

Editorial

Judging Democracy, Democratic Judgment

The topic of this special issue *Judging Democracy, Democratic Judgment* is raised by a paradox: on the one hand, a perceptible social dissatisfaction exists with democracy as currently experienced and/or practiced in the Western world; on the other hand, the word ‘democracy’ still inspires movements for social reform and is invoked in contexts or situations where democracy is absent or deficient. This paradox has led many authors, justifiably or not, to posit democracy as a more or less unsurpassable horizon, and yet simultaneously as incapable of fully delivering the promises it entails. But to what extent can one criticize democracy without necessarily abandoning democratic ideals? That is, how are we able to *judge democracy*—with what language, what criteria, what perspective—and from what position?

The title also seeks to reflect on the activity of judgment, for an extended notion of judgment would characterize it as an essentially anti-democratic, even elitist, activity. In this view, for example, the professional role of judges and the judiciary would be opposed in principle to democracy, raising the specter of counter-majoritarian difficulty. Without aiming to forestall the debate, this special issue inquires whether and to what extent judgment can ever be ‘democratic’. To put it differently, how can judgment be aligned with democratic ideals, practices, and forms of participation? What would be the features of *democratic judgment*?

In the opening essay ‘Judging Democracy in the 21st Century: Crisis or Transformation?’, Alessandro Ferrara meets the challenge head on. While the second half of the last century already evinced increasing difficulties for democracy, Ferrara contends that the 21st century has only added ‘new inhospitable grounds’—including the prevalence of finance within capitalist economies, the acceleration of societal time, globalization-induced tendencies towards supranational integration, transformation of the public sphere and the inadequacy of the traditional media, plus widespread and generalized reliance upon opinion polls.

Faced with such challenges, Ferrara undertakes the task of revitalizing the framework of political liberalism expounded by John Rawls, but beyond what he originally envisioned into the ‘aesthetic sources of normativity’. Amongst these, Ferrara stresses the role of political imagination—which plays as crucial a role as

reason in struggles against entrenched interpretations and ideologies—and of ‘democratic judgment’ as a way of assessing whether a political process that formally appears to fulfill certain procedural requirements actually deserves the qualification of ‘democratic’. In addition, Ferrara expands on Rawls’ notion of public reason to conjectural arguments—arguments that do not presuppose shared premises—and alludes to new ethical dispositions, such as the virtue of ‘openness,’ which he distinguishes from Charles Taylor’s ‘agape,’ Derrida’s ‘hospitality,’ or Stephen White’s ‘presumptive generosity.’ Ferrara defends rethinking democracy’s ethos towards a multicultural polity and de-Westernizing it, allowing ‘multiple democracies’ with alternative conceptions of the just. What ultimately makes Ferrara’s version of democracy ‘liberal,’ as opposed to other conceivable forms of democracy, is his defense of the distinction between the legitimation of power through *de facto* consensus and the exercise of power that *deserves* legitimation.

One of the thorny issues raised by Ferrara is the condition of the ‘hyperpluralism’ of modern societies, where certain segments of the population find one or other of the basic constitutional essentials to be problematic in light of their comprehensive conception of the good. This condition leads to the problem of antagonistic social factions, analyzed by Albena Azmanova in her article ‘Political Judgment for an Agonistic Democracy’.

In her article, Azmanova develops a concept of ‘agonistic judgment’ with the capacity to transform deep-seated, antagonistic social conflicts into an agonistic search for social justice. To this end, Azmanova recasts the communicative turn in democratic theory by way of replacing the (counterfactual) reliance on ideal conditions of deliberation with an account of the social hermeneutics of justification among antagonistic positions. She then examines the conditions under which agonistic judgment can have an emancipatory effect, in the tradition of critical social theory of the Frankfurt School. Azmanova claims that the emancipatory function of public deliberations consists in their capacity to unveil common structural sources of injustice behind seemingly opposing claims to justice.

While Azmanova addresses the political and structural sources of injustice, Sakari Hänninen wonders about the compatibility of modern capitalist societies with democracy. In ‘Neoliberal Politics of the Market,’ Hänninen examines the obsession of neoliberal governmentality with stability and order, which are not taken for granted as an automatic outcome of a capitalist market economy, contrary to what may seem at first to be the case. For this reason, neoliberalism must exercise a ‘politics of the market,’ the principal aim of which is to strengthen people’s belief and confidence in the capitalist market economy so as to promote the ‘proper’ functioning of the system. In doing so, Hänninen argues, the neoliberal politics of the market paradoxically resembles the logic of populism. Thus, while political populism speaks ‘in the name of the people,’ neoliberalism speaks ‘in the name of the market.’ Hänninen unveils how this resemblance to populism is no mere coincidence but stems from a similar authoritarian conception of politics, which gains ground especially in times of crisis.

The tension between neoliberalism and democracy is also the focus of our next article. In ‘The Politics of Public Things: Neoliberalism and the Routine of Privatization,’ Bonnie Honig urges us to attend to the political role of public things (e.g., parks, prisons, schools, armies, civil servants, hydropower plants, electrical grids, water, the transportation system, and so on), against a neoliberal tendency to privatize them in the name of efficiency. Following the work of the British psychoanalyst D.W. Winnicott, who called attention to the generative power of objects in promoting lifelong authentic human relationships, Honig wishes to rehabilitate the political role of public things as part of democracy’s ‘holding environment’ (a term she borrows from Winnicott). As explained by Honig, if public things are constitutive elements of democracy, then economies that undermine the ‘thingness of things,’ and reflexively prefer privatization to public ownership or stewardship, are in tension with democracy. Honig connects the affective registers of Winnicott’s theories with Hannah Arendt’s concerns about the public world and its fragility in late modernity, both of which are commended to those who seek to apprehend the plight of public things under pressure.

Privatization is now affecting all areas of life, including functions traditionally reserved to state institutions such as courts and tribunals. In ‘The Democracy in Courts: Jeremy Bentham, ‘Publicity,’ and the Privatization of Process in the Twenty-First Century,’ Judith Resnik analyzes the privatization of adjudication currently underway as a phenomenon that may endanger its democratic potential.

The essay begins by exploring how, in the last few centuries, public procedures came to be important attributes defining certain decision-making institutions as ‘courts.’ Resnik traces the political and theoretical predicates for such practices in the work of Jeremy Bentham, who commended the utility of ‘publicity’ in enhancing accuracy, in providing public education, and in ensuring judicial discipline. While courts are ordinarily identified as ‘open’ and ‘public’ institutions, Resnik notes current trends that are shifting processes toward privatization—devolving adjudication to administrative agencies, outsourcing to private providers, and reconfiguring the processes of courts to render them more oriented toward settlement. For Resnik, these new trends are problematic to the extent that they reduce the opportunities for adjudication to engage in democratic practices and normative contestation through popular input. Resnik’s claim about the democratic potential of public adjudication does not, however, entail that the judgments and norms developed will necessarily advance a shared view of public welfare. Hence, while seeking to re-engage the work of Bentham, Resnik offers different claims for publicity and less optimism about its consequences.

In the final essay, Jaco Barnard-Naudé connects the justification of judicial decisions with the concept of authority and, ultimately, with democracy. Drawing on Hannah Arendt and Bonnie Honig’s concepts of authority, Barnard-Naudé contends that the authority of an unelected postcolonial judiciary, founded by the post-apartheid Constitution of the Republic of South Africa, crucially depends on providing justification for its decisions. Barnard-Naudé makes these considerations

against the background of a recent judgment of the South African Constitutional Court (*Le Roux v Dey* 2011) that concluded that it is not defamatory to refer to someone as homosexual or gay. Barnard-Naudé focuses on the dissent by Justice Mogoeng, who did not provide any reason for his disagreement with the majority opinion. According to Barnard-Naudé, Justice Mogoeng's refusal to provide reasons for his dissent constitutes a failure to act within the limits of his authority, which amounts to a rejection of the culture of justification itself. Following the arguments of Etienne Mureinik, Barnard-Naudé draws a necessary link between a culture of authority and a culture of justification, both of which are regarded as a break from a culture of violence, in post-Apartheid South Africa.

As a final note, we are delighted to announce that NoFo 10 inaugurates a new book review section. In this issue we include two book reviews: Luis Gómez Romero reviews Desmond Manderson's *Kangaroo Courts and The rule of Law: The Legacy of Modernism* (2012) and Benoît Dejemeppe reviews François Ost's *Shakespeare: La Comédie de la Loi* (2012).

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Helsinki, June 2013