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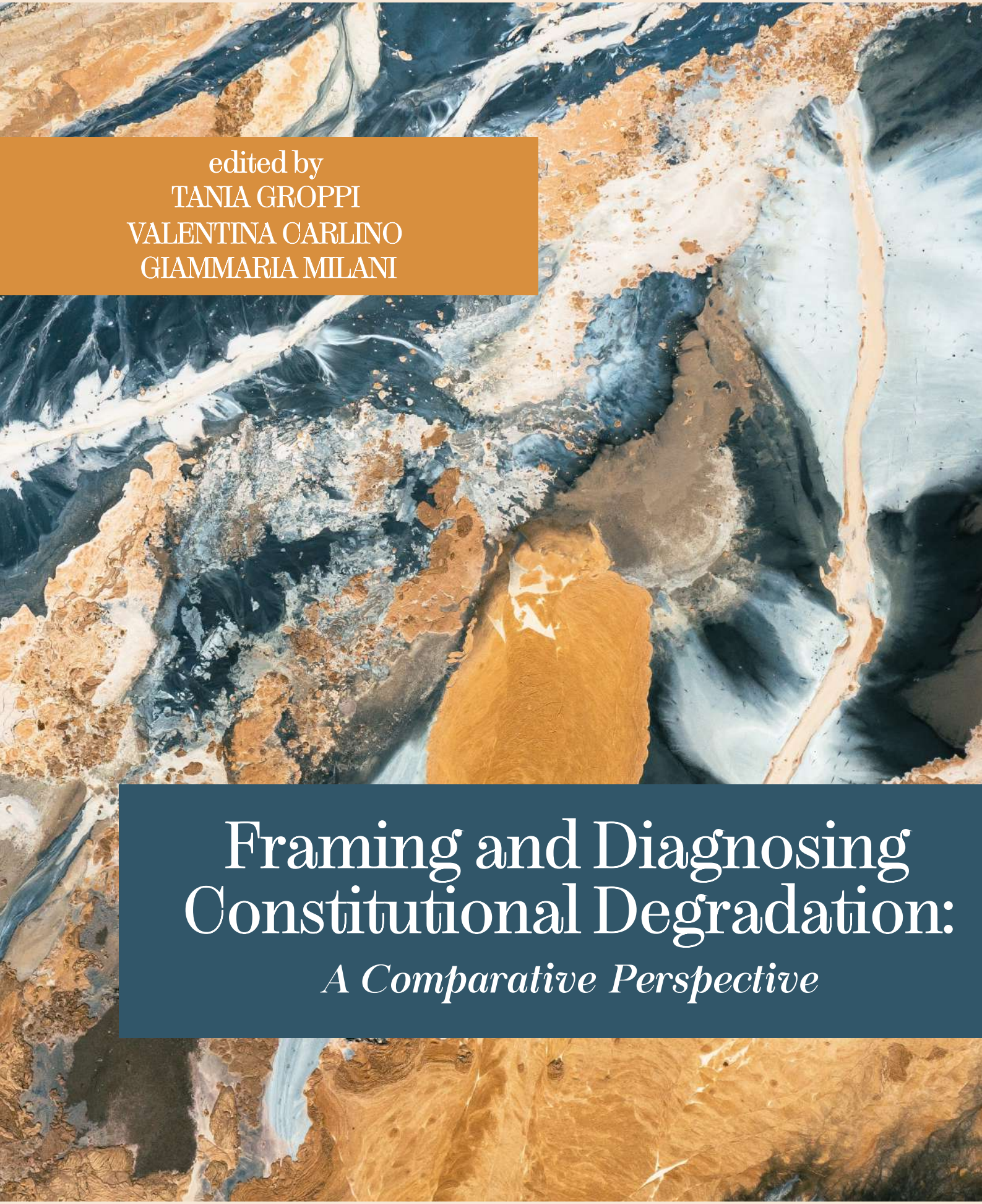

edited by
TANIA GROPPI
VALENTINA CARLINO
GIAMMARIA MILANI

Framing and Diagnosing Constitutional Degradation:

A Comparative Perspective

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Framing and Diagnosing Constitutional Degradation: A Comparative Perspective

Edited by Tania Groppi, Valentina Carlino and Giammaria Milani

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This book collects the proceedings of the workshop "**Framing and Diagnosing Constitutional Degradation**", held at Certosa di Pontignano (Siena, Italy) on June 21st and 22nd, 2021.

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Via Balbi 22 - 16126 Genova
info@giurcost.org

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Tania Groppi, Valentina Carlino and Giammaria Milani

Preface

In the late 1990s, scholars pointed out the rise of "world (or global) constitutionalism", a legal concept that mirrored the famous Fukuyama's proclamation on the "end of history". They wanted to express the convergence of national constitutions, especially as the protection of fundamental rights was concerned, towards liberal democracy[1].

Over the last twenty years, everything has changed.

Non-democratic States, which seem to be more successful in terms of economic development, increasingly challenge the benefits of liberal democracy. In fact, such countries are presented as alternative models by their leaders, who vaunt their economic successes, the speed and efficiency of their decision-making processes and the stability of their regimes[2]. Such a trend, started in the 1990s by the founder of the State of Singapore, Lee Kuan Yew, is still ongoing. As for Europe, one should especially refer to the speeches of the Hungarian Prime Minister Viktor Orbán, in government since 2010, and the Russian leader Vladimir Putin, in power, in various roles, since 1999, not to mention the Turkish president Recep Tayyip Erdoğan, in power since 2003.

This transformation is not taking place through the classic technique of *coups d'état*, but through different processes of "reverse transitions", consisting of a gradual slide towards undemocratic regimes[3]. From a procedural perspective, several studies pointed out that such regimes were established gradually, incrementally, as a result of a series of changes that appear to be of limited scope if taken into account separately, but nonetheless suitable to determine a general decline of the liberal democracy if considered as a whole: attacks to the independence of the judiciary, capture of constitutional courts and independent bodies by political majorities, control of the media, restriction of the right of expression and assembly, compression of local autonomy. These processes are geared towards a concentration of power in the hands of governments which, often supported by large and long-lasting electoral majorities, claim to speak in the name of the people, as if "the people" were a single entity and had one single voice. Hence the definition commonly used of "populism"[4].

The outcome is regimes that political scientists call "hybrids" [5]. In fact, they do not present all the traditional characteristics of authoritarian regimes, as the rights of liberty are not totally suppressed and there is little recourse to criminal law, while elections continue to be competitive (hence the name "competitive authoritarianism"). Some democratic elements co-exist with authoritarian ones, thus leading to the definition of "illiberal democracy".

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[1] B. ACKERMAN, *The Rise of World Constitutionalism,* in *Virginia Law Review,*1997, 771 ff.; M. TUSHNET, *The Inevitable Globalization of Constitutional Law*, in *Virginia Journal of International Law*, 2009, 49, 987; D.S. LAW, M. VERSTEEG, *The Evolution and Ideology of Global Constitutionalism*, in *California Law Review*, 2011, 99, 1162 ff.

[2] See for instance D. BELL, *The China Model: Political Meritocracy and the Limits of Democracy*, Princeton, 2015.

[3] Among the first scholars to identify the features of the *constitutional retrogression*, T. GINSBURG, A. Z. HUQ, *How to Save a Constitutional Democracy*, Chicago, 2018.

[4] On the different types of populism see J. M. CASTELLÀ, M.A. SIMONELLI (eds.), *Populism and Contemporary Democracy*, London, 2022.

[5] Several expressions have been used: *hybrid regimes* (M. TUSHNET, *Authoritarian Constitutionalism,* in *Cornell Law Review*, 2015, 391 ff.); *competitive authoritarianism* (S. LEVITSKY, L. WAY, *The Myth of Democratic Recession*, in *Journal of Democracy* 2015, 45 ff.); *illiberal democracy* (F. ZAKARIA, *The Rise of Illiberal Democracies*, in *Foreign Affairs,* 1997, 22 ff.).

If this trend is especially affecting new democracies, the so-called "established democracies" are also not immune from such virus. Even in those countries, one should notice the emergence and success of political movements inspired by non-democratic historical experiences or which reject, more or less explicitly, the principles of liberal democracy. Overall, a lack of confidence in democratic processes and in political parties is emerging in the perception of public opinion, as witnessed by polls and by the declining turnout in elections.

The populist rhetoric is based, among other elements, on the rejection of representative institutions and the promotion of a direct and immediate relationship between the leader and the people[6]. Indirect, representative democracy, and its immediate institutional embodiment, the Parliament, is considered as an antagonist of the only supposedly natural and genuine form of democracy, i.e. direct democracy[7]. Political scientists have shown, in addition to the growing disaffection with democratic institutions, an increasingly widespread appreciation, also in those countries, for "illiberal democracy", due to its greater efficiency compared to representative democracy[8].

As far as separation of powers is concerned, the populist rhetoric tends to make the Executive, and especially its head, the main interlocutor of the people. Whereas Parliament is deprived of its representative function, the Executive assumes a position of absolute primacy within the system of government.

Democratic degradation also appears to over-emphasize the importance of the majority principle[9]: hence, the right of the opposition to participate and the possibility to elaborate alternative political guidelines is not guaranteed and the opposition is quickly marginalized[10]. Similarly, the independence of counter-majoritarian institutions (constitutional courts, the judiciary, independent authorities) becomes the first target of populists when in power, with the aim to capture the watchdog within the majoritarian sphere.

The effects of these impulses may transform the constitution into a "constitution of power" or a "partisan constitution", designed to bring populist movements to power and to allow them to maintain and exercise their power without the limits, conditions, checks and balances that are typical of a liberal democracy[11].

The roots and the reasons of such crisis are complex.

A first element that is usually pointed out is the decline of the Westphalian concept of sovereignty: political decisions are taken beyond the State territory, at international level, very often by economic and financial actors. Therefore, there is a mismatch between what citizens participate in (through their representatives) and the places where decisions are actually taken, which increasingly transcend geographical boundaries.

Other aspects are related to the so-called digital revolution and thus the new ways of communicating. Internet and the social media, using algorithms and artificial intelligence, create gated communities among people with similar thoughts and ideas, ultimately

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[6] J.W. MÜLLER, *Populist Constitutions. A Contradiction in Terms?,* in *www.verfaffungsblog.de,* 2017.

[7] P. BLOKKER, *Populist Constitutionalism*, in *www.iconnectblog.com*, 2017.

[8] R. FOA, Y. MOUNK, *The Danger of Deconsolidation: The Democratic Disconnect,* in *Journal of Democracy*, 2016.

[9] T.G. DALY, *Diagnosing Democratic Decay*, paper presented at the *Comparative Constitutional Law Roundtable Gilbert & Tobin Centre of Public Law*, 2017.

[10] A. HUQ, T. GINSBURG, *How to Lose a Constitutional Democracy*, cit., 136.

[11] P. BLOKKER, *Populist Constitutionalism*, cit.; J.W. MÜLLER, *Populist Constitutions*, cit.; C. PINELLI, *The Populist Challenge to Constitutional Democracy*, in *European Constitutional Law Review*, 2011, 7, 12; J. M. BALKIN, *Constitutional Rot and Constitutional Crisis*, in *Maryland Law Review*, 2018, 1, 151; M. DANI, *The 'Partisan Constitution' and the Corrosion of European Constitutional Culture*, in *LEQS Paper*, 2013.

promoting fragmentation and polarization to the detriment of the pluralistic spirit of liberal democracy.

Moreover, the increase of inequalities in contemporary societies weakens social cohesion and the sense of identity[12]. The vanishing possibility of social mobility, the difficulties of daily life resulting from cuts in public spending, the uncertainties of a future that seems to depend on uncontrollable variables, generate, in the multitudes of citizens of Western democracies, a multiplicity of negative emotions: resentment, envy, distrust, insecurity, fear and even anger. In an age of limited resources, where there are few desirable jobs and even unskilled labour positions are becoming increasingly difficult to find, it is easy for discouragement and a sense of abandonment to prevail.

The eternal, great dichotomy between high and low, between above and below, reappears[13].

All those circumstances, together with the rise of an illimited global capitalism and a voracious market economy, generated a diffused sense of confusion and distrust, which facilitated the emerging of political forces proposing to preserving people's unity by fostering a "tribal" (in Hannah Arendt's terms) national identity, very often manipulating history, symbols, educational plans. This identitarian move goes hand in hand with sovereignism: as the former represents a political ideology that stresses national identity and traditional values, especially opposing mass immigration, while the latter expresses an attitude to "protect" the domestic system from supranational and international institutions and rules, human rights treaties included.

The essays presented in this volume are aimed at analysing several national experiences, first to shed the light on the processes through which degradation occurs. Diagnosing the degradation is necessary in order, for those who believe in the constitutional liberal democracy, to develop a response.

To this end, the book tries to answer four crucial questions: how and through which legal tools are these processes taking place worldwide? Which are the institutional arrangements that can promote them and, therefore, which are the particularly vulnerable elements of the constitutional liberal democracy? Which institutional arrangements could protect constitutional liberal democracies? As for the Member States of the EU, an organization based on the rule of law, what is the relationship between constitutional degradation and European integration?

Most of the papers are the result of a call for papers especially addressed to junior scholars, with the addition of some essays of invited senior scholars. All papers where first discussed during the Workshop on "Framing and Diagnosing Constitutional Degradation", held at Certosa di Pontignano (Siena, Italy), on June 21st and 22nd, 2021. The workshop, which is part of the research project on "Framing and Diagnosing Constitutional Degradation", funded within the PRIN 2017 programme (Principal Investigator Professor Tania Groppi), was originally scheduled for June 2020 but was postponed due to the CoViD-19 pandemic. All essays underwent a robust peer review scrutiny, which, together with the editorial review, while extensive in time, ultimately proved essential to ensure the quality and soundness of the works. Finally, the papers are published one year after the Workshop: while Authors made every effort to keep their papers current, for this reason, some papers may not account for the latest developments. As editors, we apologize to the Authors for this delay.

[12] G. SITARAMAN, *Economic Inequality and Constitutional Democracy*, in M.A. GRABER, S. LEVINSON, M. TUSHNET (eds.), *Constitutional Democracy in Crisis?*, Oxford, 2018, 536.

[13] See T. GROPPI, *Oltre le gerarchie. In difesa del costituzionalismo sociale*, Bari-Roma, 2021, 81 ff.

The book is organised around four parts, which mirror the four sessions of the workshop where the papers were discussed.

The first part is dedicated to the exam of some procedural aspects of constitutional degradation, examining courts, parliaments, governments, electoral arrangements. The second part presents several case-studies, considering European, African and Latin-American experiences. The third part deals with institutional arrangements which can protect liberal democracy, focussing on the role of the opposition, the independence of the judiciary, the constitutional design of constitutional courts. Finally, the fourth session is specifically dedicated to the European region, examining the role of the European Union and the Council of Europe in protecting liberal democracy.

The Chair of each session (Mario Perini, Pier Luigi Petrillo, Irene Spigno, Francesco Clementi) wrote a short introduction to each part. The essays wrote by the invited guests (Gianmario Demuro, Carla Bassu, Ibrahim Ö. Kaboğlu) follow.

The authors would like to thank all the contributors and all the people, especially the DIPEC (Research Group for European and Comparative Public Law) members and staff, who made the Pontignano 2021 Workshop and this publication possible.

Siena, July 24th, 2022

Part I
The Processes of Constitutional Degradation

Mario Perini
Gianmario Demuro
Carla Bassu
Giacomo Giorgini Pignatiello
Micol Pignataro
Andrea Vernata
Giuseppe Naglieri

Mario Perini[*]

Introduction

Constitutional degradation is central in the analysis of contemporary Western constitutional systems. It was correctly pointed out during the Workshop that after the Second World War liberal democracy, codified in rigid and guaranteed Constitutions, seemed to expand without limits and constitutes the main reference model both at the doctrinal level and in the transformations that the legal systems historically underwent.

This is no longer the case today. The process of degradation began in history, but now it is also reflected in some, for now, a minority, doctrinal reconstructive proposals.

Remaining in Europe, although the tips of the iceberg are quite well known, with the cases of Poland and Hungary, several systems that were originally inspired by constitutionalism present one or more indices of degradation, according to what emerges from both the analysis of jurists and of the positions expressed by the Court of Justice of the European Union, the European Court of Human Rights, and the Venice Commission. The most evident manifestations of this degradation concern the departure from the rule of law, in one or more of its characterizing features, the transformation of embryonic democracies into democratorships, and, more generally, the emergence of populism at the political level.

There are many levels and profiles of constitutional degradation and the speakers of this session have been very careful to examine the main ones. They managed to go below the surface of the sea to highlight what lies beneath the tip of the iceberg. And thus, we discover that almost no country is immune from this progressive degradation of the liberal-democratic model, not even those countries which have always been considered to have a more stable democracy. From this point of view, the degradation is perhaps even more worrying because it highlights serious internal contradictions in almost every liberal-democratic country and shows a generalized tendency in almost all liberal-democratic systems, even those normally considered to be of an ancient tradition.

Giacomo Giorgini Pignatiello deals with the role of judges and of the constitutional courts, highlighting how they substitute the politic more and more. From a constitutionalist perspective, this is certainly useful, but it poses a danger to the liberal-democratic model of separation of powers at the same time. The danger inherent in the latest edition of *Le Gouvernement des Juges* constitutes the third contradiction highlighted during this session of the proceedings.

Micol Pignataro takes the cue from the Covid-19 emergency to focus a trend appeared well before the emergency which consists in strengthening the executives. The pandemic simply represented an accelerator of this trend that has been manifesting itself for many years in most liberal-democratic countries and in Italy with a clear prevalence of the executive over the legislative. The fourth contradiction of liberal-democratic regimes is thus highlighted: democracy requires effectiveness of command to survive (as Piero Calamandrei focused several times during the Italian Constituent Assembly proceedings), but this can lead to annihilate the representation itself.

Andrea Vernata focuses on two connected aspects of the internal degradation of liberal-democratic systems: the sources of law, with an growing predominance of the executives, both for the intrinsic political weakness of legislative bodies and for the technical skills

[*] **Associate Professor of Constitutional Law at the University of Siena.**

required to regulate increasingly complex phenomena; the support and endorsement to *democratiae mercatoriae* for purely economic reasons without worrying too much about the consequences that this has produced within our welfare systems, with particular reference to employment costs, unemployment and relocations. A sixth contradiction that emerges concerns the pragmatism of liberal democracies which leads to the loss of loyalty and attachment to its own constitutive values.

Eventually, Giuseppe Naglieri takes inspiration from the recent US decision *Rucho v. Common Cause* 2019 to focus on apparently technical and specialized decisions (political modification of electoral district boundaries). When combined with the potential of modern technology (big data), they are able to seriously affect democratic processes, thanks also to an unprecedented ease of the executives in addressing high political issues and the step-back of the judiciary control, due to the doctrine of political questions.

All these works stress several aspects of constitutional degradation, precisely in the countries that mistakenly consider themselves immune to this phenomenon.

In the sphere of public law, five main aspects of degradation have been identified: a) the concentration of power in the executives and the weakening of the separation of powers; b) the abuse of rights by individuals and the abuse of power by public entities; c) the expanding role of judges in discretionary political decisions, with further weakening of the separation of powers; d) an enormous extension of the Expertise Model in public administration and government organizations and procedures, coupled with delegation of discretionary political powers; e) the abdication, for mere economic reasons, of the pedagogical role of liberal-democracies, with the underlying and implicit message that even liberal democracies no longer believe so much in their founding values.

In the sphere of private law, two main phenomena of constitutional degradation have been underlined: a) that caused by the abuse of law; b) that determined by the massive growing role of economic powers. The constitutional degradation emerging from the private sector is perhaps even more disturbing for three main reasons: first, due to the unreadiness of public law scholars to properly handle private law; secondly, due to the objective absence of effective tools in traditional public law for controlling private powers; thirdly, for having neglected the constitutional duties for too long, from the general one of solidarity to the more specific ones of progressive taxation.

Gianmario Demuro*

Populism and Constitutional Degradation

Is populism constitutional? Is the populist ideology compliant with a thick concept of the Rule of Law? Professor Castellà just mentioned a thin version of the Rule of Law. Eventually, a thick understanding of the Rule of Law entails an idea not so different from the ones often referred in the past with the terms *Rechtstaat* or *État de droit*.

The real question one wonders is how can we nowadays defend democracy? Or even better, how can we defend an open democracy, following Popper's definition of democracy as an 'open society'? For example, how does democracy relate with the digital sphere? How does democracy deal with the motto 'Tacking back control', which marked in the United Kingdom the victory of the exit option from the E.U.?

In other words, I wonder what is the relationship which links populism with constitutional degradation? This question entails a further potentially explosive inquiry. At the time of the viral spread of populism within our society, should we accept the idea of deeming an 'illiberal democracy' as democratic? I think we, as Europeans, should not resign ourselves to this perspective. Of course, only the time will prove whether this idea is destined to prevail within the E.U., both thanks to the efforts of the judiciaries – particularly through the decisions issued by the Court of Justice of the European Union – as well as thanks to political actions adopted by the European Parliament and national Parliaments.

In this context, information turns out to be crucial. This year 'The Constitution of Information' was published, thereby recalling the idea of the Constitution of the truth (?). Whether this seems a paradox – and I do not want to refer here to the mystery of Truth – in every democracy public debate ends up degrading, if it cannot rely on real, true information.

Where does populism originate from? Populism tries to respond to the following question. How can we represent people that were abandoned and are currently living under uncertain social and economic conditions? From this perspective, populism is the waste product of a globalized economy. The impact of globalization was disturbing.

However, it is important to highlight that populism is a phenomenon with different facets, that has been studied since the 19th century and that has been swinging between far right and far left parties for long time, as Professor Conti just maintained. Therefore, when dealing with populism, it is not so relevant the political wings involved, rather it is important the idea that there are national, ethnic, and religious groups – as Professor De Caro underlined by quoting Fukuyama – in which cultural identity becomes the identity of 'the people'. It turns into 'we' the people against you the other people. In this regard, the slogan 'America first' comes immediately to our minds.

Populism grows within societies put under pressure, where the welfare state is distressed. In such a shattered context, democracy is not able anymore to give answers. Populism plays an easy game. It conveys the simple message, 'You are not alone. We represent you'. Populism is a means through which people are directly represented. In this sense, populism is the exact contrary of the idea underlying liberal Constitutions, that embody the concept of 'polyarchy' elaborated by Dahl. Democracy is always a polyarchy and polyarchy is always a democracy.

Lately, populist parties have been attempting to get the leadership of the European Commission. Thanks to the E.U. citizens' votes this did not happen. However, we still do not

* **Full Professor of Constitutional Law at the University of Cagliari.**

know what would have happened if populist and sovereigntist forces had gained the majority of the seats in the European Parliament.

Finally, I would like to focus on the concept of sovereignty since it is crucial in the debate on populism. The national dimension celebrated by populists is nothing but an ideology. The motto 'Tacking back control' is total ideology in our times.

What might be done from the European perspective? If it is necessary to go back to our national borders, it is important to valorize the European constitutional heritage which relies in the domestic Constitutions of the Member States. The European tie has so far saved us from populism. Yet, this liaison will not save us from the most backward populist ideology if there is no response from the Member States. This is what happened in France with the election of Macron. The regional elections carried out last spring also show us that constitutional democracy across the Alps is resisting. This same kind of resistance must be implemented also in other countries, otherwise the European contribution alone will not be enough.

Carla Bassu*

The rule of law to the test

The rule of law, conceived as that system of rules and values governing the exercise of public power, has long been considered the founding element of the European heritage, part of the culture, of the traditional heritage, and not only of the legal system of the old continent's legal systems. it represents one of the most important values of the common constitutional traditions in Europe.

Rule of law is a complex and multifaceted category[1], but characterised by an indispensable content, an essential core represented by:

- principle of legality
- separation of powers
- independence of judges
- recognition of individual rights.

Indeed, these are the principles representing the foundations of the most important organisations in the continent, the European Union and the Council of Europe[2].

A few years ago, the European Commission defined the rule of law as «the dominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers», reaffirming the importance of providing a common European framework to ensure effective and consistent protection in all Member States, addressing and resolving systemic threat situations[3].

Nonetheless, we know that the situation in Europe with reference to the configuration of and respect for the principles of the rule of law is far from homogeneous and without contradictions[4].

What happens when threats to the rule of law, to the principles of rule of law come from within? When the protection of fundamental rights, the separation of powers, the balanced

* **Full Professor of Comparative Public Law at the University of Sassari.**

[1] There are many interpretations and definitions concerning the notion of rule of law. For a general overview of the different declinations of the principle, see: T. BINGHAM, *The rule of Law*, London, 2010; G. ZAGREBELSKY, *La legge e la sua giustizia: Tre capitoli di giustizia costituzionale*, Bologna, 2017, 95-127; D. ZOLO, *Teoria e critica dello Stato di diritto*, in P. COSTA, D. ZOLO (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Milano, 2002, pp. 21 ff.; G. ZAGREBELSKY, *Il diritto mite*, Torino, 1992, 20 ff.; G. PALOMBELLA, *È possibile una legalità globale? Il* Rule of law *e la governance del mondo*, Bologna, 2012; G. PITRUZZELLA, *Stato di diritto, indipendenza delle corti e sovranità popolare: armonia o conflitto?*, in *Diritti comparati*, 31 October 2018.

[2] See art. 2 TEU, «The Union is founded on the values of respect of human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail»; preamble of the Statute of the Council of Europe: «Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy»; see also art. 3 of the Statute of the Council of Europe: «Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realization of the aim of the Council as specified in Chapter I».

[3] See European Commission, *Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the Rule of Law*, Brussels, 11 March 2014.

[4] Cfr. L. PECH K. SCHEPPELE, *Illiberalism within: Rule of Law Backsliding in the EU*, in *Cambridge Yearbook of European Studies*, 2017, 19, 3-47; G. PALOMBELLA, *Illiberal, Democratic and Non-Arbitrary? Epicentre and Circumstances of a Rule of Law Crisis*, in *Hague Journal on Rule Law*, 2018, 10, 5–19.

relationship between individual and state is called into question? What are the concrete manifestations of a real risk to the integrity of the rule of law? How can this risk be recognised and combated within European organisations?

We are witnessing an increasing number of cases of legal systems in which majorities gain power according to democratic mechanisms, winning consensus in free elections; but, after that, they then tend - during their term of office - to put in place mechanisms aimed at retaining power in defiance of democratic rules. This is done through measures that restrict rights such as freedom of expression, but also the freedom of choice and self-determination of certain categories of people (one could think about the Turkish measures against journalists, lawyers and university professors, or the Polish regulations on abortion, voted by the majority in Parliament and blocked by the Constitutional Court, which still functions as a bulwark of the rule of law). Also evident in some cases are frictions over the principle of the separation of powers, with the government's influence expanding to the detriment of parliament, and pressure on the judiciary affecting its independence.

Generally speaking, all the actions implemented by what are widely referred to as “illiberal democracies” – a definition that in my opinion implies an irremediable contradiction in terms – translate into attacks on pluralism. They are aimed at orienting the society towards common standards to be achieved by means of increasingly pregnant interventions in the individual sphere of individuals, at odds with the position assumed by the public power within the framework of a liberal form of state.

I would like to raise here the question of what is the appropriate and desirable reaction by democracies that, with their shortcomings, fully respond to the rule of law parameter with respect to phenomena of constitutional regression or, in any case, illiberal manifestations taking place in systems that are part of the European supranational union (I am thinking of Poland, for example) or to which they are in any case linked by economic if not political relations.

In concrete terms, how should European democracies ideally behave towards what is happening in Hungary, Poland or Turkey?

We have the example, which caused a great uproar, of the Italian Prime Minister, Mario Draghi, who did not hesitate to identify the Turkish Head of State Recep Tayyp Erdoğan as a “dictator”, provoking different reactions.

Among the various events that can be mentioned, I would like to cite one that has found space in the pages of the newspapers in recent days: the case of Turks belonging to the movement headed by Fetullah Gülen, the Islamic preacher considered by Ankara to be the mastermind and instigator of the failed *coup d'état* on 15 July 2016. The Gülenist community in Italy numbers a few hundred people, many of whom work at the intercultural associations Alba in Milan and Milad in Modena, and the Tevere institute in Rome, all of which are inspired by the principles of Hizmet, which can be translated into Italian as “service”. Thirty-nine year old Ahmet, who holds a residence permit in Italy for an indefinite period of time and works at the Hizmet centre in Milan, recounts, for example, that she was unable to register her new-born daughter at the registry office because, when she went to the consulate to register the daughter, the Turkish consular authorities informed her that she was identified as a terrorist in her homeland and for this reason she was deprived of her citizenship. Consequently, she could not pass the citizenship on to her daughter, who thus results to be stateless. The parents have now applied for political asylum in our country. Hizmet is in fact identified in Turkey as Fethullahçı Terör Örgütü (FETÖ), i.e. the terrorist group of Fetullah's followers. Anyone, regardless of their place of residence, who can be traced back to the group is automatically

identified as an enemy of the state and deprived of citizenship. Italian bureaucracy does not always support; sometimes, it makes things more complicated. Among the many testimonies, I was struck by that of a teacher at a Gulenist school in Turkey who had her degree cancelled after the coup and while she managed to escape to Italy, many of her colleagues were arrested.

So, should Italy or the international community in general take a stand against these situations?

This is also true, for example, regarding the restriction of rights and the upsetting of the balance of power in EU Member States (Hungary, Poland) where a tug-of-war between supranational and internal institutions is already taking place with respect to certain regulatory acts that are allegedly detrimental to certain rights recognised and protected by European law and called into question by the legislation of the aforementioned Member States.

This is not the appropriate place to indicate solutions and I am not in a position to do so. Anyway, it seems to me that the issue is alive, relevant and cannot be overlooked in a context that is based on the principles of rule of law.

I am enthusiastic to be part of this PRIN project and I wonder, and I ask you, once the checklist has been identified, once the indicators have been identified to record an effective violation of the principles of rule of law and to note an effective regression of the constitutional dimension, what should stabile democracies do? What should be the appropriate responses of individual states and constitutional organisations such as the EU and the Council of Europe?

I hope, at the conclusion of the PRIN project and also thanks to events such as today's that allow us to learn and gather important insights, to be able to give an answer.

Giacomo Giorgini Pignatiello*

Transformative Constitutionalism and Constitutional Courts in the European Legal Space.

Germany and Italy in a Comparative Perspective**

ABSTRACT: ***The present contribution aims to understand whether the developments occurring in the activity of two very famous constitutional courts, namely the German and the Italian ones, are compliant with the conception of separation of powers designed by contemporary constitutionalism, or, on the contrary, may represent the prelude of a democratic regression. The article also examines whether the Italian legal system may be considered an example of transformative constitutionalism.***

1. *The concept of transformative constitutionalism beyond the borders of the Global South*

After the collapse of the dictatorships in Europe, it was clear for the constitution makers that the people's level of education, the quality of the laws, and the democratic nature of institutions were not elements *per se* sufficient for ensuring the existence of a constitutional democracy. This was the lesson that the failure of the Weimar Republic taught the world[1]. Therefore, democratic constitutions required to be provided of a supremacy status within the legal order. Constitutional adjudication became then the legal mechanism through which ensure the protection of fundamental rights against the tyranny of the political majority's will. Human dignity and the principle of substantial equality guaranteed through a wide welfare state, were the cornerstones on which post-conflict constitutional democracies were built.

Contrary to *Montesquieu*'s theories[2], contemporary constitutionalism requires public institutions to have a proactive lead in the pursuit of constitutional values (constitutionalism 2.0)[3]. In this regard, in 1998 the South African scholar *Karl Klare* coined the expression *transformative constitutionalism*[4], meaning, «a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian

* **PhD Candidate in Comparative Public Law, University of Siena.**

** **This work has been subjected to blind peer review.**

[1] F.M. WATKINS, *The failure of constitutional emergency powers under the German Republic*, Cambridge, 1934.

[2] As formulated in the famous treatise *De l'esprit des lois* (1748).

[3] According to the classification of the different phases of constitutionalism elaborated by A. SOMEK, *The Cosmopolitan Constitution*, Oxford, 2014, in part. 79-133.

[4] On transformative constitutionalism see also D. MOSENEKE, *Transformative Adjudication*, in *S. Afr. J. on Hum. Rts.*, 2002, 18(3), 309-319; P. LANGA, *Transformative constitutionalism*, in *Stell. L.R.*, 2006, 17(3), 353-360; R. ÁVILA SANTAMARÍA, *El neoconstitucionalismo transformador. El estado y el derecho en la Constitutción de 2008*, Quito, 2011; C.M. FOMBAD, *Strenghtening constitutional order and upholding the rule of law in Central Africa: reversing the descent towards symbolic constitutionalism*, in *Afr. Hum. Rts. L. J.*, 2014, 14(2), 412-448; A. VON BOGDANDY ET AL., *Transformative constitutionalism in Latin America: the emergence of a New Ius Commune*, Oxford, 2017; E. KIBET, C. M. FOMBAD, *Transformative constitutionalism and the adjudication of constitutional rights in Africa*, in *Afr. Hum. Rts. L. J.*, 2017, 17(2), 340-366.

direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law»[5]. He opposed his vision on the South African Constitution to the counter-model represented by the Global North and particularly the U.S. liberal constitutions (constitutionalism 1.0)[6], grounded on the abstention of public powers from any interference with citizens' freedoms.

Subsequently, the theoretical grounds of transformative constitutionalism had a big impact over the Global South, to the point that it is nowadays considered one of the key features of the constitutional democracies that characterize that part of the world. Over the time, many different definitions were elaborated to catch the essence of this new paradigm of constitutionalism. It was applied for example also to the international dimension of the Inter-American Court of Human Rights[7].

Transformative constitutionalism has been for long time considered a peculiarity of Southern jurisdictions. Scholars are now challenging its geographical limitation and concluded that, «the a priori exclusion of Northern examples from the debate appears particularly arbitrary»[8]. In relation to Germany, for example, it was noted that, «Like South Africa after apartheid, Germany emerged after the Second World War a broken and morally discredited country with a strong imperative of political and social change … German constitutionalism became, over time, transformative in important respects. That it did is due primarily to the Justices at the German Constitutional Court and German legal scholars … The early Justices of the German Constitutional Court were, like most new German elites, aware that they were confronted with the major task of changing Germany from a totalitarian dictatorship into a Western democratic state, respectful of individuals and their rights»[9].

Although it is still very much debated if such a particular concept might be applied to European legal experiences, I claim that also Italy enacted a transformative constitution, not differently from Germany. This is particularly true if one considers the evolution experienced by the case law of the ICC. Transformative constitutionalism is a theoretical framework particularly useful to assess the legitimate powers that constitutional courts can correctly exercise under the dogmatics of contemporary constitutionalism. In my perspective, this conceptual background helps to define how far Courts' activity can go in a democratic system and when, on the contrary, the risk of an authoritarian drift manifests.

2. *The evolution of the German Federal Constitutional Court and its powers*

In a country first defeated in a devastating war and then split in two by the Cold War, the Guardians of the Constitution pursued the social and economic goals enshrined in the *Grundgesetz* (hereinafter GG) through a strong activity, in many cases replacing the legislative power's inertia[10]. The BVerfG's activity consisting of filling legislative gaps to implement

[5] K.E. KLARE, *Legal culture and transformative constitutionalism*, in *S. Afr. J. on Hum. Rts.*, 1998, 14(1), 150.

[6] As defined by A. SOMEK, *The Cosmopolitan Constitution*, cit., in part. 36-78.

[7] A. VON BOGDANDY, R. UREÑA, *International Transformative Constitutionalism in Latin America*, in *Am. J. Int. Law*, 2020, 114(3), 405.

[8] M. HAILBRONNER, *Transformative Constitutionalism: Not Only in the Global South*, in *Am. J. Comp. Law*, 2017, 65(3), 534.

[9] M. HAILBRONNER, *Transformative Constitutionalism*, cit., 541-542.

[10] For the history and the developments of the BVerfG and its activity in the German constitutional order, please refer to M. HAILBRONNER, *Traditions and Transformations. The Rise of German Constitutionalism*, Oxford, 2015.

constitutional mandates is one of the most emblematic types of evidence of the transformative nature of the German constitutional order.

Since the 1950s the German doctrine has been digging into, and questioning, the concept of omission of the legislator[11] in a legal order where the constitutional court soon became a powerful actor among the public powers.

The BVerfG has been facing the topic of legislative omissions since the very beginning of its activity. In a 1951 decision it established that the obligation to comply with the constitution might entail the establishment of a specific duty to act for judicial and administrative bodies. It also stated that non-compliance with these obligations could lead to an unconstitutional omission, a situation which would be detrimental for fundamental rights. However, in this first stage the BVerfG recognized that the legislator's inaction *could not per se* generate a sanctionable unconstitutional omission[12]. Overruling its case-law, the BVerfG affirmed later on that in case of absolute omissions the FCC is entitled to fill the gaps and elaborate a rule which, until that time, had been understood to require an *interpositio legislatoris* for its full effectiveness[13]. By the end of the 1950s, the BVerfG had reversed its precedents and stated that unconstitutionality can derive not only by positive actions of the legislator but also by legislative omissions[14]. The Guardians of the Constitution acknowledged that the constitution can be violated by the inaction of the legislator, especially when an arbitrary exclusion of benefits occurs, thus infringing the principle of equality.

The decision issued on 29 January 1969 is deemed particularly significant. At that time several judgments of the Kiel regional court were challenged by citizens. This happened because the Kiel court used to apply pre-constitutional provisions of the Civil Code, even if this resulted in the violation of the principle of equality of children born out of wedlock. This used to happen despite the clear constitutional clause which equalized in their rights the children

[11] In relation to the individual claim towards the BVerfG see *F. Wessel, Die Rechtsprechung des Bundesverfassungsgerichts zur Verfassungsbeschwerde*, in *Deutsches Verwaltungsblatt*, 1952, 161-183; H. LECHNER, *Zur Zulässigkeit der Verfassungsbeschwerde gegen Unterlassungen des Gesetzgebers*, in *Neue furistische Wochenscrift*, 1955, 1817 ff.; H. VON KÖHLER, *Kann der Gesetzgeber durch Schweigen die Verfassungswirklichtkeit àndern?*, in *Neue Jur. Wochenschrift*, 1955, Hf. 30, 1089 ff.; J. SEIWERTH, *Zur Zulässigkeit der Verfassungsbeschwerde gegenüber Grundrechtsverletzungen des Gesetzgebers durch Unterlassen*, Berlin, 1962; R. SCHNEIDER, *Rechtsschutz gegen verfassungswidriges Unterlassen des Gesetzgeber*, in *Archiv des öffentlichen Rechts*, 1964, 89(1), 24-56; P. LERCHE, *Das Bundesverfassungsgericht und die Verfassungsdirektiven: Zu den „nicht erfüllten Gesetzgebungsaufträgen"*, in *Archiv des öffentlichen Rechts*, 1965, 90(3), 341-372; F. JÜLICHER, *Die Verfassungsbeschwerde gegen Urteile bei gesetzgeberischem Unterlassen*, Berlin, 1972.

[12] BVerfGE 19.12.1951. In this case a citizen, unable to work, with no other means of support, and with three dependent minor children, received a social pension of 183 marks per month. He therefore brought an action directly before the Constitutional Court seeking a declaration that the omission of the legislator was unconstitutional to the extent that the legal framework was not capable of ensuring citizens a more adequate and decent livelihood, thereby infringing several fundamental rights enshrined in the GG, such as human dignity (art. 1), the free development of one's personality (art. 2) and equality (art. 3). He also requested the Court to declare that the Federal Government was obliged to immediately submit a bill to amend the social security regulation.

[13] BVerfGE 18.12.1953.

[14] BVerfGE 20.2.1957, particularly remarkable in its point where it recognizes that «it follows that laws must be regarded as 'acts' of a constitutional body, namely the Legislature, through which fundamental rights may be violated. If the Legislature is constitutionally obliged to issue such an act, namely to enact a law, it may ... also violate fundamental rights by not doing so» and 11.6.1958.

born in and outside the wedlock (Art. 6 para. 5 GG)[15]. The BVerfG recognized that once a "reasonable period of time" had passed (20 years in this case) and the Parliament had not fulfilled its constitutional duty to legislate, both ordinary judges and constitutional courts could ("should") apply the constitutional norm directly. With this doctrine, the BVerfG was ultimately reiterating the jurisprudence it had already established with regard to the principle of equality among men and women some years before (Art. 3 para. 2 GG[16] in connection with Art. 117 para. 1 GG[17])[18].

Over its activity, the BVerfG has also developed new typologies of decision other than the mere acceptance or rejection of the raised question of constitutional legitimacy. This happened both to safeguard the discretionary power of the legislator and to avoid the delegation of the BVerfG's functions[19]. The techniques elaborated by the BVerfG contributed to the creation of a fruitful dialogue between state actors. In addition, political forces are responsive to the BVerfG's warnings, mainly due to the strong legal culture of loyal cooperation between powers that characterizes the German legal order[20]. German citizens keep their representatives accountable for their diligence towards the application and "realization" of the Basic Law, also in the interpretation given by its Guardians.

3. *Recent developments in the activity of the Italian Constitutional Court*

In 1946 when the constitution-making process took place, Italy had already been ruling for more than 20 years by an authoritarian regime, which strongly relied on violence, discrimination, and the denial of people's fundamental rights. Principles characterizing social democracies in Europe were enshrined in the Italian Constitution, thereby outlining a real constitutional project to be realized during the life of the Republic (programmatic Constitution)[21]. The broad recognition and protection of the individual's inviolable rights (art.

[15] German Basic Law, Art. 6 para. 5, «Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage».

[16] German Basic Law, Art. 3 para. 2, «Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist».

[17] German Basic Law, Art. 117 para. 1, «Law which is inconsistent with paragraph (2) of Article 3 of this Basic Law shall remain in force until adapted to that provision, but not beyond 31 March 1953».

[18] Other historical rulings are often recalled by scholars as examples of the BVerfG determining legislative programs, such as the Numerus-Clausus decision (BVerfGE 33, 303), the decision concerning professors (BVerfGE 35, 79), the decision on abortion (BVerfGE 39, 1), and the decision on alternative civilian service (BVerfGE 48, 127). On this point see in particular, I. HÄRTEL, *Germany*, in A.R. BREWER-CARÍAS (ed.), *Constitutional Courts as Positive Legislators*, Cambridge, 497-520.

[19] For a detailed overview on the BVerfG and the typologies of its decisions see A. FARAHAT, *The German Federal Constitutional Court*, in A. VON BOGDANDY, P. HUBER, C. GRABENWARTER (eds.), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions*, Oxford, 2020, 280-355.

[20] R. ROGOWSKI, T. GAWRON, *Constitutional Courts in Comparison: The US Supreme Court and the German Federal Constitutional Court*, New York, 2016, in part. 210-226.

[21] V. CRISAFULLI, *La Costituzione e le sue disposizioni di principio*, Milano, 1952; E. DENNINGER, *Constitutional Law between Statutory Law and Higher Law*, in A. PIZZORUSSO (ed.), *Law in the Making: A Comparative Survey*, Berlin, 1988, 103-130; M. LUCIANI, *Dottrina del moto delle costituzioni e vicende della costituzione repubblicana*, in *Riv. AIC*, n. 1 del 2013, online.

2)[22], together with the affirmation of the principle of equality (art. 3)[23] constituted the core of the Charter of the fundamental rights of the newly established Italian Republic. The Constitutional Court was created as both Guardian of people's rights and Judge of the constitutional conformity of legal acts[24], The proactive role which both public institutions and citizens are called to play to remove inequalities (art. 3 para. 2 Const.)[25], together with the principle of loyal cooperation between constitutional bodies[26] and the beginning, after WW2, of a new era for the affirmation of fundamental rights[27] entailed the provision of several duties and functions to the ICC. Not differently from the other public powers, also the ICC is required to realize the project outlined in the Constitution, whose aim is to create a new legal order, founded on the values enshrined in the Republican Charter[28].

Consequently, if we apply Hailbronner's paradigm to Italy, the Italian legal system, not differently from Germany, represents a case of transformative constitutionalism, where both public powers and citizens were and still are called to cooperate to create a more just, equal, and inclusive society. The leading role performed by the ICC throughout its almost 70 years of activity in this process of socio-legal transformation has been crucial[29]. In the face of the lawmakers' *inertia*, the ICC had to transform a legal system that, even after the promulgation of the Constitution, relied mainly on the laws and decrees approved during the fascist regime[30].

Until the 1970s the ICC struggled to challenge the existing legislation when this meant not only the more traditional approach consisting of the annulment of the provision(s) deemed in contrast with the Constitution, but especially when positive actions were necessary to realize fundamental rights like the principle of substantial equality among individuals. Many fields of the legal system served as a driver of emancipation for the ICC. However, gender, for example, is one of the discriminating factors that required most explicitly the action of the ICC to

[22] Italian Constitution, Art. 2, «The Republic recognises and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled».

[23] Italian Constitution, Art. 3, «All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions./It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organisation of the country».

[24] On the characteristics of the ICC and particularly the typologies of decisions it has elaborated over time, please refer to V. BARSOTTI ET AL., *Italian Constitutional Justice in Global Context*, Oxford, 2016; T. GROPPI, I. SPIGNO, *The Constitutional Court of Italy*, in A. JAKAB, A. DYEVRE, G. ITZCOVIVH (eds.), *Comparative Constitutional Reasononing*, Cambridge, 2017, 516-559.

[25] A. GIORGIS, *Art. 3, 2° comma*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (eds.), *Commentario alla Costituzione*, Milano, 2006, online.

[26] F. MODUGNO, *Corte costituzionale e potere legislativo*, in P. BARILE, E. CHELI, S. GRASSI (eds.), *Corte costituzionale e sviluppo della forma di governo in Italia*, Bologna, 1982, 101.

[27] As remarkably pointed out by N. BOBBIO, *L'età dei diritti*, Torino, 1990.

[28] R. BIFULCO, D. PARIS, *The Italian Constitutional Court*, in A. VON BOGDANDY, P. HUBER, C. GRABENWARTER (eds.), *The Max Planck Handbooks in European Public Law*, cit., 447-504.

[29] For an interesting reconstruction of the different stages in the development of the case-law experienced by the ICC see D. TEGA, *The Italian Constitutional Court in its Context: A Narrative*, in *Eur. Const. L.R.*, 2021, 17, 1-25.

[30] E. CHELI, *Introduzione*, in P. BARILE, E. CHELI, S. GRASSI (eds.), *Corte costituzionale e sviluppo della forma di governo in Italia*, cit., 14-15. For a comparative perspective see also L. ELIA, *La Corte nel quadro dei poteri costituzionali*, in P. BARILE, E. CHELI, S. GRASSI (eds.), *Corte costituzionale e sviluppo della forma di governo in Italia*, cit., 531.

dismantle a legislation founded on a patriarchal conception of the family and, as a consequence, of the structure and functioning of the entire society[31]. It is not a case that scholars pointed out how for many decades after the promulgation of the Constitution it seemed like the law was shaping the Constitution, and not the contrary[32]. It is just starting from 1960 that women in Italy could compete for a job in the public administration, thanks to a decision of the ICC[33]. The ban that prohibited women to access positions in the administration was found discriminatory on the basis of gender and consequently was annulled as contrasting with the principle of equality (art. 51 para. 1 Const.)[34]. It was again the ICC that decriminalized the offence of adultery[35], overruling its previous case law[36]. Then, in 1969 it ruled unconstitutional the provisions which excluded natural children as heir in absence of descendants born from the wedlock[37]. This was the first step in the long march towards the protection of the rights of children born out of wedlock, granted by art. 30 of the Constitution[38].

Notwithstanding the aforementioned theoretical background, the limits of the powers recognized to the ICC when it comes to the enforcement of fundamental rights not regulated by the legislator are still very controversial. On this regard, it must be noted that since the 1970s eminent scholars[39], following the debate that was taking place in Germany, took a strong position on the duties that the ICC is required to comply with, when it is time to safeguard rights still not recognized by the Parliament, namely legislative omissions. Interestingly, it was highlighted how even a mere decision of annulment is *per se* able to produce new norms, since it leads to innovations in regard with the pre-existing legal order. Not differently, when a legislative omission is found to be unconstitutional the Court completes the existing legal framework with new norms directly derived from the Constitution. Since its 1958 decision[40], the ICC clarified that the lack of provisions protecting certain rights cannot prevent the Court from stating the unconstitutionality of laws. Since the Court, differently from the Parliament, cannot abstain from deciding, it *must* create the missing norm, following the ordinary interpretative tools provided by the art. 12 of the

[31] F. RESCIGNO (ed.), *Percorsi di eguaglianza*, Torino, 2016; M. D'AMICO, *Una parità ambigua*, Milano, 2020; T. GROPPI, *Oltre le gerarchie. In difesa del costituzionalismo sociale*, Bari–Roma, 2021.

[32] A. ATTI, *L'eguaglianza tra i sessi nel diritto di famiglia*, in F. RESCIGNO (ed.), *Percorsi di eguaglianza*, cit., 30-60.

[33] ICC no. 33/1960. The famous case originated by Rosa Oliva who challenged the provision which banned women from working in public offices. The Court declared unconstitutional the article 7, law 17.7.1919, which prevented women from accessing public offices, because it was deemed in conflict with the art. 51 paragraph 1 of the Constitution.

[34] Italian Constitution, art. 51 para. 1, «Any citizen of either sex is eligible for public offices and elected positions on equal terms, according to the conditions established by law».

[35] ICC no. 147/1969.

[36] ICC no. 64/1961.

[37] ICC no. 79/1969.

[38] Italian Constitution, Art. 30, «It is the duty and right of parents to support, raise and educate their children, even if born out of wedlock./In the case of incapacity of the parents, the law provides for the fulfilment of their duties./The law ensures such legal and social protection measures as are compatible with the rights of the members of the legitimate family to any children born out of wedlock./The law shall establish rules and constraints for the determination of paternity».

[39] V. CRISAFULLI, *Le sentenze «interpretative» della Corte costituzionale*, in *Riv. trim. dir. proc. civ.*, 1967, 11 ff.; A.M. SANDULLI, *Il giudizio sulle leggi*, Milano, 1967; C. MORTATI, *Appunti per uno studio sui rimedi giurisdizionali contro comportamenti omissivi del legislatore*, in *Il Foro It.*, 1970, 93(9), 153-192; F. MODUGNO, *La giurisprudenza costituzionale*, in *Giur. cost.*, 1978, 12(1), 1233-1256.

[40] ICC no. 56/1958.

preliminary rules to the Civil Code. The interpretative operation carried out by the judge cannot be considered as an act of interference of the Court with the discretionary power of the Parliament. Even though a margin of creativity is always present in these operations, the Court restrains its activity to the inference from the overall legal system of the constitutional norm more suitable, thanks to its affinity to the case at issue, to reach a decision[41].

On the contrary, other scholars questioned the powers of the Court to be able to state the unconstitutionality of legislative omissions and consequently to act as a lawmaker agent[42]. First, it is argued that the Court could not decide over cases of legislative omissions due to procedural obstacles. The legal framework requires the act filed for starting the proceeding before the ICC to state expressly the provisions presumed unconstitutional. Even the Court decisions stating the unconstitutionality of laws should specify the legal provisions deemed unlawful[43]. It is also pointed out that in case of legislative omissions the interpretative operation carried out by the ICC creates new norms, thereby invading the space reserved to the legislative power. According to the Kelsenian conception of constitutional adjudication the Court should be entitled only to invalidate the acts issued by the legislator which are not in conformity with the provisions enshrined in the Constitution. Therefore, the Court has not any creative power and shall act only as a "negative legislator". It is equally underlined how the ICC case law, by covering a gap in the legislation, might undermine the principle of legal certainty that requires general and abstract rules.

Nowadays, the question is still very much debated, especially in light of the recent developments that the ICC has adopted in order to overcome the *inertia* of the Parliament[44]. Two schools of thought confront one another[45]. On the one hand, it is maintained that the ICC is experiencing an evolution of its powers and role within a constitutional democracy[46]. This entailed the elaboration of more sophisticated techniques of modulation of the effects of its decisions, not differently from those already successfully realized many decades ago by the BVerfG in Germany. On the other hand, it is observed how the ICC is adopting a more and more activist behavior by misusing its powers[47]. This would lead to a dangerous situation where the ICC, a non-majoritarian actor, makes the law, thereby creating confusion and concentration of powers within the hands of the same institution, as such prophetic of a critical constitutional degradation.

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[41] F. MODUGNO, *Corte costituzionale e potere legislativo*, cit., 48-49.

[42] G. ZAGREBELSKY, *La Corte costituzionale e il legislatore*, in P. BARILE, E. CHELI, S. GRASSI (eds.), *Corte costituzionale e sviluppo della forma di governo in Italia*, cit., 121; A. BALDASSARRE, *Il problema del metodo nel diritto costituzionale*, in AA.VV., *Il metodo nella scienza del diritto costituzionale*, Milano, 1997, 101. More recently see A. CELOTTO, *L'età dei (non) diritti*, Roma–Cesena, 2017.

[43] Art. 136 Const., Art. 1 Const. Law no. 1/1948, Art. 23, 27, and 34 of the Law No. 87/1953.

[44] D. TEGA, *The Italian Constitutional Court in its Context: A Narrative*, cit., 23-24.

[45] See an interesting collection of scholars' thoughts on this topic in R. ROMBOLI (ed.), *Ricordando Alessandro Pizzorusso. Il pendolo della Corte. Le oscillazioni della Corte costituzionale tra l'anima "politica" e quella "giurisdizionale"*, Torino, 2017.

[46] See for example G. SILVESTRI, *Del rendere giustizia costituzionale*, in *Quest. Giust.*, 2020, 4, 24-36; M. RUOTOLO, *Corte costituzionale e Legislatore*, in *Dir. e soc.*, 2020, 1, 53-74; ID., *Oltre le "rime obbligate"?*, in *Federalismi.it*, n. 3 del 2021, 54-63.

[47] See, for example A. MORRONE, *Suprematismo giudiziario. Su sconfinamenti e legittimazione politica della Corte costituzionale*, in *Quad. cost.*, 2019, 2, 251-290; A. RUGGERI, *Diritto giurisprudenziale e diritto politico: questioni aperte e soluzioni precarie*, in *ConsultaOnline*, 2019, 3, 707-728.

4. *Two relevant contemporary cases and their meaning*

In Germany, the decision on the KSG issued in May 2021 caused quite a stir. The Court was asked through the direct appeal of German and foreign applicants to scrutinize the constitutional legality of the KSG. It found out that «art. 20a GG also makes it obligatory to take national climate action even in cases where it proves impossible for international cooperation to be legally formalised in an agreement. State organs are obliged to take climate action irrespective of any such agreement and would have to continue seeking opportunities to make national climate action efforts more effective within a framework of international involvement»[48].

Therefore, «the provisions are unconstitutional insofar as they give rise to a risk of serious impairments of fundamental rights in the future – a risk that is not sufficiently contained at present. Since the emission amounts specified until 2030 in the two provisions significantly narrow the emission possibilities that will be available in accordance with Art. 20a GG thereafter, the legislator must take sufficient precautionary measures to ensure that a transition to climate neutrality is made in a way that respects freedom, in order to alleviate the reduction burdens faced by the complainants from 2031 onwards and to contain the associated risks to fundamental rights. The specifications drawn up in this regard for the reductions required after 2030 must provide sufficient orientation and incentives for the development and comprehensive implementation of climate-neutral technologies and practices. These have so far been lacking … the legislator does remain obliged to limit the temperature increase to preferably 1.5°C – a target that it formulated when specifying Art. 20a GG»[49].

As for the relationship among the BVerfG and the Parliament, the Court cared about explaining that «it is also because future generations - those who will be most affected - naturally have no voice of their own in shaping the current political agenda. In view of these institutional conditions, Art. 20a GG imposes substantive constraints on democratic decision-making ([...]). This binding of the political process as envisaged by Art. 20a GG would be in danger of being lost if the material content of Art. 20a GG were fully determined by the day-to-day political process with its more short-term approach and its orientation towards directly expressible interests ... In this respect too, it remains for the Federal Constitutional Court to review whether the boundaries of Art. 20a GG are respected ([...]). There is nothing to indicate that Art. 20a GG - as a singular exception among the provisions of the Basic Law - is beyond the scope of judicial review with regard to how its regulatory content is interpreted and applied»[50].

In Italy, the recent case "Cappato" is also worthy of attention. Initially, the ICC admonished the Parliament about the necessity of allowing and regulating the conduct consisting of the assistance by a third party in ending the life of a person, who wants to terminate their life. Already in its 2018 order[51], the ICC maintained that the total ban on suicide assistance would have ended up restricting unjustifiably and unreasonably the patient's freedom of self-determination in choosing the desired medical treatments, including those aimed to relieve them from suffering. In this way the state forces the individual to choose only one way, often also very painful, of taking away their life, thereby violating articles 2, 13, and 32(2) of the

[48] BVerfGE, Order of the First Senate, 24 March 2021, para. 201.
[49] BVerfGE, Order of the First Senate, 24 March 2021, para. 195-196.
[50] BVerfGE, Order of the First Senate, 24 March 2021, para. 206-207.
[51] ICC order no. 207/2018.

Constitution[52]. The ICC then ordered the postponement of its decision to the hearing of the 24.9.2019 in «*the hope that the matter will be promptly and fully regulated by the legislator*». In September 2019[53], the ICC took note of the fact that no legislation on the matter had been approved by the Parliament, nor a draft bill was soon to be adopted. Finally, the ICC declared in September 2019 the unconstitutionality of the art. 580 criminal code, since it violates articles 2, 13 and 32(2) of the Constitution[54]. In this case the declaration of unconstitutionality takes place only if the inertia of the legislator continues, notwithstanding the previous admonishment sent to the Parliament by the ICC with the order that postponed the final judgment. Once a reasonable period of time has elapsed, the necessity to guarantee the constitutional legality must, in any case, prevail over the need to leave room for the legislator's discretion to fully regulate the matter[55].

The cases mentioned above are deemed particularly remarkable since both Constitutional Courts declared a law unconstitutional due to the legislature's failure to act. They removed a legal gap by replacing the legislator activity, at least until the latter decides to regulate the subject. Both Courts explicitly recognized that the protection of the fundamental rights must necessarily prevail when the legislator fails to act. In the wake of transformative constitutionalism, the Courts tried through their decisions to create a fairer and more just society, which takes into account the necessary intergenerational solidarity and the individual's right to self-determination vis-à-vis the presumed interests of the community.

5. *Rethinking the role of Constitutional Courts in constitutional democracies*

The cases under scrutiny highlight the constitutional courts' duty to act in case of violations of fundamental rights due to legislature's inertia in legal systems characterized by transformative constitutions.

The new trend in the Italian legal system initiated by the ICC to both keep control over the challenged legal framework, that is strongly suspected of unconstitutionality, and to give the legislator proper time to act according to its duties relies within an evolution of the relationship among the state powers. Since the 1950s and the 1970s, the BVerfG sanctioned legislative omissions and modulated the effects of its decisions in time. This did not prevent Germany to be considered still nowadays a consolidated democracy with a respected system of constitutional adjudication and the provision of high standards for people's rights.

In a legal system founded on a transformative constitution, which sets ambitious socio-economic goals, the principle of loyal cooperation among institutions urges the Guardians of the Constitution to act as substitutes in case of the legislators' inertia for an unjustified period of time. Contemporary constitutional democracy requires a proactive role of public powers to safeguard the pursuit of fundamental values. On this regard, it does not come as a surprise that the same South African Constitution maintains that the state must respect, protect, promote and fulfil the rights in the Bill of Rights (Art. 7(2)), and that to promote the achievement of equality, legislative and other measures designed to protect or advance

[52] Italian Constitution, Art. 2 (footnote 40), Art. 13(1), «Personal liberty is inviolable», Art. 32(2), «No one may be obliged to undergo any health treatment except under the provisions of the law. The law may not under any circumstances violate the limits imposed by respect for the human person».

[53] ICC no. 242/2019.

[54] G. SILVESTRI, *Del rendere giustizia costituzionale*, cit., 36.

[55] See ICC precedents nos. 56/1958, 113/2011, 162/2014, 96/2015, 236/2016, 222/2018, 233/2018, 40/2019.

persons, or categories of persons, disadvantaged by unfair discrimination may be taken (Art. 9(2)).

Constitutional courts are required to safeguard the supremacy and the fulfilment of the rights enshrined in fundamental charters. Where legislative omissions occur, Courts have the constitutional duty to fix the institutional inertia unjustly prolonged in detriment to citizens' rights. This process of rights' enforcement led by Constitutional courts responds to the pressing needs and challenges raised by nowadays proactive societies and contributes to the achievement of the goals set by contemporary constitutionalism, pursuant with the principle of coordination of state's powers.

Micol Pignataro*

Constitutional Degradation in a Time of Coronavirus: Reflecting on Governmental Accountability in the United Kingdom and Italy**

ABSTRACT: ***The pandemic acted as an accelerator of pre-existing trends that see an overall dominance of Governments over legislative bodies, which are increasingly struggling to oversee executive power. This was the case both in the UK and in Italy, where the governments adopted specific institutional arrangements to manage the health crisis which did not necessarily include a prior involvement of the legislative body. An overview of the legal framework and of the instruments that the two legal orders used to face the pandemic highlights a common trend, and that is the preference for executive law-making to manage emergencies. The way Statutory Instruments and Statutory decrees are used respectively in the UK and in Italy are issues that pre-exist the pandemic, but an analysis of their use throughout the emergency particularly sheds light on specific structural weaknesses which are evident in both exceptional and normal times, and that relate to the two Parliaments' difficulties in keeping up with the executives' law-making activity. Considering that Parliament's inability to oversee Government gives rise to a series of problems which relate more generally to the institutional arrangement of a parliamentary democracy, it is necessary to reflect about Parliament's traditional functions and ask whether these are still adequate as the legal and political systems change. The oversight and steering functions still are one of the most fundamental and determining elements of a parliamentary form of government, but as the two experiences have showed, procedures need to be re-adapted as the Government has become the main legislative actor. For these reasons it is worth exploring post-legislative scrutiny as an instrument to hold the executive into account and to counterbalance its increasing monopoly of decision-making.***

1. *Introduction*

It is commonly thought that emergencies require forms of state action that are less procedurally laborious than those required in normal times, and this was certainly the case as the Covid-19 pandemic hit countries around the world. The demand for prompt and immediate actions, however, exposed very clearly the weakening role of Parliaments, shedding light on a process of constitutional degradation which finds its roots in the years prior to the pandemic. The concept of constitutional erosion indicates the "incremental" decay of the institutional and ideological foundations of constitutional liberal democracies, and it may take many forms[1]. For example, existing legal power can erode constitutional democracies through measures and instruments that weaken existing constitutional checks or that strengthen executive power[2]. This paper focuses on the latter elements of constitutional degradation, particularly on the significant increase of executive law-making and the

* **PhD Candidate in Constitutional Law at the University of Bologna.**

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[1] M. LOUGHLIN, *The Contemporary Crisis of Constitutional Democracy,* in *Oxf. J. Leg. Stud.,* 2019, 39(2), 435-454.

[2] T. GINSBURG, A. HUQ, *How to Save a Constitutional Democracy*, Chicago, 2018, 72.

inadequate parliamentary oversight activity, highlighting how specific practices hinder Parliament's ability to counter-balance executive dominance. The Covid-19 pandemic is used as a case-study to highlight how the increasing reliance upon executive law-making, in absence of a legislative body that is able to carry out proper scrutiny, is ultimately augmenting the process of erosion, undermining in particular two key pillars of constitutional liberal democracies: the rule of law and parliamentary or popular sovereignty.

In particular, the paper uses the United Kingdom and Italy as models to identify and illustrate this specific pattern of degradation. Despite the profound differences that lie between the two constitutional legal orders, the two can be assessed together as they are both parliamentary democracies that are characterized by a confidence relationship between Government and at least one Chamber of Parliament; neither of the two have a "constitutionally-enshrined emergency regime"[3], and they adopted specific institutional arrangements to manage the health crisis which did not necessarily include a prior involvement of the legislative body. The overview of the normative framework and of the legal instruments that the two legal orders used to face the pandemic will highlight a common trend, and that is an overall preference for executive law-making to manage emergencies: delegated legislation (particularly statutory instruments (SIs)) in the UK, and statutory decrees[4] in Italy. It is important to underscore, however, that this inclination towards secondary legislation is a mere amplification of a phenomenon that was evident well-before the pandemic, and although there is nothing unconstitutional about secondary legislation in either legal orders, these sources of law are connected to pre-existing issues that point towards a specific process of constitutional degradation. For this reason, I will only focus on specific structural weaknesses that are evident in both exceptional and ordinary times, and that relate to Parliaments' difficulties in managing the executives' law-making activity.

2. *The weakening of the Westminster model*

2.1 *Legal layout to manage the pandemic*

Before turning to the struggles faced by Westminster Parliament in overseeing the executive's normative activity throughout the Covid-19 emergency, and therefore depicting one of the patterns of constitutional degradation that the legal order is witnessing, it is necessary to understand the legal layout that was used in the United Kingdom to manage the pandemic. The framework consists of two main statutes, which both confer significant law-making powers to the executive: the Public Health (Control of Diseases) Act 1984 and the Coronavirus Act 2020. The decision to use the latter statutes has been a point of contention both within and without Parliament[5], as although there is no formal constitutional procedure for declaring a national state of emergency, the Civil Contingencies Act 2004 is a "statutory

[3] A. GOLIA ET AL., *Constitutions and Contagion–European Constitutional Systems and the Covid-19 Pandemic,* in *HJIL,* 2021, 147-284.

[4] Although the terms "law-decrees" or "decree-laws" are mostly used by scholars, I refer to the term used in the *Lex-Atlas: Covid-19 Compendium*. See J. KING, O. FERRAZ (eds.), *The Oxford Compendium of National Legal Responses to Covid*-19, Oxford, 2021.

[5] K. EWING, *Covid-19: Government by Decree*, in *King's Law Journal,* 2020, 1; A. BLICK, C. WALKER, *Why did government not use the Civil Contingencies Act?*, in *Law Soc. Gazette,* 2 April 2020.

framework functionally equivalent to it"[6]. Furthermore, as some commentators have highlighted, the 2004 Act includes a series of requirements which amount to a stronger system of parliamentary scrutiny than the one applicable under the statutes that were used to face the pandemic[7].

As the Coronavirus Act's Explanatory Notes specify, its purpose is «to enable the Government to respond to an emergency and manage the effects of a Covid-19 pandemic», and it «contains temporary measures designed to either amend existing legislative provisions or introduce new statutory powers which are designed to mitigate these impacts»[8]. Section 89 includes a sunset clause, according to which the statute will expire two years after the date of its passage; however, section 90(2) provides that a "relevant national authority" (a Minister of the Crown) can postpone the expiry date of any relevant provision of the Act for a period of up to six months and there is no limit to the number of times an extension may be given[9].

Commentators immediately pointed out that the 2020 Act deals with only some of the crisis' effects and provides for only part of the powers necessary to deal with it[10]; consequently, Government used other sources of legal authority, in particular the Public Health (Control of Disease) Act 1984. The latter provides that ministers may, by means of regulation, «make provision for the purpose of preventing, protecting against, controlling, or providing a public health response to the incidence or spread of infection or contamination in England and Wales». The use of the 1984 Act is subject to few restraints, as there is no formal requirement to declare an emergency as a pre-requisite to exercise emergency powers, and it is possible to introduce regulations without any form of parliamentary approval or scrutiny[11]. Indeed, as some suggested, the use of the 1984 Act «meant that the government's accountability to Parliament […] was extremely limited and the law-making process lacked transparency»[12].

Other commentators, however, argued that Westminster suffered a lesser loss of its "constitutional position" compared to other European Parliaments, especially due to its long-lasting oversight mechanisms[13]. Indeed, evidence given to the Constitution Committee repeatedly observed that select committees of both Houses played a significant role in holding government to account[14], but the former observation does not consider that although Parliament did carry out a constant scrutiny of Cabinet's actions, the extent to which it managed to do so was severely limited by two factors: (i) the fact that Government has complete control over the House of Commons' agenda; (ii) Parliament's difficulty in overseeing delegated legislation. Both are considered by political and legal experts as crucial

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[6] J. KING, N. BYROM, *United Kingdom: Legal Response to Covid-19*, in J. KING, O. FERRAZ (eds.), *The Oxford Compendium of National Legal Responses to Covid-19,* Oxford, 2021.

[7] J. KING, N. BYROM, *United Kingdom*, cit.; A. BLICK, C. WALKER, *Why did government*, cit.; House of Lords Constitution Committee, *Covid-19 and the use and scrutiny of emergency powers* (HL 2021-22, 15), 10 June 2021.

[8] Explanatory Notes to the Coronavirus Act 2020.

[9] The 2020 Act is set to expire at the end of March 2022, unless the Government chooses to extend the provisions. At the time of writing, the Public Administration and Constitutional Affairs Committee is carrying out an inquiry which examines the extension process and the evidence that the Government should produce to justify such an extension.

[10] K. EWING, *Covid*-19, cit., 12.

[11] K. EWING, *Covid*-19, cit., 13.

[12] Study of Parliament Group, *Parliaments and the Pandemic*, in *Study of Parliament Group*, 2021.

[13] A. GOLIA ET AL., *Constitutions and Contagion*, cit., 196.

[14] J. KING, N. BYROM, *United Kingdom*, cit.; House of Lords Constitution Committee, *Uncorrected oral evidence: The constitutional implications of Covid-19*, 24 June 2020.

concerns about the British institutional arrangement, significantly limiting Parliament's (especially the House of Commons') capability of holding the executive accountable for its actions. Due to word restraints, I will focus merely on the latter, although it is important to bear in mind that the former plays a fundamental factor in the asymmetric relationship between the Commons and Government[15], and therefore also in the process of constitutional degradation.

2.2 *Lack of accountability over delegated legislation*

The pandemic led to a considerable increase in secondary legislation, further strengthening a trend that had already become evident in the years prior the Covid-19 outbreak[16]. Indeed, Brexit had inflated the government's reliance on delegated legislation as a method of governance, so much so that the Supreme Court referred to this issue in the *Miller (no. 2)* case, when it identified parliamentary scrutiny of delegated legislation, as well as calling ministers to account, as reflecting the "constitutional principle" of "parliamentary accountability"[17]. One of the main problems about secondary legislation partly relates to Parliament's difficulties in overseeing the executive's decisions, and this was made evident during the pandemic, as scholars and several parliamentary inquiries emphasized the lack of accountability over delegated legislation[18]. This may be considered a significant element of the process of constitutional degradation, as Parliament's ability to oversee the executive is not only a key ingredient of the principle of parliamentary sovereignty, but it is also instrumental to ensuring the rule of law. This was also underlined by the Joint Committee on Statutory Instruments (JCSI), when it stated that overseeing SIs enhances transparency, as «laying before Parliament is not a meaningless formality, but an important part of access to justice and the rule of law»[19].

Secondary legislation is law created primarily by Ministers of the Crown under powers given to them by an Act of Parliament, and SIs are the most frequently used type of secondary legislation. Parliament can either approve or reject an SI (therefore, with just a few exceptions, SIs cannot be amended), and the Houses' oversight generally depends on whether they follow the negative or affirmative procedure. Data indicates that Parliament's capability to pressure the executive was severely limited by the extensive use of the negative procedure. Indeed, at the time of writing, of the 570 Coronavirus-related SIs laid before Parliament, 408 were subject to the "made negative" procedure, meaning that the SI was laid before Parliament after it had been signed into law by the Minister, and could be annulled if a motion to do so was passed by either House within 40 days of it being laid. Of the 570 SIs, 117 were subject to the "made affirmative" procedure, i.e., the SI was laid before Parliament after it had been

[15] See M. RUSSELL, D. GOVER, *Taking Back Control,* London, 2021; M. RUSSELL, *Boris Johnson and parliament: misunderstandings and structural weaknesses*, in *The Constitution Unit*, 5 February 2021.

[16] Well over 600 SIs were made to give effect to Brexit, and 570 Coronavirus-related SIs were laid before the UK Parliament. For updates see: *Coronavirus Statutory Instruments Dashboard* in *Hansard Society* (last updated 31 January 2022). See also House of Lords Constitution Committee, *The Legislative Process: The Delegation of Powers* (HL 2017-19, 225), 20 November 2018.

[17] *R (Miller) v The Prime Minister*; *Advocate General for Scotland v Cherry* [2019] UKSC 41, para. 46.

[18] J. KING, N. BYROM, *United Kingdom*, cit.; House of Lords Constitution Committee, *Covid-19*, cit.; House of Lords Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament* (HL 2021-22, 105), 24 November 2021.

[19] Joint Committee on Statutory Instruments, *Transparency and Accountability in Subordinate Legislation* (2017-19, HL 151, HC 1158), 5.

signed into law but could not remain law unless it was approved by the House of Commons (and in most cases also the House of Lords) within a statutory period. Finally, 42 were subject to the "draft affirmative" procedure, so the SI was laid before Parliament and could not be made into law by the Minister unless and until it was approved by the House of Commons and in most cases also the House of Lords[20]. The latter is considered as one of the highest forms of parliamentary scrutiny when it comes to SIs[21], and the lesser extent to which this procedure was used, even as the level of contagion dropped, is a significant indicator of the asymmetric relationship between Cabinet and Parliament, which needs to find a proper equilibrium in the latter's ability to effectively oversee the former. Furthermore, the fact that most SIs were subject to the "made negative" procedure also indicates that the SIs that were laid throughout the emergency embodied the will and policy of government only, and it is once again symptomatic of the marginalization undergone by Parliament as well as the weakening of constitutional safeguards such as the rule of law. This is especially true if we consider that more than half of the SIs subject to the negative procedure also breached the 21-day rule[22], which provides that SIs that are subject to negative procedure should generally be laid at least 21 days before they are due to come into force. This procedural rule aims to guarantee the principle of legal certainty.

Further complaints were raised about the delay that ran between the making and debating of health regulations, as it prevented appropriate parliamentary scrutiny; for example, in some cases, the SIs that had been made had already been amended by the time the debate had been scheduled[23]. This issue was also highlighted by the Speaker of the House of Commons, who asserted that «the way in which the Government has exercised its powers to make secondary legislation during this crisis had been totally unsatisfactory. All too often, important [SIs] have been published a matter of hours before they came into force, and some explanations why important measures have come into effect before they can be laid before this House have been unconvincing; this shows a total disregard for the House»[24]. One of the most recent and blatant examples concerns the approval of "Plan B", which was announced by Cabinet on 8 December 2021, and was set to be debated by the House of Commons on 14 December. As part of Plan B, the government identified a set of stringent measures (including compulsory face-masks in most public indoor venues and mandatory NHS Covid Pass in specific settings) which it meant to introduce via regulations, made into law in the form of SIs; indeed, the latter were laid before the House of Commons between 9-13 December. It is worth noting that the government used the emergency procedure under Section 45R of the Public Health (Control of Disease) Act 1984 to introduce Covid passports, and therefore the mandatory requirement came into force from the outset, limiting the House of Common's role to a mere *ex post* (rubber-stamp) approval of the SI. The timetable that was set to debate the regulations impeded any proper scrutiny to take place, limiting MPs' possibility to effectively read the legislation or any supporting material.

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[20] *Coronavirus Statutory Instruments Dashboard*, cit. Two SIs were laid only, and one was subject to a strengthened scrutiny procedure.

[21] R. CORMACAIN, *Parliamentary scrutiny of coronavirus lockdown regulations: a rule of law analysis,* in *Bingham Centre for The Rule of* Law, 28 September 2020.

[22] J. JONES, *Reliance on secondary legislation has resulted in significant problems: it is time to rethink how such laws are created,* in *The Constitution Unit*, 13 October 2021.

[23] Secondary Legislation Scrutiny Committee, *Covid-19 legislation: obstacles to Parliamentary scrutiny* (HL 2019-21, 84).

[24] HC Deb 30 September 2020, vol. 681, col 331.

This episode also recalls an issue that may be considered as another ingredient of the process of constitutional degradation outlined so far: the fact that Cabinet supplied little information about the scientific basis on which the measures had been designed, as well as the absence of any parliamentary committee with the expertise to scrutinize the scientific rationale of such measures, meant that most of the rules could not be seriously challenged. These elements, together with the limited time that was allotted to debate, entailed that Parliament had no option but to waive policies through. This was also the case for the periodic six-monthly reviews required by the 2020 Act, which compel both Houses to vote on a motion providing that the temporary provisions of the Coronavirus Act 2020 should not yet expire (s. 98). The section is framed in such a way that it is a yes/no binary vote on continuing or discontinuing most of the Act. As commentators reported, «'all or nothing' renewal/continuation/expiry motions are a useful formula to create the appearance of parliamentary control but restrict the options in a way that severely constrains parliamentary agency»[25]. Indeed, even if the six-monthly vote was presented as a concession to concerns of parliamentary scrutiny, its capacity to operate in such a way was always limited by its form, basically amounting to a rubber-stamping exercise.

It has been fairly noted that there is nothing inherently unconstitutional about using SIs[26], rather they can be a useful instrument to prescribe technical or procedural detail. However, some of the powers conferred to ministers may be very wide and may go well beyond mere technical or procedural matters. Indeed, the pervasive use of secondary legislation that was registered with Brexit and that was further exacerbated with the Covid-19 emergency shed light on the set of issues assessed so far, underscoring Parliament's severe difficulties in properly scrutinizing government's work. The dominant use of secondary legislation without the introduction of proper procedural mechanisms that are aimed at re-establishing a balance between the executive and Parliament is a key element of the process of constitutional degradation, insofar as the executive's power are widened without effective constitutional checks that balance it, ultimately undermining the two core principles of rule of law and parliamentary sovereignty.

3. *The Italian Parliament: always one step behind?*

3.1 *Legal layout to manage the emergency*

The Italian Constitution does not provide for a state of emergency, but the Government may issue statutory decrees in cases of necessity and urgency (art. 77). The latter are primary sources of law whose force is limited in time; in fact, they must be transposed into statute by Parliament within 60 days from their enactment, failing which they lapse. During the conversion process, Parliament may modify the statutory decree, but the amendments must strictly adhere to the subject matter of the decree[27]. The executive reasonably resorted to these sources of law to manage the pandemic, and it also heavily relied on the provisions introduced by the Civil Protection Code 2018[28], which regulate a statutory state of emergency.

[25] F. DE LONDRAS, *Six-Monthly Votes on the Coronavirus Act 2020* in *UK Cons. L. Blog*, 25 March 2021.
[26] J. JONES, *Reliance on secondary legislation*, cit.
[27] Decision n.32/2014 (Constitutional Court).
[28] Delegated statutory decree n. 1 (2 January 2018).

The latter was declared on 31 January 2020 and has been prolonged several times[29], leading to "an entirely new legal framework" which provided emergency powers by resorting to statutory decrees[30]. More specifically, during the former stage of the emergency, statutory decrees repeatedly authorized the adoption of Prime Minister decrees (PM decrees) to institute and adjust the different lockdown phases, subject to proportionality scrutiny and with a duration of 50 days[31]. PM decrees, however, do not require Presidential enactment (whereas statutory decrees do), nor do they entail parliamentary scrutiny, and in light of the sensitive nature of the restrictions that PM decrees were enforcing, complaints were soon raised by opposition parties, as well as by key parliamentary figures. The Speaker of the Senate, for example, strongly encouraged the Cabinet to re-establish a dialogue with Parliament, lest it undermined the role of the legislative body during a national crisis[32]. Since March 2021, due to the pandemic's evolution as well as the pressing demands exhorted by MPs, the use of PM decrees gradually decreased, and the executive entirely resorted to statutory decrees to lay down the wide array of necessary measures to manage the pandemic[33]. But the timing is not a coincidence. Indeed, as of Spring 2021, most measures that were enforced could not have been introduced by an administrative act. Indeed, in April 2021, the Government enforced the first mandatory vaccination requirement, which, following Art. 32 of the Constitution, may only be imposed through a primary source of law, and between Spring and Summer 2021, the government also introduced the Green Covid-19 Certificate requirement, whose scope of application significantly increased with time.

The Italian Parliament stumbled its way through as it tried its best to keep up with the executive's normative activity, but the former's difficulties are nothing but the consequence of earlier problematic features of the relationship between Parliament and Government. Indeed, the abundant reliance on statutory decrees is an issue that pre-dates the Covid-19 emergency[34]; in the past three legislatures, for example, governments issued an average of 2.34 statutory decrees per month. The Cabinet led by Mario Draghi has adopted the most statutory decrees in the past three legislatures, with an average of 3.82 statutory decrees per month[35]. The reasons why the Draghi government has relied so significantly on statutory decrees lie in the pandemic as well as in the need to implement the necessary policies related to the Recovery Fund, but it is also conditioned by the vast and ambiguous political nature that the government embodies. As the next section will highlight, the dominance of executive law-making and Parliament's inability to secure a firm voice in the institutional design keeps complicating the process of constitutional degradation; indeed, the abundant reliance on statutory decrees and Parliament's difficulties in overseeing and holding the government to

[29] At the time of writing, statutory decree n. 221/2021 extended the state of emergency to 31 March 2022.

[30] S. CIVITARESE MATTEUCCI ET AL., *Italy: Legal Response to Covid-19* in J. KING, O. FERRAZ (eds.), *The Oxford Compendium,* cit.

[31] There is an ongoing debate about the nature of PM decrees, and whether they are normative or administrative acts. In decision n. 198/2021, the Constitutional court excluded the normative nature of PM decrees. For further insight, see: A. ARCURI, *La Corte costituzionale salva i dpcm e la gestione della pandemia. Riflessioni e interrogativi a margine della sent. n. 198/2021*, in *Giust. Ins.*, 19 January 2022.

[32] Senate of the Republic XVIII Legislature, Press release, 22 March 2020.

[33] For further insight, see S. CIVITARESE MATTEUCCI ET AL., *Italy: Legal Response*, cit.

[34] S. CIVITARESE MATTEUCCI ET AL., *Italy: Legal Response*, cit.; A. GOLIA ET AL., *Constitutions and Contagion*, cit.; N. LUPO, *Così l'emergenza pandemica ha aggravato la crisi del procedimento legislativo in Italia,* in *LUISS School of Government Policy Brief n.13/2020*; S. CURRERI, *Il Parlamento nell'emergenza: resiliente o latitante?* in *Quad. Cost.*, 2020, 4.

[35] *Il 2021 del governo Draghi in numeri,* in *Openpolis*, 19 January 2022.

account are determining an unchecked increase of executive power, putting the rule of law and popular sovereignty under considerable strain.

3.2 *The lack of scrutiny over Government's decision-making activity*

As previously mentioned, statutory decrees are everything but exceptional in the Italian legal order, especially if you consider that more than half of primary legislation is adopted through them[36]. Nevertheless, the way Government used this source of law throughout the emergency perfectly illustrates the entire spectrum of issues that evolve around this specific legislative instrument, and it underscores that Parliament's ability to engage in effective scrutiny is significantly limited by «issues which not only relate to how the executive exercises its statutory decree-making powers, but also to the general relationship between Parliament and Government»[37]. For example, an instrument that was heavily used by Government before the pandemic, and that was widely employed throughout the emergency, is the question of confidence. Indeed, the past eight governments have placed an average of 2 questions of confidence per month[38]. According to the Houses' Rules of Procedure, if the Government moves a question of confidence in relation to the upholding of a section, and the House votes in favor, the section will be approved, and all the amendments will be considered as rejected. This clearly limits Parliament's role as a pressuring body, especially since any discussion regarding amendments is completely precluded. The Government justifies the use of this instrument by qualifying the section/amendment on which the vote has been placed as an essential element of its political program, and if the section/amendment does not win the majority of votes, Government loses its support in the House and will have to resign. The question of confidence becomes particularly problematic when the Governments submits a maxi-amendment as the scrutiny of the bill draws to an end, and then places a question of confidence on it. A maxi-amendment is an amendment that entirely substitutes the text undergoing examination, at times even integrating provisions that were not included in the original document. When the government places a question of confidence on the maxi-amendment, any discussion regarding the amendment is completely ruled out. The fact that Parliament has less chances to debate entails that one of the most essential parts of continuous parliamentary scrutiny of Government is seriously compromised. Furthermore, similarly to the "six-monthly motion" examined in relation to the Coronavirus Act 2020, these "all or nothing" deliberations have such costly implications in political terms, that Parliament is backed into a corner, where its capacity to operate is substantially limited and its prerogatives are reduced to little more than ratifying executive proposals. Indeed, the executive resorted to both practices throughout the emergency and they may be considered as one of the most typical traits of the Italian process of constitutional degradation. To this extent, and as the Constitutional court has repeatedly admonished over the past years[39], Parliament's inability to exercise effective scrutiny is indeed a pathological element of a parliamentary form of government.

[36] N. LUPO, *Così l'emergenza pandemica*, cit.

[37] S. CIVITARESE MATTEUCCI ET AL., *Italy: Legal Response*, cit.; Observatory on Legislation of the Chamber of Deputies, *The 2019-2020 Report on Legislation between State, Regions and E.U.*, 28 July 2020. See also the Observatory's latest Report, published on 31 October 2021.

[38] *Il 2021 del governo*, cit.

[39] Decision n. 17/2019 and, especially, decision n. 60/2020.

Another problematic aspect of the way Government used statutory decrees is determined by the long series of decrees that it enacted, which often merged the content of one act into another. This issue was evident well before the pandemic and it surfaced with all its dubious nature during the emergency, further shedding light on the process of constitutional degradation that is characterized by a dominance of executive law-making that is not counter-balanced by proper parliamentary scrutiny. Especially in the former phase of the emergency, the executive issued a long series of statutory decrees which followed one another, so much so that scholars depicted the emergency legislation as a "normative chain"[40]. Consequently, the content of the statutory decree under examination by the House was often merged into the law transposing another statutory decree, which ultimately ordered the abrogation of the former statutory decrees which were not formally transposed into law. At a constitutional law level, this practice raises serious concerns about the temporary nature of statutory decrees (Art. 77 Const.), the unconstitutionality of the reiteration of statutory decrees[41], and the requirement that amendments introduced during the conversion phase must strictly adhere to the subject matter of the statutory decree. Needless to say, it also undermines Parliament's power to transpose the decree into statute, and therefore, indirectly, the checks that the Constitution provides to limit the executive's exercise of power. Furthermore, as the Committee on Legislation underlined numerous times, the merging of disparate statutory decrees may create an excessive heterogeneity and thus produce negative effects on the legislative process[42].

Finally, one of the main issues about statutory decrees is time. The Italian Parliament is "perfectly" bicameral, in the sense that the two Houses exert their legislative competence collectively, so that neither can prevail over the other. This means that both Houses must approve the same text of the bill for it to become law. However, due to time constraints in the conversion process of statutory decrees (i.e. the decree must be transposed into statute within 60 days from its enactment), only one of the two Houses has the real possibility of amending the statutory decree. This implies that amendments are introduced and approved by the House that first starts the reading of the bill, and they are rarely modified by the other. This is why scholars are increasingly talking about an inclination towards a de facto mono-cameralism[43]. Although this practice had already become a focal point of attention in recent years in relation to the approval of the budget law, it was definitely reinforced throughout the emergency and raised serious concerns about the perfectly bicameral structure of Parliament. Indeed, the overproduction of statutory decrees creates an institutional disequilibrium not only between Parliament and Government, but also within Parliament itself. Ultimately, the main burden of these degenerative practices, and the ensuing process of degradation, fall not only on the legislative body, but on the People, who are deprived of the possibility of having a functional elected body that can effectively oversee the executive and contribute to upholding the principles of liberal democratic constitutionalism.

[40] See E. LONGO, M. MALVICINI, *Il decisionismo governativo: uso e abuso dei poteri normativi del Governo durante la crisi da Covid-19,* in *Federalismi.it*, 2020.

[41] Decision n. 360/1996 (Constitutional Court).

[42] For example, Committee on Legislation, *Opinion on the Conversion Bill A.C. 2921*, 4 March 2021.

[43] E. LONGO, Le trasformazioni della funzione legislativa nell'età dell'accelerazione, Torino, 2018; G.T. BARBIERI, L'irrisolta problematicità del bicameralismo italiano tra intenti riformistici e lacune normative in Federalismi.it, 2019.

4. *Conclusion*

The Covid-19 pandemic confirmed the general idea that during emergencies executives tend to have the upper hand, and they indeed surfaced as the major actors «both as decision-makers and policy-generators»[44]. This is no surprise given that, as opposed to Parliaments, they can promptly take decisions and swiftly implement them. The pandemic also «exposed with great clarity just how fragile […] the twin principles of parliamentary accountability and transparency» are[45], shedding light on the structural weaknesses that are subject to the process of constitutional degradation.

The paper tried to stress that the patterns to degradation were already present well before the pandemic, and they especially relate to the executive's increasing monopoly over legislation and Parliament's difficulty in scrutinizing executive law-making. In relation to the former aspect, «executive dominance is not a novelty for representative democracies. [Indeed], in the last few decades, representative assemblies have been marginalized at least in their traditional role as legislators and decision-makers»[46]. Not only is this trend drastically eroding the principle of representation,[47] but it is also weakening the constitutional checks that are necessary to restrain the exercise of power. Legislative control over the acts and actions of authorities is in fact of «vital importance for safeguarding the rule of law and democracy», as Parliaments not only have to ensure that «governments continue upholding human rights and that emergency measures remain necessary and proportionate to the threat faced»[48]. but the publicity of their work becomes «a vector of the legitimacy of the actions undertaken by authorities»[49].

The pre-existing issues relating to the use of SIs in the UK and the use of statutory decrees in Italy that were outlined in the paper were instrumental to identifying some patterns to degradation. In particular, the paper tried to underscore how Parliament's inability to carry out proper scrutiny gives rise to a series of problems which relate more broadly to the institutional arrangement of a parliamentary democracy. In fact, oversight is a permanent and "multipurpose" function of Parliament, that is embedded in the confidence relationship and comprises the "limiting and sharing of executive power": it goes well beyond the mere holding ministers to account, as it makes possible «to guide political decisions and to participate in governmental action by influencing decision-making, by persuading or dissuading»[50].

Change is an inevitable feature of 21st century constitutionalism and we should not turn down the possibility of imagining that secondary legislation or executive law-making may become the main way of legislating. This is especially true if we consider the fast-evolving and highly-technicalized society we live in today, which necessarily demands prompt and specialized actions that Government is best equipped to enact. Nevertheless, to avoid that the dominance of executive law-making keeps feeding into the process of constitutional

[44] A. GOLIA ET AL., *Constitutions and Contagion*, cit., 182; E. GRIGLIO, Parliamentary oversight under the Covid-19 emergency: striving against executive dominance in Theor. pract. leg., 2020; A. FOURMONT, B. RICHARD, *Parliamentary oversight in the health crisis,* in *Robert Schuman Foundations European Issues n. 558,* 11 May 2020.

[45] A. GOLIA ET AL., *Constitutions and Contagion*, cit.

[46] E. GRIGLIO, Parliamentary oversight, cit.

[47] M. LOUGHLIN, *The Contemporary Crisis*, cit.

[48] M. LOUGHLIN, *The Contemporary Crisis*, cit.

[49] A. FOURMONT, B. RICHARD, *Parliamentary oversight,* cit. This view was advanced also by E. GRIGLIO, Parliamentary oversight, cit.: «Oversight on the floor of the House provides maximum publicity and transparency, which is an added value for connecting Parliament and the public».

[50] E. GRIGLIO, *Parliamentary oversight,* cit.

degradation outlined in this paper, we must reflect upon new methods of scrutiny and new ways to hold the Government to account. Indeed, the executive's monopoly of decision-making must be counter-balanced by proper parliamentary oversight, perhaps even in the post-legislative phase. This is crucial not only because parliamentary control can guarantee the rule of law, but also because Parliament still represents a public arena, where needs, complaints and issues can and must be voiced. In this respect, Parliament remains a standing pillar of liberal democratic constitutionalism and a garrison against the process of constitutional degradation we are witnessing today.

Andrea Vernata*

Governing Bodies and Representative Assemblies: time for a new balance?**

ABSTRACT: ***The essay aims to highlight how, in contemporary democracies, the strong interactions between representative assemblies and government - also considered as Executive branches - are leading to "eclipsing" parliaments' prerogatives. It also deals with the risks arising from these trends and the consequent verticalization of political power towards governments and supra-national entities, trying to underline the reasons behind such epilogue, in particular with regard to the tendency to address the issue of economic competition in terms of political competition.***

1. *Introduction*

It is clear that modern legal orders are marked by greater complexity than in the past. National States today must confront the encounter of their national rules with a multiplicity of super-national regimes, calling into question the traditional model of a hierarchy among the sources of law[1]. The complex network of interdependencies and connections that characterize States has led to a shift in the internal distribution of powers among their constitutional organs. At the same time, normative instruments have been slow to evolve so as to reflect these transformations, which require specialists able to manage an increasingly specific and sectorial multilevel law[2]. Representative democratic assemblies have difficulty to keep pace with this new situation[3].

In this context, it is not surprising that the delicate balance between legislative and executive powers has tipped in favor of government organs. The executive, which can call upon the kind of specialized administrative apparatus needed to respond to these new sources of law, has used this complexity to gain ground as the source of new rules at the expense of representative assemblies[4]. This has been manifested, first and foremost, in the increasing recourse to executive sources of law. It can also be found in the endowment of autonomous and independent technical organs with important rule-making functions[5]. More

* **Researcher in Constitutional Law, University La Sapienza in Rome.**

** **This work has been subjected to blind peer review.**

[1] On this issue see, in particular, the considerations in A. PIZZORUSSO, *La produzione normative in tempi di globalizzazione,* Torino, 2008, and in H.V. MORAIS, *The Quest for International Standards: Global Governance vs. Sovereignty,* in *Univ. Kansas L.R.,* 2002, 50, *passim*.

[2] See M. SPAHIRO, "*Deliberative", "Independent" Technocracy v. Democractic Politics: Will the Globe Echoe the EU?,* in *Law contemp. probl.,* 2005, 68, 341 ff.

[3] This aspect has recently been highlighted by the works contained in M. DE BENEDETTO, N. LUPO, N. RANGONE (eds.), *The Crisis of Confidence in Legislation,* London, 2021.

[4] In this perspective, E. ETZIONI-HALEVY, *Bureaucracy and Democracy. A political Dilemma,* Boston, 2013, *passim.*

[5] M. MANETTI, *Le autorità indipendenti,* Roma-Bari, 2007; M. CUNIBERTI, *Autorità indipendenti e libertà costituzionali,* Milano, 2007; PATRONI GRIFFI, *Le Autorità amministrative indipendenti nell'ordinamento costituzionale: profili problematici di ieri e di oggi,* in *Rass. dir. pubbl. eur.,* 2015, 2, 6 ff.; E. CHELI, *Le autorità amministrative indipendenti nella forma di governo,* in *Ass. per gli studi e le ricerche parlamentari. Quaderno n. 11,* Torino, 2000, 129 ff.

recently, we also find an increase in legislative procedures focused primarily on supporting governmental choices, relegating parliament to the role of merely approving these choices[6].

However, it is not only the increase in complexity of the objects of rules that has affected the balance between executive and legislative organs. Globalization and financial markets, with their tendency to draw States into a system of interaction and interdependence at a super-national level[7], seem to have favoured (or perhaps even promoted) a verticalization of power[8]. This reinforces executive organs, the primary players in the process of globalization, as they can assume obligations at this level and offer the reliability that these processes require. Not surprisingly, the result is the tendency to encourage the stabilization of political leaders and reinforcing of government prerogatives: a trend accelerated by a resurgence of nationalism[9] and populism, which directly involves the idea of democracy and constitutionalism itself.

These themes relate directly to the theoretical study of modern constitutionalism and require us to reconsider its foundations, including the principle of separation of powers and sovereignty. As such, it is opportune to study these dynamics to understand their impact and, in particular, the factors able to bring the constitutional institutions of modern democracies into balance, avoiding the exacerbation of the constitutional degradation process. The aim is to evaluate if the shifting balance between the legislative and executive powers is part of the natural evolution of legal orders, or if it is instead a symptom of a much deeper institutional pathology.

2. *The Parliament between the Government and the Executive branch*

In the Western world, there has been an acceleration in the process by which the powers of executive organs are being strengthened and national parliaments consequently transformed into "chambers of ratification"[10]. Pluralism has become confined to the space of the representative chambers, thus laying the groundwork for an Executive that may act benefiting from rules on publicity and transparency[11] that are far less invasive compared to

[6] G. AZZARITI, *Diritto o barbarie, Il costituzionalismo moderno al bivio,* Roma-Bari, 2021, 253-254; N. LUPO, *Emendamenti, maxi-emendamenti e questione di fiducia nelle legislature del maggioritario,* in E. GIANFRANCESCO, N. LUPO, *Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione,* Roma, 2007, 41 ff.; D.J. MUCHOW, *The Vanishing Congress,* Washington D.C., 1976, 202 ff.; P. AVRIL, *Qui fai la loi?,* in *Pouvoirs,* 2005, 3(114), 89 ff.

[7] S. CASSESE, *Poteri indipendenti, Stati, relazioni ultrastatali,* in *Il Foro it.,* 96, 119; M.R. FERRARESE, *Prima lezione di diritto globale,* Roma-Bari, 2012, 22 ff., but also consider the financial markets framework and the impact of their "harbingers", i.e. credit rating agencies (more fully on this perspective see A. VERNATA, *Costituzione, rating e sovranità nello spazio giuridico globalizzato,* in *Dir. pubbl.,* 2018, 3, 979 ff.

[8] See G. AZZARITI, *Diritto o barbarie*, cit., 50 ff.; A. LUCARELLI, *Teorie del presidenzialismo. Fondamento e modelli,* Padova, 2000; C. DE FIORES, *Partiti politici e Costituzione. Brevi riflessioni sul decennio,* in *Costituzionalismo.it,* n. 1 del 2004.

[9] In this direction, still current A. GRAZIANI, *Lo sviluppo dell'economia italiana. Dalla ricostruzione alla moneta europea,* Torino, 1998, 227.

[10] See note 5.

[11] On the central role of this principle in reference to modern constitutionalism and the democratic principle see. J. HABERMAS, *Storia e critica dell'opinione pubblica*, Roma-Bari, 2015*, passim*; ID*., Morale Diritto Politica,* Torino, 1992*,* 81 ff.; P. RIDOLA, *Diritto comparato e diritto costituzionale europeo,* Torino, 2010, 304-340, and F. POLITI, *Il principio di trasparenza,* in S. MANGIAMELI (ed.), *L'ordinamento europeo. L'esercizio delle competenze***,** vol.

those binding on parliaments. Moreover, as we will see below, the new global economic competition[12] has led certain political movements to promote a demonization of some traditional features of democracy, like the compromise, the political mediation and pluralism itself.

Another transformation has taken place in the relation between political decisions and political responsibility[13], which tends to facilitate the factual overcoming of the limits imposed by the democratic process. The relation between political decisions and political responsibility seems weakened also due to a multiplication of regulatory bodies at supranational level without clear mechanisms of legitimization, which fades the clear allocation of political responsibilities and increase the distrust of constituencies towards non-national organisms, with an adverse effect on multilateralism.

At national level, decades spent verticalizing power and political representation have favored the strict selection of the political class[14], often giving rise to the subordination of the membership of a political party to its leadership[15]. The reasons for the lack of parliamentarians undertaking a "decisive" exercise of its powers of direction and control over the executive are therefore entirely political: that the party would not endorse the undisciplined parliamentarian in the next elections and - in the meantime - him would be ostracized by the media[16].

All this guarantees a *souple* exercise of parliamentary prerogatives, which therefore tend to remain under the thumb of the Executive, coinciding with the leadership of the party.

However, the reinforcement of the Executive not only reinforces the Government but - more generally - also the upper levels of the administrative bureaucracy. Whether or not there are spoil system mechanisms present, the directors of agencies take on the role of "filters of information" [17] for the enormous amount of quantitative and qualitative data under the purview of the public authorities. In the first place, this significantly weakens the activity of the Government, which must rely on information and data that it cannot possibly verify without the collaboration of the same directors that provided the data in the first place. But secondly, it demonstrates how hard – or impossible – it can be for representatives to control the Executive branch and conduct investigations.

This problem - part of the well-known question of the relationship between technical and political organs - is certainly not new, but the situation today is different from that of the past in two ways. First, as we have seen, the representative chambers have little incentive to exercise their powers of supervision over the actions of the Government due to tendency

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2, Milano, 2006, 280, who recalls those principles that, according to Häberle, characterize the modern constitutional; see P. HÄBERLE, *Stato costituzionale: I) Principi generali,* in *Enc. giur.,* IX, Roma, 2001.

[12] On this topic, N. FELDMAN, *Cool War: The United States, China, and the Future of Global Competition,* New York, 2015.

[13] In this terms, G.U. RESCIGNO, *Trasformazioni e problemi della responsabilità politica oggi,* in G. AZZARITI (ed.), *La responsabilità politica nell'era del maggioritario e nella crisi della statualità*, Torino, 2005, 14, has doubts that, at supranational level, the bond between the exercise of power and responsability can be considered maintained.

[14] See M. WEBER, *La politica come professione* (1919), Torino, 1976, 45 ff., and P. MAIR, *Ruling the void. The hollowing out of western democracy,* London, 2016, 9 ff.

[15] H. TRIEPEL, *La Costituzione dello Stato e i partiti politici* (1927)*,* Napoli, 2015, 3 ff.

[16] With particular regard to the relationship between media and party leadership see B. MANIN, *Principi del governo rappresentativo,* Bologna, 1995, 246 ff.

[17] On this issue, see M.S. LARSON, *The production of expertise and the constitution of expert power,* in T. HASKELL (ed.), *The Authority of experts: studies in history and theory,* Bloomington, 1984, but most widely see J. MEYNAUD, *Technocracy,* New York, 1969; R.D. PUTMAN, *Elite Transformation in Advanced Industrial Societies,* in *Comp. pol. stud.,* 1977, 10(3), 385-387; F. FISCHER, *Technocracy and the Politics of Expertise,* London, 1990.

towards the (political) subordination of the former to the latter, discussed above. Second, parliaments lack technical organs capable of challenging government claims[18] and the data on which they are based, in a context much more complicated than in the past and often characterized by a multilevel governance.

Even where such organs are present, they tend to be structured to merely "verify" the Executive's claims, but rarely are they not dependent on information and data provided by the government itself. The potential impossibility of independently collecting information and the substantial disappearance of the party structure, which in some way mirrors that of the public agencies, inevitably ends up relegating the representative chambers to the role of an observer of government decisions, directly affecting the very principle of the separation of powers.

In this context, it is not the representative chambers but the executive branch - understood as the leadership of the administrative apparatus - that becomes the most solid and natural interlocutor of the government and stakeholders. The Executive holds information, serves as a gatekeeper for legislative activity, has a permanent structure[19], a technical know-how and, free from the dynamics of consent, is therefore considered to be a more reliable interlocutor. This has implications on two levels. First, it has an effect on the form of government, as the Executive-Government connection entails the substantial pre-eminence of government policies over those of parliament - which must have recourse to any means available to overcome the administrative-government "block". Second, it influences the legislative level, because the Executive – in addition to the Government – tends to take on a role in the globalization process due to the fact that it can provide greater continuity at the level of national policies, especially towards stakeholders. The most extreme result in these cases seems to be the substantial exclusion of the representative chambers from the definition of any policies: pluralism gives way to decision-making[20]. and the idea that the former is the most dangerous obstacle to success of the latter gains ground.

3. *A new balance for a rediscovery of democracy?*

Similar trends seem to be taking place at a higher level as well.

Over the last few decades, Western democracies have found themselves facing a situation that is largely unprecedented at a geopolitical level. A new world bloc has embarked on an economic strategy which, on the one hand, has extended its sphere of influence over Western economies to the point of making them dependent on their own economy in many respects (even if only on the supply side), while on the other it has pursued - and almost achieved - national economic self-sufficiency[21]. In this context, the Western sphere of influence has not only been greatly reduced, but has also been put to the test by a broader crisis, initially economic in nature, then extending to the political and social spheres.

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[18] On this matter and for greater deepenings see A. VERNATA, *L'Ufficio parlamentare di bilancio. Il nuovo organo ausiliare alla prova del primo mandato e della forma di governo,* Napoli, 2020, 161 ff.

[19] See M. WEBER, *The Nature of Charismatic Domination,* in W. RUNCHIMAN (ed.), *Max Weber: Selections in Translation,* Cambridge, 1978, 226-250.

[20] E. OLIVITO, *Le inesauste ragioni e gli stridenti paradossi della governabilità,* in *Costituzionalismo.it,* n. 3 del 2015, 39 ff.

[21] *Ex multis,* A. BROWNE, *Self-Reliance is China's Endgame,* in *Bloomberg,* 10 December 2021.

The worsening of economic inequalities, together with the resurgence of poverty, unemployment and the kind of class-based society that the welfare state was supposed relegate to the past, has shaken the foundations of pluralist democracy[22]. Economic planning - the main tool of economic policy - has been largely absent, instead giving way to a kind of neoliberalism that has met no limits, with the sole exception of policies to combat climate change[23] and (now) with the EU Recovery plan. Instead, economic planning has been used in all its potential in the new world bloc, directing the system of production from the start towards proper purposes of the tool of economic planning, that is those of a political nature.

It is therefore no surprise that the regulation of the marketplace in a multi-year and finalistic perspective has led to much higher rates of growth than where the options has been to leave the market to its own devices[24]. However, what has been surprising has been the tendency of Western political systems to validate the criticism that democratic processes are the true obstacles within the new competition between the global hegemonies. In other words, instead of questioning the neoliberal paradigm and taking advantage of the possibility of directing the economy (as is being undertaken, in fact, for climate change), there has been a tendency to look at the processes of democratic legitimation with suspicion, arguing that concepts such as "the general interest" and "consensus" are irreconcilable and explaining the prevalence of the Chinese bloc over the Western one as the result of its decision-making structure[25]. These beliefs have inexorably ended up transforming economic competition in a conflict between political models, which has taken on the guise of a struggle between models of the basis of power and its limits (the real question is: democracy *vs* what?). The verticalization of power has therefore gained new momentum and, as is typical of all conflicts, the logic of identitarianism and plebiscitarism have gained ground: it is a quest for a political authority that can do all, salvific, able to respond to contingency by compensating any formal transgressions with the *furor populi*. At the same time, the paradigm of modern constitutionalism[26] is severely tested by the attempt to free the political authority from the forms and procedures put in place to defend pluralism and guarantee rights, which are presented as obsolete hindrances and obstacles to facing new global challenges.

In this context, it is clear that the economic and social challenges of the present – made worse by the pandemic - will advocate a new institutional equilibrium in Western democracies. Less clear is in which way the democratic consensus will be interpreted by the political system.

In a constitutional perspective, such consensus must necessarily aim towards the objectives of social transformation and freedom from poverty that have characterized the long path of modern democracy. So, this approach certainly cannot exclude reforms to readjust the balance among institutions with a view to its rationalization but, at the same time, it imposes that this adjustment should not crystallize the process of the verticalization of power and the consequent surmounting of democratic pluralism, whatever the cause, nature and origins of

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[22] On the importance of giving a direction to the democracy see J. SCHUMPETER, *Capitalismo, socialismo, democrazia,* Milano, 1964, 231 ff.

[23] The reference is to the European Green Deal; on this subject see, in particular, R. DE PAOLIS, *Constitutional Implications: The European Green Deal in the Light of Political Constitutionalism,* in *Riv. quadr. dir. amb.,* 2021, 1, 112 ff.

[24] See L. FERRAJOLI, *La democrazia attraverso i diritti. Il costituzionalismo garantista come modello teorico e come progetto politico,* Roma-Bari, 2013, 146 ff.

[25] See D.A. BELL, *The China Model: Political Meritocracy and the Limits of Democracy,* Princeton, 2015.

[26] To provide a foundation to the power and to limit it, as highlighted by G. AZZARITI, *Diritto e conflitti. Lezioni di diritto costituzionale*, Roma-Bari, 2010, 347 ff.

such processes may be. This can be done, for example, by recognizing the failures and contradictions of markets left to their own devices with respect to these objectives and by rediscovering the tools of economic planning[27], not only to oppose ongoing trends, but to propose solutions aimed at achieving social emancipation and progress.

Only through such a rediscovery will Western democracies be able to resist the rise of identity politics and rediscover the virtues of pluralism, preventing the pitfalls of the *Freund-Feind* opposition[28] and the imbalances in the relations between powers. While the reaffirmation of the theoretical principles of modern constitutionalism may not be able to prevent a new global hegemonic order on their own, they would nevertheless offer a basis for reaffirming the centrality of the person and pluralistic society within constitutional systems. The choice, in other words, is between the inertial abandoning of the constitutionalist paradigm and its reaffirmation, with the understanding that the political, economic and social perspectives of the first choice are far from reassuring, while the virtues of the second are yet to be unfold.

[27] In this perspective, the EU Green Deal and the US Climate change agenda seem to be the first steps towards a reconceptualization of the economy and a rediscovery of the importance to give a political direction to the markets.

[28] See C. SCHMITT, *Le categorie del politico* (1929), Bologna, 1972, 113 ff.

Giuseppe Naglieri*

Overturning the Pillars of Democratic Representation Trough Modern Technology-Based Partisan Gerrymandering**

ABSTRACT: ***In July 2019, the Supreme Court has definitely shut the door of the federal courts to partisan gerrymandering: it found the question to be non-justiciable under the political question doctrine, since the impossibility of finding a judicially manageable standard. The reasoning of the majority opinion overrode the impact of modern partisan gerrymandering on the american democracy: electoral maps are today the outcome of an intensive profiling work of the electorate, made by collecting and cross-checking an enormous amount of data through a massive use of technological sophistication, so that the majority party can secure itself districts with an almost certain pre-determined winner. Thus, technology becomes the tool to schedule and maximize electoral outcomes, overturning the very same essence of representative democracy. The fact that the Supreme Court refused to provide remedy to this manifest breach of the Constitution leaves open the debate about the alternative ways to stop it and the effects on the constitutional order.***

1. *Modern partisan gerrymandering as factor of constitutional degradation*

In their *"How to save a Constitutional democracy"*, Tom Ginsburg and Aziz Huq, identify three functionally intertwined elements under which a country can truly define itself as a liberal constitutional democracy.

The first among these is the presence of a democratic electoral system after which the losing sides concedes power to the winning side[1]. Following Schumpeter's argument, the authors believe that free and fair elections entail the genuine possibility of alteration of the actual political power: that means that whenever the electoral system is inelastic to the choices of the electorate and does not allow his choices to affect the distribution of political power, the democratic nature of the constitutional system is at risk.

As it is unanimously believed, partisan gerrymandering ultimately makes as many electoral districts as possible non-competitive, allowing partisans to remain in power, thus degrading the value of the vote and jeopardize its freedom and equality: electoral outcomes in most states show that despite significant shifts in votes at the state level, the number of seats gained remains biased in favor of the partisan's party. As will be shown, this process of distortion of the electoral process is made even more serious by the use of modern technologies and carries consequences not only on the individual right to vote, but on the integrity of constitutional democracy overall: modern partisan gerrymandering can therefore be properly qualified as a factor of constitutional degradation.

* **PhD in *Principi giuridici e istituzioni tra mercati globali e diritti fondamentali*, Department of Law, University of Bari; PhD in *Ciencias jurídicas y sociales*, Faculty of Law, University of Málaga.**

** **This work has been subjected to blind peer review.**

[1] T. GINSBURG, A. HUQ, *How to save a Constitutional democracy*, Chicago, 2018, 10.

2. Beyond a desire for proportional representation: Rucho's approach to modern partisan gerrymandering

In the 2016 congressional elections, the average margin of victory in the constituencies of the House of Representatives stood at 37.1 percent[2]: the winning candidate, Democrat or Republican, won the seat with an average of almost 70 percent of the vote[3]. Of 435 single-member races, 33 ended with a margin close to 10 percent, and only 17 ended with a margin equal to or less than 5 percent[4]: in 9 out of 10 constituencies, the election results were clear even before the vote.

In the same elections, aggregate data at the national level show that with 49.1 percent of the popular vote, the Republicans won 241 seats, compared to 194 for the Democrats, who had also reached 48 percent of the votes cast[5]. If we look at the elections of 2014, the data appear to be roughly comparable[6], leading to the conclusion that, in that cycle, only 14 constituencies were truly competitive[7].

Election data at the state level reveal a scenario, if possible, even more biased: in 2012, in Pennsylvania, the Democrats won only 5 seats out of the 18 in the lower house, compared to 51 percent of the statewide popular vote; in 2014 in Maryland, the Democrats won 87 percent of the seats in the lower house, compared to a modest 57 percent of the popular vote; the same discrepancies revive in the most recent elections in Indiana, Kansas, Michigan, North Carolina, Ohio, Oklahoma, Virginia, Wisconsin and Wyoming[8].

Despite these alarming evidence showing significant distortions in the electoral process, the Supreme Court in July 2019[9], has definitely shut the door of federal courts to partisan gerrymandering: it found the question to be nonjusticiable under the political question doctrine, since the impossibility of finding a judicially manageable standard. The reasoning of the majority opinion, mostly grounded on the formalist arguments of justice Scalia in *Vieth*, overrode the impact of modern partisan gerrymandering both on the fundamental rights of the individuals and on the constitutional order as a whole. Basically, the Court applies to modern partisan gerrymandering the same standards of forty years ago: through a brilliant use of historical elements dating back to the proto-republican phase and several opinions issued in the past by the Court, Chief Justice Roberts places at the center of the arguments against justiciability, a supposed "desire for a proportional representation" that any case of partisan gerrymandering seems to reveal: «Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of

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[2] B. KLASS, *Gerrymandering is the biggest obstacle to genuine democracy in the United States. So why is no one protesting?*, *Washinghton Post*, 10 February 2017, *cit.* in MC.K. CUNNINGHAM, *Gerrymandering and conceit: the Supreme Court's conflict with itself*, in *Hastings L. J.*, August 2018, 69(6), 1514.

[3] B. KLASS, *Gerrymandering is the biggest obstacle*, cit.

[4] B. KLASS, *Gerrymandering is the biggest obstacle*, cit.

[5] Ballotpedia, *United States House of Representatives Election*, 2016: http://ballotpedia.org/UnitedStatesHouse-ofRepresentativeselections,_2o16.

[6] R. BALLHAUS, *Deep Loss by Democrats Obscures Party's Numbers Problem*, *Wall St. Journal*, 24 November 2014, http://blogs.wsj.com/washwire/2014/11/24/loss-bydemocrats-obscures-partys-numbers-problem/.

[7] D. DE SILVER, *For most voters, congressional elections offer little drama*, Pew Research Center, 3 November 2014, http://www.pewresearch.org/fact-tank/2014/11/03/for-most-voters-congressionalelections-offer-little-drama/.

[8] N. STEPHANOPOULOS, E. MCGHEE, *Partisan gerrymandering and the efficiency gap*, in *Univ. Cal. L.R.*, 2015, 82, 837.

[9] *Rucho v. Common Cause*, 588 U.S.__2019.

political power and influence» but also «Partisan gerrymandering claims invariably sound in a desire for proportional representation». As Justice O'Connor put it, such claims are based on «a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes»[10]. Using the words of Sandra O'Connor in her dissenting opinion in *Bandemer*, the Chief Justice affirms that in this kind of cases, implicitly or explicitly, the unconstitutionality of a districting map is assumed for the sole reason of making more difficult for a party to transform its support on a state basis into seats, so assuming that the greater the deviation from proportionality, the more suspect the redistricting plan becomes.

To the contrary, the majority of the Court in Rucho affirms that «partisan gerrymandering is nothing new in American politics, nor is frustration with it, since the practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution»[11]. Indeed, the history of partisan gerrymandering is the history of American politics and its modern constitutional law: forty years of litigation in federal and state courts demonstrate the difficulty of addressing a problem on which, fundamentally, the integrity of democracy depends.

When Bandemer was issued, justice O'Connor claimed that «political gerrymandering is a self-limiting enterprise because a swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious»[12], meaning that a wave election would have corrected the distortions of partisan gerrymandering on political representation, without the necessity of judicial intervention: such a phenomenon could certainly be solved by the electorate or the parties themselves.

As the amicus curiae brief submitted to the Court in Rucho wisely points out[13], when Justice O'Connor wrote, Pac-Man was still a popular video game and Microsoft had just released its first Windows, meaning that the technology available at the time did not even remotely allow political parties to access the massive amount of data available, which, with the support of sophisticated software and the calculus capacity of today's processors, makes it possible nowadays to profile and predict the behavior of voters in order to draw maps suitable for preserving lasting parliamentary majorities for the following electoral cycles; not by chance, yesterday's gerrymandering is now called – ironically compared to today's precise mapmaking operations – *"dummymandering"* to highlight the imprecision and randomness of the results obtainable with the then existing techniques[14]: before partisans had access to powerful computers, huge data sets, individual-level data, advanced software, and the latest social science, their gerrymandering efforts were sometimes prone to failure. In past years, an overly ambitious gerrymander could fail to preserve legislative control for the majority line-drawing party if it misjudged the probable margin of victory or defeat in each district[15].

[10] *Cfr. Rucho,* 588 U.S. cit., 16.

[11] *Cfr. Rucho,* 588 U.S. cit., 8.

[12] *Davis v. Bandemer*, 478 U.S. 109 (1986), 'O Connor concurring.

[13] *Rucho briefs for political science professors as amici curiae*, 2018, 2.

[14] P. GALDERISI (eds.), *The Art of the Dummymander: The Impact of Recent Redistrictings on the Partisan Makeup of Southern House Seats*, *in Redistricting in the New Millennium*, 183-84.

[15] «*Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders: gerrymanders that went spectacularly wrong*», *Cfr. Rucho* 588 U.S., cit., Kagan dissenting, 9.

3*. A self-limiting enterprise? Resisting wave election through data access, micro-targeting, and voter behavior prediction.*

As has been mentioned, electoral maps are today the result of an intense activity of electorate profiling[16]. Collecting and crossing enormous quantities of data coming from the internet such preferences and posts on social networks, online purchases, subscriptions to magazines and forums, with all the types of data already available from public records, like residence, family income, elections for which registration to the electoral rolls is required, party affiliation, ethnicity, it is possible to reach a prediction of electoral preferences that is almost infallible, allowing the majority party in the state legislature to draw maps with electoral constituencies with a pre-determined winner and thus to guarantee by algorithms, artificial parliamentary majorities even for more than a decade. Technology thus becomes an instrument to program and maximize the electoral result, subverting the core of representative democracy[17]. Free and fair elections guarantee the popular derivation of powers and the periodic control of the elected by the voters, but an unscrupulous use of technology at the service of party interests in redistricting completely overturns this principle: instead of appearing before the electorate and being accountable for his actions, the candidate is able, through new and aggressive practices of gerrymandering, to accurately select his electorate in order to ensure re-election[18].

Proof of the durability of the results of modern partisan gerrymandering are the 2018 mid-term elections: significant swings in the popular vote in 2018 brought no electoral shifts in states with gerrymandered districts, demonstrating low responsiveness to voter preferences, and despite a significant increase in popular support, democratic candidates generally failed to gain congressional and state legislature seats in states with Republican gerrymanders. In 2018 congressional elections, Democrats won the popular vote nationwide by an 8.6 percent margin over Republicans[19], and despite such a margin of popular vote victory, election results in many districts were inelastic to electoral preferences: as the percentage of the vote for Democratic candidates increased, the distribution of seats in gerrymandered districts remained unchanged from previous election cycles, even if some studies show that a one percent increase in nationwide votes for a party should, in a responsive map, result in a two percent change in seats for that party[20]

Still, regarding statewide elections it is worth comparing the election results in Wisconsin, Ohio, Michigan, and North Carolina with those of Pennsylvania, where the State Supreme Court had declared in February 2018 the unconstitutionality of the previous electoral maps and accordingly supervised a new redistricting. It is evident that with a new map, in Pennsylvania, the Democrats won nine seats out of eighteen with 55.5% of the statewide

[16] D. DALEY, *The House the GOP Built: How Republicans Used Soft Money, Big Data, and High-Tech Mapping to Take Control of Congress and Increase Partisanship*, N.Y. Magazine, Apr. 24, 2016, https://nymag.com/intelligencer/2016/04/gopshouse-seats-are-safe-heres-why.html.

[17] W. K. TAM CHO, *Technology-Enabled Coin Flips for Judging Partisan Gerrymandering*, in *South. Cal. L.R. Postscript,* n. 93 del 2019.

[18] *Rucho v. Common Cause*, 585, US__2019, Kagan dissenting.

[19] H. ENTEN, *Latest House results confirm 2018 wasn't a blue wave. It was a blue tsunami*, *CNN Politics*, Dec. 6, 2018, https://cnn.it/2QxAHb5.

[20] M. P. MCDONALD, *Seats to Votes Ratios in the United States* (2009) (unpublished paper) (on file with the Jack W. Peltason Center for the Study of Democracy at the University of California, Irvine), http://bit.ly/2EhMB0B.

vote[21], while in North Carolina, for example, despite having a majority in the statewide popular vote, the Democrats won only three of the thirteen congressional seats on the ballot, the same number of seats they had won in previous years[22].

According to some scholars, there are three phenomena that allow modern partisan gerrymanders to resist wave election, not all present in prior redistricting cycles: first partisan affiliation (self-identification with a party) and voter behavior are nowadays highly stable and predictable, making the partisan affiliation of voters a dependable trait on which mapmakers can rely; second, a wealth of granular voter data now available to mapmakers enables them to predict voter behavior with an unprecedented degree of accuracy; third, new and advanced statistical and map drawing applications enable partisans to translate voting data and analysis into districts that maximize partisan advantage[23].

As a general matter—and despite suggestions to the contrary—the partisan identity of voters is highly stable, and mapmakers can use data about partisan identity to predict voter behavior with a very high degree of confidence from election to election[24]. Social science research shows that voters are "socialized" into a particular party at an early age, and partisan affiliation tends to harden in early adulthood. Once formed, these "identities are enduring features of citizens' self-conceptions", and "remain intact during peaks and lulls in party competition"[25]. And an individual's partisan identification is, on average, more enduring and stable than his or her core values or positions on political issues. Partisan attachment is a stronger predictor of voting behavior than gender, class, religion, and often race[26]. Thus, the distribution of partisan identities among the electorate «provides powerful clues as to how elections will be decided».[27] In recent years, the predictive power of partisan identity has only increased; based on an analysis of American National Election Studies time-series data conducted in 2015, the «observed rate of Americans voting for a different party across successive presidential elections has never been lower», indicating that each party has a reliable and predictable «base of party support that is less responsive to short-term forces»[28].

Today's mapmakers have access to more voter data about partisan affiliation than they did just a few years ago. Data gathering has become so precise that voters can be individually targeted with customized messages. Data brokers like Civis Analytics advertise their ability to create a "scientific understanding of the voter" to calculate the "likelihood for a certain behavior of a voter based on multiple characteristics like income, age, and geography". Data brokers are experienced in creating "augmented voter files," or extensive public and commercial datasets of voter data. These voter files combine traditional voter registration records with substantial additional information, such as «data from frequent-buyer cards at supermarkets and pharmacies, hunting and fishing license registries, catalog and magazine subscription lists, membership rolls from unions, professional associations, and advocacy

[21] S. H. WANG, *Pennsylvania 2018 Detailed Results*, Princeton Gerrymandering Project, http://bit.ly/2BVrm4a.

[22] M. ASTOR, K.K. LAI, *What's Stronger Than a Blue Wave? Gerrymandered Districts*, N.Y. Times, Nov. 29, 2018, https://nyti.ms/2Stpx3T.

[23] *Rucho briefs for political science professors as amici curiae*, 2018, 15.

[24] B. SCHAFFNER, S. ANSOLABEHRE, *2010-2014 Cooperative Congressional Election Study Panel Survey (Version 10)*, Harvard Dataverse (June 10, 2015), http://bit.ly/2BUbeA5.

[25] D. P. GREEN, B.L. PALMQUIST, E. SCHICKLER, *Partisan Hearts and Minds,* New Heaven, 2002, 4-5.

[26] D. P. GREEN, B.L. PALMQUIST, E. SCHICKLER, *Partisan Hearts and Minds*, cit., 3.

[27] D. P. GREEN, B.L. PALMQUIST, E. SCHICKLER, *Partisan Stability: Evidence from Aggregate Data*, in R.G. NIEMI, H. F. WEISBERG (eds.), *Controversies in Voting Behavior*, Washington, 2001, 4th ed, 356.

[28] C. D. SMIDT, *Polarization and the Decline of the American Floating Voter*, in *Am. J. Pol. Sci.*, 2017, 61(365), 379-81.

groups». The 2018 elections demonstrate the power of using voter records, data, social media and even credit reports to micro-target and track voters. The 2018 election was marked by unprecedented use of social media information to predict and influence voter behavior[29]. During the 2018 Georgia governor's race, for example, candidate Stacey Abrams eschewed traditional, broad targeting tactics, choosing instead to target an "untapped market" of 90,000 voters that her campaign identified as "persuadable" based on collected data[30]. The quantity and granularity of publicly available voter data, and improvements in data analytics, will allow mapmakers to assess and predict partisan affiliation at both the individual and aggregate levels more accurately than ever. Data broker Civis Analytics correctly forecasted the winner in 383 out of 394 contested races (97%) in 2018 and its estimate of the national popular vote was accurate to within tenths of a percent[31].

4. *Polarization, lack of accountability, voter dilution*

Partisan gerrymanders create "safe" districts for parties, with the result that the composition of state legislatures becomes more polarized: drawing a small number of districts the opposing party will win by lopsided margins and draw a large number of districts the redistricting party will win by narrower margins creates an overwhelming number of safe districts, with the gerrymandering party guaranteed to win in a majority of districts and the other party guaranteed to win in a minority.

Therefore, candidates in safe, gerrymandered districts will only need and will entirely bound to appeal to primary voters, who tend to be farther from the ideological center and once a candidate is selected as the party's standard-bearer, he need not and do not temper his views[32].

The absence of competitive districts thus leads to legislators who do not reflect the ideological preferences of the people they represent. If we consider a district composed of 60% Republicans and 40% Democrats, who reliably vote for their respective parties, to win the Republican primary, a candidate need only win votes from just over 30% of the total voters and since cross-party voting is relatively uncommon, the smart candidate understands that his political fortunes depend exclusively on responsiveness to the 30% needed to win the primary.

Just as candidates in a gerrymandered district have little incentive to appeal to moderate voters in general elections, legislators in a gerrymandered State also have little incentive to cooperate with the opposing party or to endorse more moderate policies once they are in office, at the extent that in many States, earning a reputation for bipartisanship is the surest way to lose the next primary: that lack of bipartisanship means that representatives from the minority party— and, therefore, their constituents—are shut out of the legislative process[33].

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[29] S. SHANE, S. FRENKEL, *Russian 2016 Influence Operation Targeted African- Americans on Social Media, N.Y. Times*, Dec. 17, 2018, https://nyti.ms/2SsqlpR.

[30] B. BARROW, *Inside Stacey Abrams' strategy to mobilize Georgia voters, AP News*, Oct. 12, 2018, http://bit.ly/2NqsIbN.

[31] Civis Analytics, *Data science and the midterm elections: breaking down the results*, Nov. 28, 2018, http://bit.ly/2XpRLjB.

[32] R. H. PILDES, *The Constitutionalization of Democratic Politics*, in *Harv. L.R.*, 2004, 118(28), 114-15.

[33] A few examples of the implications of polarization: Following the redistricting in Wisconsin, Republican lawmakers enacted new rules that limit Democrats' ability to speak on legislation and refused to consider Democrat-sponsored amendments. Democrats in Ohio are not allowed to send newsletters to their constituents until Republican leaders review them, whereupon they sometimes require the removal of content critical of

This means, for the voters whose political power a partisan gerrymander aims to diminish, an inability to elect and influence legislators that lead to an exclusion from the political process: these constituents are silenced and deprived of an effective vote and voice in the legislative process, but gerrymandering causes legislators to treat even members of their own party in purely instrumental terms, moving them around the map as necessary to secure seats. This weaponization of demography robs voters of their constitutional standing and demeans their status as individuals with unique experiences, beliefs, and desires[34].

Given the potential subversive impact that modern gerrymandering techniques have on the democratic process, it is fair to recognize the merit of Elena Kagan's dissenting opinion, shared by Justices Ginsburg, Breyer, and Sotomayor, in which she pointed out the Court's inattention to the impact of modern technologies in redistricting, treating this aggressive and subversive contemporary form of gerrymandering in the same way as the imprecise dummymandering of the Bandemer era. Using the same arguments as Sandra O'Connor in 1986 and Scalia in 2004, the Supreme Court in Rucho focuses all its attention on that «desire for a proportional representation» that it believes is evident in the plaintiffs' claims, without any comprehensive view of the modern phenomenon of gerrymandering and its impact on the representative system.

As powerful as current methods are, predictive modeling and other large-scale analytical tools will become more potent in the near future. New technologies and data sources, such as augmented voter files and modern machine-learning algorithms, will make it easier for mapmakers to predict the decision-making habits of Americans in a more nuanced and accurate way than ever before. When applied to the process of redistricting, new data analysis techniques will enable partisan mapmakers to create gerrymanders that are even more biased, more durable, and more capable of withstanding the effects of "wave" election years.

5. *State law as remedy: new paths and new challenges towards a third generation of partisans*

The majority of the Supreme Court in Rucho maintains that the solution to the exacerbation of partisan gerrymandering in the American politics lies in the legislative power at the federal and state level and especially in the numerous bills introduced over time in Congress and in the state legislatures: according to the Court, this is the only constitutionally way to limit partisan gerrymandering, with no judicial invasion of the authority of the legislative power. However, it is precisely the current majorities in state legislatures that perpetuate and exacerbate the phenomenon: in 241 years, state legislatures have shown very little willingness to correct political gerrymandering, thus waiting for such an intervention means assuming that the parties may freely renounce the most effective instrument of preservation of power at their disposal. Exactly because too many owe their seats to partisan gerrymandering, the chances for self-reform, as the poor achievements in this regard attest, are very low.

Republican legislators or policies; Republican leaders also regularly prohibit Democrats from reserving committee rooms at the state capitol building for informational meetings, and refuse to publish Democrats' notes of protest in the legislative record, despite the Ohio Constitution's guarantee that protests "shall, without alteration, commitment, or delay, be entered upon the journal." (Ohio Const. art. II, § 10). *Cfr. Gill v. Whitford Brief for Amici Curiae bipartisan group of 65 current and former state legislators in support of appellees.*

[34] «Partisan gerrymandering dilutes democracy by taking away a voter's ability to voice their particular beliefs to legislators who will acknowledge them». *Cfr. Miller* v. *Johnson*, 515 U.S. 900, 911-12 (1995).

Perhaps, then, the only way to restore a long violated constitutional rule of law is in the hands of the judiciary: through the very same technological tools used to facilitate and expand partisan gerrymandering, the courts can determine, by fair and quantitative methods, the long-chased line between legitimate and illegitimate use of the power of apportionment[35].

And if the Supreme Court's decision in Rucho precluded the involvement of the federal courts in this process, the same cannot be said for State courts: currently, only State supreme courts can address the issue, preventing an uncontrolled expansion of new technologies at the service of partisanship.

The events preceding and following *League of women voters of Pennsylvania v. Commonwealth of Pennsylvania*[36] show the viability of the state court approach: in July 2017, League of Women voters of Pennsylvania filed a lawsuit alleging that the new map introduced in 2011 by the Republican majority in the Pennsylvania legislature consisted in an unconstitutional gerrymandering. A Pennsylvania trial court held that the district lines did not violate state law, even if tended to favor Republicans. The case was appealed to the Pennsylvania State Supreme Court who struck down the existing map, saying that it "clearly, plainly and palpably" violated the state Constitution. The Court provided a timeframe in which the state legislative and executive branches could prepare new maps if they chose so. The deadline was set on February 9, 2018 but the term expired without an agreement between the Governor and the General Assembly, thus the Court released a new congressional map on February 19, 2018, to come into force for the May 15 primaries. Pennsylvania Republicans appealed to the United States Supreme Court trying to halt the enforcement of the

order, but the Court denied the request: whether the Supreme Court could ever review a partisan gerrymandering case based in state law is a question of federalism and state sovereignty. Four relevant principles rule the ability of reviewing state law decisions by the Supreme Court: (1) The Supreme Court has the final say with respect to questions of federal law; (2) the Supreme Court will not review questions of state law; (3) if it appears both federal and state law decision are present, the Supreme Court will not review the case if there is an adequate and independent state law ground; and (4) only if the basis for the state court's decision is ambiguous, the Supreme Court will assume the basis is federal, permitting review[37].

At a closer look, in Rucho, the Supreme Court itself argued that state constitutions contain provisions that can provide guidance in the mapmaking process and that broadly speaking, state law may better meet the needs of the plaintiffs: the constitutional amendments approved in Colorado and Michigan creating multimember commissions responsible in whole or in part for creating and approving district maps for congressional and state legislative districts[38] would prove the feasibility. Also, the provisions of Florida[39], Missouri[40],

[35] A very clear analysis of the reasons why the use of technology, and in detail a set of potential random maps developed by court-appointed experts and considering only traditional redistricting criteria, may prove to be the best tool for defining a baseline of fair apportionment beyond which the maps may bear elements of unconstitutionality, can be found in: W.K. TAM CHO, *Technology-Enabled Coin Flips*, cit., 11-27.

[36] *League of Women Voters of Pa. v. Commonwealth*, 174 A.3d 282 (Pa. 2018).

[37] C. STEWART, *State court litigation: the new war against partisan gerrymandering*, in *Mich. L.R.*, 2018, 116, 161.

[38] Colorado Constitution, Art. V, §§ 44, 46; Michigan Constitution, Art. IV, §6.

[39] See Florida Const., Art. III, §20(a): «No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent».

[40] See Missouri Const., Art. III, §3: «Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. 'Partisan fairness' means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency».

Constitution, as well as the Iowa[41] and Delaware[42] Codes demonstrate that the best path to identify a judicially manageable standard is through state court litigation, by taking state constitutions and state law as a parameter. This would happen, however, at the expense of uniformity, which only the intervention of the federal judiciary would have guaranteed. Whatever the most convenient option is, the matter is as urgent as ever, as the decennial census approaches, and an aggressive third generation of political gerrymandering is on its way: «the genius of republican liberty seems to demand […] not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people»[43] and preventing the abuse of new technologies from subverting the representative system means preserving the sovereignty of the people, and the accountability of legislators before them.

[41] See Iowa Code §42.4(5) (2016): «No district shall be drawn for the purpose of favoring a political party, incumbent legislator or member of Congress, or other person or group».

[42] See Delaware Code Ann., Tit. XXIX, §804 (2017): «no district shall be created so as to unduly favor any person or political party».

[43] J. MADISON, *The Federalist No. 37*, in C. ROSSITER (ed.), *The Federalist Papers*, Berkley, 2003, 223.

Part II
A Global Comparative Perspective on Constitutional Degradation

Pier Luigi Petrillo
Ibrahim Kaboglu
Diana Maria Castano Vargas
Lidia Bonifati
Thiago Burckhart
Valentina Carlino
Ferdinando La Placa
Giacomo Salvadori
Federico Spagnoli
Evis Garunja

Pier Luigi Petrillo*

A Global Comparative Perspective on Constitutional Degradation. An Introduction

Over the last thirty years, we have witnessed two phenomena, simultaneous and opposite: on the one hand, the emergence of new democratic systems, often the result of the break-up of authoritarian states, for which there has been talk of a new wave of constitutionalism; on the other, the start of a process of degradation of those very constitutional values that are the foundation of every democratic system.

The phenomenon of "constitutional degradation" is now a sad reality in all consolidated democracies and has infected even the youngest democratic systems: this phenomenon, in fact, has spread like an infectious disease to which few working vaccines seem to be available. The Turkish case is probably the most dramatic, as Ibrahim Kaboğlu points out, where the degradation is such that it can be said that the rule of law no longer exists in Turkey.

The analyses contained in this chapter, which were widely discussed at the Pontignano conference, highlight this phenomenon very clearly, showing how this disease does not depend on the form of state or the form of government, nor on the economic structure of a country, but affects the very foundations of a democratic order.

First, let us ask ourselves who are the main promoters of this phenomenon, then who are the victims, then what are the ways in which this disease spreads and takes shape in our systems, then what are the causes and, finally, what are the remedies - if any.

As the contributions on Brazil, Colombia, Hungary, Poland and Albania, but also the comparative analyses carried out on Turkey, Russia, Benin and the African context show, governments are often the (sometimes unconscious) promoters of constitutional degradation, claiming ever greater powers to the detriment of Parliament and the judiciary.

This action has taken place and continues to take place in a formal, explicit and legal manner: Constitutions or implementing laws are changed in order to give the government authoritarian powers (as in the case of Hungary or Poland) or constitutional customs are changed in order to strengthen the figure of the Head of Government to the detriment of the individual members of the Council of Ministers or parliamentary groups (as in the obvious case of Brazil). In all these cases, it is the values and principles on which the rule of law is based that are "degraded" and endangered, and which, through the legal action of constitutional revision, are eroded to the point of changing the very nature of the system.

This phenomenon, however, is also induced by implicit, subtle, creeping mutations. Without formally changing the Constitution, governments take legislative power upon themselves and intervene to regulate people's lives, leaving Parliament with the mere power to integrate the governmental text, without changing it. This is the case in Italy where, in an increasingly evident manner, over the last twenty years, the Government has exercised, exclusively, the power of legislative initiative, forcing Parliament to take or leave government bills, placing a vote of confidence on every single measure.

Constitutional degradation then found fertile ground in times of the Covid-19 pandemic. The need to respond immediately to the tragedy of the pandemic subverted all separation of powers, leading Parliament to disappear from public debate and the Government to intervene, de facto exclusively, in setting the rules of conduct (the Colombian case is a clear example).

* **Full Professor of Comparative Public Law at the University of Rome Unitelma Sapienza.**

The victims of this phenomenon are manifold. As the contributions on Hungary, Poland, Turkey and Brazil highlight, the first victims of constitutional degradation are social, civil and cultural rights. The Turkish case is emblematic: the renunciation of the founding principles of the rule of law has annihilated cultural diversity, wiped out freedom of thought and association, and dramatically compromised any hope of recovery. In Colombia, too, the phenomena of degradation have affected social rights first and foremost, as Castano Vargas pointed out in his contribution.

Another victim is the unity of the state. Constitutional degradation brings with it a deep-seated desire for selfishness and the belief that one is stronger and richer on one's own. The attempted secession in Spain, the ever-living aspirations in Scotland, the difficulty of forming unitary governments in Belgium and the periodic demands to redefine 'fiscal federalism' in Italy are confirmation of how much this disease affects democratic systems right down to their roots.

The causes of this phenomenon are many and, in this volume, they are examined clearly and comprehensively. In this introduction, therefore, it is sufficient to limit ourselves to recalling the most obvious ones.

The first causes are political, social, and economic; the second are legal. On the first front, it is indisputable that populism is one of the main factors in constitutional degradation. The desire of the politicians to pander to the mood of the moment of the people has exalted extreme and illogical positions, which have produced a political discourse without any shame or hesitation. Thus, words that until yesterday were taboo in a democratic system because they were associated with discrimination or the idea of the supremacy of one ethnic group over others, have become normal in political debate and, consequently, accepted as possible solutions to the problems of the present time. Populism was then fueled by situations of real or imagined poverty and fear of diversity and the future. The global economic crisis, further aggravated by the constraints imposed by the Covid-19 pandemic and the war between Russia and Ukraine, have generated a widespread feeling of anxiety and fear for what our lives will be: this has triggered a virtuous circle that feeds populist positions. These fears and anxieties have been fueled by the rating agencies, which continue to give 'ratings' on the economies of various countries according to obscure criteria and without any legitimacy.

In this context of degenerated values, constitutional degradation no longer seems to be a disease to be fought but the solution to evil. In other words, there is an aspiration to downgrade the principles of the rule of law in the belief that this is the only way to tackle the global crisis, not understanding that, as history teaches us, it is precisely when the bar of democratic aspirations is lowered that the crisis increases. Finally, sovereignism or supra-localism (two sides of the same coin) have fanned the flames of constitutional degradation by fueling the idea that, as mentioned, having to travel a long and winding road it is better to do so alone than in company.

There are also legal reasons in the sense that some Constitutions and some laws have, in some ways, given strength to constitutional degradation, encouraging the exaltation of these powers. One example could be the hyper-majoritarian electoral laws - mentioned in the contributions of Hungary, Poland, Albania, Russia and Brazil - which have wiped out all forms of representation for political and cultural minorities, thus making parliaments empty and weak places.

What can be the remedies to such degraded situations? How can the founding principles of the Rule of Law be restored once the erosion process has begun? These questions are difficult to answer. The judiciary, in some cases, represents a curb to this phenomenon: not

so, however, in Hungary and Poland after a law of parliament transformed even this power into a governmental frill; but it is so in Brazil where the judiciary has intervened on several occasions to stop, and sometimes condemn, the absolutist aspirations of Federal President Bolsonaro. Another barrier can be represented by the repetition of elections: the certainty, for the citizens, of being able, every 4 or 5 years, to go back to the polls to elect Parliament and/or the government can serve to restore certain principles and, at the same time, can represent a limit for the majority in office to make disruptive choices, knowing that its actions could be "sanctioned" by the voters. To some extent this has happened in the United States of America with the “rejection” of Trump after four years and in Israel with the formation of a government politically opposed to that of the powerful Benjamin Netanyahu. Perhaps the same will happen in Hungary, Poland, Albania, Bosnia in the coming years but ... will it be too late to turn back? The following contributions try to answer this question, showing how the processes of degradation are, unfortunately, irreversible and, therefore, must be stopped as soon as they occur.

Ibrahim Ö. Kaboğlu*

The Republic of Turkey: the end of Constitutionalism or of Constitutional Democracy?**

ABSTRACT: ***This chapter moves from the constitutional referendum held in Turkey on 16th April 2017, which was marked by a twofold instrumentalization: the abuse of the referendum as a democratic channel and the abuse of the Constitution in terms of circumstances and content. The practice of the new constitutional system since 9th July 2018, under the name of "'system of government of the of the Presidency of the Republic", has confirmed the personalization of power of the President of the Republic, who monopolizes the executive power, being at the same time the leader of a political party. The suppression of the parliamentary regime under the state of emergency and its authoritarian practice have indeed accelerated the efforts for the re-establishment of the rationalized parliamentary regime.***

Article 2 of the Constitution, which sets out the characteristics of the Republic, reflects Turkey's political and constitutional achievements: «The Republic of Turkey is a democratic, secular and social state governed by rule of law, within the notions of public peace, national solidarity and justice, respecting human rights, loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the preamble»[1].

In the amendment made in 2017[2], the provisions of the Constitution relating to the Council of Ministers (Art. 109 et seq.) were deleted. The executive power was attributed to the President of the Republic. Thus, all governmental and state powers are concentrated in the personality of the President of the Republic (art. 104).

Can such a rupture be conceived as the outcome of the political-constitutional institutions in Turkey, or a will imposed by those in political power?

To answer this question, it is first necessary to give a general idea of the political-constitutional developments in Turkey. Secondly, it seems appropriate to answer the following question: is the constitutional configuration introduced in 1987 compatible with the democratic rule of law as defined in Article 2?

Finally, based on current constitutional debates and work, the article will conclude with reflections on the constitutional-political perspectives in Turkey.

1. *Regarding the constitutional developments*

In Turkey, since the Ottoman Empire, the evolution of constitutionalism has been marked by the following five texts: the Basic Law of 1876, the Law on the Fundamental Organisation

* **Professor of Constitutional Law, President of the Constitutional Law Research Association, Member of Parliament for Istanbul, Member of the Constitutional Committee of the National Assembly, Member of the Franco-Turkish Parliamentary Friendship Group**.

** **This work has been subjected to blind peer review.**

[1] The Constitution was passed on 18 October 1982 by the Constituent Assembly, approved in a referendum on 7th November, and published in the Official Gazette on 9 November 1982 as N. 2709.

[2] This was the 19th amendment to the Constitution since 1987.

of 1921, the Law on the Fundamental Organisation of 1924, the Constitution of 1961 and the Constitution of 1982[3]. Two major characteristics emerge from all these texts: continuity and rupture.

Continuity means a linear advance of constitutionalism. By this we mean that each constitutional stage since the end of the 19th century has increased the number of measures to regulate and limit state powers, while the status of rights and freedoms has been progressively broadened and strengthened. The Constitutional Charter of 1876 was transformed into a Constitutional Covenant by the revision of 1909. The text of 1924 regulated both state powers and citizens' rights, whereas the Basic Law of 1921 dealt only with state organisation. The advance of the 1961 Constitution over the 1924 Constitution was considerable, as it established for the first time the classical mechanisms of the rule of law. Such a linear advance towards the establishment of constitutional balances between political power and human rights shows the existence of a constitutional continuity[4].

Still in the context of continuity, the rules and institutions as well as traditions of a modern state have roughly marked the evolution from the period of the Tanzimat[5] to the restoration of the rule of law from 1987: an institutionalised state organisation in order to further limit political power and consolidate human rights. The main achievements are: the flexible separation of powers with the independence of the judiciary, the hierarchy of norms with the supremacy of the Constitution, the government as a collegiate body, the principle of political responsibility before the National Assembly, the neutrality of the President of the Republic, the exclusive power of the National Assembly in the production of legislative norms[6].

The Constitution in force on 9th November 1982, while maintaining the parliamentary regime, was characterised by the strengthening of executive power and the weakening of the status of rights and freedoms. However, the amendments made from 1987[7] onwards and spread over two decades have gradually affected the checks and balances in favour of human rights. The obligations of the state to respect, protect and develop human rights are more tangible than the possibility of further restricting constitutional rights and freedoms, not considering the improvement of the status of individual categories of human rights.

The amended and revised Constitution must be read as a whole. Indeed, the constitutional law of freedoms can only be understood in the light of the institutional constitutional law. Article 13 of the Constitution, the cornerstone of the metamorphosis, constitutes a positive obligation for all public authorities. The legislature must first consider the implications of each criterion set out in Article 13: the democratic society, the secular republic, proportionality, and the essence of freedom. These criteria are also applicable by the judge in a direct way. They are also valid for the executive and the administration: the police are obliged to respect

[3] The most important political dates are 23rd April 1920 (establishment of the Grand National Assembly) and 29th October 1923 (proclamation of the Republic), as well as 15th May 1950 (the political changeover between the Republican People's Party (RPP) and the Democratic Party (DP). The PRP had held political power as the sole party since the foundation of the Republic).

[4] It is true that the military coups in 1960, 1971 and 1980, which impeded the continuity of constitutional democracy, prevented the pluralist regime from taking root. However, even the military did not reject the constitutional-political heritage acquired since the Ottoman Empire.

[5] The reform period which mainly covers the decades from 1840 and 1850.

[6] For details, see İ. Ö. KABOGLU, E. SALES, *Le droit constitutionnel turc. Entre le coup d'Etat et la démocratie*, II ed., Paris, 2018, 19-79. See also E. ÖZBUDUN, *The Constitutional System of Turkey/1876 to the Present*, New York, 2011.

[7] Law n. 3361 of 17 May 1987. Only the transitional article 4, which provided for the repeal of the ban on political activities for former leaders of certain political parties, was put to a referendum.

the principle of proportionality when using the freedoms of assembly and demonstration. Furthermore, the cumulative effect of the criteria set out in Article 13 must be considered[8].

The reflection on the metamorphoses of the Constitution is firstly intended to ensure the effectiveness of the Constitution; its normative value must be effective. «The provisions of the Constitution are fundamental legal rules binding upon legislative, executive and judicial organs, and administrative authorities and other institutions and individuals» (Art.11). Secondly, such reflection seems useful in the name of the principle of non-regression. This principle does not allow for regression in relation to acquired rights.

These constitutional advances concerning the right of freedoms can be completed by the democratic understanding that human rights are the normative infrastructure of democracy. Two following remarks on democracy in Turkey at the beginning of the 21st century seem quite significant:

The first one has been done regarding the connection between democracy and laicity: «Turkey is one of the few countries in the Muslim world that is a democracy. By this term we mean the pluralist democracy that emerged in Western Europe and was taken as a model by many Turks. Thus, the question of the relationship between Islam and democracy - and therefore the place of secularism - is particularly acute in Turkey, where it is a practical rather than a theoretical issue, whereas in many other Muslim countries we are left wondering about the "conditions of possibility" of democracy, since it has not been put to the test of reality […]»[9].

The second concerns the link between ruptures and continuity: «The experience of democracy in Turkey has faced very significant problems, suffered heavy setbacks, and survived both. Despite these problems and setbacks - and perhaps even because of them - Turkish democracy is by far the most successful among countries with comparable experience and traditions. It could serve as a model for others. Turkish history is rich in deviations and interruptions, which is normal in a situation of great tension and limited experience of democracy. The remarkable and distinctive element is that after each derailment, the democratic process was put back on track, and the Turkish people were able to continue their journey towards freedom and democracy»[10].

However, the constitutional amendments introduced from 2007 onwards, while maintaining the *façade* of the separation of powers, have resulted in the concentration and personalisation of powers in favour of the head of state.

2. *The imposed constitutional configuration of 2017*

The Republic of Turkey has a rigid Constitution[11]. The rigidity of the Constitution can be explained on the one hand by the block of intangible provisions and on the other hand by the sophisticated amendment procedure.

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[8] İ. Ö. KABOGLU, *Vers le droit constitutionnel des libertés en Turquie. Mélanges G. Kassimatis*, Athens, 2004, 939-955.

[9] F. VINOT, *Armée, Laîcité et Démocratie en Turquie*, in *Cahiers d'études sur la méditerranée orientale et le monde turco-iranien*, 1999, 27, 71.

[10] B. LEVIS, *La démocratie en Turquie*, in *Vie et mort des démocraties*, Paris, 2005, 271.

[11] The Constitution of 7 November 1982 is also a fairly detailed text containing 178 articles. It was voted on 18 October 1982 by the Constituent Assembly, approved by referendum on 7 November, and published in the Official Gazette on 9 November 1982 under No. 2709. The 1982 Constitution was amended and revised from 17

-Intangible provisions: The provision of Article 1 of the Constitution specifying that the form of the State is a Republic, as well as the provisions of Article 2 relating to the characteristics of the Republic and those of Article 3 which relate to "Integrity, official language, flag, national anthem, and capital of the State" cannot be amended, nor can their amendment be proposed (art.4)[12].

- Sophisticated amendment procedure: The National Assembly, a unicameral body of 600 deputies, can amend the Constitution, either by itself or through a referendum. The referendum can be optional or mandatory (Art. 175 of the Constitution).

Constitutional amendments may be proposed by at least one third of the total number of members of the Grand National Assembly of Turkey. Proposals for constitutional amendments are debated twice in the plenary assembly. They can only be adopted by a three-fifths majority of the total number of members of the Assembly and by secret ballot.

If the constitutional amendment law adopted by a three-fifths majority (360 deputies) or by a majority of less than two-thirds (400) of the total number of members of the Assembly is not referred to the Assembly by the President of the Republic, it is published in the Official Gazette to be submitted to a referendum. In this case, it is therefore a mandatory referendum.

The constitutional referendum, conceived as the path to semi-direct democracy, is also susceptible to instrumentalization by the representatives of the people. The constitutional referendum of 16th April 2017 is proof of this, as it was transformed into a "plebiscitary referendum". Following the constitutional amendment carried out under the state of emergency[13], the referendum which also took place under the same circumstances was instrumentalised because the new constitutional configuration had provided for the removal of the checks and balances necessary for a democratic rule of law, and while Article 2 of the Constitution according to which «The Republic of Turkey is a democratic and secular state governed by the rule of law» fortunately still remains in force[14].

It is worth recalling first the revisions carried out from 1987 to 2017 to clarify the problematic of the latest amendment. The procedure followed for the amendment of the Constitution raises the question of whether there is a correlation between the procedural and substantive aspects of the amendments made.

May 1987 to 21 January 2017. The last amendment made by Act n. 6771 was approved by referendum on 16 April 2017. By a total of twenty amendments, the Constitution of 1982 has been reworked, even metamorphosed. However, the latest amendment differs radically from the previous ones in that it abolished the parliamentary system.

[12] For more details, see İ. Ö. KABOGLU, E. SALES, *Le droit constitutionnel turc. Entre le coup d'Etat et la démocratie*, cit., 81-129. See also E. SALES, *La Turquie, un Etat de droit en question*, Paris, 2021, 79 ff.

[13] A coup attempt took place on 15 July 2016. It led to the introduction of a state of emergency (lifted two years later on 19 July 2018) and purges within the state apparatus and public institutions. While these purges initially targeted the Brotherhood founded by Fethullah Gülen, accused of having instigated the putsch, they also affected civil society, in particular academia, the media and human rights defenders, but also the economic sectors. According to the report published in May 2019 by the European Commission, 152,000 civil servants have been laid off in three years.

[14] On this occasion it should be noted that the Republic of Turkey is marked by the principle of secularism. Secularism has been affirmed by the Constitution since 1937 as a characteristic of the Republic. As a social structure, the majority of citizens are Muslims, the majority Sunni. There is an Alevi minority (about 20% of the population) and Christian (Greek Orthodox, Armenian Gregorian, Syriac, Latin Catholic) and Jewish minorities. For a comparative study, see İ. Ö. KABOGLU*, La migration de l'idée de la laïcité au Proche et Moyen-Orient : Turquie, Egypte et Tunisie*, in E. ZOLLER (ed.), *Migrations constitutionnelles d'hier et d'aujourd'hui*, Paris, 2017, 81-99.

- The revisions made between 1987 and 2004 by parliamentary compromise generally concern human rights. Each amendment has strengthened the legal regime of constitutional rights and freedoms.

- As for the revisions approved by referendum, i.e. by the procedure of semi-direct democracy, on the contrary, each revision has consolidated the place and power of the President of the Republic in the political-constitutional order. Indeed, the constitutional amendments submitted to the referendums that took place in 2007, 2010 and 2017 can be seen as challenges to the constitutional-political achievements and traditions established since the 1876 Constitutional Charter under the Ottoman Empire.

This being said, the referendum process reflects a double instrumentalization: the abuse of the referendum as a democratic channel by nature and the abusive modification from the point of view of circumstances and content. In other words, the abusive revisions not being limited by the procedural aspect have also mitigated the constitutional checks and balances. In any case, authoritarianism and de-constitutionalisation have become increasingly visible since the election of the President of the Republic by universal suffrage in 2014[15] and the amendment of 21st January 2017, approved by the referendum of 16th April 2017, still under the state of emergency[16], changed the political regime[17]. Contrary to the challenges and reactions due to the circumstances of the state of emergency, the President of the Republic and the government allowed themselves to "mobilise" the state apparatus for the "yes" vote, while those who were against the introduction of a personalised government were not given free access to the media. Finally, following an unfair campaign and a rather "plebiscitary" referendum, the voters said "yes" with 51.4% of the votes on 16th April 2017 to the constitutional revision[18].

In particular, it provides for the abolition of the post of prime minister and the transfer of its powers to the presidency, and a reduction in the prerogatives of parliament. The executive, no longer a collegial body, was reduced to the personalised power held by the President of the Republic.

Certainly, the need for democratisation of the politico-state structures was obvious and a constitutional revision should, in any case, aim primarily at strengthening the independence of the judiciary and the parliament as well as decentralisation. But on the contrary, beyond the centralisation of powers by attenuating the role of the National Assembly and the independence of the judiciary, an excessive personalisation of political power has reversed the route towards more limited power since the Ottoman Empire. As a result, the "new constitutional configuration", which is difficult to classify as a pluralist political system, is not

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[15] See İ. Ö. KABOĞLU, interviewed by Gaye Özpınar, *A Brief Overview of the Legal System of Turkey*, in E. ÖZYÜREK, G. ÖZPINAR, E. ALTINDIŞ *Authoritarianism and Resistance in Turkey*, London, 2019, 191-201.

[16] For details, see İ. Ö. KABOĞLU, *Constitıtional Democracy through Referendum in Turkey*, in *Revista Română de Drept Comparat*, 2018, 1, 242-261; İ. Ö. KABOĞLU, *L'évaluation de la révision constitutionnelle de 2017 sous l'optique des acquis politico-constitutionnels en Turquie*, in *Revista Română de Drept Comparat*, 2019, 1, 162-173.

[17] For the advocates of such a constitutional amendment, the fact that parliamentarianism has been abolished does not mean a change of regime, it is only a change of system. In reality, the constitutional amendment changed both the system and the political regime.

[18] The legal validity of the referendum results was also highly controversial due to the highly contested decision of the Higher Electoral Council. For a detailed study, see S. SELÇUK, *Opinion scientifique*, in ID. (ed.)*16 Nisan 2017 Halkoylamasına İlişkin Bilimsel Görüş*, Ankara 2017, 59-116. According to Prof. Selçuk, «In the light of our investigation it is clear that ENVELOPES NOT SEALED or bearing the "YES" STAMP must be considered invalid» (115).

compatible with Article 2 of the Constitution, according to which "the Republic of Turkey is a democratic state governed by the rule of law", for three main reasons: the political irresponsibility of the executive, the lack of checks and balances, and the weakening of the separation of powers and the hierarchy of norms.

Without entering into a debate on the character of the established regime, this "new" system is still shaded by a double problem of legitimacy: the constitutional referendum (of 16th April 2017) organised under the state of emergency and the legislative and presidential elections (of 24th June 2018) which also took place under the state of emergency. Therefore, it is worth making a quick remark: the referendum process was not used for constitutional democracy, but rather to suppress the politico-constitutional gains and block the path to political alternation.

The parliamentary and presidential elections resulted mainly in two alliances as an extension of two blocs like the "'yes" bloc and the "no" bloc during the constitutional referendum campaign: the People's Alliance (Cumhur İttifakı) and the Nation's Alliance (*Millet İttifakı*).

Finally, the constitutional text as amended on 16 April 2017 came into force on 9 July 2018 following the elections on 24 June 2018. In the new constitutional configuration, the entire executive power is held by one person who cumulates several qualities such as President of the Republic, Head of State, president of the political party, etc.

What qualification could be made for the new constitutional configuration? The authors of the draft call it "the system of government of the Presidency of the Republic" (*Cumhurbaşkanlığı Hükümet Sistemi*) [19] or the Turkish-style presidential system (*Türk Tipi Başkanlık Sistemi)* while the combination of constitutional provisions corresponded rather to a monocracy[20].

The authoritarianism of the "Presidency of the Republic Government System" has been well confirmed by its practice since 9th July 2018.

3. *Which constitutional perspectives? Reflections on the political-constitutional divergence towards the centenary of the Republic*[21]

The contestation since the beginning[22] of the "imposed" constitutional amendment was accentuated from the moment it came into force, which corresponds to the beginning of the 27th legislative period. Two factors not foreseen in the Constitution have shaped the practice of its new configuration:

[19] This term does not appear in the Constitution or in any law. The only reference is made in the reason for Law n. 7142. In fact, such a designation does not correspond to the constitutional configuration either, since there is no government in stricto sensu and the President of the Republic is not a neutral body under the constitutional oath (art. 103).

[20] See more in details A. BOCKEL, *La réforme constitutionnelle en Turquie : la démocratie à la dérive*, in *Revue française de Droit constitutionnel*, 2019, 3, 641-664 ; İ. Ö. KABOGLU, *Suppression du régime parlementaire sous l'état d'urgence : Remarques sur la modification constitutionnelle "approuvée" par le référendum du 16 avril 2017*, in *DPCE online*, 2017, 2, 177-190.

[21] See İ. Ö. KABOĞLU, *Foreword: "Association of the Research on the Constitutional Law (10 th anniversary)/ The Constitution of 1921 (Centennal) and the Republic (Towards the Centennal)*, in *Journal of Constitutional Law/Anayasa Hukuku Dergisi*, 2021, 19, 19-26.

[22] The bill on the proposed amendment was tabled in the National Assembly on 10 December 2016.

-Leadership of the political party: The President of the Republic, following the approval of the amendment by referendum, also took over the leadership of his former political party and this caused the widening of the qualification for political power established as a monocracy: The Presidency of the Republic and the Executive through the leadership of the political party[23].

- Legislative coalition: At legislative level, the alliance between the President's Party (AKP) and the fourth party (MHP) represented in the National Assembly, like a governmental coalition, has blocked the Parliament and hampered deliberative democracy.

The practice since its entry into force in July 2018 is proof of that:

-First, its incompatibility with pluralist regimes such as the parliamentary and presidential regime as well as the semi-presidential or semi-parliamentary regime.

-Secondly, its incompatibility with Article 2 of the 1982 Constitution which specifies the characteristics of the Republic.

-Finally, the speeches and acts of the President of the Republic do not respect the constitutional provisions as they are in force, even those introduced in 2017.

As a result, the political parties that are part of the "no" side in the constitutional referendum were quick to develop and implement their proposals for restoring the democratic rule of law. As to the question of whether constitutional democracy is possible in Turkey, hope can be entertained insofar as the dialectic between democracy and the Constitution is assured.

It can be argued that the local elections and especially the results of the renewed Istanbul mayoral elections have raised hopes for a possible political alternation in the next parliamentary and presidential elections to be held on the same day in 2023.

The closer the election date gets, the deeper the divergence between two political alliances, namely the People's Alliance (*Cumhur İttifakı*) [24] and the Nation's Alliance (*Millet İttifakı*) [25].

The legislative and presidential elections will take place in the rivalry of these two political alliances. However, the rivalry and competition will not be limited by this double election - legislative and presidential - which will take place no later than June 2023, unless the elections are brought forward[26].

The electoral campaigns will also be marked by two constitutional projects: the one of the popular alliance and that of the alliance of the nation.

While, according to the first alliance, the page of the constitutional order had already been turned by the referendum of 16th April 2017, the second alliance led a permanent discourse for the return to the parliamentary regime while contesting the constitutional amendment on the following three levels: the amendment process and the transition period as well as the authoritarian practice and arbitrariness of the personalised regime.

Indeed, the alliance of the nation embodied the principles of the constitutional project, which was aimed at restoring rationalised parliamentarism. However, an unexpected speech (1st February 2021) by the President of the Republic put an end to the "single track" in the constitutional quest. According to him, Turkey would need a "civil constitution"! In fact, the

[23] Parti Başkanlığı Yoluyla Devlet Başkanlığı ve Yürütme (PBYDBY).

[24] This alliance was created by the AKP and the MHP together with the BBP (the Grand Union Party).

[25] This alliance was created by the CHP and the İYİ Party as well as the SP and DP.

[26] Two thirds of the members of the National Assembly or the President of the Republic may decide to bring forward the elections (Art.116).

aim of such an initiative was to consolidate the constitutional configuration established under the circumstances of the state of emergency.

As a result, from spring 2021 onwards Turkey is faced with a double constitutional discourse and a double constitutional path: that of the rationalised (or strengthened) parliamentary regime and that of the "system of government of the Presidency of the Republic".

The electoral campaign will therefore be marked by constitutional discourses and projects. In this context, the accounts will be settled between the defenders of the democratic republic and the nationalistic-theocratic monocrats[27].

Since the choice of the electorate will be polarised between the parliamentary and the presidential regime, the elections will be transformed into a kind of "constitutional referendum".

In short, towards the centenary of the Republic a political-constitutional divergence will gradually deepen.

The choice between democracy and monocracy also coincides with the choice between secularism and implicit theocracy.

[27] See İ. Ö. KABOĞLU, *Demokratik Cumhuriyet mi, teokratik monarşi mi?*, in *BirGün*, 2021, 28.

Diana Maria Castano Vargas[*]

Constitutional Regressions: the Prism of Indicators in the Colombian State[**]

ABSTRACT: ***The phenomenon of regression has been affecting democratic systems around the world for more than fifteen years. Through a series of indicators, the degree of regression or degeneration can be assessed quantitatively and qualitatively–the most significant of which being the separation of powers. Beginning with an analysis of the latest political, administrative and jurisdictional vicissitudes that have occurred in the South American state since 2019, this work aims to identify the prism of indicators of constitutional regressions in Colombia.***

1. *Introductory remarks*

In the wake of the democratic stabilization's processes undertaken by Latin American countries in the second half of the 1980s, Colombia embarked on a constituent process, convening a National Assembly which would then draft the 1991 Charter intended to renew the Colombian State, whose Constitution dated back to 1886.

According to Article 1 of the Constitution, Colombia is a social state under the rule of law, organized as a unitary and decentralized republic with autonomy of its territorial entities, democratic, participatory and pluralist, based on respect for human dignity, work and solidarity. Nevertheless, the lack of or uncertain material implementation of the Constitution, towards the principles, values and rights enshrined in the same constitutional text, has frequently disappointed expectations and revealed "democratic instability" and the "regression of democracy". This phenomenon is certainly not confined to the Colombian state and has affected the vast majority of more or less "established" democracies for more than a five-year period.

According to data collected by the NGO *Freedom House,* which conducts research and awareness-raising activities on political freedoms and human rights, democracy has in fact been in recession for more than 15 years with an overall and progressive regression in several countries that, instead of gaining civil and political rights, have taken steps backwards. It is not by chance that we speak of "*democracy in retreat*", of the return of more or less authoritarian regimes that can sketch, depict or configure an *illiberal democracy*. The latest report, published at the end of 2019 and titled "*Democracy in Retreat*", highlights a scarcely consoling scenario. Between 1988 and 2005, the percentage of countries classified as non-free in *Freedom in the World* fell by almost 14 points (from 37 to 23%), while the percentage of free countries rose from 36 to 46. However, this surge of progress has recently begun to recede. Between 2005 and 2018, the share of non-free countries rose to 26%, while the share of free countries fell to 44%[1].

[*] **Research Fellow in Comparative Public Law at the University Suor Orsola Benincasa, Naples.**

[**] **This work has been subjected to blind peer review.**

[1] The *Freedom House* report can be found online at: *www.freedomhouse.org.*

The SARS-CoV-2 pandemic that started in 2019, had a significant impact on the democracy of each state[2], in addition to affecting individuals and the social conglomerate. This was underlined by the Secretary General of the Council of Europe, Marija Pejčinović Burić during the latest annual report on the situation of democracy, human rights and the rule of law, in the 47 Member States of the Organization, which speaks of a "clear and worrying regression of democracy"[3].

The same situation of the retreat of democracy is in evidence in the United Nations (UN) 2020 report on the impact of COVID-19 in Latin America and the Caribbean[4]. Never before has the unprecedented[5] "normative force of the fact"[6] of an emergency conditioned the law, justifying the adoption of wide-ranging or generic regulations, adopted to face or respond to the emergency, which puts people's health[7] and lives at risk, often leading to overlapping or invasion of competences and jeopardizing the very political stability of states.

However, the pandemic is not the trigger for the crisis of democracy, but has been added as an accelerating and revealing factor for phenomena that had already been present in many states for over a decade. This has caused the scientific community to intensify the processes of metacognition that are indispensable for better identifying the degree of democracy, or rather the degree of democratic regression, its origins and possible ways out[8].

The evaluation of democracy cannot be traced back to a single world model but depends strictly on the "genetic" and "phenotypical" characteristics of each state. Nevertheless, the most authoritative doctrine has established indicators or criteria that measure the quantitative and qualitative extent of democracies with different colors and nuances.

The quality of democracy shows signs of decline when one is faced with the reduction of the physiological functioning of the separation of powers, especially to the detriment of the independence of the judiciary, as well as the limitation of freedom of expression and of the press, the degradation of the freedoms of assembly, association, manifestation of thought and information which prevents the exercise of criticism of the actions of the rulers. The quality of democracy can also be seen in the limitation and violation of other fundamental rights, in the influence of religious factors on the legal system and political institutions, and in the reduction of *checks and balances*[9] of party interests. All this in the presence of the growing disaffection of the various political actors (political parties, movements, associations, interest groups, NGOs, the military, the clergy) towards democratic institutions.

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[2] See I. A. NICOTRA, *Pandemia costituzionale,* Editoriale Scientifica, Naples, 2021.

[3] The report "State of democracy, human rights and the rule of law a democratic renewal for Europe" can be found online at: *www.rm.coe.int.*

[4] The report "*El impacto del COVID-19 en América Latina y el Caribe"* can be found online at: *www.elsalvador.un.org*.

[5] T.E. FROSINI, *Il lascito della pandemia costituzionale (a proposito di un recente libro)*, available online at *www.federalism.it*,

[6] G. JELLINEK, *Teoría general del Estado,* Buenos Aires, Editorial Albatros, 1954, 68 ff.

[7] E. C. RAFFIOTTA, *Norme d'ordinanza. Contributo a una teoria delle ordinanze emergenziali come fonti normative,* Bononia University Press collana, Bologna, 2020, 71-79, 90.

[8] A. DI GREGORIO, *I fenomeni di degenerazione delle democrazie contemporanee: qualche spunto di riflessione sullo sfondo delle contrapposizioni dottrinali* in *Nuovi autoritarismi e democrazie: diritto, istituzioni, società*, n. 2, 2019, 1-29.

[9] L. MEZZETTI, *Corrosione e declino della democrazia,* in Nuovi Autoritarismi e Democrazie: Diritto, Istituzioni, Società, in DPCE, special issue, 2019, 421-445.

This paper seeks to identify the prism of indicators of constitutional regression in Colombia, starting with an analysis of the most recent political, administrative and jurisdictional vicissitudes in the South American state.

2. *Chronicle of a foretold estallido: The Ley de Solidaridad Sostenible bill*

From the very first lines of one of the most famous writings of the Nobel laureate of literature Gabriel García Márquez, alluded to in the subtitle[10], the reader, as well as the different characters in the work, are aware of the grim ending that will befall the protagonist, except for him, who appears "unaware" of the situation evolving towards tragedy.

Similarly, Bill 594/2021 on tax reform, the *Ley de Solidaridad Sostenible*[11] *(Sustainable Solidarity Law),* wanted by Colombian President Iván Duque Márquez and presented by the *Minister of Hacienda y Crédito Público,* Alberto Carrasquilla Barrera, was seen by the opposition, but also by members of the governing party themselves from the outset as a disastrous political choice.

The former President of the Republic, Álvaro Uribe Vélez, the party's ideologist and founder, had used the media and *social media* to call for the bill to be tabled, describing it as "aggressive" and "burdensome", as well as highly unpopular. This concern was even more acute in view of *Uribism's* sharp decline in electoral consensus, the approaching end of its term of office and the arrival of the forthcoming presidential election (May 2022), which currently favored other political parties.

The *Reforma Tributaria* aimed to raise about 23.4 trillion Colombian pesos (about €5.5 billion) to tackle the severe economic and financial pandemic to Covid-19. Broadly speaking, the planned interventions focused on four items: a) increased VAT revenues, b) provisions to broaden the taxpayer base, c) increased taxation and levies on pensions and high incomes, and, d) elimination of a number of tax breaks, exemptions and benefits.

In addition, the reform was to tax some goods/services at 19% VAT. Others would have gone from 5% to 19%. Some transactions would have undergone a fiscal transformation because they would have gone from being non-taxable (allowing the deduction of VAT on purchases) to exempt (allowing only partial deduction of VAT on purchases), which would have resulted in a heavy overall cost burden for the final consumer. There was also a provision for the elimination of exemptions on public transport services, energy, water, sewage, sanitation and waste collection, to the detriment of users classified in levels 1, 2 and 3 (corresponding to the poorest and most vulnerable population).

Some of the very sensitive goods that would suffer price increases were: computers, *tablets* and mobile phones, creating barriers to the right to education, health, work, the right to inform and be informed, the right to demonstrate and, in general, every right and freedom exercisable in the digital world which, as is evident, the Covid-19 pandemic has contributed to

[10] G. GARCÍA MÁRQUEZ, *Crónica de una muerte anunciada*, editorial La Oveja Negra, Bogotá, 1985.

[11] Bill no. 594/2021 of the Cámara de Representantes and no. 439/2021 of the Senado were entitled "POR MEDIO DE LA CUAL SE CONSOLIDA UNA INFRAESTRUCTURA DE EQUIDAD FISCALMENTE SOSTENIBLE PARA FORTALECER LA POLÍTICA DE ERRADICACIÓN DE LA POBREZA, A TRAVÉS DE LA REDEFINICIÓN DE LA REGLA FISCAL, EL FORTALECIMIENTO Y FOCALIZACIÓN DEL GASTO SOCIAL Y LA REDISTRIBUCIÓN DE CARGAS TRIBUTARIAS Y AMBIENTALES CON CRITERIOS DE SOLIDARIDAD Y QUE PERMITAN ATENDER LOS EFECTOS GENERADOS POR LA PANDEMIA Y SE DICTAN OTRAS DISPOSICIONES". Available online at: *www.camara.gov.co/solidaridad-sostenible*.

making fundamental. Other goods and services affected were: charges for residential internet connection and access (for the middle class), funeral services, postal services, cultural or entertainment services, and sporting events.

What triggered the discontent was above all the increase in the prices of essential products such as beef, chicken, pork and fish, milk and its derivatives, eggs, bread, rice, maize, coconut, bananas and, in general, all fruit, vegetables, and dried and fresh pulses. A list of more than a hundred essential products that even included coffee (being Colombia one of the world's main coffee producers) but excluded, for example, sugary drinks.

The bill also affected medicines (even gauze and equipment for blood or blood-component transfusions), as well as goods such as books, notebooks, newspapers, magazines, pencils and even paper for printing newspapers.

In addition to the economic and financial measures that have inflamed the hearts of the Colombian people (who have already been on their knees for more than a year due to the pandemic) the bill presented by the *Minister of Hacienda and Public Credit* aimed to confer *extraordinary faculties* to the President of the Republic. This issue has not been given the due prominence and importance by national and international doctrine.

From the very long text of the bill (110 pages and about 160 articles), it appears that the President would be able to exercise extraordinary powers for a period of 6 months, in a number of matters, including: 1. abolishing, merging, restructuring or modifying entities, bodies and dependencies of the national executive power; 2. providing for the merger, demerger or dissolution and consequent liquidation of public entities, mixed-economy companies, indirect decentralized companies, associations of public entities participated by public entities of a national nature; 3. carrying out the budget amendments necessary to finance the operating and investment expenditure required to fulfil the functions assigned to the entities that have been split up, suppressed, merged, restructured, modified or dissolved; 4. determining the assignment or affiliation of the entities, bodies and dependencies to the most appropriate national public power structure.

The upheaval of the structure of executive power resulting from the granting of exceptional powers, moreover in the midst of a pandemic, close to the presidential elections and in the abyss of a dramatic economic situation, was sudden and potentially risky for the very stability of the democratic system.

Following the presentation of the above bill, a general strike was called for April 28, 2021. The subsequent days of demonstrations and protests have once again plunged the country into violent and cruel scenes characterized by serious human rights violations. The scenario is directly related to the demands already put forward with the strike of 11/21/2019 as we will see.

Indeed, the report of the Inter-American Commission on Human[12] Rights during its visit in June 2021, stated that it had been able to "verify that the days of protest that began on April 28th, 2021 have similar demands to those of the mobilizations of previous years". Through its monitoring mechanisms, the IACHR stated that the common traits of the 2019, 2020 and 2021 demonstrations and protests were to be found in the increasing levels of violence, poverty and inequality, along with the growing number of murders of human rights defenders, social

[12] Inter-American Human Rights Commission, *Observaciones y recomendaciones. Visita de trabajo a Colombia*, 2021, 3 ff. Report available online at: *www.oas.org*.

leaders, representatives of indigenous and Afro-descendant peoples, as well as signatories to the Peace[13] Accord.

On May 4th, 2021, in accordance with the provisions of Article 155 of Law No. 5/1992, the draft Law was withdrawn by the new Minister of Finance and Public Credit in office as of 3 May 2021.

3. *The "21N-2019" watershed strike and the right to demonstrate and protest. From the digital square to the physical*

Despite the opposition of Colombia's most important political parties, both majority and opposition, Bill No. 594/2021 was presented to the House of Representatives on April 15th, 2021 and, the following day, pursuant to Article 163 of the Colombian Constitution, the President urged the Chambers to activate the urgent legislative procedure. The following day, pursuant to Article 163 of the Constitution, the President had urged the Chambers to activate the emergency[14] legislative procedure. In the meantime, the discontent within the parliament and especially in the public spaces of the country and in the digital ways, began to be felt, through the calling of a national strike for April 28th, 2021, with the participation of numerous categories and social organizations.

This latest street protest is not an isolated event but is part of a very complex political and economic scenario, which has to take into account contemporary and less recent historical precedents.

Already with the "*Marcha de las linternas*" on January 11th, 2019[15], the protesters had demanded, among other things, the resignation of the *Fiscal General de la República*, Néstor Humberto Martínez, for alleged connections with the corruption case called *Odebrecht* and had challenged the inefficiency of the Colombian justice system, also in relation to the wave of murders of social *leaders.*

With the "*Marcha por la vida*" on July 26th, 2019[16], the importance of peace and solidarity between peoples had been reaffirmed, protesting against the murders of social *leaders* and

[13] As early as 14/10/2020, the UN quarterly report on the United Nations Verification Mission in Colombia, through its Secretary-General, Antonio Guterres, informed that the multilateral body had ascertained the commission of 42 massacres in 2020 and the killing of 19 former FARC combatants in the same period. Furthermore, since the signing of the peace agreement, the Mission has been able to ascertain the existence of 297 attacks against former members of the FARC-EP, including 224 murders, 20 enforced disappearances and 53 attempted murders. UN report available online at: *www.colombia.unmissions.org*.

[14] According to Article 163 of the Constitution, the President of the Republic may request the "*trámite de urgencia*" of any bill. In this case, the respective chamber must decide on it within a period of thirty days. The manifestation of urgency may be repeated at all constitutional stages of the bill. If the President insists on urgency, the Bill shall have priority on the agenda to the exclusion of consideration of any other matter, until the respective chamber or committee decides on it. If the Bill to which the message of urgency refers is under consideration by a standing committee, the latter shall, at the request of the Government, deliberate with the corresponding House of the other chamber to give it its first debate.

[15] For an overview of the protest, the hashtag #MarchaDeLasLinternas can be consulted at: *#MarchaDeLasLinternas - Search on Twitter / Twitter*.

[16] For more details see: O. ARCHBISHOP URBINA ORTEGA, *Communiqué Episcopal Conference of the Catholic Church of Colombia,* 25/07/2019, available online at: *www.cec.org.co*.

former FARC-EP fighters, who had nonetheless laid down their arms and signed the Agreement[17] in November 2016 to definitively end the internal[18] armed conflict.

Further scandals had emerged with destabilizing effects on the Colombian government. In particular, a few days before a new general strike, called for November 21st 2019, former Defense Minister Guillermo Botero had resigned, after facing a motion of censure, on the basis of article 135(9) of the Colombian Constitution. On August 29th 2019, agents of the State had carried out a bombing in San Vicente del Caguán, in the department of Caquetá, against a base of the dissident fraction of the former *FARC-EP*. In the operation, in addition to the guerrilla's leader, 14 people had been killed, including eight minors, aged between 12 and 17, who had been presented to public opinion as members of the dissident group, without giving any information about their minor age and without giving notice that the *Defensor del Pueblo* had denounced the forced and continuous recruitment of minors in the place where the massacre had occurred since January of the same year.

Notices of protest had also occurred within the jurisdictional bodies, where deep dissatisfaction had emerged, manifested through a series of strikes, during the month of April

[17] The fundamental points of this Final Agreement are six: 1) integral rural reform (*reforma rural integral*), 2) political participation (*participación en política: apertura democrática para construir la paz*), 3) an end to conflict (*cese al fuego y de hostilidades bilateral y definitivo y la dejación de las armas*), 4) solution to the problem of illicit drugs (*solución al problema de las drogas ilícitas*), 5) victims (*víctimas y sistema integral de verdad, justicia, reparación y no repetición*), 6) implementation and verification mechanisms (*mecanismos de implementación, verificación y ratificación*). The full text of the Final Agreement can be found online at: *www.altocomisionadoparalapaz.gov.co* (c. 22/05/2017). May I refer to D. M. CASTANO VARGAS, *Il conflitto armato in Colombia e l'accordo finale per la pace*, in *Federalismi*, April 2018, pp.1-32. For a thorough examination of the subject see: J. E. ROA ROA, *Los retos constitucionales del proceso de paz en Colombia: La fase instrumental de ratificación o refrendación y la implementación de los acuerdos de paz*, in *Serie documentos de trabajo*, nº 47, Universidad Externado de Colombia, Bogotá, 2016, p. 3 ff.; and Uprimny Yepes Rodrigo, La refrendación o ratificación democrática de la paz: dilemas y posibilidades in Vargas Velásquez Alejo, Diálogos de La Habana: miradas múltiples desde la Universidad, Centro de Pensamiento y seguimiento al diálogo de paz, Universidad Nacional de Colombia, Bogotá, 2013, pp. 281-304, available online at: *www.repositorio.unal.edu.co*.

[18] The armed conflict in Colombia, one of the longest and cruelest conflicts in contemporary history, has six main characteristics. Firstly, it is a protracted conflict, being the oldest on the American continent. Secondly, it is a complex and multilateral conflict, with a wide range of protagonists, since it is not a conflict involving only two parties, but a plurality of protagonists, on the one hand the Colombian state and, on the other, various groups on the fringes of the law, including the *FARC-EP* guerrilla group and the paramilitary group *Autodefensas Unidas de Colombia (AUC)*. A weak state, not always consistent with its political line, incapable of carrying out its fundamental functions of effectively controlling the national territory and adequately addressing the needs that have been desperately invoked by the population. Moreover, the state and its subordinate political and administrative levels were divided on how to conduct the conflict. A third feature is the continuity of the conflict. Although several attempts have been made over the decades to put an end to the conflict, these have only been palliative measures or short-lived ceasefires, which certainly could not lead to real peace because the diagnosis of the origins of the conflict was wrong. A fourth element is the regional environmental and geographical conformation, the heterogeneity of the local population and the forms of population. In addition, the occupation of land and the displacement of peasant populations certainly affected and characterized the course of the conflict in a peculiar way. A fifth distinguishing feature is that we are dealing with a conflict born of essentially political roots. The last, important and decisive feature is the degree of atrocity and violence of the conflict's dynamics, which in the period between 1958 and 2012 alone resulted in more than 8,000,000 victims, including approximately 270,000 dead, 47,000 disappeared, 10,250 victims of torture, 36,000 kidnapped, 24,550 victims of sexual violence and more than 7,200,000 displaced.

2019[19], called by the *Asociación Nacional de Funcionarios y Empleados de la Rama Judicial* (*ASONAL Judicial*)[20].

Subsequently, there were new demonstrations because of the increase in violence, corruption, the non-fulfilment of some points of the Peace Agreement, the increase in unemployment, pension reform, and the unfortunate lack of opportunities for young[21] people. Other social groupings had demonstrated against ineffective education and environmental crises. All dissent was fueled by the detachment of the President of the Republic and his government from social reality. The most common *slogans* were directed against the "youngest president, hated by the youngest".

This widespread social unrest resulted in the protests that culminated in the national strike of November 21st, 2019 (21N-2019). The strike represented a watershed in Colombian history and constituted the largest protest demonstration in Colombia in the last 50 years.

The reasons for the stark significance of the event are of a different nature: a) for the first time in the republican history the demonstrations were supported and sustained in unison by the younger generations of all social classes, students of public and private universities, workers and pensioners of all ranks and categories, citizen control organizations, environmentalist associations, ancestral populations, Afro-descendant populations, voluntary associations, social economic development, LGBT+ communities, feminists; b) for the first time the strike was organized *in digitales* a strike conceived, called, wanted and evolved also and above all via Internet[22], from the digital square to the physical square, both in constant and indispensable reciprocity of functions, evolving into a true human/technological[23] "ecosystem"; c) for the first time, the belief was broken, in the majority of public opinion, that street demonstrations were no longer the exclusive monopoly of subversive movements, but

[19] Strikes will be repeated in April, September, October, November and December 2019

[20] Orjuela García, José Diógenes, Presidente Central Unitaria de Trabajadores, Communiqué of 27 September 2019: "La CUT respalda y exige soluciones al paro nacional de la Rama Judicial el 2 y 3 de octubre de 2019", available online at: *www.cut.org.co*. Among the demands of Colombian justice sector workers were: an increase in the budget, computerized modernization of processes, a decrease in workload, insufficient staffing levels and a call for a fundamental reform of the country's judicial system. Justice sector workers claim that the judicial system does not have the resources to function properly.

[21] In the period December 2020 - February 2021, the unemployment rate for young people was 27.7%.

[22] See S. RODOTÀ, *Il mondo nella rete. Quali i diritti, quali i vincoli*, 2014, Laterza, 6 ff. "It is clear that on the original horizon of the Internet stands out, clear, the founding myth of democracy: the Agora of Athens. In fact, it was thought that in the global village, in the immense virtual square, it would be possible to reconstruct the conditions of direct democracy. Not only that, but the Internet would come to the rescue of the dying representative democracy and take it to the safer shores of an 'immediate' democracy, i.e. to a political system characterized by permanent consultation of citizens. A '*dining room*' or '*push-button democracy*', a democracy in which each person's home would be transformed into a voting booth, would find its form in the possibility of consultations built around a yes or no answer to questions posed by others, in any case from above (...)".

[23] On this issue, see: S. RODOTÀ, *Libertà, opportunità, democrazia e informazione,* in *Internet e Privacy: quali regole?* Atti del convegno organizzato dal Garante per la protezione dei dati personali, Roma, 1998, 12 ss. The jurist referring to the Internet states: "it is a form that democracy can take, it is an opportunity to strengthen the declining political participation. It is a way to modify the processes of democratic decision-making'; Günther Anders, *L'uomo è antiquato*, Bollatti Boringhieri, Turin, 2003, quoted by S. RODOTÀ, *Vivere la democrazia*, Laterza, Bari, 2018, 132,133.

The author states: "Like a pioneer, man moves his boundaries further and further. He moves further and further away from himself; he "transcends" himself more and more - even if he does not venture into a supernatural region, because he crosses the congenital limits of his nature, he passes into a sphere that is no longer natural, into the realm of the hybrid and the artificial."

On developments in political representation, see R. MONTALDO, *Le dinamiche della rappresentanza tra nuove tecnologie, populismo e riforme costituzionali*, in Quaderni costituzioni., no. 4, 2019, 789 ff.

the expression of an effective popular movement mobilized by real needs for democratic participation.

Today's appearance of freedom of thought has been facilitated by the transformative power of the Internet and has multiplied the possibilities of expressing individual freedom without barriers or filters. According to the most authoritative doctrine, the Internet has come to the rescue of democracy, taking it to safer shores, facilitating consultation and the direct and immediate participation of citizens. Through *social networks,* people can comment, make judgments, give a thumbs up or down to any kind of content, sign petitions, create platforms for discussion and political activity directly on the Web[24].

This transformation has been made possible in Colombia thanks to the quantity and quality of the technological means by which the Internet is accessed. Of particular importance is the data from the *Digital 2020 Global Overview Report*, carried out by *We are Social* and *Hootsuite*, which depicts the statistics of Colombia's digital situation during 2019 and 2020.[25]

The Colombian state has a population of approximately 50.61 million inhabitants. Nevertheless, the number of connected telephones in the country is 60.38 million, exceeding the total number of the population. The number of users connected to the Internet in the year 2020 was 35 million, or 69% of the total population that has access to this service; while in 2010, access to the Internet was reserved for only 19.3% of the population[26].

According to the data available between 2019 and 2020, the number of Internet users increased by 2.9%, representing more than one million new users. While the number of users connected to social networks increased by 11%, i.e. 3.4 million new profiles were created for the year 2020. 96% of the population between the ages of 16 and 64 owns a mobile phone (93% is a smartphone), 79% of the population has a laptop or desktop computer (PC) and uses an average of 9 hours and 10 minutes of Internet. The data highlights Colombia's above-average position on the scale of Internet access in South America.

In this perspective, it is safe to say that the demonstrations were also triggered through the various channels of the Internet, such as *Facebook*, *Twitter*, *Instagram*, *YouTube*, *WhatsApp*, *Telegram*, *Skype*, etc., configuring in fact a kind of parallel world in which data, documents and information[27] are created, processed, collected, stored and, most importantly, shared.

On 23 November 2019, the enormous potential of the Internet proved to be crucial during a serious act of bloodshed in the center of the capital Bogotá. Riot police officers (*Escuadrón Móvil Antidisturbios ESMAD*), in front of citizens participating in a peaceful protest, had used firearms, seriously injuring the young Dilan Cruz[28], just 18 years old, who died after two days

[24] See S. RODOTÀ, *Il mondo nella rete. Quali i diritti, quali i vincoli,* 2014, *cit.*, 6 ff; T. E. FROSINI (ed.), *Diritti e libertà in internet*, Milan, 2017, 20 ff.

[25] For more details see: *www.wearesocial.com.*

[26] Data available at: *www.datos.bancomundial.org.*

[27] T. E. FROSINI, *Liberté Egalité Internet*, second ed., Naples, 2019, 19 ff.

[28] Facts similar to those involving Dilan Mauricio Cruz Médina are nothing new. In fact, there are many episodes involving *ESMAD* agents. Some similar cases are exhaustively reported in the draft Law no. 411 of 2020 of the Chamber "*Por medio de la cual se dictan medidas para la prevención y sanción de los abusos en la actividad de policía*" and, specifically, they concern the murder of the minor Nicolás Neira, whose facts have been judged by the ordinary jurisdictional authority, In its sentence of January 25th, 2021, Néstor Rodríguez Rúa, a member of the mobile anti-riot squad (*ESMAD*), was sentenced to 17 years' imprisonment for the murder of Nicolas Neira, who was hit by a bullet fired from a grenade launcher during a protest held on International Labor Day in 2005. An equally emblematic case is the murder of young Oscar Salas, in which *ESMAD* agents were involved in various capacities, information available online: *www.elespectador.com.* The full text of the House Bill No. 411 of 2020 can be found online at: *www.camara.gov.co*.

from his injuries. The episode was filmed by dozens of people with personal vehicles, by television operators and on various *social networks* and reached every corner of the world in a few minutes and became a symbol of the protests[29].

Initially, the ordinary judicial authority had been entrusted with the task of ascertaining the facts and its dynamics but, following the submission of a positive conflict of jurisdiction before the *Consejo Superior de la Judicatura* (pursuant to Article 256, paragraph 6, of the Constitution), jurisdiction passed to the military judicial authority on 12/12/2019 (*Juzgado de Instrucción Militar* in Bogotá).[30]

The facts have also been the subject of pronouncements by supervisory bodies, such as the *Procuraduría General de la Nación*[31], which has recommended that the police force suspend the use of a particular 12-gauge shotgun, equipped with bean bag ammunition, containing six to seven hundred lead pellets, generally used in public demonstrations to break up riots, manage crowd movements and roadblocks, with devastating effects, also due to the lack of adequate training of the police force[32].

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[29]On May 4th, 2021, Erika Guevara-Rosas America's Director at Amnesty International said: "The Colombian authorities must promptly, independently, and impartially investigate all allegations of excessive and unnecessary use of force against demonstrators, which has resulted in dozens of people being killed and injured, arbitrary detentions, acts of torture and sexual violence, and reports of people disappearing. They must also respect freedom of expression and the press and ensure that journalists can cover the news in safety," said Erika Guevara-Rosas, America's director at Amnesty International." "The Colombian authorities must promptly, independently and impartially investigate all allegations of excessive and unnecessary use of force against demonstrators, which has resulted in dozens of people being killed and injured, arbitrary detentions, acts of torture and sexual violence, and reports of people disappearing". For more information see: www.amnesty.org.

[30] Decision of the Sala Jurisdiccional Disciplinaria of the Consejo Superior de la Judicatura n. 11001010200020190272 8-00, Acta n. 96 of 12/12/2019. Text of the decision available online at: *jurisprudencia.ramajudicial.gov.co.*

[31] The Colombian Public Prosecutor's Office has a very different structure and functions from the Italian one. In fact, according to Art. 275 et seq. The *General Prosecutor's Office (Procuraduría General de la Nación)* is not part of the judiciary but is an independent supervisory body with administrative, financial and budgetary autonomy. Its task is to ensure the proper exercise of the functions of those who carry out state or political functions -including those elected by the people-, monitor compliance with the Constitution and the law, promote the protection of fundamental rights, respect for citizens' duties and protect public assets. This body has three types of functions The "preventive function", considered to be the main one of the *Procuraduría*, for which it has the duty to supervise the actions of public officials (those who exercise a legislative, judicial or administrative public function) or those in charge of a public service and warn of any act that may violate/infringe the applicable rules, without implying co-administration or interference in the management of state entities; The "intervention function", as a procedural subject, the *Procuraduría* intervenes before the Contentious-Administrative and Constitutional Courts and before the different instances of the Criminal, Military Criminal, Civil, Environmental and Agrarian, Family and Labor Courts, before the Superior Council of the Magistracy and the Administrative and Police Authorities. Its power to intervene is not optional but compulsory and is exercised selectively when the Attorney General and his delegates deem it necessary and is important whenever it is carried out in defense of fundamental rights and guarantees; the "disciplinary function" by which it is obliged to initiate, prosecute and rule on investigations for disciplinary offences against public employees and private individuals who perform public functions or administer state funds, in accordance with the provisions of the Unified Code of Discipline, i.e. Law No. 734 of 2002. Information available at*: www.procuraduria.gov.co*. For more details see: Luis Eduardo Rozo Acuña, Il Costituzionalismo in vigore nei paesi dell'America Latina, Turin, 2012, 255.

[32] In its report of 14/01/2020 the *Procuraduría* points out that although there are some guidelines for the education of *ESMAD* Police personnel "(...) the 48-hour academic programs promote knowledge of the use of force, tactics and techniques for proper police intervention, as well as the use of weapons, ammunition, less lethal elements and devices, but without providing specific training in the use of the 12 gauge rifle and its direct impact ammunition, since "this is only put into practice when ammunition is available, although commonly, given

The dynamics of the 21N-2019 strike had also been conditioned by the presence of the "indigenous Minga", a kind of gathering of the ancestral peoples, traditionally active for the purpose of common activity - now with the meaning of resistance or protest in defense of rights. The Minga had mobilized from the original territories and headed towards the capital and the main cities of the country. About 10,000 people took part in the protests for more than a week, demanding in particular the curbing of the wave of violence in their territories with scenarios of real war, the fulfilment of the Peace Agreement, and the taking of sufficient and rational measures against the deterioration and global warming of our common home "Mother Earth".

4. *The right to demonstrate and protest in Colombia through the most recent case law*

One of the main objectives of the Colombian Constitution of 1991 is to strengthen democracy. To this end, a participatory dimension has been incorporated whereby citizens are directly involved not only in the composition of the bodies of public power but also in controlling the work of the institutions. This control can be exercised in two ways. Citizens can make use of traditional direct mechanisms, such as voting, accountability, *rendición de cuentas* and revocatory or judicial review mechanisms. Such control implies full trust in the institutional framework and decision-making authorities. Citizens can also exercise so-called "indirect influence mechanisms" on power holders and government policies, which are not guaranteed by regulated procedures and are only supported by collective action in public, such as protest. In this case, there is a lack of trust in the decisions taken by the authority, due to the distance existing between it and the citizenry, or an interest not represented in the traditional logic and dynamics of power.

The judgment of 09/22/2020 No. STC7641-2020 of the *Supreme Court of Justicia*, *Sala de Casación Civil*, is a direct testimony of this and constitutes a milestone for the implementation of the right to demonstrate and protest in Colombia. The decision issued on the appeal filed against the judgment of 04/23/2020 of the *Sala Civil of the Tribunal Superior del Distrito Judicial de Bogotá*, in the context of an *Acción de Tutela* or *Acción de Amparo*[33], relates to

its high cost, there is a shortage, to the point that on many occasions for the conduct of an exercise only 100 cartridges are provided to train 1.000 men (...)". *Resolución* No. 2903 of 23/06/2017 by which "*reglamenta el uso de la fuerza y el empleo de armas, municiones, elementos y dispositivos menos letales*" is available online at: *www.forcupol.com/resolucion-numero-02903-del-23-junio-2017/*.

[33] The *Acción de Amparo or Acción de Tutela is an* institution peculiar to the legal systems of Latin America, the genesis of which can be traced back to Mexico; it was already present at the beginning of the 19th century in the first constitutions of the Mexican States. This action is recognized by Article 86 of the Colombian Constitution and regulated by Decree 2591 of 1991 and Decree 1382 of 2000. It is categorized as an instrument for the protection of fundamental rights and as a mechanism for protecting the supremacy of the constitution against public officials and, in general, all rulers who, in the arbitrary or illegitimate exercise of power may actually or potentially infringe, violate, restrict, alter or threaten the rights or guarantees explicitly and implicitly recognized by the Constitution. During the amparo proceedings the judge hearing the case takes on the role of "Juez constitucional de tutela" and his hierarchical superior, the judge of appeal, takes on the role of "Juez constitucional de tutela de segunda instancia". The main feature of the action's procedure is its subsidiarity, brevity and rapidity in order to allow the restoration of the infringed right and/or the cessation of the threat in a timely and congruous manner before the conflict from which it originates is extinguished. For more on this topic see: Rozo Acuña, Luis Edoardo, *Temi di Diritto Pubblico Comparato*, Urbino, L'asterisco Editori, 2010, 65 ss; Fix- Zamudio, Héctor, *Ensayos sobre el Derecho de Amparo*, tercera edición, Porrúa UNAM, México 2003.

events that occurred during the demonstrations and protests of 2019, connected to other events that have taken place in recent years.

4.1 *The facts*

As a result and consequence of a series of police violence mentioned above, a group of more than fifty people, including students, university professors, social organizations, human rights defenders, journalists, and victims' families, have filed an *Acción de tutela* or *Acción de amparo*, pursuant to Article 86 of the Constitution, against the President of the Republic, the Minister of Defense and the Minister of the Interior, the Mayor of Bogotá, the Director General of the Police Force, the General Commander of the Metropolitan Police Force of Bogotá, and the Defense Minister of Bogotá. against the President of the Republic, the Minister of Defense and the Minister of the Interior, the Mayor of Bogotá, the Director General of Police, the General Commander of the Bogotá Metropolitan Police, the *Defensor del Pueblo* (Ombudsman).

The plaintiffs alleged that from 2005 to the present, when faced with peaceful protests and demonstrations, the Colombian State had engaged in constant, repeated and persistent conduct to undermine, discourage and weaken the right to demonstrate freely and to demand that various authorities radically change their political choices. Among the behaviors that the plaintiffs identified as violations were: (i) the systematic, violent and arbitrary intervention of security forces in demonstrations and protests; (ii) the "stigmatization" of those who, without violence, had taken to the streets to criticize the Government's actions; (iii) the disproportionate use of force, lethal weapons and chemicals; (iv) illegal and abusive detentions, inhuman, cruel and degrading treatment; (v) attacks on freedom of expression and the press.

Specifically, the applicants set out in detail the serious violations of fundamental rights since the *21N-2019* strike.

In relation to the "stigmatization of protest by public officials", it was alleged that some government's agents had embarked on a campaign to discourage the exercise of the fundamental right to demonstrate peacefully. To this end, it was alleged that the government had ordered: (i) the militarization of cities with armored vehicles in areas visible to the inhabitants of the country, to warn the population, that the protesters were a "dangerous force"; (ii) the activation of the intervention plans proper to the "anti-terrorist policy"; (iii) to implement Decree no. 2087 of 11/19/2019, which gives directives to governors and mayors to adopt "curfew" measures; (iv) using the widely circulated media to make "negative propaganda" in order to negatively characterize those who intended to participate in the protest[34].

Specifically, it was pointed out that, on 20 November 20th, 2019, the Office of the United Nations High Commissioner for Human Rights (OHCHR), in a press release published on its website, had expressed explicit concern about the issuance of the aforementioned provisions. In addition, it was noted that a series of videos and photographs had been circulated on social networks in which certain groups of people expressly threatened those who would participate in the demonstrations.

On November 20th, 2019 (the day before the protests), the Public Prosecutor's Office reportedly authorized 27 simultaneous searches in Bogotá, 8 in Cali and 4 in Medellín, in the

[34] Decree No. 2087 of 19/11/2019 can be found *online* at*: www.dapre.presidencia.gov.co*

homes of journalists, artists, activists and social groups linked to the "marches" planned for the next day. Most of them were later declared illegal by several guarantee judges. Some members of the government are reported to have posted messages on various *social networks* condemning the protests, categorizing them as strategies to overthrow the President of the Republic.

With regard to the "use of lethal weapons and excessive force" during "demonstrations", the petitioners alleged that this practice constitutes a constant threat to freedom of expression[35]. In addition, the complainants alleged that, in the first week of December 2019, during the allegations made by the Director General of the National Police against students at the National University of Colombia (Bogotá campus), some of them had been brutally assaulted by agents of the *ESMAD* (*Escuadrón Móvil Antidisturbios*). Other complainants reported that they had been photographed by members of the National Police for no reason, and that they had witnessed people intimidating them in order to discourage their participation in the protests.

In relation to "arbitrary and unlawful detentions by the security forces", some complainants claimed to have been victims of beatings, detentions and unlawful arrests: 835 of these cases had been registered in Bogotá, 26 in Popayán and 25 in Barranquilla.

In relation to "attacks on the freedom of the press", it was stated that a number of journalists had been attacked by security forces in the course of their reporting activities. In addition, there were 47 cases of violence attributable to the police and *ESMAD* against media personnel.

The above-mentioned events are said to have taken place systematically in order to terrorize and dissuade citizens from attending public events.

86 documents containing news and press reports were attached to the *Acción de Tutela in order to provide* concrete evidence of the truthfulness of the complaints formally submitted.

Specifically, the applicants requested the *Juez de Tutela* to order: (i) the President of the Republic to "set up a working group" to restructure the guidelines on the use of force against peaceful demonstrations; (ii) the complained authorities to refrain from reiterating illegal conduct; (iii) the *Defensor del Pueblo* (Ombudsman) to assist and give support to the aggrieved persons; (iv) the Public Prosecutor's Office and the National Police to allow human rights organizations to carry out verifications in cases of detention and arrests of people during the course of any kind of demonstration; (v) to suspend all *ESMAD* activities until structural and substantive changes were made to the intervention procedures.

The Supreme Court, noting by Order ATC282-2020, the lack of contradictory evidence against the National Army, *ESMAD* (*Escuadrón Móvil Antidisturbios*), *COPES* (*Comando de Operaciones Especiales y Antiterrorismo*) and GOES (*Grupos Operativos Especiales de Seguridad*), of the Public Prosecutor's Office, annulled the first instance proceedings, ordering the devolution of the acts to the judge *a quo.* It also considered it necessary to summon the following bodies and offices: (i) the Office of the United Nations High Commissioner for Human Rights (OHCHR) delegated for Colombia; (ii) the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women); (iii) the International Labor Organization (ILO); (iv) the United Nations High Commissioner for Human Rights (UNHCHR); (v) the United Nations High Commissioner for Human Rights (UNHCHR); (vi) various Colombian universities;

[35] The sentence refers to the death at the hands of the Colombian Forces of Order of a number of people, including: Nicolás David Neira Álvarez, Jhony Silva Aranguren, Óscar Leonardo Salas Ángel, Héctor Alejandro Alba Siboche, Dylan Mauricio Cruz.

(vii) the Foundation for Freedom of the Press (FLIP); (viii) the National Indigenous Organization of Colombia *(*ONIC); (ix) the *Central Unitaria de Trabajadores* (CUT*)*.

In accordance with the above, the court of first instance proceeded to supplement the cross-examination. Subsequently, the appellants submitted further documents in which other facts relating to new infringements were annexed, including following the protests that arose after the decree on the health emergency generated by the SARS-CoV-2 virus.

In his reply, the President of the Republic complained of lack of active and passive legitimacy. The Ministry of the Interior pointed out that the application was inadmissible because: (i) the precautionary application is not suitable to protect collective rights; (ii) the imminence of irreparable damage is not evident; (iii) the subject-matter of the application is lacking.

For its part, the National Police stated that its actions had been carried out within the parameters of legality. The Seventy-first Sectional Prosecutor's Office of the Unit for Crimes against Public Administration held that what was requested through the application for protection did not have to be settled in court, since the rules on the right to peaceful protest are a matter for the legislature.

The Ministry of Defense argued that the National Police and *ESMAD* has the power to use "non-lethal weapons", referring to Resolution No. 3514 of November 5th, 2005, which established the "Manual for Police Service in Attention, Management and Crowd Control". This resolution authorizes the police to use, among other things, hand grenades with irritant and/or tear gas agents, stun grenades, multiple effect grenades (light and sound, gas and sound, gas and light), non-lethal rifles with rubber pellets or irritant gas capsules. Finally, he stressed the importance of maintaining order during the course of the protest.

The NGO *Human Rights Watch* documented several attacks by police forces during the protests, highlighting investigations into 72 cases of possible abuses committed by police authorities for serious human rights violations. It stated that 32 of these cases were illegally transferred to military criminal justice. Similarly, it denounced: the arbitrary arrest of 213 people, including journalists; the administrative detention of another 1662 protesters in the 2019 protests; and the unjustified expulsion from the country of 61 foreigners.

Some universities have joined the *Acción de Amparo*, while others have declared themselves uninvolved in the facts of the case.

4.2 *The fundamentals of law*

The Court defined the question of constitutionality essentially in relation to the verification of the violation of the fundamental rights to freedom of assembly, demonstration and peaceful and non-violent protest.

In addressing the issue, the court began with a historical analysis, starting with the Universal Declaration of Human Rights of December 10th, 1948, which states that no one shall be arbitrarily deprived of life, or subjected to cruel or degrading treatment or arbitrary detention. The right to freedom of movement is guaranteed and the right to express one's opinions without being harassed is guaranteed.

With the International Covenants on Civil, Political and Economic Rights approved by the United Nations in 1966, and ratified by Colombia through Law 74 of 1968, the country obliged itself to implement these provisions through effective remedies. With the American Convention on Human Rights (or Covenant of San José de Costa Rica), a Commission and a

Regional Court were created to materialize these rights whenever states failed to fulfil their conventional commitments.

From the perspective of domestic law, the Political Constitution of 1991 established *habeas corpus* and *guardianship* actions as effective and agile judicial instruments to protect fundamental rights.

As regards the rights allegedly infringed, the Court points out that the constitutional configuration of the State and society, as established in 1991, has taken on a pluralist and participatory character "based on respect for human dignity", which places on the authorities (the army, the police and therefore ESMAD) the duty to protect the inhabitants of the territory. For this reason, when the authorities violate this obligation, they must be held responsible for omission or excess of power in the performance of their functions.

The Constitution requires the authorities and officials involved: to protect the lives of persons, to refrain from "disappearing" them and to treat them fairly, paying particular attention to those with special *status*, to promote the free development of their personalities, not to harm them on account of their beliefs, not to censor their expressions or opinions, and to allow them to circulate in the territory. Similarly, unlawful interference with their private lives and violation of their homes are not permitted.

Article 37 of the Constitution states that citizens may assemble to demonstrate publicly and peacefully. Only the law can determine the cases in which this right can be restricted. Therefore, according to the tripartition of powers, it is the Congress of the Republic, and not another state institution, that can circumscribe (through a "*ley estatutaria*") the fundamental right to demonstrate and protest. Indeed, Article 121 of the Constitution states that public authorities may not exercise functions other than those attributed to them by the Constitution and the law and may not be called upon to regulate the manner in which a person may enjoy his right to demonstrate publicly and peacefully.

After a careful analysis of the facts, the Court finds as follows:

a) the absence within the Colombian legal system of an (*estatutaria*) law on the scope and limits of public force, the way in which the decision-making process should be organized (centralized or decentralized), and the nature and necessary criteria for assessing different types of conduct in the exercise of the right to demonstrate and protest;

b) the systematic violation of the right to demonstrate and protest by the security forces, especially *ESMAD,* and the real threat that this institution poses to the effective exercise of this right;

c) the inability of those involved to maintain a neutral stance towards the population;

d) the existence of political and ideological bias against those who dissent from the policies of the national government;

e) the abuse of massive raids and searches in the homes of those who have a legitimate interest in protesting;

f) non-compliance with international obligations to protect human rights;

g) the complete absence of checks and controls on the activities of the police authorities;

h) the disproportionate use of *ESMAD*'s weapons, which were considered incapable of ensuring order without infringing on citizens' freedoms and rights of dissent;

i) the lack of results following the organization of human rights training courses, ordered for members of the security forces, by the Council of State and the Inter-American Court of Human Rights, in the many cases in which the State had been condemned for the excessive and arbitrary exercise of power.

The Court points out that the disputed events are not confined to the District of Bogotá, but have had a national impact, not least because of the State's failure to intervene to balance the situation.

In the Court's view, the National Government also ignored the annual report of the United Nations High Commissioner for Human Rights and the reports of the Office of the High Commissioner and the Secretary-General of February 24th – March 20th, 2020, which stated that some members of the Mobile Anti-Riot Squad (*ESMAD*) had failed to comply with international norms and standards relating to the use of force. Indeed, there is evidence that the *ESMAD* committed repeated offences against protesters in Bogotá, Cali and Medellín in the performance of their duties. The protesters had suffered various types of trauma, such as: eye injuries leading to eventual loss, head injuries due to shots or wounds from bullets fired by the police forces and arbitrary killings.

The non-neutrality of the Colombian government is also demonstrated in the systematic characterization of the protesters, pointed out as belonging to terrorist or armed groups, therefore, subject to a sort of "objective presumption of guilt". Evidence of this can also be found in a series of publications via *social networks* in which various members of the government and members of the National Army have not only strongly criticized the demonstrators, but also developed an intense campaign against the demonstrations and protests. An example of this can be found in the virilization of various *hashtags* such as: we (i.e. the government) '*no paramos, avanzamos*'.

Furthermore, the Court points out that the President of the Republic issued Decree No. 2087 of November 19th, 2019 where, in establishing certain measures for the maintenance of public order at the national level[36], he also issued directives to governors and mayors to adopt the serious measure of "curfew"[37].

Also based on the allegation of some videos related to the protests conducted simultaneously in Bogota, Cali and Medellín during and after November 21st, 2019, in the Court's opinion, during these events, a constant occurred: the repressive tendency of *ESMAD towards the* protesters and, in some cases, also against persons unrelated to the protests, as well as the failure to apply Administrative Act no. 2903 of June 23rd, 2017, of the Director General of the National Police, concerning "(...) the use of force and less lethal weapons, ammunition, elements and devices". The Court also challenged the non-application of Resolution No. 3002, dated June 29th, 2017, by which the Director General of the National Police had given instructions on the conduct of the public order service and crowd containment, through the intervention of *ESMAD*[38].

With regard to the excessive and disproportionate use of force, the Court points out that such conduct has a negative impact on the collective environment, as it undermines citizens' trust in the police force. These behaviors generate mistrust towards the bodies in charge of protecting life, honor and property rights, and, in general, towards representative institutions, supervisory bodies and the judiciary, which appear incapable of responding effectively to abuses, casting doubt on their real ability to channel collective demands. Such behavior ends up being an unconscious incentive to chaos, violence and anarchy as the only way out of social problems.

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[36] Decree No 2087 of 19 November 2019 can be found online at: *www.dapre.presidencia.gov.co*

[37] Curfew measures in Bogotá were adopted by Decree No. 714 of 22 November 2019 *"Por medio del cual se decreta el toque de queda en la ciudad de Bogotá D.C.".*

[38] Administrative acts are available at: *www.policia.gov.co.*

Finally, the Court expressly refers to international treaties and to some precedents of the Constitutional Court, including decisions: C-204 of 2019, C-009 of 2018, C-281 of 2017, C-435 of 2013, T-366 of 2013, C-575 of 2009, C-825-04 of 2004, in which a decalogue of principles was drawn, suitable to guarantee the respect of human dignity, the right to demonstrate, the freedom of expression and manifestation of thought. When it comes to the right to demonstrate and protest, the police force must respect legality, guarantee public order, without interfering in the private sphere of citizens. It must take the necessary and effective measures to fulfil its duties and use force only when it is indispensable (subsidiary).

4.3 *The "governmental nature" of the judgment*

The operative part of the judgement of the second instance judge overseeing a guardianship is full of rulings that go beyond the functions and roles traditionally reserved for the courts. Specifically, it requires:

1. Set aside the judgment under appeal and grant protection of the fundamental rights infringed.
2. Order the parties to the dispute to refrain from any further acts likely to affect the rights claimed in the *Acción de Tutela*.
3. Order that the full text of the judgment be published prominently on the *website of* the parties involved within 48 hours, facilitating its dissemination also through publication and sharing in the various *social networks*.
4. Ordering the Minister of Defense, within the deadline of 48 hours, to "*presentar excusas*" (to issue a public apology) for the excesses committed by the public force, especially by the Mobile Anti-Riot Squad of the National Police (*ESMAD*), during the protests that have taken place in the country since 21 November 2019. Such "*excusas*" are to be widely disseminated by radio, television and social networks.
5. Furthermore, it orders the National Government - President of the Republic to proceed, within 30 days from the notification of the judgment, to:

5.1 Issuing an administrative act ordering all members of the executive power at the national level to maintain their neutrality during non-violent demonstrations, even if they aim to challenge the policies of the national government, which includes a permanent obligation to guarantee and facilitate, in an impartial manner, the exercise of the fundamental rights of expression, assembly, peaceful protest and freedom of the press, even during events of (i) foreign war; (ii) internal turmoil; (iii) a state of emergency.

5.2 Convene and form a working group to rewrite the guidelines on the use of force against peaceful demonstrations, in order to discuss not only the points and indications of the ruling, but also the arguments of any person interested in the matter.

In this regard, the national government is obliged to issue a regulation that takes into account the guidelines dictated by the case law of the Constitutional Court, the Inter-American Court of Human Rights and the recommendations of the United Nations within 60 days.

To this end, particular attention should be paid to the issues of preventing, impeding and punishing (i) the systematic, violent and arbitrary intervention of the security forces; (ii) the "stigmatization" of those who, without violence, take to the streets to question, refute and criticize the work of the government (iii) the disproportionate use of force, lethal weapons and chemicals; (iv) illegal and abusive detentions, inhuman, cruel and degrading treatment; (v) attacks on freedom of expression and the press.

Along these lines, a protocol of concomitant and subsequent preventive actions should be drawn up, with the direct participation of citizens, supervisory bodies and regional and local managers.

This protocol shall have the following literal name: "*ESTATUTO DE REACCIÓN, USO Y VERIFICACIÓN DE LA FUERZA LEGÍTIMA DEL ESTADO, Y PROTECCIÓN DEL DERECHO A LA PROTESTA PACÍFICA CIUDADANA*" and shall include, at least: a) a Protocol for preventive actions; b) a Protocol for concomitant actions; c) a Protocol for actions following the celebration of the demonstrations.

6. Ordering the National Police and the Public Prosecutor's Office to issue a memorandum of understanding allowing citizens and human rights organizations, as well as UN bodies, to carry out the appropriate checks in cases of arrest and detention of persons, during the course of any kind of demonstration, meeting or act of protest within 30 days.

7. Order the Public Prosecutor's Office and the *Defensoría del Pueblo* (*Ombudsman*) to draw up guidelines for easy access to technical-legal advice and assistance for people who are, or have been, affected by restrictive measures during protest demonstrations within 30 days.

8. Order the *Defensoría del Pueblo* (*Ombudsman*), until it is ascertained that the *ESMAD* has achieved an adequate level of guarantee in the exercise of its functions, to guarantee and enforce the rights and freedoms of the people participating in the protests, to carry out a rigorous, strong and intense control over all its work and the proceedings that are activated during the citizens' demonstrations.

9. Order *ESMAD*, and any other institution with police duties to refrain from using '12-gauge shotguns' until it has been fully ascertained that the officers are fit to make responsible and measured use of this instrument within 48 hours. This verification must be carried out by the trial court judge.

10. Order the *Defensoría del Pueblo* (*Ombudsman*) to submit a monthly report to the trial court judge on compliance with the provisions adopted therein.

11. Establish that, when the Court deems it necessary, it may take an active part in demanding compliance with what is ordered in the judgment.

12. Order the transmission of the judgment to the Public Prosecutor's Office and to the supervisory bodies, so that they may proceed with the appropriate investigations and inquiries in relation to the facts which are the subject of the appeal. A periodical report on the investigations and enquiries carried out shall be submitted to the judge at first instance.

In the case before us, Judge Álvaro Fernando García Restrepo filed his dissenting reasons in a "*Salvamento de voto*", which is articulated in the following arguments: 1) Judges' decisions must be based on objective evidence and not on "emotional", unproven statements supported only by assumptions of *conocimiento general*; 2) Judicial decisions cannot invade the prerogatives of other constitutional bodies, or order legislative interventions to the Parliament, because any act of co-legislation or co-administration is not suitable to avoid a complained infringement of fundamental rights; 3) Any police misconduct must be left to the jurisdiction of its own court, because the protections *"en forma general"* do not constitute a real remedy against misconduct, except in cases where the violations are not expressly protected by the law.

Judge Luis Alonso Rico Puerta also made a further "*Salvamento de voto*", in which he contended that: 1) Article 86 of the Constitution conditions the feasibility of the *amparo* limited to concrete cases, when the injured person "*no disponga de otro medio de defensa judicial*". In addition, there must be the prerequisite of the existence of an imminent, urgent, serious and unforeseeable situation, deserving of transitional intervention; 2) According to

the judgment in T-1008 of 2012, the *Acción de Tutela* must be considered subsidiary and therefore cannot constitute an alternative, optional and parallel means to the ordinary proceedings, aimed at "supplementing" the proceedings established by law. To do otherwise would lead to the absurdity of altering the procedural system laid down by law. Therefore, in the absence of a finding that the ordinary procedures are ineffective in each specific situation, the *Sala de Casación Civil* should have declared the *Amparo* inadmissible.

Once the judgment was notified, it was found that the national government was reluctant to comply with its terms. Specifically, the government challenged the ruling by pointing out that it was not clear what it was and that it had an "activist" approach. The judge of fundamental rights, represented in this case by the Supreme Court of Justice, allegedly overstepped the limits of its function. Specifically, it points out that law enforcement agencies operate under "security protocols in line with international human rights standards to protect the lives, rights and freedoms, integrity, property and honor of residents of Colombia. These include the rights of people who participate in public and peaceful demonstrations, as well as the rights of those who do not participate".

The public and peaceful protest of citizens would be guaranteed by the Mobile Anti-Riot Squad (*ESMAD*), disproportionate reactions would occur, according to the Colombian Government, exclusively in the face of violent, vandalistic and irrational actions that constitute facts of crime, violate the rights of others and do not constitute peaceful demonstrations. In addition, it was clarified that the Anti-Riot Squad would not institutionally incur excesses, and in the cases of November 21st, 2019, where there may have been excesses, these would only be individual actions of some "bad apples". It was added that such purely individual behavior is currently being investigated under criminal and disciplinary law by the relevant authorities, which will be called upon to define individual responsibilities.

According to the applicants in the context of the *acción de tutela* or *amparo, to* date, all the provisions of the judgment have not been implemented, despite the fact that, pursuant to article 27 of Decree-Law No. 2591 of 1991, it is enforceable and has immediate effect. For its part, the Colombian Government has announced a request to review the judgment before the Constitutional Court, pursuant to article 33 of the same Decree-Law in conjunction with article 610 of Law no. 1564 of 2012.

5. *Some concluding remarks*

The aforementioned judgement offers concrete evidence of how the phenomenon of constitutional regression, underway in various parts of the world, is widespread and can manifest itself in the most diverse forms and ways. In Colombia, it even manifests itself through the assumption of a substitutional role by the judiciary which, in the face of clear violations of fundamental rights, does not limit itself to declaring, condemning or denouncing, but intervenes directly, in first person, ordering the adoption of specific and detailed interventions, of a regulatory and administrative nature, to all the constitutional bodies, even to the point of ordering the President of the Republic himself.

I have reproduced the full text of the judgement because, as the reasons for the "dissenting votes" made clear, it contains prescriptions that go far beyond the content of a judicial decision.

The originality and extension of the subjects entitled to appeal, the generic nature of the petition, the extension of the number of institutional authorities involved, from the President

of the Republic to those directly responsible for leading the forces of law and order, are all elements that laid the groundwork for original conclusions, relating not only to the constitutional sphere, but also to the administrative, managerial and above all political sphere.

The outcome of the decision is "declaratory" of a series of offences and abuses committed to the detriment of the fundamental right to demonstrate and protest. But it is also much more than that, because it aims to give a concrete contribution, beyond the effect of the complaint, against the widespread practices adopted by the police in the management of public demonstrations.

To this end, the sentence "orders" the President of the Republic, the National Government, the Minister of Defense, the Public Prosecutor, the *Defensoría del Pueblo* (Ombudsman), the Police Authorities and other control bodies, a series of active interventions (regulatory and active administration), aimed at better regulating the work of the police and the management of public demonstrations. These are not mere "monitoring" acts with regard to other institutional bodies, but real "orders", given under the dictation of precise time limits for action.

The result could only be the total and general non-compliance of the requested bodies, as attested by their total inertia.

The whole matter should therefore be considered not only from a purely legal point of view because, on the assumption that the judgment contains prescriptions with a highly political content, it should also be assessed from these angles.

The originality of the operative part of the decision, which is certainly "*ultra vires*", stems from several critical issues: 1) the inadequacy of government bodies to deal with states of crisis; 2) the inadequacy of representative bodies; 3) the inability or inadequacy of the political party system.

In other institutional contexts (Europe above all), the reporting of possible legislative or administrative shortcomings usually finds a place in "monitoring" decisions, i.e. with merely cautionary effects towards the entire political community. In the case under consideration, however, the highest State judiciary does not limit itself to contesting, pointing out and advising, but consciously "orders", in the face of the objective weakness of the other State institutions.

The primary cause of the weakness of the political systems of Latin America as a whole can be found in the inability of the parties to know how to assume functions of inter-institutional balance. The weakness of the entire sector of associations or social formations must also be added, which, on the other hand, conditions the functioning of the United States form of government towards outcomes of sure participation, pluralism and democracy (as Alexis de Tocqueville[39] has amply noted[40]).

In the United States, political parties act as elements of institutional closure, representing an important factor of participation, autonomy, freedom and balance. In Latin America, on the other hand, they predominantly perform a stabilizing function of "oligarchic" democracy, in which they dominate the electoral phase but, for the rest, are subject to the absolute direction imposed by the dominant group that expresses the President. For these reasons, they cannot be invoked as balancing factors for the institutions, either in ordinary times or, a fortiori, in times of crisis.

[40] A. DE TOCQUEVILLE, *La Democracia en América*, The University of Chicago Press, 2000, ff. 218, available online at: *www.archive.org*.

The parties are objectively “weak” institutions, competing openly with each other, without having the necessary tools and characteristics to play a role of elaboration, stimulation, impulse, compromise or mediation.

For all these reasons, the bodies of the judiciary end up feeling improperly invested with a substitute role vis-à-vis the other constitutional bodies. This seems to be the only rational explanation for the originality of the judgment in question.

Lidia Bonifati*

Constitutional Design v. Constitutional Degradation: Strengthening the Rule of Law in Bosnia-Herzegovina**

ABSTRACT: ***The concepts of "constitutional degradation" and of "divided societies" are closely linked, as the former is at the core of the challenges posed by the latter, namely societies divided along ethno-cultural lines, and in which these lines are relevant markers of political mobilization. Indeed, the outcome of the tensions among groups may be violent (e.g., civil conflicts, ethnic cleansing, genocide), but even in absence of violence they may have a corrosive effect on the constitutional structure of the State. Consequently, this paper addresses two aspects: (1) how the processes of constitutional degradation take place in divided societies, and (2) to what extent they depend on the adopted model of constitutional design. Given the complexity of the subject, this article aims at exploring the topic by focusing on a specific matter in a determinate case study, namely the judiciary in Bosnia-Herzegovina. Indeed, Bosnia is a classic example of a divided society where the model of constitutional design introduced a complex judicial system. First, the paper deals with the theoretical framework of the concept of constitutional degradation in divided societies and focuses on the judiciary as a vulnerable area undergoing a process of degradation. Then, it examines how the Bosnian constitution designed the judiciary, and how the consociational model introduced by the Dayton Peace Agreement influenced its organization, especially at the state level. Finally, the article explores the problematic aspects emerging from the process of degradation, by taking into account the key priorities set by the 2019 Commission Opinion and the findings of the Priebe Report. Moreover, it recalls the proposals of constitutional reforms currently lost in the stalemate of the Bosnian political institutions, caused by the Dayton-system itself. This last element leads to the overall conclusion: the impact of constitutional design arrangements on divided societies should not be underestimated, as it can easily lead to a process of constitutional degradation.***

1. *Introduction*

The concepts of "constitutional degradation" and "divided societies" are closely linked. The former generally indicates the deterioration of the institutional and ideological foundations of constitutional liberal democracies and is usually associated with the current crises of constitutionalism, as in Poland and Hungary[1]. The latter refers to those societies divided along ethnic, linguistic, religious, cultural, and national lines, and in which these cleavages are permanent markers of political mobilization[2]. The two concepts are intertwined when considering the challenges arising from divided societies. Indeed, the outcome of the tensions among ethno-cultural groups may either be violent (e.g., civil conflicts, ethnic cleansing,

* **PhD Candidate in Comparative Constitutional Law at the University of Bologna and the University of Antwerp.**

** **This work has been subjected to blind peer review.**

[1] M. LOUGHLIN, *The Contemporary Crisis of Constitutional Democracy*, in *O.J.L.S.*, 2019, 39(2), 436-437.

[2] S. CHOUDHRY, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in S. CHOUDHRY (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?*, Oxford, 2008, 4-5.

genocide), or even in the absence of violence, they may lead to the deterioration of the state's constitutional structure. Both sets of outcomes constitute processes of constitutional degradation.

This article aims at further exploring how the processes of constitutional degradation take place in divided societies and to what extent they depend on the adopted model of constitutional design. The literature on constitutional design for divided societies has extensively debated the "best" model of constitutional design[3], especially following the "third wave of democratization"[4]. Although the objective of constitutional design is to engineer an institutional structure for the protection of fundamental rights, vis-à-vis a pre-existing (perhaps violent) condition of constitutional degradation, this article argues that some elements of degradation not only remain once the violence ends, but also that these persist because the model of constitutional design itself reinforces them. To justify this claim, the article focuses on a specific case study, namely Bosnia and Herzegovina.

Indeed, the choice of such a country was due to three reasons. First, it is a classic example of a divided society. In Bosnia, ethnic and religious groups used to peacefully coexist until such diversity was exploited by political ethno-nationalism in the 1990s, leading to the most violent war on European soil since World War II. Moreover, in the aftermath of the conflict, Bosnia was at the centre of the debate on which constitutional model should be adopted to accommodate internal diversity, leading to the conclusion of the Dayton Peace Agreement in 1995 and the introduction of a consociational model. Finally, the country perfectly exemplifies constitutional degradation caused by constitutional design. The lack of institutional representation of the "others", i.e., those ethno-cultural minorities not entitled to share power by the constitution, is a well-known instance of degradation, as demonstrated by the (still unimplemented) 2009 ECtHR judgement on *Sejdić and Finci v. Bosnia and Herzegovina*[5].

However, this article aims to explore a specific area vulnerable to the processes of constitutional degradation, namely the judiciary. In the literature, the judicial branch is considered one of the pillars of the rule of law[6] and consequently of constitutional liberal democracies[7]. The current crises of constitutionalism in Poland and Hungary are a perfect representation of this phenomenon. More specifically, this article is interested in examining how the design of the judiciary is linked to constitutional degradation in Bosnia and Herzegovina. Indeed, the judicial system designed by the Dayton Peace Agreement is rather complex and decentralised and partially incomplete, especially at the central level. Moreover, a recent ECtHR case (*Baralija v. Bosnia and Herzegovina*)[8] highlighted the willingness of the executive to ignore the rulings of the Bosnian Constitutional Court, further endangering the respect of the rule of law principles in Bosnia.

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[3] See A. LIJPHART, *Constitutional Design for Divided Societies*, in *J. Dem.*, 2004, 15(2), 96-109; D. HOROWITZ, *Constitutional Design: Proposals Versus Processes*, in A. REYNOLDS (ed.), *The Architecture of Democracy*, Oxford, 2002; J. MCGARRY, B. O'LEARY, R. SIMEON, *Integration or Accommodation? The Enduring Debate in Conflict Regulation,* in S. CHOUDHRY (ed.), *Constitutional Design*, cit.

[4] S.P. HUNTINGTON, *Democracy's Third Wave*, in *J. Dem.*, 1991, 2(2), 12.

[5] ECtHR [GC] 22 December 2009, No. 27996/06 and 34836/06, *Sejdić and Finci* v *Bosnia and Herzegovina*.

[6] See T. BINGHAM, *The Rule of Law*, London, 2011; M. KRYGIER, *Rule of Law*, in M. ROSENFELD, A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012; A. SAJÓ, *The Rule of Law*. in R. MASTERMAN, R. SCHÜTZE (eds.), *The Cambridge Companion to Comparative Constitutional Law*, Cambridge, 2019.

[7] See Y. HASEBE, C. PINELLI, *Constitutions*, in M. TUSHNET, T. FLEINER, C. SAUNDERS (eds.), *Routledge Handbook of Constitutional Law*, London and New York, 2013, 9-19.

[8] ECtHR 29 October 2019, No. 30100/18, *Baralija* v *Bosnia and Herzegovina*.

The article is structured as follows. First, it deals with the theoretical framework of constitutional degradation in divided societies. Then, it examines how the Bosnian constitution designed the judiciary and how the consociational model introduced by the Dayton Peace Agreement influenced its organization. Finally, the article explores the problematic aspects emerging from the process of degradation.

2. *Constitutional degradation in divided societies*

«Constitutional democracy is not being overthrown; it is being degraded»[9]. These few words describe the essence of the crises that constitutional democracies are facing around the world, after being "the only game in town"[10] since the end of the 20th century. The instances of such process of degradation are many, among the most (in)famous ones it can be recalled the illiberal turn of Poland and Hungary. Ginsburg and Huq recognise that such processes of degradation can "take many forms"[11], and they examine the mechanisms through which the constitutional erosion takes place. First, degradation is an incremental process rather than immediate, and it does not present the violent and abrupt features of a *coup* or a revolution. Conversely, it «involves the use of legal powers to achieve a gradual deterioration in the three basic institutional predicates of constitutional democracy: electoral competition, basic rights of expression and association, and the integrity of institutions»[12]. Therefore, the issue is how existing legal powers can enact the erosion of the pillars of constitutional democracy. Specifically, Ginsburg and Huq identify five methods: (1) constitutional amendments, (2) elimination or weakening of existing constitutional checks, (3) strengthening of executive power, (4) weakening of civil society organisations, and (5) suppression of party competition[13]. Furthermore, Loughlin observes that the socio-political forces that express such erosion «emerge from within, rather than outside, the existing structures of constitutional democracy»[14]. According to such view, it might be easily argued that constitutional design matters a great deal since it builds the institutional spaces for potential degradation and, conversely, for constitutional protection from such degradations. Therefore, constitutional design might create and resolve the problem of degradation.

However, when shifting the focus to what Choudhry defines as "divided societies", the situation seems to be different. A divided society is a society divided along ethno-cultural lines, and in which those divisions become markers of political mobilization and translate into political fragmentation[15]. In these societies, the tensions among ethno-cultural communities might give result in violence (e.g., civil conflicts, genocide, ethnic cleansing), or even in absence of violence, have a corrosive effect on the existing constitutional structure (e.g., institutional discrimination, constitutional crisis, political stalemate). Therefore, the challenges posed by divided societies are of high practical importance, and constitutional design plays a crucial role in facing the potential of constitutional degradation.

[9] M. LOUGHLIN, *The Contemporary Crisis*, cit., 437.
[10] M. LOUGHLIN, *The Contemporary Crisis*, cit., 436.
[11] T. GINSBURG, A.Z. HUQ, *How to Save a Constitutional Democracy,* Chicago, 2018, 34.
[12] M. LOUGHLIN, *The Contemporary Crisis*, cit., 447.
[13] T. GINSBURG, A.Z. HUQ, *How to* Save, cit., 72-73.
[14] M. LOUGHLIN, *The Contemporary Crisis*, cit., 447.
[15] S. CHOUDHRY, *Bridging Comparative Politics*, cit., 5.

Recalling the three institutional features of constitutional democracy involved in the process of degradation (i.e., electoral competition, basic rights of expression and association, integrity of institutions), a few instances in divided societies may be provided to clarify the concept. Northern Ireland is a perfect exemplification of a process of degradation involving the integrity of institutions. In 1998, the Good Friday Agreement ended the conflict between the unionist and nationalist communities (the so-called "Troubles"), introducing power-sharing mechanisms in the constitutional architecture[16]. The Agreement did put an end to violence, but the executive has been highly unstable, collapsing multiple times and leaving the small nation without a government (2002-2007, 2017-2020). This is due to the fact that if one of the two heads of the executive resigns, the entire body collapses, a mechanism that can be used for strategic reasons.

Moving to a case of deterioration of the electoral competition, another example is provided by Bosnia and Herzegovina. As already mentioned, in 1995, the Dayton Peace Agreement introduced a consociational democracy in which the three main ethnic groups (the so-called "constituent peoples") share power in the central political institutions. As in Northern Ireland, such mechanisms have ended the war in Bosnia and Herzegovina but have also created a condition of permanent discrimination of other ethnic minorities. This became evident with the ECtHR judgement on *Sejdić and Finci v. Bosnia and Herzegovina* in 2009, yet to be implemented. The Strasbourg Court condemned Bosnia for discriminating against the Roma and Jewish applicants, who were deemed non-eligible for the highest electoral posts due to their non-affiliation to the constituent peoples.

Therefore, in both cases, it can be argued that the constitutional degradation came "by design" rather than "from within" by exploitation of socio-political forces.

Finally, moving the focus on the rule of law, it certainly is a permeant concept in contemporary constitutionalism and has been extensively discussed by legal scholarship while addressing the illiberal turn of Poland and Hungary[17]. For the limited purpose of this article, the judiciary will be considered an essential element of the rule of law and as a pillar in the attempts to "operationalise" the rule of law to analyse and diagnose its state of health. More specifically, the reference to "independent and impartial courts" appears in the definition of the rule of law given by the European Commission in the Communication on the "2020 Rule of Law Report"[18], along with other elements derived from the case-law of the Court of Justice of the European Union[19] and the European Court of Human Rights[20]. Similarly, the same expression is used by the Venice Commission when identifying the six principles defining the rule of law and its "Rule of Law Checklist"[21]. Moreover, independent courts are considered an essential element in divided societies since they are an indispensable institutional mechanism

[16] See J. MCGARRY, B. O'LEARY, *The Northern Ireland Conflict: Consociational Engagements*, Oxford, 2004.

[17] See D. KOCHENOV, *The EU and the Rule of Law – Naïveté or a Grand Design?*, in M. ADAMS ET AL. (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, 2017, 419 ff.; L. PECH, D. KOCHENOV, *Better Late than Never? On the Commission's Rule of Law Framework and Its First Activation*, in *J. Comm. Mar. Stud.*, 2016, 1062 ff.; L. PECH, D. KOCHENOV, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *Eur. Const. L.R.*, 2015, 512 ff.

[18] European Commission, *2020 Rule of Law Report. The Rule of Law Situation in the European Union*, 2020.

[19] See L. PECH, D. KOCHENOV, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, Stockholm, forthcoming.

[20] See R. SPANO, *The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary*, in *Eur. L.J.*, 2021.

[21] Venice Commission, *Rule of Law Checklist*, 2016, 20.

to protect the human rights of ethno-cultural minorities[22]. Therefore, the judiciary is one of the vulnerable areas subject to constitutional degradation.

3. *The judiciary in Bosnia-Herzegovina*

3.1 *The Bosnian constitutional structure*

The constitution of Bosnia-Herzegovina was drafted in 1995 as Annex 4 of the Dayton Peace Agreement (DPA). The DPA formally ended the conflict in Bosnia, which broke out in the overall process of dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY) and, more specifically, in the aftermath of the referendum on the independence of the Bosnian Republic from the Federation. The constitution-making process thus witnessed a strong international involvement, especially of the United States, as the DPA was concluded in Dayton, Ohio, and was signed by the Republic of Croatia for the Bosnian Croat community, while by the Federal Republic of Yugoslavia for the Bosnian Serbs. It should be noted that only the Bosniaks, i.e., the Muslim population, were represented by a national actor, namely the Republic of Bosnia and Herzegovina.

The Dayton constitution designed a complex multi-tiered system composed of two entities (the Federation of Bosnia-Herzegovina (FBiH) and the Republika Srpska), and of Brčko District. The constitutions of the two entities established two rather different systems. The Federation is territorially decentralised into ten cantons (four of Bosniak majority, three of Croat majority, and two mixed Bosniak-Croat), while the Republika Srpska is a territorially centralised and unitary system of Serb majority. Each level has its own executive, legislative and judicial branches, resulting in a high degree of internal fragmentation. The constitution grants the entities relative constitutional and legislative autonomy and extensive rights concerning the delegation of responsibilities[23]. Therefore, the «real power of the state of Bosnia and Herzegovina rests with the entities»[24].

At the central level, the constitution introduced strong power-sharing elements in the central institutions, namely a collective presidency and a bicameral parliament elected on the basis of a territorially based ethnic principle. The three so-called “constituent peoples”, i.e., Bosniaks, Serbs, Croats, equally share power in each state institution (Presidency, Parliament, Council of Ministers), adopt decisions through cross-community mechanisms, and exercise veto rights on “vital interest issues”.

3.2 *A fragmented judicial system*

The constitution of Bosnia-Herzegovina delegates the organisation and the responsibilities for the judicial system to the entities and Brčko District[25]. In the Federation, the judicial system is structured in 31 Municipal Courts, ten Cantonal Courts, and one Supreme Court. If the Municipal Courts may exercise jurisdiction over one or many municipalities, the competency

[22] S. CHOUDHRY, R. STACEY, *Independent of Dependent? Constitutional Courts in Divided Societies*, in C. HARVEY, A. SCHWARTZ (eds.), *Rights in Divided Societies*, Oxford, 2012, 87.

[23] Constitution of Bosnia-Herzegovina, art. III.

[24] S. GAVRIĆ, D. BANOVIĆ, M. BARREIRO, *The Political System of Bosnia and Herzegovina: Institutions - Actors – Processes*, Sarajevo, 2013, 51.

[25] Constitution of Bosnia-Herzegovina, art. III 3(a).

of the Cantonal Courts correspond to the cantonal borders. The Supreme Court is the highest authority, while the Constitutional Court of the Federation is not counted as a judicial power, but it is mentioned as an organ of abstract normative control. On the opposite side, the judicial power in the Republika Srpska is exercised by 20 General Courts, five District Courts, and one Supreme Court. The General Courts are responsible for one or more municipalities, while several General Courts come under the authority of one of the District Courts. As in the Federation, the Supreme Court is the highest authority, and the Constitutional Court of the Republika Srpska deals with abstract normative control. A separate judicial structure was introduced in the Statute and the Law on the judicial system in Brčko District. The structure comprises a General Court and a Court of Appeal[26].

At the central level, the situation is more complex. The Court of Bosnia-Herzegovina was established in 2007, having national-level jurisdiction and marking a moment of particular importance to the Bosnian judicial system. Its tasks are comprised of the protection of effective implementation of the central state's competencies and the protection of human rights and the rule of law. However, this Court system has not yet fulfilled the prerequisites for a uniform central-state judicial system, as it would require the establishment of a Supreme Court of Bosnia-Herzegovina at the highest appeal board. Even if this idea was included in former reform discussions, there was no political majority to sustain such initiative because this would mean losing part of the entities' power of jurisdiction and autonomy.

The constitution of Bosnia-Herzegovina provides the basis for the central-level Constitutional Court[27], which is comprised of nine members: four appointed by the House of Representatives of the FBiH (two Bosniak and two Croats), two Serbs by the National Assembly of the Republika Srpska, and three judges by the President of the European Court of Human Rights. Therefore, it is a unique case of a Constitutional Court with the presence of international judges. The Bosnian Constitutional Court rules on controversies between the entities, the central state and the entities, and the central state institutions. Concerning the access to the Constitutional Court, those eligible are every member of the Presidency, the chairman of the Council of Ministries, the chairmen and deputies of the two chambers of the Parliament, a quarter of the delegates in the chambers at the central level and entity Parliaments.

Finally, the establishment of the High Judicial and Prosecutorial Council (HJPC) in 2005 was pivotal for the judicial system in Bosnia. The HJPC is an independent body designed to ensure the independence, neutrality, and professionalism of the judicial powers. It is composed of fifteen members: eleven appointed among fellow judges and prosecutors and four lay members appointed by the Council of Ministers, the Parliamentary Assembly, and one each bar association in the entities. The Council is responsible for the election of judges and prosecutors at all levels and their careers, it rules on questions of judges' non-compliance with other functions and ensures continuous and adequate funding of courts and prosecutor offices.

[26] S. GAVRIĆ, D. BANOVIĆ, M. BARREIRO, *The Political* System, cit., 44-45.

[27] Constitution of Bosnia-Herzegovina, art. VI.

4. *The process of degradation in Bosnia and Herzegovina*

4.1 *Problematic aspects of the Bosnian judiciary*

Judicial independence was the main issue in the post-war justice system. In fact, judges were exposed to strong political pressure and interference. Up until the establishment of the High Judicial and Prosecutorial Council, many issues threatened the degree of internal and external independence of judges. For instance, the appointment of judges and prosecutors used to be in the hands of the Ministers of Justice (and thus of political parties) at the different levels; the funding and human resources for the judiciary were inadequate; the backlog created by the lack of judges and resources was significant; the professional training for judges and prosecutors was poor, and so they were often young and inexperienced, easily subject to the intimidation of local politicians and warlords. All these factors encouraged the culture of lawlessness, as well as judicial corruption and conflict of interests, affecting the public opinion and the trust in the justice system.

In order to safeguard judicial independence, the appointment and dismissal of judges and their career advancement are centralised in the hand of the HJPC, and the judges of the Court of Bosnia-Herzegovina and the Courts in the entities are now assigned lifelong assignments. Moreover, the training is now provided by the Judicial and Prosecutorial Training Centres of the entities. Another important element to guarantee the separation of power is significant financial independence. The HJPC applies to the central-level Ministry of Justice for its annual budget, which must then be adopted by the parliament.

However, several critical aspects still persist. In particular, the so-called Priebe Report[28], prepared by a group of legal experts at the request of the EU Commission, recently highlighted many concerning issues that the Bosnian justice system is currently struggling with. One of these is the lack of a culture of responsibility, accountability, and transparency, which still needs to be fully developed within public institutions and leads to the lack of trust of the citizens towards their judicial system[29]. According to the legal experts, structural reforms of the judiciary are urgently needed to address a series of issues that undermine the accountability and efficiency of the system. For example, the non-implementation of the ECtHR *Sejdić-Finci* ruling and subsequent case law indicates «lack of determination of the country to respect the rule of law»[30], as also stated by the Strasbourg Court in the *Baralija* case, underlining the fact that the government was ignoring a ruling by the Constitutional Court concerning the Mostar local elections and thus undermining the respect of the rule of law principles[31]. Moreover, the civil judiciary is overburdened with a backlog of cases, thus provoking excessive length of court proceedings. Aside from civil justice, the criminal justice system exposes the deepest problematics of the judiciary in Bosnia and Herzegovina and its weakness in terms of respect of the rule of law. First and foremost, the criminal justice system still fails to properly contrast serious crime and corruption, as «none of the four criminal justice jurisdictions is adequately functioning»[32]. Cooperation is extremely weak and would need substantial improvement and commitment on all levels of government. External interference, pressure, threats, and intimidation of prosecutors and judges are still cause of

[28] *Expert Report on Rule of Law Issues in Bosnia and Herzegovina*, 2019.
[29] *Expert Report*, cit., para. 16-24.
[30] *Expert Report*, cit., para. 28.
[31] L. BONIFATI, *Molto Rumore per Nulla? Dieci Anni Dalla Sentenza Sejdić-Finci*, in *Forum Quad. Cost.*, 2020, 68.
[32] *Expert Report*, cit., para. 42.

great concern and further undermine judicial independence, a pillar of the rule of law. This aspect becomes especially evident in cases relating to high-level corruption, complex financial crimes, and organised crime, leading to impunity and aggravating the lack of trust on the part of the citizens. Finally, many war crimes still remain to be addressed, rendering justice to the victims of the 1992-1995 war in Bosnia-Herzegovina.

4.2 *The role of the European Union and the Venice Commission*

In March 2019, the European Commission launched the "EU initiative to enhance the Rule of Law in Bosnia and Herzegovina", leading to the 2019 Opinion on Bosnia's application for membership and the already recalled Priebe Report. In the 2019 Opinion, the Commission set a series of key priorities to be addressed in terms of democracy/functionality, the rule of law, fundamental rights, and public administration reforms. Specifically, the rule of law priorities concern the improvement of the functioning of the judiciary by adopting new legislation on the HJPC and on the Courts of Bosnia and Herzegovina in line with European standards and the strengthening of the prevention and fight against corruption and organised crime, including money laundering and terrorism.

Along with these priorities, the Priebe Report pointed out in particular that trust needs to be rebuilt, human rights and fundamental freedoms must be guaranteed, justice must serve citizens, the HJPC needs fundamental reform and a radical change of behaviour, and integrity of judicial office holders must be ensured. Finally, the Reports highlights that the constitutional framework is only part of the problem concerning the judiciary and the respect of the rule of law since political will is identified as the deepest obstacle for reform. However, it could be argued that the lack of political will also depend on the lack of incentives provided by the current constitutional architecture (e.g., by veto powers), in a vicious circle.

On its part, the Venice Commission was asked to submit an opinion on the draft law on the HJPC in 2014[33], and expressed some concerns on the possible transfer of competences from the HJPC to the entities in the appointments of prosecutors and on the permanence of the ethnic logic in the composition of the judicial system, possibly affecting its functioning. Moreover, the Venice Commission concluded that it would be recommended that «the HJPC be provided with an explicit constitutional basis because it believes that this would facilitate the role of the HJPC as the guarantor of the independence of the judiciary of Bosnia and Herzegovina»[34]. These concerns are in line with the findings of the Priebe Report relating to the need for reforms of the HJPC. In fact, the legal experts observed that the judicial body should follow a non-ethnic approach and be based on merit, that the procedures for the election of the HJPC members should be revised, that the disciplinary procedures and bodies within HJPC should be radically reformed, that it should be subject to performance appraisal, and that quality, transparency, and outreach should be significantly expanded.

[33] Venice Commission, *Opinion on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, 2014.

[34] Venice Commission, *Opinion on the Draft* Law, cit., para. 127.

5. *Conclusive remarks*

The issue of the relationship between constitutional design models and democracy has been greatly discussed in the literature, especially concerning the compatibility of power sharing with democracy[35]. More specifically, the purpose of this article was to explore the link between constitutional design and constitutional degradation in divided societies through the analysis of a particular case study, namely Bosnia and Herzegovina.

The study highlighted the limitations regarding the upholding of the principles of the rule of law in Bosnia and Herzegovina. Judicial independence is still an urgent matter to be properly addressed, as well as transparency, accountability, and trust. Moreover, the process of constitutional degradation in Bosnia-Herzegovina may also be detected in other spheres of the constitutional system, as demonstrated by the non-implementation of the *Sejdić-Finci* judgement and the fact that, up until a few months ago, the city of Mostar was without an elected mayor.

However, if in the "classical cases" of constitutional degradation the societal-political forces exploited the existing constitutional structure, when turning the attention to divided societies it seems rather evident that the process of constitutional design itself planted the seeds for potential processes of degradation. In Bosnia, the complex constitutional architecture designed by Dayton significantly aggravates the capacity of the constitutional system to properly uphold the rule of law in a vicious circle that still appears very difficult to be broken. Constitutional and institutional reforms are still lost in the political stalemate and are held hostage by the interests of political parties that do not have any incentive in changing a system currently in their favour, granting them strong veto powers to defend their "vital interests". Therefore, the power-sharing mechanisms introduced by the DPA do not facilitate the discussion and adoption of the reforms deemed necessary by the Priebe Report, nor the constitutional reforms to implement *Sejdić-Finci* ending institutional discrimination of minorities.

In conclusion, the showcase of Bosnia-Herzegovina seems to uphold the hypothesis that constitutional degradation came "by design". For this reason, constitutional designers should take into account the potential for degradation when engineering a new constitution or drafting constitutional amendments since the consequences could be extremely difficult to overcome in a later stage.

[35] See C.A. HARTZELL, M. HODDIE, *The Art of the Possible: Power Sharing and Post—Civil War Democracy*, in *World Pol.*, 2015, 37 ff.; C. BELL, *Power-Sharing and Human Rights Law*, in *Int. J. Hum. Rts.*, 2013, 204 ff.; S. NOEL, *From Power Sharing to Democracy. Post-Conflict Institutions in Ethnically Divided Societies*, Montréal, 2005; A. LIJPHART, *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice*, London and New York, 2008.

Thiago Burckhart[*]

Constitutional Degradation and the Protection of Cultural Rights in Brazil: Deconstitutionalization and Institutional Deregulation[**]

ABSTRACT: ***The aim of this article is to critically analyze the constitutional degradation in Brazil, particularly focusing cultural rights protection. The attempt is to evidence that the context of multiple crisis fostered constitutional degradation and generated a constitutional crisis, into which new political methodologies propel "symbolic constitutionalization" or "factual deconstitutionalization", in a context marked by "abusive constitutionalism". The article is methodologically grounded on the field of constitutional theory, in dialogue with sociological analysis of law. As a conclusion, it highlights the necessity to reaffirm the normative force of the constitution over ordinary politics in order to enforce its effectiveness.***

1. *Introduction*

Brazilian constitutional democracy is facing a severe political crisis since 2013. It has triggered the questionable *impeachment* of the former President Dilma Rousseff in 2016, and the rise of reactionary neopopulism, by the election of the current President Jair Bolsonaro in 2018. Bound up with it, another crisis, the economic recession, has driven the country towards a context of "multiple crisis". In this vein, cultural rights, recognized by the 1988 Constitution (arts. 215 and 216), are at the center of these multiple crisis, in which democratic and constitutional degradation become evident, especially when referring to public cultural policies.

Indeed, two "*modi operandi*" of constitutional degradation can be listed in this context: 1) by *constitutional amendment*; and 2) by *institutional deregulation*. The first *modus* is related to the constitutional amendment n. 95, enacted in 2016, also called "constitutional amendment of public spending ceiling", it has introduced a new tax regime and limited growth of public spending for the next twenty years, in all branches of power. The second *modus* concerns the extinction of public agencies responsible for the enforcement of cultural rights – as it is the case of the former *Ministry of Culture*, extinguished in one of the first administrative acts of the current President, in 2019. As an act of deregulation, it destabilizes the operability of public cultural policies inscribed in the constitution.

In this regard, these actions undermine the legal and political pact provided by the 1988 Constitution, as it hinders the effectiveness of fundamental rights, especially cultural rights. Hence, the aim of this article is to critically analyze the constitutional degradation in Brazil, particularly focusing cultural rights protection. It attempts to evidence that the context of multiple crisis fostered constitutional degradation and generated a *constitutional crisis*, into which new political methodologies propel "symbolic constitutionalization" or "factual

[*] **PhD Candidate in Comparative Law and Processes of Integration, Università degli Studi della Campania *"Luigi Vanvitelli"*, Italy.**

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deconstitutionalization", in a context marked by "abusive constitutionalism". The article is methodologically grounded on the field of constitutional theory, in dialogue with sociological analysis of law.

2. *Cultural rights in the 1988 Constitution*

The 1988 Brazilian Constitution has widely constitutionalized cultural rights. Historically marked by an underdevelopment both in theoretical and normative fields[2], cultural rights have gained political and legal relevance, being it considered part of the fundamental rights[3]. Fostered by the "new social movements", since the 1970s in Brazilian public sphere, as well as the "*politicization of culture*"[4] – in which indigenous peoples' movement have had an important role[5] –, the recognition of cultural rights is a historical innovation for Brazilian constitutionalism[6].

Following the heels of *constitutionalization of culture*[7] in different countries – and the internationalization of cultural rights – the 1988 Constitution provided a specific chapter for the protection of culture (*Seção II; Capitulo III; Titulo IV, da Ordem Social*), corresponding to the articles 215 and 216. The article 215 established that Brazilian State is responsible for guaranteeing the full enjoyment of cultural rights and access to national culture, by the incentive, valorization and diffusion of cultural manifestations (art. 215). The State is also responsible for protecting popular, indigenous and afro-Brazilian cultural manifestations and the culture of the groups that have participated in the country's construction (art. 215, § 1).

The article 216 constitutionalized the protection of cultural heritage[8] in both tangible and intangible dimensions providing sources for the implementation of public policies in this sector. In terms of general public cultural policies, the constitution also determines the competence of each federal body to develop and enact policies; and the diffusion of cultural heritage is protected by law (art. 216, § 3).

Two constitutional reforms have improved this constitutional design. In 2005, the constitutional amendment n. 48 established the *National Culture Plan*, which integrates public power's actions in order to accomplish the aims of the policy, such as: the defense and enhancement of the Brazilian cultural heritage; production, promotion and dissemination of cultural goods; qualified personnel's training for the management of culture in its multiple dimensions; cultural heritage access democratization; and valuing Brazilian regional and ethnic diversity (art. 216, § 3, I to V)[9]. In 2012, the constitutional amendment n. 71 established the *National Culture System*. It institutes a dynamic of joint governance and promotion of

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[2] See P. MEYER-BISCH, *Les drois culturels: une catégorie sous développé de droits de l'homme*, Fribourg, 1993; J. SYMONIDES, *Cultural rights: a neglected category of human rights*, in *Int. Soc. Scie. J.*, 1998.

[3] See F.H. CUNHA FILHO, *Teoria dos direitos culturais: fundamentos e finalidades*, São Paulo, 2018.

[4] S. BENHABIB, *Las reivindicaciones de la cultura: igualdad y diversidad en la era global*, Buenos Aires, 2006.

[5] C.M. DE SOUZA FILHO, *Multiculturalismo e Direitos Coletivos*, in B.S. SANTOS (ed.). *Reconhecer para libertar: os caminhos do cosmopolitismo multicultural*, Porto, 2004, 57-86.

[6] Although there is no clear definition of the term "cultural rights", this article focuses on the delimitations brought by Brazilian positive law.

[7] In this perspective, see: G. CAVAGGION, *Diritti culturali e modello costituzionale di integrazione*, Torino, 2018.

[8] On the "right to cultural heritage", see: Y. DONDERS, *Cultural Rights in International Human Rights Law: from controversy to celebration*, in *Japanese Yearbook of International Law,* 2020.

[9] The current Plan was established by Law n. 12.343/2010, which also establishes the *National System of Information and Cultural Indicators* (SNIIC).

democratic and permanent cultural policies development among all federal bodies, with the aim of promoting human, social and economic development through the full enjoyment of cultural rights (art. 216-A).

As regards to the "constitutional policies" [10] oriented to culture, the *Ministry of Culture* was an important institution for its development and political conduction. The Ministry was first created in 1985 – as a dismemberment of the former "Ministry of Education and Culture", being it a symbol of institutional redemocratization[11] after twenty-one years of military dictatorship[12]. Its functions were gradually extended and improved especially during Gilberto Gil's administration (2003-2008). In this period, important innovations were held by the Ministry, among them, the aforementioned *National Culture System* and *National Culture Plan*, new national policies for financing culture, for improving "living" culture, and for audiovisual and digital culture, for example. These actions have institutionally consolidated the Ministry[13] – even if only for a brief period – and shifted State at the center of cultural promotion.

As Antônio Albino Rubim points out, one of the great achievements of this momentary political-institutional consolidation was the embedding of a broad concept of culture. It turned possible to formulate a policy not only entrenched on the aspects of "heritage"[14] protection and "fine arts", but committed to *cultural diversity*[15] and democratic governance of culture. It has brought about the inclusion of culturally marginalized groups in the country's troubled ethno-cultural dynamic.

Taking it into consideration, it is notable that the 1988 Constitution may also be considered a "cultural constitution", mainly due to the "revolution" it has made by recognizing – for the first time in Brazilian constitutional history – "cultural rights". And also, for providing and enforcing the enactment of public cultural policies, managing culture as a strategic engine for development, and broadening the notion of citizenship towards a cultural and intercultural dimension

3. *Cultural policies, Constitutional amendment n. 95 and institutional deregulation*

The history of cultural policies[16] in Brazil, as states Antonio Rubim, is however marked by "*sad traditions*": absence, authoritarianism and instability. *Absence* is related to a historical

[10] The term "constitutional policies" indicates the sum of actions carried out by multifaceted actors – social, political, institutional and also the third sector – to implement the constitutional. See: G. ZAGREBELSKY, *Il diritto mitte: legge, diritti, giustizia*, Torino, 1992; M.P. MELO, M. CARDUCCI, R. SPAREMBERGER (eds.), *Politicas constitucionais e sociedade*, Curitiba, 2016.

[11] See A.A. CANELAS RUBIM, *Politicas culturais no Brasil: tristes tradições*, in *Revista Galáxias*, 2007.

[12] On the historical formation of MinC, see: F.M. FERRON, M.A.N. ARRUDA, *Cultura e politica: a criação do Ministério da Cultura na redemocratização do Brasil*, in *Revista Tempo Social*, 2019.

[13] See A.A. CANELAS RUBIM, *Politicas culturais do governo Lula/Gil: desafios e enfrentamentos*, in *Revista Brasileira de Ciências da Comunicação*, 2008.

[14] The field of heritage protection, however, has a peculiar history, as it began to develop since the 1930s, with the creation of the *Serviço do Patrimônio Histórico e Artístico Nacional*, current IPHAN (I*nstituto do Patrimônio Histórico e Artístico Nacional*), federal agency responsible for the management of Brazilian cultural heritage –it was part of the former Ministry of Culture's administrative structure.

[15] A.A. CANELAS RUBIM, *Politicas culturais no Brasil: tristes tradições, enormes desafios*, in A.A. CANELAS RUBIM, A. BARBALHO (ed.), *Politicas culturais no Brasil,* Salvador, 2007, 29.

[16] Thus, CANELAS RUBIM conceptualizes "cultural policies" as the "joint and systematic interventions; collective actors and goals", which are related to State intervention in the field of culture, with the latter as an end-object and not as a means-object. For a deep analysis, see: N.G. CANCLINI, *Culturas Hibridas*, São Paulo, 2006.

conception of cultural policy solely centered on heritage protection – since the creation of the National Service for Cultural Heritage – currently IPHAN (*Instituto do Patrimônio Historico e Artistico Nacional*) – with little or null opening towards a more wide open conception of culture. *Authoritarianism* points to the fact that Brazilian cultural policies have been more intensely developed during authoritarian regimes, such as Vargas Era (1930-1945) and military dictatorship (1964-1985). And *instability* is the combination of absence with authoritarianism, which is directly related to the endurance of cultural agencies. In this perspective, cultural rights have faced – and are still facing – numerous difficulties and challenges for its enforcement.

Although the 1988 Constitution has designed a wide constitutional protection for cultural rights through the enactment of public policies in a democratic environment, the open wounds of *sad traditions* still remain. Moreover, the unprecedented events in Brazil's democracy have also an impact in the governance of cultural rights. The current process of "*constitutional degradation*" is directly related to liberal democracy's retraction worldwide[17].

At least since 2013 Brazil is facing a political crisis of severe magnitude with nefarious outcomes, such as the questionable impeachment of the former President Dilma Rousseff in 2016, the rise of reactionary neopopulism, by the election of the current President Jair Bolsonaro[18] and the furthering of economic crisis. Indeed, cultural rights – among other issues – are at the center of this crisis, as it is particularly "taken little seriously" by conservative and reactionary politicians, whose often reduce it into moral or religious questions. In this context, two "*modi operandi*", by which constitutional degradation takes place, can be listed. The first is by *constitutional amendment* and the second by *institutional deregulations*.

The first *modus* is related to the constitutional amendment n. 95, passed in the Congress on December 2016, and established a new tax regime for the next twenty years. It changes the *Transitional Constitutional Provisions Act* imposing limitations for federal government spending, corresponding to the budget available for the previous year's – 2017 is the base year. It is not possible to change any part of the amendment within a period of ten years, being it only limited to the change in the annual correction index[19]. This new regime does not allow, in practical terms, the increase of total and real government expenses above inflation, "not even if the economy grows, differentiating Brazilian case from other foreign experiences that have adopted the public spending ceiling"[20], while investment in one area implies cutting in another.

Thus, this is a public spending ceiling regime that completely disregards the potentialities of real economic growth and economic redistribution by government's public policies in social and cultural fields. Furthermore, this regime prevents not only the increase of public investment in policies, but also innovation technology purchase, increase of remuneration, processes of hiring staff, and career's restructuring, for example. Indeed, it fatally implies on the material suspension of 1988 Constitutional project, removing from the next governments

[17] Larry Diamond points to a process of "democratic recession" due to the stagnation of the expansion of freedom and democracy in much of the globe since at least 2006. L. DIAMOND, *Facing up to democratic recession*, in *J. Dem.*, 2015.

[18] Y. MOUNK, *The people vs. Democracy: why our freedom is in danger and how to save it*, Cambridge, 2018. The Brazilian edition has a preface in which MOUNK expressly points to Brazil as a country in "democratic recession", based on the recent report by *Freedom House*, currently ruled by an authoritarian populist.

[19] C.M. MARIANO, *Emenda Constitucional 95/2016 e o teto dos gastos públicos: Brasil de volta ao Estado de exceção econômico e ao capitalismo do desastre*, in *Revista de Investigações Constitucionais*, 2017, 260.

[20] C.M. MARIANO, *Emenda Constitucional*, cit., 261.

the autonomy of decision on public budget. It "removes the right of the Brazilian citizen to choose, at each election, the government programme related to public investments and, therefore, decide on the priorities of public polices concerned with economic development"[21]. It is worth mentioning that this amendment was enacted without any reference on a "public debt audit", that already represents more than fifty percent of gross domestic product (GDP).

In practical terms, this constitutional transformation implies on the construction of a "State of economic exception", marked by a deep neoliberal rationale[22]. It took place mainly due to Dilma Rousseff's impeachment, in which his former vice-President, Michel Temer, has assumed as President[23], contradictorily implementing the political opposition's governmental programme – represented by the *Partido Social Democrata Brasileiro* (PSDB) – properly due to his political inexpressiveness and unpopularity. Taking advantage of the "fiscal responsibility argument", wherein a supposed public deficit created by the latter government – for having spent too much – would legitimize the need for a fiscal adjustment. Since its enactment, the amendment has produced several effects on cultural public policies, especially in what relaters to public investments.

The second *modus* concerns the extinction and/or precariousness of important cultural agencies. The most emblematic case was the extinction of the Ministry of Culture (MinC), in one of the first administrative acts of the current President, Jair Bolsonaro – and its conversion into Secretariat of the Ministry of Citizenship, at first, and later it has been transferred to the Ministry of Tourism, called as "Special Secretariat of Culture". This political action is narrowly related to the sad traditions of Brazilian cultural policies. By all means, this was not the first time that the Ministry of Culture was extinguished in Brazil. In 1992, during the government of Fernando Collor de Melo – the first neoliberal experience in the country – the Ministry of Culture was transformed into a Secretariat directly linked to the Presidency. However, this situation was reversed by the successive government of Itamar Franco. During Michel Temer's. government, in 2016, the Ministry was also extinguished for a very brief period, but it was reactivated due to political pressure conducted by the cultural sector.

In this vein, what is unprecedented in current context is the extinction of the Ministry of Culture allied with precariousness and scrapping of the remaining cultural institutions – foundations and autarchies[24] – that are responsible for the enforcement of cultural policies. It is an act of institutional deregulation that destabilizes the operability of State's cultural policies inscribed in the constitution. Indeed, according to the latest study published by the 2019 *Cultural Information and Indicators System*, coordinated by the *Instituto Brasileiro de Geografia e Estatistica* (IBGE)[25], the public investment in the cultural sector has been decreasing during the last seven years, and the situation tends to degrade even more due to the imposition of the spending ceiling.

Aside from the policies of production and diffusion of culture, the policies related to the protection of cultural diversity and identity also are directly impacted. The *Fundaçao Nacional*

[21] C.M. MARIANO, *Emenda Constitucional*, cit., 261.

[22] See N. KLEIN, *The shock doctrine: the rise of disaster capitalism*, New York, 2007.

[23] An unprecedented fact in Brazilian constitutional history, an outcome of a political maneuver by the Parliament, in which the impeachment was carried out only against the President and the Vice, Michel Temer, has assumed the Presidency of the Republic by the end of 2016.

[24] As for example: Fundação Casa de Rui Barbosa, Fundação Cultural Palmares, Fundação Nacional de Artes, Fundação Biblioteca Nacional, Instituto do Patrimônio Histórico e Artístico Nacional, Instituto Brasileiro de Museus e Agência Nacional do Cinema.

[25] Instituto Brasileiro de Geografia e Estatística, S*istema de Informações e Indicadores Culturais 2007-2018*, Rio de Janeiro, 2019.

do Indio (FUNAI), a federal autarchy responsible for the protection of indigenous peoples' rights, has had meaningful budget cutbacks, propelling a setback in social assistance policies as well as policies for cultural development towards indigenous peoples[26]. This furthers the distance between norm and reality in the field of indigenous peoples' rights.

4. *Between "symbolic constitutionalization", "factual deconstitutionalization" and "abusive constitutionalism"*

Taking into consideration the inherent complexity of cultural rights, that need an integrated approach for its enforcement[27], it is evident that the distancing between norms and reality is a "physiological data of legal experience"[28]. In this vein, there is the necessity to improve a critical analysis grounded on a "sociological analysis of law", as state André-Jean Arnaud e Maria José Farinas Dulce[29], in which there is no clear difference between "intern" and "extern" dimensions of legal experience, both contributing to the comprehension of legal (in)effectiveness. This article is grounded on this perspective.

Indeed, it can be stated that the "political methodologies" that triggered constitutional degradation of cultural rights in Brazil are evident examples of "symbolic constitutionalization", "factual deconstitutionalization"[30], in a context marked by "abusive constitutionalism".

Actually, Brazilian political crisis is related – and has similarities – with the crisis of democracy worldwide[31]. But it also has some uniqueness, as "many of the ghosts that scary the Brazilian society in the Twenty-First century are direct heirs of an unresolved (pre-constitutional) past, whose risks can be strongly perceived and whose solution is an urgent task"[32]. The very singularity of Brazilian crisis is due to the fact that it has turned into a "*constitutional crisis*", which is, a crisis of the constitutional function itself, by which a de-constitutional process has taken place, leading to the mangling of fundamental rights – the core of 1988 constitution[33]. The public spending ceiling amendment's approval is a clear example of an orchestrated reaction against 1988 Constitution, as it precludes the enforcement of fundamental rights[34], furthering the enormous problems related to social and economic inequality among the civil population.

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[26] See M.C. da Cunha et al. Indigenous peoples boxed in by Brazil's political crisis, *HAU J. of Ethn. theory*, 2017.

[27] An integrated approach due to the fact that cultural rights integrate different generations of rights, requiring different types of public action for its enforcement. See: M. BILDAULT, *La protection international des droits culturels*, Bruxelles, 2009.

[28] G. ZAGREBELSKY, *Diritti per forza*, Torino, 2017, 7.

[29] A.J. ARNAUD, M.J. FARINAS DULCE, *Introduction à l'analyse sociologique des systemes juridiques*, Bruxelles, 1998.

[30] As highlights M. NEVES, *Constitucionalização simbólica e desconstitucionalização fática: mudança simbólica da Constituição e permanência das estruturas reais de poder*, in *Revista de Informação Legislativa*, 1996.

[31] Y. MOUNK, *The People vs. Democracy*, cit.; S. LEVITSKY, D. ZIBLATT, *How democracies die*, London, 2019.

[32] J.Z. BENVINDO, M.A. ARAFA, F.J.G. ACUNHA, *The Brazilian Constitution of 1988 and its ancient ghosts: comparison, history and the ever-present need to fight authoritarianism*, in *Revista de Investigações Constitucionais*, 2018, 5, 18-19.

[33] C. PAIXAO, *30 anos*: *crise e futuro da Constituição de 1988*, Sao Paulo, 2018.

[34] C. PAIXAO, *30 anos*: *crise*, cit.

Constitutional crisis is nothing new in Brazil and Latin America, a region historically marked by a plethora of crises[35]. The current peculiarity is due to the fact that it is being conducted by a far-right neopopulist movement that reacts to the public sphere model constructed since the country's redemocratization[36]. It unleashed a political questioning of Brazilian constitutional democracy's basis, triggering a formal and informal deformation of the constitution.

In fact, "constitutionalization" is an ongoing process, considering that it is through "constitutional policies" – led by several possible actors whose may carry out its enforcement – that constitutions come to life. Thus, it is mainly in moments of crisis – when rights are not taken seriously"[37] – that the need to assert the "normative force of the constitution" remains more evident[38].

In this regard, thinking about this legal and political processes, Marcelo Neves defines "symbolic constitutionalization" as a hypertrophy of the constitution symbolic function, at the expense of its instrumental function. It directly damages the core of constitutional system: the fundamental rights[39]. The constitutional amendment n. 95/2016 is a vivid example of fundamental right's symbolization – especially cultural rights. The amendment hypertrophically symbolizes rights in order to disrupt the elements for its technical and institutional instrumentality and enforcement.

Likewise, Marcelo Neves also points to the "factual deconstitutionalization", which is "the distortion of the constitutional text during the process of effectiveness, without basis on generalizable normative criteria"[40]. So, deconstitutionalization means "the de-legalization due to the frailty of legal code and its inability to congruently generalize, and the lack of consistent autonomy/identity of the legality sphere"[41]. That is, the constitutional text is neglected by power structures in order to not alter *status quo*. The institutional deregulation in the cultural policies and institutions distort the constitution itself. So, while cultural rights remain formally provided in the constitution, the institutional deregulation imposes an undeclared restriction on its implementation.

Thus, constitutional degradation is settled down in a context of an "abusive constitutionalism"[42], in which the political system uses the mechanisms of constitutional change and general constitutional law to undermine the basis of constitutionalism itself. It can be expresses by constitutional amendments – which means structural changes – or even by occasional uses of the constitution against itself. The constitutional degradation of cultural rights in Brazil – in its two *modi* – can be conceived as an abusive constitutional process operated by ordinary politics, arising in a constitutional disordered context that fostered a constitutional crisis.

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[35] J.Z. BENVINDO, C. BERNAL, R. ALBERT, *Introduction: facts and fictions in Latin American Constitutionalism*, in J.Z. BENVINDO, C. BERNAL, R. ALBERT (eds.), *Constitutional change and transformation in Latin America*, Chicago, 2019.

[36] Some analyses have been made on this argument: C. ROCHA, E. SOLANO, J. MEDEIROS, *The Bolsonaro Paradox: the public sphere and counterpublicity in contemporary Brazil*, London, 2021; M. NOBRE, *Ponto-final: a guerra de Bolsonaro contra a democracia*, São Paulo, 2020; L. AVRITZER, *Política e Antipolítica: a crise do governo Bolsonaro*, São Paulo, 2020.

[37] See, R. DWORKIN, *Taking Rights Seriously*, Massachussets, 1977.

[38] See, K. HESSE, *A força normativa da Constituição*, translated by Gilmar Ferreira Mendes, Porto Alegre, 1991.

[39] See, M. NEVES, *A constitucionalização simbólica*, São Paulo, 2007.

[40] M. NEVES, *Constitucionalização simbólica e desconstitucionalização fática*, cit., 323.

[41] M. NEVES, *Constitucionalização simbólica e desconstitucionalização fática*, cit., 323.

[42] D. LANDAU, *Abusive Constitutionalism*, in *Davis L.R.*, 2013, 47.

5. *Conclusions*

The constitutional degradation in Brazil has directly impacted the effectiveness of cultural rights. Even though the historical sad traditions of cultural policies, the singularity of this time is precisely the constitutional crisis that unleashed symbolic constitutionalization, factual deconstitutionalization, in a disordered context of abusive constitutionalism. This incident was only possible due to some circumstances, such as the gradual degradation of political environmental, that took place at least since 2013 and furthered with the impeachment of the former President Dilma Rousseff and the election of a far-right neopopulist and reactionary candidate, Jair Bolsonaro, in 2018.

Indeed, periods of constitutional crisis directly weaken the enforcement of fundamental rights, especially the ones that even in times of constitutional stability have already fragile guarantees. Cultural rights are a clear example of this, mainly due to the low level of legal and theoretical development. Currently, the Covid-19 pandemic has smashed even more the constitutional crisis fostering deconstitutionalization and institutional deregulation not only in cultural policies, but also in several constitutional areas and issues. It has opened the path for emergencies within another one.

Yet, although the ongoing constitutional crisis produced by constitutional degradation and the remaining uncertainties surrounding it, at least two possible scenarios can be glimpsed. The first one depends of a socio-political transformation that might lead to the (re)enforcement of the 1988 Constitution by affirming its normative force over ordinary politics. The second one would be the waiver of the current constitutional order, due to its immutable frailty, leading towards the replacement of the 1988 constitution. Taking into consideration the principles of contemporary constitutionalism, the first scenario would be the only one that could reverse the constitutional degradation and constitutional crisis. It is only by affirming the Constitution and its normative force in all institutions, agencies, public spaces, spaces of soft power, educational institutions and especially cultural institutions that it will be possible to reverse the current process of constitutional degradation.

Valentina Carlino*

Undemocratic Threats in the African context: which lesson to be learned from the Benin turning?**

ABSTRACT: ***The aim of the paper is to study the democratic backsliding phenomenon within the heterogeneous African context, specifically focusing on the emblematic case of Benin, a small Country generally recognised as one of the continent's best hopes until very few years ago. The recent reforms carried forward by the government majority on the impulse of the President of the Republic Patrice Talon, often endorsed by the decisions of the powerful and loyal Constitutional Court, are gradually weakening the democratic guarantees within the Country, which is therefore undoubtedly moving backwards.***

1. *Introduction*

In recent years, many expressions have been created by scholars in the attempt of framing that phenomenon of progressive decline of democracy that we are experiencing worldwide, through different paths all leading to the same destination: «a process of incremental, but ultimately still substantial, decay in the […] basic predicates of democracy»[1].

The situation we are currently experiencing could have seemed highly unlikely until few years ago, on the wave of the enthusiasm engendered by the worldwide spread of democracy marked by the "third wave of democratization"[2]. Therefore, it could now seem surprising that contemporary constitutionalism, rather than strengthening and consolidating the democratic successes, is called to protect these last from what has been called a "third wave of autocratization"[3].

No geographical area is immune from these processes of gradual deviation from the essential characteristics of democracy; nevertheless, scholars generally concentrate mainly on the weaknesses of the democratic guarantees characterising Countries of stable and consolidated democratic tradition[4]. Indeed, it could be more complicated to discuss about the recession of democracy within a context in which this latter is not fully achieved. It seems that this is precisely the reason why few studies focus on the degeneration of the African democracies, following a sort of preconception on the continent, that of the "impossible democracy"[5].

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* **Post-doctoral Research Fellow in Comparative Public Law, University of Siena.**

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[1] T. GINSBURG, A.Z. HUQ, *How to Save a Constitutional Democracy*, Chicago-London, 2018, 43.

[2] S.P. HUNTINGTON, *The Third Wave: Democratization in the Late 20th Century: Democratization in the Late Twentieth Century*, Norman, 1993.

[3] A. LÜHRMANN, S.I. LINDBERG, *A Third Wave of Autocratization Is Here: What Is New About It?*, in *Dem.*, 2019, 7, 1095-1113.

[4] As for the European continent, as it is well known, the studies mainly refer to the Hungarian and to the Polish cases. *Ex multis*, see L. PECH, K. L. SCHEPPELE, *Illiberalism within: Rule of Law backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017, 19, 3-47.

[5] R. ORRÙ, *Africa subsahariana: dalla "democrazia impossibile" alla "democrazia illiberale" senza passare per la "democrazia costituzionale"?*, in *DPCE Online*, 2020, 3, 4109-4134. According to M.L. DUDZIAK, *Who cares about*

2. *The "Beninese exception" within the "African exceptionalism"*

The African continent is certainly part of this abovementioned shift, since «the overall trend is that the democratic gains won in the period after 1990 are now eroding. […] As a part of a global trend of democratic backsliding, African states have adopted legal restrictions on key civil and political rights that form the basis of democratic rule in a range of Countries»[6]. African constitutionalism is going through serious difficulties, thus putting into question the achievements of the so-called "second transition".

When facing the topic, one should consider the failure of the first two generations of African constitution-building, these occurring when acquiring independence from the colonialists (independence constitutions, 1950s and 1960s) and in the immediately subsequent years (post-independence constitutions, from 1960s to 1989)[7]. Nevertheless, one should not ignore the "constitutional fever"[8] that interested Africa since the very beginning of the 90s, giving rise to a new era of democratisation strictly linked to the socio-economic changes occurred[9], which brought to legal orders characterised by political and social pluralism, changeovers of power, wide catalogues of rights and freedoms, independent oversight bodies (notably the establishment of Constitutional Courts) and the respect of the rule of law principle[10]. The "rebirth of African liberalism"[11] was not only theoretical: democracy is not an unknown notion in the Continent (anymore)[12]. One should rather focus on the problems occurring in assuring the full implementation of the "democratic consequences"; on their effectiveness. The spread of the liberal constitutionalism paradigms must be analysed in the light of a the economic, social, and political context of the region[13], closely linked to what has been indicated as the "imperfection" of the African democracies[14]. Among the various elements, one should consider the strong tendency toward the one-party

courts?: Creating a constituency for judicial independence in Africa, in *Mich. L.R.*, 2003, 6, 622-1634, «Amidst the blossoming of comparative scholarship, most of the continent of Africa is usually overlooked, as if it were a legal "Heart of Darkness"', as if it were a lawless world».

[6] L. RAKNER, *Democratic Rollback in Africa*, in N. CHEESEMAN (ed.), *The Oxford Encyclopedia of African Politics*, New York, 2019.

[7] The categorisation is taken by C.M. FOMBAD (ed.), *Separation of Powers in African Constitutionalism*, Oxford, 14 ff.

[8] J. DU BOIS GAUDUSSON, *Introduction*, in AA.VV., *Les Constitutions africaines publiées en langue française*, vol. 2, Paris-Bruxelles, 1998, 2.

[9] On the topic N. CHEESMAN, *Democracy in Africa. Successes, Failures, and the Struggle for Political Reform*, New York, 2015, 86-113.

[10] See V. PIERGIGLI, *The Reception of Liberal Constitutionalism and "Universal Values in the African Bills of Rights. Ambiguities and Perspectives at the Turn of the Millennium*, in V. PIERGIGLI, I. TADDIA (eds.), *International Conference on African Constitutions. Bologna, November 26th-27th*, 1998, Torino, 2000, 119-144.

[11] The expression comes from E. GYIMAH-BOADI, *African Ambiguities: The Rebirth of African Liberalism*, in *J. Dem.*, 1998, 2, 18-31.

[12] For a reconstruction of the topic, also from an historical point of view, see H. KWASI PREMPEH, *Africa's "Constitutionalism Revival": False Start or New Dawn?*, in E.N. SAHLE (ed.), *Democracy, Constitutionalism, and Politics in Africa. Historical Contexts, Developments, and Dilemmas*, New York, 2017, 13-60. See also P. QUANTIN, *La démocratie en Afrique à la recherche d'un modèle*, in *Pouvoirs*, 2009, 2, 65-76.

[13] L. MEZZETTI, *Le democrazie incerte. Transizioni costituzionali e consolidamento della democrazia in Europa occidentale, Africa, America latina, Asia*, Torino, 2000, spec. 169 ff.

[14] S. SICARDI, *Le "democrazie imperfette": un approccio problematico ed articolato*, in A. DI GIOVINE, S. SICARDI (eds.), *Democrazie imperfette. Atti del convegno dell'Associazione di Diritto Pubblico Comparato ed Europeo*, Torino, Università degli Studi, 29 March 2002, Torino, 2005, 1-6.

State, which seems to provide stability in a framework characterised by serious internal ethical conflicts. Consequently, even if multiparty elections have generally been assured in the Continent starting from the 90s, only few States have concretely witnessed a pluralistic political context, signed by a possible sharing of power[15]. It frequently happens that the electoral moment serves as tool for granting the renewal of the incumbent President, for permitting which the amendment of the Constitution is anything but rare[16].

In this context, Benin stands out, or better, it used to. First African Country to inaugurate the "National Conferences" model (in 1990)[17], its first democratic Constitutions – immediately submitted to a referendum in December of the same year – provides for a presidential form of government with elections of the Head of State every five years, along with legislative elections for the new unicameral Parliament to be held each four years. Under the new Constitution, Benin experienced the first multiparty legislative election in the Sub-Saharan region[18] (17th February 1991). The "popular strength" behind the Beninese transition strongly influenced the design of the 1990 Constitution, which is characterised by a unique adherence to the principles of the African Charter on Human and People's Rights[19] as well as by the entrenchment of the «leading concentrated model of constitutional review on the continent»[20]. The Constitutional Court, conceived as democratic watchdog of rule of law and human rights in the Country, is embedded with many functions.

Until few years ago, this constitutional design was generally conceived as a fortunate one; Benin has been considered as one of the African best hopes for a long time, standing out in the Western area as one of the very few successful transitions[21]. Moreover, if it is possible to observe a certain "stability" in the regimes established in most Countries of the continent, it is worth noting that Benin has instead recorded a real improvement in the "quality" of its democracy, especially thanks to the watchdog role played by the guarantee's bodies, notably the Constitutional Court, which has shown itself capable to contain anti-democratic impulses and allow the maintenance of the democratic framework[22].

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[15] See R. ORRÙ, *Africa e democrazia liberale: un intreccio possibile?*, in A. DI GIOVINE, S. SICARDI (eds.), *Democrazie imperfette*, cit., 239-274, spec. 265-268.

[16] R. ORRÙ, *Africa subsahariana: dalla "democrazia impossibile" alla "democrazia illiberale"*, cit., 4122-4126. See also J. BLECK, N. VAN DE VALLE, *Electoral Politics in Africa since 1990: Continuity in Change*, Cambridge, 2019.

[17] R.M. GISSELQUIST, *Democratic Transition and Democratic Survival in Benin*, in *Dem.*, 2008, 4, 789-814; A.D. ADAMON, *Le renouveau démocratique au Bénin*, Paris, 1995; K. NWAJIAKU, *The National Conferences in Benin and Togo Revisited*, in *J. Mod. Afr. Stud.*, 1994, 3, 429-447.

[18] M. BRATTON, N. VAN DE WALLE, *Democratic Experiments in Africa Regime Transitions in Comparative Perspective*, Cambridge, 1997.

[19] H. SÈGNONNA ADJOLOHOUN, *Between Presidentialism and a Human Rights Approach to Constitutionalism: Twenty Years of Practice and the Dilemma of Revising the 1990 Constitution of Benin*, in M. KIWINDA MBONDENYI, T. OJIENDA (eds.), *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa*, Cape Town, 2013, 245-290.

[20] S.H. ADJOLOHOUN, *Centralized Model of Constitutional Adjudication. The Constitutional Court of Benin*, in C.M. FOMBAD (ed.), *Constitutional Adjudication in Africa*, New York, 2017, 51-79, 52.

[21] S.H. ADJOLOHOUN, *Centralized Model of Constitutional Adjudication*, cit., 52: «After two decades of practice, the achievements of Benin's "constitutional revolution" speak for themselves. The Country has never missed any of its presidential, legislative or municipal elections since 1991. Six presidential elections have been held and four presidents have alternated in power in twenty-seven years of democratic renewal. Once known as the unstable nation in the era preceding the so-called "third wave of democratisation", the country has not experienced a single *coup d'état* and not a single change was made to its constitution in the last twenty-seven years».

[22] See S. LEVITSKY, L.A. WAY, *Competitive Authoritarianism. Hybrid Regimes After the Cold War*, New York, 2010, 291-297.

Moving from this context, the "U-turn"[23] of the Country may then seem particularly surprising and worrying. This process started a few months after the election of cotton magnate Patrice Talon as President of the Republic, in March 2016. In a very few years, Benin has undergone a rapid decline in terms of democracy: from virtuous example to case study for regression on the continent. In 2019, according to Freedom House data, Benin recorded the negative record as Country with the highest loss of democratic score in Africa[24]; the following year, it was downgraded from Free to Partly Free[25].

How can such a change be explained?

3. *Preliminary steps*

Immediately after being sworn in as Head of State, Talon initiated a whole series of reforms aimed at ensuring the continuity of his power and strengthening it.

The first indispensable step to this end was the appointment of the new members of the Constitutional Court, which took place in June 2018. Until then, relations between the President and the Court had been very tense; more than once the acts of the executive had been judged by the latter as illegitimate, branded as being disrespectful of the Constitution. The "clash" had been exacerbated when, by *Décision DCC 18-001* of January 18, 2018, the Court had declared partially unconstitutional the *Loi n. 2017-43*, which had amended the 2015 General Statute of the Civil Service in the sense of introducing an absolute ban on strikes for certain categories of civil servants. The reform, strongly contested within civil society, was one of Talon's priorities in terms of public administration reform. In asserting the unconstitutionality of the legislation, the constitutional judge had used very strong words, arguing that «the legislature, in complicity with the executive power, insidiously lays the groundwork for a democratic involution that could lead to relive the painful experience of 17 years of dictatorship experienced by our country»[26].

The Court's activism, together with the breadth of its powers, explain why "capturing" it was one of Talon's first moves. According to Article 115 of the Constitution, the body is composed of seven members, four of whom are appointed by the National Assembly and three by the President of the Republic, for a non-renewable five-year term. Indeed, the question of the excessive influence of the President in the composition of the Court, due both to the three members of which he is responsible for the choice and to the *de facto* power he exercises over the Parliament, is quite old and intrinsically linked to the primacy of the Head of State over other organs[27]. Talon therefore leveraged a pre-existing problem to secure a

[23] Expression created with reference to Hungary by J. KORNAI, *Shifting Away From Democracy – Hungary's U-Turn*, in *Public Finance and Management*, 2015, 3, 171-202.

[24] J. TEMIN, *Democratic Trends in Africa in Four Charts*, in *Freedomhouse.org*, 2020, available via Freedom House.

[25] Freedom House, *Freedom in the World 2020*, *Benin*, in *Freedomhouse.org*, available via Freedom House: «Benin had been among the most stable democracies in sub-Saharan Africa, but President Patrice Talon began using the justice system to attack his political opponents after taking office in 2016, and new electoral rules effectively excluded all opposition parties from the 2019 parliamentary elections. Protests surrounding those elections were met with harsh restrictions on civil liberties, including an internet shutdown and deadly police violence against demonstrators».

[26] All the translations from the French in this contribution are made by the Author.

[27] H. SÈGNONNA ADJOLOHOUN, *Between Presidentialism and a Human Rights Approach to Constitutionalism*, cit., 261-263.

"new" Constitutional Court loyal to him, which was necessary to support - and, above all, not hinder - the reforms that would follow. The appointment of Djogbenou, his friend and lawyer, as President of the Court, was therefore not particularly surprising.

Very significantly, almost as if to symbolize the start of the process of "institutional convergence", a few days after taking office, the new constitutional judges returned to rule on the legitimacy of the strike ban, raising the issue *ex officio* before themselves and overturning the outcome of the previous decision. With *Décision DCC 18-141* of June 28, 2018, the "new" Court restored the legality of the legislation in question, arguing on the basis of the need to ensure the continuity of the essential public service, what would justify the failure to comply with the constitutional and international rules on the subject.

In this context, it is worth noting that, only a week earlier, the Court had endorsed another of the crucial reforms for Talon, namely the creation of a *Cour de répression des infractions économiques et du terrorisme* (CRIET, with *Loi n. 2018-13*), a special judge entrusted with the repression of crimes related to terrorism, economy and trafficking and use of narcotics. Among the many problematic profiles, two stand out in particular: on the one hand, the members of the CRIET are all appointed by the Council of Ministers; on the other hand, the decisions rendered are not susceptible to appeal. The perfect timing with which the enactment of the law on the CRIET coincided with the installation of the new members of the Constitutional Court is certainly such as to legitimize suspicions that Talon was voluntarily waiting for the appointment of the new members, aware that the precedents would probably have asserted the non-compliance with the Constitution of the reform, blocking it. Moreover, it should be noted that the reform had been proposed by the President of the Constitutional Court Djogbenou when, immediately before serving as a constitutional judge, he was Minister of Justice.

One of the first cases brought before the CRIET was the so-called *affaire Ajavon*, named after the political rival of the incumbent President, accused in October 2016 of holding a large quantity of drugs in his apartment. Judged by an ordinary court in Cotonou, Ajavon was finally found not guilty, for lack of evidence. Shortly after his inauguration, however, the CRIET decided to reopen the case, examining the merits again, *in absentia*; in October 2018 the new sentence was issued, this time of guilt, with a condemn of twenty years in prison. Ajavon then turned to the African Court of Human and Peoples' Rights, alleging violation of numerous provisions of the Banjul Charter by the Beninese State[28]. The Court upheld the plaintiff's claim, finding a violation of articles 3, 5, 7 and 26 of the Charter and article 14 of the International Covenant on Civil and Political Rights. Moving on from the concrete case, the African Court deemed the CRIET legislation illegitimate insofar as it disrespects the international principle - but also the constitutional principle - of the dual level of judgement; contrary to what the national executive maintains, the possibility of appealing against the decision of the special judge by *pourvoi en cassation* is not such as to protect the rights of the plaintiffs in the trial. Notably when, as it is the case, the decision is given by a specialized court, composed of members appointed by the government, whose procedural rules are such as to make the speed of the judgment prevail over respect for the individual's rights of defence and due process.

In any case, the indications provided by the African Court have been completely ignored by the Beninese authorities, which have neither annulled the sentence in question nor modified the reference legislation. Moreover, the case law of the CRIET, analysed in the light of the

[28] African Court on Human and Peoples' Rights, *Ajavon c. Repubblica del Benin*, n. 013/2017, 29 March 2019.

decisions rendered, raises considerable doubts as to the impartiality of this body, which has on several occasions sentenced political rivals of Patrice Talon to imprisonment or exile, preventing them from participating in electoral contests. The controversy, never really extinguished, exploded again over the presidential elections of April 2021 (*infra*); during the electoral campaign, the CRIET inflicted more than one sentence on the leaders of the oppositions, who, in the end, were not able to present their candidacy.

4. *Consolidation through the elections*

Once launched, Talon's political project needed to be consolidated, to avoid as much as possible an overturing of the situation and, consequently, the loss of the leadership[29]. For that purpose, it was necessary to modify the electoral framework. The first moves of the "legal gambit" put in place by Talon "to normalise the political exclusion" [30] consisted in a combination of a new Electoral Code[31] and a new Charter of the Political Parties[32], promulgated on the initiative of the Beninese President in September 2018, a few months before the legislative elections held in April of the following year.

Among the many changes made to the electoral legislation in 2018, two are worth mentioning here. First, Article 242 of the Electoral Code sets the bar threshold for elections to the National Assembly at 10%. Evidently, in addition to making the exclusion of the dominant party rather unlikely - especially in democracies that are not fully stable[33] - the purpose of the novelty is to drastically decrease the number of lists among which to distribute parliamentary seats, in a country characterized by a very strong multipartyism, which counts (*rectius* counted) more than two hundred parties.

Also of great concern is the substantial increase in the deposit to be deposited with the National Autonomous Electoral Commission (CENA) to be validly presented for election. With the new Electoral Code, presidential candidates must pay 250 million CFA francs (approx. 380,000€), compared to the 15 million previously provided (approx. 10,000€); to be admitted to the legislative elections, lists must instead pay 200 million CFA francs (approx. 300,000€) and no longer 8 million (approx. 12,3000€)[34]. The new law operates a selection of candidates based on wealth; moreover, the economic difficulties in which the country finds itself cannot be ignored, so that for most of those who would like to participate in the electoral competition, the new deposit represents an almost insurmountable obstacle. Moreover, the refund of the deposit is not automatic; only the candidates for the presidency or the electoral lists that have received at least 10% of the valid votes are entitled to regain possession of the amount paid.

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[29] For instance, as for Hungary, see M. MAZZA, *The Hungarian Fundamental Law, the New Cardinal Laws and European Concerns*, in *Acta Juridica Hungarica*, 2013, 2, 140-155.

[30] M. DUERKSEN, *The Dismantling of Benin's Democracy,* in *Africa Center For Strategic Studies*, 2021, available via Africa Center.

[31] *Loi n. 2018-31 portant code électoral en République du Bénin*.

[32] *Loi n. 2018-23 portant Charte des partis politiques en République du Bénin*.

[33] C. O'DWYER, M. STENBERG, *Local-Level Democratic Backsliding? The Consolidation of Aspiring Dominant-Party Regimes in Hungary and Poland*, in *Gov.&Opp. Int. J. Comp. Pol.*, 2021, 1, 1-24.

[34] F. DIALLO, *Combien coûte une candidature à une présidentielle en Afrique subsaharienne?*, in *Jeuneafrique.com*, 2019, available via Jeune Afrique.

It is worth noting that, in the occasion of the *a priori* control, the Constitutional Court had considered both the Electoral Code and the Charter of Political Parties perfectly legitimate[35], as then confirmed a few months later on the occasion of a verification of compliance with the Constitution of the presidential decree of January 2019 by which the elections to the National Assembly were called, requested by two Beninese citizens (belonging to the opposition) [36].

Due to the new electoral framework, only two lists, both supporting the ruling majority, were authorized by CENA to compete, while the other candidates were deemed not to comply with the new electoral rules. Despite the protests that broke out in the country and led to demonstrations in the capital[37], the voting operations were carried out and the result was validated by the Electoral Commission. With a participation rate at an all-time low of around 26%, the *Union Progressiste* party won 47 seats, and *Bloc Républicain* 36; a totally one-party parliament loyal to President Talon.

5. *Amending the Constitution*

With a fully loyal Parliament, the Head of State could finally amend the 1990 Constitution – after two failed attempts within the previous Parliament – with *Loi constiutionnelle n. 2019-40* of 7 November 2019. The revision was a wide-ranging one, affecting 47 of the 160 articles composing the text and numerous topics. The constitutional law, unanimously approved, was passed in a very short time, following an unsuitable urgent procedure, validated by the Constitutional Court[38]. Nevertheless, the lack of consensus and dialogue behind the amendment served as basis for the decision of the African Court with which it declared the illegitimacy of the Beninese constitutional revision law, since it does not comply with the "principle of consensus" referred to in art. 10, par. 2 of the African Charter on Democracy, Elections and Governance[39]. According to the judges of Arusha, «the fact that the Revised Constitution was passed unanimously cannot conceal the need for national consensus», which would also emerge from the ideals imprinted in the Charter of December 1990[40]. For this reason, the *Noudehouenou* ruling of December 2020 ordered the Beninese State to abrogate the constitutional revision law, to guarantee citizens direct participation, free of any political, administrative or judicial obstacles, in the elections and, therefore, indirectly in the modification of the Constitution[41]. Naturally, no action was taken by the national executive on the words of the African Court.

After all, the review served to consolidate the dominance of the President.

Among the main tools introduced for this purpose, one should remember the one of the "sponsorships". Art. 132 of the Electoral Code, as modified with *Loi n. 2019-43* of 15 November 2019, in accordance with the amended art. 44 of the Constitution, establishes that, to

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[35] Constitutional Court of Benin, *Décision DCC n. 18-199l*, 2 October 2018.

[36] Constitutional Court of Benin, *Décision EL 19-001*, 1 February 2019.

[37] F. PAUTEL*, Benin: Crackdown on protests and wave of arrests fuel tense election period*, in *amnesty.org*, 2019, available via Amnesty.

[38] *Décision DCC 19-504*, 6 November 2019.

[39] T. BLAISE, *La charte africaine de la démocratie, des élections et de la gouvernance*, in *Annuaire français de droit international*, 54, 2008, 515-528.

[40] African Court on Human and Peoples' Rights, *Noudehouenou c. Repubblica del Benin*, n. 003/2020, 4 December 2020, par. 65.

[41] See the comment of O.D. AKINKUGBE*, Houngue Eric Noudehouenou v. Republic of Benin*, in *Am. J. Int. L.*, 2021, 2, 281-287.

legitimately run in the presidential election, a candidate must be supported by at least 10% of all the deputies and mayors in office. Having said that, a fundamental role was played by the local elections held on May 2020 for the renewal of councils, mayors, and deputy mayors in seventy-seven municipalities of the Country, elections in which only five parties were allowed to compete, four of which belonged to the governing majority. The rules established by the new Electoral Code allowed the installation of mayors almost entirely of political sensitivity close to the Head of State. Obviously, along with the already discussed parliamentary election, this facilitated the application of the sponsorship mechanism in favour of the majority in charge. In fact, some potential candidates were not even able to present their candidacy, as they were unable to gather the consensus of the percentage of deputies or mayors required by the Electoral Code. This context paved the way for a dispute before the Constitutional Court, brought by some citizens of Benin with the intention of having the electoral legislation declared illegitimate, insofar as it impeded the possibility of free candidacy. In this regard, it should be recalled that the Arusha Court has repeatedly affirmed the incompatibility of the African Charter of Human and Peoples' Rights with national provisions aimed at preventing the presentation of independent candidacies[42].

As was predictable, the circumstances outlined above led to a new victory for Talon who, without too many surprises, was re-elected in the first round with 86.36% of the preferences expressed; a real show of strength against his competitors, in a vote with a participation rate of 50.17% of those eligible. Despite the protest movements that arose in the Country in the weeks immediately preceding the vote, Talon was sworn in and (re)installed as President of the Republic on 23 April 2021.

6. *Brief concluding remarks*

What can the Beninese democratic decline tell us?

Firstly, one should notice that the situation of this small but emblematic Country is not an isolated case; on the contrary, it seems to perfectly fit within that recalled tendency that is globally putting democracy at risk. In this sense, it seems possible to affirm that the phenomena of erosion can also refer to the African continent, which is experiencing them in more than one Country.

On the other hand, one cannot ignore the parallelism between what is happening among the most successful liberal democracies in the area - including, precisely, Benin - and what we are witnessing in certain contexts of Western legal tradition (and not only). Indeed, constitutional degradation seems to constitute a minimum common denominator in experiences which are very distant from each other and generally difficult to compare. The causes, the protagonists, the instruments, the objectives found in the various studies of domestic law are basically the same, thus generating a sort of “blank slate” of democratic backsliding to be filled with content according to the individual national experiences, whose

[42] The first decision in this sense has been pronounced on 14 June 2013 within a case concerning Tanzania, on which: V. PIERGIGLI, *La Corte africana dei diritti dell’uomo e dei popoli giudica sulla violazione dei diritti di partecipazione politica e delle regole democratiche in Tanzania (Tanganika Law Society et al. v. Tanzania, 14 giugno 2013)*, in *Federalismi.it*, *Focus Africa*, 1, 2014.

fragility - or, on the contrary, solidity - in terms of democracy can certainly be an important factor in the maintenance of the guarantees for its protection[43].

Last but not least, it is worth noting that, as for the African continent, the democratic erosion in progress is assuring a growing role to the Arusha Court, often considered by oppositions, activists and citizens as a place in which to challenge the illegitimate decisions of the majorities in charge, the twisting of the representation circuit and non-consensual constitutional revisions[44]. At the same time, it confirmed that the main difficulty in the effectiveness of the African system of protection of rights lies in the lack of implementation of sentences by the States parties. In fact, the litigation initiated before the African Court seems to confirm the theory that the Court can serve as a place where the voices of opposition, too often silenced at the domestic level, can be heard to trigger social change. Unable to effectively address national institutions, many actors in local political and civil life turn to the regional court as a form of activism, even in the knowledge that its decisions are often unheard and disregarded (as happened, as mentioned, in Benin). However, this does not exclude the usefulness of recourse to the international court, which in any case triggers a mechanism of accountability of the governments involved, whose actions will be under the spotlight of the entire international community.

On the one hand, the risk is that of diminishing the role of the African Court, as well as fuelling the resistance of numerous countries to its jurisdiction. In April 2020, Benin withdrew its declaration to allow individuals, as well as non-governmental organizations (NGOs) with observer status at the Commission, to bring questions directly before the Court, a possibility foreseen in articles 5, paragraph 3 and 34, paragraph 6 of the Protocol to the African Charter on Human and Peoples' Rights for the creation of an African Court on Human and Peoples' Rights. Of the thirty countries that are signatories to the protocol, only ten have decided to guarantee such a possibility; as of today, it is guaranteed only in Burkina Faso, Gambia, Ghana, Malawi, Mali and Tunisia. Rwanda, in fact, withdrew its membership in 2016, to be followed by Tanzania in 2019 and Benin and Ivory Coast in 2020. To be read in the prism of the aforementioned African reticence to recognize a regional jurisdiction, the issue is undoubtedly also linked to the progress of the democratic involution underway on the continent, for which the Court could constitute a barrier.

On the other hand, in fact, although opposed by the countries that have ratified the Protocol, recourse to the African regional judge seems to be looked upon favorably precisely because it is potentially capable of curbing, or at least shedding light on, the illiberal mechanisms triggered in the area; this seems to be borne out by the hostility of the national authorities.

In fact, once the erosion underway at a global level has been ascertained and after having traced the "mechanisms" and common causes that are repeated in the various national contexts, the only viable solution seems to be to look at possible remedies. If constitutional democracy is undoubtedly in danger, what can we do to save it, through the tools it provides?

[43] M.W. SVOLIK, *Which democracies will last? Coups, incumbent takeovers and the dynamic of democratic consolidation,* in *Brit. J. Pol. Scie.*, 2010, 4, 715-738; D. SLATER, B. SMITH, G. NAIR, *Economic origins of democratic breakdown?*, in *Persp. Pol.*, 2014, 2, 353-374.

[44] As also suggested by O.D. AKINKUGBE, *Houngue Eric Noudehouenou v. Republic of Benin*, cit., 281.

Ferdinando La Placa[*]

Constitutional Degradation: a Comparative Overview[**]

ABSTRACT: ***Seen as the best form of democracy, adopted in almost every country in the last century, constitutional liberal democracy is facing over the last decades a turbulent period of constitutional degradation. This paper will analyse this undergoing process, initially, focusing the attention on populism, considered as an essential element of this process when ongoing, and as a warning signal for the stability of the other democracies when the process has not started yet. It will, then, scrutinize the main institutional and legal instruments adopted by populist leaders to undermine the fundaments of a constitutional liberal democracy (Constitutional amendments, alteration of the electoral competition, weakening of the checks and balances' system, reduction of fundamental rights and freedoms protection). Therefore, it will examine the practical application of this constitutional erosion in Hungary, Poland, Turkey and Russia, giving, thus, a comparative overview of the phenomenon. Finally, it will briefly attempt to propose some suggestions to contrast this pernicious process and protect constitutional liberal democracies.***

1. *Introduction*

Seen as the best form of democracy, adopted in almost every country in the last century, constitutional liberal democracy is facing over the last decades a turbulent period of constitutional degradation. With this expression, scholars usually indicate a slow but gradual decay in the features and structures of contemporary democracies. This deterioration is not an overnight phenomenon: the state does not experience a proper crisis, which would occur in case of a *coup* or other kinds of constitutional collapse, but, despite preserving its formal *façade* of constitutional democracy, it undergoes a partial erosion of those values and norms that represent the fundaments on which a constitutional democracy is based[1]. This process can reveal itself in different forms according to the country object of analysis: in Poland and Hungary, the recently approved reforms threaten the independence of the judiciary; in Turkey and Russia, the presidents, through the controlled majority in the Parliaments, have changed the constitution to enhance their authority, power and constitutional prerogatives, meanwhile restricting personal freedoms and rights; in other countries, we witness the rising of populist movements, which, with their Manichean[2] and simplifying style[3] and the idea of

[*] **PhD Candidate in Law at the University of Turku.**

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[1] M. LOUGHLIN, *The Contemporary Crisis of Constitutional Democracy*, in *Oxf. J. Leg. Stud.*, 2019, 39(2), 435 ff. For further studies on the topic see *ex multis*: F. ZAKARIA, *The rise of illiberal democracy*, in *Foreign Affairs*, 1997, 76(6), 22 ff.; N. BERMEO, *On democratic backsliding*, in *J. Dem.*, 2016, 27(1), 5 ff.; M.A. GRABER, S. LEVINSON, M. TUSHNET (eds), *Constitutional Democracy in Crisis?,* Oxford, 2018; A. HUQ, T. GINSBURG, *How to Lose a Constitutional Democracy*, in *UCLA Law Review*, 2018, 65(1), 78 ff.; K.L. SCHEPPELE, *Autocratic Legalism*, in *U. Chi. L. Rev.*, 2018, 85(2), 545 ff.; T.G. DALY, *Democratic Decay: Conceptualising an Emerging Research Field*, in *Hague J. Rule Law*, 2019, 11(1), 9 ff.; S. HAGGARD, R. KAUFMAN, *Backsliding. Democratic Regress in the Contemporary World*, Cambridge, 2021.

[2] M. ANSELMI, *Populism: An Introduction*, Abingdon, 2018, 8.

[3] P. TAGGART, *Populism*, Buckingham, 2000, 112.

pure democracy[4], substantially different from the liberal one, could be considered prodromal element to constitutional erosion.

The peculiarity of this phenomenon is that, since no democracy is perfect and since every country could experience political turmoil (due to the approval of a deeply contested act or the electoral victory of a questionable leader), it could be very difficult to realise the moment when the constitutional degradation begins and, particularly, notice the precise moment in which the democracy is in peril and could convert itself in an authoritarian regime[5]. It is so the Scholars' Burden to analyse contemporary democracies' constitutional health and report when the risk is occurring, otherwise «like the proverbial boiling frog, a democratic society in the midst of erosion may not realize its predicament until matters are already beyond redress»[6]. Thus, it becomes important to examine the elements that could bring to the awareness that something underneath is moving and that arrangements must be taken.

Consequentially, this paper will analyse the undergoing process of constitutional degradation, initially focusing the attention on populism, considered as an essential element of this process when ongoing and as a warning signal for the stability of the other democracies. It will, then, scrutinise the main institutional and legal instruments adopted by populist leaders to undermine the fundaments of constitutional liberal democracy. Therefore, it will examine the practical application of this constitutional erosion in different countries, giving, thus, a comparative overview of the phenomenon. Finally, it will briefly attempt to propose some suggestions to contrast this pernicious process and protect constitutional liberal democracies.

2. *Populists' rising, troubles approaching*

Primarily, it must be considered that the menace of constitutional degradation does not come from the outside but must be found inside the democratic system[7]. The authors that would trigger this process are usually the main characters of the political and democratic scene, namely political parties, political leaders, and population. Constitutional deterioration is indeed strictly linked to the crisis of the representative system: where people start to feel abandoned by the political system, where politics are no more considered responsive to people's requests, where the trust in the political system is undermined, there meanders the seed of the erosion; and when this process becomes advanced, then demagogues step in[8]. It is physiological to find some potential demagogues or populist leaders in every democracy, but they are generally relegated to the political scene's fringes. However, if they manage to win the election and lead the country, «constitutional rot has become serious indeed»[9].

Populists' rising could so represent the first step to constitutional degradation. The populist threat, indeed, lies in their backing and spreading a peculiar idea of democracy and constitution, which, although they try to present as consistent with contemporary constitutional principles, is actually at odds with them. These movements seek to offer a constitutional counter-narrative based on embracing a mimetic and parasitic approach

[4] Mudde and Rovira Kaltwasser refers to a democracy «*sans* adjectives», in C. MUDDE, C. ROVIRA KALTWASSER, *Populism. A Very Short Introduction*, Oxford-New York, 2017, 80.

[5] D. LANDAU, *Abusive Constitutionalism*, in *UC Davis Law Review*, 2013, 43, 193, online in *https://lawreview.law.ucdavis.edu/issues/47/1/articles/47-1_Landau.pdf*.

[6] T. GINSBURG, A.Z. HUQ, *How to Save a Constitutional Democracy*, Chicago, 2018, 77.

[7] W. A. GALSTON, *The populist challenge to liberal democracy*, in *J. Dem.*, 2018, 29(2), 5.

[8] J. M. BALKIN, *Constitutional crisis and Constitutional Rot*, in *Md. L. Rev.*, 2017, 77(1), 151 ff.

[9] J. M. BALKIN, *Constitutional crisis and Constitutional Rot*, cit., 152.

towards constitutionalism[10]. If, on the one hand, to give a resemblance of legitimacy to their political choices and proposal, populist leaders attempt to adopt the constitutional language to present themselves following the constitutional principles (e.g., sovereignty, majority, people), on the other hand, they reshape the meaning of these principles creating a constitutional counter-discourse characterised by an alteration to the legal and value-related hierarchies typical of constitutional democracies. These manipulative interpretations can be easily found in their unconditional exaltation of the principles of sovereignty and majority. Considering those principles rid of any kind of constraints set by the constitutional system, they reduce democracy to mere majority rule. Thus, populist rhetoric appears to be based on the promotion of the idea of a *pure democracy*, which substantially differs from the idea of a liberal democracy fostered by contemporary constitutionalism. Indeed, if the word "*democracy*" indicates a form of State based on the principle of popular sovereignty, on the chance for every citizen to be able to participate in the exercise of public powers and on the majority rule (according to which the decisions are taken by the majority and minority must conform to them), the terms "*liberal democracy*" imply something more: this form of State, besides all those aforementioned features, presents also some measures and procedures of control which guarantee the respect of fundamental rights and constitute a safeguard for minorities, in order to avoid the so-called «tyranny of the majority»[11]. These arrangements, outlined in the constitutions, such as the control of the Parliament on the Executive, the independence of the judiciary, free and fair elections and the prescribed procedures to amend the constitution, assure the very existence of a pluralistic society and represent the basic pillars of a constitutional liberal democracy. But, populist leaders sometimes go further, and even manifestly recognise a new kind of democracy they aim to create: an *illiberal* one. In a speech held in 2014, Magyar Prime Minister Viktor Orbán emphasised the necessity to build «an illiberal state, a non-liberal state»[12] that, without liberal democracies' constraints, could efficiently respond to the challenges arising from a globalised and competitive world.

Another problematic aspect of populist rhetoric is its conception of both the people and political representation. Populists adopt a counterfactual notion of the people, which, in their view, consists of a homogenous, essentially monolithic, community, which defines itself as opposed to an alleged other that must be excluded from the society[13]. Populism denies the real complexity of the society and of the different groups that compose it, reducing everything to an irredeemable opposition between the people and the other. A kind of definition that represents a disturbing element in a liberal democracy based on a pluralistic notion of the *demos*, composed by an irreducible multitude of different and equal citizens regardless of its components' opinions or identities. Inversely, in a populistic view, everyone who does not fall inside their idea of community, e.g., for his belonging to a different political, ethnic or religious group, is considered as an outsider, as a not real part of the population of the country, irrelevant and not important, so that concessions to or compromises with him is consequently unnecessary[14]. Moreover, populist leaders, presenting themselves as the true and sole representatives of the people, would also claim to be the only real interpreters of its will and

[10] G. MARTINICO, *Fra mimetismo e parassitismo. Brevi considerazioni a proposito del complesso rapporto fra populismo e costituzionalismo*, in *www.questionegiustizia.it*, 2019, 1, 71 ff.

[11] C. MUDDE, C. ROVIRA KALTWASSER, *Populism*, cit., 80 ff.

[12] C. TÓTH, *Full text of Viktor Orbán's speech at Băile Tuşnad (Tusnádfürdő) of 26 July 2014*, in *https://budapestbeacon.com,* 29.7.2014.

[13] F. PANIZZA, *Introduction*, in F. PANIZZA (ed.), *Populism and the Mirror of Democracy*, London-New York, 2005, 16 ff.

[14] C. DEIWIKS, *Populism*, in *Living Rev. in Dem.*, 2009, 1, 3.

would consider everyone (other political parties, the judiciary) or everything (constitutional constraints, international organizations) which hinder the realization of the reforms they advocate in the name of the people, as people's enemy or illegitimate impediments[15]. Thus, to deliver popular will, populist movements, would not hesitate, when they have the chance, to remove these obstacles, even unilaterally modifying the constitution and the so-called "rules of the game" for their (*rectius* for the people's) advantage[16].

The crisis of traditional political parties, the strengthening of populist movements, and, mainly, the constant and slow spread of their divisive idea of a society based on the refusal of pluralism, on the irrelevance of those who think differently or are different, and on a manipulative interpretation of both the democracy and the constitutional principles, represent a ticking noise for constitutional democracies. If populist movements, indeed, find fertile ground to sprout, it means that society, or at least a part of it, will share their view; and if they share it, society will be more prone to accepting and legitimising even alteration to the constitutional system; and when that happens, constitutional degradation will follow.

3. *How to seize a democracy: a legal toolbox*

Unlike a constitutional crisis, constitutional degradation occurs gradually and within the framework of the law and the constitution. It consists of a series of discrete reforms that singularly could be considered consistent within a democratic scope but summed up together prove to be pernicious for the whole constitutional system. This kind of erosion implies, indeed, a sophisticated and devious use of the legal and constitutional instruments to progressively undermine the substance of constitutional democracy, though maintaining intact its formal appearance[17].

Although the practical fulfilment of this form of degradation could change according to the different legal systems, the devices used to reach the aim are almost the same in every country, and so knowing them could make us more alert when they are employed. The main gizmos in the toolbox are four and will be briefly analysed in this paragraph.

The first and surely most useful tool is the constitutional amendment. A simple instrument that, following an established procedure, could modify the norm that is conceived to protect the whole system. Given that constitutional amendment could generally modify every part of the constitution, intervening in the fundamental law is without any doubt the most efficient way to weaken the constitutional order[18]. The modifications could be of two kinds. It is possible to have a replacement of the constitution, and so to produce a new one, or it is possible to edit the existing text and thus alter only a part of it. The first option is more ostentatious and allows to freely reshape the entire constitutional system, whereas the second one is more underhanded and permits to maintain the general framework, while sneakily defusing it. As said, any constitutional change could be perfectly justifiable inside a

[15] J.W. MÜLLER, *What is Populism?*, Philadelphia, 2016, 101.

[16] P. BLOKKER, *Populism as a constitutional project*, in *Int. J. Const. Law*, 2019, 17(2), 545 ff.

[17] Varol talks about «stealth authoritarianism» which «creates a significant discordance between appearance and reality by concealing anti-democratic practices under the mask of law» in O.O. VAROL, *Stealth Authoritarianism*, in *Iowa Law Review*, 2015, 100, 1685, online in *https://ilr.law.uiowa.edu/assets/Uploads/ILR-100-4-Varol.pdf.*

[18] Concerning constitutional alterations, Landau introduces the concept of «*"abusive constitutionalism" as the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before*» in D. LANDAU, *Abusive Constitutionalism*, cit., 195.

democratic country to renovate the system or update it, but if other reforms are implemented, those small variations could subvert together the entire system. However, since constitutions to be amended usually require a particular majority to be reached, this tool is not always available.

Alterations to the electoral competition could be considered another handy instrument. In a liberal democracy, electoral rules tend to be fixed and accepted by all the competing parties to guarantee a fair election and the possibility to have an alternation in power: if a party wins an election, the others will form the opposition, knowing that, maintaining the same rules, in the next electoral competition the roles could be reversed. But, if the winning party changes the so-called *rules of the game* for his own advantage, trying to assure his stability in power, the competition would not be fair anymore[19]. The strategies to be adopted, which are usually justified by the apparently neutral and legitimate purpose of ensuring political stability or eliminating electoral frauds[20], could be the most various and could consist in: e.g., restrictions on the ability of individuals and political parties to be represented and compete in elections, particular regulations concerning voters' registrations or simple modifications to the electoral law. In that last scenario, a bit of gerrymandering never hurts.

Another useful tool is certainly the weakening of the checks and balances' system[21]. Introduced to guarantee the separation of powers and a reciprocal and continuous control of the three branches of government on each other and prevent illegitimate abuse of power, the check and balances' system could be a first mechanism to dismantle. Although the legislative is one of the three branches and oppositions could be rather boisterous, a party who wins the election has usually the majority of the House by his side, which, following the directive of the executive, would approve the bills put in the party leader's political agenda without too many hurdles. The main obstacle could so be the judiciary and especially the court who has the power to control the legitimacy of the law, namely the Constitutional Court[22]. To diminish the independence of these bodies, seen «*as an illegitimate constraint on majority rule*»[23], when there is not the possibility to redesign it by a constitutional amendment, populist leaders will modify the rules concerning tribunals' functioning and composition. Some measures that could seem only neutral procedural changes but that could have an enormous impact on the activity and the role of the courts could be, for example, lowering the retirement age of judges, introducing new requirements and procedures for their appointment, expanding the number of justices constituting the bench, reducing the scope of the jurisdiction or increasing the cases of judges' accountability.

The last instrument that could be adopted is the reduction of fundamental rights and freedoms protection[24]. Particularly relevant can be the limitation of fundamental rights supported by deliberately ambiguous reasons of avoiding constitutional violation, public security or morality. The main freedoms that are usually restricted are the freedom of speech and opinion, the freedom of assembly, the freedom of association, the freedom of

[19] M. BALKIN, *Constitutional crisis and Constitutional Rot*, cit., 153 ff.

[20] O. O. VAROL, *Stealth Authoritarianism*, cit., 1701.

[21] J.W. MÜLLER, *Rising to the challenge of constitutional capture*, in *https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/* , 21.03.2014. See also, G. STOPLER, *ntroduction to I-CONnect/ICON-S-IL Symposium: Constitutional Capture in Israel?*, in *Int'l J. Const. L. Blog*, in *http://www.iconnectblog.com/2017/08/introduction-to-i-connecticon-s-il-symposium-constitutional-capture-in-israel/*, 20.08.2017.

[22] B. BUGARIČ, T. GINSBURG, *The Assault on Postcommunist Courts*, in *J. Dem.*, 2016, 27(3), 69.

[23] P. BLOKKER, *Populism as a constitutional project*, cit., 547.

[24] D. LANDAU, *Abusive Constitutionalism*, cit., 200.

information, the freedom of the press and the media[25]. Pretexts adopted could be diverse: with the excuse of terrorism or extremism threats, laws could be passed to deliberately shut down NGOs or prosecute political groups; censorship and penalties could be introduced to avoid the spread of *false* information; special taxes or registrations procedures could be requested to carry out particular activities; academics could lose their job or be arrested for having discredited the honour of the State; in the name of religion or morality, minority groups could be publicly discriminate or withdrawal from international conventions could be decided.

4. *Practical application: Men at work*

Having analysed the legal tools that could be used to degrade a constitutional system, it is interesting to examine how and which of them have been deployed in the different countries. The paragraph would concentrate on our nearest neighbouring state where this process is occurring, focusing the attention on the reforms approved in Hungary and Poland, and then, moving to the borders of the EU, on those approved in Turkey and Russia, where the phenomenon is far more advanced.

As for constitutional amendments, Hungary is second to none. After having tried to change the constitution during its first mandate as PM in 1998-2002 but being stopped by the Constitutional Court for having failed to reach the requested 2/3 majority[26], Viktor Orbán, once won again the election in 2010, succeeded[27]. Thanks to the electoral law in force at that time, his electoral results of 53% of the vote translated into 68% of the seats of the unicameral Parliament, a sufficient supermajority to change the Constitution. Before doing so, Orbán managed to pass several constitutional amendments to neutralize the counter-majoritarian elements of the constitution in order not to be stopped again, even removing a provision that required the approval of 4/5 of Parliament to establish the procedures and rules for preparing a new Constitution[28]. Free from constraints, his political party, Fidesz, replaced the old Constitution, approving, in only a few months and without the involvement of the opposition, a new Fundamental Law[29]. The new constitution, adopted respecting the formal but weak procedures provided by the previous one, together with other cardinal laws and constitutional amendments[30], totally reshaped the Magyar state, eliminating almost all institutional checks: the number of parliament members was halved[31] and bills' second reading was abrogated[32]; the Commission for the appointment of the Constitutional Court judges, previously composed by one member for each political party, now reflects proportionately the composition of the Parliament, so that Fidesz, with its supermajority, could nominate them[33]; the number of the

[25] T. GINSBURG, A.Z. HUQ, *How to Save*, cit., 111 ff.

[26] CC decision n. 1/1999.

[27] M. A. ORLANDI*, La democrazia illiberale. Ungheria e Polonia a confronto*, in *DPCE*, 2019, 1, 170.

[28] Provision that was not protected by the same rule that it stated, so that it could have been changed, and so happened, with a 2/3 majority, see A. ARATO, *Post-Sovereign Constitution-Making in Hungary: After Success, Partial Failure, and Now What?*, in *S. Afr. J. Hum. Rts.*, 2010, 19(1), 43.

[29] Approved by the National Assembly on 18 April 2011 and signed by the President of Hungary on 25 April 2011.

[30] In almost 11 years from FL approval, 9 constitutional amendaments have been already approved.

[31] Art. 3 Act CCIII 2011.

[32] G. MILANI, *How Democratic are Illiberal Democracies? Parliament and Parliamentarism in the Hungarian Constitutional Retrogression*, in *www.federalismi.it*, n. 19 del 2019, 15.

[33] Art. 7 Act CLI/2011.

judges composing the Court was enlarged from 11 to 15 and their office mandate risen from 9 to 12 years[34]; the competences of the Constitutional Court were shrunk[35] and all its decisions made before the new Constitution took effect were repealed[36]. Additionally, several independent institutions, such as the Media Board, the Electoral Commission and the Budget Commission were reformed and re-staffed with Fidesz loyalists[37]. Moreover, to preserve its power, Orbán not only introduced a new electoral law, which, reshaping certain electoral constituencies, favoured its party[38], but he also introduced laws concerning parties funding and electoral propaganda to the detriment of the oppositions[39]. Furthermore, the new Constitution and its revisions while exalting the Magyar identity and Christian values[40], severely limit the rights of minorities, criminalizing the homeless and marginalizing women, asylum seekers and disabled people[41].

Poland, on the other hand, has been a master in capturing independent institutions, especially the judiciary. Never having reached the needed majority to change the constitution, the coalition led by PiS (*Prawo i Sprawiedliwość*) decided to intervene through ordinary legislation[42]. Stating that judicial review would deprive the Parliament of its legislative power and so limit popular will, to defuse the scrutiny of the Constitutional Court, Parliament's majority passed several laws concerning the inner functioning of the Court[43]. Despite some initial conflicts with the Constitutional Court[44], after a couple of years, PiS managed to tame it[45]. If the constitution specifies that constitutional judges are elected with a simple majority of the *Sejm*, the new laws[46] remarked the obligation to take the oath before the President of

[34] Art. 24 FL.

[35] Since the Constitutional Court can no more review constitutional amendments for substantive conflicts with the Constitution (art. 24, c. 5, after IV constitutional amendment approval (T9929/2013)), every time the Constitutional Court declares a law unconstitutional, the government reintroduces its content with a revision of the FL. See, M.A. ORLANDI, *La democrazia illiberale*, cit., 177 ff.

[36] New point 5 of the Closing and Miscellaneous Provisions of the FL, introduced by art. 19, IV constitutional amendment, which manifestly contrasts the jurisprudential continuity stated in the CC decision n. 22/2012. See, K.L. SCHEPPELE, *Constitutional Coups in EU Law*, in M. ADAMS, A. MEUWESE, E. HIRSCH BALLIN (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, 2017, 456 ff. See also, K. KELEMEN, *A Flexible Constitution: The 4th Amendment to the Hungarian Fundamental Law – Part II*, in *www.dirittocomparati.it*, 25.03.2013.

[37] M. BÁNKUTI, G. HALMAI, K.L. SCHEPPELE, *Disabling the Constitution*, in *J. Dem.*, 2012, 23(3), 140 ff.; T. GINSBURG, A.Z. HUQ, *How to Save*, cit., 69.

[38] P. KREKÓ, Z. ENYEDI, *Orbán's Laboratory of Illiberalism*, in *J. Dem.*, 2018, 29(3), 40.

[39] Reforms introduced by the IV (T9929/2013) and V constitutional amendments (T12015/2013) which modified c. 3 of art. IX of the Foundamental Law (FL), against a previous Constitutional Court decision (n. 1/2013). See, G.F. FERRARI, *La Costituzione dell'Ungheria*, in M. GANINO (ed.), *Codice delle Costituzioni. Vol. III*, Padova, 2013, 393 ff.

[40] See the Nation Avowal of the FL.

[41] M.A. ORLANDI, *La democrazia illiberale*, cit., 199 ff.

[42] T. DRINÓCZI, A. BIEŃ-KACAŁA, *Illiberal Constitutionalism: The Case of Hungary and Poland*, in *Ger. Law J.*, 2019, 20, 1153.

[43] Act 19 November 2015, item 1928; Act 22 December of 2015, item 2217; Act 22 July 2016, item 1157; Act 30 November, item 2072; Act 30 November, item 2073; Act 13 December 2016, item 2074.

[44] K 35/15, K 47/15, K 39/16, see W. SADURSKI, *How Democracy Dies (in Poland): A Case of Study of Anti-Constitutional Populist Backsliding*, in *Sydney Law School Legal Studies Research Paper*, 18/01, 2018, 25 ff., and A. MLYNARSKA-SOBACZEWSKA, *Polish Constitutional Tribunal Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review*, in *Eur. Public Law*, 2017, 23(3), 489 ff.

[45] W. SADURSKI, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler*, in *Hague J. Rule Law*, 2019, 11(1), 63 ff.

[46] See articles 4 and 5 of Act 30 November, item 2073, and art. 6 Act 30 November, item 2072.

the Republic, who in this way could substantially affect the appointment of the judges[47]. Similarly, the populist party not only reformed the other higher judiciary bodies, such as the Supreme Court and the National Council of the Judiciary, but also the ordinary ones, giving the executive, the President of the Republic or Parliament's majority the ability to influence their composition and their activities, and thus eliminating the independence of the judiciary[48]. Besides, PiS also changed the rule for the appointment of the National Electoral Commission and its chief increasing the executive powers in the organization of the elections[49]. Furthermore, freedom of media was restricted by imposing all public broadcasters a new board controlled by the Treasury Ministry[50], by substituting the old National Council of Radio and TV Broadcasting, a constitutional body for ensuring media independence, with a new National Media Council, staffed with PiS members, and by replacing public tv dissident journalists with more *loyal* one[51]. Moreover, the right of assembly, giving priority to *cyclical* manifestation organised by authorities, and the right of privacy, with police given a wide range of investigating powers, were limited, and, with the capture of the judiciary, also the protection of human rights degraded[52].

Concerning Turkey, its process of degradation hastened after the 2016 failed coup. The constitutional reform of 2017, approved during the state of emergency and promising to give more stability to the country and avoid future political crises, converted Turkey into a presidential state without providing the necessary counter-powers[53]. The amendments, which introduced the contextual election of both the Parliament and the President, now both with a term of 5 years, also established the principle of the *simul stabunt simul cadent*; but, if the President could always dissolve the Parliament, the Parliament needs to reach a 3/5 majority to do the same[54]. With the transformation into a presidential state, the President becomes the only chief of the executive and the Ministers he nominates do not need the confidence of the Parliament anymore[55]. Also, he gained wide decree powers, that in a state of emergency expanded. Indeed, if normally these decrees could be controlled by the Constitutional Court and they could intervene only in specific sectors, when the President declares the state of emergency, constitutional control is lifted and decrees could regulate every subject (though these decrees become void if the state of emergency is not approved in three months by the Parliament)[56]. Moreover, the reform reduced Parliament's control on the executive, making also more complex the impeachment procedures[57]. Additionally, the reform modified the

[47] S. GIANNELLO, *La nuova legge polacca sul sistema giudiziario: cresce (ulteriormente) la distanza che separa Varsavia e Bruxelle*s, in *www.federalismi.it*, n. 8 del 2020, 133 ff.

[48] M. WYRZYKOWSKI, *Experiencing the Unimaginable: the Collapse of the Rule of Law in Poland*, in *Hague J. Rule Law*, 2019, 11(2-3), 417 ff.; M.A. ORLANDI*, La democrazia illiberale*, cit., 185 ff.

[49] M.A. ORLANDI*, La democrazia illiberale*, cit., 212.

[50] J. FOMINA, J. KUCHARCZYK, *Populism and Protest in Poland*, in *J. Dem.*, 2016, 27(4), 63.

[51] W. SADURSKI, *Poland's Constitutional Breakdown*, Oxford, 2019, 138 ff. See also, D. GUZEK, A. GRZESIOK-HOROSZ, *Political Will and Media Law: A Poland Case Analysis*, in *East European Politics and Societies*, October 2021, online in *https://journals.sagepub.com/doi/full/10.1177/08883254211049514*.

[52] W. SADURSKI, *Poland's Constitutional Breakdown*, cit., 150 ff.

[53] A. PAUL, D.M. SEYREK, *Constitutional changes in Turkey: A presidential system or the president's system?*, in *www.epc.eu*, 24.1.2017.

[54] Art. 116 of the Turkish Constitution, as amended on April 16, 2017 with act no. 6771.

[55] Act 6771/2017 repealed indeed all the articles from 109 to 114 of the Constitution related to the Council of Ministers.

[56] Artt. 119 and 148 of the Turkish Constitution, as reformed on April 16, 2017 with act no. 6771.

[57] L. DE GRAZIA, *Constitutional Coup e Democrazie Illiberali: l'esperienza della Turchia*, in *www.rivistaaic.it*, n. 4 del 2018, 385 ff.

composition of both the Constitutional Court, with the judges reduced from 17 to 15 (3 elected by the Parliament and 12 nominated by the President directly or on the proposal of other bodies)[58], and the Council of Judges and Public Prosecutor, lowering its member from 22 to 13 and giving the President more influence on their appointment[59]. Furthermore, after the failed coup, the emergency power deployed by the government reduced rights protection[60], suspending the ECHR and perpetrating a continuous series of arrests and firings of academics, journalists and civil servants allegedly accused of terrorism[61]. The failed coup also gave the pretext for shutting down several oppositional broadcasts, radios and websites[62]. As for the electoral competition, major Turkish media support the ruling party, electoral frauds and irregularities are not uncommon[63] and, after the removal of parliamentary immunity, even parliament members can be prosecuted[64].

As for Russia, since his first mandate, Putin's power has been constantly strengthening. After having extended the presidential mandate in 2008 from 4 to 6 years[65] and having reached the two mandate limits foreseen by the Constitution, in 2020 Putin presented a reform project, which, amended by the Parliament, zeroed the mandates of who currently or formerly held the Presidency at the time the reform was approved, namely Putin[66]. The reform[67], approved also by an *ad hoc* referendum in July 2020[68], increased President's power at Parliament's expense. It eliminated, in the Russian semi-presidential system, the necessity of Parliament's confidence vote for the Prime Minister; reduced the number of Constitutional Judges, whose members and those of the Supreme Court could now be suspended by the President for defamation; gave the Constitutional Court[69] preliminary review powers to check the constitutionality of a law, if it is requested by the President before the promulgation; and provided full immunity from prosecution for former Presidents[70]. Moreover, as for the reduction of human rights protection, the reform introduces the priority of the Russian Constitution over both international law and the decisions of international institutions, which could be enforced in Russia only if they do not contradict the Russian Constitution[71]. In addition, recognising the marriage only between man and woman, it restates traditional values while outlawing same-sex marriage[72]. Concerning electoral competition, detention or arrest of political dissidents for minor offences is not rare, and also media's independence is

[58] V.R. SCOTTI, *L'indipendenza della Corte costituzionale turca fra legittimità delle leggi e tutela dei diritti. Quali segnali per la tenuta della democrazia in Turchia?*, in *Riv. dir. comp.*, 2019, 1, 51.

[59] L. DE GRAZIA, *Constitutional Coup*, cit., 393.

[60] European Commission, *Key findings of the 2020 Report on Turkey*, online in *https://ec.europa.eu/commission/presscorner/detail/en/country_20_1791*.

[61] L. DE GRAZIA, *Constitutional Coup*, cit., 381.

[62] E. YANARDAGOGLU, *The Media and the Failed Coup in Turkey: Televised, Tweeted and FaceTimed, Yet so 20th Century*, in *Global Media and Communication*, 2017, 13(2), 199.

[63] T. GINSBURG, A.Z. HUQ, *How to Save*, cit., 109 and 114.

[64] R. ALBERT, *Constitutional Amendments. Making, Breaking, and Changing Constitutions*, Oxford, 2019, 28 ff.

[65] E. TEAGUE, *Russia's Constitutional Reforms of 2020*, in *Russ. Pol.*, 2020, 5(3), 303.

[66] S. BELOV, *The Content of the 2020 Constitutional Amendments in Russia*, in *IACL-IADC Blog*, 1.4.2021.

[67] Constitutional Amendment Act no. 1-FKZ, 14 March 2020.

[68] D.S. HUTCHESON, I. MCALLISTER, *Consolidating the Putin Regime: The 2020 Referendum on Russia's Constitutional Amendments*, in *Russ. Pol.*, 2021, 6(3), 361 ff.

[69] Whose members are nominated by the President with the approval of the Federal Assembly.

[70] A. LOPUKHINA, *Putin's ceaseless career: Amending the Russian Constitution to stay until 2036*, in *www.diritticomparati.it*, 6.4.2020.

[71] L. MÄLKSOO, *International law and the 2020 amendments to the Russian Constitution*, in *Am. J. Int. Law*, 2021, 115(1), 86 ff.

[72] E. TEAGUE, *Russia's Constitutional Reforms of 2020*, cit., 306.

compromised since, with all the controls, fines and restrictions imposed, they broadcast only government-approved contents[73].

5. *What to do?*

The examination of these countries shows how populist leaders and parties, respecting the formal procedures provided in the Constitutions, managed to capture the state and all its institutions. The main instrument deployed was certainly the constitutional amendment, but even the use of ordinary legislation worked as well. The elements considered only last century bastions for the defences of the constitutions, as the rigid and written feature or the presence of a Constitutional Court, proved to be simple fences before these populist attacks. The lack of constitutional protection for the Polish judges and the simple majority requested for their appointment, the unicameralism of the Hungarian state and the disproportional effect of the electoral law, the state of emergency in Turkey and power concentration in the Presidency in Russia permitted the development of the process. Of course, the blame is not all on the Constitutions. Altering them requires, indeed, someone who wants to ignite the process[74], and populist leaders are usually the first ones eager to do so. Fighting populists is certainly not an easy task, but if people turn to them, it implies that there are economic and social problems that traditional political parties did not manage to solve. Thus, politicians not only need to convince voters of the inconsistency and the risk of populist illiberal rhetoric, but they need to defuse it by answering concretely to people's needs to demonstrate that democratic solutions can effectively be better solutions[75]. The slow proceeding of constitutional degradation makes itself identical to the Latin *gutta* that *cavat lapidem, non vi sed saepe cadendo*: as a series of little water drops, these reforms gradually hollow the rock of our democracy. To help stop the dropping before it is too late, constitutions need to defend themselves better. On the one hand, it appears crucial to place wider shields for their own modifications[76], such as the introduction of longer and confirmative procedures or the participation of more institutions in the process (like the Constitutional Court or a Second House, so that it could be more pluralistic and pondered)[77]. On the other, it seems essential to better protect the independent institutions put to guard them[78]. Indeed, if constitutional defences fall, all the system will follow, even without the slightest constitutional change.

[73] T. GINSBURG, A.Z. HUQ, *How to Save*, cit., 110 ff.

[74] T. GINSBURG, A.Z. HUQ, *How to Save*, cit., 173.

[75] S. FELTRI, *Populismo sovrano*, Torino, 2018, 130.

[76] D. LANDAU, *Abusive Constitutionalism*, cit., 260.

[77] A. VERMEULE, *Second Opinions and Institutional Design*, in *Va. Law Rev.*, 2011, 97(6), 1449 ff.; J. ELSTER, *Ulysses unbound: studies in rationality, precommitment and constraints*, Cambridge, 2000, 88 ff.

[78] Y. ROZNAI, T. HOSTOVSKY BRANDES, *Democratic Erosion, Populist Constitutionalism, and the Unconstitutional Constitutional Amendments Doctrine*, in *Law Ethics Hum. Rights*, 2020, 14(1), 46.

Giacomo Salvadori*

When the Judiciary gives weight to words. Italy and Spain compared on the repression of dissent**

ABSTRACT: ***Italy and Spain in the 1970s and 1980s faced terrorist organizations, preparing particularly severe criminal laws to combat the phenomenon. The State repressive action, coordinated in all its articulations, made it possible to overcome a very troubled period, while at the same time ensuring a difficult stability of young democratic systems. The parallelism between the two Countries is actual on the basis of some distinct trials, based in Turin and Madrid, which led to a significant question: could the anti-terrorism law, used against certain behaviors today, express a tendency of public authorities to criminalize dissent? Freedom of thought is essential for an informed and dynamic debate on issues of public interest: the right of expression must be guaranteed even in the face of words that offend, scandalize and harass; conversely, with a specious use of the criminal instrument, the State shows that it wants to indicate to the population that certain forms of dissent are not tolerated, nor is criticism, which can even integrate criminal acts.***

1. *Premise: a neighbouring breeding ground*

Modern times offer us constant temptation to associate more or less impromptu and new phenomena to what has already experimented in history, and in particular of recent history, almost as if the twentieth century was the archetype of every social movement and everything should be read according to the categories of the last century. Often the stigma falls from above as soon as the comparison is next, and the modern *conventio ad excludendum* hits those segments of society where the critical anti-conformity spreads. In short, sometimes there is a casual use and often a pretentious use of the conceptual categories: the present contribution, minimally, aims to offer a picture on how another spectrum, that of terrorism, is evoked by investigating authorities with great ease, even due to rather vague regulatory definitions.

Italy and Spain are two Member States of the European Union (EU) which, after the Second World War and with particular intensity during the 70's and 80's, faced the explosion of the armed struggle carried out by terrorist organizations with the approval of particularly rigid criminal legislation. Emblematic of this historical period are the Italian *Brigate Rosse* (*BR*) and the Basque *Euskadi Ta Askatasuna* (*ETA*), organizations with different objectives, but with subversive aims in common: both were born within the student and workers' movement, from which they drew a common Marxist-Leninist matrix, to then join the armed struggle against State institution[1].

The Basque case is peculiar, because the transition to clandestinity preceded the end of the Franco dictatorship by about twenty years, but the frontal conflict with the State continued

*** PhD in "Giustizia costituzionale e diritti fondamentali" of Università di Pisa and Doctor in Derecho, Gobierno y Políticas Públicas of Universidad Autónoma de Madrid. Currently is subject expert in Constitutional law at Università Cattolica del Sacro Cuore.**

**** This work has been subjected to blind peer review.**

[1] On this point, however, it is worth recalling what we have heard from a person with direct knowledge of the matter: «*l'ETA ci interessava perché era una organizzazione indipendentista in una grande regione operaia, con radici sociali vere, di sinistra, comuniste. E aveva una straordinaria capacità operativa* […]. *Ci chiarimmo le rispettive posizioni in due riunioni, di punti comuni ne avevamo davvero pochi. La stima reciproca non basta. Ci*

also in the democratic regime, where the demands for independence even found parliamentary representation. It should not be forgotten that the terrorist phenomenon was so present during the transition process that the *Constitución Española* (*CE*) itself bears the signs of it, explicitly mentioning in Article 55.2 the possibility of suspending the constitutional guarantees in matters of precautionary custody, inviolability of the home and correspondence «*para personas determinadas, en relación con las investigaciones correspondientes a la actuación de bandas armadas o elementos terroristas*».

Keeping in mind the aspects of divergence between the two terrorist experiences – among others, historical context and institutional regime of origin, objectives pursued, territorial rooting and popular representativeness – the premise is useful to observe how the State repressive action, coordinated in every articulation, made it possible to overcome a very turbulent historical period, contributing to the consolidation of a delicate stability for two young democratic systems. This was possible, among the many reasons, because of a substantial and firm coincidence of intentions which guided the uniform action of all the public powers involved in the fight against terrorism.

2. *Which kind of terrorism are we fighting today?*

The parallelism between the two Countries has become topical again in recent times, following certain judicial proceedings in Turin and Madrid which lead to an important question: is there a risk that the panoply of repressive instruments, a legacy of the fight against terrorism (also recent ones), will be used for the sole purpose of criminalizing certain forms of dissent? A similar tendency can be found where the criminal protection appears manifestly disproportionate with respect to the value expressed by certain non-violent conduct which, far from being subsumed within the wide framework of the crimes of propaganda, remind commentators and public opinion of the dark features of the crime of opinion.

In fact, when talking about the fight against terrorism, it must always be kept in mind that an excessive anticipation of the criminal protection towards non-violent conduct is unacceptable, since an abstract endangering of the protected juridical goods – even the supreme ones – is not compatible with pluralist democratic regimes. Freedom of expression is recognized in its fullness not only by the Constitution of the two Countries (Art. 20 in Spain and Art. 21 in Italy) but also by numerous treaties ratified by them, including the European Convention on Human Rights of 1950 (Art. 10) and the International Covenant on Civil and Political Rights (ICCPR) adopted in 1966 by the United Nations General Assembly (Art. 19); reference can then be made to the jurisprudence of the European Court of Human Rights (ECHR) in order to understand how the other values at stake, such as in this case national security and public safety, have been balanced over the years[2].

It should also be noted that the EU Directive 2017/541 on combating terrorism, characterized by an increasingly preventive use of criminal law, in 2020 was commented in a

lasciammo senza concludere altro se non che ogni tanto ci saremmo visti», da M. MORETTI, C. MOSCA, R. ROSSANDA, *Brigate Rosse. Una storia italiana*, Milan, 2017, 190.

[2] The ECHR stated in an earlier judgment that freedom of expression «embraces the freedom to express ideas and opinions that offend, shock or disturb. [...] Such are the demands of [...] pluralism, tolerance and broadmindedness without which there is no "democratic society"», in Handyside v. United Kingdom, 7th December 1976, par. 49. It then specified the need to distinguish clearly between incitement to violence and legitimate statements and criticism, however hostile, negative and harsh, in Falakaoglu v. Turkey, 26th April 2005, par. 35, since «the line between virulent or even offensive criticism and incitement must not [...] be confused»,

document promoted by the International Commission of Jurists, containing some applicative indications addressed to judicial operators[3]. These recommendations are in line with those already expressed recently by other authoritative supranational institutions[4].

2.1. *Some Italian trials*

As it is known, the *Corte costituzionale*, since the 70's, has advanced a constitutionally oriented reading of some crimes of opinion provided by the fascist criminal code, considering necessary a concrete suitability of the manifestation of thought to solicit the commission of criminal acts: it is only the existence of a danger to the protected legal asset that legitimizes the compatibility between the incriminating cases of crimes of apology and art. 21 Cost. However, this delicate point of balance requires a meticulous assessment by the judicial authority, since it is necessary to reject the idea that the motivation can be limited to hasty references to the characteristics of offensiveness of the context in which the statements are expressed, or even worse, to the belonging or ideological closeness of the alleged "moral author" to subjects who have been responsible for violent actions in the past.

In recent times, the Turin Public Prosecutor's Office has constantly resorted to criminal prosecution even in the case of ancillary and secondary behavior, provided that it is linked in some way to the NO-TAV movement, which has been guarding the territory of the Susa Valley for over twenty years and firmly opposes the construction of the high-speed train. In the

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Incal v. Turkey, 9th June 1998; Otegi Mondragon v. Spain, 15th March 2011, par. 54. With specific regard to support for terrorist organizations, it has stated that «a message of intransigence as to the objectives of a proscribed organisation cannot be confused with incitement to violence or hatred», Surek and Ozdemir v. Turkey, 8th July 1999, par. 61; Erdogdu v. Turkey, 15th June 2000; indeed, statements in favour of "resistance", "struggle" or "liberation", or expressions of support for the leaders of armed groups, *ex se*, in the past have not been considered sufficient to justify a limitation of freedom of expression: see Ceylan v. Turkey, 8th July 1999, par. 34; Yalçinkaya and Others v. Turkey, 24th June 2014, par. 34.

[3] *International Commission of Jurists, Human Rights in Practice, Nederlands Juristen Comité voor de Mensenrechten (NJCM),* Scuola Superiore Sant'Anna di Pisa, *Counter-terrorism and human rights in the courts: guidance for judges, prosecutors and lawyers on application of EU Directive 2017/541 on combating terrorism*, 18th November 2020. With particular regard to Article 5 of the Directive, entitled "Public incitement to commit terrorist offences" (24 *et seq*.), judges are reminded that criminal prosecution is admissible for clearly defined offences of expression which incite to violence and aim to provoke and, in fact, create a concrete danger of such acts; where criminal protection serves a public interest, it must be assessed whether it is necessary and proportionate in the specific case.

[4] OECD, *Guidelines for Addressing the Threats and Challenges of "Foreign Terrorist Fighters" within a Human Rights Framework*, 12th September 2018, 55 *et seq*., where it is specified that «*if restrictions are to be justified based on threats to national security, the threat cannot be abstract or hypothetical, but must involve at least a reasonable risk of serious disturbance. Restrictions on freedom of expression must be exceptional, strictly justified as necessary and proportionate by reference to all the circumstances of the individual case. Restrictions cannot be justified on the basis that the ideas and opinions are not popular, are disfavoured or considered to represent an abstract danger*». The so-called "Rabat Plan of Action" can provide useful guidance on what constitutes incitement, even though it is not an internationally binding standard that has been adopted by UN member states. It identifies six factors that need to be considered to distinguish forms of expression that should be defined as incitement to hatred and thus prohibited in accordance with Article 20 ICCPR: the context, position of the speaker, intent, content and form, extent of the speech act, and the likelihood, including imminence, of harm that may occur as a result of the speech. See: "*Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence*"; Appendix in UN High Commissioner for Human Rights, Report to the Human Rights Council ("*Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred*"), UN Doc. A/HRC/22/17/Add.4, 11th January 2013.

context of this conflict, which was mainly peaceful, there were, however, some episodes of open conflict between demonstrators and police forces, which led to convictions of members of the movement for crimes of resistance and damage; the most interesting aspect, however, is the use by the investigators of the category of terrorism, through the elevation of some sabotage conduct to the chrism of an attack for terrorist purposes and the act of terrorism with deadly or explosive devices referred to Articles 280 and 280-*bis* of the Italian Criminal Code, ultimately excluded by the *Cassazione* because of the unsuitability of the pressure illegally put on by the defendants to produce an effective constraint on the public authority[5].

In this context, it does not seem out of place to point out how the accusatory approach has taken care to censure some positions – which have become emblematic rather because of the incrimination than because of the statements themselves –, giving rise to sensational trials in which the judicial attention has focused on weighing the exact support that the opinions expressed would have ensured to certain violent acts. The most famous investigation is undoubtedly the one that led to the indictment for criminal instigation of the writer and journalist Erri De Luca, after he said in an interview that «*la Tav va sabotata*»[6]. But over the years, other accusations have followed, and, about the incrimination of words, a certain sensation was caused by the sentence of two months' imprisonment for moral complicity in aggravated violence and occupation of land imposed on Roberta Chiroli, who had closely followed the protests in *Valsusa* and had written her degree thesis in anthropology for the Ca' Foscari University of Venice: the student, later acquitted on appeal, was considered psychically involved in the violent events because of the use, in her thesis work, of the first person narrative[7].

A similar punctative firmness recalls the excesses of the 1980s, when numerous processes against members and alleged supporters of the non-parliamentary left movement *Autonomia Operaia* were conducted on the wave of emergency legislation[8]. Then it was the Padua Public

[5] More precisely, the final ruling of the precautionary phase observes that the «*art. 270*-sexies *presenta una struttura complessa, nella quale, pur essendo la norma stessa dedicata alla descrizione di una finalità, sono certamente compresi elementi di carattere obiettivo, quali misuratori della specifica offensività dei fatti contemplati, e quali garanzie di un ordinamento che, per necessità costituzionale, deve rimanere distante dai modelli del diritto penale dell'intenzione e del tipo di autore*» (Cass., VI, 15th May-27th June 2014, no. 28009, 22). Similar assessments were reiterated by the Supreme Court in 2017, in rejecting the appeal of the Turin Prosecutor's Office against the acquittal from the indictments relating to terrorist purposes (the convictions for damaging, resisting a public official and manufacturing and transporting weapons were confirmed). On this subject, see the precise reconstruction of L. PIPINO, *La Val Susa e il diritto penale del nemico*, in L. PIPINO (ed.), *Come si reprime un movimento: il caso TAV. Analisi e materiali giudiziari*, Naples, 2014, 15 *et seq.*

[6] Erri De Luca was then totally acquitted by the Court of Turin. For a reconstruction of the event, with a comment on the judgment, see S. ZIRULIA, *'La TAV va sabotata': Erri De Luca assolto dall'accusa di istigazione a delinquere*, in *Diritto Penale Contemporaneo*, 8th February 2016. See also the findings of M. PELISSERO, *La parola pericolosa. Il confine incerto del controllo penale del dissenso*, in *Questione Giustizia*, 4/2015, 38 *et seq*., in which the author, who also shares the position of case law that limits the scope of application of incitement to crime to cases where there is «*un pericolo immediato e concreto di commissione di reati*», adds that «*in questo ambito il pericolo concreto mostra scarse capacità selettive, rimessa al potere discrezionale del giudice, lasciato privo di criteri direttivi controllabili e facilmente condizionabile dal contesto politico-sociale*» (42).

[7] On the difficult relationship between criminal jurisdiction and science, and in particular on the unfamiliarity shown by investigators with regard to the research methodology known as "participant observation", see E. MORLICCHIO, *La libertà di ricerca va a processo*, in *il Mulino*, 23rd August 2016.

[8] It should be remembered that the same *Corte costituzionale* examined the emergency legislation approved between 1979 and 1980 to counter terrorism and believed that the strongly limiting measures of individual guarantees – such as the consistent dilation of preventive incarceration – were not unreasonable if these are reported to protection of the democratic order and public security. The Court, however, precise that, even in the face of an exceptional situation of emergency must still be carried out a ballot of reasonableness, aimed at

Prosecutor's Office to arrange prior incarceration for hundreds of people – became thousands in the following years – considered the legal face of a more complex occult organization, linked to *Brigate Rosse* and to the Aldo Moro seizure. The "*Processo 7 Aprile*" – ended with a drastically lower number of convictions than the amount of people investigated and imprisoned – immediately attracted Amnesty International attention that accused the Italian authorities to have committed numerous irregularities in the proceedings against Toni Negri and numerous other militants (mainly academics, journalists and teachers), to have manipulated the story and to have abused of a long preventive incarceration[9].

2.2. *Some Spanish trials*

In a not dissimilar manner, albeit in a completely different context, democratic Spain has been the subject of widespread international criticism due to the harsh repression with which the central State responded to the independence demands coming from Catalonia, culminating in the unilateral calling of the *referendum* on independence on October 1st, 2017. Once again, on this occasion, the *Tribunal Supremo* in Madrid used particularly serious criminal articles to punish the actions of the main political figures, held responsible for instigating contributions and initially prosecuted for «*Rebelión*», a crime for which the current Criminal Code provides for an edictal range of fifteen to twenty-five years in prison, requiring, however, that the revolt promoted be implemented «*violenta y públicamente*». The obvious lack of the requirement of violence has been widely stigmatized by the doctrine[10] and this has also been the basis for the rejection of European arrest warrants for separatist leaders who have fled abroad, issued by the German and Belgian judicial authorities[11].

However, apart from the *referendum* on Catalan independence, there are several other signs that reveal a conception of criminal law as an instrument for skimming off unwelcome opinions. In recent years, in fact, following some reforms approved in 2015, there has been a succession of trials and convictions having as their charge Article 578 of the Spanish Criminal Code, which punishes the crimes of apology and justification of terrorism, as well as humiliation of the victims of the same[12]. Unlike the subsequent art. 579, which prohibits

verifying the «*congruità*» of the exceptional provision compared to the good that it intends to protect: it would not be justified, in fact, an extension of the prior incarceration terms «*tale da condurre verso una sostanziale vanificazione della garanzia*» (Corte cost., 14th January-1st February 1982, no. 15).

[9] Amnesty International Report, 1983, 262-263. For a complete reconstruction of that massive investigation, see G. BOCCA, *Il caso 7 aprile. Toni Negri e la grande inquisizione*, Milan, 1980.

[10] See, for example, the petition signed by over a hundred Spanish law professors, which states, in particular, that «*por cuanto hace al delito de sedición, conviene recordar que se está recurriendo sistemáticamente al mismo (artículo 544) para reprimir y silenciar movimientos ciudadanos que practican, de modo pacífico, el derecho de manifestación, reunión, concentración*» (https://www.eldiario.es/opinion/tribuna-abierta/banalizacion-delitos-rebelion-sedicion_129_1824859.html).

[11] On this point, it is suggested the reading of N. ZAMBRANA-TÉVAR, *Catalan Separatists Convicted for Sedition: Vindication for German Courts and Dual Criminality?*, in *Opinio Juris*, 24th October 2019.

[12] The *Ley Orgánica* (*LO*) 2/2015 modified the *capítulo* VII of Criminal Code, about terrorism. In particular, the incriminatory scope of a criminal case already stigmatized, in the past, of indefiniteness, has been enlarged: it's the art. 578, which, since 2000, punishes «*el enaltecimiento o la justificación públicos*» of terrorism crimes or, however, of those who «*hayan participado en su ejecución, o la realización de actos que entrañen descrédito, menosprecio o humillación de las víctimas de los delitos terroristas o de sus familiares*». The reform has increased the sanctioning treatment in the maximum sentence provided for, increasing the edictal range from a minimum of one to a maximum of three years' imprisonment (thus making the application of precautionary custody possible); it has introduced the additional penalty of a fine from twelve to eighteen months, which, according to the *días-multa* system set out in art. 50, corresponds to a daily quota ranging from a minimum of two to a

incitement to commit a crime of terrorism, art. 578 has a generic and imprecise formulation[13], which allows the investigators to criminalize a whole world of expressions and affirmations that do not reach the level of concrete danger necessary to integrate the crime of incitement.

Something very similar to a judicial persecution has been unleashed primarily against several musical artists of the rap and hip-hop scene, held responsible with their words to incite terrorism and violence (as well as, often, of lese majesty): among these, the most notorious cases concern Valtònyc and Pablo Hasél, who must serve several years in prison for phrases contained in the lyrics of their songs[14]. While the latter is currently in prison[15], the former has taken refuge in Belgium, where the judicial authorities have rejected the European arrest warrant issued by Madrid, considering that the facts alleged against the Spanish artist do not constitute an offence under Belgian law and that, in any case, they do not meet the definition of "terrorism" contemplated by the framework decision of the Council of the European Union on the European arrest warrant of 13th June 2002, which also disregards, for certain crimes, the criterion of so-called double criminality. Furthermore, the *Tribunal Supremo* recently

maximum of 400 euros, the non-payment of which within two years of the conviction converts the penalty from a pecuniary to a custodial sentence. The new paragraph 2, moreover, provides for an aggravated hypothesis, establishing that the penalty is determined in the «*mitad superior*» - therefore, starting from a minimum of two years' imprisonment - if the act is committed through the use of information technology. The new art. 579-*bis*, also introduced by *LO* 2/2015, automatically commits to a person convicted of crimes of terrorism «*las penas de inhabilitación absoluta, inhabilitación especial para profesión u oficio educativos, en los ámbitos docente, deportivo y de tiempo libre, por un tiempo superior entre seis y veinte años al de la duración de la pena de privación de libertad impuesta en su caso en la sentencia*»: this is a particularly incisive accessory penalty, which deprives the convicted person of the possibility of obtaining or maintaining, among other things, a whole series of public benefits, such as a scholarship. The reform has been greeted with concern by international observers: see OHCHR, *Two legal reform projects undermine the rights of assembly and expression in Spain*, 23rd February 2015, http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15597, that explicitly states «*the anti-terror law could criminalize behaviours that would not otherwise constitute terrorism and could result in disproportionate restrictions on the exercise of freedom of expression*»; more recently, see Amnesty International, *Dangerously Disproportionate: the ever-expanding National Security State in Europe*, 17th January 2017, https://www.amnesty.org/en/documents/eur01/5342/2017/en/. Also see, from a different perspective, L. Gomez Abeja, *"Passive Indoctrination" as a Terrorist Offense in Spain. A Regression from Constitutional Rights?*, in *Verfassungsblog*, 11th May 2018.

[13] Article 579, textually, punishes whoever «*difunda públicamente mensajes o consignas que tengan como finalidad o que, por su contenido, sean idóneos para incitar*» the commission of terrorist crimes. It is evident that the reference to specific concepts of criminal science, such as purpose or suitability, allows the criminal case to be anchored to factual presuppositions necessary for its correct integration, since the judge must assess, through the posthumous prognosis typical of attempted crimes, whether the incriminated conduct is actually and *ex ante* capable of constituting a danger for the protected legal asset. However, it is also evident how the anchorage to similar factual requirements is completely lacking in the incriminating provision of art. 578, characterized by an abstractness incompatible with the principles that govern the penal system.

[14] Catalan rapper Pablo Hasél was sentenced to nine months in prison, six years of disqualification from public office and a 30,000-euro fine for a song and a few tweets, dating from between 2014 and 2016; he had already been sentenced to two years in prison in 2014. Valtònyc, on the other hand, was sentenced in 2018 to three and a half years in prison and an eight-year ban. The crimes charged are glorification of terrorism and insults to the Crown and institutions.

[15] Hasél wanted to actively play the card of passive resistance to arrest. The will not to flee abroad and try to resist arrest, as well as the will not to ask for any pardon, was a political decision: exile would have favored the repressive machine of the State and would have produced a reduction of social conflict, he explained in several interviews in the days before the detention. Esteban Beltrán, director general of Amnistía Internacional España, stated that «*Nadie debería ser procesado penalmente sólo por expresarse en redes sociales o por cantar algo que pueda ser desagradable o escandaloso. No se pueden penalizar expresiones que no incitan de manera clara y directa a la violencia. Si no se modifican estos artículos se seguirá silenciando la libertad de expresión y coartando las manifestaciones artísticas*».

confirmed the sentence of six months' imprisonment for the hip-hop collective La Insurgencia, accused of glorifying GRAPO (an armed anti-fascist resistance group, which acted in Spain during Francoist dictatorship) in its compositions[16]. Then there is the interesting judicial case of Cassandra Vera Paz, denounced in 2016 for a series of jokes published on Twitter that satirized the peculiar modalities of the terrorist attack with which ETA in 1973 eliminated Luis Carrero Blanco, *Presidente del Gobierno* in the final phase of the Francoist dictatorship[17]. The quantity of explosives placed under the roadway where the presidential car was passing was such as to literally blow up the car, which passed over a four-story building: hence some of the mockery of the regime, relaunched by the young woman through her social profile, which mocked Franco's successor, portraying him as an astronaut. The girl was sentenced in first instance by the *Audiencia Nacional* to one year of imprisonment for apology of terrorism and humiliation of the victims and seven years of disqualification from public office, but the sentence was later overturned by the *Tribunal Supremo* in 2018. On the other hand, it should be noted that this is not an isolated case and that other social network users have fared worse: in the context of "*Operación Araña*", an investigation carried out between 2014 and 2016 with the primary purpose of pursuing the apology of terrorism in social networks, there have been more than 70 arrests and more than 40 convictions with sentences of up to two years imprisonment[18], including other highly controversial cases involving journalists and artists[19].

These figures represent an absurd repression, especially if one compares them with those of the years when ETA was still active[20]. Thus, if in Spain the armed threat of domestic

[16] The *Tribunal Supremo* confirmed its jurisprudence around Article 578 of the Criminal Code on 24th June 2020, reducing the sentence for the twelve members of the collective from the two years and one day (in addition to the nine years of disqualification and 4,800 euros each) that the *Audiencia Nacional* had imposed on them at first instance in 2017.

[17] Luis Carrero Blanco was a Francoist military man, later become an admiral, who had already distinguished himself during the Spanish Civil War during the repression of the Asturian strike. It was in this context that the friendship between Carrero Blanco and the future dictator Francisco Franco, at the time a colonel, was consolidated. Decades later, a few years before his death, he appointed him head of government, implicitly suggesting him as his successor. The mandate of Carrero Blanco, however, lasted only six months, because on 20th December 1973 he was the victim of a bombing, later claimed by ETA. Precisely, at the exit of a religious service, his car was blown up in a thirty meters high jump by a charge of explosives placed under the road surface.

[18] "*Operación Araña*" was divided into four distinct phases, which led to numerous arrests throughout Spanish territory as a result of investigations carried out by the *Guardia Civil* and *Policía Nacional*, coordinated by the *Audiencia Nacional*: see in this regard Amnistía Internacional España, *Tuitea si te atreves. Cómo las leyes antiterroristas restringen la libertad de expresión en España*, 14th March 2018. It should be noted that in recent years the number of people convicted in Spain for this crime committed via social networks has decreased, from 35 convictions in 2016 to just one in 2020 (a figure not recorded since 2011). On the other hand, still in 2019 there were nine trials for this charge. Between 2017 (31 convictions) and 2018 (6 convictions) there was the most significant reduction https://www.es.amnesty.org/en-que-estamos/noticias/noticia/articulo/amnistia-internacional-es-injusto-y-desproporcionado-que-pablo-hasel-entre-en-la-carcel/).

[19] It is worth noting the sentence of one and a half years' imprisonment imposed on the journalist Boro in 2019 by the *Tribunal Supremo*, for criticizing the detention of some elderly ETA members; the young filmmaker Alex García, on the other hand, was tried for apology of terrorism, paradoxically, for having made a feature film interviewing several people prosecuted for apology of terrorism: despite the request for two years' imprisonment made by the *Ministerio Fiscal*, he was acquitted by the *Audiencia Nacional*. A case similar to Cassandra's concerns César Strawberry, singer of the musical group Def con Dos, who after six tweets of an ironic nature having as object ETA, GRAPO and again Carrero Blanco, was sentenced to one year of imprisonment with the same charge *ex* art. 578 c.p.: his position, however, received *amparo* from the *Tribunal Constitucional*, that with the sentence 35/2020 annulled the final condemnation, valuing the institutional aspects that freedom of expression assures with respect to democratic pluralism.

[20] In 2011, ETA's last year of official activity, there were just two convictions for the same charges (see https://www.publico.es/sociedad/deriva-justicia-audiencia-condenado-30.html).

terrorism has historically been high — more than 800 people have lost their lives in attacks carried out only by ETA[21] — in the current historical period it does not appear that the organizations named in tweets and songs constitute an imminent threat to national security. Therefore, it is hard to understand the reason for such a deployment of forces in a supposedly anti-terrorist action, since these criminal associations have long since ceased their armed struggle and have been considered dissolved for several years[22]: thus it should not be considered taboo to mention them, nor is it proportionate to put on trial those who talk about them in an unconventional key.

3. *The value of dissent*

Against what looks like a "repression of return", or quite simply a constitutional degradation, it is opportune and indeed necessary «*rivendicare convintamente il ruolo del dissenso e preservarne lo spazio operativo: perché è il miglior antidoto contro ogni forma di autoritarismo, esplicito o meno che sia*»[23]. Therefore, we need to be very careful with regard to incrimination for crimes of opinion, especially if this appears to be specious or part of an overall design of delegitimization of minority ideas and positions that, as we have been able to guess from this brief examination, seems to occasionally unite (at least) two European countries in which democracy can certainly be said to be consolidated.

Therefore, it seems desirable that the State repressive machine take into greater consideration the constitutional and supranational jurisprudence on freedom of expression[24], remembering that «*un diritto penale che vede nemici ogni dove rischia di accreditare l'immagine di una società percorsa da una generalizzata guerra civile, contribuendo così a fomentare una conflittualità, anzi uno spirito sociale d'inimicizia, che è del tutto contrario alla sua vera missione di stabilizzazione e pacificazione della società*»[25]. But today's repressive approach, occasional but sometimes widespread, at least in certain contexts, is favored by an incriminating legislation written in a very generous way. Perhaps it is time to ask ourselves whether, *de iure condendo*, we can finally expunge from the criminal law some cases that remind us of outdated regimes, which do not seem any more adequate and proportionate to the fair protection of the legal goods we would like to protect.

With specific reference to the Spanish context, the need seems pressing, since it was intended to repress expressions of a political nature, especially in social networks, and the artistic community of the Country. Freedom of thought is essential for an informed and dynamic debate on issues of public interest, and people dedicated to the arts and music play a crucial role in questioning the *status quo* by inspiring critical thinking: the right to freedom of expression must be guaranteed even in the face of words that offend, scandalize and

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[21] See the archival version of the *Ministerio del Interior*'s statistics: https://web.archive.org/web/20120406224236/http://www.interior.gob.es/prentsa-3/balantzeak-21/ultimas-victimas-mortales-de-eta-cuadros-estadisticos-630?set_locale=es. The last murder was on 16th March 2010.

[22] ETA declared on 20th October 2011 «*el cese definitivo de su actividad armada*», then announced a few years later, on 17th March 2017, its final disarmament, unilaterally and unconditionally, and the dissolution of the organization the following 3rd March 2018. GRAPO, on the other hand, has been inactive since 2007.

[23] R. RORDORF, *Editoriale*, in *Questione Giustizia*, 4/2015, 4.

[24] At the same conclusion arrived H. DUFFY, K. PITCHER, *Inciting Terrorism? Crimes of Expression and the Limits of the Law*, in B. GOOLD, L. LAZARUS (eds.), *Security and Human Rights*, Hart Bloomsbury Publishing, 2018.

[25] F. PALAZZO, *Contrasto al terrorismo, diritto penale del nemico e princìpi fondamentali*, in *Questione Giustizia*, n. 4/2006, 666.

harass[26]; conversely, with a specious use of the criminal instrument, the State shows that it wants to indicate to the population that certain forms of dissent are not tolerated, nor is criticism, which can even integrate criminal acts. Furthermore, the need to correct the constitutional criticality referred to the principle of the natural judge, because of the reservation of jurisdiction of the *Audiencia Nacional* for, among other things, any crime against the Crown or committed by members of armed gangs or terrorist organizations, or in any case contributing to their activity, as well as crimes connected with the latter, cannot be postponed any longer[27].

Finally, as for Italy, the constitutional regression linked to the persecution of the crimes of opinion seems to have no generalized and widespread nature, but a local, since it is functional to an intense and fierce investigative struggle aimed at contrasting specific critical nonconformity and resistance islands. This is confirmed by the consideration that, always in Turin, some young activists who have been in Syria in the years of the war against ISIS, to support the populations that fought fundamental militants responsible for massacres, decapitations and mass rapes, were considered "socially dangerous", and the special surveillance prevention measure was arranged towards them[28]. The request of the Turin Public Prosecutors was addressed in 2019 to Maria Edgarda Marcucci and four other people: Paolo Andolina, Jacopo Bindi, Davide Grasso and Fabrizio Maniero. They all have been discharged from the prosecution of social danger, except the young woman, that was forced by the Court of Turin to two years of prohibitions and curfew: at home at 9 every night, passport withdrawal, no participation in public meetings, constant communications with the police to warn every move. At the beginning of April 2022 her restrictions ceased, but fascist criminal law still goes on.

[26] According to what was already specified at the time by the *Tribunal Constitucional* in sentence n. 177/2015.

[27] As stated by *Disposición transitoria* of *LO* 4/1988, in reform of *Ley de Enjuiciamiento Criminal*.

[28] The «*sorveglianza speciale*», is a prevention measure introduced in 1931, in the fascist era, and consists of a number of limitations of personal freedom in the absence of crimes, but due to the social danger of one or more people. The legislative decree no. 159/2011 is the last of a series of acts that have updated, without abolishing them, provisions dating back to 1931, to the consolidated text of the laws of public security of the fascist code.

Federico Spagnoli*

The Process of Constitutional Degradation in Spain. The Catalan Secession Crisis and the Scottish "precedent"**

ABSTRACT: ***In this paper I try to show how the secession attempts of Catalonia in the last decade and the reaction of the Spanish Government caused a constitutional degradation in Spain, as both used constitutional concepts and rules in a political way, weakening the authority of the Constitution and the legitimacy of the Tribunal Constitucional. I compare and contrast the Catalan experience with the Scottish one in order to show how the political agreement between governments led to a secession referendum being legally held; however, the peculiar nature of the British constitutional system makes it difficult to implement such a solution in Spain. The cause of the problem is, therefore, political.***

1. *Introduction*

In this paper I argue that a constitutional degradation took place in Spain in the last decade because of the Catalan secessions crisis. In order to justify this statement, I will summarize how the main actors of the crisis-the Spanish government and the Catalan secessionists- acted from 2012 onwards and the effects their acts had on the political and constitutional landscape of Spain, and I will also try to address possible constitutional solutions to the crisis by adopting a comparative perspective. The present analysis cannot of course fully account for such a complex and unresolved problem. First, I will hint at the problematic nature of secession under the Spanish Constitution and the causes of the crisis. Second, I will list the secessionists' actions to accomplish their goal and Spain's reactions, such as constitutional judgments and repressive measures. Third, I will argue that actions of both sides had a negative impact on the constitutional balance, since they refused to engage in political negotiations and resorted instead to *extra ordinem* solutions and a political use of constitutional justice, which contributed to conflict and weakened the political legitimacy of the Constitution. I will then compare and contrast this result with the political agreement which made the 2014 Scottish independence referendum possible and the calls for secession not as destabilizing to the United Kingdom as they were to Spain; however, I will point out the peculiarities that make it difficult to implement such a process in Spain. I will conclude by proposing a way out of the impasse based on political negotiations, as suggested by the *Tribunal Constitucional*, although the political situation makes it unlikely in the short term.

2. *The main conflict: secession and the Spanish Constitution*

Catalonia's attempts to secede have been going on for a decade. Here I do not argue whether secession is justified according to the prevailing scholarly theories[1]. Rather, I will highlight the contrast between secession and Article 2 of the 1978 Spanish Constitution.

* **PhD Candidate in "Giustizia costituzionale e diritti fondamentali" at the University of Pisa.**

The latter stipulates, "*The Constitution is based on the indissoluble unity of the Spanish nation, the common and indivisible country of all Spaniards; it recognises and guarantees the right to autonomy of the nationalities and regions of which it is composed, and the solidarity amongst them all*"[2]. It establishes the so-called "*Estado de autonomias*", as it provides subnational units with a right to autonomy, distinguishing between "regions" and "nationalities", the latter being regions where minority national communities exist, such as Catalonia[3].

However, it makes it clear that only Spain is a nation, whose unity cannot be dissolved[4]. Article 2 appears to explicitly forbid secession. One has to remember that the Constitution is the product of a compromise made during the transition to democracy, aimed at preventing secession by Catalonia and the Basque Country[5]. With time, the compromise began to weaken because of the economic crisis and the growing disenchantment with the Constitution[6].

For Catalonia, this began when its attempt to gain new competences[7] and affirm itself as a nation through the 2006 Statute of Autonomy failed, as the Statute was partially found unconstitutional by the *Tribunal Constitucional* in 2010[8]. The decision was seen as a politically-motivated attack and led to protests[9]. Another point of contention was the rejection of Catalonia's demand for greater fiscal autonomy[10].

Such motives led the two parts to conflict and the constitutional order to a crisis.

3. *The "right to decide" and the "*procés*": Catalan attempts at secession and Spain's reaction*

I will now examine how the parts behaved during the crisis.

Since the November 2012 elections, proponents of the Catalan independence (and even some anti-secession parties) have invoked the so-called "right to decide"[11], that is, the right of the Catalan people to express its opinion about Catalonia's constitutional status through a democratic vote. Secession has been framed as a democratic exercise (but it is not clear

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[**] **This work has been subjected to blind peer review.**

[1] See L. PÉREZ; M. SANJAUME, *Legalizing Secession: The Catalan Case*, in *Journal of Conflictology*, 2013, 3-12.

[2] English translation found at: https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf.

[3] According to G. FERRAIUOLO, *Costituzione federalismo secessione. Un itinerario*, Naples, 2016, 158 ff., the distinction is a concession to regional nationalisms and does not turn Spain into a "*nación de naciones".*

[4] On the constitution as an expression of the political unity of a legal order see J. KIEWIET, *Legal Unity as Political Unity? Carl Schmitt and Hugo Krabbe on the Catalonian Constitutional Crisis*, in *Utrecht Journal of International and European Law*, 2018, 59 ff.

[5] A. CASTELLS, *Catalonia and Spain: Political and Fiscal conflict*, in *Pôle Sud*, 2014, 61.

[6] J. M. CASTELLÀ ANDREU, *The Proposal for Catalan Secession and the Crisis of the Spanish Autonomous State*, in *Diritto pubblico comparato ed europeo*, 2015, 429 f.

[7] Even though Catalonia initially enjoyed greater autonomy under Article 151 of the Constitution, later reforms led to a *de facto* levelling of the competence regimes of the Communities; E. AJA, *Estado autonómico y reforma federal*, Madrid, 2014, 56.

[8] *Sentencia 31/2010, de 28 de junio*. An analysis can be found in L. ANDRETTO, *La sentenza del Tribunale costituzionale spagnolo sullo Statuto di Autonomia della Catalogna*, in *Rivista AIC*, 2010.

[9] On this decision as a "closing" to constitutional interpretations in favour of autonomy see K. J. NAGEL, *Catalonia and Spain's Constitutional Crisis: Time for a Federal Solution?* in *50 Shades of Federalism, 2020***,** 3 f.

[10] A. CASTELLS, *Catalonia and Spain*, cit., 61 ff.

[11] J. MARCET, *Eight years of pro-independence effort in Catalonia: elections, actors and the political process*, in *WP* núm. 355 Institut de Ciències Polítiques i Socials Barcelona, 2019, 9-12.

whether Catalans enjoy a right to self-determination under international law)[12]; however, it would still violate Articles 1 and 2 of the Constitution[13]. The right was declared by the Resolutions of 27 September 2012 and 5 January 2013 of the Catalan Parliament, which provided for a democratic and transparent process of popular participation to make it effective[14].

The Spanish Government appealed to the *Tribunal Constitucional*, which led to Judgement 42/2014[15]. Although the *Tribunal* found the 2013 Resolution unconstitutional as to the alleged "sovereignty" of the Catalan people, it recognized that the right to decide could be exercised through a constitutional amendment. The principle of "*lealtad constitucional*" makes it so that the *Cortes* would be obliged to consider an amendment proposal by the Parliament of an Autonomous Community for a secession referendum to be held. Article 168 (which provides for a very complex procedure[16]) should be employed[17].

The *Tribunal* tried to mediate between the two sides, without completely thwarting Catalonia's aspirations for independence[18]. However, Spain refused to give Catalonia the competence to hold a referendum[19].

Therefore, a Catalan law provided for the power to hold "popular consultations"; one on the status of Catalonia was scheduled for 9 November 2014. The Spanish Government appealed to the *Tribunal*, but Catalonia went on to hold an online participatory process, which resulted in a legally-void vote for independence[20]. The *Tribunal* declared both processes unconstitutional, as they were in fact referenda[21].

The September 2015 elections were given a "plebiscitary" value; when pro-independence parties won an absolute majority of seats[22], they declared the beginning of a "*procés polític*" to bring about an independent republic of Catalonia, and they warned that they would not feel bound anymore by the decisions of Spanish institutions, such as the *Tribunal Constitucional*[23]. The *Tribunal* declared these goals in contrast with Articles 1, 2, 9 and 168 of the Constitution, since there cannot be a legitimate democratic mandate to independence in

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[12] They do not, according to J. M. CASTELLÀ ANDREU, *The Proposal for Catalan Secession*, cit., 440. A contrary view is held by Coppieters Foundation, CIEMEN, *Universal Periodic Review Spain-Third Cycle, The situation of the right to self-determination in Spain. Right to Autonomy and collective rights at stake* (available at: file:///C:/Users/feder/AppData/Local/Temp/JS21_UPR35_ESP_E_Main.pdf).

[13] M. BARCELÓ I SERRAMALERA, *Referendum e secessione. La vicenda della Catalogna*, in *Federalismi.it*, 2015, 2.

[14] *Resolución 742/IX del Parlamento de Cataluña, sobre la orientación política general del Gobierno de la Generalidad*; *Resolución 5/X del Parlamento de Cataluña, por la que se aprueba la Declaración de soberanía y del derecho a decidir del pueblo de Cataluña*.

[15] *Sentencia 42/2014, de 25 de marzo*.

[16] An amendment must be approved by both houses of the *Cortes* by a two-third majority, before and after general elections, and be confirmed by referendum. As J. KIEWIET, *Legal Unity as Political Unity?*, cit., 61 f., notes, only the lighter Article 167 procedure has ever been used.

[17] *Sentencia 42/2014*, cit., II, 4, c).

[18] V. FERRERES COMELLA, *The Spanish Constitutional Court Confronts Catalonia's 'Right to Decide' (Comment on the Judgment 42/2014)*, in *European Constitutional Law Review*, 585, defines the decision as "a heroic effort at preserving the existing constitutional order".

[19] J. MARCET, *Eight years of pro-independence effort*, cit., 12 f. The delegation would have taken place under Article 150.2 of the Constitution.

[20] K. J. NAGEL, *Catalonia and Spain's Constitutional Crisis*, cit, 4.

[21] *Sentencia 31/2015, de 25 de febrero de 2015; Sentencia 138/2015, de 11 de junio*.

[22] J. MARCET, *Eight years of pro-independence effort*, cit., 14 ff.

[23] *Resolución 1/XI del Parlamento de Cataluña, sobre el inicio del proceso político en Cataluña como consecuencia de los resultados electorales del 27 de septiembre de 2015*.

violation of the Spanish people's sovereignty, national unity and constitutional rigidity[24]. Spain resorted to prosecutions and police investigations against leading independentists[25].

The Catalan Parliament later controversially[26] approved two laws providing for a unilateral independence referendum to be held[27] and the legal transition towards the Catalan Republic[28]. The Government appealed to the *Tribunal*, which suspended the laws and eventually found the law on referendum unconstitutional[29]. On 1st October 2017, law enforcement intervened to prevent the referendum from taking place and violent clashes erupted[30]. 90% of the voters (less than 50% of those entitled to vote) voted for secession [31].

A parliamentary declaration of independence had no practical effect[32], and Spain invoked Article 155 of the Constitution, an unprecedented move which empowered the Government to temporarily suspend Catalonia's autonomy and call for new elections that, however, returned an independentist majority[33].

Meanwhile, the *Partido Popular* Prime Minister Mariano Rajoy, strongly opposed to any compromise with Catalan nationalists, had been replaced by the Socialist Pedro Sanchez, more willing to negotiate[34]. Yet, no real progress has been made, and the Catalan problem is still far from being resolved.

4. *The political use of constitutional justice as an alternative to negotiation: a framework for constitutional degradation*

Both actors arguably committed constitutional violations, leading to what has been described as the worst constitutional crisis to have taken place in Spain since Franco's time[35]; here I argue that this amounts to a constitutional degradation.

I do not mean that Spain is not a democracy anymore. Constitutional retrogression or backsliding does not have to lead to complete democratic collapse or partial authoritarian rule[36]. I suggest that the secession crisis can be seen at least partially as a case of constitutional degradation, as it led to a serious political conflict that had an especially negative impact on the rights of free speech and political participation and on constitutional law[37]. The process took place, as it often happens, in an incremental way, by the repeated exercise of powers

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[24] *Sentencia 259/2015, de 2 de diciembre.*

[25] K. J. NAGEL, *Catalonia and Spain's Constitutional Crisis*, cit., 5.

[26] According to N. SKOUTARIS, *Homage to Catalonia: How to Lift the Gridlock of Constitutional Crisis in Spain,* in *VerfBlog,* 2017, the procedures employed "do not pass democratic muster by any stretch".

[27] *Ley 19/2017, de 6 de septiembre, del referéndum de autodeterminación*.

[28] *Ley 20/2017, de 8 de septiembre, de transitoriedad jurídica y fundacional de la República*.

[29] *Sentencia 114/2017, de 17 de octubre.*

[30] As V. FERRERES COMELLA, *I-CONnect Symposium: The Independence Vote in Catalonia–The Constitutional Crisis of October 1*, in *Int'l J. Const. L. Blog*, 2017, points out, "There was no need to use police coercion when the referendum had already been technically dismantled".

[31] J. MARCET, *Eight years of pro-independence effort*, cit., 24.

[32] A. MASTROMARINO, *La dichiarazione di indipendenza della Catalogna*, in *Osservatorio costituzionale*, 2017.

[33] K. J. NAGEL, *Catalonia and Spain's Constitutional Crisis*, cit., 6 f.

[34] J. MARCET, *Eight years of pro-independence effort*, cit., 32.

[35] J. KIEWIET, *Legal Unity as Political Unity?*, cit., 57.

[36] A. HUQ, T. GINSBURG, *How to Lose a Constitutional Democracy*, in 65 *UCLA Law Review* 78, 2018, 120.

[37] A. HUQ, T. GINSBURG, *How to Lose*, 96, enumerate three areas for which constitutional retrogression implies deterioration: "a) the quality of elections, b) speech and association rights, and c) the rule of law".

which are not illegitimate *per se*, but whose global effects progressively led to an increasing strain on the constitutional framework[38].

The secession dispute has been aptly described as a dialogue between deaf and dumb[39], since the two parts showed little interest in coming to an agreement, fueling political conflict and constitutional instability. Broadly speaking, the crisis "nourished polarization, populisms, and authoritarian tendencies in both Catalonia and Spain"[40].

On the one hand, secessionists exalted democracy against the rule of law, even if that meant subverting the Constitution[41] and jeopardizing constitutional rights and procedures[42]. The democratic case for secession is controversial, as it is not supported by a clear majority of Catalans[43]. Their appeal to the "right to decide" has been read as referring to the exercise of constitutional rights (such as those provided for by Articles 1, 20, 23) or as an act of constituent power, which has been denied by the *Tribunal*[44].

On the other hand, the PP Cabinet denied the request to hold a democratic vote on secession (even under a constitutional delegation of powers to Catalonia[45]) and used police force or prosecutions against secessionists. Another issue was the application of Article 155 of the Constitution, which was judged by some as unnecessary and possibly unconstitutional for its impact on fundamental rights[46]. These actions were criticized by international human rights organizations[47].

However, what contributed the most to the crisis was probably the use of constitutional justice as an alternative to political negotiation[48], as it ended up ruining the political legitimacy of the *Tribunal Constitucional* and the Constitution.

The problems started with the 2010 decision, which was criticized as politically-influenced[49] (it required four years, with the recusations of some judges and delays in their replacing[50])

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[38] A. HUQ, T. GINSBURG, *How to Lose*, 98.

[39] A. MASTROMARINO, *La Catalogna se desconecte, la Spagna risponde*, in *DPCE Online*, 2015, 397.

[40] P. BOSSACOMA BUSQUETS, *Self-Determination and Coercion in Spain. The Case of Catalonia*, in *Revista d'estudis autonòmics i federals*, No. 34, 2021, 323.

[41] "[…] secessionists […] very rarely claim that their actions are in conformity with the constitution of the given metropolitan State. In fact, the aim of referendums [like the one on 1st October 2017] is precisely to mark the rupture with the old constitutional order and to create a new one" (N. Skoutaris, *Homage to Catalonia*, cit.).

[42] *Sentencia 114/2017*, cit., II, 5, d; H. Torroja, *The self-determination of peoples vs human rights in liberal democracies: the case of Catalonia*, 29 October 2019 (available at: https://www.realinstitutoelcano.org/en/analyses/the-self-determination-of-peoples-vs-human-rights-in-liberal-democracies-the-case-of-catalonia/).

[43] V. FERRERES COMELLA, A. FOSSA ESPALDER, A. SAIZ ARNAIZ (eds.), *Inconsistencias de la "desconexión"*, in *El País*, 25 November 2015.

[44] A. ROMANO, *Constituent power and independence processes: problems and perspectives in the light of Catalan experience*, in *Revista d'estudis autonòmics i federals*, No. 27, 2018, 68 ff. (criticizing the former argument).

[45] Although, according to V. FERRERES COMELLA, *I-CONnect Symposium: The Independence Vote in Catalonia, cit., "[…]* it is doubtful that such an authorization would be valid under the current Constitution, given the Constitutional Court's case law".

[46] E. ALBERTÍ ROVIRA, *Cuestiones constitucionales en torno a la aplicación del artículo 155 CE en el conflicto de Cataluña*, in *Revista d'estudis autonòmics i federals*, No. 27, 2018, 8 ff.

[47] J. M. TIRAPU, *Catalonia: Human Rights Violations in the Imprisonment and Conviction of the Pro-Independence Political Leaders*, 26 March 2020 (available at: https://ohrh.law.ox.ac.uk/catalonia-human-rights-violations-in-the-imprisonment-and-conviction-of-the-pro-independence-political-leaders/).

[48] G. FERRAIUOLO, *Costituzione federalismo secessione*, cit., 156.

[49] G. FERRAIUOLO, *Costituzione federalismo secessione*, cit., 154 ff.

[50] K. J. NAGEL, *Catalonia and Spain's Constitutional Crisis*, cit., 3.

and "clumsy"[51] in the way it treated controversial provisions, such as the status of Catalonia as a "nation"[52]. It has been shown to have directly led to an increase in support for independence[53].

The *Tribunal*'s relationship to Catalonia was not wholly antagonistic[54], as Judgment 42/2014 attempted to frame secession in a constitutional way. Nevertheless, the suggested path of constitutional reform required a degree of political consent which did not exist.

The *Tribunal* was then dragged in the struggle, not as an arbiter, but as an ally to the Government[55], as it is tasked with upholding the Constitution[56], and its members are politically appointed with a limited role for Autonomous Communities in their selection[57], which makes it a poor choice for the impartial handling of such conflicts (although the *Tribunal* has always been a crucial actor in framing the system of territorial autonomy[58]).

The Government also tried to strengthen the *Tribunal* against Catalonia's noncompliance[59] by amending[60] the Organic Law of 1979 and giving the *Tribunal* extensive powers to ensure that its decisions are implemented, which have been deemed excessive or inappropriate by some[61]. Because of its decisions, the *Tribunal* came to be perceived by the independentists as in favour of the Spanish Government and devoid of legitimacy[62]; the 2015 Catalan Parliament resolution mentioned Judgment 31/2010 as a proof of this lack of neutrality[63]. It is no longer recognized as a trustworthy arbiter of constitutional order[64], and, though constitutionally sound, its arguments are not deemed persuasive. Since 2010, independentists have been claiming that by their acts the Government and the *Tribunal* have broken an agreement between Catalonia and Spain and deprived the Constitution of its political legitimacy[65] (although it is not commonly seen as a compact of nations[66]).

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[51] V. FERRERES COMELLA, *I-CONnect Symposium: The Independence Vote in Catalonia, cit.*

[52] E. AJA, *Estado autonómico y reforma federal*, cit., 93.

[53] A. CASAS, F. CURCI, A. I. DE MORAGAS, *Checks and Balances and Nation-Building: The Spanish Constitucional Court and Catalonia*, 2020, available at: https://extranet.sioe.org/uploads/sioe2020/casas_curci_de-moragas.pdf, 2020, 4.

[54] In fact, J. MIGUEL BÁRCENA, *El proceso soberanista ante el Tribunal Constitucional*, in *Revista Española de Derecho Constitucional*, 113, 162, argues that its views may have encouraged some arguments employed by secessionists.

[55] M. HELMICH, *Spain, Catalonia, and the Supposed Authority of the Judiciary*, in *Jus Cogens*, 2020, 264.

[56] K. KRISCH, *The Spanish Constitutional Crisis: Law, Legitimacy and Popular Sovereignty in Question,* in *VerfBlog,* 2017.

[57] K. J. NAGEL, *Catalonia and Spain's Constitutional Crisis*, cit., 3.

[58] J.B. HARGUINDÉGUY, G. SOLA RODRÍGUEZ, J. CRUZ DÍAZ (eds.), *Between justice and politics: the role of the Spanish Constitutional Court in the state of autonomies*, in *Territory, Politics, Governance*, 2018.

[59] M. ALMEIDA CERREDA, *El "nuevo" sistema de ejecución de las resoluciones del Tribunal Constitucional español*, in *Istituzioni del federalismo: rivista di studi giuridici e politici*, 2016. 165 ff.

[60] *Ley Orgánica 15/2015, de 16 de octubre, de reforma de la Ley Orgánica 2/1979, de 3 de octubre, del Tribunal Constitucional, para la ejecución de las resoluciones del Tribunal Constitucional como garantía del Estado de Derecho.*

[61] Such as the Commission of Venice (Opinion 827/2015, 13 March 2017).

[62] M. HELMICH, *Spain, Catalonia, and the Supposed Authority of the Judiciary*, cit., 264.

[63] "[…] *en particular del Tribunal Constitucional, que considera falto de legitimidad y de competencia a raíz de la sentencia de junio de 2010 sobre el Estatuto de autonomía de Cataluña* […]" (*Resolución 1/XI del Parlamento de Cataluña*, cit.).

[64] G. FERRAIUOLO, *Costituzione federalismo secessione*, cit.,156.

[65] See the preamble of *Ley 19/2017* ("[…] *especialmente después de la ruptura del pacto constitucional español de 1978*").

[66] *Sentencia 114/2017*, cit., II, 5, b. However, according to K. Krisch, *The Spanish Constitutional Crisis*, cit., "A document which, at the time, was accepted by many merely for fear of the alternatives, does not have a

Spain opted for a judicialization of politics to contrast secession[67], with an exclusive reliance on constitutional law which did not consider a widespread (if unconstitutional) desire for a popular vote on the matter[68]. However, political legitimacy is as fundamental as constitutional law for a democratic multinational system of government, as its was pointed out by the Supreme Court of Canada in the 1998 Quebec Secession Reference[69].

Although secessionists ignored constitutional provisions and rejected decisions of the *Tribunal*, the political use of constitutional justice by the Government further exacerbated the contrast. It turned the Constitution into a matter of contention, rather than an instrument of conflict resolution.

Moreover, the refusal to negotiate with Catalan authorities (though not wholly unjustified on a constitutional basis) in favour of a judicial strategy showed that there are few institutional ways to address the crisis; the role of parliaments as political actors has been eclipsed by courts and *extra ordinem* acts. The hollowing out of parliaments (and of the corresponding political parties) has been described as a sign of constitutional degradation on a comparative level as well[70]. Therefore, it would be necessary to identify an institutional forum where secession can be discussed by political actors without *a priori* prohibitions, while at the same time abiding to the fundamental constitutional principles, so that legitimacy and rule of law may be both ensured[71]. Current Spanish institutions do not make a good framework for such a dialogue: the Senate offers a limited representation of the Autonomous Communities[72], and the *Tribunal Constitucional* is a State organ, with a heavily politicized composition[73]; nor it is easy to find an authority which could act as a neutral arbiter (such as the EU)[74]. Finally, even if these difficulties were resolved, Article 2 of the Constitution and its apparent prohibition of secession would remain.

However, an alternative both to conflict and *status quo* could be found in the contemporary British experience.

5. *The Scottish referendum of 2014: a different model?*

I will now deal with the process which led to the 2014 Scottish independence referendum and compare it with the Catalan crisis, as other authors have done, since the two cases show

particularly strong claim to authority four decades later". A. CASTELLS, *Catalonia and Spain*, cit., 67, speaks of a "constitutional pact" about to break up.

[67] J.-B. HARGUINDÉGUY, G. SOLA RODRÍGUEZ, J. CRUZ DÍAZ, *Between justice and politics*, cit., 4.

[68] K. KRISCH, *The Spanish Constitutional Crisis*, cit.

[69] C. CERSOSIMO, *Secession: the strict line between law and politics. A comparative analysis of Catalonia, Quebec and Scotland*, in *Roma Tre Law Review*, n. 2/2019, 288, referring to Supreme Court of Canada, *Reference re Secession of Quebec*, [1998] 2 SCR 217, par. 67, which adds: "[…] in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people […]".

[70] M. LOUGHLIN, *The Contemporary Crisis of Constitutional Democracy*, in *Oxford Journal of Legal Studies*, 2019, 442 ff.

[71] "[…] It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values" (Supreme Court of Canada, *Reference re Secession of Quebec*, cit., par 67).

[72] K. J. NAGEL, *Catalonia and Spain's Constitutional Crisis*, cit., 8.

[73] J.-B. HARGUINDÉGUY, G. SOLA RODRÍGUEZ, J. CRUZ DÍAZ (eds.), *Between justice and politics*, cit., 10 ff. Ferraiuolo, *Costituzione federalismo secessione*, cit., 154 talks of its "*colonización*" by the two main parties.

[74] N. SKOUTARIS, *Homage to Catalonia*, cit.

many similarities: both Spain and the United Kingdom are democratic, plurinational Western European countries having a federal/regional structure where secession attempts have been carried out in recent years, even though neither constitution provides for a right to secede[75].

I will not dwell on the causes of Scottish secessionism[76]. Though both secession attempts took place in the same years, they had different features and effects; I argue that this is mainly due to the different political and constitutional landscape, which allowed for a negotiated solution which has been lauded as a "role-model"[77] for the handling of secession in Western countries.

After winning a parliamentary majority in 2011, the Scottish National Party claimed a mandate to lead the country to independence[78]. The British Government employed a twofold strategy. On the one hand, it tried to address Scotland's claims by adopting a new law devolving greater economic and fiscal powers[79]. On the other hand, it negotiated with the Scottish Government to determine how and when an independence referendum should take place; the result was the Edinburgh Agreement of 15 October 2012, which stipulated that the vote should have a clear legal base and be held in a way that would ensure public confidence and fairly and clearly express the views of the Scottish people. The Scottish Parliament was allowed to legislate on the matter and adopted the Scottish Independence Referendum Act 2013; the referendum took place on 18 September 2014, with a majority of voters rejecting independence.

The different attitude of the British Government from the Spanish one is clear. The Cameron Cabinet never appealed to the judiciary or invoked constitutional law; it chose instead to allow for a democratic consultation to be held, largely because British political culture does not view politics, law and moral as thoroughly separated. The law was used to let a minority nation express its voice about its own future[80], even if a special solution (though not wholly out of the constitutional order[81]) was required. The Spanish Government refused to do the same for Catalonia through a delegation of constitutional competence[82]. Contrary to what happened to Catalonia, Scotland's character as a "nation" was not questioned, and great importance was given to the SNP electoral mandate[83].

The call for an independence referendum did not result in a serious destabilization of the system because both parts agreed on its rules. The UK legal order thus appears to be more capable of accommodating secession demands by a subnational entity than the Spanish one because of its relying mainly on political negotiations.

However, legal and political peculiarities of the British system should not be ignored.

First, the political solution was made possible by the uncodified nature of the British Constitution, which allows *ad hoc* solutions such as the Edinburgh Agreement and the special

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[75] D. CETRÀ, M. HARVEY, *Explaining accomodation and resistance to demands for independence referendums in UK and Spain*, in *Nations and Nationalism*, 25 (2), 2019, 609 f.

[76] See N. DUCLOS, *The Strange Case of the Scottish Independence Referendum. Some Elements of Comparison between the Scottish and Catalan Cases*, in *Revue Française de Civilisation Britannique*, 2015, 8.

[77] Coppieters Foundation, CIEMEN, *Universal Periodic Review Spain-Third Cycle*, cit., 14.

[78] Even if its campaign had not been about independence (N. Duclos, *The Strange Case of the Scottish Independence Referendum*, cit., 2).

[79] Scotland Act 2012 (2012 c. 11).

[80] G. FERRAIUOLO, *Costituzione federalismo secessione*, cit., 139.

[81] That is, an order in Council under section 30 of the Scotland Act 1998 (G. Caravale, *Il* referendum *sull'indipendenza scozzese: quali scenari futuri per la* devolution *britannica?*, in *Federalismi.it*, 2015, 5).

[82] As B. LEVITES, *The Scottish Independence Referendum and the Principles of Democratic Secession*, in *Brook. J. Int'l, L.*, 2015, 400, notes, Catalonia's devolved powers could not overcome a lack of consent from Spain.

[83] N. DUCLOS, *The Strange Case of the Scottish Independence Referendum*, cit., 3 ff.

devolution of powers[84] (as it also happened in Canada)[85]. Therefore, this model cannot be readily employed in Spain, whose written Constitution can only be amended through specific procedures. Moreover, even under such an arrangement, the consent of the British Parliament was necessary to give Scotland the competence to hold a referendum on constitutional matters[86].

Secondly, even though the 2014 referendum led the UK to grant further competences to Scotland[87], following the 2016 Brexit referendum new calls for independence have been opposed by the British Government[88]. It appears that, more than an uncodified constitution or a plurinational notion of State, political considerations by the main parties were fundamental in allowing the referendum to take place[89]. For the 2014 precedent to be repeated, there must be a great degree of political consent between the two parts, as it has been said for Catalonia.

While it is important to recognize its value as a precedent for democratic secession based on specific procedures[90], its limits must be recognized as well.

6. *Conclusion*

I have tried to argue how Catalonia's secession attempts and the reactions by the Spanish Government caused a constitutional degradation, since both weakened the authority of the Constitution and the legitimacy of the constitutional court and possibly infringed constitutional values or rights.

The former tried to accomplish its goal by rejecting the 1978 Constitution to build a new constitutional order; the latter applied constitutional law in a formally legitimate way, with the assistance of the *Tribunal Constitucional*, yet eventually damaged the political legitimacy of both in the eyes of the Catalan public and consistently chose repression over dialogue, thus preventing Catalans from expressing their views in an orderly and democratic fashion. In the end, both created a climate of political tension which undermined the constitutional stability of the Spanish "*Estado de autonomias*".

The Scottish case offers an alternative model of management of a secession crisis in an European democratic country, based on the cooperation between executives; yet, for constitutional and political reasons, it cannot be readily implemented in Spain, even if it has been invoked by Catalan secessionists[91].

However, there could be a way out of the constitutional impasse, as already suggested by Judgement 42/2014 of the *Tribunal Constitucional*, which held that secession is possible under the Constitution, provided that constitutional reform is employed, and that the Government would be bound to consider (though not to accept) such an amendment proposal.

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[84] E. MAINARDI, *Il referendum in Scozia: tra devolution e indipendenza*, in *Federalismi.it*, 2014, 16 ff.

[85] As C. CERSOSIMO, *Secession*, cit., 285, notes, Quebec was able to hold secession referenda in 1980 and 1995 since the Canadian Constitution did not explicitly forbid it (as they had a non-binding value).

[86] Contrary to what happened in Canada, this was made necessary by the the doctrine of Parliamentary sovereignty (*ibid.*).

[87] Scotland Act 2016 (2016 c. 11).

[88] D. CETRÀ, M. HARVEY, *Explaining accomodation*, cit., 614 f.

[89] D. CETRÀ, M. HARVEY, *Explaining accomodation*, 621 ff.

[90] B. LEVITES, *The Scottish Independence Referendum*, cit., 399 ff.

[91] A. K. BOURNE, *Europeanization and Secessions: The Cases of Catalonia and Scotland*, in *Journal on Ethnopolitics and Minority Issues in Europe*, Vol 113, No 3, 2014, 113.

It appears as a reasonable choice, as it tries to reach a balance between constitutional legality and democratic legitimacy by adopting the spirit, if not the method, of the Scottish precedent and employing arguments that remind of the Canadian Secession Reference (which was cited by the *Tribunal*)[92]. The representatives of Catalonia and Spain would thus be able to engage in meaningful and democratic negotiations.

There is a problem with this suggestion: as for Scotland, it requires a great degree of political consent, especially if the Article 168 procedure is to be followed. This does not seem to be the case in Spain.

For now, it is difficult to imagine a political solution. Nevertheless, it appears to be the only legal and peaceful way out of the crisis, even if it means resorting to instruments not expressly provided for by the Constitution to channel conflict[93], as it happened in the UK, where both parts agreed to read constitutional provisions so as to allow a public consultation without endangering the rule of law.

Therefore, if many people are dissatisfied with the current status of Catalonia, it might be necessary to provide for a constitutional answer, such as a secession clause or a referendum, to prevent dangers for the whole system[94].

[92] *Sentencia 42/2014*, cit., II, 3. However, R. IBRIDO, *Il 'derecho a decidir' e il tabù della sovranità catalana. A proposito di una recente sentenza del Tribunale costituzionale spagnolo*, in *Federalismi.it*, 2014, 19 ff., notes how the Supreme Court did not mention the amendment procedure as the only framework of negotiation.

[93] E. ALBERTÍ ROVIRA, *Cuestiones constitucionales*, cit., 21 f.

[94] A. ROMANO, *Constituent power*, cit., 74 f.; V. FERRERES COMELLA, FOSSA ESPALDER, A. SAIZ ARNAIZ (eds.) *Inconsistencias de la "desconexión"*, cit.

Evis Garunja*

The Effects of *Vetting*[1] Process on Constitutional Changes of Albanian Judiciary System**

ABSTRACT: ***The adoption of laws in Albania is often achieved through consensus among legislators, declaring it as the best solution for a certain political or legal situation, which resulted ineffective in many cases. The focus of law improvements was concentrated on control/Vetting, that is, the exclusion from the judicial system of individuals who do not meet one of the three constitutional criteria (wealth, moral integrity, and professionalism). Vetting, control per se, is not a reform of justice, but only one of its constitutive phases. The Albanian Constitution changes aim to restructure the justice institutions to achieve the standards requested for the Albanian EU integration. The paper goes through the different constitutional reforms, focusing on the judicial system changes especially on the recent results of the vetting process in Albania. The questions like: How is the Vetting process affecting judicial standards, how are the new Albanian justice institutions reacting, what is the public opinion on this progress and the benefits of society?, are essential to understand how this process was conducted in Albania, its problems and difficulties. The results are explained through underlining different studies, media interventions, and recent political and public statements of involved institutions.***

1. *Introduction*

Albania is undergoing a long political-social-economic transition following the democratic changes of the 1990s, accompanied by numerous difficulties and problems in all fields. The factors that influenced this long transition refer to the Albanian state's historical context, ranging from the Ottoman occupation's backwardness to the absence of institutional structures, conflicting relations between state and citizen, and a backward feudal economy dominated by the peasant population. It was established a political system and legal framework based on Italian and French legislation, which changed dramatically due to the establishment of an autocratic monarchy. Political pluralism and democratic institutions were destroyed during the communist era. They created a socialist society based on a planned, centralized, and collectivist economy[2]. The pluralistic transformations, democratic values and principles, freedom, and respect for human rights that accompanied developments in Albania were embodied in Geoffrey Pridham's definition of democratization as "a multidimensional process, which includes the overthrow of the totalitarian regime, liberalization of the pre-transition, democratic transition, and democratism. The democracy within it will feature a range of historical elements that will complicate the regime change process"[3].

* **Law Lecturer at the University Aleksander Moisiu Durres, Albania.**

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[1] *Vetting* is an extraordinary assessment/control of the wealth, integrity and professionalism of judges and prosecutors. The official term used by the Constitution is "Reassessment".

[2] I. TOPALLI, *Democratization of Albanian Constitution according the European standards*, in *Mapo Magazine*, Tirana, June 13, 2018.

[3] G. PRIDHAM, *Designing Democracy: EU Enlargement and Regime Change in Post-Communist Europe,* London-New York, 2005.

The development of Albanian society's constitutional structure[4], also known as the Principal Constitutional Dispositions (Law No. 7491/1991), was the first step toward democratization. This set of constitutional rules established the democratic state and the rule of law in a parliamentary republic, with the Albanian people exercising national sovereignty. Human dignity, rights and freedoms, the constitutional order, equality before the law, social justice, and pluralism are all recognized and respected under this system. The People's Assembly, the President of the Republic (chapter II, points A & B, Law No. 7491/1991), and the Council of Ministers as the most significant institution of the state administration (chapter III) were at the heart of the state's organization. People's power was exercised through their elected representatives as well as the referendum[5]. Albania has taken a long time to enact a consensual constitution in a country that is politically divided and torn by political party wars. The Constitution of 1998 opened the path for democratic ideals and the development of democratic and social rule of law in order to protect fundamental rights and freedoms as well as other national values.

Due to constitutional guarantees such as the control of the constitutionality of the rules, the supremacy of international acts, international integration clauses, direct invocation of the European Convention of Human Rights, constitutional revision by a qualified majority, human rights guarantees not only by national but also by international judges, direct execution, and so on, this main document has withstood the test of time (Anastasi, 2013, 63).

The rapid post-communist social development affected the longevity of the first legal instrument of the democratic state. Constitutional reforms are now underway, with the goal of achieving functional stability across all constitutional bodies, as well as a reliance on democratic ideals and the rule of law. Albanian constitutionalists believe the judicial system reform to be the most important in terms of the number of institutions it impacts, the number of law professionals involved, the length of time it takes, the outcomes of performance control, and the authority of justice employees. This study emphasizes the relevance of this reform for the Albanian legal system, as well as the challenges, expectations, and outcomes.

2. *The constitutional reforms*

The Albanian Constitution, which embodies the principle of the rule of law and legitimizes the constitutional authorities established therein[6], was placed at the summit of the legal pyramid. The Constitution's drafters made certain that it guaranteed the chance for long-term popular consensus and that it included mechanisms for dealing with any type of public conflict[7].

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[4] XH. ZAGANJORI, A. ANASTASI, E. ÇANI (Methasani), *Rule of Law on the Albanian Constitution*, Tirana, 2011.

[5] See A. ANASTASI, *The Constitution as a foundation of the social and political co-existence in a historical and evolutionary context*, Congress "The Constitution as a instrument of stability and development", Tirana, November 22, 2013, 63.

[6] See E. HASANI, I. CUKALOVIC, *Commentary of the Kosovo Constitution*, Botimi I*,* Pristina, 2013, 386; E. Hoxhaj, *Review of the Constitution – overview comparisons in Europe* (Dissertation for the degree "Doctor"), Tirana, 2012; International conference*, 20 years of Constitutional Court of Republic of Albania*, Tirana, June 7-8, 2012; Konrad Adenauer Stiftung, Justice reform, *Training module for students, not lawyers and activists of civil society*, Tirana, 2018; Law Faculty of University of Tirana, *Law Studies No. 2*, *Shtëpia Botuese "FLESH" shpk,* Tiranë, Dhjetor 2016; Ministry of Justice, *Analytic Document, Detailed information on justice system sector's*. Tirana, January 2015.

[7] V. BALA, *A constitutional reform for a major Constitutional culture, Academic works on the necessity of constitutional changes*, Tirana, April 2015, 143.

Following the excellent experiences of European constitutional courts and bodies, the Constitutional Court was designed as an institution with the capacity to protect, safeguard, and, ultimately, interpret the Constitution, as a guarantor for the development of the rule of law[8]. Constitutional justice ensures the hierarchy of sources of law, adjudicates jurisdiction between public authorities, and implements valid norms regardless of whether the rules are constitutional or not[9].

The major goal of constitutional control or constitutional justice in Albania has been and continues to be identifying, evaluating, and correcting constitutional imbalances in a continuous, uninterrupted, and methodical manner. This control provides the tools necessary to assure the long-term viability of a pluralistic society that achieves functional and dynamic uniformity while continuing to evolve[10].

The Constitutional Court, influenced by internal factors such as the need to clarify the constitutional text and harmonize the principles and values enshrined in it, as well as external factors such as the need for Europeanization/internationalization of constitutional justice, has transformed the fundamental law into a "alive" Constitution through various interpretations[11].

Regardless of the Constitutional Court's influence and role in preventing institutional conflicts, the Albanian transition has experienced periods of political consciousness as well as serious political crises[12].

In Albania, legislation is frequently adopted through parliamentary consensus, with politicians stating it to be the greatest solution for a specific political or legal scenario, although this has not resulted in a high-quality legislative outcome[13]. This agreement lacked a preparatory study, a clear understanding of the social and economic state of the relationship that the legislation is supposed to control, its evolution, other influencing variables, and the legal, social, and economic consequences of the law's application. The law is intended to address problems rather than create them.

The proper selection and appointment of judges functioned as a guarantee for the rule of law in this regard. The contrary weakens the judiciary's efficiency, the public's faith in justice, and institutions' commitment to the rule of law's execution. At times, the legal system has produced shards of proof of independence and professionalism, while at other times, it has provided a negative answer. This has an impact on the public's trust in the legal system. The lack of trust has been blamed on a lack of objective appraisal of the legal system's flaws, as well as the attribution of social elements to the justice system.

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[8] B. DEDJA, *The role of Constitutional Court on the enforcement of rule of law* state, Session 2: *Establishing Rule of Law*, International Conference: "Strengthening the rule of law and global governance as a matter of time in order to protect the future of two billion children worldwide and the generations to come", India, December 9-12, 2011.

[9] K. TRAJA, *The Constitution as an instrument of stability and development*, Congress "The Constitution as an instrument of stability and development"*, cit*., 13-14.

[10] K. TRAJA, *The Constitution as an instrument of stability and development*, *cit.*, 200.

[11] S. BERBERI, *The Constitution as an alive instrument and constitutional interpretation*, Congress "The Constitution as an instrument of stability and development"*, cit.*, 115.

[12] See Albanian Legal Territorial Studies Institution (A.L.T.R.I), Academic works on the need for Constitutional changes, under the project: *Constitutional reform under the civic and academic* prospective, Tirana, April 2015.

[13] M. BERISHAJ, *Which is the influence of the political parties on the democratic consolidation?*, Prishtina, August, 15, 2013 available at: http://www.kipred.org/repository/docs/Cili_eshte_ndikimi_i_partive_politike_ne_konsolidimin_demokratik_272866.pdf; F. Zhilla, *Political crisis as constitutional crisis*, in *Panorama Magazine*, Tirana, October 2015.

The Institute for Development Research and Alternatives[14] reported that Albanians believed that monetary interests, commercial relationships, personal connections with judges, and political viewpoints influenced courts the most in a 2009 survey titled *Corruption in Albania: Perceptions and Experiences*[15].

The Center for Transparency and Freedom of Information polled 58 percent of judges in October 2012. Only 58 percent of the judges took part in the survey for a variety of reasons, including not knowing about the survey's methodology, not being contacted by the center, their replies being absent, or subjective reasons such as not wanting to be exposed to the poll's issue. When asked if they feel the court system is corrupt, 25% replied definitely, while 58 percent indicated the system is regarded as corrupt. When asked if the judicial system was free of political interference, 50 percent of the judges who took part in the survey said yes[16].

According to these polls, Albanians believe the judiciary is one of the three institutions that contributes the least to the fight against corruption.

According to a GRECO[17] (No 4/2014) [18] evaluation, the judicial system in Albania was particularly harmed by: (i) a low level of public trust; (ii) a weak position in comparison to other powers; (iii) a lack of control over the selection of Supreme Court judges; (iv) the Minister of Justice's exclusive competence to initiate disciplinary proceedings against first instance judges and judges of appeal courts; (v) the National Judicial Conference's inaction, which has a negative impact on judge selection, progression, training, and disciplinary actions[19].

Albanian politics undertook a series of constitutional changes[20] aimed at a radical reform of the judicial system in Albania, special in its kind, as the guarantor of the constitutional institution's independence, strengthening its healthy part, and achieving one of obligations for Albania's European accession.

The modified Constitution allows for the establishment of new institutions from the ground up to complete the *vetting process* of judicial bodies[21]. According to the Vetting Law, a

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[14] Institute for Development Research and Alternatives (IDRA), *Corruption in Albania, Perception and Experience*, 2009, 22-24.

[15] Albanian Parliament, Ad-Hoc Parliamentary Commission for the judiciary system reform, the Group of High Level Experts, *The analyze of Justice system in Albania*, Tirana, June, 2015; Albanian Parliament, Ad-Hoc Parliamentary Commission for the judiciary system reform, the Group of High Level Experts, *Project: The Strategy of Justice System Reform,* Tirana, July 24, 2015.

[16] See http://reformanedrejtesi.al/sites/default/files/dokumenti_shqip_0.pdf.

[17] GRECO - Group of States Against Corruption

[18] Report on the evaluation of Albania no. 4, 24-27 June 2014 GRECO, available at: http://www.coe.int/t/dghl/monitoring/greco/news/News%2820140627%29Eval4Albania_en.asp.

[19] See also: A. DYRMISHI, M. HALLUNAJ, *Evaluation Report I: The activity of Special Prosecution Office and Special Court against Corruption and Organized Crime 2020*, Center for Democratic and Government Studies, Tirana, February, 2021; A. DYRMISHI, *Mediation's role solving conflicts in corrupted judiciary systems*, in *Med. J. Soc. Sci.,* 5(22), 2014.

[20] CDL-AD (2008)033, *Opinion on the Amendments to the Constitution of the Republic of Albania*, adopted by the Venice Commission at its 77th Plenary session on the basis of comments by Mr. Sergio Bartole, December 15, 2008. See also G. ÇARKAXHIU, *Justice Reform in Albania with Particular Focus on the Establishment of New Institutions*, *European Integration - Realities and Perspectives, Proceedings 2020, Legal Sciences in the New Millennium,* 2020, 66.

[21] The Union of Judges of Albania, the Faculty of Law of the University "Luarasi" and the "European Center", *Judicial reform as one of the 12 priorities of the challenge of Albania's EU integration*, Tirana, July, 2012; See also: OSCE, *Analyzing the justice system in Albania*, Tirana, 2004 available at: https://www.osce.org/sq/albania/23964; A., Pejović Andrija, *Amendments to the Constitution in the area of*

commission will be established to choose judges at all levels, as well as members of the Appeal Court and the Disciplinary Appeals Tribunal. The statute established the Public Commissioners Authority and the International Operation Monitoring Institution (commonly known as IMO), which is the international *Vetting process* monitoring agency.

The Vetting (Control) Act (Law 84/2016) stipulated that the bodies must be established within 145 days of its enactment[22].

The modified Constitution also stated that if the judicial and non-judicial members of the High Council of Justice (hereinafter HCJ) passed the *vetting/control* process successfully, the HCJ would replace the High Council of the Judiciary within 8 months of the constitutional modifications taking effect. Albania's High Council of the Public Prosecutor (hereinafter HCP) was constituted for the first time after 8 months of the constitutional amendments taking effect, because prosecutors and other non-prosecutors members had to go through a *vetting/control* process[23].

The Constitution stipulated that the new institution of the High Inspector of Justice (hereafter HIJ) would be elected by 2/3 of the Assembly until the parliamentary elections on August 11, 2016, and subsequently by 3/5 of the Assembly. This clarification in the Constitution came as a consequence of a tough agreement between political parties in order to establish a constitutional official with a nine-year mandate[24].

The Constitution also mentions the creation of Special Courts against Organized Crime and Corruption within two months of the HCJ's founding, as well as the applicable statutes.

When the Special Prosecutor's Office is founded and its judicial competencies are established by law, the Prosecutor's Office for Serious Crimes will cease to exist. The Special Prosecutor's Office was to be established within two months of the HCP's inception, according to these constitutional modifications. At the same time, the Constitution stipulated that the Attorney General would be elected for two-thirds of the Assembly in the August 2016 parliamentary elections. After this time, 3/5 of the Assembly will elect the institution's authority. In this approach, the Constitution attempted to create a consensus among political parties on the appointment of a constitutional authority with a seven-year term[25].

3. *The situation of the justice reform*

Albania's implementation of justice reform has been fraught with difficulties[26]. The High Judicial Council (HJC) and the High Council of Prosecutors (HCP), which are critical entities in the transition from the re-evaluation process to new governing institutions of justice in

Judiciary in the Candidate Countries for the Membership in the Eu - The examples of Montenegro, Albania and Serbia, 2020, 119-134, available at: https://ssrn.com/abstract=3638958.

[22] F. KALAJA, *On Constitutional Changes*, in *Mapo Magazine,* Tirana, January 14, 2016.

[23] Helsinki Committee of Albania, Save the Children, Center of Integrated Legal services and practices, Report: *The establishment and functioning of new justice governance bodies, Referring to monitoring findings in the period of April 2018 - March 2019*, Tirana 2019, available at: www.ahc.org.al; Helsinki Committee of Albania, (2018), Studying report: *Monitoring the Vetting process of judges and prosecutors during the period of January 2017 - June 2018*, Tirana, 2018, available at: www.ahc.org.al.

[24] See also R. ALBERT ET AL., *Constitutional reform in Brazil: lessons from Albania?*, in *Rev. Inv. Const.*, 4(3), 2017, 11-34; A. BALLIU, *The Reform of Justice in Albania*, in *Beij. L. Rev.*, 11, 2020, 709-728.

[25] Available at: https://shtetiweb.org/2017/05/20/bilanci-reformes-ne-drejtesi/.

[26] RR. ZGURI, D. PAVLI, *Reporting justice reform by Albanian media: between the public interest and political clientelism*, Tirana, 2018, available at: www.institutemedia.org.

Albania, were only established after three years. Justice reform was mostly undertaken as an externally imposed product (with considerable encouragement from the EU, US, and Western institutions) rather than an internal product (with institutional and political backing) [27].

The primary focus was on *vetting*[28], or the exclusion from the judicial system of individuals who did not meet one of the three constitutional criteria (wealth, moral integrity, or professionalism), while other important aspects of reform were overlooked, such as new entrants to the system, the career system, quality improvement in judicial decisions, transparency, independence, and professionalism. *Vetting* is not a reform of justice in and of itself, but rather one of its constituent parts[29].

Albania has a legal system with an inactive Constitutional Court, a Supreme Court with only three members, and 31,000 cases to resolve after three years of constitutional revisions. The Special Prosecutor's Office and the Anti-Corruption Court have yet to be established, more than 150 magistrates have been removed from the legal system, posing a new dilemma, and a provisional Attorney General has been in office for more than a year[30].

The only established bodies are the High Council of Prosecutors, which has a fixed location (building), the High Judicial Council, which has incomplete decisions and vacations to replace, and the Inspectorate of High Justice, which is in charge of disciplinary actions against judges and prosecutors in cases of law violations[31].

The Commission on Justice Appointment (KED – CJA), on the other hand, continues to evaluate applicants for the Constitutional Court, HCJ, SPAK, and Attorney General[32].

Since the sole constitutional body founded under legal terms is the IMO, the only body not created by Albanians, the Albanian Constitution and law have only been respected by internationals. Internationals have the right to establish themselves under the law. Any Albanian institution that has been established within the timeframes has been disregarded by Albanians[33].

The Constitutional Court, the Supreme Court, the Court of First Instance, and the Anti-Corruption Court of Appeal have all missed deadlines, but the establishment and selection of new candidates for the Special Anti-Corruption and Organized Crime Structure/SPAK, the Constitutional Court, the Supreme Court, as well as the Court of First Instance and the Anti-Corruption Court of Appeal, require more time.

The new institutions of the justice system were able to become fully operational thanks to the strong international impact.

The General Attorney was appointed by the High Prosecution Council after a verification and review process. The High Inspector of Justice was established as an impartial body tasked with inspecting judges and prosecutors in order to punish incidents of legal violations. The Constitutional Court was only able to function after unusual challenges in mid-November 2019, when it was able to reach the necessary quorum[34]. Its judges were chosen in a manner that was free of political considerations (according to the Minister of Justice declaration). The

[27] Available at: www.isp.com.al.

[28] On the Albanian Constitution the term of vetting is reevaluation.

[29] Institution for Political Studies (ISP), *The justice reform: 2018, the balance, problems, challenges*, Tirana, 2018, available at: www.isp.com.al.

[30] Available at: https://oranews.tv/article/mosfunksionimi-i-reformes-ne-drejtesi-bilanci-i-tre-viteve.

[31] Available at: https://shtetiweb.org/2017/05/20/bilanci-reformes-ne-drejtesi/.

[32] Available at: https://oranews.tv/article/mosfunksionimi-i-reformes-ne-drejtesi-bilanci-i-tre-viteve.

[33] Available at: https://shtetiweb.org/2017/05/20/bilanci-reformes-ne-drejtesi/.

[34] On Jannuary 1, 2020 more than 85 cases were waiting for the Constitutional Court decision.

Supreme Court's three judges are still working to reduce the amount of pending cases. The High Judicial Council continues to assess candidates for new Supreme Court members.

The reform of the justice system resulted in:

1. Six members of the Constitutional Court were chosen;
2. The High Inspector of Justice was chosen by the Judicial Appointments Council.
3. The High Judicial Council has chosen three Senior Judges and is continuing to evaluate the other 12 candidates for Senior Judges.
4. The General Prosecutor and 13 members of the SPAK were chosen by the High Council of Prosecution;
5. The National Bureau of Investigation was established in July 2020, with the Special Prosecution and the HJC electing the Director under the supervision of the International Mission;
6. The Constitutional Court has a quorum of seven members, allowing the process and court hearings to commence;
7. Despite having only three members, the High Court continues to operate and has processed over 2100 cases;
8. The High Inspector of Justice has investigated 180 complaints against judges and prosecutors[35].

Meanwhile, it's important noting that issues with the reform's implementation continue to exist. Almost five years have gone since the implementation began, and the Special Courts and SPAK with judges have still not been completed.

Because the number of corruption convictions and organized crime convictions is so low, residents' trust in justice institutions has been harmed[36].

The Prosecution and Special Courts registered 40 criminal cases for corruption and 50 criminal cases for organized crime in a single year till December 2020, although the large number of allegations of corruption translated into a modest percentage of criminal proceedings in court.

The Center for Study of Democracy and Governance (Tirana, February 2021) found that the majority of corruption cases involve claims against public personnel. However, their sentences for corruption merely include public probation rather than incarceration. The Special Court of First Instance has handed down 5 prison sentences for corruption, with a maximum sentence of 3 years and a minimum sentence of 6 months.

In the court, there are 25 active corruption cases and six passive corruption charges against public personnel. Only three instances of corruption were brought against judges and prosecutors, with no cases of corruption brought against high-ranking public officials or local elected officials.

There were 225 denunciations for 271 people, half of whom were charged with organized crime and the other half with corruption, and both were referred to the Special Prosecution against Corruption and Organized Crime (SPAK). Last year, half of the 343 criminal procedures were related to corruption, with only 42 to organized crime. Only 16 of the 162 organized crime files have been sent to trial.

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[35] Available at: http://ata.gov.al/2021/03/31/reforma-ne-drejtesi-gjonaj-institucionet-e-reja-te-sistemit-te-drejtesise-teresisht-funksionale/.

[36] A. DYRMISHI, M. HALLUNAJ, *Raport Vlerësimi I: Veprimtaria e Prokurorisë së Posaçme dhe Gjykatave të Posaçme për Korrupsionin dhe Krimin e Organizuar 2020***,** Tiranë, Shkurt 2021, (Center for Democratic and Government Studies, *Evaluation Report I: The activity of Special Prosecution Office and Special Court against Corruption and Organized Crime 2020*, Author: Arjan Dyrmishi, Mirsada Hallunaj, Tirana, February, 2021).

Only 39 of 240 corruption cases were sent to trial, according to the research. Only 10% of the cases examined by the Special Prosecution Office were transferred to the Special Court for Corruption and Organized Crime for trial.

The Special Court prosecuted around 30% of the accused. Only 11 petitions for sequestration were made to the court out of 310 property investigations, and the Special Prosecution only requested confiscation of the confiscated property in four instances in progress.

Given the public view that corruption exists at all levels of government, new judiciary structures and their activities aimed at preventing, investigating, and prosecuting high-level corruption cases at the highest echelons of government have been a focus of attention. The Center for the Report of Democracy and Governance released a study that used indicators to illustrate and justify the causes for the large fall in citizens' trust in justice reform and SPAK.

According to the CSDG[37] Barometer[38], fewer citizens believe that the Special Structure against Corruption and Organized Crime (SPAK) would help the battle against corruption and organized crime, and that the court's efficacy will improve as a result of justice reform.

Respondents believe that justice institutions (the prosecutor's office and the courts) are corrupt and politically influenced.

Even the *vetting/verification* procedure revealed flaws: double standards in candidate evaluations, political pressures, disparities in training and judgment among the same control/vetting structures, and only evaluating the wealth component while ignoring the other two (professionalism or integrity). The Independent Commission on Qualification (ICQ) [39]/ Institution of Public Commissioner (IPC)[40]/ Special College of Appeal (SCA) [41] lacks a clear strategy regarding the first subjects to be vetted (for example, professionals who applied for membership in a new judicial institution will be evaluated first) or how third-party complaints (public, injured parties, persons harmed by magistrate's actions) will be evaluated.

4. *Conclusions*

The *vetting* format, as a concept, provides a decent means to scan even politics, journalism, academia, or sport, among other things, in response to the public's need for an elite rotation, but it has also been abused for political and populist purposes, reducing its value. Various parties within the legal system are using the transition time from vetting to the construction of new institutions, up to their full operation, to achieve justice denial or to undertake suspicious acts of corruption. As verification procedures approach, this category is projected to resign. The lack of a direct link between the dismissal decision of the Independent Commission on Qualification/Special College of Appeal and the consequences of bringing lawbreakers before the courts provides space and immunity to those who are still in power

[37] Center for the Study of Democracy and Governance (CSDG), see: http://csdgalbania.org/.

[38] Available at: http://csdgalbania.org/sq/prezantohet-edicioni-i-dyte-i-barometrit-shqiptar-te-sigurise-2020/.

[39] Independent Commission on Qualification (*Komisioni i Pavarur i Kualifikimit* – KPK).

[40] Institution of Public Commissioner (*Institucioni i Komisionereve Publike* – IKP).

[41] Special College of Appeal (*Kolegji i Posaçëm i Apelimit* – KPA).

but have bad judicial credentials, as well as undermining public support for the core of justice reform[42].

In this situation, the question naturally arises: why are Albania's autonomous institutions so vulnerable? Are they conditioned by the failings of the 1998 Constitution or by the Albanian citizen who does not embrace or is used to their independence?

The response could include a variety of reasons, beginning with the Constitution's submission to political influence, which is a popular mentality among modern political operators. «For the representatives, political interests come first, which has severely harmed the justice system,» says Albanian constitutionalist Aurela Anastasi. Interference by those in positions of political authority has an impact on not only this system, but all state agencies. The Constitution lays out ideals to follow, not how to put them into practice. When it comes to individual failures, they might be categorized as institutional failures. Individuals fail in this circumstance not only as individuals, but also as representatives of their institutions»[43].

[42] Institution for Political Studies, *The justice reform: 2018, the balance, problems, challenges*, *cit.*; Institution for Political Studies, *The justice reform: 2018-2019, the balance, monitoring, problems, Report,* Tirana, 2019, see: www.isp.com.al.

[43] A. ANASTASI, *The implementation of the Constitution under the political power*, in *Reporter.al*, Tirana, November 19, 2015.

Part III
Institutional Arrangements which Can Protect Liberal Democracy

Irene Spigno
Ylenia Maria Citino
Ilaria De Cesare
Marco Bruno Fornaciari
Mayra Angélica Rodríguez Avalos
Francesco Alberto Santulli
Marco Antonio Simonelli
Giulia Vasino

Irene Spigno*

How to protect contemporary liberal democracies from constitutional degradation? Introductory remarks to the session on institutional arrangements which can protect liberal democracy

Constitutional degradation is a phenomenon that, albeit with different nuances and characteristics, has affected many contemporary liberal democracies for over a decade, which have been weakened not by a specific event of a formal rupture or a *coup d'état*, but by being subjected to debilitating dynamics despite the presence of a constitutional framework that proves to be only apparently solid. The examples are manifold and range from striking events such as the failure of movements linked to the Arab Spring degenerated into military rules (as in Egypt), armed conflicts (as in Libya, Yemen, and Syria), and political repression, to more subtle and insidious phenomena of constitutional degradation such as the rise of illiberal democracies in Hungary and Poland, the electoral success of nationalist parties in France, Germany and Austria, the growing political influence of religious fundamentalism (as in Israel, India, and Turkey) and finally the rise of presidential figures of strong authoritarian nature as in Venezuela with Nicolas Maduro, in the Philippines with Rodrigo Duterte, in the United States with Donald Trump and in Brazil with Jair Bolsonaro.

There are already various studies on the possible causes that generated this phenomenon, so we will not focus on this point in the following pages. Regardless of the causes, which can be varied, there are two common symptoms of the constitutional degradation of the 21st century: the first is represented by the marginalization of parliamentary institutions. Parliaments, which previously served as a counterweight to governments in constitutional democracies, now appear weakened and operate with difficulty. The processes of supranational integration and the strengthening of the normative power of the executive branch have undermined the centrality of legislative output. The balance of power between government and parliament has changed and parliament has increasingly assumed a secondary position, accompanied by the weakening of the political pluralism, evident in the crisis of political parties, the tensions suffered by freedom of expression, and the little relevance of parliamentary opposition.

These shifts in the dynamics of power also affect the position taken by constitutional judges and high courts who are increasingly caged by the same dynamics of authoritarian drift of power which, on the one hand, leads to phenomena of judicial populism, and on the other, to the inadequacy of previously established procedural rules.

The contributions that the reader will find in this section of the volume consist on trying to find possible cures to these two symptoms of the phenomenon of constitutional degradation. A relevant symptom of the constitutional degradation affecting parliaments is the weakening of parliamentary opposition. In this sense, Ylenia Maria Citino, in her essay on "Comparing constitutional provisions regarding parliamentary opposition. An introductory note", identifies that the marginalization of parliaments is also related to the "agony" of parliamentary oppositions as one of the multiple causes of the current deterioration that the contemporary liberal democracies are experiencing.

A possible solution that the author identifies may be a strengthening of constitutional provisions in order to protect parliamentary opposition and ensure a safe environment for a

* **General Director of the Academia Interamericana de Derechos Humanos, Universidad Autónoma de Coahuila.**

well-functioning democracy. With a comparative perspective, Citino analyses all the Constitutions containing specific provisions related particularly to the opposition, with the aim to understand if the protection of parliament may need the protection of parliamentary opposition. Since most of the civil law in European democracies avoids addressing the issue by not including any reference to parliamentary opposition in their constitutional texts (with the exception of France and Portugal), a high number of nonwestern democracies, with a strong British constitutional influence, could provide an inverted Constitutional borrowing to older democracies as a tool to manage the constitutional crisis they are experiencing.

The topic of the loss of centrality of parliaments is analyzed in the text by Ilaria de Cesare in the essay on "Constitutional Degradation and the Italian Parliament. How can the centrality of the representative body in the Italian legal system be preserved?" which reasons about the Italian experience, focusing in particular on the analysis of the process that may undermine the Italian Parliament centrality in the exercise of the legislative function. The text investigates in depth whether the representative body in Italy has lost its central role, due to many tools used by the government to impose itself on the parliament, suggesting some legal reforms as tools to correct the consequences of this dangerous phenomenon– among others the amendment of Parliamentarian rules – in order to ensure the centrality of the Parliament.

A careful look at the Italian experience is also offered by Francesco Alberto Santulli, in reference to the crisis of the political party system. On "The crisis of political parties as a phenomenon of constitutional degradation: what is to be done?" first of all by investigating the causes of this crisis and then moving on to the effects produced by it on the political party system and resulting in a crisis of politics, of representation, of the relationship between voters and elected representatives, and of the parliamentary form of government, hitting the proper functioning of the representative democracy. Santulli suggests the elaboration of an electoral law in order to guarantee a more transparent relationship between electors and elected representatives. This would be a way to make electors more aware in the exercise of their rights, and the latter more responsible in the exercise of their functions.

The impact of constitutional degradation on the independence of the media is the subject of the essay elaborated by Simonelli. The author underlines the fundamental role played by media and public opinion in reference to political pluralism and democratic accountability. Constitutional degradation is also marked by attacks to freedom of media (as many populist governments have included as part of their political strategies) and the experiences developed by Hungary and Poland illustrate this clearly. In these cases, in order to strengthen pluralism and to contain anti-constitutional tendencies, the authors suggest guaranteeing the media a higher degree of protection than to any other commercial activity as well as the provision of institutional arrangement of media regulation involving a plurality of actors in appointments and decision-making procedures.

With specific reference to the drifts assumed by the judiciary and in particular by the high courts and constitutional judges, it is possible to identify two specific dynamics. On the one hand, a certain judicial activism that seeks to counteract the authoritarian drift of power, overcoming the procedural or formal limits of the interpretation to which it can be subjected. Giulia Vasino focuses on this aspect on the essay "De-constructing and re-building procedural standards: new trends in the current stage of the Italian constitutional review of legislation", which analyzes the role recently played by the Italian Constitutional Court, accused of transforming itself into a highly interventionist political actor rather than the traditional guardian of the Constitution.

This new physiognomy has led the Court to reshape some of its traditional procedural standards, which raises concerns in some scholars who argue that the foreseeable effect of this proactive decision-making method would be the deconstruction of the institutional pillars on which the constitutional state is founded and that the traditional principle of separation of powers would be jeopardized. However, the author considers that these shocking changes in the institutional balance and in the legal framework would only be apparent, given that in the light of recent jurisprudence, the Court's behavior actually shows its intention to reconsider the constituent elements of its modus operandi without giving up to a judicial approach of defense of the constitutional charter, through the creation of new self-imposed procedural limits as well as the strengthening of universally adopted decision-making schemes, such as the proportionality test.

The second, on the other hand, concerns the possible cases of judicial populism with reference to cases in which constitutional courts are somehow involved in the degenerative process. On the second aspect of the involvement of high courts in constitutional degenerative processes, Bruno Fornaciari's essay on "Involution of the Constitutional Order and the Role of the Highest Courts: a comparative perspective" analyzes different experiences, underlining how in some countries such as Hungary, Poland and Turkey, political power has had a punitive attitude towards the top courts, while in other countries such as Russia and Venezuela the "power" (mainly concentrated in the hands of a head of state) has tried to subjugate such courts regardless of their behavior.

A specific focus on the Mexican experience is at the center of the text elaborated by M. Rodríguez Avalos, which focuses on the problem of protecting the independence of the judiciary, taking as its starting point the decision of the Supreme Court of Justice of the Nation (SCJN) on the unconstitutionality of the Energy Transitional Law reform and judicial ruling on its unconstitutionality, which has caused instability between the branches of power in the country. The author stresses that Mexico is also experiencing a situation of constitutional degradation that has the Supreme Court of Justice of the Nation as its protagonist, mainly due to the various attacks enacted by the President of the Republic over the Judiciary which results in a high degree of popular uncertainty and distrust over the constitutional institutions.

The phenomena of constitutional degradation we are witnessing at different latitudes and in different contexts have in common the existence of an enormous gap between norms and laws, between law in the formal sense of the term and the constitutional reality, also with reference to those contexts where there are quite developed regulatory systems but then the political game creates distortions and these distortions obviously translate into the constitutional degradation of liberal democracies.

Liberal democracies which, moreover, have been unable to convert into inclusive and integral democracies, understood as democracies that allow and facilitate the participation of minorities and historically discriminated groups. Therefore, probably, one of the fundamental tools to protect contemporary democracies from constitutional degradation consists in the inclusion of the vulnerable group perspective.

Ylenia Maria Citino*

Comparing Constitutional Provisions Regarding Parliamentary Opposition. An Introductory Note**

ABSTRACT: ***The current deterioration of the global liberal democratic order is unveiling the dysfunctionalities and unpreparedness of the representative institutions towards new challenges, like the spread of populism or the pandemic. Parliamentary opposition is in agony along with the marginalization of parliaments and it is not infrequent that the antagonism develops out of the institutions, in illiberal ways. In such a context, can constitutional provisions on the opposition protect and ensure a safe environment for a well-functioning democracy? This essay is an introductory note that compares all the Constitutions containing Articles related specifically to the opposition, to understand if nonwestern democracies can provide an inverted Constitutional borrowing to older democracies in crisis.***

1. *Opposition as a tool for a well-functioning democracy*

In the last few decades, the public opinion was confronted with the evidence that democracy is more and more on shaky ground[1]: with similar wording ("degradation", "corrosion", "disintegration", "erosion", "failure", "pathology", "decline" of democracy), scholars from diverse backgrounds agree on the necessity to use constitutionalism as a "battering ram" to propel against the most relevant disruptions of democracy and the rule of law[2].

Despite the widespread commitment to constitutional reforms by several countries[3], older democracies are affected by the proclivity of Governments to acquire more power in the legislative process, thus contributing to the marginalization of Parliaments. In general, the "constitutional degradation" of the liberal democratic order unveils the dysfunctionalities and unpreparedness of the representative institutions in modern times, showing that the traditional deliberative process is a hinder from passing laws in a timely manner and that the

* **Post-Doctoral Research Fellow in Constitutional Law, Luiss Guido Carli University.**

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[1] As stated by Freedom House, *Freedom in the World 2021. Democracy under siege*, Washington, 2021, countries with aggregate score declines have outnumbered countries that improved their democratic level, thus incrementing the gap. Following Schumpeter's procedural definition of democracy, this paper uses the term *democracy* to refer to any institutional arrangement that allows the acquisition of power by means of a competitive and fair election. See J.-A. SCHUMPETER, *Capitalism, Socialism and Democracy*, New York and London, 1947, 269.

[2] See L. MEZZETTI, *Corrosione e declino della democrazia*, in *Diritto pubblico comparato ed europeo*, 2019, special issue, 421 and the references in the first eleven footnotes.

[3] See, for instance, FREEDOM HOUSE, *Nations in Transit* – 2021. *The Anti-Democratic Turn*, Washington. The Report concerns progress and setbacks in democracy in 29 countries from Central Europe to Central Asia.

scrutiny of government is often weak. As it was dramatically unfolded during the pandemics, the opposition in many Western European democracies is currently under "harassment"[4].

However, democracy is rooted in sovereign parliaments, as they are designed to serve as a "common house" where their members are enabled and qualified to express their views, reflecting the interests of all the different components of society. Genuine pluralism and freedom of opinion are two of the main cornerstones of a well-functioning democracy. Moreover, a healthy opposition measures the health of democracy: as Sartori underlined in the late Sixties, opposition is a "safety valve" to give voice to minoritarian groups of society[5]. Consequently, laying down a status for the opposition can be useful to enable it to play a constructive role in the conduct of the government and avoid that changes in majorities or in regime can thwart political pluralism and accountability[6].

The idea of a responsible opposition contrasts to the anti-system side of it, resulting in various flanks of theorization: the nature of the opposition changes with respect to the target towards which it is directed, be it the government, governmental policies, the political elite or the political regime[7].

Distinguishing a responsible opposition from sterile criticism is even more important today, when the surge in rivalry politics, determined by the rise of populism and nationalism worldwide, is fostering new cleavages in society and spreading illiberal practices amid established political elites and institutions[8]. Brexit, as well as Trump and Bolsonaro's presidencies are relevant to this regard, and it is no surprise that backlashes amplified[9]. Hungary and Poland's ruling parties are openly discrediting the integrity of their institutions. The demands for change are sometimes powerful, violent and chaotic, thus shaping anti-system oppositions. If these phenomena are disregarded, they may lead, at the end of the day, to political and constitutional disintegration, even in well-established democracies.

Understanding and regulating parliamentary opposition's status in both the legislative and scrutiny processes is key not only to the consolidation of young regimes but also to tackle the erosion of liberal standards in older democracies. The lack in a performing set of rules encouraging a constructive political competition and enacting minority rights can eventually affect the quality of the political debate. However, is it true the opposite statement? Can the institutionalization of opposition rights preserve the degradation of the political debate? The answer depends on the way the opposition is designed at constitutional level. This core

[4] N. BERMEO, *On Democratic Backsliding*, in *Journal of Democracy*, 2016, 13.

[5] G. SARTORI, *Opposition and Control. Problems and Prospects*, in *Government and Opposition*, 1/1966, 149-154.

[6] Competition between political parties is a structural inextricable component of democracy. See, for example, the "two-turnover test" as a way of measuring the democratic consolidation of a country, as laid down by S.P. HUNTINGTON, *Democracy's Third Wave*, in *Journal of Democracy*, 2/1991, 12-34 and further expounded in *The Third Wave: Democratization in the Late Twentieth Century*, London, 266.

[7] N. BRACK-S. WEINBLUM, *'Political opposition': Towards a Renewed Research Agenda*, in *Interdisciplinary Political Studies*, 1/2011, 69-79.

[8] Built from classic Rokkan's theory, see at least the recent works from G. BARBIERI, *Populism, cleavages and democracy*, in *Partecipazione e conflitto*, 11/2018, 202-224 and G. MARTINICO, *The Greatest Challenge. How Populism erodes European Constitutional Democracies*, in T. MARGUERY-S. PLATON-H. VAN EIJKEN, (eds.), *The European Elections, 40 years later. Assessement, Issues and Prospects*, Bruxelles, 2020, 105-118.

[9] See, for instance, the consequences on economic insecurity and health policies: E. SPEED-R. MANNION, *The Rise of Post-truth Populism in Pluralist Liberal Democracies: Challenges for Health Policy*, in *International journal of health policy and management*, 6(5)/2017, 249-251.

concept is already part of literature insisting that conceptualizing a notion of 'opposition' can be useful, for instance, to explain the nature of Euroscepticism in political competition[10].

Besides in Italy the effort to outline an official status for the opposition failed multiple times[11], raising not only contingent political issues but also weighty theoretical problems: a) the necessity to clarify who is the beneficiary of specific rights, who can be officially recognized as "parliamentary opposition"; b) what powers shall be allocated to the subjects thus identified; c) how to ensure that the allocation of specific powers to the opposition enables sufficient stability to Governments, political legitimacy and the preservation of the constitutional institutions from illiberal 'nuisances'; d) the source that shall regulate parliamentary opposition, be it at constitutional level or at secondary level.

In this short introductory essay, after explaining the methodology, I will analyze the presence and absence of a status for the opposition starting from civil law European countries and drawing attention to some exceptions. I will then try to make a catalogue of definitions of the institutionalized opposition with special focus on common law regimes. Then, I will shed light on the definitions extracted by other group of countries in order to verify if any "constitutional borrowing" from these regimes is possible in view of addressing new or emerging threats to democracy.

2. *Countries providing a constitutional status for the opposition*

Making a comparison on the constitutional protection of the status of the opposition is a complex topic. The most obvious consideration is that we have to deal with a huge mass of legal and political data. Majority-minority relationship is a manifold subject, where law, history, as well as political and social studies are tightly embroidered[12]. This is why it is

[10] See B. CARLOTTI, *Patterns of Opposition in the European Parliament. Opposing Europe from the Inside?*, Palgrave MacMillan, 2021.

[11] See, however the last developments following the reform of the internal rules of the Italian Senate, in M. MANETTI, *Regolamenti di Camera e Senato e la trasformazione dell'assetto politico-parlamentare*, in *Federalismi.it*, 1/2018, 7 ff. Some contributions to the Italian debate on the status of the opposition can be found in G. TARLI BARBIERI, *Lo "statuto" dell'opposizione*, in P. CARETTI (ed.), *La riforma della Costituzione nel progetto della bicamerale*, Padova, CEDAM, 1998; G. DE CESARE, *Maggioranza e opposizione nell'ultimo progetto della Commissione bicamerale*, in *Nuovi Studi Politici*, 2/1999, 55 ff..; M.E. GENNUSA, *Lo "statuto" dell'opposizione*, in *Le istituzioni del federalismo*, 1/2001, 249 ff.; A. BURATTI, *Governo, maggioranza e opposizione nel procedimento legislativo e nella programmazione dei lavori parlamentari*, in *Diritto e Società*, 2/2002, 289 ff..; C. CHIMENTI, *L'opposizione parlamentare nella nostra democrazia maggioritaria*, in *Quaderni costituzionali*, 4/2002, pp. 741-748; S. SICARDI, *Maggioranza e opposizione nella lunga ed accidentata transizione italiana*, in *AIC - Il Governo : atti del XVI Convegno annuale, Palermo, 8-9-10 novembre 2001*, Padova, CEDAM, 2002, 109 ff..; A. MORRONE, *Governo, opposizione, democrazia maggioritaria*, in *Il Mulino*, 4/2003, 637-648; F. Rigano, *Per lo statuto dell'opposizione*, in *Il Politico*, 1/2004, 165-171; E. GIANFRANCESCO, N. LUPO (eds.), *Le regole del diritto parlamentare nella dialettica tra maggioranza e opposizione*, Roma, Luiss University Press, 2007; A. ANTONUZZO, *Lo «statuto delle opposizioni» nella riforma costituzionale e le sue prospettive di attuazione, tra riforme dei regolamenti parlamentari e nuovi assetti istituzionali*, in *Amministrazione In Cammino*, 2016, 1-56; S. CURRERI, *Lo stato dell'opposizione nelle principali democrazie europee*, in *Rivista AIC*, 3/2016, 1-70; G. CAVAGGION, *Quali prospettive per lo statuto delle opposizioni? Riflessioni a partire dall'esperienza degli ordinamenti regionali*, in *Rivista AIC*, 2/2017, 30 ff.; M. CAVINO, *La necessità formale di uno statuto dell'opposizione. Nota a ord. C. Cost. 8 febbraio 2019 n. 17*, in *Federalismi.it*, 4/2019, 7 ff.; E. LONGO, *La funzione legislativa (e il rapporto maggioranza-opposizione)*, in *Rassegna di diritto pubblico europeo*, 1/2019, 15-30.

[12] The scientific debate on the opposition is huge. Concerning the social and political research under comparative perspective, reference should be made at least to O. KIRCHHEIMER, *The Waning of Opposition in Parliamentary Regimes*, in *Social Research*, 2/1957, 127-156; G. SARTORI, *Opposition and Control. Problems and*

paramount to delimit the scope of this introductory note: one shall consider only the legal institutions, rather than the vicissitudes of the political actors. To do so, all the rules of procedure and standing orders regarding the opposition in Parliament will lay on the edge of the present comparison, even if they concern substantial constitutional matter, as the method chosen requires sticking to the formal qualification of the legal source.

Opposition in trans-national regimes will not fall into the scope of the present note. However, the reader shall keep in mind the importance of the manifestations of parliamentary opposition as a means of strengthening the role of supranational representative bodies, such as the European parliament, as recognized by many scholars[13].

For the purpose of this note, *Constitute.org*[14] was the platform where two specific queries were performed: "opposition" and "minority". As a result, there was a list of 71 countries matching the desired entries. The texts referring only to racial, ethnical or regional minorities were manually excluded.

Without even trying to solve the epistemic problem originating from the difficulty of drawing an unbiased, flawless taxonomy of macrocomparative legal families[15], the States were arranged under five main groups: 1) formerly communist countries, including Balkan countries and countries formerly part of the Soviet Union[16]; 2) Lusophone countries[17]; 3) Latin-American countries[18]; 4) current Members of the Commonwealth[19]; 5) Francophone countries[20]. Besides, two states constitute a single-country group: Thailand is the only one from South-East Asia; Sweden is the sole Nordic country.

After completing the spreadsheet with useful data, I analyzed the presence or absence of some constitutional features on the opposition. Some outcome of this investigation is hereby presented: in the following paragraphs, I will enquire about the reasons of the nonappearance

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Prospects. Government and Opposition, cit., 149-154; R. A. DAHL, *Political Opposition in Western Democracies*, in J. BLONDEL (ed.), *Comparative Government*, London, 1969 and Id., *Polyarchy. Participation and Opposition*, New Haven-London, 1971, *passim*; A. LIJPHART, *Patterns of democracy: Government Forms and Performance in Thirty-six Countries*, 2nd edn., New Haven-London, 2012. For some consistent Italian literature see at least A. MANZELLA, *Opposizione parlamentare*, in *Enciclopedia Giuridica Treccani*, XXI, 1990, 1-5; G. DE VERGOTTINI, *Opposizione parlamentare*, in *Enciclopedia del diritto*, XXX, 1980, 532-561; A. MEZZETTI, *Opposizione politica*, in *Digesto delle Discipline Pubblicistiche*, Torino, 1995, 347 ff.

[13] L. HELMS, *Parliamentary Opposition and its Alternatives in a Transnational Regime: The European Union in Perspective*, in *The Journal of Legislative Studies*, 1-2/2008, 212-235; C. KARLSSON-T. PERSSON, *The Alleged Opposition Deficit in European Union Politics: Myth or Reality*, in *Journal of Common Market Studies*, 4/2018, 888-905.

[14] Z. ELKINS-T. GINSBURG-J. MELTON, *Constitute: The World's Constitutions to Read, Search, and Compare*, Austin, online world Constitution database.

[15] A problem already emphasized in J. HUSA, *Classification of Legal Families Today. Is it time for a memorial hymn?*, in *Revue internationale de droit comparé*, 1/2004, 11-38.

[16] This group includes Albania, Armenia, Croatia, Georgia, Kyrgyzystan, Uzbekistan.

[17] This group includes Angola, Brazil, Cabo Verde, Guinea-Bissau, Mozambique, Portugal, Saõ Tomé and Principe, East-Timor.

[18] In this group we have Argentina, Colombia, Ecuador, Panama, Paraguay, Suriname.

[19] This group is the widest and includes Antigua and Barbuda, Bahamas, Barbados, Belize, Bhutan, Dominica, Fiji, The Gambia, Grenada, Guyana, India, Jamaica, Kenya, Lesotho, Malta, Mauritius, Nepal (a candidate to Commonwealth), New Zealand, Pakistan, Papua New Guinea, Saint Kitt and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Seychelles, Solomon Islands, South Africa, South Sudan, Sri Lanka, Trinidad and Tobago, Uganda, Vanuatu, Zambia, Zimbabwe.

[20] This group includes Algeria, Burkina Faso, Burundi, Chad, Comoros, Congo, Democratic Republic of Congo, France, Ivory Coast, Madagascar, Morocco, Niger, Senegal, Togo, Tunisia.

of most European countries from the list, some exceptions to that and the patterns that can be found within the few constitutional definitions of opposition[21].

3. *The absence of a status for the opposition in civil law European countries and some exceptions*

Just by simply scrolling the list of the selected countries, it is possible to suggest some preliminary findings: most of the civil law European democracies avoid addressing the issue[22]. It is no surprise that developed democracies do not officially recognize the opposition in their Constitutions nor do even merely mention it. However, the absence from the list doesn't denote a lack of constitutional protection. In some circumstances, constitutional values and principles are enshrined in the spirit of a legal system to such an extent they simply don't need to be formally declared. In others, the decision not to include the opposition in the Constitution can produce questionable consequences. Alternatively, some guarantees can be implicitly laid down through supermajorities votes, other parliamentary procedural rules at constitutional level or general principles, like the freedom of political speech, the right to form political parties, the right to pluralism and so on.

The explicit examples are very few. In Germany, while the *Grundgesetz* is silent, most of the *Bundesländer* Constitutions are equipped with their *Oppositions-Artikles*[23]. All the subsequent *Landesverfassungen* tailored their opposition rules from this very Constitution. Hence, the importance of the rules that for the first time in history make it possible for the political parties to be enshrined in a regional German charter[24].

At the national level, we have two relevant examples of Constitutions in force quoting the opposition: 1976 Portuguese Constitution and French Constitution, as amended in 2008. Art. 114 of the first states that "minorities shall possess the right to democratic opposition". It, then, proceeds to offer a definition by the means of a political criterion ("political parties that […] do not form part of the Government"). This collective entity is given "the right to be regularly and directly informed by the Government as to the situation and progress of the main matters of public interest". This provision has been implemented by Law n. 24/98 on the

[21] As to the rights and duties of the opposition, reference has to be done to the extended version of the present note.

[22] However, Colombia is on the list, being the exception that proves the rule as it is the most recent accession to the OECD, on April 28th, 2020.

[23] From the German doctrine, see at least H.P. SCHNEIDER, *Die Parlamentarische Opposition im Verfassungsrecht der Bundesrepublik Deutschland*, Frankfurt, 1974; S. HABERLAND, *Die verfassungsrechtliche Bedeutung der Opposition nach dem Grundgesetz*, Berlin, 1995; R. POSCHER, *Die Opposition als Rechtsbegriff*, in *Archiv des öffentlichen Rechts*, 3/1997, 450 ff.; K. STÜWE, *Die Opposition im Bundestag und das Bundesverfassungsgericht: das verfassungsgerichtliche Verfahren als Kontrollinstrument der parlamentarischen Minderheit*, Baden-Baden, 1997, 24 ff..; D. KUHN, *Der Verfassungsgrundsatz effektiver parlamentarischer Opposition*, Tübingen, 2019.

[24] See also Art. 23, lett. a), as incorporated in 1971, of 1952 *Hamburg Verfassung*. As to the other *Länder*, the introduction of the *Oppositions-Artikle* in their Constitutions commenced in the 1990s. See M.E. GENNUSA, *Lo "statuto" dell'opposizione*, in *Le istituzioni del federalismo*, 1/2001, 249 ff. Other European countries (Greece, Spain, Belgium and Italy) have provisions regarding the opposition at regional level, but this is not formally recognized in their Constitutions. About the opposition at the Italian regional level, see P.L. PETRILLO, *Nuovi statuti regionali e opposizione*, in *Quaderni costituzionali*, 4/2005, 829-854.

"Estatudo do Direito de Oposição", that repeals the previous version (Law n. 59/77)[25]. The new *Estatudo* adds a functional criterion, further describing the opposition as a corps of MPs committed to scrutinizing and criticizing the policy of the Government. Being a consensual democracy, it is noteworthy that another provision of this act (Art. 3.4) distinguishes the parliamentary opposition at national and local level from "the other minorities not represented in any of the above bodies".

The second example is France, which has undergone relevant political transition after 1962 referendum introducing direct presidential election. In 1958, the electoral reform that switched to majority voting system did not help to simplify a fragmented political framework. Ever since 1962, instead, the party system has gone through an intense process of "bipolarization"[26]. Pending the political debate, many asked to regulate an official statute to the opposition[27]. The reform process had an important setback in 1974, when the *Conseil Constitutionnel* invalidated an attempt to rationalize the relationship between majority and minority groups, claiming the necessity to table a formal revision of the Constitution[28]. Only in 2008 a modernization of the Constitution was possible[29]. According to the newly enclosed parts, the opposition was ripped in two components: compared to the common law notion of "Official Opposition", France didn't even try to formalize an Opposition with capital "O"[30]. Rather, Arts. 48.5 and 51.1 now distinguish between "opposition groups" and "minority groups" as two different and variable agglomerations of representatives which are entitled "one day of sitting per month" plus more specific provisions from the Rules of Procedure. In fact, as to Art. 19 of the *Assembée Nationale* rules and Art. 5 *bis* of the Senate rules, at the beginning of each ordinary session every group has to declare if it stands as an opposition or a minority group[31].

Thirdly, there is a small reference in the Swedish system: Art. 14 of the Riksdag Act establishes that "minority spokesmen for a committee" shall have the right to make an intervention during the deliberative process, but "a distinction may be made" if it is a minister or a majority spokesman speaking. This minor mention means an indirect recognition of

[25] Art. 1 was put in writing in the same terms of the Hamburg Constitution, as noted by A. RINELLA, *Materiali per uno studio comparato su lo "Statuto" costituzionale dell'opposizione parlamentare*, Trieste, 1999, 95.

[26] Cf. F. HAMON-M. TROPER, *Droit Constitutionnel*, Paris, 41st edn., 2021, 532.

[27] Notably, the alternance in French politics was scattered in 2017 by the coming to power of Emmanuel Macron and his newly founded movement, La République en Marche.

[28] Decision No. 2006-537 DC of 22 June 2006. Cf. P. AVRIL, *« L'improbable » statut de l'opposition (à propos de la décision 537 DC du Conseil constitutionnel sur le règlement de l'Assemblée nationale)*, in *Les Petites Affiches*, s.n., 2006, 7-9; S. CURRERI, *Il Conseil constitutionnel boccia la via regolamentare allo statuto dell'opposizione*, in *Quaderni costituzionali*, 4/2006, 776-778.

[29] Cf. S. CECCANTI, *Lo Statuto dell'opposizione in Francia per una nuova valorizzazione del Parlamento*, in *Federalismi.it*, 2/2009, 1-10.

[30] For the French debate, see at least P. JAN, *Les oppositions*, in *Pouvoirs*, 1/2004, 23-43; J.-P. DEROSIER (ed.), *L'opposition politique*, Paris, 2016; Y. SUREL, *L'opposition au Parlement. Quelques éléments de comparaison*, in *Revue internationale de politique comparée*, 2/2011, 115-129.

[31] J.-E. GICQUEL, *Le groupe minoritaire : le nouveau venu sur la scène parlementaire*, in *Mélanges Henry Roussillon*, Toulouse, T. 1., 2014, 381 ss. The political minorities in France are also important for they have right to referral to the *Conseil Constitutionnel* ("*saisine*"). A group of at least sixty MPs is jointly given the early scrutiny of the laws, before their promulgation, on grounds of "nonconformity to the Constitution" (Art. 61 of the Constitution). Similarly, Art. 93 of the German Constitution entitles one fourth of the members of the *Bundestag* to refer to the Federal Constitutional Court to check the compatibility with the Constitution of a law, but this control is *a posteriori*.

parliamentary minorities but cannot imply that Sweden has a full-fledged status of the opposition at constitutional level.

In Italy, failure to provide a formal status to the opposition was registered after the unsuccess of the 2016 Renzi-Boschi constitutional reform, that amended also Art. 64 of the Constitution, devoting to the Parliamentary Rules the duty to acknowledge and enact a Statute of rights for the opposition[32]. This was only the last of a number of attempts originating from an age-old debate[33].

In summary, these few examples can suggest that the above definitions of "opposition" seem more emphatic than prescriptive. It is not rare to observe *Allparteienregierungen* (all-party governments) or grand coalitions governments: they shall be considered unconstitutional in the event that the existence of an opposition was considered compulsory by the Constitution. Also, in coalition governments, it is not rare to have minoritarian governments[34]. This is the main reason why a functional definition of opposition is preferred. However, even this criterion is not flawless: in order to identify the opposition parties, in case of absence of any explicit declaration of affiliation, we have to pick from the factions that "do not support" the government. This notion can be interpretated in various manners, as the degree of "non-support" can be different. But this volatility of the notion makes it hard to ponder the important legal consequences of an opposition statute[35].

Following Dahl[36], the absence of the status of the opposition in "high-consensus European systems" creates a sort of Leviathan political elite in which the people do not identify anymore, thus leading to anti-system opposition[37]. This theoretical assumption is regrettably confirmed by the recent empirical evidence[38].

4. *Political minorities or losing parties: a catalogue of definitions*

An interesting result from the comparative model on the status of the opposition is that only ten countries have an explicit provision containing a notion of "opposition"[39]. Merely two

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[32] Following V. LIPPOLIS, *Maggioranza, opposizione e governo nei regolamenti e nelle prassi parlamentari dell'età repubblicana*, in L. VIOLANTE (ed.), *Storia d'Italia, Annali, 17, Il Parlamento*, Torino, 2001, 655, it is paramount to amend the Constitution in order to have a politically mature opposition.

[33] Cf. *ex multis*, A. BURATTI, *Governo, maggioranza e opposizione nel procedimento legislativo e nella programmazione dei lavori parlamentari*, in *Diritto e Società*, 2/2002, 289 ff.

[34] See I. LUSTIK, *Stability in Deeply Divided Societies: Consociationalism versus Control*, in *World Politics*, 3/1979, 325-344.

[35] For other relevant countries, not directly mentioned above, see R.B. ANDEWEG-L. DE WINTER-W.C. MÜLLER, *Parliamentary Opposition in Post-Consociational Democracies: Austria, Belgium and the Netherlands*, in *The Journal of Legislative Studies*, 1-2/2008, 77-112.

[36] R.A. DAHL, *Political Opposition*, cit., 400.

[37] However, the German Constitution tries to face the phenomenon of anti-system parties in Art. 21, where it is prescribed that political parties shall not only "conform to democratic principles" but also refrain from "undermin[ing] or abolish[ing] the free democratic basic order" or endangering the existance of the Republic. To this purpose, the Federal Constitutional Court has a scrutiny on the question of unconstitutionality regarding political parties.

[38] E. SALVATI, *Opposition Parties in the European Parliament: The Cases of Syriza, Podemos and the Five Star Movement*, in *The International Spectator*, 1/2021, 126-142.

[39] Belize, Buthan, Burundi, Colombia, Fiji, Kyrgyzystan, Malta, Mauritius, Solomon Islands, Zambia. For "explicit status of the opposition" we intend a definition that is not related to any other provision, nor any notion obtainable indirectly by the one referred to the Leader of the Opposition.

out of ten are not part of the Commonwealth[40]. The first conclusion to be drawn is that a formal recognition of the opposition is more likely in a legal system with a strong British influence and, possibly, a first-past-the-post electoral system[41]. A country having an unfettered bipartisan system, assisted by a plurality electoral mechanism, will welcome a responsible idea of opposition[42]: either by referring to the constitutional position of the Leader of the Opposition or by providing an explicit definition entailing a numerical criterion, as it happens with Bhutan's Constitution.

Art. 158, indeed, states that "the party which wins the majority of seats in the National Assembly in the general election shall be declared as the ruling party and the other as the opposition party"[43]. The winner-loser dichotomy goes along with the idea of a parliamentary opposition enjoying an "institutional" function, since it is theoretically possible to alternate with the government[44]. The metaphor of the political power acting like a swinging pendulum is particularly suitable in these cases: consequently, it will be easy to distinguish the Official Opposition, whose set of rights is unequivocally enshrined in the Constitution, from the other opposition parties constituting a minor entity[45]. A peculiarity that was initiated by British parliamentary practice and after recognized by Art. 10 of the Ministers of the Crown Act.

As to the Commonwealth realms, it is possible to extract a definition from other provisions regarding the appointment of the Leader of the Opposition by the Governor-General. The wording is almost identical in all the countries that have such nomination: the Leader is chosen among those who seem able to command the "majority of the elected members of the House who do not support the Government" or, if no one appears to be in command, the Leader "of the largest single group of members of the House who do not support the Government"[46]. This notion combines a numerical and a political criterion[47]. The other Commonwealth countries relevant to this purpose adopt similar provisions: Art. 124 of the Indian Constitution

[40] This confirms the opinion that in most non-common law countries the parliamentary opposition is implicitly derived from certain procedural rules shaping the supervision, control and scrutiny of the government associated with the status of the opposition. Cf. G. DE VERGOTTINI, *Opposizione parlamentare*, 532.

[41] For the constitutional role of the British opposition, see R. BRAZIER, *The constitutional role of the opposition*, in *Northern Ireland Legal Quarterly*, 2/1989, 131-151. Regarding the American scene, scholars are discussing the benefits of granting some rules to the "Government in opposition", as a means of dividing power and "resolve the central crisis" posed by the unified American government. See D. FONTANA, *Government in opposition*, in n *Yale Law Journal*, 3/2009, 601.

[42] Even if this is clear by law, the concept is often "nebulous" in reality, as its usages encompass various phenomena. See P. NORTON, *Making Sense of Opposition*, in *The Journal of Legislative Studies*, 1-2/2008, 236-250.

[43] It continues by specifying that "in the case of casual vacancy, if the opposition party gains majority of seats in the National Assembly after the bye-election, such party shall be declared as the ruling party".

[44] G. DE VERGOTTINI talks about a "constitutional function of the opposition". See his *Diritto costituzionale comparato*, Padova, 7th edn., 2007, 496. *Contra*, R.A. DAHL, *Political Opposition*, 400, objecting to the theory of the opposition as being an autonomous function.

[45] There is also a third entity, different from Official Opposition and other opposition parties. See Art. 66 of the Constitution of Solomon Islands, distinguishing the "opposition group" as formed by MPs in opposition to the Government and the "independent group", comprising MPs who are independent both of the Government and of any opposition group.

[46] See Art. 79 of the Constitution of Antigua and Barbuda, Art. 82 of the Constitution of Bahamas, Art. 74 of the Constitution of Barbados, Art. 47 of the Constitution of Belize, Art. 66 of the Constitution of Dominica, Art. 66 of the Constitution of Grenada, Art. 89 of the Constitution of Jamaica, Art. 58 of the Constitution of Saint Kitt and Nevis, Art. 67 of the Constitution of Saint Lucia, Art. 59 of the Constitution of Saint Vincent and the Grenadines, Art. 83 of the Constitution of Trinidad and Tobago.

[47] In fact, the opposition is always a minoritarian force. However, it is not always true the opposite, i.e. a minority plays automatically the role of the opposition. Cf. A. MANZELLA, *Il Parlamento*, Bologna, 2003, 276; A. PIZZORUSSSO, *Minoranze e maggioranze*, Torino, 1993, 51.

alludes to a *de facto* Leader of the Opposition; alternatively, the office will be granted to "the Leader of single largest Opposition Party in the House of the People". In almost identical terms Arts. 90 and 73 respectively of the Constitution of Malta and Mauritius favor the Leader of the "opposition party whose numerical strength in the House of Representatives is greater than the strength of any other opposition party" or, otherwise, an appropriate person chosen at the discretion of the President of the Chamber. Similarly, it is for Art 92 of the Constitution of Lesotho.

While in Sch. 1.1 of the Rules of interpretation of the Constitution of Papua New Guinea, the opposition is defined by the only means of a political criterion ("those members of the Parliament who are not generally committed to support the Government"), some countries adopt a mere numerical criterion, as is the case of Art. 57 of the Constitution of South Africa (the "largest opposition party"), Arts. 149 of Gambian Constitution and 108 of Kenyan Constitution ("the second largest party or coalition of parties"), Art. 71 of the Transitional Constitution of the youngest State in the world, South Sudan ("the political party holding the second highest number of seats").

Some countries' charters mention the Leader of the Opposition, only to grant him the benefits and the privileges annexed to his status (Guyana, Nepal, Seychelles and some minor mentions in the Constitutions of Pakistan, Sri Lanka, Vanuatu, Uganda and Zimbabwe).

We can also find redundant notions, as in the case of provisions stating that the Leader of the Opposition is chosen amongst "the members of Parliament who do not belong to the Prime Minister's political party and are members of the opposition party or a coalition of opposition parties" (Art. 78, Constitution of Fiji) or "the Members of Parliament who are from the opposition" (Art. 74, Constitution of Zambia).

The other two countries that make a formal recognition of the opposition are Burundi and Kyrgyzstan. They both have relatively young Constitutions, dating respectively from 2018 and 2010, and they both use the criterion of affiliation. As to Art. 703 of the Kyrgyz Constitution, "the faction or factions which are not part of the parliamentary majority and which have announced their opposition to the latter, shall be considered as parliamentary opposition". Similarly, Art. 178 of the Constitution of Burundi requires parties or independents to "claim to adhere to the opposition in the National Assembly" as a condition to "participate of right in all parliamentary commissions". However, "a political party providing a member of Government cannot claim that it is part of the opposition".

5. *Conclusion: a necessary reversal in "constitutional borrowing"*

Constitutional borrowing, as a tendency to draft a charter «by inserting language taken from another people's governing document»[48], is carried out in a one-to-one direction, as legal history confirms: namely, from the most established regimes towards emerging democracies, interested in borrowing specific institutional designs from the constitution of

[48] N. TEBBE-R.L. TSAI, *Constitutional borrowing*, in *Michigan Law Review*, 2/2010, 462; *see* also L. EPSTEIN-J. KNIGHT, *Constitutional borrowing and nonborrowing*, ICON, 1(2), 2003, 196 ss.; M.D. ADLER, *Can Constitutional Borrowing be Justified? A Comment on Tushnet*, in *University of Pennsylvania Journal of Constitutional Law*, 1/1998, 350-357.

the previous. Nonetheless, such last point may require a desirable inversion of the direction. Older democracies shall now engage in "learning" from other experiences.

There is no doubt that common constitutional traditions shape the way the functioning of the opposition is outlined by the above examined documents. These findings make it easier to answer to the assumption made in the introduction: whether the insertion of constitutional provisions on the Constitution can be worthwhile to prevent the degradation of some democracies, in which the opposition lies powerless.

I think that the most recent developments in some EU Member States, regarding the increasing pressure – or even the blowback – on democratic institutions, require each State to take appropriate measures, without turning down a possible revision of the Constitution.

Further study should be conducted after this introductory analysis of the various Constitutions, in order to demonstrate that the lack of an explicit statute of the opposition in older democracies has various consequences: it may affect the quality of political opposition in and outside parliaments. It could be a loophole for anti-system opposition and disruptive political movements to either pave their way in the institutions and undermine democracy from the inside or to oppose to the government in further illiberal manners. Filibustering and volatility in the political affiliation of the MPs can cause the marginalization of the assembly, a defective or lacking scrutiny of the government and the ineffectiveness of the *check and balances* principle.

So, perhaps, this matter should be regulated by sources of "upgraded" level of normativity: instead of being set in parliamentary procedural rules, constitutional conventions and practice or unwritten rules, the core of the opposition status shall be set in stone at the constitutional level, where it belongs. This may yield some positive changes both in consensual democracies, by avoiding any abuse of the majority to the ordinary functioning of the system and ensuring the fairness of the political debate, and in majoritarian democracies, by allowing a more solid opposition to develop an alternative policy in a constructive way. Furthermore, the Constitution can offer a wider spectrum of protection when compared to ordinary laws or parliamentary internal rules, for the simple reason that its revision requires supermajorities or special procedures.

One may have a hard time in promoting the idea that democracy can be fostered by constitutionalizing the opposition. Yet, the existence of a status of the opposition is important *per se*. It may be a driving force for the protection of political pluralism, however illusory it may seem.

Ilaria De Cesare[*]

Constitutional Degradation and the Italian Parliament
How can the Centrality of the Representative Body in the Italian Legal System be preserved?[**]

ABSTRACT: ***The essay focuses on the process that is undermining the centrality of the Italian Parliament. The paper investigates whether the representative body has lost its role and suggests some legal interventions to correct this phenomenon. To do so, we are going to analyse the legal tools (and their effects) used by the Government to impose itself on the Parliament. Though the actual functioning of Italian legal system could still be considered as belonging to the area of what Constitution established, it does not seem possible to postpone a reform to ensure the centrality of the Parliament. It appears that the best tool would be an amendment of the Parliamentary Rules of Procedure, to guarantee an evolution – instead of a transformation - of the legal system.***

1. Introduction

In recent years, a lot has been said about transformation in representative democracies. In many legal systems, a re-alignment of functions among public institutions, due to the interaction between legal systems and social evolutions[1], has been observed. In this context, the concept of "constitutional degradation" has arisen, as the expression of the democratic legal system deterioration, both from the structural and the substantial point of view[2]. Examining this complex phenomenon, we decided to focus our attention on the actual equilibria between Government and Parliament in the Italian legal system. In Parliamentary systems such as the Italian one, these institutions are linked by a vote of confidence and they partially share some functions, as laid down by the Constitution.

Furthermore, in Parliamentary forms of Government the legislative function is traditionally considered the heart of the system, that's why we are going to analyse the problem of constitutional degradation referring to it as a sort of "health meter". In this paper, we are going to observe especially the legislative procedure, because it seems to be affected by some "degenerative praxis", which have been reinforced during the last years[3]. The goal is that of

[*] **Post-doc Research fellow in Public Law at the University of Pavia.**

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[1] Think about new questions and problems posed by climate change; gender theory, racial and ethnic revolution, globalization, and many other global changings occurring today. For example, see the reflections on challenges posed by the sustainability to the democracy, and vice versa, developed by F. Heidenreich, *How will sustainability Transform democracy? Reflections on an Important Dimension of Transformation Sciences*, in *GAIA - Ecological Perspectives for Science and Society*, vol. 27, no. 4/2018, 357-362.

[2] As reported years ago by R. OSTROW, *A deterioration of democracy? Corruption, Transparency and Apathy in the Western World*, in *The SAIS Review of International Affairs*, vol. 34, no. 1/2014,43, «Freedom house in 2007, announced the "profoundly disturbing deterioration" of democracy».

[3] C. FASONE talks about a «steady decline», *Catalysing Marginalisation. The effect of Populist Governments on the Legislative and Scrutiny Functions of the Italian Parliament*, in *Parliamentary Affairs*, vol. 74, 2021, 803.

investigating whether there are deviations from the constitutional starting model and how much serious they are.

So, once we have identified the constitutional model and the transformations accepted in it, and after the analysis of the degenerative praxis with the problems that they cause, we will try to offer some solutions to the "degradation of the legislative function". These solutions will consider the outcome of the last proposals of a general constitutional revision[4], and, on the other hand, the suggestions proposed by scholars to solve this problem.

2. *The constitutional degradation of the legislative procedure: is it a transformation of the legal system?*

The proposed analysis is going to be developed from a diachronic perspective, encompassing a time frame which, according to many scholars, has marked a deep change in our representative democracy, with a special focus on noteworthy events that have characterized our institutional experience in the last 25 years[5].

This temporal context is very useful, since it allows to highlight and link social and institutional dynamics, and it denotes the way in which Society and State (in all of its organs) have been influencing each other. Furthermore, this temporal context seems to suggest the concept of *transformation*, as a heterogeneous phenomenon of mutations, deviations, and re-adjustments respect to a starting model. This model is the results of a combination of normative (primarily constitutional provisions) and factual elements (especially political ones).

Therefore, the equilibria in the exercise of functions allocated among constitutional institutions - especially the shared functions - can change whenever a modification in a component of the constitutional system occurs, but it does not always happen in accordance with the Constitution. Consequently, we should understand which kind of transformation we are dealing with[6]. In order to do it, a reference to some scientific concepts – physical and chemical - may be useful. On one hand, the physical phenomenon of transformation (physical change) is the reversible transition of matter from one state to another. On the other hand, chemical transformation (chemical change) is the irreversible transfer of matter into a different one, through a reaction that severs the pre-existent chemical bonds and creates new ones.

In juridical science[7], the "body" subjected to the process of change is the constitutional system. But which kind of transformation is it? Is it possible to imagine, in the legal system,

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[4] As known, since '90 there has been an active constitutional revision season. But, except for the constitutional revision of the V Title and for some specific and short constitutional revision laws, every recent project of a deep revision of the legal system has ended without hitting the goal. On this see S. Illari, *Retracing some "foodsteps" on the road of the Italian Republican Constitution*, in Il Politico, no. 1/2019, 55-58.

[5] On the period between 1993 and the new elections in 2013, *ex multis*, S. SICARDI, M. CAVINO, L. IMARISIO (eds.), *Vent'anni di Costituzione (1993-2013). Dibattiti e riforme nell'Italia tra due secoli*, Bologna, 2015, where they point out the distinction between the First, Second and Third Republic. See, in any case, the critical observation by U. ALLEGRETTI, *Storia costituzionale italiana*, Bologna, 2014, 185.

[6] We may collect suggestions from a paper by R. BIN, *Mutamenti costituzionali: un'analisi concettuale*, in *Dir. Cost.*, no. 1/2020, 23-45, in which the Author underlines how the use of the expression "legal system" leads the scholars to talk about change, without considering that what change is lies in the description of *being* (how Italy is governed) but doing so while honouring the constitutional *need to be*.

[7] N. BOBBIO, *Scienza del diritto e analisi del linguaggio*, in *Riv. trim. dir. e proc. civ.*, 1950, 342-367, on the modern conception of science and, specifically, on juridical science, firstly as a rigorous language that allows us to transform subjective knowledge into objective knowledge.

two kinds of this phenomenon: a reversible one, that may fall within the controversial universe of *costituzione materiale* [material Constitution, sometimes also called living Constitution][8], and an irreversible one, that may pertain to the written constitution? As concerns the latter, we must immediately underline that it may cause a breakdown in the constitutional bonds[9].

What we have just outlined leads us to another question: which kind of change does constitutional degradation imply? Degradation of constitutional matter represents a step towards a sweeping legal transformation, since it is a process that impacts on institutional behaviours. If it is a structural change, that is to say a breakage in constitutional bonds between bodies (a sort of "constitutional" chemical change), it may cause a breakdown in the Constitution. It would entail an irreversible transformation of our legal system. For this reason, it is necessary to reflect on the equilibria affected by this phenomenon: if we understand the origins and modalities, it will be possible to make the decisions that will be able to prevent an eventual breakdown of the legal system.

As we said in the beginning, to answer these questions, the benchmark will be the relationship between Parliament and Government. From this perspective, we are going to verify whether the juridical instruments and practices that have affected the *exercise* of the legislative function have also affected its *ownership*. In doing this, we will attempt to detect eventual deviations from the Constitution and from the legal system it prescribes. Moreover, the very notion of "form of Government" is not merely descriptive. As a matter of fact, even if classifications are ideated to help the scholars[10], "form of Government" has also a prescriptive meaning[11]. Indeed, the Constitutional Court has used this expression in order to evaluate the power of the Parliament to vote a motion of individual no-confidence for a Minister, in absence of any reference to that power in the constitutional text[12]. Therefore, following the most recent theories about this point, the notion of form of Government accepted in this essay is the one linked to the normative-constitutional elements, without involving other elements, even if they are useful to its functioning[13].

Considering the above, it is worthwhile to give a brief description of what proves to be the

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[8] On the admissibility of the concept elaborated by Constantino Mortati and on its uses, see A. BARBERA, *Ordinamento costituzionale e carte costituzionali*, in *Quad. Cost.*, no. 2/2010, 311-358. We must stress that we are deeply convinced that the only possible "order" is the one prescribed by the written Constitution, which represents the insuperable limit for evaluating all institutional behaviours.

[9] R. BIN, *Mutamenti costituzionali,* cit., 31.

[10] On the relationship between forms of State and forms of Government C. MORTATI, *Le forme di Governo. Lezioni*, Padua, 1973.

[11] L. ELIA, *Governo (forme di)*, in *Enc. dir.*, XIX, 1970, 634-675.

[12] As recalled by G. SOBRINO, *La forma di Governo*, in S. SICCARDI, M. CAVINO, L. IMARISIO (eds.), *Vent'anni di Costituzione*, cit., 65. Before, L. ELIA, *Forme di Stato e forme di Governo*, in S. CASSESE (ed.), *Diz. dir. pubbl.*, Milan, 2006, 2600-2601, that underlines the use of expressions such as «logica del governo parlamentare» [Parliamentary system logic], «sviluppo storico del governo parlamentare» [historical development of Parliamentary system] and «regola fondamentale del regime parlamentare» [fundamental rule of Parliamentary system]. On Form of Government construed with a prescriptive meaning, read points 7-8 «considerato in diritto», decision no. 7/1996, Constitutional Court.

[13] M. LUCIANI, *Governo (forme di)*, in *Enc. dir.*, *Annali*, III, 2010, 538-596, who separates the political-institutional system – to lead even the parties system – from the normative-constitutional one. The Author also excludes from the Form of Government provisions about normative production «perché la regola del rapporto fra gli organi, in questo caso, è mediata dalla regola del rapporto fra gli atti e i (fatti)normativi», [because the rule of the relationship between organs, in this case, is mediated by the rule of the relationship between normative acts and praxis] which in this analysis are considered as an element necessary to define the relationship between Parliament and Government. M. LUCIANI, *Governo*, cit., 586.

equilibria between Parliament and Government established by the Constitution, concerning the legislative function.

In the constitutional text, this function is outlined not as an exclusive prerogative of the Parliament. However, observing all the constitutional provisions that refer to the law-making process and to other acts having the force of the law, we may discern a position of prominence (*lordship*) of the Parliament. This prominence can expand or diminish, but it can never completely disappear, because the Chamber of Deputies and the Senate are and remain the holders of the legislative function at the State level[14], where that function can be "delegated" to the Government only if the constitutional provisions are honoured. After all, the Parliament is the body that is most deeply, even genetically, linked with the representative principle, since it is the only place in which the representatives of the citizens seat. The legislative function is the paradigmatic way of applying this constitutional principle: thanks to this function, the elected majority can translate its political guidance into positive laws, in compliance with the Constitution.

Notwithstanding the foregoing, over time we have witnessed a gradual reduction in the exercise of the legislative function by the Chambers, with a shift toward the Government[15]. This has led the doctrine to support an enhancement of parliamentary instruments of control, as the Government is becoming the protagonist in the legislative decision-making process, i.e. through the decree-law procedure and through the legislative delegation procedure.

In relation to the questions posed above, these considerations introduce a new (and last) question: is it enough to enhance the function of control in order to ensure respect for the legislative *ownership*?

In the light of that, we can proceed to examine what seems to characterize the degradation that is impacting our Parliament: after all, it is within the opaque folds of the system rules and institutions that constitutional degradation is creeping in.

3. *Law making process and degenerative praxis*

When Bagehot enumerated the functions of the House of Commons, he did not consider the legislative function « as important as the executive management of the whole state, or the political education given by Parliament to the whole nation»[16]. The legislative function is not (any longer) considered as the function that displays the prominence of the Parliament also in

[14] On this see art. 70 Const., that identify the institutional body "delegated" to the legislative function. N. LUPO, *Art. 70*, in R. BIFULCO, A. CELOTTO, M. OLIVETTI (eds.), *Commentario alla Costituzione*, Turin, 2006, 1337.

[15] C. FASONE, *Catalysing marginalisation*, cit., 804, on a «shift from parliamentary "centrality" to marginalisation" ». A comparative analysis of legislation in 13th and 14th legislature is offered by G. CAPANO, M. GIULIANI, P. J. BARR, *The Italian Parliament twixt the logic of Government and the Logic of Institutitons (Much Ado about Something – but What Exactly?)*, in *Italian politics*, vol. 18, 2002, 142-161. Interesting for our investigation, the evidence about the use of decree-laws in numbers of items.

[16] W. BAGEHOT, *The English Constitution*, [1867], M. Taylor ed., New York, 2001, 100-102. These observations are the result of a change that affected the Parliament, concerning the sharing of the political direction function. See S. SICARDI, *Il parlamento e il suo futuro*, in M. CAVINO, L. CONTE (eds.), *Le trasformazioni dell'istituzione parlamentare. Da luogo di compromesso politico a strumento tecnico della divisione del lavoro*, 25 November 2016, Naples, 2017, 12-13.

the Italian legal system [17], even if the Chambers formally holds its ownership[18]. With regard to the legislative function, we observe a number of consolidated distortive practices in the use of governmental co-participation instruments, that could be considered as signs of the Italian constitutional degradation.

The first degenerative praxis occurs in the procedure for the adoption and confirmation of decree-laws[19]. Through time, such practice has determined three tendencies in constitutional case-laws, concerning the "come back to the Constitution"[20]: the possibility of declaring the unconstitutionality of decree-laws adopted in the absence of conditions imposed by art. 77 Const.[21]; the censure of the reiteration[22]; finally, the necessary homogeneity of the substance of the confirmation law with respect to the law-decree[23].

The 2017-2018 report from the *Osservatorio sulla legislazione*[24] shows relatively few decree-laws adopted during the 16th and 17th legislatures (respectively, 14.37% and 12.92% out of all normative acts)[25]. But the most interesting result is the one related to the confirmation: 28% and 22%, respectively, out of all laws (almost 50% of all normative acts), are confirmation laws, while just a few are non-confirmed decree-laws, mainly because their content has merged into other decree-laws[26]. However, a "substantive" data should be added to the numerical one: decree-laws are increasingly showing heterogeneous content[27], despite the declared unconstitutionality of this kind of provisions, even if it is included in the confirmed decree-law *ab origine*[28].

The numerical data on the confirmation suggests that this procedure is becoming a sort of *de facto* ratification. Although numerous decree-laws are confirmed with modifications, this suggestion is confirmed by the difficulties that the competent Commissions face in reviewing

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[17] G. BRUNELLI, *Il Parlamento*, in *Rivista AIC*, no. 2/2018, 7, who linked the prominence of the Parliament in the legal system to the circumstance that it is the centre of popular sovereignty.

[18] Discussions on a "production machine" of laws G. BRUNELLI, *Il Parlamento*, cit., 14.

[19] The origins of certain institutional behaviours date very far back in time, but it is just since the 90s that the Constitutional Court has started its interpretational orientation. See N. Lupo, *Il Governo italiano*, 173.

[20] G. D'AMICO, D. TEGA, *1993-2013: la Corte costituzionale tra giurisprudenza e politica*, in *Vent'anni di Costituzione*, cit., 560.

[21] Decision no. 29/1995 Constitutional Court, and then decisions nos. 171/2007 and 128/2008.

[22] Decision no. 360/1996 Constitutional Court.

[23] Decisions no. 22/2012, 34/2013 and 32/2014 Constitutional Court.

[24] Established within the Chamber of Deputies. The report *La legislazione tra Stato, Regioni e Unione Europea*, *Rapporto 2017-2018* was published on the institutional web site of the Chamber and is freely available at the web address https://temi.camera.it/leg18/temi/il-rapporto-sulla-legislazione-2017-18.html.

In July 2020, the 28th, the 2019-2020 report was presented. The last report analyses the first two years of 18th legislature (March 2018, the 23rd – July 2020, the 23rd) and refers to the State legislation as consolidated trends. https://temi.camera.it/leg18/temi/il-rapporto-sulla-legislazione-2019-2020.html, 23. About this consolidation see also C. FASONE, *Catalysing Marginalisation*, cit., 805-808.

[25] Report 2017-2018, 17.

[26] Report 2017-2018, 18 and 21. The report underlines that during the 17th legislature just two law-decrees were effectively not confirmed. Notice that the report on the first two years of 18th legislature shows a slight decrease in confirmation laws, with 34% on the total laws, down from 39% for the first two years of 17th legislature. See report 2019-2020, 26.

[27] On this point, and for a specific analysis of the Report 2017-2018, see E. AURELI, *L'uso dei decreti legge nella XVII legislature,* in *Rivista AIC*, no. 1/2019, 302-333.

[28] Decision no. 128/2008 and, previously, decision no. 171/2007 Constitutional Court. Furthermore, in decision no. 22/2012, for the first time the Constitutional Court declares the unconstitutionality of a provision introduced with the confirmation of a decree-law, due to its clear extraneousness to the original content of the decree. Even earlier on this point, Q. CAMERLENGO, *Il decreto legge e le disposizioni "eccentriche" introdotte in sede di conversione*, in *Rass. Parl.*, 2011, 91-120.

heterogeneous contents in contingent times and in ensuring an in-depth discussion about them[29].

We find our second degenerative practice moving onwards to the legislative delegation and its use. It should be noted that over time, there have been more problematic cases concerning the correspondence between delegation laws and legislative decrees[30] than cases concerning the way in which delegation is enacted[31]. But the problem with the exercise of the legislative function by the Parliament, in the delegation law, lies specifically in the latter ones[32].

In particular, a phenomenon defined as "law *with* delegation"[33] has been observed. The delegation is often included in laws with a more extensive content, or in laws adopted for different reasons, as is the case of the delegation *in* a confirmation law. This procedure risks to hinder a serious parliamentary discussion on the delegation, and the discussion risks to completely disappear when the confirmation law is protected by a question of confidence[34]. Therefore, in this manner, the Parliament deprives itself (temporarily, of course) of the legislative function, without a real will to do it.

The last «problematic practice»*[35]* is that of the question of confidence on the maxi-amendments. For long time, the doctrine has been underlining that these kinds of amendments are rarely compatible with the constitutional architecture of the legislative procedure, which envisages that the Parliamentarian's will should be «as free as possible»[36]. Nevertheless, the approval of the law is increasingly secured by the question of confidence, an instrument which relegates the parliamentary discussion (and its will) to the back burner. Furthermore, we must highlight that, starting from the 17th legislature, the practice of institutional *fair play* - in which the Government refrained from proposing maxi-amendments that would have a different content from that of the text examined by the Parliament[37] - was interrupted[38]. This interruption has deteriorated parliamentary discussion even further.

The most evident shift in maxi-amendment praxis, that took place during the discussions of the budget law for 2019, was the focus of a case-law about the conflict arising from allocation of powers of the State, and that ended with Decision no. 17/2019 Constitutional court. The

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[29] Report 2017-2018, 8, confirmed by report 2019-2020, 23. The data about the confirmation of decree-laws was considered an element leading to doubts on the theory that see in the governmental use of emergency decrees an attempt to the parliamentary discussions. But, the extremely heterogeneous content of decree-laws, the limited timeframes for discussing and approving them, and the subdivision into many commissions are still all elements that hinder a serious parliamentary discussion. See E. AURELI, *L'uso del decreto legge*, cit., 306-314.

[30] *Ex plurimis*, Decision no. 80/2012 Constitutional Court.

[31] We note, from the opposite perspective, decision no. 251/2016 Constitutional Court, which declared the unconstitutionality of the content of a delegation law, involving a number of legislative decrees as well. On this point, see N. LUPO, *Il Governo italiano, settanta anni dopo,* in *Rivista AIC*, no. 3/2018, 189.

[32] Take, for example, the practice of introducing other restrictions, such as the advice given by Parliamentary Commissions in order to overcome the absence of criteria required under art. 76 Const. R. BIN, G. PITRUZZELLA, *Diritto costituzionale*, XXI ed., 385-386.

[33] M. CAVINO, *Le fonti del diritto*, in *Vent'anni di Costituzione*, cit., 336.

[34] See M. CAVINO, *Le fonti*, cit., 336-337, analysing decision no. 237/2013 Constitutional Court; on this topic, see also A. Ruggeri, *La impossibile "omogeneità" di decreti-legge e leggi di converisone, per effetto della immissione in queste ultime di norme di delega (a prima lettura di Corte cost. n. 237 del 2013)*, in *Forum di Quad. cost., Rassegna,* no. 11/2013, 1-9.

[35] ∫∫ 5 «considerato in diritto», decision no. 251/2014 Constitutional Court, as recalled by N. Lupo, *I maxi-emenamenti e la Corte costituzionale (dopo l'ordinanza n. 17 del 2019)*, in *Oss. Fonti*, no. 1/2019, 6.

[36] On this point, see A. Ruggeri, *In tema di norme intruse e questioni di fiducia, ovverosia della disomogeneità dei testi di legge e dei suoi possibili rimedi*, in *federalismi.it*, n. 19/2009, 1-11.

[37] N. LUPO, *I maxi-emendamenti*, cit., 4.

[38] C. FASONE, *Catalysing Marginalisation*, cit., 806-807.

claimant Parliamentarians complained about a «inaccettabile totale compressione del ruolo delle Camere» [unacceptable total compression of the Chambers role][39], due to the inability to examine, in the Commission and in the Assembly, the content of the proposed maxi-amendment, because a question of confidence had been imposed on it[40].

Perhaps the Court has demonstrated a cautious approach[41], declaring the appeal as inadmissible, since a violation of the Parliamentarian prerogatives, which must be *very* clear, has not been found[42]. Moreover, this case-law seems to retrace the other ones on decree-laws, in which the Court had chosen to declare as unconstitutional only the «*evidenti*», «*manifeste*», «*palesi*» [evident, clear, obvious] violations of the Constitution, leaving significant room in the relationship between the Parliament and the Government. But in decision no. 17/2019, the Court also emphasised the importance of reducing practices that undermine the role of the law «as a place for public and democratic conciliation of various interests at stake»[43].

We must stress that a new institutional behaviour that impacts on the role of the Parliament has arisen in the context of the emergency caused by Covid-19 pandemic, especially in the first period. The Government, instead of using numerous decree-laws, imposed the conditions aimed at facing (partially) the emergency using a different act - the Prime Minister Decree (D.P.C.M.) - in decree-law no. 9/2020[44]. As this practice of few decree-laws and many D.P.C.M.s was carried on, we observe that later, there has been a partial reaffirmation of the Parliament through the confirmation of decree-law no. 19/2020. The latter included an amendment by which the Government is required to illustrate the Prime Minister Decrees to the Chambers *before* their adoption. In this manner, the Parliament can at least elaborate some suggestions[45].

Even if such institutional behaviour is non-structural (because it is linked to the management of the pandemic[46]), by the other described practices the Parliament is relegated to a secondary role, since it doesn't simply lose its prominence in the exercise of the legislative function, but it also walks in the shadow of the Government, thus retaining a merely formal - or even ancillary - role.

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[39] ∫∫ 8 «ritenuto in fatto», decision no. 17/2019 Constitutional Court.

[40] On the budget session 2020 and on the repetition of practices seen before – except for the government maxi-amendment – see C. BERGONZINI, *La sessione di bilancio 2020, tra pandemia e conferma delle peggiori prassi*, in *Oss. Cost.*, no. 1/2021, 215-232.

[41] It is very difficult to imagine a more severe violation than the one that happened in this procedure. See A. ANZON DEMMIG, *Conflitto tra poteri dello Stato o ricorso individuale a tutela dei diritti?*, in *Giur. Cost.*, no. 1/2019, 189, and M. MANETTI, *La tutela delle minoranze parlamentari si perde nel labirinto degli interna corporis acta*, *ibidem*, 193. This case-law was recently confirmed by decisions nos. 274-275/2019 and no. 60/2020 Constitutional Court.

[42] On the reasons given by the Court see the «considerato in diritto». Critical, *ex multis*, A. RUGGERI, *Il "giusto" procedimento legislativo in attesa di garanzie non meramente promesse da parte della Consulta*, in *Rivista AIC,* no. 2/2019, 597-610.

[43] ∫∫ 4.3 «considerato in diritto», decision no. 17/2019 Constitutional Court.

[44] Among the first analyses see M. CAVINO, *Covid-19. Una prima lettura dei provvedimenti adottati dal Governo*, in *federalismi.it*, no. 1/Osservatorio emergenza Covid, 1-9, M. Luciani, *Il sistema delle fonti del diritto alla prova dell'emergenza*, in *Rivista AIC*, no. 2/2020, 109-141.

[45] For a reconstruction of the steps that led to a *parliamentarisation* of the management of the pandemic, see V. LIPPOLIS, *Il Rapporto Parlamento-Governo nel tempo della pandemia*, in *Rivista AIC,* no. 1/2021, 268-277.

[46] For future, we should collect suggestions from M. LUCIANI, *Il Sistema*, cit., 120 and 141, and control that the extra-ordinary do not become ordinary.

With the annihilation of parliamentary discussion[47], it seems very difficult to consider that a reorganization within the exercise of the legislative function is being carried on. In these circumstances, its *ownership* appears to be compromised, since it is devoid of substance if it lacks genuine and aware *exercise* of such function. Therefore, the spread of practices that reduce or eliminate discussions about normative acts, which seriously impairs the will of each Parliamentarian, *also* causes deterioration in the *ownership* of the legislative function.

This degradation could ultimately lead to a "chemical" transformation of the Italian form of Government. We are facing practices that appear to be divergent with respect to the Constitution and, if they become consolidated[48], they could lead to a different legal system and not just to a new layout of institutional equilibria.

In addition, the progressive removal of discussions on laws prevents the Parliament from reaching a reconciliation of the various requests coming from society[49], which is the heart of the legislative function. We are witnessing the increasing affirmation of a binary yes/no approach, which is genetically extraneous to the notion of parliamentary discussion[50], but is very common in today society and in its political parties. This circumstance must be taken into consideration, because the solutions proposed to save the parliamentary ownership of the legislative function will not be totally effective without a concomitant resurrection of the representativeness[51].

4. *A possible solution to rebalance the legislative function*

Among the many possible solutions to correct the described practices, the one that seems to be – for now - the most adequate is a reform of the Parliamentary Rules of Procedure (Parliamentary Rules) directed to restore the constitutional equilibria of the legislative function[52]. The debate about the reduction of the role of Chambers – not just a quantitative reduction, but also a qualitative one – leads scholars to propose an enhance of the parliamentary function of control[53]. Although there are various points of view on different versions of this theory, the assumption that associates all of them seems to be the acceptance

[47] Even at the beginning of the 18th legislature we had seen this phenomenon, with the formation of the Conte I Cabinet. A return to the centrality of the Parliament took place during the formation of Conte II Cabinet. See Q. CAMERLENGO, *La forma di governo parlamentare nella transizione dal primo al secondo esecutivo Conte: verso un ritorno alla normalità costituzionale?*, in *Oss. Cost.*, no. 5/2019, 13-24. An analysis of parliamentary discussion at the beginning of the XVIII legislature is offered by C. F. FERRAJOLI, *Le Camere non discutono più. Crisi del dibattito parlamentare e irresponsabilità politica degli organi rappresentativi*, in *Lo Stato*, no. 13/2019, 29-45.

[48] If these practices had the strength to become full-fledged constitutional conventions, this would be a problematic hypothesis that should be examined. On this point, see the studies collected in A. BARBERA, T. F. Giupponi, *La prassi degli organi costituzionali*, Bologna, 2008.

[49] See G. AZZARITI, *Le trasformazioni dell'istituzione parlamentare: da luogo del compromesso a strumento tecnico della divisione del lavoro. Considerazioni conclusive*, in *Le trasformazioni*, cit., 112.

[50] A. D'ATENA, *Tensioni e sfide della democrazia*, in *Rivista AIC*, no. 1/2018, 13-15.

[51] In a paper that investigates the contradictions between democracy and the legal system generated by populisms, F. BILANCIA, *The constitutional dimension of democracy within a democratic society*, in *Italian journal of Public* Law, vol. 11, issue 1/2019, 8-21, outlines the «cut between parliamentarian institutions and the people», analysing the crisis of representativeness.

[52] See N. LUPO, *Funzioni, organizzazione e procedimenti parlamentari: quali spazi per una riforma (coordinata) dei regolamenti parlamentari?*, in *Federalismi.it*, special no. 1/2018, 14-16.

[53] In the past, this function was overlooked because the Parliament used to influence the Government action thought the legislative function. C. Fasone, *Catalysing marginalisation*, cit., 808.

of a condition: we are witnessing so many transformations outside the Parliamentary system, that an overhaul of the Parliament role is necessary, even without any revision of the Constitution[54].

Even if this assumption is incontrovertible, we ask ourselves whether the overhaul of the Parliament must entail the acceptance of the erosion of the legislative function, counterbalanced with an enhancement of the function of control.

First of all, it is worthwhile to clarify that the function of control is inherent to the Parliamentary system, since the action of the Government is always subject to evaluation and confirmation by the political representative body: the Parliament can express a vote of no confidence on the Government[55] and cause its resignation, without a concomitant fall of the Chambers[56]. In this way, the control is extended to all the functions exercised by the Parliament over the Government, and it consists in verifying the action of the controlled institution. As a result, the function of control is transversal[57].

Focusing on the relationship between the control and the normative function, some proposals recommend a specific «legislative control»[58]. In particular, what is being proposed is to enhance the parliamentary inquiry, which had been provided only under art. 79 Chamber Rules since 1997. This power is implicitly provided under art. 72 Const.[59] – to be read in conjunction with art. 70 Const. on the parliamentary ownership of the legislative function[60].

With no doubt, inquiry is an important step in the law-making process, since it allows the law to perform its function of regulating society with a «full cognition»[61]. We can certainly affirm that an in-depth and adequate inquiry is a necessary condition, but it is still not enough to save the Chambers ownership of the legislative function. Indeed, the inquiry may be sacrificed by the practices analysed before[62]; for example, when the question of confidence is posed about a maxi-amendment on a confirmation law[63]. Therefore, first of all it is necessary to restore the identification between the ownership and the exercise of the legislative function, and later it will be possible to enhance the inquiry phase.

In addition to the foregoing, we need to make another consideration: since the Parliament is the place of national political representation, it *cannot* give up the legislative function,

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[54] *Ex multis*, F. DAL CANTO, *Tendenze della normazione, crisi del Parlamento e possibili prospettive*, in *federalismi.it*, special no. 3/2019, 41-43; P. PICIACCHIA, *La funzione del controllo parlamentare in trasformazione*, *ibidem*, 134-137; A. MANZELLA, *L'opposizione in regime di parlamentarismo assoluto*, *ibidem*, 279-283. More in general, see the studies collected in the volume M. CAVINO, L. CONTE (eds.), *Le trasformazioni*, cit.

[55] On the control function, in connection with the confidence relationship, A. Manzella, *Il parlamento come organo costituzionale di controllo*, in *Nomos*, n. 1/2017, 6.

[56] A. D'ANDREA, *Le funzioni di controllo: dal Parlamento controllore al Parlamento controllato*, in *Le trasformazioni*, cit., 91-96.

[57] N. LUPO, *La funzione di controllo parlamentare nell'ordinamento italiano*, in *Amministrazione in cammino*, 2009, 3-4. On the difficulties in restricting notions and effects of parliamentary control, see P. PICIACCHIA, *La funzione di controllo*, cit., 137-140.

[58] A. MANZELLA, *L'opposizione*, cit., 282.

[59] F. DAL CANTO, *Tendenze della normazione*, cit., 50.

[60] Q. CAMERLENGO, *L'istruttoria legislativa ed il sindacato di costituzionalità*, in *Giur. Cost.*, no 3/2012, 2457-2481, especially 2460-2461.

[61] Q. CAMERLENGO, *L'istruttoria legislativa*, cit., 2462.

[62] See A. D'ANDREA, *Le funzioni di controllo*, cit., 101-102.

[63] A practice which had serious adverse effects on the inquiry procedure pursuant to art. 79, Chamber Rules, together with that of referring the discussion of projects to the Assembly even when the preliminary investigation has not been completed or has not even begun. See N. LUPO, *La funzione di controllo*, cit., 12-13. On art. 79 Chamber Rules, discusses the «lost chance» F. DAL CANTO, *Tendenze della normazione*, cit., 48.

because the electoral game is played in it[64]. That's why a technical control over the government acts cannot be enough to re-establish the centrality of the Chambers. Moreover, the function of control is supposed to value the responsibility of the Government and it does not allow a concrete parliamentary influence on the normative act, even strengthening the preventive control[65].

At the same time, it is on the representative level that we face the greatest difficulties, since the practices we have examined so far are just the most evident aspect of a deeper degradation affecting the Parliament *as* the centre of *political representation*. This degradation concerns the representative concept itself and it shows up through the elimination of a dialogue between opposed parties, in favour of a binary approach, which is typical of the direct democracy and not of the representative one.

For this reason, as we face this degradation, the real question is whether we want to save the Parliament's *ownership* of the legislative function. If the answer is affirmative, it will not be enough to enhance the function of control[66], but it will be also necessary to streamline the practices we have analysed[67], and to achieve a decisive restoration of the representative branch[68].

This is the real challenge that we are facing. In order to win, the proposed amendment to the Chambers Rules should restore the exercise and the ownership of the legislative function, without forgetting the circumstances that have led the Government to assume a more decisive role in the law-making procedure.

Maybe it is necessary to conceive the legislative function as a *genus*, which encompasses two *species*: a "technical" one, exercised also with the Government, and a "political" one. In the first type, we can imagine that the political aspect is mixed with a technical one. This type includes the analysed practices, and it has to be regulated so that the technical aspect does not prevail over the political one, in conformity to the Constitution. In the second type, the Chambers should exercise the more traditional legislative function, which makes them the centre of the political representation.

The Parliament must not withdraw in front of high political choices, which qualify the nature of a State, and, at the same time, it must effectively take part in the adoption of normative acts deriving from a legislative function shared with the Government. This could be a (partial) solution to reverse the current trend towards constitutional degradation and to avoid the risk of an irreversible constitutional breakage.

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[64] V. LIPPOLIS, *Un parlamento sotto attacco e in crisi di identità*, in *federalismi.it*, special no. 3/2019, 253.

[65] On this point, P. PICIACCHIA, *La funzione di controllo*, cit., 142-144.

[66] The constitutional reform of 2016 had attempted to move in this direction and seemed to be inspired by the French constitutional reform of 2008, which had bolstered parliamentary control. See N. LUPO, *Funzioni, organizzazione, procedimenti*, cit., 20. But in France, we have a different form of Government, i.e., a semi-presidential one, where the relationship between Government-Parliament-citizens is partially different from that seen in the Parliamentary Form of Government.

[67] Defined as « unsolved problems of two Chambers» by G. BRUNELLI, *Il Parlamento*, cit., 14. Note that during the 17th legislature, a process to reform the Chambers Rules had begun, but only ended in the Senate and without the expected results, as evidenced by the content of decision no. 17/2019 Constitutional Court.

[68] G. AZZARITI, *Le trasformazioni*, cit.

Marco Bruno Fornaciari*

Involution of the Constitutional Order and the Role of the Highest Courts: a Comparative Perspective**

ABSTRACT: ***The contribution examines in a comparative key the function performed by the High Courts in the individual national systems, subject to involutionary processes of the traditional forms of government expression of liberal-democratic constitutionalism. The legal doctrine questions the affirmation of an unprecedented paradigm, albeit with the high democratic standards required for member states to join supranational organizations.***

1. *The phenomena of democratic decay and the involvement of constitutional justice bodies*

The objective of this essay is to reflect on the phenomenon of the so-called "regressions" or constitutional degenerations, based on the analysis of some significant cases (Poland, Hungary, Russia, Turkey and Venezuela) and analyzing the role and fate of apical courts[1] both in phase of the regression than in the following one. In particular, we want to pay attention to the ways in which regressions have affected the constitutional text.

The reflections arising from the comparative investigation of the five experiences cited highlight a phenomenon of wide practical diffusion and equally wide attention on the part of international doctrine which is very focused on the theme of the decay of democracies against the background of the crises which, judicial power, in some cases led to the deterioration of apparently consolidated democratic structures[2]. Nonetheless, there are difficulties in framing these phenomena as well as the political-institutional forms they generate, if we think in particular of the traditional classification of forms of state in the context of comparative law studies. In fact, the legal arrangements in front of which we find ourselves reveal hybrid characteristics.

The study of the phenomena of crisis or regression of constitutional democracy is useful for understanding the modalities of degeneration, for identifying the salient and common

* **Lawyer in Taranto.**

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[1] By top courts we mean here the courts that exercise control of constitutionality. Therefore, in 4 of the 5 cases we are dealing with constitutional courts while for Venezuela we refer to the Sala constitucional of the Supreme Court of Justice (Tribunal Supremo de Justicia, infra TSJ), but the constitutionality check can also be carried out by other courts pursuant to 'art. 334, c. 2 of the 1999 Bolivarian Constitution ("In the event of incompatibility between this Constitution and a law or another legal norm, the constitutional provisions are applied, referring to the courts in any cause, even ex officio, the decision of the most suitable").

[2] The literature on the subject is vast. Among the most recent volumes are: T. GINSBURG, A. HUQ, *How to Save a Constitutional Democracy*, University of Chicago Press, 2018; G. ALLEGRI, A. STERPA, N. VICECONTE (eds.), *Constitutional issues at the time of populism and sovereignty*, Editoriale scientifica, Naples, 2019; S. GARBEN, I. GOVAERE, P. NEMITZ (eds.), Critical Reflections on Constitutional Democracy in the European Union, Hart Publishing, 2019; M.A. GRABER, S. LEVINSON, AND M. TUSHNET (eds.), *Constitutional Democracy in Crisis?*, Oxford University Press, 2019; W. SADURSKI, *Poland's Constitutional Breakdown*, Oxford University Press, 2019. In relation to the courts: K. PÓCZA (ed.), *Constitutional Politics and the Judiciary*, Routledge, 2018; M. BELOV (ed.), *Courts, Politics and Constitutional Law, Judicialization of Politics and Politicization of the Judiciary,* 1st Edition, Routledge,

features of the degenerative model and for limiting the risks of circulation. The main aspects to focus attention on concern the modalities of degeneration in the various cases examined (especially in relation to the constitutional text: is it modified, emptied, interpreted ad hoc or even replaced?); the role of the top courts in the degenerative process (were they victims, conniving or ambiguous?) and in the consolidation or stabilization of the new structure; responsibility for the supranational dimension (Council of Europe, European Union and Organization of American States, with the related courts).

The countries considered, although belonging to partially different cultural and geo-political contexts, have all experienced a constitutional "decay" or "regression" in recent years, both where democratic stabilization had been achieved and in genetically semi-authoritarian political systems. Despite the frequent use of definitions such as "illiberal democracies" or "populist regimes"[3] it is preferable to speak of constitutional "regression" or "involution", indicating a modification (amendment and replacement) of the constitution, or the emptying or derogation of the constitution, to in order to neutralize the checks and balances system provided by it[4]. The top courts were inevitably involved in authoritarian degeneration and the subsequent maintenance of the status quo coming to as the case may be besieged, conquered and neutralized or manipulated to allow for further "system" transformations.

The involvement of the top courts in the degenerative process depends on various factors, attributable to the pressures of the dominant political majority at a given historical moment, but also to the errors of previous legislators or constituents, as in the Hungarian and Polish case. This process is influenced by the procedures for selecting judges and the possibility of their re-election as well as by reforms which, to justify the replacement of the judges of the top courts, refer to their alleged inefficiencies, corruption or compromise with the past regime or proceed to an early retirement, as it happened in Poland in relation to the judges of the Supreme Court. However, even politically appointed or "loyal" judges may prove to be not entirely aligned (as transpires from some dissenting opinion). Then there is the question of the "natural" deference of constitutional judges towards the executive power and especially the head of state (as seen for example in Russia and Turkey). In some of the cases examined, courts that in the past had shown a leading role often turned against the ruling majorities have seen their role drastically reduced both through batches of "loyalists" and with the constitutional reduction of competences (Hungary, Turkey). We can therefore distinguish between countries in which political power has had a punitive attitude towards the top courts (Hungary, Poland, Turkey) and countries in which "power" (mainly concentrated in the hands of a head of state) has tried to subjugate such courts regardless of their behavior (Russia, Venezuela).

2019; C. LANDFRIED (ed.), *Judicial power. How constitutional courts affect political transformations,* Cambridge, Cambridge University Press, 2019.

[3] In the most recent constitutional doctrine, the reference to populist constitutionalism is among the most widespread: see, for example, the 2019 special issue of the German Law Journal (Vol. 20, nn. 2-3 Double Special Issue on Populism and Constitutionalism).

[4] But according to X. PHILIPPE, *La légitimation constitutionnelle des démocratures*, in Pouvoirs, n. 2/2019, 33-45, in the "democracies" the demagogic majority political power would have exploited the existing constitutional text, effectively emptying its substance (the spirit of constitutionalism) while keeping its formal envelope intact, only to then proceed with ad hoc changes to strengthen its own regime.

2. *The political-constitutional context in the countries considered and the relationship with supranational organizations*

As regards the role of the top courts in the constitutional crises examined, common tendencies and many differences are observed, depending on the nature of the involutionary parable of the democratic fabric and the peculiar historical heritage.

The tendential concentration of power in the hands of an authoritative leader sees the application of different modules, on the basis of different constitutional and political contexts. In the case of Hungary and Poland, we start from a condition of democratic stabilization, following the transition to democracy in 1989, which lasted until the parliamentary elections of 2010 and 2015 respectively; Russia has worsened its authoritarian performances since 2004 while in the case of Turkey, which in history has witnessed various phases of confusion between civil and military power and the dominance of the executive.

The cases of Russia and Turkey are united by the fact that, although starting from different constitutional systems (in terms of form of government), in recent years there has been a further consolidation of the powers of the executive, and in this case of the President: in Turkey through explicit constitutional changes and in Russia with political practice and legislation (to which is added the increase in the duration of the presidential term introduced with constitutional revision in 2008). So also in Russia and Turkey, where there is the presence of a charismatic leader who has held power for about 20 years, in recent years there has been a further authoritarian degeneration (for Russia it is above all relations with the rest of Europe that have worsened after the events in Ukraine in 2014 and the closure towards the Council of Europe in the name of the national identity). The constitutional crisis in Hungary and Poland takes different forms, starting from a condition of overwhelming majority power that does not formally affect the constitutional powers of the executive leader (the real leader is not the President of the Republic but the premier in Hungary and the leader of the majority party in Poland).

Regarding the conditionality of supranational organizations, Hungary and Poland are the only countries considered to be part of the European Union (but Turkey has been subject to European democratic conditionality for a long time - with results in terms of reforms of some importance. until the early 2000s - and formally it still is) and it is thanks to this membership that the violation of the basic rules of the democratic-liberal model of state appeared in all its gravity. Participation in the Council of Europe unites four of the five countries considered. As far as Venezuela is concerned, the relationship with the Organization of American States and with the Inter-American Court of Human Rights has seen fierce conflicts up to the recent exit of the country from the Organization[5].

Although we can presume a failure of the democratic conditionality of international organizations, however, even considering the long term, the situation turns out to be more complex. Pressure from the Council of Europe has led to important reforms also in Russia and Turkey and for certain periods the dialogue with the Strasbourg Court has been fruitful. As regards the European Union, a series of control and monitoring mechanisms have been used

[5] Venezuela denounced the American Convention on Human Rights on April 27, 2017 and the definitive exit from the Organization was formalized on April 27, 2019 in an official statement from the government. See G. Candia, Regional human rights institutions struggling against populism: The case of Venezuela, in German Law Journal, Vol. 20, 2019, pp. 141-160; L.A. NOCERA, *What is the suspension / expulsion procedure from the Organization of American States and for what reasons it can be arranged*, in New Authoritarianisms and Democracies: Law, Institutions and Society (NAD), n.1 / 2019, pp. 191-195.

or proposed over time[6]. Developments must also be welcomed of the jurisprudence of the Court of Justice, which demonstrates its desire to give substance to the application of the values referred to in art. 2 TEU which otherwise would risk remaining pure declarations of principle[7]. Finally, the judgment on the democratic conditionality of the EU must not be too severe if we look at the long term, ie at the beginning of the democratization process. More controversial is the situation at the level of the Council of Europe, where there have recently been openings towards Russia not justified by advances on the reform front but rather by financial concerns.

3. *The process of subjugation of the Courts*

The attack on the top courts or their exploitation represent a characteristic of the involutionary path of these countries. Since there is no space for a detailed review of the jurisprudence, we try to understand, through some significant cases, how these courts have been involved in authoritarian degeneration and in the maintenance of the status quo. The case of Venezuela represents in the Latin American continent the most emblematic example of the involvement of the supreme judicial body in the authoritarian involution of the constitutional system. This has happened since the ambiguous decisions of 1999 when, not yet subjugated by the Chavista majority, the then Supreme Court of Justice, the supreme body of the ordinary judiciary which also carried out a centralized control of constitutionality[8], opened the doors to constitutional transformation[9]. We refer to the two sentences of January 19, 1999, issued as a constitutional judge, with which the CSG endorsed the calling of a popular consultative referendum authorizing the convening of a National Constituent Assembly (*Referéndum para the Convocatoria de una Asamblea Nacional Constituyente*). It was essentially a question of interpreting the ambiguous letter of art. 4 of the 1961 Constitution concerning the principle of popular sovereignty («Sovereignty it belongs to the people, who exercise it through suffrage and through the organs of public power").

[6] The means used were different, with different practical impact and with the involvement of different institutions: infringement procedure pursuant to art. 258 TFEU (concerns specific violations of European law), rule of law framework (a "dialogic" instrument adopted in 2014 and applied without practical results to Poland but with the advantage of having a "system" approach), rule of law dialogue (annual forum before the European Council: low impact), art. 7 TEU (instrument with a high political content activated for the first time in December 2017 at the instigation of the Commission vis-à-vis Poland: various preliminary stages without reaching the vote in the Council). On 17 July 2019, the Commission adopted a Communication entitled Strengthening the rule of law within the Union.

[7] See: case C-64/16, Associação Sindical dos Juízes Portugueses v Tribunal de Contas of 27 February 2018 (in response to a preliminary ruling pursuant to Article 267 TFEU of the Portuguese Supreme Administrative Tribunal); case C- 216/18 PPU, LM of 25 July 2018 (in response to a preliminary ruling by the High Court of Ireland); case C-619/18 Commission v. Poland (order of 17 December 2018 and judgment of 24 June 2019 on infringement procedure initiated by the Commission).

[8] Whose judges under the 1961 Constitution were elected by the joint session of Congress (Senate and Chamber of Deputies) for 9 years, with one third of the judges renewed every 3 years (art.214).

[9] After the presidential elections of 1998, won by Chavez, a constitutional impasse had arisen, given the Chavist desire to adopt a new constitution (expression of an Estado nuevo), as promised in the electoral campaign. The 1961 Constitution, however, did not provide for the convening of a constituent assembly by means of a consultative referendum. It was therefore a question, both in fact and in law, of the exercise of constituent power. A.R. BREWER-CARÍAS, *Los jueces constitucionales: controlando al poder o controlados por el puo. Algunos casos recientes*, cit., 187 ff.

The Constitution adopted following this constituent process transformed the Supreme Court of Justice into the new Supreme Court of Justice (Tribunal Supremo de Justicia, TSJ)[10], equipped with a special constitutional room, composed of 7 judges, for the control of constitutionality. (the latter can also be exercised in a widespread manner, art. 334,

c. 2).

Political developments in Turkey have been more complex since there has not been one constitutional discontinuity due to the adoption of a completely new text and the attitude of the majority party since 2002, the AKP, has seen an incremental involution also from a constitutional point of view with a series of revisions with a contradictory content.

The Turkish Constitutional Court had played an important role in terms of secularization, democratization and Europeanization since the 1960s, after its introduction in the 1961 Constitution. Although the latter was the result of a military coup, the Court was modeled on and despite the strong mortgages of military power on the Turkish system, it had managed to gain credibility both nationally and internationally as an important garrison in a secular sense[11], as evidenced by the numerous sentences of dissolution of Islamic-inspired political parties that have allowed to contain populist and Islamist religious degeneration. Thanks also to the breadth of its competences, the Court has played a very active role as a majority counter-power by pronouncing various sentences contrary to the government majority which then considered its intervention as illegitimate interference in the political sphere[12]. Consequently, the AKP has downsized the competences and role of the Court starting from the constitutional reform of 2010 which introduced, on the one hand, the direct appeal of citizens (in order to reduce the litigation before the Strasbourg Court and therefore to satisfy the requirements of conditionality democratic) but on the other hand made the appointment of judges more linked to the President. The judges in office have been left in their place but the number has increased, immediately allowing the head of state to appoint judges close to him. Further small changes came with the constitutional reform of April 16, 2017, which has reduced the number of judges from 17 to 15[13] (as in the 1961 Constitution) but did not change the powers of the Court which are however indirectly limited due to the strengthening of the executive power.

The case of Russia appears eccentric compared to the others as the political situation is more stable. The role of the Constitutional Court has not been powerful or authoritative since its creation in 1991. However, due to the political involvement of the body in a historical moment of institutional crisis (1991-1993)[14] the 1993 Constitution had reduced its skills. Since

[10] The 32 judges (magistrados) of the Supreme Court of Justice or TSJ are elected by the National Assembly for a non-renewable 12-year term. The election requires a two-thirds majority or a simple majority if three successive attempts to elect a judge fail. Pursuant to art. 265 of the Constitution, judges can be dismissed by a two-thirds majority of the National Assembly in some cases. The TSJ also exercises the administration of justice and is a self-governing body of judges.

[11] See C. CAMPOSILVAN, THE CONSTITUTION OF TURKEY, in L. MEZZETTI (ed.), *Code of Constitutions*, Vol. VI.1, Cedam-Wolters Kluwer Italia, Padua, 2016, pp. 503 and following

[12] This involved three fundamental issues, the constitutional revision, the dissolution of the Refah Partisi (predecessor of the AKP) and the procedure for the parliamentary election of the head of state. See O. O. VAROL, L. DALLA PELLEGRINA, N. GAROUPA (eds.), *An Empirical Analysis of Judicial Transformation in Turkey*, in *The American Journal of Comparative Law,* Vol. 65, 2017, p. 194.

[13] This derives from the abolition of two military courts that could propose candidates, the High Military Court of Appeal and the High Military Administrative Court.

[14] The Constitutional Court introduced in 1991 in the transitional period between the end of the USSR and the adoption of the new Russian Constitution in 1993 was endowed with powers that favored greater involvement in the political scene, such as verifying the constitutionality of parties and associations and opinions

then there has been a not entirely positive evolution, both considering the restrictive interventions of the legislator and the trends of the jurisprudence. In this last regard, it can be observed that the Court has always kept a rather obsequious attitude towards the executive's policies (it legitimized the war in Chechnya, the incorporation of Crimea, it favored the opposition with the Strasbourg Court in matters politically sensitive that touched important public interests, such as in the Jukos case). A similar trend is found in the jurisprudence relating to fundamental political rights.

For Hungary, the first step in the legal transformation that began after the 2010 parliamentary elections which handed over the constitutional majority to the conservative party Fidesz (in coalition with the allied Christian-Democratic People's Party), has the control and downsizing of the Constitutional Court is foreseen, the main obstacle on the path of adopting "reformist" legislative packages, given the breadth of access to this body and its authority. The transformation of the Court therefore began even before the adoption of the new Fundamental Law, concerning both the procedures for the election of judges and their number and competences.

In the initial phase of the attack on the Court, i.e. between 2010 and 2011, it tried to resist but the constitutional legislator gradually changed its competences[15] or constitutionalized legislative provisions that had been declared unconstitutional37 until to cancel the jurisprudence preceding the new constitutional text with the IV constitutional revision[16]. As regards the behavior of the Court in the phase following the "subjection", in addition to the sentences supporting the identity vision of the government majority, the tendency is either to avoid politically sensitive cases (with various tricks, including postponing the decision as much as possible) or speak out in favor of the government majority. Particularly significant are the judgments on constitutional identity (especially that of 30 November 2016), and on the superiority of the LF over international treaties[17].

Finally, as regards Poland, following closely the Hungarian precedent, the new Polish leadership that won the parliamentary elections of 25 October 2015 has gradually and systematically begun to bring the main counter-majority powers under the control of the governing majority. by the Constitutional Tribunal. In this case, the first important constitutional tear involved the replacement of some judges whose mandate was ending and the violation of the constitutional judgment, with the government's refusal not only to publish unwanted unconstitutionality decisions in the official gazette but even to consider them

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on the behavior of the head of state such as to justify his impeachment. Considering these aspects, and the fact that the historical period was characterized by a heated conflict between the parliamentary body of Soviet derivation and the nascent presidential power, the Court was actively involved in the conflict between the Congress of People's Deputies and President Yeltsin by taking the side of the parliament and ending up being penalized, even with a suspension. Please refer to A. DI GREGORIO, *Constitutional justice in Russia. Origins, models, jurisprudence*, Giuffré, Milan, 2004, 73 ff.

[15] The competences were mainly reduced by the new Fundamental Law and by the IV constitutional revision.

[16] In particular, with the new LF of 2011 the Hungarian Court was expressly forbidden to review the constitutionality of the laws on budget and central taxation until the public debt exceeds half of the GDP (unless it is a violation of some fundamental rights such as the right to life, human dignity, freedom of thought, conscience, religion and the protection of personal data). Furthermore, the Court can no longer rule on the actio popularis (although individual recourse was introduced to compensate). See C. PIŠTAN, *Constitutional Justice and the Judiciary. The role of the constitutional courts in the processes of democratization and Europeanization,* in A. DI GREGORIO (ed.), *The constitutional systems of the countries of central-eastern Europe, the Baltic and the Balkans*, cit., 355 ff.

[17] On the subject, see A. DI GREGORIO, *Constitutional Courts in the Context of Constitutional Regression. Some Comparative Remarks,* in M. BELOV (ed.), *Courts and Politics, Routledge*, Oxford, 2019.

legally valid. This initial degeneration was affected by some errors of the post-communist constitutional engineering and political behavior that was not very conscious of the previous majority. The Polish Constitutional Tribunal had played an important role since 1986 (it was introduced in the terminal phase of the communist system as an important signal of liberalization) but there had been ambiguity in the appointment of constitutional judges throughout the post-communist period due to the little rigid selection (simple majority of the Sejm: a balance was obtained only thanks to the political alternation of the government in the various legislatures). Things changed with the 2015 elections which gave the absolute majority in the two chambers to the PiS which initially exploited some errors of the previous ruling party Civic Platform[18]. It was a question of delegitimizing the composition of the TC through the replacement of three judges legitimately elected in October 2015 with three others elected, at the beginning of the following legislature, in the following December, and subsequently to favor, thanks to the expiry of other judges, the almost complete renewal of the body[19]. On the other hand, in relation to the functioning of the constitutional body of justice, the involutionary path envisaged the first adoption of laws amending the law of June 2015 (November 19, 2015 and December 22, 2015), which affected both the composition and on the methods and order of adoption of the decisions, and then of a completely new law in July 2016, as well as the refusal to publish politically unwelcome sentences (in particular the sentences K47 / 15 of March 9, 2016, K39 / 16 of 11 August 2016, K 44/16 of 7 November 2016).

Apparently, Poland has therefore followed the same path as Hungary but in the absence of a constitutional majority, the Conservative party had to act differently, violating the constitutional judgment several times and therefore, indirectly, the Constitution. At the beginning of the constitutional transformation, the Tribunal tried strenuously to resist with the support of international and other judges. But once the "packaging" has been carried out, it pronounces itself only in minor cases or in favor of the executive without any discussion of cultural or legal importance. However, since the constitutional transformation is more recent than in the Hungarian case, we are witnessing the presence of a “parallel” legal and judicial system that includes dialogue between national judges and the European Court of Justice[20].

[18] Who had elected five new constitutional judges at the end of the legislature, despite having the right to elect only three.

[19] For which we refer to J. SAWICKI, *The conquest of the Constitutional Court by the majority that does not recognize itself in the Constitution,* in *Nomos, le attualità del diritto,* no. 3, 2016.

[20] The latter ruled definitively on 24 June last regarding the law on the Supreme Court which lowered the retirement age of judges and introduced a mechanism of possible retention in service at the discretion of the head of state, but further rulings will also follow. upon reference for a preliminary ruling by the Polish judges. For a comment see L. PECH, S. PLATON, *The beginning of the end for Poland's so-called “judicial reforms”? Some thoughts on the ECJ ruling in Commission v Poland (Independence of the Supreme Court case),* 30 June 2019, su http://eulawanalysis.blogspot.com/2019/06/the- beginning-of-end-for-polands-so.html.

Mayra Angélica Rodríguez Avalos[*]

In defense of the Constitution: Judicial Autonomy and the Crusade of Judiciary in Mexico[**]

ABSTRACT: *Separation of powers is traditionally a guarantee of legal certainty in democratic constitutional systems. Therefore, Judiciary is the branch of power responsible for the guarantee of constitutional order. Taking it in consideration, this study aims to analyze, from a constitutional perspective, the importance of the protection of judicial independence in Mexico. It will focus on the recent Electric Industry Law reform and the judicial procedures reviewing its constitutionality, which has caused tension between the branches of power in the country. The conclusion argues that the attacks enacted by the President of the Republic over the Judiciary are a form of constitutional degradation.*

1. *Introduction*

The Constitution is a dual instrument: political and normative, which gives life to the State, composed of constituted powers whose performance within the powers vested in it guarantees the rule of law. The constitutional control of acts of government, are the guarantee of legal security for the citizenry, against the abuse of public power in the Democratic State. The independence of the judiciary is essential to ensure the protection of the Constitution and the rule of law.

In Mexico, with the arrival of President Andrés Manuel López Obrador, in 2018, a series of actions have been carried out that do not respect these precepts, invade the competence of other powers or organs of the State, and have placed under attack the Judiciary, with statements issued from government public spaces. This study explains from the constitutional theory the conformation and functioning of the Mexican State, which contemplates the classic division of power, and incorporates the autonomous constitutional organs, to guarantee the balance of public power. The second section presents the current context, with a descriptive legal approach, focusing on the energy reform of 2013 and the executive and legislative measures adopted to reverse it, including judicial proceedings brought before the judiciary against these measures. The third section, since from the constitutional content, analyzes the judicial decisions issued, as well as the legal consequences of the statements of President *López Obrador*, which question and attack the activity of judges. Finally, it is concluded that, to ignore the Constitution, and the division of powers, weakens the Judiciary, violates the rule of law, which ultimately results in a degradation of the Constitution.

2. *Constitution and Rule of Law*

The Constitution is a container of ideas, is text and context[1], which protects the separation of the public power, the human rights, and operation of mechanisms of control of the public

[*] **PhD Candidate in Comparative Law and Processes of Integration at the University of Campania Luigi Vanvitelli.**

power exercised by the institutions that are born of the State. His content «is and must be neutral»[2], It is the organization of the powers that gives shape to the State, and the Constitution, is the normative expression of this articulation»[3]; therefore, they are «the instruments of government that limit, restrict and allow the exercise of political power»[4]. The Constitution shape, and structure the decision-making processes of States, as well as establish the procedure for the creation of laws without limiting their content. They are, «first, procedures whose intention is to ensure a controlled exercise of power»[5].

Similarly, the rule of law «is defined as the framework that allows the balance between the notions of state-apparatus and state-community, it is an institutional design»[6] that provides legal certainty. Its constituent elements are: «1) the rule of law, 2) the legality of the administration, acting according to the law and sufficient judicial control»[7], understood as the organization of the government of the State, based on the division of powers; «3) subjection to the law, by those who exercise the administration of the State; 4) The protection of human rights and the establishment of guarantees for their protection»[8]. It guarantees the balance of powers and thus avoids the strong trend existing in several countries of the Americas with presidential regimes, in which greater weight is given to the Executive Power, which has generated a hyper-presidentialism dependent on an omnipresent concentration of power that implies, among other things, the loss of judicial independence.

Therefore, the separation of powers is a mechanism of their safeguarding, in which to each is «attributed a certain functions nucleus, where third-party intrusions are not permissible»[9]. In Mexico, the Power of the Union[10], according to the classical theory of Montesquieu, is divided into three sovereign powers, independents in their integration and function, but necessary for the existence of the State.

The judiciary[11], resides in the Supreme Court of Justice of the Nation[12], is the highest body to monitor and guarantee respect for the Constitution, the separation of powers and the rule of law; is also constituted by the Electoral Tribunal, Collegiate Circuit Courts and the District Judges, the latter, have the power to review the constitutionality of acts or laws claimed, in the *Juicios de Amparo*. Its regulatory body was the Council of the Judiciary, which monitored the compliance of its members with the Constitution and the law [13]

[**] **This work has been subjected to blind peer review.**

[1] T. BUCKHART, *O constitucionalismo na América Latina. A refundação e as epistemologias do sul,* Curitiba, 2016, 47.

[2] G. SARTORI, *Ingeniería Constitucional comparada*, Traducción Roberto Reyes Mazzoni. Fondo de Cultura Económica, Mexico, D.F. Spanish edition. 1994, 3933.

[3] P. SALAZAR UGARTE, *Sobre el concepto de la Constitución,* in J. L. FABRA ZAMORA, E. SPECTOR (Eds). *Enciclopedia de Filosofía y Teoría del Derecho,* Mexico, 2015, 1932.

[4] G. SARTORI, *Ingeniería Constitucional comparada*. 3860.

[5] G. SARTORI, *Ingeniería Constitucional comparada*, 3926.

[6] S. R. MÁRQUEZ RÁBAGO. *Estado de Derecho en México*, In *Estado, Derecho y Democracia en el momento actual*, México, 212.

[7] S. R. MÁRQUEZ RÁBAGO. *Estado de Derecho en México,* 212.

[8] R. RUÍZ DÍAZ LABRANO, *El Estado de Derecho. Algunos elementos y condicionamientos para su efectiva vigencia*, Brasil, 6.

[9] N. LÖSING, *Independencia y función del Poder Judicial en el Estado democrático de derecho,* Anuario de Derecho Constitucional Latinoamericano, año XVII, Montevideo, 2011, 414-427, 419.

[10] See Article 40 of the Constitution of the United Mexican States.

[11] See Article 94 of the Constitution of the United Mexican States.

[12] Composed of 11 Ministers, third paragraph, article 94 Political Constitution of the United Mexican States.

[13] With the exception of the Supreme Court. Constitutional Court in the Nation.

The legislative branch, which resides in the Congress of the Union, with a Chamber of Senators and a Chamber of Representatives, is the body in the exercise of the reforming power of the Constitution, in this case, it must take into consideration the existence of the so-called petrified or unamendable clauses, which make certain aspects of their content irreformable. The mechanism for monitoring constitutional reforms is based on the approval of local congresses.[14] For the creatin of laws, must follow a due process and respect the Constitution. Being a constituted power that emanates from the Constitution itself, its action is in conformity with the principles and provisions contained in it. «If it sanctions norms contrary to international law, to strict constitutional or procedural rules, it has violated the constitutional»[15], therefore the law it issues will be unconstitutional.

The executive branch is confined to a single person, known as the President of the United Mexican States[16], for a period of six years, with no possibility of re-election[17], with the power, among other functions, to appoint the Secretaries of State[18] who make up the Federal Public Service, to present to the Senate the list of candidates for the Justices of the Supreme Court of Justice,[19] as well as to present bills and amendments to the Constitution.

For their part, the autonomous constitutional organs, are those organs of the State with legal personality, own resources, and specific powers to guarantee the balance of power. They are born out of the Constitution and therefore are not subordinate to the traditional powers. They are «characterized by the competence to exercise to the highest degree, a complex of public functions; and, with the adequacy to restrain, control and balance the other bodies with equally supreme responsibilities»[20], They have the capacity to issue their regulations, provide for their organization and structure for its functioning, in accordance with the competence conferred on them by the Constitution[21] and laws.

Its origin corresponds to the historical, social, political, or economic moments that highlighted the need for independent and impartial institutions, for to provide agility and transparency on issues that in a concrete way generated situations, of social and political tension that affected the rule of law. As in the case of the integration of the judiciary, the executive and legislative branches are involved in the appointment of the incumbents, but under no conditions are subordinated to them; even tensions arise, when coordination between sovereign powers and autonomous constitutional organs, does not focus on the powers to which each is entitled.

In the Mexican State, there are nine bodies, including the Federal Commission on Economic Competition *(COFECE),* which guarantees free competition, as well as preventing,

[14] Given the federal pact on which the Mexican State is founded, which consists of 32 legislatures, 19 of which require approval, the law is approved by the Federal Executive.

[15] N. P. SAGÜES, *Notas sobre el poder constituyente irregular*. *En La Constitución bajo tensión*, eBook edition, Mexico, 2016, 553.

[16] See Article 80 of the Constitution of the United Mexican States.

[17] Which constitutes a petrified clause.

[18] Article 89 section II of Mexican Constitution.

[19] See Article 89 section XVIII, of the Political Constitution of the United Mexican States.

[20] J. FABIAN RUÍZ, *Los órganos constitucionales autónomos en México; una visión integradora. Cuestiones Constitucionales*. México, 2017, 85-120, 87, doi: http://dx.doi.org/10.22201/iij.24484881e.2017.37.11454

[21] In the case of the Commission on Economic Competition, article 28 paragraph 21 of the Mexican Constitution, establishes independence in its decisions and operation. However, each body has its own specific characteristics on the subject, which is one of the main criticisms of the way in which they operate, since it is considered that there is no approval as to the origin and regulation of each of the nine bodies provided for in the Constitution. To delve into the topic, read J. ACKERMAN, *Organismos Autónomos y democracia: el caso de México,* Mexico*,* 2007, 84-116, 18.

investigating, and combating monopolistic practices, concentrations, and other restrictions on the efficient functioning of markets laid down in the Constitution and laws.[22] It has power to carry out actions to remove barriers to free competition.

3. *The legal implications of reversing Energy Reform*

The current government of the president *Andrés Manuel López Obrador*, the self-styled «Fourth Transformation (*4T)*[23]», builds the alternative project of nation, which aims to achieve the rebirth of Mexico[24], with a structural reform that leaves out the previous neoliberal policies. One of its main objectives is to reverse the 2013 energy reform, considered the most important of the previous government. This constitutional reform of articles 25, 27 and 28 recognizes, among other issues, that it is the responsibility of the nation to plan and control the national electricity system and the public service for its transmission and distribution, but, introduced private capital for sustainable energy generation, contemplated in the Energy Transition Law *(LTE)*[25], while the Electricity Industry Law *(LIE)*[26], provides the conditions for the generation and marketing of electricity under a system of free competition, with the *COFECE* ensuring that these conditions occur.

The government considers that by allowing private investment, the essence of the revolutionary principles of national sovereignty contained in the Constitution was affected; however, the exclusivity of the nation for the production and distribution of electricity, was introduced in a reform of article 27 in 1960[27]; the Constituent Power did not contemplate the subject given the context of the time when the Constitution was issued, therefore, since it was not foreseen in the original text in 1917, the energy issue does not constitute an immutable or petrified clause, so, its regulation from the Constitution, must respond to the current needs and conditions, with respect to the protection of the environment and sustainable development.

The energy policy of the *4T*, is oriented to favor the generation, operation, and distribution of the electricity by the productive company of the State, the Federal Electricity Commission *(CFE)*; which contradicts, the programmatic obligations of the State to ensure free competition provided for in articles 25 and 27 of the Constitution.

In this context, the government of President *Lopez Obrador* issued of the Energy Secretariat Decree of May 15, 2020, on the Reliability, Safety, Continuity and Quality Policy in the National Electricity System, which proposed new rules for the energy sector, not provided in the

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[22] Article 28, paragraph 15, Mexican Constitution, incorporated through the energy reform of 2013.

[23] Name with which the current government is so-called in association to three historical transcendent moments for the formation of the nation: 1) The independence of the Kingdom of Spain (1810/1821); 2) the War of Reform (1858/1861) internal armed conflict between conservatives and liberals; 3) the Mexican Revolution (1910/1917), the armed struggle against the "porfirist regime", for the recognition of the social rights that gave life to the current Constitution. The Mexican Constitution is the first in the world to guarantee them. To delve into the topic see A. NORIEGA CANTÚ, *La creación de los derechos sociales en la Constitución Mexicana de 1917*, in *Los derechos sociales creación de la revolución de 1910 y de la Constitución de 1917*, Mexico, 1988, also see T. R. RODRÍGUEZ GARCÍA, *Los derechos sociales laborales en México y su exigilibilidad*, España, 2013, and J.A. CRUZ PARCERO, *Historia y porvenir de los derechos sociales en México*, Mexico. 2017.

[24] D. MARQUEZ GÓMEZ, *El cambio de la administración pública de la cuarta transformación*, México, 2019.

[25] Issued on December 24, 2015

[26] Issued on August 11, 2014, reformed on March 9, 2021. Regulation of Articles 25, fourth paragraph; 27 sixth and 28, fourth paragraph of the Political Constitution of the United Mexican States.

[27] Reform of paragraph 6, on December 29, 1960

Constitution or in the *LIE,* that limit the issuance of permits for new wind or solar power plants and to prohibit the construction of projects in places that it considers congested or with little transmission capacity. The *COFECE* filed a *controversia constitucional*[28] against this Decree, with the Supreme Court of Justice, because it considered that the government was encroaching its functions on the principles of free competition.

Subsequently, the reform of the Electricity Industry Law *(LIE)*[29] is published, on March 9, 2021, which competitive advantages are granted to the Federal Electricity Commission *(CFE)*, which hinders competition, alters dynamics, and discourages investment by power plant operators. Therefore, two private companies, *Eoliatec del Pacífico* and *Parque Solar Orejana*, who signed contracts for the wind power generation before the reform; initiated their *Juicio de Amparo.*[30] Likewise, on the part of the Senators of the opposition political parties *PAN*[31], *PRI*[32], *PRD*[33] and *MC,*[34] presented the *acción de inconstitucionalidad* for considering that the reform affects economic competition, the right to the environment and the Paris Agreement, legal certainty and non-retroactivity when modifying contracts signed during the previous government.

These jurisdictional procedures are expressly referred to in the National Constitution to review the constitutionality of the acts of the executive power, as well as the laws that are issued by the legislature. However, President *Lopez Obrador* considered them an attack on his government, expressing disagreement with the proceedings initiated, and beginning a campaign against the judiciary.

4. *The judiciary under attack*

The job of judges must be autonomous, to ensure that cases are resolved in accordance with the provisions of the Constitution and law, without interference by others. «The Judge must and is subject to the law, his interpretation must be independent of imposed criteria, and cannot be reduced to an application or interpretation»[35] without value of the laws. «The idea of the independence of the judge is inextricably linked to the conception of the constitutional State»[36] It guarantees the separation of powers, which in turn protects the very existence of the State.

However, this autonomy was affected, when the *controversia constitutional* was admitted, against the Decree, and the Supreme Court of Justice, granted the suspension of its application[37], the President began his campaign against the decisions of Justices. The first statements of President *López Obrador* focused on affirming that he would seek to privilege

[28] Mechanism of Judicial Control, against laws or acts of government that are considered by the plaintiffs unconstitutional.

[29] Specifically, articles 3, 4, 53, 101 and 108

[30] Proceeding provided by the Constitution as a mechanism for safeguarding the human rights.

[31] National Action Party.

[32] Institutional Revolutionary Party.

[33] Democratic Revolution Party.

[34] Citizen Movement Party.

[35] N. LÖSING, *Independencia y función del Poder Judicial en el Estado democrático de derecho.* Anuario de Derecho Constitucional Latinoamericano. Año XVII, ISSN 1510-4974, Montevideo, 2011. 414-427, 417.

[36] S. DIETER, *La independencia del Juez,* Barcelona. Ariel, 1985, 11.

[37] After the presentation of this work, in November 2021, the Second Chamber of the Supreme Court of Justice issued the judgment, declaring the agreement unconstitutional.

the general interest of the people, over personal or group interests, however legitimate they were: «The government is not a committee at the service of private groups or individuals, the government is at the service of the people. In in the Federal Government will see if there is no other body to defend the public interest. If necessary, I will propose, in due course, a constitutional reform so that the domination of the nation over natural resources prevails»[38]

Statements began to create tension between the executive and judicial branches, which increased when other judicial were initiated the *Juicios de Amparo* against the reform of the *LIE.* In this case, he President López Obrador directed its attack specifically to *Juan Pablo Gómez Fierro,* Second District Judge[39] in Specialized Administrative Matters in Economic Competition, Broadcasting, and Telecommunications,[40] to discredit the credibility him, because he ordered the definitive suspension of the *LIE* as a precautionary measure, although the *Amparo* Law establishes it, to prevent the contested law from causing irreparable damage while the trial is being conducted. Accurately, «the effectiveness of the *Juicio de Amparo* proceedings and the suspension of the claimed act have long-standing roots that have proven their merits throughout the legal history of Mexico.

«The autonomy and independence of the judges is the essence of the decisions that should not derive[41]»; in the specific case, in the personal assessments of the holder of another sovereign power, especially with statements that distort reality, such as those made by the President *López Obrador*; although, he points out that his opinions constitute in both cases, his right to freedom of expression; that while it is true that, freedom of expression is «the quintessence of being and feeling free, and one of the master keys of the constitutional state»[42] in the present case it is significant, because it is issued by the holder of one of the sovereign powers.

Article 6 of the Mexican Constitution, that protects the expression of ideas, does not provide that the holder of executive branch is authorized to issue statements questioning the actions of another public authority. It is important to note that the right of expression of ideas is not absolute, «the protection of the axiological value is recognized[43], but it is delimited to guarantee other rights, that is as explained from the «dividing theory that separates freedom of expression, the rights to communicate and receive information»[44]. Similarly, the protected right of reply, to which President López Obrador also refers, has as a condition for its exercise, respect of the provisions contained in the law, however, the morning information space[45] that

[38] To read the note in the original Spanish language https://www.msn.com/es-mx/noticias/mexico/tras-fallo-de-scjn-en-materia-energ%C3%A9tuca-amaga-amlo-con-presenta-reforma-constitucional/ar-BBlaiKAG?li=AAggxAT retrieved 22 October 2020.

[39] Appointed jointly with Rodrigo de la Peza, First District Judge, by the Council of the Judiciary, in accordance with Articles 28, paragraph 21, section VII in relation to the 94, paragraph 6, of the Mexican Constitution.

[40] To resolving throughout the country, cases of the Mexico City, provided for in the constitution.

[41] N. LÓPEZ RAMOS, *Autonomía e independencia judicial garantizan la plena defensa de los derechos humanos. Instituto de Investigaciones Jurídicas de la UNAM*. Publication made on the occasion of the various publications issued in 2012, derived from the Amparo Trial, regarding the exhibition in Mexico of the film *"Presunto culpable".*

[42] M. REVENGA SÁNCHEZ, *Intransigencia constitucional. Sobre los límites de la tolerancia en el Estado constitucional de Derecho,* ebook Edition, Mexico, 2019, 35.

[43] The Spanish Constitutional Court has shown affinity in its judicial decisions on the subject, based on this theory, to delve into the topic, read M. REVENGA SÁNCHEZ, *Intransigencia constitucional. Sobre los límites de la tolerancia en el Estado constitucional de Derecho,* México, 2019.

[44] M. REVENGA SÁNCHEZ, *Intransigencia constitucional. Sobre los límites de la tolerancia en el Estado constitucional de Derecho,* 39.

[45] The press conference is held from Monday to Friday. It starts at 06:00 hours, but does not set a specific duration time.

the current federal government has built, from which it has expressed its criticism against, is not a constitutionally or legally envisaged mechanism.

A second violation of the autonomy of the judiciary, occurred when the President López Obrador, announced the possibility of presenting a amendment of the articles 25, 27 and 28 of the Constitution, so that the LIE is not considered unconstitutional; however discussed the issue at a meeting in May 2021, with three Justice of the Court, as he himself recognized and justified it, as «collaboration between powers», which is not provided for in the Constitution, in addition to that the Juicios de Amparo were in progress.

In regard of pronouncements from public opinion, about the legal implications of this meeting, the President of the Supreme Courte of Justice of the Nation, he pointed out that «the Supreme Court could not give an opinion on the constitutionality of laws or acts outside legal proceedings initiated by legitimate action, the judges only act within a case or controversy, because this is the essence of the division of powers»[46]. But he was one of the Justices who met with the President, which implies their abstention to resolve in cases that arise in relation to the laws that were the subject of their meet.

This situation creates tension, coupled with is a subordination of the Judiciary to the interests of the Executive branch, ignoring the Constitution and the principle of separation of powers, who are immutable clauses. It is true that some Constitutional Courts provide for prior review of the amendment; however, is based on the procedure previously established in the Constitution which grants this power; in that case, there is no invasion or collusion between powers, is a matter of prior constitutional control. However, this is not provided, for in the Mexican Constitution.

Acts of government must conform to the provisions of the Constitution, and follow the procedures established by law, when this does not happen, those who legitimately have the right may request their review before the Judiciary, and it will be the latter who determine its constitutionality or legality, because it is the last bastion for the protection and guarantee of the Constitution and the Rule of Law. It is not for the executive power use the press conferences of government to question the legal actions contemplated in the national legal system, even if he points out that, these are personal opinions, since, when presented at these press conferences, he does so in the capacity of the holder of one of the powers of the State. Likewise, collaboration between powers must be expressly stated in the Constitution, it is not the power of the president, decide how it should be carried out, each power is autonomous in functions and when those functions involve intervention with others, the procedure is provided for in the Constitution.

In the constitutional State, the sovereignty of powers is not absolute, as referred to by Martin Kriele, no one is, in the precise sense, «sovereign», because all must exercise their powers in the framework prescribed by the Constitution[47] or otherwise, it loses its meaning, its essence, degrades.

5. *Conclusions*

The Transformation of a Nation must be in accordance with the guidelines and precepts that the Constitution establishes, because from it are born the institutions that give life to the Rule of Law. The Constitution must include the necessary changes, for protection of people,

[46] In the social network Facebook, of the Justice Arturo Zaldívar Lelo de Larrea.

[47] N. P. SAGÜES, *Notas sobre el poder constituyente irregular*. *En La Constitución bajo tensión*, 686.

and environment, but following the process, that provides legal security and not for whims or improper interpretations of the Constitution or laws.

As can be seen, once the line of division of sovereign powers has been blurred, it increases the frequency with which the head of the Federal Executive crosses it against what the Constitution itself orders. Therefore, it is the judges, who have in their hands the formal and material guarantee of the Constitution, are the last line of their defense and of the rule of law.

Francesco Alberto Santulli*

The Italian Crisis of Political Parties as a Phenomenon of Constitutional Degradation: what is to be done? Thinking about the electoral law**

ABSTRACT: ***The Italian crisis of parties, as a phenomenon exacerbated by endogenous and exogenous factors, can be framed as a phenomenon of constitutional degradation, since this crisis does not stop at the party system, but more generally involves a crisis of politics, of representation, of the relationship between voters and elected representatives, and of the parliamentary form of government. Indeed, this crisis empties the physiological functioning of the institutions that characterize representative democracy and determines a general sense of confusion and bewilderment among citizens. To resolve it, there has often been talk of an alleged inability of the Constitution to decipher reality, believing that the malfunctioning of the institutions was attributable to the Chart, and not to the inability of political actors to manage public affairs or to re-legitimize themselves; on other occasions, the maximum extension of powers of President of the Republic was requested to make up for the lack of communication between political forces; at other times, the so-called "technocratic governments" were deemed necessary to manage the most delicate phases of the political season. After having outlined the fundamental characteristics in which the crisis of parties manifests itself as a phenomenon of constitutional degradation, this paper intends to underline how a solution to this crisis must necessarily pass through the preparation of an electoral law that finally sanctions a transparent relationship between electors and elected representatives, to make the former more aware in the exercise of their rights, and the latter more responsible in the exercise of their functions.***

1. *The constitutional relevance of the political party*

The Italian Constitution is marked by the role assumed by political parties in determining the balance of the nascent pluralist democracy and, obviously, of the parliamentary form of government. The parties had to represent the vehicles for unifying the life of the community, in compliance with the principle of political solidarity pursuant to art. 2 of the Constitution, since, even in the promotion and representation of different interests, they would have contributed to guaranteeing the values which had given life to the new republican season. In other words, the parties had the task of overseeing the conservation of constitutional institutions and the mutual respect of heterogeneous social groups[1].

The idea of the party as a "part of a whole" responds to the desire, which runs throughout the twentieth century, to capture the complexity of society through tools for the composition of pluralism, and thus defuse the potentially explosive effects of this complexity through political participation. In this perspective we can read the right of political association pursuant to art. 49 of the Constitution, which is articulation of the broader right provided for

* **PhD in Legal Studies at the University of Bologna.**

** **This work has been subjected to blind peer review.**

[1] For a diachronic analysis of the evolution of political representation, see M. GOLDONI, *L'onore del potere giudiziario: Montesquieu e la monarchia dei poteri intermedi*, in D. FELICE (ed.), *Politica, economia e diritto nell'«Esprit des lois» di Montesquieu*, Bologna, 2009, 2 ff.; T. CASADEI, *Modelli repubblicani nell'«Esprit des lois». Un 'ponte' tra passato e futuro*, in D. FELICE (ed.), *Libertà, necessità e storia*, Bologna, 2003, 66-67; P. RIDOLA, s.v. *Partiti politici*, in *Enciclopedia del diritto*, XXXII, Milano, 1982, 66 ff.

by art. 18. At the basis of the twentieth century, in fact, there is this idea: in society, many ideas, ideologies, classes and social conditions coexist, and it is considered necessary to compose this complexity through containers capable of translating this complexity into a mode of political participation. In other words, only the party can contain this complexity and defuse its potentially explosive effects. Thus emerges the idea of a subject – the party – which is by definition a faction and which can represent the most important tool for integrating the relationship between society and State.

Now, in order to understand how it was possible to reach the breaking point, in which political parties have lost their path, and with it their main function, that is the representation of different interests, it is preferable to start from the beginning, briefly outlining the evolution of the parties, and thus explain why, for the Italian experience, it is necessary to intervene on the electoral law.

The «parable» of the political parties is contained in a famous *Rede* given by Heinrich Triepel at the University of Berlin on 3 August 1927, in which he distinguished four historical phases: from the *Bekämpfung* to the *Ignorierung*, then to the *Ankennung*, then passing through the *Legalisierung*, and finally to the *Incorporation*[2].

In short, in an era in which a pluralist society is emerging, the Triepelian quadripartition intended to express the conceptual phases that have marked the attitude of political parties towards the State. Furthermore, not necessarily in the concrete constitutional experience the four phases had to take place in the same order in which Triepel had listed them[3].

In a first phase, therefore, the legal system would have looked at the party from a position of indifference, behind which it retained skepticism and competitiveness, if not real hostility: the constitution of minor social forces – it was believed – could weaken the State, undermine its foundations which were not solid at all, with the creation of a "State within the State". In a second phase, the one of tolerance or recognition, the State would have recognized the party and tolerated its existence within its own bosom, in a utilitarian key of the intrinsic ordinary capacities that the party organization carried with it. With the subsequent phase of legalization, the State intended to recognize the party of such utility as to deem it worthy of a special discipline, which went beyond mere recognition. The party thus became an intermediary element between Parliament and citizens, functional to a full and correct performance of the representation. Finally, as regards the incorporation phase, some clarifications need to be made. For Triepel, in fact, full incorporation occurs only in one-party systems (the case of Bolshevism is peculiar), in which the State becomes a party and the party becomes a State[4]. This does not mean, however, that incorporation should be ruled out in pluralist democracies; precisely, while in the one-party systems it assumes the characteristics of formal incorporation (characterized by elements such as the recognition of authoritative powers to the party organs or the prediction of the coincidence between party offices and institutional offices), in multi-party systems there is rather a «material» incorporation[5].

In particular, in totalitarian regimes the party is not *a part of the* whole, it is *the* whole, in fact the system is a one-party system[6]. In contemporary democratic systems, on the other

[2] H. TRIEPEL, *Die Staatsverfassung und die politischen Parteien*, Berlin, 1927, 8 ff.

[3] See M. LUCIANI, *Partiti e forma di governo*, in *Nomos. Le attualità nel diritto*, n. 3, 2018, 2.

[4] See V. ZANGARA, *Il partito unico e il nuovo stato rappresentativo in Italia e in Germania*, Bologna, 1938, 19.

[5] See F. BILANCIA, *La Costituzione dello Stato e i partiti politici: l'attualità del noto saggio di Heinrich Triepel*, in *Costituzionalismo.it*, n. 1, 2015, 7 ff.

[6] See M. GREGORIO, *Parte totale. Le dottrine costituzionali del partito politico in Italia tra Otto e Novecento*, Milano, 2013; D. PALANO, *Partito*, Bologna, 2013.

hand, we generally find ourselves faced with an intermediate form between legalization and incorporation, either because the State entrusts the parties with specific publicistic functions, or because it institutionalizes them and subjects them to a different discipline from that envisaged for common associations, or again because it interprets them as indispensable subjects of the political-constitutional order, and therefore as subjects whose existence is necessary. The material incorporation would then take place when the party manages to conquer a hegemonic position and maintain it, respecting the rights of freedom, thus determining the political policies. What matters, in other words, is the party conditioning of government action, a fact that can be measured in terms of power relations. In this sense, Mortati's well-known theory of the «material constitution» comes to mind: that is, the essential nucleus of targets and forces which governs every single positive order, and which concerns, as regards the political forces, those that can actively interpret the general interest of the political community[7].

As we have already mentioned, in our Constitution the function of parties clearly emerges in art. 49 that, as an articulation of the freedom of association of art. 18, the constituent recognizes as a non-functionalized right: the aim of contributing to determining national politics is an open target, which lays the foundations for a pluralism of political forces and excludes the possibility of a single-party system[8]. Actually, in the Constituent Assembly there were two great souls concerning political parties: the first, classic one, led by Orlando, anchored to a liberal conception, and therefore firm to the tolerance of the State towards parties[9]; a second one, attributable to Mortati, who saw parties as an instrument to stabilize the entire constitutional order[10]. From this dualism, a party discipline *au milieu du gué* has emerged, because if the inclusion of the party among the organs of the State remains openly disowned, it is true that the party is recognized as having constitutional relevance and a role in the consolidation of republican institutions.

2. *Crisis of parties, crisis of politics, crisis of representation*

Since the end of the nineties of the last century, a period of our republican history, which can be summed up in the expression «republic of parties»[11], is progressively closing. That was a republic founded on parties with strong collective identities, stable territorial ramifications and with a capillary presence throughout the national territory. The crisis and the end of the mass parties seemed the logical corollary of the recent events: the end of the Cold War and the progressive disintegration of the ideological opposition; the social disparities caused by the consumer society; the increase of population groups (precarious workers, immigrants, so-called *neet*, unemployed young people) difficult to inscribe in the watertight compartments of traditional social classes.

The mass party was followed by new party figures essentially devoid of ideological charge and aimed at obtaining the consent of the widest possible electoral public, focusing on

[7] C. MORTATI, *La costituzione in senso materiale*, Milano, 1940.

[8] T. MARTINES, *Diritto costituzionale*, Milano, 2017, 673.

[9] See. F. PIZZOLATO, *Orlando all'Assemblea Costituente*, in *Rivista AIC*, n. 3, 2016, 1 ff.

[10] See C. MORTATI, *Concetto e funzione dei partiti politici*, s.l., 1949, now in *Nomos. Le attualità nel diritto*, n. 2, 2015.

[11] This expression is borrowed from P. SCOPPOLA, *La Repubblica dei partiti. Evoluzione e crisi di un sistema politico 1945-1996*, Bologna, 2021.

leadership rather on single members and militants. This new model was accompanied by a radical modification of the essence of western politics: the abandonment of the possibility of building an alternative society to the existing one and, therefore, the preference for the mere administration of public affairs.

The causes of this change are many and can be briefly listed here. First of all, the fall of the Berlin Wall and the end of the Soviet Union not only favored neoliberal policies, but also pushed the de-ideologization of parties which, having lost their original perspectives, have also lost their identity. This process involved all parties, and not just those close to the Soviet model. Secondly, the new technologies have determined the transition from the organization of the party based on congresses, members, sections, circles, in modes of participation that are only apparently open, but in reality extremely self-referential, which do not translate into an instrument of connection between organization and its members but only between the leader and his base, or rather his *followers*.

Moreover, as a national factor, there is the institutional crisis that led to the loss of credibility and legitimacy of the political parties on which the «material Constitution» of 1948 was based. Crisis that emerged in all its importance in the referendum of April 18, 1993, which led to the abandonment of the proportional electoral system and to a new reading of political representation and relationship between governors and citizens. Perhaps, it is in the sense of the birth of a new material constitution that the – otherwise highly questionable and improper – distinction between *first* and *second* Republic can be read.

The crisis of parties, as a phenomenon exacerbated by endogenous and exogenous factors, moreover both national and international, can be framed as a phenomenon of constitutional degradation, since this crisis does not stop at the party system, but more generally involves a crisis of politics, of representation, of the relationship between voters and elected representatives, and of the parliamentary form of government. Indeed, this crisis empties the physiological functioning of the institutions that characterize representative democracy and determines a general sense of confusion and bewilderment among citizens. To resolve it, there has often been talk of an alleged inability of the Constitution to decipher reality, believing that the malfunctioning of the institutions was attributable to the Chart, and not to the inability of political actors to manage public affairs or to re-legitimize themselves; on other occasions, the maximum extension of powers of President of the Republic was requested to make up for the lack of communication between political forces; at other times, the so-called technocratic governments were deemed necessary to manage the most delicate phases of the political season.

A solution to this crisis must necessarily – but not only – pass through the preparation of an electoral law that finally sanctions a transparent relationship between electors and elected representatives, to make the former more aware in the exercise of the right, and the latter more responsible in the exercise of their functions. In the following pages, we will consider a possible scenario that lies ahead for the Italian experience.

3. *Some considerations on the electoral system*

Some considerations on the relationship between electoral system and constitutional principles appear interesting today for the revision law – confirmed by the referendum of 20 and 21 September 2020 – which amended articles 56, 57, 59 of our Constitution. The discussion that awaits us now is about the changes consequent to that reform, urgent and

inevitable changes, such as the necessary modification of parliamentary regulations or the electoral system[12]. In particular, questioning once again on what has been defined as the *Grundnorm* of the political system – i.e. the electoral law – a link between the formal and the material Constitution, is appropriate precisely in the light of the constitutional revision, given the wider selectivity of elected representatives which will inevitably characterize the future face of our Parliament.

A new – and eventual – discipline would thus replace the current electoral formula, which was recently revised as regards the definition of single-member and multi-member constituencies for the election of the Chamber of Deputies and Senate of the Republic[13]. This last legislative intervention, actually, was necessary in order to avoid any sort of «institutional blackout» due to the inapplicability of the electoral law in the event of a possible end of the legislature, in compliance with the warning of the constitutional jurisprudence that recognized several times in it a constitutionally necessary law[14].

As we know, since 1993 there have been numerous – and different – disciplines which have marked a profoundly unstable and uncertain political-institutional system, and which can perhaps be understood in the light of what, in more general terms, would represent the attempt spasmodic of Parliament to regain legitimacy from public opinion. An attempt that, evidently, is rediscovered at every missed opportunity and then perseveres in the search for corrective measures.

Now, if we start from the referendum of April 1993, different electoral laws have followed: the so-called "*Mattarellum*" in 1993, the "*Porcellum*" in 2005, the "*Consultellum* I" (following the sentence no. 1 of 2014), the "*Italicum*" in 2015, the "*Consultellum* II" (sentence no. 35 of 2017), "*Rosatellum* I" in 2018, "*Rosatellum* II" in 2020 (with the legislative decree no. 177 of 2020 which, after the constitutional referendum of 2020, redefined the constituencies of the Chamber and Senate, in implementation of law no. 51 of 2019). So, in thirty years we have had seven electoral systems, which represent a negative record and – as has been marked – the pathology of a «hyperkineticism»[15] not found in any other Western system.

Representing or governing is the alternative of a famous quarrel that arose from the time of the expansion of suffrage and the birth of mass parties. According to some commentators, it was thought that the elections served to show the existing political addresses in the country and that those political address would then be identified in Parliament; a second orientation,

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[12] See G. L. CONTI, *Il futuro dell'archeologia: le proposte di riforma della Costituzione sul banco della XVIII Legislatura*, in *Osservatorio sulle fonti*, n. 3, 2018; A. ALGOSTINO, *Perché ridurre il numero dei parlamentari è contro la democrazia*, in *Forum di Quaderni costituzionali*, 30 settembre 2019; F. BIONDI, *Le conseguenze della riduzione della riforma costituzionale del 2019*, in *Nomos. Le attualità del diritto*, n. 3, 2019; G. CERRINA FERONI, *Riduzione del numero dei parlamentari e applicabilità delle leggi elettorali*, in *Osservatorio Aic*, n. 3, 2019, 4 ff.; F. CLEMENTI, *Sulla proposta costituzionale di riduzione del numero dei parlamentari: non sempre "less is more"*, in *Osservatorio sulle fonti*, n. 2, 2019; R. MARZO, *Su alcuni numeri della matematica costituzionale (spunti di riflessione sulla riduzione dei parlamentari)*, in *Osservatorio Aic*, n. 4, 2020, 97 ff.; E. ROSSI (ED.), *Meno parlamentari, più democrazia?*, Pisa, 2020; C. TRIPODINA, *Riduzione del numero dei parlamentari, tra riforma costituzionale ed emergenza nazionale*, in *Osservatorio Aic*, n. 3, 2020, 69 ff.; M. VOLPI, *La riduzione del numero dei parlamentari e il futuro della rappresentanza*, in *Costituzionalismo.it*, n. 1, 2020, 43 ff.

[13] D.lgs. 23 dicembre 2020, n. 177 "*Determinazione dei collegi elettorali uninominali e plurinominali per l'elezione della Camera dei deputati e del Senato della Repubblica, a norma dell'art. 3 della legge 27 maggio 2019, n. 51*", published on G.U. n. 321 of 29 december 2020.

[14] See Judgments of Italian Constitutional Court n. 15 and n. 16 of 2008 and n. 13 of 2012. See also P. Viviana, *La legge elettorale come legge costituzionalmente necessaria*, in *Osservatorio sulle fonti*, n. 1, 2019, 2 ff.

[15] F. LANCHESTER, *Il corpo elettorale tra recessione del principio elettivo e ruolo delle corti. Riflessioni sul caso italiano*, in *Nomos, Le attualità del diritto*, n. 1, 2017, 9 ff.

on the other hand, held that the electoral act was rather a complex of unitary choices, and in particular the choice of a political direction, a program, a party, a government team, a leader[16].

Certainly, the democratic circuit defined by our Constitution (articles 1, 3, 48, 49, 56, 57, 92, 94) identifies in the elective vocations the main instrument for the expression of popular sovereignty. However, a sort of particracy without parties has long existed in our system, generated by the shortcomings of old political families, by the formation of new divisions, and by the participation crisis that has generated strong electoral abstentions and volatility.

Today, paraphrasing a famous aphorism, it must be said that the confusion under the sky is great, even if it does not seem that the situation is excellent[17]. And the confusion is great first of all due to the plethora of proposals for constitutional and institutional reform, still very undetermined, and sometimes inhomogeneous with each other, which are at the center of the parliamentary debate, in an already complex situation due to the continuing pandemic emergency. Therefore, we are aware of the difficulties of imagining the developments of future electoral legislation in the presence of a weak and constantly changing political system. We live in a time of suspension (from «hyperkineticism» to «hypokineticism»), because there are other and more pressing problems, but it could also be a time for reflection.

Of course, it would be necessary to do a great work of detoxification of the twenty years we have behind us, years that have proposed a paradigm, a logic, a system, a way of reasoning that goes under the name of «majority democracy», that is the – wrong – idea that elections are used to choose governments. Such as the terrible, yet still repeated refrain, according to which *it is important to know who governs us on election day*[18]. But, the essence of the vote in constitutional systems is not – only – the certainty of the electoral outcome but – mostly – to allow the people to choose their parliamentary representatives. And the real problem, actually, is not the electoral law, but that the current political forces are no longer able to carry out their constitutionally given function. They are no longer an instrument to allow citizens to participate, with a democratic method, in determining national politics (as stated by article 49 of the Italian Constitution).

Let us consider sentence no. 1 of 2014, in which the Constitutional Court stated that it is necessary: 1) to allow the voter a margin of choice for their representatives; 2) to avoid violating the logic of representation provided for in the Constitution, because if it is true that governability is a legitimate goal, it is true, however, that representation is an inalienable constitutional value.

If we interpret these two formulations of the Court, we should say that then, in order to guarantee effective representation, it is necessary to define an electoral system that is substantially proportional, to guarantee the representation of all minorities and which allows the choice of individual candidates. Now, if this is the case, the fear of uncertainty should lead the political forces to the same conclusion that the Constituent Assembly reached: the way to go should be that towards a proportional system. And anyway, a proportional system – in any case – works with political forces that believe in parliamentarism and in the fact that

[16] This dichotomy is remembered by Fulco Lanchester during the Congress "Il sistema elettorale in senso stretto: quali prospettive in Italia?", hosted by University of Rome La Sapienza on 29 april 2021.

[17] As noted by Gaetano Azzariti during the Congress "Sistema elettorale e principi costituzionali" hosted by Unitelma Sapienza University on 14 october 2020.

[18] See F.A. SANTULLI, *La proposta di modifica del sistema elettorale: appunti su A.C. 2329*, in *Osservatorio costituzionale*, n. 2, 2021, 87.

parliamentary policies and even governments are constructed in a dialogic way. In simpler words, forces that truly believe in the parliamentary game.

A possibility, then, could be represented by single-member constituencies in a proportional system (as in the election of the Senate until 1993, provided for by law n. 29 of 1948)[19]. On the one hand, territorial pluralism would be guaranteed (not resorting to blocked lists, but multiplying the number of colleges, with a consequent greater connection between representative and represented). The choice of the elector would thus be clearly identified on two levels, that of the party and that of the person, and the party would emerge empowered. It is infact necessary to adopt a simple system, and this could be a system with small single-member constituencies, as many as the seats assigned to the single Region, with candidates linked together on the basis of belonging to the same political force, and with a direct assignment of the seat to those who obtain a suffrage greater than 65%; for the remaining seats, that is almost the majority of them, there would be a division with proportional criteria based on the individual result reported by the individual candidates.

The greatest advantage of this system would be the single-member constituency which somehow guarantees close proximity of the candidates to the electoral body. The multiplication of the colleges, moreover, would guarantee the representation of citizens. As for the disadvantage – it could be argued – in such a system there is no guarantee for the victory of the candidate who gets one more vote in the single college, and it could actually happen. But on closer inspection this is unacceptable in a majority logic, according to which whoever has one more vote must have the right to obtain the college; but in a proportional logic, on the other hand, a balance would be found between political representation and personal representation, in the sense that the unelected candidate in the constituency would still be representative of his party in those constituencies and would continue to be the voice of the party, since political representation should be favored in some way rather than the representative in the single college.

4. *Conclusions*

When discussing electoral law, the same issues have been facing for about thirty years, without acquiring greater awareness by political actors. There is a clear interdependence between the stability of the electoral system and the stability of the political system. Yet, our system has been put under severe stress, through numerous electoral laws in a few years, and it is has been the improper response of the party crisis to its own shortcomings. Moreover, if it is undisputed that the electoral law is a constitutionally necessary law, it is well known that it has not always resulted in a necessarily constitutional law. In fact, the product of the parties' response to their own crisis has been repeatedly criticized by the Constitutional Court[20].

We are witnessing a "heterogony of ends" represented by the fact that those who change the electoral laws to take advantage of them, then always lose the elections. Obviously, it is on the values of constitutionalism that we must continue to invest as a leading light. And to do so must be the politically relevant subjects, once re-legitimized as exercising the function constitutionally entrusted to them. Today is the time for sowing, with the hope that, even if

[19] This electoral possibility has been proposed by Gaetano Azzariti during the Congress "Il sistema elettorale in senso stretto: quali prospettive in Italia?" on 29 april 2021.

[20] Above all, it is still remarkable what Constitutional Court stated with judgments n. 1 of 2014 and n. 35 of 2017.

not immediately, in the medium term we will realize that the situation is profound and critical. As long as we continue to think of the electoral law only in terms of a technical way of translating votes into seats, we will go nowhere and the constitutional degradation will be deeper and deepeer, because the question is about our constitutional democracy[21].

[21] See C. LAVAGNA, *Il sistema elettorale nella Costituzione italiana*, in *Rivista trimestrale di diritto pubblico*, n. 2, 1952, 849 ff.; ID., *Istituzioni di diritto pubblico*, terza edizione, Torino, 1976, 543 ff.

Marco Antonio Simonelli*

The People's Watchdog. Safeguarding Democracy via Media Independence**

ABSTRACT: ***The Chapter focuses on the impact of constitutional degradation on the independence of the media. According to the European Court of Human Rights, media perform the essential function of informing the public about government's actions and thy are therefore an essential precondition for an accountable executive. This is why, when on power, populists try to loosen the down the constraints coming from the media sector, through various strategies. After an illustration of the best standards elaborated by the Venice Commission for the regulation of the media sector, the Chapter takes Hungary and Poland as case studies, illustrating the strategies employed by the two governments, in order to identify the solutions which may help securing media independence vis-à-vis governmental attempts to tame the public watchdog.***

1. *Introduction*

The continuous search for a direct relationship with the populace is probably the defining feature of all forms of populism. This direct relationship should allow a permanent accountability of the representatives towards the electorate, instead of one being limited to the time of elections. And, for the effective functioning of this kind of accountability, together with electoral rules, citizens must be properly informed about governmental actions, i.e. that the government operates in a transparent way. In contemporary democracies, the main instrument to guaranteeing the transparency of governmental actions is represented by media such as newspapers and televisions.

A well-functioning liberal democracy indeed requires a shared basis of knowledge and beliefs and a shared space in which deliberation on the basis of that foundation can take place. In absence of a free public sphere, elections are reduced to a mere formality, useful only to provide a *de facto* illiberal regime with a façade of democratic legitimacy. The media have thus the fundamental duty to report objective information and data to citizens, as indispensable elements to ensure that democracy lays on solid foundations. It is therefore unsurprising that media, alike the judiciary, are indeed one of the favourite targets of anti-democratic reforms aimed at reducing all constraints on the will of the ruling majority[1]. Emblematic is the case of Poland, where one of the first laws enacted by the PiS populist government subjugated the boards of all public broadcasters.

Against this backdrop, the present work investigates the process of constitutional degradation affecting public media in European States and tries to put forward solutions to strengthen the media system *vis-à-vis* the populist tide. To reach this stated aim, the contribution will proceed along the following lines.

Section 1 of the work provides the theoretical framework of the contribution, in particular by describing the ambivalent relationship between populism and the media. Section 2 illustrates the regulatory media framework in European democracies, paying particular attention to the best standards in media policy elaborated by the Venice Commission. Section 3 analyses how media legislation has been modified in countries where populist parties are in power. Section 4 concludes by suggesting solutions to protect media independence.

* **Post-doctoral Research Fellow, Universidad de Barcelona.**

** **This work has been subjected to blind peer review.**

[1] T. GINSBURG, A.Z. HUQ, *How to Save a Constitutional Democracy*, Chicago, 2018.

Before embarking on this task, a couple of methodological warnings are necessary. First, the geographical scope of this work will be constrained to EU countries as they constitute a relatively homogeneous pool of country. Secondly, this work adopts a comprehensive nontechnical definition of media, embracing audiovisual media as well as the print outlets engaging in news and reporting activities. Social media instead raise substantially different issues, especially concerning the limit to freedom of expression and the scope and extent of digital rights, and will be thus excluded from our analysis.[2]

2. *"Purveyor of information and public watchdog". The role of media in contemporary democracy*

The role of media in contemporary democracy is a vital one[3]. Freedom of expression is essential to guarantee the pluralism of opinions and ideas, without which a society cannot be called democratic. Alongside political parties and civil society, media are one of the channels through which the opinions of the people are formed and transmitted. Media in fact perform the essential functions of informing the general public about the actions undertaken by the government and its representatives and provide a platform for debating matters of general interest. At the same time, media in a democracy act as public watchdog, enhancing governmental accountability towards the populace. In the words of the European Court of Human Rights ('ECtHR') media act as 'purveyor of information and public watchdog' and their independence and neutrality must be guaranteed against any undue interferences from political authorities.[4] It is therefore unsurprising that the independence of media, traditionally referred to as the freedom of the press, is one of the most frequently used indicators of democratic quality.

Albeit pre-emptive censorship has been formally abolished in each and every EU State and all European constitutions solemnly affirm freedom of expression and freedom of the press, the independence of media still remains a contentious issue. According to Freedom House, attempts to politically influence public media are common not only in autocratic or populist-ruled countries, but also in consolidated democracies, like Austria, Italy, and Spain[5]. Whilst some frictions exist in virtually every democracy of the world, the rise of populism has substantially changed the panorama as regards the relationship between media and democracy. Populist leaders have indeed been able to exploit the media to communicate directly to the people, bypassing and delegitimising parliaments[6]. Such a process commonly goes under the name of "mediatisation of politics" and many authors see a strict correlation between this process and the success of populist ideology[7]. In this sense, there is a substantial unanimity in political scholarship that the market-driven logic of

[2] For a comprehensive account of these questions see: J. SCHWANHOLZ, JULIA, T. GRAHAM, P. T. STOLL (eds.), *Managing democracy in the digital age: internet regulation, social media use, and online civic engagement*, New York, 2018.

[3] CDL-PI (2020)008, *Compilation of Venice Commission opinions concerning freedom of expression and media*, 6.

[4] ECtHR, 73604/01, *Monnat v. Switzerland*, 21 September 2006, para. 70.

[5] Freedom House, *Freedom and the Media 2019: A downward Spiral*, 5. Available at:https://freedomhouse.org/sites/default/files/2020-02/FINAL07162019_Freedom_And_The_Media_2019_Report.pdf last accessed 30 September 2021.

[6] This tendency was already noted by Walter Benjamin who in 1935 wrote: '[s]ince the innovations of camera and recording equipment make it possible for the orator to become audible and visible to an unlimited number of persons, the presentation of the man of politics before camera and recording equipment becomes paramount. Parliaments, as much as theaters, are deserted.' See: W. Benjamin, *The Work of Art in the Age of Mechanical Reproduction,* 23-24. Available at: https://web.mit.edu/allanmc/www/benjamin.pdf last accessed 30 September 2021.

[7] Amongst many see: G. MAZZOLENI, *Populism and the media*, in D. ALBERTAZZI, D. MCDONNELL (eds.), *Twenty-First Century Populism: The Spectre of Western European Democracy*. Basingstoke and New York, 49–64.

media outlets had favoured the emergence of populist politics by giving visibility to highly controversial ideas and proposals.[8]

However, if we turn the picture around, it radically changes. Empirical evidence indeed shows that a populist rule is associated with an erosion of freedom of expression[9]. This happens because populist parties, when in power, become intolerant towards any form of scrutiny, be it judicial, parliamentarian, or journalistic. Populists' attacks on media independence, have been generally considered as a part of a broader strategy aimed at "shrinking the spaces" for the civil society[10]. The strategies employed by populist rulers to pursue this aim are various, but in the end, they all tend to neutralise the role of the media as public watchdog, thus loosening the constraints on the ruling majority.

These strategies are easily implemented by populist majorities because, except for provisions on the freedom of the press, the vast majority of democratic constitutions do not discipline the status and role of the media in our societies so that the media can be attacked by means of ordinary legislation, or even governmental decrees[11]. Against these attacks, two types of guarantees can be provided. From an individual point of view, journalists and media professionals should be able to freely express their opinions in public, and this implies in the first place that criminal sanctions against journalists should in principle be avoided[12]. From an organisational standpoint, instead, institutional guarantees shall be put in place to ensure that media outlets and corporations are in the position to holding the government to account on issues of public interest. This work focuses only on the latter aspect, that is the regulatory framework, as it is essential to investigate the existing models for media regulation in order to identify which one best insulates media outlets from political interferences.

3. *The European standards on media regulation*

The standards applicable to numerous aspects of media law and policy at the national level are set by the requirements which can be derived from binding legal and soft-law instruments adopted by the Council of Europe and the European Union. The EU rules however mainly affect the regulation of competition and market regulatory aspects,[13] whilst the European Court of Human Rights case-law concerning media essentially concerns the protection of individual journalists against the threats of criminal sanctions.[14] Hence, for the European standards on the institutional aspects of

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[8] On this point see: L. MANUCCI, *Populism and the Media*, in C. R. KALTWASSER, P. TAGGART, P. OCHOA ESPEJO, P. OSTIGUY (eds.), *The Oxford Handbook of Populism*, Oxford, 2017, 467.

[9] P. D. KENNY, "*The Enemy of the People": Populists and Press Freedom*, in *Political Research Quarterly*, 2020, 73, 2, 261–275.

[10] Ginsburg and Huq consider the attack on media one of the five principal strategies of democratic backsliding. See: *Ibid*., 90-91.

[11] M. F. PLATTNER, *Media and Democracy: The Long View*, in *Journal of Democracy,* 2012, 23, 4, 62-72.

[12] The principle was firstly affirmed in *Barthold v. Germany* and subsequently confirmed by the Strasbourg Court, lastly in: ECtHR, 46232/10 74770/10, *Timakov and OOO ID Rubezh v. Russia*, 08 September 2020.

[13] In particular the Directive on Audio-visual Media. See: Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities. For a commentary see: M. BURRI NENOVA, *The New Audiovisual Media Services Directive: Television without Frontiers, Television without Cultural Diversity*, in *Common Mark. Law Rev.*, 2007, 44, 5, 1689-1725.

[14] For a detailed overview of the possible threat to freedom of expression of journalists see: D. VOORHOOF, A. VAN LOON, C. VIER, R. Ó FATHAIGH, *Freedom of expression, the media and journalists: case-law of the European Court of Human Rights*, 5th ed., III, Strasbourg, 2020.

the media regulatory framework, and in particular their relationship with the political branches of the State, we have to focus our attention principally to the opinions and documents of the Venice Commission.

At the outset, it shall be noted that in Europe, the most common model of media regulation is one based on a dual system of public and private broadcasting.[15] The idea behind this model is that the public service broadcaster shall contribute to promoting pluralism in society, especially by ensuring the representation of political minorities and inform the general public about matters of public interest. Private media outlets also contribute to this goal and are subject to the supervisory powers of a media regulatory authority. In this regard, the Venice Commission repeatedly affirmed that private media must enjoy a degree of protection higher than any other commercial activity, and the State is the ultimate guarantor of pluralism, especially in relation to audio-visual media as an essential element of a democratic society.[16] On this aspect, the Venice Commission held that "[m]edia pluralism is achieved when there is a multiplicity of autonomous and independent media at the national, regional and local levels, ensuring a variety of media content reflecting different political and cultural views."[17] This implies that the State shall guarantee also with respect to private media, fair, transparent and non-discriminatory access to services to everyone.[18] Finally, even though it does not amount to a positive obligation, States should introduce financial subsidies for private media to promote media pluralism.[19]

As regards public media, albeit the State has no obligation to engage directly in imparting information to the general public, when it does it shall ensure internal pluralism, meaning that different political, cultural, and social views shall be represented.[20] Public service broadcasting also must be independent from the government and the legislative, e.g. individual public service media cannot be obligated to use as news-source an agency controlled by the government.[21] Pluralism should also be ensured in the boards of public media, meaning that the government or the majority coalition or party shall not have a decisive influence in appointing the members of the boards. The Commission, however, does not specify what amounts to decisive influence, simply requiring that «a fair representation of all important political, social and relevant professional groups within those bodies must be secured».[22] Finally, concerning financing, the Venice Commission warns against the possibility for a public-controlled media company to be listed on the stock exchange as this may put «pressure to maximise the advertising income, which will interfere with the achievement of the public-policy aims».[23]

Concerning media-regulatory authorities, the Venice Commission repeats the usual *caveat* that 'there is no single European model of organisation of the media regulatory authorities' yet it identifies as the overarching principle that this authority institution should be independent and impartial.[24] As to the system of appointment, the Venice Commission strongly favours a model in which an element of self-government is present. This means that the media community and the

[15] A. HARCOURT, *The Regulation of Media Markets in selected EU Accession States in Central and Eastern Europe*, in *Eur. Law J.,* 2003, 9, 3, 316-340.

[16] CDL-AD (2005) 017, *Opinion on the compatibility of the laws "Gasparri" and "Frattini" of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media*, Adopted by the Venice Commission At its 63rd Plenary Session (Venice, 10-11 June 2005), paras. 36 and 260, cited in: CDL-PI(2020)008, *Compilation, 7.*

[17] CDL-AD (2005) 017, *Opinion on the compatibility of the laws "Gasparri" and "Frattini"*, paras 37, 40; cited in: CDL-PI(2020)008, *Compilation*, 18.

[18] CDL-PI (2020) 008, *Compilation*, 18.

[19] *Ibid.*, 24.

[20] *Ibid.*, 20.

[21] *Ibid.*

[22] *Ibid.*, 23.

[23] *Ibid.*, 24.

[24] *Ibid.*, 26.

telecommunication industry should be able to appoint or delegate representatives to the independent authorities as this would ensure pluralism and neutrality of the authority.[25] On this point, the Commission clarified that detailed rules preventing conflicts of interest should be adopted.[26] If, instead, is chosen a model in which the composition of the body is politically influenced, the system of appointment shall ensure political diversity and the representation of the different social groups that compose the society.[27] As to the president of the authority, the Commission recommends it to be elected by the members of the authority themselves.[28] Finally, regarding the powers of the authority, the Commission merely affirms that a priori control on the content of programmes shall be excluded as this would be tantamount to a form of censorship.[29]

Having illustrated what are the European standards concerning the regulation of the media sector, in the following Section we will focus on the reforms affecting the media system in Hungary and Poland to see to which extent they deviate from these standards.

4. *The attacks on media independence.*

The process of constitutional degradation in Hungary and Poland offers as usual a playbook on how to tame and control the media system. In both countries, the assault on the independence of public media was amongst the first worries of Orban and Kazskincky[30].

In Hungary, the National Media and Infocommunications Authority (the "Media Authority") was established in July 2010, just three months after the landslide victory of the Fidesz in the national elections. This law initiated a series of changes to Hungary's media regulation system and replaced Hungary's former regulatory bodies with a single entity, the Media Authority with vast powers conferred to the President of the Media Authority. Under the new legislation, the president of the Media Authority is appointed directly by the prime minister for indefinitely renewable nine-year terms, The president of the Media Authority appoints the main decision-makers in the Media Authority nominates candidates for the most senior position in each public service media provider, and he is the indirect employer of all journalists working for the public service broadcaster. The president of the media authority is also the *ipso iure* candidate for the chairperson of the Media Council, with final appointment subject to two-thirds parliamentary approval. Yet, it is worth noting that the parliament has virtually no choice as the President may start to chair the meetings of the Media council even without parliamentary approval[31]. All in all, the current media legislation envisages a system in which a single person, directly appointed with unfettered discretion by the Prime minister holds extensive and concentrated powers for nine years over all regulatory, senior staffing, financing and content matters across all media sectors. In addition to this already troublesome picture, it has to be added the judicial scrutiny over the decisions of the President of the Media Authority are limited to check compatibility with media legislation, thus precluding scrutiny with respect to constitutional provisions. All in all, the combined effect of those changes is a media sector entirely controlled by the government where, albeit no formal censorship is present,

[25] *Ibid.*, 25.
[26] *Ibid.,* 26.
[27] *Ibid.*
[28] *Ibid.*, 26.
[29] *Ibid.*, 25.
[30] Ginsburg and Huq actually describe the capture of the media system as a step two of democratic erosion, whereas step one is the creation of a political platform and the reach of power. See: T. GINSBURG, A.Z. HUQ, *How to Save a Constitutional Democracy*, cit., 18.
[31] Extensively on the capture of the media system by the Hungarian government see: L. BELLUCCI, *La sindrome ungherese in Europa. Media, diritto e democrazia in un'analisi di law and politics*, Milano, 2018.

freedom of expression is limited by the fear of negative consequences for expressing a position not aligned with that of government.[32]

The path followed by the Polish Government is rather similar[33]. In December 2015, the PiS began its attack on the media independence and pluralism with the law on Public Service media governance, which disposed the premature termination the mandate of all the members of the National Broadcasting Council, a body provided by the Article 213 of the Polish Constitution for the safeguard of the right to information and the public interest regarding radio broadcasting and television, simultaneously conferring the Minister of Treasury the power to directly appoint and dismiss all members of the Supervisory and Management Boards of public tv and Radio, thus making them wholly dependent on the goodwill and favour of the government. Given the constitutional status of the National Broadcasting Council, the Polish government could not abolish it, so it pursued a strategy to empty it of any significant powers. In June 2016 the parliament passed legislation creating a parallel National Media Council, which was attributed the power to appoint and dismiss the members of the governing bodies of the public media. The body consists of five members, three appointed by the parliamentary majority and two by President of the republic on the advice of opposition parties for a term of six years, so it is a body de facto controlled by the ruling majority. Finally, in December 2017, the parliament passed a law terminating the mandates of the boards of all public-service broadcasters and gave each broadcaster a new board, whose members can be appointed and dismissed at any time by the Ministry of the Treasury. Such a dependency, in a context in which the National Media Council is already controlled by the parliamentary majority, threatens pluralism in the media sector, which according to the Venice Commission, is an essential element of a democratic society[34].

Also in June 2020, the Polish Competition authority blocked the acquisition by the principal opposition newspaper in Poland of Polska Press, a publisher of local periodicals, only to give the green light of the acquisition of the same company by a State controlled oil company.

This brief account of the 'reforms' concerning the media sector in Hungary and Poland, shows that media independence can be attacked by at least three different strategies.

First, the capture of the public broadcasting service - a common feature in the media systems of European States- is transformed from an independent and neutral institution into a propaganda organ of the ruling party. This is what happened in Poland, where the power to appoint the boards of the public radio and television broadcaster was stripped away from the National Broadcasting Council and conferred to the minister of treasury.

Second, media regulatory authorities, that should guarantee internal and external pluralism in the media environment, are placed under the direct control of the ruling populist majority. In Hungary, the current media legislation envisages a system in which a single person, the President of the Media authority, directly appointed with unfettered discretion by the Prime minister, holds extensive and concentrated powers for nine years over any kind of regulatory, senior staffing, financing, and content matters across all media sectors.

A third strategy is interfering with private media outlets. This is a strategy followed by the Hungarian and Polish governments, which both significantly increased the state's intervention in the media sector. This interference can take various forms, from the purchase by a state-controlled

[32] See: V. CARLINO, *Ungheria. Le Autorità Indipendenti e la "Democratic Erosion"*, *Nomos. Le attualità nel diritto*, 2019, 3, 23.

[33] Extensively on the Polish case see: J. FOMINA, J. KUCHARCZYK, *The Specter Haunting Europe: Populism and Protest in Poland*, in *Journal of Democracy,* 2016, 27, 4, 58-68.

[34] CDL-AD (2005) 017, *Opinion on the compatibility of the laws "Gasparri" and "Frattini"*, paras. 36 and 260, cited in: CDL-PI (2020) 008, *Compilation*, 7.

company of private broadcaster, to the denial of renewing the licence for broadcasting to independent media[35].

This list of strategies for taming independent media is not intended to be exhaustive. In a more advanced phase of democratic erosion, for instance, the government may start to threaten journalists with the imposition of criminal sanctions or other measures having a chilling effect on freedom of expression[36], or penalise independent media through hidden economic sanctions. Yet, as regards the institutional aspects of media independence, the three above mentioned strategies are the ones that the populist governments in Hungary and Poland have adopted to neutralise the accountability function of media outlets. At this point, we can turn our attention to the possible solutions to strengthen the media sector *vis-à-vis* a populist attack.

5. *Conclusions*

In order to identify which model of media regulation may better resist a prolonged populist rule, we have to move from the assumption that media must enjoy a degree of protection higher than any other commercial activity, and the State is the ultimate guarantor of pluralism, especially in relation to audio-visual media has an essential element of a democratic society. If constitutional recognition of media independence and of constitutional rank of independent authority may enhance the protection of media outlets, and are thus to be welcomed, as showed by the Polish case this is not sufficient[37]. As a general principle, indeed, any institutional arrangement to contain anti-constitutional tendencies should be based on the involvement of a plurality of actors in appointments and decision-making procedures and the same applies to media regulation.[38] Such an approach is supported also by the opinions and documents of the Venice Commission, where it is. strongly favoured a model of media regulation in which an element of self-government is present or at least a model in which the participation of the opposition is guaranteed.

The other core principle that should inform the regulation of the media sector is pluralism. A principle that applies both to the number of private media operating in the country and to public media, which shall ensure internal pluralism, meaning that different political, cultural, and social views shall be represented. Also, pluralism means that individual public service media cannot be obligated to use as news-source an agency controlled by the government. The respect of the principle of pluralism should be ensured by the media regulatory authority. Yet, as we have seen, the capture of the media regulatory authority constitutes the first step that populist takes to destroy the independence of media. Once again proving true the Böckenförde thesis that liberal democracy is based on normative premises it cannot guarantee[39].

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[35] A recent report of Reporters without frontiers signalled this and many other problems in Poland and declared a "press freedom state of emergency". See: https://rsf.org/en/news/rsf-declares-press-freedom-state-emergency-poland .

[36] The most prominent example of this practice is Turkey, which as to 2019, is the first country in the world for number of journalists jailed. See: https://www.amnesty.org/en/latest/news/2019/05/turkey-the-worlds-largest-prison-for-journalists/ last accessed 30 September 2021.

[37] CDL-AD (2005) 017, *Opinion on the compatibility of the laws "Gasparri" and "Frattini" of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media*, paras. 36 and 260, cited in: CDL-PI(2020)008, *Compilation of Venice Commission opinions concerning freedom of expression and media, 7.*

[38] See J.M. CASTELLÀ ET AL., *Populist constitutionalism. Its impact on the constitution, the judiciary and the role of the EU*, *Demos Working Paper*, 2020, 23. Available at: https://openarchive.tk.mta.hu/433/1/Populist_Constitutionalism_Final%20.pdf last accessed 30 September 2021.

[39] E. W. Böckenförde, *Staat, Gesellschaft, Freiheit*. Frankfurt am Main, 1976, 60.

All the actors of contemporary constitutional democracy have to step in to protect democracy. The case of the Polish bill increasing taxation for media outlets on advertising revenues is paradigmatic. Immediately, the law received widespread international criticism, in particular, the Commissioner for Human Rights Dunja Mijatovic affirmed that law threatens media pluralism by suffocating independent media outlets[40], and 3 European MPs addressed three questions to the Commission, asking how the Commission intended to react to this law[41]. Also, private media outlets in Poland went off-air to protest the bill, claiming that it was a threat to media independence[42]. As a result of this mounting pressure, the bill has not been transformed into law.

As a last point, it is necessary to reflect on the role the EU may play in protecting the independence of media. An independent media system, like an independent judiciary, is an indispensable element of the rule of law, and the EU should step in to protect media independence as it did for the Polish judges. In order to do so, the Commission may rely on solid legal grounds to launch an infringement proceeding. Namely Article 30 of the Audiovisual directive, establishing an obligation for Member State to designate a regulatory authority legally distinct from the government and functionally independent[43]; and Article 11(2) of the Charter of Fundamental Rights, which affirms that freedom and pluralism of media shall be respected[44].

In conclusion, an independent media system capable of ensuring the transparency of government's actions cannot be guaranteed by the mere adoption of a specific model; it demands a continuous effort of national governments and international actors to safeguard the independence of media regulatory authorities and pluralism. Such an effort is indispensable because, if media independence collapse, democracy will follow suit. Preserving an independent and free media landscape is instrumental not only to prevent disinformation and guaranteeing the rights to freedom of expression and information, but also to prevent constitutional degradation.

[40] See: https://www.coe.int/en/web/portal/-/poland-draft-media-laws-should-respect-european-human-rights-standards last accessed 30 September 2021.

[41] Question for written answer, E-000832/202, *Subject: Proposal for an advertising tax in Poland*. Available at: https://www.europarl.europa.eu/doceo/document/E-9-2021-000832_EN.html last accessed 30 September 2021.

[42] W. Kość, *Polish media suspend reporting to protest planned tax on advertising*, in *Politico*, 10 February 2021, available at: https://www.politico.eu/article/polish-media-suspend-reporting-to-protest-a-planned-tax-on-advertising/ last accessed 30 September 2021.

[43] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010, *on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services*.

[44] Given the presence of EU legislation in the media sector, no problem arises concerning the applicability of the Charter. On the point see: European Parliament (A7-0117/2013), *Report on the EU Charter: standard settings for media freedom across the EU*. Available at: https://www.europarl.europa.eu/doceo/document/A-7-2013-0117_EN.html last accessed 30 September 2021.

Giulia Vasino*

De-constructing and re-building Procedural Standards: New Trends in the Current Stage of the Italian Constitutional Review of Legislation**

ABSTRACT: ***In the present stage of Italian Constitutional justice, the Constitution's gatekeeper has developed into a highly interventionist political actor, thereby reshaping some of its traditional procedural standards. Such evolution towards a less constrained judicial review of legislation raises concerns. Part of the doctrine maintains that the foreseeable effect of this proactive decision-making method would be the deconstruction of the institutional pillars on which the constitutional state is founded. In this light, the traditional principle of separation of powers would be jeopardized. However, the paper aims to temper this negative perspective, by arguing that these disrupting changes to the institutional balances and the legal framework are only seemingly disruptive. By focusing on recent notable case-law, it will be highlighted that the Court's conduct indicates its intention to reconsider the constitutive elements of its modus operandi without relinquishing its jurisdictional approach. In this scenario of "de-constructing" and "re-building", what emerges is the Court's will to impose upon itself new procedural limitations as well as to strengthen universally adopted decisional schemes, such as the proportionality test, strongly emerges.***

1. *Introduction*

In recent times, the configuration of the judicial review of legislation in Italy has provided evidence of centralizing tendencies which have resulted in the Constitutional Court acquiring a role of unprecedented relevance. Indeed, in spite of the complexity of the perspective advocated by the legal doctrine, the academic debate agrees on defining the current stage of Italian constitutional justice as the phase characterized by self-empowerment, activism, or even "supremacy" of the Court[1]. Most notably, similarities with the *modus operandi* of its most powerful German counterpart, the *Bundesverfassungsgericht,* have been pointed out. Scholars have indeed highlighted how *la Corte* has progressively emancipated itself from its original political weakness[2].

The expressions of this widely perceived innovative course, ripping throughout the different spheres of the judicial review's architecture, are significant. In particular, sharp criticism has been provoked by the reconsideration of the *rime obbligate* standard. This is a procedural paramount rule created by the Court itself, which has traditionally represented a self-imposed limit to the Court's creativity and, at the same time, a shield for the discretionary power of the Parliament. More clearly, this canon, which literally means "mandatory verses", requires the Court, whenever it exercises its normative powers for corrective actions in the judicial review, to bring to light the

* **Post-doctoral Research Fellow, Department of Political Science, Sapienza – University of Rome.**

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[1] D. TEGA, *La Corte nel contesto. Percorsi di ri-accentramento della giustizia costituzionale in Italia*, Bologna, 2020; A. MORRONE, *Suprematismo giudiziario. Su sconfinamenti e legittimazione politica della Corte costituzionale*, in *Quad. cost.,* 2019, 2; T. GROPPI, *Il ri-accentramento nell'epoca della ri-centralizzazione. Recenti tendenze dei rapporti tra Corte costituzionale e giudici comuni*, in *Federalismi.it*, 2021, 3, 129; A. RUGGERI, *Rapporti interordinamentali e rapporti istituzionali in circolo (scenari, disfunzioni, rimedi)*, in *Freedom, Security & Justice: European Legal Studies*, 2019, 2.

[2] A. VON BOGDANDY, D. PARIS, *Building Judicial Authority: A Comparison Between the Italian Constitutional Court and the German Federal Constitutional Court*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper, No. 1., 2019.

univocal interpretation deductible from the constitutional text, limiting its discretion to a minimum level. In this light, the judicial body is only allowed to act within well-defined parameters. Otherwise, its intervention would overlap with that of the political decision-maker. However, its binding value has been significantly softened in recent case-law. Indeed, the use of a vaguer legislative "point of reference" in the legal framework would be purportedly considered acceptable in the case where an acceptance judgement was issued when there is no univocal normative solution clearly enshrined in the Constitution[3].

For this reason, commentators argue that the institutional balance underlying the relationship between the Court and the Parliament has been profoundly reshaped[4]. According to this critical view, after many years in which the CC had generally displayed a cautious *self-restraint* regarding issues of constitutionality that involved the Assembly's political discretion, the jurisdictional organ is now opting for questionable interventionism. This view holds that the CC's approach is characterized by a Machiavellian attitude, whereby legitimacy prevails over legality[5]. Therefore, the aim of enhancing the effectiveness of its guarantee function arguably overshadows the procedural rules to which the Court's must adhere.

Such evolution towards a less constrained judicial review of legislation raises concerns. Part of the doctrine maintains that the foreseeable effect of this proactive decision-making method would be the deconstruction of the institutional pillars on which the constitutional state is founded. More clearly, the prominence acquired by the judicial body and the progressive erosion of vital procedural elements limiting its action could be a symptom of "constitutional degradation". Although the connection is more difficult to detect as these adjustments are apparently internal to the decision-making procedure, this development could lead to disrupting changes in institutional balances. In other words, the traditional principle of the separation of powers would be jeopardized.

However, this paper will argue that these fractures in the legal framework are not as real as it might be claimed. By exploring recent remarkable case-law, the study aspires to emphasize that the judicial body's decision-making demonstrates its will maintain solid self-imposed limitations.

Firstly, an "internal" perspective based on the analysis of certain new argumentative key factors of the Court's reasoning will be adopted. It will be argued that the Court's conduct seems to indicate its intention to reconsider some constitutive elements of its decision-making style without relinquishing its jurisdictional *modus operandi*. Secondly, an "external" perspective focusing on the openness of the judicial organ to judiciary supranational models will be explored. It will be highlighted that *la Corte* is now part of a well-established transnational judiciary network, which has contributed to building a permanent and mutually enriching dialogue between different constitutional systems.

Hence, both the Court's willingness to readjust the old procedural framework and the existing high degree of interaction between supranational and national jurisdictional organs make it difficult to envisage a "dangerous" and unbridled monologue on the part of Court when it comes to issues related to fundamental rights.

[3] M. RUOTOLO, *L'evoluzione delle tecniche decisorie della Corte costituzionale nel giudizio in via incidentale. Per un inquadramento dell'ord. n. 207 del 2018 in un nuovo contesto giurisprudenziale*, in *Rivista AIC*, 2019, 2, 653-654.

[4] R. PINARDI, *La Corte e il suo processo: alcune preoccupate riflessioni su un tema di rinnovato interesse*, in *Giur. cost.,* 2019, 3.

[5] D. MARTIRE, *Giurisprudenza costituzionale e rime obbligate: il fine giustifica i mezzi? Note a margine della sentenza n. 113 del 2020 della Corte costituzionale*, in *Osservatorio costituzionale*, 2020, 6, 5.

2. *The new features of judicial reasoning: "proceduralization" of the Court's interventions and unheeded warnings as objective criteria*

In the current stage of the constitutional justice the jurisdictional organ seems to have developed a more flexible approach to its procedural rules in order to safeguard the primacy and the promptness of its own intervention. In this context, ensuring effectiveness in the protection of individual rights, as well as avoiding "judicial review-free zones"[6], appear to constitute the driving forces of this change. This innovative decisional path reflects a "renewed sensitivity"[7] on the part of the CC, which can be summarized in the idea that - when a conspicuous violation of constitutional principles occurs - the Court can act to amend the *vulnus* "whatever it takes"[8].

It is therefore undeniable that the constituent elements of the constitutional procedural framework are indeed being called into question. However, the decisional options implemented by the Court in the current phase seem to demonstrate that the Court's decision-making is firmly based on the intent to maintain solid procedural rules. Even this more activist style of reasoning unfolds through an inherently consistent proceeding or, at least, seeks to maintain an anchorage to elements of objectivity and graduality. Accordingly, it seems appropriate to temper the idea that the Court has now embraced the spirit of "the ends justify the means".

Upon closer examination, new patterns emerge in the judicial reasoning of the judgements in which the new jurisdictional technique takes shape. Indeed, the weakening of the *rime obbligate* criterion appears to occur precisely when the following conditions are fulfilled: 1) crucially fundamental rights are at stake; 2) a similar normative solution, albeit not univocal, can be utilized by the Court as a reconstructive reference provision to adopt an "additive" judgement (*sentenza additiva*)[9]; 3) previous dismissal decision(s) on the same matter, containing a plea to the legislator to amend the statute, can be identified; 4) and most importantly of all, the judicial warning falls on deaf ears, as no corrective intervention is provided by the Parliament[10]. The expression "judicial warning" or "judicial stimulus" (*monito*) constitutes an advice or an admonition addressed to the legislator which is usually included into the grounds for a dismissal decision. With this warning the Court invites the Parliament to promptly modify the examined statute in order to bring it into compliance with constitutional principles: otherwise, it would unhesitatingly be declared illegitimate.

In view of this pattern, the Court appears to establish an explicit link between the Parliament's evasion of one or more warnings and the consequential legitimacy of its less constrained declaration of unconstitutionality[11]. Unheeded warnings can become an objective factor which turn the long-term absolute limitation into a relative obstacle. In this light, the Court seems to have brought the *doppia pronuncia* logic to maturity, by knowingly tailoring its biphasic structure to the purpose of effectively performing a judicial review of legislation. This sophisticated kind of judgement consists

[6] This expression refers to one of the most challenging matters related to judicial review: the need to make all the areas of the juridical system subject to the jurisdictional verification of the Constitutional Court, thereby avoiding the existence of issues that could not be brought before the Court. The importance of eliminating judicial review-free zones ("*zone d'ombra*") has been highlighted by the Court in judgement no. 1/2014. See, among many, R. BALDUZZI, P. COSTANZO, *Le zone d'ombra della giustizia costituzionale*. *I giudizi sulle leggi*, Torino, 2007.

[7] G. LATTANZI, *Relazione del Presidente Giorgio Lattanzi*, 21 marzo 2019, in www.cortecostituzionale.it, 14.

[8] A. RUGGERI, *Rimosso senza indugio il limite della discrezionalità del legislatore, la Consulta dà alla luce la preannunziata regolazione del suicidio assistito (a prima lettura di Corte cost. n. 242 del 2019)*, in *Giustizia insieme*, 2019.

[9] In this event, as the mere annulment cannot restore constitutional legality, the Court hereby introduces a new exhaustive set of norms by itself into the legal framework.

[10] M. RUOTOLO, *Oltre le "rime obbligate"?,* in *Federalismi.it*, 2021, 3; G. Repetto, *Recenti orientamenti della Corte costituzionale in tema di sentenze di accoglimento manipolative*, in *Consultaonline.org*, 2020, 3.

[11] M. RUOTOLO, *L' evoluzione delle tecniche decisorie della Corte costituzionale nel giudizio in via incidentale*, cit.

of an informal declaration of unconstitutionality[12]. Structurally, it is characterized by the apparent logical contradiction between the Court's reasoning and the decision to reject the question. The Court denounces the act for not complying with constitutional parameters, but then forgoes its annulment, and instead calls upon the Parliament to correct the defective law. The following threat which is made to the legislator is fairly straightforward: if the Assembly fails to heed the judicial warning in a reasonable amount of time, the Court will strike down the law in a subsequent judgement concerning the same issue. While in earlier stages the Court was extremely reluctant to intervene, it is now undertaking a less cautious strategy.

Such an innovative approach, while aiming at legitimizing less procedurally constrained interventions, has paradoxically found again its pivotal element in procedural rules. In fact, the aforementioned "recurring" features are likely to rise upward into reference standards, if steadily applied. These steps suggest a determined intention to re-build a new processual path. By accurately reporting its previous attempts to encourage law-making, along with the description of the negative impact of legislative unresponsiveness on the fundamental rights involved, the CC has established a substantially new decisional method. This innovative decisional approach has been defined by scholars with the evocative expressions "*rime possibili*" or "*rime adeguate*" (*appropriate* or *adequate verses*), both indicating the less limited configuration of the Court's reasoning if compared with the stricter "*rime obbligate*" standard. In the CC's strategy, legislative omissions evolve into the justifying basis for a more proactive judicial review technique[13].

In this scenario, the delicate balance between the principle of separation of powers and the aim of "making constitutional justice" would achieve a new level of functional equilibrium[14]. On the other hand, drawing upon previous warnings represents a crucial benchmark to legitimize the Court's interventionism while, at the same time, it can also be seen as the backbone of this new procedural pattern. Hence, the Court's decision-style appears to be anything but free of institutional limitations. Interestingly, the connection between the missed opportunity of the legislator and the less-constrained decision of the CC evinces a tendency to revaluate ordinary instruments without dismantling the graduality of the intervention. In this case, even the extension of the discretionary power of the Constitution's gatekeeper would not be unlimited, since it would be directly related to the legislator's unresponsiveness.

The inner logic of this *modus operandi* has become easily visible in the sophisticated "wait and see" approach adopted in the new cooperative type of decision named "foreseen unconstitutionality"[15] (*incostituzionalità prospettata*) judgement (orders nos. 207/2018; 132/2020; 97/2021)[16]. However, this method has been also discernible in some recent landmark decisions of

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[12] R. PINARDI, *La Corte, i giudici ed il legislatore*, Milano, 1993, 80 ff.; A. CERVATI, *Tipi di sentenze e tipi di motivazioni nel giudizio incidentale di costituzionalità delle leggi,* in AA. VV. (eds.), *Strumenti e tecniche di giudizio della Corte costituzionale,* Atti del Convegno svoltosi a Trieste, 26-28 maggio 1986, Milano, 1988, 127; A. PISANESCHI, *Le sentenze di costituzionalità provvisoria e di incostituzionalità non dichiarata: la transitorietà nel giudizio costituzionale*, in *Giur. cost.*, 1989, 631.

[13] S. LEONE, *La Corte costituzionale censura la pena accessoria fissa per il reato di bancarotta fraudolenta. Una decisione "a rime possibili"*, in *Quad. cost.*, 2019, 1, 184; D. MARTIRE, *Dalle "rime obbligate" alle soluzioni costituzionalmente "adeguate", benché non "obbligate"*, in *Giur. cost.*, 2019, 2, 696.

[14] See G. SILVESTRI, *Del rendere giustizia costituzionale*, in *Questione giustizia*, 2020, 4.

[15] With this innovative kind of judgement, the CC decides to delay its declaration of unconstitutionality and to approve a suspensive decision. By delivering a procedural order, it grants a determined amount of time to the Parliament to discuss the issue and correct the legislative framework.

[16] M. BIGNAMI, *Il caso Cappato alla Corte costituzionale: un'ordinanza ad incostituzionalità differita*, in F.S. MARINI, C. CUPELLI (eds.), *Il caso Cappato. Riflessioni a margine dell'ordinanza della Corte costituzionale n. 207 del 2018*, Napoli, 2019; P. CARNEVALE, *Incappare in... Cappato. Considerazioni di tecnica decisoria sull'ordinanza n. 207 del 2018 della Corte costituzionale*, in *ConsultaOnline*, 2019, 2; E. GROSSO, *Il rinvio a data fissa nell'ordinanza n. 207/2018. Originale condotta processuale, nuova regola processuale o innovativa tecnica di giudizio?,* in *Quad. cost.*, 2019, 3; A. RUGGERI*, Replicato,*

unconstitutionality concerning penal matters, in which the argumentation of the sufficiency of the aforementioned "normative point of reference" (*punto di riferimento normativo*) was brought to light for the first time (judgements nos. 236/2016; 222/2018; 233/2018; 40/2019; 242/2019)[17].

In view of all this, the theory of the irreversible decline of the *rime obbligate* standard should be reconsidered. This procedural limitation still stands, while at the same time its inherent logic is translated into the less restrictive *rime possibili* method. Furthermore, there is a direct connection between the "importance" of the constitutional value at stake and the willingness of the Court to increasingly move away from its traditional procedural setting. This perspective would corroborate the idea that graduality is still essential to the Court.

3. *Harmonising procedural standards: the permanent dialogue between Courts and the proportionality test as a key method in global constitutionalism*

Constitutional reasoning is also positively affected by the long-established dialectic between Courts. Far from being mere institutional interaction, judicial dialogue has been progressively creating a horizontal connection, which has become a vital forum of cross-fertilization among the constitutional systems involved.

Thanks to this mutual influence, a shared "plural sensitivity" has been interiorized in the Court's decision-making[18]. Indeed, the adoption of a comparative perspective often plays a crucial role in the Court's judgements[19]. Such rhetorical strategy is now frequently used not only with the aim of homogenizing and enhancing the protection of fundamental rights, but also for the purpose of supporting the utilization of sophisticated judicial solutions implemented by the Court's European counterparts. In this context, this increasingly solid interconnection between jurisdictional models can be seen as an additional "reassuring" element that should be taken into consideration in order to mitigate the widespread concern over the Court's alleged activism.

The ongoing "osmosis" between constitutional experiences can further expand the consistency and the transparency in this transitioning judicial reasoning. Indeed, it constitutes a valuable source to absorb new procedural standards as well as to improve pre-existing standards which are still are in an embryonic stage in la Corte's judicial reasoning.

Behind such perspective lies the general theory that courts' reasoning represents a crucial instrument to ensure transparency in judicial review[20]. Actually, the aim of the constitutional reasoning is not to convince the audience with persuasive argumentations. Rather, it is to provide clear, serious and plausible motivations in order to rationally legitimize courts' decisions. According to this view, the reasoning of the Court's decision should not consist of a "justification theory", a

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seppur in modo più cauto e accorto, alla Consulta lo schema della doppia pronuncia inaugurato in Cappato (nota minima a margine di Corte cost. n. 132 del 2020), in *ConsultaOnline*, 2020, 3;

[17] See V. BARSOTTI, P. CARROZZA, M. CARTABIA, A. SIMONICINI, *Introduction. Dialogue as a method*, in V. BARSOTTI, P. CARROZZA, M. CARTABIA, A. SIMONICINI (eds.), *Dialogues on Italian Constitutional Justice: a comparative perspective*, Torino – London – New York, 2020, 5-6; see also F. VIGANÒ, *Un'importante pronuncia della Consulta sulla proporzionalità della pena*, in *Diritto penale contemporaneo*, 2017, 2, 66; A. GALLUCCIO, *La sentenza della Consulta su pene fisse e 'rime obbligate': costituzionalmente illegittime le pene accessorie dei delitti di bancarotta fraudolenta*, in *Diritto penale contemporaneo*, 2018, par. 6.2; R. BARTOLI, *La Corte costituzionale al bivio tra "rime obbligate" e discrezionalità? Prospettabile una terza via*, in *Diritto penale contemporaneo*, 2019, 2, 151.

[18] T. GROPPI, *Il ri-accentramento nell'epoca della ri-centralizzazione*, cit., 141.

[19] D. DE LUNGO, *Comparazione e legittimazione. Considerazioni sull'uso dell'argomento comparatistico nella giurisprudenza costituzionale recente, a partire dal caso Cappato*, in F.S. MARINI, C. CUPELLI (eds.), *Il caso Cappato,* cit., 97.

[20] F. FALORNI, *Giudice costituzionale e trasparenza: un binomio sempre più ricorrente*, in *Federalismi.it*, 2020, 30, 84 ff.

rhetorical argumentation or a mere demonstration of the collegium's will[21]. The judicial reasoning should aim to deliver «information on the substance of the decision and of the facts and reasons on which it was based», by ensuring the so-called «transparency in rationale»[22].

However - as authoritatively pointed out – transparency in constitutional reasoning can also have an "internal" effect[23]. More precisely, a rational and solid judicial itinerary can have an impact on the jurisdictional organ itself, since it could act as a binding precedent for future judgements[24]. In this light, the Court's discretion itself would be self-limited.

Starting from these assumptions, it should be emphasized that the proportionality test is an important standard which arises from the multilevel system. It consists of a key argumentative model that constitutional judges have at their disposal to make decisions through a systematic evaluation process. In this way, the delicate balance between fundamental rights is solidly based on well-defined logical steps arranged in progression[25]. Only by following this sequential procedure can the compression of a certain fundamental right be admissible. To highlight the rigorousness of the proportionality scheme, scholars use the definition "structured analysis"[26].The test was originally drawn up by the German constitutional Court but, thanks to the wide reputation of the BVG, it has been thereafter incorporated into the international juridical culture[27]. At present, it unequivocally constitutes a primary tool for the ECtHR and the CJEU[28].

Furthermore, the "constitutionalism of rights" aims to create universal constitutional justice rooted in the meaning of human dignity. However, this aspiration has always had to deal with the highly fragmented and conflictual essence of contemporary pluralistic states[29]. In this context of structural and ideological disputes involving the highest values of the legal system, the proportionality test, thanks to its inherently procedural essence, provides an approach that would soften their widespread impact. With a rational method, which pulls apart a certain issue by dividing it into different features, the judicial review would rely on a particularly well-suited solution in this diversified environment. Behind the 3 or 4 step analysis lies the assumption that dichotomic answers are inadequate when it comes to the balancing of constitutional rights. Especially with regard to the third stage of evaluation (the proportionality test in a narrow sense), the aim of the judicial analysis is not the establishment of a hierarchical scale of values[30].

3.1. *"De-structured" proportionality in the Italian Constitutional Court's judicial reasoning*

As a paramount element within Europe's common legal heritage, proportionality plays an important role in the Italian constitutional court's reasoning. However, despite its influence, it is still

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[21] See M. TARUFFO, *La motivazione della sentenza civile*, Padova, 1975, 118-126.

[22] J. DE FINE LICHT, D. NAURIN, P. ESAIASSON, M. GILLJAM, *When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship*, in *Governance: An International Journal of Policy, Administration, and Institution*, 2014, 27, 1, 113.

[23] R. ROMBOLI, *La mancanza o l'insufficienza della motivazione come criterio di selezione dei giudizi*, in A. RUGGERI (ed.), *La motivazione delle decisioni della Corte costituzionale*, Torino, 1994, 339 ff.

[24] F. FALORNI, *Giudice costituzionale e trasparenza*, cit., 96 ff.

[25] R. ALEXY, *Constitutional Rights, Balancing, and Rationality*, in *Ratio Juris*, 2003, 16, 2, 133-134.

[26] See A. BARAK, *Proportionality. Constitutional Rights and their Limitations*, Cambridge, 2012, 460-462; V.C. JACKSON, *Constitutional Law in an Age of Proportionality*, in *Yale Law J.*, 2015, 124, 8, 3098.

[27] See A. STONE SWEET, J. MATHEWS, *Proportionality Balancing and Global Constitutionalism*, in *Colum. J. Transnat'l. Law*, 2008, 47, 73.

[28] A.L. BANDOR, T. SELA, *How proportional is proportionality?* in *Int. J. Const. Law*, 2015, 13, 2, 530 ff.

[29] See R. NANIA, *Sui diritti fondamentali nella vicenda evolutiva del costituzionalismo*, in *Nomos. Le attualità nel diritto*, 2020, 1, 3.

[30] G. SCACCIA, *Proportionality and the Balancing of Rights in the Case-law of European Courts*, in *Federalism.it*, 2019, 4, 4.

implicitly mentioned and it is far from being in line with the level of sophistication typical of the European model. For that reason, with regard to the Italian judicial review, scholars claim the existence of a "de-structured" proportionality[31].

Firstly, one can observe uncertainty on terminological level. Rationality, proportionality and reasonableness are often fungible in *la Corte*'s judicial reasoning, along with the principles of adequacy, consistency, appropriateness and non-arbitrariness. In one case, the CC explicitly stated that proportionality is a direct expression of the more general principle of reasonableness[32]. Moreover, these two landmark criteria are often invoked as hendiadys, unlike other jurisdictional systems, in which the nature and the intensity of their meaning are significantly different[33].

In contrast, according to the Anglo-American juridical heritage, reasonableness represents a "minimal" judicial criterion, commonly applied when the provision under scrutiny appears blatantly absurd at first sight[34]. According to the well-known Wednesbury test[35], the reasonableness test consists of the mildest examination and it usually reflects judicial deference to legislative power. Moreover, since the reasonableness analysis is residual, it constitutes a freeform standard, which works on an intuitive level: judges do not need to rely on a logical itinerary when the irrationality of the statute is fairly incontrovertible[36].

Therefore, well-structured European proportionality, characterized by an increasingly pervasive control, is alien to the Italian judicial review[37]. Anyway, it can be argued that every single phase of the proportionality test is nevertheless widely employed by the Court on regular basis. In particular, focusing on the adequacy of the relation between means and goals is a recurring assessing model. Also, the fact that legislative interventions must be strictly necessary to safeguard the constitutional interests involved is often evaluated by the collegium. Above all, the balancing of rights, which shares the same core features with the proportionality test "in strict sense", has been likewise included in the Italian constitutional Court's toolkit.

It may be argued that there is no need to transpose naturally enforced standards into a more structured scheme, since the various steps have already been sedimented into constitutional reasoning. Meanwhile, it should be mentioned that, since the last decade, the Court itself has been demonstrating its intention to overcome the de-structured approach to proportionality. It is, not surprisingly, with decision no. 1/2014 - which also marks the starting point of the current phase of the Italian constitutional justice - that the various stages of the test have been spelled out with more precision by the CC[38]. Although it was timidly mentioned in other previous judgements, in this decision on electoral matters the three essential steps of proportionality - suitability, necessity and proportionality (in the narrow sense) – are fulfilled. But, on close examination, also legitimacy is

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[31] M. CARTABIA, *I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana. Intervento presentato a Incontro trilaterale tra la Corte costituzionale italiana, la Corte costituzionale spagnola e il Tribunale costituzionale portoghese*, Roma, Palazzo della Consulta, 2013, available at www.cortecostituzionale.it (accessed 22 May 2021), 4.

[32] See Judgement no. 220/1995.

[33] For example, as M. CARTABIA, *I principi di ragionevolezza e proporzionalità*, cit., 2 has pointed out, in judgement no. 2/1999 the Court states that the automatism in the disciplinary measure under examination was «irreasonable, since it does not comply with proportionality, which is the foundation of rationality that informs the principle of equality».

[34] M. CARTABIA, *I principi di ragionevolezza e proporzionalità*, cit., 3.

[35] See J. LAW, E. MARTIN, *A Dictionary of Law*, 7 ed., Oxford, 2014.

[36] See G. BOGNETTI, *Il principio di ragionevolezza e la giurisprudenza della Corte suprema americana* in *Il principio di ragionevolezza nella giurisprudenza della Corte costituzionale*, Atti del seminario svoltosi in Roma, Palazzo della Consulta, 13-14 ottobre 1992, Milano, 1994, 43 ff.

[37] F. FALORNI, *Verso una compiuta elaborazione del "test di proporzionalità"? La Corte Costituzionale italiana al passo con le altre esperienze di giustizia costituzionale*, in *DPCE online*, 2020, 4, 5308 ff.

[38] G. SCACCIA, *Proportionality and the Balancing of Rights*, cit., 5-6.

included, as the Court stated that the legislative provision aimed at encouraging the creation of a stable majority in Parliament.

Furthermore, proportionality has been invoked in decision no. 10/2015 as criterion of reference with regard to the modulation of temporal effects[39]. More specifically, the proportionality analysis *stricto sensu* has been employed to justify the decision to derogate from the ordinary retroactive effectiveness of its judgement, by ruling that it would only have just *pro futuro* effects[40]. In that decision, the CC stated that a sophisticated jurisdictional intervention must comply with the following requirements: 1) the urgent need to guarantee one or more constitutional principles, which would otherwise suffer irreparable damage; 2) the modification of the normal retroactive effect shall be limited to what is strictly necessary. In this light, it appears more evident that proportionality acts, above all, as a binding standard for *la Corte* itself.

As a matter of fact, the intention to move towards a more structured and complex application of proportionality has been demonstrated by the Court and thereafter implemented in the following decisions (sentt. 275/2015; 20/2019; 170/2019; 119/2020)[41]. Hence, this would indicate a partial success which deserves to be positively welcomed and is likely to be further fulfilled.

4. *Conclusions*

In recent times the Italian Constitutional Court's judicial reasoning has undergone significant changes. Crucial standards of the constitutional review have been thrown into question. A relevant process of "rewriting" the legal framework, inspired by the aim of increasing the guarantee function's effectiveness, is underway.

Although this process might represent *prima facie* evidence of the more general pathways leading to the degradation of the Constitutional State's grounds, this hypothesis should be rejected.

On one hand, the Court's activism appears to be firmly based on a jurisdictional *modus operandi*. Even this more proactive style of reasoning is developed through an inherently consistent procedural scheme, in which legislative unresponsiveness plays a key role. In the stage of the Court's self-empowerment, the judicial reasoning would aim to combine that "renewed sensitivity" of the Court with the purpose of maintaining procedural limitations. This original approach, even if characterized by less constrained interventions, still finds its paramount rules and the main source of its legitimization in the adherence to institutional limitations and in the principles of graduality and loyal cooperation.

On the other hand, in this ongoing process of de-constructing and re-building procedural standards, the transnational dialogue between Courts offers valuable inspiration and reassuring guarantees. The propulsive and homogenizing thrust coming from supranational and European models positively affects the fairness and the transparency of constitutional reasoning. In particular, the utilization of the proportionality test, which is the mainstay of the protection of constitutionally protected rights in global neo-constitutionalism, can play a significant role within this enriching endeavor. Since it consists of a set of rules determining the requirements for a limitation of fundamental rights, it constitutes an essential procedural standard that should be further implemented by the Italian Court.

Furthermore, both the "internal" and "external" perspectives examined appear to jointly find fertile ground in the current phase of Italian constitutional justice. This seems to be related to the

[39] See F. FALORNI, *Verso una compiuta elaborazione del "test di proporzionalità"?,* cit., 5317 ff.

[40] C. MAINARDIS, *Limiti agli effetti retroattivi delle sentenze costituzionali e principio di proporzionalità (un'osservazione a C. cost. n. 10/2015*), in *Forum di Quad. cost.,* 2015, 9, 4 ff.

[41] F. FALORNI, *Verso una compiuta elaborazione del "test di proporzionalità"?,* cit., 5320 ff.

renewed approach of the Constitution's gatekeeper to the indirect ("*incidenter*") proceeding's essence. Indeed, the impact of the protection of individual rights on the transformation of the Constitutional Court's functional limitations has been highlighted. But, upon deeper examination, the importance of this factor seems to be more articulated than it would appear. It cannot be reduced to the general need to increase the weight of the individual instances within the hybrid system of judicial review. More specifically, it assumes an "individualizing" meaning, as it seems to be oriented to the aim of preserving and enhancing the individual demands as they occur in the original judgement[42]. The enhancement of the concreteness of the judicial review would result in the idea that the restoration of the constitutional values cannot be *sine die* postponed.

In this context, whereby the judicial review of legislation is increasingly permeable to the powerful influence of factuality, the proportionality test can also flourish. Factuality, indeed, plays a pivotal role within the reasoning structure of proportionality. This method «offers rulings of prevalence, based on specific circumstances and therefore mutable and inherently precarious»[43]. Principles, rights and values become entwined with reality, in its changing circumstances and its conditioning factors and limitations.

[42] G. REPETTO, *Recenti orientamenti,* cit., 5 ff.

[43] G. SCACCIA, *Proportionality and the Balancing of Rights*, cit., 4.

Part IV
European Integration and Constitutional Degradation

Francesco Clementi
Josep Maria Castellà Andreu
Stefano Bargiacchi
Luca Dell'Atti
Simone Gianello
Pietro Masala
Omar Makimov Pallotta
Paola Pannia

Francesco Clementi*

First Constitutional essentials first. An introduction to the Panel "European integration and Constitutional degradation"

The first twenty years of the new century have been a particularly intense period for the European Union. It has been marked, in fact, by many events: globalization with the two heavy economic crises that accompanied it; a change in the demographic skin of the Union itself due to the intense migration phenomenon; the UK's Brexit; significant internal phenomena of disintegration of democratic principles and the rule of law such as those taking place in Hungary and Poland; as well as the eruption of latent and never dormant conflicts on Europe's borders, such as in Ukraine; right up to the devastating global health crisis that enveloped the whole world due to the spread of the Covid pandemic.

The effects produced then by all these elements on the already peculiar institutions of the European Union have been powerful, as they have deeply shaken, like an earthquake remembered for decades, every corner of the European common house, testing first of all its main engine: the process of integration between states, systems and peoples, which has been as much a detonator of development and economic progress as it has been a broad and intense disseminator of the principles of democracy, its values, rights and guarantees, first and foremost where the Yalta Pact and its Cold War had allowed single-party political regimes, which were neither pluralist nor authentically democratic, to emerge.

Increasingly, the issue of constitutional degradation then became a central element of scholarly analysis, before becoming the heart of the anxieties of many European citizens, especially in Eastern Europe. In fact, in this gradual disintegration of the pillars of values - starting with the Rule of Law - that have held and continue to hold together more than three hundred million people, there is every risk that the divisions, conflicts, bad values and principles that constitutionalism has always fought against will re-emerge. And which for centuries, like a tenacious, treacherous, deadly poisonous plant, always ready to grow and rapidly adapt to any terrain, constitutionalism has aimed precisely at eradicating from the European soil.

The essays you will read below are all the fruit of this reflection. They express, with intensity of analysis, care and precision in the search for key elements and determining factors, effectiveness in synthesis and attention to detail, the whole then of everything that represents today the problem of constitutional degradation in the process of European integration. And in proceeding with this analysis, the authors intersect the great social phenomena described above, also underlining further elements such as, for example, the theme of populism and its various articulations, in the light of a very fluid European social, political and economic dynamic within it.

A European Union - it is worth remembering - that is nonetheless less distracted by constitutional degradation than one might think: not only for its actions to protect the rule of law, the separation of powers and fundamental rights in Hungary and Poland, or what it is doing to keep the Ukrainian conflict away from the reality of a return to a war actually fought on European soil, but also for the important commitment - perhaps still little seen in its strength, but that will be seen - to European restructuring that the Conference on the Future of Europe of these days demonstrates; overcoming also the many difficulties and the very pronounced skepticism that, certainly, has never been lacking in European citizens.

Thus the essays collected here gradually highlight the many sides of a theme - constitutional degradation - which risks leading the European Union itself to constitutional osteoporosis, causing the constitutional infrastructure of European democracy to lose strength and gradually decay, in

* **Associate Professor in Comparative Public Law at the University of Perugia.**

small steps, powerfully and intensely undermining its essential elements: the rule of law, the separation of powers, being a European citizen and the function of that citizenship; the role of the European institutions and, at the same time, also of the national institutions of the individual states, starting with the national parliaments in their function as transformative hubs of our societies as multipliers of pluralism, tolerance and participation.

It is with these lenses that one can first of all read Stefano Bargiacchi's essay ("The new role of national parliaments in the post-crisis EU economic governance. Some considerations on the Hungarian case; another) constitutional degradation issue?"), which highlights the need for a redefinition of the role of national parliaments in their ability to be involved in the public finance decisions of their countries, so that the generalized constitutional obligation of sustainability of public finances - studied here starting from the Hungarian experience - is not achieved through a strong (and probably unjustified) limitation of Parliament's ability to supervise executive power and to develop an allocation of public resources different from that proposed by the government.

On the other hand, Luca Dell'Atti's essay ("European Treaties and Social Constitutions. A Problem of Sovereignty") also stresses the importance that social rights and the historical ability of the main EU member states to ensure a strong welfare system for their citizens should not be undermined by a model of European economic governance that is incapable of rebalancing its mercantilist tendencies with a more complete social vocation, which is instead the identifying feature of European societies and systems compared to those of the world.

It is no coincidence then that Simone Gianello's essay ("The ECHR as a tool for the protection of the rule of law (articles 17 and 18)") deals with the risks of a possible constitutional degradation in Europe, beyond the European Union itself, just from the side of rights and Courts.

In fact, these the author first of all points out that the jurisprudence of the European Court of Human Rights has mostly not been used for the primary purpose of detecting systemic violations of the rule of law and providing solutions to counter them; For this reason, it would then be appropriate for the European Court of Human Rights to be more open - especially with regard to Articles 17 and 18 - in order to promote the strengthening of a symbiotic relationship between the European Court of Human Rights and the Court of Justice, as, moreover, repeatedly emphasized by Edu Court President Robert Spano himself. Secondly, it is stressed that there has been an excess of deference by the ECHR to what has been decided by the supranational actors involved in the financial assistance operations that have imposed austerity measures, thus marking the potential risks of absence of judicial remedies to protect fundamental rights.

Pietro Masala's analysis, in his essay "Emerging collective implications of personal data processing and possible forms of super-individual protection for the safeguard of constitutional values and democracy in Europe", deals instead with something else, namely the specific risks concerning the collective dimension of such personal data protection, underlining the need for the European GDPR to consider the collective dimension as a key component of a more effective European data protection model; that is, specifically considering the negative impacts of data processing on fundamental rights and social and ethical values.

Similarly, Omar Pallotta ("Fighting Europarties' democratic backsliding: arguments for a multilevel approach"), adopting a multilevel approach to verifying the compliance of European political parties, underlines that only this kind of technique, the multilevel one, can be adequate to enhance the democratic or non-democratic nature of the EU values. Only with such an approach could the conformity of parties to European values be fully assessed, thus definitively linking their national dimension with the more properly European one.

Finally, Paola Pannia ("Out of guarantees, out of community. "Institutional uncertainty" in the migration domain as symptom of "constitutional degradation"") intelligently and acutely traces the asymmetrical process of advancement of European integration around the legal status of migrants.

In fact, migrants are subjected to a regime of "institutional uncertainty" in the face of an overly casual use, i.e. one that does not conform to a European logic of integration, of what is still the explicit symbol of their decision-making legitimacy on the subject; a strength of state systems that is however increasingly challenged today, in this globalized world, by migrants who demand rights.

In short, as can be seen, the analysis of the risks of a constitutional degradation in the European Union itself can be studied from many different angles, offering many interesting points on which to continue developing one's own reflections.

However, a common thread unites all these studies: namely the need to go beyond those hierarchies - as Tania Groppi recently wrote in a fine volume (*Oltre le Gerarchie*, Laterza Publisher, 2021) - which not infrequently are nothing more than heavy conceptual superstructures, grown up over time; sediments and weights that should instead be removed precisely in order to put once again at the center of the action of the European institutions, in an order of priority, themselves the essential elements and the deep sense of the values and principles of liberal-democratic constitutionalism: which historically, not by chance, constitute the beating heart of the European social, legal and political space.

Josep M. Castellà Andreu*

Judicial Independence and the Rule of Law According to the Venice Commission

ABSTRACT: ***This chapter deals with the Venice Commission doctrine on the independence of the judiciary in the context of the Rule of law, separation of powers and rights' guarantees. In particular, the text focuses on the composition and appointment of the Judicial Council members. In new democracies, the Venice Commission is in favor of these organs, aware that this might not be necessary in consolidated old democracies. The Venice Commission urges for a plural composition, with a majority of its members selected by the very same judges and the rest by the Parliament, with qualified majorities. This is how the Venice Commission intends to avoid both corporatism and politization.***

1. *Introduction*

Issues related to the defense of the rule of law, the separation of powers and judicial independence have returned to the forefront of political and legal discussion in current times, characterized above all by the populist drift of parties and governments in several European states. In response to this, both the European Union and the Council of Europe have activated complaint mechanisms, setting themselves up as guarantors of the rule of law in the European context. These new guarantors are in addition to those provided for by the respective constitutional systems, which are not always as effective as expected, in part precisely because of the actions of populist majorities in national parliamentary institutions: the approval of legislative and even constitutional reforms that limit judicial independence and the independence of the Constitutional Court, as well as the outright "capture" of these bodies through the election of like-minded judges to constitutional and supreme courts. In the following pages we will analyze the main problems posed by the composition and form of election of the governing body of the judiciary and the solutions advocated by the institutions of the Council of Europe and the European Union, with particular attention to the doctrine of the Council of Europe's Venice Commission.

The Venice Commission has been developing a well-established doctrine concerning legislative and constitutional reforms in several Council of Europe countries, not only in relation to the Judicial Council but also to other oversight bodies (Prosecutorial Council, Ombudsman, etc.). Although some of the criteria adopted are similar (form of election, anti-deadlock mechanisms), each of them has its own characteristics due to the different types of

* **Full Professor of Constitutional Law, University of Barcelona - Member of the Venice Commission of the Council of Europe.**

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functions or constitutional position of the respective institutions.[1] In the following pages, we will focus on the doctrine on judicial councils.

Europe's concern and its call for attention to the reforms approved or proposed in some states takes place in a context in which the European Union and the Council of Europe are closely following the erosion of judicial independence, and of constitutional counterpowers in general, in Central and Eastern European states, whose governments are often described as populist, especially Poland and Hungary - with Prime Minister Victor Orbán even proud of describing their constitutional model as an "illiberal democracy".[2]

Given this situation, it seems appropriate to examine the Venice Commission's doctrine on judicial independence, placing it within the framework of respect for the rule of law. The Commission for Democracy through Law (the official name of the Venice Commission) is a consultative body of the Council of Europe on matters related to democracy, the rule of law and human rights, the basic pillars of this international organisation. The Commission is now in its thirtieth year since it was created in 1990 in the context of the fall of the Berlin Wall with the purpose to advise on constitutional and legislative reforms in Eastern European states that would allow a smooth transition to pluralist and constitutional democracy. Over the years, the issue of judicial independence and the composition of its governing body has been an almost constant theme in the reports and opinions issued by the Venice Commission. Suffice it to say that in the last two plenary sessions (October and December 2021) it has been present in relation to two opinions on constitutional reform in Serbia.[3] This reform relates to Serbia's candidacy for EU membership and the necessary adaptation of the Serbian legal system to the principles of the Union - enshrined at Article 2 TEU. A similar situation has arisen in the past with other candidate states, which were compelled to undertake institutional reforms, and in particular of their judicial system, with the creation of a Judicial Council.

The Venice Commission is not the only Council of Europe body that has dealt with judicial independence and its guarantee through a Judicial Council. The Committee of Ministers, the GRECO Anti-Corruption Group, and the Consultative Council of European Judges have also

[1] On the Prosecutorial Council, the Commission affirmed: «The Venice Commission has always acknowledged that in some democratic legal orders there are no prosecutorial councils, and, where they do exist, there is a range of acceptable models of how such councils should be composed. In this respect, there is an important difference between standards regarding judicial and prosecutorial councils. While prosecutors should be protected from political interference, and while a prosecutorial council may offer such protection, there is no requirement that such council should necessarily be dominated by the prosecutors. The Venice Commission has consistently advocated for prosecutorial councils where prosecutors elected by their peers represent a "substantive part", yet not necessarily a majority of members». See: CDL-AD(2021)051, *Opinion on the draft amendments to the Law on the prosecutorial Council of Kosovo*, adopted by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 October 2021), para. 26.

[2] On constitutional erosion see T. GISBURG, A.Z. HUQ, *How to save a Constitutional Democracy*, Chicago, 2018, spec. 43-45. In relation to the Spanish case, where a legislative reform of the General Council of the Judiciary was proposed in 2020 by the governing parties in order to overcome the blockage in the renewal of the Council by lowering the parliamentary majority required for it. The criticisms of GRECO and the European Commission have been decisive in paralysing the reform. See N. GONZÁLEZ CAMPAÑÁ, *Constitutional erosion in Spain: from the Catalan pro-independence crisis to the (intended) judiciary reforms*, in J.M. CASTELLÁ, M.A. SIMONELLI (eds.), *Populism and contemporary democracy in Europe: old problems and new challenges*, Cham, 2022.

[3] CDL-AD(2021)032-e *Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments*, adopted by the Venice Commission at its 128th Plenary Session (Venice and online, 15-16 October 2021), CDL-AD(2021)048-e *Urgent opinion on the revised draft constitutional amendments on the judiciary*, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 24 November 2021, endorsed by the Venice Commission at its 129th Plenary Session (Venice and online, 10-11 December 2021).

done so. More recently, the European Union has joined these interventions, in the context of strengthening and monitoring the rule of law in the Member States, and in doing so, has endorsed the criteria set by the Council of Europe.

2. *The renewed attention to the rule of law and approximation to the Venice Commission's concept of the rule of law*

The attention to the rule of law in recent years contrasts with the few doctrinal and political studies of previous decades. The rule of law has expressly defined the form of the state since the constitutionalism of the post-war period (Articles 20.3 and 28 of the Bonn Basic Law, although unlike the latter, which refers to the Länder, Article 20.1 does not include it in the definition of the form of the state) and the 1970s («social and democratic state under the rule of law» in Article 1.1 of the Spanish Constitution, «consolidate a state under the rule of law which ensures the rule of law as an expression of the will of the people» in the Preamble). In these constitutions, it was an unquestioned element, which is why less attention was paid to it than to the principles of the democratic state (legitimization of power) and the social state (tasks and aims of the state). Its content and scope were undisputed in both theoretical and political terms in liberal-democratic, rational-normative and consensus-based constitutionalism, even if the fight against the immunities of power is never a fully completed task.

However, in recent times, the populist and neo-authoritarian threats in various European states and other continents have had a direct impact on the rule of law and constitutional democracy, and in particular on the separation of powers and judicial independence. For this reason, the theoretical and political focus has returned to the necessary defense of the rule of law. Thus, its questioning and neglect have brought it to the forefront of the concerns of supranational and international organizations such as the EU and the Council of Europe and also of academic debate and public opinion.[4] In the case of the Treaty on European Union, Article 2 mentions the rule of law as one of the founding values of the EU. And, in the Statute of the Council of Europe, the preamble mentions the «rule of law» as one of the principles on which «genuine democracy» is founded.

As far as the EU is concerned, it is worth noting that in 2014 the European Commission adopted the Communication from the Commission to the European Parliament and the Council «A new EU framework to strengthen the rule of law».[5] This document begins by stating, as a declaration of principles, that «[t]he rule of law is the backbone of any modern constitutional democracy» and provides for the activation of the framework in cases where there is «a systemic threat» in states, which also affects the EU as an «area of freedom, security and justice without internal borders», which empowers the EU to act to protect the rule of law «as a common value of the Union» (p. 5). Not only formal but also substantive aspects are used for the definition of the rule of law (p. 4). The same Communication explicitly

[4] The publication of the Rule of Law Index by the World Justice Forum since 2015 shows this attention. This ranking analyses 44 items grouped into 8 broad sections, including both normative and empirical elements (corruption), thus offering a broader vision of the rule of law than that commonly considered by constitutionalist doctrine or in international documents such as those cited in the text (e.g. civic participation or labour rights). The 2021 index is available at: https://worldjusticeproject.org/rule-of-law-index/global/2021/ (accessed 15 January 2022).

[5] (COM(2014)158), *Communication from the Commission to the EP and the Council: A new EU Framework to strengthen the Rule of Law.*

cites the Council of Europe and the Venice Commission which are to be called upon for advice (p. 9). Recently, with Regulation 2020/2092 of the EP and the Council of 16 December 2020, the EU has also linked the disbursement of EU funds to compliance with the rule of law.

As Paloma Biglino underlined, albeit the European Union and the Venice Commission speak with different voices, the former more diplomatic and technical, the latter more political, in relation to the rule of law, but both coincide in emphasising the importance of the rule of law.[6] Thus, the Venice Commission has devoted two highly relevant general studies to the rule of law, as a synthesis of different traditions (Anglo-Saxon, Germanic and French), one from 2011 and the Checklist from 2016.[7] In these, the Commission adopts, on the one hand, a substantive and not a formal definition of the rule of law, considering it insufficient. The Rule of Law is not simply the existence of a legal system or "Rule by law", but the supremacy of the law, which is inseparable from the defense of substantive values linked to the separation of powers and the guarantee of fundamental rights, as Elías Díaz had the opportunity to show in face of Kelsen's positivist conception and against the posture of the Franco's regime ideologists on the existence of the rule of law in Spain at the end of the 1950s, after the administrative reforms implemented by the regime.[8] On the other hand, the constitutional rule of law was taken on as opposed to the legal rule of law of the 19th century. Thus, the concept of the rule of law was intertwined constitutional democracy, the idea of the constitution as the supreme norm and the democratic legitimisation of power

In this way, the rule of law has, as the Venice Commission summarises in the 2016 Checklist, the following main constituent elements:

«(1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; and (6) Nondiscrimination and equality before the law» (para. 18).

The Checklist also recalls the link between the rule of law and democracy and human rights (pillars of the Council of Europe):

«the Rule of Law focuses on limiting and independently reviewing the exercise of public powers. The Rule of Law promotes democracy by establishing accountability of those wielding public power and by safeguarding human rights, which protect minorities against arbitrary majority rules» (para. 33).

The Venice Commission has referred to the observance of the rule of law in many contexts, among which, due to their objective relevance and topicality, constitutional change and revision – as in the case of the convening of the Constituent Assembly in Venezuela – [9] or the

[6] P. BIGLINO CAMPOS, *La Comisión de Venecia y el patrimonio constitucional común*, in *Revista General de Derecho Constitucional,* 28, 2018, 21.

[7] CDL-AD(2011)003 *Report on the Rule of* Law; adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011); CDL-AD(2016)007 *Rule of Law Checklist, a*dopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016).

[8] E. DÍAZ, *Introducción*, in ID., *Estado de Derecho y Sociedad democrática*, Madrid, 1975: «Not every state is a state governed by the rule of law; the existence of a legal order, of a system of legality, does not authorise us to speak simply of a state governed by the rule of law». On the opposite view see: H. KELSEN, *Teoría General del Estado*, 1983, 57: «...from the point of view of legal positivism, every state is a state of law, in the sense that all state acts are legal acts, because and insofar as they carry out an order which has to be described as legal». (Translation provided by the author).

[9] The Commission affirmed that «the constitutional procedure to renegotiate the foundational pact should establish mechanisms to guarantee that such renegotiation takes place within the boundaries of democracy and the rule of law». See: CDL-AD(2017)024 *Opinion on the legal issues raised by Decree 2878 of 23 May 2017 of the*

secession of a territory and the referendum to achieve it,[10] i.e. even at times of maximum invocation of the democratic principle; or in relation to states of emergency.[11] Among such issues is also the independence of the judiciary.

3. *Judicial independence, with particular attention to the governing body of the judiciary*

The European Commission's 2014 Communication on a new EU framework for strengthening the rule of law includes «independent and impartial courts» (p. 4) among the principles that characterize the rule of law. Indeed, judicial independence appears as a fundamental element of the rule of law.

The Council of Europe, through various bodies, has also referred to this issue on numerous occasions. Suffice it to recall the recommendation of the Council of Ministers of 2010, which states that «not less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism within the judiciary».[12]

The Venice Commission has addressed the independence of the judiciary in various reports. It always did so in the context of the protection of the rule of law. As already recalled, in the 2016 Rule of Law Checklist, it places access to justice before independent and impartial courts among the «core elements» of the rule of law (para. 18). The Commission links the rule of law to the separation of powers or system of checks and balances and to the control of the acts of the other powers:

«[t]he distribution of powers among the different State institutions may also impact the context in which this checklist is considered. It should well-adjusted through a system of checks and balances. The exercise of legislative and executive power should be reviewable for its constitutionality and legality by an independent and impartial judiciary. A well-functioning judiciary, whose decisions are effectively implemented, is of the highest importance for the maintenance and enhancement of the Rule of Law» (para. 39).

Then it goes on to specifying the meaning of independence:

«[i]ndependence means that the judiciary is free from external pressure, and is not subject to political influence or manipulation, in particular by the executive branch. This requirement is an integral part of the fundamental democratic principle of the separation of powers. Judges should not be subject to political influence or manipulation» (para 74).

Thus evidencing the means-end relationship between the principle of judicial independence and the rule of law and the separation of powers. The same can be said concerning the guarantee of rights, as will be seen below.

President of the Republic on calling elections to a national constituent Assembly, endorsed by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017), para. 15.

[10] According to the Commission the referendum «can also address territorial issues, such as the creation or merger of subnational entities as well as secession, in the rare cases where it is allowed by the national Constitution». See: CDL-AD(2020)031, *Revised Guidelines on the holding of* referendums, para. 13. The *Guidelines* includes the principle of rule of law for all the referendums, p. 10.

[11] In a recent study, the Commission held that: «even in a state of public emergency the fundamental principle of the rule of law must prevail». See CDL-PI(2020)005 *Respect for democracy, human rights and rule of law during States of Emergency. Reflexions*, para 9.

[12] Recommendation of the Council of Ministers (CM/Rec(2010)12), *Judges, Independence and Responsibilities*, para. 27.

The Venice Commission adopted a broad view of judicial independence in its *Report on the Independence of the Judicial system.*[13] When speaking of judicial independence we can distinguish two macro-perspectives: the independence of each judge and court, on the one hand, and the independence of the judiciary as such *vis-à-vis* the other branches of government, the legislature and «especially» the executive, on the other.[14]

The 2010 Report on Judicial Independence refers to both dimensions of judicial independence and its connection to the protection of the rights of individuals:

«[t]he independence of the judiciary has both an objective component, as an indispensable quality of the Judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people» (para. 6).

The first or subjective dimension, which is not considered in these pages, is guaranteed through multiple mechanisms ranging from the determination of the status of judges to the rights related to judicial protection and the due process of law, as well as procedural guarantees.

The second or objective dimension, i.e. the independence of the judiciary as a branch of the state, in turn is guaranteed through various arrangements in comparative law, which the Venice Commission takes into account in order to draw relevant consequences. Here it distinguishes "older democracies" from "new democracies".[15] With regard to old or established democracies, a deferential position is taken on the solutions they follow, in accordance with their «legal culture and traditions». In these, the executive often intervenes - even has «a decisive influence» – in the appointment of judges, but this does not prevent the judiciary from being independent in practice, precisely because of the restrictions arising from the legal culture and traditions.[16]

New democracies, on the other hand, because they have not developed these traditions, require «explicit constitutional and legal provisions" to prevent "political abuse in the appointment of judges».[17] And it is added, in what constitutes the crucial point of our interest, that «an appropriate method of guaranteeing judicial independence is the establishment of a judicial council», endowed with constitutional guarantees as to its composition, powers, and autonomy.[18] In other words, the establishment of a judicial council is held as a fundamental guarantee, as well as a constitutional regulation of the basic elements of the legal regime of the judicial council in order to preserve it from the majority decision in the Parliament.

In the 2010 Report, the Venice Commission summarises its position on guaranteeing judicial independence through judicial councils:

«it is the Venice Commission's view that it is an appropriate method for guaranteeing for the independence of the judiciary that an independent judicial council have decisive influence

[13] CDL-AD(2010)004-e *Report on the Independence of the Judicial System Part I: The Independence of Judges*, adopted by the Venice Commission at its 82nd Plenary Session (Venice, 12-13 March 2010).

[14] CDL-AD(2016)007 *Rule of Law Checklist*, para. 86.

[15] CDL-AD(007)028 *Judicial Appointments*, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), paras. 44-50, reiterated *verbatim* in para. 31 of the 2010 Report on Judicial Independence.

[16] CDL-AD(007)028 *Judicial Appointments*, para. 45.

[17] *Ibidem*, para. 46.

[18] *Ibidem*, para. 48.

on decisions on the appointment and career of judges. Owing to the richness of legal culture in Europe, which is precious and should be safeguarded, there is no single model which applies to all countries. While respecting this variety of legal systems, the Venice Commission recommends that states which have not yet done so consider the establishment of an independent judicial council or similar body. In all cases the council should have a pluralistic composition with a substantial part, if not the majority, of members being judges. With the exception of ex-officio members these judges should be elected or appointed by their peers» (para. 32).

The position of the Venice Commission on judicial councils can be understood from the paragraphs reproduced or summarised so far and from the considerations made in numerous subsequent opinions and reports of the Commission. Each individual opinion is based on a specific legislative proposal in a State and on a different factual situation, hence the necessity to distinguish general principles applicable to any reform from specific pronouncements for individual situations. To begin with, the Commission opts, as a general rule, for the establishment of the so-called "Mediterranean model" of judicial government, which was established in post-war constitutionalism in France (1946) and Italy (1947) and subsequently in the Fifth French Republic, in the constitutions of the 1970s (in the case of Spain) and from there in the states of Central and Eastern Europe as well as in some Latin American states (such as Argentina and Peru). There are notable differences between each case in terms of composition and functions, but the Venice Commission identified a few fundamental characteristics of the model. Although at first, the Venice Commission is cautious in proposing such a model («respects the diversity between existing legal systems», «recommends», «to those states that have not yet done so»...), over time the option for this model becomes clearer and more precise. This is an emblematic case of how the Venice Commission adopts a certain constitutional policy criterion.[19]

Although the 2010 Report on Judicial Independence literally refers to «consultative bodies», the powers entrusted to them are of governance and administration and obviously not jurisdictional. Identifying their core function, the Venice Commission states that a Council «should have a decisive influence on the appointment and promotion of judges and disciplinary measures against them» (para. 31, reproducing para. 49 of the 2007 Report cited above).[20]

With regard to the composition and election of judicial councils' members, the Venice Commission advocates a mixed composition between judges and jurists, as well as a double election, involving the judges themselves and Parliament, as it is characteristic of the Mediterranean model. The aim is to avoid both corporatism – as it would result from an election only by the judges – and politicisation – if all its members were elected by Parliament. In this way, this "pluralistic composition" ensures both the independence of the body, its

[19] S. BARTOLE, *The internationalization of Constitutional Law. A view from the Venice Commission,* Oxford, 2020, 74 ff.

[20] In a recent opinion on Cyprus, the Commission had the opportunity to clarify the role in of judicial council in judicial appointments. It indeed affirmed that the Advisory Judicial Council, the body proposing the appointments of the judges of the Supreme Constitutional Court and the Supreme Court by the President of the Republic, and composed mostly of SCC judges, should be able to rank the candidates to these posts, in order to reduce the discretion of the President, which should be obliged to give reasons when altering the order of preference. Also, the Venice Commission rejects that the Attorney General should be part of it, or if it is included in the composition it should not be endowed with voting rights. See: CDL-AD(2021)043-e *Opinion on three Bills reforming the Judiciary*, adopted by the Venice Commission at its 129th Plenary session (10-11 December 2021, Venice and online), paras. 38, 42-43.

technical competence and democratic legitimacy: "[t]o give it democratic legitimacy, other members should be elected by Parliament from among those with appropriate legal competence".[21]. A mixed composition thus seeks to avoid both pressure from other powers that would affect judicial independence and the self-protection of judges:

«[w]hile the main purpose of the very existence of a judicial council is the protection of the independence of judges by insulating them from undue pressures from other powers of the State, involving only judges carries the risk of raising a perception of self-protection, self-interest, and cronyism. Corporatism should be counterbalanced by membership of other legal professions, the "users" of the judicial system, e.g. attorneys, notaries, academics, civil society».[22]

The Commission takes a step further by specifying the proportion of members elected by the judges and by the Parliament: « [a] substantial element or a majority of the members of the judicial council should be elected by the Judiciary itself»[23].

It also sometimes affirms that «at least half» of the members shall elected by the peers.[24] In addition, a bunch of states also provide for some members to be part of the Judicial Council by virtue of the office they hold (such as presidents of the Supreme Court or others). In such a case, the Commission does not count such members among those elected by the judges themselves.

Subsequent reports and opinions specify the criteria for the election by judges and by Parliament and the qualified majorities required, establish anti-deadlock mechanisms, in case the opposition prevents the timely appointment of members of the Judicial Council, and contain other provisions concerning the criteria for the selection of candidates.

In relation to the election of judges as members of the Council, the Venice Commission underlines that they should be elected by their peers, involving judges of the different levels and categories, and that they should not be members of the Council *ex officio* or by seniority.[25]

In relation to the election of lay members of the judicial council by Parliament, the Venice Commission advocates what could be called the "de-governmentalisation" of the Council. That is, to place the council beyond the reach of the majority in office. This is different in the strict sense from the objective of depoliticising the Council, which is reached by providing a substantial part of the Council not being elected by Parliament. This distinction between de-governmentalisation and depoliticisation is not clear in the terms used by the Commission. In fact, the report *Parameters on the Relationship between the Parliamentary Majority and the*

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[21] See: CDL-AD(2010)004-e*,* para. 50.

[22] See: CDL(2021)43, para 51; with references to the opinions CDL-AD(2018)003, *Opinion on the law amending and supplementing the Constitution of the Republic of Moldova (Judiciary)*, Adopted by the Venice Commission at its 114th Plenary Session (Venice, 16-17 March 2018) para. 56; CDL-AD(2014)008, *Opinion on the draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014), paras 30-31.

[23] See: CDL(2021)43, para. 50.

[24] See, amongst others: CDL-AD(2015)022 *Opinion on the draft Act to amend and supplement the Constitution (in the field of Judiciary) of the Republic of* Bulgaria, adopted by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015), para. 39; CDL-AD(2019)015, *Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist*, adopted by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019) and endorsed by the Committee of Ministers on 5 February 2020, fn 94. Such a posture is in line with the 2010 Recommendation of the Council of Ministers of the Council of Europe, cited above.

[25] Most recently it can be seen in the already cited opinion on Cyprus: CDL(2021)43, paras 49 and 54. The Supreme Council of Judicature is the body responsible for the appointment of ordinary judges. It is the only case at present of an entirely judicial composition.

Opposition in a Democracy,[26] in the context of the participation of the opposition in the appointment of certain positions, speaks of «depoliticising» to refer to the selection procedure based on «cross-party consensus» (para. 139). Whilst, with the de-governmentalisation or disempowerment of the majority in the ability to elect the members of the Council, the objective of «political neutrality» is to be achieved. This is achieved through various mechanisms, the most "obvious" of which is the requirement of a qualified majority for election (para. 141), whose threshold varies according to the political context of each country.

A 2/3 majority is generally indicated as appropriate.[27] The purpose of the qualified majority requirement is clear: «the system of appointments to a collective body should ensure that its members are appointed on the basis of a reasonable compromise amongst various political forces and other stakeholders, or on the basis of a proportionate representation».[28]

However, if the majority bloc has the required qualified majority, then the criterion does not suffice since in such a case «the qualified majority rule will […]help to cement the influence of the current governing majority».[29] Considering this risk, other mechanisms are mentioned that seek a «reasonable compromise amongst the various political forces», e.g. proportional distribution between majority and opposition groups, or the opposition being able to control and influence the candidate selection process.[30]

Another criterion that serves to depoliticise the body is providing that the members elected by Parliament should be «legal professionals», although the Commission recognises that in some systems they may be parliamentarians.[31]

The election of «lay members» or non-judge members by Parliament, as we have seen, seeks to avoid corporatism within the judiciary: «the risk that the Judicial Council become a self-regulatory body of the judiciary».[32] To this end, some states, such as Montenegro, provide for the president of the Council to be elected by non-judge members (art. 127 Constitution) or – following the French example – for disciplinary commissions to be chaired by one of these members.

The Venice Commission pays particular attention to the risk of blockage – either by the opposition or by the government majority – in the appointment of lay members if the required qualified majority is not reached. The Commission demands that to the protection of minorities in Parliament, which the qualified majority requirement entails, correspond a duty for minorities to act responsibly and with loyalty to the system, which is a «moral obligation».

Anti-deadlock mechanisms seek to «discourage the opposition from behaving irresponsibly», but without giving the majority opportunities «by impossible proposals s to lead to the necessity for the application of such mechanisms».[33] This can also lead to paralysis

[26] CDL-AD(2019)015, *Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist.*

[27] See CDL-AD(2013)007 *Opinion on the Draft Amendments to the Organic Law on Courts of General Jurisdiction of Georgia*, adopted by the Venice Commission at its 94th Plenary Session (Venice, 8-9 March 2013), paras 52-53; CDL-AD(2017)018 *Bulgaria Opinion on the Judicial System Act*, adopted by the Venice Commission at its 112th Plenary Session (Venice, 6-7 October 2017), para. 16).

[28] CDL-AD(2019)015, para. 143.

[29] *Ibidem*, para. 142.

[30] *Ibidem*, para. 143.

[31] CDL-AD(2007)028, para. 31

[32] CDL-AD(2018)015 *Opinion on the draft law on the Judicial Council and Judges of Montenegro*, adopted by the Venice Commission at its 115 th Plenary Session (Venice, 22-23 June 2018), para. 22.

[33] *Ibidem*, para. 15.

of the institution, especially when the powers of the body, either during the mandate or prorogued, are reduced. Different mechanisms are proposed to avoid deadlock, while others are discouraged. In particular, these should not consist of reducing the required qualified majority, as this would discourage the search for political compromise and thus render the *raison d'être* of such a requirement meaningless: «[i]n a Constitutional state, democracy cannot be reduced to the rule of the majority, but encompasses as well guarantee measures for the opposition».[34] In the case of Montenegro, it is permissible to lower the required majority from 2/3 to 3/5, but not an absolute majority of all members of the House, because it is a disincentive for the majority to reach an agreement in the first vote.[35]

Other solutions, such as the intervention of the President of the Republic or the nomination of candidates by neutral bodies, are however preferable.[36]

Lately, the Venice Commission has returned in several 2021 opinions to address the composition and election of judicial councils. Among them, two opinions stand out, issued on the occasion of a constitutional reform project in Serbia affecting, *inter alia*, the High Judicial Council (Art. 151 of the Constitution). In a "dialogue" between the Commission and the Serbian authorities, following the issuance of the first opinion, some recommendations were accepted by the Serbian authorities and others were not, leading to a second opinion. This reform has to be seen in the context of the EU accession negotiations. Let us take a closer look.

The reform proposal envisages an 11-member Council: 6 judges elected by their peers and 5 by the National Assembly amongst prominent jurists with at least 10 years of seniority. Alternatively, a second proposal establishes, instead of 6 members elected by the judges – 5 plus the Chief Justice. The latter alternative implies that less than half of the Council members would be judges, in the sense of elected by their peers, as the Chief Justice is elected by the National Assembly. The Venice Commission opts, in the first opinion, for the first proposal, considering that the second alternative:

«is not to be recommended, even if the Venice Commission is of the view that the National Assembly should not be excluded from the appointment procedure for members of the HJC nor that the President of the Supreme Court would be a member. GRECO goes even further in this respect; in its fourth evaluation round (corruption prevention in respect of members of parliament, judges and prosecutors) adopted on 29 October 2020, in its Recommendation iv. *It provides that: "changing the composition of the High Judicial Council, in particular by excluding the National Assembly from the election of its members, providing that at least half its members are judges elected by their peers and abolishing the ex officio membership of representatives of the executive and legislative powers*"; [...]»[37].

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[34] *Ibidem*, para. 18.

[35] See, amongst many: CDL-INF(1998)009, *Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania*, adopted by the Sub-Commission on Constitutional Reform on 15 April 1998, para. 19; CDL-AD(2013)028-e *Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro*, endorsed by the Venice Commission at its 96th Plenary Session (Venice, 11-12 October 2013); CDL-AD(2017)031, *Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts*, adopted by the Commission at its 113th Plenary Session (Venice, 8-9 December 2017), paras. 21-22.

[36] CDL-AD(2015)022 *Opinion on the draft Act to amend and supplement the Constitution (in the field of Judiciary) of the Republic of* Bulgaria, paras. 46-51.

[37] CDL-AD(2021)032 *Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments*, para. 66; (italics in the original).

A different criterion from that of GRECO can be glimpsed here, as it will be further expanded below. Faced with these considerations in the first opinion of the Venice Commission, the Serbian authorities propose the introduction of a third alternative criterion: of the 11 members of the Council, 6 to be elected by judges, 4 by the Assembly, and one being the President of the Supreme Court. The Commission, in the second opinion, considers that the latter option meets the requirements of the above-mentioned Recommendation of the Committee of Ministers.[38]

Regarding the five elected members of parliament, the constitutional reform proposal includes the election procedure: public competition, short list or selection of 10 candidates by the relevant Parliamentary Commission with a «broad representation» criterion, and final election by the National Assembly by 2/3. In the event that this quorum is not reached by all or any of the five members, a subsidiary anti-blocking mechanism is envisaged, which is also the subject of comments by the Commission. This involves leaving the election to a special commission made up of the Presidents of the National Assembly, the Constitutional Court, the Supreme Court, the Attorney General and the Ombudsman, by a simple majority of them. The Commission however added that more consensus should be required in such a small commission.[39]

Finally, in the Serbian context, with a dominant bloc or party reaching two-thirds of the Assembly, the Commission considers the 10-year experience requirement for jurists to be insufficient and suggests introducing ineligibility requirements to achieve a greater distance of those elected from the parties, to make them more politically neutral and to avoid conflicts of interest.[40] In the second opinion of the Venice Commission, following the reply of the Serbian authorities to the first opinion, the Venice Commission considers the recommendation to be substantially fulfilled with the inclusion of the prohibition of political militancy of Council members, and the reference to the corresponding organic law containing other measures of ineligibility for public officials.[41] With regard to maintaining the five members of the Special Commission, the Commission notes that this is not contrary to European standards but suggests the use of anti-blocking mechanisms that are perceived as more politically neutral:

«as four out of the five members of this commission are currently elected by the National Assembly (and not all with a qualified majority), for the Commission it is not impossible that the proposed antideadlock mechanism might "lead to politicized appointments", at least until such time as these constitutional amendments enter into force and produce their effects (for example, the President of the Supreme Court will no longer be elected by parliament, and the Prosecutor General will be elected with a qualified majority and will enjoy other guarantees of independence - see para 33 of the October opinion) and the composition of parliament will be more pluralistic. The Commission acknowledges that there is no prescriptive or detailed standard as to the composition of such an antideadlock mechanism, and therefore cannot conclude that the proposed mechanism is not in line with international standards and must be changed. Nonetheless, the Commission encourages the Serbian authorities to explore the

[38] CDL-PI(2021)019rev-e, *Urgent Opinion on revised draft constitutional amendments on the judiciary*, issued on 24 November 2021, pursuant to Article 14a of the Venice Commission's Rules of Procedure, para. 22.

[39] CDL-AD(2021)032-e *Opinion on the draft Constitutional Amendments on the Judiciary and draft Constitutional Law for the Implementation of the Constitutional Amendments*, para. 70

[40] *Ibidem*, para. 69.

[41] CDL-PI(2021)019rev-e, *Urgent Opinion on revised draft constitutional amendments on the judiciary*, issued on 24 November 2021 pursuant to Article 14a of the Venice Commission's Rules of Procedure, paras. 24-25.

possibilities for an alternative antideadlock mechanism which may alleviate the concern that it may not be, or may be perceived not to be, politically neutral».[42]

As a last point, it is worth adding to all of the above the recommendation by the Venice Commission, some additional measures prescribed by the Commission to better guarantee the independence of judicial councils. First, one concerning the moment of the adoption of laws relating to the composition of judicial councils: consultation to the judges (as GRECO has highlighted). Second, regarding the decision-making process within this body, which "should be organised in such a manner as to stimulate internal dialogue and coalition of members of different backgrounds and political colours".[43] Finally, the Venice Commission supports the extension of the mandates of the members of these councils «as a tool to preserve the functioning the democratic institutions of the state».[44]

4. *Final reflections*

Throughout the previous pages, we have approached the Venice Commission's doctrine on judicial independence in the context of the preservation of the rule of law, the separation of powers, and the guarantee of rights. In particular, we have focused on the composition and election of the Judicial Council, as general criterion proposed by the Commission, without prejudice to the particularities of old democracies. The Venice Commission calls for a pluralistic composition of judicial councils, with a majority of members elected by the judges themselves and the rest by Parliament, with qualified majorities. This avoids corporatism as well as politicisation and governmentalisation of the institution. At the same time, the Commission introduces criteria to avoid blockages in the appointment and others referring to the objective requirements for the eligibility of members. The aim is to limit Parliament's discretion in the appointment of Council members as much as possible.

The criteria summarised here give concrete form to the aforementioned Recommendation of the Committee of Ministers of the Council of Europe of 2010, but introduce some nuances with respect to other bodies of the Council of Europe itself. For instance, the Consultative Council of European Judges (CCJE) has drawn up several opinions in which, in addition to recommending the constitutional regulation of the fundamental principles on judicial independence and the creation of a body independent of government and administration for the selection and promotion of judges, it indicates that:

«[t]he Council for the Judiciary can be either composed solely of judges or have a mixed composition of judges and non judges. In both cases, the perception of self-interest, self protection and cronyism must be avoided».

Then continuing affirming that:

«[i]n the CCJE's view, such a mixed composition would present the advantages both of avoiding the perception of self-interest, self protection and cronyism and of reflecting the different viewpoints within society, thus providing the judiciary with an additional source of legitimacy. However, even when membership is mixed, the functioning of the Council for the Judiciary shall allow no concession at all to the interplay of parliamentary majorities and

[42] CDL-PI(2021)019rev-e, *Urgent Opinion on revised draft constitutional amendments on the judiciary*, para. 22.

[43] CDL-AD(2019)015 *Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy*, para. 143.

[44] CDL-AD(2018)015 *Opinion on the draft law on the Judicial Council and Judges of Montenegro*, para. 25.

pressure from the executive, and be free from any subordination to political party consideration, so that it may safeguard the values and fundamental principles of justice».[45]

It thus emerges that even the option of an entirely judicial composition is considered. The position of the Venice Commission, as we have seen, is more nuanced and flexible with regard to the composition of the Judicial Council, recommending a plural composition. The same is true of GRECO, as we have seen above.

The aforementioned Venice Commission criteria have acquired greater relevance amongst EU Member States since, as mentioned at the beginning, the European Commission mentions this consultative body of the Council of Europe for the determination of criteria on the rule of law for the evaluation to be carried out within the framework of the New Framework for strengthening the rule of law in 2014. It is worth stressing that this is a new case of collaboration between the two international organisations, and a clear example of what Professor Sergio Bartole has called the "conditionality strategy" used by the Venice Commission to assess the applications of new EU members (as in the case of Serbia mentioned above) or to monitor compliance with the rule of law by member states.[46] Thus, the influence of the Venice Commission goes beyond the issuing of merely advisory criteria whose legal force lies in the institution's *auctoritas*, or soft law. Ultimately, the relevance of these criteria lies in the fact that they provide indications for the improvement of the rule of law and constitutional democracies in face of persistent populist.

[45] CCJE, Opinion n. 10, *on Council for the Judiciary in the service of* society, paras. 16 and 19.

[46] S. BARTOLE, *The internationalization of Constitutional Law. A view from the Venice Commission,* cit., 74 ff.

Stefano Bargiacchi[*]

The Accountability Public Finances in a Democratic Degradation Framework: the Case of Hungary.

Is everything OK if the austerity acquis is (more or less) respected?[**]

ABSTRACT: ***The aim of this work is to analyse the effects of constitutional degradation on the accountability of the Hungarian public finance system. This contribution will try to explain that it is currently almost impossible to retain the government accountable to any other institution of the State in terms of the management of public finances. After a short historical reconstruction of the Hungarian path to democratic erosion, the role of the government in the "capture" of the Költségvetési Tanács - the national fiscal council - will be analysed. The conclusions will be focused on the concept of international accountability and its importance in the definition of the European Union's role.***

1. *Introduction and framework*

The aim of this contribution is to analyse the effective accountability of public finances in the Hungarian democratic degraded constitutional experience. Moving from the concept of "constitutional degradation", it will be remembered that in a (formally) parliamentary form of government, the confidence relationship that bounds the executive to the parliamentary majority at its support has important implications on the conditions under which the accountability of public finances is enforced[1]. The fact that independent fiscal institutions have an important role in the EU economic governance will also be highlighted. In this perspective, the paper will try to explain why in Hungary it is almost impossible to retain the government accountable to other institutions of the State in the management of public finances in current practices. It will be argued that the only possible accountability in this sector of public policies derives, *de facto,* from the willingness of the government to comply (more or less) with international and European standards in budget management[2].

The relationship between public institutions and economic processes is an important field of studies for experts in constitutional law and for those who have an interest in constitutional engineering. The debate on how constitutional provisions can interact with the economy is still open and far from being concluded, Constitutions sometimes being seen as «economic documents»[3] as well. This is true not only because a constitution may expose the social and economic "pact" that should regulate the life of a country, but also because the institutional organisation that defines

[*] **Post-doctoral Research Fellow in Comparative Public Law, University of Pisa.**

[**] **This work has been subjected to blind peer review.**

[1] OECD, *Parliament's role in budgeting*, in *Budgeting and public expenditures in OECD countries*, 2019, 81 ff. On this point see also the methodological reconstruction made by C. BERGONZINI, *Parlamento e decisioni di bilancio,* Roma, 2014, 15 ff.

[2] It is important to notice that Hungary is not a member of Euro area. For this reason, the country is subject to different rules regarding the degree of independence that it is required to the national fiscal institution in order to comply with an international standard of accountability. On this point D. FROMAGE, *Creation and reform of independent fiscal institutions in EU member states: incomplete and insufficient work in progress?,* in B. DE WITTE, C. KILPATRICK, T. BEUKERS (eds.*), Constitutional Change Through Euro-Crisis Law,* Cambridge, 2017, 108 ff.

[3] R.A. POSNER, *The Constitution as an Economic Document*, in *Geo. Wash. L. Rev.*, 1987, 4.

how the economic policy of a State is managed has important consequences on how, and if, the aforementioned "pact" will be enforced.

In this context, the raising of constitutional degradation issues[4] among a quite large number of democratic countries may have influenced their "economic constitutions" too. This process may occur under two different ways. First, the constitutional degradation of a regime may undermine the accountability of the government on how it manages public expenses. The second aspect to consider is related to the evolution of the economic constitution of a country in consequence of the constitutional activism of a constitutional degraded regime. It is possible that those countries would also act in an "economic way" against some minorities or marginalised groups, to strengthen the appealing with the majorities of the people[5]. In this perspective, it has been argued by political scientists that the "social cohesion" of all the residents in a country is an enemy for far right-populist parties[6], Hungary being a good example of both aspects. This work will mostly develop considerations on the evolution of the accountability of the Hungarian government in the budgetary process while having the EU framework in mind. Some suggestions regarding the second aspect will be developed in the conclusions. It will be noticed that the actions adopted in order to comply with the EU regulatory framework since 2010 may have favoured a "degenerated" constitutional activism.

2. *The degeneration of the concept of accountability in Hungary*

Since the end of the Cold war, after the fall of communist regimes in Eastern Europe, Hungary has been considered one of the most successful examples of the transition to democracy[7]. The entry of the country in the EU with the acceptance of the *acquis communautaire* has been considered the logic consequence of this process of democratization[8]. However, after the 2010 election, the country started a process of democratic backsliding[9]. The 2010 free and fair elections due to the fragmentation and delegitimization of the governing parties gave the right coalition Fidesz-KDNP, led by Orban, a significant (super)majority of 2/3 of parliamentary seats and the possibility to "unilaterally" amend the Constitution[10]. In this sense, the new fundamental law entered into force on 01/01/2012, with the objective to *U-Turn* the policies of the country[11], which was the most important political and institutional success of that political coalition. Without any substantial modification in the *formal* form of government in Hungary, the system of check and balances of the country was weakened in favour of the executive power.

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[4] For a definition of the concept see T. GINSBURG, A.Z. HUQ, *How to save a constitutional democracy*, Chicago, 2018. The conceptualizations on this topic are very dynamic and scholars are fare from reaching an agreement on that. Practical problems arose when it is necessary to say if a certain country can be considered a democratic degraded regime. Anyway, there is an agreement among scholars that support the concept of "constitutional degradation" that it could certainly be applied to Hungary. A. DI GREGORIO, *I fenomeni di degenerazione delle democrazie contemporanee: qualche spunto di riflessione sullo sfondo delle contrapposizioni dottrinali*, in *NAD*, 2019, 2, 2 ff.

[5] On this point see Y. TORU, *Parliaments in an age of populism,* in C. BENOÎT, O. ROZENBERG (eds.), *Handbook of Parliamentary Studies*, London, 318 ff.

[6] M. TARCHI, *Populism and Extreme Right: Affinities and Differences*, in L. QIANG, D. DEMIN (eds.), *Europa at the Crossroads: Right-wing Politics and the Future of Europe*, Peking, 2020.

[7] K. KOVÁCS, G.A. TÓTH, *Hungary's Constitutional Transformation*, in *Eur. Const. L. Rev.*, 2011, 7.

[8] A. DI GREGORIO, *La Costituzione ungherese del 25 aprile 2011: è davvero tutto così nuovo? Qualche osservazione in libertà*, in *Dir. pubbl. Paesi Eur. Or.*, 2011, 2,

[9] N. BERMEO, *On Democratic Backsliding*, in *Journal of Democracy*, 2016, 1,

[10] Only after its victory at the elections the Fidesz party announced that it was going to make a new Constitution. A. JAKAB, P. SONNEVEND, *Continuity with Deficiencies: The New Basic Law of Hungary*, in *Eur. Const. L. Rev*, 2013, 9, 105.

[11] M. KORNAI, *Shifting away from Democracy Hungary's U-Turn*, in *Pub. Fin. & Man.*, 3, 2015.

In this case, it is easy to say that in a parliamentary form of government, where the executive is supported by a great majority of 2/3 of the MPs, it is hard (in effect impossible) for the Országgyűlés (Hungarian parliament) and for its minorities, besides their formal power, to develop any effective control on the government[12]. This effect is strengthened if, like in this instance, the electoral law (and the political context) permits a centralized selection of the candidatures without almost any possibilities for heterodox position inside the majority to emerge[13]. In this context, any relations of vertical accountability that may occur between Parliament and the Government is *de facto* ineffective[14]. The weakening of the check and balances system of a constitutional degraded country also influenced all institutions with the objective to implement the so-called horizontal accountability[15], a form of mutual control exercised through a network of independent and often non majoritarian institutions[16]. In that respect, it has been argued that the large network of independent agencies created in Hungary after 1989 was the first target of the Orban's populist logic[17]. A good example of this trend could be seen in the evolutions of the internal check and balances system in the field of public finances and in the national budget decision, also for the influence of the EU regulatory framework in this field.

3. *Another piece of the degradation: the reform of Költségvetési Tanács*

It is known that, since the first response to the economic crisis erupted in 2007/08, EU member states have established independent fiscal policy institutions[18] with the objective to monitor and coordinate economic policies conducted at a national level[19]. A fundamental requirement for an institution of this kind is that its independence is maintained and respected[20].

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[12] M. VOLPI, *La nuova Costituzione ungherese: una democrazia dimezzata*, in *DPCE*, 2012, 2, A. DI GREGORIO, *La Costituzione ungherese del 25 aprile 2011,* cit., 5 ff.

[13] On the evolution of the Hungarian electoral system: M.A. Orlandi, *La "democrazia illiberale". Ungheria e Polonia a confronto*, in *DPCE*, 2019, 1, 171, and K. BENOIT, *Holding Back the Tiers*, in M. GALLAGHER, P. MITCHELL (eds.), *The Politics of Electoral Systems*, Oxford, 2005, 231 ff. For a strong criticism on how electoral engineering have been used by Hungarian government: A. VON NOTZ, *How to abolish democracy: electoral system, party regulation and opposition rights in Hungary and Poland,* in *Verfassungblog,* 2018.

[14] R. TARCHI, *Democrazia e istituzioni di garanzia*, in *Rivista AIC*, 2018, 3.

[15] M. O'DONNELL, *Delegative Democracy*, in *Journal of Democracy*, 1994, 1. On the concept of accountability see A. LE SUEUR, *Accountability*, in P. CANE, J. CONAGHAN (eds.), *The New Oxford Companion to Law*, Oxford, 2008, 7 ff.

[16] C. Scott, *Independent Regulators*, in M. BOVENS, R.E. GOODIN, T. SCHILLEMANS (eds.), *The Oxford Handbook of Public Accountability,* Oxford, 2014.

[17] A.Z. HUQ, *How to save a constitutional democracy*, cit., 231 ff. More specifically see also V. CARLINO, *Ungheria: le autorità indipendenti e la "democratic erosion",* in *Nomos. Le attualità nel diritto*, 2019, 3, 2.

[18] The International Monetary Fund (IMF) defines a fiscal council as: «a permanent agency with a statutory or executive mandate to assess publicly and independently from partisan influence government's fiscal policies, plans and performance against macroeconomic objectives related to the long-term sustainability of public finances, short-medium-term macroeconomic stability, and other official objectives» (X. DEBRUN, T. KINDA, T. CURRISTINE, L. EYRAUD, *The Functions and Impact of Fiscal Councils',* in C. COTTARELLI (ed.)*, IMF Staff Report,* 2013, 8).

[19] Since 2013, EU member states were legally obliged to create a «functionally autonomous» fiscal council at the national level, in application of Directive EU 2011/85 and, for the counties who had ratified it, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG). See D. FROMAGE, *Creation and reform of independent fiscal institutions in EU member states: incomplete and insufficient work in progress*, cit., 110

[20] On the role of independent fiscal institutions, or fiscal councils: R. HAGEMANN, *How Can Fiscal Councils Strengthen Fiscal Performance?*, in *OECD J.: Econ. Stud.*, 1, 2011, 75 ff.; R. BEETSMA, X. DEBRUN, *Fiscal Councils: Rationale and Effectiveness*, in *IMF Work. Paper*, WP/16/86, 2016, 3 ff. See also C. CLOSA, *Democracy vs. Technocracy: National Parliaments and Fiscal Agencies in the EMU Governance*, in *Reconnect WPS*, D.10.2., 2020; C. FASONE, D. FROMAGE*, Fiscal Councils: Threat or Opportunity for Democracy in the Post-Crisis Economic and Monetary Union?,* in L. DANIELE, P. SIMONE, E.R. CISOTTA (eds.), *Democracy in the EMU in the Aftermath of the Crisis,* Springer, 2017, 165 ff. It is important to notice

Since the democratisation of the country, the budget policy of Hungary has followed a cyclical pattern correlated with the election campaign. For example, the budget deficit peaked at almost 10 per cent of GDP in the 2006 election year. This cycle, where periods of expansionary fiscal policy are followed by budget consolidation, has been described as «fiscal alcoholism»[21]. Consequently, since 2004, Hungary has been subjected to the excessive deficit procedure of the stability and growth Pact. In 2008, the country was granted support loans equivalent to 20 billion euros from the EU and the IMF. An initiative by the socialist Government to conduct a longer term sustainable fiscal policy resulted in the adoption of the Fiscal Responsibility Act LXXV/2008 in the same year[22]. As part of restoring credibility, an independent Fiscal Policy Council, Költségvetési Tanács, was established the following annual period. At that time, the Council consisted of three members, assisted by a secretariat of about thirty officials. The members were each nominated by the President of the Republic, by the Governor of the Central Bank, and by the President of the National auditor, together with the Parliament's "*advice and consent"* to the nominations[23]. One eligibility requirement was that a person must not have been active in a political party for the last four years. Like others fiscal councils around Europe, the main tasks of the Hungarian independent authority was to review legislative proposals and bills involving state finances, analyse the effects of reforms proposed by the government, and make its own macroeconomic forecasts. The aim was to increase transparency and accountability in fiscal policy through independent analysis and dissemination of information.

After the mentioned 2010 elections, when the right-wing coalition Fidesz KDNP obtained the 2/3 majority in the Országgyűlés, the fiscal framework of the country was weakened in several respects. Transparency had been reduced, and Parliament had taken several decisions that conflicted with the framework[24]. Since 2010, the Government assumed a central role to tackle the economic and social impact of the financial and economic crisis. It is common that an executive assumes more powers during a crisis period,[25] but the ways in which it occurred in Hungary represented another symptom of the constitutional degradation process[26]. Regarding the accountability of public finances in 2011 (act CXCIV 2011), the Fiscal policy Council's influence was restricted after the Council criticised the government's budget bill for overly optimistic forecasts and lack of transparency. Despite resistance by the opposition and international criticism, the Council's budget was reduced from 836 million to 10 million Hungarian forints. The official motivation of the decision was related to the need for consolidation and the similarity of the Council's remit to those of the Central Bank and the National Audit Office. The real reason for the Council's budget cuts, however, was related to a non-pro-government behaviour which culminated with an expression of general

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that both the provisions of the mentioned 2011/85 EU Directive and of the Fiscal compact are extremely vague in the way they set the independence requirements of the independent fiscal institutions that each country have to establish. This fact plays an important role in the choice of the European Commission to promote little supervision on the institutional configuration of fiscal councils, even though it could have closely monitored them. On the role of the European Commission in the supervision of the independent fiscal institutions T. TESCHE, '*The Troika is Dead, Long Live the Domestic Troikas?': The Diffusion of National Fiscal Councils in the European Union*, in *J. Common Mark. Stud.,* 2019, 6, 2118 ff.

[21] G. KOPTIS, *Hungary: A Short-Lived Fiscal Watchdog*, in B. ROMHANY (ed), *Restoring Public Debt Sustainability: The Role of Independent Fiscal Institutions*, Oxford, 2013.

[22] In this period the European Commission and IMF put pressure on the Hungarian government to install a fiscal council. See T. TESCHE, '*The Troika is Dead, Long Live the Domestic Troikas?',* cit., 2118.

[23] G. KOPTIS, *Hungary: A Short-Lived Fiscal Watchdog*, cit., 12 ff.

[24] G. KOPTIS, *Hungary: A Short-Lived Fiscal Watchdog*, cit., 12 ff.

[25] K.L. SCHEPPELE, *Understanding Hungary's Constitutional Revolution*, in A. VON BOGDANDY, P. SONNEVEND (eds.), *Constitutional Crisis in the European Constitutional Area*, Oxford, 2015.

[26] B. BUGARIC, *Protecting democracy inside the EU: on article 7 TEU and the Hungarian turn to authoritarianism*, in C. CLOSA, D. KOCHENOV (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Oxford, 2016.

comments on the government's budget bill. The Council's secretariat was abolished, and the Council had to use the technical support of the National Audit Office and the Central Bank, limiting the Council's ability to make independent forecasts and analyses. The composition of the council was reformed, and new members were appointed[27].

According to 2011 CXCIV act, the chairperson must be selected by the President with a mandate of six years, without remuneration and on a part-time basis, the remaining two positions being filled *ex officio* by the Central Bank Governor and the National Auditor. Those dispositions would have been embedded in the article 44 of the reformed Constitution as well. Ironically, it has been affirmed that the demise of the Council can be interpreted as evidence of its previous effectiveness[28].

We should notice that, after the "capture" of the fiscal council by the Government, the powers of the institution were improved, and a new Council Secretariat of only two people was established in early 2012. The Council has also received a form of right of veto *vis-à-vis* the budget bill, meaning that the bill can be rejected if the debt brake, as defined by article 36 of the Constitution, is not observed. But it seems unlikely that it will be possible to use the right of veto in any meaningful way, also because the Council's resources and analytical capacity are not in proportion with that faculty[29]. The history of the evolution of accountability in the Hungarian public finance sector is a good picture of the meaning of democratic erosion. In this context, the Hungary's public finances adjustment was made possible despite the absence of any internal control on the activities of the executive.

4. *The importance of international accountability*

The improvement of the fiscal framework of Hungary should be read as a consequence of international criticism, European pressure, and the presence of a government which wanted to comply with some austerity measures. What needs to be seen is that, when the financial situation of Hungary was stabilized, the attention of the EU at that time was not enough focused on *how* those improvements in the macroeconomic indicators were obtained[30]. A prevalence of an intergovernmental way to act had the effect to give only a small scrutiny on the measures adopted by Hungary until the output of those policies was not in contrast with the achievement of an improvement in the macroeconomic indicators. It was only in the summer of 2018 when the European Parliament asked the EU member states to determine, through a resolution and in accordance with the Article 7 TUE, whether Hungary was at risk of breaching the EU's founding values, that the situation changed. The annex to this famous resolution (adopted with a 448-197 majority) contains some paragraphs which are related to the violations of economic and social rights. Hungary is pictured as a country where the proportion of people at risk of poverty and social exclusion is above the Union average, with children being more exposed to poverty than other age

[27] In some member states, national fiscal councils have developed into reputable fiscal watchdogs that do not shy away from criticizing their national governments in case of noncompliance with the national fiscal rules. In this perspective, it has been observed that continuous conflicts with their respective government can put national fiscal watchdogs in a vulnerable position. The Hungarian example is relevant in showing that, Although the institutional set-up can provide some protection from political interference, a government that is eager to weaken or dismantle its fiscal council will ultimately succeed. T. Tesche, *The European Fiscal Board: supranational de novo body or orchestrator?,* in *It. Pol sc. Rew.,* 51, 2021, 400

[28] G. KOPTIS, *Hungary: A Short-Lived Fiscal Watchdog*, cit.,, *Hungary: A Short-Lived Fiscal Watchdog*, cit., 17 ff.

[29] EUROPEAN COMMISSION, *Assessment of the 2012 National Reform Programme and Convergence Programme for Hungary,* 2012. See also L. JANKOVICS, *Independent Fiscal Institutions: "New Kids on the Block" in Economic Policy,* in D. PIROSKA, M. ROSTA (eds.), *Systems, Institutions, and Values in East and West,* Budapest, 2020, 131 ff.

[30] S. VAN DEN BOGAERT, *The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems*, in *Common Mark. Law Rev.*, 2016, 3.

groups. Additionally, the level of minimum income benefits is one of the lowest in the Union, the adequacy of unemployment benefits is very low, and levels of payment are among the lowest in the Union[31]. These remarks are a clear symptom of two tendencies. First, the Orban's philosophy regarding the post-crisis role of the state in the market with a strong emphasis on solidarity and social rights in fiscal and economic regulation is still far from giving some benefits to marginalised social groups in Hungary. Second, the lack of accountability of the government in the budgetary decision, despite possibly not having undermined the financial stability of the country, has made it almost impossible for certain groups to advocate for their cause in an effective way[32].

5. *Conclusions*

The debate on the budgetary autonomy of national states in the European Union after the 2008 economic crisis is far from being closed, and the response to the recent pandemic emergency has raised more questions than answers in this field. What it is clear is that, beside its formal powers, the Hungarian Parliament was ousted from any relevant decision, due to the existence of a so large parliamentary majority for the government that the executive may ignore any critical voice inside the Országgyűlés. the observations on the role of Hungarian fiscal council follow the same direction.

The only level of accountability that the Hungarian government may have, is inside the European and international community. Nevertheless, the disagreement inside these communities, as shown by the immobility on the opened article 7(1) procedure, makes it clear that it is impossible to influence the policy of a constitutional degraded regime through political international pression until that country has had some degree of international support and his illiberal policies have a decisive influence only at the internal level.

It is still too early to take a position on the effects that the pandemic crisis has had on the EU integration[33]. If the pandemic crisis has accelerated the decline of neoliberal EU integration process, marking a renewed trend towards the centrality of the state, and no longer based on austerity, perhaps the tides may turn in a way under which it will be successfully possible to challenge the idea of democracy theorized in the constitutional degraded country.

[31] EUROPEAN PARLIAMENT, *Resolution of on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded*, 12 September 2018.

[32] M. BANKÚTI, G. HALMAI, K.L. SCHEPPELE, *Hungary's Illiberal Turn: Disabling the Constitution*, in *Journal of Democracy*, 2012, 3. See also C. CLOSA, *Reinforcing EU Monitoring of the Rule of Law: Normative Arguments, Institutional Proposals, and Procedural Limitations*, in C. CLOSA, D. KOCHENOV (eds.), *Reinforcing Rule of Law Oversight in the European Union*, cit.

[33] A. CANTARO, *Potenza e impotenza del sovranismo europeo. Pandemia e tecnocrazia*, in *Federalismi.it*, 2021, 15.

Luca Dell'Atti*

The Neo-liberal Twist of European Integration as a Degradation of Social Constitutionalism. Counter-trends in the Management of the Pandemic**

ABSTRACT: ***The aim of this article is to attempt to describe the neoliberal twist imposed on the process of European integration as a phenomenon of constitutional degradation, since it affects the most qualifying and progressive advances of social constitutionalism: the protection of social rights as constitutional rights and substantive equality as the main purpose of government. To this end, the mismatch between European primary law and constitutions with a high social content is analyzed under three different perspectives: firstly, the technique of the protection of social rights, highlighting the difference in the origin and evolution of the two catalogues of rights; secondly, the technical rather then political nature of the decision-making; finally, the problem of sovereignty between EU and Member States.***

1. *Introduction.*

This short article is the written and extended version of a communication made in the context of the Worskhop 'Framing and Diagnosing Constitutional Degradation' (Pontignano, 21-22 June 2021) that was supposed to be held in June 2020 but was postponed by one year due to the CoViD-19 pandemic. Although the key considerations have not changed in the space of a year, the pandemic has highlighted, on the one hand, some vivid problems affecting relations between the EU and Member States and, on the other, the crisis of social rights in many European countries, especially after the austerity policies inspired by Europe ten years ago. Indeed, the comparison between the way the economic and financial crisis of 2008-2011 was handled and the current one appears to be an interesting point of view to verify whether EU institutions and European governments have learned the lesson of the past.

In view of the above, the aim of this article is to attempt to describe the neo-liberal twist imposed on the process of European integration as a phenomenon of constitutional degradation, since it affects the most qualifying and progressive advances of social constitutionalism, namely the protection of social rights as constitutional rights and substantive equality as the main purpose of government. To this end, we will first examine the relationship between European primary law and constitutions with a high social content with regard to the techniques for protecting social rights, highlighting the difference in the origin and evolution of the two catalogues of rights (section 2); Then, the aforementioned comparison will be made by noting the openings towards a more integrated structure of European political decision-making and more solidarity in the relations between Member States and between them and the Union (section 3); finally, the mismatch between European economic governance and social constitutions will be discussed with regard to the problem of sovereignty in Europe (section 4).

* **Post-doctoral Research Fellow in Constitutional Law, University of Bari Aldo Moro.**

** **This work has been subjected to blind peer review.**

2. *Social constitutions and European Treaties.*

Focusing on the European constitutions it is possible to move for a classification according to the standard of the protection offered to social rights. This classification depends firstly on whether or not social rights are constitutionalised and secondly, among constitutions that expressly provide for them, on the technique of normative codification, as a further distinction can be made between purely 'programmatic' constitutions that require the intervention of the parliament in order to provide effective protection for social rights and constitutions that grant these rights immediate and direct protection as fundamental rights, similar to the so-called 'first-generation rights'.

In carrying out such an analysis, an Author identified a very high level of protection in the Italian, Spanish, Portuguese and Greek constitutions[1]. Among these, the Italian Constitution is quite paradigmatic because of its chronological precedence and which in many ways has represented a model for the other mentioned constitutions. The Italian Constitution, in fact, expressly codifies the principle of substantial equality, correcting the principle of formal equality in a progressive sense and making it the main scope of republican institutions (Article 3, paragraph 2); it assigns undisputed axiological centrality to the right to work (Article 4) and makes economic freedoms functional to the protection of workers' dignity and social utility (Articles 41 and 43)[2].

If we compare this bundle of constitutions with European primary law we can see a clear mismatch, dealing with social rights. In spite of several attempts in the opposite direction, during the long process of European integration, social rights remain less important compared to classical civil rights and, above all, economic freedoms. First of all, it is well known that social rights legally appear with the Charter of Fundamental Rights of the European Union (2000), which, however, only becomes legally equivalent to the Treaties with the Lisbon Treaty (2007-2009). Secondly, the codification of social rights in the Nice Charter suffers from a certain confusion between the 'first-generation rights', linked to the birth of the liberal State, and those linked to the development of the welfare State, which represents the most qualifying advance in constitutionalism[3]. It should also be noted that the CJEU is somewhat reluctant to apply the Charter directly as a yardstick for the legitimacy of national legislation. A recent and relevant case on social rights comes from Italy and, in particular, from a preliminary reference by the Italian Constitutional Court in its order 182/2020. In the case the 'dialogue between courts' shows a different perspective of the two courts: while the Italian court looks directly to article 34 of the CFREU to assess the legitimacy of the Italian legislation on the birth bonus, with a view to the maximum expansion of the mechanisms for the protection of fundamental rights[4], the European Court recalled its constant case law stressing that "where they adopt measures which come within the scope of application of a directive which gives specific expression to a fundamental right provided for by the Charter, the Member States must comply with that directive [...]. It follows that the question referred must be examined in the light of Directive 2011/98"[5]. It is therefore in secondary law –and not in primary law– that is needed to look for the benchmark of coherence of the law of the Member States with the protection offered to the rights at European level. A conclusion that represents, in substantive terms, the most relevant point of weakness of the protection offered by the Nice Charter.

[1] S. GAMBINO, *I diritti sociali fra costituzioni nazionali e costituzionalismo europeo*, in *Federalismi.it*, 2012.

[2] On the different interpretations of the economic constitution see F. SAITTO, *"Costituzione finanziaria" ed effettività dei diritti sociali nel passaggio dallo «Stato fiscale» allo «Stato debitore»*, in *Rivista AIC*, 2017, 1.

[3] In this regard, it has been pointed out, for example, that the right to work is included in the chapter dedicated to freedom, together with the freedom to conduct a business, and not in those dedicated to equality, dignity or solidarity: I. CIOLLI, *I diritti sociali al tempo della crisi economica*, in *Costituzionalismo.it*, 2012, 3.

[4] For a focus of the Italian Costitutional Court's opinion see B. SBORO, *Definendo il concorso di rimedi: le recenti vicende del "dialogo" tra Corti in materia di diritti fondamentali*, in *Forum di Quaderni Costituzionali*, 2021, 1.

[5] Judgment of 2 september 2021, C-350/20, ECLI:EU:C:2021:659, paragraph 47.

Finally, the Charter makes it explicitly clear that it applies to the EU institutions and the Member States, not directly to citizens (Article 51.1) and that it does not alter the division of competences made by the Treaties, since it cannot therefore extend the Union's fields of action (Article 51.2). Since the competences, in this policies' area, lie essentially with the Member States, it is quite understandable that EU still gives centrality to economic freedoms while provides only indirect and mediated protection for social rights[6], and that the recent effort of the EU institutions to restart a serious debate on the protection of social rights has not produced visible results[7].

Thus, we can highlight a clear mismatch between European and constitutional social rights. Among others, two relevant reasons can be identified to explain this. On the one hand, the aforementioned difference between catalogues of social rights and standards of protection offered by national constitutions has prevented European courts from finding homogeneous and solid common constitutional traditions in them, as has been the case for civil rights[8]. In fact, dealing with the multi-level system of protection of rights –whereby several integrated legal systems should provide stronger protection of rights overall– the European system of rights (EU and ECHR) has succeeded in overcoming the protections provided by many States with regard to certain advanced civil rights (e.g. rights of LGBTQIA+ people, privacy on the web, etc.) but has failed to do so with regard to social rights[9]. On the other hand, as will be deeper seen in the next section, the EU was born on a different ideological and teleological basis from the one that inspired social democratic constitutionalism after World War II, and developed, for the purpose of creating and consolidating the single market, a catalogue of rights whose hard core is the free movement of workers, goods, enterprises and capitals. Precisely with reference to the relationship between social rights and market freedoms, the case law of the CJEU during the crisis years is well known and widely noted[10]: the Luxembourg judges, balancing the right to strike with the freedom of economic activity, rejected the a priori prevalence of the former over the latter, de facto leaving the balance between capital and labour to the technical case-by-case assessment of the judge[11].

In conclusion, both of the above profiles show that the evolution of rights in the European legal system has been essentially jurisprudential, which is why these rights have been referred to as 'a-constitutional rights' since they evolved outside of historically and politically conditioned processes, and whose effectiveness is left to practice, soft law and the (supposedly) technical and neutral decisions of judges, instead removed from the traditional subjects of democratic intermediation, i.e. government and parties[12].

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[6] B.M. FARINA, *Diritti sociali e prospettive di sviluppo del Welfare europeo*, in *Annali 2016-2018*, Napoli, 2018, 147 ff.

[7] The reference is to the inter-institutional proclamation of the European Pillar of Social Rights in occasion of the Göteborg Summit on 17th November 2017: for a critical opinion see S. GIUBBONI, *Appunti e disappunti sul pilastro europeo dei diritti sociali*, in *Quad. cost.*, 2017, 4, 953 ff.

[8] S. GAMBINO, *I diritti sociali fra costituzioni nazionali e costituzionalismo europeo*, cit., 13 ff.

[9] S. GIUBBONI, *Diritti e solidarietà in Europa. I modelli sociali nazionali nello spazio giuridico europeo*, Bologna, 2012, 139 ff.; C. SALAZAR, *I diritti sociali nel "gioco delle tre Carte": qualche riflessione*, in L. D'ANDREA, G. MOSCHELLA, A. RUGGERI, A. SAITTA (eds.), *La Carta dei diritti dell'Unione Europea e le altre Carte*, Torino, 2016, 217 ff.

[10] We refer to the cases Viking, C-438/05 (438, 11/12/2007); Laval, C-341-05 (341,18/12/2007); Rüffert, C-346/06 (346, 3/4/2008); Commission v. Luxembourg, C-319/06 (319, 19/06/2008). In literature, see M.V. BALLESTRERO, *Le sentenze Viking e Laval: la Corte di giustizia bilancia il diritto di sciopero*, in *Lav. dir.*, 2008, 2, 389 ff.; U. CARABELLI, *Il contrasto tra le libertà economiche fondamentali e i diritti di sciopero e di contrattazione collettiva nella recente giurisprudenza della Corte di giustizia: il sostrato ideologico e le implicazioni giuridiche del principio di equivalenza gerarchica*, in *Studi sull'integrazione europea*, 2011, 2, 217 ff.

[11] According to S. GAMBINO, *Diritti e cittadinanza (sociale) nelle costituzioni nazionali e nell'Unione*, in *La cittadinanza europea*, 2013, 2, 35, this is a logical error that weakens the constitutional right to strike (as such protected, for example, by Article 40 of the Italian Constitution) to the status of a mere interest.

[12] G. AZZARITI, *Le garanzie del lavoro tra costituzioni nazionali, Carta dei diritti e Corte di Giustizia dell'Unione Europea*, in *www.europeanrights.eu.*

3. *Governance v. government: a comparison between the management of two crisis.*

It can be assumed that States remain the first –and strongest– outpost for the protection of social rights, especially those States whose constitutions have a particularly advanced social content. Yet, precisely on the ability of Member States to ensure a strong welfare system for their citizens, the EU is able to have a constraining influence: although social rights are considered –at least by the mentioned constitutions– as fundamental rights with constitutional rank, they are, at the same time, 'expensive rights', conditioned by the actual budgetary possibilities of governments, with particular reference to the possibility of having recourse to sovereign debt[13]. These possibilities have been legally and substantially limited by the austerity policies implemented at European level in reaction to the economic and financial crisis of 2008-2011. Among these, a key importance have: the limit on recourse to sovereign debt provided for by the Stability and Growth Pact; the cross-compliance characterizing the European Stability Mechanism (ESM) in which aid to States, granted in the form of loans, is also subject to the implementation of reforms[14] in the fields of social security, healthcare and education, directly affecting the stability of national welfare systems.

Moreover, when discussing the method of the decision-making process in the adoption of European emergency legislation, the absence of adequate institutional forms of crisis governance was highlighted, replaced by forms of intergovernmental agreement between single governments: we refer, in particular, to the ESM and the so-called Fiscal Compact, both adopted by international treaties and not by EU regulatory instruments, clearly showing the weakness of the moment of political decision-making on a European scale[15]. Indeed, this is only a part of a broader process in which the fluid mechanisms of technocratic governance of the EU (and especially of the euro[16]) overlap with the strict mechanisms of the democratic government of Member States. Thus, the financial constraints arising from Europe and decided by authorities with no democratic legitimacy –in whole or in part– undermine the ability of national parliaments and governments to effectively guarantee social rights, also leaving to the constitutional courts the difficult task of achieving a balance between containing spending and protecting constitutional rights[17]. The crisis of social rights, in short, turns from an economic crisis into a constitutional crisis and, therefore, a democratic one, as it affects the protection of fundamental rights and the possibility of democratic governments to widely safeguard welfare and related services.

Lastly, from a less legal and more political perspective –but full of consequences for the observation of constitutional lawyers on the evolution of the democratic State– the absence of a space for political decision-making properly related to the EU has exacerbated the consensus deficit of European citizens, especially in the countries most affected by the crisis and by the following

[13] D. TEGA, 2012 *I diritti sociali nella dimensione multilivello fra tutele giuridiche e crisi economica*, in *Gruppo di Pisa – La Rivista*, 2012, 3.

[14] A. BARAGGIA, *La "condizionalità" nella governance economica europea: luci ed ombre di uno strumento controverso*, in M. SALERNO, M. FERRARA (eds.), *Costituzione economia e democrazia pluralista, Itinerari della Comparazione – Quaderni della Rivista DPCE online*, 2017, 1, 193 ff.

[15] S. GAMBINO, *Diritti e cittadinanza*, cit.

[16] We are of course referring to the ECB, whose centrality in the governance of monetary policy has increased following the crisis of the last decade, also as a result of the weakness and disagreement of the EU's political institutions. For an in-depth analysis on this point and on the instruments developed by the ECB in those years see G. LUCHENA, *Sovranità monetaria e Stati nazionali: le operazioni non-standard della Banca centrale europea*, in *Dirittifondamentali.it*, 2017, 1.

[17] In Italy, this balance has become increasingly critical following the approval of a Constitutional amendement in 2012, which modified Article 81 of the Constitution by introducing the budget balance as a constitutional constraint.

austerity measures[18]: a dramatic evidence of the weakness of the compromise between neo-liberal practices and social democracy[19].

The mismatch between European law –both ordinary and emergency– and national constitutions with a socially advanced core rests, after all, on the difference on the main ends that bind the respective legal systems: on the one hand, the extension 'for all' of 'first-generation rights', the mitigation of the economic differences that effectively prevent the achievement of full equality and the guarantee of social rights; on the other hand, the creation and improvement of the single market by protecting the free movement of the production factors[20].

Such a mismatch has increased as a result of the neoliberal twist of the European integration process –which reached its peak precisely with the emergency legislation of the last decade– in its ordoliberal declination of the Freiburg School scholars[21]: in fact, at the heart of the doctrine of the social market economy (soziale Marktwirtschaft) we can find the deconstruction of the model of direct public intervention in the economy aimed at balancing inequalities through redistributive policies and increased public spending, and the reconstruction of a model in which public power (be this the governments, the EU, the common currency) becomes a mere regulator of free competition and price stability in the idea that it is these that create widespread social welfare[22].

Yet, in the management of the crisis generated by the pandemic spread of the so-called new coronavirus, it is possible to identify some differences and, in particular, some steps towards a more solidarity-based model of relations in the European multi-level system and, perhaps, also the beginnings of a new model of European economic governance[23] able to rebalance its mercantilist tendencies with a more complete social vocation. Some evidence: the suspension of the Stability and Growth Pact; the partial reform of the ESM, although not entirely free of conditionality, whose Board of Governors will, for example, have to interact with Parliament, bringing it back into the European political institutions; about the Next Generation EU, it is financed through a properly European debt, accompanied by direct European taxation; the ordinary legislative procedure (co-decision) has been adopted for the approval of the most important of the Next Generation's funds, the Recovery and Resilience Facility (RRF); it consists not only of loans but also of grants; the distribution of funds is not based on the classic 'juste retour' formula, which is proportionate to the amount each State contributes to the EU budget, but on the basis of the needs of the requesting country[24].

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[18] See C. GALLI, *Sovranità*, Bologna, 2019, 236 ff.

[19] S. GIUBBONI, *Stato sociale e integrazione europea. Una rivisitazione teorica*, in *Quad. fior.*, 2017, 46, I, 553 ff. See also W. STREECK, *Tempo guadagnato. La crisi rinviata del capitalismo democratico*, Feltrinelli, 2013 where the Author theorises the transition from the 'fiscal State' to the 'debtor State' to the 'consolidated State'. The EU is archetypical of the last transition since it has created a supranational pole for conditioning economic policy without having built an equally supranational democratic arena. We will return to this issue in section 4.

[20] To be fair, when the TEU mentions the social market economy, it refers to the goals of economic growth and price stability as well as full employment and social progress (Article 3.3), but there is no doubt that, in practice, the first model has by far prevailed over the second: see R. Dickmann, *L'articolo 3 del Trattato sull'Unione e la politica economica europea*, in *Federalismi.it*, 2013, 11, 3.

[21] A. SOMMA, *La dittatura dello spread. Germania, Europa e crisi del debito*, Roma, 2014.

[22] For an analysis of the relationship between the ordoliberal doctrine and the social content of the Italian Constitution see O. CHESSA, *La Costituzione della moneta*, Napoli, 2016, 49 ff.

[23] An important part of this debate concerns the type and manner in which the state interacts with economics, which, dealing with the relations between the EU and the Member States, mainly involves the issue of public aids to businesses and competition. For prospective considerations on the matter, during and after the pandemic, see G. LUCHENA, *Il rilancio dell'economia attraverso aiuti statali proattivi e condizionati*, in *Passaggi costituzionali*, 2021, 1, 162 ff.

[24] This is the opinion of A. GUAZZAROTTI, *Cose molto cattive sulla ribellione del Tribunale costituzionale tedesco al Quantitative easing della BCE*, in *laCostituzione.info*, 2020.

Yet, it has been written, solidarity, under the Treaties, meant in an equalizing sense, is not yet an absolute right for States and a corresponding obligation for other States and the EU. Forcing the scientific and public debate on this point –the Author says– , although justified by the exceptional nature of the pandemic emergency, runs the risk of clashing with the strict legal framework[25]. This leads to the conclusion that the Conference on the Future of Europe, as it is aimed at fostering the contribution of citizens and civil society in a participatory way, seems to represent an important opportunity to deal with the interconnected issues of democratic deficit, political and social integration, multi-level relations and European decision-making. On the other hand, as pointed out, seriously addressing the critical issues raised by these matters –for the future and on a stable basis, not to face a moment of exceptional crisis– would require an organic reform of the Treaties, which is not within the mandate of the Conference and requires, in any case, the activation of Article 48 TEU[26].

4. *Conclusions. Sovereignty in Europe and the future of the Union.*

Commenting on the measures taken at European level to deal with the economic effects of the health emergency, it has been said that the phase we are living in represents a crossroads: on the one hand, it is difficult to argue that a common and external threat such as a virus can be dealt with by each government in isolation; on the other hand, however, the common and integrated response –in itself certainly more effective than a sum of solitary reactions– cannot rely on technocratic solutions motivated by the impossibility of waiting for the consolidation of a truly European public sphere to support supranational democratic institutions, as this would repeat, on a larger scale, the mistakes of the last decade[27].

Indeed, the history of European integration is a history of gradual compression of State sovereignty without building up a mirror political sovereignty on a continental scale. Many scholars have discussed the crucial question of the state of sovereignty in Europe, producing different conclusions: some spoken of 'divided sovereignty' between the Member States and the UE (or rather, the euro)[28], others of a 'lost sovereignty', not acquired by others (precisely the EU)[29], others of a 'financial sovereignty without State'[30]. However, despite the diversity of their conclusions, these opinions grasp and agree on the central point, relating to the loss of sovereignty of States, which is not filled by the European level either because the latter conflicts head-on with the constitutional sovereign, or because, while exercising sovereign powers, it pursues aims that are incompatible with the social-democratic State.

In conclusion, it seems well clear the reason for declining the asymmetrical process of advancing European integration and defending national constitutions characterized by a high social content as

[25] See G. MORGESE, *Solidarietà di fatto… e di diritto? L'Unione europea allo specchio della crisi pandemica*, in Eurojus, 2020, *special number*, 113.

[26] In this respect it is useful to point out that, while Ursula von der Leyen, in her political guidelines by candidate for President of the Commission, wrote "I am ready to follow up on what is agreed, including by legislative action if appropriate. I am also open to Treaty change" (par. 6), the Council has adopted a much more circumspect position, emphasising that "The Conference does not fall within the scope of Article 48 TEU" (https://www.consilium.europa.eu/en/press/press-releases/2020/06/24/conference-on-the-future-of-europe-council-agrees-its-position/, par. 6, 21).

[27] A. GUAZZAROTTI, *Cose molto cattive sulla ribellione del Tribunale costituzionale tedesco al Quantitative easing della BCE, cit.*

[28] C. GALLI, *Sovranità,* cit.

[29] A. GUAZZAROTTI, *La sovranità tra Costituzioni nazionali e Trattati europei*, in *DPCE online*, 1, 327 ff.

[30] A. LUCARELLI, *Le radici dell'Unione Europea tra ordoliberalismo e diritto pubblico europeo dell'economia*, in *Diritto pubblico europeo – Rassegna on-line*, special number, 12 ff.

a case of constitutional degradation: a degradation of those profiles of constitutionalism that represent its most qualifying and progressive aspects.

This process can be analysed –as we have done in this brief paper– from two different perspectives. As far as the protection of social rights is concerned, the European legal framework has not developed techniques for the authentic constitutional protection of social rights while, on the contrary, has promoted the prevalence of economic freedoms and, at the same time, has undermined the integrity of the welfare system in many member states due to austerity policies. As far as decision-making is concerned, the European institutional framework, while directly and indirectly eroding the areas in which national governments can operate, has not developed a decision-making circuit firmly centred on the mechanisms of democratic representation, favouring the progressive prevalence of technical bodies and processes over political ones. The two profiles, analysed separately for reasons of methodological facilitation, are actually held together as sides of the same coin; mirror reflections of the same phenomenon that can be the subject of a properly constitutionalist analysis. This sort of analysis is carried out in an in-depth manner by Michael Wilkinson, who uses the words "liberal authoritarianism" to mean "a conjunction of political authoritarianism and economic liberalism. To reduce it to its most basic formulation, it captures the phenomenon of a liberalism that is pursued by authoritarian means, in ways that avoid robust democratic accountability. It is liberal in the sense that it depoliticizes the economy, naturalizes inequalities, and values markets, competition, and private ownership"[31]. According to the Author, in line with Galli's argument, monetary union has created, at the same time, a currency without a state and a state without a currency: "The two symbolic 'advances' of Maastricht—European citizenship and European money—were, nominally, on a par with regard to their quasi-constitutional status. But it would be money rather than citizenship that would come to symbolize the Europe of the twenty-first century. EMU had provided the new political symbol of integration, and created a new institutional apparatus, monetary governance now lying in the hands of a European Central Bank (ECB) that would soon take centre stage"[32]. In the Author's opinion, however, the prevalence of technique over politics, the EU's democratic deficit and the obstacles to the construction of a political union are not direct effects of the Maastricht turning point, since they are to be found *ab initio* in the logic that led to post-war European integration: "the post-war reconstitution of Europe—including the project of integration—is, in a significant sense, *conservative*. Certainly, it has taken place 'in the shadow' of a federalist vision of European unification. But this has never been more than a shadow; it has never materialized. In practice, the federalist project was almost immediately defeated. Instead, the constitutional architecture conserves a material order (and *telos*) of economic liberalism"[33].

These considerations, however, do not mean suggesting the need for a sort of constitutional restoration that pushes each government towards its own solitary destiny. On the contrary, it means that social constitutionalism represents a sort of benchmark for the future of the Union: the establishment of a uniform plan of social guarantees and rights at European level, the construction of political decision-making seats legitimized on democratic –not technocratic– grounds could represent a way to ensure that the process of European integration does not collapse on itself but becomes stronger.

[31] M.A. WILKINSON, *Authoritarian Liberalism and the Transformation of Modern Europe*, Oxford University Press, 2021, 3.

[32] M.A. WILKINSON, *Authoritarian Liberalism and the Transformation of Modern Europe*, cit., 274-5.

[33] M.A. WILKINSON, *Authoritarian Liberalism and the Transformation of Modern Europe*, 6.

Simone Gianello*

The European Convention on Human Rights as a tool for the protection of the rule of law (articles 17 and 18 ECHR)**

ABSTRACT: ***The purpose of this essay is to deepen the possible use of the European Convention on Human Rights as an instrument to dispute the processes of constitutional degradation within illiberal democracies. In particular, the focus will be placed on two articles of the Convention, Art. 17, and Art. 18 ECHR, and on their tendency to be used in order to safeguard the systemic nature of the rule of law. In conclusion, it will be shown how the Convention, and more accurately the two provisions in question, can be used as instruments alone capable of countering the spread of such phenomena and, on the other hand, as complementary tools for other institutions, such as for those of the European Union.***

1. *The rise of illiberal democracies within European borders*

The populist wave that overwhelmed the European Union over the last years has brought to the surface – as a direct consequence – a critical phenomenon characterized by the common project aimed at weakening the guarantees of the rule of law and the values of western constitutionalism. Especially in countries such as Poland and Hungary – but references could be extended to other Council of Europe countries such as, for example, Russia or Turkey – there has been a generalized attack against on the system of institutional counterpowers. One of the peculiarities of illiberal democracies, in fact, is the weakening of those institutional subjects – which usually lack popular legitimacy – constitutionally responsible for safeguarding constitutional values, separation of powers, and fundamental freedoms. More generally, the foundations of constitutionalism and the rule of law[1].

One of the most significant features, which has raised the greatest concerns and to which an answer is still being sought within the European Union and the Council of Europe, is certainly the assault on the independence of the judiciary (as well as of the constitutional courts). This, in fact, represents *de facto* and *de jure* one of the unquestionable preconditions which shape the oxymoron that lie at the basis of the idea of populist constitutionalism, whereby every liberal democratic value or principle becomes contestable by the political majority[2]. Consequently, the Constitution itself

* **Assistant Professor in Comparative Public Law, University of Milano-Bicocca.**

** **This work has been subjected to blind peer review.**

[1] See J. SAWICKI, *L'erosione 'democratica' del costituzionalismo liberale. Esperienze contrastanti dall'Europa centro-orientale*, Milano, 2020; M.A. ORLANDI, *La «democrazia illiberale». Ungheria e Polonia a confronto*, in *DPCE*, 2019, 1, 167 ff.

[2] P. BLOKKER, *Populist, Counter-Constitutionalism, Conservatism, and Legal Fundamentalism*, in *Eur. Const. Law Rev.*, 2019, 15, 532-533. As the Author stated, populism «counter the idea of the Constitution as a higher law by promoting a *political* notion of the Constitution. The populist understanding of law refutes the notion that is has a superior or aprioristic nature that allows it to take precedence over politics or democracy, and emphasizes the always already political nature of law». Furthermore, ID., *Populist Constitutionalism*, in C. DE LA TORRE (ed.), *Routledge Handbook on Global Populism*, London, 2018, 113 ff. and G. Halmai, *Populism, authoritarianism and constitutionalism*, in *German Law Journal*, 20 (2019), 306 ff. On the other hand, the idea of political constitutionalism is explained by R. BELLAMY, *Political Constitutionalism. A Republican Defense of the Constitutional Democracy*, Cambridge, 2009, 143 ff. Lastly, on the conceptual difference between political and populist constitutionalism, as well as on the doctrinal debate on the

loses its dual function as the source and limit of government action, becoming the privileged tool for legitimizing the policies carried out by populist majorities, as well as a shield against interference from the supranational order.

Starting from these assumptions and bearing in mind the limits related to the effectiveness of the responses provided by domestic institutions (and those of the European Union), below we will try to understand if and how the European Convention on Human Rights – Articles 17 and 18 ECHR above all – can be used to protect these core values from the threats of the illiberal democracies.

These threats, indeed, are not meant to unfold exclusively within the institutional relationships of each State but produce effects that reverberate beyond its borders. In the European Union, for example, we are witnessing the breaking of the values proclaimed by art. 2 TEU, according to which the Union is founded «on respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail». Principles which in turn are inextricably linked with respect for the rule of law which constitutes the backbone of every modern constitutional democracy[3], prerequisite for the protection of rights and obligations arising from the Treaties and international law, for mutual trust between Member States and all citizens to the EU institutions. The rule of law is a concept also recalled in the Preamble of the Charter of Fundamental Rights of the European Union and in the Statute of the Council of Europe, which does not assume merely formal value as a list of mere procedural requirements. On the contrary, it displays its relevance also (above all) from a substantive point of view, including, among other, principles such as legality, legal certainty, prohibiting the arbitrary exercise of executive power, effective judicial protection by independent and impartial courts, separation of powers and equality before the law[4].

Focusing attention on the legal space of the Council of Europe, on the other hand, the President of the European Court of Human Rights, Robert Spano, stressed that the rule of law is a constitutional principle in the system of human rights protection. Throughout the history and the evolutionary process of the European Convention on Human Rights, «the rule of law has been the lodestar guiding the development of the case-law of the European Court of Human Rights»[5]. Although the Convention does not provide provisions that *expressis verbis* protect the rule of law as a value in itself – except for the preamble of the Statute of the Council of Europe and of the Convention – in the last few years the «normative impact of the rule of law has been increasing in the case-law of the Court, in particular in cases dealing with the independence and impartiality of the judiciary»[6]. The Strasbourg Court itself made clear that the rule of law is one of the features of the common spiritual heritage of the member States of the Council of Europe[7]. The rule of law and the avoidance of arbitrary power are principles underlying the Convention[8] and it is from the rule of law itself which the whole Convention draws inspiration.

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subject, among others see L. CORSO, *Populismo, limiti al potere e giudici costituzionali. Una lezione americana*, in *Rag. Prat.,* 2019, 1, 220 ff.

[3] European Commission, *Communication from the Commission to the European Parliament and the Council. A New EU Framework to Strengthen the Rule of Law*, Brussels, 11.3.2014 COM (2014) 158 final, 11 March 2014, 1.

[4] European Commission, *Communication from the Commission to the European Parliament, the European Council and the Council. Further strengthening the Rule of Law within the Union State of play and possible next steps*, Brussels, 3.4.2019 COM (2019) 163 final, 3 April, 1.

[5] R. SPANO, *The Rule of Law as the Lodestar of the European Convention on Human Rights. The Strasbourg Court and the Independence of the Judiciary*, in *Eur. Law J.*, 2021, 1-2.

[6] *Ibid*.

[7] ECtHR, *Golder v. the United Kingdom*, Application no. 4451/70, 21 February 1975, pt. 34.

[8] ECtHR, Grand Chamber, *Taxquet v. Belgium*, Application no. 926/05, 16 November 2010, pt. 90.

Beyond declarations of principle, as already said, recent years have shown the difficulty in providing them effective protection. From the standpoint of the European Union, in fact, the "*political instrument*" provided for by art. 7 TEU, triggered by the Commission against Poland and by the European Parliament against Hungary, did not produce any concrete effects due to its regulatory operating procedures. So far, only the first paragraph of art. 7 TEU, which makes it possible to determine the existence of a clear risk of a serious breach by a Member State of the values referred to in Article 2 TEU has been invoked. Despite the option arranged pursuant art. 7, par. 2, TEU - which makes it possible to ascertain the existence of a serious and persistent breach by a Member State of the aforementioned fundamental values - is still on the ground, the unanimity required and the choice to entrust the final decision to the intergovernmental circuit have in in fact it made it impossible to use, at least for the moment [9]. On the judicial side, after a first period marked by an evident *self-restraint*, some results in safeguarding the judicial independence – in particular against Poland by virtue of the infringement procedure pursuant to art. 258 TFEU and the preliminary reference provided for by art. 267 TFEU[10] – arises from the case law of the European Court of Justice through the (re)interpretation of some provisions such as art. 19, par. 1 TEU, art. 2 TEU and art. 47 of the European Charter of Rights[11]. In addition to the above and more generally in *Repubblika* the Court of Justice also established the existence of a principle of *non-regression* of the fundamental values on which the European Union is built, in particular the rule of law[12]. Pursuant to art. 49 TEU, which provides for the possibility for any European State to apply to become a member of the European Union, every single Member State which have freely and voluntarily committed themselves to the common values referred to in Article 2 TEU, has the obligation to respect and promote them. Therefore, the compliance by a Member State with the values enshrined in Article 2 TEU «is a condition for the enjoyment of all of the rights deriving from the application of the Treaties to that Member State. A Member State cannot therefore amend its legislation in such a way as to bring about a reduction in the protection of the value of the rule of law, a value which is given concrete expression by, inter alia, Article 19 TEU»[13].

2. *The European Convention on Human Rights and the protection of the rule of law*

Unlike the Luxembourg Court, however, the functioning and jurisprudence of the European Court of Human Rights have not been used for the primary purpose of detecting systemic violations of the rule of law. Only recently the latter has entered the heart of these questions. In this sense, it is

[9] Overall, on the limits of the intergovernmental method, S. FABBRINI, *Sdoppiamento. Una prospettiva nuova per l'Europa*, Roma-Bari, 2017, 10-11.

[10] J. SAWICKI, *L'Unione europea come argine all'erosione dello stato costituzionale di diritto. Ai margini di una comparazione complessa, e forse un po' ingrata*, in *Costituzionalismo.it*, 2020, 3, 153 ff.; P. VAN ELSUWEGE, F. GREMMELPREZ, *Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice*, in *Eur. Const. Law Rev.*, 2020, 16, 8 ff.; K. LENAERTS, *The Rule of Law and the Coherence of the Judicial System of the European Union*, in *Common Mark. Law Rev.*, 2007, 44, 1625 ff.

[11] Among the most important decisions of the European Court of Justice (ECJ), see Grand Chamber, Case C-619/18, 24 June 2019; Grand Chamber, Case C-192/18, 5 November 2019; Grand Chamber, Joined Cases C-585/18, C-624/18, C-625/18, *AK*, 19 November 2019; Grand Chamber, Case C-791/19 R, 8 April 2020; Grand Chamber, Case C-824/18, *AB et al.*, 2 March 2021 and Grand Chamber, Case C-791/19, 15 July 2021. On these issues, N. CANZIAN, *Il principio europeo di indipendenza dei giudici: il caso polacco*, in *Quad. cost.*, 2020, 2, 465 ff. Regarding the relative effectiveness in terms of the execution of these judgments, J. SAWICKI, *La collisione insanabile tra diritto europeo primario e diritto costituzionale interno come prodotto della manomissione ermeneutica di quest'ultimo*, in *DPCE online*, 2021, 4, 3601 ff.

[12] M. LELOUP, D.V. KOCHENOV, A. DIMITROVS, *Non-regression: Opening the Door to Solving the 'Copenhagen Dilemma'? All the Eyes on Case C-896/19* Repubblika v Il Prim Ministru, in *Reconnect Working Paper*, No. 15 – June 2021.

[13] ECJ, Grand Chamber, Case C-896/19, *Repubblika*, 20 April 2021, pt. 63.

appropriate to recall the judgment issued against Poland in the *Xero Flor* case, where the Court ruled that on the basis of art. 6, par. 1 ECHR it is not possible to consider the Polish Constitutional Tribunal as a Tribunal established by law due to the serious irregularities in the appointing process of its members[14]. In *Broda and Bojara*, instead, the Conventional judges held that the removal of the applicants from their posts as vice presidents of a regional tribunal by the Minister of Justice had violated their right of access to a court under art. 6, par. 1 ECHR, since their removal was ordered without any motivation and possibility of appeal before an independent court[15]. Last but not least, the *Reczkowicz v. Poland*[16] and the *Dolinska-Ficek and Ozimek v. Poland*[17] judgements in which the Strasbourg Court – on the basis of the criteria established in the *Ástráðsson* decision[18], the same adopted in the *Xero Flor* case – declared that even the Disciplinary Chamber and the Chamber of Extraordinary Review and Public Affairs of the Supreme Court are not a Tribunal established by law pursuant art. 6, par. 1 ECHR due to their irregular composition. The main reason of the limited intervention of the Strasbourg judges on these issues, however, rather than in the Court's case-law, has its roots in the very conformation of the Convention, in its *raison d'être*. At the end of the day, in fact, the ultimate purpose of the ECHR is to protect the fundamental rights of individual applicants *vis-à-vis* the action of the governments of the High Contracting Parties[19].

Notwithstanding the foregoing, there are nevertheless two provisions placed at the end of Title I of the Convention whose function can be extended to the protection of democracy and the rule of law[20]. The first is art. 17 ECHR which reads nothing in this Convention may be interpreted as implying for any State, group, or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. The second, on the other hand, is the subsequent art. 18 ECHR under which the restrictions permitted under the Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed. Both provisions have been invoked before the Strasbourg Court very rarely[21]. Only in recent years, there has been a broader interpretation by the Strasbourg Court regarding art. 18 ECHR – which could also produce effects on art. 17 ECHR – giving them a scope of application in line with their systemic *ratio* of safeguarding the conventional principles.

2.1. *The prohibition of acts that unlawfully destroy or limit conventional rights and freedoms*

The ultimate purpose of Article 17 ECHR is the attempt to reconcile two complementary needs: to defend democracy and to prevent States from imposing undue restrictions on fundamental rights for this purpose. In drawing inspiration from art. 30 of the *UN Universal Declaration of Human Rights of 1948*, it addresses both the High Contracting Parties and individuals or organized groups (for example political parties) inhibiting those actions which, taking advantage of the content of the

[14] ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, Application no. 4907/18, 7 May 2021. About the consequences of the judgment, on the side of the relationships between the Poland Constitutional Tribunal and the Strasbourg Court, S. Gianello, *Se il Trybunał Konstytucyjny dichiara l'inesistenza della decisione Xero Flor v. Poland della Corte Europea dei Diritti dell'Uomo: alcune riflessioni a margine*, in *DPCE* online, 3/2021, 3241 ff.

[15] ECtHR, *Broda and Bojara v. Poland*, Application nos. 26691/18 and 27367/18, 29 June 2021.

[16] ECtHR, *Reczkowicz v. Poland*, Application no. 43447/19, 22 July 2021.

[17] ECtHR, *Dolinska-Ficek and Ozimek v. Poland*, Application nos. 49868/19 and 57511/19, 8 November 2021.

[18] ECtHR, *Guðmundur Andri Ástráðsson v. Iceland*, Application no. 26374/18, 1° December 2020.

[19] C. CARUSO, *Sul caso Baka c. Ungheria: la Corte Edu condanna la "distruzione" della separazione dei poteri*, in *Diritti Comparati*, 10 July 2014.

[20] F. TAN, *The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding?*, in *Göttingen Journal of International Law*, 9/2018, 111-112.

[21] S. BARTOLE, P. DE SENA, V. ZAGREBELSKY, *Art. 18*, in *Commentario breve alla Convenzione europea dei diritti dell'uomo*, Padova, 2012, 584.

Convention, are aimed at destruction of the rights and freedoms contained in it, as well as prohibiting the imposition of broader restrictions than those already identified by the Convention. In other words, while the first part of the provision prohibits the *abuse of the right*, the second precludes the *abuse of the restrictions* provided for by the ECHR. Its insertion in the Convention, as has been said, represents «the most explicit expression of the ambition of the Convention as a whole: preventing the emergence or re-emergence of totalitarian regimes in Western Europe»[22].

Art. 17 ECHR has never led to a conviction of a State. It has been used against individuals and groups, as provision to establish the inadmissibility of an application, to rule out *ratione materiae* extension of the right invoked by the applicant, or as a parameter to justify the necessity of State interference. For example, rejecting the idea that Articles 9 and 10 of the ECHR could justify the propaganda of ideas contrary to the spirit and text of the Convention, such as hate speech and apology for totalitarian ideologies. In any case, as emerges from the preparatory work, there is no doubt that this provision can also be applied to the State authorities when their interference, introducing limitations on the exercise of a right provided for by the Convention, is in fact directed to its denial. Quoting the words of the French component Teitgen «it is legitimate and necessary to limit, sometimes even to restrain, individual freedoms, to allow everyone the peaceful exercise of their freedom and to ensure the maintenance of morality, of the general well-being [...] that is permissible; that is legitimate. But when [the State] intervenes to suppress, to restrain and to limit these freedoms for, this time, reason of state; to protect itself according to the political tendency which it represents, against an opposition which it considers dangerous; to destroy fundamental freedoms which it ought to make itself responsible for coordinating and guaranteeing, then it is against public interest if it intervenes. Then the laws which it passes are contrary to the principle of the international guarantee»[23].

An example is provided by the so-called *Greek case*, when the military forces that came to power with the *coup d'état* in April 1967 were accused of having systematically infringed conventional rights and freedoms, establishing an authoritarian regime in violation, *inter alia*, of Article 17 ECHR[24]. Although the Commission rejected the objections of the Greek authorities based on Article 15 ECHR, in his dissenting opinion, the Austrian member Ermacola supported the idea of applying art. 17 of the Convention in conjunction with art. 3, Prot. 1, ECHR as «the situation in Greece is caused by the respondent Government and, in particular, by the fact that the Government has taken no effective step to apply Article 3 of the First Protocol in such a way is intended by democratic governments referred to in the Preamble of the Convention [...] this leads me to the conclusion that the respondent Government has engaged in activities or has performed acts aiming at the limitation of the rights under the Convention to a greater extent than is provided for in the Convention (Article 17 of the Convention)»[25].

More recently, in *Navalnyy v. Russia*, in which Moscow was condemned under art. 5 and 11 read in conjunction with art. 18 of the ECHR, it was argued (in the dissenting opinion) that the matter could have been decided in the light of art. 17 ECHR. The concept of abuse of rights «can be understood as being directed at, not only - excessive - individual restrictions of the exercise of fundamental rights, but also a general system of limitations or actions going beyond what is necessary in a democratic regime […] in this respect [...] the various violations taken in isolation -

[22] P.E. DE MORREE, *Rights and Wrongs under the ECHR. The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights*, Utrecht University, 2016, 23.

[23] Council of Europe, *Preparatory work on Article 17 of the European Convention of Human Rights*, Strasbourg, 5 March 1975, 6.

[24] European Commission on Human Rights, *Denmark, Norway, Sweden and the Netherland v. Greece* (the Greek case), Applications nos. 3321/67, 3322/67, 3323/67, 3344/67, 5 November 1969.

[25] Dissenting Opinion of Mr. Ermacola in *Yearbook of the European Convention on Human Rights. The Greek case 1969*, The Hague, Netherlands, 1972, 102-103.

which must always be sanctioned by the Court, however on different grounds - are merely individual instances of an abusive system which, as a whole, falls under Article 17»[26].

2.2. *The prohibition of restricting conventional rights and freedoms for illegitimate purposes*

Article 18 ECHR, on the other hand, prohibits the *misuse of power*, *id est* violation of the freedoms protected by the Convention by means of minor measures which, prompted by States parties, while made with the pretext of organizing the exercise of these freedoms on its territory, or of safeguarding the letter of the law, have the opposite effect. The Article *de quo* integrates the second preposition of art. 17 ECHR in the part in which it prohibits the use of wider restrictions than those provided by the Convention. While the latter, in its use, is limited to the identification of additional restrictions to rights and freedoms than those permitted by the ECHR, art. 18 unfolds its effects in the context of what is theoretically permitted to the High Contracting Parties, but which concretely aspires to purposes other than those prescribed by the Convention[27]. As art. 17 of the ECHR, the subsequent provision has its *ratio* in the search for tools that prevent the consolidation of authoritarian systems. As can be seen from the *travaux préparatoires*, the provision aims to safeguard against anti-democratic tendencies which, while posing as legitimate restrictions on rights, concretely abuse and undermine human rights and the principles of democracy[28].

For a long time, it was considered a sort of quiescent provision due to a restrictive case law of the Strasbourg Court. Starting from the presumption of good faith of the High Contracting Parties, the Court required the applicants to demonstrate the existence of a *hidden agenda* pursued by national authorities that could be ascertained only in the presence of a very exacting standard of proof[29]. A significant turning point came with the Grand Chamber's decision in *Merabishvili v. Georgia*, when the conventional judges loosened the burden of proof for the applicant by establishing, among other things, that the principle of beyond reasonable doubt also applies in relation to art. 18 ECHR[30]. Furthermore, the applicant no longer has to demonstrate the existence of a *hidden agenda*, but only the predominant nature of the unlawful purpose pursued by the state authorities. From this perspective, «the Court is therefore of the view that a restriction can be compatible with the substantive Convention provision which authorises it because it pursues an aim permissible under that provision, but still infringe Article 18 because it was chiefly meant for another

[26] ECtHR, *Navalnyy v. Russia*, Applications nos. 29580/12 and 4 others, 15 November 2018, *partly concurring, partly dissenting of Judges Pejchal, Dedov, Ravarani, Eicke and Paczolay*, p.t. 17-18.

[27] P. SANTOLAYA MARCHETTI, *Limiting Restriction on Rights. Art. 18 ECHR (A Generic Limits on According to Purpose)*, in P. SANTOLAYA MARCHETTI, J. GARCÌA ROCA (eds.), *Europe of Rights: A Compendium of the European Convention of Human Rights*, Leiden, 2012, 528.

[28] As highlighted by the Italian member Benvenuti, «what we must fear today is not the seizure of power by totalitarianism by means of violence, but rather totalitarianism will attempt to put itself in power by pseudo-legitimate means. Experience has shown that it is sufficient to establish an atmosphere of intimidation and terror in one single electoral campaign in a country for all the executive act establishing a totalitarian regime to acquire a character, an appearance, of legality [...] the battle against totalitarianism should rather be modified and should become a battle against abuse of legislative power, rather than abuse of executive power [...] every State which violates Human Rights and above all the rights of freedom, will always have an excuse». Council of Europe, *Preparatory work on Article 18 of the European Convention of Human Rights*, Strasbourg, 10 March 1975, 4. For an overview on the issue, H KELLER, C. HERI, *'Selective Criminal Proceedings and Article 18 ECHR: The European Court of Human Rights' Untapped Potential to Protect Democracy*', in *Human Rights Law Journal*, 2016, 36, 1 ff.

[29] The first sentence was issued only in 2004 in the case of *Gusinskiy v. Russia* (ECtHR, *Gusinskiy v. Russia*, Application no. 70276/01, May 19, 2004) for the joint violation of art. 5 and art. 18 ECHR since the applicant, at the time President of a Russian private media company, was arrested and subjected to preventive detention (in violation of Article 5 ECHR) for the further purpose of conditioning him to sell his company to the Russian public company Gazprom.

[30] C. HERI, *Merabishvili, Mammadov and Targeted Criminal Proceedings: Recent Developments under Article 18 ECHR*, in *Strasbourg Observers*, 15 December 2017.

purpose that is not prescribed by the Convention; […] in assessing that point, the Court will have regard to the nature and degree of reprehensibility of the alleged ulterior purpose, and bear in mind that the Convention was designed to maintain and promote the ideals and values of a democratic society governed by the rule of law»[31].

The effects of the jurisprudential change could be appreciated closely[32]. In *Navalnyy v. Russia*, for example, the Grand Chamber, sentenced the Russian government for the joint violating of art. 18 in connection with art. 5 and art. 11 of the ECHR due to the series of imprisonment of the Russian political activist. The Court found that, beyond any reasonable doubt, «the restrictions imposed on the applicant [...] pursued an ulterior purpose within the meaning of Article 18 of the Convention, namely to suppress that political pluralism which forms part of 'effective political democracy' governed by the rule of law, both being concepts to which the Preamble to the Convention refers»[33]. The unlawful treatment carried out by the authorities against Navalnyy – as a popular opposition leader – hidden the further purpose of deterring those who wanted to demonstrate publicly against the government, undermining the very essence of democracy.

Similarly, in *Selahattin Demirtas v. Turkey (No. 2)*, the extended pre-trial detention of the applicant (one of the leaders of the opposition People's Democratic Party), infringed both art. 3, Prot. 1, ECHR and art. 18 in connection with art. 5, paragraph 3, ECHR as, according to the Court, it had been demonstrated «beyond reasonable doubt that the extensions of the applicant's detention, especially during two crucial campaigns, namely the referendum and the presidential election, pursued the predominant ulterior purpose of stifling pluralism and limiting freedom of political debate, which is at the very core of the concept of a democratic society»[34].

3. *Some brief reflections on the practical (possible) use of Articles 17 and 18 ECHR*

In conclusion, how can articles 17 and 18 of the ECHR be used in order to safeguard the systemic nature of the rule of law? From this point of view, two complementary interpretations appear possible: firstly, the Convention can be used as an instrument to counter the spread of such phenomena *per se*. At the same time, it can become an integrative tool for other institutions, in particular for those of the European Union.

Let's go back to the *Baka v. Hungary* (2016), when the authorities of the Member State were condemned for the early removal of the President of the Supreme Court in breach of art. 6 and art. 10 ECHR[35]. According to the Grand Chamber, the action of the Hungarian government not only undermined the independence of the judiciary but also produced a «chilling effect in that it has discouraged not only him but also other judge and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of judiciary»[36]. In that case the applicant did not invoke the violation of art. 17 and art. 18 ECHR, therefore the Court did not take them into consideration for the purposes of its decision. However, in principle, as far as freedom of expression is concerned, the identification of clear chilling effects reinforces the idea that the dismissal of President Baka was aimed at suppressing dissent against the reform of the judiciary. The removal of the President of the Supreme

[31] ECtHR, Grand Chamber, *Merabishvili v. Georgia*, p.ts. 305-307.

[32] On this point, S. GIANELLO, *Quando Strasburgo si fa garante della democrazia: alcune considerazioni sui casi* Navalnyy e *Selahattin Demirtas*, in *Quad. cost.*, 2019, 1, 215 ff.

[33] ECtHR, Grand Chamber, *Navalnyy v. Russia*, Application no. 101/15, 17 October 2017, p.to 175.

[34] ECtHR, *Selahattin Demirtaş* Turkey (No. 2), Application no. 14305/17, 20 novembre 2018, p.to 273.

[35] K. KELEMEN, *Baka contro Ungheria: la Corte EDU e l'indipendenza dei giudici*, in *Quad. cost.*, 2016, 4, 827 ff.

[36] ECtHR, Grand Chamber, *Baka v. Hungary*, Application no. 20261/12, 23 June 2016, p.t. 173.

Court for criticizing the government majority infringes the principle of separation of powers, the independence of the judiciary, as well as the rule of law as such, depriving him of effective means of protection. Each of these aspects – as well as representing the typical traits of illiberal democracies – could embody hypotheses of abuse of power pursuant to art. 17 ECHR – since state action seems to have been based (at least) on the use of wider restrictions than those provided by the Convention.

Mutatis mutandis, similar arguments could be used against the Polish reforms concerning the judiciary system, especially after the entry into force of the so-called *Muzzle Law*[37]. The removal of judicial instruments of protection in the appointment (and exclusion) processes of judges, the use of disciplinary procedures to jeopardize their independence and impartiality and the increasingly politicization of the Supreme Court (Disciplinary Chamber and Extraordinary Control and Public Affairs Chamber) display clear examples of abuse of power by the Warsaw authorities. At the same time the disclosure duties on the past participation of judges in political organizations or associations should be considered, as well as the substantial prohibition to take part in the public debate on issues that could imperil the proper functioning of the judicial system. In the light of these circumstances the violation of art. 6 (right to a fair trial), art. 8 (right to respect for private and family life), art. 10 (freedom of expression) and art. 11 ECHR (freedom of assembly and association) could be linked to the violation of Articles 17 ECHR – in particular with regard to art. 6 ECHR – and art. 18 ECHR – in this case with specific reference to the limitations set out in art. 8, art. 10 and art. 11 ECHR.

The finding of the abuse or misuse of power by the public authorities can also produce positive effects as regards the determination of remedies in the event of a conviction against a High Contracting Party. The Committee of Ministers could impose the adoption of wide reforms aimed at restoring the *status quo ante* in consideration of the overall scope of the violation, in addition to restoring the applicant. If this doesn't happen, failure to implement these measures could lead to the activation of the procedure referred to in art. 46 of the ECHR and the related sanctioning consequences, as required by art. 8 of the Statute of the Council of Europe. Penalties ranging from the suspension of the right of representation, up to the *requested* to withdraw under the conditions set out in art. 7. If such member does not comply with this request, as stated in the CoE Statute, the Committee may decide that it has ceased to be a member of the Council as from such date as the Committee may determine.

On the other hand, a judgment pursuant to art. 17 and art. 18 ECHR could provide important evidence to be used in the procedure of art. 7 TEU, giving the Council and the Member States additional details based on which to take their decisions in order to overcome the current deadlock. In a dialogue between Courts, instead, the case law of the Strasbourg Court would have positive effects on the activity of Luxembourg judges. Pursuant to art. 52 of the EU Charter, for example, in so far it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the Convention. In many cases the Court of Justice referred to jurisprudence developed under Article 6 ECHR to interpret Article 47 of the Charter on the right to an effective remedy and to a fair trial, or to art. 19 TEU which in turn refers to the art. 47 of the Charter. As the Luxembourg judges recalled in *Simpson*, «since the first sentence of the second paragraph of Article 47 of the Charter corresponds to the first sentence of Article 6 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'), its meaning and scope are, in accordance with Article 52(3) of the Charter, the same as those laid down by that convention»[38].

[37] On this topic S. GIANELLO, *La nuova legge polacca sul sistema giudiziario: cresce (ulteriormente) la distanza che separa Varsavia e Bruxelles*, in *Federalismi.it*, 2020, 8, 116 ff.

[38] ECJ, Grand Chamber, Joined Cases C-542/18 RX-II and C-543/18 RX-II, *Simpson and HG*, 26 March 2020, pt. 72.

In other words, a wider openness of the ECHR to Articles 17 and 18, ultimately and as can be seen from the above, could produce several benefits in the relationship between the Convention and EU law promoting, among other things – to quote once again the words of Robert Spano – the symbiotic relationship between the European Court of Human Rights and the Court of Justice[39].

[39] R. SPANO, *The Rule of Law as the Lodestar of the European Convention on Human Rights. The Strasbourg Court and the Independence of the Judiciary*, cit. 13 ff.

Pietro Masala[*]

Emerging collective implications of personal data processing: challenges and responses in the European context[**]

ABSTRACT: ***In the age of Big Data, artificial intelligence and algorithms, personal data protection takes on increased relevance not only in its individual dimension, but also and specially in its superindividual dimension. Given the risks arising from the extensive use of penetrating techniques of data collection, user profiling and predictive analytics, involving new challenges for the safeguard of fundamental rights and democracy, it is essential to recognise the importance and peculiarities of such superindividual dimension, hence to develop solutions capable to take due account of the collective implications of data processing. Consistently, our analysis focuses on those challenges that transcend the individual dimension of data protection and, more specifically, on how they are being addressed in Europe. The General Data Protection Regulation has established the transition to a new protection model, including risk management and accountability as key components, with the declared purpose of combining the development of digital economy with a proper protection of personal data. Nevertheless, it does not demonstrate full awareness of the collective risks currently related to data processing: a further step should be taken, in order to incorporate the superindividual dimension of data protection into European and national legislations. Therefore, by considering the indications coming from some recent texts drawn up within the European Union and the Council of Europe, we point out some possible approaches and tools which should be adopted and implemented in this perspective.***

1. *Introduction*

During the last decade, constitutional degradation has also been the result of technological development: this has been and will increasingly be a relevant factor, especially because of its implications concerning the rights to privacy and to the protection of personal data, whose constitutional importance in the European context firstly stems from their proclamation in the European Convention on Human Rights (Art. 8) and in the Charter of Fundamental Rights of the European Union (Arts. 7 and 8).

Internet and new technologies can play a positive role both in terms of boosting economic growth and strengthening fundamental rights and democracy, by increasing opportunities for information and participation. Nevertheless, their impetuous development also raises major challenges, both (directly) for the protection of personal data and (indirectly, as a result of data processing) for the preservation of the structure and substance of constitutional democracies[1]. Indeed, in the age of Big Data and algorithms, personal data protection takes on increased relevance not only in its individual dimension, but also and especially in its superindividual dimension. Given the risks arising from the extensive use of penetrating techniques of data collection, user profiling and predictive analytics, it is essential to acknowledge the importance and peculiarities of this dimension, hence to develop solutions capable to take due account of the collective implications of

[*] **Researcher in Public Law, D'Annunzio University of Pescara-Chieti.**

[**] **This work has been subjected to blind peer review.**

[1] See, among others, O. POLLICINO, G. DE GREGORIO, *Constitutional Law in the Algorithmic Society*, in VV. AA. (eds.), *Constitutional Challenges in the Algorithmic Society*, Cambridge, 2021, 3-24, where it is stressed that fundamental rights and democratic values are challenged by the emergence of new forms of powers (digital private powers) in the new context.

data processing[2]. Therefore, our analysis will focus on those challenges that transcend the individual dimension of data protection and, more specifically, on how they are being addressed in Europe.

In fact, during the last five years both the European Union (EU) and the Council of Europe (CoE) have updated their legal systems in order to ensure a better protection of the rights of individuals (data subjects) concerning their personal data, thus establishing the highest standards worldwide. Moreover, various texts recently adopted within both organisations also show a heightened awareness of the specific risks concerning the collective dimension of that protection and try to tackle them, in ways that are partly similar and partly different.

As is well known, in the EU, awareness of the implications of the development of data processing techniques led to the adoption of Regulation (EU) 2016/79 (General Data Protection Regulation), conceived as the core of the Digital Single Market Strategy, which was based on Art. 16 TFEU and has been relaunched as European Digital Strategy by the current European Commission. The GDPR repealed Directive 95/46/EC and established the transition from a protection model mainly based on the consent of the data subject to a new model, where a special focus is put on the accountability of the data controller and on risk management, with the purpose of combining the development of digital economy with the proper protection of personal data and fundamental rights. Nevertheless, the GDPR does not demonstrate full awareness of the superindividual implications of data processing: a further step should be taken, by incorporating the collective dimension as key component of a more effective European data protection model. Therefore, by paying attention to the indications coming from further texts drawn up within the EU and the CoE, we propose to highlight some approaches and tools which should be adopted by the European and national legislators in this perspective.

2. *Challenges and risks in a new context*

Before considering present and possible legal responses, some essential remarks on current challenges should be made. In fact, new data-intensive technologies (such as Big Data analytics, artificial intelligence, internet of things) and the related forms of processing have changed the previous paradigm in two main ways.

On one hand, the new technological context implies that a data protection model based on individual consent and self-determination has serious shortcomings. This is due to many factors, including: the large amount of data collected, stored, analysed, combined and used in multiple and ever-changing ways; the growing complexity and opacity of algorithms and AI applications, whose outcomes, in particular when used in decision-making processes, are often unpredictable, even for developers; the imbalance in knowledge and power between controllers and data subjects (suppliers and consumers), especially in the online environment. All this explains, in particular, why the new regulations on data protection are increasingly stressing risk assessment, which is also regarded as a way to overcome such shortcomings[3].

On the other hand, in the same context, data processing, especially when related to profiling, predictive analytics, algorithms and automated decision-making, entails a variety of risks which may affect not just the individuals and their rights but also groups, society and, in various respects, the

[2] This approach is defended, in particular, by A. MANTELERO, *La privacy all'epoca dei Big Data*, in VV. AA. (eds.), *I dati personali nel diritto europeo*, Torino, 2019, 1181-1212.

[3] See A. MANTELERO, *La gestione del rischio nel GDPR: limiti e sfide nel contesto dei Big Data e delle applicazioni di Artificial Intelligence*, in A. MANTELERO, D. POLETTI (eds), *Regolare la tecnologia: il Reg. UE 2016/679 e la protezione dei dati personali*, Pisa, 2018, 293 ff.

functioning of democracy: risks of discrimination, manipulation, dehumanisation[4]. Such collective risks go beyond the traditional sphere of data protection and, where assessment is concerned, require specific consideration of the adverse impacts of data processing on fundamental rights and social and ethical values. For instance, in order to combat biases related to algorithmic decision-making (resulting either from datasets or from unintentional or conscious decisions by the developers) and to prevent group discrimination, it is necessary to implement risk assessment on a larger scale, by considering the social and ethical implications of data collection and processing, i.e. not only their specific impact on the right to personal data, but also their broader impact on fundamental rights and constitutional values[5]. Similarly, in order to ensure the proper functioning of democracy, it is necessary to assess the risks arising from the use of profiling techniques for marketing purposes and, in particular, for political communication purposes: the risk of abusive manipulation of voters must be assessed, to prevent personal information from being unfairly used in order to micro-target individuals and groups with specific content, including fake news (a concrete risk, as shown by the Facebook-Cambridge Analytica scandal)[6].

Finally, it must be stressed, for a proper understanding of present challenges and possible remedies, that such risks have arisen not just from technological development and the spread of digital devices, but also and primarily from an unprecedented imbalance of power, which is the result of an extraordinary concentration of knowledge and economic resources in the hands of few private global actors. The largest high-tech companies, whose head offices are placed outside Europe, have long taken advantage of their knowledge and of the lack of proper regulations to harvest and exploit the personal data of unprotected and unaware individuals all over the world, boosting datafication of human life to gain ever increasing profits. The lack of appropriate legal responses and the consequent increase in imbalance and asymmetry (which also means, in constitutional terms, inequality) have been favoured, especially in the USA, by the hegemony of neoliberalism and by the concern for security of public authorities faced with the menace of international terrorism[7].

The concern for data protection has, by contrast, led both the CoE and the EU to modernise their regulations in order to address the risks arising from the new technological context. In particular, the EU, has been pursuing the goal of building a Digital Single Market (DSM), where setting high standards in data protection should favour the trust of data subjects and thus economic growth based on the fair implementation of data-intensive technologies. In the following pages, we will consider to which extent the new regulations take into account the collective dimension of data protection, especially when they define risk assessment procedures. We will also consider how they could be improved in this perspective, ultimately in order to tackle the power imbalance that has increased risks and in itself represents a formidable threat to constitutional values.

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[4] For an overview of such risks: Consultative Committee of the Convention for the protection of individuals with regard to automated processing of personal data (CC), *Profiling and Convention 108+: Report on developments after the adoption of Recommendation (2010)13 on profiling* (26 Oct. 2020). For recent exhaustive analyses of the "constitutional challenges" raised by new technologies, see VV. AA. (eds), *Constitutional Challenges in the Algorithmic Society*, Cambridge, 2021.

[5] A. Mantelero, *La gestione del rischio nel GDPR: limiti e sfide nel contesto dei Big Data e delle applicazioni di Artificial Intelligence*, cit., 303.

[6] See, among others, C.J. BENNETT, D. LYON (eds.), *Data-driven elections: implications and challenges for democratic societies*, in *Internet Policy Review, 2019, 8, 4;* CC, *Personal data processing by and for political campaigns: The application of the Council of Europe's modernised Convention 108* (26 Oct. 2020); European Data Protection Supervisor, *Opinion on online manipulation and personal data* (Op. 3/2018).

[7] For a detailed analysis: S. ZUBOFF, *The Age of Surveillance Capitalism*, London, 2019. Another essential landmark is F. PASQUALE, *The Black Box Society,* Cambridge, 2016. O. POLLICINO, G. DE GREGORIO, *Constitutional Law in the Algorithmic Society* stress that «the primary challenge for constitutional democracies in the algorithmic society might be to limit the rise of global private powers replacing democratic values and private determinations»(22).

3. *Risk assessment in the GDPR and its limits*

As said, the European Digital Strategy aims to achieve two objectives: the "protection of fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data" and "the free movement of personal data within the Union". The specific features of the data protection model envisaged by the GDPR can only be understood by duly considering this dual concern, which is stated by Art. 1 of the act.

In order to attain those goals, the GDPR introduced significant changes[8], including a certain "downgrading of consent"[9] (according to Art. 6, other conditions, such as a contract, a legitimate interest or a public interest, are sufficient to ensure the lawfulness of processing) and a strengthening of the data subject rights (Arts. 12-23), whose list now also contains "the right not to be subject to a decision based solely on automated processing, including profiling[10], which produces legal effects concerning him or her or similarly significantly affects him or her" (with important exceptions: Art. 22). However, what most characterises the new approach is the emphasis placed on the principle of accountability (Art. 5.2). Indeed, it is the responsibility of the data controller, "taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons", to "implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with th[e] Regulation" (Art. 24). This further means that the controller, by implementing such measures, shall ensure data protection by design and by default, in compliance with the principles of purpose limitation and data minimisation (Art. 25).

Within this framework, the most suitable instrument for ensuring that the collective risks arising from new data-intensive technologies are prevented and mitigated is the data protection impact assessment (DPIA), a procedure which must be followed, in particular, where high-risk processing is concerned. Art. 35.1 establishes that "where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons[11], the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data". Art. 35.2 specifies this assessment shall in particular be required in the case of: a) "a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect

[8] For a detailed analysis see, among others, F. PIZZETTI, *Privacy e il diritto europeo alla protezione dei dati personali*, Torino, 2016. More specifically, about the risk-based approach adopted (also) in the GDPR, its potential and limits: R. GELLERT, *The Risk-Based Approach to Data Protection*, Oxford, 2020.

[9] F. PIZZETTI, L. MONTUORI, *Il nuovo Regolamento Data protection e le sfide dell'innovazione digitale*, in VV. AA. (eds), *Diritti e libertà in Internet*, Firenze, 2017, 113.

[10] According to Art. 4, "profiling" consists of "any form of automated processing of personal data evaluating the personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movement".

[11] Rec. 75 specifies "the risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from personal data processing which could lead to physical, material or non-material damage" (in particular: where the processing may give rise to discrimination or any other significant economic or social disadvantage; where data subjects might be deprived of their rights and freedoms or prevented from exercising control over their personal data; where sensitive personal data or personal data of vulnerable persons are processed; where personal aspects are evaluated, in particular analysing or predicting them in order to create or use personal profiles; where processing involves a large amount of personal data and affects a large number of data subjects).

the natural person"; b) "processing on a large scale of special categories of data referred to in Art. 9" (sensitive personal data)[12] or of "personal data relating to criminal convictions and offences referred to in Art. 10"; c) "a systematic monitoring of a publicly accessible area on a large scale".

As for the procedure to be applied, Art. 35.7 establishes the DPIA shall contain at least: "a systematic description of the envisaged processing operations and the purposes of the processing, including, where applicable, the legitimate interest pursued by the controller"; "an assessment of the necessity and proportionality of the processing operations in relation to the purposes"; "an assessment of the risks to the rights and freedoms of data subjects"; "the measures envisaged to address the risks, including safeguards, security measures and mechanisms to ensure the protection of personal data and to demonstrate compliance with this Regulation taking into account the rights and legitimate interests of data subjects and other persons concerned"[13].

All of these provisions clearly place emphasis on the responsibility of the controller, consistently with the principle of accountability. Nevertheless, the values at stake explain why it is also envisaged a significant involvement of the national supervisory authority which, according to Art. 51, is responsible for monitoring the application of the Regulation. Firstly, such authority shall establish and make public a list of the kind of processing operations which are subject to the requirement for a DPIA (Art. 35.4). Secondly, a "prior consultation" may be necessary, depending on the concrete outcome of the assessment: the controller should consult the authority, prior to the start of processing activities, where the DPIA "indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk" (Art. 36).

This legal framework for risk assessment can be regarded as an advancement, especially because it requires that the impacts of processing on the "rights and freedoms of natural persons" be evaluated. And yet, if regarded from the specific perspective of the collective dimension of data protection, it shows some shortcomings[14]: basically, because it is focused on the management of the risks for the individuals and seems to be still too vague and general, whereas a broader view of risk assessment would be needed to properly address all the adverse impacts of data processing techniques, including those on groups and society[15]; and also because, although participation is not ignored[16], its potential is not fully developed.

[12] Rec. 51 explains these data "merit specific protection as the context of their processing could create significant risks to the fundamental rights and freedoms". Processing is prohibited by Art. 9.1, but derogations are provided for in Art. 9.2.

[13] Rec. 78 explains that "in order to be able to demonstrate compliance" with the GDPR, the controller should adopt internal policies and implement measures which meet the principles of data protection by design and by default (consisting, *inter alia*, of minimising the processing of personal data, pseudonymising them, transparency, enabling the data subject to monitor the processing, enabling the controller to create and improve security features). Art. 35.8 specifies that "compliance with approved codes of conduct [...] shall be taken into due account".

[14] A. MANTELERO, *La gestione del rischio La gestione del rischio nel GDPR: limiti e sfide nel contesto dei Big Data e delle applicazioni di Artificial Intelligence*, 299-230.

[15] See also K. DEMETZOU, *Data Protection Impact Assessment: A tool for accountability and the unclarified concept of high risk in the General Data Protection Regulation*, in *Computer Law & Security Review*, 2019, 35. Some authors are much stronger in their criticism of the conception of risk in the GDPR: M. PADDEN, A. ÖHEJAG-PETTERSSON, *Protected how? Problem representations of risk in the General Data Protection Regulation (GDPR)*, in *Critical Policy Studies*, 2021, 15, 4, argue that the GDPR's framing of public interest privileges economic growth over individual rights and democratic freedoms, noting that «the very act of regulating (as opposed to prohibiting) practices such as profiling and algorithmic decision-making in certain circumstances serves to legitimize these practices and does little to negate the power asymmetries of surveillance capitalism».

[16] Art. 35.9 reads: "where appropriate, the controller shall seek the views of data subjects or their representatives on the intended processing, without prejudice to the protection of commercial or public interests or the security of processing operations".

4. *The innovative approach proposed within the Council of Europe*

Some legal texts recently adopted within the CoE consider the collective dimension of data protection more explicitly.

The Convention for the protection of individuals with regard to the processing of personal data, so-called Convention 108+ (i.e. Convention 108, adopted in 1981, as updated in 2018), provides the basic regulatory framework[17]. Consistently with the peculiar nature of the CoE, the sole purpose of the modernised Convention, declared in Art. 1, is to protect the individuals with regard to the processing of their personal data, thereby contributing to respect for their human rights and fundamental freedoms, whereas the GDPR also aims to ensure the free flow of data in the DSM. Nonetheless, the principles enshrined in the Convention are actually largely similar to those introduced by the GDPR. In particular, Art. 10.2 of the Convention, establishing that "each Party shall provide that controllers and, where applicable, processors, examine the likely impact of intended data processing on the rights and fundamental freedoms of data subjects prior to the commencement of such processing, and shall design the data processing in such a manner as to prevent or minimise the risk of interference with those rights and fundamental freedoms", has obvious similarities to Art. 35 GDPR. Therefore, what must be underlined is that both texts stress the importance of risk assessment, which means a shared understanding of the limits of individual self-determination in the new technological context.

The Convention Committee (i.e. the Consultative Committee which is responsible for interpreting the Convention and ensuring to facilitate and improve its implementation, in particular by making recommendations and expressing opinions: Arts. 22 and 23) has recently adopted two further texts, which are especially interesting as they are focused on the risks arising from new technologies and propose specific solutions to address them. The "Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data" (23 Jan. 2017) and the "Guidelines on Artificial Intelligence and data protection" (25 Jan. 2019) are intended to provide guidance for legislators and policy makers, as well as for controllers and processors (or AI developers, manufacturers and service providers).

Both texts put emphasis on the collective dimension of personal data protection and identify specific tools which should be used to ensure that this dimension is duly taken into account. These tools are conceived as necessary components of a precautionary approach, which is based on the principles of the Convention. And indeed, like the Convention, the Guidelines aim "to favour the development of technology grounded on fundamental rights and not merely driven by market forces or high-tech companies"[18]: in this perspective, they basically recommend that risk assessment and management be complemented by a values-based approach (encompassing social and ethical values) and by the participation of stakeholder representatives.

More specifically, the Guidelines on Big Data stress that "Big Data represent a new paradigm in the way in which information is collected, combined and analysed" and that, since they make it possible "to collect and analyse large amounts of data to identify attitude patterns and predict behaviours of groups and communities, the collective dimension of the risks related to the use of data is also to be considered" (in addition to their "direct impact on individuals and their rights"). Starting from this assumption, the Guidelines "recommend measures that Parties, controllers and processors should take to prevent the potential negative impact of the use of Big Data on human dignity, human rights and fundamental individual and collective freedoms". Their general purpose is to limit the "risks for data subjects' rights" in the Big Data context, which "mainly concern the

[17] For an overview, C. DE TERWANGNE, *Council of Europe convention 108+: A modernised international treaty for the protection of personal data*, in *Computer Law & Security Review*, 2021, 40.

[18] CC, *Report: Artificial Intelligence and Data Protection: Challenges and Possible Remedies*, 25 January 2019).

potential bias of data analysis, the underestimation of the legal, social and ethical implications of the use of Big Data for decision-making processes, and the marginalisation of an effective and informed involvement by individuals in these processes".

More precisely, the Guidelines aim to promote an "ethical and socially aware use of data". This implies that, "in particular where information is used for predictive purposes in decision-making processes, controllers and processors should adequately take into account the likely impact of the intended Big Data processing and its broader ethical and social implications to safeguard human rights and fundamental freedoms, and ensure the respect for compliance with data protection obligations as set forth by Convention 108". They should therefore adopt "preventive policies concerning the risks of the use of Big Data and its impact on individuals and society". It is further stressed that "since the use of Big Data may affect not only individual privacy and data protection, but also the collective dimension of these rights, preventive policy and risk-assessment shall consider the legal, social and ethical impact of the use of Big Data, including with regard to the right to equal treatment and to non-discrimination".

Consistently, a peculiar three-layer model of risk assessment of the potential impact of data processing on fundamental rights and freedoms is proposed. The Guidelines state, firstly, that "personal data processing should not be in conflict with the ethical values commonly accepted in the relevant community or communities and should not prejudice societal interests, values and norms, including the protection of human rights"; secondly, that controllers should take into account "common guiding ethical values", which "can be found in international charters of human rights and fundamental freedoms, such as the European Convention on Human Rights"; thirdly, that, if the assessment detects "a high impact of the use of Big Data on ethical values", controllers should establish or consult "*ad hoc* ethics committees" (independent bodies composed by members selected for their competence) "to identify the specific ethical values to be safeguarded in the use of data".

Controllers are responsible for the assessment: they should first "identify and evaluate the risks of each processing involving Big Data and its potential negative outcome on individuals' rights and fundamental freedoms [...] taking into account the social and ethical impacts"; then develop and provide appropriate measures (such as by-design and by-default solutions) to mitigate those risks; and finally monitor their adoption. In any case, the assessment "should be carried out by persons with adequate professional qualifications and knowledge to evaluate the different impacts, including the legal, social and ethical dimensions". In addition, "with regard to the use of Big Data which may affect fundamental rights", both the assessment and the design of data processing should be participatory: more precisely, "the Parties should encourage the involvement of the different stakeholders (e.g. individuals or groups potentially affected by the use of Big Data)".

The Guidelines on AI propose a largely similar approach, starting from the assumption that AI based systems, software and devices (AI applications) "may have adverse consequences for individuals and society". Consistently, they "provide a set of baseline measures that governments, AI developers, manufacturers and service providers should follow to ensure that AI applications do not undermine the human dignity and the human rights and fundamental freedoms of every individual, in particular with regard to the right of data protection", especially "when AI applications are used in decision-making processes". Given that "an approach focused on avoiding and mitigating the potential risks of processing personal data is a necessary element of responsible innovation in the field of AI", it is stressed that, "in line with the guidance on risk assessment provided in the Guidelines on Big Data [...] a wider view of the possible outcomes of data processing should be adopted": the assessment should therefore "consider not only human rights and fundamental freedoms but also the functioning of democracies and social and ethical values".

Accordingly, "AI developers, manufacturers and service providers should adopt: a values-oriented approach in the design of their products and services, consistent with Convention 108+, in particular with article 10.2, and other relevant instruments" of the CoE; and "a precautionary approach based on appropriate risk prevention and mitigation measures" in assessing the possible adverse consequences on human rights and fundamental freedoms. In all phases of processing they should adopt "a human rights by design approach and avoid any potential biases, including unintentional or hidden, and the risk of discrimination or other adverse impacts on human rights and fundamental freedoms". Moreover, they "are encouraged to set up and consult independent committees of experts form a range of fields, as well as engage with independent academic institutions, which can contribute to designing human rights-based and ethically and socially-oriented applications". Finally, "participatory forms of assessment, based on the engagements of individuals and groups potentially affected", are also encouraged.

Legislators and policy makers (hence, public procurement procedures) should impose "specific duties of transparency, prior assessment of the impact of data processing on human rights and fundamental freedoms, and vigilance on the potential adverse effects and consequences of AI applications" (algorithm vigilance).

A significant role should be played by supervisory authorities. These should be consulted "when AI applications have the potential to significantly impact the human rights and fundamental freedoms of data subjects"; should "support and monitor the algorithm vigilance programmes of AI developers, manufacturers and service providers"; should be encouraged to cooperate with "other bodies having competence related to AI, such as: consumer protection; competition; anti-discrimination; sector regulators and media regulatory authorities".

5. *Final remarks and future perspectives*

If compared to the risk assessment required by the GDPR, the model of risk assessment proposed by the Guidelines of the CoE is more developed: it is values-oriented and participatory, hence addresses more directly the collective risks arising from new technologies. In addition, the Guidelines show a more acute awareness of the asymmetry characterising the algorithmic society: not just because those on Big Data state that "consent is not freely given if there is a clear imbalance of power between the data subject and the controller, which affects the data subject's decisions with regard to the processing", but also because both recommend that policy makers inform individuals and groups and invest resources in digital literacy and education to increase data subjects' awareness and understanding of the implications of the use of personal data in the Big Data and AI context.

It may be argued that the human rights centred general approach of the CoE may explain these differences, whereas the specific concern for boosting digital economy may be a reason for the less explicit commitment of the EU.

However, it must be considered that, even though DPIA, as it is described in the GDPR, is characterised by quite generic references to fundamental rights and participation, it could in practice be interpreted and implemented in a way which results consistent with a broader view of the impacts of processing, entailing assessment of collective risks[19] and effective participation of

[19] The Article 29 Working Party's 2017 *Guidelines on DPIA* recommend that "in cases where it is not clear whether a DPIA is required", this "is carried out nonetheless as a DPIA is a useful tool to help controllers comply with data protection law". They stress that Art. 35.3 just "provides some examples when a processing operation is 'likely to result in high risks'": "a non-exhaustive list", implying that "there may be 'high risk' processing operations that are not captured by this list, but yet pose similarly high risks" and "should also be subject to DPIAs".

stakeholders. Furthermore, awareness of collective risks and recommendations to adopt a values-oriented and participatory approach in their assessment have been present for a quite long time also within the EU. This is evident in some resolutions of the European Parliament[20], but especially in the opinions of the European Data Protection Supervisor (EDPS), an independent institution responsible (currently under Art. 52 of Reg. 2018/1725) "for advising Union institutions and bodies and data subjects on all matters concerning the protection of personal data". The opinions issued by the EDPS put emphasis on the urgency to address the ethical and social implications of data processing and contain consistent recommendations, which insist on a broad ethical approach in risk assessment (and on participation), especially when collective risks are concerned; they also insist on further developing a structured cooperation in different fields between the competent oversight authorities, including data protection, consumer protection and competition authorities (which is evidently a necessary condition to tackle the power imbalance we have repeatedly mentioned)[21].

It must also be considered that the GDPR (like Convention 108+, if compared to the Guidelines) is a "general" regulation and should be complemented by further acts on specific fields, for which the Commission presented proposals which are being debated. These include the proposals for regulations "concerning the respect for private life and the protection of personal data in electronic communications" (ePrivacy Regulation[22]); "on Single Market for Digital Services" and "on contestable and fair markets in the digital sector" (Digital Services Act and Digital Markets Act, both presented on 15 Dec. 2020); on Artificial Intelligence (26 Apr. 2021). We cannot thoroughly examine them here, but we can note they share the twofold concern to combine the development of digital economy with the protection of fundamental rights, according to a general strategy which claims to be based on a "balanced approach". This is evident and declared, for instance, in the Explanatory memorandum to the proposal on AI, where it is stressed that "the same elements and techniques that power the socio-economic benefits of AI can also bring about new risks or negative consequences for individuals or the society". The Commission also specifies that the proposal "seeks to ensure a high level of protection" for fundamental rights affected by AI and "aims to address various sources of risks through a clearly defined risk-based approach", which "does not create unnecessary restrictions to trade, whereby legal intervention is tailored to those concrete situations where there is a justified cause for concern"[23].

It is difficult to ascertain whether the Commission's approach in its recent initiatives is adequately "balanced". It can be observed that the EDPS, in its opinion n. 2/2021, welcomed the proposal for a Digital Markets Act, as this seeks to promote fair and open markets and the fair processing of personal data. But it also expressed a certain criticism, in particular in its opinion n. 1/2021 on the proposal for a Digital Services Act, stressing that "certain activities in the context of online platforms present increasing risks not only for the rights of individuals, but for society as a whole"; and that "while the Proposal includes a set of risk mitigation measures, additional safeguards are warranted,

[20] E.g. *Resolution of 14 March 2017 on Fundamental rights implications of big data*.

[21] Among others: *Opinion on coherent enforcement of fundamental rights in the age of big data* (Op. 8/2016), besides the mentioned *Opinion on online manipulation and personal data*.

[22] The proposal was presented in 2017 and its long, tormented history reveals the difficulty to achieve a balance between protection purposes and economic interests.

[23] Hence the prohibition of all those AI systems whose use is considered unacceptable as contravening Union values, for instance by violating fundamental rights (Art. 5); and, with regard to "high-risk AI Systems", that pose significant risks to the health and safety or fundamental rights of persons, specific provisions concerning "testing procedures" and a "risk management system" (Art. 9), as well as "data governance" (for training, validation and testing data sets), including "examination in view of possible biases" (Art. 10). For an overview: M. VEALE, F. ZUIDERVEEN BORGESIUS, *Demystifying the Draft EU Artificial Intelligence Act*, in *Computer Law Review International*, 2021, 22, 4, 97-112.

in particular in relation to content moderation, online advertising and recommender systems"[24]. It is worth mentioning that, "given the multitude of risks associated with online targeted advertising", the EDPS urged the EP and the Council, as co-legislators, "to consider additional rules going beyond transparency" and indeed beyond accountability. The EDPS specified that "such measures should include a phase-out leading to a prohibition of targeted advertising on the basis of pervasive tracking, as well as restrictions in relation to the categories of data that can be processed for targeting purposes and the categories of data that may be disclosed to advertisers or third parties to enable or facilitate targeted advertising". Finally, it considered that "recommender systems should by default not be based on profiling" and, "given their significant impact", it recommended "additional measures to further promote transparency and user control"[25].

Similarly, in its opinion n. 4/2020, on the Commission's White Paper on AI, the EDPS had welcomed numerous references to a European approach to AI, grounded in EU values and fundamental rights, but also noted that the notion of risk of impact seemed "too narrowly defined" and considered that, "beside 'the impact on the affected parties', the assessment of the level of risk of a given use of AI should also be based on wider societal considerations, including the impact on the democratic process, due process and the rule of law, the public interest, the potential for increased general surveillance, the environment and (concentrations of) market power". Art. 6 of the Commission's subsequent proposal (containing classification rules for high-risk AI systems) is not equally explicit, though it must be added that, according to Art. 7, the Commission would be empowered to adopt delegated acts to update the list of high-risk AI systems, considering *inter alia* the "risk of adverse impact on fundamental rights".

The hope is therefore that old and new EDPS recommendations, manifestly based on a values-oriented approach entailing a broader view of data processing risks, will be duly considered; and also that cross-fertilisation in the European context (which has already led to the enshrinement of largely similar principles in the GDPR and Convention 108+) will contribute to the adoption of EU binding acts that complement the GDPR by addressing more explicitly and effectively the collective implications of new data-driven technologies.

[24] See the *Executive Summary* of the opinion.
[25] *Ibid.*

Omar Makimov Pallotta[*]

Fighting Europarties' Democratic Backsliding: Arguments for a Multilevel Approach[**]

ABSTRACT: ***According to art. 3, para. 1, point c) of Regulation (EU, Euratom) no. 1141/2014 on the statute and funding of European political parties and European political foundations, «[a political alliance that wishes to apply to register as European political party] must observe, in particular in its programme and in its activities, the values on which the Union is founded, as expressed in art. 2 TEU (…)». For this reason, the same Regulation provides for an ad hoc verification procedure (art. 10, para. 3 and 4) that may end with the deregistration of a transnational political alliance which is deemed to violate EU's founding values. This article aims at understanding whether European political parties showing complicity with their "illiberal" member parties (such as EPP and ECR with regard to, respectively, Fidesz and PiS) can be targeted by means of the horizontal rule of law oversight mechanism. Although – at least at first reading – legislation currently in force seems to take a "unit" approach that leaves no room for assessment of national (member) parties' behaviour, at a closer look the formulation of art. 3, para. 1, point c) of the 2014 Regulation does not seem to completely prevent a "multilevel" approach: in fact, by stating that Europarties must respect EU's founding values «in particular» in their programmes and activities, the provision allows the Authority for European political parties and European political foundations to: 1) assess transnational alliances' actions/omissions aimed at condoning or conniving members' activities that favour the erosion of liberal democracy at the national level; 2) consider such attitudes as evidence of an EU values breach. However, the above clearly suggests that the scope of art. 3, para. 1, point c) should be more clearly set out, in order to determine the relevance of the national party dimension when it comes to verifying transnational alliances' observance of art. 2 TEU.***

1. *European political parties towards 2024: evolve and survive or stagnate and die?*

As is widely known, the Hungarian and Polish ruling parties are responsible for the long-running deterioration of the structure and substance of constitutional democracy in their respective countries. Starting from an analysis of Europarties' current "state of health", this contribution aims at understanding: 1) Whether the mentioned anti-democratic behaviour of national political forces could determine a democratic backsliding of European political parties, as long as they show complicity towards their illiberal members; 2) whether the current horizontal EU values compliance mechanism provided for by Regulation no. 1141/2014 can be activated against "complicit" Europarties.

According to art. 10, paragraph 4, TEU, political parties at the European level «contribute to forming European political awareness and to expressing the will of citizens of the Union»; they are not anymore «important factors for integration within the Union», as Maastricht's party article previously stated, but they are nevertheless regarded as the tool having the greatest potential for growth in a Union (still) begging for democratic legitimacy. Europarties can be defined as national party networks: they have been established in the 70's as (con)federations of national political

[*] **Research Fellow in Constitutional Law, University of Teramo.**

[**] **This work has been subjected to blind peer review.**

parties, mostly under pressure from political groups in the European Parliament (EP), which regarded the first direct elections to the latter as an opportunity to build a true trans-European political arena[1]. However, unlike domestic political forces in the XIX century which were often born as intra-parliamentary entities and proved to be able to establish contact with society in a short time[2], European transnational party (con)federations have never been capable of making a leap in quality: they have always remained victims of an "original sin", which corresponds to nothing more than their (con)federal nature; and notwithstanding the numerous attempts to introduce (first) and improve (later) their regulation, both at the primary and secondary law levels[3], Europarties have not been given the means to engage in a direct dialogue with their "natural interlocutors", which is to say European citizens. In this respect, not even Regulation no. 1141/2014, the most advanced piece of legislation on this subject ever adopted at the EU level, has proved to be effective. By the time of the elections to the EP (which are usually referred to as "second order national elections")[4], voters can only relate with national parties and choose from a list of candidates negotiated by each domestic political force, without any interference from the Europarty to which the latter is affiliated. Thus, MEPs are a direct expression of national parties, whose affiliation to a European political party is possible, though not mandatory. Once elected, the new members of the European Assembly have the chance to establish or join a political group[5], which is often (though not always) a "projection" of a Europarty in the parliamentary institution. However, as far as policy formulation is concerned, political groups enjoy a high degree of autonomy with respect to the corresponding Europarties (where they exist)[6] and, furthermore, national delegations play a crucial role in the internal decision-making processes of the group. As evident, the national sphere of influence over the European party system is still more than remarkable. By resorting to Bardi's "European" adaptation of Katz and Mair's theory on the three faces of party organization, we can say that the scale undoubtedly tips towards the party on the ground (i.e. national political parties), to the detriment of the party in the

[1] On the relationship between the birth of transnational party federations and the first direct elections to the European Parliament, see G. PRIDHAM, P. PRIDHAM, *The new European party federations and direct elections*, in *The World Today*, 1979, 35, 2, 64. However, according to the Authors, the creation of such entities was not just the result of pressures coming from political groups: «[…] the widening scope of policy activity in the Community in the 1970s as well as the growing attention given to the European Parliament as an institution during the same period have also promoted this development». Similarly, see D. MARQUAND, *Towards a Europe of the Parties?*, in *Political Quarterly*, 1978, 49, 425 ff.

[2] On the "internal" origin of parties during the XIX century, cfr. M. DUVERGER, *I partiti politici* (1951), Milano, 1961, 16 ff.

[3] A comprehensive overview of the many adjustments made to party regulation at the primary and secondary law levels from Maastricht onwards can be found in F. SAITTO, *European political parties and European public space from the Maastricht Treaty to the Reg. No. 1141/2014*, in *Rivista di Diritti Comparati*, 2017, 2, 23 ff.

[4] Among many, see S. HIX, *Parties at the European level and the legitimacy of EU socio-economic policy*, in *J. Common Mark. Stud.*, 1995, 4, 535: «The transnational party federations which were formed prior to the EP elections have been nothing more than clearing houses, providing information, campaign materials, and organizing (poorly attended) conferences and candidate exchanges. Under the present institutional system the EP elections will only ever be "second order national contests"».

[5] See Rule 33, paragraph 1, of the EP's Rules of Procedure: «Members may form themselves into groups according to their political affinities».

[6] At least, this is what emerges from a combined reading of Rules of Procedure and internal regulation of the most important Europarties and political groups (namely, S&D/PES and EPP). Policy shaping by European political parties must stop, figuratively speaking, at the edge of political groups' offices in the EP: Europarties are not provided with tools capable of translating their proposals with binding effects into the institutional arena; aside from their representatives' participation in the groups' Bureau meetings, they are merely entitled to address recommendations and resolutions to their "projections". Thus, the "party in the public office" seems to play the lion's share.

central office (i.e. Europarties) and of the party in the public office (i.e. political groups in the EP)[7]. With specific regard to the relationship between the European parties and their member parties, the (con)federal nature of the former determines that the latter are extremely jealous of their prerogatives and don't seem willing to transfer "portions of sovereignty" in favour of the transnational (con)federations[8]. As is perhaps foreseeable, the dynamics between Europarties and member parties follow those between the EU and its Member States: for this reason, in order to make a qualitative leap, merely amending secondary law on Europarties could not suffice. Even though the legislation currently in force leaves quite a lot of room for improvement, as we will further see, amendments alone would be too little for the much-desired quantum leap that would allow a direct dialogue and contact between citizens and transnational parties. To this end, amendments to secondary law should be accompanied by the restart of the EU federalizing process; something that – at least at present – does not seem even realistically possible as a prospect.

2. *European political parties in the face of EU's founding values: the* ad hoc *deregistration procedure*

Regulation no. 1141/2014 provides for a series of requirements that political alliances must comply with, in order to be registered as European political parties[9]. These conditions are listed in art. 3, paragraph 1. Among many, we will focus our attention on the one provided for by point c) of the mentioned provision, which states that «[a political alliance that wishes to apply to register as European political party] must observe, in particular in its programme and in its activities, the values on which the Union is founded, as expressed in art. 2 TEU, namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities». The Authority for European Political Parties and European Political Foundations, set up by means of the same Regulation, has the duty to verify that the conditions provided for by art. 3 continue to be complied with by registered Europarties: as far as the respect of the values listed in art. 2 TEU is concerned, the Regulation establishes an *ad hoc* verification procedure, which is laid down in art. 10, paragraphs 3 and 4, and may end with the deregistration of a transnational political alliance. Thus, the EU can be rightly included in the group of protected (or militant) democracies[10]. According to the above-mentioned provisions, only the three major EU Institutions (Parliament, Council and Commission) are entitled to lodge with the Authority a request

[7] Cfr. L. BARDI, *Parties and party system in the European Union*, in K.R. LUTHER, F. MÜLLER ROMMEL (eds.), *Political parties in the new Europe*, Oxford, 2002, 293 ff. See also R.S. KATZ, P. MAIR, *The evolution of party organizations in Europe: the three faces of party organization*, in *American Review of Politics*, 1993, 4, 594.

[8] On the (con)federal nature of Europarties, see extensively L. THORLAKSON, *Federalism and the European party system*, in *J. Eur. Public Policy*, 2005, 3, 468 ff.: «As an evolving party system, confederally constructed from national parties, the European party system faces much the same challenges for analysis as federations».

[9] Registration is now required by Regulation no. 1141/2014 in order for Europarties to have access to funding as well as to acquire European legal personality, among other things.

[10] Cfr. S. CECCANTI, *Le democrazie protette e semi-protette da eccezione a regola. Prima e dopo le Twin Towers*, Torino, 2004, 9: «La limitazione dei fini è considerata protezione quando le fattispecie sono dettagliate o quando, pur generiche, sono comunque associate ad almeno uno degli elementi seguenti che sono indice di una volontà di protezione dell'ordinamento, utilizzando quindi un'interpretazione sistematica: la competenza di un organo che ha la facoltà di sciogliere consequenzialmente i partiti politici o di farne decadere i rappresentanti nel Parlamento nazionale (…)». A clear definition of militant democracy can be found in J.-W. MÜLLER, *Militant democracy*, in M. ROSENFELD, A. SAJÓ (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 1253: «"Militant democracy" – sometimes also called "defensive democracy" or "fighting democracy" – refers to the idea of a democratic regime which is willing to adopt pre-emptive, *prima facie* illiberal measures to prevent those aiming at subverting democracy with democratic means from destroying the democratic regime».

for verification of compliance with art. 3, paragraph 1, point c). Thus, the Authority has no power to initiate the procedure on its own initiative: at the most, it may inform the mentioned Institutions about relevant facts of which it became aware and that may result in a breach of art. 3, paragraph 1, point c). Regulation no. 2018/673 has slightly amended the first subparagraph of art. 10, paragraph 3: now, if a «group of citizens» learns of potential violations of EU values by European parties, it has the right to file a reasoned request with the EP, urging it to ask the Authority to initiate the procedure. Once reached by a request coming from an Institution, the Authority is obliged to ask for an opinion – to be released within two months – to a Committee of independent eminent persons: a body that already played a role under Regulation no. 2004/2003 and that is made up of six members, appointed by the three mentioned EU Institutions on the basis of their personal and professional qualities[11]. Once the opinion has been issued, the Authority must decide on the deregistration, enjoying a vast discretion in this respect: it is not in any way forced to follow the suggestions included in the Committee's opinion. The only restraint on the Authority corresponds to the assessment of the violation's nature: in fact, it is allowed to deregister a Europarty only when it is found guilty of a «manifest and serious breach» of the conditions set out in art. 3, paragraph 1, point c). According to doctrine, this means that – unlike what emerges from art. 7, paragraph 2, TEU, which requires a «serious and persistent breach» – the violation «should not be purely theoretical», but it «must have somehow materialized. It is not, in other words, a speculative assessment of likely implication, but a review of the seriousness of what has already occurred»[12]. Following a positive result with regard to the existence of a manifest and serious breach, the Authority is allowed to deregister the Europarty concerned. However, the former is asked to communicate this decision to both the Council and the European Parliament, which have a three-month deadline to express an objection. Such an opposing act has the effect of definitively stopping the procedure: «in the event of an objection (…) the European political party or foundation shall remain registered». The use of the word "and" between Parliament and Council suggests that, in order to block a deregistration decision, both Institutions should oppose it; thus, an objection coming from one Institution only seems insufficient to prevent a deregistration. In light of this, the decision to leave the fate of "illiberal Europarties" in the hands of highly politicized Institutions has been criticized by many. In fact, the decision to establish an independent Authority entitled to manage registration (and deregistration) of European political parties was dictated by the need to move away from the model provided for by Regulation no. 2004/2003, which entrusted to the sole EP the whole verification procedure. Then, notwithstanding the creation of an Authority specifically responsible for verification, the "last word" has been again left for politicized Institutions: any deregistration would be likely bogged down with Parliament's internal power relations or with multiple vetoes in the Council[13]. In sum, Regulation no. 1141/2014 and subsequent amendments haven't done much to definitively get rid of the "political oversight" that characterized the system previously in force.

[11] The Committee members must be neither officials nor other servants of the European Union. The group must be completely independent in the performance of its duties and, before issuing its opinions, it may request any relevant documents and evidence from a wide range of subjects, from the same Authority to the concerned Europarty.

[12] J. MORIJN, *Responding to "populist" politics at EU level: Regulation 1141/2014 and beyond*, in *Int. J. Const. Law*, 2019, 2, 634. Limiting the possibility of a deregistration to «manifest and serious» breaches only has important effects, as underlined by G. GRASSO, R. PERRONE, *European political parties and the respect for the values on which the European Union is founded between the European legislation and the national laws*, in *European Public Law*, 4/2019, 678: «Breaches not deemed "manifest and serious" may not be sanctioned in any way, as the Authority has no other means to intervene». Scepticism in this respect is also expressed by M.R. ALLEGRI, *Ancora sui partiti politici europei: cosa c'è di nuovo in vista delle elezioni europee 2019*, in *Federalismi.it*, 2019, 9, 14.

[13] Cfr. G. GRASSO, G. TIBERI, *Il nuovo Regolamento sullo statuto e sul finanziamento dei partiti e delle fondazioni politiche europee*, in *Quaderni Costituzionali*, 1/2015, 202.

3. *Targeting European political parties for complicity with their "illiberal" members: entering the interstices of Regulation (EU, Euratom) no. 1141/2014*

As is well known, for many years now the EU is facing one of the most challenging crises in its history: in two of its Member States, namely Poland and Hungary, governments have decided to implement measures that have slowly made them "illiberal democracies"[14]. The two ruling parties, Fidesz in Hungary and PiS in Poland, after gaining the majority in national Parliament, set an entirely new political direction, one axiologically poles apart from the EU's founding values enshrined in art. 2 TEU. Both parties have dismantled the entire checks and balances system, thus undermining, among other things: the separation of powers principle; the inviolability of fundamental rights (including those pertaining to minorities); the independence of the judiciary (and of Constitutional courts); media freedom and the like. The EU replied to such actions by activating against Poland (20th December 2017) and Hungary (12th September 2018) the "vertical" oversight mechanism provided for by art. 7 TEU. However, the complex procedure is proving to be incapable of keeping pace with the fast development of the democratic backsliding in the mentioned countries: the Council, in its General Affairs configuration, is still in the midst of Member States' hearings which it is required to make according to the Treaties.

Net of the "political" delays concerning art. 7 TEU, we must focus on the Europarty membership of the Polish and Hungarian ruling parties and on the impact that this membership might have on the constitutional crises that those Member States are going through. Fidesz has been until quite recently member of the European People's Party (EPP), one of the oldest and biggest transnational political forces in Europe, which gathers more than 80 national parties; PiS, instead, is still member (at least at the time of writing) of the European Conservatives and Reformists (ECR, formerly known as Alliance of Conservatives and Reformists in Europe), a smaller Europarty founded in 2009, which gathers more than 40 national political forces. Both the involved Europarties, as widely proved by doctrine, have facilitated the drift towards authoritarianism in Hungary and Poland, showing in a large number of occasions complicity with regard to the many wrongdoings attributable to the cited ruling parties. Complicity, as underlined in the literature, corresponds to the contribution «as a "secondary agent" to the unlawful or immoral activity of a "primary wrongdoer"»; it can be shown by connivance, that is to say by refusing or failing «to act in a particular way that would prevent or limit wrongdoing», or by condoning, that is to say by «accepting and pardoning the morally or legally wrong behaviour of another»[15]. Both the EPP and the ECR have shown for many years connivance and condoning with respect to the unlawful actions of their Polish and Hungarian member parties, by means of declarations and votes cast within the EP.

For instance, in 2013 the EPP voted down the Tavares report issued by the EP's Committee on Civil Liberties, Justice and Home Affairs – which was aimed at condemning the curtailment of fundamental rights in Hungary – accompanying the vote with unequivocal declarations of condoning by prominent (Euro)party leaders; similarly, the EPP has later repeatedly voted against sanctions to be imposed on the country led by Viktor Orbán. This, until recently: in 2019 Fidesz was suspended

[14] The scientific literature on the subject is more than vast. See, e.g., W. SADURSKI, *Poland's constitutional breakdown*, Oxford, 2019; L. PECH, K.L. SCHEPPELE, *Illiberalism within: Rule of law backsliding in the EU*, in *Cambridge Yearbook of European Legal Studies*, 2017; G. HALMAI, *The Fundamental Law of Hungary and the European constitutional values*, in *DPCE online*, 2019, 2; D. KOCHENOV, P. BARD, *The last soldier standing? Courts vs politicians and the rule of law crisis in the new Member States of the EU*, in *European Yearbook of Constitutional law*, 1, 2018; R. UITZ, *Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary*, in *Int. J. Const. Law*, 2015.

[15] F. WOLKENSTEIN, *European political parties' complicity in democratic backsliding*, in *Global Constitutionalism*, 13th January 2021, 11 ff.

from the EPP and, in 2021, the former has definitively left the Europarty, following the abandonment of the EP group by the Fidesz delegation that in turn was up for a suspension. Then, after years of stalemate, during which the EPP showed at least some degree of awareness about the problem, both the conservative group and the corresponding transnational party proved unable to unconditionally expel their illiberal components, allowing them to leave well before being affected by any expulsion measure.

Similarly, connivance and condoning have been shown by the ECR in favour of PiS: even though the "political weight" of the ECR cannot be compared to the EPP's, the former didn't demonstrate any intention to act in order to condemn democratic backsliding in Poland. On the contrary, leaders of ECR member parties have often issued statements aimed at highlighting the broad discretion enjoyed by Member States when it comes to constitutional amendments or legislative reforms, as if those could not have an impact on the European legal order at all[16].

Thus, there is no denying that involved Europarties did nothing for almost a decade in order to limit (or at least to condemn) the authoritarian drift occurring in Poland and Hungary. Thus, it should be verified whether "complicit" Europarties could be also considered as violators of EU's founding values and, in this case, whether they could be sanctioned by means of deregistration. The 2012 Commission's proposal for a (new) Regulation on European political parties actually adopted an explicit multilevel approach in this respect[17]: in fact, according to this first draft, each Europarty should have respected EU values «in its program and its activities, and through those of its members». The use of the term "through" implied that breaches occurring at the national party level would have been ineluctably imputed to the European political party involved. If such a provision entered into force, there wouldn't have been any doubt on the possibility to sanction "complicit" Europarties: in fact, each (con)federation would have been responsible for its members' alignment with art. 2 TEU: to avoid sanctions, a European political party would have been compelled to suspend or exclude the non-compliant member. However, as underlined by doctrine, negotiations in the Council determined the deletion of the reference to member parties in the "EU values" clause[18]. Member States, as always extremely jealous of their prerogatives, probably feared an excessive intrusion into their sovereign powers. Thus, a unitary approach was preferred and the final version of art. 3, paragraph 1, point c) of Regulation no. 1141/2014 now provides that a political alliance which intends to register as a Europarty «must observe, in particular in its programme and in its activities, the values on which the Union is founded». At a first reading, the solution found seems to prevent a multilevel approach with respect to the verification of compliance: a transnational political force is not asked to observe EU values "through" the programmes and activities of its members any longer. This, however, doesn't necessarily mean that the national party dimension completely loses its relevance. At a closer look, the provision under examination appears more inclusive than it may seem: in fact, even though it refers to programmes and activities of Europarties alone, it also specifies that political alliances must observe EU values «in particular» (thus, not exclusively) in those areas. Furthermore, Europarties' «activities» might also cover actions/omissions, such as declarations and formal statements, made by transnational party (con)federations in relation to what "illiberal" member parties do in their respective countries. Therefore, nothing prevents the Authority to include in the *ad hoc* verification procedure an analysis concerning the existence of measures taken by a (con)federation towards a member party that is violating EU's founding values. And after all, since Europarties are multilevel by nature, it would be unreasonable to evaluate their alignment with art. 2 TEU without taking into account the national

[16] A detailed overview of ECR and EPP's actions and omissions involving complicity by condoning/connivance can be found ivi, 13 ff.

[17] Cfr. J. MORIJN, *Responding to "populist" politics at EU level: Regulation 1141/2014 and beyond*, cit., 627-628.

[18] *Ibid*.

party dimension. Denying the possibility of adopting a multilevel approach would mean that only Europarties whose programmes and activities are inspired by illiberal political views could be sanctioned by means of deregistration. As is widely known, however, transnational (con)federations are often made up of members with heterogeneous ideological backgrounds. The EPP, for example, commits itself to respect EU values, but actually has allowed an illiberal member party, responsible for manifest and serious breaches of art. 2 TEU, to operate within it for many years. According to a unitary approach, such behaviour could not be sanctioned as a failure to fulfil the requirement provided for by art. 3, paragraph 1, point c). Following this *en bloc* interpretation, the great majority of illiberal (or potentially illiberal) national parties would prefer being "hosted" by large and ideologically heterogeneous Europarties, thus making sure to avoid being targeted by undesirable suspensions/exclusions. This would foster constitutional degradation processes at the European level, since Europarties' tolerance towards "illiberal" members would be in turn tolerated. Besides, transnational party confederations are interested in having a large number of members coming from different countries, since legislation asks European political forces to have member parties coming from at least one-quarter of Member States[19]. Therefore, members' suspension/exclusion due to art. 2 TEU violations might become even more unlikely.

4. *Conclusions*

At the time of writing, it's still unknown which approach – the unitary one or the multilevel one – would actually be followed by the Authority. This is because the only attempt to start the *ad hoc* procedure – promoted by a group of citizens, pursuant to art. 10, paragraph 3, of the 2014 Regulation as amended in 2018 – was unsuccessful. In fact, the reasoned request, which was addressed to the European Parliament and detailed the numerous acts of connivance and condoning by the EPP and ECR, was dismissed by the EP Presidency due to procedural issues[20]. This stalemate, whose profound reasons derive from political considerations, actually allowed Fidesz and PiS to operate within their respective Europarties for a long time – just consider that the latter is still an active member of the ECR. In theory, the activation of the verification of compliance procedure against both Europarties would have somehow altered the course, speeding up exclusion decisions or, at least, limiting acts of connivance. Instead, as far as deregistration is concerned, we have already seen how this final determination is still fully left in the hands of the Council and the EP, which would have hardly allowed the implementation of such an extreme measure against the ECR or (even more so) the EPP.

It can be inferred from the above that the current horizontal EU values compliance mechanism has remarkable potential, but also undeniable vulnerabilities, the most evident being the preservation of political oversight over the *ad hoc* verification of compliance procedure. With specific regard to the kind of assessment allowed by Regulation no. 1141/2014, we have seen that an explicit multilevel approach, aimed (also) at scrutinizing national member parties' compliance with art. 2 TEU, has been dismissed, notwithstanding its presence in the first draft proposal issued in 2012. However, the current formulation doesn't prevent the Authority, at least on paper, from: 1) assessing Europarties' actions/omissions aimed at condoning or conniving members' activities at

[19] *Ibid.*, 635.

[20] On the mentioned attempt to trigger the horizontal EU values compliance mechanism in relation to the EPP and ECR (at that time known as ACRE), see A. ALEMANNO, L. PECH, *Holding European political parties accountable - testing the horizontal EU values compliance mechanism*, in *Verfassungsblog*, 15th May 2019. See also G. GRASSO, *The European Ombudsman as an insurmountable roadblock?*, in *Verfassungsblog*, 15th October 2019.

the national level that favour the erosion of liberal democracy; 2) considering such attitudes as evidence of an EU values breach.

In accordance with art. 38 of Regulation no. 1141/2014[21] and in light of the 2024 EP elections, the rules concerning European political parties will soon be amended. As already briefly stated, changes at the secondary law level would be certainly inadequate in order to ensure Europarties the role that art. 10, paragraph 4, TEU gives them. However, since there is nothing to suggest that the EU federalizing process will soon resume with renewed strength (not even with the recent kick-off of the Conference on the Future of Europe)[22], even minor adjustments to the current legislative framework could represent steps forward for an increasingly democratic European party dimension. In this respect, one of the areas of intervention should undoubtedly be the "EU values" clause, the scope of which should be more clearly set out, in order to conclusively determine the relevance of the national party dimension when it comes to verifying Europarties' observance of art. 2 TEU[23].

[21] Which states as follows: «The European Parliament shall, after consulting the Authority, publish by 31 December 2021 and every five years thereafter a report on the application of this Regulation and on the activities funded. The report shall indicate, where appropriate, possible amendments to be made to the statute and funding systems. No more than six months after the publication of the report by the European Parliament, the Commission shall present a report on the application of this Regulation in which particular attention will be paid to its implications for the position of small European political parties and European political foundations. The report shall, if appropriate, be accompanied by a legislative proposal to amend this Regulation».

[22] Criticism at the Conference has been recently levelled by A. ALEMANNO, *Europe's democracy challenge: citizen participation in and beyond elections*, in *Ger. Law J.*, 2020, 1, 172. According to the Author, «this initiative (…) lacks a well-defined mission, methodological foundation and political leadership. (…) Yet, as similar EU-sponsored endeavors showed, these one-off initiatives are cosmetic at best – think of the 2018 Citizens' Consultations for tomorrow's Europe – and recipe for failure at worst – think of the 2003-2005 Constitutional Convention. The EU needs to move away from such *ad hoc* participatory processes that are designed as quick, often patronizing, fixes to the original democratic puzzle of the Union. It must instead urgently embrace, under the current Treaties, a new systemic approach to EU democratic reform agenda, aimed at empowering citizens to both set and monitor agendas on a permanent basis».

[23] It must be said, however, that any intervention at secondary law level aimed at further clarifying when a transnational alliance is breaching EU values would remain in the wake of an observed trend towards a gradual shift «from a democratizing logic to a more protective one, motored by reactions to anti-system political parties». See L. NORMAN, *To democratize or to protect? How the response to anti-system parties reshapes the EU's transnational party system*, in *J. Common Mark. Stud.,* 3/2021, 13. An increasing implementation of militant democracy instruments in many democratic legal orders has also been detected by G. AMATO, *Nota su una legge sui partiti in attuazione dell'art. 49 della Costituzione*, in *Rass. parl.*, 2012, 4, 777 ff: «Oggi, (…) anche sotto la spinta di fenomeni di terrorismo internazionale oltre che di fratture politico-sociali non facilmente componibili (basti pensare ai c.d. partiti etnici, razzisti e/o fondamentalisti che abitano molte nostre società), l'adozione degli strumenti propri di una democrazia protetta è un processo nettamente in ascesa negli ordinamenti democratici».

Paola Pannia*

Excluded from Guarantees, Excluded from the Community. "Institutional Uncertainty" in the Migration Domain as a Symptom of "Constitutional Degradation"**

ABSTRACT: ***This chapter aims to assess whether the systematic and pervasive legal uncertainty in which migrants are constrained in our legal systems can be regarded as a formidable tool of migration control, rather than the mere result of the states' incapacity and lack of preparation to manage a complex phenomenon. Conceived in these terms, can the "institutional uncertainty" be considered as a symptom of "constitutional degradation"? Drawing from some of the main findings of a H2020 research project, and undertaking a comparative approach, the chapter analyses the national protection statuses provided in some European countries (and beyond). Indeed, although their complementary role to the protection system, national protection statuses often feature a reduced set of rights (compared to the ones enjoyed by beneficiaries of international protection), more precarious residence permits, broad discretionary decision-making exercised by authorities. Against this background, national protection statuses may be seen as a strategy undertaken by states to comply with international and European obligations in a less stringent fashion, while affirming a paradigm of "domination" vis-à-vis the foreigners.***

1. *Introduction*

Uncertainty can be regarded as an essential and "inevitable" element of modern legal orders. Under the pressure of recent economic, political and social changes, the "legicentric" paradigm has been definitively dismantled, together with the idea of legal systems as rational and closed. Flexible and general legal formulas are common strategies whereby governments attempt to face the complex dynamics of our modern reality, to the extent that some scholars portray the traditional idea of "certainty" as an outdated concept[1].

This is especially the case when it comes to the challenges posed by the governance of large movements of migrants and refugees. Here, the constellation of intertwining regulatory frameworks in the «multilevel»[2] management of migration gives a sense of the complexity characterizing the issue. A broad range of actors, and their multiple and conflicting interests, compete with one another, transforming the field of migration and asylum into what has been called a «battleground», or «multilevel playing field»[3].

* **Post-doctoral Research Fellow, University of Florence.**

** **This work has been subjected to blind peer review.**

[1] G. PALOMBELLA, *Dopo la certezza: il diritto in equilibrio tra giustizia e democrazia*, Bari, 2006. See also P. GROSSI, *Mitologie giuridiche della modernità*, Milano, 2007.

[2] For the concept of multilevel governance in the migration field see T. CAPONIO, M. JONES-CORREA, *Theorising migration policy in multilevel states: the multilevel governance perspective*, in *Journal of ethnic and migration studies*, 2018, 44, 12, 1995; G. ZINCONE, T. CAPONIO, *The multilevel governance of migration*, in R. PENNIX, M. BERGER, K. KRAAL (eds.), *The dynamics of international migration and settlement in Europe. A state of the art*, Amsterdam, 2006, 269.

[3] The term «battleground» is used by M. AMBROSINI to «deepen the multi-actor, conflictual and plural local dynamics» (F. Campomori, M. Ambrosini, *Multilevel governance in trouble: the implementation of asylum*

However, in the case of migration, relating uncertainty only to the difficulties (and necessities) of governing a complex and fast-changing phenomenon would be misleading. Indeed, uncertainty radically affects migrants' lives in the public sphere and it does so in a structural and systemic way, shaping the relationship between the State and foreigners. In the migration domain, uncertainty pervades every stage of migration management systems, from rescue operations to refugee status determination and, more broadly, the set of entitlements bestowed on migrants before and after they obtain protection or a permit to stay. The regulatory context is characterized by legal vacuums (as the hotspot situation in Italy paradigmatically shows), a multiplicity of immigration channels and the obscurity surrounding the requirements for gaining access to them (or the circumstances under which a legal status may be withdrawn). Furthermore, the lack of transparency and predictability as to the number and scope of the rights and obligations assigned to each type of residence permit makes it difficult for migrants to control their legal status (and, consequently their life).

To what extent can the uncertainty surrounding the migration domain be considered one of the many faces of "constitutional degradation"?

Here, a preliminary clarification is in order. This article introduces and operationalizes the concept of "institutional uncertainty", which does not have the same meaning of "legal uncertainty" (although there is a great deal of overlap between the two concepts). Unlike the much more common and elaborated concept of «legal uncertainty»[4], the term "institutional uncertainty" is intended to embrace a broader horizon. Indeed, it refers not only to the legal framework and its inherent fuzziness, and the way in which it is interpreted and enforced (from a top-down view), but also to the practices of public institutions and public officials who, making use of their ample room for discretion, shape the understanding of migrants' rights and respond to migrants' claims. Conceived in these terms, the concept of "institutional uncertainty" aims to convey the pervasive, structural, systemic uncertainty that surrounds migrants and their rights in the public space. In this context, uncertainty cannot be solely considered as the necessary negative externality of the government's attempt to deal with complexity. Conversely, it should be regarded as a mechanism to exert migration control at the expense of the basic features of constitutionalism[5].

The article is structured as follows: after having illustrated the main trends that affect the national protection status in selected European countries (plus Turkey and the UK), this article analyses the threat that the condition of "institutional uncertainty" is posing to our constitutional orders. By looking at the legal protection provided to foreigners under these migration statuses, the paper aims to assess how current migration regimes represents a neglected – yet vivid – example of constitutional degradation.

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seekers' reception in Italy as a battleground', in *Comp. Migr. Stud.*, 2020, 8, 22, 3). The concept «multilevel playing field» belongs to the conceptualization of G. Lahav, V. Guiraudon, *Actors and venues in immigration control: closing the gap between political demands and policy outcomes*, in *West Eur. Polit.*, 2006, 29, 2, 201). In the same article mentioned above, Campomori and Ambrosini speak about this concept as a term which helps in investigating «not only the various levels of policy making, but also the diverse actors and logics that prevail in it» (16).

[4] See *inter alia* T. BINGHAM, *The Rule of Law*, London, 2010; COUNCIL OF EUROPE, *The Council of Europe and the Rule of Law. An overview*, CM(2008)170 21 November 2008. Available at: https://www.coe.int/t/dc/files/Ministerial_Conferences/2009_justice/CM%20170_en.pdf.

[5] P. PANNIA, *'Institutional uncertainty' as a technique of migration governance. A comparative legal perspective*, in *DPCE online* 45, 4, 2020. The article addresses the manifold ways in which "institutional uncertainty" affects migrants' legal status, with reference to the following aspects: a) the types of legal status granted to migrants; b) the criteria that migrants have to fulfil in order to obtain a specific legal status; and c) the rights and duties related to each specific status.

The analysis is drawn from some of the main findings of a H2020 research project, RESPOND,[6] and takes a comparative approach.

2. *A case study: a comparative analysis of national protection statuses in Europe and beyond*

The national protection status is meant to provide a complementary form of protection for those who are not eligible for refugee status (or subsidiary protection in the case of EU Member States)[7]. Although provided in almost all EU countries, national forms of protection fall outside the purview of the Common European Asylum System and its harmonization aim. This contributes to explaining the large variety of regulations among European countries[8]. Significant differences include, among other things, the grounds on which national protection is granted (ranging from international obligations such as the principle of *non-refoulement* to compassionate reasons)[9], the duration of the associated residence permit and the range of rights attached to the status of beneficiary of national protection.

Despite such a varied landscape, some relevant common features can be outlined. While it is undeniable that national forms of protection continue to play an important complementary role to the protection system created at the EU level, the protection gap created by these regimes still needs to be thoroughly addressed by scholars. Indeed, beneficiaries of statuses such as "humanitarian protection" or "tolerated stay" are often entitled to a reduced set of rights compared to the ones enjoyed by beneficiaries of international protection. Moreover, national forms of protection provide for precarious residence permits, often valid only for few months. Finally, a condition of legal uncertainty strongly affects the process of obtaining this status.

Sweden provides an extreme, yet telling, example. According to Section 2a, Chapter 4 of the Swedish Aliens Act, a residence permit for "persons otherwise in need of protection" is granted to foreigners who do not qualify as refugees or beneficiaries of international protection, but who, if returned to their country of origin (or in the case of stateless aliens, the country in which they previously had their habitual place of residence), risk being subjected to human trafficking or exposed to environmental disaster or face very serious

[6] RESPOND: https://respondmigration.com/ . The research covers cases and the national experiences of 7 European countries (Austria, Hungary, Germany, Greece, Italy, Poland, Sweden), plus Turkey and the UK.

[7] National protection statuses are not only provided by EU Member States. For instance, with reference to the USA legal system, see N. LORI, *Offshore Citizens. Permanent Temporary Status in the Gulf*, Cambridge, 2019, which mentions the temporary protection status in the United States; the author clarifies that «TPS is not asylum because it is explicitly designed to not be an avenue for permanent residency» (45). Indeed, «The law explicitly precludes TPS holders from adjusting to lawful permanent residence (LPR) status: Immigration and Naturalization Act, § 244(h). Individuals who are on TPS may qualify for asylum – but by law one may apply for asylum only within the individual's first year in the United States. Because asylum processing is lengthy and cumbersome, immigration judges and applicants alike often opt for TPS despite its limitations» (45, note 10).

[8] On this subject see C. COSTELLO, *The human rights of migrants and refugees in European Law*, Oxford, 2015; the author underlines that the entry into force of the EU Qualification Directive «has not reduced States' propensity to grant ad hoc statuses» (73).

[9] For further details see EMN, *Comparative overview of national protection statutes in the EU and Norway*, EMN Synthesis Report for the EMN Study 2019, 2020, 5 ff. Available at: https://ec.europa.eu/home-affairs/content/emn-study-comparative-overview-national-protection-statuses-eu-and-norway_en

health issues.[10] However, in July 2016, the Temporary Act suspended the right to access this national form of residence up to July 2019 (the measure was subsequently extended until July 2021). Currently, the new law approved in July 2021 has reduced the scope of this national protection status[11].

In Poland, a permit to stay for "humanitarian protection" is granted to foreigners whose return cannot be enforced due to "humanitarian" reasons (Part VIII, Chapter 3 of the Law on Foreigners) related to family issues, children's rights, the risk of being tortured or forced to work, and of being deprived of the right to a fair trial upon return. Beneficiaries of humanitarian protection have reduced access to social assistance compared to refugees[12].

As in the case of discretionary and restricted leave, the national form of protection in Hungary relies upon the principle of *non-refoulement*. This protection is granted to a foreigner who does not meet the requirements for international protection, but who, if returned, is "likely to be subjected to persecution on the grounds of his/her race, religion, nationality, social affiliation or political conviction" [13] or would be exposed to danger of being sentenced to death, being tortured or subjected to other inhuman treatment or punishment[14]. The so called "National Ban on Deportation" established in Germany pertains to the same category of national protection. Under Section 60 V and VII of the Residence Act, deportation is prohibited under the terms of the ECHR or when the foreigner is at risk of "substantial concrete danger to his/her life and limb or liberty"[15]. In practice, this form of protection is often granted on health grounds and beneficiaries are entitled to a residence permit of at least one year.[16] In Austria, a so-called "toleration card" is issued when an order of removal cannot be enforced due to a variety of reasons tied to preservation of the family unit, personal integrity and health issues, but also because of technical obstacles to the transfer. Though they are excluded from access to integration programs, the beneficiaries of this form of national protection are entitled to an ample range of rights, including the right to work and to access social welfare measures. However, in practice, these rights are often disregarded by the authorities[17]. Another form of "tolerated stay" is also provided for in Poland. Here a permit for "tolerated stay" is granted to foreigners who do not qualify for international or

[10] M. SHAKRA, J. WIRMAN, J. SZAŁAŃSKA, *Sweden – Country Report: Legal and Policy Framework of Migration Governance*, RESPOND Working Papers, 2018.

[11] For further details on the new law, see the press release of the Government of Sweden, *Amended regulations in the Aliens Act*, 11 April 2021. Aavailable at: https://www.government.se/press-releases/2021/04/amended-regulations-in-the-aliens-act/

[12] M. SZULECKA, M. PACHOCKA, K. SOBCZAK-SZELC, *Poland - Country Report: Legal and Policy Framework of Migration Governance*, 2018, available at http://uu.diva-portal.org/smash/get/diva2:1248415/FULLTEXT02.pdf

[13] This is the wording of Section 51 of the Aliens Act (Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals), available here https://www.refworld.org/pdfid/4979cae12.pdf . See also Section 45 of the Asylum

[14] Section 51 of the Aliens Act says "nor to the territory or the frontier of a country where there is substantial reason to believe that the expelled third-country national is likely to be subjected to the actions or conduct defined in Article XIV(3) of the Fundamental Law (non-refoulement).". See also Section 45 of the Asylum Act (Act LXXX of 2007 on Asylum).

[15] E. CHEMIN, S. HESS, A. K. NAGEL, B. KASPAREK, V. HÄNSEL, M. JAKUBOWSKI, *Germany - Country Report: Legal and Policy Framework of Migration Governance*, 2018, 161. Available at: http://uu.diva-portal.org/smash/get/diva2:1248277/FULLTEXT01.pdf .

[16] AIDA, *Country Report: Germany*, 2018, 47. Available at https://www.asylumineurope.org/reports/country/germany

[17] I. JOSIPOVIC, U. REEGER, *Austria – Country Report: Legal and Policy Framework of Migration Governance*, RESPOND Working Papers, 2018. Available at: https://respondmigration.com/wp-blog/2018/5/1/201802-austria-country-report-legal-and-policy-framework-of-migration-governance?rq=austria

humanitarian protection, but whose removal cannot be enforced because of technical obstacles or because they would face threats to their life or risk being tortured or forced to work in the country of origin or former habitual residence should they be sent there. Holders of this national form of protection have limited access to social assistance compared to beneficiaries of international protection. Finally, Poland also grants another form of national protection: so-called "asylum", which is granted when "a valid interest of the Republic of Poland" justifies the foreigner's stay (Article 90 of the Law on Protection). For instance, this particular form of national protection has been granted to Ukrainians of Polish descent fleeing the military conflict in Western Ukraine[18].

Another example (outside Europe) regards Turkish "conditional refugee protection", which is granted to foreigners who qualify for refugee status, but come from a non-EU country. Beneficiaries of this status are entitled to a short stay (1 year) and a narrower set of rights than beneficiaries of refugee and subsidiary protection. In particular, the right to family reunification is excluded, as is «the prospect of long-term legal integration into Turkey»[19]. Freedom of movement as well is restricted in the case of holders of "conditional refugee" status, who are required to reside in specific provinces and to regularly report to local authorities. Beneficiaries of this legal status are supposed to stay in Turkey temporarily pending resettlement in a third country. However, in practice, due to the decreasing quotas of safe third countries, refugees under conditional refugee status stay in Turkey for a long time and remain «in limbo»[20].

In addition to humanitarian protection[21], the UK also provides for other forms of national protection: namely "discretionary leave" and "restricted leave". Both statuses are set out in policy guidance documents.[22] Based on "exceptional humanitarian or compassionate grounds", discretionary leave may be granted to foreigners who do not qualify for international or humanitarian protection. The grant of discretionary leave encompasses a wide range of cases, such as situations of severe illness, situations where return would constitute inhuman or degrading treatment under Article 3 of the ECHR, situations involving victims of trafficking or unaccompanied foreign minors who do not qualify for other protection statuses and cannot be returned to their country of origin. The duration of the leave to stay granted depends on the individual case, but it generally does not exceed 30 months. A short stay is also provided for in cases of "restricted leave", whose duration is usually a maximum of six months (renewable). This form of national protection is granted to foreigners who are not eligible for international protection because of their conduct (e.g. because they committed a serious crime), but whose rights would be undermined in case of removal to their country of origin. However, this status entails a significant curtailment of rights: indeed,

[18] M. SZULECKA, M. PACHOCKA, K. SOBCZAK-SZELC, *Poland - Country Report: Legal and Policy Framework of Migration Governance*, 2018. Available at: http://uu.diva-portal.org/smash/get/diva2:1248415/FULLTEXT02.pdf

[19] AIDA, *Country Report: Turkey*, 2018, 97. Available at: https://www.asylumineurope.org/reports/country/turkey

[20] *E. Cetin, N. O. Ozturk, N. E. Gokalp Aras, Z. Sahin Mencutek*, *Turkey: Country Report: Legal and Policy Framework of Migration Governance*, 2018, 682. Available at: http://uu.diva-portal.org/smash/get/diva2:1248427/FULLTEXT02.pdf

[21] In the UK, humanitarian protection can be likened to the "subsidiary protection" provided by the Common European Asylum system (CEAS), which no longer applies to the UK. It is worth to remind that the UK opted into the first phase of CEAS but then opted out of the second phase.

[22] The policy guidance concerning restricted leave is available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/711142/restricted-leave-v3.0ext.pdf. The policy guidance concerning the discretionary leave is available here https://www.gov.uk/government/publications/granting-discretionary-leave.

holders of restricted leave are not entitled to reunite their family, to study or to work (or in some cases they can access employment only under strict conditions). Neither housing nor social benefits are afforded to them. The freedom of movement can also be restricted, and permission has to be requested in order to move[23].

National protection statuses are also subject to frequent legislative changes. Between 2010 and 2018, reforms introduced in 13 EU Member States radically amended or abolished this form of protection[24].

Furthermore, broadly discretionary decision-making affects the practice of public professionals who are in charge of interpreting and enforcing the law which regulates the granting of national protection statuses (as well as the rights attached to it). This is also the result of the vague wording used in legislative provisions (or policy guidance) regulating national forms of protection[25]. Clear examples of such indeterminacy are the "serious reasons of a humanitarian nature" to be demonstrated in order to obtain humanitarian protection in Italy (before the major reform introduced in 2018)[26]; the "exceptional compassionate circumstances" set as a condition for obtaining discretionary leave to remain in the UK; the existence of "considerable concrete danger to his/her life, limb or liberty" in the destination country, which has to be proven in order for the national ban on deportation to be applied in Germany; and the generically stated aim of protecting the foreigner or securing a vital national interest, based upon which asylum is granted in Poland[27].

These examples point to the need for a serious reflection upon legal statuses and their key role in the management of migration. In national legal systems, when it comes to the room for manoeuvre in creating or modifying the content of different legal statuses, international protection occupies one end of the spectrum. In fact, in the light of the international legal framework (and first and foremost the Geneva Convention), little margin is left for States to determine the requirements necessary to obtain this status and the subsequent legal treatment. Immigration on economic grounds can be placed at the opposite end of the spectrum, as the power to select people who are entitled to enter and stay on socioeconomic grounds lies fundamentally with the State[28]. Through the creation of additional protection statuses and the multiplication of «quasi-refugee labels»[29], States attempt to limit access to international protection status, over which they may exercise less control. Although

[23] C. HIRST, N. ATTO, *United Kingdom - Country Report: Legal and Policy Framework of Migration Governance*, 2018. Available at: https://respondmigration.com/wp-blog/2018/8/1/comparative-report-legal-and-policy-framework-of-migration-governance-pclyw-ydmzj-bzdbn-sc548-ncfcp-5a657.

[24] EMN, *Comparative overview of national protection statutes in the EU and Norway*, cit., 41.

[25] *Ibid*., 14 ff. For further details see also P. *Pannia, V. Federico, A. Terlizzi, S. D'Amato*, *Comparative Report Legal & Policy Framework of Migration Governance*, 2018, 54 ff. Available at: http://uu.diva-portal.org/smash/get/diva2:1255350/FULLTEXT01.pdf

[26] This was the reading of Art. 5, Legislative Decree No. 286/1998. Indeed in 2018, following the introduction of the Salvini Decree (N. 113/2018), the humanitarian protection regime was significantly reformed and replaced with a new set of statuses and grounds entitling to protection: (a) "special protection", grounded on the principle of non-refoulement; b) severe medical issues; c) environmental disasters; d) acts of particular civic value; e) and "special cases" involving victims of trafficking, labour exploitation and domestic violence. The reform resulted in a substantial reduction in the legal guarantees provided to persons in need of protection.

[27] Art. 90 of the Law on Protection. This particular form of national protection has been granted, for instance, to Ukrainians with Polish roots fleeing the military conflict in Western Ukraine (M. SZULECKA, M. PACHOCKA, K. SOBCZAK-SZELC, *Poland - Country Report: Legal and Policy Framework of Migration Governance*, 2018, 18. Available at: http://uu.diva-portal.org/smash/get/diva2:1248415/FULLTEXT02.pdf).

[28] C. JOPPKE, *Selecting by origin: ethnic migration in the liberal State*, Harvard, 2005.

[29] R. ZETTER, *More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization*, in *J. Refug. Stud.,* 2007, 20, 2, 172.

international and constitutional obligations continue to ensure fundamental spaces of protection of foreigners' rights, a high degree of uncertainty still surrounds national protection statuses, which appear more as a «regularization mechanism»[30], an «exception», than as a «way to maintain legality in some scenarios»[31].

3. *Constitutional degradation and the legal framework of migration: a paradigm of "domination"*

The topic of "constitutional degradation" has attracted more and more interest among scholars who, from different conceptual angles, attempt to grasp the variable factors characterizing such a phenomenon. The success and proliferation of regimes of "constitutional democracy" can be partly explained with the large variety of meanings, conceptions and functions that this template has acquired and manifested thus far. The same also applies to the theoretical frameworks constructed by scholars to analyse current instances and degrees of constitutional crisis. As a result, the main works on this topic fail to provide a clear definition of "the basic characteristics and underlying values of constitutional democracy" or, alternatively, offer an overly restrictive and "minimalist" understanding of the concept[32].

In dealing with the definitional issue, this article embraces an idea of constitution which revolves around two fundamental conceptual nuclei: legal protection and the fulfilment of a core set of principles binding the community.

Indeed, at least according to the legal tradition of a specific area of the world, the history of constitutions has been a history of struggles to limit public authority and to develop tools that ensure the accountability of state agents (the internationalization of human rights can be seen as the last step of this process). However, beyond the traditional layer of "guarantees" provided to individuals, there is also a symbolic dimension, where constitutions play a role as driving force of social change oriented towards anti-subordination and egalitarian aims. Endowed with the same fundamental rights (and duties), individuals perceive themselves as a community (that is why some authors speak about "the people" as an effect, not a

[30] See for instance the taxonomy of A. KRALER, *Regularization: A misguided option or part and parcel of a comprehensive policy response to irregular migration?*, IMISCOE Working Paper, 24, 9, 2009.

[31] On this see C. DAUVERGNE, *Making people illegal: what globalization means for migration and law*, Cambridge, 2008, 28 ss. who depicts regularization as a «purification ritual» (139) challenging the ability of law to represent a remedy to illegality (p. 27). This contention is rejected by C. Costello, who states that «regularization is often legally required to maintain the integrity of the legal system. It maintains legality in some scenarios, rather than undermining it» (74). However, attention should be paid to the way in which these regularization mechanisms are shaped and implemented. In many cases, as demonstrated by national protection statuses, regularizations continue to represent "an exception". They can be seen as a strategy undertaken by EU Member States to comply with international and European obligations in a less stringent fashion, while maintaining a certain margin of appreciation. On this point C. Costello herself recognizes that «Member States' responses to the Syrian refugee crisis also reflect recourse to ad hoc national statuses for those fleeing this conflict, notwithstanding UNHCR's well-argued contention that most of those fleeing are Convention refugees with a well-founded fear of persecution by reason of their political opinion or imputed political opinion»v(76).

[32] M. LOUGHLIN, *The Contemporary Crisis of Constitutional* D*emocracy, in Oxford J. Leg. Stud.*, 2019, 39, 2, 435 ff., where the author discusses the following books: M. A GRABER, S. LEVINSON, M. TUSHNET (eds)*, Constitutional Democracy in Crisis?*, Oxford, 2018; T. GINSBURG, A. Z HUQ, *How to Save a Constitutional Democracy*, Chicago, 2018.

precondition of constitutions)[33]. Both these aspects converge in modern constitutional democracies,[34] consecrating the self-government of people.

But which people?

According to the Schmittean notion of constitution, "the people", intended as a homogeneous entity with a unitary will, represent the source of the Constitution's effectivity and legitimacy[35]. This concept of constitution, built on the basis of strict nationalism, is rejected here. The idea of constitution to which this article adheres leaves the question of "which people?" unanswered, because it considers it irrelevant. Indeed, the core of a constitution does not rely so much on its formal features but rather on its content. This approach disregards those by whom the constitution is made, and looks instead at its addressees, that is, those who share the same rights.[36] This is the pluralistic character of constitutions, which are not intended to represent a homogeneous collective identity, but rather to protect and give recognition to different, conflicting voices. This is also a crucial element which allows a constitution to evolve and thus to survive.

The essential aims of constitutions are betrayed by the framework of "institutional uncertainty" pervading the migration domain.

Indeed, through a number of mechanisms, such as the narrowing of access to international protection and the diluting of refugee status into a congeries of national forms of protection (as well as the creation of legal vacuums and ample spaces of discretionary powers, externalization practices and informal agreements) states elude traditional accountability mechanisms. As illustrated earlier with the specific case of national protection statuses, the lack of accountability is further enhanced by the actions of public professionals and institutions (i.e. municipal authorities, Police officials, social services and health service workers) responsible to interpret and enforce the laws[37]. Even courts rarely question the State's power to select entries and control national borders by deciding the criteria that a migrant has to fulfil in order to obtain a specific legal status and to enjoy the respective rights and duties[38]. Against these multiple "spaces of immunity", migrants get lost in a jungle of regulations that change continuously and often haphazardly. From such a perspective, institutional uncertainty can be regarded as a formidable tool of migration control, which allows the state and its agencies to restrict arrivals, to select who may enter and who may not and to do so in a quasi "*legibus-solutus*" way. Under pressure to respond both to difficult negotiations between various interest groups and to the need for domestic electoral

[33] L. FERRAJOLI, *La costruzione della democrazia. Teoria del garantismo costituzionale*, Bari-Romea 2021, 244 ff.

[34] M. FIORAVANTI, *Costituzionalismo. Percorsi della storia e tendenze attuali*, Bari-Roma, 2009; P. Ridola, *Preistoria, origini e vicende del costituzionalismo*, in P. CARROZZA, A. DI GIOVINE, G. F. FERRARI (eds.), *Diritto costituzionale comparato*, II, Bari-Roma, 2009, 737 ff.

[35] L. FERRAJOLI, *La costruzione della democrazia. Teoria del garantismo costituzionale*, cit., 239.

[36] L. FERRAJOLI, *La costruzione della democrazia. Teoria del garantismo costituzionale*, 175.

[37] This also refer to the actions of street-level actors, i.e. bureaucrats, volunteers, people working for private companies, and others, who contribute with their personal ideologies and background to interpret and enforce the law concerning the granting of legal status and of rights related to it. On street-level bureaucrats see M. LIPSKY, *Street-level bureaucracy: dilemma's of the individual in public services*, New York 1980).

[38] For instance, it is undoubtedly worth noting the jurisprudence of the European Court of Human Rights, which, based on Art. 8 of the ECHR (and thus giving relevance to the long presence and strong ties of migrants in societies of arrival) has recognized that migrants have a legal right to stay, even when such a right is not provided for under national legislations. However, the Court keeps asserting States' exclusive power to control migration and to decide who may enter and reside in their territory. On this subject see C. COSTELLO, *The Human Rights of Migrants and Refugees in European Law*, cit.

consensus-building, politicians «make and unmake»[39] migration policies, complicating migrants' journey towards the goal of accessing rights and fulfilling their aspirations[40]. In this context, given the lack of stable, clearly defined rules, migrants are unable to regulate their life with any degree of certainty as to the consequences of their choices or actions.

Meanwhile, uncertainty prevents foreigners from nurturing a sense of belonging. This allows the public authorities to exert control also over the second dimension of constitutionalism: that of contributing to constructing the social order as part of the political community. Indeed, migrants find themselves excluded from the process through which a community shapes and re-shapes its cultural and political identity.

Thus, by subjecting migrants to a regime of "institutional uncertainty", States adhere to a "functional" view of non-citizen people, who serve contingent interests of a symbolic, political or economic nature. In this way, States use the migration domain to reaffirm their legitimacy, their "sovereignty", which is more and more challenged in this globalized world, at the total expense of foreigners' rights. Going against the ultimate aim of every constitutional system, a paradigm of "domination" governs the relationship between the State and foreigners. Here the basic features of the rule of law (such as predictability, public disclosure and legal certainty) fade away, together with the possibility of participating in democratic discussion and the negotiation of interests and the composition of conflicts. In this respect, the condition of "institutional uncertainty" pervading the regulatory framework of migration represents an indicative symptom of the process of "constitutional degradation", which undermines the core principles of constitutionalism (guarantee against the arbitrary power of the state and the construction of a "new order" to which every member of the community has the right to participate).

[39] The expression is quoted from S. CASTLES, *Why Migration Policies Fail*, in *Ethn. Racial Stud.,* 2004, 205 ff.

[40] A. TRIANDAFYLLIDOU, *The Migration Archipelago: Social Navigation and Migrant Agency*, in *Int. Migr.*, 2018, 1.

ELENCO DELLE AUTRICI E DEGLI AUTORI

Stefano Bargiacchi, Post-doctoral Research Fellow in Comparative Public Law, University of Pisa

Carla Bassu, Full Professor of Comparative Public Law at the University of Sassari

Lidia Bonifati, PhD Candidate in Comparative Constitutional Law at the University of Bologna and the University of Antwerp

Thiago Burckhart, PhD Candidate in Comparative Law and Processes of Integration, Università degli Studi della Campania "Luigi Vanvitelli", Italy

Valentina Carlino, Post-doctoral Research Fellow in Comparative Public Law, University of Siena

Diana Maria Castano Vargas, Research Fellow in Comparative Public Law at the University Suor Orsola Benincasa, Naples

Josep Maria Castellà Andreu, Full Professor of Constitutional Law, University of Barcelona - Member of the Venice Commission of the Council of Europe

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Giammaria Milani, Ricercatore in Diritto pubblico Comparato, Università di Siena

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Pier Luigi Petrillo, Full Professor of Comparative Public Law at the University of Rome Unitelma Sapienza

Micol Pignataro, PhD Candidate in Constitutional Law at the University of Bologna

Mayra Angélica Rodríguez Avalos, PhD Candidate in Comparative Law and Processes of Integration at the University of Campania Luigi Vanvitelli

Giacomo Salvadori, PhD in "Giustizia costituzionale e diritti fondamentali" of Università di Pisa and Doctor in Derecho, Gobierno y Políticas Públicas of Universidad Autónoma de Madrid. Currently is subject expert in Constitutional law at Università Cattolica del Sacro Cuore.

Francesco Alberto Santulli, PhD in Legal Studies at the University of Bologna

Marco Antonio Simonelli, Post-doctoral Research Fellow, Universidad de Barcelona

Federico Spagnoli, PhD Candidate in "Giustizia costituzionale e diritti fondamentali" at the University of Pisa

Irene Spigno, General Director of the Academia Interamericana de Derechos Humanos, Universidad Autónoma de Coahuila

Giulia Vasino, Post-doctoral Research Fellow, Department of Political Science, Sapienza – University of Rome

Andrea Vernata, Researcher in Constitutional Law, University La Sapienza in Rome

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