Illiberal regimes in the perspective of comparative constitutionalism[*]

Cesare Pinelli

1. *Premise*

Illiberal regimes are generally defined as regimes in which neither democracy nor fundamental rights are granted, and in which rule of law is substantially disregarded. Constitutional democracies, conversely, are regimes in which these principles and institutions are both granted and interconnected. No further distinction, on the other hand, is drawn between the constitutional democracies which were instituted gradually through a process of internal development within a given nation's form of government, and the more frequent instance of constitutional democracies which were instituted after the collapse of a former totalitarian state (namely, the typical instance of twentieth-century illiberal regimes).

It is also commonly acknowledged that several of the regimes to have emerged worldwide in recent decades are to be located at some intermediate point in the constitutional democracy/totalitarian state dichotomy. How these regimes should be classified theoretically and how they may stabilize are still matters to be assessed: rather than attempt a taxonomy, it is thus preferable to offer an account of their origins and of the problems raised by their emergence in the perspective of comparative constitutionalism.

2. *The totalitarian State as prototypical twentieth-century illiberal regime*

Differences between Nazi, Fascist, and Communist ideologies and practices notwithstanding, the illiberal regimes that took hold in the majority of European countries in the twentieth century marked a watershed in the practices of individual and collective experience. While the repression of dissent had been the primary concern of absolutist and authoritarian regimes, totalitarian regimes needed to

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[*] L'articolo non è stato sottoposto a referaggio.

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secure active consent from the people – not least because the prior introduction of universal suffrage had already involved large sectors of the population in the public sphere, qua electorate. Consent was certainly achieved through the institution of a police state and the creation of a single mass party (hierarchically organized and closely interwoven with the state bureaucracy); what also proved vital was the use of mass propaganda technologies, available to political power for the first time in history.

As theorized by Italian philosopher Giovanni Gentile, in a totalitarian system "everything is in the State and nothing that is either human or spiritual exists, or is valuable, outside the State"[1]. Ernst Cassirer was later to observe that even clever and cultivated men surrendered "the highest human privilege", and all of them began to feel, to think and to speak in the same way, without realizing their own lives were manoeuvred by political rulers[2]. By managing to inform the thoughts of individual citizens, totalitarian regimes succeeded in making public and private reason coincide. The feature of totalitarian regimes some theorists describe as their 'concreteness' consisted in the abolition of the distance between political power and the realm of the individual, the aim of which was to transform people into slaves.

At the Constituent Assemblies that convened after World War II there was a widespread sense that hitherto unknown evils had discredited the state; and at the same time, an account had to be provided for the failure of the previous liberal regimes to resist the totalitarian turn. Overall, a thorough re-examination of the relationship that had held between state and constitution since the French Revolution was felt to be in order.

The 1789 total breach with the *ancien régime*, the so called "*table rase*", rested on the assumption that the plans for a future of freedom and equality for all could be drawn by the *volonté générale* as expressed in parliament. The law was conceived as an abstraction, at a remove from the actual needs of the people and the rights of the individual. The principle of equality before the law itself only granted the equal treatment of citizens on formal grounds, while *de facto*

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[1] G. Gentile, *Fascismo (dottrina del)*, in *Enciclopedia Italiana*, vol. XIV, Istituto dell'Enciclopedia Italiana, 1932, 835.
[2] E. Cassirer, *The Myth of the State*, Yale University Press, 1946, 483.

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laying the premises for discrimination. At the same time, the danger of a new form of absolutism (the "tyranny of the majority" denounced by Tocqueville) lay in the very principle of legitimacy parliament drew from the fact of representing the people. Finally, with the abolition of the *corps intermédiaires* (the system of associations and professional groups) which under the monarchy had held its absolutist pretensions in check, nothing remained between the state and the individual, the former directly exerting its authority over the latter through an increasingly centralized administration. Due to its abstractness, however, this design failed to meet the totalitarian launch of a 'turn towards the concrete', while at the same time exerting a strong influence on the rest of continental Europe.

3. *The post-totalitarian Constituent Assemblies*

The post-World War II Constituent Assemblies were thus confronted with the issue of reversing totalitarianism (particularly the blurring of the public/private divide, with the State interfering with the conscience of individuals) without reviving the 'abstract' version of sovereignty.

It is for this reason that the new constitutional perspective prevents any subject, including the state, from determining the ultimate ends of the community, which are expressed as substantive principles enshrined in the constitution. Meanwhile, the state itself ceases to be viewed as a monolithic entity; it is viewed, rather, as a set of public institutions whose constitutional legitimacy is relative to the respective functions of each, and made to descend from a pre-determined hierarchy.

This new version of constitutionalism aimed to overcome the atomistic conception of freedom that had characterized the post-1789 era over large stretches of the European continent: emphasis was placed on the relational dimension of individual identity by guaranteeing freedom of association (which did not feature in the nineteenth-century charters) and promoting pluralism in the social, economic, cultural and religious spheres. Such pluralism, in turn, was intended as a corrective to a purely representative democracy and envisaged the direct involvement of the people at referenda and/or

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through the election of representatives at the local level. In this regard, a federal or a regional state structure was established on the twofold assumption that citizens are more likely to be aware of, and take interest in issues debated at a local level than the general policies discussed in the national assemblies, and that such structure serves the end of breaking down public power along vertical lines, thus complementing the division of power effected by the separation of powers at the horizontal level.

In order to foster a pluralistic version of democracy and prevent the formation of a monolithic power block, democratic practices were extended beyond electoral processes. First and foremost, democracy was compounded by the recognition of citizens' fundamental rights, whose full application was deemed necessary to ensure that electoral choices were made self-consciously. In the sophisticated version of the rule of law instantiated by the introduction of constitutional review over legislation, the judiciary was made fully independent in order to safeguard the enjoyment of such rights. Accordingly, different legitimation procedures were provided for elected officials and courts respectively, although this paved the way for a progressive imbalance between the democratic and the liberal pillar of the system.

4. *Illiberal democracy*

Post-1945 European Constitutions are still in force. Inter alia, this has tempered political conflict vis-à-vis the turbulent experience of the past. The new European constitutional states thus joined the family already formed by the United Kingdom, the United States, and Canada, which further grew with the accession of India, Japan, and Australia. Meanwhile, the Cold War created a division which extended beyond its military and economic aspects to a conflict of opposite *Weltanschauungen*. Hence, from a Western perspective, the divide between constitutional democracies and totalitarian States (or, in political terms, between "the free world" and Communism) which for a long time captured the essence of the liberal/illiberal regimes distinction.

Following the assertion that constitutional democracy had become the predominant type among constitutional regimes, Carl J.

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Friedrich and Zbigniew K. Brzezinski further suggested that totalitarian dictatorships, their current counterparts, differed from earlier autocracies not just inasmuch as their ideology covered "all vital aspects of man's existence", but because they "could have arisen only within the context of mass democracy and modern technology"[3]. Although opposed, totalitarianism and constitutional democracy were thus viewed as common products of an irreversible process of worldwide modernization.

The success of the 1979 Iranian Revolution, with its emphasis returning to the country's religious tradition, should alone have demonstrated that generalized progress toward modernity was not to be taken for granted. What is more, the regime of the *Ayatollahs*, where religious bodies exert a tutelary role over elected officials, was in no way compatible with an exclusive constitutional democracy/totalitarianism dichotomy.

Further problems with this dichotomy became evident as the Soviet Union collapsed, bringing the Cold War to an end. While purely totalitarian regimes virtually disappeared (as even China liberalized its economy), constitutional democracies developed only in South Africa and in a series of Latin American States – with some difficulty. The new scenario was characterized, rather, by a huge flourishing of non-totalitarian illiberal regimes.

The formula 'illiberal democracy' was thus tentatively proposed to designate regimes which could be said to stand at some point between constitutional democracy and totalitarianism: although the number of democracies has increased to 118 out of the world's 193 States, "many countries are settling into a form of government that mixes a substantial degree of democracy with a substantial degree of illiberalism", with the implication that "Illiberal democracies gain legitimacy, and thus strength, from the fact that they are reasonably democratic"[4].

It is important to note that constitutional democracies were founded and flourished on the understanding that free elections tie in with the rule of law and the safeguard of fundamental rights.

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[3] C. J. Friedrich and Z. K. Brzezinski, *Totalitarian Dictatorship and Autocracy*, Harvard University Press, 1956, 27.

[4] F. Zakaria, *The Rise of Illiberal Democracy*, in 76 *Foreign Affairs* (1997), 22.

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Conversely, what the illiberal democracy formula implies is that the holding of elections suffices to qualify a certain system as democratic.

Outside the perimeter of what has traditionally been labelled as 'violation of civil liberties' lie further threats to constitutional democracy. Phenomena such as the virtual monopoly of the media by governing parties through patronage deals or proxy arrangements, or the disparity of resources between incumbents and the opposition created by state/party/business ties are likely not to be framed as civil liberties violations (the way, e.g., the closing down of newspapers would). And yet such uses of political power constitute an infringement of citizens' political rights, the exercise of which is necessary for free elections[5]. It is crucial to note 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"[6].

On the other hand, the manipulation of democratic practices may give rise to the emergence of populist leaders even in countries where constitutional democracies were already established. While nominally democratic, in the actual exercise of power populist leaders have been observed to disregard (and sometimes interfere with) the rule of law and the separation of powers principle[7]. A greater cause for concern lies in the fact that an appeal to constitutional principles themselves is frequently made to justify such phenomena. For instance, the concentration of media power is justified on grounds of economic freedom (although it negatively affects freedom of information). Populist leaders, further, incline towards a misrepresentation of parliamentary procedures and of the independence of the judiciary on the strength of the argument that the will of the people is the ultimate source of legitimacy, casting them above other powers.

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[5] S. Levitsky and L. A. Way, *Competitive Authoritarianism: Hybrid Regimes After the Cold War*, Cambridge University Press, 2010, 6.

[6] M. Walzer, *Spheres of Justice. A Defense of Pluralism and Equality*, Basic Books, 1993, 19.

[7] C. Pinelli, *Populism and Illiberal Democracies: The Case of Hungary*, in Z. Szente, F. Mandak and Z. Fejes (eds.), *Challenges and Pitfalls in the Recent Hungarian Constitutional Development. Discussing the New Fundamental Law of Hungary*, L'Harmattan, 2015, 211.

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In the light of the above, it may be argued the 'illiberal democracy' formula is a misnomer, suggesting as it does that the regimes it designates are substantially democratic, although illiberal. They should, rather, be regarded as a type of illiberal regime that differs in certain respects from the totalitarian.

An alternative definition, that of "competitive authoritarian regimes", is predicated on the fact that the contest for power in these regimes is ostensibly democratic; yet, while the opposition parties may run for election, they are however severely handicapped by fraud, civil liberties violations, and the abuse of state and media resources[8]. While there are grounds for a distinction between competitive authoritarian regimes so understood and mere 'façade democracies', it can be difficult in practice to draw a line of demarcation between them, as the instance of Russia may prove[9].

At bottom, these definitions rest on the assumption that the Schumpeterian view of democracy as an electoral competition aimed at selecting governmental authorities also applies to constitutional democracies. However, as we have seen, there is much more to the structure of a democracy in the constitutional system than mere electoral competition.

5. *The Western pretension to export democracy and civilization*

The discussion so far has focussed on the constitutional and political organization of public life, though a further element needs to be taken into account. Counter to what had been envisaged as a global process of modernization, the 1979 Iranian Revolution was the first indication that a return to religious or cultural traditions was taking place among non-Western civilizations, alongside the rise of non-totalitarian illiberal regimes.

As globalization has brought civilizations at closer quarters than in the past, the question arises as to whether the latent conflict among different civilizations is founded on a principle of respective

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[8] S. Levitsky and L. A. Way, *Competitive Authoritarianism*, cit.

[9] L. Diamond, *Facing up to the Democratic Recession*, in 26.1 *Journal of Democracy* (2015), 144.

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legitimacy or rather on the pretence to hegemony of one upon the others – as implied in the thesis that conflict opposing 'the West' to 'the Rest' has supplanted ideological and other forms of conflict[10].

Diverging from the view that, in our times, "A country does not have to be deemed fit *for* democracy; rather, it has to become fit *through* democracy"[11], certain Western States took action to propagate a standardized version of democracy essentially founded on the holding of free elections: the underlying assumption being that the proper development of whatever civilization would proceed from those premises. Such attempts were made, initially, by the IMF, the World Bank, the US, and the EU based on the practice of conditionality – namely the making of aid and co-operation agreements with recipient States conditional upon the meeting of certain requirements, including financial stability and democracy, with the end of ensuring the opening of new markets. Conditionality may thus be viewed as a practice for promoting democracy under a narrow definition, one which "underscores a reconceptualised form of a constitutional state consciously crafted to be weak in relation to the sway of global markets, while also sufficiently barricaded against the day-to-day influence of ordinary citizens and civil society. This is a state in which citizens' control over elected officials is removed while accountability, transparency and public participation are undermined"[12].

In EU policy, similarly, the accession of Central and Eastern European Countries (CEEC) to the EU was made conditional upon their adoption of provisions safeguarding human rights principles and democracy. The incremental manner in which the EU responded to CEEC demands contributed "to the construction of their role as supplicants and, more particularly, as apprentices"[13]. In parallel, the EU attitude towards applicant states came to be framed as "an

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[10] S. P. Huntington, *The Clash of Civilizations?*, in 72.3 *Foreign Affairs* (1993), 48.

[11] A. Sen, *Democracy as universal value*, in 10.3 *Journal Of Democracy* (1999), 4.

[12] N. L. Mahao, *The Constitutional state in the developing world in the age of globalization*, in 12.2 *African Journals Online* (2008),13.

[13] C. Bretherton and J. Vogler, *The European Union as a Global Actor*, Routledge, 1999, 149.

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invitation to join the club coupled with the tightening of the club membership rules, in order to ensure that no barbarians get inside"[14]. Beyond the rhetoric of the EU motto 'United in diversity', accession criteria revealed how applicant states were in fact being subjected to a standardized test of democracy.

Further along the continuum of democratic enforcement, military intervention (whether in response to terrorist acts or as a means to maintain hegemonic control over certain regions) has been advertised as a mission to export democracy. The Constitution of Afghanistan is at once the clearest outcome of such a mission and manifest proof of its failure. Because it was super-imposed onto a communitarian domestic tradition, the Constitution alienated the people from the newly founded institutions and thus fuelled intractable conflicts[15].

Under different circumstances, the imposition of the Constitution in Iraq also failed in tempering the religious conflicts latent in the country, thus paving the way for their violent outburst. In the Iraqi case, then, 'Constitution, and constitution-making, instead of becoming tools of crisis management, and symbols of future political stability and identity, have become instead sources of special grievance for the excluded, a significant part of the fuel for the fires of a civil war'[16].

The claim that Western efforts to propagate democracy lend support to religious fundamentalism need not necessarily validate Huntington's thesis that democracy is an exclusive achievement of Western civilization. The rise of fundamentalism may instead signal the shortcomings of the Western ambition to enforce democracy as a complementary means to achieve a standard of economic and cultural uniformity.

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[14] W. Sadurski, *Charter and Enlargement*, in 8 *European Law Journal* (2002), 343.

[15] C. Pinelli, *State-Building and Constitution-Making. The Cases of Kosovo, Iraq, and Afghanistan*, in XVI *Diritto pubblico* (2010), 299.

[16] A. Arato, *Post-Sovereign Constitution-Making and Its Pathology in Iraq*, in 51 *New York Law School Law Review* (2006/07), 538.

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6. *Theocratic constitutionalism*

Islamic states are characterized by several different forms of regime, quite independently of reactions to the Western pretension to impose democracy from the outside. The range of forms of government goes from Saudi Arabia's absolute theocracy (thus, a form of totalitarianism) to the Republic of Tunisia's 2014 Constitution, which instituted a constitutional democracy while identifying Islam as the country's official religion. In between these extremes lies a variety of diverse regimes, in all of which free elections are held: Morocco's constitutional monarchy; Egypt's military regime; Turkey's presidential system; Pakistan's parliamentary system; or the Iranian republic of the *Ayatollahs.*

The criterion outlined in paragraph 4, above, for discriminating between liberal and illiberal regimes is insufficient to capture the reality of Islamic states, since it fails to bring into the equation the divine law (*Shari'ah*)/secular law relationship. At the same time, recognition of the importance of the religious element in understanding those polities does not necessarily imply that a category for 'theocratic constitutionalism' should be set apart as a distinct form of constitutionalism, as some believe.

The notional category of theocratic constitutionalism is identified by the following attributes: "(1) adherence to some or all core elements of modern constitutionalism, including the formal distinction between political authority and religious authority, and the existence of some form of active judicial review; (2) the presence of a single religion or religious denomination that is formally endorsed by the state as the "state religion"; (3) the constitutional enshrining of the religion, its texts, directives, and interpretations as a or *the* main source of legislation and judicial interpretation of laws – essentially, laws may not infringe upon injunctions of the state-endorsed religion; and (4) a nexus of religious bodies and tribunals that not only carry symbolic weight, but that are also granted official jurisdictional status and operate in lieu of, or in an uneasy tandem with, a civil court system"[17].

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[17] R. Hirschl, *The Theocratic Challenge to Constitution Drafting in Post-conflict States*, in 49.4 *William & Mary Law Review* (2008),1179.

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With the exceptions of the Constitutions of Afghanistan and Iraq, in which elements of modern constitutionalism were introduced (such as a federal structure, or a constitutional court), the constitutional organization of Islamic countries exhibits, rather, the features of nineteenth-century European statehood; first and foremost among these is a formal conception of the rule of law – a legacy from the colonial era. Each constitution makes different provisions for adjusting such features to the general principle of the hierarchical supremacy of religion, though this does not, in turn, necessarily qualify the state as a theocracy. Most importantly, adjustments of that sort are possible within a conceptual framework in which all individuals are seen to be subjected to an overarching objective order: such a notion is common to divine law (as in the instance of Islam) as it was to traditional legal positivism, whereas it is clearly at odds with the principles of modern constitutionalism.

The rationale behind the institution of a separate category for theocratic constitutionalism may be sought in the assertion that it "is seeking to displace the post-1945 universalist constitutionalist system, based on the normative system presided over by the community of nations, with one in which the constitutions of states reflect the will of God as one or another faith communities understand that will and its earthly constitution, for example, through *ulema* or *magisterium*"[18].

If this were the issue at stake, the categorization of a theocratic constitutionalism would involve a paradigm shift affecting the entire domain of discourse on constitutionalism. Not just the post-1945 system would be affected, but the separation between religion and state inaugurated with the 1648 Treaty of Westphalia, which lay the premises for the establishment of state sovereignty, and later of liberal regimes. Our present grounds for distinguishing between *ulema* and *magisterium*, and, most importantly, between caliphates and states descend from such separation.

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[18] L. Catà Backer, *Theocratic Constitutionalism: An Introduction to a New Global Legal Ordering*, in 16.1 *Indiana Journal of Global Legal Studies* (2009), 85.

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7. *Communitarian constitutionalism*

'Communitarian constitutionalism', finally, has enjoyed some popularity as a formula to describe such East Asian regimes as Malaysia and Singapore. These countries feature strong executives operating within a dominant party parliamentary system, as a reflection of a cultural background informed by the Confucian tradition and the Asian values school, in which the common good is valued higher than any notion of individual freedom. A trait these countries have in common with Islamic states is the emphasis placed on matters of identity and authority; on the other hand, they are also multiracial and religiously diverse, which means that internal balances are constantly shifting and have to be maintained through a continuous re-negotiation of consensus. In this regard, they also differ from liberal regimes: while these, it is contended, are structured according to principles based on the impersonal application of universal legal norms and the enjoyment of rights at the individual level, leading 'to an asymmetric neglect of civic duties, responsibilities, and the common good which non-liberal communitarian polities prioritized', in communitarian systems 'The socially embedded rather than unencumbered self is the adopted vision where the community plays a role in forming personal identity and moral choice, with the state committed to equipping citizens to participate in self-rule'[19].

Once again, it is necessary to consider whether the differences between liberal and illiberal regimes are in fact as irreconcilable as might appear. In particular, the view of constitutional democracies as committed to a notion of 'unencumbered self' has to be abandoned. Counter to an atomistic conception of society, there are several instances of countries which subscribe to a pluralistic vision of democracy, combining open political competition with the granting of freedom of association and of cultural and social pluralism among citizens. Again, the interval between the orientation to strictly individual rights and to the participation of social groups in public

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[19] L.-A. Thio, *Constitutionalism in Illiberal Polities*, in M. Rosenfeld and A. Sajò (eds.), *The Oxford Handbook of Comparative Constitutional Law* , OUP, 2012, 133.

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affairs may be regarded as a continuum along which diverse points of balance may be achieved.

Liberal regimes nurture within themselves the potential for internal evolution. Though to a lesser extent, however, the same holds for non-totalitarian illiberal regimes. It is in this perspective that the latter deserve further consideration.

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Abstract: Illiberal regimes are generally defined as regimes in which neither democracy nor fundamental rights are granted, and in which rule of law is substantially disregarded. Instead of attempting a taxonomy, the article gives an account of their origins and of the problems raised by their emergence in the perspective of comparative constitutionalism.

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