THE CONSTITUTIONAL IMPLICATIONS OF DEMOCRACY IN GOVERNING COMPLEX SOCIETIES

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And I say also unto thee,
Thou art Peter,
And upon this rock
I will build my church;
And the gates of hell
Shall not prevail against it.
Mt. 16:18 (Holy Bible, 2006: 10)

ABSTRACT: This article examines the constitutional interactions between transition governance and leadership in shaping innovative designs for complex societies. When assessing institutional innovation, state constitutions reveal a great deal of variation: democratic designs take extremely differentiated forms according to different constitutional contexts. This is why this article focuses on the theoretical conceptions of democracy, as they are contextualised in different constitutional designs. It begins with three quotations (from the Holy Bible, the European Union’s admission criteria, a report by the World Bank) that provide us with paradigms for institutional innovation and governance in times of transition, while also shedding light on the concepts of ‘democracy’, ‘leadership’, and ‘transition’. To this extent, the essay examines alternative types of democracy (deliberative, conversational, representative, economic) in order to fill in the gaps within liberal democratic designs. Among them, economic democracy profoundly affects constitutional designs. This means that, in a globalised economic world, constitutional contexts act as mere recipients of changes promoted by the dominance of international actors that have neither democratic nor popular legitimacy.

KEYWORDS: Constitutional democracy; Constitutionalism; Representative democracy; Deliberative democracy; Economic democracy; Constitutional transitions; Transition governance; Leadership; Constitutional context.


IMPLICACIONES CONSTITUCIONALES DE LA DEMOCRACIA Y GOBIERNO DE SOCIEDADES COMPLEJAS

RESUMEN: El artículo aborda la relación, de transcendencia constitucional, entre transiciones democráticas y leadership a la hora de delinear marcos institucionales novedosos para el gobierno de sociedades complejas. A este respecto, las constituciones estatales manifiestan una gran variedad de formas de institucional innovation. Por esta razón el artículo se centra sobre las concepciones de democracia, para luego examinar su concreción en los diferentes contextos constitucionales. El artículo empieza profundizando el significado de tres citas (una de la Biblia, una relativa a los criterios de adhesión a la Unión Europea, una sacada de un report del Banco Mundial), que enuncian paradigmas de institutional innovation and governance en épocas de transición y, en el mismo tiempo, son esclarecedoras de los conceptos de ‘democracias’, ‘liderazgo’ y ‘transición’. El artículo examina luego distintos modelos de democracia (deliberativa, conversacional, representativa, económica) que complementan el clásico modelo de democracia liberal. Sin embargo, el concepto de economic democracy es el que más afecta los contextos constitucionales. En un mundo que ya está completamente globalizado a nivel económico, los contextos constitucionales se limitan a registrar pasivamente cambios institucionales promovidos por actores internacionales que no tienen legitimación democrática ni popular.

PALABRAS-CLAVE: Democracia constitucional; Constitucionalismo; Democracia representativa; Democracia deliberativa; Democracia económica; Transiciones constitucionales; Gobernanza de transición; Contexto constitucional; Liderazgo.


Fecha de recepción: 02/05/2017
Fecha de aceptación 16/05/2017
Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market force within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

(European Council, 1993)

Underlying the litany of Africa’s development problem is a crisis of governance. By governance is meant the exercise of political power to manage a nation’s affairs. Because countervailing power has been lacking, state officials in many countries have served their own interests without fear of being called to account. In self-defense individuals have built up personal networks of influence … Politics becomes personalized, and patronage becomes essential to maintain power. The leadership assumes broad discretionary authority and loses its legitimacy. Information is controlled, and voluntary associations are co-opted or disbanded. This environment cannot readily support a dynamic economy. At worst the state becomes coercive and arbitrary. … Dedicated leadership can produce a quite different outcome. It requires a systematic effort to build a pluralistic institutional structure, a determination to respect the rule of law, and vigorous protection of the freedom of the press and human rights.

(World Bank, 1989: 60-61)

I. SETTING THE THEORETICAL FRAMEWORK: THE CONSTITUTIONAL IMPLICATIONS OF LEADERSHIP AND INNOVATIVE INSTITUTIONS

Scholars with a background in either law or political science may consider unusual the choice to begin an essay on governance, complex societies, and innovative institutions by quoting the Holy Bible, the admission criteria to the EU, and a World Bank report on sub-Saharan Africa.

They might also consider bizarre the idea of examining transition governance in a complex world by making reference to these extremely differentiated sources. And their criticism might not only be procedural but also substantive. It is not just a matter of quotations, they might argue, but, they would probably also ask themselves whether and how these texts and documents could really contribute to an analysis of the topic in question.

On the contrary, I contend that the lines quoted at the beginning of the essay are extremely useful when addressing the constitutional implications of the interactions
between governance, complex societies, and the role of leadership in shaping innovative institutional designs. To this extent, this essay has primarily speculative aims. Indeed, it is aimed at assessing the impact of the “controversial” conceptions of democracy that support the adoption of innovative institutional designs in constitutional liberal democracies.

I will not concentrate on the multifarious constitutional features that characterise each specific constitutional legal system, where the governance of societal complexity requires innovative institutions. Although they vary from state to state, these features serve a unitary function that embraces all constitutional contexts and designs. This is apparent in the field of comparative constitutional legal studies, which focuses on how and to what extent each country implements the conception of constitutional democracy. This is due to the fact that, “in large measure, the notion of a common point of departure seems inherent in the process of comparison”.

In particular, domestic constitutional features may be considered as constitutional reflections of broader theoretical conceptions of democracy, and the latter have proven to be capable of shaping the complex and multifarious relations between society, leadership, transition, and innovation within specific constitutional contexts.

This essay thus provides a scenario for a broader examination of current trends in comparative constitutional studies. It is evident that globalisation, on the one hand, and global financial dominance, on the other, have profound impacts upon domestic socio-

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economic and political contexts. These are indeed in a fluid state, and the challenges the state-society institutional interface has to cope with are even more remarkable. On the one hand, these challenges are the outcome of a political deficit; on the other, global financial dominance is governed by international financial actors that have neither democratic nor popular legitimacy; furthermore, there is a lack of accountability in how they oversee financial governance. Finally, nation states are in a state of flux, and instability is accrued by the presence of fragmented plural societies within which global mobilisation, labour migration movements, and economic freedom of the movement of capital and goods generate even sharper cross-cutting cleavages in the intersections of law, governance, and societies.

The current financial crisis has also caused a shift from the political to the economic sphere. For instance, it has narrowed the discretion the political branches are entitled to when it comes to determining the destination of revenue to be raised throughout the country. As national governments have to pay off the public debt, a limited amount of proceeds now ensure minimum standards of income, health, education, and welfare, as well as the possibility for all citizens to enjoy comparable services. This threatens proposals for innovative structures made by the various political branches, and weakens the ability of political actors to manage the complex interweaving stemming from the need for social entitlements, governmental change, and the respect for the democratic framework. And the threats are even more contentious if we consider how global terrorism is now menacing liberal democracy, mobilisation, and pluralism, i.e., the same presuppositions that both constitutional democracy and global governance are based on.

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6 T.-C. Cheng, “Power, Authority and International Investment Law”, p. 469; J. Bohman, Democracy across Borders, p. 3. The assumption has been recently challenged by scholars: see D. Chalmers et al. (eds), The End of the Eurocrats’ Dream: Adjusting to European Diversity, Cambridge University Press, Cambridge, 2016.

II. FROM CONSTITUTIONAL TO THEORETICAL DEMOCRACY: COMPARATIVE STUDIES AND INNOVATIVE INSTITUTIONS

There are practical reasons for choosing to focus on the theoretical presuppositions of constitutional democracy. When assessing institutional innovation, state constitutions reveal a great deal of variation: both the process of naming democratic designs and the forms they take are indeed extremely differentiated according to the different constitutional contexts. This is particularly apparent when constitutional designs incorporate -that is, contextualise- theoretical conceptions of democracy.

I do not underestimate what scholars term as the “Montesquiean tradition”. Paraphrasing Tushnet, my intent is to highlight how each country’s choice of a specific constitutional democratic design merely reflects which is the country’s understanding of the theoretical conceptions of democracy. Indeed, that understanding contextualises such conceptions by taking into account the country’s politics and culture.

This constitutional understanding unavoidably affects leadership that, at various degrees and acting upon a political mandate, promotes institutional innovation. Indeed, “pluralisation and contextualization of models of democracy … allows us to recognize variation in the meaning and scope of democratic politics”.

When it comes to comparing this variety of names and forms, the analysis gives rise to the following questions: does linguistic variation really reflect a variety of forms? Does this cross-referential constitutional vocabulary entail differentiated concepts? Or, as I contend, does it merely “confound the language [of constitutions], [such] that they may not understand one another’s speech”.

The three passages I quoted above also support the method I will apply throughout the essay, i.e., a method that comes out of comparative legal studies and that has proven

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9 I.e., the “idea propounded most eloquently by Montesquieu—that each nation’s laws reflected and embodied something distinctive about that nation’s “spirit” or culture—that dominated the thinking of legal scholars” (M. Tushnet, Advanced Introduction, p. 2 fn 3).


12 Ge. 11, 7, in: King James Version (1611), The Holy Bible Containing the Old and New Testaments Translated out of the Original Tongues and With the Former Translations Diligently Compared and Revised by His Majesty Special Command, Cambridge University Press, Cambridge, 2006, 10.
to be extremely useful in cross-national analyses. Comparative legal studies are usually entrusted with the goal of dealing with the variety of forms and naming that characterise the constitutional reflections of the theoretical foundations of constitutional democracy, complexity, and institutional innovation. On the one hand, these studies contribute to filling in the gaps between “black-letter law and rules ‘in action’” of democratic designs.

On the other hand, this method makes it possible to examine a vast array of constitutional regimes and operational rules, and therefore to propose classifications that are the outcome of a cross-national analysis. Comparative legal scholars are indeed accustomed to examining a vast array of constitutional forms (i.e., reflections of the theoretical concept of democracy), to grouping them on the grounds of their common traits, and to devising “prescriptive models”, which are “a synthesis of complexity by logical categories” that are useful for the advancement of comparative legal studies.

The comparative method thus exhibits an impressive ability to deal with legal complexity; furthermore, it proves to accomplish the goal of accommodating the variety of democratic forms and to shed light on the interrelationship between the theoretical types of democracy (deliberative, conversational, representative, economic) and their constitutional implications, under which governance of complexity is attained and institutional transition takes place. From this, however, it does not follow that this method is aimed at reducing and oversimplifying this variety; by contrast, it is capable of comparing and contrasting different constitutional democracies, of detecting analogies and differences between them.

This means that the comparative method presupposes both legal (the constitutional frameworks as reflections of theoretical conceptions of democracy) and linguistic variation, both of which express contextualised democratic forms. Hence, legal and linguistic variation cannot be considered an obstacle to comparative studies. The method indeed allows scholars to get beneath linguistic labels and detect the commonalities upon

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which variety may be grouped. The variety of languages, then, does not confound the interpreter: paraphrasing Shakespeare’s *Romeo and Juliet*, “That which we call democracy by any other name would perform the same function” (Shakespeare, II, ii, 1-2).

What makes this possible is the so-called functional approach\(^\text{16}\), which goes beyond specific constitutional designs characterising single democratic regimes: in Reitz’s words:

Thus a good comparative law study should normally devote substantial effort to exploring the degree to which there are or are not functional equivalents of the aspect under study in one legal system in the other system or systems under comparison. This inquiry forces the comparatist to consider how each legal system works together as a whole. By asking how one legal system may achieve more or less the same result as another legal system without using the same terminology or even the same rule or procedure, the comparatist is pushed to appreciate the interrelationships between various areas of law\(^\text{17}\).

Instead of focusing on variation, the legal comparative approach centres on the function democracy displays under different constitutional frameworks: indeed, “[i]nstitutions, both legal and non-legal, even doctrinally different ones, are comparable if they are functionally equivalent, if they fulfill similar functions in different legal systems”\(^\text{18}\).

The search for commonalities and analogies may be useful when highlighting borrowings, the evolution of specific constitutional contexts, as well as their transplants\(^\text{19}\). And this article will examine how the dissemination of theoretical conceptions of democracy, as well as their incorporation and subsequent adaptation in constitutional designs, take place.

However, devising prescriptive models does not support the homogenisation-unification of these diverse solutions adopted under different constitutions. I have already contended that comparative legal studies presuppose linguistic and legal variation; furthermore, the functional approach encourages the practice of “comparative law as a


\(^{17}\) J. C. Reitz, “How to Do Comparative Law”, p. 621.


subversive discipline\textsuperscript{20}. The subversive character of comparative studies reveals the fallacy of the presence of “new universals” in what has become a globalised world\textsuperscript{21} and therefore shows how legacies and transplants exhibit an elevated degree of resilience in contexts that act as mere recipients of transplanted solutions in the field of constitutional democracy.

From this, however, it does not follow that democracy cannot be a new universal per se. It is evident that this typical Western conception has become “one of the world’s new universal religion[s]”\textsuperscript{22}. This trend is even more apparent if only we consider how financial international actors “spread the word” by promoting democracy as an “emerging right to democratic governance”\textsuperscript{23}.

III. COMPARATIVE LEGAL STUDIES, THEORETICAL FRAMEWORK, AND PARADIGMS OF INSTITUTIONAL INNOVATION

I come now to the three quotations with which the essay begins. Although they seem to be extremely differentiated on the grounds of both their sources and meaning, it is possible to get beneath linguistic labels and grasp the commonalities among them.

The functional approach, which has proven to be extremely useful in comparative legal research, highlights their common traits: to varying degrees, the three passages may be considered metaphors or paradigms of institutional change. They embody the patterns through which it is possible to promote and govern complex societies by encouraging changes and ameliorations of the institutional setting. Furthermore, they focus on the role of the actors (the leadership) that promote institutional change; they also shed light on what I term the “paradigm shift”, i.e., on how leadership affects institutional change and therefore has an impact on the legal features that reflect the different theoretical conceptions of constitutional democracy.

The passage from the Gospel provides us with an extensive paradigm for institutional innovation. Paraphrasing it, the text reads as follows:

And I [the theoretical model of constitutional democracy] say also unto thee,
Thou art Peter [leader/institutional innovator],

\textsuperscript{21} H. Muir Watt, “Further terrains for subversive comparison”, p. 272.
And upon this rock [constitutional democracy] I will build [or innovate] my church [reflections of constitutional democracy/society];
And the gates of hell [a different regime/rule] Shall not prevail against it [constitutional limitations].

When promoting transition/innovation in complex societies, i.e., in societal contexts that are extremely pluralistic, polarised, and divided along cultural, social, and religious cleavages even within state boundaries, this paradigm sets the principles (theoretical conception of democracy) to which the legal framework as established, implemented, or innovated by the leadership should adhere.

The leadership is then the actor that governs societal complexity, and therefore aims to promote its transition by accommodating its cross-cutting cleavages. However, the paradigm both promotes change and sets limitations on innovation. This is apparent as far as the role of leadership is concerned. Which types of institutional innovation should the leadership propose? Should it act consistently with the conception of democracy that the legal framework presupposes? Or is it allowed to suggest implementations/innovations that go beyond the legal reflections of the theoretical conception of democracy?

The paradigm lays down both procedural and substantive limitations on innovative institutional change. However multifaceted the society may appear and tremendous the innovations may be in order to cope with complexity, the leadership should propose changes that are not only consistent but also coherent with the original conception of democracy that it is incorporating. This is the reason why I primarily focus on the theoretical framework and therefore term constitutional designs “reflections” of the theoretical conception of democracy. In fact, the constitutional system is democratic not only because it is implemented throughout manifold forms of democracy but also because these forms are coherent with the theoretical foundations promoting institutional change, thus revealing the democratic character as inherent to the same constitutional system.

However, the paradigm we infer from the Gospel gives rise to the following issues. Although it imposes on leadership the requirement to act consistently with the original conception of democracy, it does not clarify which are the original theoretical foundations that reveal the democratic character of its constitutional reflections.

Furthermore, it does not explain which types of transition/change patterns the paradigm refers to. In particular, the concept of transition is not formulated clearly enough, and greater precision is therefore necessary. From the paradigm, we do not infer whether innovation merely consists in the governance of transition from authoritarian rule
to a democratic regime—and therefore only deals with the establishment of constitutional democracy in emergent democracies—or whether the concept encompasses all the changes that Western democracies are currently experiencing (in structures, policies, values, and decision-making processes) because of the economic crisis and global financial dominance. In this regard, the crisis gives rise to issues that are related to global economic governance. Hence, international financial actors such as the World Bank and the International Monetary Fund, as well as private-sector investors, endorse the transformation of the legal and economic premises of constitutional democracy by promoting stringent budgetary policies and the narrowing of the welfare state: “Transnational and transgovernmental elite networks can play valuable roles in world politics, but they do not constitute democracy in the classic sense.” Furthermore, such transformation of democracy proposes

The division of labor and political delegation of authority that produces a proliferation of principal/agent relationship in which agents govern citizen-principals in many areas of life. Certainly, large areas of economic life, from the Federal Reserve to the International Monetary Fund, show this reversal of agency where the terms of the relationship are dictated by the agent rather than by the principal.

In both cases, the Gospel paradigm fails to clarify how the paradigm shift works. In particular, it does not shed light on how leadership interacts with the theoretical presuppositions of constitutional democracy and its reflections under specific constitutional designs or on how leadership interprets both constitutional values vis-à-vis constitutional limitations to proposed innovative designs. Indeed, the Gospel paradigm merely designates the leader as the principal interpreter of the conception of democracy that lies beneath the constitutional legal framework he or she governs. Furthermore, its shift entails conversational, mutual interaction between the leadership and the constitutional framework, but it does not explain whether such interactions take place in the constitutional scenario.

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24 It is “remarkable” that the institutions of the World Bank Group “have reached their present status as the premier source of both development finance and economic research and information without introducing any major change in their constituent charters” (I.F.I. Shihata et al. (eds.). The World Bank in a Changing World. Selected Essays, Martinus Nijhoff Publishers, Dordrecht et al.1991, p. 15).


26 J. Bohman, Democracy across Borders, pp. 7-8.
IV. TYPES OF DEMOCRACIES, THE ROLE OF THE LEADERSHIP, TYPES OF TRANSITIONS

We come now to the second and third quotations with which the essay begins. Both passages help us clarify the types of democracies, the role of the leadership, and the types of transitions the paradigm of innovation is built upon.

1. What is hinted at in the Gospel paradigm? Liberal democracy as the type of democracy

The type of democracy may be easily inferred by the second passage quoted in the beginning of the essay, which lays down the so-called Copenhagen criteria, which are now enshrined in Article 2 of the EU Treaty and that set precise legal requirements governing the complex transition for the admission of new states into the European Union. Furthermore, these Articles set of constitutional constraints upon national leadership: it cannot promote any constitutional change if such change, pursuant to Article 7 TEU, might trigger “those clear risk of a serious breach by a Member State of the values referred to in Article 2”\(^\text{27}\).

The principles set forth therein (stability of institutions guaranteeing democracy; the rule of law; human rights; respect for, and protection of, minorities; the existence of a functioning market economy; and the capacity to cope with competitive pressure and market force within the Union) refer to the prototypical Western conception of democracy, ie, “the liberal democratic model of democracy”\(^\text{28}\). To this extent, these principles are constitutional reflections of the theoretical conception of liberal democracy: “the classical nineteenth-century balance of power system” is “dominated by constitutional democracies, notably the United States and member states of the European Union, which requires democracy as a condition of accession”\(^\text{29}\). And

When global financial dominance promotes a paradigm for innovation, the proposed paradigm usually coincides with that of liberal democracy: “the one thing that has been almost completely absent from the 50 or so cases of attempted democratization since 1974 is experimentation beyond the basic institutions of liberal democracy”\(^\text{30}\). As the


\(^{29}\) R.O. Keohane, “Nominal democracy?”, p. 344.

passage from the above-quoted World Bank report suggests, rule of law, political accountability, efficient governmental action, protection of fundamental rights, and a market economy are both presuppositions and reflections of liberal democracy. Government is thus legally limited in its powers, and its authority or legitimacy depends on its observing these limitations, which also constrains its ability to promote legal and institutional change.

This is particularly apparent when it comes to decision-making processes: reflections of liberal democracy traditionally rest on representative government, i.e., a system of governance where indirect forms of participation in political decision-making processes are predominant, and where the political leadership acts as the constitutional leadership, i.e., it is constrained by the constitutional limitations on the exercise of its powers, which it must observe.

Finally, the World Bank report upholds that liberal democracy perfectly fits the new universal of global economic and financial dominance: “[i]ndeed, Western liberal democracies have acted together to construct the current system that enables the global economy to operate”\(^{31}\). Liberal democracies are thus “the only viable societal model left, for only they are compatible with economic success and [the] rapidly integrating information-intensive world economy”\(^{32}\).

2. Which role for leadership in the Gospel paradigm?

Liberal democracy also sheds light on the role leadership plays under constitutional and democratic regimes. The role of the leadership is particularly relevant because it promotes changes in governmental structures, and accommodates such changes to the social and political contexts\(^ {33}\).

However, liberal democracy thus tends to reduce the leadership’s ability to manoeuvre and to narrow the applicability of the paradigm shift. The representative character of the liberal democratic system thus influences the same degree of institutional innovation.

This holds true as far as participatory and deliberative “democracies” are concerned. Under constitutional democracy, liberal democracy governs the relations between different kinds of democracy\(^ {34}\).

\(^{31}\) J. Bohman, Democracy across Borders, p. 28.
The "representative government-liberal democracy" equation is coherent with the Gospel paradigm, whereby the church in Greek indeed refers to an assembly or congregation (hence representatives), as it tends to exclude patterns of innovation that rest only on mechanisms of direct citizen participation (observations, civil juries, panels, public investigations, etc.), and totally depart from representative government. This is due to the fact that liberal-representative democracy implies, at its heart, that citizens elect their representatives, who in turn govern on their behalf. As Jeffrey Sachs J argued in *Doctors for Life International v Speaker of the National Assembly and Others*:

Representative democracy undoubtedly lies at the heart of our system of government, and needs resolutely to be defended. Accountability of Parliament to the public is directly achieved through regular general elections. Furthermore, we live in an open and democratic society in which everyone is free to criticise acts and failures of government at all stages of the legislative process. Yet the Constitution envisages something more.

Liberal democracy is thus representative-oriented, and the juridical effects of participatory mechanisms require the previous consent of the constitutional leadership when processing the results of participation in public authority.

If this is the case, constitutional reflections of democracy do not create any conflict between deliberative, representative, and participatory democracy.

Representative democracy is even more predominant when it comes to deliberative democracy, which presupposes a model in which deliberation, through argumentation and persuasion, gives way to the broadest consent possible in public decisions. Evidently, when applied to representative democracy, *deliberation* aims to establish qualified majorities, not only in constitutional legislation or reform but also in the ordinary legislation.

In summary, with reference to participatory and deliberative "democracies", the different mechanisms of citizen participation require previous consent when processing the results of participation in public authority.

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36 See below, para V.


3. Which kind of transition?

The paradigm shift is even more apparent in the third passage, which refers to Africa’s development problems: the crisis of governance is the crisis of political leadership that operated as constitutional leadership under a constitutional regime. Political leadership is not able to promote, under the guise of constitutional leadership, the exercise of political power to manage a nation’s affairs.

This passage endorses the following assumption: the role of leadership should always adhere to constitutional democracy. When assessing institutional innovation, proposed changes count as constitutional reflections of the theoretical conception of democracy. This is the major consequence of the legal application of such a theoretical conception: in fact, “constitutional democracy” designates a system of “genuine democracy”, according to which political decisions are taken in terms of the constitution. Indeed:

Genuine democracy is responsive to the preferences of real human beings. It requires elections that hold elected leaders accountable to publics and other arrangements that hold non-elected leaders accountable to elected ones. It also requires an effective rule of law with protection of individual rights; the existence of a vibrant civil society whose discussions are heard throughout the polity; substantial governmental transparency and procedures to ensure that leaders defend their policies in public, along with some opportunities for confidential discussions to promote compromise.\(^{39}\)

Constitutions thus prescribe the terms and the conditions under which political decisions may be made. This means that innovative leadership is constrained by both procedural and substantive limitations set forth by constitutions.\(^ {40}\) This means that political leadership is a constitutional leadership in liberal democracies and may therefore only propose innovative change and solutions that are consistent with the values already incorporated in the constitution.

Within the liberal democratic model, a paradigm shift is then considered a negative implication of how political leadership infringes the limitations set by constitutional designs. Political leadership fails because it proposes its own interpretation of the

\(^ {39}\) R.O. Keohane, “Nominal democracy?” p. 344.

constitutional framework instead of implementing the interpretation already enshrined in the constitution. In this regard, conflicts usually arise between national parliaments and the judiciary on issues related to judicial review. When it comes to the latter, indeed, it is quite evident that the real problem is constitutional interpretation. As Mark Tushnet has pointed out, the question arises:

when Congress enacts a statute that, on one reasonable interpretation of the Constitution -Congress’s interpretation- is perfectly constitutional, and that, on another reasonable interpretation -the Court’s- is unconstitutional. Neither the supremacy clause nor the idea of a constitution superior to ordinary law […] tells us which reasonable view ought to prevail, and there are reasons grounded in democratic theory for thinking that Congress’s should41.

Thus, the pendulum swings between two different provinces of reasonable constitutional interpretation. It could be argued these conflicts are physiological within constitutional designs42, and that political leadership supersedes constitutional leadership when it sets aside representative government: “politics becomes personalized, and patronage becomes essential to maintain power. The leadership assumes broad discretionary authority and loses its legitimacy. Information is controlled, and voluntary associations are co-opted or disbanded”43.

Like the Copenhagen criteria, the World Bank report allows an alternative reading with regard to the role of constitutional leadership. Indeed, it suggests that political leadership may also play a positive role. Indeed, when socio-economic and political contexts are in a fluid state -this was the case both of African states and the then new democracies of Eastern Europe in the early 1990s44- the presence of a fragmented plural society should be governed by innovative structures, and the leadership may be capable of managing the complex interweaving stemming from the need for governmental change and respect for the democratic framework.

Hence, institutional innovation should propose a public service that is efficient, a judicial system that is reliable, and an administration that is accountable to the public. This requires a strong role for the leadership that is not limited to the implementation of constitution-oriented policies, but that should also propose how to promote both the restoration of the liberal democratic model and to foster “a systematic effort to build a pluralistic institutional structure, a determination to respect the rule of law, and vigorous protection of the freedom of the press and human rights”\textsuperscript{45}.

It follows that institutional innovation refers to both the transition from authoritarian rule to a democratic regime and to those changes that Western democracies are experiencing in structures, policies, and core values. Undoubtedly, when governing transition, institutional innovation should primarily refer to the patterns of change in governmental structures and procedures of democracies, which should foster democratic participation in public affairs and the governance of complex societies. Such changes are required to meet the needs of the body politic in an age of anxiety characterised by the passing of state-centric structures and by the deficit of legitimisation in financially oriented global governance.

V. THE REASON FOR INSTITUTIONAL CHANGE: FROM RATIONAL DICHOTOMY TO PLURAL DEMOCRACIES

“The liberal democratic model undoubtedly has many virtues, not least in its normative and emancipatory qualities and its ability to foster stable political systems’ - and yet ‘still a doubt remains”\textsuperscript{46}. Notwithstanding its predominance in Western democracies over the last two centuries, the liberal democratic model is not able to support all types of institutional change and innovation\textsuperscript{47}.

On the one hand, liberal democracy has its roots in the 17th-19th centuries and presupposes a homogeneous body politic, i.e., a political community where common core values (be they religious, class-based, cultural) are shared\textsuperscript{48}. Societal homogeneity may be straightforwardly administered by liberal democracy, which is a type of government that relies completely on representative institutions. Representative democracy is indeed a type of governance where the members of a political community participate mainly

\textsuperscript{45} World Bank, \textit{Sub-Saharan Africa}, p. 61.
\textsuperscript{47} P. de Vos and W. Freedman (eds.), \textit{South African Constitutional Law in Context}, p. 94.
through elected representatives in the governance of their community. Traditional liberal democracies presuppose that citizens elect their representatives, which in turn govern on their behalf. Such governance is possible due to the homogeneity of its body politic. Cleavages are mainly political and therefore mediated by political parties, and this mediation allows the political community’s interests and representatives’ interests to perfectly match.

Pluralistic contemporary societies lack such homogeneity. The governance of societal complexity - where the financial crisis threatens “social” minimum standards, the mobilisation of people and migrations accrue cross-cutting cleavages, terrorism menaces the governance of this complexity - is thus unattainable through representative government alone. The consequences are threefold. First, several countries (like Brazil and South Africa) have experienced different paths of democratisation in order to govern societal accommodation, and innovative institutions are now enshrined in constitutional texts (among them, direct and participatory democracy). Second, such an innovative institutional strategy still presupposes the type of governance that falls under the umbrella of liberal democracy. As already mentioned, when proposing its own model of institutional innovation, the leadership governs that institutional innovation still narrows the scope of institutional change by merely complementing the dominant representative government with different forms of democracy (representative, direct, participatory). This is due to the fact that the sociopolitical context still operates as if it were homogeneous: institutional change must be consistent with the rationale of liberal-constitutional democracy, and political leadership should therefore act in accordance with the democratic principles embedded in the constitution.


In this respect, liberal democracy alone cannot cope with the complexity of society, whose conflicts cannot always be resolved through the traditional channels of representative democracy. As US scholars were already arguing in the 1960s and 1970s, complexity and heterogeneity can be considered expressions of a “pluralistic sovereignty”, whose fragmentation has to be handled with innovative, non-traditional forms of democracy.53

Traditional liberal democracies presuppose that citizens elect their representatives, which in turn govern on their behalf. Hence, indirect participation through elections and homogeneity in the social base make liberal democracy mainly majoritarian-oriented54, as in the case of the United States of America55. This is the main legacy that Burke, Mill and Dicey granted to this conception of democracy56: not only does democracy consist of the majority principle (and rule) for the governance of the societies, but the whole governmental and institutional framework is percolated by the majority principle. The frame of government is majoritarian-based; checks and balances and the reflections of deliberation and participation are counter-majoritarian: the broad majority that is required, for example, in the amending process, is a patent limitation on constitutional leadership57. And the assumption holds true if we consider the most radical conceptions of democracy, such as that Thomas Paine epitomised in his works: “representation and election’ are indeed established and conducted for the public good58.


57 See Section IV.3 above.

58 T. Paine, “Dissertation on the first principles of government”, in Rights of Man, Common Sense and Other Political Writings, Oxford University Press, Oxford, 1995, pp. 388-389, 396 See also C.
This also entails that, during the political mandate, representatives may make decisions without taking into due account the community’s views: representatives are indeed supposed to represent the majority of the populace, and that majority of the populace would support such decisions. But does this assumption still hold true “during the intervals between elections” in societal contexts where differences and cleavages undermine societal homogeneity or where representatives are called on to face the dire effects of the crisis by adopting appropriate measures without taking into account the popular will and the populace will probably bear the burden of these effects—thus disregarding the same constitutional democratic presuppositions?

The role of the same constitutional adjudicators corresponds to the majoritarian style in liberal democracies. Indeed, the political branches perceive that the courts have a non-majoritarian character, which is intrusive and anti-majoritarian, because judicial intervention overrides decisions that, in their view, have some democratic justification. As a result, physiological relations often turn into pathological tensions.

The conflict is obviously particularly problematic when parliaments override judicial rulings that declare statutory provisions unconstitutional by passing a constitutional amendment. In such cases, courts not only scrutinise constitutional amendments but also the constitution itself- and the role of the courts in going as far as to scrutinise such constitutional overruling can even be considered “supra-majoritarian”. Many courts can effectively exercise such oversight; and they usually affirm their power (or even their duty) to scrutinise whatever piece of legislation adopted by parliaments they please, thus conferring upon themselves normative precedence even over those qualified majorities necessary for enacting constitutional amendments.


62 In Austria, “the Constitutional Court is empowered to confront the Constitution with its own basic principles, like the principle of democracy, the federal state, the Rechtsstaat, separation of powers and the general system of human rights” (Austrian Constitutional Court, ViSig 16.327/2001). See A. Gamper, “Homogeneity and Democracy in Austrian Federalism: The Constitutional Court’s Ruling on Direct Democracy in Vorarlberg”, Publius, no 33, 2003, pp. 45-57. In Italy, Germany and (partly) France, oversight over constitutional provisions is at least advocated by the courts. As for Italy, see Constitutional Court, Ruling No. 1146/1988. As for Germany, see BVerfGE 84, 90 and BVerfGE 109, 279. In France, the Constitutional Council (Conseil Constitutionnel) acknowledged its supra-majoritarian role in 1992, and therefore, that constitutional amendments were subject to judicial review (Decision of 2 September 1992, Maastricht II No. 92-312 DC, Rec. 76, § 19). In 2003, however, it overruled its former decision (Ruling No. 2003-469 DC, Rec. 293). In any case, it is contentious whether the Council is empowered to confront the constitution with its own basic principles (normes de la supraconstitutionnalité) such as the principle of popular sovereignty. See G. Drago, Contentieux constitutionnel français, 3rd edn, PUF, Paris, 2011, pp. 330-333.
This entails that further reflection is required as far as the Gospel paradigm is concerned. This is an abstract model capable of adapting to different types of democracy whose legal implementation is even more relevant, as they outline the scenario within which the governance of complexity and institutional transition take place, and where actors and innovation face the challenges stemming from global financial dominance.

To this extent, I propose a theoretical narrative that is an alternative to the traditional one, according to which we usually consider the relations between conceptions of democracy and constitutional democratic designs. This means that we have to abandon reasoning based on dualism and dichotomy, i.e., reasoning that philosophers would call “rational”. As Richard Rorty argues, “to be rational consists precisely in respecting the distinctions between the absolute and the relative, the found and the made, object and subject, nature and convention, reality and appearance”.

To put it another way, we have to abandon the rational idea that only those innovative designs that are consistent with (and are merely legal reflections of) the conception of liberal democracy are the only ones that are constitutionally compatible. Therefore, we have to accept that there is room left for different forms of democracy capable of managing complexity and coping with institutional transition. These forms are different from liberal democracy: they have frequently been applied in the course of constitutional history, and are indeed modelled on specific experiences.

To this extent, deliberative democracy is an intriguing theoretical type of democracy. In fact, the process of evaluating pros and cons before taking a decision is considered to be the ideal deliberative model. After previous public discussion and an exchange of information among all interested parties, a deliberation, which is not aimed at influencing decision-making on the part of the public administration, is undertaken:

64 See D.K. Hart, “Theories of Government Related to Decentralization and Citizen Participation”, Public Administration Review, n° 32, 1972, p. 604: the ideal democratic man “is an abstraction -an ideal type serving approximately the same function as the ‘rational man’ in classical economic theories”.
In “discursive” or “deliberative” theories of democracy […] the point is to increase the quality of democratic judgments through widespread citizen participation in multiple public spheres, both within and between the institutions of state, economy and civil society.\(^67\)

Further theoretical reflections have focused on the relationship between deliberative and participatory democracy and their areas of application. However, this theoretical assumption indicates that, even though representative participatory and deliberative democracy share some relevant traits, the relationship between them occasionally raises the issue of determining the fields in which both methods (deliberative and participatory) are applicable.

What I contend here is that there also are different conceptions of democracy that leadership can be based on when outlining the principles underpinning an innovative institutional design. I will deliver a brief sketch of such theoretical conceptions in the following paragraphs, thus highlighting how variety affects both the theoretical conceptions and their legal reflections. Democracies thus vary from one constitutional context to another: they reflect different theoretical types of democracy in which both social and political values and the role of the leadership change.\(^68\) And “[t]his claim opens up the possibility that there are a variety of qualitatively different models of democracy available to us, none of which can be decisively proved correct or incorrect.\(^69\)

The outcomes are manifold. First, escaping the dichotomy between rationalism (i.e., pure liberal democracy) and irrationalism (alternative types of democracy) may help to fill in the gaps between written provisions and the practice of law. In this respect, innovative designs are neither reflections nor divergent applications of the liberal prototype model of democracy, but rather constitutional implications of alternative democratic patterns.\(^70\) Second, the functional approach that is typical in comparative constitutional studies permits us to examine a vast array of constitutional forms (i.e., reflections of different theoretical concepts of democracy) and allows us to group them on the grounds of their common traits. The alternative conceptions of democracy still exhibit an impressive ability to deal with legal complexity, because they are different declensions of the democratic forms that were elaborated within context of Western constitutionalism.


This sheds new light on the interrelations between theoretical types of democracy (deliberative, conversational, representative, economic) and their constitutional implications, under which governance of complexity is attained and institutional transition takes place. The comparative method does not, however, reduce variety; instead, it is capable of comparing and contrasting different constitutional democracies, of revealing analogies and differences between them.

VI. NEW PATTERNS FOR INSTITUTIONAL INNOVATION: SOCIAL AND CONVERSATIONAL DEMOCRACY

We come now to alternative conceptions of democracy. The socio-democratic conceptions that underpin the Western model of the welfare state may also be traced back to social democracy, which is lucidly epitomised by John Dewey's and Richard Rorty's "social hopes for "a classless, casteless, egalitarian society".

Rorty upheld the anti-dichotomy (i.e., anti-Platonist) assumption that we referred to above: the rationalism-irrationalism dualism is inherent in his philosophical conceptions, which are termed pragmatism. This proves to be useful when going beyond the representative liberal democratic model. On the one hand, it does not rest on purely theoretical conceptions of democracy: “The American pragmatist tradition … has made a point of breaking down the distinction between philosophy, science and politics”, and has overturned the “Cartesian-Lockean picture of a mind seeking to get in touch with a reality outside itself”, where the “Cartesian mind is an entity whose relations with the rest of the universe are representational rather than causal”. This means that leadership should stop “thinking of words [constitutional designs] as representations” of a theoretical framework, and think of itself “as nodes of a causal network which binds the organism together with its environment” [the societal context], where institutional innovation shall apply.

Furthermore, pragmatism “the philosophy of democracy”, which “substitutes the notion of a better human future for the notions of ‘reality’, ‘reason’ and ‘nature’”. Its realism stems from observation of the US constitutional reality:

both pragmatism and America are expressions of a hopeful, melioristic, experimental frame of mind. I think the most one can do by way of linking up pragmatism with America is to say … [that] we can, in politics, substitute hope for


72 Rorty, Philosophy and Social Hope, p. xx.

73 Rorty, Philosophy and Social Hope, p. xxiv.
the sort of knowledge which philosophers have usually tried to attain. America has always been a future-oriented country, a country which delights in the fact that it invented itself in the relatively recent past74.

The constitutional (i.e., democratic) character of social democracy is apparent when we consider that it has also had practical and historical applications. Just as pragmatism has been carved out of the U.S. constitutional reality, historical social democracy is inferred from the Putney Debates held before the English Civil War “between the elected representatives of the soldiers of the New Model Army (‘the Agitators’) and their officers (the ‘Grandees’) between 29 October and 1 November 1647” in Putney Church near London75.

The Putney Debates are then even more relevant because they are the historical prototype of deliberative democracy. The text consists in the transcription of the debates made by Sir William Clarke76; this “is a key text for understanding the roots of the formulation of our modern concepts of democracy and liberalism, particularly because they appear to be the first recorded expression of demands for universal manhood suffrage within a representative system of government”77.

To this extent, the Putney Debates highlight how radical political leadership made an effort to determine the best constitutional, democratic design, where the milieu of constitutionalism reached its more radical, but advanced, heights: among the proposals that were made for the governance of England with renewed institutions, the levellers referred to the idea of covenant as a “model of society”, to “equality of all citizens”, to the “salus populi and popular sovereignty”.78 There also were radical proposals, such as the extension of the franchise and of the qualifications for voting: this outlined a “model of

74 Rorty, Philosophy and Social Hope, p. 24. P.C. Schmitter, K. Terry Lynn, “What Democracy Is and Is Not”, p. 4 argue that democracy can take various meanings and institutional forms. Furthermore, its meaning is contingent upon socio-economic conditions and state practices. Indeed, they warn that “there is no one form of democracy and that Americans should be careful not to identify the concept of democracy too closely with their own institutions” (summarised in L. Diamond, “Three paradoxes of democracy”, in: L. Diamond, M. Plattner (eds.) The Global Resurgence of Democracy, Johns Hopkins University Press, London, 1993, p. xi.


78 These ideas were imbued with the religious beliefs of the non-conformist congregations in which Levellers and Lollards took part, including Anabaptists. See S. D. Glover, “The Putney Debates”, p. 49 fn 9.
republicanism designed to provide genuine popular sovereignty and to have justified the right of common soldiers to defend their political interest.\textsuperscript{79}

This leads to a democratic conception that is truly egalitarian:

The poorest he that is in England hath a life to live as the greatest he; … I think [it] is clear that every man that is to live under a government ought to first consent to put himself under that government.\textsuperscript{80}

However, the Putney Debates were given alternative interpretations: Levy conceived of the levellers as “radical Whigs”, not “egalitarian democrats”.\textsuperscript{81} On the one hand, this should have limited the innovative designs proposed by the political leadership and therefore undermine the project of overturning the traditional decision-making processes.\textsuperscript{82} On the other hand, it implied a shift towards a narrative based on proprietary rights that is closer to the Lockean one rather than to egalitarianism. A kind of democracy that is intermediate between social democracy and liberal democracy and yet is capable of supporting and promoting innovative institutional changes that can accommodate popular sovereignty, “liberalism”, and the “possessive individualist” nature of John Lilburne, the prominent leader of the levellers:

A theory of property whose purpose was to rationalize the market, encourage accumulation, and maximize economic efficiency would have been quite agreeable to the elimination of most customary rights in use.\textsuperscript{83}

The theoretical scenario in which governance of complexity and institutional transition take place is even more intriguing in conversational democracy, which is described in Michael Oakeshott’s The voice of poetry in the conversation of mankind (1958).\textsuperscript{84} In


\textsuperscript{80} This was Colonel Rainsborough’s exclamation during the Putney Debates, quoted and discussed in M. B. Levy, “Property and the Levellers: The Case of John Lilburne”, \textit{The Western Political Quarterly}, n° 36, 1983, p. 116. See also P. Crawford, “The poorest she”: women and citizenship in early modern England”, in: M. Mendle (ed.), \textit{The Putney Debates of 1647}, pp. 197-218.


\textsuperscript{82} M. B. Levy, “Property and the Levellers”, pp. 116-117: Lilburn did not oppose his own alternative conception to the traditional patriarchal \textit{omnia proprietas a rege}: “a serious full-blown philosophical attempt … came later with John Locke’s labor theory of appropriation”.

\textsuperscript{83} M. B. Levy, “Property and the Levellers,” p. 129.

Oakeshott’s political thought, aesthetics “defends poetry as one of the independent worldviews which constitute the character of modern experience”\(^8^5\). In this respect, the theoretical framework is opposed to the vulgar moralisation of art, and poetry and politics still have an intrinsic value of their own.

Like Rorty’s pragmatism, aesthetics is non-dualistic since it does not match the rational tradition: there is not concern towards “desire and aversion, approval or disapproval, and ‘fact’ and ‘non-fact’”\(^8^6\). On the contrary, there is the presence of different voices (practice, science, poetry, philosophy), but this does not entail that the deliberative process does not have practical implications. There is an implicit strong political commitment in Oakeshott’s reflections: “There is no *vita contemplativa*; there are only moments of contemplative activity abstracted and rescued from the flow of curiosity and contrivance”\(^8^7\).

This also means that there are no deliberate predetermined contents within the democratic constitutional context: Oakeshott’s deliberative process is the purest form of “conversation [that] may have passages of argument and a speaker is not forbidden to be demonstrative; but reasoning is neither sovereign nor alone, and the conversation itself does not compose an argument”\(^8^8\).

Oakeshott’s theoretical framework seems to be extremely adequate in the complex societal context and when governing transitions: the conversational democratic model is indeed “pluralistic” and “participatory” and matches the needs of fragmented societies. The different voices of *conversational democracy* concur, to varying degrees, in shaping a model where “all utterance[s] should be relevant; but relevance in conversation is determined by the course of the conversation itself, it owes nothing to an external standard”\(^8^9\).

VII. UNDERMINING DEMOCRATIC INNOVATION: STANDARDS, ECONOMIC DEMOCRACY, AND EXTERNAL LEADERSHIP PROMOTING SOCIAL CHANGE

Whereas conversational democracy does not constrain the utterance to external standards, *economic democracy* -the last theoretical conception of democracy I will


\(^{8^7}\) M. Oakeshott, *The voice of poetry in the conversation of mankind*, p. 541.


\(^{8^9}\) M. Oakeshott, *The voice of poetry in the conversation of mankind*, p. 494.
examine—depends on such external standards. This last conception does trigger the role of leadership: unlike liberal, social, and conversational democracies, economic democracy does not promote any institutional change from within. The external pressure of economic models and actors causes a shift from the political to the economic sphere, which focuses on ‘the problem of allocative efficiency rather than [on] questions of stabilization and income redistribution’\textsuperscript{90}.

This is due to the fact that:

\begin{verbatim}
the loci of power ... originally centred in state bureaucracies and/or local communities and municipalities, have been gradually shifting to corporations, and more impersonally, to world markets, their power unleashed by free-trade ideology, information technology and economic de-regulation. In this dynamic process entailing the concentration of power in ever-fewer hands, companies make decision based not on the public good, but on their own need to survive in an unforgiving capitalist system. Pushed by debts to banks and shareholders to grow and maximize profits, they pander to and create ‘effective demand’ for spurious products, thus often missing real and basic needs in communities, if unbacked by purchasing power\textsuperscript{91}.
\end{verbatim}

The external factors thus outline a new constitutional narrative where an ongoing economic but democratic process eclipses constitutional representative democracy, which is indeed eroded by economic forces. The crisis affects political democracy, leadership, societal complexity, and boosts the lack of accountability of the dominant global financial system. As a consequence, academics advocate “a system of checks and balances on economic power and support for the right of citizens to actively participate in the economy regardless of social status, race, gender, etc.”\textsuperscript{92}.

In this regard, the quest for innovative institutions should be based on the following “faces of economic democracies”\textsuperscript{93}: monitoring of market mechanisms and corporate activities; moral and political support of social enterprises, limitations of the power of banks by reducing fractional reserve banking; reclaiming the commons, reframing of economic freedoms.


\textsuperscript{93} N. Johanisova, S. Wolf, “Economic democracy”, p. 562.
These mechanisms should counterbalance economic democracy. Indeed, they are a counter-model vis-à-vis global financial dominance, but they are also proactive, as they presuppose innovative institutions that allow the populace to get involved in decision-making processes related to the (economic) common good.

This economic and democratic counter-model is then a reaction to international investment law, which “shifts power and authority from states to investors, tribunals and other decision-makers”, and “[t]hese shifts produce outcomes that only partially support global policies”, as well as the transfer of power and authority to decision-makers who are not democratically accountable. But such a shift also impacts the legal systems of the world: the euro-Atlantic legal tradition (or Western legal tradition) is the dominant one, and, within it, the common law tradition prevails over the civil law legal tradition. This is due to the fact that the common law legal tradition is said to ensure elevated economic performance. This is a shift from the legal to the economic meaning of law, which also makes it possible to do “comparative law by numbers”. On the one hand, there is the idea that:

‘law matters’: legal institutions have an impact on economic growth. This is in tune with neoclassical law and economics, which is based essentially on the idea that law should be measured by the incentives it sets for welfare-maximizing conduct.

On the other, the Doing Business reports of the Word Bank, i.e., “cross-country comparisons including rankings of the attractiveness of different legal systems for doing business” have led to the idea that it is possible to evaluate the economic performance of legal systems by applying quantitative methodologies and numeric indicators:

The promise of evidence-based policy-making is that it is not only more objective and less prone to misuse, but also more transparent, more democratic, and more open to public debate than decisions taken by politicians and business leaders with references to qualitative forms of knowing.

99 R. Rottenburg, S. E. Merry, “A World of Indicators: the Making of Governmental Knowledge through Quantification”, in: R. Rottenburg et al. (eds.), The World of Indicators. The Making of
The shift from a legal to an economic conception of democracy as the constitutional organisation of the body politic is also a shift from government to governance. The constitutional reflections of democracy are then mere reflections of economic governance and adhere to an efficiency rule, which ensures institutional changes in order to have economic performance.

VIII. THE LEXICON OF DEMOCRACY AND ITS CONSTITUTIONAL UPHEAVAL: TOWARDS A UNIVERSAL ECONOMIC DEMOCRATIC LANGUAGE?

The same conception of democracy has been undergoing an even more remarkable shift that affects not only its constitutional reflections and operational rule but also the meaning of the principle in question. This is what linguists call “semantic change”, as it impacts the lexical semantics of the legal language, i.e., the very function of government.

We have already highlighted how the subversive character of comparative legal studies presupposes the complexity and diversity of (both linguistic and legal) forms. Furthermore, we have pointed out that the comparative method accommodates diversity by grouping this variety of forms because they are functionally equivalent, i.e., they fulfil similar functions in different legal systems. The functional method reveals a fallacy in current research related to economic (financial and democratic) dominance. This fallacy does not concern the variety and heterogeneity of the forms such relations take under federal constitutions; it rather concerns the idea that there is “at the least a global legal language” capable of expressing such variety and that ‘global legal language [is necessarily] based on economic models’.

Such a shift in semantics is due to the intrinsic feature of legal language:

the language of laws and statutes is characterised by neutrality and generality; it avoids subjective and personal attitudes and strong regional marking, to ensure correct and unambiguous transmission of information it must be conservative in its choice of structure and lexis and hostile to stylistic variation.

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101 See Section 2 above.
And yet, these features “represent anonymous authority and power”\textsuperscript{104}: external factors, such as economic ones, may thus challenge the meaning of the legal lexicon related to constitutional democracy, and therefore impose a new sense (the language of economics) on existing lexical items.

How this change in meaning occurs is due to pressure from economic models, which focus on “the problem of allocative efficiency rather than [on] questions of stabilization and income redistribution”\textsuperscript{105}. The process of semantic change affects existing lexemes because they adopt an additional meaning that complements the old one\textsuperscript{106}. This entails a shift from “legal” to “economic” semantics, which is even more significant when the substitution of meaning is complemented by the substitution of words, i.e., when the economic lexemes replace legal jargon. In this regard, linguistic change seems to be a mere projection of the above-mentioned principle of global financial dominance, and expresses the “efficiency rule”, i.e., the optimisation of the allocation of goods, powers, responsibility, as well as the promotion of an equilibrium between the estimates of revenue and expenditures.

Public finance budgetary policies are now economic reflections of constitutional economic democracy: constraints and limitations upon the leadership’s actions are thus set by external actors, which also establish new procedural and substantive limitations on democratic change. Indeed, if “constitutional (economic) democracy” merely designates a system of governance according to which political decisions are taken in terms of the constitution, economic democracy prescribes the terms and the conditions under which these decisions may be made. The public finance model is now setting a new scenario: the promotion of change is in the hands of the various political branches (internal leadership), but the effective implementation of reform depends on the economic situation. This is what is called “nominal democracy”: “Nominal democracy meets democratic standards on the surface and embodies the rhetoric of democracy, but lacks the content. Transnational and transgovernmental elite networks can play valuable roles in world politics, but they do not constitute democracy in the classic sense”\textsuperscript{107}.

Indeed, the role of the leadership is triggered by the current economic and financial crisis: in Europe, for instance, several EU member states have amended their constitutions and introduced therein the principle of balance between revenue and expenditures.

\textsuperscript{104} M. Rissanen, “Standardisation”, p. 121.
\textsuperscript{105} M. Olson Jr, “The Principle of “Fiscal Equivalence”, at 482.
\textsuperscript{107} R.O. Keohane, “Nominal democracy?”, p. 344.
This is an example of an external (or imposed) form of institutional innovation that limits the welfare democratic state, since economic budgetary policies enshrined by the constitutional reforms assure that the budgetary position of the member states is balanced or in surplus according to Article 136 Treaty on the Functioning of the European Union (TFEU) and to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) signed in Brussels on 2 February 2010. In particular, international financial actors and global financial dominance suggest the adoption of a model capable of supporting a capitalist socio-economic model, but one that totally departs from the model of Soziale Marktwirtschaft (i.e., social market economy), which is enshrined in Article 3 of the TEU\textsuperscript{109}.

However, it could be argued that the economic shift entails the deletion of constructs purporting one of the main core values upon which constitutionalism was erected, that is, the idea of the supremacy of the same democratic constitutions: “The stability treaty not only requires … constitutional changes in each of the signatory states, but also raises significant questions about its relationship with EU law and the extent of the discretion left to member states to make fundamental decisions about taxation and spending”\textsuperscript{110}.

This change in the meaning of the paradigm for democratic innovations is threefold. First, there is a shift towards centralisation, and this reflects the anxiety towards the creation of a global legal language and common regulation of international financial relations and markets. Second, there is an even more remarkable shift towards the efficiency rule, whose application requires that, when funds and proceeds are allocated at different levels of government, the national level is financially responsible vis-à-vis financial markets and international investors. To put it differently, the national government is accountable as far as global economic governance is concerned. Third, global financial dominance causes a shift from the political to the economic sphere, and the leadership seems to rely on a new form of confidence between the political power and the sovereign


financial market, where the “distressed sovereign debt can be sold on private equity markets and the debtor [is] subjected to the harsh economics of private law”\textsuperscript{111}.

It follows that there has been a complete overturn in how constitutional (economic) democracy handles societal complexity and promotes innovative institutions for its governance. The Gospel paradigm still holds true, but presuppositions, limitations, and goals of institutional innovation have profoundly changed (setting the democratic framework and governing complexity). Whereas the theoretical conception of liberal democracy could still be implemented by resorting to differentiated constitutional domestic designs, the efficiency rule now requires constitutional features that are common throughout the world. The theoretical conception and constitutional reflections now match under a unique type of democracy that ensures improved economic performance. This also means that society is experiencing a new homogeneity and that economic-oriented democracy is capable of managing (i.e., simplifying) the complex and multifarious relations between society, leadership, and transition/innovation under specific constitutional designs.

Homogeneity now pervades the governmental structure: on the one hand, theoretical and constitutional conceptions of democracy match their societal reflections; on the other, homogeneity narrows the discretion of a leadership that is proposing innovative institutions. The devising of normative models supports the homogenisation-unification of these diverse solutions adopted under different constitutions, and this makes them prescriptive. This means that, in a globalised economic world, constitutional contexts act as recipients of the proposed policies in the field of constitutional economic democracy\textsuperscript{112}.

This is a constitutional upheaval that totally departs from what democracy and comparative legal studies presuppose: the sustainability of linguistic and legal variety and diversity. When economic democracy will definitely determine the meaning of the lexicon of constitutionalism, the limitation of powers and government of the body politic will then be based on a new economic democracy, and this will mean the time for new universals has come.

Against this background, additional efforts in the practice of subversive comparison are required, and scholars should, whenever possible, oppose the change in legal lexical semantics, and warn against the application of economic principles to constitutional democracy and to the governance of the body politic.

\begin{itemize}
\item \textsuperscript{111} H. Muir Watt, “Further terrains for subversive comparison”, p. 286.
\item \textsuperscript{112} B. A. Simmons, Z. Elkins, “The globalization of liberalization: policy diffusion in the international political economy”, \textit{American Political Science Review}, n° 98, 2004, pp. 171-189.
\end{itemize}