

Old and New Oligarchs. Analogies and Differences*

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1. Why an historical background is needed

In recent years the Venice Commission has been called to release opinions on the laws of some Eastern European countries (Ukraine, Moldova, and Georgia) aimed at countering the excessive influence of “oligarchs”, namely “persons with significant economic and political weight in public life”, through restriction of their rights, especially those related to participation in public activities such as the right to be elected and to finance political parties or electoral campaigns, without sufficient guarantees regarding the due process of law and an independent judge.

In its opinion on the Ukrainian law, the Commission emphasized that dangers of concentration in the hands of a private individual of significant influence over the economic, political and public life of a country should be countered by adopting a “systemic approach”, namely through “an effective competition policy, anti-corruption and anti-money-laundering measures, measures to ensure media pluralism, rules on the financing political parties and election campaigns”. A “personal approach” such as that envisaged in the law has instead “a punitive character” being founded on the prohibition or on the restriction of certain activities referred to certain individuals (“oligarchs”). According to the Commission, even in exceptional situations of “state capture”, such approach should not be alternative, but supplementary, to the systemic

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one, since the former “is difficult to reconcile with principles of political pluralism and the rule of law, as it has the potential of being misused for political purposes”¹.

This reasoning, which was repeated in the opinions concerning the other laws on the same issue, led however the Commission’s members to realize that a more general issue was at stake: that of the relationship between money and politics, whose increasing “uneasiness” was believed to affect contemporary democracies far beyond the before mentioned countries. Hence the need of deepening the reflection on the topic in a specific conference.

An historical background deserves to be made at this respect. The ancient Greek word *ὀλιγαρχία* designs the rulers of the oligarchic regimes, namely a corrupt form of aristocracy, the government of the few in the Aristotelian theory as distinguished from those, respectively, of the many (democracies) and of one ruler (monarchies).

Here comes the question of whether the use of the same word in the contemporary legislation amounts to a mere curiosity or affords instead an understanding of the challenge that the money/politics relationship may pose to democracies.

It is worth premising that contemporary oligarchs are far from being insulated in their own societies. To the contrary, they tend to shape them through their influence, which usually goes beyond the mere use of huge sums of money in the electoral campaigns. Money is indeed crucial for achieving the ends pursued by oligarchs, but is not sufficient. Further elements are needed, such as the acquisition of a dominant role in the media, and a distortion of the separation of powers principle aimed at avoiding substantial controls, from the judiciary in particular, on the institutional behaviour of oligarchs.

Whenever oligarchs succeed in their attempts of shaping democratic societies for their own ends, democracies are clearly at risk. These are unlikely to become oligarchies in the old sense of the term. People will continue to vote, thus renewing legitimacy to the political institutions, while nothing similar happened in the old oligarchies, where power was also formally in the hands of few rulers, be those the town’s aristocrats, as the Dogi of Venice, or others². Contemporary oligarchs, to the contrary, tend to exploit and/or circumvent democratic institutions and political representation in particular, rather than to abolish them.

Given these elements, an historical introduction to the issue should not consist in reconstructing the rise and fall of the oligarchic regimes of the past. Nor could it be an easy task, given the resort to the same word in order to design the political parties’ elites in the essays of Roberto Michels and Gaetano Mosca, or the 19th century’s form of State in continental Europe.

¹ See Venice Commission, Opinion on the Law on the prevention of threats to national security, associated with excessive influence of persons having significant economic or political weight in public life (oligarchs), Venice, 9-10 June 2023, CDL-AD(2023)018.

² See inter alia J.Isaac, *Gli oligarchi. Saggio di storia parziale* (1946), Palermo, Sellerio, 2016.

An historical introduction should rather serve to explain why and how an old word (and category) such as ‘oligarchs’ has been, and could be, adapted in the very different context of contemporary democracies. Although unlikely to be transformed into oligarchic regimes, these appear fragile vis à vis the heirs of the oligarchs of the past, namely those provided with a significant, and sometimes extraordinary, economic and political weight in public life. Rather than a local peculiarity, the rise of oligarchs in certain European countries may thus appear a symptom of a wider ‘uneasy relationship’ between money and democracy.

2. The rise of the oligarchs as a symptom of the failure of a thin version of democracy

Threats to constitutional democracy are likely to lurk outside the perimeter of what has traditionally been labeled ‘violation of civil liberties’. Unlike closing down a newspaper, phenomena such as governing parties virtually monopolizing access to the media through patronage deals or proxy arrangements, or state/party/business ties creating vast resource disparities between incumbents and opposition, may not be viewed as civil liberties violations. Yet we should be aware that “the use of political power to gain access to other goods is a tyrannical use. Thus, an old description of tyranny is generalized: princes become tyrants, according to medieval writers, when they seize the property or invade the family of their subjects”³. According to Pascal, “Tyranny is the wish to obtain by one means what can only be had by another. We owe different duties to different qualities: love is the proper response to charm, fear to strength, and belief to learning”⁴.

It is a sense that oligarchs may be viewed as potential tyrants. The difference with the Middle Age consists in the fact that contemporary oligarchs have nothing to do with “princes”. Given the constitutional principle of equality, such category of subjects is simply unconceivable today. But their conduct of using power for accumulating further power can be equated to that of the old princes becoming tyrants. Nowadays, the use of political or economic power to gain access to other goods constitutes an infringement of citizens’ political rights. Since the exercise of these rights is necessary free elections, protective devices preventing such infringements need to be included among the attributes of democracy⁵.

The rise of the oligarchs in the political arena of numerous States, certainly many more than Ukraine, Georgia and Moldova, demonstrate inter alia the failures of a thin version of democracy, namely that founded exclusively on free elections and on the separation of powers’ guarantees.

³ M. Walzer, *Spheres of Justice. A Defense of Pluralism and Equality* (1993) 19.

⁴ B.Pascal, *The Pensées* (1961), 96, quoted by Walzer, *Spheres of Justice*, at 18.

⁵ S. Levitsky and L.A. Way, ‘Competitive Authoritarianism: The Origins and Dynamics of Hybrid Regimes in the Post-Cold War Era’, in *J. of Democracy* (2002) 65.

Finally, the manipulation of democratic practices needs to be considered. It includes the rise of populist leaders not only in countries affected by the “third wave of democratization” but also in those characterized by longstanding democratic traditions. Once in charge, populist leaders rely solely on the “will of the people” to justify their claims to be upholding democracy, without observing (and, indeed, sometimes manipulating) the other principles and institutional devices deemed necessary for establishing or maintaining democracy. During the Cold War, the expectation was that democratic countries would be threatened by authoritarian regimes, i.e. from the outside. Instead, in spite of the worldwide spread of democracy following the fall of the Berlin wall, threats to democracy frequently appear from within democratic countries. These threats do not simply consist in the rise of populist leaders and in the increasing concentration of media ownership, which might correspond with, or simply prepare, an oligarchic turn. A greater cause for concern is the fact that both these phenomena tend to be justified with arguments relying on constitutional principles themselves. Concentration of media power is justified on grounds of economic freedom, regardless of whether it damages freedom of information. Populist leaders also tend to misrepresent parliamentary procedures or the independence of the judiciary, and to claim that they themselves are above other powers because they have been legitimised by the will of the people.

The above reported elements demonstrate that a thin version of democracy, consisting in the mere practice of free elections, together with a formal maintenance of the separation of powers principle, greatly favours not only the rise of oligarchs in the political arena, but also that of populist governments, even when these are not ruled by oligarchs themselves. Oligarchs and populists are in any case able to exploit the institutional devices that ensure the functioning of a constitutional democracy, departing from political representation.

Beyond their propaganda, the immediate aim of populists appears altogether similar to that of traditional political parties, namely obtaining the majority of parliamentary seats. Furthermore, wherever they gain that majority, populist parties cease immediately to target the representative system as such. And yet, populist regimes tend to deny the reversibility of political power. Majoritarianism coincides there with the winner-take-all rule, with the majority in charge willing to rest in power beyond the legislature by all means, departing from restrictions of media communications that might leave room to the opinion of their political adversaries: pluralism is obstructed because it risks to hamper such possibility, not because it contrasts with an ideological tribute to the people’s will. On the other hand, the independence of the judiciary is seriously jeopardized until courts do not conform to the government’s will. It is as if populists were satisfied with the formal respect of democratic procedures and institutions, and invite the people to content themselves with it. Populists would not reconcile, instead, with a more demanding version of democracy, requiring the substantial exertion of fundamental rights from citizens as a

condition for a true practice of free elections, and, correspondently, effective judicial guarantees.

The same might be said of oligarchs, whose real influence in the political institutions' decision-making can remain hidden as long as a formal approach is adopted to its legitimacy. While holding significant portions of political power, oligarchs claim at the same time to have no direct influence on public decisions, unless they deem necessary a personal engagement in politics as the sole means for pursuing their own interests. The question may be raised whether the principle of equality before the law, that lies at the core of democratic procedures, enable those encroaching the boundaries between politics and the market such as the oligarchs to achieve their ends. It is at any rate clear that a merely formal version of such principle allows them to transform the effective meaning of democracy without paying significant consequences.

3. Reactions against the rise of the oligarchs (or of populist parties) in constitutional democracies

In a constitutional democracy populism should not be legally contrasted, and this is usually the case. Even in Germany, whose Basic Law allows the Federal Constitutional Court to declare the dissolution of any political party that seeks to undermine or abolish the free and democratic order or to endanger its existence (Article 21 BL), the Court has refrained from adopting such measure against an ultranationalist party as the NPD⁶, thus declining 'to provide further fodder for the populists' familiar narrative that the establishment systematically suppresses the voice of 'the people'⁷. As significantly affirmed by the then FCC's President, reactions to the populist challenge should derive primarily from the political process itself⁸. A response to populism might indirectly be caught in Article 7 TEU, which entrusts the European Council with the powers of ascertaining the existence of systemic violations by a Member State of the 'common values' enumerated in Article 2 TEU, including 'the rule of law and respect for human rights', and of adopting a series of related measures that can go to the point of suspending the voting rights of the representative of that Member State. But these measures are not meant to outlaw populist governments as such. Rather, they aim at sanctioning systemic breaches of the EU 'common values' that might recur within a Member State, irrespective of the contingent political colour of its government. Their nature is thus legal, not political, although enforcement of Article 7 TEU's mechanisms rests almost entirely in the hands of national governments.

⁶ Federal Constitutional Court, January 17, 2017, *Neue Juristische Wochenschrift* 611, on which see L. Schuldt, 'Mixed Signals of Europeanization: Revisiting the NPD Decision in Light of the European Court of Human Rights' Jurisprudence' (2018) *German Law Journal* 810, 817.

⁷ A. Pirang, 'Renaissance of Militant Democracy?', www.lawfareblog.com, March 27, 2017.

⁸ A. Voßkuhle, 'Demokratie und Populismus' (2018) *Der Staat* 120, 134.

In the same direction goes the Venice Commission's reaction to the measures introduced in certain countries for countering the power of the oligarchs, with the specific recommendation to adopt a "systemic" rather than a "personal approach". Here comes once again the issue of pluralism's maintenance. The notion that responses to oligarchic threats or to populism should come from politics rather than from law reflects a core principle of constitutional democracies such as pluralism, which they could not renounce without betraying themselves. It is respect for pluralism, together with the rule of law, which impedes whichever degeneration of majoritarianism into the winner-take-all rule, thus rendering inter alia unpredictable the electoral outcome. It is respect for pluralism that should prevent, and usually prevents, democratic governments from restricting political freedom on personal basis.

4. *What is at stake*

Constitutional democracies may thus appear too weak vis-à-vis those tending to abuse of their power beyond the restrictions that are usually provided by the separation of powers principle. This is the case of populist leaders and of oligarchs, whenever they circumvent, rather than directly violate, the rules of democratic regimes. Nor can these renounce to pluralism, until the risk of its irreversible destruction is envisaged.

How could, then, constitutional democracies surmount such difficulties? A multi-faceted answer should be given at this respect, thus taking account of all the challenges deriving from "constitutional retrogressions"⁹. Within a more limited although still useful perspective, I will answer the question of why constitutional scholarship tends to underestimate, if not to neglect, such difficulties, as well as the "uneasy relationship" between money and democracy.

Let us look at the rules on financing parties or electoral campaigns. In the United States, where the "Money is Speech" Supreme Court's doctrine goes back to *Buckley v. Valeo* (1976), the libertarian interpretation of the First Amendment left scholars ill-equipped to address issues implicating both rights of expression and resource allocation such as that of financing politics. In various European countries, analogous classifications are sometimes afforded by courts in issues concerning the media in electoral campaigns, with the effect of masking the power thus acquired by private companies in the "marketplace of ideas".

Such classifications reflect the deeply rooted conviction that fundamental rights should be protected only against political power, and are thus necessarily connected with it, irrespective of whichever acquisition of private power following from exerting these rights. Controversies over constitutionalism – whether it should be grounded on limiting power and/or on legitimizing it through democratic means – regularly

⁹ See A.Huq and T.Ginsburg, 'How to Lose a Constitutional Democracy', 65 UCLA L.REV. 78 (2018), 83.

presuppose its connection with the political power of the state. In the neoliberal epoch, new power relationships arose however from society, not from public institutions, leaving formally unchallenged the constitutional design. In addition, the realm of economic global power or of the communicative system, being inter alia inextricably connected with technological change, appears to constitutionalists far more elusive than that of political power.

In particular, the hypothesis deserves to be considered that deregulation of financial markets brought to a coalescence of the economic with the political sphere, since it usefully complements the picture of the financial markets' decision making, hitherto limited to the legal and to the economic field. The political aspect needs to be inserted into the picture as well, being crucial for an understanding of the twofold role of states within the system. It consists in granting both the enforcement of contracts in the routine and the ultimate protection of the whole financial system against self-destruction¹⁰.

The issue of checking those relationships, and of the mechanisms that could be forged to this end, is not political, but constitutional, in the sense of constitutive of a certain legal and economic order. The role of oligarchs is likely to be studied in a similar perspective. In the countries concerned their power, as we have seen, has arisen from society, and has reached rather undisturbed the political sphere. At that point, it was of course more difficult on legal grounds to capture and possibly eliminate the consequences of the oligarchs' conduct in the political arena.

Between the exertion of economic or political freedom and its restriction based on 'a personal approach', lies indeed enough room for a 'systemic approach' consisting of a series of rules and institutional devices aimed at limiting on objective grounds the power of private entities vis-à-vis that of others and/or public powers (antitrust mechanisms, anticorruption laws, rules on financing politics). To that extent, such approach corresponds to a more demanding version of democracy. The point is that it still fails to be viewed in connection with the core of constitutional principles, not least because of a scholarly resistance to abandon the presumption that power is intrinsically connected to politics and to the public sphere. Developments occurring in our time within the money/democracy relationship urge prompt reflections on the issue.

¹⁰ P.F. Kjaer, 'Law and Order Within and Beyond National Configurations' in *The Financial Crisis in Constitutional Perspective*, eds. P.F. Kjaer et al. (2011), 418.

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Abstract: The Venice Commission has been called to release opinions on the laws of some Eastern European countries aimed at countering the excessive influence of “oligarchs”, persons with significant economic and political weight in public life. It is very difficult on legal grounds to capture and eliminate the consequences of the oligarchs’ conduct in the political arena. In this perspective, it is even more necessary adopting a ‘systemic approach’, consisting of a series of rules and institutional devices aimed at limiting on objective grounds the power of private entities. This approach undoubtedly requires a more demanding version of democracy.

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