

“Algocracy”: the decline of representative democracy

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Abstract. The contribution aims to analyze the impact of new digital technologies in democratic processes and public institutions. How do algorithms affect consent? The answer must be sought in the relationship between technology and law, between the "real square" and the "virtual square". Can we speak of overcoming representative democracy? We will try to answer this question starting from the crisis of the intermediate bodies and the development of the instruments of direct democracy. The algorithm society transforms the citizen into a mere consumer. The use of increasingly advanced digital tools constitutes the implementation of the constitutional principles of good performance and impartiality of the P.A. How have parliamentary procedures changed following the Covid 19 pandemic? Another issue concerns the legal nature of remote voting and its constitutional compatibility. Can we speak of a constitutional right to the internet? Free Internet access is today the most advanced tool to concretely implement the principle of equality, reducing the "digital divide".

Keywords: digital divide, e-Democracy, filter bubble.

1 Introduction: the origins of a pathology

In the era in which the future and the very existence of parliaments are at stake, the question is to understand whether the overcoming of representative democracy is an inevitable process or not. Every day, every single user receives miles of information from the network, many of which significantly influence the formation of public opinion on matters of public interest. It is a liberal theory already known to philosophers such as John Stuart Mill and Jeremy Bentham: the “marketplace of ideas theory”. The more ideas circulate and compete with each other, the more it is possible to make a selection among them, thus contributing to the formation of a conscious political will in each citizen. Fake news has always existed, only the means of propagation and their effectiveness have changed. Although not an unprecedented phenomenon, the absolute speed of circulation (and sharing) of news on the web and in social media is an element of novelty. The problem lies in the political use of fake news by leaders as a tool to distort public opinion. This inevitably ends up altering the functioning of the constitutional bodies [1]. New scenarios open up to the unresolved

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problems of all time. Think, for example, of the algorithms that provide us with suggestions and preferences based on the personal interests that emerge from the records of our searches on the net. This case is based on the *filter bubble* paradigm developed by Eli Pariser [2]. The user finds himself isolated as in a “niche”, where he receives content in line with his preferences but at the same time he is excluded from all information that is in contrast with his orientation and opinions. This inevitably leads to the strengthening of one's convictions (also in the matter of public policies) and to an impoverishment of the dialectical and confrontational capacities. The algorithms build a “tailor made world” [3] in which everyone can carve out his or her own horizon of truth. Will it all be the fault of a civic relativism before digital?

What has been said raises a reflection on the authentic meaning of representative democracy today. With algorithmic governance, the "government by discussion" would disappear, that is the theory devised by John Stuart Mill according to which the political decision is preceded by a public confrontation. Public decision-making processes, whether bureaucratic or legislative, always require greater technical awareness. The relationship between *law* and *technique* must first be understood [4]. Although law is a social science, it constantly makes use of technical tools. However, there is no lack of guidelines that support absolute identification. In fact, elective assemblies are characterized by a continuous interpenetration between technical skills and political interests. The public relationship between experts and citizens is based on trust. When this fails, democracy can degenerate into “government by the masses or into an elite technocracy” [5]. Already in 1884 Gaetano Mosca, a jurist and political scientist from Palermo, defined the role of the majorities as “passive”: the organized minorities, called *élite*, govern [6]. This is the “theory of the ruling class” [7], which met with great fortune in the elitist doctrine, of which Mosca was a precursor. Following this approach, the completely evanescent and promethean character of popular sovereignty will emerge, while the representation of the great popular masses will reveal itself in an illusion.

Democratic processes are never linear. If it is true that the people of the network do not coincide with active citizenship, it is equally true that the "virtual square" can sometimes become a "real square". Think of the many mobilizations that starting from the network lead to real manifestations. The digital revolution has upset the forms of citizen participation, both for the construction of consensus and for the determination of public policies. The most evident example is represented by the fundamental role of social networks during the Arab Springs, and above all for the popular uprisings that took place in Tunisia between 2010 and 2011. A return to the past would be impossible and unhistorical. The processes of digitization must therefore be governed and not demonized.

2 The crisis of “intermediate bodies”

The crisis of representative democracy is in reality the crisis of the represented subject. The algorithm society transforms the citizen into a mere consumer. The citizen understood as the holder of rights and duties is thus deprived of both his individual dimension and his social dimension as he is no longer the bearer of any category interest. The technological process depersonalizes the voter, making him a taxable person unable to "participate". Through user preferences, the algorithm directs the subject towards a specific political orientation. Conversely, the political operator shapes their political offer by intercepting the trends shown by users on the net. In this way, the algorithm translates into a consent tool. The value of the user depends on the value of his information. The relationship between the public sphere and the private sphere would be based on the collection of data and information of individual users on the network. The person's identity is stolen. The citizen becomes a complex of digital information, the only information that is of interest to public power. Can an algorithm by itself contain the stratifications that hide behind a single electoral preference? The impact of this system on democratic processes is devastating, especially when you consider the speed with which content is spread on the web. This is incalculable and often irreversible damage. For these reasons direct democracy is the antechamber of plebiscitary democracy.

In Italy, but also in Europe, the transition from the "party" to the "parties" effectively represented the end of an authoritarian regime and the advent of a democratic system capable of translating popular will into normative content. In the work of the Constituent Assembly, therefore, the parties could not fail to find recognition in the Italian Constitution, although this meant having to degrade the contribution of citizens to that of the parties in determining national politics. The normative reconstruction of the political party can only start from a combined provision between arts. 2, 18 and 49 of the Constitution. The recognition of social formations and freedom of association soon found completion in art. 49, according to which the parties are the instruments through which citizens contribute with a democratic method to determine national politics. In parliamentary grammar it is difficult to understand whether the party competition has replaced the citizens' competition. Vezio Crisafulli, who already underlines the instrumental function of the parties with respect to the implementation of the democratic principle and popular sovereignty, recalls how art. 49 does not foresee particular rights for parties, but rights for citizens, who freely associate in parties[8]. Popular sovereignty is fully realized in the bond of representation, no longer only between elected and voters, but between voters and parties, and between them and the parliamentary groups of which they are projection in the institutional seats. The perimeter within which the parties act does not allow, to want to inconvenience the Aquinas, a subversion of the *ordinatio regiminis*.

About political parties, it seems that everything has been said. It would be impossible to tell the story of the twentieth century without telling the story of the parties and the cultural roots on which they are based. It was precisely through the parties that the "masses" made themselves a state by "breaking" into democratic institutions. The widening of suffrage and the social legitimacy of popular parties have certainly transfigured the face of institutions, marking the inevitable crisis of liberal and classical parliamentarism. There has been talk, perhaps for too long, of a crisis of the parties, or more properly of a crisis of the intermediate bodies. In this constitutional contradiction lies the crisis of representativeness, understood as the loss of collective identity [9]. It should be noted that we are not dealing with a phenomenon isolated in time and space. In their historical development, in fact, the parties have experienced phases of health and phases of illness. The political party, by denying its mediating role, has produced an unprecedented popular bewilderment in the face of the volatility of social roles. The secularization of ideologies, today increasingly transversal and the homogenization of category interests, have made political formations unidentifiable. The dissolution of the social classes, despite the fact that economic contradictions continue to sharpen, causes the "mastic" that binds elected and voters together. The 21st century thus appears to be the century of *brittle identities*. To "liquid society" [10] can only correspond "liquid parties". With the advent of mass parties, the election becomes a choice, not only of candidates, but of a real political direction. The post-modern parties have instead renounced being collectors of ideas. The transliteration of the concept of "idea" with the word "program" is symptomatic of a new leader drift, decreeing the prevalence of the individual over the community [11]. The function of political parties lies in the interpretation of a "particular vision of the general interest", translating the political program into legally binding acts. The ability, lost by the parties, of recomposing conflicts, has thus led to a progressive impoverishment of parliamentary representation and dialectic. This pauperization results in an ever more dense selection of the interests and lists represented. The political offer is fully considered in a sprawling collection of proposals, filtered by the political leader according to the electoral sensitivity. This can be translated into the impossibility, for many social issues, not only of finding an answer, but above all a place assigned to their formulation. The party system (*Parteienstaat*, about Leibholz) died, first under the ax of Tangentopoli, today with the sovereign and populist contamination that rages in Europe and the rest of the world. In twentieth-century pluralist democracies, parties organized social conflict and represented it in the institutional context. It is more appropriate to speak of "transformation" of democracy rather than "crisis". With the decline of party politics, the rise of a technocratic society did not follow. Fading away representative democracy, parties are led to chase instincts, even the most bitter ones, no longer managing to direct their actions towards the *common good*. An algocracy to which Italian politics seems to have resigned itself. With a depreciation of the

constitutional role of the political party and its progressive marginalization in determining legislative choices, the democratic stability of modern constitutional systems cannot be compromised. A delegitimization that has its roots in the total loss of adherence and identification with society, until to deny their very usefulness. Get the clash between citizens and parties, or rather between *us* and *them*, makes mutual recognition impossible. Faced with an absolute absence of structures capable of connecting the *center* and the *periphery*, parties are essential links for the functioning of democracy, integrated in the *trait d'union* between people and institutions. In spite of everything, these remain the hinge between the “palace” and the “square”, but constitutional law must deal only with the first case.

3 Which democracy is possible?

A deep dividing line distinguishes two antithetical models: “direct democracy” and “representative democracy”, with the inevitable risk that the former becomes a parody of the latter. Many of the tools of the so-called “direct democracy” are nothing more than participatory institutions that integrate with representative democracy, being complementary to it and compatible with it. Already in unsuspected times there has been talk of e-Government, that is, the process of digitization of public institutions, which through the use of ICT favor the “good trend” of public administrations [12]. At the basis of this is the osmotic relationship between the citizen and the state administrative apparatus. This report is called *e-Democracy* [13] [14] [15], intended not only as a suitable tool for online voting, but as a platform for sharing constitutionally relevant content.

The introduction of electronic voting in democratic systems certainly places limits on transparency requirements. Think, for example, of how online voting methods can jeopardize the implementation of the mandatory mandate ban. Electronic voting would be considered to be devoid of those minimum requirements that can guarantee personal attribution and secrecy. The Covid-19 pandemic has imposed a new regulation of parliamentary procedures. According to widespread opinion, the legislator should intervene to remedy the evident structural deficiencies of the elected assemblies. Think of “distance learning” in schools or “smart working” in the public administration. Before Covid, electronic voting in legislative assemblies, called e-voting, was used exclusively in “presence”, through the use of a closed circuit that allows the individual member of parliament to be able to express their vote preference. The third paragraph of art. 64 of the Italian Constitution states that the resolutions of the Parliament are not valid if the majority of their members is not present. The Constitution would therefore prevent the possibility of voting remotely as physical presence is an essential requirement for the exercise of political representation. The political confrontation necessary for the formation of parliamentary choices would be highly compromised. Although the first means of

communication were already in existence in 1947, the Constituent Fathers identified in the vote in presence a garrison set up to protect the political representation. The use of alternative spaces certainly favors greater instantaneousness. The Council of Europe over twenty five years confirmed the compatibility of distance voting in electronic form with the Code and protocols established by the Venice Commission [16] [17]. By breaking down the limit of distances, we respond to a need for communicative transversality, favoring the meeting and dialogue between the social partners. This push would seem to be in line with the *Tallinn Declaration* on e-government, drawn up on the sidelines of the conference on 6 October 2017, in which relevant European ministers have undertaken to accelerate the spread of electronic identification means throughout the EU. As can also be seen from the *National Innovation Plan 2025*, artificial intelligence and big data will guide public entities towards increasingly innovative and light administrative procedures, thus implementing the constitutional principles of good performance and transparency of public administration.

Are new fundamental rights emerging from technological development without current regulatory recognition or do already codified rights manifest themselves in a different form? They are therefore tools that integrate and do not replace traditional ones. At this point, the thesis supported by Stefano Rodotà to constitutionalize the right of internet access is understood, understanding it as a functional and essential paradigm for political participation [18] [19]. In 2015 thanks to the contribution of the well-known jurist the "*Declaration of Internet Rights*" was reached. Article 2 of this document defines access to the Internet as a fundamental right of the person which contributes to his individual and social development. The article goes on to recall that "every person has the right to access the Internet on equal terms, with technologically adequate and up-to-date methods that remove all economic and social obstacles". The European Union intervened with the EU Regulation of 25 November 2015 which defines common rules to ensure equal treatment of Internet access services, while protecting the rights of citizens-users. Free internet access is today the most advanced tool to concretely implement the principle of equality, thus reducing the "*digital divide*". The epidemic has certainly exacerbated economic and social disparities in Europe and the rest of the world. Not all families can take advantage of a stable connection to the Internet or a sufficient number of suitable devices to meet the multiple professional or educational needs. The right to access the Internet is to be considered a social right, or rather a subjective claim to public services that national institutions must guarantee to their citizens through public policies. It would therefore be a question of a right which, although not yet codified, can nevertheless be traced back to current constitutional provisions. In the age of globalization, the legal problems of a constitutional nature deriving from technological development can no longer find a suitable place for their solution in the national dimension alone.

4 Final considerations

That democracy accuses a state of fatigue is an incontrovertible fact. It is therefore necessary to identify the deepest causes of this malaise. The democratic system as we know it today is far from the model of the ancients. Any equipment would be anachronistic and misleading. If Athenian democracy is based on participation understood as a shared exercise of power, contemporary democracies presuppose a circuit of representation for their very existence. It is not a system of self-government but a system of *control* and *limitation* of the government itself [20], as the most classic constitutional theories suggest. It is perhaps more appropriate to speak therefore of the transformation of democracy rather than of "crisis", not a static principle but in constant evolution. Democracy reflects the culture and sensitivity of the time, borrowing and changing them. Moreover, it has happened several times throughout history: from the Jacobin-inspired democracies to the liberal ones based on the census of the late nineteenth century, up to the mass ones of the twentieth century [21]. What if permeability to transformations really guaranteed the continuity of democratic systems? Only totalitarian regimes, in fact, resist any change by trying at all costs to remain equal to themselves [22]. It is clear up to now that the notion of democracy cannot certainly exhaust its meaning included in the form of government. European civilization has gone from being the cradle of *advanced* democracy to becoming the sepulcher of a democracy *attacked* first and then *regressed*. There are no freedoms other than a democratic framework. But there is not necessarily a complete democracy where substantial equality is not guaranteed. Economic development often, but not always, conditions the democratic index of a state [23]. Democratic processes are long procedures that require deep sedimentation. This distinguishes a *mature* democracy from a *fragile* democracy. This reflection leads us to the age-old question of the democratization of the Middle Eastern, African or Asian countries. Embryonic attempts that in most cases perish themselves dramatically after sharp accelerations.

In conclusion, the use of new technologies must be implemented in administrative processes. The contribution of increasingly advanced digital tools constitutes the implementation of the constitutional principles of good performance and impartiality of the P.A. As regards specifically the constitutional law profiles, however, the use of new forms of participation encounters two fundamental limits: *instrumentality* and *accessibility*. The use of digital platforms can encourage participation but must place the human person at the center, which is the beginning and end of the democratic order. In this sense, technology is instrumental to citizens and their role within the institutions and parliamentary assemblies. The concept of accessibility, on the other hand, relates to the ability of the internet to bring citizens closer to public policies. Constitutionally relevant contents are made accessible to the community without any distinction. Digital accessibility therefore becomes an emanation of the principle of

equality, thus imposing economic investments aimed at bridging the digital divide and promoting computer literacy on several levels. This extension of content does not always correspond to greater democratic participation. The audience that widens on the net, narrows to the urns. The demonstration that the use of digital platforms has not increased the spaces for democracy lies in the ever more widespread and growing level of abstention throughout Europe.

The speed of legislative processes is the element that most divides the forms of direct democracy from the representative one. We must start from an irrefutable fact: it is impossible to deny the strategic importance of artificial intelligence in democratic processes. Representative and direct democracy need not necessarily oppose each other. A mixed system could be theorized. It is possible to insert elements of direct democracy in a classical representation system [24]. A winning model to relaunch the relationship between representation and technology is that of the *Electronic Town Meeting* (e-TM). It is a way of directly involving citizens on specific territorial issues. This is done through public debates and comparisons. The Town Meeting was born in North America, specifically within the ecclesiastical assemblies of New England. This institute of participation has been transliterated in Europe with the name of Electronic Town Meeting, through IT methods that allow spaces for discussion between citizens on issues of local interest. It could also be a successful model in Italy at the peripheral level, as this experience is in line with the ancient Italian municipal tradition.

In a climate of growing disaffection for the public issues, the low turnout is directly proportional to the increasingly limited commitment of citizens to political formations and associations. The reduction in the number of parliamentarians, the continuous attempts to limit the exercise of the free mandate and the progressive introduction of digital voting tools are the immediate consequences of the loss of centrality of parliaments, increasingly marginal in the balance of powers. But is democracy still a goal in our country? Is this really an unfulfilled promise? Think of the conquest of universal suffrage in the age of revolutions. Suffice it to think more recently about environmental law, the ever more pronounced protection of minorities or the consolidation of human rights by extending their recognition in international law [25]. The new challenge remains that of preventing *pluralist* democracies from degenerating into *populist* democracies, antechambers of political experiences already dramatically lived. Moreover, from anti-political criticism to anti-democratic criticism the step is short. To be healthy, democracy must live a continuous tension between *demos* and *kratos*, only in this way will it remain «the least good of the good forms and the least bad of the bad forms» [26].

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