

## Criminal and Constitutional Populism Under the Aristotelian Framework

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*Abstract:* Aristotle's work relies on the assessment of human nature and the search for the supreme good defined as the complete fulfillment of an active life. In his view, the Stagirite regards the community of the political type as the most conducive to the common and individual good. Therefore, the account of justice cannot be separated from the account of politics, and consequently from the account of virtues. These two concepts are indeed intrinsically connected. In fact, in his perspective, the best city requires the best citizens as the ideal ground to build up the best possible community, and vice versa. This conceptual framework seems particularly essential and useful to assess the modern phenomenon of constitutional populism. The basis of Aristotle's theory of justice (in its general, distributive, and corrective type) applied to the perceived deviant constitution of democracy demonstrates how the phenomenon works in the fields of constitutional and criminal law.

*Keywords:* Aristotle; justice; ethics; law; populism.

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## 1. *Introduction*

Aristotle's work in the *Politics* intends to develop further and wider the issues previously treated on *Nicomachean Ethics*, the assessment of human nature, and the search for the supreme good (*eudaimonia*)<sup>1</sup>. The Stagirite regards the political community as a paramount requirement to achieve the ultimate fulfillment of human life. The political community, in fact, enables and compels the individual to exert his practical reason (*phronesis*) as well as his theoretical rationality, thus allowing the refinement of the whole of virtues<sup>2</sup>. He labels this type of community as the intrinsically natural human union<sup>3</sup>, which comes into being for the innate human need for self-sufficiency but bolsters

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1. See Christopher Charles Whiston Taylor, *Politics*, in Jonathan Barnes (ed.), *The Cambridge Companion to Aristotle* at 233 (Cambridge University Press 1995). Defining in depth the concept of *eudaimonia* is beyond the scope of this article. For the sake of this inquiry, it is worth considering the outline provided by Terence H. Irwin, *Conceptions of Happiness in the Nicomachean Ethics*, in Christopher Shields (ed.), *The Oxford Handbook of Aristotle* at 495 ff. (Cambridge University Press 2012), who, evaluating the Aristotelian view, affirms that "the human good, (...) is activity of the soul in accordance with the best and most perfect (or complete) virtue in a perfect life. (...) Towards the end of the last book of the *Ethics*, he (Aristotle, ndr) seems to answer this question by arguing that the best and most perfect virtue is theoretical wisdom (*sophia*) exercised in theoretical study or contemplation (*theôria*) of universal and necessary truths about the universe."

2. See *id.* at 234.

3. See Aristotle, *Politics* at 1.2.1252b 27-33 (CDC Reeve tr. Hackett 1998).

its existence for the sake of good life itself. Accordingly, he labels this sort of community as the intrinsically natural human union, since it comes into being for the innate need for self-sufficiency but bolsters its existence for the sake of good life itself<sup>4</sup>.

In order to fully understand this point, it is important to consider how Aristotle distinguishes human beings from other gregarious beasts. Aristotle famously labels the human being as "a naturally political (animal)"<sup>5</sup>. He also underlines that rational speech (*logòs*) is what sets humans apart because it allows for the perception and expression of what is just and unjust. He further notes that "it is community in these that makes a household and a city-state"<sup>6</sup>. With these premises in mind, it becomes clear that the ability to conceptualize justice is a distinguishing factor that separates human beings from beasts and qualifies the polis in comparison to other forms of alliances that do not render citizens just and upright<sup>7</sup>. The Stagirite introduces the concept of constitution in a political community as "the organization of offices in city-states, the way they are distributed, what element is in the authority of the constitution, and what the end is of each of the communities"<sup>8</sup>.

These premises underpin a crucial point in the connection between ethics and politics: they highlight the relationship between virtue, justice, and the forms of government. In fact, Aristotle grounds his constitutional theory on the distinction between "those constitutions that look to the common benefit" and "those which look only to the benefit of the rulers", labelling the first ones "correct" and "deviations" the formers, "for they are like rule by a master, whereas a city-state is a community of free people"<sup>9</sup>. These are indeed corrupt versions of the just forms of government: tyranny is a deviation of kingship; oligarchy is a deviation of aristocracy; democracy is a deviation of the

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4. See *ibid.*

5. Aristotle, *Nicomachean Ethics* at 1.7.1097b 12 (Terence Irwin tr. Hackett 2nd ed. 1999).

6. Aristotle, *Politics* at 1.2.1253a17-18 (cited in note 3).

7. See *id.* at 3.9.1280b11-12.

8. *Id.* at 4.1. 1289a15-18; see also *id.* at 3.1.1274b37-40, 6.1278b8-11.

9. *Id.* at 3.6.1279a16-21.

so-called polity<sup>10</sup>. These three broken constitutions, in the Aristotelian view, prove unable to reach the goal of the common good<sup>11</sup>, because by definition, they do not aim at the common good, but at the benefit of those in power (the tyrant, the few, or the many)<sup>12</sup>. The upshot is a general deficiency of justice under these regimes since they do not allow for the exercise of virtue, which is essential to the implementation of justice.

Given this framework, the Aristotelian analysis of the various forms of government, dealt with in the *Politics*, cannot be harmlessly set apart from the account of the different virtues of character considered in his ethical treatises, and from justice as well<sup>13</sup>, since the two provinces of political theory and principles of ethics are, for the Stagirite, inextricably entwined<sup>14</sup>. Indeed, the best city requires the best citizens, as well as the best citizens require the best city, as the ideal ground upon which the best possible community can be built<sup>15</sup>.

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10. See *id.* at 3.6.1279a22-1279b8. In brief, kingship is the government of a single ruler for the common benefit, whereas the command of a minority is an aristocracy if it pursues the city's good, and the government of the many is a polity if it aims at the community's best interest. See generally Anselm H. Amadio and Anthony J.P. Kenny, *Political theory of Aristotle* (Encyclopedia Britannica, last modified January 3, 2023), <https://www.britannica.com/biography/Aristotle/Political-theory> (last visited April 10, 2023).

11. See *ibid.*

12. See *ibid.*

13. See Jean Roberts, *Routledge Philosophy Guidebook to Aristotle and the Politics* at 17 (Routledge 2009).

14. See Taylor (cited in note 1).

15. In this framework, the pattern of the virtue of friendship (*philia*) becomes particularly explicative of the condition of justice under a broken constitution, since "Justice also naturally increases with friendship" (Aristotle, *Nicomachean Ethics* at 8.9.1160a7 (cited in note 5)).

Giving the example of tyranny, it is exactly this kind of sentiment that a tyrant strives to annihilate, through means such as the forbidding of messes, associations, schools, and other kinds of meeting (see Aristotle, *Politics* at 5.11.1313a41-b1 (cited in note 3)), reliance on spies, in order to control his subjects' freedom of expression (See *id.* at 5.11.1313b11-16), and calumniation, which cause discordance among the governed (See *id.* at 5.11.1313b16-18). In fact, civic friendship is undeniably a threat to a despot's rule over the polis, for it encourages alliance and like-mindedness between citizens, hence the development of virtues and the pursuit of the common good (see Marguerite Deslauriers, *Political Unity, and Inequality*, in Marguerite Deslauriers and Pierre Destrée (eds.), *The Cambridge Companion to Aristotle's Politics* at 120-121 (Cambridge University Press 2013), thus contrasting with the ruler's own advantage (Aristotle,

In the light of this inquiry, the account of justice and its link to the account of other virtues plays a pivotal role, to the point that it is worth taking into consideration the role of virtues as a basis for the Aristotelian theory of justice.

In this vein, this article aims to delineate the layout and the functioning of general, distributive, and corrective justice within the spectrum of the deviant constitutions analyzed by Aristotle<sup>16</sup>, with reference to democracy. Ultimately, this paper will try to show how the Aristotelian framework proves useful to address the modern problem of populism in the constitutional and criminal law fields. To that end, this paper will outline first the concept of justice developed by Aristotle and how this notion is declined within its distributive and corrective justice subdivisions. It will proceed to apply these concepts to the sphere of erroneous forms of government (tyranny and oligarchy) sketched by the Stagirite), and to his vision of democracy, examining its constitutive features and fallacies. Having outlined this framework, it will be possible to apply the results of the proposed analysis to the layout of constitutional democracy, highlighting the points of contact between the modern phenomenon of populism and the failures identified by Aristotle. The overlapping of these two levels will therefore provide the starting point for developing some solutions to the consequences of the mentioned phenomenon in the realms of constitutional law and criminal justice, using the Italian legal system as a case study.

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*Politics* at 4.10.1295a20-21 (cited in note 3)). Consequently, a dictator does not only avoid fostering his citizen's friendship, but he also constrains it, for the governed are allowed neither to participate in the public life nor to take advantage of leisure, compulsory requirement in order to live a noble and happy life (See *id.* at 3.9.1280b40-1281a1). This conceivably results in a widespread deficiency in the exercise of virtues of character towards each other, and therefore in an underdevelopment of general justice (see Aristotle, *Nicomachean Ethics* at 5.2.1129b32-1130a5 (cited in note 5)).

Even under an oligarchic regime, the arrangement of friendship seems inherently faulty, because of the disproportion in power and riches in the state, which makes the growth of such bond between unequal individuals unlikely (Aristotle, *Nicomachean Ethics* at 1158b30-33 (cited in note 5)). For an account of *philia* under a democratic regime, see para. 3.

16. Aristotle, *Nicomachean Ethics* at 1158b30-33, para 3 (cited in note 5).

## 2. Justice according to Aristotle

For the scope of this inquiry to be clear, it is prudent to first define the framework of the subject itself. This work's primary sources on Aristotle's justice are *Nicomachean Ethics*, Book V, and *Politics*, Book III, with the former that can be conceptually subdivided into two main sections<sup>17</sup>. The first one, which comprises chapters 1 to 5, consists of the construction of his assumption of justice as a state of character, while in the second one (chapters 6-11) the author supports his theory<sup>18</sup>.

The Stagirite's idea of the path toward the ultimate realization of human life<sup>19</sup> is thoroughly explained by the Doctrine of the Mean<sup>20</sup>. Virtue is the right extent, determined by reason<sup>21</sup> and prudence<sup>22</sup>, to which every single virtue of character is practiced<sup>23</sup> that is to say, it is neither unreservedly pursued nor completely neglected - and where material things are neither craved for nor ignored<sup>24</sup>. It is the capacity to reach the right mean between excesses and deficiencies<sup>25</sup> or, to put it in other words, "the ability to see, on each occasion, which course of action is best supported by reasons"<sup>26</sup>.

In this context, Aristotle welcomes the idea that ethical individual virtues are a combination of "rational, emotional, and social skills"<sup>27</sup>. To lead a proper life, individual virtues must be exercised jointly and harmoniously, as if they were a whole<sup>28</sup>. This practice is only pos-

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17. See Charles M. Young, *Aristotle's Justice*, in Richard Kraut (ed.), *The Blackwell Guide to Aristotle's Nicomachean Ethics* at 179 (Blackwell 2006).

18. See Ronald Polansky, *Giving Justice Its Due*, in Ronald Polansky (ed.), *The Cambridge Companion to Aristotle's Nicomachean Ethics* at 152 (Cambridge University Press 2014).

19. See Richard Kraut, *Aristotle's Ethics* (Stanford Encyclopedia of Philosophy, May 1, 2001), available at <https://plato.stanford.edu/entries/aristotle-ethics/> (last visited April 10, 2023).

20. See Aristotle, *Nicomachean Ethics* at 2.6 (cited in note 5).

21. See *id.* at 6.1.1138b21-34.

22. See *id.* at 6.7.1144b21.

23. See *id.* at 2.7.1107a1-26.

24. See *id.* at 338, Glossary.

25. See *id.* at 2.7.1107a1-5.

26. Kraut, *Aristotle's Ethics* (cited in note 19).

27. *Ibid.*

28. See *ibid.*

sible by applying general rules to concrete cases: the individual must therefore acquire the ability to discern, on each occasion, which is the best way to act<sup>29</sup>. This process is the so-called *phronesis* (practical wisdom), which individuals must acquire not only through study (e.g., of philosophy, mathematics, etc.) but also through the exercise of those social, emotional, and decision-making capacities which make them capable of applying the supreme good in practice, each time depending on the situation<sup>30</sup>.

Aristotle draws from the very beginning a distinction between general (or broad, universal) and special (or narrow, particular) justice<sup>31</sup>. The former amounts to an achievement that requires the coordinated exercise of multiple good states of character, as being upright and lawful needs the practice of the whole of virtue<sup>32</sup>. The latter, on the other hand, is a distinct virtue of character, assimilated with the other personal virtues (e.g., courage, temperance, liberality, etc...), and it is concerned with the search for what is fair in concrete cases<sup>33</sup>.

In his inquiry, the Stagirite goes even further, highlighting these concepts in parallel to the demarcation of injustice: justice is contrary to injustice, which is also divided into general and special injustice<sup>34</sup>. Hence, the author considers both justice and injustice more than individual concepts<sup>35</sup>. They are the very foundations of Aristotle's idea of justice<sup>36</sup>. In *Nicomachean Ethics* Book V<sup>37</sup>, Aristotle deeply explains how fairness (i.e., special justice) is an intermediate state, examining justice in distribution<sup>38</sup>, and justice in rectification<sup>39</sup>. However, the same is not also done for lawfulness (i.e., general justice): hence, he probably assumes that the latter is an intermediate state per se because it comprises other virtues (including special justice itself), thus

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29. See *ibid.*

30. See *ibid.*

31. See Young, *Aristotle's Justice* at 181 (cited in note 17).

32. See *id.* at 181-183.

33. See *ibid.*

34. Aristotle, *Nicomachean Ethics* at 5.1.1129a33 (cited in note 5).

35. *Id.* at 5.1.1129a28.

36. See *id.* at 5.5.1133b30-33.

37. *Id.* at 5.1.1129b30-2.1130a16.

38. *Id.* at 5.3.1131b10-13.

39. *Id.* at 5.4.1131b25-27.

encompassing their individual means, as Young suggests<sup>40</sup>. Aristotle, therefore, draws a picture that represents universal justice as including special justice, among the other virtues of character. Special justice is also essential to the exercise of general justice: hence, the relationship between these two types of justice exists and is that of a part to a whole<sup>41</sup>.

In this framework, Aristotle further develops his theory<sup>42</sup>. The difference in structure and discipline for "justice", as foreseen in Book 2 is acknowledged by its subdivision into general and special<sup>43</sup>. In fact, examining the two sorts, he identifies the first one with adherence to law; he remarks "what we call just is whatever produces and maintains happiness and its parts for a political community"<sup>44</sup>. This is the reason why this kind of justice is subsequently recalled as "supreme among virtues"<sup>45</sup> or "complete virtue to the highest degree"<sup>46</sup>; indeed, the Aristotelian view of the *polis* (the city-state, the perfect and most desirable community for individuals) postulates that individuals must behave in accordance with the law (*nomos*, general Greek word comprehensive of written and customary law)<sup>47</sup>. In fact, the law is what prescribes the correct way to act in relation to others and the right demeanor between members of the same society; it also simultaneously orders sanctions for the impact of our actions upon our neighbors<sup>48</sup>. As such, citizens must exercise the entirety of virtues of character to abide by the rules<sup>49</sup>. This is why, "in justice, all virtue is summed up"<sup>50</sup>.

Thereafter, Aristotle proceeds to describe by defining its structure the second kind of justice, which he labels "special"; its sphere of action is different when compared to the universal type, as it is concerned with the individual quality of being fair<sup>51</sup>. Indeed, it regards

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40. Young, *Aristotle's Justice* at 181 (cited in note 17).

41. See Polansky, *Giving Justice Its Due* at 156-157 (cited in note 18).

42. Aristotle, *Nicomachean Ethics* at 5.5.1133b30-33 (cited in note 5).

43. *Id.* at 2.7.1108b7-9.

44. *Id.* at 5.1.1129b18-19.

45. *Id.* at 5.1.1129b28.

46. *Id.* at 5.1.1129b31.

47. See *id.* at 5.1.1129b18-32.

48. See Polansky, *Giving Justice Its Due* at 155 (cited in note 18).

49. See Aristotle, *Nicomachean Ethics* at 5.1.1129b32-35 (cited in note 5).

50. *Id.* at 5.1.1129b30.

51. *Id.* at 5.2.1130b9-10.



divisible goods (i.e., honor, wealth, and safety); goods that one desires more than his fair share. Special justice distinguishing factor is hereby brought into analysis: *pleonexia* (greed)<sup>52</sup>. This is the very element that separates particular justice from its contrary, special injustice (i.e., the unfair), and that singles it out from universal justice<sup>53</sup>. Consequently, the narrow type of justice regards fairness in measure. It does not encompass other virtues of character but combines itself with them: honor with magnanimity and proper pride; wealth with liberality and magnificence; safety with courage<sup>54</sup>. Special justice has a diverse interest from all of these forms of excellence: it refers to justice in all those states<sup>55</sup>.

Aristotle then highlights the existence of two sub-types of special justice: justice in distribution and corrective justice. The first one regards proportion in shares of goods and honors in a state, while the second rectifies wrong allocations of resources resulting from transactions<sup>56</sup>.

More precisely, distributive justice, by definition, concerns the identification of those who count as equal and those who do not in the community, and the corresponding standard<sup>57</sup>: freedom, which is also the end in a democratic polis<sup>58</sup>. In more modern terms, distributive justice seems concerned with the correct allocation of posts in public administration, relations between public bodies, rules on checks and balances, the election of the legislative assembly, and appointment at the cabinet.

Corrective justice, in turn, regards the application of justice in concrete cases and employs liability as a conceptual tool to rectify wrongs<sup>59</sup>. It levels off the loss suffered by reversing the damage on the infringer, thus stigmatizing an unfair behavior, and restoring

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52. See Young, *Aristotle's Justice* at 183 (cited in note 17).

53. See Aristotle, *Nicomachean Ethics* at 5.2.1130b7-29 (cited in note 5).

54. See Young, *Aristotle's Justice* at 183 (cited in note 17).

55. See *ibid.*

56. See Marlena G. Corcoran, *Aristotle's Poetic Justice*, 77 Iowa L. Rev. 837, 842 (1992).

57. See Aristotle, *Nicomachean Ethics* at 5.3.1131a20-25 (cited in note 5).

58. See Judith A. Swanson and C. David Corbin, *Aristotle's Politics: A Reader's Guide* at 100-102 (Continuum 2009).

59. See Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 The University of Toronto Law Journal 349, 349 (Autumn 2002).

equality<sup>60</sup>. This type of justice, as mentioned, presides over interactions, both voluntary and involuntary, and assesses whether or not someone is to blame for an injustice, and whether or not the counterpart needs compensation<sup>61</sup>. It clearly shares a resemblance with the modern law of contracts and torts<sup>62</sup>.

Corrective and distributive justice are nothing alike. Distributive justice may involve a plurality of parties, whereas corrective justice concerns only two of them<sup>63</sup>; the differentiation even occurs on the ground of merit, which is the standard for sharing a benefit or a burden and it illustrates the contents for distributive justice. On the other hand, corrective justice applies arithmetically to restore the fairness of either voluntary or involuntary) transactions<sup>64</sup>. Therefore, if distributive justice seems keen to regulate "the fair distribution of public goods among individuals or groups within a political system"<sup>65</sup>, rectificatory justice "attempts to undo illegitimate losses and gains through bilateral and direct vindication", thus governing the area of private bargains<sup>66</sup>.

However, these are not only descriptive figures of justice in the narrow sense. Aristotle considers the constitution of the polis its edifice<sup>67</sup>; "and a constitution, in turn, is a kind of justice"<sup>68</sup>. Indeed, whereas a city-state is secured by the administration of justice carried out by judges (who apply corrective justice)<sup>69</sup>, a form of government is mainly concerned with distributive justice<sup>70</sup>. Thereby, whereas Aris-

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60. See *ibid.*

61. See *ibid.*

62. See *ibid.*

63. See Jason W. Neyers, *The Inconsistencies of Aristotle's Theory of Corrective Justice*, 11 *Can. J. L. and Jurisprudence* 311, 311 (1998).

64. See *id.* at 311-312.

65. *Ibid.*

66. *Id.* For a different perspective, see Thomas C. Brickhouse, *Aristotle on Corrective Justice*, 18 *The Journal of Ethics* 187, 187-205 (2014), according to which corrective justice seems "bifunctional", and strives to restore the imbalance of both rights and wrongs.

67. Aristotle, *Politics* at 3.2.1276a17-b13 (cited in note 3).

68. David Keyt, *Distributive Justice in Aristotle's Ethics and Politics*, 4 *Topoi* 23, 23 (1985).

69. See Aristotle, *Nicomachean Ethics* at 5.4.1132a1-30 (cited in note 5).

70. See Keyt, *Distributive Justice in Aristotle's Ethics and Politics* at 23 (cited in note 68).

totelian political philosophy engages with the analysis and assessment of the various forms of government, it falls in the realm of justice in distribution<sup>71</sup>. On the contrary, where private interests are concerned, this is a matter of rectificatory justice.

### 3. *Aristotle on Deviant Constitutions*

To fully understand the account of democracy, a brief introduction to the broken constitutions outlined by Aristotle and their display of justice is useful. It bears repeating that Aristotle builds his constitutional theory on the distinction between "those constitutions that look to the common benefit" and "those which look only to the benefit of the rulers", labeling the first ones as "correct" and "deviations" the others<sup>72</sup>. More precisely, in his account of the different forms of government, Aristotle defines tyranny as the deviant form of kingship, because it is the rule of one, who aims at his private interest, over the interest of the many<sup>73</sup>. This distinguishes it from monarchy itself, insofar as not the law, but the ruler's will is in charge of the constitution<sup>74</sup>. The Stagirite ultimately labels tyranny as the worst constitutional form<sup>75</sup>, for it encompasses elements of democracy and oligarchy, seen as other unjust forms of government, and displays errors of both<sup>76</sup>.

This opinion results in specific consequences on the conceivable functioning of the distributive and the corrective type of justice. As mentioned above, under a tyranny the end is the ruler's benefit, and if authority is assigned on such a basis, a substantial imbalance of power emerges between the despot and the rest of the city-state<sup>77</sup>. Since the rule of a tyrant is undeserved, this arrangement affects distributive justice, because this way equals gets unequal shares (of goods, wealth, posts, etc.) in the polity<sup>78</sup>. Such an asymmetry involves even

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71. See *ibid.*

72. See note 9.

73. See Aristotle, *Politics* at 4.11.1295a20-21 (cited in note 3).

74. See *id.* at 4.11.1295a15-20.

75. *Id.* at 4.8.1293b27-30.

76. See *id.* at 5.10.1310b4-6.

77. See *id.* at 4.10.1295a18-21.

78. See *id.*

other partitions of common assets, since *pleonexia* (greed) is one of the most common offenses of a despot<sup>79</sup>, for he is prone to excessive acquisitiveness, especially of money and property<sup>80</sup>. Aristotle stresses this out, when he enumerates impoverishment and taxation as instruments used by tyrants to maintain their power<sup>81</sup>, and when listing confiscation of private possessions as a cause of change in constitutions<sup>82</sup>. Furthermore, appropriation of wealth, a feature that tyranny shares with oligarchy, proves to be an end in itself<sup>83</sup>. Therefore, these Aristotelian concepts permit to classify distributive injustice as a characteristic feature of tyrannical regimes.

In light of this inquiry, the role of corrective justice under a despotic regime can be outlined accordingly. This type of justice concerns the just in voluntary and involuntary transactions and, unlike the distributive type, treats individuals as equals<sup>84</sup>. Author Richard Kraut, describing its general features, pinpoints a meaningful link between rectifications of wrongs and equality in the community<sup>85</sup>. He asserts a missed punishment does not only damage the victim but corresponds to a recognition of a manifest superiority in the status of the offender<sup>86</sup>. This leads to a separation in the community between privileged individuals and underprivileged ones, ultimately pointed out as "tyrants and subjects"<sup>87</sup>.

On the other hand, oligarchy, which Aristotle considers the second worst among the incorrect constitutions<sup>88</sup>, is the rule of the wealthy, and consequently few, over the city-state for their advantage<sup>89</sup>. As noted by John Cooper, an oligarchic state is conceived like a

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79. See Fred D. Miller Jr., *Nature, Justice, and Rights in Aristotle's Politics* at 281, 302-303 (Oxford University Press 1995).

80. See *id.* at 283.

81. Aristotle, *Politics* at 5.11.1313b18-27 (cited in note 3).

82. *Id.* at 5.10.1311a25-28.

83. See *id.* at 5.10.1311a10-13.

84. See Aristotle, *Nicomachean Ethics* at 5.4.1131b25-1132a5 (cited in note 5).

85. Richard Kraut, *Aristotle: Political Philosophy* at 149-150 (Oxford University Press 2002).

86. *Id.*

87. *Id.* at 149.

88. Aristotle, *Politics* at 4.2.1289b3-4 (cited in note 3).

89. See *id.* at 4.4.1290b19-20.

commercial alliance, which pursues preservation and growth in possessions<sup>90</sup>. Accordingly, individuals display no interest in each other's virtues and vices<sup>91</sup>.

Justice in distribution under an oligarchy seems broadly influenced by the fundamental characteristics of such a regime. This polity is defined as the rule of the few, rich citizens over the city, whose aim is their private advantage<sup>92</sup>. The partition of offices and goods among individuals and groups must reflect this order. Richard Kraut observes that, in the partition of tasks, the notables lay claim to more power than the many, consistent with their wealth and their greater contribution to the good of the state<sup>93</sup>. The Stagirite himself recognizes their entitlement, for they retain the vast majority of land and are more experienced in conducting business<sup>94</sup>. Accordingly, in this form of government, justice in distributable goods appears to really be inequality, because it deals with divisions between unequals<sup>95</sup>. Since wealth is the end of this type of constitution and its standard as well, the most relevant offices should be assigned to the rich<sup>96</sup>. However, given this context, an oligarchy must endeavor to survive by means of artificial decorum and deception<sup>97</sup>, but it could not endure unless it enlists the aid of the lower classes<sup>98</sup>. Since poverty and interdiction from offices create adversaries in a city-state<sup>99</sup>, a deviant constitution is preserved blending its elements with those from the opposite faction<sup>100</sup>.

Therefore, oligarchy admits different compositions in terms of distribution consistent with such policy, which the Stagirite counsels

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90. John M. Cooper, *Political Animals and Civic Friendship*, in Richard Kraut and Steven Skultety (eds.), *Aristotle's Politics: Critical Essays* at 71 (Rowman & Littlefield Publishers 2005).

91. See *id.* at 72.

92. See Aristotle, *Politics* at 3.9.1279b34-1280a6 (cited in note 3).

93. Kraut, *Aristotle: Political Philosophy* at 448 (cited in note 85).

94. Aristotle, *Politics* at 3.13.1283a30-37 (cited in note 3).

95. See *id.* at 3.9.1280a11-15.

96. See *id.* at 4.4.1290b14-20.

97. See *id.* at 4.13.1297a14-34.

98. See Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 288 (cited in note 79).

99. See Aristotle, *Politics* at 3.11.1281b28-30 (cited in note 3).

100. See *id.* at 5.9.1309b18-35.

in order to make the constitution longer lasting<sup>101</sup>. In fact, oligarchs should leave some lucrative offices to the poor, or at least avoid high-handed and covetous behavior, in that they should not steal from public revenues<sup>102</sup>. For the many can accept exclusion from civic posts, inasmuch as they may devote leisure to their work, but not when wealthy people profit from it<sup>103</sup>. In fact, factions arise in such polity even because of arrogance and acquisitiveness, of private estates or public revenues, or because of exclusion from the constitution itself<sup>104</sup>. In its best version, posts are assigned according to a high standard of property possession, but still, only those who meet this requirement are admitted to participate in the polity<sup>105</sup>. Moreover, wealthy citizens are expected to invest part of their riches in the preparation of liturgies, since they foster the people's sympathy and trust<sup>106</sup>. Kraut underlines how this behavior is required by Aristotle to approach its ideal city-state, where these public services restrict the individuals' private use of wealth<sup>107</sup>. Therefore, these considerations underline how an oligarchic regime displays different and higher, degrees of distributive justice, approximating a just arrangement as it progresses towards a democratic regime<sup>108</sup>.

Because of the previous analysis, the breach of corrective justice seems particularly pernicious in an oligarchy. Since oligarchs are predisposed to start factions, against the many, and against each other, incorrect rectifications of trivial violations can become sources of contempt, thus giving rise to discord between notables and jeopardizing the very survival of the polity<sup>109</sup>. In this realm, Aristotle lists as causes of change in an oligarchy quarrel about inheritances<sup>110</sup>, weddings, and trials<sup>111</sup>. At the same time, it is worth noticing that, according to Aristotle, judges in an oligarchy are recruited among those who fulfill the

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101. *Id.* at 5.9.1309a19-22.

102. See *id.* at 5.8.1308b34-1309a20.

103. See *ibid.*

104. See *id.* at 5.3.1302b5-28.

105. See *id.* at 4.5.1292b39-42.

106. See *id.* at 6.8.1321a33-40.

107. Kraut, *Aristotle: Political Philosophy* at 326-327 (cited in note 85).

108. *Id.* at 370.

109. See Aristotle, *Politics* at 5.4.1303b18-31 (cited in note 3).

110. *Id.* at 5.4.1303b31-37.

111. *Id.* at 5.7.1306a31-1306b1.

minimum standard of assessment, since the poor are allowed to participate only in the best-case scenario, whereas in the others they are object of deception, to conserve the constitution<sup>112</sup>. This entails even a fine for lack of attendance as jurors for the notables, while the poor receive little sanctions or none<sup>113</sup>. This policy discourages the many from undertaking their task, thus leaving the administration of justice in the hands of the oligarchs<sup>114</sup>. Cooper observes that, if the constitution is conceived as a joint enterprise, the only real concern is to avoid injustice within the terms of the agreement and prevent cheating in business and other instances<sup>115</sup>. This partial delivery of corrective justice is likely to be affected consequently<sup>116</sup>.

#### 4. *Aristotle on Democracy*

In the domain of deviant constitutions, the very opposite of tyranny, being many in charge of the constitution<sup>117</sup>, and the downside of oligarchy, being the power in the hands of the poor<sup>118</sup>, is democracy.

Aristotle characterizes democracy as the government of the poor and free; considers it as the broken form of polity, which is, instead the correct form of government by the people<sup>119</sup>; and underlines how democracy stands out as the most moderate among the unjust forms<sup>120</sup>.

Concerning the first feature, it is clear that, under a democratic regime, the many rule<sup>121</sup>. However, the sheer number of rulers appears

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112. See *id.* at 4.13.1297a14-35.

113. See *ibid.*

114. See *ibid.*

115. Cooper, *Political Animals and Civic Friendship* at 72 (cited in note 90).

116. See Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 81 (cited in note 79).

117. Aristotle, *Politics* at at 5.10.1312b3-5 (cited in note 3).

118. See *id.* at 3.9.1279b17-20.

119. *Id.* at 3.7.1279b5-8.

120. *Id.* at 4.2.1289b4-5.

121. Democracy as a form of government derives from the conjunction of the Greek words *démos* (people) and *krátos* (power), but, in the ancient Aristotelian view, it bore a negative meaning. As mentioned, the Stagirite used it to indicate the broken version of popular government, which today we could translate with ochlocracy or demagoguery. However, democracy is today associated with a mostly positive meaning. The first requisite of modern democracy is the principle of popular sovereignty,

somehow incidental<sup>122</sup>. The real distinguishing factor among the deviant constitutions is the ideology underpinning democracy: freedom, and not wealth or the tyrant's desire, is the criterion employed to establish who counts as equal in the community<sup>123</sup>. And freedom is a trait of every citizen, rich and poor alike<sup>124</sup>. In the Stagirite's opinion, in the city-state both the poor and the wealthy err in overestimating the importance of their asset of freedom: in fact, under a democratic government people sustain that, since they share the same status of free citizens, they must enjoy equality in every other field<sup>125</sup>, thus avoiding any kind of assessment conducted on a more adapted basis (i.e., merit)<sup>126</sup>. This leads to a distribution of "honors" on the grounds of presumed equality, and not on the grounds of competence, evaluation, distinction, etc.

Regarding the second characteristic, as mentioned above, democracy seems to be the corruption of the germane constitution of polity. The distinction lies in the aim: when the mass rules for the common and non-partisan advantage, we have the so-called *politeia*, listed among the good constitutions<sup>127</sup>. The classist view of democracy prevents the community from reaching the supreme good since the rulers aim at their interest, not at the mutual benefit. This explains how,

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expressed through universal suffrage - the right to vote and to be elected. Another key feature of modern democracy, and a consequence of popular sovereignty, is the majority rule, the principle according to which the minority must accept and follow the decisions taken by the majority. However, the principle of popular sovereignty must adhere, in turn, to the rules of constitutionalism. Being subject to constitutional limitations, the majority rule is limited to standards and procedures whose objective is the respect of fundamental values and the involvement of the minority in decisional processes. These constraints are pivotal for the very existence of what we call democracy. In sum, modern constitutional democracy accords the majority a limited power, so its right to take decisions should not extend to the point of denying the rights of the minority - and every mechanism created to reach this goal seems therefore banished. For these brief considerations, see *Democrazia. Diritto costituzionale*, in Enciclopedia Treccani, <https://www.treccani.it/enciclopedia/democrazia-diritto-costituzionale> (last visited April 10, 2023)

122. See Andrew Lintott, *Aristotle, and Democracy*, 42 *Classical Quarterly* 114, 116 (1992).

123. See *ibid.*

124. See Aristotle, *Politics* at 3.8.1279b34-80a6 (cited in note 3).

125. See Lintott, *Aristotle and Democracy* at 116 (cited in note 122).

126. See Aristotle, *Politics* at 6.2.1317b43-44 (cited in note 3).

127. See *id.* at 3.7.1279a36-38.



at the same time, Aristotle maintains that democracy seems the most tempered of the broken forms of government: it is established upon the same core organizing principle of the polity, that is the majoritarian rule. However, since the goal is the common good, governance must adhere to the will of the people, yet it remains in accordance with the rule of law, which is crafted exactly to prevent the rulers from going astray and exploiting their power. Still, democracies are deemed by the Stagirite more stable and more durable than other broken constitutions, because, thanks to the principle of equality, they allow other social groups - especially the middle class - to participate in public offices<sup>128</sup>. According to this view, the Stagirite draws a distinction between the types of democracy: the regime based on pure equality, governed therefore by the rule of the many, according to the majoritarian rule; the democracy in which offices are assigned on the basis of property, where the relevant amounts are low; the regime in which every fully-fledged citizen, or every citizen in general, may partake in the city-state; and the worst type, the dictatorship of the masses, where the people rule as a one, and it is their will - not the law - that commands unreservedly<sup>129</sup>.

The Aristotelian account of friendship (*philia*) provides useful evidence of the plausible functioning of general justice in the latter regime<sup>130</sup>. The Stagirite grounds his description of democracy on the sheer contrast with oligarchy, thus pointing out the fundamental and pivotal mistrust between rich and poor that permeates the city-state<sup>131</sup>. This basic burden oppresses relationships between citizens of different classes in the polis, thus impairing the goal of the common good since each faction aims at its own<sup>132</sup>. The weakening of friendship is the natural upshot of this sub-optimal situation<sup>133</sup>.

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128. *Id.* at 4.12.1295b-1296a20.

129. *Id.* at 4.4.1291b30-1292a39. The middling class, in particular, is perceived as more stable and reliable since they do not desire other people's assets, nor are they envied - for they are not rich.

130. See Aristotle, *Nicomachean Ethics* at 8.9.1160a7 and at 8.1.1155a4 (cited in note 5).

131. See Kraut, *Aristotle: Political Philosophy* at 446-447 (cited in note 85).

132. See *ibid.*

133. See *id.* at 467.

Nonetheless, democracy still entails an appreciable level of *philia* because the poor disputes with the wealthy over the power in the *polis* but are ultimately prone to form a cohesive political unit, with the sole purpose to satisfy their claim for equality<sup>134</sup>. Therefore, this factious relationship still encompasses a basic level of community (*koinonia*), in that both sides, although operating for their own advantage, engage in a reluctant collaboration in the legal and economic areas<sup>135</sup>. However, this arrangement does not permit obtaining some sort of "like-mindedness" (*homonoia*)<sup>136</sup>, because there is a crucial disagreement between both sides over the principle of their power<sup>137</sup>. Consequently, this democracy is fragile, because its intrinsic rivalry can only be concealed under the mantle of participation in offices; thus, the risk of the emergence of an extreme form of democracy, by way of the subversion of the rule of law by the many, seems not preposterous<sup>138</sup>. This sort of government of the people deviates into tyranny since the multitude has authority over the constitution and commands as a single ruler<sup>139</sup>. The ultimate democracy employs the same sort of devices used by Cleisthenes in Athens, as explained in the *Politics*: it adds new tribes, reduces the number of cults, and disbands citizens' associations, all this to control *philia* among the many<sup>140</sup>.

General justice is likely to be undermined as a consequence, since such a regime aims only at the benefit of those in power, and accordingly vexes the rich<sup>141</sup>. In this framework, Richard Kraut examines the Aristotelian thought and affirms that the considered regime - democracy, but even oligarchy, to a lesser extent - in its best version

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134. See Aristotle, *Politics* at 5.1.1302a10-12 (cited in note 3).

135. See Kraut, *Aristotle: Political Philosophy* at 466 (cited in note 85).

136. Like-mindedness means concord. According to Aristotle, "a city is said to be in concord when (its citizens) agree on what is advantageous, make the same decision, and act on their common resolution." (Aristotle, *Nicomachean Ethics* at 9.5.1167a26-28 (cited in note 5)).

137. Kraut, *Aristotle: Political Philosophy* at 468 (cited in note 85).

138. See *id.* at 469-470. After all, the Stagirite acknowledges that "passion perverts rulers even when they are the best men. That is precisely why law is understanding without desire." (Aristotle, *Politics* at 3.16.1287a31-32 (cited in note 3)).

139. See Aristotle, *Politics* at 4.5.1292a4-18 (cited in note 3)

140. See *id.* at 6.5.1319b20-32.

141. See Kraut, *Aristotle: Political Philosophy* at 382 (cited in note 85).

still comprises a worthy degree of justice:<sup>142</sup> in fact, the best attainable condition requires the utilization of such persistent strife to reach a stable equilibrium of opposing forces<sup>143</sup>. For example, since the many hate wealthy people, they can enlist their help to undertake public services and, in doing so, they would prevent the elite from acquiring more power and money;<sup>144</sup> and, as Aristotle suggests, although the poor are badly prepared to perform significant offices, they may still reach an elementary type of justice by gathering in the assembly to exert control over the rich<sup>145</sup>. In the case of democracy, friendship is fostered among citizens through a compromise in which both parties agree on a rough parity of power, ensuring mistrustful cooperation that encloses a mutual benefit<sup>146</sup>. They still maintain their opposite views, but nonetheless, they succeed in achieving an acceptable level of friendship and justice, more than in any other deviant constitution, as Aristotle acknowledges<sup>147</sup>. Thus, the many poor can practice an elementary type of virtue by controlling the opposite faction's wrongs, even when virtue is not the end in itself<sup>148</sup>. Kraut pinpoints that a democracy can be considered not quite unjust only when it achieves its moderate form, through a minimal degree of friendship<sup>149</sup>. In such a regime, those in power can prevent the constitution from degenerating into a tyranny through the practice of virtue, hence accustoming citizens into being, if not entirely, at least semi-good<sup>150</sup>. Therefore, a law-abiding behavior that fulfills the condition of justice as lawfulness is somewhat conceivable<sup>151</sup>, and a tantamount level of universal justice is attainable in turn<sup>152</sup>.

However, since in his work the Stagirite considers different types of democracy, depending on which different parts of inhabitants of the city-state have authority, general justice is bound to vary

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142. *Id.* at 448.

143. See *id.* at 467-468.

144. See *id.* at 447-448.

145. See *ibid.*

146. See *id.* at 469.

147. Aristotle, *Nicomachean Ethics* at 8.11.1161b10-11 (cited in note 5).

148. See Kraut, *Aristotle: Political Philosophy* at 451 (cited in note 85).

149. *Id.* at 382.

150. See *id.* at 437.

151. See Aristotle, *Nicomachean Ethics* at 5.1.112b12-19 (cited in note 5).

152. See Kraut, *Aristotle: Political Philosophy* at 382-383 (cited in note 85).

accordingly<sup>153</sup>. A significant testing ground for this assumption is the pattern of generosity under a democratic regime. The Greek word that stands for such virtue, *eleutherios*, encompasses a double meaning, as it translates both the English adjectives generous and civilized<sup>154</sup>. Aristotle employs the term in both senses: in the *Nicomachean Ethics*, first when he describes the particular virtue of character linked to giving and taking money<sup>155</sup>, and secondly when he delineates what behavior is proper to a fully developed individual<sup>156</sup>. Therefore, Irwin suggests, the Stagirite recognizes these two meanings, the narrower and the broader, as intrinsically united, since the former, the generous one, is evidently a concrete expression of the latter, the civilized one.<sup>157</sup> Hence, the relationship between generosity and the correct attitude of a civilized, happiness-aiming person is that of a part to a whole, in as much as this framework parallels the single virtue-universal justice rapport.<sup>158</sup> To put it simply, the individual practice of generosity advances the human being toward the best version of himself.

This is particularly relevant in the case of democracy because such a constitution involves a characteristic tendency towards the equalization of assets<sup>159</sup>. Richard Kraut, evaluating the Aristotelian defense of common use of private property, underscores how communal property might jeopardize the development of the virtue of generosity<sup>160</sup>. The author clarifies that generosity intervenes only in personal relationships, and thus cannot truly increase through the layer of public expenses<sup>161</sup>. Indeed, economic means are the key to the implementation

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153. See Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 161 (cited in note 79).

154. Aristotle, *Nicomachean Ethics* at 331, Glossary (cited in note 5).

155. *Id.* at 3.5.1115a20-21.

156. *Id.* at 10.9.1179b8. According to the description proposed by Irwin, the civilized individual possesses the correct type of education, and therefore pursues only those virtues and enjoyments that are valorized by its formation. He eschews any prejudiced devotion to irrational pleasures and needs that pertain to the body, since enjoying those boorish activities is the hallmark of the servile lot. For this description, See *id.* at 331, Glossary.

157. *Id.* at 331, Glossary.

158. See *ibid.*

159. See Aristotle, *Politics* at 3.9.1280a8-19 (cited in note 3).

160. Kraut, *Aristotle: Political Philosophy* at 339-342 (cited in note 85).

161. *Ibid.*

of generosity, since they allow individuals to employ this excellence by giving assistance to family members and friends, on special occasions or whenever necessary<sup>162</sup>. The weakening of such ties, resulting from an abolition of private ownership and from the conceivable subsequent arise of quarrels<sup>163</sup>, would make it impossible to nurture the virtue of generosity, therefore to a significant impairment of general justice, since it requires the exercise of all excellences, not only of a certain amount of them<sup>164</sup>. Moreover, Kraut further comments on the Aristotelian vision of generosity when he affirms that this *aretê* could not be equally improved through citizens' collective participation in decisions about the use of public wealth for the common benefit<sup>165</sup>. Even Miller, who confirms how the use and alienation of property are mandatory in the refinement of generosity, points out this interpretation of the Aristotelian concept of ownership<sup>166</sup>.

This line of reasoning is clearly applicable to the extreme form of democracy, in which popular leaders engage in confiscations of properties - which Aristotle considers an expression of injustice<sup>167</sup> - instead of ensuring that the many are not too indigent<sup>168</sup>. Excessive poverty negatively affects leisure and hinders the practice of virtue, therefore, with respect to the present inquiry, it favors ungenerosity, which the Stagirite labels as "unjust"<sup>169</sup>. Therefore, in a demagogue-led democracy, the goal of general justice seems meaningfully constrained by this lack of generosity between individuals. However, this pattern ranges widely within the spectrum of different kinds of democracy, since the worst type inhibits the surfacing of such excellence, for this regime overlaps with tyranny<sup>170</sup>. By contrast, other sorts of democratic government conceivably foster generosity to increasingly higher degrees, the more they lean towards a polity, for they aim at a superior

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162. See *ibid.*

163. See Aristotle, *Politics* at 2.5.1263b7-25 (cited in note 3).

164. See Kraut, *Aristotle: Political Philosophy* at 340-341 (cited in note 85).

165. *Id.* at 341-342.

166. Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 324-325 (cited in note 79).

167. Aristotle, *Politics* at 6.3.1318a24-26 (cited in note 3).

168. See *id.* at 6.7.1320a5-33.

169. Aristotle, *Nicomachean Ethics* at 5.2.1130a19-20 (cited in note 5).

170. See Aristotle, *Politics* at 4.5.1292a17-18 (cited in note 3).

constitution, the so-called polity<sup>171</sup>. In fact, interpreting the Aristotelian thoughts, the same Kraut argues that there is no real contradiction between communal property and such a virtue since the *polis* should not subtract too much wealth from its citizens, but only a portion, the "correct mean". Hence citizens must be allowed to utilize part of their resources to pursue happiness, which also comprises fostering the virtue under scrutiny<sup>172</sup>. This scheme reinforces the idea of a parallelism between the generosity-civilized attitude relationship and the particular virtue-universal justice connection<sup>173</sup>. This relation is highlighted even by the English translation of *eleutheros* ("free"), hence a term grammatically and conceptually germane to the Greek notion of generosity<sup>174</sup>. Irwin highlights how this proximity evaluates such virtue as the correct standpoint of a free citizen<sup>175</sup>. Therefore, the considered virtue proves to be a useful gauge of the condition of universal justice in a democratic city-state: the more generosity is implemented among individuals, the more the broad type of justice, the universal one, seems to approach its Aristotelian correct arrangement<sup>176</sup>. As mentioned above<sup>177</sup>, distributive justice, by definition, concerns the identification of those who count as equal and those who do not in the community, and the relative basis<sup>178</sup>. The end in a democratic polis is freedom, and, consistently, the same holds for the standard<sup>179</sup>. However, for Aristotle, democrats have an incorrect conception of freedom, as under such labels they dignify the rule of the many and the notion that everyone should live an unregulated life<sup>180</sup>. As Jill Frank underlines when interpreting the vision expressed in the *Politics*, the Stagirite rejects their flattening equalization based on freedom as the measure for the partition of goods in the community, for it is

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171. See *id.* at 3.7.1279a36-38.

172. Kraut, *Aristotle: Political Philosophy* at 339-342 (cited in note 85).

173. See Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 292-294 (cited in note 79).

174. Aristotle, *Nicomachean Ethics* at 331, Glossary (cited in note 5).

175. *Ibid.*

176. See notes 170 and 171.

177. See notes 57 and 58.

178. See *ibid.*

179. See *ibid.*

180. See *ibid.*

a parameter more prone to arithmetic than to geometric equality<sup>181</sup>, which is the correct feature of distributive justice<sup>182</sup>. In fact, in the context of a comparison between the Aristotelian and the liberal democratic property model, the author explicitly remarks how a just distribution must take into consideration equality and differentiation alike<sup>183</sup>.

By contrast, inclusiveness is the distinguishing mark of a democratic state in the *Politics*, in that it strives to extend the threshold of fully-fledged citizenship, thus making entitlement to distributable goods and political rights a volatile limit<sup>184</sup>. In accordance with these assumptions, it is no wonder that for the Stagirite the preferable kind of democracy is the type based on a small level of property assessments and composed of similar people - viz. farmers<sup>185</sup>. Aristotle admits that such order is compatible with the ownership of only a certain amount of land, small enough to allow even the poor to participate in offices when necessary<sup>186</sup>. This arrangement is beneficial for the construction of a democratic *polis* under multiple points of view, for it constrains greed<sup>187</sup>, allows widespread participation<sup>188</sup>, encourages good government<sup>189</sup>, and prevents wrongdoings<sup>190</sup>. Accordingly, this small allotment system promotes farmers' hard work instead of their compulsive political participation, since the former activity is profitable while the latter is not; simultaneously, this arrangement permits a share of the

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181. Jill Frank, *Integrating Public Good and Private Right: The Virtue of Property*, in Aristide Tessitore (ed.), *Aristotle and Modern Politics: The Persistence of Political Philosophy* at 271-272 (University of Notre Dame Press 2002). As Irwin puts it, the democratic notion of equality seems arithmetic since the people maintain that every free citizen possesses an equal merit, therefore an equal entitlement to partake in the city-state and to have possessions. On the other hand, oligarchs invoke a geometric (or proportional) equality, since the criteria for the subdivision of divisible goods (resources, offices etc.) - therefore merit - is based on wealth. Cfr. Aristotle, *Nicomachean Ethics* at 250, Glossary (cited in note 5).

182. See *ibid.*

183. *Id.* at 272-273.

184. See Aristotle, *Politics* at 4.4.1291b14-29 (cited in note 3).

185. *Id.* at 6.4.1319a4-5.

186. *Id.* at 4.5.1291b38-40.

187. See *id.* at 6.4.1318b11-14.

188. See *id.* at 4.5.1291b39-40.

189. See *id.* at 6.4.1318b32-33.

190. See *id.* at 6.4.1319a1-4.

wealthy in public offices<sup>191</sup>. This treatment prevents the exclusion of rich citizens from public affairs and obtains their collaboration with the democratic political order<sup>192</sup>. It is useful, as Aristotle advises, to distribute offices that do not assign supreme authority to those who partake less in the polity<sup>193</sup>.

Nonetheless, apart from this best-case scenario, other versions of majority rule vary in accordance with the inclusion of progressively worse groups of inhabitants in the polity<sup>194</sup>, thus resulting in different, and inferior, degrees of justice in distribution<sup>195</sup>. The extension of citizenship to worthless individuals ultimately leads to the establishment of the worst kind of democracy, which indulges in tyrannical abuse of political rights and common assets<sup>196</sup>, that is to say, the unrestrained acquisition of power and wealth by the ruling class over the excluded "elite". In particular, the urban crowd, which outnumbers the upper or middling segments of the city, uses its leisure to assemble, thus gaining a profit out of political activities thanks to the earning of wages given to people in offices<sup>197</sup>. Furthermore, such a regime resorts to vicious means such as property seizure, excessive taxation, and public lawsuits brought against wealthy individuals, everything in order to win the multitude's trust - thus in contrast with distributive justice itself<sup>198</sup>. Besides, even when revenues are obtained, Aristotle criticizes their wasteful utilization, which is common in democracies, embodied by means of indiscriminate and addictive distributions to the poor, something he discards as "pouring water into the proverbial leaking jug"<sup>199</sup>.

These means provide a sheer contrast with the Stagirite's theories for a fair distribution, for he demands not only a restraint in confiscations and in common ownership of land but also better support

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191. See Swanson and Corbin, *Aristotle's Politics: A Reader's Guide* at 102 (cited in note 58).

192. See *ibid.*

193. Aristotle, *Politics* at 5.8.1309a26-30 (cited in note 3).

194. See *id.* at 6.4.1319a30-40.

195. See Aristotle, *Politics* at 1291b30-1292a6 (cited in note 3).

196. See Swanson and Corbin, *Aristotle's Politics: A Reader's Guide* at 103 (cited in note 58).

197. See Aristotle, *Politics* at 6.2.1317b28-34 (cited in note 3).

198. See *id.* at 5.5.1305a3-7.

199. *Id.* at 6.7.1320a29-31.



towards the poor<sup>200</sup>. This encompasses purposeful donations of surpluses, means to work, or opportunities to escape poverty, as in Carthage<sup>201</sup>. Therefore, democracy contemplates different kinds of distributive justice, for different types of such polity<sup>202</sup>. In this perspective, it is noticeable that a democratic city-state seems to miss the mark of a correct partition of divisible goods over the vast majority of the spectrum, since it pursues the benefit of one single class, the poor, whereas the advantage of the others, the wealthy, results disproportionately overshadowed<sup>203</sup>.

Hence, the democratic regime pursues its misinterpreted end, freedom, through a straightforward equalization that levels off individuals' merits and riches, regardless of the Aristotelian formula for a just allocation, which claims that equals should get equal shares<sup>204</sup>.

Even for what concerns corrective justice, it is essential to consider the type of democracy that is being examined. In this political regime, the administration of justice is carried out through the active participation of citizens, for example when serving as jurors, since the selection from all is held to be a defining democratic trait<sup>205</sup>. Nevertheless, Aristotle outlines such arrangement in two ways: the first three considered types of democracy entail no wages for judicial services, while the least form, the tyranny of the multitude, comprises a payment for jurors<sup>206</sup>.

This layout conceivably influences the quality of justice in rectification, for a fee stimulates participation and frequency of meetings because citizens have the leisure to engage in such activities since they can make a profit out of it<sup>207</sup>. The upshot is a pejoration in the quality of judgments, since the Stagirite mentions the very opposite of the described order, absence of revenues and short sessions for the courts,

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200. See Swanson and Corbin, *Aristotle's 'Politics': A Reader's Guide* at 103-104 (cited in note 58).

201. See *ibid.*

202. See note 194.

203. See Swanson and Corbin, *Aristotle's 'Politics': A Reader's Guide* at 106 (cited in note 58).

204. See note 184.

205. See Aristotle, *Politics* at 4.16.1301a10-12 (cited in note 3).

206. *Id.* at 4.6.1292b22-1293a11.

207. See Aristotle, *Politics* at 6.2.1317b28-34 (cited in note 3).

as the right arrangement for this sort of issue<sup>208</sup>. Moreover, courts play a pivotal role under this extreme form of democracy, inasmuch as through them the demagogues persuade the multitude, bringing spiteful cases against notables to expropriate their land<sup>209</sup>.

Thus, the arithmetic equality that characterizes this sort of particular justice appears endangered by the aforementioned money-hungry behavior and by its related malicious intent<sup>210</sup>. Richard Kraut observes that this pattern covers *pleonexia*, the kind of injustice related to distributable goods<sup>211</sup>. He argues that the unjust juror eventually gains prestige, honor, and money from his service<sup>212</sup>. In addition, this latter also enjoys wronging the victim, and thus lets the infringement of his rights go uncorrected<sup>213</sup>. In this framework, a person ends with more than his fair share, and vice versa for the injured party<sup>214</sup>. By contrast, in the preferable kinds of democracy, unpaid and infrequent jury service ensures purposeful participation and controls the risk of court misuse<sup>215</sup>. As a confirmation, Kraut highlights how the fair juror restores the loss of the victim, thus respecting the mandate of arithmetical equality<sup>216</sup>. In the same vein, a remarkable feature of the administration of justice in a democratic *polis* is Aristotle's warning on the hazard of having poor and base people participating in relevant offices<sup>217</sup>. He alerts that such persons would predictably err and act unfairly, for they are deficient in *phronesis* and in justice alike<sup>218</sup>.

Given this layout, ostracism offers a significant puzzle for the functioning of corrective justice in a democratic city-state<sup>219</sup>. This procedure permits to exile for a fixed period an individual that surpasses his fellow citizens in external goods, such as political power, wealth, or

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208. *Id.* at 6.5.1320a21-28.

209. See *id.* at 5.5.1305a3-7.

210. See notes 207, 209.

211. Kraut, *Aristotle: Political Philosophy* at 158 (cited in note 85).

212. *Ibid.*

213. See *ibid.*

214. See *ibid.*

215. See note 206.

216. Kraut, *Aristotle: Political Philosophy* at 158 (cited in note 85).

217. Aristotle, *Politics* at 3.11.1281b21-30 (cited in note 3).

218. See *ibid.*

219. See *id.* at 3.13.1284a17-32.

friends<sup>220</sup>. The Stagirite envisages that the correct constitution should be framed in order to avoid the recourse to such a device; nonetheless, he still endorses it as a corrective mean<sup>221</sup>. The main problem is that ostracism hits individuals who have not infringed on other persons' rights, as Miller correctly pinpoints<sup>222</sup>. While rectification targets past misdemeanors, ostracism seems forward-looking, and sanctions wrongs not already done.<sup>223</sup> Moreover, Aristotle underlines how this device is available as a powerful medium in the hands of deviant regimes, democracy included<sup>224</sup>, and in faction disputes, and thus presents inherent aspects of danger<sup>225</sup>. Therefore, the argument that the Stagirite employs to justify its utilization is civic priority<sup>226</sup>, for political justice requires it as an option to preserve the constitution<sup>227</sup>.

To summarise, the framework of justice in rectification under a democracy seems to be substantially different under likewise types of democracy, to the point of being completely altered under the worst form, where its tyrannical features impair the same possibility of a fair rectification<sup>228</sup>.

## 5. *Constitutional and Criminal Populism*

This brief excursus certainly does not claim to exhaust the investigation into the concept of justice according to Aristotle, nor to deepen its notion of democracy. However, it will serve to highlight how elements of this deviant form of government could today be seen

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220. See *ibid.*

221. See Andrés Rosler, *Civic Virtue: Citizenship, Ostracism, and War*, in Deslauriers and Destrée (eds.), *The Cambridge Companion to Aristotle's Politics* at 156 (cited in note 15).

222. Miller, *Nature, Justice, and Rights in Aristotle's Politics* at 246 (cited in note 79).

223. See Rosler, *Civic Virtue: Citizenship, Ostracism, and War* at 156-157 (cited in note 221).

224. Aristotle, *Politics* at 3.13.1284a33-1284b2 (cited in note 3).

225. *Id.* at 3.13.1284b 19-24.

226. See Kraut, *Aristotle: Political Philosophy* at 272 (cited in note 85).

227. See Rosler, *Civic Virtue: Citizenship, Ostracism, and War* at 157 (cited in note 221).

228. See note 138, 210.

in multiple manifestations of public powers. In fact, it is necessary here to refer to that political, social, and legal phenomenon now well known in modern Western democracies which goes by the name of populism. The concept, elusive and susceptible to numerous definitions<sup>229</sup>, but for the purposes of this survey it will suffice to consider its main features, namely the presence of the people-elite dichotomy and the insistent appeal to the general will of the people<sup>230</sup>.

These features bring a populist regime very close to the type of democracy that has been analyzed previously. In fact, they almost loyally mimic the functioning of the democratic regime set out above, with its counter position between classes or groups and the consequent unbalanced distribution of power and resources. The relevance of such considerations can be measured with reference to at least two aspects of the populist movement, namely constitutional and criminal populism.

Concerning the first phenomenon, populism has been traditionally viewed as the opposite of constitutional democracy, that is, democracy based not only on the will of the majority, but even in accordance with the fundamental law, up to the point that it disregards the liberal democratic regime per se or, to the very least, coexists with it in a parasitic fashion<sup>231</sup>. Populists often display dissatisfaction with legal boundaries and procedures, show aversion to institutions and intermediary bodies, and favors direct connections between the

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229. For a more detailed inquiry on the phenomenon, see, e.g., Daniele Albertazzi and Duncan McDonnell, *Introduction. The Sceptre and the Spectre*, in *Twenty-first Century Populism. The Spectre of Western European Democracy* at 1-7 (Palgrave 2008).

230. Cfr. Vasileios Adamidis, *Democracy, populism, and the rule of law: A reconsideration of their interconnectedness*, *Politics* 1, 5 (2021).

231. See Paul Blokker, *Populist Constitutionalism* (VerfBlog, May 4, 2017), available at <https://verfassungsblog.de/populist-constitutionalism/> (last visited April 10, 2023); Bojan Bugarič, *The Two Faces of Populism: Between Authoritarian and Democratic Populism*, 20 *German L.J.* 390, 390-391 (2019); Giuseppe Martinico, *Fra mimetismo e parassitismo. Brevi considerazioni a proposito del complesso rapporto fra populismo e costituzionalismo*, 1 *Questione giustizia* 71, 77 (2019); Alessandro Bernardi, *La sovranità penale tra Stato e Consiglio d'Europa* at 177 ff. (Jovene 2019).

leaders and the masses<sup>232</sup>. In sum, populists pursue political governance through immediate means, rather than negotiated ones<sup>233</sup>.

However, a sheer contrast with populist ideas seems not necessarily the case of a democratic order. As some authors argue, in fact, populism appears somehow to intermingle with constitutionalism since they share the same founding principle - that is, popular sovereignty<sup>234</sup>. According to this view, the relation with populism appears as a sort of radicalization of constitutionalism that exacerbates the concept of majority rule<sup>235</sup>, up to the point to make populism "part of a revolutionary tradition within democratic thought and practice"<sup>236</sup>. Populists affirm that modern liberal democracy is insufficient to foster popular supremacy, that is to say, taking a course of action in accordance with the will of the majority<sup>237</sup>. The obstacle to the unrestrained general will of the people is to be found in the rule of constitutional law<sup>238</sup>, which seems in turn the main difference between populism and constitutional democracy. Every institutional or procedural mechanism that limits the direct expression of the masses (e.g., central banks, independent authorities, electoral rules, legislative and administrative procedures) is subject to sharp criticism and fingered as a filter that hinders the expression of the popular will<sup>239</sup>.

Given this framework, the so-called "legal resentment" that spreads from populists has been classified by Blokker as a multi-pronged

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232. *Ibid.*

233. See *ibid.* citing Nadia Urbinati, *Democracy, and populism*, 5 *Constellations* 110, 111 (1998).

234. See Paul Blokker, *Populist Constitutionalism* (cited in note 231); see also Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, 12 *European Constitutional Law Review* 6, 11 (2016); Yves Mény, Yves Surel, *Populismo e democrazia* at 10-11, 35-38 (Il Mulino, 2000).

235. See Luigi Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity* at 6-26 (cited in note 234).

236. Paul Blokker, *Populism and Constitutional Reform. The Case of Italy*, in Giacomo Delledonne, Giuseppe Martinico, Matteo Monti and Fabio Pacini (eds.), *Italian Populism and Constitutional Law. Challenges to Democracy in the 21st Century* at 11-38 (Palgrave Macmillan 2020).

237. See *ibid.*

238. See Domenico Pulitanò, *Populismi e penale. Sulla attuale situazione spirituale della giustizia penale*, *Criminalia* 124 (2013), available at <https://discrimen.it/wp-content/uploads/Criminalia-2013.pdf> (last visited April 10, 2023).

239. See Mény and Surel, *Populismo e democrazia* at 59 (cited in note 234).

approach to the legal dimension of liberal democratic constitutionalism<sup>240</sup>. The rule of law, he argues, is accused to be a non-neutral and artificial engine of the policy-making process, not its background, thus removing the decisional power from the people<sup>241</sup>. On top of that, the procedural aspects of a pluralistic democracy are criticized as slow and farraginous, and perceived as obstacles to the direct representation of interests. What is more, populists take a skeptical stance on human rights and supranational law and jurisprudence, as they are conceived as non-democratic in nature, that is to say, not immediately stemming from a single political community, thus alienating from the true source of power in society<sup>242</sup>.

These characteristics of constitutional populism must be linked with another key aspect, the pivotal role of "constituent power in populist projects"<sup>243</sup>. As highlighted by Möller, and quoted by Blokker, in fact, the "invocation of 'the people' is not only a matter of bolstering mere political discourse, but of constitutional politics addressing the higher-ranking dimension of the legal and political community, the distribution of powers, and the overall design of rulemaking and application"<sup>244</sup>. This line of reasoning goes even further, since "populism does not only refer to certain policy issues but invokes 'the people' as constituent power on which the political community relies"<sup>245</sup>.

Such an assessment of a constitutional value connects the modern stance on populism to the concept of distributive justice advanced by Aristotle. The distribution of goods in a populist democracy (viz., public administrative offices, political powers, checks and balances, etc.) should belong unreservedly to the majority and should not bear restrictions from rules imposed either by the political community in the wider sense (including the excluded elite, be it a different class, group, faction, political party) - traditionally embodied in a modern democracy by a constitution or by constitutional law - nor should it

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240. Blokker, *Populist Constitutionalism* (cited in note 231).

241. See *ibid.*

242. See *ibid.*

243. Blokker, *Populism and Constitutional Reform. The Case of Italy* at 11-38 (cited in note 236).

244. Kolja Möller, *Popular Sovereignty, Populism and Deliberative Democracy*, 42 *Philosophical Inquiry* 14, 17 (2018).

245. *Id.* at 17-18.

be enforced by means of supranational entities such as international organizations or courts<sup>246</sup>. The criteria for a just allocation of posts and powers, in sum, responds not on merit, attitude, or democratic turnover, but on immediate responsiveness to the people's will. Approximately the same exegetic path may be followed in relation to criminal populism, which brings into play both the Aristotelian notions of distributive and corrective justice.

In general, penal populism refers to the idea of political use of crime and criminal justice-related issues, according to a rationale that relies more on the search for social consensus than on real needs for intervention<sup>247</sup>. According to R. Cornelli, this particular kind of populism seems built around four cornerstones, which are: the presence of excessive popular feelings<sup>248</sup>, the use of those very feelings as the basis of political decisions, mainly oriented to "social reassurance", the application of these decisions in the criminal field, perceived as the most adapted place to respond to collective emotional pressures, the development of a criminal policy that extends the criminal law area<sup>249</sup>.

As a matter of fact, security and criminal justice are often the objects of political use in terms of collective relief, with primary concern on fears and alarms sometimes induced or over-emphasized by political media campaigns often exploiting the topic of crime<sup>250</sup>. Even in the most well-established democracies, the administration of criminal justice - in this view, the elite - is constantly pressed by media, society, and political forces, which are the people, to live up to their exigencies

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246. See, e.g., *ibid.*, where Möller evidence how "populists do not rely on a societal foundational force which checks and authorises public institutions, but in fact can also turn the constitutional structure or the state against the "elites", supranational agreements, or economic powers".

247. See Ylenia Liverani, *L'enigma penale. L'affermazione dei populismi nelle democrazie liberali. Intervista ad Enrico Amati* (Extrema Ratio, December 30, 2020), available at <https://extremaratioassociazione.it/wp-content/uploads/2021/01/amati-intervista-definitiva.pdf> (last visited April 10, 2023). For a more detailed account on this notion, see John Pratt, *Penal populism* at 8 ff (Routledge 2007).

248. *I.e.*, towards a particular criminal phenomenon or episode.

249. Roberto Cornelli, *Contro il panpopulismo. Una proposta di definizione del populismo penale*, 4 *Diritto penale contemporaneo - Rivista Trimestrale* 129 (2019).

250. See Liverani, *L'enigma penale. L'affermazione dei populismi nelle democrazie liberali. Intervista ad Enrico Amati* (cited in note 247).

and expectations<sup>251</sup>. This arrangement tends to impinge on criminal law policy as a whole. It is increasingly evident the creation of offenses tailored to specific "enemies", such as migrants<sup>252</sup>, mafia members<sup>253</sup>, terrorists, road and sex offenders, corrupt officials, etc<sup>254</sup>. At the same time, on the procedural level, special investigative techniques (like wiretapping, undercover operations, etc.) as well as extensive use of pre-trial detention and other precautionary measures, are being deployed in order to tackle and prosecute particularly heinous crimes, according to the logic of the so-called "double track"<sup>255</sup>.

However, it is worth noticing that the juxtaposition between the righteous mass and the perceived corrupt and inefficient elite in the realm of penal populism seems not only limited to the sphere of public criminal law policies but transcends to the area of private interests. As some authors suggested criminal populism entails the whole "realm of justice and the rule of law, the proper application of laws and the social conditioning that arises from improper application".<sup>256</sup> As a consequence, penal populism applies not only to the law-making process - the 'production' of criminal law -, but also to its application - that is to say, to the criminal law in action<sup>257</sup>.

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251. See Luciano Violante, *Populismo e plebeismo nelle politiche criminali*, *Criminalia* 197 ff. (2014).

252. See Marta Minetti., *International Legal Principles, Penal Populism and Criminalisation of 'Unwanted Migration'. An Italian Cautionary Tale*, 24 *International Community Law Review* 358, 368-369 (2022).

253. See *ibid.*

254. See generally Luciano Violante, *L'infausto riemergere del tipo di autore*, *Questione Giustizia* 101, 101 ff. (n. 1, 2019).

255. See, e.g., Antonio Bitonti, voce *Doppio binario*, *Dig. disc. pen.*, Aggiornamento 393 ss. (UTET 2005).

256. Manuel Anselmi, *Populism: An Introduction* at 73 (Routledge 2018) as cited in Giovanni Damele, *The Judicial System at the Crossroads of Populism and Elitism*, in *Democrazia e Sicurezza - Democracy and Security Review* 157, 158 (2021).

257. See Giovanni Damele, *The Judicial System at the Crossroads of Populism and Elitism* at 158 (cited in note 256).



In this framework it is possible to discern another "mass", formed by the victims of crime/plaintiffs<sup>258</sup> and the community as a whole<sup>259</sup>, whereas the perpetrators/defendants/prisoners are the wicked "elite" to counter - since they appear to be unduly shielded from the due consequences of their behavior (i.e., punishment) by condescending and liberal public authorities, especially judges<sup>260</sup>. Thus, the public-administered criminal justice transforms into an ancillary vehicle of private, vindictive justice<sup>261</sup>. The purpose of the trial, in this view, is no longer to ascertain personal responsibilities at the end of a fair trial and to impose a sanction that is proportionate and adequate, but to resort to quick sentencing and harsh penalties so as to avenge the suffering inflicted by the crime, and to commensurate sanctions to that very pain<sup>262</sup>. This idea of criminal law as a mere tool to rectify wrongs overshadows the very pillars of the rule of law<sup>263</sup>, for example, the right to defense, due process, and presumption of innocence. In this scenario, the overexposure of jurisdictional activities to the mass media plays a pivotal role: the judicial system and its administrators seem to be summoned in the artificial courtroom of public mediatic opinion to account for the results achieved or missed - and the "judge" here becomes either politics or the mass<sup>264</sup>. The judicial decision

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258. See Ennio Amodio, *A furor di popolo. La giustizia vendicativa gialloverde* at 18-19, 145-149 (Donzelli Editore 2019); see also Enrico Amati, *Insorgenze populiste e produzione del penale*, in F. Giunta et. al. (eds.), *Diritto penale e paradigma liberale: tensioni e involuzioni nella contemporaneità: atti del Convegno di Siena, Certosa di Pontignano, 24 e 25 maggio 2019* at 43-45 (Edizioni scientifiche italiane 2020).

259. See Manuel Anselmi, *Populismo e populismi*, in Stefano Anastasia, Manuel Anselmi and Daniela Falcinelli, *Populismo penale: una prospettiva italiana* at 18-19 (Wolters-Kluwer 2020).

260. See Amodio, *A furor di popolo. La giustizia vendicativa gialloverde* at 18-19, 145-149 (cited in note 258); see also Amati, *Insorgenze populiste e produzione del penale* at 26 (cited in note 258).

261. See Vittorio Manes, *Diritto penale no-limits. Garanzie e diritti fondamentali come presidio per la giurisdizione*, 1 *Questione Giustizia* 86, 88 (2019).

262. See Amodio, *A furor di popolo. La giustizia vendicativa gialloverde* at 18 (cited in note 258).

263. See Filippo Sgubbi, *Monsters, and Criminal Law*, in Daniela Carpi (ed.), *Monsters and Monstrosity: From the Canon to the Anti-Canon: Literary and Juridical Subversions* at 289-292 (De Gruyter 2019).

264. See Manes, *Diritto penale no-limits. Garanzie e diritti fondamentali come presidio per la giurisdizione* at 294 ff. (cited in note 261).

seems therefore lost in this "bacchanal of opinions", where procedural safeguards and legal technical knowledge are of no use<sup>265</sup>.

Given the above, clarification is needed. The interaction between political populism in criminal policies and judicial populism derives, as strikingly suggested by Professor Fiandaca, from the intrinsically populist character of criminal law per se, as it relates to the true identity "of a given population at a given historical moment"<sup>266</sup>. If the choice of what behaviors should be punishable by law ultimately belongs, in a democratic order, to the people, and if justice is administered "in the name of the people"<sup>267</sup>, thus the populist idea cannot harmlessly set apart from democratic criminal law.

It is precisely this collective dimension of criminal law that requires clarity in the incriminations and in the sanctioning responses, in order to guide the behavior of the members of the community through an understandable message in which everyone can recognize the meaning that legitimizes the obedience requested by the state<sup>268</sup>. The law seems now as the safeguard of democracy, and democratic criminal law, no longer for its mere contents, which are presumed to be in line with liberal values; but for its decisional process, which permits, despite majority regime, parliamentary dialectics, the control of opinion public, and the constitutional review, which is capable of bridging the content "void" of democracy with a table of values constitutive of the most profound popular identity<sup>269</sup>.

These features highlight a comparison with Aristotle's justice. Using the Stagirite's grammar, populism assesses the desirability and effectiveness of criminal law proposals on the grounds of *ethos* and *pathos* of the advocate, his credibility, perceived integrity, and his capability to arouse strong emotions in the audience, rather than on rational speech (*logòs*), that would be the case with checked facts, data,

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265. *Id.*

266. Giovanni Fiandaca, *Populismo politico e populismo giudiziario*, in *Criminalia* 102 ff. (2013).

267. Article 101 §1, Constitution of the Italian Republic.

268. See Fiandaca, *Populismo politico e populismo giudiziario* at 102 ss. (cited in note 266).

269. See Francesco Palazzo, *Legalità penale. Considerazioni su trasformazione e complessità di un principio fondamentale*, Quaderni fiorentini 1322 (2007).

logic, and legal reasoning<sup>270</sup>. Therefore, criminal policies supported by feelings of anger, or pity prevail on an evaluation of the merit and opportunity of the opponent's proposal<sup>271</sup>. Populists appeal to the moral superiority of the elite, and this stance justifies the belittling and delegitimization of its arguments rather than their refutations<sup>272</sup>. Opposing populists' demands means ostracism, expulsion of the "traitor" from the dignified mass<sup>273</sup>. This is the conceivable functioning of distributive justice in the criminal area: a decision-making process hampered by over-sensitivity and resentment which blur the substantial or procedural norm that is, the output of that very process to shape the law in order to serve not its purpose but the populist expectation of law, order, security, and promptness of the criminal justice system. Even corrective justice results are impaired by the populist ambiance. As mentioned above, the process of "victimization" of the administration of justice risks missing the focus of the criminal trial, which is to ascertain criminal responsibilities through the guarantees of a fair procedure. The moral argument and the blaming of the elite results in the demand for harsher sentences and rapid prosecutions even in the material case, to victimize the defendant given that the sanctions tend to amend the pain inflicted on the victim and the community as a whole, thus not aiming at the reinstatement of the transgressor<sup>274</sup>.

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270. See José Javier Olivas Osuna, *from chasing populists to deconstructing populism: A new multidimensional approach to understanding and comparing populism*, 60 *European Journal of Political Research* 829, 838 (2021). The three considered means of persuasion derive from Aristotle's *Rhetoric*: *ethos* appeals to the credibility of the speaker; *pathos* relies on arousing emotions in the audience; *logos* involves the logical comprehension of the discourse. For an account of the application of these three figures to a legal argument, See generally Krista C. McCormack, *Ethos, Pathos, and Logos: The Benefits of Aristotelian Rhetoric in the Courtroom*, 7 *Wash. U. Jur. Rev.* 131, 131 ff (2014), available at [https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1107&context=law\\_jurisprudence](https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1107&context=law_jurisprudence) (last visited April 10, 2023).

271. See *ibid.*

272. See *ibid.*

273. See Jorgen Wilhelm Müller, *Populism and constitutionalism*, in Cristobal Rovira Kaltwasser, Paul Taggart, Paulina Ochoa Espejo and Pierre Ostiguy (eds.), *The Oxford handbook of populism* at 593 (Oxford University Press 2017) as cited in José Javier Olivas Osuna, *From chasing populists to deconstructing populism: A new multidimensional approach to understanding and comparing populism* at 838 (2021).

274. See Anselmi, *Populismo e populismi* at 18-19 (cited in note 259).

## 6. *Populism under the Aristotelian framework: outcomes and (possible) countermeasures*

This result suggests a conclusion, based on the analyzed decline of virtues under this polity. Since such a deviant constitution (in the Aristotelian view) aims, by definition, not at the common good, but at the benefit of those in power (the mass), the upshot seems a general deficiency of all the types of justice, mitigated only while the rulers, by means of contrived decency or political choice, approximate the just arrangement of the correspondent correct constitution<sup>275</sup>.

This conclusion has direct consequences on the impact of populist ideas on constitutional and criminal law. If the principal core of populism is the strict adherence to the people's will, my stance here is that, as I tried to highlight above<sup>276</sup>, a certain degree of populism appears intrinsic in both realms of public law. There is no such thing as a sheer contrast between the populist invocation of the people's will as a basis for power and the normative foundation of democratic legitimacy: on the contrary, they are two faces of the same coin - that is, popular sovereignty<sup>277</sup>. Given the considered framework of constitutional and criminal law, is the Aristotelian view on democracy able to help us with the modern conundrum of populism? And if so, how? The answer, in my opinion, lies in the above-mentioned summary of this defiant form of government. If the ruler's will (that is, the people) strives to ensure the best for the majoritarian class, then the rest of society (the out-groups) seems left behind in the distribution of power, of offices and in the participation in the decision-making process (for what concerns distributive justice), and in the fair adjudication of

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275. See note 143.

276. See notes 234, 235, 236, 266, 267, 268.

277. Cfr. Mark Tushnet, *Varieties of Populism*, 20 *German L.J.* 382, 383 (2019), that links the "very foundations of democratic constitutionalism" to a sort of populism; Massimo Donini, *Populismo penale e ruolo del giurista*, *Sistema penale* 14 (2020), available at [https://www.sistemapenale.it/pdf\\_contenuti/1599384043\\_donini-2020-b-populismo-penale-ruolo-del-giurista.pdf](https://www.sistemapenale.it/pdf_contenuti/1599384043_donini-2020-b-populismo-penale-ruolo-del-giurista.pdf) (last visited April 10, 2023), that sees the conflict between populism and constitutionalism as a mostly apparent one; Gaetano Insolera, *Il buio oltre la siepe. La difesa delle garanzie nell'epoca dei populismi*, 1 *La Giustizia penale* 59 (2019), who highlights the 'close relationship' between populism and democracy.

judicial cases (for what pertains to rectificatory justice). In Aristotelian terms, they are not part of the constitution<sup>278</sup>.

As a consequence, there seems to be a gap between *popular* sovereignty and *democratic* sovereignty in the modern sense<sup>279</sup>. A democratic regime does not entail a mere majoritarian dictatorship but requires the involvement of minorities and oppositions in every constitutional process (e.g., legislative procedures, elections, referenda, etc.). At the same time, a democratic criminal justice system does not aim to the annihilation of the defendant, nor to the satisfaction of the victim, but to ascertain personal responsibilities during a fair procedure and, after that, it seeks the amendment of the guilty. It is precisely when the people invoke a sovereign dominion over those very freedoms and rights at the basis of liberal democracy that populism starts to threaten the democratic order<sup>280</sup>. Therefore, the mentioned gap between popular and democratic sovereignty has to be filled, and this is the role of the rule of law<sup>281</sup>.

Aristotle highlights this point as the distinctive hallmark between the correct polity and its deviant version of democracy. The law represents the moment of the composition of the different social interests. Therefore, the first remedy to populism seems constitutional in nature and consists in exploiting the "counter-majority institutions of liberal democracy"<sup>282</sup>. Multiple mechanisms help to shield constitutional order and criminal justice from majoritarian subversion. For

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278. See text to notes 178 and 179.

279. Massimo Donini, *Populismo e ragione pubblica. Il post-illuminismo penale tra lex e ius* at 54 (Mucchi Editore 2019) (emphasis added); see also Donini, *Populismo penale e ruolo del giurista* at 3 (cited in note 277).

280. See Valentina Pazé, *Il populismo come antitesi della democrazia*, 7 *Teoria politica. Annali* 113 (2017); see also Cas Mudde and Cristóbal Rovira Kaltwasser, *Populism and (liberal) democracy: a framework for analysis*, in Cas Mudde and Cristóbal Rovira Kaltwasser (eds.), *Populism in Europe and the Americas: Threat or Corrective for Democracy* at 16-26 (Cambridge University Press 2012).

281. Cfr. *id.* at 112-113; see also Donini, *Populismo penale e ruolo del giurista* at 16 ff. (cited in note 277); Renzo Orlandi and Bruna Capparelli, *Il contrasto alla corruzione come strumento di lotta politica*, 3 *Revista Brasileira de direito processual penal* 1125 (2020).

282. Enrico Amati, *L'enigma penale. L'affermazione politica dei populismi nelle democrazie liberali* at 291 (Giappichelli 2020).

this account, it might be useful to use the example of the Italian legal system.

Concerning the constitutional order, it is worth considering, as suggested by some scholars, the strict observance of doctrines of unconstitutional amendments to the fundamental charter followed by the Italian Constitutional Court<sup>283</sup>. Multiple rules of Italian constitutional law set up eternity clauses that etch the borders of legitimate constitutional amendments. In the first instance, Article 139 of the Italian Constitution prohibits the modification of the Republican form of government, thus preventing any constitutional change that would run counter the radical choice made by the general referendum of June 2nd, 1946, which opted in favor of the Republic and rejected monarchy; the XII transitional and final disposition forbids the reorganization, under any form whatsoever, of the dissolved Fascist party, establishing an exception to the right to join or form a party to avoid that, after the fall of the fascist regime, it could be reinstated by reconstituting the organization that was at its head<sup>284</sup>; the Implicit Limitation Doctrine underpinned by the Italian Constitutional Court recognizes as illegitimate the amendment of those very principles that, although not directly listed among those not subject to the procedure of constitutional modification, nonetheless lie at the heart of the Italian democratic Constitution.<sup>285</sup> These principles are to be found on a case-by-case assessment, as they are not explicitly stated: however among those expressly recognized thus far the Court has included popular sovereignty (art. 1 Cost.), the equality of citizens before the law (art. 3 Cost.), the unity and indivisibility of the Republic (art. 5 Cost.), the secularism of the State (artt. 7, 19 Cost.), the unity of the constitutional jurisdiction, the right to judicial protection in any state and degree of judgment (artt. 24 -113 Cost.), the autonomy and independence of the judiciary (art. 101 Cost.), and the inviolable rights of

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283. See Pietro Faraguna, *Populism and Constitutional Amendments*, in Delledonne, Martinico, Monti and Pacini (eds.) *Italian Populism and Constitutional Law* at 106-108 (cited in note 236).

284. See Costantino Mortati, *Problemi di diritto pubblico nell'attuale esperienza costituzionale repubblicana* at 71-81 (Giuffrè 1972).

285. See Michele Di Bari, *Unconstitutional Constitutional Amendments. Comparative considerations on the recent case law*, 1 *Diritto pubblico comparato ed europeo* 3, 3-4 (2022).

the individual, especially those enumerated in part I of the Constitution (artt. 2 and 13 Cost. ff).<sup>286</sup> Accordingly, a limit imposed by logic seems to be found even in that very rule that disciplines the procedure of constitutional amendment itself (Article 138): as a matter of fact, it would be easy to eschew the burdensome constitutional amendment procedure if the quorum and the other limits could be manipulated (conceivably downwards) through constitutional reform as well.<sup>287</sup> Therefore, it cannot be denied that the Court is competent to judge on the conformity of constitutional revision laws and other constitutional laws also with regard to the supreme principles of the constitutional order. If this were not the case, it would lead to the absurdity of considering the system of jurisdictional guarantees of the Constitution as defective or ineffective precisely in relation to its most valuable norms<sup>288</sup>. In sum, the Constitution appears capable of defending itself - through the aforesaid mechanisms, prescribed by law or through the interpretation of the judge of the laws - from forms of interpolation aimed at suppressing those very democratic freedoms that the constituents wanted to subtract even to the majority principle.

Another device employable to counter majoritarian supremacy may be found in the existence of procedural mechanisms aimed at the deceleration of processes of constitutional reform<sup>289</sup>. In this regard,

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286. See Franco Gallo, *La revisione costituzionale ed i suoi limiti*, 2 Ricerche giuridiche 463, 468-469 (2013), available at <https://edizionicafoscari.unive.it/media/pdf/article/ricerche-giuridiche/2013/2/art-10.14277-2281-6100-Ri-2-2-13-2.pdf> (last visited April 10, 2023).

287. See, e.g., Augusto Barbera and Carlo Fusaro, *Corso di diritto costituzionale* at 121 (Il Mulino 2012). According to the mentioned article, "laws amending the Constitution and other constitutional laws shall be adopted by each House after two successive debates at intervals of not less than three months and shall be approved by an absolute majority of the members of each House in the second voting. Said laws are submitted to a popular referendum when, within three months of their publication, such a request is made by one-fifth of the members of a House or five hundred thousand voters or five Regional Councils. The law submitted to referendum shall not be promulgated if not approved by a majority of valid votes. A referendum shall not be held if the law has been approved in the second voting by each of the Houses by a majority of two-thirds of the members."

288. See Di Bari, *Unconstitutional Constitutional Amendments*, at 3-4 (cited in note 285).

289. See Faraguna, *Populism and Constitutional Amendments* at 106-108 (cited in note 283).

it is worth noticing that the freedom of the parliamentary mandate given to representatives in Italy operates in a twofold way: towards the electors and the party as well. Article 67 of the Constitution<sup>290</sup> allows the representation of the Nation *per se* and, at the same time, pursues the correct functioning of the assembly<sup>291</sup>. It can be inferred that, under the current Constitution, the recourse to punitive instruments like forfeitures (adopted, for example, in Article 160 of the Constitution of Portugal of 1976) or pecuniary sanctions prescribed by internal rules of parties or parliamentary groups for the representative who adheres to a different party after the election should be banned<sup>292</sup>. Even private agreements signed by members of the ruling parties might be considered an indirect restraint on public bodies<sup>293</sup>. The result, in terms of judicial protection, is clear: an amendment of the free mandate rule of article 67 would infringe one of the essential parameters of the republican form of State (liberty of the member of parliament to express opinions and to cast votes in the performance of his function (art. 68 Cost.), therefore resulting in an unconstitutional reform<sup>294</sup>. This constitutional protection prevents members of parliament from being "captured" by their party, safeguards their freedom of conscience, opinion, and vote, and may prevent the parliament from transforming itself into the mere sounding board of the majority.

Another point of friction between constitutional law and populism is the role of bicameralism<sup>295</sup>. Bicameralism is a wise doctrine.

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290. On this particular disposition, see generally Fabiana Maresca, *Libertà di mandato e disciplina dei gruppi parlamentari*, in Umberto Ronga and Claudio Cantone (eds.), *La partecipazione democratica in Italia. Modello, prassi, prospettive* at 75 ff. (Editoriale Scientifica 2021).

291. See Luigi Principato, *Popolo, Nazione e libero mandato: la sovranità popolare come limite, non già come potere*, 1 *Questione Giustizia* 189, 197 (2019).

292. See *ibid.*

293. See *ibid.*; cfr. on this point Michele Carducci, *Le dimensioni di interferenza del "contratto" di governo e l'art. 67 Cost.*, in 13 *Federalismi.it* (June 13, 2018), available at <https://www.federalismi.it/ApplyOpenFilePDF.cfm?artid=36452&dpath=document&dfile=13062018124205.pdf&content=Le%2Bdimensioni%2Bdi%2Binterferenza%2Bdel%2B%27contratto%27%2Bdi%2Bgoverno%2Be%2B1%27art%2E%2B67%2B-Cost%2E%2B%2D%2Bstato%2B%2D%2Bdottrina%2B%2D%2B> (last visited April 10, 2023).

294. See *ibid.*

295. See Faraguna, *Populism and Constitutional Amendments* at 106-108 (cited in note 283).



Attempts to create a "second chamber reform has been on the political agenda for centuries" in many countries<sup>296</sup>. The historical goal is to modify the "elitarian" second chamber, as the high chamber is traditionally conceived (see for instance the House of Lords in the UK), in favor of one centered on the representation of territories.<sup>297</sup> The case of Italy seems not different: from a Senate made up of members appointed for life by the King under the first constitution (the *Albertine Statute* of 1848)<sup>298</sup>, the Senate came to apply the principle of perfect bicameralism under the Constitution of 1948, founded on two elective chambers, equally representative and endowed with the same powers<sup>299</sup>. However perfect bicameralism has been a matter of contention in modern times: the failed attempt to amend the Italian Senate's composition in 2016, demonstrates it<sup>300</sup>. The project, aimed at reforming the high chamber from a directly elected to an indirectly elected one, whose members would have been representatives of regions, with limited veto powers, has been largely impaired by populist agendas<sup>301</sup>. As noted in doctrine, populist forces at the time may have

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296. Meg Russell, *Foreword: Bicameralism in an age of populism*, in Richard Albert, Antonia Baraggia and Cristina Fasone (eds.), *Constitutional Reform of National Legislatures. Bicameralism under Pressure* at ix-x (Cheltenham, 2019).

297. Maria Romaniello, *Bicameralism. Multiple theoretical roots in diverging practices*, in Albert, Baraggia and Fasone (eds.), *Constitutional Reform of National Legislatures* at 16 ff. (cited in note 296)

298. See, e.g., *La storia del Senato* (senato.it), available at <https://www.senato.it/istituzione/il-senato-nel-sistema-bicamerale/la-storia-del-senato> (last visited April 10, 2023). The King could choose senators, without number limit, from 21 categories listed by the Statute, including, i.e., the Archbishops and Bishops of the State, deputies after three legislatures or six years of exercise, the Ministers of State, the Ambassadors, the First Presidents and the Presidents of the Magistrate of Cassation and of the Chamber of Accounts, the Advocate General to the Magistrate of Cassation, the Officers and the General Intendants, the Counsellors of State, the members of the Royal Academy of Sciences, or those who, due to their wealth, paid a certain amount of annual taxes, as well as those who had illustrated the country "with eminent services and merits". It is worth mentioning, however, that the Government always sought to ensure the support of the Senate as well as the lower Chamber, resorting to the appointment of a large number of senators in favour of it (the so-called "inforate").

299. See *ibid.*

300. See Russell, *Foreword: Bicameralism in an age of populism* at xvi-xvii (cited in note 296).

301. See Carlo Fusaro, *Constitutional Change and Upper Houses: The Italian Case* (The Constitution Unit Blog, August 10, 2018), available at <https://constitution-unit>.

shifted the attention of the audience to other problems, such as immigration and unemployment, thus making the referendum appear as a sort of "meddling" of the Constitution undertaken by the leading political party<sup>302</sup>. The decision was therefore transformed into an evaluation of the then Prime Minister and his Cabinet (in this sense, fostered by the Prime Minister himself, who declared to deem the referendum as a confidence vote), with negative results for them<sup>303</sup>. It is evident then that "(w)hen brought to public attention, second chambers, as bodies that serve to constrain elected politicians, may appear surprisingly suited to the current anti-political mood"<sup>304</sup>.

The supranational legal boundaries might also be put to good use<sup>305</sup>. The reference here is to the so-called multilevel protection of rights. European states enjoy a fundamental rights protection system built upon at least three frameworks of rights and courts: at the national level, at the EU level, and at the conventional level<sup>306</sup>. In this multi-pronged approach, every framework possesses a specific charter of fundamental rights (respectively the Constitution, the Charter of Fundamental Rights of the EU - CFREU, and the ECHR) and a supreme court tasked with the interpretation and application of those rights (Constitutional Courts and/or ordinary judges, the CJEU and the ECtHR)<sup>307</sup>. Italy partakes in this multilevel system. Therefore, fundamental rights must adhere not only to the euro-unitary layout but also to the characterization received from the ECHR, from international standards, and under the domestic law (this is the paramount principle of equivalence, provided for by art. 53 CFREU)<sup>308</sup>. This con-

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com/2018/08/10/constitutional-change-and-upper-houses-the-italian-case/ (last visited April 10, 2023).

302. See *ibid.*

303. See *ibid.*

304. Russell, *Foreword: Bicameralism in an age of populism* at xvi-xvii (cited in note 296).

305. See Faraguna, *Populism and Constitutional Amendments* at 106-108 (cited in note 283).

306. See, e.g., Aida Torres Pérez, *Multilevel Protection of Rights in Europe Get access Arrow*, in *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* at 27-38 (Oxford University Press 2009).

307. See *ibid.*

308. See, e.g., Marcello Daniele, *La triangolazione delle garanzie processuali fra diritto dell'Unione Europea, CEDU e sistemi nazionali*, *Diritto penale contemporaneo*

ceivably would hamper the attempt to modify the legislation in a way incompatible with human rights, thanks to the multiple supranational norms and to the various options of judicial review provided.

Given the above, it is safe to assume the presence of analogous constraints in the criminal domain, such as substantive constitutional principles of criminal law, such as the principles of proportionality, legality, non-retroactivity, offensiveness, guilt, individualization, and progressiveness of the sanctioning treatment, and the prohibition of analogy<sup>309</sup>.

Concerning criminal legislation, it is paramount to appeal to the judiciary to scrutinize the legitimacy of the repressive apparatus, asking the interpreter to rectify the most flagrant normative manipulations, by means of a constitutionally and conventionally oriented interpretation, or by activating the control of the legitimacy of the superior (national and/or European) courts<sup>310</sup>. This irreplaceable work must be accompanied "with an operation of a cultural type, capable of claiming the maturity of our democracy with respect to populist pressures, bringing the idea of a relationship between the state and an instrumental society back to the center of public discourse to the authentic care of the interests of the latter; a relationship free from authoritarian contamination that reflects outdated ideologies and in any case not compatible with the contemporary constitutional order"<sup>311</sup>. This holds true especially in those cases where a specific minority seems the real target of a criminal sanction. This result is strikingly evident in areas where, in fact, there are already several interventions of the

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- Rivista trimestrale at 50-51 (n. 4, 2016), available at [https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/daniele\\_4\\_16.pdf](https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/daniele_4_16.pdf) (last visited April 10, 2023).

309. See Daniela Falcinelli, *Dal diritto penale "emozionale" al diritto penale "etico"*, in Stefano Anastasia, Manuel Anselmi and Daniela Falcinelli (eds.), *Populismo penale: una prospettiva italiana* at 97-98 (Wolters-Kluwer 2020).

310. See Stefano Zirulia, *Il diritto penale nel "Decreto Lamorgese": nuove disposizioni, vecchie politiche criminali*, *Diritto penale e processo* 579 (2021); see also Insolera, *Il buio oltre la siepe. La difesa delle garanzie nell'epoca dei populismi* at 62 (cited in note 277); Amati, *Insorgenze populiste e produzione del penale* at 47-50 (cited in note 258).

311. *Id.*; see also Insolera, *Il buio oltre la siepe. La difesa delle garanzie nell'epoca dei populismi* at 61 (cited in note 277), who stresses the importance of judicial alphabetisation of people for what concerns civil rights and democratic institutions; Massimo Nobili, *Principio di legalità e processo penale (in ricordo di Franco Bricola)*, *Rivista italiana di diritto e procedura penale* 660 (1995).

Constitutional Court aimed at protecting the weakest individuals: the reference here is to inmates and immigrants<sup>312</sup>. In both cases, populist legislation may arise from a widespread perception of danger and hatred, to respond to the emergency of the moment, often in defiance of constitutional rights<sup>313</sup>.

The penitentiary legislation is a particular testing ground for the maintenance of the rule of law, since the function and scope of criminal punishment seem the ones in which the populist justice is most openly manifested, intermingling the executive phase of the condemnation with an antithetic plan of revenge<sup>314</sup>. The idea underpinning such a populist path to reform maintains that serving the sentence - especially for serious crimes - does not suffice, since the defense of the community from crime weighs more than the protection of the constitutional rights of those who have severely breached the criminal law.<sup>315</sup> Therefore, it is commonplace among populist legislators to craft, particularly harsh punishments and to tighten the grip on prison benefits to fulfill this task<sup>316</sup>.

This belief has been stigmatized by the Italian Constitutional Court and the Strasbourg Court (the European Court of Human Rights) on

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312. See Gaetano Silvestri, *Corte costituzionale, sovranità popolare e "tirannia della maggioranza"*, 1 *Questione Giustizia* 22, 25 (2019).

313. See *ibid.*

314. See Amodio, *A furor di popolo. La giustizia vendicativa gialloverde* at 109 (cited in note 258).

315. See Silvestri, *Corte costituzionale, sovranità popolare e "tirannia della maggioranza"* at 25-26 (cited in note 312).

316. A striking example of this trend, in the Italian recent legislation, is the so-called "Corrupt-Sweeper" Law (9 January 2019, n. 3), which extended, by means of its art. 1, paragraph 6, modified the 4-*bis*, paragraph 1, of the law of 26 July 1975, n. 354, including among the crimes 'impeding' the suspension of the execution pursuant to art. 656, paragraph 5, of the Code of Criminal Procedure, certain crimes against the public administration, and in particular those envisaged "in Articles 314, first paragraph, 317, 318, 319, 319-*bis*, 319-*ter*, 319-*quater*, first paragraph, 320, 321, 322, 322-*bis* (...)". For these and other comments on that piece of legislation, Vittorio Manes, *L'estensione dell'art. 4-bis ord. penit. ai reati contro la p.a.: profili di illegittimità costituzionale*, *Diritto penale contemporaneo* 105 ff. (n. 2, 2019), available at <https://www.penale-contemporaneo.it/upload/7442-manes2019a.pdf> (last visited April 10, 2023).

In any case, it should be mentioned that the recent Decree-Law n. 162/2022 has now expunged the crimes against the Public Administration from the catalogue of those 'impedimental' offences.

multiple occasions<sup>317</sup>. The Italian judge of the laws relied on the principle of the re-educational function of the criminal punishment (art. 27, third paragraph, Cost.), while the second resorted on the prohibition of torture (art. 3 ECHR)<sup>318</sup>. In fact, those very principles are impaired by those prison conditions and treatments offensive to the dignity of the human person and therefore possible causes of increased hostility of the prisoner towards society and the laws that govern it<sup>319</sup>. It is worth mentioning, on the issue of the prohibition of inhuman and degrading treatment, the decision of the Strasbourg Court in *Torregiani* (2013), which declared prison overcrowding as incompatible with the above-mentioned conventional rights, and ruling n. 279 of 2013 of the Constitutional Court, which declared the unconstitutionality of limitations placed upon public utility work<sup>320</sup>.

Regarding the immigration framework, another perceived "elite" is the massive crowd of asylum seekers and economic migrants in search of better living conditions throughout Europe and Italy<sup>321</sup>. According to the populist narrative, the immigrant, no matter if regular or not, poses a threat to order and safety<sup>322</sup>. As a consequence, the mere provision to foreigners of social protection measures prescribed by the Italian law for citizens is labeled as an "injustice" *per se*<sup>323</sup> - hence the request to exclude non-Italians from social benefits or, at least, the provision of more stringent requirements<sup>324</sup>.

Another common feature of populist criminal law seems directed towards anti-immigrant policies<sup>325</sup>. The phenomenon of discrimination may be direct or indirect, with the first including express limitations or prohibitions, while the second advocates the request of

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317. See Silvestri, *Corte costituzionale, sovranità popolare e "tirannia della maggioranza"* at 26 ff. (cited in note 312).

318. See *ibid.*

319. See *ibid.*

320. See *ibid.*

321. See *ibid.*

322. See *ibid.*

323. See *ibid.*

324. See *ibid.*

325. See Adelmo Manna, *Il fumo della pipa (il c.d. populismo politico e la reazione dell'Accademia e dell'Avvocatura)*, 2 *Archivio penale* 1 ff. (2018).

impossible or very harsh pre-conditions<sup>326</sup>. However, from the point of view of constitutional legitimacy, the result is the same, that is, the unconstitutionality of the scrutinized norm<sup>327</sup>.

There are multiple examples of this feature. In the criminal law field, probably the most striking and explicative case is the declaration of constitutional illegitimacy of the so-called "aggravating circumstance of illegal immigration" (*clandestinità*) provided for in article 61 of the Italian criminal code (Const. Court no. 249/2010), found in flagrant violation of the principle of equality and offensiveness, since it "automatically and in advance (formulated) a judgment of dangerousness of the person responsible, which must be the result of a particular assessment, to be carried out on a case-by-case basis, with regard to the concrete objective circumstances and personal subjective characteristics"<sup>328</sup>.

On the procedural level, in turn, the criminal trial must adhere to its adversarial system, to the presumption of innocence, to the right to defense, to the right to a lawful proceeding<sup>329</sup>. In this field, constitutional jurisprudence has developed - in line with the cultural and legal orientation mentioned earlier - the great theme of the rights of prisoners, assisting their claims with judicial protection<sup>330</sup>. For instance, in judgment n. 341 of 2006 on the rights of prison workers, and in judgment n. 135 of 2013 on the effectiveness of the decisions of the

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326. See Silvestri, *Corte costituzionale, sovranità popolare e "tirannia della maggioranza"* at 27 (cited in note 312).

327. See *ibid.*

328. Corte costituzionale, July 8, 2010 no. 249.

329. For an overview of these pivotal safeguards in the Italian criminal procedure, see generally Renzo Orlandi, *The Italian Path to Reform: Italy's Adversarial Model of Criminal Procedure*, 5 *Italian Law Review* 565, 565 ff. (2019), available at <https://theitalianlawjournal.it/data/uploads/5-italj-2-2019/565-orlandi.pdf> (last visited April 10, 2023); Luca Lupária and Mitja Gialuz, *Italian Criminal Procedure: Thirty Years after the Great Reform*, 1 *Roma Tre Law Review* 26, 33 ff. (2019), available at <https://theitalianlawjournal.it/data/uploads/5-italj-2-2019/565-orlandi.pdf> (last visited April 10, 2023); Luca Lupária and Mitja Gialuz, *Italian criminal procedure: thirty years after the great reform* available at <https://romatrepress.uniroma3.it/wp-content/uploads/2020/01/Italian-criminal-procedure-thirty-years-after-the-great-reform.pdf> (last visited April 10, 2023).

330. See Silvestri, *Corte costituzionale, sovranità popolare e "tirannia della maggioranza"* at 26-27 (cited in note 312).

supervisory judge on the appeals of prisoners,<sup>331</sup> the Court stressed the need to strike a just balance between the needs of social defense and the protection of fundamental rights but excluded that, in doing so, the latter could be undermined in their hard-cores.<sup>332</sup> This interpretation stifles those balancing operations aimed at attributing excessive weight to the former: in those cases, the apparent "proportionality" seems driven more by short-lived exigencies than by the values underlying modern constitutionalism.<sup>333</sup> On top of that, the *Torregiani* ruling of the ECtHR operated as a landmark judgment even on the procedural level, since the Italian lawmaker, urged by the Strasbourg decision to enhance the prisoners' rights' protection, amended the penitentiary law introducing article 35-bis O.P. (*Ordinamento penitenziario*), which provides now a jurisdictional complaint with which detained and interned persons can assert the protection of their rights before a judge.

Above all, the separation of powers must be preserved<sup>334</sup>, "so as to avoid undue encroachment between the different spheres of public activity"<sup>335</sup>. In fact, since the attack on the traditional checks and balances system has been the primary objective of modern populism, the tutelage of constitutional democracy should build up an "anti-concentration principle" in order to make it harder to destroy or diminish the separation of powers.<sup>336</sup> This might include institutional arrangements such as, for example, electoral laws which favor the fragmentation of power among different parties;<sup>337</sup> an independence-oriented organization of the judiciary branch;<sup>338</sup> the adoption of "horizontal accountability institutions" to oversee in a politically independent fashion those interests which are pivotal for the functioning of a

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331. See *ibid.*

332. See *ibid.*

333. *Ibid.*

334. See generally Donini, *Populismo penale e ruolo del giurista* at 13 (cited in note 277), who notices that the division of powers (executive, legislative, judiciary) seems now endangered.

335. Nicola Selvaggi, *Populism and Criminal Justice in Italy* at 307 (cited in note 236).

336. Stephen Gardbaum, *The Counter-Playbook: Resisting the Populist Assault on Separation of Powers*, 59 *Columbia Journal of Transnational Law* 1, 6 (2020).

337. See *id.* at 34-46.

338. See *id.* at 46-51.

constitutional democracy but are also keen on exploitation by populist forces (such as monetary policies, public officials' responsibilities, corruption cases, electoral procedures);<sup>339</sup> the implementation of pluralism and independence-driven media laws<sup>340</sup>.

However, even with these countermeasures in place, it should not be surprising that populism still is present in today's countries. As I tried to highlight above, populism seems like the second face of the same coin of a democratic regime. Therefore, in a certain sense, it is entirely physiological that in a democracy the will of the people can be exploited in order to circumvent or divert those rules by which it is filtered. This is precisely the risk that Aristotle foreshadowed.<sup>341</sup> In this vein, the countermeasures indicated here can only identify an external barrier to demagogic subversion. A true overcoming of this phenomenon can only take place in the face of a long work on the ethical and cultural level which<sup>342</sup>, allowing the citizen to truly introject democratic values, can allow everyone, on an individual and collective level, to aim for the common benefit - that is, to achieve our supreme good.

## 7. Conclusions

This article aimed at evaluating the frame of general, distributive, and corrective justice within the democratic constitution. The pattern of universal justice evidences the tendency to reach a broken arrangement since this sort of justice is at least biased under a democratic regime (in the Aristotelian sense). Concerning the two particular kinds of justice, the same trend is highlighted in the distributive type by the importance given to the purpose of the constitution, in accordance with which the partition of goods takes place. Consequently, these wrongful backgrounds spoil even the delivery of corrective justice. The application of this arrangement in modern democracies leads to interesting results when confronted with the multi-faceted

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339. *Id.* at 51-53.

340. See *id.* at 53-56.

341. See par. 4.

342. See note 311.



phenomenon of populism. Whereas the purported will of the majority endangers the democratic processes - or, in the criminal field, the fair trial and the constitutional facets of the sanctioning system - it is the respect of the rule of law in all of its manifestations (ordinary, constitutional, supranational law) that ensures the preservation of fundamental rights, rights of minorities and, in general, those constitutional rights which allow the involvement of the individual in the polity. In this framework, the most immediate and effective protection seems to be the judicial review and the interpretation of the law, since it calls into question the conformity of the norm (the product of the majority) with those constitutional values which cannot be overcome.

This is non-exhaustive, but the article should have provided an account of how the Aristotelian assessment of democracy still remains today. The rule of the majority should not violate the rule of law, which in a democratic order is set forth to safeguard the public processes (constitutional or criminal) from partisan abuses. Whereas this happens, the constitutional regime realizes an unjust allocation of power, and the criminal justice surrenders to vindictive aspirations, therefore, as a result, the pluralistic liberal-democratic regime decays into the broken form of government envisaged by Aristotle.