

Editorial

The legitimacy of modern liberal democracies is based on the implicit assumption that democracy is closely aligned with the rule of law. Their connection seems to be the keystone of any community that considers itself democratic and based on the universal values of equality and human rights.¹ However, if we leave the level of declarations and self-presentations of regimes and look at real politics, the situation no longer seems so clear-cut. First of all, the connection between the rule of the people and the rule of law does not apply universally, but is rather a historically limited phenomenon. At a time when the modern understanding of the rule of law or the *Rechtsstaat* was being established, the rule of the people was seen as a threat to it rather than as its natural constitutional base.² Only after democracy began to be considered the best, and in fact the only acceptable form of government (roughly, from 1915),³ has the connection between the two concepts come to seem necessary and natural. The model of a political system thus conceived, in which democracy, as a way of selecting those who hold power, and the rule of law, as the way in which this power is exercised, exist simultaneously, has long been considered normative; this model corresponded typically to the political reality of the countries of post-war Western Europe and North America, i.e. those that, in the view of political scientists, belonged to the stable “canon” of Western democracies.⁴

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- 1 “Human rights, the rule of law and democracy are interlinked and mutually reinforcing and ... they belong to the universal and indivisible core values and principles of the United Nations”. *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, (A/67/L.1), 19. September 2012, par. 5, available at <http://unrol.org/files/Official%20Draft%20Resolution.pdf>.
 - 2 A. de Tocqueville, *De la démocratie en Amérique*, Paris 1835–1840, II, p. 356; J. S. Mill, *On Liberty*, London 1859, pp. 7–9; J. Burckhardt, *Griechische Kulturgeschichte*, Berlin 1908, I, pp. 84 f.
 - 3 M. H. Hansen, *Was Athens a Democracy? Popular Rule, Liberty and Equality in Ancient and Modern Political Thought* (Historisk-filosofiske Meddelelser, 59), Copenhagen 1989, p. 5.
 - 4 See, e.g., M. Duverger, *Les partis politiques*, Paris 1951; G. Sartori, *Parties and Parties Systems. A Framework for Analysis*, Cambridge 1976.

With regard to this political model, the issue of the transitions of undemocratic regimes to democracy (whether in Central and Eastern Europe or in Latin America or Asia) has also been studied by political scientists for the last thirty years. The need for a legal framework, and therefore for the rule of law, was seen as a necessary complement to the process of democratization.⁵ At the same time, however, it has become more and more obvious that democracy and the rule of law haven't become mutually reinforcing in many cases, with a number of post-authoritarian states developing a model of illiberal democracy characterized by the separation of these two principles, typically while maintaining majority rule but without guaranteeing the rule of law. In addition, we have recently seen not only in the newly transformed countries, but also in some old Western democracies, a gradual rise of populism accompanied by a process which, though being called *democratic backsliding*,⁶ consisted not primarily in the retreat of democracy, but on the contrary in the decline of the rule of law.

This state of affairs raises a strong need to rethink the foundations of our political order. It must first be admitted – in accord with some contemporary political theorists – that in today's democracies, the relation of the rule of the people and the rule of law seems to be a rather ambivalent issue.⁷ Second, we should focus more than before on the fact that the rule of law is *conceptually* independent of democracy, since its rationale is meant to confront power regardless of its shape or of its autocratic or democratic nature.⁸ Then, after excluding beliefs shared rather unconsciously so far, and after putting off the fear of corrosion of our well-known political world, we can think about what remains as a possible starting point for finding a new legitimization for our politics.

It is arguable that in this thinking we can benefit – as in other areas of political and spiritual life – from the lessons and inspirations of ancient Greek political thought. It is here that significant parallels with our time can be seen. And although the scholarly debate on the extent to which the Greek conceptions of democracy and the rule of law are principles comparable to

5 See, e.g., J. J. Linz – A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*, Baltimore – London 1996, pp. 6–7. Cf. J. Ferejohn – P. Pasquino, *Rule of Democracy and Rule of Law*, in: J. M. Maraval – A. Przeworski, *Democracy and the Rule of Law*, Cambridge 2003, pp. 242–260.

6 N. Bermeo, *On Democratic Backsliding*, in: *Journal of Democracy*, 27, 2016, pp. 5–19.

7 J. Raz, *Ethics in the Public Domain*, Oxford 1994, p. 361; R. Dworkin, *Law's Empire*, Cambridge (Mass.) 1986, p. 376; L. Morlino – G. Palombella, *Introduction*, in: *id.* (eds.), *Rule of Law and Democracy. Inquiries into Internal and External Issues*, Leiden – Boston 2010, p. ix.

8 G. Palombella, *The Rule of Law as an Institutional Ideal*, in: L. Morlino – G. Palombella (eds.), *Rule of Law and Democracy*, p. 33.

the modern ideas is still open,⁹ it is at least remarkable that we encounter here similar ambivalences and a corresponding series of historical changes.

Also for many ancient Greeks during the classical epoch, democracy has been closely associated with the dominant role of law.¹⁰ Equality under the law (*ison, isonomia*) presented – besides liberty (*eleutheria*) – one of the principles which the ancient Greek democracy was based on;¹¹ *demokratia* could either be directly defined as *isonomia*¹² or at least described as a political system in which the law rules and prevails over any privilege.¹³

The key to this development is the establishing of the concept of law, which includes the notion of regularity and repetition and is related to the moral notions of punishment and reward. Human laws were understood as given by the gods, which was an extremely strong intuition that retroactively influenced the origin of the concept of natural law and whose wide acceptance was not abolished by the reinterpretation of the origin of law in Greek materialism, whether philosophical or sophistic; this intuition was also incorporated into an attempt to intellectualize the concept of law in the Socratic-Platonic tradition.

The belief in the divine origin of laws also persisted in the distinction between written law, valid for individual cities, and unwritten, universally valid law,¹⁴ both of which were crucial for the emergence of the notion of the rule of law in the classical era. On the one hand, the concrete form of the

9 M. H. Hansen, *Was Athens and Democracy?*, holds the thesis that contemporary democracy corresponds to the ancient one, both as an ideal and from an institutional point of view (although he acknowledges that the Athenians did not know the division of powers). J. Bleicken, *Die athenische Demokratie*, Paderborn 1986, kap. XVI, emphasizes rather the differences between Athenian and modern democracy.

10 See Aeschines, 1,4–6, 3,6; Euripides, *Suppl.* 406 ff.; Thucydides, *Hist.* II,37,1–3; ps.-Xenophon, *Ath. pol.* 1,4 f.

11 Aristotle, *Pol.* 1310a28–33.

12 See Herodotus, *Hist.* III,80,6, 83,1. J. W. Jones, *The Law and Legal Theory of the Greeks*, Oxford 1956, p. 90; J. Bleicken, *Die athenische Demokratie*, p. 47.

13 Thucydides, *Hist.* III,79; Andocides 1,87. M. H. Hansen, *The Athenian Democracy in the Age of Demosthenes*, London 1999, pp. 81 ff., takes a different position, claiming that *isonomia* was not a current political concept at all. Ch. Meier, *Die Entstehung des Begriffs „Demokratie“*. *Vier Prolegomena zu einer historischen Theorie*, Frankfurt a. M. 1970, pp. 7 ff., 44–49; *Id.*, *Der Wandel der politisch-sozialen Begriffswelt im 5. Jahrhundert v. Chr.*, in: *Archiv für Begriffsgeschichte*, 21, 1977, pp. 7–41, distinguishes *isonomia* together with *eunomia* on the one hand and *demokratia* together with other “cracies” on the other as two different stages in the development of Greek politics.

14 Srv. A. Lesky, *Der Kampf um die Rechtsidee im griechischen Denken*, Athen 1968; differently R. Hirzel, *Ἀγγραφος νόμος* (Abhandlungen der philosophisch-historischen Classe der Königlich-Sächsischen Akademie der Wissenschaften, 20), Leipzig 1900, p. 96, who understands the tension between unwritten and written law as a conflict between divine law and human norms or between the universal law of nature and individual rights. Similarly M. Oswald, *Nomos and the Beginnings of the Athenian Democracy*, Oxford 1969, pp. viii, 55–56.

isonomy, i.e., equality before the law, was associated with and guaranteed by written law;¹⁵ on the other hand, the rule of law represented the Panhellenic ideal, which constituted the common identity of otherwise diverse Greek communities.¹⁶

In addition to equality before the law, the rule of law included the principle of distribution of power among different offices, which is probably a key principle for the establishing of the very concept of a *politeia*,¹⁷ as well as the principle of the responsibility of officials. The fact that officials were held accountable before special authorities and that any citizen could hold an official accountable and accuse him of breaking the law was considered a democratic principle.¹⁸ It is in these institutions and in the related idea of an immutable *nomos* (as opposed to a mere *psephisma* issued by an assembly or council), where the people cannot change the essentials of the system, that a certain dynamics of the relationship between the rule of law and democracy develops and goes beyond the meaning of democracy itself.¹⁹

However, shortly after democracy was established as the most widespread constitution in Greece, this internal relation between the rule of law and democracy came into question. These changes are usually associated with the sophistic movement. While the first generation of sophists, led by Protagoras still accepts the essential connection between democracy and the rule of law (although out of merely pragmatic reasons and based on their relativism), the second generation of sophists, represented by the figures of Thrasymachus and Callicles in Plato's dialogues, reinterprets this connection in a rather radical way. Claiming that the rule of people is actually the rule of the weak over the strong, they degraded the law, on which this rule is based, to an artificial instrument of power by which the prevailing majority pursues their own goals. This position, which certainly has its presuppositions in the field of general beliefs about the goal of life and happiness, can be understood in two ways: either in the light of moral skepticism and relativism, where the given diagnosis is only a description of sociological facts (this

15 Andocides, I,85, 87, 89.

16 E. M. Harris, *Solon and the Spirit of the Law in Archaic and Classical Greece*, in: *Democracy and the Rule of Law. Essays in Law, Society, and Politics*, Cambridge 2006, p. 25.

17 Crucial here is the terminological isolation of the term *politeuma* for the civic body, where the term *politeia*, which originally included *politeuma*, continues to denote only relations between institutions. The Greek constitutional teaching from Herodotus through Plato and Aristotle to Polybius presupposes this narrow usage. Also the modern concept of the constitution was created by abstraction from this narrow usage. In this narrower context, the concept of constitution is indeed closely linked to the concept of law. See Aristotle, *Pol.* 1292a32.

18 Herodotus, *Hist.* III,80,6; Aristotle, *Ath. pol.* 43,4, 45,2, 48,3–4, 61,2.

19 M. Ostwald, *From Popular Sovereignty to Sovereignty of Law: Law, Society and Politics in Fifth-century Athens*, Berkeley 1987, p. 497, even talks about “subordinating the principle of popular sovereignty to the principle of sovereignty of laws”.

position is also associated with legal positivism), or as a normative teaching of moral egoism, according to which the law as an instrument in the hands of a stronger majority oppresses, contrary to nature, the naturally superior minority and prevents excellent individuals from ruling.

Also as a reaction to this sophistic interpretation, Plato denied the original identification between the rule of the people and the rule of law and set them rather as opposites, at least to the extent that the rule of the people is understood – similarly to the sophists – as the rule of the majority oppressing the minority. Against a democracy understood in this way, the law (*nomos*) is conceived as a manifestation of the rational and divine order and its sovereignty over the purely human interests is emphasized. This intellectualization of the law, combined with the radicalization of the demand of the rule of law,²⁰ has also contributed to the extension of the concept of *nomos* to natural phenomena and thus to the constitution of the concept of natural law. That the law should rule and prevail unconditionally, is precisely the point at which the central issue of Platonic political philosophy occurs, namely that of relation between the prevalence of the law and the sovereignty of philosophical knowledge.

Tracing a basically similar path as his teacher, Aristotle made the sovereignty of law the criterion of the good constitution and in a more specific context of his constitutional taxonomy, he made the rule of law the differentiating feature of various types of moderate democracy, indicating that insofar as a democratic constitution is ruled by law, it in fact presents less of a democracy.²¹ Even in the second context of his political theory, which instead of a comparative constitutional taxonomy emphasizes the normative view of politics, Aristotle is a supporter of nomocracy, claiming that it is the law who should rule. Precisely for this clear-cut argument, contrasting the rule of law with the rule of man (and without need for further qualification whether the man in question is a philosopher or not), Aristotle is more generally accepted as one in whom the idea of the rule of law clearly finds application.

However, while sharing concerns about the risks of the unlimited rule of the people, Plato and Aristotle tried to avoid the strict opposition of de-

20 The debate over whether to consider this constellation to be comparable to the modern rule of law (with G. R. Morrow, *Plato and the Rule of Law*, in: *The Philosophical Review*, 50, 1941, pp. 105–126; and G. Klosko, *Knowledge and Law in Plato's Laws*, in: *Political Studies*, 56, 2008, pp. 456–474, giving the affirmative response, on one side, and F. L. Lisi, *Plato and the Rule of Law*, in: *Méthexis*, 26, 2013, pp. 83–102, on the other) is still ongoing, as our volume also expresses.

21 See J. Ober, *Mass and Elite in Democratic Athens*, Princeton 1989, p. 303, who holds the view that Aristotle contrasted the rule of law and the rule of the people.

mocracy and the rule of law by (a) a relative appreciation of the existing empirical legislation (especially the law code of Athens) including its clearly democratic aspects and by (b) conceiving *nomos* as a form of public reason that can persuade the majority to live a lawful life. Being a direct alternative to the impact of demagogues the rational or – in case of those who are not able to participate in reason directly – semi-rational discourse can reconcile the rule of people with the rule of law: in such a constitution the majority is eligible for responsible political participation since it has been formed by the *logos* of the law.

In this special issue of the Philosophical Journal, papers dealing with the above-mentioned issues are gathered. Their original versions were presented at the XIX. Annual Meeting of the Collegium Politicum, hosted by the University of Pardubice in May 2019. Their revised versions gathered in this volume are arranged chronologically but some of them focus also on reception of ancient Greek thought and on its impact on today's politics.

Thanks of the editor of this volume belong to the University of Pardubice, which enabled the aforementioned meeting to take place, and especially to Aleš Prázný and Ondřej Krása, who participated in its organization. I am also indebted to the reviewers of the individual papers, as well as to the reviewers of the entire volume; I further thank Willliam Wood, who proofread the contributions of non-native speakers, as well as to the editors of the Philosophical Journal, and especially the editor-in-chief for their helpful approach.

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