagonistic camps, "the pure people" versus "the corrupt elite", and which argues that politics should be an expression of the volonté générale (general will) of the people» (Mudde, Rovira Kaltwasser 2017, 5-6).

Very similar, albeit with some differences, is the definition provided by Albertazzi, McDonnell (2008, 3, 4), according to whom populism is «an ideology which pits a virtuous and homogeneous people against a set of elites and dangerous "others" who are together depicted as depriving (or attempting to deprive) the sovereign people of their rights, values, prosperity, identity and voice». On this basis, some distinctive characteristics of populism can be identified: iiia) the people are seen as homogeneous, unified and virtuous. This can refer to different visions (common people, nation, ethnicity, etc.)[15]; iiib) as a *thin* ideology, populism is «highly compatible not only with any political ideology (Left or Right, reactionary or progressive, reformist or revolutionary) and any economic programme» (Albertazzi, McDonnell 2008, 3, 4)[16]. iiic) the expression of this will is «usually led by a charismatic leader who is portrayed as knowing instinctively what the people want» (Albertazzi, McDonnell 2008, 5). Leaders present themselves as true interpreters of the "will of the people" and as the only ones capable of realising it directly[17]; iiid) the unity and ho-

[12] Klingemann et al. 2022, 451, note that these indices «are the major indicators to determine resilience or retreat» of democratic systems.

[13] Klingemann et al. 2022, 452-453, show that «globally, support for democracy as an ideal form of government reaches an average of 0.78 and is stable over time (2005/09: 0.78; 2010/14: 0.78; 2017/20: 0.79). With a mean value of 0.58, support for the democratic regime in one's own country is lower and (mildly) on the decline (2005/09: 0.61; 2010/14: 0.57; 2017/20: 0.56)».

[14] Klingemann, Canan-Sokullu 2022, 286, note that «on average 30% of Germans and 67% of Italians express dissatisfaction with regime performance, saying that they are fairly or not at all satisfied with the way democracy is working in their own country».

[15] This translates, particularly for right-wing populism, into a resurgence of nationalism. According to van Beek 2022, 65, this populism «submerged as it is in the past, or in retrotopia» seeks to create (Ignazi 2019, 212) «a common national or subnational identity, from which all substantial diversity, a harbinger of division, is banned», i.e., Fuchs, Klingemann 2019, 8, «a sharp frontier between the inside and the outside».

[16] Mudde, Rovira Kaltwasser 2017, 6, note that «populism almost always appears attached to other ideological elements, which are crucial for the promotion of political projects that are appealing to a broader public». According to van Beek 2022, 65, this happens «by combining their own "thin" ideology with "thick" ideologies such as nationalism, socialism, federalism, fascism or conservatism».

[17] According to van Beek 2022, 65, «the characteristic anti-establishment rhetoric of populism turns into something of an encumbrance for populist leaders when they themselves become the political elite. They adopt two ways of dealing with this pesky inconvenience. The first is to remain in a permanent campaign mode by pointing fingers at alleged anti-government agents plotting against them and the state. The second method is to redefine the political elite by arguing that the real power continues to reside elsewhere, that is, with the media, the judiciary, the financial elite or the technocratic classes».

mogeneity of the people expresses a will that represents the common good: this monist idea «and especially its notion of a "general will" may well lead to the support of authoritarian tendencies» (Mudde, Rovira Kaltwasser 2017, 18), such as the «rejection of the rules of the game», the «denial of the legitimacy of opponents» (Maffettone 2019, 56) and above all (Urbinati 2020), «the attempt to decisively weaken the instruments of guarantee (constitutional courts, the judiciary, pluralism)». Populist parties and leaders «constitute the internal challenge for democracy» in that support for «popular sovereignty and majority rule» is generally accompanied by a sceptical view of "liberal democracy": as "monists", they are «highly sceptical about minority rights and the politics of compromise»[18].

b) *Society*: i) One aspect of social change is the progressive *increase in inequality*. The general trend is that «after declining for many decades», «income and wealth inequalities have been on the rise nearly everywhere since the 1980s» (Blanchard, Rodrik 2021): globally (2023 data for income and 2022 data for wealth), for example, 50% of the population owns 2% of wealth and receives about 8% of total income, while 10% of the population owns 77% of total wealth (of which 1% of the population owns 40%) and receives 53,5% of total income (of which 20,5% of the population owns 20,5%). In the US, 50% of the population owns 1,5% of wealth and receives about 13% of total income, while 10% of the population owns 70% of total wealth (of which 1% of the population owns 47%) and receives 35% of total income (of which 20,7% of the population owns 20,7%). In Europe, 50% of the population owns 3,3% of the wealth and receives about 18% of the total income, while 10% of the population owns 60% of the total wealth (of which 1% of the population owns 36%) and receives 36,6% of the total income (of which 13,3% of the population owns 36%). In Italy, 50% of the population owns 2,5% of the wealth and receives about 16,6% of the total income, while 10% of the population owns 56% of the total wealth (of which 1% of the population owns 22%) and receives 37% of the total income (of which 1% of the population owns 13,3%)[19]. The evolution of income differences was summarised as follows, based on final data for 2019 (Blanchard, Rodrik 2021): «the income shares of the richest 1% in Western Europe and the United States increased from around 8% in the 1970s and 1980s to 11% [13,3] and 20% [20,7], respectively, today. In 1980, the income share of the bottom 50% stood at 20% in both regions. Over the subsequent three and a half decades, this figure dropped to 12,5% [13] in the United States and 18% in Europe». Although Europe presents better data, the trend remains the same. In Italy, from 2010 to 2016, «the Gini index, a summary measure of the degree of inequality in distribution, rose from 0.67 to 0.71», and "fell slightly" in the following period; during the same period, «the share of net wealth owned by the richest 5 per cent of households rose from 40 per cent to 48 per cent». At the end of 2022, «the richest 5 per cent of Italian households held 46 per cent of total net wealth, while the poorest 50 per cent owned less than 8 per cent» (Neri et al. 2024)[20]. As far as income is concerned, in Italy «inequality [...] grew sharply in the early 1990s», reaching, for «net wages of the working-age population», a growth in the «Gini index from 0.25 in 1989 to 0.32 in 2020» and, in the same vein, the index of «disposable income for the 25-55 age group [...] from 0.28 in 1989 to 0.34 in 2020» (Checchi, Jappelli 2023)[21]. To this must be added «persistent wage stagnation»: despite the fact that «nominal wages grew by 107,5% between 1991 and 2022, real wage levels remained virtually unchanged, showing growth of just 1%»[22]. ii) The second aspect of social change is the «*accelerating*

[18] Fuchs, Klingemann 2019, 8-9, who speak of a «process of authoritarianisation by populist parties and their leaders».

[19] Data taken from WID – World Inequality Database.

[20] The Oxfam Report 2024, 17, refers to this as the «persistent reversal of fortune», i.e. the enrichment of the richest part of the population at the expense of the least well-off. The 2025 report shows that wealth comes from positional rents: «just consider that over a third (36%) of billionaires fortunes come from inheritance».

[21] In WID – Inequality in 2024: a Closer Look at Six Regions, it is highlighted that Italy ranks fourth among all European countries in terms of inequality levels.

[22] Oxfam 2024, 29, 9, reports «a decline that in 2022 placed Italy in 22nd position among OECD countries in terms of real average annual wages, marking a drop of 13 places in the ranking compared to 1992», and that «low wages mean

pace of migrations» (van Beek 2022, 5) that happened in the 1990s and peaked in the 2015 "European refugee crisis". Migration flows had different origins (mainly from former Soviet bloc countries and the Balkans from the 1990s onwards – in 2004 and 2007, some of these countries joined the EU)[23], Africa, Asia, the Middle East, Central and South America) in the 2000s. At the beginning of 2012, «foreign nationals (non-EU citizens) residing in the 27 countries of the European Union [...] numbered approximately 20,7 million, representing 4,1% of the total population» (Bettin, Cela 2015). This proportion has grown steadily[24]: according to data for 2023, there are currently 42 million people born outside the EU and 27 million non-EU citizens, representing 8,5% and 6,1% of the total population (448 million)[25], while the five countries with the highest number of foreigners are Germany (more than 10 million), France (5,4 million), Spain (5,2 million), Italy (5 million) and Austria (1,5 million). In the United States, 14% of residents were born abroad; iii) the third aspect is the *impact of strong technological innovation* which, based on the development of information technology, robotics and artificial intelligence, has brought about profound changes in the world of work. The consequences are different depending on whether the innovations are a «form of alternative (replacement) to [...] work [or] whether the new technology develops as a means of increasing the efficiency of [...] work (complementarity)»[26]. In the first case, there would be a loss of jobs, while in the second, jobs could increase. It seems much more likely that the direction will be towards job losses[27]: what can be observed, however, is that increases in employment are recorded «in labour-intensive and low-wage sectors (commerce, care, catering, tourism), and are accompanied «by a considerable increase in involuntary part-time work among women and men and [by] a decrease in hours worked»: all this has contributed «to widening the area of *in-work poverty*». This means that despite «poverty remaining typically concentrated among the "unemployed" (unemployed, underemployed, inactive and retired), over the years the number of individuals who, despite having a job or belonging to a household in which there are employed persons, find themselves in relative or absolute poverty has grown» (Modica Scala 2022, 133).

c) *Political-institutional and legal*: i) the *difficulty* of democratic systems in *resolving* (governing) *social and economic issues*[28]. This situation can be highlighted in light of the ineffectiveness of the policies implemented in Western countries to combat economic problems (and the further complications they have generated). In Europe, for example, this has been referred to as "structural reform", i.e. «a grab bag of policies meant to enhance productivity and improve the functioning of the supply side of the economy». It is a model that aims «to sweep away impediments to the functioning of labor, goods, and services markets – to make it easier for firms to fire unwanted employees, to break business and union monopoly power, to privatize state assets, to reduce reg-

that many workers, despite working long hours, remain trapped in the spiral of poverty».

[23] These are Estonia, Latvia, Lithuania, Poland, the Czech Republic, Slovakia, Slovenia, Hungary, Bulgaria and Romania.

[24] According to the website IOM, UN migration (https://dtm.iom.int/europe/arrivals), which records arrivals by land and sea, after the peak in 2015 with more than 1 million immigrants, flows have been fairly stable, never falling below 100 000 migrants (with peaks of 380 000 in 2016 and 290 000 in 2023). More comprehensive and much broader figures are available from Eurostat, https://ec.europa.eu/eurostat/web/interactive-publications/migration-2024#migration-to-the-eu.

[25] European Commission, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/promoting-our-european-way-life/statistics-migration-europe_it.

[26] Maffettone, Vecchione 2020, who note that «the dynamics linked to technological change have different effects on *skilled* and *unskilled* workers».

[27] An estimate by Bannò et al. (2021) reports a risk of job losses in Italy of 33,4% (7,1 million jobs) in an occupation-based approach, which is reduced to 18,1% (3,4 million jobs) if the approach is task-based. The most recent surveys assess the impact of Artificial Intelligence and the risk that its introduction will also jeopardise many skilled jobs. See, for example, Castigli 2024.

[28] Lane 2023, 3, argues that «systemic inadequacies of democratic government have given rise to a political legitimacy deficit. Political elites have become "decoupled" from social classes. Ruling elites have dominated politics, and political parties have been unable to respond positively to public demands».

ulation and red tape, to remove licensing fees and other costs that deter market entry, to improve the efficiency of the courts, to enforce property rights, to enhance contract enforcement, and so on» (Rodrik 2017a, 51). What's more, «the grab bag is even bigger. Often, for example, structural reform includes changes in taxes[29] and social security programs with an eye toward fiscal sustainability». (Rodrik 2017a, 51) This "expansionary austerity"[30], in addition to producing serious social effects (as in Greece) and "reverse" wage effects (from the poor to the rich), offers no guarantee of success (Rodrik 2017a, 52 ff.)[31]. ii) The *complication of the system of sources of law*. In legal theory, this aspect has been analysed in terms of post-law (*post-diritto*) and interlegality. Both approaches emphasise the presence of «legal regimes of different origins [which] coexist and multiply in a complicated and often confusing polycentric framework of a plurality of authoritative instances» (Zaccaria 2022, 7) which determines the presence of a «pluralism of sources, public and private, no longer arranged in a rigid hierarchical relationship», but which «interact and often compete with each other»[32]. In the same vein, the observation emphasises «the crisis of boundaries, or rather of the distinction that made modern law complete and self-contained, and therefore comparable to a system: that distinction between internal and external, between norms and facts, is increasingly weakening in the face of the proliferation of intersections and overlaps of legality, even if these must be described, conversely, as plural, fragmented, conflicting, competing and heterogeneous» (Chiti et al. 2022, 7). iii) A further change relates to the *loss of centrality of parliament*, the decline in the quality of legislation[33], and the parallel *increase in the regulatory power of the government*. This is a "common process" that sees a decline in the role «of political representation, as well as in the culture of debate and dialogue and the quality of legislative activity» and «the progressive and incessant centralisation of political power in the government, which in turn is combined with personalisation and verticalisation within the government itself» (Ciolli 2024)[34]. This is happening both with the increase in the «regulatory role of the government»[35], a phenomenon that «includes

[29] Hellier 2023, 86, shows that «governments can set taxation schemes which are regressive at the top with possibly negative rates on the highest bases (income, wealth), even if they are equality-oriented and pro-redistribution».

[30] Maffettone, Vecchione 2020, who also analyse the American model of the "debt economy" based on «low interest rates in order to encourage household and corporate borrowing».

[31] Democratic government has also been questioned at a theoretical level: because of the way they work, democracies could lead to wrong and irrational choices. This thesis argues that «given how little voters know and how badly they process information, it is not surprising that democracies frequently choose bad policies». Even if voters do not directly decide on political choices, «they significantly change the probability that different policies will be implemented»: there is therefore a good chance that democracy, as a system, will lead to wrong choices. See Brennan 2016, 202.

[32] Zaccaria 2022, 7, shows that the «theoretical pair consists of the binomial deconstruction-pluralism, in the sense that the deconstruction of the traditional 20th-century legal order has gradually been combined with a process of greater pluralistic openness, with the opening up of the legal dimension to the presence and action of a greater number of public and private subjects: old and new actors now coexist, in an open process, on the increasingly complex stage of the "legal game"».

[33] Lupo 2019, notes that «statute law has become increasingly "precarious": that is, it needs amendments, adjustments and rethinking, which occur shortly after its entry into force, often even a few days later; and there is a proliferation of what are metaphorically referred to as maintenance, testing and servicing of legislation; while the legislator itself struggles to conceive and prepare legislation that is in any way destined to last. In other words, the legislator struggles to bring about the "negotiated legislation" that it aspires to produce, as it is far from easy to effectively involve and integrate the main interests at stake. It often acts in an ad hoc manner, inspired by contingent and short-term considerations, adjusting, postponing or even rethinking recent or very recent legislative measures on the basis of their shortcomings and difficulties of application and, above all, as a result of the reactions they provoke». Bar-Siman-Tov 2015 highlights the «frequent deviations from the rules governing the legislative process, and excessive use of unorthodox legislative procedures that short-cut the normal legislative process, such as fast-track and omnibus legislation».

[34] Ciolli 2024 notes that «a characteristic common to processes of democratic regression is the loss of centrality of parliaments».

[35] In particular in parliamentary democracies and in countries, such as Italy, where this role is enshrined in the Constitution.

both primary and secondary legislative acts adopted by the government (i.e. decree-laws, legislative decrees and regulations) and the powers (of initiative, amendment, planning and intervention in the Commission and in the Assembly) of the Government in the legislative process», and «the role that the Government plays in the regulatory processes of the European Union, not only in the implementation of EU law, but also and above all in its formation» (Lupo 2019). In the latter case, where governments «act as legislators in EU decision making», it has been highlighted that «in the multilevel system of the European Union (EU), national governments have been empowered at the expense of parliaments». This is the case, for example, in «negotiations among member states with encompassing redistributive consequences, such as the reforms enacted during the Eurozone crisis or the negotiations on the financial framework and the Covid-19 recovery package», due to the fact that the positions of governments «find little democratic anchoring of the preference formation process [prior to the negotiations] through the involvement of national parliaments or other domestic actors» (Tarlea et al. 2024).

3. *Liberal Democracy and Constitutional Democracy*

The main contemporary democracies, particularly those in the West, are constitutional democracies, which are often referred to in current literature as liberal democracies. This latter term is undoubtedly appropriate[36], but in some respects it risks overlooking important elements of contemporary systems. Liberal democracy refers to a political system «marked not only by free and fair elections, but also by the rule of law, a separation of powers, and the protection of basic liberties of speech, assembly, religion, and property», i.e. what «might be termed constitutional liberalism»[37]. However, the idea of liberal democracy and liberal constitutionalism can be open and undefined: this seems to be particularly true with regard to the rights protected. Although liberal constitutionalism «is often treated as synonymous with constitutionalism itself», its essential aspects are not always clear[38]. In the main reconstructions, as already mentioned, it can be said that liberal democracy «is principally meant to secure four essential pillars: the institution of "checks and balances" through the imposition of limitations on the powers of government; adherence to the rule of law; protection of a core of fundamental rights; and assuring certain guarantees necessary for the maintenance of a working democracy»[39]. Economic and social rights are not always considered part of the core fundamental rights: as has been noted, even though «several post-Second World War liberal constitutions comprise certain social and economic rights calling for the provision of some welfare benefits which plainly comport some distributive justice component», the link between liberal constitutionalism and such rights «may be best understood as being merely contingent» (Rosenberg 2022). This aspect, the contingency of the link between socio-economic rights

[36] To the point that the change in essential aspects of democracy has been labelled as the transition to an "illiberal democracy". See Zakaria 1997, which refers, at that time, to Peru, Slovakia, the Philippines and the countries of the former Yugoslavia. The term, as is well known, was then taken up, in a positive sense, by Orbán in 2014.

[37] Zakaria 1997, 22, which specifies that liberal constitutionalism «is theoretically different and historically distinct from democracy».

[38] Thio 2012, who notes that «its content remains ambiguous».

[39] Rosenberg 2022, who adds that «insofar as the right to equality is included among the core ones that are afforded constitutional protection, this also assures some minimum of justice which may be largely formal if constitutional equality extends only to rights and procedures without regard to manifestly widely unequal material conditions or consequences» and that liberal democracy ensures «a series of rights, such as freedom of speech, due process, and freedom of religion, that are essentially universal in scope. Outside of the core, there is more contestation». According to Mulieri 2024, the definition of liberal democracy has been developed according to different guidelines, but they have a «fundamental point that unites each of these approaches», namely «the search for a balance between the defence of certain fundamental freedoms and the guarantee that decision-making mechanisms ensure a good level of dependence on electoral choices».

and liberal democracy, risks overshadowing a decisive aspect of contemporary democratic-constitutional systems (especially European ones). This is, in particular, the "guiding" dimension of post-war constitutions, i.e. their aspect as a "project" to be realised (Fioravanti 2014). This makes the rights and principles contained in the constitution binding not only in terms of guaranteeing civil and political rights in the relationship between the individual and the state, but also in terms of realising rights linked to social equality in relation to both the expansion of civil rights and the realisation and implementation of social rights. Of course, it is possible to take a narrow view of these aspects of constitutional democracies and conceive of the constitution as a mere framework (*rahmen*)[40] or as a "limit", as has been accurately pointed out, «presuppose a kind of division of legal space [in which] one part of legal space is occupied by the constitution; another part of legal space is occupied by ordinary legislation». From this perspective, «these two spaces are conceived as separate and, all things considered, independent of each other [...] Legislation is therefore conceived as an activity that is essentially free in its aims, left to the free play of democratic politics, which can only be subject to *external* limits». Normally, the legislator finds himself in a "constitutionally indifferent" space, within which he can move freely[41]. This possibility exists unless the legislation «affects a constitutionally protected interest» and there is a «clear conflict with a clear constitutional precept»[42].

4. *The Two Sides of Constitutional Democracies and the Problem of Their Balance*

The first important factor contributing to the difficulties and changes in constitutional democracies is the progressive decline in the balance between its two main sides: on the one hand, the attribution of sovereignty to the people and, on the other, the simultaneous limitation of this power by the rights and principles contained in the constitution. Constitutional democracy «is not simply a mere agreement on the rules of the political game (procedural values) [but] constitutes, instead and above all, a precise set of fundamental values» that establish «a comprehensive system of fundamental legal limits – both procedural and substantive» (Spadaro 2007). These systems, based on the coexistence of limits on power and the democratic principle, therefore have the "contradictory role" of establishing strong political power (attributed to the people) and at the same time "limiting" it[43]. The two contrasting sides are therefore (a) popular sovereignty and (b) constitutional limits positivised in principles and rights[44]. From a historical point of view, the constitutional democracies of the post-World War II period are the result of a process that led to the creation of «a new and unprecedented form» (Fioravanti 1999, 158) of legal and political organisation in which the values and needs of two different traditions are brought together[45]: that of democratic sovereignty and that of constitutionalism (in its two variants of guarantee and guidance)[46]. The plurality of rights (freedom, political, social) present in constitutional democra-

[40] The concept of the constitution as *rahmenordnung* is from Böckenförde 1990. According to Di Martino 2016, 19, this view «stems from the liberal idea that individual freedom corresponds to a pre-state sphere that the state is obliged to preserve» and sees fundamental rights as "*Abwehrrecht[e]*".

[41] Pino 2015, according to whom «these two spaces are conceived as separate and, all things considered, independent of each other: civil law, administrative law, tax law, criminal law and procedures are depicted as areas that are completely autonomous from the constitution, each with its own logic, institutions and guiding principles».

[42] Pino 2015, which identifies two other conceptions of the constitution: as a "foundation" and as an "axiology".

[43] Holmes 1998 distinguishes between the disabling and enabling functions of the constitution.

[44] Fioravanti 2001, 918, speaks of the "double foundation" of democratic constitutions.

[45] Fioravanti 2001, 818, for whom this was something «difficult to conceive in our constitutional tradition», i.e. constructing systems in which «to reconcile what has historically belonged to two different camps for two centuries: democracy on the one hand, and the constitution on the other».

[46] The reference is to the Anglo-Saxon model of guarantee and the French model of guidance. In the first case, constitutional norms have the task of regulating the dynamics of society, i.e. of being the common "theatre of com-

cies represents both the guarantee of the autonomy of the individual, of his or her possibility of participating in the political process, of independence from need, and the goal of realising a need for justice, for substantial equality and therefore for a project of society that politics and law have the task of realising[47].

The dual nature of constitutional democracies gives rise to their parallel dual legitimacy: political decisions are valid on the basis of the principle of democratic sovereignty and that of respect for and implementation of constitutional principles and rights. There are therefore «two patterns of justification of collective decisions» (Martí 2005): the democratic procedure (popular sovereignty) and rights (limits of sovereignty).

These two aspects refer not only to two historically different fields (democracy and constitution), but also imply a strong tension, almost a contradiction, between their modes of legitimation[48]. Collective decisions are, on the one hand, legitimised on the basis of the decision, following a specific procedure and method, of the representatives of the sovereign people, while, on the other hand, legitimacy is linked to a series of substantive contents that refer to «independent substantive standards of rightness», i.e. to a «thicker theory of justice» (Martí 2005).

Possible tensions and conflicts concern: a) «the reconciliation between values associated with individual autonomy [rights] and those linked to democracy»: even if «the protection of fundamental rights [and] the development of democracy» are «values [...] that cannot be renounced as they are valuable political achievements of modernity [...] we must face the fact that both values, or sets of values, conflict with each other, at least in certain cases, and that we need a solution to resolve this sort of tragic dilemma»[49]; b) possible failure to implement constitutional principles by political sovereignty: this may occur in relation to the limitation of certain rights, the failure to implement important aspects of constitutional rights, such as social rights, and certain constitutional principles, such as those linked to a substantive vision of equality[50]. This may occur due to the latency of political power or the assertion of political sovereignty as an expression of the will of the people. In such cases, the two levels of legitimacy of decisions can be seen as *independent* and as expressions of different and competing needs: on the one hand, the will of the people may be limited to the affirmation of interests or values that are in any case partial, but considered to be

petition" between social and political forces, of protecting individual rights, and are constructed on the basis of the balance and mutual limitation of powers (an organisation that seeks to limit power through its distribution among different institutional actors and the provision of checks and balances). In the second case, the rules provide for a "policy", a "political programme" that must be "implemented" through the action of the political authority and must shape the direction of society's development. For this analysis, see Fioravanti 2014.

47 Preterossi 2023, 298, in this regard, speaks of the «constitutive duality of the democratic constitution» which «cannot contemplate only the limitation of power [...] but must provide for and plan its organisation and, even more so [with reference to «its axiological-material core»], its finalisation».

48 Martí 2005 speaks of a «dilemma between democratic proceduralism and substantivism». Martí 2008, 131, emphasises «the tensions or conflicts that exist between the protection of fundamental rights or human rights, on the one hand, and the development and unfolding of democracy, on the other».

49 Costa 2006, 9, speaks of the «difficult balance between rights and law, between *ratio* and *voluntas*», i.e. between "sovereign *voluntas*" and its constraint «to a higher *ratio*». For Martí 2008, 134, 133, 136-137, «the very fact of conceiving fundamental rights as "limits of democracy" reveals the idea of tension or conflict between one value and another», and «this [...] despite the fact that, paradoxically, in many other cases the two values seem to imply each other»: this is the "paradox of the preconditions of democracy». In fact, for «the democratic procedure to be effective and legitimate, it is necessary not only to comply with the procedural rules that govern it, but also to satisfy the preconditions of the process itself, that is, the conditions necessary for the effectiveness of the process, which are very similar to the issues protected by fundamental rights. And so, the more democratic, and therefore legitimate, a decision-making procedure is, the greater the number of preconditions that must be guaranteed *ex ante*, and consequently the fewer decisions that will have to be taken once the procedure has been established».

50 Fioravanti 2023, 143, emphasises the presence of two principles, autonomy and solidarity, which refer respectively to the «exaltation of civil society of private individuals» and the «collective logic of projects oriented towards social justice».

those of the people, and may not express (and may even contradict) constitutional values, while, on the other hand, the protection of constitutional principles and rights becomes a fundamental task of the judiciary (Constitutional Court and other courts); c) who can and must decide, within the institutional structure of constitutional democracies, in the event of conflict or different interpretations[51] of constitutional precepts between political power and judicial power. The latency of political power or the assertion of the primacy of the sovereignty of the people can lead to a separation between political decision-making and control by the courts (constitutional and non-constitutional).

However, there are conditions of equilibrium that allow constitutional democracies to remain stable. In a nutshell, these are political, social and institutional aspects that these systems, as social projects, seem to imply: a) the *stability* of the constitutional compromise in relation both to adherence to the principles, rights and values contained in the constitution and to the commitment to their development and the progressive realisation of the objectives of the constitutional pact, in particular those relating to social rights and equality; b) the presence and effectiveness of political parties: these must not only be the channel for political participation (as a link and a forum), but also the protagonists in the implementation of the constitution (Fioravanti 1990). Parties should guarantee the relationship between voters and elected representatives and the participation of individuals in political life (making possible «a tendency towards constant political commitment» and «not episodic but continuous participation») and, at the same time, be both bearers of partial interests and "total parties" (Mortati 1949) insofar as they are directed towards the realisation of constitutional principles[52]. Parties with this triple role (participation, representation of social interests, implementation of the constitution) are central to the functioning and balance of constitutional democracies[53]; c) stability and dialogue between the various actors (parliament, government, constitutional and judicial courts) within the institutional framework.

These conditions have gradually deteriorated. This is particularly true of: a) the constitutional compromise and agreement on constitutional values, which have encountered serious difficulties in relation to the project of expanding social equality, which seems to have taken the opposite direction: the global prevalence of neoliberal policies based on freedom of enterprise (see § 5.2) has led, as we have seen, to a sharp increase in inequality and the strong prevalence of the principle of private autonomy over that of solidarity (Fioravanti 2023, 143). There are also serious concerns regarding multiculturalism, bioethical issues and civil rights: immigration has been seen mainly as a problem and paths towards cultural dialogue and inclusion as something superfluous, bioethical issues have become moments of conflict between values (starting with the questioning of acquired rights such as abortion) and the extension of LGBTQ+ rights is encountering serious difficulties. b) The transformation of political parties, which have gradually proven to be deficient both in terms of the link between society and political decisions and in terms of the achievement of constitutional objectives. In their self-referential dimension, their commitment to implementing constitutional principles and rights is becoming less and less evident. Since the crisis of the mass party, parties have proved to be «capable only of mediating interests in a limited and specific way, without claiming to place this within a more organic programme». This dynamic has left «the space of rights and principles uncovered» and given a «powerful impetus [...] to the development of fundamental rights» by the judiciary (Bisogni 2023, 204, 206, 207). This role of the judiciary does not depend solely on the «substitution exercised towards a legislator who is now too often

[51] On the conflict between democratic principles and constitutional rights, Loughlin 2022, 97, asks the question «Which of these principles has primacy?» and considers it «one of the most perplexing questions of modern politics».

[52] Simonetti 2024, referring to Mortati 1967, emphasises that «party pluralism or dualism would not be possible "if it did not take place within the same fundamental ideology, i.e. on the basis of substantial agreement between the various opposing forces on certain fundamental principles"».

[53] Costa 2014, according to whom the party is «an indispensable hub» for the functioning of constitutional democracy.

forgetful of the constitutional dimension», but can be seen as «a physiological effect of the constitutional state of the present», i.e. of the crisis of the "monist-party-centric" model based on certain conditions of equilibrium and, above all, on the central role of parties[54]. All this translates into a new dual aspect of the legal-political experience: the roles of the various institutional actors are separated: while politicians determine the majority position, often outside constitutional objectives, judicial bodies and constitutional courts have «the task of giving concrete form to the constitution and affirming the fundamental rights contained therein» (Fioravanti 1998). In this context, two different visions of the constitution also emerge: on the one hand, political sovereignty understood primarily as an "arena of conflict" (framework/limit); on the other, jurisdiction as a set of principles and rights that must be implemented. In the event of a different interpretation of the Constitution by judges and the political power, the question arises as to who should ultimately decide. c) In addition to the change in the relationship between the judiciary and the political power, the balance of powers has, as already indicated, shifted significantly in favour of the executive and the delegation of important regulatory matters to independent authorities.

5. *Globalisation and Democracy*

The second and, according to almost unanimous opinion, most important source of the problems facing contemporary constitutional democracies is the phenomenon of globalisation[55]. This refers to the third wave of globalisation (or the first true globalisation), also known as hyperglobalisation (Rodrik 2011) or neoliberal globalisation (D'Attorre 2023)[56]. This phenomenon emerged in the late 1980s and, despite the fact that «globalisation is not a linear and stable process, but proceeds in waves and successive cycles, interspersed with phases of retreat» (D'Attorre 2023), it was «perceived as a new phenomenon and predicted to have an inexorable spread»[57]. In a nutshell, it is a process that, aided by rapid and significant technological progress, has seen «the politically enforced deregulation of foreign trade and direct investment» and «the internationalisation of the capital market» (Betz, Hein 2023, 2). Based on a series of political decisions «namely the reduction of the once high, politically imposed barriers to the cross-border flow of goods, services and capital» (Betz, Hein 2023, 10, 9) and the drastic reduction in the costs of «transport and communication [...] for the exchange of goods, services and ideas», a system of «global interdependence and networking of all societies on Earth through trade, capital, labour and ideas»[58] has developed.

In a nutshell, globalisation has led to: i) a significant increase in the number of economies involved in international trade and, at the same time, the fact that «numerous new participants in

[54] Fioravanti 2018, 451, speaks of an «order with undecided sovereignty». See Bisogni 2023, 203.

[55] Amato 2021, 1, 6, for example, directly links the emergence of the idea of majority democracy and the questioning of the rule of law by the will of the majority with «the economic and social consequences of globalisation in our western societies». In essence, «the globalised economy [...] has been the main reason for the widespread anxieties and dissatisfactions to which we owe the new brand of majoritarian democracy» and intolerance «towards the precepts of the rule of law».

[56] The first is that of the late 19th century, while the second is linked to the Bretton Woods agreements. The latter made it possible for «growing economic interdependence» to coexist with «sufficient room for manoeuvre for nation states to implement redistributive policies that could protect the most vulnerable social groups from the costs of globalisation. In other words, the liberal international order had been explicitly designed to ensure the coexistence of globalisation and the welfare state» (Poletti 2022).

[57] Betz, Hein 2023, 1, who add «recently (since around 2015), this optimism has been replaced by predictions of a reversal or at least stagnation of processes of increasing global economic networking and a partial deglobalisation/renationalisation».

[58] Betz, Hein 2023, 6-7, for whom this interdependence is «measured as the share of foreign trade, capital inflows and outflows in the GDP of the economies involved, payments for foreign technologies and patents and net immigration of workers».

the international market have significantly increased their share in world imports and exports» (Betz, Hein 2023, 11). At the same time, international trade governing bodies (WTO) and development support agencies (IMF, WB) have taken on a very important role; ii) the global division of the production chain of goods into different locations and countries (the splitting of value chains) with a view to saving on production processes thanks to the «cost advantage for certain manufacturing stages» of different locations and countries. (Betz, Hein 2023, 9, 11); iii) the financialisation of capital resulting from the opening of financial markets, i.e. the possibility of investing (and disinvesting) in the financial markets of different countries. This opportunity has resulted in the progressive use of capital in financial instruments and speculation at the expense of investment in production[59]; iv) the reduction of the decision-making space of national (democratic) powers, which depends on the free movement of goods and capital, the fragmentation of production processes, the difficulty of intervening in global choices, and the reduction and privatisation of state tasks; v) the profound change in law and its sources in the relationship between private and public autonomy and between supranational regulation and national choices.

The last two aspects (reduction of decision-making space and modification of sources) are particularly relevant to the difficulties faced by democracies.

5.1 *The Narrow Scope of Choices and the Logic of Discipline*

The global dimension of "transnational interactions" has meant that «they can no longer be controlled, fenced in or driven forward solely by national agencies. Furthermore, this is associated with the fact that new, transnational actors are impacting on national societies, eroding their sovereignty or even undermining it from within» (Betz, Hein 2023, 7). This naturally means that «globalisation has fundamentally changed the conditions under which nation-state democracies function». In the global dimension, external problems and decisions by other governments, as well as the activities of transnational private actors (multinationals, banks) and international bodies (WTO, IMF, WB) are of internal relevance (Fuchs, Klingemann 2019, 4, 5). In particular, the cross-border activities of private actors «undermined the effectiveness of state regulations and threatened to undermine national monetary, fiscal, currency, employment and tax policy» (Betz, Hein 2023, 13).

Globalisation leads to a general loss of sovereignty by nation states in favour of "private-sector actors" (Betz, Hein 2023, 13). This occurs at various overlapping levels: a) restriction of decision-making powers, b) the logic of public power regulation, c) difficulty in obtaining resources.

a) globalisation has «transferred major economic decisions to a sphere that is completely beyond the reach of the nation state», i.e. to multinational companies, international trade organisations and transnational agreements, «reducing the scope for intervention by national governments». This means that if the decision-making space of national democratic governments in the economic sphere becomes very limited, «most democratic activity inevitably ends up appearing superfluous» (Crouch 2020). Furthermore, if «transnational corporations [...] do not like the regulatory or fiscal regime of a particular country, all they have to do is threaten to leave, and states, in need of investment, will compete to offer them favourable regulatory and fiscal conditions» (Crouch 2020). «The sphere within which public opinion had a direct effect on the content of pol-

[59] Sandel 2022, 306, 297, argues that «in the finance-dominated capitalism of the post-Reagan era, companies made money not by investing but by speculating on the future value of existing assets» and shows that «the Ford Motor Company, an icon of American manufacturing [...] in the early 2000s [...] made more money selling car loans than selling cars». According to Rodrik 2017b, the globalisation of finance was probably «the most egregious mistake after the 1990s»: not only does «globalisation [...] accentuate» the flaws of the market and government regulations («asymmetric information, bank runs, excess volatility, inadequate regulation»), but above all «there is a strong empirical association between financial globalisation and financial crises».

icy» is reduced, in particular «with regard to state intervention in the economy» (Roberts 2010, 11). As a result, the «locus of effective political power can no longer be assumed to be national governments»: «the scope for action by rulers of democratic nation states is becoming narrower, and the attribution of their accountability for social conditions is getting more difficult» (Fuchs, Klingemann 2019, 5, 7).

The economic and social policy of democratic states operates within «economic and legal constraints» that are decided «in "cold" forums, outside the democratic circuit and far from social conflict [...] *Economic constraints* restrict the room for manoeuvre in public spending, borrowing, taxation, public investment, redistribution policies and social justice»[60]. As we have seen (*supra* 2ci), this has led to the adoption of restrictive and austerity policies. It should also be added that the «increasingly financial [...] and oligopolistic configuration» of transnational companies (such as those in the digital sector) and the «gigantic concentration of financial wealth and media influence that this variant of capitalism manifests» has as a consequence an «enormously increased capacity to influence the political power of the state, emptying democracy of its effective power» (D'Attorre 2023).

b) The reduction and modification of the state's tasks («the logic of discipline») on the basis of «a distinctive programme of state renewal» that «did not simply aim to dismantle or downsize the state, but also to rebuild government so that it would be complementary to a liberalised and globalised economy» in order to «make the global economy work smoothly» (Roberts 2010, 4). In summary, this programme consisted of: the sale to private individuals of «major businesses that were once operated as government enterprises – airlines, electricity and telephone companies, mining and steel manufacturers, among others»[61]; the transfer of the management and development «of public infrastructure – roads, bridges, schools, hospitals, prisons, and so on» to private consortia[62]; in setting up «institutional arrangements that would promote key parts of the pro-market creed, such as the need for sound money and fiscal discipline» (Roberts 2010, 4). In favour of this "logic" there is mainly «a deep scepticism about the merits of conventional methods of democratic governance, which are believed to produce short-sighted, unstable policies or policies designed to satisfy the selfish interests of powerful electoral blocs, well-organised interest groups and the bureaucracy itself». Linked to this is the remedy for this idea: the "depoliticisation" of certain areas of public life and their entrusting, as indicated, to «authority to technocrat-guardians» or more directly with the prohibition of certain political choices (Roberts 2010, 5). This «weakness of the nation state» has been considered «a virtue: if one firmly believes that governments are – almost by definition – incompetent and that large companies are always efficient, it follows that the weaker governments become and the more companies free themselves from their power, the better». This way of thinking, which is extremely widespread in political life, has contributed to the loss of importance of political democracy (see Crouch 2020, chap. 1).

c) Globalisation substantially reduces the ability of nation states to raise resources through taxation and debt. This is due to the need, in «commercial competition with countries that have competitive advantages deriving from abundant low-cost labour», not to implement «increases [in taxation] that could have very significant marginal effects on the competitiveness of domestic companies already under stress»: «the internationalisation of production [...] by increasing the potential mobility of companies, also increases their bargaining power vis-à-vis the state» and «the possibility that companies will decide to relocate in search of better tax or regulatory con-

[60] Bin 2007, 47-48, speaks of «new dictatorships of international finance» whose "strategic objective" is to «exclude or at least limit the influence of decisions made by the representative circuit on the management of economic "rights"».

[61] Roberts 2010, 3, who adds «government regulations that limited competition within major industries were pruned and sometimes completely eliminated».

[62] Roberts 2010, 6, notes that this is done «while also providing legal guarantees that politicians would not try to interfere in their work».

ditions». This competition contributes to reducing, as we have seen, «the autonomy of states in defining macroeconomic policy» and their «ability [...] to finance policies by resorting to debt» due to the "disciplining effect" of "financial market integration" and the possibility «of moving amounts of money sometimes exceeding the entire GDP of some countries» (Poletti 2022). The most direct consequence has been «the worldwide reduction in income and corporate taxes»[63] and therefore «a shift in the burden of taxation from capital to labour and consumption»: this «has led to a redistribution of the tax burden in favour of capital and to the detriment of labour» (Poletti 2022).

The situation of democratic states in globalisation has been effectively described with the image of the "golden straitjacket" (Friedman 1999). This straitjacket is what is required, the conditions for participating in the global market. Once this direction has been taken, «the Golden Straitjacket narrows the political and economic policy choices of those in power to relatively tight parameters. That is why it is increasingly difficult these days to find any real differences between ruling and opposition parties in those countries that have put on the Golden Straitjacket. Once your country puts it on, its political choices get reduced to Pepsi or Coke – to slight nuances of taste, slight nuances of policy, slight alterations in design to account for local traditions, some loosening here or there, but never any major deviation from the core golden rules» (Friedman 1999).

5.2 *Changes in (the World of) Law*

The transformations of law are equally significant. As mentioned, they affect sources, the national/supranational relationship and the phenomenon of deconstitutionalisation. This has been characterised as «*the depoliticisation of the economy in a market-oriented* way», which represents «the other face of global law, accompanied by the *moralisation of law in a humanitarian* way» (D'Attorre 2023). This has meant both a decline in the role of the law and a growth in the role of private law, as well as the prevalence of transnational law over national law. Globalisation and therefore «the establishment of a more integrated world market with fewer barriers requires a global law that is increasingly uniform and pervasive in individual state legal systems, which can no longer respond solely to national interests and specificities» (D'Attorre 2023). This was particularly true for "transaction costs", especially for "jurisdictional discontinuities": «As overt trade barriers have come down, the relative importance of such transaction costs has grown» and it has been «estimated these costs to be a whopping 170 percent (in ad valorem terms) for advanced countries, an order of magnitude higher than import tariffs themselves» (Rodrik 2017a, 18).

Global law has therefore focused «increasingly on harmonising the various regulatory regimes in all areas, from health and plant protection standards to financial regulations»[64]. This has been achieved «through international treaties [trade agreements] or through rulings by international courts and judicial bodies of various kinds and compositions» (D'Attorre 2023, referring to Ferrarese 2012). The role of the latter depends on the «difficulty of harmonising the law by political means» and is based on the possibility of «recognition and enforcement of foreign law», i.e. offering private economic actors «the option to choose domestic or foreign law as they please». This strategy, which has proved «most successful in protecting capital globally», is based in particular on the possibility for «private agents [...] to put in place conflict-of-law rules that endorse the choices that private parties make». These are "arcane" rules that are «specific conflict-of-law rules for every area of the law, such as contracts, torts, property rights, corporate law, and so forth»[65].

[63] Betz, Hein 2023, 13, who add the difficulties of taxation «in the face of cross-border, largely immaterial activities of digital conglomerates».

[64] Rodrik 2017a, 28, who sees hyperglobalisation as «the attempt to eliminate all transaction costs that hinder trade and capital flows. The World Trade Organization was the crowning achievement of this effort in the trade arena».

[65] Pistor 2019, who notes that «for contract and corporate law, conflict-of-law rules have converged to a remarka-

This dimension of law has gradually emerged «as a kind of *spontaneous order* of society and the global market, which judges, lawyers and jurists simply give legal form to, without this implying any element of *artificial creation*. In this sense, global law presents itself not as an *order constructed* by specific economic interests or political will, but as the *legal sedimentation of the spontaneous self-regulation of the market*». Global market law seems to represent a kind of natural law whose directives can only be followed[66]: it «presents itself as a right of society as opposed to the right of the state, and as such is freed from the arbitrariness of sovereign power, from the irrationality latent in political pressure on national legislative law, and from territorial boundaries and limitations» (D'Attore 2023). As already mentioned (see § 4), these changes entail a loss of the normative nature of the constitution, leading to what can be seen as a process of "de-constitutionalisation" (Ferrajoli 2018, Giolo 2020): decisions on social issues are made independently of constitutional guidelines and are subject to market demands (privatisation, budgetary balance, labour market deregulation, etc.). Constitutional norms, particularly those related to social rights, are interpreted in light of the "legal compatibility" imposed by market globalisation which, as we have seen, «removes the boundaries on the movement of property and wealth, which are free to circulate and choose to locate themselves where the conditions of "protection" are best» (Bin 2007, 48). In this way, «the fundamental economic component of liberal rights» is disconnected from the dimension of equality and solidarity that underpin the constitutional systems of the twentieth century, «breaking the compromise between individualism and inequality on the one hand, and public space and equality on the other»[67]. In this context, even «the guarantees provided by constitutional rigidity have proved, in the long run, to be of little use» (Bin 2007, 47).

5.3 *Globalisation and the West: Heterogenesis and Trilemma*

Globalisation has given rise to «severe imbalances, both economic and political» (D'Attorre 2023), financial and economic crises, and serious social problems. An almost perfect heterogenesis of ends has concentrated «the economic and social costs of globalisation [...] precisely in those societies that were thought to benefit most from it», i.e. in Western democracies. Faced with «a process of global wealth diffusion», there has been «the progressive impoverishment of the middle class within Western democracies» and, as we have seen, the sharp rise in inequality (*supra* 2bi). In these societies, there are "winners" and "losers": «globalisation has brought enormous benefits» thanks to a process of increasing «the degree of concentration of wealth» for «certain specific social actors» and, at the same time, «the number of people living in poverty or economic and social insecurity has been increasing» (Poletti 2022). To this must be added, in the face of the «growing demand for welfare policies» caused by the «increasing economic and social costs asso-

ble extent on the principle that the parties to a contract or the founding shareholders are free to choose the law by which they wish to be governed», adding that «the Trojan horse in these treaties is a dispute settlement mechanism that goes by the acronym ISDS (investor-state dispute settlement). It allows a foreign investor to bring a case for damages against the host state in an arbitral tribunal outside its territory. The language of the treaties is sufficiently open-ended to give arbitrators the power to grant damages for "unfair and inequitable treatment" that are on par with damages for expropriation». Sandel 2022, 294, emphasises that «Fossil fuel companies have obtained the right to seek compensation if a country adopts new environmental standards that harm their profits».

66 Bin 2007, 47, speaks critically of the "natural order" which is that «constituted by the laws of international trade, the Maastricht parameters, the evaluation criteria set by *rating* agencies, the *reports* of the OECD, and the liberal commandments of international financial institutions»: «these are "natural laws", in the sense that they are "external" and "given" with respect to the decision-making circuit through which the political will of representative bodies is expressed [...] they are rules "revealed" by bodies representing economic interests, not "democratic" interests, imposed on political institutions and not modifiable by them».

67 Bin 2007, 48, which adds that in this way this area «emigrates beyond the control of the democratic system» and how «"the daily referendum of the markets" replaces the traditional channels of political representation in evaluating the actions of governments».

ciated with economic liberalisation», the sharp decline, as we have seen, «in the ability of Western democracies to offer adequate protection within the constraints imposed by a hyper-globalised international economy» (Poletti 2022).

The relationship between democracy and (hyper)globalisation and the ability of democracies to make autonomous choices in the economic and social spheres has been summarised (Rodrik 2011) in the form of a trilemma. At the base of a hypothetical triangle are sovereignty ("national self-determination") on one side and democracy on the other, with globalisation at the apex. The trilemma consists of the following: it is not possible to have all three options at the same time, but it is possible to have i) sovereignty and globalisation without democracy (the relationship will be that of the golden straitjacket), ii) democracy and globalisation without sovereignty (here we will have a – futuristic – relationship of global governance, i.e. the idea of a global government), iii) democracy and sovereignty without (hyper)globalisation (here we will have the Bretton Woods compromise).

According to the same author, «Nowhere is this trilemma clearer than in Europe», where «the euro, which established a single currency among a subset of member states», represented «in effect [...] hyperglobalization on a European scale» (Rodrik 2017a, 66, 77). The euro is, in fact, the "logical extension" of the «an ambitious single market agenda that aimed to unify Europe's economies, whittling away at national policies that hampered the free movement not just of goods but also of services, people, and capital»(Rodrik 2017a, 66, 77)[68]. In this context, the democracies of the European Union have not chosen whether to «embark on political union or loosen economic union» (Rodrik 2017a, 8).

6. *Conclusions: Democracy and De-Globalisation*

Globalisation and the precarious relationship between the two sides of constitutional democracies have put these systems in difficulty: as we have seen, a sharp decline in the possibilities for intervention in the economic and social spheres – it deepens social divisions, exacerbates distributional problems and undermines domestic social bargaining (Rodrik 2017a, ix) – and the loosening of the relationship between capitalism and democracy[69], the political and economic importance of private law, the imbalance between the powers of the state, the crisis of representation, and the rise of populism: this has led to some elements of degeneration (de-constitutionalisation, centralisation of power, attempts to limit certain freedoms and the power of the judiciary). In systems where populist parties are in government or have strong vote shares (on the rise across Europe), can lead to electoral/majoritarian democracies, often with plebiscitary tendencies, in which the majority, as the power of the people, has primacy over other powers and where, in order to defend

[68] According to Bisogni, D'Attorre 2023, 93-96, the EU is largely a *legal* union «in which the law is primarily called upon to ensure the integration and smooth functioning of the markets, together with the protection of fundamental economic freedoms. From the point of view of the relationship between politics and economics, the European legal space was founded primarily on the intangibility of freedom of movement (of persons, goods, services and capital), which is indispensable to the functioning of the single market, with respect to the residual margins of legislative discretion of the Member States». The European experience, based on the "technocratic structure" of the Maastricht Treaty, appears to focus on protecting the "self-organisation" of the market, the "principle of competition" and the «elimination of the element of political sovereignty». D'Attorre 2023, referring to Galgano 2005 for the affirmation of the primacy of law over politics in the European integration process, notes how «it was the case law of the Court of Justice of the European Union, even before the Treaties and intergovernmental agreements, that gave European economic law a powerful neo-liberal twist».

[69] Crouch 2020, ch. 2, asks whether capitalism and democracy today reinforce each other and even whether they are compatible.

that power, it is possible to diminish constitutional safeguards of rights[70]. In Europe, examples include Hungary and Poland, and to these we can add the trends towards strengthening executive power and limiting judicial power and rights in Italy and the United States.

However, this drift is not automatic, and it is possible to identify some schematic points that could be useful in the opposite direction. Political representation can find alternative forms in the use of deliberative democracy tools (mini publics, citizens' assemblies, deliberative panels, expert committees) based on random selection and the strength of arguments (Bächtiger et al. 2018). Similarly, the role of national democracies should be reviewed with a view to expanding their scope for economic and social intervention[71]: a new balance must be struck between democracy and globalisation, in which the latter is not exclusively a constraint on the former[72].

This issue would also require an assessment of the current phase of globalisation's recession, i.e. deglobalisation. This is the phenomenon whereby, since the 2008 crisis, many «measures to restrict trade between G20 countries» have been and are being introduced, and «restrictions on international capital movements»[73] have increased and continue to increase, to the point of a possible "tariff war". This could lead to a «re-nationalisation of the worldwide social context, a relocation of decisive powers of control from international and supranational agencies to those spaces which enable a democratic collective will-formation, for which only the nation state is suitable»[74]. However, this does not appear to be the path we are on: firstly, globalisation is not over and, on the contrary, a significant reduction in globalisation would have negative consequences on consumer goods prices, energy prices and employment; secondly, a tension seems to be emerging within capitalism between free traders and protectionists, which could lead to developments in different directions (Brancaccio, Suppa 2019, 115); thirdly, the current slowdown has led to «geopolitical competition between the major global powers» (D'Attorre 2023) and not to the strengthening of national democracies.

In this context, a favourable path for European democracies is towards political integration that should «catches up with economic integration, or [...] the EU will remain dysfunctional» (Rodrik 2017a, 76), incapable of protecting democracy and responding to the transformations of globalisation.

Appendix
Democracy, Constitutionalism, Rechtsstaat*, Rule of Law. Some Historical-Conceptual Aspects*[75]

1. The distinction between liberal and constitutional democracy can also be articulated in relation to the different dimensions of rule of law. To do this, it is necessary to relate the four concepts indicated in the title from their historical bearing and the implications of the different conceptual conjugations (liberal/constitutional). In particular, after recalling the distinction between twentieth-century constitutionalism and liberal constitutionalism (already seen in the text), the distinction between *Rechtsstaat* (*État de droit*, *Stato di diritto*) and rule of law (which are not just synonyms) will be analyzed. This distinction will make it possible to highlight how underlying the German reflection on *Rechtsstaat* is a critical need for what socially prevents the full development of the

[70] On the ways in which the tools of constitutionalism («designs, concepts, and principles») can be used for autocratic purposes, see Dixon, Landau 2021.

[71] Rodrik 2011, 246ff, argues in this direction for a return to the Bretton Woods balance.

[72] Some indications in this sense can be found in Poletti 2022.

[73] Brancaccio, Suppa 2019, 114, calculate, when they write, 1196 of the first type (trade) and a further 12 per cent of the second (finance) and note that, initially, «these restrictive measures were adopted not only by relatively small economies such as Malaysia and Argentina, but also by giants such as Russia, India, China and, above all, the United States of America».

[74] Betz, Hein 2023, 208, who note that this could favour «a re-appropriation of the commanding heights of the economy by the state» and «a relativisation of absolute property rights».

[75] This analysis is based on Bin 2016.

freedom of individuals and therefore that of the control of private and not only public power[76].
2. As mentioned (*supra* § 3), the main distinction between constitutionalisms concerns the different relationship between state and society, and fundamental rights. In the case of the twentieth-century one, as seen, the constitution also has a function of "guiding" society and provides a broad catalog of social rights, while for the liberal one, the constitution has a function of "guaranteeing" the dynamics of society and social rights are not a decisive aspect of it. A similar distinction can be found between the initial conception of *Rechtsstaat* and that of rule of law. We will briefly consider the theory of R. von Mohl and that of A.V. Dicey.

2.1. Underlying the notion of *Rechtsstaat* is the need, in Mohl's thinking, to "juridicize" the police state (Polizeistaat)[77]. The latter, which should be seen, in the constitutional reality of German states, as characterized by an order whose criterion is the «Wohlfahrt, the welfare of the subjects»[78] but which nevertheless maintains forms of inequality and does not guarantee equal rights and freedoms. Mohl's proposal of *Rechtsstaat* (1832-1833) is linked to the idea that it is that «which suits itself to a society developing through its members' energies and initiatives» and that «the value of individual and collective resources was enhanced by strengthening individual freedom». Freedom is not a «mere "empty domain" free from external intrusions but was substantiated in the individual's positive and expanding actions»: this requires «to back the individual by removing hindrances he may not be able to overcome on his own» (Costa 2007, 92)[79]. *Rechtsstaat* therefore has a material and a formal dimension: the former refers to the fact «that the state must pursue positive ("just") goals», while the latter does so with respect to the «binding to law and statute law» (Stolleis 1992, 260) of these goals/goals. The main purpose of the state is not only «the maintenance of the legal order [...] as a necessity and a good in itself», but also «the support of reasonable ends, where and to the extent that the own means of individuals or groups already gathered in smaller circles are not sufficient»[80], while the realization of the state's purposes in legal forms was based on a few basic principles: «where the rights and obligations of citizens are disposed of or punishments are inflicted, a law passed in accordance with the constitutional procedure in force is necessary» (Stolleis 1992, 260)[81].

[76] Bin 2016 discusses the polemical significance of the early use of the term *Rechtsstaat* and its view as a "fighting word". Costa 2007, 93, notes that this term was, in the first half of the nineteenth century, a «key word underpinning constitutional reforms» and that, as we shall see, «in the second half of the century it underwent a depoliticization and technicalization process».

[77] According to Stolleis 1992, 258, Mohl seeks to «link late absolutist police science with the postulates of the constitutional movement».

[78] Schiera 1982, 1003, who reconstructs, with reference to Prussia, the path of formation of German police states, the characteristics of this type of state, and the establishment in liberal historiography of a pejorative view that emphasizes «the obsessive and oppressive aspect of "state interventionism"».

[79] According to Bin 2016, underlying this idea is the need for «guarantee of equality of individuals and protection of rights and property from economic and cetual power exercised by other individuals. The rule of law was invoked as a bulwark of the security of citizens, because not the state, but society, the people, and the arrogance of private individuals constituted the threat to individuals».

[80] Bin 2011, shows that Mohl «strictly conditions the configurability of the rule of law on the presence of an effective limitation of political power by popular representation. Law can be accepted as self-restraint only if it is the product of a public process in which individuals are called upon to participate through an effectively representative system».

[81] According to Di Martino 2018, Mohl «rejects an idea of the rule of law [*Rechtsstaat*] limited to the defensive guarantee of individual rights and includes in its definition the contents and ends of the state. The apex principle of the system is always individual liberty, but the instruments for achieving it are numerous: while the tasks related to the defense of the individual's legal sphere are entrusted to the jurisdiction (*Justiz or Rechts-polizei*), those related to the support of individual liberty belong to the administration (*Hülfs-polizei*). While Mohl's position appears indebted to themes developed during Enlightened absolutism, it also represents an early attempt to respond to the emerging social question». For Ridolfi 2022, «the liberal Mohl, a few years Stahl's senior, developed in the same years a theory of the rule of law [*Rechtsstaat*] that was even more attentive to social changes, and primarily to those associated with the unleashing of a raging process of industrialization, taking up the conceptual core of the police state, and meaning by

2.2. One can summarize the original idea of rule of law in «three basic characteristics [...]: (1) the supremacy of ordinary law; (2) equal status before the law; and (3) the derivation of constitutional rights from the individual rights proclaimed by courts of justice and parliament» (Gozzi 2007, 239, referring to Dicey 1885). What characterizes this approach is the fact that rights are «in England, the product of a "jusgenerative" process that comes from society and its judicial structures, not from a voluntary normative act or constituent body». It is a «social order *spontaneously* established by society» (Bin 2016): for Dicey (1982, 121), «the "rule of law", lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land». The social order thus establishes the minimal and limited role of public power.

3. The establishment of the *Rechtsstaat* in nineteenth-century Germany did not follow the lines of von Mohl's proposal and went, in the *Nachmärz* – after 1848/49, in a different direction. The conservative view of Friedrich Julius Stahl took hold, according to which «The state should be a *Rechtsstaat*; that is the slogan and, in truth, the driving force behind the development of modern times. It should precisely define the scope and limits of its authority and the free sphere of its citizens in accordance with the law, and secure them inviolably, and it should not realize (enforce) ethical ideas through state action, i.e. directly, beyond the scope of the legal sphere. This is the concept of the "*Rechtsstaat*"» (Stahl 1856 quotet according to Stolleis 1992, 278)[82]. Nineteenth-century liberalism adopted this view and, in so doing, «loosened the link between the material idea of the *Rechtsstaat* and political participation and after 1849 largely abandoned it. The *Rechtsstaat* was no longer synonymous with political freedoms, active participation of citizens and material equality, but was limited to the formal definition and guarantee of the citizens' sphere of freedom: "The character of the *Rechtsstaat* guarantees only the inviolability of the legal order, but not its content". The concept of the formal *Rechtsstaat*, thus depoliticized, is, so to speak, the residual liberal program after 1848» (Stolleis 1992, quoting Stahl 1847). The *Rechtsstaat* (and other European states governed by the rule of law) can be reduced to the «limitation of public power through the imposition of the constraint of the law and the guarantee of judicial protection [including for acts of public administration] against any infringement of the private sphere» (Bin 2016). The result is a «vision of the *Rechtsstaat* distorted by liberal ideology, which postulates a strict separation of the state from civil society: public institutions have only the task of defending the *social order*, certainly not of changing it», a social order that «is the product of the relationships that are "spontaneously" established in society» (Bin 2016).

3.1. In the second half of the twentieth century, the *Rechtsstaat* was profoundly transformed with the passage of rigid constitutions in the major European countries (Italy, Germany, France, Spain, and others) giving rise to the constitutional rule of law. The constitutions are characterized by a strong presence of not only civil and political rights, but also and especially social rights (*sozialer Rechtsstaat*), and «the affirmation of substantive equality alongside formal equality»[83].

this the desirability of the state actively intervening to restore balances that had been shattered through no particular fault of its citizens. In this way, albeit in an extremely embryonic way, Mohl laid the groundwork for the transition from the nineteenth-century liberal to modern *sozialer Rechtsstaat*».

[82] Di Martino 2018 cites Stahl 1878: «the *Rechtsstaat* must precisely determine and make absolutely certain, in the manner of law (*in der Weise des Rechts*), the trajectory and limits of its activity as well as the free sphere of citizens, and it must not further realize ethical ideas in a direct manner through state means (thus by coercion)».

[83] Bin 2016, which also notes that «the old principles of the rule of law in the liberal tradition (legality, judicial protection of rights, separation of powers, formal equality) have now been incorporated into the constitutional text, receiving as their endowment specific mechanisms that transform them into precise rules».

The principles and rights contained in constitutions are posited, as we have seen (supra par. 3), as "guide" for the development of society and are, among other things, guaranteed by the existence of the constitutionality review. This is a pluralistic framework of rights and principles that not only extends the «catalog of "negative" freedoms, "liberal" rights, formal equality» (Bin 2016), but also allows for the consideration of different interpretations, possible collisions between rights and different aspects of the same right[84]. The constitutional rule of law overcomes «the separation of social and political order of the liberal *Rechtsstaat*» and replaces it with the «democratic program of social transformation» provided by constitutional principles» (Bin 2016).

4. How has the idea of rule of law evolved? It can be said, first, that this concept has acquired a great centrality to the point of replacing in current usage that of *Rechtsstaat* (constitutional or otherwise). In some analyses, the rule of law is enriched and, as has been noted, often, «refer to just about every political ideal which has found support in any part of the globe during the post-war years», in particular, protection of human dignity and allocation of rights (civil, political, social)[85], and also democracy, privacy, justice. It can be said, that progressively the rule of law became part of «a "*cluster of ideals*" that constitutes the core of modern political morality, and in which each term integrates with the others and is substituted for them, as if they were interchangeable concepts: "*democracy, human rights and perhaps also the principle of free* market"»[86]. In this dimension of "ideal" it becomes difficult to understand «how many and what values are included in the notion of *rule of law*» (Bin 2016), to the point that it has been seen as «"an unruly horse", because the content of the rule of law has been hotly disputed» (Postema 2022, 17). There are of course two prevailing views, one formal and the other substantive: the former «means that government in all its actions is bound by rules fixed and announced beforehand-rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge» (Hayek 1944 quoted according to Raz 2009) to which must be added the requirements that law must have («be general, consistent, prospective, accessible, intelligible, and stable»), and often «standards for governmental institutions, especially courts (the judiciary must be independent of political pressures especially from the executive branch of government, and that courts respect familiar principles of due process»); the second adds to the formal aspects the protection of individual rights[87] that «do not merely form the content of positive law, but they are the wider background and integral aspect of its fabric» and, although not always, the requirement of democracy and that of orientation to principles of justice (Adamis 2021). The formal dimension seems patently insufficient[88], but for the more articulate and encompassing one, the question remains as to its extension to private powers, that is, whether its core («to temper the exercise of power to avoid to the extent possible its arbitrary exercise», Postema 2022, 20) is related only to the public sphere or goes beyond it. In thinking about rule of law, there is an awareness that the task is «to protect individuals against what would otherwise be undeterred privations against them-not [only] by overreaching state officials, but [also] rather by undeterred private individuals, corporations, or entities» (Postema 2022, 32, quoting West 2011). What remains doubtful is how to make this task possible in the dimension of economic relations and the different conformation of law that has developed with globalization: the feeling is that at this level this reflection «valorizes "de-statialized" traits of *rule of law* to make

[84] This has been matched by the wide spread of judgments (rulings) based on balancing and proportionality.

[85] Raz 2009, 210, with reference to «the International Congress of Jurists meeting in New Delhi in 1959», who adds that these are «ideals which bear little or no relation to the one it originally designated».

[86] Bin 2016 with reference to Waldron 2004.

[87] Often, Postema 2022, 16, the reference is to «international human rights norms and standards».

[88] For Raz 2009, 211, «A nondemocratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies».

it the centerpiece of the theoretical edification of a global law in which legality and the protection of rights can be disengaged from the traditional scheme of state sovereignty» and relies on the judgments of judges and courts and a «dense nebula of administrative and international bodies, customary norms, and market rules» (Bin 2016) to establish international legality. What seems to reappear in this direction is the idea of spontaneous social normativity, and what seems to disappear from the scene are social rights and the possibility of substantive equality.

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