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DE L'UTILITÉ D'UNE RÉFLEXION SUR LA POSSIBILITÉ D'UNE DÉMOCRATIE NON LIBÉRALE

Les communications réunies par Ricardo Ramirez Calvo et Justin Orlando Frosini dans ce numéro spécial de la revue *Percorsi Costituzionali* ont, pour partie d'entre elles, été présentées dans l'atelier consacré aux démocraties non libérales organisé dans le cadre du Congrès de l'Association internationale de droit constitutionnel qui s'est déroulé à Séoul (Corée) en juin 2018. Il convient de saluer leur travail éditorial qui a permis cette publication sur un des thèmes essentiels du débat constitutionnel contemporain, non seulement en Europe, mais aussi, sous des formes différentes, dans la plupart des continents. Cette publication doit également être replacée dans le cadre du groupe de recherche consacré au «constitutionnalisme dans les démocraties non libérales» que Ricardo Ramirez Calvo et Justin Orlando Frosini coordonnent et qui est l'un des groupes les plus actifs de l'Association internationale de droit constitutionnel.

L'implication de constitutionnalistes relevant de systèmes juridiques, historiquement et idéologiquement, très différents, dans cette réflexion traduit l'importance de ce concept relativement nouveau.

Par un détournement de son sens premier, on a tendance à assimiler la démocratie à l'archétype d'un «bon gouvernement»[1] associant une légitimité populaire, une séparation des pouvoirs et des droits individuels garantis. En réalité, la démocratie, prise au sens strict du terme, est un mécanisme de légitimation du pouvoir. En gros, des élections libres et disputées à intervalles réguliers. Elle implique la liberté d'expression, l'existence d'une opposition. Pour sa part, le libéralisme politique vise à assurer un «gouvernement mo-

[1] Cf. not. P. Rosanvallon, *Le bon gouvernement*, Paris, 2015.

déré» (Montesquieu). Il renvoie aujourd'hui à la séparation des pouvoirs et à l'existence de droits individuels garantis par un juge. Dans la défense de ce gouvernement libéral, à laquelle s'attelle Montesquieu, il n'établit pas de lien nécessaire entre le libéralisme et la démocratie. Ainsi un gouvernement aristocratique, ou oligarchique, peut être un gouvernement libéral. À l'inverse, on peut parfaitement imaginer un système démocratique dans lequel le pouvoir serait concentré entre les mains d'un homme, à condition que son mandat soit régulièrement remis en cause à l'occasion d'élections libres et d'un référendum plébiscitaire. Si ce dernier modèle n'existe pas réellement, il n'en est pas moins théoriquement possible.

Cette dissociation entre démocratie et libéralisme[2] est aujourd'hui présente dans le discours de certains responsables politiques de régimes que l'on considère souvent comme autoritaires (même si le degré d'autoritarisme peut sensiblement varier). Il en est ainsi, en Europe, dans la Russie de M. Poutin, dans la Hongrie de M. Orban, mais aussi dans d'autres pays à la suite de récentes élections (Pologne, République tchèque…). Cette conception peut s'expliquer par plusieurs facteurs: la renaissance d'un sentiment national dans des pays qui ont connu des occupations successives dans le cadre d'empires (ottoman, austro-hongrois, III^e^ Reich, soviétique pour la Hongrie); la nécessité de retrouver des valeurs propres et des racines historiques dans le cadre d'une Europe qui leur semble avoir perdu valeurs et repères; l'affaiblissement du pouvoir politique marqué par la crise de la démocratie liée au sentiment (ou à la réalité) que les votes des citoyens ne contribuent que marginalement à la détermination de la politique suivie; l'emprise des juges sur la vie sociale, des pouvoirs financiers sur la vie économique… Dans d'autres pays, cette notion renvoie à des traditions de présidentialisme autoritaire, par exemple en Amérique du Sud. Ce présidentialisme se retrouve également dans certains États issus de la décolonisation. A l'inverse des systèmes, comme par exemple celui de la Chine, récusent à la fois la démocratie et le libéralisme. Le concept de démocratie libérale recouvre en fait des situations très variées, le seul point commun étant l'existence d'un pouvoir légitimé par l'élection, mais dont l'exercice s'écarte des exigences de modération libérale.

[2] Cf. B. Mathieu, *Le droit contre la démocratie*, Paris, 2017.

Ainsi, se manifeste une volonté de rétablir un pouvoir politique fort, autoritaire et légitimé par une volonté populaire clairement exprimée. Cette volonté de remettre au centre du jeu la démocratie conduit en retour à rejeter ce qui contraint ou limite le pouvoir politique et à exprimer des valeurs proprement nationales. D'où un exercice concentré du pouvoir et des conflits avec les juges, les instances européennes, voire la presse. Cette situation tend à être conceptualisée (justifiée) par le recours au concept de démocratie non libérale.

Les réflexions, très sommaires, qui suivent portent sur la situation européenne, mais les communications présentées dans ce numéro permettent d'enrichir l'analyse dans un champ plus large.

L'évolution du modèle démocratique, qui ne peut plus être ignorée, peut s'expliquer par de très nombreux facteurs, dont certains ont été déjà invoqués. Il peut s'agir de l'introduction d'un système démocratique dans un pays qui n'a pas de tradition libérale (Russie). La conception hégémonique et universaliste d'une conception individualiste des droits fondamentaux peut également jouer un rôle. Mais il peut s'agir également d'une volonté de rupture avec un modèle dont on considère, à tort ou à raison, qu'il limite excessivement le pouvoir politique par des règles juridiques relevant de l'état de droit, par l'intervention des juges ou par les contraintes du droit supranational. Les craintes d'une perte d'identité liée au développement de l'immigration et du communautarisme, à la montée en puissance de valeurs étrangères aux cultures nationales, comme celles liées à l'islam, peuvent également conduire au rejet d'une conception libérale de la démocratie (pays d'Europe centrale). En toute hypothèse, se développe en Europe, sous la couverture commode du populisme, un mouvement en faveur d'un pouvoir autoritaire, comme en témoignent certaines études d'opinion[3]. Ce mouvement touche les démocraties historiques (France, Allemagne, Italie, Autriche…) comme le montre le succès des partis dits populistes à la droite ou à la gauche de l'échiquier politique. Il est également nourri par un sentiment de perte d'identité et d'impotence, c'est-à-dire d'inefficacité, du pouvoir politique. La dénonciation du populisme au nom de la démocratie est paradoxale.

[3] D. Reynié (dir.), *Où va la démocratie? Enquête internationale de la Fondation pour l'innovation politique*, Paris, 2017.

Comme l'a déclaré le président Macron lors d'un déplacement en Inde «*ce serait une drôle de conception de la souveraineté populaire que de dire qu'on soutient la démocratie sauf quand elle permet l'accession au pouvoir de valeurs contraires aux nôtres*»[4]. C'est toute l'ambiguïté, mais aussi la richesse, de nos démocraties libérales qui est en cause.

Ces évolutions de systèmes démocratiques, ou qui affirment la volonté de l'être, peuvent être assez erratiques: en Ukraine, l'élection d'un candidat issu du monde du spectacle, sans expérience politique; en Italie, une alliance entre un mouvement se définissant comme «antisystème», animé par un humoriste, (5 étoiles) et un parti situé à l'extrême droite sur l'échiquier politique. Dans d'autres États, l'évolution du système est plus cohérente (Pologne, Hongrie…). Elle engendre cependant des conflits avec l'Union européenne et tend à séparer une Europe occidentale libérale d'une Europe centrale plus autoritaire, conflit qui n'est pas sans danger pour l'unité européenne. Ce conflit prend une dimension juridique, alors que l'Union européenne a engagé des procédures d'infraction contre la Pologne et la Hongrie, et politique, alors que les élections au Parlement européen de 2019 cristallisent l'opposition, non plus entre la droite et la gauche, mais entre libéraux et non libéraux.

Il est trop tôt pour savoir si un tel système peut prospérer sans tomber dans les travers d'un régime autoritaire classique, car pour revenir à Montesquieu, «toute autorité qui a du pouvoir a tendance à en abuser» et «seul le pouvoir arrête le pouvoir». Il n'en reste pas moins que ce mouvement montre les limites d'un système qui tend à rejeter tant les identités nationales, que l'intérêt général et l'efficacité du pouvoir au profit exclusif d'une conception abstraite et technocratique de l'idée européenne, des droits individuels (ou communautaristes) parcellisés et contradictoires et d'un contrôle non démocratique et puissant du pouvoir politique. En réalité, la véritable question est de savoir si un tel système peut perdurer sans perdre, in fine, son caractère démocratique.

On relèvera d'ailleurs, sans que le phénomène soit exactement de même nature, que se développent dans les démocraties libérales, les plus ancrées dans ce système, le recours à des mesures d'urgence ou d'exception qui renforcent les pouvoirs gouvernementaux. Face

[4] Journal quotidien *Le Monde*, 12 mars 2016.

à un péril qui a pu être terroriste ou sanitaire, qui demain pourra être militaire ou numérique, la nécessité impose de rééquilibrer les relations entre l'intérêt général et les libertés individuelles et de renforcer le caractère autoritaire de l'exercice du pouvoir, alors même que de nombreux contrôles, notamment juridictionnels, sont maintenus. C'est l'un des défis auxquels sont confrontées les démocraties libérales. Il n'est pas sans lien avec l'analyse du concept qui est développé dans les études qui suivent.

Sur un plan plus théorique, indépendamment de l'existence et de l'avenir d'un modèle de démocratie non libérale, ces analyses nous conduisent à un retour sur la nature et la portée d'un principe que l'on pouvait croire à vocation universelle et standardisé, le principe démocratique.

BERTRAND MATHIEU

L'UTILITÀ DI UNA RIFLESSIONE SULLA POSSIBILITÀ DI UNA DEMOCRAZIA NON LIBERALE

Alcuni degli interventi raccolti da Ricardo Ramirez Calvo e Justin Orlando Frosini in questo numero speciale della Rivista *Percorsi Costituzionali* sono stati, in parte, presentati durante il workshop dedicato al tema delle democrazie illiberali tenutosi in occasione del Congresso dell'Associazione internazionale di diritto costituzionale che si è tenuto a Seul (Corea), nel giugno 2018. Il loro lavoro editoriale, che ha permesso questa pubblicazione su un tema fondamentale del dibattito costituzionale contemporaneo, dovrebbe essere lodato non solo in sede europea, ma anche, con modalità diverse, nella maggior parte dei continenti.

Questa pubblicazione deve anche essere collocata nel contesto del gruppo di ricerca dedicato al «costituzionalismo nelle democrazie non liberali» coordinato da Justin Orlando Frosini e Ricardo Ramirez Calvo, che è uno dei gruppi maggiormente attivi dell'Associazione internazionale di diritto costituzionale.

Il coinvolgimento, in questa riflessione, di costituzionalisti provenienti da sistemi giuridici molto diversi, tanto sotto il profilo storico quanto sotto il profilo ideologico, riflette l'importanza di questo concetto relativamente nuovo.

Attraverso un'errata interpretazione del suo significato originario, si tende ad equiparare la democrazia all'archetipo del buon governo[1] che associa la legittimità popolare, la separazione dei poteri e la garanzia dei diritti individuali. In realtà, la democrazia, intesa nella sua accezione ristretta, rappresenta un meccanismo di legittimazione del potere. In sostanza, elezioni libere e regolarmente disputate. Essa implica la libertà di espressione, l'esistenza di un'op-

[1] Cf. not. P. Rosanvallon, *Le bon gouvernement*, Paris, 2015.

posizione. A sua volta, il liberalismo politico mira a garantire un «governo moderato» (Montesquieu). Esso rinvia, al giorno d'oggi, alla separazione dei poteri e all'esistenza di diritti individuali garantiti da un giudice. Nel difendere questo governo liberale, di cui parla Montesquieu, non si stabilisce un legame necessario tra liberalismo e democrazia. Così un governo aristocratico, o oligarchico, potrebbe essere un governo liberale. Al contrario, si può perfettamente immaginare un sistema democratico in cui il potere potrebbe essere concentrato nelle mani di un singolo uomo, a condizione che il suo mandato sia regolarmente rimesso in discussione in occasione di libere elezioni e di un referendum plebiscitario. Se quest'ultimo modello non esiste nella realtà, è comunque teoricamente possibile.

Questa dissociazione tra democrazia e liberalismo[2] è presente, ad oggi, nel discorso di alcuni politici di regimi considerati spesso autoritari (anche se il grado di autoritarismo può variare in modo significativo). È il caso, in Europa, della Russia di Putin, dell'Ungheria di Orban, ma anche di altri Paesi dopo le recenti elezioni (Polonia, Repubblica Ceca…). Questo può essere spiegato attraverso diversi fattori: la rinascita di un sentimento nazionale in paesi che hanno vissuto occupazioni successive come parte di Imperi (ottomano, austro-ungarico, Terzo Reich, sovietico per l'Ungheria); la necessità di riscoprire valori propri e le proprie radici storiche nel contesto di un'Europa che secondo loro ha perso valori e punti di riferimento; l'indebolimento del potere politico segnato dalla crisi della democrazia legata al sentimento (o alla realtà) che i voti dei cittadini contribuiscano solo marginalmente alla determinazione della politica adottata; l'influenza dei giudici sulla vita sociale, dei poteri finanziari sulla vita economica, etc. In altri paesi, questa nozione si riferisce a tradizioni di presidenzialismo autoritario, come, a titolo esemplificativo, in Sud America. Questo presidenzialismo si ritrova anche in alcuni Stati emersi dalla decolonizzazione. Al contrario, sistemi come quello cinese, per esempio, rifiutano tanto la democrazia che il liberalismo. Il concetto di democrazia liberale concerne, infatti, una grande varietà di situazioni; l'unico punto comune è l'esistenza di un potere legittimato attraverso elezioni, ma il cui esercizio si discosta dalle esigenze della moderazione liberale.

[2] Cf. B. Mathieu, *Le droit contre la démocratie*, Paris, 2017.

C'è quindi il desiderio di ristabilire un potere politico forte, autoritario e legittimato da una volontà popolare chiaramente espressa. Questa volontà di rimettere al centro del gioco la democrazia porta, a sua volta, a respingere ciò che obbliga o limita il potere politico e ad esprimere valori propriamente nazionali. Da qui, un esercizio concentrato di potere e conflitti con i giudici, gli organismi europei e persino con la stampa. Questa situazione tende ad essere concettualizzata (giustificata) ricorrendo al concetto di democrazia non liberale.

Le seguenti riflessioni, molto sommarie, riguardano la situazione europea, tuttavia gli interventi presentati in questo numero permettono di arricchire l'analisi in un campo più ampio.

L'evoluzione del modello democratico, che non può più essere ignorata, può invece essere spiegata da numerosi fattori, alcuni dei quali sono già stati invocati. Potrebbe trattarsi dell'introduzione di un sistema democratico in un paese che non conosce una tradizione liberale. Anche la concezione egemonica e universalistica del concetto individualista dei diritti fondamentali può svolgere un ruolo. Ma può anche trattarsi di una volontà di rottura con un modello che, a torto o a ragione, si ritiene possa limitare eccessivamente il potere politico attraverso norme giuridiche che rientrano nello Stato di diritto, un intervento dei giudici o vincoli del diritto sovranazionale. I timori di una perdita di identità legata allo sviluppo dell'immigrazione e del comunitarismo, all'ascesa di valori estranei alle culture nazionali, come quelli legati all'Islam, possono anche portare al rifiuto di una concezione liberale della democrazia (Paesi dell'Europa centrale). In ogni caso, sotto la comoda copertura del populismo, si sta sviluppando in Europa un movimento a favore del potere autoritario, come dimostrano alcuni studi di opinione[3]. Questo movimento tocca le democrazie storiche (Francia, Germania, Italia, Austria) come dimostra il successo dei partiti c.d. populisti a destra o a sinistra dello spettro politico. Questo movimento è anche alimentato da un sentimento di perdita d'identità e di impotenza, cioè di inefficienza, del potere politico. La denuncia del populismo in nome della democrazia è paradossale. Come ha detto il presidente Macron durante una visita in India, «*sarebbe una strana con-*

[3] D. Reynié (dir.), *Où va la démocratie? Enquête internationale de la Fondation pour l'innovation politique*, Paris, 2017.

cezione della sovranità popolare dire che noi sosteniamo la democrazia, tranne quando essa permette l'adesione al potere di valori contrari ai nostri»[4]. È in gioco tutta l'ambiguità, ma anche la ricchezza, delle nostre democrazie liberali.

Queste evoluzioni dei sistemi democratici, o sistemi che affermano la volontà di esserlo, possono essere piuttosto erratiche: in Ucraina, l'elezione di un candidato del mondo dello spettacolo, senza esperienza politica; in Italia, un'alleanza tra un movimento che si definisce «anti-sistema», guidato da un comico, (5 stelle) e un partito situato all'estrema destra dello scacchiere politico. In altri Stati l'evoluzione del sistema è più coerente (Polonia, Ungheria…). Tuttavia, essa crea conflitti con l'Unione Europea e tende a separare un'Europa occidentale liberale da un'Europa centrale più autoritaria: questo scontro non è privo di pericoli per l'unità europea. Questo conflitto assume una dimensione giuridica laddove l'Unione Europea avvia procedure di infrazione contro la Polonia e l'Ungheria, e una dimensione politica, nel momento in cui le elezioni al Parlamento europeo del 2019 cristallizzano l'opposizione, non tra destra e sinistra, ma tra liberali e non liberali.

È troppo presto per sapere se un tale sistema può prosperare senza cadere nella trappola di un classico regime autoritario, perché, per tornare a Montesquieu, «ogni autorità che ha potere tende ad abusarne» e «solamente il potere ferma il potere». Tuttavia, questo movimento mostra i limiti di un sistema che tende a respingere sia le identità nazionali, sia l'interesse generale e l'efficacia del potere a vantaggio esclusivo di una concezione astratta e tecnocratica dell'idea europea, dei diritti individuali (o comunitaristi) frammentati e contraddittori e di un controllo antidemocratico e forte del potere politico. In realtà, la vera questione è se un tale sistema possa continuare senza perdere, in ultima analisi, il suo carattere democratico.

Si rileveva peraltro, senza che il fenomeno sia esattamente della stessa natura, che nelle democrazie liberali si può fare ricorso a misure di emergenza o di eccezione che rafforzano i poteri governativi. Di fronte ad un pericolo che può essere terroristico o sanitario, che domani potrà essere militare o digitale, la necessità e urgenza impone di riequilibrare le relazioni tra l'interesse generale e

[4] *Le Monde*, 12 marzo 2016.

le libertà individuali e di rafforzare il carattere autoritario dell'esercizio del potere, mentre vengono mantenuti numerosi controlli, in particolare quelli giurisdizionali. Questa è una delle sfide che le democrazie liberali devono affrontare ed è rilevante rispetto all'analisi del concetto che si sviluppa negli articoli qui pubblicati.

Su un piano più teorico, indipendentemente dall'esistenza, oggi o nel futuro, di un modello di democrazia non liberale, questi studi ci riportano a una riflessione rispetto alla natura e alla portata di un principio che si credeva universale e standardizzato, cioè il principio democratico.

BERTRAND MATHIEU

THE USEFULNESS OF A REFLECTION ON THE POSSIBILITY OF A NON-LIBERAL DEMOCRACY

Some of the articles gathered together by Ricardo Ramirez Calvo and Justin Orlando Frosini in this special issue of *Percorsi Costituzionali* were presented during the workshop on non-liberal democracies, organized as part of the Congress of the International Association of Constitutional Law which was held in Seoul (Korea) in June 2018. Commendation is due to their editorial work which made this publication possible. This is one of the most important topics in the contemporary constitutional debate, not only in Europe but also, in its various forms, in most continents. This publication has to be seen in the wider framework of the research group dedicated to "Constitutionalism in Illiberal Democracies", headed by Justin Orlando Frosini and Ricardo Ramirez Calvo, which is one of the most active groups of the International Association of Constitutional Law.

This reflection involves constitutionalists from historically and ideologically very diverse legal systems, which shows the importance of this relatively new concept.

Due to a conversion of its original meaning, we tend to assimilate democracy to the archetype of a good government[1] coupled with popular legitimacy, separation of powers and the guarantee of individual rights. In reality, strictly speaking, democracy is a mechanism of legitimating power. Roughly speaking this means free elections held at regular intervals. It implies the freedom of expression and the opposition's existence. For its part, political liberalism aims to ensure a «moderate government» (Montesquieu). It refers today to a separation of powers and to the existence of individual rights guaranteed by a judge. In defending this liberal government, Mon-

[1] Cf. not. P. Rosanvallon, *Le bon gouvernement*, Paris, 2015.

tesquieu does not necessarily link liberalism with democracy. Thus an aristocratic or oligarchic government could be a liberal government. On the contrary, we could perfectly imagine a democratic system in which power is concentrated in one person, provided that her/his mandate is regularly disputed through free elections and plebiscitary referendum. If this last model does not actually exist, it is still theoretically possible.

This dissociation between democracy and liberalism[2] is today found in the speeches of policy makers from regimes often considered as authoritarian (even if the degree of authoritarianism can differ markedly). This is the case in Europe, in Putin's Russia, in Orban's Hungary but also in other countries following recent elections (Poland, Czech Republic…). This approach can be explained by several factors: the rebirth of a national sentiment in countries which experienced successive occupations as part of empires (Ottoman, Austro-Hungarian, Third Reich, Soviet Union for Hungary); the necessity to regain proper values and historic roots as part of a Europe that seems to have lost its values and guiding principles; the weakening of political power characterized by a democratic crisis linked to the feeling (or the reality) that citizens' votes contribute only marginally to determining policies; the judges' hold on social life, financial powers on the economic life… In other countries, this notion refers to the traditions of authoritarian presidentialism, for example in South America. This presidentialism can also be found in post-colonial states. In contrast, some systems such as China's, reject both democracy and liberalism. The concept of liberal democracy covers a wide range of situations, the only commonality is the existence of a power legitimized by elections, but whose exercise depart from the requirements of liberal moderation.

Thus, a will to re-establish a strong and authoritarian political power, legitimized by a popular will clearly expressed, is manifest. This willingness to put democracy back at the heart of the game leads, in turn, to reject what binds or limits the political power and to express properly national values. Thus, a concentrated power conflicts with judges, European institutions, perhaps the press. This situation tends to be conceptualized (justified) by the use of the concept of non-liberal democracy.

[2] Cf. B. Mathieu, *Le droit contre la démocratie*, Paris, 2017.

The very brief reflections that follow deal with the European situation, but the articles contained herein make it possible to enrich the analysis to a wider field.

The evolution of the democratic model, which cannot be ignored, can be explained by numerous factors, some of which have already been mentioned. It may be the introduction of a democratic system in a country without a liberal tradition (Russia). The hegemonic and universalistic approach of an individualist view of fundamental rights can also come into play. But it can also be about a strong desire to break with a model considered, right or wrongly, as limiting excessively the political power through legal rules regarding the rule of law, through the judges' intervention or through the constraints of supranational law. Fears of losing identity due to immigration or communitarianism, to the increasing power of values unknown to national cultures – such as those related to Islam – can also lead to the rejection of a liberal approach to democracy (see the countries of Central Europe). In any case, a movement in favour of an autocratic power is developing in Europe, as testified by some opinion polls[3]. This movement affects historic democracies (France, Germany, Italy, Austria…) as shown by the success of so-called left-wing and right-wing populist parties. It is fostered by a loss of identity and a feeling of impotence, that is to say the inefficiency of political power. The denunciation of populism in the name of democracy is paradoxical. As President Macron stated during his visit to India: «*It would be a strange approach to popular sovereignty to say that we support democracy except when it allows the rise to power of values differing from ours*»[4]. It is the ambiguity and the wealth of our liberal democracies that is questioned.

The evolution of democratic systems, or systems which claim the will to be democratic, can be quite erratic: in Ukraine, the election of a candidate coming from the show business, without political experience; in Italy, an alliance between a movement defining itself as «anti-system», led by a comedian, (5 stars) and a far-right party. In other states, the evolution of the system is more coherent (Poland, Hungary…). Nonetheless, it creates conflicts with the Eu-

[3] D. Reynié (dir.), *Où va la démocratie? Enquête internationale de la Fondation pour l'innovation politique*, Paris, 2017.

[4] Journal quotidien *Le Monde*, 12 mars 2016.

ropean Union and tends to divide a Western liberal Europe from a more authoritarian Central Europe, a conflict which has its dangers for European unity. This conflict takes a legal dimension, when the European Union initiates infringement proceedings against Poland and Hungary; as well as a political dimension, when the 2019 elections to the European Parliament consolidated the opposition, not between the right and the left, but between liberals and non-liberals.

It is too early to know if such a system can thrive without falling into the trap of a classical authoritarian regime, because to come back to Montesquieu, «Any authority which has power tends to abuse it» and «only power stops power». The fact remains that this movement shows the limits of a system that tends to reject not only national identities, but also the general interest and the effectiveness of power in favour of an abstract and technocratic approach of the European idea, of individuals rights (or communitarists) which are fragmented and contradictory and of a non-democratic and powerful control of political power. Concretely, the real question is if such a system can last without losing its democratic character.

Moreover, we can note that, without being exactly of the same nature, the use of emergency or exemption measures which reinforce governmental power is expanding in liberal democracies. Facing a terrorist or sanitary danger, which tomorrow can become military or digital, there is a need to rebalance the relations between general interest and individual liberties and to strengthen the authoritarian character in the exercise of power, even though numerous controls, notably judicial, are maintained. It is one of the challenges that liberal democracies are facing. It is not unconnected to the analysis of the concept which is developed in the articles contained herein.

On a more theoretical level, independently from the existence and from the future of a model of non-liberal democracy, these studies drive us to return to the nature and the scope of a principle that we thought was universal and standardized: the democratic principle.

SAGGI

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ILLIBERAL CONSTITUTIONALISM: A CONTRADICTION IN TERMS?

1. *Introduction*

Illiberal constitutionalism has always been a disputed term. The use of it presupposes that it defines a certain category of constitutional practice which deviates from what is understood to be the norm or, at least, a minimum standard. The term "illiberal constitutionalism" has been subject to extended criticism.[1] Some authors have preferred to use alternative denominations such as authoritarian constitutionalism or, as David Landau, abusive constitutionalism, which he defines as the use of mechanisms of constitutional change to make a state significantly less democratic than it was before.[2]

Abusive constitutionalism utilizes constitutional tools to create authoritarian and semi-authoritarian regimes. The resulting regimes usually hold competitive elections, but, through different means, incumbents tend to keep power for themselves, making it almost im-

[1] See in this very same issue the insightful essay by T. Daly, *Illiberal Democracy: Time to Stop Using a Problematic Term?*

[2] D. Landau, *Abusive Constitutionalism*, in *University of California Davies Law Review*, 47, 2013, 195.

possible for competing candidates to achieve any meaningful degree of power, even less any change of government. Landau adds that:

> «[…] in these regimes the dominant political actors and forces tend to control not only the branches of government, but also the mechanisms of horizontal accountability that are supposed to check political actors. Thus, institutions like courts, ombudsmen, attorney general's offices, and electoral commissions all tend to be controlled by incumbents».[3]

In turn, Law and Verteeg use the term sham constitutions to define a constitution whose provisions are not upheld in practice. In order to determine if a constitution meets this definition, the magnitude of the gap between what a country promises in its constitution and what it delivers in practice is observed: the larger the shortfall, the more strongly that the constitution is identified as a sham[4]. As those authors recognize, sometimes it is difficult to differentiate sham constitutions and aspirational constitutions.[5]

Sham constitutions would be no more than window dressing, but the reasons for which authoritarians take pains in staging such a disguise is not at all clear, as Ginsburg and Simpser show.[6] These authors use the denomination authoritarian constitutionalism to refer to constitutions that substantially deviate from Western constitutional models, a term that has been extensively used.

Notwithstanding all the force of the arguments against the term "illiberal constitutionalism", the alternatives do not solve the indeterminacy of the concept and, thus, are not an adequate option.

2. *The Concept of Constitutionalism*

One of the main inventions[7] of American constitutionalism is the separation of powers with its checks and balances. Certainly the separation of powers was not a novelty when it was introduced into

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[3] D. Landau, *op. cit.*, 200.

[4] D.S. Law, M. Versteeg, *Sham Constitution*s, in *California Law Review*, 101, 2013, 880.

[5] D.S. Law, M. Versteeg, *op. cit.*, 881.

[6] T. Ginsburg, A. Simpser, *Introduction*, in T. Ginsburg, A. Simpser (eds.), *Constitutions in Authoritarian Regimes*, Cambridge, 2014, 7.

[7] The idea of "invention" in the art of government, specifically with regard to the contribution of the U.S. Founding Fathers, is explained by S.E. Finer, *The History of Government*, Oxford, 1999, Vol. 3, 1507.

the United States Constitution in 1787. However, its combination with checks and balances among the three different branches is a creation of American constitutionalism. One of the best explanations of this principle was given by James Madison in The Federalist Papers No. 51:

> «But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means, and personal motives, to *resist encroachments of the others*. The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary *to control the abuses of government*. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this; you must first enable the *government to control the governed*; and in the next place *oblige it to control itself*. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions»[8] (italics added).

Francis Wormuth rightly observed that to these auxiliary precautions mentioned by Madison, we give the name constitutionalism.[9]

Control is an inseparable feature of liberal constitutionalism. It is not enough to determine the rules under which the government will operate. In order to have a liberal constitutional system, government must be confined and controlled. The basic idea of liberal constitutionalism requires that to each grant of power, a control mechanism must be countered.[10]

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[8] J. Madison, *Federalist No. 51*, in A. Hamilton, J. Madison, J. Jay, *The Federalist on the New Constitution*, Hallowell, 1857, 239.

[9] F.D. Wormuth, *The Origins of Modern Constitutionalism*, New York, 1949, 3.

[10] A Spanish scholar argues that control is an inseparable feature of the constitution itself, and that if there is no control, there is no constitution, see M. Aragón, *El Control como Elemento Inseparable del Concepto de Constitución*, in *Revista Española de Derecho Constitucional*, Vol. 19, 1987, 52.

A few years after Madison's statements, Thomas Paine wrote one of his most renowned essays, *Rights of Man*, in which he expressed similar views. Paine's starting point was that «[a] constitution is not the act of a government, but of a people constituting a government; and government without a constitution, is power without right».[11] In his view, government did not precede the constitution, but was the result of it. He rejected the idea that the constitution is a compact between the people and the government, but rather a compact of the former between each of them to form a government. For him, «[t]o suppose that any government can be a party in a compact with the whole people, is to suppose it to have existence before it can have a right to exist».[12] This is the core of his idea of a constitution: «a constitution is a thing antecedent to the government, and always distinct therefrom».[13]

3. *Critique of Liberal Constitutionalism*

This concept of a constitution is not free from criticism. One of the strongest critics was of course Carl Schmitt, who objected «that which is designated as a 'true' or 'genuine' constitution often only corresponds to a particular ideal of the constitution».[14] Schmitt added that «[t]he principles of the modern, *bourgeois-Rechtsstaat* constitution correspond to the constitutional ideal of bourgeois individualism, so much, indeed, that these principles are often equated with the constitution as such and *constitutional state* is given the same meaning as *bourgeois Rechtsstaat*».[15] Sometimes liberal constitutionalism even denies the name constitution to a document which does not satisfy the demands of its ideal type.[16]

Marxists also despise liberal constitutionalism as nothing more than ideology. For them, law has an ideological character. Although

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[11] T. Paine, *Rights of Man*, New York, 2004, 156. Paine's book was originally published in 1791.

[12] T. Paine, *op. cit.*, 160.

[13] T. Paine, *op. cit.*, 163.

[14] C. Schmitt, *Constitutional Theory*, Durham, 2008, 89. For the purpose of this paper, the English translation by Jeffrey Seitzer is used.

[15] C. Schmitt, *op. cit.*, 169.

[16] C. Schmitt, *op. cit.*, 89; also see L. Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in *Cardozo Law Review*, Vol. 14, 1992, 534-536.

neither Marx nor Engels developed a comprehensive theory of law, there are scattered references to law in their works. The predominant early[17] Marxian view is that the economic production and the social relationships constituted by it determine the coming into existence as well as the disappearance of state and law.[18] As pointed out by Engels, «justice is never anything but the ideologized, glorified expression of the existing economic relations».[19] Law, from this perspective, is one of the means to alienate the worker in a bourgeois society, in order to obtain from the worker the maximum possible surplus value. It is one of the weapons used by capitalist society to oppress the workers, as part of the class struggle. In the communist society, with the disappearance of classes, law will become superfluous.[20]

As explained above, what we call liberal constitutionalism corresponds to a certain ideal, an aspirational ideal in Tushnet's words.[21] Whether such ideal is the best constitutional arrangement or not is subject to dispute.[22] However, this does not invalidate the approach of analysing constitutions by confronting them with a given set of ideas, in this case with liberal constitutionalism. The question whether those patterns are better than others, is part of a different discussion. The result of this separate debate does not influence, in our view, the adequacy of the term "illiberal constitu-

[17] The idea of law in communist countries, in particular in the Soviet Union, changed significantly over the years. A general account of communist legal theory is the classic work of H. Kelsen, *The Communist Theory of Law*, New York, 1955. A specific overview of the constitutional theory in communist states can be found in G. de Vergottini, *Diritto costituzionale comparato*, Vol. II, Padova, 2004, 4-154. However, one should bear in mind that even the idea of a legal theory and that there is a special phenomenon named law is rather alien to Marxism cfr. H. Collins, *Marxism and Law*, New York, 2001, 13.

[18] H. Kelsen, *op. cit.*, 1.

[19] F. Engels, *The Housing Question, Part Three: Supplement on Proudhon and the Housing Question*, in K. Marx, F. Engels, *Collected Works*, London, 2010, Vol. 23, October 1871-July 1874, Section II, 381.

[20] C.J. Friedrich, *Die Philosophie des Rechts in historischer Perspektive*, Berlin, 1955, 8.

[21] M. Tushnet, *The Possibility of Illiberal Constitutionalism?*, in *Florida Law Review*, Vol. 69, 2017, 1371.

[22] Nazi jurists, for example, claimed that the Third Reich was a *Rechtsstaat*, a state where the rule of law was respected (a comprehensive description of this debate can be found in J. Meierhenrich, *The Remnants of the Rechsstaat*, Oxford, 2018, 95-158).

tionalism" as opposed to such ideal constitution termed "liberal". It helps to put in context the analysis of constitutions which substantially deviate from the standard of liberal constitutionalism.

Matteucci argues that the term "constitutionalism" is used to identify an ideal type of political organization with which reality may be confronted. It is a «technique of liberty against arbitrary power».[23] In other words, to establish liberal constitutionalism as a pattern to compare with, does not mean that a constitution is required to have a certain substantive normative content to be legitimate, but only to be regarded as liberal. From a positivist point of view, a constitution, like any legal order, does not need to meet certain substantive content to assert its legitimacy. Validity and substantive justice are separate levels of analysis. To classify a constitutional system as illiberal does not automatically qualify it as substantially unjust and therefore it does not automatically lead to discarding the concept altogether.

Illiberal constitutionalism is not without defenders, although few of them would accept using such denomination. They would prefer to use the notion of non-liberal constitutionalism as Graham Walker does.[24] He argues that «a constitutionalism conceived independent of liberal criteria may allow a different but equally principled set of answers».[25] Walker's view of liberal constitutionalism wrongly assumes that it requires an absolute neutral state, devoid of any kind of substantial values or ends. This notion is, however, misled, since liberal constitutionalism is a «normative political commitment, an espousal of a society that would promote some public and personal goods and not others».[26]

Liberal constitutionalism must not be mixed up with the necessity of a minimal state. Bobbio rightly observed that the limited state «covers two different aspects of the problem, which are not always properly distinguished: the limits (*a*) of the *powers*, and (*b*) of the *functions* of the state».[27] The limits of powers presuppose the

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[23] N. Matteucci, *Organizzazione del potere e libertà. Storia del costituzionalismo moderno*, Bologna, 2016, 19-20.

[24] G. Walker, *The idea of nonliberal constitutionalism*, in I. Shapiro, W. Kymlicka, *Ethnicity and Group Rights*, New York, 1997, 154.

[25] G. Walker, *op. cit.*, 156.

[26] R.M. Smith, *Liberalism and American Constitutional Law*, Cambridge, MA, 1985, 14.

[27] N. Bobbio, *Liberalism and Democracy*, London, 2005, 11.

existence of rights-based states, but do not necessarily imply the existence of minimal-states. Liberal constitutionalism requires the existence of a limited state in terms of the respect for individual rights and, thus, the limitation of state powers. However, it does not entail that constitutions should, in order to be classified as liberal, reduce the functions of the state to those of a minimal state. Although to a certain point the limitations of the powers of the state may require the limitations of the functions of the state, one does not necessarily follow the other. In addition, liberal constitutions make substantive choices and impose certain material values. The recognition of communal identities and its incorporation into the constitutional structure does not diminish the liberal character of such a constitutional order as long as minorities are not deprived of their rights. No constitution is entirely neutral and even the most liberal do provide privileges to certain groups and not to others.

4. *Liberal Constitutionalism and the Protection of Individual Rights*

What is liberal constitutionalism? We understand it to mean a constitutional system which provides the following:

(*i*) The separation of powers, with real checks on the exercise of power and, thus, securing the real independence of the judiciary;
(*ii*) Recognition of certain minimum rights of the individuals, who can seek protection from the courts in case of encroachment;
(*iii*) Fair, periodic and competitive elections.

This is a minimal definition and can certainly be heavily criticized. However, our goal is not to provide a definition to put an end to the debate. It is much simpler than that: to set a conceptual basis as a starting point for the analysis of the trends of constitutional organization across the world. As explained before, some authors dispute that liberal constitutionalism be the only path to democratic government and constitutionalism. However, as stated above, to define a constitution as illiberal is a descriptive conclusion, not necessarily an assessment of its substantive justice. Although the negative side of the term cannot be ignored, the objectivity of its use must be stressed.

We do believe that constitutionalism must be liberal in order to be worthy of such a name. Constitutionalism means that the auxiliary precautions mentioned by Madison exist. It is the call of early liberals for limited government under the rule of law.[28] Such a limited government is not an end in itself, but the means to protect individual rights from infringements from the state. Barnett reminds us that a constitution is «the law that governs those who govern us and it is put in writing so it can be enforced against the servants of the people».[29] A constitutional organization that fails to provide such protection, falls short of the category of constitutionalism.

Carl J. Friedrich has shown that the doctrine of individual rights is one of the distinguishing features of modern constitutionalism.[30] Friedrich stressed such importance when he stated that the essence of constitutionalism is a vivid appreciation of the rights of free men.[31] Today we correct that slightly and talk of the rights of "free persons". The limitation of the powers of government in order to protect the rights of the people and shield them from tyranny, is both the main objective of liberalism and constitutionalism. It is in this sense that liberalism and constitutionalism merge and lead to the conclusion that the term illiberal constitutionalism is an oxymoron.

If constitutionalism is the political doctrine that claims that political authority should be bound by institutions that restrict the exercise of power,[32] the protection of individual rights is a necessary outcome of it. The importance of safeguards for rights is not new. American constitutionalism was based on the idea of the protection of individual rights. But in Europe the rights discourse established itself in legal debate only after the Second World War, a period termed by Bobbio as the age of rights.[33] It could just as well be denominated the age of liberal constitutionalism.

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[28] R.M. Smith, *op. cit.*, 30.

[29] R.E. Barnett, *Our Republican Constitution*, New York, 2016, 23.

[30] C.J. Friedrich, *Constitutional Government and Democracy*, 4th ed., Boston, 1950, 9.

[31] *Ibidem*.

[32] J-E. Lane, *Constitutions and political theory*, Manchester, 1996, 19.

[33] N. Bobbio, *L'età dei diritti*, Torino, 1997, 45.

5. *Neo-Liberalism, Unelected Power, Corruption, Eco-authoritarianism: the Many Faces of the Recurrent Menace to Liberal Constitutionalism*

The studies included in this special issue of *Percorsi Costituzionali* help us to understand the risks faced by liberal constitutionalism in contemporary times. The reaction of governments to the sudden appearance of the Covid-19 pandemic shows us that the threat to individual liberties is not merely theoretical. History teaches that panic is the seedbed of authoritarianism. The proper response must be found in liberal constitutionalism.

This special issue is the result of the activities of the Research Group on Illiberal Constitutionalism of the International Association of Constitutional Law, which we jointly coordinate. The Research Group was created by a happy coincidence in the World Congress of Constitutional Law held in Oslo, Norway, in 2014, where both authors, without having met before, had the same idea of constituting a group to promote the study of the extended phenomenon of non-liberal constitutionalism. Since then, the Research Group has addressed the general theoretical issues related to constitutionalism in illiberal democracies,[34] it has looked at the illiberal elements in consolidated democracies[35] which began with a keynote speech by our esteemed colleague and vice president of IACL Bertrand Mathieu on «*Démocratie, Libéralisme, État de droit: pour Remettre un Peu d'Ordre dans Ces Notions*»[36] and it has dealt with the Modern Challenges to Democracy.[37] In parallel to these plenary sessions since 2014 the Center for Constitutional Studies and Democratic Development and the Johns Hopkins University's School of Advanced International Studies have promoted two seminar series. The first on the general theme of Constitutionalism in Illiberal

[34] *Constitutionalism in Illiberal Democracies*, 28 April 2016, Bocconi University, Milan, Italy. Speakers included Giuseppe Franco Ferrari, Donna Greshner, Andrew Harding, Marko Milenkovic, Pablo Riberi and Arianna Vedaschi.

[35] Illiberal Elements in Consolidated Democracies, 14-15 October 2016, University of Padua, Padua, Italy.

[36] Other speakers included Sergio Gerotto, Giorgio Grasso, Filippo Viglione, Donna Greschner, Sara Pennicino, Paolo Barrozo and Frédéric Bérard.

[37] Modern Challenges to Democracy, 4-5 September 2017, University of San Andres, Buenos Aires, Argentina. The speakers included Sara Pennicino, Pablo Riberi, Carna Pistan, Zoltán Szente, Jason Mazzone, Patricio Nazareno, Martín D. Farrell, Sebastián Elías.

Democracies and the second focused on an understudied region within the field of comparative constitutionalm i.e. the former Soviet States of Central Asia.

With regard to the first general theme, during his seminar Dr Ognjen Pribicevic[38] addressed what he believes to be a crisis in liberalism in Western democracies[39] which has led to an erosion of the system of checks and balances and in Pribicevic's opinion this system does not exist anymore, since neoliberal ideology has dominated for almost half of the century. Dr Pribicevic argues that despite this crisis of liberalism in Western democracies, the EU is still the key to solving problems in the Western Balkans, as their modernization is impossible without EU help. To achieve this goal, the EU must be more present in the region to prove itself as a serious and capable player and dissuade other powers from wielding influence. If the EU does not step up more seriously, Dr Pribicevic predicts that China, Russia, Turkey will continue entering the Western Balkans and the problems of the Balkan region will creep closer to the EU.[40]

On 25th March 2019, Sir Paul Tucker[41] gave a talk on *A Gap in Constitutionalism: Independent Central Banks and Other Commitment Devices*,[42] based on research for his book *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State*. Tucker's core argument is that

> «Today there is a risk that people are going into central banking to seek increased power as these positions become more prestigious. Instead of the usual "politically literate technocrats," today there are more "technocratically literate politicians" looking for leadership positions in central banks. Because of this, there should be increased

[38] Senior Research Fellow at the Institute of Social Sciences in Belgrade, Serbia and former Serbian Ambassador to the United Kingdom and Germany.

[39] O. Pribicevic, *The Crisis of Liberalism and Its Implications on the Western Balkans*, Constitutionalism in Illiberal Democracies Series, Bologna, 11th February 2019.

[40] For an extensive summary of Pribicevic's talk see *https://www.bipr.eu/PROFILESUMMARIES/20190211.pdf* (last accessed 21st June 2020).

[41] Systemic Risk Council; Harvard Kennedy School, US and former deputy governor of the Bank of England from 2009 to 2013.

[42] P. Tucker, *A Gap in Constitutionalism: Independent Central Banks and Other Commitment Devices*, Constitutionalism in Illiberal Democracies Series, Bologna, 25th March 2019.

> scrutiny and transparency. It will also be important to implement reforms and lines of supervision that make politicians more accountable for the design of central banking regimes, and central banks more accountable for their trusteeship of those regimes. Otherwise the *illiberal backlash* will be greater»[43] (italics added).

On 21st October 2019, Donna Greschner,[44] a longstanding member of our research team, gave a fascinating talk on *Corruption's Corrupting of Democratic Constitutionalism*.[45] It is common knowledge that corruption is one of the biggest menaces to liberal democracy, but what Greschner justly underlined during her seminar is that the trend towards turning corruption into a human rights violation is not the best way of tackling the problem. Indeed the Canadian constitutionalist makes a compelling argument by affirming that «existing mechanisms of constitutional law yielding stronger results»[46] might be a better weapon in the fight against this great threat to an equal and just society and thus to the underlying tenants of liberal democracy:

> «Moreover, attributing human rights violations to kleptocrats remains extremely challenging in the absence of damning empirical evidence. Criminal law, on the other hand, explicitly frames grand corruption as theft and with the capabilities to "name, shame, and punish" violators in a way that human rights law cannot».[47]

Finally on 10th February 2020, just before the outbreak of the pandemic, we held a seminar with Wolfgang Merkel[48] during which the esteemed German political scientist posed the question of whether the much debated crisis of democracy might actually be an invention. There were two takeaways from this seminar.[49] First of all, with a certain caution based on recent developments in the US

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[43] For an extensive summary of Tucker's talk see *https://www.bipr.eu/PROFILESUMMARIES/20190325.pdf* (last accessed 21st June 2020).

[44] University of Victoria, Canada

[45] D. Greschner, *Corruption's Corrupting of Democratic Constitutionalism*, Constitutionalism in Illiberal Democracies Series, Bologna, 21st October 2019

[46] For an extensive summary of Greschner's talk see (last accessed 21st June 2020).

[47] *https://www.bipr.eu/PROFILESUMMARIES/20191021-1.pdf*, 2.

[48] WZB Berlin Social Science Center; Humboldt University of Berlin, Germany.

[49] W. Merkel, *Is the Crisis of Democracy an Invention?*, *Constitutionalism in Illiberal Democracies Series*, Bologna, 10th February 2020

and elsewhere, Merkel emphasized what he considers a distinguishing feature of liberal democracy i.e. *resilience*:

> «Though the latest trends do not bode well, *resilience is also a feature of liberal democraci*es. Despite being in a more vulnerable position today […] liberal democracies have grown *more liberal* in other key areas. For instance, liberal democracies continue to make progress in issues, such as gender, gay and minority rights. Furthermore, no OECD country has witnessed its democracy collapse since 1967 (when a military junta overthrew Greece's democratically elected government)»[50] (italics added).

Secondly, Merkel raised an issue worthy of further investigation i.e. the threat to liberal democracy of so-called «eco-authoritarianism»[51]

> «[…] a recent phenomenon in which hardline climate activists have argued that representative democracy is too slow of a system to respond to the impending disaster of climate change. Activists advocate for government by enlightened technocrats rather than elected representatives, who would be capable of taking non-democratic measures to protect life on Earth».[52]

6. *Pseudo Liberal Democracies? A Regional Focus on Central Asia*

The second seminar series we organized as part of the IACL research group is devoted to Constitutional Developments in Central Asia, the results of which will appear in another forthcoming publication.[53] The first event was organized on 15th February 2016 and the speaker, Armen Mazmanyan,[54] was called upon to answer the question of whether the Constitutional Courts in Central Asia are to be considered Facades, Puppets or Trojan Horses. Maz-

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[50] See *https://www.bipr.eu/PROFILESUMMARIES/20200210.pdf*. 2, (last accessed 21st June 2020).

[51] D.C. Shahar, *Rejecting Eco-Authoritarianism, Again*, in *Environmental Values*, Volume 24, Number 3, June 2015, 345-366.

[52] See *https://www.bipr.eu/PROFILESUMMARIES/20200210.pdf*. 2, (last accessed 21st June 2020).

[53] J.O. Frosini, C. Pistan (eds.), *Illiberal Constitutionalism in Central Asia*, Wolters Kluwer, Padova (forthcoming).

[54] Director of the Apella Institute and of its Center for Constitutional Studies, Yerevan, Armenia.

manyan acutely observed that «Constitutional Courts by the nature of their composition represent a more liberal outlook than the regimes they operate under, with members often drawn from the academic community rather than existing judges from the lower courts».[55] In this respect, «Constitutional Courts can act as a "Trojan Horse" for democracy and liberal values within Central Asian countries».

The second event on 21st March 2016 saw an old friend of the CCSDD, Bill Bowring,[56] returning to Bologna to talk about *Constitutional Reset in Central Asia in the Context of the Eurasian Economic Union*. After rightly observing that «the present boundaries of Central Asia are the result of the Soviet Union»[57] and therefore they do not necessarily align with the groups living there, Bowring then went on to underline that the five states of Central Asia, namely Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan, «are very different in terms of geography, population, ethnicity and religion». Bowring pointed out that «because of the common history of Russian rule in the region, what happens in Russia is important to the situation in Central Asia and that «not only do Central Asian countries share a common Soviet past, they also have experience with authoritarian regimes and precarious or non-existent rule of law».

On 17th October 2017 Kathleen Collins[58] talked about *The Emergence and Mobilization of Islamism in the Former Soviet Union: Tajikistan in Comparative Perspective*. Collins began her seminar by underlying the fact:

> «[…] that the rise of Islamism in the country [Tajikistan] took people by surprise. Many Western scholars expected that 70 years of So-

[55] A. Mazmanyan, *Constitutional Courts in Central Asia: Facades, Puppets or Trojan Horses?*, Constitutional Development in Central Asia Series, Bologna 15th February 2016 see *https://www.bipr.eu/PROFILESUMMARIES/20160215.pdf* (last accessed 21st June 2020).

[56] Professor of Law at Birkbeck College, University of London and practising barrister (Field Court Chambers, Gray's Inn).

[57] B. Bowring, *Constitutional Reset in Central Asia in the Context of the Eurasian Economic Union*, Constitutional Development in Central Asia Series, see *https://www.bipr.eu/PROFILESUMMARIES/20160321.pdf*, 1-2 (last accessed 21st June 2020).

[58] Associate Professor at the Department of Political Science at the Univerisity of Minnesota.

> viet rule would have destroyed institutional Islam and established entrenched support for secularism. Furthermore, Muslims in the USSR were cut off from the global Islamist movement. Despite these conditions, the Islamic Renaissance Party of Tajikistan (IRPT) became the country's principal opposition movement up until its ban last year [2016]».[59]

Collins identified three variables that affect mass mobilization of Islamic parties. First of all what she defines as the «legitimacy that comes from figures of sacred authority»,[60] second, the «strength of Islamic social networks», and third the success in applying «broad Islamic ideas to local political conditions».[61]

The scholar from Minnesota then goes on to explain the decision of the regime to start a total crackdown on political Islam which resulted in the banning of IRPT and the repression of its leaders, many of whom fled into exile. In Collins opinion:

> «this episode of repression could *threaten the democratic nature of political Islam* in Tajikistan. Repressing the moderate IRPT and eliminating a democratic outlet for political Islam could serve to strengthen the growing radical and militant movements in Tajikistan»[62] (italics added).

On 30th January 2017 we had the privilege of hosting the Director of Columbia University's Harriman Institute, Alexander Cooley,[63] who gave a fascinating talk on *Central Asia's Global Authoritarian Spaces: Politics and Contestation Outside of a Closed Region*. Cooley started his talk by addressing some of the widely-held beliefs concerning Central Asia and he pinpointed three «broad myths»[64] which, in his opinion, limit the way we examine the

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[59] K. Collins, *The Emergence and Mobilization of Islamism in the Former Soviet Union: Tajikistan in Comparative Perspective*, Constitutional Developments in Central Asia Series, 1; see *https://www.bipr.eu/PROFILESUMMARIES/20161017.pdf*, 1, (last accessed 21st June 2020).

[60] *Ibidem*.

[61] *Ibidem*.

[62] K. Collins, *op. cit.*, 2.

[63] Director of Columbia University's Harriman Institute for the Study of Russia, Eurasia and Eastern Europe and the Claire Tow Professor of Political Science at Barnard College, Columbia University.

[64] A. Cooley, *Central Asia's Global Authoritarian Spaces: Politics and Contestation Outside of a Closed Region*, Constitutional Developments in Central Asia Series,

process of democratization and political contestation in the region. The first is the myth of «global isolation and the lack of connectivity»,[65] the second is the myth of «partial liberalization»[66] and, third, the myth of «local traditionalism».[67] Cooley does not deny that these three myths actually have elements of truth to them, but the way we conceive them «prevent us from understanding the extraterritorial dimensions of Central Asia's authoritarian politics».[68]

Instead of these myths, Professor Cooley looks at other elements that might be obstructing the democratization of the region. The first is the «rise of "illiberal norms" in the global scene, such as conservative ideals and the spread of nationalism». Second he talks about a phenomenon of «transnational uncivil society».[69] In fact, according to Cooley the weak civil society in Central Asia, the so-called Elites Global Network and global kleptocracy are all facilitating the authoritarian regimes.

Finally, Cooley points to how inadvertently the West facilitates this situation by «enabling the capital flight and corruption that takes place through shell companies created within their borders».[70]

Our *Constitutional Developments in Central Asia Series* was successfully completed on 29th January 2018 with a talk given by one of the world's experts on Central Asian Constitutionalism,[71] Scott Newton.[72] Newton starts by examining what he terms as the «constitutional adjustments»[73] that have been made in the last few years in Uzbekistan, Turkmenistan, Kazakhstan, Tajikistan and Kyrgyzstan.

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see *https://www.bipr.eu/PROFILESUMMARIES/20170130.pdf*, 1-2 (last accessed 21st June 2020).

[65] A. Cooley, *op. cit.*, 1.

[66] *Ibidem*.

[67] *Ibidem*.

[68] *Ibidem*.

[69] A. Cooley, *op. cit.*, 2.

[70] *Ibidem*.

[71] Newton is the author of one of the very few books in English on the constitutional systems of Central Asia: S. Newton, *The Constitutional Systems of the Independent Central Asian States. A Contextual Analysis*, Oxford, 2017.

[72] Reader in Laws of Central Asia, SOAS University of London, London, United Kingdom.

[73] S. Newton, *Plus ça change…The Solved Riddle of All Central Asian Constitutions*, Constitutional Developments in Central Asia Series, see *https://www.bipr.eu/PROFILESUMMARIES/20180129.pdf*, 1, (last accessed 21st June 2020).

Although all the Central Asia constitutions have been reformed on several occasions, according to Newton these countries suffer from «persistent constitutional stasis»[74] and the governing institutions have three distinguishing features. The first is that these constitutions create a «super-president, in which the presidency is perceived as a meta-branch and remains generally unchecked».[75] Second, where there is a constitutional court, the latter lacks any power to check the other branches of government. Newton believes that these courts are carrying out «constitutional laundering»,[76] in other words they render legal what in fact is illegal. Third, the scholar from SOAS considers the parliaments of the countries in Central Asia to be mere talking shops composed of cronies of the president.

Newton, who is very critical of international organizations that carry out "democracy assistance" and provide opinions on constitution-making (such as the Venice Commission), goes on to underline that the constitutions of these five countries have become «a badge of entry to polite society…which must be donned in order to be taken seriously in the international community».[77]

7. *The X^th^ Congress of the International Association of Constitutional Law: the Ideal Forum to Discuss Constitutionalism in Illiberal Democracies*

The Xth World Congress of Constitutional Law in Seoul, Korea, was the venue for a workshop on Illiberal Democracy, which gave our Research Group the opportunity to engage in several in-depth debates with scholars from across the globe. The success of the workshop and seminars of our Research Group shows that illiberal constitutionalism is a current subject of concern. In the past it seemed to be something isolated to third world countries. Today, consolidated democracies show clear indications of authoritarian trends. Developments in Poland and Hungary, to mention just two examples, confirm that no country is entirely isolated from this peril.

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[74] S. Newton, *Plus ça change*, cit., 1.
[75] *Ibidem*.
[76] *Ibidem*.
[77] S. Newton, *Plus ça change*, cit., 2.

The contributions in this issue reflect this reality. In fact, they are devoted both to general theory and case studies that span across different regions of the world and intersect various constitutional tenants such as the role of Parliament, the rights of minorities, referendums and so forth.

The first paper, by Pablo Riberi, rejects shallow populist majoritarianism as well as non democratic responses towards the rule of the many by referring to systems that failed to work out a balance between popular rule and separation of powers.[78] In fact, Riberi believes that liberal achievements enshrined in the constitution are likely to be safer when their contents «came up from street fights rather than from Courts' adjudication».

This discourse connects perfectly with the second contribution by Tom Gerald Daly who questions the very use of the term illiberal democracy something that as a research group we have been debating since our creation in Oslo in 2014.[79]

The second group of papers deals with "creeping illiberalism" within the European Union and, it goes without saying that these contributions focus on the two member states that clearly manifest democratic decay: Hungary and Poland. Milani's paper deals with the way in which the Parliaments of Hungary and Poland have been adversely affected by what the author specifically defines as constitutional retrogression.[80] Still focusing on the Polish and Hungarian case, Drinóczi and Bien-Kacala claim that the failure of public law mechanisms, as for example, soft and hard law instruments must be linked to illiberal populism, on the one hand, and emotionally unstable identity, on the other, combined to create the DNA of illiberal constitutionalism.[81] Andras Pap digs deeper into the question of identity by specifically addressing how the 2011 Hungarian Constitution must be interpreted, according to the pre-

[78] P. Riberi, *Non-Democratic Constitutionalism and the Uneasiness of the Crowds*, published herein.

[79] T. Daly, *op. cit.*

[80] G. Milani, *How Democratic are Illiberal Democracies? The Parliament in Constitutional Retrogression*, published herein.

[81] T. Drinóczi, A. BienKacala, *The DNA of Illiberal Constitutionalism: Failure of Public Law Mechanisms and an Emotionally Unstable Identity - A Hungarian and Polish Insight*, published herein.

amble, based on a specific ideologically driven controversial interpretation of history.[82]

A less known case of distancing from liberal constitutionalism and possible meddling with the history to build an ideologically driven interpretation of the Constitution is addressed by Carna Pistan and her paper devoted to national identity and minority rights in the Republic of Croatia.[83] Moving to a non EU country, but still belonging to the former Yugoslavia Marko Milenkovic's contribution deals with Serbia and the hot topic of "pandemic backsliding" which could of course be applied to other countries across the globe.[84]

Moving further to the East, Tatiana Maslovskaya tackles two important issues: first the legal context in which the notion of democracy is used in the member states of the Commonwealth of Independent States (CIS)[85] and second the limits to liberal democracy in these countries.[86] The paper sheds light on the specificities which characterise the way in which democracy and liberalism interplay in the post-Soviet space.

Cristina Gazzetta's contribution concerning Morocco and Tunisia highlights the fact that in these two countries the constitutional status of the opposition is a litmus test to assess their quality of democracy.[87] The way this theme links up to the topic of the special issue is the question of how illiberal democracies may influence the constitutional systems of these two countries of North Africa.

The third and final part of the special issue is devoted to one of the most common gateways for illiberal elements to creep into consolidated democracies. More specifically, the underlying idea of these three papers is that direct democracy can be a divisive tool of

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[82] A. Pap, *Fake History, Real Impositions on Constitutional Interpretation: the Case of Hungary's 2011 Constitution*, published herein.

[83] C. Pistan, *Memory Engineering, Nation-Building and Minority Rights Protection in the Republic of Croatia: the "Dark Side" of The Constitution*, published herein.

[84] M. Milenkovic, *Responses to the Covid-19 Crisis in Serbia: Democracy and The Rule of Law on Ventilators?*, published herein.

[85] That is to say: Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan and Uzbekistan.

[86] T. Maslovskaya, *Elements d'analyse sur l'état de la démocratie dans les pays de la Communauté des Etats Indépendants*, published herein.

[87] C. Gazzetta, *L'opposition constitutionnelle en Tunisie et au Maroc: quelques brèves réflexions*, published herein.

participation which may pave the way to an illiberal majoritarianism. In particular, Di Bari shows this conservative and anti-minority dynamic in various countries with regard to referendums on same-sex marriage across various jurisdictions around the world.[88]. The counter-minoritarian dilemma linked to direct democracy is also the concern of Pennicino's analysis of the Italian constitutional system.[89] Indeed, by using the case of the Five Star Movement, the author argues that despite the ideological orientation, all forms of populism are incompatible with liberal constitutionalism because they are at odds with a fundamental tenant of the latter, that is to say pluralism. More specifically, Pennicino offers evidence of this by providing an historical account of the constitutional reform agenda of the self-declared populist movement founded by Beppe Grillo and Gianroberto Casaleggio. Last but not least, by contrast, Sergio Gerotto offers an overview of direct democracy in Switzerland.[90] The latter, of course, is often considered the cradle of direct democracy and despite the distinguishing features of this constitutional system, is frequently referred to as a model to be imitated by populist leaders.

8. *Pandemic Backsliding or a Strengthening of Liberal Democracy?*

As this article goes to print the entire globe is in the grips of the Covid-19 pandemic. We have no intentions of opening Pandora's box and fully addressing the implications of the coronavirus on liberal democracies across the globe, but certainly this situation which, in many ways finds no equivalent in history, poses a series of questions in terms of the tenacity and resilience of liberal democracy as mentioned by Wolgang Merkel in his seminar and by Milenkovic and Pennicino.

More in general, this issue of *Percorsi costituzionali* showcases the variety of contributions which are the result of a five year long

[88] M. Di Bari, *A Majoritarian One-shot, a Minority being Shot. Direct Democracy and the «Counter-minoritarian Dilemma»*, published herein.

[89] S. Pennicino, *Has Liberal Constitutionalism Yielded to Populism or have the Populist Yielded to Liberal Constitutionalism? The case of Italy and the Five Star Movement*, published herein.

[90] S. Gerotto, *Note sparse sulla democrazia e i suoi limiti. Ovvero, del perché la Svizzera ha qualcosa da insegnare in tema di democrazia diretta*, published herein.

research project which initially focused on a very specific phenomenon, i.e. non-liberal constitutionalism, but today has gained a global, long term relevance.

Indeed, at a time foundational concepts of constitutionalism are being challenged not only by pandemics, but also by conflict of geopolitical interests and ideological values, constitutional scholars are called to rethink the core meaning of basic notions, as that of emergency, individual freedoms and sovereignty. A crisis as the one triggered by the Covid-19 virus could result in being a curse or a blessing for liberal constitutionalism, depending on whether, paraphrasing the very effective title of Milenkovic's piece, it turns out that it is liberal democracy to have been put on ventilators or whether, on the contrary, it is illiberal populism to have been put on hold by constitutional constraints.

It is the task of comparative constitutional scholars to earnestly engage with such question and to reach beyond their traditional comfort zone to engage with local oddities in order to detect the gradual decline of constitutional systems. In 2015, Renata Uitz published a full-hearted appeal to comparative law scholars, stating that «routine comparative constitutional law analysis should not be prone to overlook symptoms of gradual constitutional decline and even those that have been explicitly defined as building an illiberal democracy».[91] Five years ago, she warned that «focusing on general concepts, conducting surveys of constitutional designs in view of generalization, seeking universal principles in order to find convergences are all symptoms of the same tendency to disregard relevant differences and local variations»[92] and, considering the illiberal turn Hungary has progressively embraced, Renata Uitz's concerns resonate with us. It is our duty to act as sentinels and be guardians of constitutional developments especially at a local level and especially at an early stage.[93]

Bruno Leoni once said that «it seems the destiny of individual freedom at the present time to be defended mainly by economists

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[91] R. Uitz, *Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary*, in *I·CON*, 1, 13, 2015, 300.

[92] *Ibidem*.

[93] See also M. Hong, *Constitutional Resilience - How Can a Democratic Constitution Survive an Autocratic Majority?": Freedom of Speech, Media and Civil Society in Hungary and Poland*, in *VerfBlog*, 9th December 2018.

rather than by lawyers or political scientists».[94] As accurate as such statement might have been, and taking at heart the role of sentinels of constitutional developments mentioned above, this special issue tries to fill such gap.

Abstract

The article begins by addressing the very concept of constitutionalism. In this paper the two authors argue that the unwritten historical constitution needs to be revitalized and that, whatever its drawbacks, liberal democracy is still the best way to protect individual rights. The article highlights those events where the IACL research team debated the recurrent menace to liberal constitutionalism such as neo-liberalism, unelected power, corruption and eco-authoritarianism. The article ends with a question: has the Covid-19 pandemic led to further democratic retrogression or has it actually strengthened democratic regimes?

L'artcolo esordisce illustrando il concetto stesso di costituzionalismo. In questo contributo, i due Autori sostengono che deve essere rivitalizzata la costituzione storica e non scritta e che, pur con tutti i suoi difetti, la democrazia liberale rimane ancora il sistema migliore per proteggere i diritti individuali. L'articolo evidenzia tutte le iniziative dove il gruppo di ricerca IACL ha avuto modo di discutere le minacce ricorrenti al costituzionalismo liberale come, per esempio, il neo-liberalismo, il potere non eletto, la corruzione e l'eco-autoritarismo. L'articolo si conclude ponendo un quesito: la pandemia da Covid-19 ha portato ad una ulteriore retrogressione della democrazia o, al contrario, ha rafforzato i sistemi democratici?

[94] B. Leoni, *Freedom and the Law*, 3rd ed., Indianapolis, 1991, 3.

TOM GERALD DALY

ILLIBERAL DEMOCRACY: TIME TO STOP USING A PROBLEMATIC TERM?

1. *Introduction*

The concept of "illiberal democracy" is now widely used but is a problematic term. As an increasing number of states have suffered significant attacks on their democratic systems, such as Hungary or Poland, the term has been used to describe the resulting "hybrid" system of governance fusing elements of democratic and authoritarian rule, viewed as mirroring that in longer-standing governance systems such as Turkey, Russia, or Singapore. However, the term is applied to a wide variety of states, of varying levels of political freedom, and which can begin from different starting points (e.g. a "democratising" authoritarian state, or a "decaying" liberal democracy).

This article, by combining conceptual and comparative analysis, will argue that the concept of "illiberal democracy" is problematic, or at least needs to be used with significant caution, for three main reasons: (*i*) incompatibility with contemporary understandings of democracy; (*ii*) the stark differences between "illiberal

democracies"; and (*iii*) the availability of possibly more useful terms. Part I provides a brief overview of how the term has become more common and the ways in which it is used. Parts II, III, and IV address each of the three reasons which suggest the term "illiberal democracy" is problematic.

The main claim of this article is that the term "illiberal democracy" needs to be used carefully, given that it is applied to states of different natures and can lack conceptual clarity. More fundamentally, it is argued that illiberal democracy is a problematic term due to its practical tendency to confer legitimacy on many systems of governance that are not democratic even in the narrowest sense of according meaningful electoral power to the people to vote sitting governments out of office. The article concludes that "hybrid regime" may be a more appropriate term on the basis that it deprives fundamentally undemocratic regimes of the legitimatory label of "democracy", and helpfully shifts our focus away from the question of whether a system is an alternative form of democracy (which is an effective riposte by budding autocrats) to the much more pertinent question of what recognisable elements of authoritarian rule are present.

2. *The widespread use of the term "illiberal democracy"*

The term "illiberal democracy" was popularised by the political commentator Fareed Zakaria in a 1997 journal article.[1] Zakaria used the term to describe the phenomenon that in an increasing number of countries, democratically elected leaders were engaging in practices at odds with liberal democratic rule. Zakaria's definition of the term in his 1997 article is "democratically elected regimes which routinely ignore constitutional limits on their power and which deprive their citizens of basic rights and freedoms".[2] The term encapsulated a concern that, in a context of worldwide shifts to democratic rule, not all trajectories were leading to recognisable liberal democratic systems. While many states in the "third wave of democratisation" were making clear democratic progress, others were stalling or developing a different form of governance: not fully authoritarian, nor fully democratic.

[1] F. Zakaria, *The Rise of Illiberal Democracy*, in *Foreign Affairs*, 22, 1997.
[2] *Ibidem*.

The term has since become widely used. In academia, it is used by leading scholars including Renáta Uitz, Marc Plattner, and others in analysis of states including Hungary, Poland, Thailand and the Philippines.[3] It is reflected in, for instance, the names of the International Association of Constitutional Law (IACL) research group "Constitutionalism in Illiberal Democracies". The term is also broadly used by policymakers and media commentators alike.[4] Reports by Freedom House, the leading democracy assessment organisation, commonly employ the term "illiberal democracy" and the term "illiberalism" as a synonym, e.g. recently defining it as "an ideological stance that rejects the necessity of independent institutions as checks on the government and dismisses the idea of legitimate disagreement in the public sphere".[5]

In a recent book, the political theorist Yascha Mounk uses the term to describe the phenomenon "whereby voters are growing impatient with independent institutions and less and less willing to tolerate the rights of ethnic and religious minorities," which he calls "democracy without rights".[6] He contrasts this with the phenomenon of "undemocratic liberalism", which he sums up as "rights without democracy". In this form of government, Mounk argues, "procedural niceties are carefully followed (most of the time) and individual rights are respected (much of the time). But voters have long since concluded that they have little influence on public pol-

[3] See e.g. R. Uitz, *Can You Tell When an Illiberal Democracy is in the Making? An appeal to Comparative Constitutional Scholarship from Hungary*, in *International Journal of Constitutional Law*, 13, 1, 2015, 279; M. Plattner, *Illiberal Democracy and the Struggle on the Right*, in *Journal of Democracy*, 30, 1, 2019; and P. Kongkirati, *From Illiberal Democracy to Military Authoritarianism: Intra-Elite Struggle and Mass-Based Conflict in Deeply Polarized Thailand*, *ANNALS, the American Academy of Political & Social Science*, 681, 1, 2019, 24. See also A.L. Pap, *Democratic Decline in Hungary: Law and Society in an Illiberal Democracy*, New York, 2017; and M. Thompson, *The Rise of Illiberal Democracy in the Philippines: Duterte's Early Presidency*, in I. Deinla, B. Dressel (eds.) *From Aquino II to Duterte (2010-2018)*, Cambridge, 2019.

[4] See, e.g. *The Rise of 'Illiberal Democracy*, in A. Puddington, *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians*, Freedom House, 2017; E. Zgut, *Illiberalism in the V4: Pressure Points and Bright Spots*, Political Capital and FSE, 2018; and S. Kauffmann, *Europe's Illiberal Democracies*, in *The New York Times* 9 March 2016.

[5] Freedom House, *Nations in Transit 2018: Confronting Illiberalism*, 2018, 1.

[6] Y. Mounk, *The People Versus Democracy: The Rise of Undemocratic Liberalism and the Threat of Illiberal Democracy* Harvard, 2018.

icy".[7] Mounk argues that the crisis of liberal democracy is that it is degenerating into these two extremes. However, as concerns the term "illiberal democracy", compared to Zakaria's definition of the term, which focuses on the attitudes of elected governments, Mounk's use of the term approaches it from the rather different perspective of the *electorate* becoming more illiberal (although the two are clearly linked).

3. *Incompatibility with existing understandings of democracy*

3.1. *The broad consensus regarding thicker conceptions of democracy*

For many, the term "illiberal democracy" must be an oxymoron, on the basis that contemporary understandings of democracy focus not only on giving effect to the democratic will through elections and other mechanisms such as referendums, but also assume a commitment to core liberal tenets such as judicial independence and protection of minority rights, and a commitment to constitutionalism or the rule of law (often used as synonyms despite conceptual differences). Scholars speak of "liberal constitutional democracy" or "the democratic minimum core"[8] to capture this understanding. This thick conception of democracy, expressed as "liberal constitutional democracy" (e.g. Scheppele, Daly[9]) or "constitutional liberal democracy" (e.g. Huq and Ginsburg[10]), reflects the manner in which liberalism, constitutionalism, and democracy have become tightly conceptually braided in recent decades, especially since the global "third wave of democratisation" from the 1970s onward. Ginsburg and Huq, for instance, describe constitutional liberal democracy as a democratic system that, at minimum, includes:

> «political rights employed in the democratic process, the availability of neutral electoral machinery, and the stability, predictability, and

[7] *Ibidem*, 13.

[8] R. Dixon, *Populist Constitutionalism and the Democratic Minimum Core*, in *Verfassungsblog*, 2017.

[9] See K.L. Scheppele, *Autocratic Legalism*, in *The University of Chicago Law Review*, 85, 2018, 545; and T.G. Daly, *Democratic Decay in 2016*, in *Annual Review of Constitution-Building Processes: 2016*, 2017.

[10] A.Z. Huq, T. Ginsburg, *How to Lose a Constitutional Democracy*, *UCLA Law Review*, 65, 2018, 95.

publicity of a legal regime usually captured in the term "rule of law».[11]

Huq and Ginsburg's use of the term reflects their understanding that a thin procedural conception of democracy based on elections is insufficient and also that "liberal democracy" is an incomplete label in that it tends to elide the outsized role that constitutional law and constitutionalism have increasingly played in our prevailing understandings of "true" democracy. The latter is evidenced in the triumph in recent decades of "thicker" conceptions of democracy and the "constitutionalisation" of democracy, as bills of rights have grown progressively longer and constitutions have become more prescriptive regarding the functioning of democratic institutions.[12]

Whether we believe that an "illiberal" democracy is an oxymoron or a variant of genuine democratic rule comes to the fore, for instance, in how we characterise the existing governance system in Hungary after ten years of fundamental transformation under Prime Minister Viktor Orbán. Critics insist that Orbán and his government are creating a "hybrid" regime blending elements of authoritarian and democratic rule, by hollowing out democratic organs and repressing civil society (discussed below).[13] Orbán retorts that what remains is a viable democracy, but one that is not liberal in character: it is a "Christian democracy" or an "illiberal democracy".[14] Critics again counter that there is no such thing as an "illiberal democracy", to the extent that "liberalism' in this context denotes functioning accountability institutions, limited government, and respect for minority rights – not to be confused with the liberal/conservative political divide. As Scheppele puts it: "I use the term "liberal" as a description of a family of political philosophies, which does not mean…that politicians are, or should be, on the Left".[15] For these critics, even if Orbán's government still hold min-

[11] *Ibidem*, 108.

[12] See e.g. S. Issacharoff, *Constitutional Courts and Democratic Hedging*, in *Georgetown Law Journal*, 99, 2011, 961 ff.

[13] A. Bozóki, D. Hegedűs, *An externally constrained hybrid regime: Hungary in the European Union*, in *Democratization*, 2018, 1173.

[14] See e.g. Prime Minister Viktor Orbán's speech at the 29th Bálványos Summer Open University and Student Camp, 29 July 2018: *https://bit.ly/2KhFlCL*.

[15] See K.L. Scheppele, *Autocratic Legalism*, cit., 558 ff.

imally credible elections (and even this is not met in today's Hungary), the degradation of the broader suite of liberal democratic institutions and values means that the system could at best be called a "majoritarian autocracy".[16]

A decade after Orbán's Fidesz party first came to government, Hungary been recognised as a "hybrid regime", blending elements of authoritarian rule (e.g. concentration of power in the ruling party) and democratic rule (e.g. meaningful if highly imperfect elections), rather than an overtly authoritarian regime.[17] The growing academic consensus on this point is also reflected in policy analysis, not least the democracy assessment organisation Freedom House's decision to downgrade the country from "free" (i.e. functioning liberal democracy) to "partly free" in 2019.[18]

3.2. *Liberal constitutionalism, democratic constitutionalism, and self-sustaining democracy*

It is notable that many scholars and policymakers who employ the term "illiberal democracy" often expend little energy defining what they understand by the "liberal" component in "liberal democracy".[19] It is worthwhile to briefly state that, although the meaning of liberalism is contested, a broad (and commonly accepted) definition is provided by Freeden and Stears as "an individualist creed, celebrating a particular form of freedom and autonomy, involving the development and protection of systems of individual rights, social equality, and constraints on the interventions of social and political power".[20]

Kim Scheppele in her work has teased out the relationship between "liberal constitutionalism" and "democratic constitutionalism", emphasising that a "true" democracy must be a "self-sustaining" system where genuine electoral competition continues and government is not held by one political party or group. She empha-

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[16] See L. Pech, K.L. Scheppele, *Poland and the European Commission, Part I: A Dialogue of the Deaf?*, in *Verfassungsblog*, 2017.

[17] See A. Bozóki, D. Hegedűs, *An externally constrained hybrid regime: Hungary in the European Union*, in *Democratization*, cit., 1173.

[18] Freedom House, *Freedom in the World 2019: Democracy in Retreat*, 2019.

[19] Marc Plattner is an exception, as discussed below.

[20] See: M. Freeden, M. Stears (eds.), in *The Oxford Handbook of Political Ideologies*, Oxford, 2013, 329.

sises that liberal constitutionalism and democratic constitutionalism are conjoined in contemporary democratic practice and thought. Democratic constitutionalism is viewed as honouring the core democratic principle of rule by the majority by channelling the popular will through democratic institutions (e.g. parliaments), while liberal constitutionalism is viewed as setting a bar on governments" freedom to act in the name of the majority by requiring democratic institutions to remain limited and accountable, and ensuring continued respect for all individuals in the polity.

For Scheppele, a self-sustaining democracy in its most basic form would simply bar an elected leader from doing away with elections as a means of entrenching their power. By contrast, in its more complex manifestation, Scheppele sees this form of governance as predicated on a full suite of institutional arrangements, including "a pluralistic media, a range of effective parties, an independent judiciary, recognition of a legitimate and loyal opposition, neutral election officials, a system of representation that does not unduly dilute the powers of minorities, and legally accountable police and security services, as well as a free and active civil society",[21] Not only should these be in existence, in her view they should enjoy constitutional protection for a democracy to be considered self-sustaining. "Constitutional" here clearly means broad recognition in system-wide practice as well as recognition on paper.

A question often glossed over in analysis of liberal democracy and illiberal democracy is the level and nature of democratic development of a given state. Long-established democracies are in a different position to younger democracies. Although long-established democracies such as the USA have experienced "authoritarian enclaves" (in the form of highly gerrymandered one-party government at the state level),[22] a younger democracy will have ordinarily experienced full authoritarian rule in recent decades, which may range from military dictatorship to totalitarian rule to undemocratic monarchy – all of which leave distinct and long-lasting traces in the political system and culture after the democratic transition. In addition, as Plattner has observed, in the majority of Western democracies liberalism – reflected in a commitment to individual rights,

[21] K.L. Scheppele, *Autocratic Legalism*, cit., 558.

[22] See R.D. Kelemen, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, *Government and Opposition*, 211, 52, 2, 2017, 214 ff.

constitutionalism, and the rule of law – preceded extension of the franchise. By contrast, he notes the expansion of elections as a central mechanism of politics to states worldwide during the "third wave of democratisation" with no tradition of liberalism. We might add that since the 1970s the tendency has been to treat liberalism and democracy as conceptually and practically fused; as a package deal rather than a suite of disparate options.[23]

3.3. *Illiberal, conservative, non-liberal democracy as alternatives to liberal democracy*

In this context, it is important to emphasise that governments rarely describe their aims as creating "illiberal democracy" (Hungary's Prime Minister Orbán is a notable exception[24]). Instead, they strongly criticise liberal democracy and offer a purportedly democratic alternative (e.g. "conservative democracy" in Poland and Turkey, which denotes a "non-liberal" democratic system).[25] In Andean states such as Venezuela and Bolivia, the term "post-liberal democracy" has been coined to describe systems designed to operate outside the "Washington consensus" model of "standard" liberal democracy married to neoliberal macro-economic policy,[26] which has in some cases been the vehicle for setting the state on an authoritarian path, especially in Venezuela. In South Africa the term "liberationist democracy" has been employed to denote a state which focuses more strongly on economic development than central tenets of liberal democracy such as classic civil rights, although this has not been pushed as an overarching narrative by the government.[27]

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[23] M. Plattner, *Illiberal Democracy and the Struggle on the Right*, cit., 7 ff.

[24] E. Zgut, *Illiberalism in the V4: Pressure Points and Bright Spots*, cit., 2.

[25] See e.g. K. Korycki, *Memory, Politics and the "Populist" Moment*, in *Canadian Political Science Association Annual Meeting*, Ryerson University, Presentation, 2017; and B. Alpan, *From AKP's 'Conservative Democracy' to 'Advanced Democracy': Shifts and Challenges in the Debate on 'Europe'*, in *Journal of South European Society and Politics*, 21, 1, 2016, 15.

[26] See e.g. A. Schilling-Vacaflor, D. Nolte (ed), *New Constitutionalism in Latin America: Promises and Practices*, New York, 2012; and J. Wolff, Postliberal *Democracy Emerging? A Conceptual Proposal and the Case of Bolivia*, PRIF Working Paper 11, 2012.

[27] J. van der Westhuizen, *South Africa's soft power conundrum: how to win friends and influence people in Africa*, in *Journal of Political Power*, 9, 3, 2016, 449 ff.

The proliferation of various non-liberal models for democratic governance has been based on different motives in different states, but in some has clearly operated to provide a veneer of respectability to the incremental hollowing out of the democratic system. In Hungary, for instance, the justice minister has previously defended the country's system as a "conservative democracy" which is opposed to permitting "individual interests to dominate the interest of the community".[28] This vision of conservative democracy is quite unlike that of standard conservative democratic parties who tend to accept (in a broad sense) the legitimacy of individual rights and mechanisms for protecting rights: a clear example is the Christian Democratic Union (CDU) party under Angela Merkel's leadership in Germany. By contrast, as discussed by Huq and Ginsburg, conservative democracy in Hungary appears to be a synonym for Viktor Orbán's vision of an "illiberal democracy" that makes room for elections but little space for checks on government. As Orbán described it in a speech in 2014:

> «[The] Hungarian nation is not a simple sum of individuals, but a community that needs to be organized, strengthened and developed, and in this sense, the new state that we are building is an illiberal state, a non-liberal state. It does not deny foundational values of liberalism, as freedom etc. But it does not make this ideology a central element of state organization, but applies a specific, national, particular approach in its stead».[29]

In Poland, the term can be applied to the governing Law and Justice (PiS) party's platform, which "emphasizes human dignity, personal and communal freedom, but also the nation, morality, and the "universal" Catholic Church, as well as an insistence that communist power persists in the state".[30] It also reflects, in the view of the Polish intellectual Rafał Matyja, the paranoiac style of PiS politics, based on "a logic of total distrust towards institutional rules and willingness to replace them by mechanisms based on personal trust".[31]

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[28] T. Székely, *Justice Minister Defends Hungary's "Conservative Democracy"*, in *Euractiv*, 2015.

[29] A.Z. Huq, T. Ginsburg, *How to Save a Constitutional Democracy*, Chicago Press, 2019, 70.

[30] K. Korycki, *Memory, Politics and the "Populist" Moment*, cit., n 15.

[31] W. Sadurski, *Poland's Constitutional Breakdown*, Oxford, 2019, 162.

In Turkey, the term "conservative democracy" has quite a specific meaning. Başak Alpan describes the term as an ambiguous term, an "empty signifier", previously used by the ruling party, the Justice and Development Party (AKP), in the early 2000s to unify its disparate electoral base. The term's "all-encompassing ambiguity" made sense in the political context in which the AKP entered government, with a modernising project aimed at meeting the popular hopes for accession to the European Union (EU) and reconciling the highly diverse, and at times diametrically opposed, sectors of the state and population: rigidly secularist adherents to the founding values of the state under Kemal Ataturk; and practising Muslims long excluded from political life by a web of laws and norms (including the ban on the headscarf introduced after the military coup d'état in 1980).[32] The AKP's leader, Tayyip Erdoğan, embodied the idea of a "Muslim Democrat" whose democratic ideals could be reconciled with the strictures of their faith, as opposed to an "Islamist politician" for whom the ultimate authority and legitimacy of political structures could only be found exclusively in religious teachings and practice. Erdoğan himself had softened his image to win power, having been imprisoned for four months in 1998 during his time as mayor of Istanbul for reciting a religiously inflammatory poem.

It is also important to recognise that good faith experimentation with different models of democratic government is not itself problematic, such as moving from a legal constitutionalist (court-centred) model of constitutional and rights protection to a political constitutionalist (parliament-centred) model (indeed, it has been argued, rather unconvincingly, in Poland that recent developments area a valid shift from liberal democracy to a more traditional republican form of government[33]). However, in many states purporting to engage in such transformation, the result has been the same: a concentration of power in one party, and a reduction in the openness of political competition and capacity for alternation of government.

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[32] B. Alpan, *From AKP's 'Conservative Democracy' to 'Advanced Democracy': Shifts and Challenges in the Debate on 'Europe*, cit., 17.

[33] See the response of Justice Lech Morawski of the Polish Constitutional Tribunal to the Verfassungsblog symposium: 'A Critical Response', 2001. Justice Morawski was appointed under dubious circumstances by the sitting Law and Justice (PiS) government.

4. *The differences among illiberal democracies*

A second factor that renders use of the term "illiberal democracy" problematic is that it applies to a multiplicity of contexts, which can differ starkly. The states to which the term is applied can be broadly divided into three categories: (*i*) stable, long-established illiberal democracies; (*ii*) liberal democracies turning into illiberal democracies; and (*iii*) states transitioning between different forms of illiberal democracy.

4.1. *Stable, long-established illiberal democracies*

A number of states have achieved a long-lasting and stable system of governance that blends elements of democratic rule (e.g. regular elections) with elements of authoritarian rule (e.g. significant restrictions on core democratic rights, such as the rights to free speech, assembly and association, and on the possibility of opposition forces entering government). Singapore is the classic example.[34]

In stable, long-established illiberal democracies, "hard" authoritarian tactics, such as suspending the Constitution or banning all political parties, are not used. Instead, a variety of means are used to suppress the possibility of the opposition winning power at the ballot box, including gerrymandering. While this renders it much harder for the opposition to enter government, it does not make it impossible, as recently seen in Malaysia, where in 2018 an opposition alliance led by Malaysia's former ruler Mahathir Mohamad won the general elections for the first time in the state's 60-year history, ending the long reign of the ruling Barisan Nasional.

Mark Tushnet has described the Singaporean system as "authoritarian constitutionalism" – suggesting that what was previously viewed (by some) as a system transitioning toward liberal democratic rule can now be considered a distinct regime type, which evinces significant fidelity to constitutional practice.[35] Some observers have argued that the Singaporean model should be viewed in a positive

[34] See e.g. H. Mutalib, *Illiberal Democracy and the Future of Opposition in Singapore*, in *Third World Quarterly*, 21, 2, 2000, 313.

[35] M. Tushnet, *Authoritarian Constitutionalism: Some Conceptual Issues*, (ed) T. Ginsburg, A. Simpser, in *Constitutions in Authoritarian Regimes*, Cambridge, 2014.

light, on the basis that it has permitted a "pragmatic" approach to democracy, and is required in light of the three fundamental challenges of multiculturalism, economic development, and security.[36] Others mark it out as an example of "abusive legalism", where law is misused to maintain a broadly repressive regime in place, which makes only limited space for individual rights and freedoms.[37] What is clear is that such systems are certainly not within the family of liberal democracies.

4.2. *Liberal democracies turning into "illiberal democracies"*

Other states described as "illiberal democracies" are not stable, long-established systems of governance, but rather, previously liberal democracies which are now in a state of incremental, but profound, transformation. The end-point or stabilisation of governance systems in Poland and Hungary is not yet clear. The ongoing deterioration of liberal democracy in Poland provides a good example.

Poland was once a poster child for democracy in the post-Communist sphere,[38] due to the state's prominent democratic transition under the Solidarity Movement, and its adoption of all the trappings of a European *Rechtstaat* – complete with a liberal democratic constitution, constitutional court, and central preoccupation with human dignity and human rights. By the time of its entry into the European Union in 2004 it was widely viewed as a securely consolidated democratic system.

However, since the Law and Justice (PiS) party returned to government in October 2015 with the first outright majority since the fall of Communism (handing it the opportunity to remake the political system according to its worldview. The party's previous tenure in government, in a short-lived coalition in the mid-2000s, featured attacks on the judiciary, media, independent Central Bank,

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[36] See D. Chai and G. Koh, *A defence of Singapore-style democracy*, Consensus SG 2017.

[37] See e.g. A Cheung, *"For my Enemies, the Law": Abusive Legalism'*, Candidacy paper, JSD Program, NYU School of Law, 2018.

[38] L. Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Polen? (Disabling the Constitutional Court in Poland)* (ed.), A. Smyt, B. Banaszak, in *The Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989-2015*, Gdańsk, 2016, 63.

and rights of sexual minorities, leading the scholar Ivan Krastev in 2007 to call Poland «the capital of Central European illiberalism today».[39] Having seemingly discarded previous plans to adopt an entirely new constitution,[40] the PiS quickly launched an assault on liberal democratic structures through a raft of legislation aimed at *de facto* constitutional change: rendering the Constitutional Tribunal "ineffective and toothless"[41] (including measures to annul judicial nominations made by the previous Parliament, curtailing access to the Tribunal, introducing quorum and voting majority rules with the effect of hindering the Tribunal's effective functioning); refusing to publish the Tribunal's judgments against these measures; packing the court; disabling the opposition's power in Parliament; increasing government control of the media (by transferring control over appointment of governance boards of public broadcaster from an independent body to the government); permitting more extensive police surveillance; making extensive changes to diminish the independence of the civil service more widely; and, more recently, laws permitting the government to more easily fire top judges and restrict civil society organisations.[42]

These measures have strongly echoed the path of legislative and constitutional reform taken by the illiberal Fidesz party government in Hungary since 2010. In July 2016, Wojciech Sadurski warned of «an assault on the very foundations of democracy».[43] The crisis has continued and worsened for some four years, due to ineffectual opposition from within and outside Poland. As Laurent Pech and Kim Lane Scheppele observed in January 2017: «Any aspiring demagogue with an authoritarian streak will conclude from the EU's latest failure to do anything meaningful against Polish au-

[39] I. Krastev, *The Strange Death of the Liberal Consensus*, in *Journal of Democracy*, 56, 18, 4, 2007, 56.

[40] See the interview with Wojciech Sadurski: *What is Going on in Poland is an Attack against Democracy*, in *Verfassungblog*, 2016, *https://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/*.

[41] T.T. Koncewicz, *Of Constitutional Defiance, Migration and Borrowing of Unconstitutional Tactics and European Resistance*, in *International Journal of Constitutional Law Blog*, 2016.

[42] See T.G. Daly, *Between Fear and Hope: Poland's Democratic Lessons for Europe (and Beyond)*, in *European Constitutional Law Review*, 15, 4, 2019, 752 ff. Review of W. Sadurski, *Poland's Constitutional Breakdown*, cit.

[43] W. Sadurski, *What is Going on in Poland is an Attack against Democracy*, cit.

thorities that you can brutally undermine the rule of law in the EU and expect no response until you have already consolidated all power in very few hands».[44] Poland may soon cease to count as even the simplest form of self-sustaining democracy under Scheppele's formulation: as discussed below, since the PiS party's victory in the October 2019 general election, the government has taken steps to degrade the integrity of the electoral system.

4.3. *Transition between different forms of illiberal democracy*

Moreover, recent developments in Turkey show that one form of illiberal democracy can transform into a different form over time. Until the early 2000s, Turkey (starkly evidenced by military coups in 1960 and 1980) was a secularist élite-dominated system, with the military and Constitutional Court acting as veto powers, and actively repressing democratic politics that threatened the secularist values of the state or the notion of a homogenous population. Indeed, Arat and Pamuk suggest that secularist élites lost ground to newer Islamic-rooted élites – especially the AKP party – due to «their illiberal understanding of democracy».[45] Reforms under the AKP between the early 2000s and the early 2010s, overall, appeared to set the country on a clear path toward liberal democracy, aided by the EU accession process. However, the incremental and ongoing subversion of democratic rule under President Erdoğan, especially since 2013[46] has recast the governance system as another form of illiberal democracy.

The "authoritarian turn" under the leadership of Erdoğan was copperfastened by a narrowly passed 2017 referendum which transformed the parliamentary system to a strong presidential system. The referendum, approving a package of 18 constitutional amendments, has replaced the Kemalist élite's staunchly secularist governance system with a more Islamist strong-man system dominated by President Erdoğan. As Akman and Akçalı note, serious concerns

[44] L. Pech and K.L. Scheppele, *Poland and the European Commission, Part I: A Dialogue of the Deaf?*, in *Verfassungsblog*, 2017.

[45] Y. Arat, Ş. Pamuk, *Turkey Between Democracy and Authoritarianism*, Cambridge, 2019, 5.

[46] See L. Diamond, *Facing Up to the Democratic Recession*, in Journal of Democracy, 26, 1, 2015, 141 ff.

had been raised about the plans beforehand as creating a "constitutional dictatorship" due to the weakness of checks and balances within the new model. The overweening powers of the president under the amendments – primarily, presidential decree powers, broad authority regarding appointment, powers concerning unilateral dissolution of parliament – raised the risk of a "hyper-presidential" system opening the way toward a strongman, personalised, or "strong populist dictatorship". That the president could not issue decrees concerning individual rights seemed little comfort given that this limitation could be suspended during a state of emergency. Supposed checks on these powers, such as Parliament's power to petition the Constitutional Court for annulment of decrees and to refer certain decrees to a popular referendum, seemed a weak counter-weight given the president's ability to unilaterally dissolve parliament and serious concerns about the independence of the judiciary.[47]

Akman and Akçalı's concerns have been borne out by developments in Turkey in the three years since the referendum. Extensive purges of the state – including the judiciary, military, and civil service – have disabled independent checks on government, with enhanced government control of the media (through legal harassment and buy-outs) and suppression of the political opposition and civil society organisations bringing the state from a short-lived second illiberal democracy to something closer to "hard" authoritarianism: in 2018 Freedom House changed Turkey's status to "not free".[48]

5. *The availability of more useful terms*

A range of scholars, including Laurent Pech, Kim Scheppele and Dan Kelemen, and organisations such as Democracy Reporting International (DRI) eschew use of the term "illiberal democracy". This section considers the main criticisms and briefly examines possible alternatives.

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[47] C.A. Akman, P. Akçalı, *Changing the system through instrumentalizing weak political institutions: the quest for a presidential system in Turkey in historical and comparative perspective*, in *Turkish Studies* 18, 4, 2017, 577 ff.

[48] See e.g. Y. Arat, Ş. Pamuk, *Turkey Between Democracy and Authoritarianism*, cit.

5.1. *Strong criticism of the term "illiberal democracy"*

In a briefing paper decrying use of the term "illiberal democracy", the leading democracy organisation DRI argues against the term in strident terms.[49] An extended quotation is warranted here:

> «Next to populism, "illiberal democracy" is often used to describe the aspirations of some parties or the reality in countries like Hungary, Poland or even Russia.
>
> The political commentator Fareed Zakaria publicised the term "illiberal democracy" in 1997, arguing that in more and more countries, democratically elected leaders were curtailing the fundamental freedoms of their citizens. The problem with his argument is that in the countries he cited as examples, such as Russia or Kazakhstan, leaders were not democratically elected. A country is not an electoral democracy simply because people have the chance to cast a vote. Communists and Nazis held elections.
>
> The idea of an "illiberal democracy" has no basis in political science or international law.
>
> Even the most minimal scientific definition of democracy, proposed by Joseph Schumpeter, namely "a competitive struggle for votes", presupposes "competition", i.e. a level-playing field. Throwing opponents into jail or abusing media to only broadcast one message undermines competition. Schumpeter did not think that the Third Reich or the Soviet Union were democracies simply because they held elections. Other, wider definitions by political scientists include political rights. The same goes for obligations of states under international law, which makes clear that democratic participation is not limited to voting. The right to vote is only one expression of the wider right to political participation. (…)
>
> In short, the right to vote is not a stand-alone right but it stands and falls with other political rights. A democratic election requires political freedoms: political parties and candidates must be able to compete under equal conditions, the media must be free and pluralistic, and citizens must be free to express themselves. These conditions were not present in the countries Zakaria cited, and they are rapidly weakened in the newly emerging "illiberal" states.
>
> Democracy also requires institutions (such as independent courts) to protect these freedoms. For example, once the Polish PiS

[49] Democracy Reporting International, *False Frames: How We Undermine Democracy with Careless Language*, Briefing Paper 89, 2017.

> party paralysed the country's constitutional court, the opposition was unable to defend its rights in parliament through any legal means. When a large part of the population cannot be effectively represented in parliament, it is a problem with democracy, not with liberalism. Together, these rights and institutions make up a democracy. If they are not present, a state does not become illiberal, it becomes less democratic or outright authoritarian».[50]

In sum, the argument here is that any system which lacks both the *liberal* elements of liberal democracy (e.g. accountability institutions) and the *democratic* elements (e.g. elections, conducted within adequate supporting conditions) cannot count as a "true" democracy. True democracy is a liberal democracy where both dimensions are conjoined, and there is no other form of democracy, whether called "illiberal", "conservative", "constrained", "controlled" or otherwise.

When we use the term "illiberal democracy", then, we are recognising in effect that the system is not democratic within the accepted parameters of what constitutes a genuine democratic system. Viewed in this light, the term "democracy" in "illiberal democracy" becomes what linguists call an auto-antonym: a word that has two opposite meanings: think of how the word "sanction" can mean both "permit" and "penalise". Any leader assuming the mantle of illiberal democracy is both professing the democratic credentials of their regime while simultaneously admitting their falsity.

5.2. *Majoritarian autocracy: an alternative term?*

Pech and Scheppele have suggested that governance systems in states such as Poland and Hungary should be called "majoritarian autocracies" rather than "illiberal democracies".[51] This has an obvious appeal, given that governments in these states have initially won power with clear electoral majorities. However, majoritarian autocracy itself may be a misleading term given that governments in Hungary and Poland, once in power, have manipulated electoral laws and processes to stack the electoral odds in their favour. The

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[50] *Ibidem*, 3.

[51] L. Pech, K.L. *Scheppele, Poland and the European Commission, Part I: A Dialogue of the Deaf?*, in *Verfassungsblog*, 2017.

Polish vice-Prime Minister has gone as far as to suggest that families with children should be accorded an additional vote per child, which would dramatically skew how "the majority" is identified, and cut across the foundational democratic principle of political equality between citizens.[52]

Far beyond rhetoric, the integrity of the electoral system has now been seriously threatened in Poland. The structure for greater government control over the electoral system – striking directly at free and fair elections as the core of any conception of democratic rule – has been put in place. A new law adopted in September 2018, and approved by the "packed" Constitutional Tribunal in 2019, has paved the way for government control of the National Electoral Commission (which deals with election management as well as political party funding) by completely restructuring the Commission, concentrating control over appointment of its head to the minister for interior, and empowering government officials to make the final decision on drawing and redrawing electoral boundaries. At the time of writing, the government's immediate gambit is to skew the forthcoming presidential elections in May 2020, particularly by depriving the National Electoral Commission of its powers to organise the election mere weeks before the election is held.[53] As the former head of the Commission put it: «The May elections will not be a celebration of democracy, but its burial».[54]

Even if full, free and fair elections remain in place, as the DRI policy paper argues, any conception of democracy as simply majority will, unchecked by mediating and accountability institutions, is no more than tyranny of the majority. However, they rightly note that from Hungary to Poland to the USA, there is no attempt to remove counter-majoritarian institutions such as courts. Rather, political leaders seek to enhance government control of the courts to diminish checks while maintaining a useful façade masking a political

[52] On 14 April 2018 Verfassungsblog tweeted a Polish-language article, with the accompanying English statement: «Polish vice PM Jaroslaw Gowin calls for additional votes for families with children, to be fixated in a "new constitution". Is that how PiS aims to achieve the 2/3 maj necessary to replace the current constitution»?

[53] F. Casal Bértoa, S. Guerra, *Democratic backsliding, Poland's election and Covid-19: What needs to be considered?*, in *EUROPP Blog*, 2020.

[54] '*Prof. Zoll: The May elections will not be a celebration of democracy, but its burial. The State Electoral Commission should resign*', in *Rule of Law in Poland*, 2020.

system increasing based on naked – and often, highly personalised – power. As the authors put it:

> «The talk of "illiberal democracy" thus provides a sense of philosophical sophistication to something that is better described as a power grab».
>
> Indeed, using the idea of "illiberal democracy" feeds a new frame that is being constructed around the supposed juxtaposition of traditional-conservative versus progressive-liberal views. Authoritarian leaders say: «Dont ask me how I govern, ask me how I defend our culture and way of life». This helps autocratic leaders shift the dominant frame of thinking about politics because it implies a battle about political ideologies – pro- or anti-liberalism – what is in fact an attack on democracy. In short, it's not about liberalism, it's about democracy. The methodology used by Inglehart and Norris supports such a re-framing as it also does not distinguish democratic and anti-democratic elements of political platforms, but builds an opposition of "populist" versus "cosmopolitan liberal"».[55]

5.3. *Modern authoritarianism*

It might be argued that "modern authoritarianism" is a better term than "illiberal democracy". It has been defined by Andrew Puddington as:

> «the phenomenon whereby fundamentally antidemocratic governments have strengthened their hold on power by making at least some of a common set of concessions – largely illusory in nature – to the world's prevailing democratic order, including economic openness, a pluralistic media, limited political competition, civil society activity, and the basics of the rule of law».[56]

However, this term, as defined by Puddington, is limited in its application. It most clearly refers to previously authoritarian regimes that have engaged in liberalising measures as a strategic approach to enhancing their legitimacy and retaining the power to engage within an international order in which the traditional agnosticism of international law towards the governance system within a

[55] Democracy Reporting International, 'False Frames,' 4.

[56] See A. Puddington, *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians*, in Freedom House, 2017.

particular state had ceded to growing recognition of the principle of democratic rule as the sole legitimate system, or even an "emerging right to democratic governance", in Thomas Frank's words.[57] It may also be used to refer to a system in flux, oscillating between forms of clearly undemocratic rule and phases of more democratic governance, albeit constrained by various actors such as the military: Thailand is a prime example, with Kongkirati describing the more open democratic phases as "illiberal democracy".[58]

As such, the term "modern authoritarianism" appears most suited to a particular subset of states, although it has been used in tandem with the term "illiberal democracy" itself.[59] Moreover, the purchase of the term has been degraded somewhat by recent geopolitical developments, which have witnessed a move away from democracy as an overriding principle, and an increasing willingness by various regimes to cast aside the pretence at democratic or open government, including Russia, China, Egypt, Kazakhstan and others.[60]

5.4. *Hybrid regime*

Given the limited application of the terms "majoritarian autocracy" and "modern authoritarianism", perhaps the best alternative term is "hybrid regime". A hybrid regime, as defined by Pippa Norris (and name-checking Turkey, Thailand, the Philippines, and Venezuela), is:

> «a system characterized by weak checks and balances on executive powers, flawed or even suspended elections, fragmented opposition forces, state restrictions on media freedoms, intellectuals, and civil society organizations, curbs on the independence of the judiciary and disregard for rule of law, the abuse of human rights by the security forces, and tolerance of authoritarian values».[61]

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[57] T. Franck, *The Emerging Right to Democratic Governance*, in *Journal of International Law*, 86, 1, 1992, 46.

[58] Kongkirati, *From Illiberal Democracy to Military Authoritarianism*, cit.

[59] A. Puddington, *Breaking Down Democracy: Goals, Strategies, and Methods of Modern Authoritarians*, cit.

[60] *Ibidem*.

[61] See: P. Norris, *Is Western Democracy Backsliding? Diagnosing the Risks*, in *Harvard Kennedy School Working Paper*, No. RWP17-012, 2017, 12. The paper has been published (but without this passage) as *Is Western democracy backsliding? Diagnosing the risks*, in *Journal of Democracy*, 28, 2, 2017, 1.

András Bozóki provides a useful summary of the conceptual terrain covered by this term. In a 2017 paper he discusses global democratic developments in recent decades, which have upended perceptions of any neat binary between democratic and authoritarian regimes. That neat binary had seemed defensible during the Cold War, with rather clearer demarcations between the democratic and undemocratic worlds, and with liberal democracy becoming the only legitimate political system after 1989: "democracy by default". However, as Bozóki observes, since the end of the "transition paradigm" in the early 2000s (i.e. the paradigm based on widespread transitions from authoritarian to democratic rule from the 1970s onward) it has become increasingly evident that not only could democratic transitions sour into a system that was not a recognisably functioning liberal democracy, but even consolidated liberal democracies could suffer a negative transformation in an authoritarian direction without becoming "hard" authoritarian systems.[62] A growing "grey zone" of "hybrid regimes" between democracy and dictatorship developed, with the common feature of permitting some political competition, albeit with the odds stacked in the ruling elite's favour through manipulation and rearrangement of the political arena and electoral framework:

> «These regimes have been termed variously: as semi-democracies, semi-dictatorships, "guided," "sovereign" or "managed" democracies, delegative democracies, illiberal democracies, liberal autocracies, electoral authoritarianisms, competitive authoritarianisms and the like. As early as 1986, O'Donnell and Schmitter already recognized the existence of some transitory regimes, such as [democradura] and dictablanda, based on the Latin American experience. It soon became clear that the defining democracy and dictatorship was not simply an "either-or" question, but a problem of "more or less". Countries in the grey zone contain some elements of democracy and authoritarianism at the same time, albeit in different proportion. But even if it is a "more or less" issue, one has to be able to identify the Rubicon, a particular historical juncture or moment, which needs to be crossed at times of regime change. Even if it is true that dictatorships do not develop to democracies overnight, nor fall back to dic-

[62] A. Bozóki, *Illiberal Democracy Belongs to the Hybrid Regimes: Reflections on Jeffrey C. Isaac's Illiberal Democracy*, Public Seminar, 2017.

> tatorships with the same speed, still we have to able to find the borders between liberal democracies, hybrid regimes, and dictatorships. Even on the "more or less" axis, there are some turning points that separate the three different regimes from each other».

Hybrid regime as a term, then, may have the expansiveness and flexibility of the term "illiberal democracy" without the problematic tendency to clothe many undemocratic systems with the veneer of legitimacy that the term "democracy" affords, whether we term it "illiberal", "non-liberal", "conservative" or otherwise. It also, as defined by Bozóki, helpfully moves us away from the opposition between "liberalism" and "illiberalism", and instead sets our sights on whether political competition is genuinely present. In this sense, it chimes well with Scheppele's concept of "self-sustaining democracy" discussed earlier in the paper, and the recognition that some states are currently moving far enough down the spectrum of political arrangements to shift from recognisable liberal democracy to something of a different order. Indeed, Bozóki in a 2018 article on Hungary describes the state as occupying "the ever-widening grey zone between liberal democracy and dictatorship".[63] However, although he suggests that one must be able to identify a certain moment, a crossing of the Rubicon, that marks the regime change, this may not be readily apparent. Unlike the "swift death" of democracy by a *coup d'état*, the precise moment of regime transformation will often be very difficult to discern in cases of incremental transformation (even where rapid). As Wojciech Sadurski observes: «threshold moments are not seen as such when we live in them».[64]

Of course, some view the term as hopelessly vague. Sadurski, in his 2019 book Poland's *Constitutional Breakdown*, eschews use of the term "hybrid regime" on the basis that it lacks any meaningful content as to what the indicated mixture comprises.[65] Yet, that might be somewhat unfair: the indicated mixture will always be a blend of elements of liberal democratic governance and authoritarian governance, such as a state that holds broadly free elections but

[63] A. Bozóki, D. Hegedűs, *An externally constrained hybrid regime: Hungary in the European Union*, cit.

[64] W. Sadurski, *Poland's Constitutional Breakdown*, cit., 6.

[65] *Ibidem*, 14.

where no or few accountability institutions are able to check the government. Moreover, it helpfully shifts our focus away from the question of whether a system is an alternative form of democracy (which is such an effective riposte by budding autocrats) to the much more pertinent question of what recognisable elements of authoritarian rule are present. Such elements may exist in all liberal democracies – including the most well-regarded liberal democracies worldwide – but the analysis, thus reframed, encourages us to focus on questions of degree and prevalence.

That this analysis is far from easy, and is more of an art than a science, does not undermine the importance of the exercise. Constitutional scholars have begun to establish frameworks for carrying out this analysis with significant precision: Gábor Atilla Tóth, for instance, discusses how the "false justification" of new hybrid types of authoritarian rule can be identified through constitutional markers, which permits constitutional democracy to be distinguished from authoritarianism. For Tóth, it is possible to distinguish meaningful democracy from the "pretence of democracy" through, first, a systematic analysis of the constitutional text and practice and second, through analysis of the «deep structure of the false justification of the system».[66]

5. *Conclusion*

Writing even three or four years ago on the subject of illiberal democracy, one might have had significant cause to pause before decrying use of the term "illiberal democracy". However, as the grey zone between liberal democracy and authoritarianism continues to grow, and as more former liberal democracies enter the grey zone or hurtle towards it – such as Hungary and Poland – it is time to stop using the term. This paper has sought to emphasise the problematic nature of the term, not only due to its lack of analytical clarity but due to its tendency to obscure rather than illuminate the true nature of the governance systems to which it is applied. Worse, applying the term to certain states is to legitimate a system that should be denied the label of "democracy". At the time of

[66] G.A. Tóth, *Constitutional Markers of Authoritarianism*, in *Hague Journal on the Rule of Law*, 11, 2019, 37.

writing we see this issue at play most evidently in the EU, with enduring inaction against Hungary and Poland due to a poor grasp of what constitutes a "true" democracy and the effective propaganda by the governments in each state insisting that theirs is simply another form of democracy, just as legitimate as standard liberal democracy.

Perhaps the term "hybrid regime" can provide a less problematic term. Although having somewhat fuzzy conceptual contours, it at least avoids applying the legitimating label of democracy to political regimes that demonstrably do not deserve it, and can usefully shift our analytical focus to discerning practices and patterns of authoritarian rule. However, the aim of this article has not been to be unduly prescriptive. Rather, the overall aim here has been to stimulate debate on the importance of utilising appropriate nomenclature and conceptual frameworks, given that they shape how we see – and understand – the nature of governance systems worldwide, which has become acutely important in the current climate of deterioration of democratic rule worldwide.

Abstract

Is it time to stop using the term "illiberal democracy"? The concept is now widely used but is problematic. As an increasing number of states have suffered significant attacks on their democratic systems, such as Hungary or Poland, the term has been used to describe the resulting "hybrid" system of governance fusing elements of democratic and authoritarian rule, viewed as mirroring that in longer-standing governance systems such as Turkey, Russia or Singapore. However, the term is applied to a wide variety of states, of varying levels of political freedom, and which can begin from different starting points (e.g. a "democratising" authoritarian state, or a "decaying" liberal democracy) or relate to a stable and long-established system of governance. This article, by combining conceptual and comparative analysis, argues that the concept of "illiberal democracy" is problematic, or at least needs to be used with significant caution, for three main reasons: (*i*) incompatibility with contemporary understandings of democracy; (*ii*) the stark differences among "illiberal democracies"; and (*iii*) the availability of possibly more useful terms. Fundamentally, it is argued that the term "hybrid regime" may be a more appropriate term, by denying intrinsically undemocratic governance systems the label of "democracy" and providing a more value-neutral term for analysis of specific governance systems.

È tempo di smettere di usare il termine "democrazia illiberale"? Il concetto è ora ampiamente utilizzato ma rimane problematico. Dato che un numero crescente di Stati ha subito attacchi significativi ai loro sistemi democratici, come l'Ungheria o la Polonia, il termine è stato usato per descrivere il risultante sistema di governo "ibrido," che fonde elementi di governo democratico e autoritario, visto che rispecchia quel sistema di *governance* che già da lungo tempo esiste in Turchia, Russia o Singapore. Tuttavia, il termine viene applicato a una vasta gamma di Stati, con diversi livelli di libertà politica e che può iniziare da diversi punti di partenza (ad esempio uno stato autoritario "democratizzante" o una democrazia liberale "in decomposizione") o riferirsi a una stabilità e ad un sistema di *governance* consolidato. Questo articolo, combinando l'analisi concettuale e comparativa, sostiene che il concetto di "democrazia illiberale" è problematico, o almeno deve essere usato con notevole cautela, per tre ragioni principali: (*i*) la sua incompatibilità con la comprensione contemporanea della democrazia; (*ii*) le nette differenze tra le "democrazie illiberali"; e (*iii*) la disponibilità di termini eventualmente più utili. Fondamentalmente, si sostiene che il termine "regime ibrido" potrebbe essere un termine più appropriato, negando ai sistemi di governance intrinsecamente non democratici l'etichetta di "democrazia" e fornendo un termine più neutro per l'analisi di specifici sistemi di governo.

PABLO RIBERI

NON-DEMOCRATIC CONSTITUTIONALISM AND THE UNEASINESS OF THE CROWDS

Εἰδέναι χρὴ τὸν πόλεμον ἐόντα ξυνόν, καὶ δίκην ἔριν· καὶ γινόμενα πάντα κατ᾽ 3†χρεώμενα†
(…We must know that war is common to all and that strife is justice, and that everything comes …)
Heraclitus, *Fragments…*

1. *Foreword*

The aim of this paper relies on a basic theoretical distinction between two different approaches to constitutionalism. Both of them enhance diverse descriptive and normative statements. I have two targets in mind. In the first place, the claim that at least in Latin America empty formulations and low-emotional slogans pervade populism. In the second place, my wish is to attempt a critical outlook on how philosophical-legal-liberal (neo)constitutionalism assesses democratic constitutional ruling by the many. Particularly, considering the potential degrading into populism that some new Latin-American constitutional experiences might be undergoing, my standpoint is that the dilemma between liberal and illiberal democracies looks either nonsensical or superfluous.[1]

[1] Riker's defense of liberalism against populism is widely known. See W.H. Riker, *Liberalism against Populism: A confrontation between the Theory of democracy and the theory of social choice*, Long Grove, IL, 1988. Also, Stephen Holmes comprehensively portrays with sound and sharp accuracy a wide range of *non-marxist* critic stances against liberalism. See S. Holmes, *Anatomía del Antiliberalismo*, Madrid, 1999.

Today, several countries of the region are witnessing a variety of political speeches saddled with constitutional ravings, of different shades and emphases which – all things considered –, are labelled as "populist". In all their linguistic vagueness, these speeches make up a rebellious set of general statements. These utterances are used to reject some liberal principles; to blame ideas and goals of eighteenth and nineteenth-century constitutionalism; to denounce European ethnocentrism and to confront colonialism not to mention all sorts of legal imperialism as well. Based upon the flimsy evidence they also protest against capitalist market logic, environmental damage, church influence and, – as it might offend gender diversity or other minority complaint –, any sort of bigotry coming from atavistic conservative morals. The bottom line is that a wide array of dissenters – many kinds – is rejecting current inequalities – and some equalities as well – while condemning the symbolic hegemon of liberal constitutionalism. Liberal constitutionalism – they complain – implies the protection of the established social and economic order.

Any analysis of reasons or arguments of said formulations leads us to a composite of entwined political, legal and moral crossroads. Spelling out the strengths and weaknesses of those claims goes beyond the scope of this paper. Neither is my aim to explore any ontological or formal conditions of truth and justice which, associated with any populist demand, might be farfetched to this paper concerns as well. Furthermore, I will not address the virtues and flaws of some Latin-American illiberal populist' quests that subordinate constitutional reform to potential social development.[2] This is not the aim of my thoughts.

2. *Two Versions of Constitutionalism*

As I said, at random, Latin American academic debate between liberal and illiberal democracies turns to be either nonsensical or superfluous. Perhaps, this is so in other developing democracies and it might be happening likewise in some consolidated ones.

[2] For example, it is not an easy undertaking to criticize populism by spelling out Laclau's- or Schmitt's- influence on it. I believe that there is a disoriented legal trend that discredits "populism"and/ or "decisionism" by means of the emotional load of these words.

By dividing all regimes and polities into two fields – it is my guess –, such watershed opens a large loophole whose dragging effects neglect subtle and relevant constitutional information. Accordingly, my concern is to push forward another divisive watershed that clearly crosscuts constitutionalism as an ideology.

Besides true philosophical contents (απο τεσ φισοεοσ αυτεσ και τεσ αλεζειοσ) Aristotle rightly understood that "the Constitution also needs political foundations". Given the obvious existence of pluralistic ideas of moral good, this looks to be a solid constitutional cornerstone.[3] On the other hand, if constitutionalism must be understood as an ideology rather than as a scientific or technical discipline, it is natural to assume that the existence of biased subjectivity in its ideological load might likely impinge upon some faction reluctance to abide by the prevailing rule. This is an empirical fact that any reasonable observer cannot miss.

Be this as it may, scholars usually acknowledge two very different lineages of constitutionalism.[4] In the first place, there is legalist constitutionalism, on whose philosophical foundations, an epistemic set of rigid normative and empirical truths pervade an ideal model of Constitution and constitutional rights. In the second place, there is political constitutionalism, on whose democratic and/or republican foundations a precarious and variable set of normative imperfect outcomes end up upholding formal substantiveless proceedings and civic dialogical expectations about the Constitution and constitutional rights.

Based on philosophical and expert grounds, the legalist constitutionalism relies on economic, instrumental and/or deontological rationality. Such taking is inclined to give shelter to the negative aspects of civil liberty. From this assumption, it echoes individual rights that liberal philosophy has enshrined as natural or fundamental to man's dignity and autonomy. On the opposite side, besides prioritizing the so-called "positive liberties" political – democratic, republican constitutionalism –, understands instead, that to enjoy self-government, it is necessary to go through an institution-

[3] P. Riberi, *La Comunidad en Aristóteles de la Virtud a la Política*, in *Revista Foro de Córdoba*, 50, (IX), 1998, 313-334. Likewise, see P. Riberi, *Derecho y Política: Tinta y Sangre*, ps., in R. Gargarella (ed.), *La Constitución en 2020*, Buenos Aires, 2011, 241. Also A. Macintyre, *After Virtue*, Notre Dame, 2007, 7-14.

[4] R. Bellamy, *Political Constitutionalism*, Cambridge, 2007.

alized process of collective deliberation and approval. Even though political constitutionalism has also embraced many goals of the liberal agenda, the truth is that many individual rights of republican or democratic ancestry look more important as they ensure the permanent multiplication of civil disagreements. The so-called "polytheism of values" – so cherished in the political realm – needs dynamic disagreements rather than privileged tutors of rigid constitutional truths.

So, if legal constitutionalism is obsessed with certain neutrality and "non-interference" by the State, political-democratic-republican constitutionalism, on the contrary, is obsessed with avoiding any structural condition of "domination" (inside or outside the State).[5] While the former attempts to conceive natural rights as coming from individual theories grounded on willpower, the latter, instead, considers that only the so-called "theories of interest" are in a position to provide a load of (lexicographic) priority to the word "right" in the context of solving civil conflicts.

In opposition to atavistic revolutionary precedents, where democratic-republican – and populist – reasons (and feelings)have once come along for the sake of consolidating a fraternal "public-deliberative" bond within the concept of self-government, nowadays, it is plausible that contemporary constitutionalism regards itself as rather "legalist" and mostly philosophical. Legal constitutionalism relies on non-political grounds and supra-legal tenets brought from philosophical grasps. Thus, if, calling for collective responsibility – and massive civil participation – "positive" demands for freedom had once strived for "procedural" conditions of political legitimacy, different shades of current liberal supporters are namely concerned to enshrine and give shelter to the so-called "negative liberties".

Henceforth, beyond this dichotomy, a driving technocratic engagement is certain. Legal experts are their time to determine the exact meaning and latitude of constitutional rights. In this regard,

[5] Further analysis of the differences between the idea of liberty as "non-domination" and liberty as the "absence of arbitrary interference" looks key to understanding Strauss, Arendt and Berlin's distinction of the ancient and the modern concept of liberty. To specifically ferret out the republican and liberal distance in this subject-matter, there is a very sound piece written by Philip Pettit. See P. Pettit, *Republicanismo*, Barcelona, 1999, 77 ff.

political constitutionalism, however, feels awkward. Although most of its scholars do cherish Enlightenment and Liberal heritage, they are likely inclined to prevent current scholarly hegemonic – and cosmopolitan – universal consensus to monopolize this undertaking.

3. *A taxonomy for constitutionalists*

My standpoint is that neither in Latin America nor in any part of the world has the Constitution been able to avoid suffering from the weaknesses of a faltering reason but from the distorting influence of unfettered human passions. The truth is that human nature repeats its shrewdness and miseries in reason as well as in its subtlest of emotions. Thus, populist Latin-American constitutionalism may be new, but it still keeps talking about old things.[6] The same happens to neo-constitutionalism, whose rhetorical novelty has added very little to the eternal dramas of injustice and frustration of human nature. If what I am suggesting were somehow plausible, it would also be more sensible to resort to a theoretical frame, at random ignored or criticized by the "philosophical-legalist" thought and, likewise, by the "populist" thought as well.

My concern, then, is to recover a theoretical dichotomy which would better allow us to square both assumptions and expectations as to what a Constitution, constitutional law and constitutional rights are – or ought to be –. I support the idea that different kinds of constitutionalism summarize ideological backgrounds and practices which all together reinforce discursive positions on the subject. However, other than a few biased theoretical alternatives which aim at being given credit for an alternative without assuming the costs coming from that choice, the truth is that we cannot avoid being in one of the sides of the following dilemma. On the one hand, some people regard the foundations of the Constitution, con-

[6] If constitutionalism agrees on a certain outset of features, Guastini's insights – quoted by Comanducci – look very telling of which should be an unavoidable checklist of required elements. These are 1. Written Constitution, 2. Jurisdictional guarantee, 3. The Constitution's binding nature, 4. Over-interpretation of the constitution to get principles and rules beyond the text, 5. The possibility of applying constitutional norms directly, 6. Adapting laws to the Constitution. See P. Comanducci, *Formas de (Neo)constitucionalimo: Un análisis meta-teórico*, en M. Carbonell (ed.), *Neoconstitucionalismo(s)*, Madrid, 2005, 81.

stitutional law and constitutional rights (or some level of them) from an epistemic-substantive point of view. On the other hand, some others do it from a political-deliberative-procedural point of view.[7] To an impartial observer, the former view lies on a philosophical-idealistic perspective, while the latter means sensitivity and more political, worldly practices.

So, legal or philosophical constitutionalism handles truth, appropriateness or justice with pundit authority. Different perspectives from the same trend, henceforth, mono-logically aim at the objective verification of those elements, characteristics, principles or contents that coming together would validate a knowledgeable right normative threshold. To be certain about such meaning, the conclusive validity of these rulings must be subordinated to a meta-positive postulation of universal principles and/or values involved. Even against the majority's – even the great majority's – opinion; there may be no validity or constitutionality recognition of normative statements in general if they are not certified by expert legal authority.

In other words, no matter which legal or de facto authority is evaluating constitutional law, for these rules, principles, and values to be valid, legitimate and/or constitutional, they must all undergo an epistemic-substantive judgment delivered by constitutional experts.[8] What is the practical alternative to this?

The alternative must always rely on a political-formal-procedural construction. Indeed, when the community conveys either compromised or majoritarian democratic insights, those who makeup or support constitutional decisions, are not burdened to spell out perfect justice and unchangeable truths. When we take notice of the fabric of constitutional democracy, the values, principles and technical reasons – which may justify a general or a particular norm –, acquire a rather relative significance. It is obvious,

[7] P. Riberi, *An Uncertain dilemma: Philosophical or Political Foundations for the Constitution*, in P. Riberi, K. Lachmayer (eds.), *Philosophical or political foundation of Constitutional Law? Perspectives in conflict*, Sønderborg, 2014, 52 ff.

[8] As regards this, article 16 of the French *Declaration* of the *Rights* of Man and *Citizen* of August 26, 1789 – placed at the beginning of the French Constitution in 1791 –, is a clear example of it. Here we could read (that) «Toute société dans laquelle la garantie de droits n'est pas assurée, ni la separation des pouvoirs déterminée, n'a point de constitution».

then, that the processes of postulation and resolution of political and ethical conflicts – through somehow stable consensus – rely on pluralistic, deliberative and egalitarian mechanisms of conflict resolution. Such procedural mechanisms allow, from time to time, for crystallizing and updating a body of normative decisions within the very core of the Constitution itself. Beyond the morality and rationality of its predicates, it is "*autoritas*" (rather than "*veritas*") exhibited by rules, principles, and values of the Constitution, which allows all-important State decisions to acquire normative strength.

This taking acknowledges very sound roots in practical experience. It also has thoughtful philosophical reflections on its side. As Aristotle underscores

> «The many (*hoi polloi*), of whom none is individually an excellent (*spoudaios*) man, nevertheless can, when joined together be better than those [the excellent few], not as individuals but all together [*hos sumpantas*], just as potluck [*sumphoreta*], dinners can be better than those provided at one man's expense. For, there being many, each person possesses a constituent part [*morion*] of virtue and practical reason, and when they have come together, the multitude [*plethos*] is like a single person, yet many-footed and many-handed and possessing many sense-capacities [*aistheseis*], so it is likewise as regards to its multiplicity of character [*ta ethe*] and its mind [*dianoia*]. This is why many [*hoi polloi*] judge better in regard to musical works and those of poets, for some judge a particular aspect [*ti morion*], while all of them judge the whole [*panta de pantes]*».[9]

In other words, the Constitution can be understood as the political expression of citizens'participation, as a civilized result of free and equal exchanges that conveys either shallow or complex ideas of justice and have no better choice than to subject their viewpoints and differences to imperfect and temporary solutions.

Naturally, history teaches us that at random, such an alternative has also been detrimental to civil rights and individual freedoms. Yet, depending on the prevailing ideology inspiring the Constitution, there could be diverse deliberative, legislative and interpretative skills in both democratic and technocratic bodies. As it is

[9] See Aristotle, *Politics*, 3.1281a40/b10. This reference has been singled out by many authors. See, J. Ober, *Democracy and Knowledge*, Princeton, 2010, 110. Also, J. Waldron, *The Dignity of Legislation*, Cambridge, 1999, 101.

well known, observation is loaded with theory. Therefore, constitutional theory analysis could help us to figure out which are the differences among different legal and political perspectives. And to my knowledge, there are several well-defined trends; two of which are political in nature and another two are of philosophical origin. Consequently, four main types of stances are attempting to better grasp the understanding of meta-positive styles of constitutional language.[10] These can be grouped as follows:

1. Conservative and extreme (rather) Libertarian stands (all *crypto*-constitutionalists), who want to isolate the Constitution from its political-democratic and historical roots.[11] Not only do they dispute or question egalitarian domain and civic participation, but they also challenge life in the community and the moral value carried by decisions made by institutions that have been designed to embody state political activity and popular representation. Some of these trends refer to heteronomous-substantive philosophical theories (HSPhT). These are characterized by the belief that the validity and legitimacy of constitutional norms depend on the authority which has discovered, formulated or passed the patterns. These theories often show an authoritarian bias or, at least, a blunt counter-majoritarian ambition in its legal DNA.

2. Liberal and some moderate republican standpoints – adherents to the so-called *discourse-ethics*, for example – which attempt to emphasize the deontological bases of the Constitution, easing off any procedural formalism. A common trait of these viewpoints is the reference to what could be named autonomous philosophical theories of justice (APhTJ). In these cases, the validity and legitimacy of the contents of the Constitution usually depend on how norms adapt to and are compatible with universal objective assumptions or conditions which these APhTJ theories recommend or state. It is worth noting that these theories have become sensitive to liberal programs of advanced capitalism, where democracy and politics are strongly limited both by judges' activism and by the or-

[10] P. Riberi, *An Uncertain dilemma: Philosophical or Political Foundations for the Constitution*, cit., 46 ff.

[11] In order to further explore the concept of crypto-constitutionalism, see the following piece, P. Riberi, *Límites al Poder Constituyente: Subjetividades y Agonías del Criptoconstitucionalismo*, in J.I. Nuñez Leiva (ed.), *Nuevas Perspectivas en el Derecho Público*, Santiago de Chile, 2011, 122 ff.

acles market logic. Within this grouping, some liberals are not insensitive to the political-majoritarian support of the Constitution. Quite often they ask respect for majority rule, even though they admit to sympathizing with basic epistemic contents about rights; and although they accept deliberative restraints to citizens.

3. Populist viewpoints of a majoritarian-plebiscitary nature. These trends exacerbate the legitimizing value popular will provides while playing down the normative value of pre-constitutional commitments. For conventional political theories of exclusive majoritarian recognition, which I call (CMPT), the validity and legitimacy of constitutional norms and contents are always tied to the permanent validation, testing and changes made up by democratic majority rule. These theories are supported by populist-majoritarian or plebiscitarian versions of democracy. They are usually aligned with some primitive populist decisionism which underestimates the normative value of constitutional pre-commitment and the normative value of abiding by such engagement.

4. Some republican-democratic-popular viewpoints of a "procedural" nature which, without sacrificing the normative-positive nature of the contents of constitutional agreements, rely on popular sovereignty and civic participation as the most robust foundation for the constitutional order. Actually, for normative-democratic-procedural theories of political nature (NDPPT) the ongoing outcome of open deliberative instances among free and equal citizens must be solely responsible for establishing all contents within the Constitution. These theories are supported by republican constitutionalism and popular deliberative versions of democracy which, however – mostly –, do not ignore rights discourse or the essentially binding nature of said constitutional pre-commitment. Even though they question the "dead hand's" pre-eminence in the setting of limits to a would-be constitutional (amending) power, these trends nonetheless uphold the idea that it is sensible to ensure super-majoritarian safeguards and/or procedural rigidness within the rules regulating constitutional reform.

Within this scenario, from my point of view, theoretical trends trying to explain and justify constitutional law may be classified into these four main standings. The division between epistemic-substantive positions and deliberative-procedural stands can apply to endless patterns of assortments. At one extreme (HSPhT), we

can swiftly fit old *jus-naturalist* stances as well as those surviving anarchic or extremely liberal traditions that take on a metaphysical frame of transcendental meaning. Such perspectivity usually provides comparative insights to match the closed circle of necessary elements they administer with the validity or justice of particular constitutional contents which, of course, they are also willing to validate and/or verify. Ironically, this viewpoint has always been held by old conservatives. Today, with similar antidemocratic and/or authoritarian instincts, new libertarian; utopia crafters are also willing to blur the limits of their prejudice in some sort of legal metaphysics.

At the opposite extreme, we can find all populist varieties, from autocratic/authoritarian expressions to all majoritarianism, which reject the value of constitutional pre-commitment and/or the immanent normativity coming from the very concept of a Constitution. Influenced by some kind of moral and normative skepticism, most of these theoretical views seem to agree on the fact that constitutional contents must be subjected to simple and random arithmetic of circumstantial majorities. The truth is, these theories love to sacrifice themselves in a *Heraclitean* fire of permanent agonistic fight. Furthermore, many of them are calling for the never-ending forces of resentment. If any sense of normativity turns to be acceptable, then, every strategic and opportunistic move to change the unfair lot of so many underprivileged people will also deserve justification.

Others, less ambitious, are inclined to moderate their constitutional expectations. The biggest challenge for any civilized constitutional order is still to avoid threats to peace. If the citizens' transforming will or organized resilience is to be guided through political channels of legislation and restrictive case law constitutional constructions, then it is natural to reject any epistemic-metaphysical or conventional truths beyond some kind of popular scrutiny.

The third alternative, therefore, looks as follows: Beyond these extreme positions, within the proposed pattern, scholars and public actors are mostly sensitive to more moderate theoretical and ideological preferences. Digging in philosophical viewpoints associated with political liberalism and institutional republicanism, these trends attempt to give constitutional shelter to a minimum of moral principles and rights. Accordingly, most constitutionalists and pun-

dit legal scholars feel comfortable relying on an epistemic-substantive checklist of transcendental validity.

Some sophisticated theoretical-liberal standpoints, particularly, foster "constructive" or "hermeneutic" practices to acknowledge justice and rights developments along a continuous timeline. To avoid the esoteric recipes of *crypto-constitutionalists*, however, a group of constitutional scholars has been wisely involved in a sound public debate.[12] They are steadfastly willing to submit their philosophical and metaphysical claims to an open-forum of pluralistic discussions. They do not want to go further neglecting the hovering "counter-majoritarian" fear that is always present within these constitutional concerns. In particular, there are moderate theories of justice which, although relying on a normative backdrop of uncompromised principles, are nonetheless attentive to democratic cravings and civic involvement.

The fourth alternative (NDPPT), which is certainly less popular among legal scholars, is engaged with the postulates of political-deliberative-procedural conditions of validity for the Constitution. Far from anti-normative trends, however, this stance has little common grounds with the most politically radical-populist positions. Moreover, these trends, instead, do prefer to dive into old democratic and republican traditions while committing themselves into the wisdom and hope of deliberative politics. The rule of the many provides either or both, legitimacy and good results. And here, it is worth noticing two main political concerns. Firstly, apart from the compromised nature of constitutional making, this viewpoint accepts the normative fabric of any Constitution as such. Secondly, the unambiguous reference to individual equality brings about an unavoidable opposition to any epistemic ambition reflecting stone-crafted constitutional contents. The dead-hand is dead.

In sum, it is worth noting that the need for acknowledging political foundations of the Constitution has rallied the convergence of the least extreme liberal defenders along with some versions of non-authoritarian communitarianism. The quest for tolerance has triggered this weird empathy.

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[12] I have coined the word "cryptoconstitutionalism" referring to those epistemic legal streams – of pundit minorities – willing to hijack and/or monopolize constitutional law and human rights' true meaning and knowledge. See, P. Riberi, *Límites al Poder Constituyente: Subjetividades y Agonías del Criptoconstitucionalismo*, cit., 122.

4. *Quod omnes tangit ad omnibus aprobari debet*

The defense of the rule of law is a central aim for every civilized society. Constitutionalism as an ideology has become a key factor in crafting both the procedural and the substantive developments of such a concept. Fitting on the saddle of this category, a pervasive two-prong normative belief has been traveling among public law scholars' mindset. On the one hand, it purports a core craving whose basic goal is no other but to prevent potential attacks on freedoms and rights on the part of the popular majorities. On the other hand, it conveys the need for a coordinated reciprocal mistrust among the superior branches of government. Finally, here a preliminary caveat deserves attention: beyond theoretical ambition, these reflections are particularly developed for Latin American experience with Argentine overtones.[13]

The "illiberal" danger, then, warns us about the purposeful or reckless jeopardy that may arise from either unfettered populist majorities and/or messianic leader-driven crowds. The unruly, unreflecting masses ought to be feared any place, any time. And in this vein, constitutionalism should steadfastly help to curb the irrational instincts of majorities involved in certain collective decision-making outbursts. Constitutionalism – based upon liberal values and principles –, namely, should deter democratic-representative bodies to seize rights-based disputes just by themselves.

Under the cloak of the rule of law, then, constitutional principles and provisions come along to ease social relations.[14] Beyond

[13] It is important to take notice of how emergency laws have opened the gates of arbitrary rule in many countries of the region. At random, self-inflicted emergencies have triggered the executive's ambition to get more extraordinary powers. Ironically, the implementation of these increasing powers explains the new "emergency" situation which, in turn, hastens new extraordinary powers.

[14] In *The Spirit of the Laws* (1748), Monstesquieu wrote: «When the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty… Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be legislator. Were it joined de the executive power, the judge might behave with violence and oppression. There would be an end to everything, were the same man, or the same body, whether nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and trying the causes of individuals».

the divide between the Anglo-American rule of law and the *staatrecht* constructions, however, a big deal of theoretical and practical disputes arises from implementation and adjudication of said underlying duet: principles and/or rules. And in a common concern, henceforth, it looks sensible to either neglect or put off most of such interpretative conflicts. In other words, a much more overriding threat calls for our attention.

Now, on the one hand, any civilized law-abiding individual would fear the current populist agenda on immigration, crime-profiling, international trade, etc. On the other hand, the current connection between illiberal off-springs progressive growth coupled with democratic expectations failing dynamics, are overwhelming concerns deserving our utmost attention. Truth be told, democratic and political institutions are currently failing to tackle ordinary individuals' social, economic, moral problems whereas electoral competition is driving restless majorities to support either non-rational proposals or morally offensive programs. At random, they rely on candidates whose promises convey both daunting traits. Accordingly, the mainstream of the so-called (neo)constitutionalism is reacting to deploy a comprehensive set of non-democratic mechanisms of resilience. Namely, mainstream (neo)constitutionalism fosters increasing Courts' engagement in political disputes. In different versions and with distinct emphases, in short, such mainstream of (neo)constitutionalist scholars seem to be sharing the very same economy of fears against majoritarianism and any type of popular rule.

The straightforward reading of these phenomena, however, is flawed. It is true that in general terms, the diagnosis looks correct; as well as the concrete assessment of the illiberal hazards at stake. My grasp, far beyond such reading of the facts, is that the remedial proposal would require, instead, more thorough attention. For example, taking advantage of more analytical and multidisciplinary tools, perhaps, we could work out better would-be institutional answers. Besides, we are allowed to be suspicious of non-subtle historical rhetoric with its normative dicta. Underneath the current sprawl of illiberal policies and programs, there has always been a timeline of factual elements explaining each particular political dynamics in place. And this looks fundamental in order to hold a concrete understanding of far-reaching consequences for every single polity.

My concern, then, is that non-democratic assumptions – and their secondary non-democratic effects – are not clearly stated and/or, they can be wrongfully construed in constitutional terms. In my opinion, this is so because the remedies involved might bring about worse results that the very same disease, not to mention that, because of its political underpinnings, the constitutional entrenchment of non-democratic mechanisms and institutional restrictions, strictly speaking, would hardly succeed controlling and/or correcting the threats they claim to hamper.

The protection of values, principles, and rights whose Enlightened and liberal genealogy is still widely cherished in Latin America – and in almost any civilized community – can be still enhanced from different avenues of thought. This means that beyond the political or the philosophical nature of these elements, it is here where democratic, republican, and/or liberal thinking seldom come into terms. The core question, therefore, is whether these values, principles, and rights are still needing political regulation or whether they should authoritatively be modeled by Courts' pundit jurisprudence. And my intuition relies on the former alternative, indeed.

Moreover, although my normative engagements dwell at the antipodes of neo-constitutionalism; even though the epistemic foundations of the so-called philosophical liberalism are at odds with whatever populist insights, still I positively value democratic/liberal common concerns. In a few words, my populist insights are based upon a theoretical framework whose foundation stems from a basic statement. And this statement reads that, in the long run, by respecting the egalitarian presuppositions of democratic politics, it looks rather more feasible to ensure the validity of both, the so-called negative liberties and the positive ones. In other words, fumbling one's way through self-government, separation of powers and right protection, any constitutional design would endlessly be doomed to strike a balance between democratic-deliberative institutions and crosschecking legal mechanisms.

It is also crystal clear that over the repetition of non-democratic constitutional discourses, an unnecessary dilemma is now hastening an unnecessary divide. In its terms, either one should commit himself to individual rights and freedom protections or – consciously or unconsciously – one is recklessly relinquishing individual's willpower under the majoritarian/populist/communitarian

rule. Whatever the stakes, anti-majoritarian reluctance toward politics and horizontal deliberation can seldom cope with the challenge of comprehensive moral views in constant reproduction.

And here an important question arises here: can peaceful coexistence and social cooperation drive would-be contemptuous majorities' – and other minorities – instincts, when constitutional rules provide neither equal footing deliberation nor fair institutions to promoting true plural and democratic solutions? Perhaps, it is foreseeable that majorities at large are likely to undermine individual rights. Indeed, there is a far-reaching historical record of individual liberties infringement by the populace; of how the mob has thwarted collective tolerance and has hampered economic development as well. But even if this were true, the big question still is how we could better cope with people's natural reluctance to just follow experts' legal, economic and technocratic rulings in controversies; precisely, where their beliefs, preferences, and interests are in jeopardy. Both in legal and political disputes there will always be winners and losers. Therefore, in the light of free and equal human beings' conflicting values, interests, and/or preferences, there is no other way out but to either rely on pundit technocrat bodies of experts or to rely on substantive-less democratic – majoritarian – proceedings whose lingering solutions have random deadlines.

Provided that ordinary individuals in discontent are unlikely to abide by pundit and expert authority and given the fact that Courts can also endorse illiberal decisions, a pair of important questions may arise: Firstly, as regards the democratic/liberal tension, is there any middle-ground? Secondly, what can we do to prevent Courts' hegemony or populist threat? Now, to face these questions, instead of rambling meandering paths, we should better take direct avenues of thoughts. Those conveying a normative commitment to republican values, principles, and rules (as a concrete historical and political mindset), would hardly find any fairer alternative but to rely on the makings of a democratic outset of political institutions. Among other reasons, namely, because there is not the slightest hope that a miraculous-culturally driven upheaval will make ordinary folks' consciousness come up with a uniform set of liberal values, principles, and rules.

It is very unlikely that human-rights engagement will simultaneously flow into individuals' hearts and brains. Those whose beliefs,

preferences, and interests are diverse develop different intuitions of fairness and justice indeed. Even in a Rawlsian construct, such uniformity looks awkward and farfetched. In any complex society where income, education, and public services are unequally distributed, homogeneity will never take place. Furthermore, if such dystopic portray might ever happen, it would not be attractive at all.

Bluntly speaking, then, let us take the bull by the horns. The truth is that poverty, oppressive conditions and the lack of equal opportunities are effective fertilizers for civic unrest. In the light of these factors, nonetheless, populist outburst or democratic spiritedness can thrive. So, if such an overriding dilemma turns out to be unavoidable, the right response is none but to ferret around deliberative settings and fair majoritarian proceedings. Democratic spiritedness needs democratic conditions to thrive. Without such conditions, social cooperation and community trustworthiness are very unlikely. Because there have been, there are and there will always be organized contenders ready to get away with it, it is sensible to work out political conditions to prevent domination. As the USA founding fathers duly acknowledged, hegemonic groupings and or ruthless elites shall always be construed as a major threat to freedom.

Besides, a basic historical fact strengthens this warning. And this is that populism and illiberal forces hardly retreat. Furthermore, they usually try to victimize themselves when non-democratic decision-making processes overlap or replace the rule of the many. Consequently, beyond the rhetorical assessment of the concept of the rule of law – with which hardly anyone can disagree –, my concern concentrates on a methodological goal. My concern is to push forward a double goal which, in my opinion, is fundamental to cope with the current illiberal and autocratic challenge. On the one hand, it is fundamental to acknowledge an eminently strategic-*ad-hoc* – reading of everyone's civic responsibilities. On the other hand, it is key to take notice of the historical lineage that has tailored the contours of said concept. Democratic, Republican, Liberal settings could never subject individuals to any illiberal, autocratic and/or intolerant rule. Being a citizen – or a free individual in an open society –, strait-forwardly implies the complete rejection of any authoritarian command. So, *…quod omnes tangit*, prevents reckless distractions.

5. *Justice is conflict*

As it is stressed at the epigraph of this paper, I am convinced that Justice has little connection with harmony and detachment. Sharing Stuart Hampshire – and Heraclitus – insights, to my knowledge, Justice is conflict. We need justice and right's discourse when civil conflict bursts into reality.[15] Rancière has pointed out a key idea which has had a bold impact on the legal debate: Justice springs from conflict.[16] This is why the epitome of justice as peaceful and stable harmony presented by most liberal-legal-philosophical approaches looks clearly unfit. The concealed concern behind those representations is, however, understandable. This is so because they want to provide reliable legal solutions. They want so with coherence and stability. And, of course, this is quite a challenge.

In fact, along with history, when asked what "justice" is, philosophy and politics have repeatedly rallied with randomly converging responses. Beyond the content or potential coincidences of their answers, both fields have always had strain relations. Indeed, the discursive practices of both disciplines reveal their motivations are poles apart. To achieve general harmonic conditions, philosophy's main intention has always been to provide universal answers to minimize "disagreements" in matters of justice. It aims at discovering or building objective conditions of truth or certainty so that ethical or legal solutions could be cogently predicted. And this,

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[15] S. Hampshire, *La Justicia en Conflicto*, Madrid, 2002, 6.

[16] Rancière's idea about how legal language reduces and expels disagreement is interesting. Therefore, even when philosophy and law may help to shed light and improve the debate among those who think differently, very often both perspectives only concentrate on marshaling dissonance. In other words, philosophy believes it can tame all unnecessary differences and disputes. "Right" reason is called up to settle disagreement and confusion. For example, if A and B disagree as to what is white, there will be, very probably, a misunderstanding or a lack of knowledge by one of the parties. However, we should not mistake such eminent concern with political "disagreement". Indeed, people could disagree on which rights must be thoroughly protected and on which collective interests deserve optimization. That is to say, there is a sharp difference between the lack of knowledge of one of the parties who debates based on a mistake, bad faith or insanity, and political disagreement, which comes from a conflict of interests, beliefs or competitive volitions. Constitutional disagreements appeal to us the most are radical disagreements about justice and the common good. These disagreements are political in nature while politics gives us perfect soil to come up with legitimate and stable constitutional answers. See J. Rancière, *El Desacuerdo*, Buenos Aires, 1996, 11.

in turn, reveals that philosophical inquiry cannot help adapting its outcomes to an authoritative-aristocratic lineage of thinking. Those who master the rhetorical forms which explain or justify justice commands, oftentimes, are the same legal experts interpreting and imposing the objective content of the law.

Moral truth, supra-legal contents of justice and the opinion of a few prestigious scholars who clarify chaos tend to be explicitly or implicitly in line with mainstream academics. On the contrary, politics makes sense only if disagreements can reproduce themselves and remain in spite of solutions already found. It is obvious that politics – just as justice – becomes visible and necessary when conflict breaks out. When we all agree, what do we need politics for? Why talk about justice when answers and solutions have been or will be given by others? Needless to say, politics is supported by disagreement and disagreement is political as far as its verification and overcoming are performed by free and equal citizens in a horizontal setting.[17]

In a republican-democratic order, it is neither legitimate nor constitutionally accepted for some people to have their way – all the time –; hence, a clear and unspoken feeling of tolerance and pluralistic dissatisfaction must exist among individuals. Sharing inexhaustible, comprehensive, decent emotions is key to taking advantage of other peoples' dissents. Naturally, "Politics" fosters deliberative disagreements, compromises – and temporal agreements – about all relevant aspects of public life. In terms of a democratic-republican continuous deliberation, peaceful acceptance of a civilized order is nothing but the institutionalized perpetuation of an endless chain of constitutional disappointments and civic hopes.

5.1. *Political Constitutionalism and the rule of the many*

Some interests, wishes or beliefs are better represented and supported than others in society. This happens in countries like Argentina, but also in some other countries, as well. Whatever the morality or rationality of disputed contents, it is true that what pre-

[17] Waldron stresses «Law, as I said, aspires to justice; but it represents the aspiration to justice of a community, which – as Aristotle emphasizes – is made up not of those who think similarly, but of those who think differently about matters of common concern». See, J. Waldron, *Law and Disagreement*, Oxford, 1999, 6.

vails in civil conflict resolution is not always justice. A collective well spread interest, belief, or wish – held by great majorities or not –; even though injustice stands plausible, tends to naturally overshadow other interests, beliefs or wishes that are not well presented or supported. Needless to say, in order to make demands visible, some collective groups usually show better organization skills and more enthusiasm to communicate their goals than all their opponents.

A relevant question, therefore, is whether the soundness and eloquence of factional claims are able enough to preempt others' rival positions. And here I want to underscore two important questions. First, whether under optimal timetable and rhetoric skills among the contending speakers, the most reasonable and fairest answer will likely pop up from a debate. Second, whether such an option will receive the majority's support. I doubt it. Nonetheless, my feeling is it is impossible to verify empirically either of these two questions. Such understanding, all things considered, leads my mind to the following outcome. To fairly process civil conflicts within a political realm, looks like the most reasonable option at hand. This is key, especially, when no stable legal criteria exist or when constitutional agreements – as to the fairness of results – can hasten rampant disputes between majorities and minorities.

Be it as it may, to tackle popular dissatisfaction, both legal and political constitutionalism has resorted to some common strategies. For instance, republicanism, as well as several liberal approaches, regards public deliberation as the most convenient tool for common good – and right protection –. Likewise, the need for decentralization of power and, even more important, the unavoidable need for the publicity of government acts and the subsequent accountability of government officials and representatives are also part of the common agenda to achieve social tranquility.

To strengthen the load of legitimacy, it does not seem to be enough to hold popular elections at regular intervals. As Bellamy points out, it is only from "political circumstances" that public officials and representatives can gain democratic legitimacy for their offices. Moreover, the inevitable multiplication and reproduction or moral and political disagreements should not be a difficulty but rather an opportunity to encourage deliberative and negotiating practices which, by nature, are unstable.[18]

[18] R. Bellamy, *Political Constitutionalism*, Cambridge, 2007, 85.

However, an essential aspect of contemporary constitutional concerns should be noted. At least for a pluralistic-republican-democracy, it is important to think that any collective process of deliberation, negotiation, compromise or agreement always requires the display of some sort of civic virtues. If citizens do not show truthfulness, endurance and some twist of constitutional patriotism, adversity threatens to bring about the collapse of social cooperation and solidarity. And when this happens, again, the division between aristocratic epistemic approaches *vis à vis* majoritarian-procedural ones can hardly avoid presenting themselves cloaked with sheer force.

Finally, a growing individualism is currently saddled with civic reluctance to get involved in politics. Ordinary people feel uneasy about their public obligations and civic responsibilities. Very dauntingly, we are witnessing a moral diaspora protected by ecumenical legal formulas which, in the long run, are increasingly fueling a heavy load of egocentrism and social unrest.

5.2. *Democratic Fear of Legalist Constitutionalism*

The term democracy started to have a positive assessment only after the first half of the XIX century; more specifically after the publication of Alexander Tocqueville's book, Democracy in America (1835). This author described the majoritarian keys which gave light and sense to American democracy and he said (that democracy encourages) «the theory of equality applied to intelligence».[19] It seems appropriate to note that after the old-classical experience – and in spite of some renaissance attempts – ruling elites always managed to mistrust and be cautious towards majorities potentially out of control.[20]

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[19] Tocqueville claims: «the moral authority of the majority is partly based upon the notion that there is more intelligence and wisdom in a number of men united than in a single individual, and that the number of the legislators is more important than their quality. The theory of equality is thus applied to the intellects of men; and human pride is thus assailed in its last retreat by a doctrine which the minority hesitates to admit, and to which they will but slowly assent» see Alexis de Tocqueville, *La Democracia en América*, México, 2002, 255.

[20] Ulysses in chains (by Elster) is an attractive and eloquent metaphor. It explains the significance of constitutional pre-commitment. However, there is a growing fear which blurs such metaphoric representation. Some kind of philosophical-legal

Big ignorant masses – seduced by demagogic and violent people – were not only considered unpredictable and immature but, more radically, they were thought to lack patriotism, morality, and intelligence. Even Marx single out this stigma; at least that is what it seems when he singled out the lumpen-proletariat as a low standard social category. Regarding ordinary people's merits and popular decision-making participation, Tocqueville, however, calls for a different way of addressing these topics.

Be this as it may, current democracy is confronted with very demanding challenges. Due to a general lack of time – not to mention the current complexities of electoral options –, a big question deserves attention: how is it possible for those apathetic, incompetent and irrational citizens to fulfill the logical individualistic assumptions that the rational choice rhetoric rule for them?[21] Faced with such a daunting picture, if great majorities are only filled with lowly, false or selfish instincts, why participate and debate horizontally? Very strikingly, responses brought from a kind of decisional "paternalism" look very appealing to both populist-authoritarian and individualistic-rational choice stances.

Furthermore, for some liberal patterns, political representation is unavoidable as long as it is a reliable antidote capable of discouraging direct participation and massive deliberation by the people. As Downs has pointed out, there are no adequate motivations. Furthermore, there are no plausible collective incentives that could lead rational individuals to devote scarce time and personal resources to get critical information to responsibly participate in public life.[22] Besides the fact that the concept of "populism" has usually

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constitutionalism and quite a few liberal approaches have caricatured the logic of the "king in chains". Indeed, there seems to be a need to control and restrict the uncontrollable figure of the "people" invoked by majorities or by their direct representatives. That is to say, Ulysses has become a psychopath who, however, is likely able to ask for imprisonment in advance or more extremely, he has become a werewolf, who asks his lover to leave him because he knows about full moon's misfortunes.

[21] It is an evident assumption that the irrationality and ignorance attributed by "rational choice" to political activity are based on an arguable assumption. Such statements are only logical if all participants accept a single frame of the individual, interchangeable preferences which, naturally, respond to utilitarian or economic oriented patterns of neutrality, appropriateness or validity. See also Landemore's insight on this topic: H. Landemore, *Democratic Reason*, Princeton, 2013, 32.

[22] A. Downs, *An Economic Theory of Political Action in Democracy*, in *Journal of Political Economy*, 1957.

been used to criticize the majoritarian intention to get involved in politics, the truth is that – for some mainstream scholarly oriented (neo)constitutionalism –, mass democracy represents a preposterous fantasy. It conveys extremely negative secondary effects and a wide range of hazards.

Moral good, self-interest, and justice have little to do with public life and common interest, they complain. Logical and epistemic assumptions, extracted from a normative or a pragmatic dimension, outweigh constitutional values, rules, and principles that dare to secularize the importance of the democratic rule. The Constitution is a (negative) liberty device whose fundamental grounds are rooted beyond the political-dialogic possibilities that ordinary citizens could grasp. A sort of Herculean wise-cracy, accordingly, has to be called to limit those subordinate democratic decision-making circuits that the very Constitution recklessly admits.

Opposed to this view, political-democratic approaches to constitutionalism point out that the makings of the Constitution need more stringent foundations. The legitimacy of the legal order heavily relies on this starting point. Some viewpoints, precisely, stress the need that epistemic reasons of savvy scholars and judges interplay with the beliefs, interests, and wishes of the many. In other words, it is believed that full and massive participation with – free and egalitarian – public deliberation turns democracy into a more "legitimate" and fair system. And this is so, not only because of the wide variety of interests and concerns displayed in the input –, but also because massive deliberative undertakings bring about better knowledge in the output.[23] To decide, looking for unanimous consent; or todecide after applying the majority rule, likewise, may promote a double prong of good reasons to uphold democratic collective action.

6. *Latin American core constitutional challenges*

To my knowledge, as regards constitutional design, there are two basic and compelling concerns. Firstly, from a broad historical and regional experience, it looks plain to me that there is a subtle misconception hovering around Latin America nuanced debate on

[23] C. Sunstein, *Why Democracy Needs Dissent*, Cambridge, MA, 2003, 111 ff.

this subject matter.[24] Latin American faltering toils to entrench the rule of law, to my knowledge, have been wrongfully explored and explained. And my guess is that a prior misunderstanding has brought about a concrete long-standing constitutional blindness. My feeling is that the ruling elite and intellectuals – not to mention active citizenship –, cannot afford to distinguish "Constitutional Policies" from ordinary politics. This watershed would have provided a much more rewarding clear-cut distinction that proved to be a core tenet among developed constitutional democracies. Institutional disagreement and timely legal adjustments have always been essential for strengthening the rule of law. Again, in terms of constitutional design and constitutional architectonics, the making of the Constitution should never be downplayed in the agonistic field of ordinary politics.

Secondly, sharing Roberto Gargarella's grasp, to my knowledge, there is a disproportionate scholarly commitment to dwelling in the study of rights and freedoms, whereas Latin American scholars, at least, have paid little attention to the "engine room" of the Constitution.[25] In other words, academic debate has devoted much of its time to spelling out the rule of law secrets; to foster ambitious liberal programs; to multiply the promises of endless chains of unfettered rights. Is this wrong? I do not dare to say so, though in Latin America such instincts have undermined public trust toward the constitution. In what sense I am speaking? Latin American scholars, intellectual and political experts, in general, feel at ease addressing principled-right base pundit discussions among themselves. The nuts and bolts of the organic part of the Constitution, conversely, have turned out to be an unattractive and barren territory for mainstream (neo)constitutionalism. The gap between the formal entrenchment of rights and their actual implementation is very revealing of such shortcoming.

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[24] For instance, if we analyze the cycle of constitutional reforms as regards reelection of the Executive Branch in Latin America, Gabriel Negretto explains how accepting or banning them, such reforms are always the result of a strategic agreement among elites and/or dominating forces speculating with preserving power, either individually or in a shared manner. G. Negretto, *La Política del Cambio Constitucional en América Latina*, Ciudad de México, 2015, 185 ff.

[25] R. Gargarella, *Latin American Constitutionalism and the Engine Room of the Constitution*, in P. Riberi, K. Lachmayer (eds.), *Philosophical or political foundation of Constitutional Law? Perspectives in conflict*, cit., 109 ff.

And this looks very detrimental for the people's constitutional engagement. Together with Gargarella, my concern is that there is a straight-forward linking connection between both parts of the Constitution. If this is right, then, the doomed fate of the former is derived from the faltering or shaky functioning of the latter.[26] Accordingly, by drawing correct incentives to strengthening the separation of powers; by entrenching fair and democratic decision-making process – within the gears and levers of the Political Power –, both the rule of law and democratic spiritedness are much more likely to thrive in society at large.[27]

7. *Final Remarks*

Illiberal threats and liberty backlashes may show up unexpectedly. For example, in a subtle description of a post-modern contemporary character, Rorty ironically reveals an aesthetic sort of self-expansionism that illustrates the dissatisfaction and comfortable rebelliousness of many people around us.[28] On the other hand, somehow aligned with this feeling, some streams of the so-called constitutional populism are now rallying a heterogeneous portray of complaints. Naturally, it is worth noticing that after some majoritarian-democratic disappointments, strategic litigation and civil mistrust are taking on an agenda of endless and fractioned selfish

[26] For example, in they deny that a single electoral victory is sufficient to vest plenary lawmaking authority in the victorious political movement. He underscored that «this proposition yields one of the most distinctive features of the separation of powers: the fact that the different lawmaking powers often operate on a staggered electoral schedule. Even if party A wins big at time one (T1), it may have to win "n" times more before it can gain plenary lawmaking authority». See, B. Ackerman, *The New Separation of Powers*, in *Harvard Law Review*, 113, 3. (Jan., 2000). 633-729.

[27] Following Ackerman's assessment, Juan Linz has properly proved that "*separation of powers*" was one *of* the United States's most dangerous exports to Latin America. And he complains: «generations of Latin liberals have taken Montesquieu's dicta, together with America's example, as an inspiration to create constitutional governments that divide lawmaking power between elected presidents and elected congresses only to see their constitutions exploded by frustrated presidents as they disband intransigent congresses and install themselves as caudillos with the aid of the military and/or extra-constitutional plebiscites» *Ibidem.*

[28] Referring to Nietzsche or Foucault, Rorty places this stand within the decentralizing modern process. For instance, through the subconscious mind and psychoanalysis, Freud managed to secularize and subdivide the inner subjective perspective of moral reflection. Besides going over Foucault's words in *Hermenéutica del Sujeto.* See R. Rorty, *Freud y la*, Buenos Aires, 1993, 216.

ambitions driven by individuals and organized minorities. Urged by a non-politicized discourse, it is plain that an expansive system of rights enlargement is currently happening everywhere. Paradoxically, the unmistakably normative and political roots of the Constitution is repeatedly neglected or frowned upon in this trend.

On the other hand, all (neo)crypto-constitutionalism of a philosophical or legalist progeny is strongly upholding the normativity of the Constitution; at least for the sake of some of its cherished contents. Is it possible to combine the political roots of the constitution with its normativity? How could we better cope with this awkward situation?

Let us look back for some inspiration. For example, it is clear that from Plato's day to present times, the prevailing expressions of philosophical criticism have consolidated a lot of mistrust towards the ability, skill, and goodwill of ordinary people. Furthermore, Plato attributed to Socrates a mistrustful idea of majorities' abilities to work out justice and moral right answers. We must not forget, in this trend, that since the myth of Prometheus, the human bond with reason has been doomed to go through narrow alleys of sin, deceit and divine disgrace.[29]

Nevertheless, in the "Protagoras" (or Sophists'), he has a conversation with Socrates on whether virtue could be taught or not. There is a tough debate on the matter, and with unusual respect for each other, both speakers analyze how politics has incomparable meaning among citizenship. Besides, Politics, – maximum virtue indeed –, was distributed in an egalitarian way in Athens. Of course, arts (sciences) have always been taught for the sake of dominating the laws and the epistemic contents of each of them. They need a specific "technique", like the art to construct a house or the art to make a ship. Each discipline, accordingly, needs particular expertise. On the contrary, however, there is no single handout to teach and to learn politics. And this is so because the main reason for its being is to amend – or avoid – the injustices committed by men against each other.[30]

[29] Consider that in Prometheus' myth, "reason" is the fire stolen from the gods. In Protagoras, Plato also suggests a unique reading of the myth. Plato wrote: «man received the ability to preserve life, and yet, he did not receive politics, since politics was in the hands of Zeus, and Prometheus still did not have the freedom to enter the sanctuary of the father of gods». See Platón, *Protágoras*, en *Diálogos*, México, 1991, 113.

[30] As regards this issue, it is worth noticing that Aristotle distances himself from

Having said this, Protagoras' democratic argument proceeds as follows:

> «This is why, Socrates, Athenians and other people who discuss business concerning the arts, such as architecture or any other, only listen to the advice from few men, namely artists; and if others outside the profession give their opinion, they are not heard, as you have said and that is very rational. But when it comes to purely political affairs, as politics is always about justice and temperance, they listen to everybody and rightly so, because they are forced to have those virtues, as there is no society without them. This is the only reason for such difference, Socrates».[31]

Whatever the case, democratic objections have always been and will continue to be based on both descriptive-factual criticism and theoretical-normative criticism. And here comes a caveat: It is not only in Latin America that there is fear of the indignados – "the outraged" –. Illiberal off-spring experiments are rooted in this feeling in different parts of the planet. Therefore, if democracy must be regarded not only as an adequate way of legitimizing the origin of political power but also as a sensible way of collective ruling, a very basic question arises: As from the so-called "wisdom of the Crowd" – in line with Aristotle and bearing in mind what led Athenians to boast their superiority in all human and divine areas –, the core issue at stake was whether bold democratic reason could achieve acceptable "epistemic" tolls of efficiency, justice, truth, and common sense. A future-oriented question still would be whether a political community ruled by the many can keep producing competitive responses – equal or superior to – those offered by scholars and

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Plato. In Chapter VII of the book called *Politics*, when he analyzes the essential link between justice and politics, that distance is extreme. In Aristotle's view, justice has to do not only with honor and recognition but also with its goals and their practices implied. For instance, to better explain the higher meaning of the category, there is a very eloquent example. Suppose one has to choose whom to give the best flute. The decision as to who, among several people, could be worked out in a very fair and inspiring way. Indeed, we should not necessarily decide based on the candidates' *intuitu personae* merits. On the contrary, following Aristotle's ethical view we could also figure out a better solution by positioning ourselves on a higher step and making the decision thinking about music and not flute players. In other words, we should consider who is going to play best and leave the audience with the best possible music. See Aristóteles, *La Política*, Mexico, 1996, 210. Michael Sandel's comments on this idea are also clarifying: M. Sandel, *Justice - What's the right thing to do?*, New York, 2009, 186.

[31] See Platón, *op. cit.*, 114.

learned minorities?[32] Truth be told, I am not able to answer such a question. All things considered, although I have no positive answer, I am nonetheless ready to challenge those who reject democratic decision-making processes in the public sphere.

Therefore, my final remark aims at emphasizing the ideological, political and democratic keys that Liberalism and the Enlightenment constitutionalism have passed on to us. And within this scope, I would like to point out the importance of preserving political-procedural rules that should also need to fulfill content-based goals.[33] Liberal achievements enshrined in the Constitution, I guess, are likely safer when their contents came up from street fights rather than from courts' adjudication. In sum, sharing Waldron's sort of political cognitivism, let me stress that «[…] Aristotle's strongest suggestion that the connection between DWM and the idea of polity subject to the Rule of Law is not contingent», looks more appealing in so far as civil and political liberties have been set to play together.[34] In short, this claim should not lead us to infer that any dispute or conflict may be reduced to politics or that any civil difference must be submitted to voting. Furthermore, as Plato warns us, some decisions would better be made by experts, such as judges, or by those who are directly interested in that conflict's solution. Again, *quod omnes tangit*; there is no question about this. It is also clear that not every problem or conflict may be reduced to binary terms and it is not reasonable to think that majority rule will work out all constitutional conflicts in a civil, long-lasting and safer

[32] Based on the cognitive diversity characterizing the application of the rule in a democracy, some authors, like Landemore, claim that democracy is the most intelligent option if we consider other alternative polities. The arguments and examples proposed by the author as to how collective democratic reason can provide adequate answers to common problems are very meaningful. For instance, if a group of people with different knowledge and personal abilities has to find the way out of a maze, the strength of collective action based upon democratic decision is equal or superior to the results and possibilities that would be achieved if it were otherwise. Particularly, when democratic-majoritarian decision-making outcomes are confronted *vis à vis* experts' judgments. See H. Landemore, *Democratic Reason*, Princeton, 2013, 4 ff.

[33] As Cato said, «the reason why our political system was superior to those of all other countries was this: Our State… is not due to the personal creation of one man, but of very many; it has not been founded during the lifetime of any particular individual, but through a serious of centuries and generations».Cato quoted by Landemore. See, H. Landemore, *Democratic Reason*, Princeton, 2013, 232.

[34] See J. Waldron, *The Dignity of Legislation*, Cambridge, 1999, 99.

way. Perhaps this is the reason why to have lively political grounds in a republican-democratic-constitutional setting the basic constitutional rules have always been drafted by the largest possible citizens' participation.[35] At random, this seems to be a wise and fair undertaking for the many. If not, who are we to blame?

Abstract

The goal of this paper is to reach out the makings of Latin America and other regions' failure to work out a balanced system of popular rule with separation of powers. Bearing in mind the latest developments around the world, the aim of this text is to provide a double prong set of statements. On the one hand, to unveil a misleading link connecting a wide range of negative institutional and human rights complaints against the democratic decision-making process. On the other hand, in terms of democratic-republican goals, the paper argues that a wide range of current theoretical/practical cravings is also falling short. The concern is that self-perceived barely democratic constitutional systems are undergoing the devastating consequences of neglecting core elements of political legitimacy. Both in the so-called non-consolidated and some consolidated ones, such circumstances are bringing about instability coupled with other unforeseeable hazards. In short, this paper rejects shallow populist majoritarianism as well as non-democratic responses toward the rule of the many.

L'obiettivo di questo articolo è di cercare di spiegare perché molto Paesi dell'America Latina – e di altre regioni – siano incapaci di elaborare un sistema equilibrato di governo popolare con una vera separazione dei poteri. Tenendo presente gli ultimi sviluppi a livello globale, lo scopo di questo articolo è duplice. Da un lato, svelare un legame fuorviante che collega una vasta gamma di denunce contro il processo decisionale democratico. D'altra parte, in termini di obiettivi democratico-repubblicani, questo articolo sostiene che molti concetti teorici/pratici usati attualmente siano inadeguate. La preoccupazione è che sistemi auto-percepiti come costituzionali e con un tasso di democraticità molto debole stiano subendo effetti molto negativi che derivano dal fatto di aver trascurato elementi centrali della legittimità politica. Sia nei c.d. sistemi democratici non consolidati, che in alcuni ordinamenti consolidati, tutto ciò sta causando instabilità e altri pericoli per la democrazia. In sintesi, l'Autore respinge sia le forme di *maggioritarianismo* deboli e populiste, sia le risposte non democratiche verso il c.d. *rule of the many*.

[35] C. Sunstein, *A Constitution of Many Minds*, Princeton, 2009.

GIAMMARIA MILANI

HOW DEMOCRATIC ARE ILLIBERAL DEMOCRACIES? THE PARLIAMENT IN CONSTITUTIONAL RETROGRESSION

1. *The spread of illiberal democracy in Europe*

For decades, starting from the Second World War, but especially after the progressive waves of democratization that took place in many regions all around the world after the end of the colonial and socialist regimes, scholars have noticed a constant and worldwide increase of democracy over autocracy. The constitutional democracy has spread to different parts of the world as a form of State characterized not only, as in the case of the electoral democracy, by the presence of free and competitive elections, but also by further elements such as the presence of a rigid constitution approved through a democratic procedure, the constitutional guarantee of rights and freedoms and of the separation of powers, the openness towards international law and the recognition of local autonomy.

However, at the end of the last century, some analyses have begun to emphasize another trend, contrary to the previous one, which has progressively affected a growing number of States in different parts of the world: this trend consists in the diffusion of the illiberal democracy and in the simultaneous questioning of constitutional democracy as a model of reference.

Currently, the trend seems to be confirmed and enriched with new elements that require a careful and complex analysis of the is-

sue, especially for the European scholars: on the one hand, we are witnessing a circulation of the illiberal democracy model in the European continent, as shown by the threats recently posed to the constitutionalism in EU countries such as Hungary and Poland; on the other hand, even though the phenomena are strictly connected, there is an increasingly marked tendency to shift towards illiberal democracy within systems previously characterized by a stable and effective presence of the constitutional democracy.

As a consequence of this evolution, several studies have been conducted in order to define the elements and processes characterizing the diffusion of illiberal democracy.

As for the content, some scholars observe that the phenomenon is leading to a new form of State, which does not entirely fall neither into the framework of the democratic form of State, nor into the autocratic one. Several expressions have been used to describe this new form of State, such as illiberal democracy,[1] hybrid regime,[2] competitive authoritarianism.[3]

Concerning the procedure, as several studies point out, the dissemination of such regimes takes place gradually and incrementally, as the result of a series of changes that appear to be of limited scope when individually considered; the decline of the democratic State is in fact engendered by all these changes, occurring together. Here also, different definitions have been proposed to describe the complexity of the phenomenon: constitutional retrogression,[4] constitutional rot,[5] democratic decay,[6] democratic recession,[7] democratic disconnect,[8] democratic backsliding.[9]

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[1] F. Zakaria, *The Rise of Illiberal Democracy*, in *Foreign Affairs*, 6, 1997, 22-43.

[2] M. Tushnet, *Varieties of Constitutionalism*, in *www.iconnectblog.com*, 2014.

[3] S. Levitsky, L.A. Way, *Competitive Authoritarianism. Hybrid Regimes after the Cold War*, Cambridge, 2010.

[4] A. Huq, T. Ginsburg, *How to Lose a Constitutional Democracy*, in *UCLA Law Review*, 65, 2018, 78-169.

[5] J.M. Balkin, *Constitutional Rot and Constitutional Crisis*, in *Maryland Law Review*, 1, 2018, 147-160.

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

[7] L. Diamond, *Facing Up to the Democratic Recession*, in *Journal of Democracy*, 1, 2015, 141-153.

[8] R. Foa, Y. Mounk, *The Danger of Deconsolidation: The Democratic Disconnect*, in *Journal of Democracy*, 3, 2016, 5-17.

[9] N. Bermeo, *On Democratic Backsliding*, in *Journal of Democracy*, 1, 2016, 5-19.

Most of these studies show the transformations that some systems are witnessing with reference to the constitutional guarantees or to the counter-majoritarian institutions. In particular, especially within the European context, the focus is placed on the challenges posed to the rule of law principle. This can also be explained considering the involvement of the European Union in some national issues considered to be so serious to justify the activation of the art. 7 TEU clause concerning the violation of the fundamental principles of the European Union. Other studies are dedicated to the independence and the functioning of the constitutional courts, as well as to the interference in the composition and the functions of these bodies. At the same time, other counter-majoritarian institutions, such as the judiciary, the independent authorities, and, in a wider sense, also the press and the media in general, have been analysed.[10]

The purpose of this paper is to focus on the other side of the coin,[11] the one related to the political and representative institutions. Within this perspective, the adjective "democratic" used in the title of this paper, is to be intended in a restrictive sense. As a matter of fact, the meaning of the question is whether and how the constitutional retrogression process deriving from the affirmation of illiberal democracies is able to affect not only the guarantee bodies of the constitutional form of State, but also the political and representative institutions, and in particular the Parliament.

In this regard, paragraph 2 provides for a hypothetical framework on the possible impacts of constitutional retrogression on the Parliament and, more specifically, on its relationships with the people, the Government and the system of constitutional guarantees. Paragraph 3 introduces the case-studies which are analysed in order to confirm these hypotheses: Hungary and Poland. Both countries are currently facing serious threats to constitutional democracy; due to their internal situation, they are often indicated as the most significant examples of constitutional retrogression within the European Union. Paragraph 4 proposes a comparative analysis of the constitutional retrogression effects on the Hungarian and the Polish Parliaments, concerning both their structure and their functions.

[10] See paragraphs 3 and 4 for further references related to Hungary and Poland.

[11] T. Groppi, *Occidentali's Karma? L'innesto delle istituzioni parlamentari in contesti 'estranei' alla tradizione giuridica occidentale*, in *federalismi.it*, 5, 2019, 27, highlights the need to focus more on the organic dimension of constitutional law.

Finally, paragraph 5 tries to answer to the initial question, and to clarify if it is possible to draw some general conclusions on the relation between the legislative power and illiberal democracy.

2. *Illiberal democracies and Parliaments: a multidirectional effect*

For the sake of argument, we can state that the diffusion of the illiberal democracy may affect the role of the Parliament at least at three different levels: the relationship between the Parliament and the citizens; the relationship between the Parliament and the Government; and the relationship between the Parliament and the system of constitutional guarantees.

As regards the relationship between the Parliament and the citizens, the spread of illiberal democracies has been linked, both by the political scientists and the legal scholars, to the diffusion of populist movements.[12] 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.[13] Indirect democracy, of which the Parliament is the institutional manifestation, is considered from this point of view as an artifice and opposed to direct democracy, which is regarded as the natural and genuine form of democracy.[14] This lack of trust in the representative institutions has been the subject of many studies conducted by political scientists who have demonstrated, along with the growing disaffection with democratic institutions, an increasingly widespread appreciation for the illiberal democracy due to its greater efficiency and transparency compared to the representative democracy.[15] The consolidation of this trend could lead to an outsize use of the tools of direct democracy and to the questioning of those tools and principles that are typical of the liberal State, such as the prerogatives of the MPs and the prohibition of the binding mandate.

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[12] See A. Huq, T. Ginsburg, *How to Lose a Constitutional Democracy*, cit., 137; C. Pinelli, *The Populist Challenge to Constitutional Democracy*, in *European Constitutional Law Review*, 7, 2011, 5 ff.; N. Walker, *Populism and constitutional tension*, in *International Journal of Constitutional Law*, 2, 2019, 515 ff.

[13] J.W. Müller, *Populist Constitutions. A Contradiction in Terms?*, in *www.verfassungsblog.de*, 2017; C. Pinelli, *The Populist Challenge*, cit., 12.

[14] P. Blokker, *Populist Constitutionalism*, in *www.iconnectblog.com*, 2017.

[15] R. Foa, Y. Mounk, *The Danger of Deconsolidation*, cit., 12.

When it comes to the relationship between the Parliament and the Government, systems affected by a constitutional retrogression show a compression of the principle of separation of powers.[16] This phenomenon, which primarily concerns the counter-majoritarian institutions and the independence of these latter from the political power,[17] may also have implications on the relationship among the political institutions themselves. In this respect, it may lead to a limitation of the Parliament's autonomy from the Executive. In fact, the populist rhetoric exposes the Government, making it the interlocutor of the people. From this perspective, the Parliament would be deprived of its representative function, while the Executive would assume a position of absolute primacy within the system of government.

As to the relationship between the Parliament and the framework of constitutional guarantees, this can be analysed in the light of the relationship between government majority and opposition. Any analysis of the principle of separation of powers would be inadequate when exclusively focused on the dialectic Government-Parliament, which is typical of the liberal State; in this perspective, the relationship established between the opposition and the parliamentary-government majority must be considered.[18] From this point of view, once recognized the majority principle as a general rule, the right to participate and the possibility to elaborate alternative political guidelines should be guaranteed. The illiberal democracies, powered by the populist rhetoric, may at once overestimate the majority principle[19] and underestimate the rights of the opposition.[20] 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 the constitutional State.[21]

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[16] J.W. Müller, *Populist Constitutions*, cit.

[17] A. Huq, T. Ginsburg, *How to Lose a Constitutional Democracy*, cit., 127.

[18] G. de Vergottini, *Diritto costituzionale comparato*, Padova, 2013, 562.

[19] T.G. Daly, *Diagnosing Democratic Decay*, cit.

[20] A. Huq, T. Ginsburg, *How to Lose a Constitutional Democracy*, cit., 136.

[21] P. Blokker, *Populist Constitutionalism*, cit.; J.W. Müller, *Populist Constitutions*, cit.; C. Pinelli, *The Populist Challenge*, cit., 12; J.M. Balkin, *Constitutional Rot*, cit., 151; M. Dani, *The 'Partisan Constitution' and the Corrosion of European Constitutional Culture*, in *LEQS Paper*, 2013.

3. *Illiberal democracies in the European context: Hungary and Poland*

Hungary and Poland can provide useful case-studies to verify these hypotheses. Indeed, following the reforms approved in Hungary starting from 2010 and in Poland after 2015, the countries have become paradigmatic of the phenomenon of constitutional retrogression. Both are located in an area, Central and Eastern Europe, often considered as a "land in between" the democratic world represented by Western Europe and the authoritarian one represented by Russia.[22]

After the breakup of the Soviet bloc, Central and Eastern European countries have been for many years the subject of studies dedicated to the consolidation of democracy and the possible retrogression towards authoritarian or semi-authoritarian regimes.[23] The interest for the area has certainly known a new impetus after the reforms approved in some countries, such as Hungary and Poland, which have exposed the concern that the new democratic regimes were not strong enough to consolidate.[24]

In the next sub-paragraphs the most important events of the Hungarian and Polish constitutional retrogressions will be put in light; starting from this framework, it will be then possible to analyse more in detail how this evolution is affecting the countries' Parliaments.

3.1. *Hungary: A paradigmatic case study*

Besides being a forerunner of constitutional retrogression in Central and Eastern Europe, Hungary stands as a paradigmatic case in that its Prime Minister and Fidesz's leader Viktor Orbán himself asserted the intent to depart from the tradition of the liberal constitutionalism. He affirmed that the country «abandoned

[22] See B. Bugarič, *A crisis of constitutional democracy in post-Communist Europe: "Lands in-between" democracy and authoritarianism*, in *International Journal of Constitutional Law*, 1, 2015, 219-245.

[23] Already in 2007, the *Journal of Democracy* significantly entitled «Is East-Central Europe Backsliding?» a monographic number.

[24] That is why the area and, specifically, the decay of the structures of constitutional democracy within these Countries, have been the focus of attention and concern of European institutions.

liberal methods and principles of organizing society, as well as the liberal way to look at the world»; that «a large governing party will emerge in the center of the political stage [that] will be able to formulate national policy, not through constant debates, but through a natural representation of interests»; and that «In Europe the trend is for every constitution to be liberal, this is not one».[25]

The edification of the illiberal democracy supported by Orbán took place through a series of reforms and it culminated with the adoption of a new Constitution in 2011,[26] which entered into force in 2012 and has already been amended several times. The 2011 Constitution has attracted criticism concerning both the constitution-making process and the contents, as well as a part of the ordinary and organic laws approved in recent years, considered inconsistent with the principles of the constitutional State.

As for the constitution-making process, a first matter of concern is the non-application of the four-fifths clause.[27] This clause, according to which the constitutional amendment should have been adopted by the four-fifths of the MPs, was introduced in 1995 at art. 24 of the Constitution of 1949. However, the allegation appears to be unfounded because the provision ceased to be in force after 1998.[28]

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[25] Statements quoted by G. Halmai, *Illiberal Democracy and Beyond in Hungary*, in *www.verfassungsblog.de*, 2014.

[26] The new text replaced the Constitution of 1949 which, although significantly modified from 1989, had remained in force following the end of the socialist regime in the country as the provisional Constitution of Hungary. See A. Jakab, P. Sonnevend, *Continuity with Deficiencies: The New Basic Law of Hungary*, in *European Constitutional Law Review*, 1, 2013, 104; M. Olivetti, *Il regime parlamentare nell'Europea centro-orientale dopo il 1989*, in R. Ibrido, N. Lupo (eds.), *Dinamiche della forma di governo tra Unione europea e Stati membri*, Bologna, 2018, 119.

[27] M. Volpi, *La nuova Costituzione ungherese. Una democrazia dimezzata*, in *Diritto pubblico comparato ed europeo*, 3, 2012, 1013 ff.; K. Kelemen, *Una nuova Costituzione per l'Ungheria*, in *Quaderni costituzionali*, 3, 2011, 681; R. Uitz, *Can you tell when an illiberal democracy is in the making? An appeal to comparative constitutional scholarship from Hungary*, in *International Journal of Constitutional Law*, 1, 2015, 285.

[28] J. Fröhlich, L. Csink, *Topics of Hungarian Constitutionalism*, in *Bij De Buren*, 2012, 427; P. Sonnevend, A. Jakab, L. Csink, *The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary*, in A. von Bogdandy, P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area*, Oxford and Portland, 2015, 43; M. Bánkuti, G. Halmai, K.L. Scheppele, *From Separation of Powers to a Government without Checks: Hungary's Old and New Constitutions*, in G.A. Tóth (ed.), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law*, Budapest, 2012, 254.

Furthermore, several political parties complained about the limited involvement of the opposition and the Parliament in general, as the draft was prepared by a restricted commission of three people and then approved after about one month from its presentation.[29] Moreover, they also raised criticisms concerning the unusual method of popular participation, which took the form of a survey consisting of twelve general questions proposed before the public presentation of the draft constitution;[30] actually, this latter element witnesses the impact of populist rhetoric on the relations between the Parliament and the citizens.

Other issues have aroused after the approval of the transitional provisions at the end of 2011, that is to say after the adoption of the Constitution but before its entry into force. These provisions, whose content can hardly be defined as "transitory", were declared unconstitutional in 2012.[31] After the decision of the Constitutional Court, the Parliament has changed the text of the Fundamental Law in order to "constitutionalize" the transitional provisions, through the approval of the fourth amendment to the Constitution of 2011, certainly the most controversial one.[32]

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[29] Z. Szente, *Challenging the Basic Values. Problems in the Rule of Law in Hungary and the Failure of the EU to Tackle Them*, in A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford, 2017, 459; P. Sonnevend, A. Jakab, L. Csink, *The Constitution as an Instrument*, cit., 24; K.L. Scheppele, *Understanding Hungary's Constitutional Revolution*, in A. von Bogdandy, P. Sonnevend (eds.), *Constitutional Crisis*, cit., 111; N. Chronowski, *Carved in granite? Variable constitutional architecture in Hungary (2010-2018)*, in *DPCE Online*, 2, 2019, 1490.

[30] R. Uitz, *Can you tell*, cit., 286; K.L. Scheppele, *Understanding Hungary's Constitutional Revolution*, cit., 111; A. Di Gregorio, *Il costituzionalismo "malato" in Ungheria e Polonia*, in A. Di Gregorio (ed.), *Trattato di diritto pubblico comparato. I sistemi costituzionali dei paesi dell'Europa centro-orientale, baltica e balcanica*, Padova, 2019, 366.

[31] See Constitutional Court, Decision No. 45/2012. The Constitutional Court affirmed that these Transitional Provisions added substantive constitutional rules, enacted in excess of the constitutional delegation of power to adopt transitional provisions to the new Fundamental Law and thus invalid as ultra vires. See on the point R. Uitz, *The return of the Hungarian Constitutional Court*, in *www.verfassungsblog.de*, 2013.

[32] Z. Szente, *Challenging the Basic Values*, cit., 460; G. Halmai, *An Illiberal Constitutional System in the Middle of Europe*, in *European Yearbook of Human Rights*, 5, 2014, 501; G. Spuller, *Transformation of the Hungarian Constitutional Court: Tradition, Revolution, and (European) Prospects*, in *German Law Journal*, 4, 2014, 669; P.-A. Collot, *Difficulté contre-majoritaire et usage impérieux du pouvoir constituant dérivé au regard de la quatrième révision de la Loi fondamentale de Hongrie*, in *Revue*

As for the contents of the reforms adopted since 2010, the role of the Constitutional Court seems to be the most problematic node of the new Hungarian constitutional order. In particular, the reforms concern both the competences of the Constitutional Court, with the reshaping of the type of access, the restriction of the jurisdiction in financial matters and the prohibition from using the precedents pre-2012, and the composition of the Constitutional Court, which at the time, thanks to the changes in the appointment process, the number of judges and their term of office, appears to be strongly controlled by the majority and the Government.[33]

Nonetheless, also the independence of the judiciary and the media have been affected by reforms which pose serious challenges to the principles of the constitutional State.[34]

In order to understand the recent evolution of the Hungarian Parliament and its role in the constitutional system after the reforms of the last years, it is important to point out the existence of some critical points concerning, in general, the sources of the constitutional legal order.

First of all, the 2011 Constitution seems to be a flexible one; indeed, the constitutional revision procedure appears to be at the disposal of the political majority, since a majority of two-thirds of the members of the unicameral Parliament is sufficient to approve the revision, without further aggravation. As a consequence, and on the basis of the majority electoral system, the political majority itself is able to freely and unilaterally modify the text of the Constitution;

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française de Droit constitutionnel, 4, 2013, 797; P. Sonnevend, A. Jakab, L. Csink, *The Constitution as an Instrument*, cit., 55; L. Sólyom, *The Rise and Decline of Constitutional Culture in Hungary*, in A. von Bogdandy, P. Sonnevend (eds.), *Constitutional Crisis*, cit., 25.

[33] See Z. Szente, *Challenging the Basic Values*, cit., 464; A. Vincze, *Wrestling with Constitutionalism: The Supermajority and the Hungarian Constitutional Court*, in *Vienna Journal of International Constitutional Law*, 1, 2014, 89; M. Bánkuti, G. Halmai, K.L. Scheppele, *From Separation of Powers*, cit., 254; L. Sólyom, *The Rise and Decline*, cit., 25; A. Huq, T. Ginsburg, *How to Lose a Constitutional Democracy*, cit., 127.

[34] See Act CLXII of 2011 on the legal status and remuneration of judges; Act CLXI of 2011 on the organisation and administration of courts; Act CIV of 2010 on the freedom of the press and the fundamental rules on media content; Act CLXXXV of 2010 on media services and mass media. M. Bánkuti, G. Halmai, K.L. Scheppele, *From Separation of Powers*, cit., 262; G. Poliák, *Context, Rules and Praxis of the New Hungarian Media Laws*, in A. von Bogdandy, P. Sonnevend (eds.), *Constitutional Crisis*, cit., 125 ff.

it is then unsurprising that the Constitution has already been amended seven times since 2012.[35]

Secondly, the nature of the organic laws, qualified by the Constitution as "cardinal laws", appears to be problematic. The reason for concern is not the provision of such acts, that are approved by a majority of two-thirds of the MPs present at the voting, but the high number of referrals to this kind of legislation in the constitutional text and, above all, the kind of subjects reserved to the organic law.[36]

Thirdly, according to the fourth amendment, the decisions taken by the Constitutional Court before the entry into force of the 2012 Constitution are repealed, even if their effects remain in force; this rule expressly contrasts with the position of the Court, which previously affirmed the continuity of its jurisprudence in cases involving those provisions that had been merely reproduced by the text of the new Constitution.[37]

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[35] It is true that, following the end of the Soviet regime, the Hungarian Constitution was characterized by its flexibility, having been amended 22 times from 1990 to 2010 and 12 times from 2010 to 2012; however, if in this long period a certain flexibility of the Constitution found its *raison d'être* in the provisional nature of the Constitution itself, which according to the actors of the democratic transition would soon had to be replaced by a new text, the post-2012 situation is challenging for the principle of the rigidity of the Constitution. A. Jakab, P. Sonnevend, *Continuity with Deficiencies*, cit., 104; Z. Szente, *Challenging the Basic Values*, cit., 460; M. Bánkuti, G. Halmai, K.L. Scheppele, *From Separation of Powers*, cit., 254; P.-A. Collot, *Difficulté contre-majoritaire*, cit., 790; G.F. Ferrari, *La Costituzione dell'Ungheria*, in M. Ganino (ed.), *Codice delle Costituzioni. Vol. III*, Padova, 2013, 390; L. Sólyom, *The Rise and Decline*, cit., 21.

[36] On the one hand, these laws must legislate on matters that would have to find a more rigid regulation in the Constitution, such as the organization of the guarantee bodies and the protection of rights and freedoms; on the other hand, the regulation of some matters, concerning for example social and fiscal policies, should be left to the ordinary law as a manifestation of the political directions likely to change with the evolution of the economic and political situation in the country. See A. Jakab, P. Sonnevend, *Continuity with Deficiencies*, cit., 104; M. Bánkuti, G. Halmai, K.L. Scheppele, *From Separation of Powers*, cit., 267; P. Sonnevend, A. Jakab, L. Csink, *The Constitution as an Instrument*, cit., 78 ff.; M. Volpi, *La nuova Costituzione ungherese*, cit., 1019; G.F. Ferrari, *La Costituzione dell'Ungheria*, cit., 395; G. Romeo, E. Mostacci, *La forma di governo*, in G.F. Ferrari (ed.), *La nuova Legge fondamentale ungherese*, Torino, 2012, 85. See also Venice Commission, *Opinion on the New Constitution of Hungary*, No 621/2011, 17-18 June 2011.

[37] See Constitutional Court, Decision No 22/2012. A. Jakab, P. Sonnevend, *Continuity with Deficiencies*, cit., 109; Z. Szente, *Challenging the Basic Values*, cit., 460; L. Sólyom, *The Rise and Decline*, cit., 25 ff.

3.2. *Poland: Following the illiberal footprints*

If Hungary is commonly considered as the European forerunner of the constitutional retrogression, Poland confirms that such retrogression should be a matter of concern in the continent, given what is happening in the country since 2015.

Even if both countries share important features and major steps of their constitutional evolution, so that it is possible and also suitable to analyse them within a common framework, the impact of the constitutional retrogression on their formal Constitution differs in several aspects. In fact, if the approval of a new Fundamental Law in 2011 is considered the most evident shift of Hungary toward illiberal democracy, the Polish Constitution of 1997 has never been repealed,[38] even if its meaning has significantly changed over time, following the adoption of relevant statutes, resolutions and practices.[39]

A possible reason explaining this different approach undoubtedly stems from the differences in the constitutional revision procedures of Hungary and Poland. According to art. 235 of the Polish Constitution, a bill to amend the Constitution may be submitted by at least one-fifth of the statutory number of Deputies, the Senate or the President of the Republic; the bill shall then be adopted by the

[38] The democratic and constitutional transition of Poland started in 1989 with the so-called "Round Table Talks". The transition, that took place gradually, started through the revision of the socialist Constitution, amended six times from 1989 to 1991. The old Constitution was partly repealed in 1992 and then replaced by a provisional text, the so-called "Little Constitution", which regulated the functioning of the Legislative and the Executive branches and of local governments. See B. Banaszak, *General Introduction*, in B. Banaszak *et al.* (eds.), *Constitutional Law in Poland*, The Hague, 2012, 17 ff.; M. Granat, K. Granat, *The Constitution of Poland. A Contextual Analysis*, Oxford, 2019, 1 ff.; A. Di Gregorio, *Le Costituzioni*, in A. Di Gregorio (ed.), *Trattato di diritto pubblico comparato*, cit., 56 ff.; C. Filippini, *Polonia*, Bologna, 2010, 39 ff.

[39] W. Sadurski, *Poland's Constitutional Breakdown*, Oxford, 2019, 1 ff., talks about an «Anti-constitutional populist backsliding». See also Id., *Constitutional Crisis in Poland*, in M.A. Graber, S. Levinson, M. Tushnet (eds.), *Constitutional Democracy in Crisis?*, Oxford, 2018, 257 ff.; Id., *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, in *Sydney Law School. Legal Studies Research Paper*, 18, 2018, 1 ff.; A. Di Gregorio, *Il costituzionalismo "malato"*, cit., 389-390.

[40] See A. Di Gregorio, *Le Costituzioni*, cit., 143 ff.; C. Filippini, *Polonia*, cit., 101 ff.

Chamber by a majority of at least two-thirds of votes in the presence of at least one-half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least one-half of the statutory number of Senators. Moreover, if the amendment concerns the parts of the Constitution dedicated to the fundamental principles of the Republic, to the rights and freedoms or to the same amendment procedure (Chapters I, II and XII), all subjects authorised to propose the bill may ask for the submission of the text to popular referendum. In that case, the revision of the Constitution shall be deemed to be approved if the majority of votes is in favour of the amendment.[40]

These provisions must be read in conjunction with the political and election system of Poland. The Constitution of Poland establishes a proportional system for the election of the Chamber (art. 96).[41] This system, which has been in place in the country since the end of the socialist State, is considered one of the key factors of the Polish multi-party system.[42] As a consequence, it generally happens that several political parties are represented in the Parliament, while none of them is usually able to gain the absolute majority of the seats in the Chamber and in the Senate.[43]

The combination of the constitutional amendment procedure and the political and election system provides the text of the Polish Constitution with a higher level of rigidity in comparison with the Hungarian tradition.[44] Since 1997, the Constitution of Poland has been amended only twice, in 2006 and 2009.[45] Notwithstanding the extraordinary electoral results obtained by Prawo i Sprawiedliwość

[41] No similar rules are set concerning the Senate (art. 97).

[42] See M. Granat, K. Granat, *The Constitution of Poland*, cit., 56; A.W. Preisner, *Form of the Government*, in B. Banaszak *et al.* (eds.), *Constitutional Law in Poland*, cit., 98 ff.; J. Sawicki, *Le forme di governo*, in A. Di Gregorio (ed.), *Trattato di diritto pubblico comparato*, cit., 227 ff.; C. Filippini, *Polonia*, cit., 57 ff.

[43] Since 1997, the political parties that obtain seats in the Chamber are usually six or seven; the only exception was after the elections of 2007, when only five political parties gained the sufficient number of votes to obtain seats.

[44] Nevertheless, as higlighted by A. Orlandi, *La democrazia illiberale. Ungheria e Polonia a confronto*, in *Diritto pubblico comparato ed europeo*, 1, 2019, 178, both constitutional amendment procedures provide for weak forms of constitutional rigidity.

[45] See S. Biernat, M. Kawczyńska, *The Role of the Polish Constitution (Pre-2016): Development of a Liberal Democracy in the European and International Context*, in A. Albi, S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*, The Hague, 2019, 750.

(PiS) in 2015, the ruling party led by MP Jarosław Kaczyński,[46] which for the first time after the end of the socialist regime gained the absolute majority of seats both within the Chamber and the Senate,[47] the Constitution has then not been amended since the beginning of the constitutional retrogression.[48]

The lack of formal revisions to the text of the Constitution does not mean that the Polish constitutional order has remain unchanged. On the contrary, a series of ordinary statutes, parliamentary resolutions and practices adopted since 2015 have breached or forced the meaning of the country's Constitution, thus threatening in particular the system of constitutional guarantees.[49]

As for Hungary, in Poland the retrogression affected firstly and mostly the constitutional jurisdiction and the judiciary in general, which has been weakened and harnessed by the government majority. The strategy has been very clear in the case of the "capture" of the Constitutional Tribunal,[50] conducted through the enactment of

[46] Jarosław Kaczyński is the former Prime Minister of Poland (2006-2007) and twin brother of Lech, late President of the Republic (2005-2010) dead in an air crash. The Kaczyński brothers founded Prawo i Sprawiedliwość (Law and Justice) in 2001; the party was led by Lech till 2003 and then by Jarosław, who is the current President of the party. Since the PiS election victory in 2015, Jarosław Kaczyński has remained a "simple" MP, not assuming any function within the Executive branch.

[47] In 2015 PiS obtained the 37% of the votes and 235 seats out of 460 at the Chamber and the 40% of the votes and 48 seats out of 100 at the Senate. In 2019 the ruling party reached the 43% of the votes and 235 seats out of 460 at the Chamber and the 44% of the votes and 48 seats out of 100 at the Senate.

[48] See A. Sledzinska-Simon, *The Polish Revolution: 2015-2017*, in *www.iconnectblog.com*, 2017; W. Sadurski, *Poland's Constitutional Breakdown*, cit., 1 ff.

[49] A. Sledzinska-Simon, *The Polish Revolution*, cit., talks about a «PIS revolution-by-law»; W. Sadurski, *Poland's Constitutional Breakdown*, cit., 2 underlines that «Poland is unique in its ostentatious disregard for its own formal constitutional rules».

[50] See W. Sadurski, *Poland's Constitutional Breakdown*, cit., 58 ff.; A. Sledzinska-Simon, *The Polish Revolution*, cit.; T.T. Koncewicz, *The Court is dead, long live the courts? On judicial review in Poland in 2017 and "judicial space" beyond*, in *www.verfassungsblog.de*, 2018; J. Sawicki, *Prove tecniche di dissoluzione della democrazia liberale: Polonia 2016*, in *Nomos*, 1, 2016, 1-24; Id., *La conquista della Corte costituzionale ad opera della maggioranza che non si riconosce nella Costituzione*, in *Nomos*, 3, 2016, 1-9; Id., *Polonia: un tentativo di eviscerazione dello stato costituzionale*, in *Quaderni costituzionali*, 1, 2016, 115-118; Id., *Una crisi costituzionale ormai cronicizzata e il suo impatto sulla democrazia: la Polonia nel 2016*, in *Quaderni costituzionali*, 4, 2016, 799-802; A. Angeli, *Polonia. Le derive di una democrazia (quasi) maggioritaria: tra rischio di paralisi dell'organo di giustizia costituzionale e dualismo giuridico*, in *Federalismi*, 17, 2016, 1 ff.; A. Di Gregorio, *Il costituzionalismo "malato"*, cit., 379; A. Orlandi, *La democrazia illiberale*, cit., 177-180; Č. Pištan, *Giustizia costituzionale e potere*

statutes and resolutions aimed at limiting the activity of the judges and controlling the composition of the institution.[51]

The independence of the judiciary has also been subject to significant and evident limitations enacted by the PiS majority since 2015, in particular through the approval of the so-called "justice package" in 2017. As a matter of fact, following the approval of three statutes concerning the Supreme Court, the National Council of the Judiciary and the judiciary system in general,[52] the Government and the Parliament are now able to strongly limit the degree of autonomy and impartiality of the judges, which is one of the main characters of the constitutional democracy.[53]

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giudiziario. Il ruolo delle Corti costituzionali nei processi di democratizzazione ed europeizzazione, in A. Di Gregorio (ed.), *Trattato di diritto pubblico comparato*, cit., 355 ff.

[51] The rules concerning the Constitutional Tribunal have been modified several times between 2015 and 2016. The Act of 25 June 2015 on Constitutional Tribunal has been amended twice soon after the election of the new Parliament, on November 19 and on December 22. The new rules have been almost completely declared unlawful by the Constitutional Tribunal, Judgement 47/15 of 9 March 2016. The Parliament has then adopted a new statute, the Act of 22 July 2016 on Constitutional Tribunal, partly annulled by the Constitutional Tribunal, Judgement 39/16 of 11 August 2016 and Judgement 44/16 of 7 November 2016. All these decisions of the Constitutional Tribunal have not been published by the Government, which considered them unlawful for being in contrast with the procedures laid down by the relevant legislation. The aforementioned statutes have been later repealed with the approval of three acts: the Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal; the Act of 30 November 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal; the Act of 13 December 2016 on Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal and to the Act on the Status of the Judges of the Tribunal.

[52] The so-called "justice package" consists of the Act of 12 July 2017 on the organisation of ordinary courts; the Act of 8 December 2017 amending the Act on the National Council of the Judiciary; the Act of 8 December 2017 amending the Act on the Supreme Court.

[53] See W. Sadurski, *Poland's Constitutional Breakdown*, cit., 96 ff.; Id., *Judicial "Reform" in Poland: The President's Bills are as Unconstitutional as the Ones he Vetoed*, in *www.verfassungsblog.de*, 2017; P. Mikuli, *The Declining State of the Judiciary in Poland*, in *www.iconnectblog.com*, 2018; T.T. Koncewicz, *Farewell to the Separation of Powers - On the Judicial Purge and the Capture in the Heart of Europe*, in *www.verfassungsblog.de*, 2017; M. Matczak, *How to Demolish an Independent Judiciary with the Help of a Constitutional Court*, in *www.verfassungsblog.de*, 2017; A. Sledzinska-Simon, *The Polish Revolution*, cit.; A. Angeli, A. Di Gregorio, J. Sawicki, *La controversa approvazione del "pacchetto giustizia" nella Polonia di "Diritto e Giustizia": ulteriori riflessioni sulla crisi del costituzionalismo polacco alla luce del contesto europeo*, in *DPCE*

Along the same lines, other important pieces composing the puzzle of the counter-majoritarian guarantees have also been affected. In fact, the control now exercised by the Government and the Parliament both over the public and the private media may be considered as a way to create a "propaganda machine", for the purpose of consolidating the PiS control over institutions and society.[54]

It is clear that, even if a formal change of the Constitution did not occur, the constitutional democracy is facing an important retrogression in Poland since 2015. Probably, this process is not immediately obvious as in the Hungarian example in matters of form, and this is exactly why it could appear even more dangerous. Indeed, while Hungary witnesses a formal retention of the constitutional rule of law, as it formally complies with its new illiberal Constitution, the Polish PiS is instead acting in blatant contrast with the Constitution of 1997.[55]

Thus, the different strategy pursued by the Polish ruling majority has an impact on the relevant sources of law which form the foundation of the constitutional retrogression. It follows that, while in Hungary the main matter of analysis is the Constitution adopted in 2011, in Poland the major threats to constitutional democracy are to be found in ordinary statutes and resolutions approved by the Parliament, as well as in acts and practices adopted by the Government and the President of the Republic.

4. *The Parliament in the Hungarian and Polish constitutional retrogression*

Differently from what happened in other post-socialist countries in Central and Eastern Europe after the fall of the socialist regimes, in 1989 Hungary chose a parliamentary form of government.[56] The Parliament, in the Constitution of the democratic tran-

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Online, 3, 2017, 787 ff.; A. Di Gregorio, *Il costituzionalismo "malato"*, cit., 382; A. Orlandi, *La democrazia illiberale*, cit., 188.

[54] See B. Klimkiewicz, *State, media and pluralism: Tracing roots and consequences of media policy change in Poland*, in *Publizistik*, 62, 2017, 197 ff.; W. Sadurski, *Poland's Constitutional Breakdown*, cit., 138 ff.; A. Orlandi, *La democrazia illiberale*, cit., 197.

[55] See A. Di Gregorio, *Il costituzionalismo "malato"*, cit., 389-390.

[56] M. Ganino, C. Filippini, A. Di Gregorio, *Presidenti, Governi e Parlamenti nei Paesi dell'Europea orientale (Polonia, Lituania, Ungheria, Repubblica ceca): l'equilibrio*

sition, was the focal point of the Hungarian system of government,[57] marking a sort of formal continuity with the previous regime which, according to the socialist model, was characterized by the centrality and the primacy of the Assembly, expression of the popular will organized in the single party.[58] Despite the substantial detachment from the previous regime due to the affirmation of the principles of separation of powers and of political pluralism, along with the setting up of a parliamentary assembly effectively able to influence the form of government,[59] the practice soon revealed the subordinate position of the Parliament with respect to the Government.[60]

The recent changes to the Hungarian constitutional system seem to confirm this trend. According to the wording of art. 1 of the Constitution, the Parliament is the «supreme organ of popular representation».[61] In fact, the chapter dedicated to the Parliament has been considered as one of the less controversial parts of the new Constitution,[62] as also proved by the lack of interest shown by international organizations, such as the Venice Commission. Indeed, the reading of Chapter I shows that Parliament has formally gained importance within the Hungarian form of government. However, a systematic examination of the Constitution, and in par-

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innanzitutto, in A. Di Giovine, A. Mastromarino (eds.), *La presidenzializzazione degli esecutivi nelle democrazie contemporanee*, Torino, 2007, 139 ff.; L. Montanari, *Le nuove democrazie dell'Europa centro-orientale*, in P. Carrozza, A. Di Giovine, G.F. Ferrari (eds.), *Diritto costituzionale comparato*, Roma-Bari, 2014, 521.

[57] J.T. Andrews, *Legislatures in Central and Eastern Europe*, in S. Martin, T. Saalfeld, K.W. Strøm (eds.), *The Oxford Handbook of Legislative Studies*, Oxford, 2014, 648.

[58] P. Sonnevend, A. Jakab, L. Csink, *The Constitution as an Instrument*, cit., 38; S. Bartole, P. Grilli di Cortona, *Transizione e consolidamento democratico nell'Europa centro-orientale: élites, istituzioni e partiti*, Torino, 1998; J. Sawicki, *Democrazie illiberali? L'Europa centro-orientale tra continuità apparente della forma di governo e mutazione possibile della forma di Stato*, Milano, 2018, 15.

[59] Z. Mansfeldova, *Central European Parliaments over Two Decades. Diminishing Stability? Parliaments in Czech Republic, Hungary, Poland, and Slovenia*, in *The Journal of Legislative Studies*, 2, 2011, 129.

[60] G. Ilonski, *From Minimal to Subordinate: A Final Verdict? The Hungarian Parliament, 1990-2002*, in *The Journal of Legislative Studies*, 1, 2007, 38.

[61] P. Smuk, *The Parliament*, in A. Varga, A. Patyi, B. Schanda (eds.), *The Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution*, Dublin, 2015, 124.

[62] P. Smuk, *The Parliament*, cit., 136.

ticular of the Chapter dedicated to the National Assembly (arts. 1-7), highlights a general weakening of Parliament, affected by a series of more or less incisive changes in its composition, functions and internal organization.[63] This is even more true when supported by an analysis of the legislative and regulatory provisions which currently regulate the Hungarian legislative assembly within the complex legal framework aforementioned: Act CCIII of 2011 on the election of the National Assembly; Act XXXVI of 2012 on the National Assembly; Act XXXVI of 2013 on Electoral Procedure; Resolution 10 of 2014 on certain provisions of the rules of procedure.[64]

If we compare the Polish form of government with the Hungarian one, differences seem to prevail over similarities. The main differences, according to a formal analysis, concern in particular the selection of the President of the Republic, which in Poland is directly elected, as well as the structure of the Parliament, which is bicameral in Poland. Nonetheless, if we look at the concrete functioning of the institutions, there appear to be important points of contact between the two countries.

On the first aspect, it is worth noting that while a central role was recognised to the President of the Republic in Poland both in the amended Socialist Constitution and in the Small Constitution of 1992, the Constitution of 1997 strongly reduced its functions, while maintaining its popular election.[65] Consequently, as in other countries in Central and Eastern Europe, the direct election of the President of the Republic doesn't automatically imply the existence of a semi-presidential form of government, which is rather functioning as a parliamentary system.[66]

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[63] Z. Szente, *Marginalising the Parliament. (Anti)Parliamentary Reforms in Hungary after 2010*, paper presented at *Convegno SISP Democrazia e democratizzazioni*, 2016, 1.

[64] P. Smuk, *On Legislative Power*, in P. Smuk (ed.), *The Transformation of the Hungarian Legal System 2010-2013*, Budapest, 2013, 97; Z. Szente, *Marginalising the Parliament*, cit., 2; Id., *How Populism Destroys Political Representation. (Anti-)Parliamentary Reforms in Hungary after 2010*, in *DPCE Online*, 2, 2019, 1613.

[65] See M. Granat, K. Granat, *The Constitution of Poland*, cit., 76; R. Balicki, *Head of State*, in B. Banaszak *et al.* (eds.), *Constitutional Law in Poland*, cit., 114; M. Ganino, C. Filippini, A. Di Gregorio, *Presidenti, Governi e Parlamenti*, cit., 153.

[66] See M. Wyrzykowski, A. Cieleń, *Presidential Elements in Government: Poland. Semi-presidentialism or 'Rationalised Parliamentarianism'?*, in *European Constitutional Law Review*, 2006, 266 ff.; M. Ganino, C. Filippini, A. Di Gregorio, *Presidenti, Governi e Parlamenti*, cit., 155.

When it comes to the parliamentary structure, the Chamber clearly seems to prevail over the Senate.[67] Only the former exercises a controlling function over the activity of the Council of Minister (art. 95), with which it is linked by a relationship of confidence (arts. 154 ff.). The legislative function is also mainly exercised by the Chamber, which adopts statutes by a simple majority vote (art. 120); the Senate can only propose to accept, reject or amend the bill previously approved by the lower house; to do so, it has 30 days (art. 121), or 14 days if the bill is declared as urgent (art. 123). In any event, the Chamber can override the position of the Senate by an absolute majority vote.

Even if the Polish Parliament is not considered as the supreme organ of popular representation, as it is in Hungary, the Constitution of 1997 revitalized its role following a strong recognition of the principles of separation of power (art. 10) and political pluralism (art. 11). Nonetheless, in Poland too the constitutional retrogression has affected the position of the Parliament. This particularly happened through a series of practices that deeply changed and weakened the exercise of its legislative, control and creative functions. The election system has changed as well, through the adoption of the 2017 reform which limited the fairness of the electoral procedures while keeping unchanged the electoral formula.[68]

In the next sub-paragraphs, the main novelties concerning the role and functions of the Hungarian and Polish Parliaments will be analysed, describing how the position of the Legislatives has changed in its relationship with the citizens, the Government and the system of constitutional guarantees.

4.1. *Elections and referendum*

The relationship between the Parliament and the people has been the subject of important changes able to bring out a transformation in the role of the representative democracy within the Hungarian and Polish constitutional systems.

[67] See M. Granat, K. Granat, *The Constitution of Poland*, cit., 46 ff.; I.J. Bišta, *Legislative Branch*, in B. Banaszak *et al.* (eds.), *Constitutional Law in Poland*, cit., 127 ff.; M. Ganino, C. Filippini, A. Di Gregorio, *Presidenti, Governi e Parlamenti*, cit., 153; J. Sawicki, *Le forme di governo*, cit., 162 ff.

[68] Act of 14 December 2017 amending the Act on elections to the Chamber of the Republic of Poland and to the Senate of the Republic of Poland.

The method of election of the Parliament is a first aspect to be taken into consideration. The adoption of a mixed electoral system is a peculiarity of the Hungarian legal system, since during the democratic transitions the other Central and Eastern Europe countries generally opted for proportional electoral systems.[69] The choice had a clear impact on the Hungarian political system, which has then been characterized by a progressive decrease of the parties represented in Parliament and by the strengthening of the more powerful ones.[70] The political system also impacted on the functioning of the form of government, marked by a high degree of governmental stability, by the total absence of forms of consensual democracy and by the subservience of Parliament to the Executive.[71]

The electoral system proved to be quite unbalanced in 2010, when it allowed the allocation of two-thirds of the seats (260 out of 386) to the party that had obtained just over a majority of votes (53%). These results granted the start of a constituent legislature.[72]

The system was then amended in 2011 by introducing additional critical elements.[73] First of all, the weight of the proportional quota and of the majority quota changed from a ratio of 55/45 to a ratio of 47/53. Moreover, both the reduction of the number of MPs, from 386 at 199, and the use of the plurality formula for the

[69] G. Ilonszki, R. Varnágy, *From Party Cartel to One-Party Dominance. The Case of Institutional Failure*, in *East European Politics*, 3, 2014, 424; L. Montanari, *Le nuove democrazie*, cit., 519; M. Ganino, C. Filippini, A. Di Gregorio, *Presidenti, Governi e Parlamenti*, cit., 169 ff.; J. Sawicki, *Democrazie illiberali?*, cit., 81.

[70] Z. Mansfeldova, *Central European Parliaments*, cit., 133. It is worth mentioning that the large consensus for Fidesz was also a consequence of the fall of the Socialist party, its main opponent, which held the majority within the Parliament from 2002 to 2010. Over the years, a volatility of the consensus has been registered among the Hungarian citizens, who generally tends to rally around a strong single party.

[71] J.T. Andrews, *Legislatures in Central and Eastern Europe*, cit., 662; D.M. Olson, P. Norton, *Post-Communist and Post-Soviet Parliaments: Divergent Paths from Transition*, in *The Journal of Legislative Studies*, 1, 2007, 189; G. Ilonszki, D.M. Olson, *Questions about Legislative Institutional Change and Transformation in Eastern and East Central Europe: Beyond the Initial Decade*, in *The Journal of Legislative Studies*, 2, 2011, 121; M. Ganino, C. Filippini, A. Di Gregorio, *Presidenti, Governi e Parlamenti*, cit., 170 ff.

[72] B. Bugarič, *A crisis of constitutional democracy*, cit., 230; M. Volpi, *La nuova Costituzione ungherese*, cit., 1017; K.L. Scheppele, *Understanding Hungary's Constitutional Revolution*, cit., 112; A. Di Gregorio, *Il costituzionalismo "malato"*, cit., 367-368; Id., *Hungarian constitutional developments and measures to protect the rule of law in Europe*, in *DPCE Online*, 2019, 1465 ff.

[73] See Act CCIII of 2011 on the election of the National Assembly.

election in single-member constituencies, increase the distortive effect of the election system.[74] Nonetheless, the new definition of the electoral constituencies has been contested and depicted as a work of gerrymandering.[75]

The analysis of the new electoral legislation shall also take into account the other provisions promoted by the Orbán Government with the purpose to enlarge the electoral base of the current majority. In this respect, we can mention both the introduction of the vote for Hungarians abroad, along with the controversies related to the new regulation of citizenship and the registration of non-resident voters, and the proposal for the allocation of an additional vote for families with children, a measure contested by some members of the same Fidesz party and finally withdrawn.[76]

Linked to the issue of elections and, more generally, to the relationship between the Parliament and the people in Hungary, the rules on referendum have also been amended with the adoption of the new Fundamental Law. The Constitution of 1949, after the amendment of 1997, provided at art. 28/C that a referendum could be requested by 200,000 voters, or otherwise by the Parliament on the initiative of the President of the Republic, the Government, 100,000 voters or one-third of MPs.[77] The new text eliminates the possibility for the parliamentary minority to request a referendum (art. 8 Const.). This change weakens the guarantee function of the referendum and increases its plebiscitary nature, as long as the President and the Government can resort to the popular consultation to ratify their decisions, bypassing the representative circuit.

The concrete functioning of the referendum, as well as of the election system, may also be affected by the new rules concerning the National Election Commission. The Commission consists of a

[74] K.L. Scheppele, *Understanding Hungary's Constitutional Revolution*, cit., 120; G. Delledonne, *Constitutional courts dealing with electoral laws: comparative remarks on Italy and Hungary*, in *DPCE Online*, 2019, 1552 ff.

[75] G. Halmai, *Illiberal Democracy and Beyond*, cit.; K.L. Scheppele, *Understanding Hungary's Constitutional Revolution*, cit., 120; A. Di Gregorio, *Il costituzionalismo "malato"*, cit., 369.

[76] M. Steinbeis, Hungary's Proto-Authoritarian New Constitution, in *www.iconnectblog.com*, 2011.

[77] P. Kopecký, M. Spirova, *Parliamentary Opposition in Post-Communist Democracies: Power of the Powerless*, in *The Journal of Legislative Studies*, 1-2, 2008, 153; J.W. Schiemann, *Hungary: The Emergence of Chancellor Democracy*, in *The Journal of Legislative Studies*, 2-3, 2004, 133.

chairman and six members elected for a nine-year term by the Parliament, with a two-thirds majority of the MPs, on the proposal of the President of the Republic. Each political party that is registered as a faction within the Parliament can appoint one additional member, whose mandate ends upon announcement of any parliamentary elections; after a national list has been registered for such elections, it may designate one temporary member whose mandate ends at the first session of the newly elected Parliament.[78]

The Fidesz's majority has actually "captured" the Commission since 2010. The then in office members – who had been chosen in February and who were supposed to stay in place for 4 years – were removed in April in order to be replaced by new members to be elected with the new established procedure, that is to say by a majority vote of the Parliament. As a consequence, the party was able to obtain the control of the Commission, quickly filled with its loyalists.[79] That means controlling the operations connected to the parliamentary elections.[80] Moreover, the Commission also has to certificate referenda before they can be submitted to the citizens; in this perspective, it is quite unlikely that this instrument could be used as a counter-majoritarian institution, that is to say as a way for the opposition parties to try to stop some legislative initiatives included in the Fidesz electoral program.[81]

The "capture" of the electoral institutions is a common feature of both the Hungarian and the Polish constitutional retrogressions. In fact, in 2017 Poland modified its election system to change the functioning and the composition of both the National Electoral Commission and the District Electoral Commissions; nonetheless, no changes were introduced to the electoral formula for the Chamber and the Senate.

The Constitution of 1997 provides for a proportional system for the election of the Chamber, while no similar provision is included for the Senate. Since the entry into force of the Constitution, the electoral legislation has been amended several times:[82] cur-

[78] See Act XXXVI of 2013 on Electoral Procedure.

[79] M. Bánkuti, G. Halmai, K.L. Scheppele, *From Separation of Powers*, cit., 256.

[80] K.L. Scheppele, *Understanding Hungary's Constitutional Revolution*, cit., 120.

[81] M. Bánkuti, G. Halmai, K.L. Scheppele, *From Separation of Powers*, cit., 256.

[82] The current relevant legislation is the Act of 12 April 2001 on the elections to the Chamber of the Republic of Poland and to the Senate of the Republic of Poland.

rently, the Chamber is elected by proportional representation in 41 multi-seat constituencies using the D'Hondt method and different thresholds for parties (5%) and coalitions (8%), while the election of the Senate is based on the first-past-the-post voting in 100 single member constituencies.[83]

Probably, the presence of a constitutional provision detailing the election system of the lower (and predominant) house has prevented the election formula from being revised. Nonetheless, it has been noted that elements such as the minimum thresholds and the D'Hondt method are by themselves able to make the proportional election more favourable to the bigger parties and, consequently, to make it more similar to a majoritarian system.[84] Therefore, it is not surprising that both in 2015 and in 2019 the PiS won an absolute majority of seats after reaching a relative majority of votes.

Given the constitutional provision on the proportional election and the presence of strong parliamentarian majorities deriving from the voting system, the ruling party has never felt the need to change the electoral formula. However, in order to control the electoral competition and to strengthen its grip on power, the ruling party amended the electoral legislation,[85] by "de-judicializing" the electoral administration.[86]

Originally, the National Electoral Commission was composed of nine judges. It was equally made of three judges of the Constitutional Tribunal, three of the Supreme Court and three of the Supreme Administrative Court, all appointed by the Presidents of their respective bodies. Following the 2017 amendment, the Commission is currently composed of two judges belonging to the Constitutional Tribunal and the Supreme Administrative Court, while the other seven members are appointed by the Chamber among persons "qualified to be judges". The head of the National Electoral Bureau, the executive branch of the Commission, is appointed by the Commission itself; nonetheless, while the head was previ-

[83] M. Granat, K. Granat, *The Constitution of Poland*, cit., 48 ff.; I.J. Bišta, *Legislative Branch*, cit., 127 ff.; C. Filippini, *Polonia*, cit., 61 ff.; J. Sawicki, *Le forme di governo*, cit., 166 ff.

[84] M. Granat, K. Granat, *The Constitution of Poland*, cit., 48 ff.; L. Montanari, *Le nuove democrazie*, cit., 519 ff.

[85] Act of 14 December 2017 amending the Act on elections to the Chamber of the Republic of Poland and to the Senate of the Republic of Poland.

[86] W. Sadurski, *Poland's Constitutional Breakdown*, cit., 140.

ously proposed by the chairperson of the Commission, it is at present appointed from among a list of three candidates submitted by the Minister of Interior. Finally, the chairpersons of the District Electoral Commissions now are also appointed by the National Electoral Commission among the list of candidates proposed by the Minister of Interior; and, most importantly, they may no longer hail necessarily from the judiciary.[87]

This series of reforms have thus allowed the majority to "capture" the whole electoral administration, both at the national and local level. It hence became possible not only to control the electoral procedures, but also to influence the allocation of funds to political parties, especially during the electoral campaigns;[88] the impact of these changes over the principles of political pluralism and fairness of electoral process are quite manifest.

4.2. *The control function*

The most evident changes in the role of the Hungarian Parliament are connected to its relationship with the Government, at least at a constitutional level. This link is at the core of the Hungarian parliamentary form of government, traditionally characterized by the primacy of the Prime Minister and by the presence of other elements of rationalization.[89] Although it has been argued that the Hungarian form of government has substantially remained unamended after the modification of the constitutional framework of the country,[90] there are some mutations that can be read as a further strengthening of the Government to the detriment of the Parliament.

The Prime Minister is still elected by the Parliament with an absolute majority on the proposal of the President of the Republic (art. 16 Const.); the ministers are still appointed by the President of the Republic on the proposal of the Prime Minister, thus expressing

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[87] W. Sadurski, *Poland's Constitutional Breakdown*, cit., 141; M. Granat, K. Granat, *The Constitution of Poland*, cit., 53; A. Orlandi, *La democrazia illiberale*, cit., 212.

[88] W. Sadurski, *Poland's Constitutional Breakdown*, cit., 141; Id., *Who will Count the Votes in Poland?*, in *www.verfassungsblog.de*, 2018.

[89] The figure of the Hungarian Prime Minister has always been inspired by the German Chancellor. G.F. Ferrari, *La Costituzione dell'Ungheria*, cit., 395.

[90] A. Jakab, P. Sonnevend, *Continuity with Deficiencies*, cit., 119.

the monocratic principle underlying the rationalization of the Hungarian form of government.[91] However, some innovations deserve to be underlined.

A first element of discontinuity shall be detected in the fact that the Parliament does not discuss the Government program, as it used to do in the past, but at present it can only vote on the person of the Prime Minister;[92] in this perspective, the sharing of political guidelines between Parliament and Government is missing and, as a consequence, the possibility for the Parliament to exercise its function of political direction tends to dissolve. On the contrary, the regulation of the relationship of confidence is confirmed: the Government must resign if the Parliament approves a motion of no confidence and simultaneously elects a new Prime Minister, or if the Parliament rejects a vote of confidence proposed by the Government (arts. 20-21).[93]

A second element is represented by the rules concerning the formation and the functioning of the committees of inquiry. The possibility of these parliamentary bodies to oversight the action of the Government is traditionally limited in the Central and Eastern European countries,[94] but in Hungary it has been further compressed due to some recent changes. According to art. 36 of the rules of procedure in force from 1994 and now repealed,[95] a committee of inquiry had to be set up if at least one-fifth of the MPs supported such a motion. As set out in art. 24 of the Act on National Assembly, approved in 2012, it is actually still possible for one-fifth of the MPs to request the creation of a committee of inquiry, but no guarantees concerning the effective establishment of this latter are provided for. Moreover, art. 24 also prescribes that it

[91] M. Ganino, C. Filippini, A. Di Gregorio, *Presidenti, Governi e Parlamenti*, cit., 173; G.F. Ferrari, *La Costituzione dell'Ungheria*, cit., 395.

[92] According to the article 18 of the new Fundamental Law, «The Prime Minister shall define the general policy of the Government», so that it is no longer necessary to discuss the governmental program before the Assembly, since this latter already elected the Prime Minister. P. Smuk, *The Parliament*, cit., 136; M. Volpi, *La nuova Costituzione ungherese*, cit., 1022; G.F. Ferrari, *La Costituzione dell'Ungheria*, cit., 396.

[93] M. Volpi, *La nuova Costituzione ungherese*, cit., 1022.

[94] G. Ilonski, *From Minimal to Subordinate*, cit., 51; D.M. Olson, P. Norton, *Post-Communist and Post-Soviet Parliaments*, cit., 186; P. Kopecký, M. Spirova, *Parliamentary Opposition*, cit., 145.

[95] Resolution 46 of 1994.

is not possible to establish such committees if another control tools, i.e. interpellations or interrogations, are sufficient to clarify the situation under investigation.[96]

A third element concerns the regulation of another important scrutiny tool, the so-called question time. According to the previous rules of procedure, a minimum time of 60 minutes per week was dedicated to the instantaneous questions and answers; the rules of procedure also required the presence of the person called upon to answer, whose absence could only be justified in case of need to simultaneously perform a «pressing public duty» (art. 119). The Resolution 10 of 2014 seems to undermine the effects of the question time, since it revises the time constraints and it softens the obligation to be present and to answer (art. 125).

The fourth, and maybe most important, element of discontinuity is represented by the new regulation concerning the Parliament autonomy in exercising its budget approval function. The innovations concern on the one hand the new hypothesis of early dissolution of the Parliament, and, on the other hand, its relationship with the newly established Fiscal Council. According to the art. 3 of the new Constitution, if the Parliament cannot approve the State budget by March 31st, it is dissolved.[97] This novelty has to be read along with art. 44 Const., which provides for the creation of a Fiscal Council, an institution responsible for ensuring the respect of the financial clauses established in the Fundamental Law and specifically for monitoring the public debt, which does not have to exceed the 50% of the GDP (art. 36 Const.). The Council is a technical advisory body consisting of a chairman appointed by the Head of State, of the Governor of the Central Bank, also nominated by the Head of State, and of the President of the Court of Auditors, who is appointed by the Parliament. According to the Constitution, the Council examines the feasibility of the budget and it participates in its preparation. Moreover, it delivers opinions concerning the respect of the financial clauses which bind the Parliament, therefore unable to approve the budget without the consent of the Coun-

[96] P. Smuk, *On Legislative Power*, cit., 113.

[97] As in the past, the dissolution may take place also if the Parliament does not elect the Prime Minister within 40 days of the proposal by the President of the Republic (art. 3 Const.). A. Jakab, P. Sonnevend, *Continuity with Deficiencies*, cit., 119; P. Smuk, *The Parliament*, cit., 140.

cil.[98] It is evident that this framework of provisions combined with each other formally limits the autonomy of the Parliament and its capacity to participate in the definition of the State budget.

From a formal point of view, the relationship between the Parliament and the Government in Poland, with particular reference to the parliamentary function of monitoring over the Executive,[99] has remained unmodified. Nonetheless, some changes in practices and customs have occurred and they deserve to be mentioned.

Some classical oversight instruments, such as the so-called question time, are no longer effective for enabling the Parliament to have a real control over the activity of the Government, because a change in the customary procedure has been reported. Specifically, while all the political groups in the Chamber have always posed questions with a rotating system in subsequent sessions, most recently the questions coming from the majority MPs are given precedence. Moreover, the traditional pattern to reserve the chairmanship of sensitive parliamentary committees or advisory bodies to opposition MPs has been abandoned as well: this is the case, for example, of the Commission for secret services, chaired since 2015 by PiS MPs.[100]

From a more general perspective, the decision of Kaczyński not to exercise Executive functions also seems to have quite ambiguous effects on the relationship between the Parliament and the Government. The role of Prime Minister in Poland has traditionally been exercised by the leader of the majority party;[101] on the con-

[98] A. Jakab, P. Sonnevend, *Continuity with Deficiencies*, cit., 120; G. Spuller, *Transformation of the Hungarian Constitutional Court*, cit., 667; A. Tarzia, *La Costituzione finanziaria*, in G.F. Ferrari (ed.), *La nuova Legge fondamentale ungherese*, cit., 143; F. Vecchio, *Teorie costituzionali alla prova. La nuova Costituzione ungherese come metafora della crisi del costituzionalismo europeo*, Padova, 2013, 53; M. Bánkuti, G. Halmai, K.L. Scheppele, *From Separation of Powers*, cit., 263; M. Varju, *Government, Accountability, and the Market*, in G.A. Tóth (ed.), *Constitution for a Disunited Nation*, cit., 301 ff.; A. Azzutti, *The relation between public and economic powers under the new Hungarian Economic Constitution and within the constraints of EU law*, in *DPCE Online*, 2019, 1659 ff.

[99] According to art. 95 Const., only the Chamber exercises control over the activities of the Council of Ministers. See M. Granat, K. Granat, *The Constitution of Poland*, cit., 67 ff.; I.J. Biństa, *Legislative Branch*, cit., 136 ff.

[100] W. Sadurski, *Poland's Constitutional Breakdown*, cit., 135.

[101] See in particular Prime Ministers Jerzi Buzek (1997-2001), prominent member and leader, from 1999 to 2001, of Akcja Wyborcza Solidarność; Leszek Miller

trary, starting from 2015 the chairpersonship of the Executive has been held by two "simple" members of the PiS,[102] substantially indicated for that post by Kaczyński, who, other than remaining the unchallenged leader of the ruling party and an MP, retains a strong grip on the Executive.[103] Consequently, Kaczyński, who is the real responsible of the Polish constitutional and political direction, cannot be directly accountable, neither from a political nor from a constitutional point of view.[104]

4.3. *The legislative function*

The legislative function has also been subject to important changes in recent years in the Hungarian and in the Polish parliamentary systems.

In Hungary, what is most striking is the abolition of the two-readings procedure for the approval of bills. Before the amendment, according to the rules of procedure of 1994, the analysis of the bill started with a general debate, followed by a detailed debate on the single articles and the proposed amendments, and, finally, by the final vote (arts. 98 and ff.). The standing committees had a limited role in that procedure, since they could only express their opinion during the general debate; at this stage of the procedure, the opposition within the committee could present a separate opinion, called minority opinion (art. 101).

Currently, according to the Act on National Assembly (arts. 21 and ff.), the bill is discussed in detail only within the committees. Once the standing committee delivers its recommendations and votes on the proposed amendments, the text is immediately transmitted to the Committee on Legislation. This body, introduced in

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(2001-2004), founder and leader, from 1999 to 2004, of Sojusz Lewicy Demokratycznej; the same Jarosław Kaczyński (2006-2007), cofounder and leader since 2003 of Prawo i Sprawiedliwość; Donald Tusk (2007-2014), cofounder and leader since 2003 of Platforma Obywatelska.

[102] They are Prime Ministers Beata Szydło (2015-2017) and Mateusz Morawiecki (2017-).

[103] Compared to the Hungarian Head of Government, the Polish Prime Minister appears to be a weaker figure, even if the latter may play a prominent role within the Council of Ministers. See R. Balicki, *Executive Branch*, in B. Banaszak *et al.* (eds.), *Constitutional Law in Poland*, cit., 149; M. Ganino, C. Filippini, A. Di Gregorio, *Presidenti, Governi e Parlamenti*, cit., 155.

[104] See A. Sledzinska-Simon, *The Polish Revolution*, cit.

the Hungarian parliamentary system in 2012 through the Act on National Assembly, plays a central role in the legislative procedure: it combines the amendments adopted by the standing committee with its own proposals into a summary of proposed amendments, that is then submitted to the Assembly for the final vote.[105] The procedure poses some problems not only in relation to the compression of the role of the Assembly in the exercise of the legislative function, but above all in that the committees secure a minor degree of representativeness and publicity, with a consequent restriction of the democratic guarantees underlying the legislative procedure.[106] The Act on National Assembly only establishes that the number of the members of the committees «shall *preferably* be proportionate with the rate of the number of members of the parliamentary groups» [emphasis added] (art. 17); this provisions does not guarantee the possibility for the political minorities to have an influence on the work of the committees. This clause, along with the quite limited size of the committees,[107] makes them, as it has been pointed out, «*de facto* agents of a strong executive».[108]

This important change is also supplemented by the introduction of new tools able to constrain the possibility for the oppositions to participate in the legislative procedure and to have an influence on it. This is the case of the urgent procedure and of the *vote bloqué*.[109] The urgent procedure already existed under the rules of procedure of 1994 (art. 99), but only provided for the possibility to speed up the inclusion of a bill on the orders of the day. According to art. 60 of Resolution 10 of 2014, the adoption of the urgent procedure allows, *inter alia*, to reduce the time for the general and the detailed debates, to shorten the deadline for the sub-

[105] Z. Szente, *Marginalising the Parliament*, cit., 3; P. Smuk, *The Parliament*, cit., 152.

[106] C. Nikolenyi, *Strong Governments Make Strong Committees? Committee Composition and Decision-Making in the Hungarian Parliament*, *Paper presented at the Workshop on Institutional Determinants of Legislative Coalition Management*, 2015.

[107] The smallest one, the Committee on National Security, consists of 7 members, while the four biggest committees, Economics, Budget, Culture and Welfare, consist of 15 members. Data available on *https://www.parlament.hu/en/web/house-of-the-national-assembly/standing-committees*.

[108] C. Nikolenyi, *Strong Governments Make Strong Committees?*, cit., 3.

[109] Z. Szente, *Marginalising the Parliament*, cit., 4.

mission of amendments and to reduce the timing between the different phases of the procedure. Alongside the new regulation of the urgent procedure, the Resolution 10 of 2014 has also introduced the block vote (art. 61 and ff.). Accordingly, the Assembly is not able to modify the legislative proposals, since it can only approve or reject the text prepared by the Committee on Legislation.

In this case as well, the most important changes in Poland have not been introduced through a constitutional or legislative reform, but rather through a reshaping of the relevant practices and customs. One of the most evident novelties concerns the right to introduce legislative bills, which is recognized to the Deputies, the Senate, the President, the Council of Ministers and any group of 100,000 citizens (art. 118 Const.). In the last two legislative terms a net increase of the private members' proposals is witnessed, which are however actually governmental proposals, put forward by the MPs as their own.[110] Such trend appears even more clear if we consider that the bills proposed by the Council of Ministers are subject to a series of procedural steps (hearings, consultations, etc.) slowing down the legislative process, which instead are not foreseen for the private members' bills.[111]

Other worrying novelties concern the role of the Senate and the citizens in the legislative process. The practice of the Senate to initiate legislation in order to implement the decisions of the Constitutional Tribunal has lost its importance, also due to the limited number of judgments pronounced by the constitutional judges in comparison with the previous years.[112] The popular initiatives, which already have limited chances to become acts, encounter now

[110] As noted by W. Sadurski, *Poland's Constitutional Breakdown*, cit., 133: «In the first full year of the rule by PiS, 2016, over 40 percent (76 out of 181) of PiS legislative proposals were submitted as private members' bills (in the two previous parliamentary terms, the percentages were respectively 15 and 13 percent)».

[111] See W. Sadurski, *Poland's Constitutional Breakdown*, cit., 133; M. Granat, K. Granat, *The Constitution of Poland*, cit., 58; J. Sawicki, *Le forme di governo*, cit., 170.

[112] As reported by M. Granat, K. Granat, *The Constitution of Poland*, cit., 69: «For example, in the Senate's eighth term [2011-2015], 60 per cent of bills concerned the execution of judgments of the Constitutional Court. Since the start of the constitutional crisis in 2015, this function of the Senate lost some of its importance. This is connected to the fact that the Constitutional Court issues far fewer judgments when compared to previous years».

further obstacles, as in some cases the Chamber decided to immediately reject them without any exam or debate.[113]

Further practices enacted in the last terms in Poland have strongly affected the role of the opposition in the legislative process and, more in general, the quality of the parliamentary debates. In this regards, we could mention the imposition of a time limit for the speeches (maximum one minute), the practice of voting amendments *en bloc* and immediately after their presentation, the restriction of the media participation in the parliamentary sittings, the exclusion of the opposition MPs from the parliamentary activities on disciplinary or logistic grounds.[114]

4.4. *The elective function*

The role of the political minorities has been subject to other important changes, both in Hungary and in Poland. In this regard, the relationship with the Constitutional Court or Tribunal represents one of the most worrying novelties. In both countries, the constitutional judges are elected by the Parliaments, but the recent changes in relevant legislations and practices show a limited role of the oppositions within the appointment procedures.

In Hungary, before the 2011 constitutional reform, Constitutional Court's judges were chosen among a list of candidates proposed by a parliamentary commission where each party was equally represented. The Assembly had then the task of electing the judges with a two-thirds majority (art. 32/A). It has been pointed out that «this process … made it impossible for most governments to just push their own nominees onto the Constitutional Court, even with a parliamentary supermajority. Compromise, and even log-rolling, became normal».[115] On the contrary, under the Constitution of 2011, the oppositions have a very limited influence on the selection of the Constitutional judges. Indeed, the parliamentary commission in charge of drawing the list of candidates is now composed proportionally to the representation of the political forces in the As-

[113] See J. Sawicki, *La conquista della Corte costituzionale*, cit., 4.

[114] See W. Sadurski, *Poland's Constitutional Breakdown*, cit., 134; J. Sawicki, *La conquista della Corte costituzionale*, cit., 6-7.

[115] M. Bánkuti, G. Halmai, K.L. Scheppele, *From Separation of Powers*, cit., 248.

sembly (art. 24), thus enabling a supermajority to "capture" the Court.[116]

In Poland also the attempt to control the composition of the Constitutional Tribunal has been part of the strategy enacted by the PiS in the aim of limiting the counter-majoritarian constitutional guarantees. The major events able to symbolize that strategy happened between 2015 and 2016, when new judges had to be elected to fill five vacancies. The crisis began in October 2015, when the outgoing Parliament then dominated by the PO appointed (in its last sitting) five new judges for vacancies to be fulfilled in November (three posts) and in December (two vacancies); that is to say, partly before and partly after the election of the new Parliament. In its first sittings, the newly elected Chamber, in which the PiS had the absolute majority of seats, immediately approved two resolutions aimed at repealing all of the five appointments made in October[117] and electing five other judges.[118] The newly elected President of the Republic, Andrzej Duda, hailing from the PiS, refused to swear in the five previously elected judges, while the five judges newly appointed were sworn into office few hours after their nomination in a closed ceremony held after midnight.

Soon after, the Constitutional Tribunal adopted two judgments for annulling the appointment of two judges elected during the previous term[119] and of three judges appointed by the newly elected Chamber.[120] After this dispute, the Constitutional Tribunal[121] consisted of ten judges appointed before the crisis and of two judges elected by the newly elected Chamber and undisputed; moreover, there were three judges regularly appointed during the previous term but not sworn into office by the President of the Republic; and three judges unlawfully elected by the new Chamber, admitted by the President of the Constitutional Tribunal Andrzej Rzepliński as members of staff but not allowed to perform judicial functions.

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[116] G. Spuller, *Transformation of the Hungarian Constitutional Court*, cit., 649; L. Sólyom, *The Rise and Decline*, cit., 22; M. Bánkuti, G. Halmai, K.L. Scheppele, *From Separation of Powers*, cit., 254.

[117] Resolution of 25 November 2015.

[118] Resolution of 2 December 2015.

[119] Constitutional Tribunal, Judgment 34/15 of 3 December 2015.

[120] Constitutional Tribunal, Judgment 35/15 of 9 December 2015.

[121] According to art. 194 Const., the Constitutional Tribunal is composed of 15 judges.

The three latter judges were successively recognized as full members at the end of 2016 by the new President Julia Przyłębska; meanwhile, after the end of other mandates and the appointment of new judges, the majority has been able to almost completely "capture" the Constitutional Tribunal.

5. *What lessons from the Hungarian and Polish Parliaments?*

The Hungarian and Polish cases provide us with some hints about the ways in which a political majority threatens or weakens the main tenets of the constitutional State and, for our analysis, specifically the parliamentary institution.

The relationship between the Parliament and the citizens has been modified in Hungary both by the new electoral law and by the renewed regulation of the referendum, which seem to oversize the majority principle and introduce elements of a plebiscitary democracy. Moreover, both in Hungary and in Poland the "capture" of the electoral administrations can undermine the principle of political pluralism, that is essential for the functioning of the representative institutions in a constitutional democracy.

The relationship between the Parliament and the Government is in turn subject to significant tensions. In Hungary, the capacity of the Parliament to participate in the elaboration of the political and economic direction of the country is severely affected. The new rules concerning the formation of the Government and the dissolution of the Parliament, together with the limitation of the scrutiny function, following the modification of the rules on the committees of inquiry and on the question time, clearly highlight a trend towards an increasing subordination of the Parliament to the Government. In Poland, a series of practices concerning the question time and the parliamentary committees have weakened the effective ability of the Chamber to control the activity of the Government.

Finally, the relationship between the Parliament and the system of constitutional guarantees, as well as the connected relationship between the parliamentary majority and the oppositions, seem to be affected by the changes to the legislative and elective functions of the Parliament. Both in Hungary and in Poland, the legislative procedure appears to be completely at the disposal of the

majority, while the oppositions have very limited opportunities to influence the political decisions or simply to take part in the parliamentary debates. The same weakening of the oppositions can be observed in relation with the procedures for the appointment of the bodies of constitutional guarantee, such as the Constitutional Court or Tribunal.

The calling into question of the role of the Hungarian and Polish Parliaments, which appear increasingly narrowed, are the result of incremental, gradual and sometimes silent actions. Considered as a whole, the amendments affect Parliaments from many different angles and end-up reshaping the structure and the function of political representation. On the contrary, when individually analysed, one could underestimate the amendment's potential threat to the constitutional democracy and its stability. Moreover, it is worth noting that illiberal shift often happens through democratic instruments misused in favour of the majority in charge, so that a certain constitutional appearance is maintained.

As the cases of Hungary and Poland well underlines, a series of (even small) changes, legislative amendments and new practices that follow one another can, when mixed together, put in danger the constitutional State. These risks can materialize within the democratic circuit itself, by leaning on the attractive force of a government led by a strong party. In this sense, the political context and especially the constitutional culture of the country have to be taken into account. The Hungarian and Poland Parliaments are now designed to function in falsely homogeneous political and social panoramas: within this perspective, the Parliament is controlled by the Government and its majority, its representative function is lost, and the political oppositions are not able to create political viable alternatives.

One should once more focus on the subtle feature of constitutional retrogression, resulting not only from the formal changes to the constitutional and normative framework, but also depending on the political reality and the political contingences. The majorities emerged in 2010 in Hungary and in 2015 in Poland have undermined the principles of parliamentarism, changing the rules as well as the practice of the respective parliamentary systems. Can we still rely on our consolidated democracies and their degree of resilience?

Abstract

The paper focuses on the evolution of Parliaments in the illiberal democracies, starting from a hypothetical framework on the possible impacts of constitutional retrogression on Parliaments and, more specifically, on their relationship with the people, the Government and the system of constitutional guarantees. This hypothetical framework is used to analyse the constitutional retrogression effects on the Hungarian and the Polish Parliaments, concerning both their structure and their functions. Finally, the article tries to clarify if it is possible to draw some general conclusion on the relation existing between the legislative power and the illiberal democracy.

L'articolo analizza l'evoluzione dei parlamenti nelle democrazie illiberali, partendo da alcune ipotesi sull'impatto della regressione costituzionale sui parlamenti e, in particolare, sulle loro relazioni con il popolo, con il Governo e con il sistema delle garanzie costituzionali. Queste ipotesi sono utilizzate per analizzare gli effetti della regressione costituzionale in Ungheria e Polonia, per quanto riguarda sia la loro struttura che le loro funzioni. L'articolo tenta infine di chiarire se è possibile proporre considerazioni generali sulle relazioni tra potere legislativo e democrazia illiberale.

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THE "DNA" OF ILLIBERAL CONSTITUTIONALISM: FAILURE OF PUBLIC LAW MECHANISMS AND AN EMOTIONALLY UNSTABLE IDENTITY. A HUNGARIAN AND POLISH INSIGHT

1. *Introduction*

The paper claims that each of the failed public law mechanisms can be linked to the inherent features of illiberal constitutionalism. Before starting to explore the reasons for our claim, we briefly summarise how we have conceptualized illiberal constitutionalism so far. We have already discussed[1] how constitutional changes can be understood in the field of constitutional law by using the terms 'illiberal constitutionalism', and have explained how it has been established and consolidated in Hungary and Poland by capturing constitutions and constitutionalism. We have stressed that the populist

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[1] T. Drinóczi, A. Bień-Kacała, *Illiberal constitutionalism - the case of Hungary and Poland*, in *German Law Journal*, 20, 2019, 1140-1166 and from the Rule of Law perspective in T. Drinóczi, A. Bień-Kacała (eds.), *Rule of Law, Common Values and Illiberal Constitutionalism: Poland and Hungary within the European Union*, London, 2020, forthcoming.

political majority, lacking self-restraint, can develop an illiberal democracy with legal means such as formal and informal constitutional change, and by packing and paralyzing the constitutional court. Illiberal constitutionalism is built in states that have already experienced liberal constitutionalism and are supported by the misunderstood concept of political constitutionalism. These states also rely heavily on the emotional components of national identity. In our view, illiberal constitutionalism is not the opposite of liberal constitutionalism, but rather is a state in which the political power relativizes the rule of law, democracy, and human rights in politically sensitive cases, constitutionalizes populist nationalism, and takes advantage of identity politics, new patrimonialism, clientelism, and state-controlled corruption. Consequently, constitutional democracy still exists, but its formal implementation outweighs its substantial realization. That, in turn, serves the fulfilment of the populist agenda and further consolidates the new regime, which creates a vicious circle, escape from which, that is the undoing of this remodeling, does not seem plausible – not even in the medium-term.

When we break down our concept of illiberal constitutionalism, we can detect a misunderstood concept of political constitutionalism.[2] In our opinion, the 'newest' Hungarian and Polish constitutionalism is neither *de facto* nor *de iure* political constitutionalism, and the label of 'juristocracy' is not applicable when describing the period 1990-2010/2015. What can best describe the ongoing Hungarian and Polish practices is indeed its reverse form: the judicialization of politics as theorised by Armen Mazmanyan.[3] It is what has been emerging in the post-2010/2015 era, and this is what can never result in 'juristocracy', because the constitutional court (tribunal) judges are not the constitution-based and mandated critics but the servants of the political will. This assessment led us to explore how the rule of law had been dismantled in Poland and Hungary, and we conceptualised their national understanding as illiberal legality, which partially contributes to the failure of public law

[2] T. Drinóczi, A. Bień-Kacała, *Illiberal constitutionalism in Hungary and Poland: The case of judicialization of politics*, in A. Bień-Kacała *et al* (eds.), *Liberal Constitutionalism - Between Individual and Collective Interests*, Toruń, 2017, *https://repozytorium.umk.pl/handle/item/4861*, 73-108.

[3] A. Mazmanyan, *Judicialization of politics: The post-Soviet way*, in *International Journal of Constitutional Law*, 13, 1, 2015, 200-218.

mechanisms and can be linked to the emotional trajectory of Poles and Hungarians.[4]

Against this background, this paper shows how public law mechanisms have failed to provide a remedy for illiberal Hungary and Poland, and how the very same mechanisms could both fuel the remodeling power of populist politics and prove to be unable to undo it. In this paper, however, due to limited space, we can give neither a detailed overview of the current constitutional history of our states[5] nor a comprehensive description of Hungarian and Polish history[6] and the emotional trajectory of Hungarians and Poles,[7] as they appear in narrative psychology studies.[8] Instead, we use our theory, as briefly encapsulated above, as a framework for our discussion. We also rely on the existing general understanding of the reader regarding Hungarian and Polish constitutional politics.

The paper is structured as follows. After the Introduction (section 1), in section 2 we describe the available public law mechanisms and their failure and link them to the intrinsic features of illiberal constitutionalism. In section 3, we offer an explanation for the illiberal remodeling and the unfeasibility of any retransforma-

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[4] T. Drinóczi, A. Bień-Kacała, *Extra-legal particularities and illiberal constitutionalism. The case of Hungary and Poland*, in *Acta Iuridica*, 4, 2018, 338-354.

[5] See, eg, T. Drinóczi, *Constitutional Politics in Contemporary Hungary*, in *Vienna Journal of International Constitutional Law*, 1, 2016, 63-98; A. Bień-Kacała, *Poland within the UE: Dealing with populist agenda*, in *Osteuropa Recht*, 4, 2017, 428-443.

[6] See, eg, P. Lendvai, *The Hungarians: A Thousand Years of Victory in Defeat*, Princeton University Press, 2004; A. Zamoyski, *The Polish Way: A Thousand-Year History of the Poles and Their Culture*, New York City, 2012.

[7] É. Fülöp *et al.*, *Emotional elaboration of collective traumas in historical narratives*, *http://real.mtak.hu/20201/3/emotional_elaboration_of_collective_traumas.pdf*, *https://penandthepad.com/narrative-psychology-3393.html*; O. Vincze, J. László, *A narratív perspektíva szerepe a történelemkönyvekben* [The role of narratives in history textbook], *http://real.mtak.hu/2385/1/49413_ZJ1.pdf*. For a detailed discussion see T. Drinóczi, A. Bień-Kacała, *Extra-legal particularities and illiberal constitutionalism. The case of Hungary and Poland*, cit., 338-354.

[8] Narrative psychology provides a dynamic approach to understanding human identity and the process of making sense of our ever-changing world. U. Popp-Baier, *Narrative Psychology* in A. Runehov, L. Oviedo (eds.), *Encyclopedia of Sciences and Religions*, Dordrecht, 2013; E. Fülöp *et al.*, *cit.*; J. László, *Narratív pszichológia*, in *Pszichológia*, 4, 2008, *http://real.mtak.hu/2385/1/49413_ZJ1.pdf*; M. Murray, *Narrative psychology and narrative analysis* in P.M. Camic, J.E. Rhodes, L. Yardly (eds.), *Qualitative research in psychology. Expanding perspectives in methodology and design*, Washington DC, 2003, *https://www.researchgate.net/publication/274889276_Chapter_6_Narrative_psychology_and_narrative_analysis*.

tion from the perspective of narrative psychology. We set out our conclusions in section 4.

2. *Public law mechanisms to address detrimental remodeling - their failure or abuse*

At this point, after giving a brief overview of Hungarian and Polish events, we identify the legal mechanisms that have been used, or which it is suggested should be used, to address the detrimental remodeling to illiberalism. We describe how they have failed or been abused, and explain why such failure and abuse can be linked to the inherent features of illiberal constitutionalism.

As is well known, populist parties in both states won the general elections[9] with a constitutional[10] or an absolute majority.[11] Just after creating their new governments, Viktor Orbán (in Hungary) and Jarosław Kaczyński (leader of the Law and Justice Party, the PM was Beata Szydło in Poland) started to remodel the existing liberal democracies. Because of the different general election results, these leaders have been using different methods of remodeling. The Hungarian way is more formal, based on constitutional measures (the adoption and amendment of the Constitution) that have been abusive. Poland uses informal tools of remodeling, breaching and disregarding constitutional provisions (especially in connection with the Constitutional Tribunal (CT) and judiciary). The Hungarian system is based on an illiberal Constitution (the 2011 Fundamental Law (FL)), whereas the Polish system is based on the delegitimization of the still binding 1997 Constitution. In both states, the political majority first took control of the independent institutions of checks and balances by packing the constitutional courts, changing the appointment processes for constitutional court judges (Hungary) and their decision-making processes (Poland), and reforming the judicial system and rules regarding the Prosecutor General (both states). As a result, the constitutional courts in particular have become the servants of the ruling parties and leaders, and they have started to justify transformative political and legal actions. The political decision-makers have not left other democratic

[9] After previous episodes of unsuccessful government in Hungary between 2006 and 2010, and in Poland between 2005 and 2007.

[10] Hungary, 2010, 2014, 2018.

[11] Poland, 2015, 2019.

institutions intact either. Since the beginnings of the remodeling, they have introduced new laws and changed others in the fields of, for example, elections, the ombudsman, the judiciary and court system, and civil society; and they have afforded less and less protection to individuals by restricting their freedoms (of assembly, expression, the press and other means of social communication). In our opinion, even the constitutional amendment in Hungary,[12] for instance, which stipulates that the exercise of the freedom of expression and assembly cannot entail the invasion of the private and family lives of others or trespass into their homes, is clearly a result of an unconstitutional balancing exercise between fundamental rights in the constitution itself. It is an obvious unconstitutional constitutional limitation of human rights, by pretending to be constitutional and abusing the language of human right protection.

2.1. *International and supranational law*

As Hungary and Poland are members of the same international organizations, such as the United Nations (UN), the Council of Europe (CoE) and the European Union (EU), events taking place in Hungary (since 2010) and in Poland (since 2015) have triggered a sharp international and supranational reaction. Many international organizations, such as the UN Special Rapporteur[13] and Venice Commission,[14] have already expressed their concerns,

[12] The Seventh Amendment to the Fundamental Law (28th June 2018).

[13] A UN Special Rapporteur delivered preliminary remarks on the independence of Polish judges and lawyers, at *http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22313&LangID=E*.

[14] Eg, 720/2013 Opinion on the Fourth Amendment to the Fundamental Law of Hungary; 683/2012 Opinion on the Cardinal Acts on the Judiciary; 668/2012 Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary; 665/2012 Opinion on Act CLI of 2011 on the Constitutional Court of Hungary; 663/2012 Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organization and Administration of Courts of Hungary; 621/2011 Opinion on the new Constitution of Hungary or 614/2011 Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary; 833/2015 Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland and 860/2016 Opinion on the Act on the Constitutional Tribunal; 839/2016 Opinion on the Law on the Police; 904/2017 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 Organization of Ordinary Courts.

shared their opinions and formulated recommendations. These, however, being soft law instruments, did not resolve the problem. The illiberal state apparently does not take soft law measures seriously,[15] nor does it pay much attention to hard(er) law measures, highly political in nature as they are,[16] such as the EU mechanisms to safeguard European law and values,[17] and the results of court proceedings.[18] Even after launching 'the nuclear option' against Poland on 20 December 2017,[19] and after adopting on 12 September 2018 by European Parliament the resolution on a proposal calling on the Council to initiate the Article 7(1) of the Treaty on European Union procedure against Hungary,[20] the legal and political landscape has not evinced any change.[21] It is already certain that no other measures, such as infringement procedures, could produce the expected effect.[22]

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[15] Hungary, for instance, voted on the bill on non-governmental organizations (NGOs) ('Stop Soros' bill), which criminalizes aid to illegal immigrants, grants the Interior Minister the power to ban NGOs that support migration and are deemed a national security risk, and requires a huge tax to be paid after foreign financial support, even before the Venice Commission could submit its conclusion on it.

[16] L. Besselink, *The Bite, the Bark, and the Howl: Article 7 TEU and the Rule of Law Initiatives*, in A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values Ensuring Member States' Compliance*, Oxford, 2017, 128-132.

[17] Eg, Article 7 of the TEU and Articles 258-260 TFEU; A new EU Framework to strengthen the Rule of Law, COM (2014) 158 final/2.

[18] In September 2017, the Hungarian Government, clearly in line with its political agenda, refused to implement the ruling of Court of Justice of the European Union, which dismissed the actions brought by Hungary together with Slovakia against the relocation (quota) decision of the European Council (provisional mechanism for the mandatory relocation of asylum seekers). See *Slovak Republic and Hungary v Council of the European Union*, C-643/15 and C-647/15, 6th September 2017, ECLI:EU:C:2017:631. See also judgements concerning Poland: the Puszcza Białowieska case (C-441/17, ECLI:EU:C:2018:255) or the independence of judiciary case (C-216/18 PPU, ECLI:EU:C:2018:586).

[19] *http://europa.eu/rapid/press-release_IP-17-5367_en.htm*.

[20] European Parliament resolution of 12th September 2018 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 (2017/2131(INL), *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0340+0+DOC+XML+V0//EN&language=EN#BKMD-10* and previously (June 2018) approved Sargentini Rapport, *http://hungarianspectrum.org/2018/06/26/the-sargentini-report-sailed-through-the-libe-committee/*.

[21] In case of Poland, see A. Bień-Kacała, n 7, 428-443.

[22] Eg Case C-286/12 *European Commission v Hungary*, ECLI:EU:C:2012:687. See also, eg, Z. Szente, *Challenging the Basic Values. The Problems of the Rule of Law*

The reason for the intransigence of illiberal populist states is simple: the actors speak different languages. European and international institutions expect a constructive dialogue to be conducted in an impartial, evidence-based and cooperative manner. But communicating with populist politicians through dialogue cannot be successful given the very nature of populism[23] – neither consensus seeking nor compromise, which should result from a dialogue, exists in the populist agenda.[24] There is no space for consideration of the opinions of others, because that would require the illiberal populist leaders to accept legal and constitutional constraints and put themselves in a non-national context in which each actor has its own political, legal and moral duties and responsibilities. However, a 'normative commitment to constraints on public power', as put by Tushnet when describing a different legal setting – authoritarian constitutionalism – is somewhat missing in Poland and Hungary.[25] It is enough to think of the unconstitutional constitutional amendments of 2010 and in 2013 (the Fourth Amendment of the FL) in Hungary, and of the continuous breach of the Polish Constitution by, for example, the refusal to accept the oaths of office of the judges of the CT, not publishing the judgments of the CT, adopting the judicial reform legislation and amendment of the law on the right of assembly.[26] Legal arguments are rebuffed by populist slo-

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in Hungary and the Failure of the European Union to Tackle Them in A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values Ensuring Member States' Compliance*, Oxford, 2017, 456-475. We assume that ineffectiveness is now constant, and we expect that it will be true in the case of the infringement procedures against the Czech Republic, Hungary and Poland for non-compliance with legal obligations on relocation if the EU ascertains a breach of EU law. See at *http://europa.eu/rapid/press-release_IP-17-5002_en.htm*. We do not think that the other infringement procedure against Hungary for non-compliance of its asylum and return legislation with EU law ('Stop Soros' law, at *http://europa.eu/rapid/press-release_IP-18-4522_en.htm*) would have any beneficial results either.

[23] T.T. Koncewicz, *The Polish Crisis as a European Crisis: A Letter to Mr Jean-Claude Juncker*, in *VerfBlog*, 2017/10/16, at *http://verfassungsblog.de/the-polish-crisis-as-a-european-crisis-aletter-to-mr-jean-claude-juncker/*.

[24] This kind of attitude and language, designed to humiliate EU officials and values, was identified by L. Pech, K.L. Scheppele, *Poland and the European Commission, Part III: Requiem for the Rule of Law*, in *VerfBlog*, 2017/3/03, at *http://verfassungsblog.de/poland-and-the-european-commissionpart-iii-requiem-for-the-rule-of-law/*.

[25] M. Tushnet, *Authoritarian constitutionalism*, Harvard Public Law Working Papers, No 13-47, 2013, 72.

[26] See more about it in T. Drinóczi, A. Bień-Kacała, *Illiberal constitutionalism in*

gans, and, considering the populist party's continuous electoral victories at the national level, this 'game' seems to please the voters. On the other hand, due to the membership in the European Union, the EU law, paradoxically, still represents a weak but tacitly existing constitutional/legal constraint on the public power. Even if its defense mechanisms have not worked so far and, to a certain extent, its application at the legislative level is flawed in some areas, the mere existence of EU law and its day-to-day adjudication by national courts may influence and keep the illiberal politicians away from leading their countries into authoritarianism even faster.[27] The application of international obligation, especially in the field of human rights, which has already been embedded in both states, can also be regarded as a weak but constitutionally internalized constraint.[28] Claiming that supranational and international politics and law, which have just depicted as having failed to protect standards and values, could be viewed as a certain constraint on national governments seems to be a paradox; but it is just as absurd as having the Member States within the European Union in which the remodeling of constitutionalism has gone so far that some scholars call them authoritarian regimes. We claim that the remodeling has reached the state of illiberal constitutionalism, which is admittedly a weak form of constitutionalism, from where the regime could deteriorate even more, or, which is less likely, could start the re-transformation back to liberal constitutionalism.

Hungary and Poland: The case of judicialization of politics, cit., 85, 96-98; T. Drinóczi, *Constitutional Politics in Contemporary Hungary*, in *Vienna Journal of International Constitutional Law*, cit., 63-98.

[27] Measuring of this effect is challenging (A. Bozóki, D. Hegedűs, *An externally constrained hybrid regime: Hungary in the European Union*, Democratization 25, 2018, 7), but EU reports (eg, Annual reports on monitoring the application of U law), statistics (number of preliminary ruling procedures) and comparative analysis on the bases of indices and reports (eg, Freedom House, WJP Project, Human Rights Watch) could assist in the exercise.

[28] R. Uitz, *Nemzetközi emberi jogok és a magyar jogrend* [International human rights and the Hungarian legal order], in A. Jakab, G. Gajduschek (eds.), *A magyar jogrendszer állapota*, MTA Társadalomtudományi Kutatóközpont, Jogtudományi Intézet, 2016, 173-210; M. Varju, *A magyar jogrendszer és az Európai Unió joga: tíz év tapasztalata* [The Hungarian legal system and the law of the European Union: experiences of ten years], in A. Jakab, Gy. Gajduschek (eds.), *A magyar jogrendszer állapota*, MTA Társadalomtudományi Kutatóközpont, Jogtudományi Intézet, 2016, 143-171; A. Bozóki, D. Hegedűs, *op. cit.*

2.2. *Militant democracy*

The militant democracy doctrine claims that a liberal democracy should maintain efficient measures to defend itself.[29] It has been connected to statutory or constitutional provisions limiting certain dangerous thoughts and extreme political parties; but it has also been acknowledged that militant democracy should respect human rights[30] and should assume that actions are taken *bona fide* when using preventive legal measures.[31] Otherwise, it can easily become an illiberal system.[32]

Nevertheless, militant democracy measures are viewed as ineffective when an extremist party is allowed to emerge in the political system.[33] On the other hand, it is challenging to find the proper balance between the rights to free speech, to association and the free formation of political parties, which articulate the will of the people, and the need for constitutional self-protection. This phenomenon brings us to the dilemma that presents itself as a paradox: if the doctrine of militant democracy – because it still affords more importance to civil and political fundamental rights, or because the destructive intention of the party was not as visible as it has later become – could not prevent the emergence of illiberal democracy, how could the same doctrine help to defeat it? As pointed out earlier, the doctrine of militant democracy has its own in-built weaknesses in the illiberal constitutionalism. Measures such as the dissolution of extreme political parties are to be initiated and implemented by state authorities that are, to various extents, corrupted

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[29] Eg J.W. Muller, *Militant Democracy*, in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2011, 1253-1268; A. Saió, *Militant Democracy and Emotional Politics*, in 4 *Constellations* 2012, 562-572; A. Bień-Kacała, A. Jackiewicz, *Militant democracy. Demokracja, która sama się broni(?)* [Militant democracy. A democracy that defends itself(?)], in *Państwo i Prawo*, 8, 2017, 25-41.

[30] P. Macklem, *Militant democracy, legal pluralism, and the paradox of self-determination*, in *International Journal of Constitutional*, 3, 2006, 494-495.

[31] A. Saió, n 29, 562.

[32] Guidelines on prohibition and dissolution of political parties and analogous measures, Adopted by the Venice Commission at its 41st plenary session (Venice 10-11 December 2000), at *http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-INF(2000)001-e*.

[33] See the case of neo-Nazi NPD, the judgment BVerfGG 17 January 2017 r (2 BvB 1/13), at *https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2017/bvg17-004.html;jsessionid=D73C0CAD3CA98F447B2A371B748739D6.2_cid393*.

by the illiberal state.[34] What the word 'extreme' means, against which the constitutional order is to be protected, and how to interpret this constitutional order, is determined by those who have built the illiberal state, or by those who serve it. As in the illiberal constitutional setting, constitutionalism is captured by, partly, packing and corrupting the constitutional courts, and the states face the 'special kind of judicialization of politics', under which constitutional review is, to a large extent, the servant of politics.

In such circumstances, only huge and nationwide political discontent or civil disobedience may bring about change. In Poland and Hungary, however, we have not been experiencing any will to revolt.[35] It seems that the people of Poland and Hungary are either unable or unwilling to form strong and capable civil societies, or to raise their voices against extreme views or resist aggressive political campaigns based on unfounded but popular fears.[36] And the legal and political environments that have been created in both states do not help the civil society and the public to raise their voices.[37]

2.3. *The multi-tiered amendment designs and references to transnational norms*

Rosalind Dixon and David Landau propose that constitutional designers should utilize multi-tiered amendment procedures. The tiered mechanism for constitutional amendment 'aims to combine the virtues of rigidity and flexibility by creating different rules of constitutional amendment for different parts of the constitution',

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[34] T. Drinóczi, A. Bień-Kacała, *Illiberal constitutionalism in Hungary and Poland: The case of judicialization of politics*, cit.

[35] Oposition parties and crirics of the regime have not chosen violent actions but they have been peacefully exercising their rights to disagree (elections, demonstartions, etc.).

[36] T.T. Koncewicz, *Constitutional Fidelity and the Polish Constitution*, in *Blog of the International Journal of Constitutional Law*, 11 August 2017, at *http://www.iconnectblog.com/2017/08/constitutional-fidelity-and-the-polish-constitution*. As for Hungary, see the ongoing billboard campaign on migrants and about G Soros in 2018, and the national consultation on immigration and terrorism (*http://www.kormany.hu/download/9/a3/50000/Nemzetikonzultacio_mmkorrnel.docx*) and the Soros Plan (to relocate migrants from Africa and Middle East, *https://bbj.hu/politics/hungarian-govt-begins-all-out-assault-on-soros_139438*).

[37] See, eg, the Seventh Amendment to the Fundamental Law and the 'Stop Soros' law. Above n 15 (and accompanying main text) and n 17.

preserve 'the core of the constitution against destabilizing and anti-democratic forms of change' and 'help to build a constitutional identity'.[38]

In Hungary this design is not applied, since the written constitutions have always been easily amendable, provided the ruling power has enjoyed a constitutional majority. The Hungarian constitutional system has never explicitly acknowledged any eternity clauses, nor allowed the people to express their opinion on constitutional amendments via referendums. This approach to constitutional design was not even considered, and the original attitude towards a flexible constitution was not changed when the FL was adopted in 2011.

Poland, however, employs more demanding procedural rules on constitutional amendment, though they are still less demanding than those of other states utilizing multi-tiered amendment procedures. A referendum on constitutional amendments is optional.[39] It is questionable whether an even more demanding tiered constitutional regime could have preserved Polish democracy and the identity of the Constitution.[40] The Polish Government, since 2015, has systematically dismantled the constitutional system established by the 1997 Constitution.[41] Owing to the lack of a constitutional majority in the parliament, the Constitution could not be formally amended,[42] so the constitutional changes, which amount to the denuding of the constitution, have been accomplished informally by the adoption of purely and obviously unconstitutional laws and the performance of unconstitutional practices.

Rosalind Dixon and David Landau also propose another solution. According to their views, courts should evaluate the constitutionality of constitutional changes against the standard of transna-

[38] R. Dixon, D. Landau, *Tiered Constitutional Design*, at *https://ssrn.com/abstract=2953755*, 1, 63.

[39] It is called when the republic, fundamental rights and the rules on constitutional amendment are to be amended, if it is initiated by those entitled to submit constitutional amendments. Art 235.

[40] As understood by T. Drinóczi in *The identity of the constitution and constitutional identity. Opening up a discourse between the Global South and Global North*, in *Iuris Dictio*, 21, 2018, 63-80.

[41] A. Bień-Kacała, *Polish Constitutional Tribunal: a systemic reform or a hasty political change*, in *Diritto pubblico comparato ed europeo*, 1, 2016.

[42] A. Bień-Kacała, *Informal constitutional change. The case of Poland*, in *Przegląd Prawa Konstytucyjnego*, 6, 2017, 199-218.

tional norms in democratic constitutions.[43] If, however, the courts are packed or paralyzed or corrupt, it is highly doubtful that the otherwise loyal judges would take advantage of any transnational rules as compared to the textual interpretation of the constitution in Hungary or the complete neglect thereof in Poland.[44] For instance, some Hungarian judges of the Constitutional Court (CC) do not even respect the ruling of the European Court of Human Rights (ECtHR). András Zs Varga, in his quite unfounded dissenting opinion, claims that although Hungary is obliged to execute ECtHR decisions, it is not forced to abandon its constitutional identity while doing so. Therefore, for him, the decision of the CC on the freedom of religion,[45] in which the Court directly applied one of the rulings of the ECtHR,[46] is erroneous.[47]

2.4. *Application of the doctrine of unconstitutional constitutional amendments*

Constitutional courts may use[48] the doctrine of unconstitutional constitutional amendments.[49] For the prevention of an illiberal or undemocratic remodeling, an independent and active constitutional court is needed that is flexible and open enough to

[43] R. Dixon, D. Landau, *Transnational constitutionalism and a limited doctrine of unconstitutional constitutional amendments*, in *International Journal of Constitutional Law*, 3, 2015, 606, 629.

[44] On the other hand, the situation is not similar to that of Russia, where, since 2015, the constitutional court can overrule the decisions of the ECtHR.

[45] 23/2015 (VII.7) decision of the Hungarian Constitutional Court.

[46] Case of *Magyar Keresztény Mennonita Egyház and Others v Hungary*, judgment 8 April 2014.

[47] He considered the regulation of the FL, which differentiates between religious communities and established churches (being religious communities cooperating with the state in order to achieve goals of the community), to be a peculiarity of Hungary's constitutional history and an essential component of its constitutional identity. In his view, constitutional identity is derived from otherwise unspecified historical facts that are recognized by the FL. He listed the conditions, set by the Church Law, by which a religious community may become an established church under the heading of 'constitutional identity'. In his opinion, the CC had ignored the distinction between 'religious community' and 'established church' included in Article VII of the FL, since this CC ruling, based on the ECtHR decision, classified these criteria as conflicting with international treaties. Dissenting opinion of András Varga Zs to 23/2015 (VII.7) decision of the Hungarian Constitutional Court [93]-[97].

[48] D. Landau, *Abusive constitutionalism*, in *UC Davis Law Review*, 3, 2013.

[49] Y. Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers*, Oxford, 2017.

change the constitution, even informally, with a view to implementing it properly. This happened, for example, in India and Colombia. It is no longer an option in Poland with its captured CT. Moreover, as has already been established, both Poland and Hungary face a special kind of judicialization of politics: both the CT and the CC are more the servants of the political will than independent institutions of constitutional protection. We do not expect that the CT will consider the doctrine of unconstitutional constitutional amendments, leaving the obviously unconstitutional legislation alone.[50] The CC, on the other hand, opened up the Hungarian constitutional system to review of unconstitutional amendments in its decision 22/2016 (XII.5) on the constitutional identity of Hungary.[51] In this ruling, the CC, informally modifying the Constitution, established that the FL does not create but recognizes the constitutional identity of Hungary, which is rooted in the historical Constitution. Later, in 2018, the Seventh Amendment, through a formal procedure, constitutionalized the same political will. Considering the possible future applicability of the unconstitutional constructional amendment doctrine in order to prevent the alteration of the identity of Hungary, the doctrine may serve as a double-edged sword. Not contesting at all the importance of this kind of review, which is necessary if constitutionality is to be maintained, when a constitution itself is not in line with certain international and supranational standards, even though it is bound by them, the non-standard provisions may be preserved by the constitutional courts. In Hungary, the CC, by relying on the new doctrine of constitutional identity rooted in the historical Constitution, enabled itself to defend the most criticized provisions of the FL[52] against a constitu-

[50] See, eg, the Law on Supreme Court, 8 December 2017, Dz. U. 2018, poz. 5, especially Art 111 (at *http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000005/O/D20180005.pdf*), which is clearly in conflict with Art 183(3) of the Constitution: The First President of the Supreme Court, who turned 65 before the end of the constitutionally determined 6-year term of office, had to retire by the force of law on reaching the age of 65.

[51] T. Drinóczi, *Hungarian Constitutional Court: The Limits of EU Law in the Hungarian Legal System*, in *Vienna Journal of International Constitutional Law*, 1, 2017, 139-151.

[52] See, eg, the Fourth Amendment, Opinion on the Fourth Amendment to the Fundamental Law of Hungary Adopted by the Venice Commission at its 95th Plenary Session, Venice, 14-15th June 2013. It contained the incorporation of many provisions that have been previously declared unconstitutional by the CC. T. Drinóczi, *Constitutional Politics in Contemporary Hungary*, cit., 63-98.

tional amendment that was meant to improve the constitutional content and raise it to the standard visible in the common constitutional tradition of Member States and international human rights obligations.

2.5. *Empowering citizens*

Overcoming the illiberal challenge would require educated and reasonable citizens. It is, however, quite a big ask, given the underfinanced educational policies that Hungary and Poland pursue. Hungary has started to develop a nationalistic educational and research agenda instead of putting emphasis on liberal values and spending more public money on education. That is why developing a democratic culture that accommodates liberal values, as Gábor Halmai and others suggest,[53] appears to be a utopian ideal. Advocates of a substantial constitutional democracy seem to be left with the hope that civil society could organize itself to promote and safeguard the values of liberal democracy, and it will have to do so in a legal and political environment which is far from friendly.[54] Hungary and Poland feature 'top-down' societies rather than 'bottom-up' communities.[55] In such a case, the constitution and mutual relations between powers and citizens are perceived as based on coercion and not as genuine social contracts.[56] Therefore, even the potential for civic disagreement with populist politics is highly doubtful.

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[53] G. Halmai, *The Decline of liberal democracy in Europe's midst*, at *http://www.eurozine.com/the-decline-of-liberal-democracy-in-europes-midst/*; F.N. Fesnic, *Can Civic Education Make a Difference for Democracy? Hungary and Poland Compared*, in *Political Studies*, 4, 2016, 966-978.

[54] See the case of the CEU and 'Stop Soros' law, nn 15 and 24, and the accompanying main texts. In Poland, for now, centralization of NGOs' financing processes has been implemented. See ustawa z dnia 15 września 2017 r. o Narodowym Instytucie Wolności - Centrum Rozwoju Społeczeństwa Obywatelskiego [the Law on National Institute for Freedom - Civil Society Development Centre], Dz. U. z 2017 r., poz. 1909.

[55] S. Dellavalle, *"Top-down" vs. "Bottom-up": A Dichotomy of Paradigms for the Legitimation of Public Power in the EU*, in 2 *Perspectives on Federalism*, 2017, 31-32. The preferred value is hierarchy instead of equality, especially in the Polish society. A. Bień-Kacała, *Równość czy hierarchiczność? Kilka słów o wartościach w państwie, prawie i społeczeństwie* [Equality or hierarchy? Few words about values of state, law and society], in 40 *Gdańskie Studia Prawnicze*, 2018, 17-30.

[56] R.G. Holcombe, *Consent or Coercion? A Critical Analysis of the Constitutional Contract*, in A. Marciano (ed.), *Constitutional Mythologies New Perspectives on Controlling the State*, New York-Dordrecht-Heidelberg-London, 2011, 9-24.

2.6. *Emergency judicial power*

There is another, more country-specific alternative, which has emerged in Poland. It proposes that ordinary courts should take over the competence of constitutional review from the paralyzed CT.[57] The advocates of emergency judicial power correctly contend that the primary constitutional values are the supremacy of the Constitution and the separation of powers. If the CT is disabled, as happens to be the case in Poland, the ordinary courts should take over constitutional review (without, however, the power of repealing laws).[58] It is proposed that this be called emergency judicial review.[59]

It is undeniable that liberal democracy should be restored, but it is not clear whether it can be done by unconstitutional measures. The paradox here seems to be similar to that of the efficient use of militant democracy. Without a proper legal basis (regarding the competence of the courts to assess constitutionality and to set aside unconstitutional legislation), this is unconstitutional, as it affects the rule of law and several of its components, such as legal certainty, the transparency of the legal system and state authorities, and predictability in the functioning of state organs. Nevertheless, in a captured constitutional setting, in which the constitutional courts and the independent judiciary have already been compromised, the taking over of constitutional review by the courts may most probably be ineffective.

The advocates of emergency judicial review should try to find an answer to the question whether 'good will' aimed at overcoming unconstitutionality can make desperate measures constitutional, whether it serves the best chance of retransformation and how it

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[57] R. Balicki, *Bezpośrednie stosowanie konstytucji* [Direct application of a constitution], in 4 *Krajowa Rada Sądownictwa*, 2016, 13-19; P. Kardas, M. Gutowski, *Konstytucja z 1997 r. a model kontroli konstytucyjności prawa* [1997 Constitution and a model of constitutional review], in 4 *Palestra*, 2017, 11-30.

[58] L. Garlicki, *Sądy a Konstytucja Rzeczypospolitej Polskiej* [Courts and the Constitution of the Republic of Poland], in 7-8 *Przegląd Sądowy*, 2016, 23-25; L. Garlicki, Z.A. Garlicka, *External Review of Constitutional Amendments? International Law as a Norm of Reference*, in *Israel Law Review*, 44, 2011, 343-368.

[59] The statement of the CT's President Andrzej Rzepliński and unpublished judgment of 9 March 2016, K 47/15. T.T. Koncewicz, *The Polish Crisis as a European Crisis: A Letter to Mr Jean-Claude Juncker*, cit., 31-33; and T.T. Koncewicz, *On the Strategic Reading of the Constitutional Document. Mapping out Frontiers of New Constitutional Research*, in *Przegląd Konstytucyjny*, 2, 2018, 16-45.

can be justified. As the Hungarian CC stated in 1991 regarding the legal assessment of the transition, the rule of law cannot be built against the rule of law.[60] In the case of emergency (danger threatening the life of the nation), state organs usually are empowered, by more or less detailed constitutional or other statutory rules, to use emergency powers. As said, that does not seem to be the case here. Moreover, once the idea of emergency judicial review is accepted, if justified and applied for restoring liberal constitutionalism, it could also potentially and legitimately be used by the already captured courts to prevent the same retransformation and disregard laws still in line with liberal values. What could be proposed, maybe, is rather the personal empowerment and commitment of ordinary judges towards the application of the EU law and international human rights law, which are, in a stronger or weaker form, part of the legal systems. In this way, the further rotting of the Polish and Hungarian legal systems could be slowed down 'from the bottom'.

The questions thus emerge: How could the illiberal regime permanently accommodate itself in our societies? Why do people keep supporting it in elections? Why is a viable opposition unable to emerge? Why are people so quick to adopt populism and antagonism and an autocratic leader? And why they do not long for a liberal system? There may be many explanations, such as the third wave of the democratization process in 1989 and 1990, the economic and political crises (2008-2010, 2014-2015), populist rhetoric and a clear lack of political self-restraint.[61] We cannot discuss all of these in this contribution; instead we focus on the emotional aspect of national identity and investigate whether the need for strong leadership and receptivity to populism may be explained by historical particularities. We propose that if they can be so explained, it may be the case that national and constitutional identities have been constructed in a way that has led to the current situation.

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[60] 11/1992. (III. 5.) decision of the Hungarian Constitutional Court.

[61] P. Blokker, *New Democracies in Crisis?*, London-New York, 2015; B. Bugarić, *A crisis of constitutional democracy in post-Communist Europe: "Lands in-between" democracy and authoritarianism*, in *International Journal of Constitutional Law*, 1, 2015; J. Ruprik, *Emerging illiberalism in the East*, in *Journal of Democracy*, 4, 2016, 77-84; A.R. Menocal, V. Fritz, L. Rakner, *Hybrid regimes and the challenge of deepening and sustaining democracy in developing countries*, in *South African Journal of International Affairs*, 1, 2008, 33-35.

3. *Emotionally unstable identity as a background to the remodeling effect of illiberal populism*

Narrative psychology provides a dynamic approach to understanding human identity and the process of making sense of our ever-changing world.[62] Scientific narrative psychology presumes a strong relationship between narrative and identity. It helps the identification of inner states and representations of social relations by connecting narrative compositions to psychological processes in individuals and groups. The interrelations between the development and shaping of individual identity and the role of the narrative in this process have also been studied in the context of group identity. Éva Fülöp and her co-authors[63] have proposed that not only individuals have a 'life trajectory', which sequentially represents the positively or negatively evaluated events of their lives, but that this evaluative sequence of salient historical events as 'historical trajectory' also characterizes the identity of nations, including their emotional life.[64] They also explain that 'narrative social psychology claims that states and characteristics of group identity that govern people's behaviour when they act as group members as well as the elaboration of traumatic experiences which affect the group as a whole can be traced objectively, that is, empirically in the narrative composition and narrative language of different forms of group histories'.[65] Group or national identity is thus assumed to be constructed by a genuinely narrative group history.

Group or national identity construction has three main channels: historiography, collective memory, and history textbooks and

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[62] M. Murray, *Narrative psychology and narrative analysis* cit., 110.

[63] They have conducted empirical research with regard to Hungary, see Fülöp *et al.*, *Emotional elaboration of collective traumas in historical narratives*, cit.

[64] Polish historical and time perspectives are elaborated in A. Zajenkowska (ed.), *Polska na kozetce. Siła obywatelskiej refleksyjności* [Poland on the couch. The power of civic reflexivity] (Sopot 2016), especially by C. Żechowski, *Historia jako źródło (nieświadomych) cierpień* [History as a source of (unconscious) suffering], 143-152; M. Stolarski, P. Zimbardo, *Czas na Polskę! O perspektywie czasowej Polski i Polaków* [Time for Poland! On the time perspective of Poland and Poles], 227-240. See also W. Wrzesiński, *Charakter narodowy Polaków. Z rozważań historyka* [National character of Poles. From the historian's reflections] (Wrocław 2004) and P. Augustyniak, *Homo Polacus. Eseje o polskiej duszy* [Homo Polacus. Essays about Polish soul] (Kraków 2015).

[65] É. Fülöp *et al.*, *op. cit.*

historical novels. Éva Fülöp and her co-authors found that if these sources are studied, they can help to 'empirically operationalize the concept of historical trajectory and explore emotional aspects of national identity through a narrative analysis of the emotional entailments' of the historical trajectory of a group or a nation.[66] The history of the group through recurring experiences makes collectives more sensitive to certain emotions, and as a consequence, every nation has its own characteristic emotional repertoire and norms of emotional expression.[67]

3.1. *The Hungarian historic and emotional trajectory*

Results of the Hungarian narrative psychology studies point to the depressive dynamics of the Hungarian national identity.[68] In the Hungarian collective memory, positively evaluated events belong to the medieval period, such as the defence of Christian Europe against the Ottoman Turks, which seems to be part of the national ideology and identity.[69] Historical events occurring in later centuries, for example wars of independence and revolutions (1703, 1848, 1956[70]), were always followed by defeat and repression. The pattern recurred in the two World Wars; Hungary was on the los-

[66] Historiography provides the most canonized form of historical experiences by attempting to ascertain objective facts of events and to diminish ambiguities. Collective memory (eg diaries, family accounts, oral history) tends to represent history in a biased, that is a group-serving, way from the perspective of the grouHistory textbooks and historical novels represent transitional forms of memory between historiography and collective memory, since in these narratives concrete acts of history are saturated with the psychological aspects of episodes (eg intentions, perspectives, evaluations, emotions, agency, etc.). É. Fülöp *et al.*, *op. cit*.

[67] É. Fülöp *et al.*, *op. cit*.

[68] É. Fülöp *et al.*, *op. cit*. For more about Hungarian history in English, see P. Lendvai, *op. cit*.

[69] This even appears in the preamble to the FL.

[70] Rákóczi's War of Independence (1703-11) was the first significant attempt to overthrow the Habsburgs. The insurrection was unsuccessful, but the Hungarian nobility still managed to partially satisfy Hungarian interests. The Hungarian Revolution of 1848 was closely linked to other revolutions of 1848 in the areas ruled by the Habsburgs, and grew into a war for independence from the Austrian Empire. The repression of the war was followed by a consolidation period, called passive resistance, which ended with the Austro-Hungarian Compromise of 1867. The Hungarian Revolution of 1956 was a nationwide revolt against the Socialist Government and its Soviet-imposed policies. Soviet troops put an end to the revolution, which was followed by great retaliation.

ing side in both wars, and this loss is preserved in the collective memory.[71] Passive resistance featured in the period after 1849, which seems to be integrated within the collective memory, and it featured after the revolution of 1956.[72] Collective victimhood,[73] mainly due to oppression by the Turks, Habsburgs, Soviets and the Trianon peace treaty,[74] and, as György Spiró explains, the recurring disloyalty of the state (mainly in the 20th century[75]), also seems to be an integrated part of the national identity.[76] People thus have continually been disappointed in the efficiency of state institutions and their operation. Citizens were abandoned, to their disappointment, by all regimes throughout Hungarian history. This led to the attractiveness of an autocratic leader, which also may have been integrated into the national identity.[77] Psychologists found collective victimhood to be a strong Hungarian emotion. The sense of collective victimhood immunizes the group just as it does abused persons. For Zsolt Szabó, it gives a reason why Hungary is not a host nation.[78] It was also Hungary that adopted the first legal measures against the Jewish population based on the Nazi example, and

[71] É. Fülöp *et al.*, *op. cit.*

[72] G. Spiró, *Két középkelet-európai mentalitás az államiság szempontjából*, in *2000 Irodalmi és Társadalmi havi lap*, 6, 2007, 7.

[73] Collective victimhood is more likely to arise when people feel the sense of victimhood not because of the harm experienced by themselves, but because of the loss or suffering of their group. Victimization in the history of a group can cause substantive changes in group identity. É. Fülöp *et al.*, *op. cit.*, 7.

[74] The Treaty of Trianon was the peace agreement of 1920 to formally end World War I between most of the Allies of World War I and the Kingdom of Hungary, which was at that time, until 1946, a 'monarchy without a monarch'. Around two-thirds of the territory of the country were allocated to neighbouring countries, along with their populations; one-third of Hungarians were left outside of post-Trianon Hungary.

[75] The Hungarian Soviet Republic (1919), by its own nature, betrayed its citizens based on their social class background. In the 1940s, the state betrayed all its citizens whom it claimed to be Jewish, ie 10% of its population; the socialist regime betrayed all its people except the nomenclature (protégés of the system). G. Spiró, *op. cit.*, 10.

[76] É. Fülöp *et al.*, *op. cit.*, 7, 19; G. Spiró, *op. cit.*, 10.

[77] G. Spiró, *op. cit.*, 5.

[78] Magyar identitás szabadságharcos - interjú Szabó Zsolttal, az ELTE Szociálpszichológia tanszékének adjunktusával [Interview with Szabó Zsolt, the adjunt of the Department of Social Psychology of ELTE], *http://mindset.co.hu/a-magyar-identitas-szabadsagharcos-interju-szabo-zsolttal-az-elte-szocialpszichologia-tanszekenek-adjunktusaval/* (hereinafter 'Interview with Szabó Zsolt').

which actively collaborated with Nazi Germany in implementing its policies.[79] These events caused collective guilt, which triggered varying degrees of amnesia and an urge for self-justification.[80] Furthermore, anti-Jewish laws were criticized at that time on the ground, amongst others, that they would support the notion that no hard work or personal responsibility was necessary to acquire goods. It may have encouraged the notion, featured in literature, of the Hungarian national characteristics including laziness and deviousness, etc.[81] On the other hand, it shall be noted that overgeneralisation need to be avoided, thus, Hungarians cannot be viewed and feature as a homogeneous entity. All empirically and scientifically unsupported descriptions are thus exaggerations and stereotypical. It does, however, seem to be accurate to say that the Hungarian historical trajectory is not favourable ground on which to build an emotionally stable identity,[82] something for which the unstable and vulnerable national identity yearns and which has always been found in autocratic leaders from the right-wing.[83] For making a more legally oriented conclusion, based on the recent case law in Europe about the applicability of the constitutional identity, we claim[84] that while Germany adopts a 'confrontational with EU law' model (which is nevertheless still cooperative)[85] and Italy uses a 'cooperation with embedded identity' model,[86] Hungary keeps to a 'confrontational individualistic detachedness' model[87]. Even though Germany and Italy show a clear EU-friendly attitude when identity is in question, Hungary takes an antagonistic approach[88]. This, unfortunately, seems to be in line with the national identity and, to a

[79] In return, the revision of the Trianon peace treaty was hoped for.

[80] G. Spiró, *op. cit.*, 5.

[81] G. Spiró, *op. cit.*, 7.

[82] É. Fülöp *et al.*, *op. cit.*, 11.

[83] Interview with Szabó Zsolt, n 78.

[84] T. Drinóczi, *Constitutional Politics in Contemporary Hungary*, in, 63-80.

[85] Lisbon decision (BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08), OMT reference decision (BVerfG, Jan 14. 2014, 2 BvR 2728/13).

[86] N 24/2017 of the ICC triggered by the CJEU decision in judgement of 8th September 2015, Case C-105/14, ECLI:EU:C:2015:555 (Taricco I); Judgment of 5th December 2017, Case C-42/17, ECLI:EU:C:2017:936 (Taricco II).

[87] 22/2016 (XII.5) decision of the Hungarian CC, dissenting opinion to 23/2015 (VII.7) decision of the Hungarian CC.

[88] T. Drinóczi, *Constitutional identity in Europe: the identity of the constitution. A regional approach*, in *German Law Journal*, 2, 2020, 105-130.

certain extent, still stereotypical emotional characteristics of the Hungarian nation.

3.2. *The Polish historic and emotional trajectory*

Polish characteristics, national identity and emotional attributes, like Hungarian ones, have been shaped throughout history.[89] It could be a part of the background to Poland's national identity that pluralism, decentralization, discipline and respect for state authority are not favourable features in Poland. First of all, the Polish nation can clearly be characterized by seemingly self-contradictory features, like freedom, on the one hand, and conservatism rooted in Catholicism, on the other.[90] Even freedom is confusing. It had a positive dimension connected to the free election of the king during 'The First Republic' or the transition to democracy in 1989.[91] Simultaneously, it was used destructively through the *liberum veto* or as a misconception of state sovereignty within the European Union.[92] For Poles, being a Pole and being a Catholic are almost synonymous. Catholicism also triggers a lack of pluralism and a longing for 'sameness'. At the same time, a hierarchical structure within society is preferable to equality among people and state organs. As a result of parochialism and a folwark-like[93] societal structure,[94] Poles organize themselves by creating a hierarchy, and thus a democratic method of decision making is viewed with suspicion.[95]

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[89] W. Wrzesiński, *op. cit.*, 38.

[90] W. Wrzesiński, *op. cit.*

[91] T. Drinóczi, A. Bień-Kacała, *Extra-legal particularities and illiberal constitutionalism. The case of Hungary and Poland*, cit., 346-347.

[92] As a sovereign state Poland should have the right (based on a special understanding of freedom) to propose candidates other than Mr Tusk for President of European Council, even against every other Member State). Sovereignty (and freedom) means almost the right to disagree.

[93] A primarily serfdom-based farm and agricultural enterprise. Folwarks originated as land belonging to a feudal lord and not rented out to peasants but worked by his own hired labour. The peasants toiled on the lots they rented from the overlord, but in addition were obliged to provide complimentary labour to the overlord on his folwark.

[94] E. Michalik, J. Santorski, *Polska na kozetce* [Poland on the couch], Warszawa, 2016.

[95] A. Bień-Kacała, *Równość czy hierarchiczność? Kilka słów o wartościach w państwie, prawie i społeczeństwie*, cit.

Another strong feeling in the historical trajectory is messianism, the newest representation of which is the feeling that only Poles can save Europe, for example in the case of migration. In consequence, the position of Poland is that the EU should reject the idea of 'quotas'. No European procedure before the CJEU, not even the launching of Article 7 process, can change these feelings and emotions, which are reinforced by strong resentment, along with a common opinion that Poles deserve better. On the individuals' level, Poles need a kind of strong leader, or, better, a messiah, who will tell them what they should do and what they deserve just as such leaders have done throughout history: mythological persons and similar figures, such as Józef Piłsudski and Lech Kaczyński and currently Jarosław Kaczyński. It also follows that the decisions of these leaders are acceptable and undisputable. No justification is needed, as the rules come from the one person the people believe in. Thus, legal procedures and institutions (eg the CT or judiciary) can be delegitimized when confronted with the leader's idea of 'Great Poland'.

Megalomania also typifies the Polish character.[96] This feature is related to the messianism of the Polish nation and its ideal image. Partly because of their fragmented statehood, Poles view themselves as a great nation, which has a significant and ideal history. The Polish nation is brave, patriotic, courageous and imperishable. It is neighbouring countries that are to be criticized for the deterioration of Poland throughout history, especially by partition and during World War II. Even after WWII, during the Soviet era, the state was strongly influenced by foreign powers. Therefore, an opposition rose against the state.[97] Since 1989, the system has been changed and become democratic, but the emotions of the people and the people themselves remain the same - clients of the state.[98] The state has been perceived as an opponent, an antagonist, and not as a co-creator of the common good. The authority of the state diminished, but messianism, as explained above, has created a strong need for a mythical leader. It was the 2015 election that delivered him. Since then, using the Smoleńsk catastrophe, another myth has revived, which is that of the Motherland. She is perceived as a common

[96] W. Wrzesiński, *op. cit.*, 15-36.
[97] W. Wrzesiński, *op. cit.*, 39.
[98] P. Augustyniak, *op. cit.*, 49-51.

good, the Republic of Poland or *Res Publica*, and reserved only for real Poles. In consequence, the homogeneous concept of the nation is being developed and given absolute priority. Only a certain part of Polish society, representing a certain vision of Poland, deserves to be recognised as the Polish Nation. Opposing voices are not welcome, which influences the education system, the usage of militant democracy measures and the development of civil society.

4. *Conclusion*

The public law mechanisms have shown an alarming, but not unexpected, result. Each of the reviewed mechanisms can be linked to the inherent features of illiberal constitutionalism. The failure of soft and hard law instruments can be connected first to illiberal populism – illiberal leaders and their European colleagues and institutions speak different languages. Second, it can be linked to the 'no normative commitment to constraints on public power' component – illiberal populists are playing national sovereign states in the era of multi-layered and global constitutionalism, and do not take supranational and international cooperation and commitments seriously but they and, most importantly, the legal system cannot disregard the constraints these obligations mean for the daily application and enforcement of national, supranational and international positive law. Third, the failing effect is explained and justified by a misunderstood concept of political constitutionalism. Militant democracy cannot help because illiberal constitutionalism is based on the relativization of liberal values, most particularly that of human rights. Constitutional design using multi-tiered amendment procedures is destined to fail because of the capture of the constitution by formal procedures (Hungary) and packed constitutional courts (Hungary and Poland). A packed constitutional judiciary prevents the proposal to use transnational norms from being an effective countermeasure. It is the component of illiberalism that, in two different ways, disables the application of the doctrine of unconstitutional constitutional amendments in order to retransform the system. The compromised constitutional court cannot defend the still liberal Polish Constitution; while in Hungary, it can safeguard the already illiberal constitution and constitutionalism. The majority of constitutional judges became subservient to political will: they have

made the law the servant of politics; this judicialization of politics in the illiberal constitutional setting is the core poison pill to liberal constitutionalism – it is indeed in the background of the failure of all mentioned public law mechanisms.

The development of illiberal democracy, and, consequently, the failure of public law mechanisms, is also fuelled by the emotional attitudes that have evolved throughout the histories of the two nations. These non-legal aspects of Hungarian and Polish illiberalism, which seem to be embedded in the national identity constructions, find support in different fields of social sciences. It thus seems that the need for strong autocratic leadership and these nations' receptivity to populism, and, as a result, the unavoidable failure of public law mechanisms, have been influenced by historical particularities and emotional trajectory. If it is indeed the case, constitutional identity may have been built in a way that, to a certain extent, has been pre-determined and which has led to the current situation. If this is true, it also means that the retransformation of the current regimes will prove to be extremely difficult, if not impossible, as, unlike politicians, the people cannot be dismissed. The failure of public laws mechanisms and an emotionally unstable identity thus combine to create the 'DNA' of illiberal constitutionalism.

Abstract

The paper claims that each of the failed public law mechanisms can be linked to the inherent features of illiberal constitutionalism. It explains why exit strategies offered by the literature cannot help and how the emotional attitudes, which have evolved throughout the history, might have undermined the ability of Poles and Hungarians to maintain their liberal constitutionalism. The failure of public laws mechanisms and an emotionally unstable identity thus combine to create the "DNA" of illiberal constitutionalism.

L'articolo sostiene che il fallimento del diritto pubblico possa essere collegato alle caratteristiche intrinseche del costituzionalismo illiberale. Gli autori spiegano perché le soluzioni offerte dalla dottrina non possono aiutare e in che modo gli atteggiamenti emotivi, che si sono evoluti nel corso della storia, potrebbero aver minato la capacità dei polacchi e degli ungheresi di mantenere il loro costituzionalismo liberale. Il fallimento del diritto pubblico e un'identità emotivamente instabile si combinano così per creare il "DNA" del costituzionalismo illiberale.

ANDRAS L. PAP

FAKE HISTORY, REAL IMPOSITIONS ON CONSTITUTIONAL INTERPRETATION: THE CASE OF HUNGARY'S 2011 CONSTITUTION[1]

1. *Introduction*

This article focuses on constitutional history. As the Hungarian case study will demonstrate, the politics of historical memory can play an important role in the establishment and consolidation of new (semi-)authoritarian regimes.[2] As it will be shown, reinventing the past is a crucial element in the rhetorical and PR-artillery Orbán's illiberal hybrid autocracy. Historical memory politics is one of the «soft power-sources» for legitimating and consolidating post 2010 Hungarian «illiberal democracy».[3] The article scrutinizes the 2011 Fundamental Law, adopted by Prime Minister Viktor Orbán's

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[2] J. Rupnik and J. Zielonka, *Introduction: The State of Democracy 20 Years on. Domestic and External Factors*, in «*East European politics and societies*», 27, 1, 2013, 3-25, and A. Ágh, *Cultural War and Reinventing the Past in Poland and Hungary: The Politics of Historical Memory in East-Central Europe*, in *Polish political science yearbook*, 45, 2016, 32-44.

[3] G. Polyak, *The Hungarian Media System: Stopping Short or Re-Transformation?*, in *Südosteuropa*, Special issue, *Hungary's path toward an illiberal system*, 63, 2, 2015, 272-318.

illiberal regime in Hungary. The author identifies three dimensions in which constitutional history is present. The first concerns a fabricated constitutional mythology, the constitutional moment from which the constituent power claims its legitimacy, and which, according to legal and political documents adopted by the government, also claimed to have created a novel constitutional community. The new political community is officially declared in a unique pre-constitutional document, a Declaration of Parliament on National Cooperation, which declares the emergence of a new political community.[4] The second dimension of constitutional history refers to an ideologically driven, controversial interpretation of history, declared in the preamble of the constitution, which institutionalizes constitutionally cemented memory politics. The third dimension concerns unique provisions of the constitution which actually impose normative rules on constitutional interpretation in relation to constitutional history. These norms are twofold. First, an amendment to the 2011 text explicitly declares void all constitutional jurisprudence (that is Constitutional Court decisions) adopted prior to the 2011 constitution, the Fundamental Law. Second, the provision on constitutional interpretation within the main text of the constitution, which gives a quasi-normative force to the preamble, setting forth that Fundamental Law shall be interpreted in accordance with the preamble, as well as the undefined, unspecified «achievements of the historical constitution».[5]

As for methodology: the article scrutinizes the text of the Fundamental Law and adjacent legislation, excluding case law. In the case of the assessment of the 2010 constitutional moment and the constitutive community, the analysis will also include the aforementioned parliamentary Declaration and the 2010 government program, along statements by the «grand architect» Mr. Orbán: thus, the self-assessment of the 'design' and the designers.

The Hungarian case study, thus, is not about the role of the judiciary, but the government and the constituent power. In theory, history could still serve both as a limit to and a license for judicial freedom in constitutional interpretation in Hungary, as constitutional identity and history are officially declared to be intertwined.

[4] Political Declaration 1 of 2010 (16 June) of the Hungarian Parliament on national cooperation.

[5] Art. R of the Fundamental Law.

2. *The myth of constitutional election*

The first part of the article investigates how history is invoked in envisioning a constitutional moment[6] providing a legitimacy for the self-proclaimed revolutionary regime of the government led by Viktor Orbán, which claims to reconstitute and re-conceptualize the relationship between the state and its citizens, both in institutional and normative terms. Here, the new constitution does not actually take up the task of declaring a new political community. This is done by another, formally non-binding, unique pre-constitutional document, Political Declaration 1 of 2010 (16 June) of the Hungarian Parliament on national cooperation. This document foresees and legitimizes the unmitigated break with the preexisting political community and declares the emergence of a new regime, the National System of Cooperation (henceforth NSC), the system which originates retroactively from a «voting booth revolution», a term used by Orbán to describe the election which created the parliamentary supermajority of the governing coalition (FIDESZ and the Hungarian Christian Democratic Party, the two parties that ran jointly). Under retroactivity, I refer to the fact that the idea of the creation of a new political community (or even the adoption of a new constitution) was not even mentioned during the electoral campaign and, needless to say, the contours and fundamentals of this new regime were not subject to political deliberation either. Nevertheless, in an overwhelming political victory, where the two parties received more than two-third of the parliamentary mandates, was claimed by Orbán to be the sole and unique founding constitutional moment.

Thus, the starting point of the 2010-2011 constitutional moment is the 2010 spring elections, where a coalition of the Fidesz and the Christian Democratic Party, two self-identified right wing, conservative parties led by Fidesz-president Viktor Orbán, received the support of 41,5% of all the people entitled to vote and 53,1% of all the votes, which was translated to 68% of all the parliamentary mandates,[7] giving the winners a two-third majority, which allowed them to amend the old constitution and adopt a new one.[8]

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[6] B. Ackerman, *We the People*, Volume 1, Cambridge, 1993.

[7] J. Kornai, *Hungary's U-Turn*, in *Capitalism and Society*, 10, 1, 2015, 12.

[8] For more see A.L. Pap, *Democratic Decline in Hungary. Law and Society in an Illiberal Democracy*, London and New York, 11-43.

On 28 June 2010, upon the proposal of a Fidesz MP, Parliament repealed Article 24 (5) of the Constitution,[9] which required a four-fifth majority of MPs to adopt the procedural rules of the preparation of a new Constitution. Thus, the governing coalition, having a two-third majority, eliminated the provision obliging it to cooperate with opposition parties while preparing the new Constitution. A Parliamentary Ad Hoc Committee Preparing the Constitution was established[10] on the same day. 30 out of its 45 members were the MPs of the governing coalition. The committee prepared a Concept Paper, which in the end was only considered to be a working document, and a Draft was prepared by Fidesz/Christian Democrat MPs and introduced to Parliament on 14 March 2011. The new constitution, the so-called Fundamental Law was adopted with only the votes of the Fidesz/Christian Democrats coalition on 18 April and entered into force on 1 January 2012. It has been the sole product of the governing political party and has been adopted by the governing majority without the support of any other political force. The text, widely criticized by national, European and international NGOs and organizations,[11] was adopted on the basis of a Bill submitted after an only 35 day-long debate and exclusively by the votes of the members of the governing coalition.

To create the delusion of popular support, a so called 'national consultation' was launched. The National Consultation Committee sent questionnaires to all the eight million Hungarian citizens entitled to vote, asking them to answer 13 questions concerning the draft. According to the government (as there were no transparent means to verify this), 12% of voters returned it[12].

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[9] Amendment of the Constitution of 5 July 2010, Art. 2.

[10] Parliamentary Resolution 47/2010. (VI. 29.).

[11] Opinions Nos CDL(2011)016, and CDL(2011)001 of the European Commission for Democracy through Law (Venice Commission) on the new Hungarian constitution and the three legal questions arising out of the process of drafting the new Hungarian constitution. (First and second Venice Commission opinion.) European Parliament resolution of 5 July 2011 on the Revised Hungarian Constitution. See also the motion for resolution No 12490 on serious setbacks in the fields of the rule of law and human rights in Hungary tabled on 25 January 2011 in the Parliamentary Assembly of the Council of Europe, oral questions tabled in the European Parliament on the new Hungarian Constitution and to the Council and Commission statements on the revised Hungarian constitution and following the debate held on 8 June 2011.

[12] K. Osvát, S. Osvát, *Hungary's 2011 Constitution: Key Features and Political Background*, in *ANU Centre for European Studies Briefing Paper Series*, 2, 2 (2011), 1-

Although it was never a part of the 2010 electoral campaign, the cornerstone of the rhetoric of Orbán's regime is that the new constitution finally finishes the political transition and completes the de-communization process that was suspended in 1990. In Jenne and Mudde's[13] words, Fidesz has argued that their proposed transformations represent the realization of the promises of 1989, which went unfulfilled by the communists and dissidents who signed the 'pacted' transitions.[14]

It will be argued that the emergence of a new political community (labeled as the 'System of National Cooperation') during a constitutional moment appear to be marketing products. The concept of the System of National Cooperation, identified as the epiphany of the new political community legitimizing a new constitutional regime, and solemnly declared in the form of a parliamentary resolution, was the rhetorical center of the government program, and a government order even made it mandatory to be displayed in all government facilities in Hungary. However, after October 2012 not a single reference has been made to it in government sources, politicians' speeches, or documents.

Orbán's regime claimed no less than having created a new a political community. This is reflected for example in the changing of the official name of the state from 'Magyar Köztársaság' to 'Magyarország'. The former, commonly referred to in English as the 'Republic of Hungary', in the Hungarian original meant actually 'Hungarian Republic', a grammatical syntax with the noun 'republic' ('republic') specified with the adjective 'Hungarian' ('magyar'). Magyarország, ('Magyarstan') means 'Hungarian Country', grammatically a morpheme, a complex word derived from the agglutination of the words 'Hungarian' ('magyar' – can be either a noun or

17. Available at; *http://politicsir.cass.anu.edu.au/sites/default/files/docs/2011-2_Hungarian-Constitution-Osvat-and-Osvat.pdf* (accessed 22 May, 2020) and A. Wiktorek Sarlo, M. Otarashvili, *Can the EU Rescue Democracy in Hungary?*, in *E-Notes*, 2013. Available at: *https://www.fpri.org/article/2013/07/can-the-eu-rescue-democracy-in-hungary/* (accessed 22 May, 2020).

[13] E.K. Jenne, C. Mudde, *Can outsiders help?*, in *Journal of Democracy*, 23, 3, 2012, 8.

[14] See also G. Halmai, *The Rise and Fall of Hungarian Constitutionalism*, in S. Benhabib *et al.*, *The Democratic Disconnect Citizenship and Accountability in the Transatlantic Community*, Washington, DC, 2013), 67-76.

an adjective) and 'Country' ('ország').[15] Signs at the borders, cover pages of passports and identity cards have been changed, and even courts deliver judgments in the name of the new subject.

The Declaration, adopted shortly after the new government had taken office, was to be displayed in all government facilities in Hungary per a government order, which even specified the size, color, fonts, and the details of framing.[16] The President, the Speaker of the Parliament, the Presidents of the Constitutional Court and the Supreme Court, the President of the Central Bank, mayors, the ombudspersons, chief prosecutors and judges were requested in forming a Government Resolution to follow suit. Most state institutions, such as hospitals or universities also complied. Opposition parties and human rights NGOs considered this duty to display an oath of allegiance an intrusion to the separation of powers and the independence of crucial institutions. The statement issued by the Socialist Party argued that «*This ordinance is Viktor Orbán's letter of resignation from western civilization*» and «*the first symbolic step toward building a totalitarian regime that doesn't tolerate differences of opinion*». Even the far-right party, Jobbik stated that this reminded of the days when „*one had to put up similar documents next to the pictures of Lenin, Stalin, Rákosi, and Kádár*».[17] Socialist MP's even submitted a satirical bill mocking the Declaration and, inter alia, declaring Orbán's birthday a national holiday.[18]

The political credo of the new regime and the new political community reads as follows:

> «At the end of the first decade of the 21st century, after forty-six years of occupation and dictatorship and two turbulent decades of transition Hungary has regained the right and ability of self-determination. […] the Hungarian nation once again summoned its vitality and brought about another revolution in the voting booths. […] The National Assembly declares that a new social contract was laid down

[15] P. Takács, *A rózsa neve: Magyar Köztársaság - Az államok nevéről és a magyar állam átnevezéséről*, Budapest, 2015.

[16] Gov. D. 1140/2010. (VII. 2.).

[17] *Orbán's Proclamation of National Cooperation on Every Wall*, 2010. Available at: *https://hungarianspectrum.wordpress.com/2010/07/03/orbans-proclamation-of-national-cooperation-on-every-wall/* (accessed 22 May, 2020).

[18] P. Krekó, *Fidesz & hubrisz*, in *The Budapest Times*, 2010, Available at: *http://budapesttimes.hu/2010/07/12/fidesz-hubrisz/* (accessed 31 December, 2016).

> […] through which the Hungarians decided to create […] the National Cooperation System. […] We, members of the National Assembly […] shall elevate the new political and economic system emerging on the basis of the popular democratic will».[19]

The term and concept of the SNC was used as a central theme in the government program, submitted to Parliament on May 22, 2010.[20] In fact, the 80-page-long program, which contains a subchapter on the 'New Social Contract', and where the government consistently refers to itself as 'The Government of National Affairs', and set forth that «Hungarians want deep-seated and fundamental change in every area of life. […] [T] hey have authorized us […] to establish a new political, economic, and social system built on new rules in every area of life».

The government program also contains important statements and points of references for constitutional identity:

> «In April 2010 the long period of transition rife with struggles, divisiveness, and crises […] was brought to an end by the act of the revolution which took place in the polling booths. In spring 2010 for the first time in Hungary since the system change a single political force was granted democratic authority of constituent import. […] The new Assembly is […] entrusted […] to carry out revolutionary changes».

The idea that the new government program is actually a new social contract is made explicit:

> «The current Constitution […] is a temporary, transitional constitution. […] because there was no underlying and valid social contract. The new social contract has now been concluded in the 2010 parliamentary elections. Legislators have been entrusted […] with the creation of the country's new constitution».

The government program, thus, both declares a supreme source of political legitimacy, which actually created a new constitutional community, embodied by the government (majority in par-

[19] Official government translation.

[20] Office of the National Assembly, *The Programme of National Cooperation, Document Number: H/47*, Received 22 May 2010. Available at: *https://www.parlament.hu/irom39/00047/00047_e.pdf* (accessed 22 May, 2020).

liament), and expresses a messianic determination for transformative changes in political and spiritual life: «Hungarians expressed […] those core values which are important to all of us for prosperity and a respectable life: work, home, family, health, and order».[21]

It is illuminating to look at the how the concept and the very term had been used in subsequent government communication. I carried a comprehensive survey of press releases and other entries in the archives of the national news agency, Magyar Távirati Iroda (MTI), which supposedly contains all relevant entries. The SNC was mentioned for the first time on the night of the elections in Orbán's speech announcing victory. The next time it was mentioned, again by Orbán, during the first meeting of Fidesz's parliamentary group, and a few days later in the opening session of the parliament. He, again, talked about that SNC at two campaign rallies in May, and later in June 2010, when signing an agreement with a leader of Hungarians living in Serbia (where he declared that the System of National Cooperation includes Hungarians living outside Hungary). In parliament, on the 56th (!) day of his office (reflecting on the revolution of 1956), the prime minister stated that the new political community, the 'national center' is a community of rationality, and his efforts are focused on transforming the two-third parliamentary majority into a political community of a 'central force field', the system of national cooperation. In a somewhat contradictory fashion, he also said that the reason to govern is the creation of this 'political center', and the way to achieve it is the SNC. In September 2011, on the 100th day of his government in office, Orbán reported to parliament on the development of the four distinct '*national cooperations of politics, economy, administration and morality - the latter to be elaborated within and by the new constitution*'. According to my research, the last time he ever mentioned the SNC, was on October 23, 2012 when giving out awards on the national holiday. Besides in Orbán speeches, only for other times was the term mentioned by other politicians: once by the spokesman for the Prime Minister, the deputy spokesman for Fidesz in political rebuttals, and by an under-secretary, and an MP in connection with the new law on churches, expressing the importance of including traditional churches in the SNC. That is all. After October 2012 not

[21] Official government translation.

once was this term and concept, so corollary to the new political community that it was ordered to be displayed in state buildings, mentioned by government sources. After the adoption of the new constitution, the displayed copies of the Declaration of National Cooperation in government offices were mostly replaced by the Preamble of the new constitution, the National Avowal of Faith.[22] In the past years the term and the abbreviation is practically only used in an ironic way in government-critical contexts.

To sum up the above, in 2011 not only was there no pressing need for constitution-writing in Hungary, but the idea never even occurred in the 2010 electoral campaign, which gave the Orbán-government the legal authorization to make it happen. The constitutional moment, thus, was created retroactively by the communications team of the Orbán-government.

3. *Constitutional commitments to historical memory*

The second dimension of constitutional history refers to an ideologically driven, controversial interpretation of history, declared in the preamble of the constitution, which institutionalizes constitutionally cemented memory politics. The relevant text of the Fundamental Law (amended three times in the first few years of the 2010-2014 Orbán-government, and seven times by 2018) is as follows:

First, the preamble, the 'National Avowal' provides declarations concerning the highlights of Hungarian history:

> «WE, THE MEMBERS OF THE HUNGARIAN NATION, […] are proud that our king Saint Stephen […] made our country a part of Christian Europe one thousand years ago. We are proud of our forebears who fought for the survival, freedom and independence […] We are proud that our nation has over the centuries defended Europe in a series of struggles and enriched Europe's common values with its talent and diligence. We recognise the role of Christianity in preserving nationhood».

[22] Curiously, while the initial display was ordered by law, in the form of a government order, we could not locate a source of law for the replacement, only a communiqué on the Fidesz website. See *A Nemzeti Hitvallás Szövege*, 2011. Available at: *http://www.fidesz.hu/hirek/2011-04-18/a-nemzeti-hitvallas-szovege/* (accessed 31 December, 2016).

It furthermore gives recognition to the unwritten historical constitution and the 'Holy Crown', as a special constitutional institution:

> «We honour the achievements of our historic constitution and we honour the Holy Crown, which embodies the constitutional continuity of Hungary's statehood and the unity of the nation. We hold that the protection of our identity rooted in our historic constitution is a fundamental obligation of the State».

The preamble also provides guidelines for interpreting history, in particular constitutional history:

> «We do not recognise the communist constitution of 1949, […] We agree with the Members of the first free National Assembly, which proclaimed as its first decision that our current liberty was born of our 1956 Revolution. We date the restoration of our country's self-determination, lost on the nineteenth day of March 1944, from the second day of May 1990, when the first freely elected organ of popular representation was formed. […] We believe that our children and grandchildren will make Hungary great again […] Our Fundamental Law shall […] be an alliance among Hungarians of the past, present and future».

These declarations are accentuated by Article R) of the second, normative part, named 'FOUNDATIONS' of the constitution, which sets forth that:

> «(3) The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historic constitution. (4) The protection of the constitutional identity and Christian culture of Hungary shall be an obligation of every organ of the State».

Adopted more than twenty years after the political transition, the constitution pays considerable attention to the Communism and transitional justice. The preamble, the National Avowal sets forth that «*We deny any statute of limitations for the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and the communist dictatorship*».

A normative, Article U holds:

> «Political organisations that [… are] legal successors of the Hungarian Socialist Workers' Party continue to share the responsibility of

> their predecessors as beneficiaries of their unlawfully accumulated assets. […] society's sense of justice must be ensured […] In order for the State to preserve the memory of the communist dictatorship, a Committee of National Memory shall operate. […] The holders of power under the communist dictatorship shall be obliged to allow statements of fact about their roles and acts […] their personal data […] may be disclosed to the public. […] The pensions or any other benefits […] to leaders of the communist dictatorship […] may be reduced […] the arising revenues must be used to mitigate the injuries caused by the communist dictatorship and to keep alive the memory of victims. […] (6) Serious criminal offences […]which were committed […] in the name or in the interest of, or in agreement with the party-state and which were left unprosecuted for political reasons by ignoring the Act on criminal law in force at the time of commission, shall not be considered as time-barred».

As we could see, these provisions concern fours points: (*i*) a declaration of discontinuity with earlier, foremost the communist constitutional regime; (*ii*) a recognition and revitalization of the pre-1944 unwritten historical constitution; (*iii*) the introduction of transitional justice measures in the field of lustration and privacy; and (*iv*) official interpretation and vision of history. Let us address these in turn.

3.1. *Discontinuity*

The Fundamental Law, as shown above, declares a clear discontinuity with the 1949 Constitution, but recognizes the legitimacy of the 1990-2010 constitutional regime. The reason why this is somewhat tricky is that the 1989-political transition technically was a constitutional "refolution", following the roundtable discussions involving communist leaders and self-appointed (unelected) dissident politicians, instituting a vast amendment to the 1949 constitution, which remained in force until the very 2010 elections. Hence, the declaration of discontinuity has only symbolic and political meaning, but no legal substance.

3.2. *And another continuity: Revitalizing the unwritten historical constitution*

What makes the discontinuity-declaration relevant from the constitutional point of view is that the Fundamental Law does not

«*recognise the suspension of our historic constitution due to foreign occupations*», which presumably includes both the 1944 German occupation and the communist regime built and sustained under the shadow of Soviet military. It still remains unclear, however, what the fate of the hence revitalized «historical constitution» was in the 1990-2010 era.

Miklóssy and Nyyssönen[23] argue that constitutional memory, canonizing an interpretation of the past to be remembered has effects beyond symbolic politics: it concerns the ground of the entire legal system, revealing the immanent understanding of legal principles of the new polity. They underline that new constitutions inevitably create a political discontinuity, a new frame of reference, a value system permeating the legal and political culture:

> «By laying down the new legal cornerstones for the societal being, the constitutions […] establish a bridge between the past and future. The constitution-writer positions the new polity into a flow of time, marking a new boundary vis-à-vis the old state of affairs».[24]

They even argue that constitutions are a special species of memory laws «*in a sense that their primary functions are to define a new polity that needs an anchorage in memory*».[25] However, they warn, that,[26] rigidly canonized images of the past and a strictly defined value-base may restrict and limit the leverage of the individual who does not fit into the exclusively described community.

A sympathetic analysis of the Fundamental Law by Hörcher[27] argues that

> «It is only natural […] that if the tyrannical communist regime created a new, written constitution and threw away the historical one, after the fall of communism a new, democratic regime will distrust

[23] K. Miklóssy, H. Nyyssönen, *Defining the new polity: constitutional memory in Hungary and beyond*, in *Journal of Contemporary European Studies*, 26, 3, 2018, 322-23.

[24] *Ibidem*, 323.

[25] *Ibidem*, 323.

[26] *Ibidem*, 330.

[27] F. Hörcher, *The National Avowal: An Interpretation of the Preamble, from the Perspective of the History of Political Thought*, in A. Varga Zs., B. Schanda, A. Patyi (eds.), *The Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution*, Dublin, 2015, 46.

> that written creation and will try to do its best to refurbish whatever is possible from the old, historical one».

He adds[28] that «[…] members of the National Roundtable talks in 1989 were not careful enough […] to secure the legitimacy of the new written Constitution. […] the present references to the historical Constitution gestures to heal wounds of the body politics».

It needs to be added that such commitments are not without legal precedents: during Orbán's first premiership (this time not yet having a two-third majority, and to be outvoted in two consecutive elections before 2010), the symbolic 'Act 1 of 2000 on the memory of the founding of the Hungarian state and the Holy Crown' defined the Holy Crown as embodying *'the historical continuity of Hungary's statehood and the unity of the nation'*. Yet, it is quite ambivalent how the Fundamental Law's doctrinal design manages to reincorporate pre-1944 the constitutional regime of then monarchical state.[29]

As Könczöl summarizes the historical constitution and the Holy Crown doctrine:

> «it was first formulated as such in Werbőczy's Tripartitum, a lawbook from the sixteenth century, where the author combined crown symbolism with an organic conception of the state and a theory of mutual empowerment. […] the Holy Crown is regarded as the source of all political power, with the King and the nobility being members of the Crown. […] After 1920, it was of particular importance for the legitimacy of the 'Kingdom without a King', and also for Hungarian claims to the 'Lands of the Holy Crown'».

This, hence also serves as the basis for the constitutional doctrine of a unified nation, incorporating the Hungarian Diaspora liv-

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[28] *Ibidem*, 46-47.

[29] M. Könczöl, *Dealing with the Past in and around the Fundamental Law of Hungary between 1990 and 2010*, Cambridge, 2017, 246-62; Z. Szente, *The Doctrine of the Holy Crown in the Hungarian Historical Constitution*, in *Journal on European History of Law*, 4, 1, 2013, 109-115; Á. Rixer, *Hungary's Fundamental Law and the Concept of the Historical Constitution*, in *Journal on European History of Law*, 4, 2013, 116-24 and G. Schweitzer, *Fundamental Law - Cardinal Law - Historical Constitution: The Case of Hungary since 2011*, in *Journal on European History of Law*, 4, 1, 2013, 124-128.

ing (most of all) in the neighboring states – as a consequence of the 1920 post WWI-treaty of Trianon, where Hungary lost two-thirds of its territory and the corresponding population. The Peace Accord is still a cornerstone of national memory politics[30] and seen as the most enduring national catastrophe, and a symbol of Hungary's and Hungarians' victimization and mistreatment by the international community. A significant secondary legislation, Act XLV of 2010 on National Belonging, law declaring June 4, the 90th anniversary of the Trianon Peace Treaty, a national day of remembrance also held that that Parliament was committed to restoring national unity broken up by the Trianon Treaties and stepping up against the assimilation of Hungarians who were cut from their homelands by shifting borders.[31]

The artefact of the Crown is exhibited in the Parliament building, according to Radnóti[32] sending a conflicting message as to where the source of sovereignty for lawmaking lies and stems from.[33]

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[30] Aspirations to reunite with ethnic kins have been probably the most important reference point in politics, as well as a foreign policy priority - especially for the political right and conservatives. But not only for conservatives. As Pogonyi points out (S. Pogonyi, *Transborder Kin-minority as Symbolic Resource in Hungary*, in *Journal on Ethnopolitics and Minority Issues in Europe*, 14, 3, 2015, 73-98), from the 1970s, the Hungarian democratic opposition openly demanded help for Hungarians discriminated against in Romania and Czechoslovakia, and democratization and transborder engagement have become twin projects of the anti-Communist dissidents, nationalists, and liberals alike. For example, in 1989 it was the liberal Free Democrat's Party (SZDSZ) that promised to offer non-resident citizenship for transborder Hungarians. After the transition, right-wing parties increasingly used transborder Hungarians to strengthen their national image, while liberals and social democrats accused them with nationalism and even irredentism.

[31] S. Pogonyi, *Transborder Kin-minority as Symbolic Resource in Hungary*, cit., 84-85., also see I. Halász, *We the Members of the Hungarian Nation…" Remarks on the Changing Concept of Nation in the New Fundamental Law of Hungary*, in *Journal on European History of Law*, 1, 2013, 128-32.

[32] S. Radnóti, *A Sacred Symbol in a Secular Country: The Holy Crown*, in G.A. Tóth (ed.), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law*, Budapest-New York, 2012, 104.

[33] Also see I. Császár, B. Majtényi, *Hungary: The Historic Constitution as the Place of Memory*, in M. Suksi, K. Agapiou-Josephides, J.-P. Lehners, M. Nowak (eds.), *First Fundamental Rights Documents in Europe: Commemorating 800 Years of the Magna Carta*, Mortsel, Cambridge, 2015 and U. Belavusau, *Memory Laws and Freedom of Speech: Governance of History in European Law*, in A. Koltay (ed.), *Comparative Perspectives on the Fundamental Freedom of Expression*, Budapest, 2015, 535-556.

3.3. *Transitional justice*

Two decades after the political transition, with a stable constitutional democracy, and following a series of restitution and annulment acts adopted in the 1990's, the new constitution introduces three types of transitional justice measures: a set of declarations on the crimes of communism; rules on the respective statute of limitations; and exemptions from privacy protections for certain groups of collaborators.

First, as the Amicus briefs written by Hungarian academics to the Venice Commission, the Council of Europe's democracy watchdog instrument points out in regards of the provision of denying «*statute of limitation for the 'inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorships*», if «inhuman» crimes should be taken to mean war crimes and crimes against humanity, then the denial of a statute of limitations complies with effective international law, otherwise it may raise concerns regarding retroactive effect.[34] Also, the legal ramifications of the provision identifying the former communist party as a "criminal organization," and designating the current Socialist Party as the legal successor are vague, and no relevant legal action followed suit. However, leaders the possibility has been opened for former members of the communist party to be prosecuted.

As Halmai[35] points out:

> «In 2013, […] as part of the Fourth Amendment to the Fundamental Law […] passed after 23 years of solid democracy […], revisits the settlements made during the immediate transition from communist dictatorship to democracy by reopening possible cases against former communist officials. While the law could potentially serve the aim of accountability, in the only case opened so far (the Biszku case), it in fact represents victors' justice by weakening the ruling party Fidesz's political rival, the Socialist Party (the successor of the Communist Party)».

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[34] G. Halmai, K.L. Scheppele (eds.), *Opinion on Hungary's New Constitutional Order: Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws*, Princeton University, 2011.

[35] G. Halmai, *Memory Politics in Hungary: Political Justice without Rule of Law*, 2018). Available at: *https://verfassungsblog.de/memory-politics-in-hungary-political-justice-without-rule-of-law/* (accessed 24 May, 2020).

Second, Article U(4) provides that former communist leaders are public persons with respect to their past political actions and as such, must tolerate public scrutiny and criticism, except for deliberate lies and untrue statements, as well as the disclosure of personal data linked to their functions and actions. It needs to be added that list of members of the Communist secret service and their informers was never published in Hungary.[36]

3.4. *Official historical narrative-creation*

The most highly debated and controversial part of the Fundamental Law is its ideologically driven, selective, yet official interpretation of history. As Halmai[37] summarizes the main criticism: the constitution

> «fails to acknowledge that war crimes and crimes against humanity were committed not only by foreign occupying forces and their agents during World War II, but also between 1920 and 1944 by extreme right-wing "free troops" and the security forces of the independent Hungarian state, […] Nor does it acknowledge that the continuity of Hungary's statehood was not interrupted: […] the government was not shut down. The Regent remained in his office, and the parliament sat […]. The Hungarian state leadership did not declare the termination of legal continuity, but cooperated with the occupying powers».

Also, as the 2011 Amicus brief explains, the Fundamental Law disregards the fact that the 'Temporary National Assembly' convened at the end of 1944, and the 1945 elections would be classified by contemporary «democracy-watchers" as «partly free», and these elections were «the freest in Hungary's entire history up until that time». Furthermore, progressive legislation in this era, including the so called «little constitution» of the Republic approved at the

[36] In 1994 Parliament enacted Act 23 of 1994 on the review of persons in certain important positions, providing only a partial a review of senior public officers, where a panel of three judges could investigate if someone was either a member of the Nazi Arrowcross Party, or was involved in the work of certain of the Communist secret services. See M. Könczöl, *Dealing with the Past in and around the Fundamental Law of Hungary between 1990 and 2010*, cit.

[37] G. Halmai, *Memory Politics in Hungary: Political Justice without Rule of Law*, cit.

beginning of 1946, was an important point of constitutional historical reference in the 1989 Round Table talks. The Fundamental, hence, according to the 2011 Amicus brief,

> «only recognises the (pre-1944) glorious pages of Hungarian history, but does not acknowledge the acts and failures that give cause for self-criticism. It only holds to account the […] injuries caused to the Hungarian people by foreign powers, and does not wish to acknowledge the wrongs committed by the Hungarian state against its own citizens and other peoples. It raises to a constitutional level […] national self-glorification, self-pity and self-justification».

The Fundamental Law's engagement in memory politics had not remained symbolic. As Benazzo documents,

> «Fidesz approved a new law on street names that banned the use of names of organizations, persons or institutions or symbols associated with totalitarian regimes. […] In addition, key figures of the interwar period have been elected as national intellectuals worth studying in education curricula. […] and the government […] is rigorously controlling the history curricula at schools through rewriting the school textbooks, and denying the right of the teachers to choose among the available alternative textbooks».[38]

Jones[39] characterizes this a frenzied metamorphosis where «*today's Budapest is the site of extreme inequality, centrally-funded revisionist building projects and memorials*». As Egry (Benazzo)[40] adds, it also made way for the proliferation of state-funded «*memory entrepreneurs*» and research infrastructure propagating this interpretation of constitutionalized national history. Examples include the 'Museum of Terror', the 'Foundation for Central and Eastern European History', the so called Veritas Institute, and the Commission of National Memory, explicitly mentioned and created by the constitution.[41]

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[38] S. Benazzo, *Not All the Past Needs To Be Used: Features of Fidesz's Politics of Memory*, in *Journal of Nationalism, Memory & Language Politics*, 11, 2, 2017, 205.

[39] G. Jones, *Jewel in the National Crown: Conquering Budapest*, 2016. Available at: *http://visegradrevue.eu/jewel-in-the-national-crownconquering-budapest/* (accessed July 3, 2017).

[40] S. Benazzo, *Not All the Past Needs To Be Used: Features of Fidesz's Politics of Memory*, cit.

[41] A. Batory, *Populists in Government? Hungary's 'System of National Cooperation*, in *Democratization*, 23, 2, 2016, 283-303 and L. Bayer, *Viktor Orbán's Revision of*

As it has been demonstrated, constitutional history was taken use of in two dimensions by the Orbán-government: as declarations of discontinuity and continuity, and normative value judgements concerning 'what' history was, and how and 'what' «historic justice» should be served. It needs to be added, that there was and is no consensus in these within the Hungarian society, and the Orbán-government certainly was not interested in seeking or finding a common ground for constitutional historical memory. This created a deeply divided society, where «culture war» was one of the main tools to create cleavages to keep up political mobilization supporting the new regime. In fact, this constitutionally centralized history was implemented by a mandatory, ideologically biased framework-curriculum, which only allows a 20% flexibility in terms of content, abolishing the textbook market.[42] Also, government control was extended to formerly independent research institutions under the auspices of the Hungarian Academy of Sciences,[43] national science and culture funds were taken over by the government, and much of the funding have been diverged to an alternative network of government-dependent and government-friendly research institutes, think-tanks, higher education institutions and GONGO's.[44]

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the 1956 Revolution, 2016. Available at: *https://www.politico.eu/article/viktor-orbans-revision-of-the-1956-revolution/* (accessed 24 May, 2020). See also A. Kurimay, *Interrogating the Historical Revisionism of the Hungarian Right: The Queer Case of Cécile Tormay*, «*East European Politics and Societies*», 30, 1, 2016, 10-33; G. Mink, L. Neumayer (eds.), *History, Memory and Politics in Central and Eastern Europe*, Basinstoke, 2013; A. Pető, *Revisionist Histories, "Future Memories": Far-Right Memorialization Practices in Hungary*, in *European Politics and Society*, 18, 1, 2017, 41-51 and F. Furedi, *Populism and the European Culture Wars - The Conflict of Values between Hungary and the EU*, London and New York, 2017.

[42] I. Bajomi, A. Bozóki, J. Csáki, Z. Enyedi, I. Fábián, G. Gábor, A. Gács, P. Galicza, G. Gyáni, A. Haris, M. Heller, T. Jászay, I. Kenesei, G. Klaniczay, D. Krusovszky, K. Kubínyi, V. Kulcsár, P. Lővei, A. Máté, J. Mélyi, G. Nagy, E. Pásztor, G. Polyák, P. Radó, A. Rényi, I. Siratό, É. Tőkei, A. Váradi, M. Vásárhelyi, *Hungary turns its back on Europe. Dismantling culture, education, science and the media in Hungary 2010-2019*, Humán Platform, Oktatói Hálózat, Hungarian Network of Academics, 2020, 36.

[43] G. Halmai, *The End of Academic Freedom in Hungary*, 2019. Available at: *https://ds.hypotheses.org/6368* (accessed 22 May, 2020).

[44] See I. Bajomi, A. Bozóki, J. Csáki, Z. Enyedi, I. Fábián, G. Gábor, A. Gács, P. Galicza, G. Gyáni, A. Haris, M. Heller, T. Jászay, I. Kenesei, G. Klaniczay, D. Krusovszky, K. Kubínyi, V. Kulcsár, P. Lővei, A. Máté, J. Mélyi, G. Nagy, E. Pásztor, G. Polyák, P. Radó, A. Rényi, I. Siratό, É. Tőkei, A. Váradi, M. Vásárhelyi, *Hungary*

4. *Positioning history in constitutional interpretation*

The third dimension of recognizing constitutional history concerns unique provisions of the constitution which actually impose normative rules on constitutional interpretation in relation to constitutional history. These norms are twofold. First, an amendment to the 2011 text explicitly declares void all constitutional jurisprudence (that is Constitutional Court decisions) adopted prior to the Fundamental Law, and second, the provision on constitutional interpretation within the main text of the constitution, which giving a quasi-normative force to the preamble, setting forth that the «the Fundamental Law shall be interpreted in accordance with» the preamble, as well as the undefined, unspecified «achievements of our historical constitution».

Balázs Schanda (a post-2010 elected member of the Constitutional Court) and Loránt Csink (a former high-ranking government official of the 2010-2014 Orbán Government) explain the legislative history:[45] «*the Constitutional Court does not decide upon precedents; the legal base of its decisions is always the Constitution […]. The rationes decidendi of former decisions are not binding for future cases, they just help to establish the clear adjudication of the Constitutional Court*».

They point to decision 22/2012 of the Court where it held that wherever the Fundamental Law stipulates a right or an institution the same way as the Constitution, the constitutional interpretation maintains, and state: «*Such a statement did not meet the Government's idea that stressed a rhetoric discontinuity between the old and the new Constitution. Therefore, the Fourth Amendment […] formally repealed the decisions of the Constitutional Court made under the previous Constitution*».[46]

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turns its back on Europe. Dismantling culture, education, science and the media in Hungary 2010-2019, cit., 5-7 and T.D. Ziegler, *Academic Freedom in the European Union - Why the Single European Market is a Bad Reference Point*, Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2019-03, 2019), 8. Available at: *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3317406* (accessed 22 May, 2020).

[45] L. Csink, B. Schanda, *The Constitutional Court*, in A. Varga Zs., B. Schanda, A. Patyi (eds.), *The Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution*, Dublin, 2015, 195.

[46] *Ibidem*, 196.

In its submission to the Venice Commission, the government argued that

> «This […] does not affect the force of the Constitutional Court decisions in the sense that laws formerly nullified by these decisions will not come into force again, nor does it mean that [… it …] may not come to the same conclusion in a specific future case as in a case before the Fundamental Law. […], it means that should the […] Court intend to use its previous assessments, it would not be enough to merely referring back to a former decision, but it would be obliged to give a detailed legal reasoning in the light of the Fundamental Law».

It even added that this can «be regarded as a rule broadening the margin of manoeuvre of the Constitutional Court, because the Court will be more free to decide whether it would like to simply repeat the legal reasoning of its former decisions or work out new arguments not bound by the case-law built on the previous Constitution».

As for the second, the Venice Commmission highlighted that since there is no clear definition to what the «achievements of the historical constitution» may be, this creates vagueness for constitutional interpretation.[47]

As Egresi explains, the Holy Crown doctrine, and the historical constitution is a composition of different organic laws as for example: Organic Laws of King Stephen I; the Golden Bull adopted by the noble-assembly in 1222 declaring all nobles' rights and privileges against Hungarian Kings and feudal society; the Tripartitum: compiled by István Werbőczy in 1514 in legal Latin language, and is considered to be a summary of ancient Hungarian constitutional practice; the April Laws of the Hungarian Revolution against the Habsburg Empire in 1848, the Law of the Compromise between the Hungarian Nation and the Habsburg Monarchy in 1867, etc.

As Miklóssy and Nyyssönen add,[48]

> «The long tradition of written laws obscures the fact that it actually preserved the mentality of the ancient common law, accentuating

[47] F. Hörcher, *The National Avowal: An Interpretation of the Preamble, from the Perspective of the History of Political Thought*, cit., 44.

[48] K. Miklóssy, H. Nyyssönen, *Defining the new polity: constitutional memory in Hungary and beyond*., cit., 327.

> criminal law and retribution. Thus, until the 19th century this ideational tradition obstructed the evolution of liberal legal thinking and, especially, of individual rights vis-à-vis state power, which was the ground for the principles of equality and human rights. To put it differently, by maintaining the Holy Crown Doctrine, the Basic Law wanted to underline that the historical state and contemporary legal principles are intertwined issues».

As Sulyok and Trócsányi (former constitutional court justice, later Orbán's Minister of Justice, currently a FIDESZ member of the European Parliament) argue, «Primarily, it is the duty of the Constitutional Court to define which parts of these achievements can be taken into consideration without the infringement of the Basic Law and which documents can be referenced in constitutional jurisprudence».[49]

It has been shown that not only is the constitution itself quite explicit in terms of what history and constitutional identity it sets forth, the Orbán-government made sure to provide for straight-forward authorization for constitutional interpretation. This, along the well-documented packing of the Constitutional Court by government loyalists[50] created another instrument for the Orbán-government's ideological state capture.

5. *Concluding remarks*

The article identified three dimensions in which constitutional history is present in the 2011 Hungarian constitution: a fabricated constitutional mythology, the constitutional moment from which the constituent power claims its legitimacy, and which also claimed to have created a novel constitutional community; an ideologically driven, controversial interpretation of history, declared in the pre-

[49] L. Trócsányi, M. Sulyok, *The Birth and Early Life of the Basic Law of Hungary*, in A. Varga Zs., B. Schanda, A. Patyi (eds.), T*he Basic (Fundamental) Law of Hungary. A Commentary of the New Hungarian Constitution*, Dublin, 2015, 11.

[50] For example, in 2015, the Eötvös Károly Institute, the Hungarian Helsinki Committee and the Hungarian Civil Liberties Union published a report (EKINT-HCLU-HHC 2015) analyzing 23 high-profile Constitutional Court cases, showing that some judges were found to have voted in support of the government in 100 percent of cases.

amble of the constitution, which institutionalizes constitutionally cemented memory politics; and normative rules on constitutional interpretation for constitutional history.

Since the Fundamental Law is less than ten years old, judicial practice is subsequently scarce on the subject matter. It is also to be seen whether the National Avowal and its endorsement of constitutional history will serve as a normative or an authoritative tool, and what the long-term consequences will be of the intentional vagueness of the constitution's wording in regards of the 'achievements of the historical constitution' that allows and even calls for selectivity and cherry picking. The more specific constitutional provisions on historical justice and lustration for most have remained symbolic ideological PR, and were not followed by legislation or litigation (and the three Orbán-governments since 2010 have all had former members and officials of the Communist party in ranks).

Hungary certainly followed a unique path in post-communist transitions: unlike in other states, the first wave of democratization of the pacted or 'post-sovereign' constitution making, the adoption of an interim constitution, which was designed as the first of a two-step process, was never followed by the adoption of a final constitution after the first democratic elections.[51]

It also needs to be added that, contrary to what it claims to be, the System of National Cooperation, was not an actual institutionalized modus operandi for the new Hungarian state, nor is it the demarcation of the «new» constitutional community, or a form of political institutional design. It is rather the political and quasi-normative manifesto of the Orbán-regime's discursive framework: a form of a constitutional commoditization aimed at selling[52] a political regime, where a significant emphasis is put on ideological mobilization. It is this very discursive framework that describes and markets new imagined community of the SNC-Hungarian nation and to narrates its shared common belonging.[53] And the nation, seen

[51] G. Halmai, *The Rise and Fall of Hungarian Constitutionalism*, cit., 75.

[52] For the concept, see J.L. Comaroff, J. Comaroff, *Ethnicity, Inc.*, Chicago, 2009.

[53] For scholarly assessments on the role of discursive action in the process of identity formation see J.E. Fox, C. Miller-Idriss, *Everyday Nationhood*, in *Ethnicities*, 8, 4, 2008, 536-563 and A.P. Cohen, *Symbolic Construction of Community*, London and New York, 1985.

through particularly adjusted historical looking-glasses, as Hobsbawm[54] points out, is a device to distinguish between the innocent and the guilty.

In sum, the Hungarian case is peculiar and instructive because here the constitution-maker, the governing majority, actually took agency to decide on both the role of history in constitutional interpretation, as well identifying a very particular interpretation of history and historical truth itself. It is illuminative in the sense that it accentuates that a significant deal of criticism for courts' authority to assess history may root in misgivings about a particular interpretation of history (rather than the idea itself).

Abstract

This article shows how constitutionally enshrined historical memory politics and reinventing the past is a crucial element in Viktor Orbán's illiberal hybrid autocracy in Hungary. The author identifies three dimensions in which constitutional history is present: a fabricated constitutional mythology, the constitutional moment from which the constituent power claims its legitimacy, and which is claimed to have created a novel constitutional community; an ideologically driven, controversial interpretation of history, declared in the preamble of the constitution, which institutionalizes constitutionally cemented memory politics; and normative provisions in the constitution pertaining to constitutional interpretation in relation to constitutional history.

Il presente articolo dimostra come la politica della memoria storica costituzionalmente sancita e la reinvenzione del passato rappresentino un elemento cruciale dell'autocrazia ibrida illiberale di Viktor Orbán in Ungheria. L'autore identifica tre dimensioni in cui è presente la storia costituzionale: una mitologia costituzionale fabbricata, il momento costituzionale da cui il potere costituente rivendica la sua legittimità e che si afferma abbia creato una nuova comunità costituzionale; un'interpretazione ideologicamente guidata e controversa della storia, dichiarata nel Preambolo della costituzione, che istituzionalizza la politica della memoria costituzionalmente cementata; e disposizioni normative contenute nella Costituzione riguardanti l'interpretazione costituzionale in relazione alla storia costituzionale.

[54] E.J. Hobsbawm, *Nations and Nationalism since 1780, Programme, Myth, Reality*, Cambridge, 1992, 163-92.

CARNA PISTAN

MEMORY ENGINEERING, NATION-BUILDING AND MINORITY RIGHTS PROTECTION IN THE REPUBLIC OF CROATIA: THE "DARK SIDE" OF THE CONSTITUTION[1]

It is often said that men are ruled by their imaginations; but it would be truer to say that they are governed by the weakness of their imaginations.
(Walter Bagehot [1967], 1963, 82)

[1] This article is the result of the research activities related to the Jean Monnet Module "EU Enlargement and Constitutional Transitions in the Western Balkans" (Project reference: 600091-EPP-1-2018-1-IT-EPPJMO-MODULE), and the Jean Monnet Project "We, the People of the United Europe: Reflections on the European State of Mind" (Project reference: 612070-EPP-1-2019-1-IT-EPPJMO-PROJECT), supported by the Erasmus+ Programme of the European Union. The European Commission support for the production of this publication does not constitute an endorsement of the contents which reflects the views only of the author, and the Commission cannot be held responsible for any use which may be made of the information contained therein. An earlier version of this article was presented at the 2019 ASN World Convention, Panel BK2 "National Identity and Minority Rights Protection in the Western Balkans. Mapping External Influences," Harriman Institute, Columbia University, NYC, US. The author is also most grateful for support from the *Center for Constitutional Studies and Democratic Development* (CCSDD) during the various phases of this research.

1. *Introduction*

Almost seven years ago, on 1 July 2013, the Republic of Croatia became the 28th EU member state. The realization of this strategic goal, which was compared in the country only to the 1992 international recognition, came after a long and complex integration process.[2] In order to join the EU, Croatia was subjected to a rigorous application of 1993 Copenhagen criteria, as well as some additional criteria which were developed by the EU under the 2000 Stabilization and Accession Process (SAP) as part of its enlargement policy toward the Western Balkans.

Among the various challenges Croatia had to face on its road to the EU, an emblematic problem was given by the protection of minority rights. In fact, whether compared to other Central and Eastern European countries which acceded to the EU in 2004 and 2007, Croatia had an unique situation in relation to national minorities. Such situation did not stem as much from the relatively large number of minority groups present within its territory, but rather from the country's recent past.[3] As a result of the violent break-up of Yugoslavia, Croatia experienced in the 1990s the war and ethnic conflict, as well as a decade of an ultranationalist rule which led to the establishment of an authoritarian mode of governance and international isolation.[4] The 1990s were thus marked by a hostile approach toward ethnic others, particularly (although not exclusively) the Serb community. It was only in 2000s that a new political climate emerged in the country; it allowed for the launch of the parallel processes of democratization and Europeanization within which minority rights protection not only became a central theme but also – under the impact of the EU political conditionality – one of the crucial aspects of Croatia's accession to the EU.[5]

The EU minority conditionality is notably enclosed in the Copenhagen political criterion which expressly refers to the "re-

[2] See D. Jovic, *Croatia and the European Union: a long delayed journey*, in *Journal of Southern Europe and the Balkans*, 1, 2006, 85.

[3] See S. Tritunovska, 'Minority Rights Protection', in *International Journal on Minority and Group Rights*, 6, 1999, 463.

[4] See generally S.P. Ramet, D. Matic (eds.), *Democratic Transition in Croatia: Value Transformation, Education, and Media*, College Station, 2007.

[5] C. Gordon, G. Sasse, S. Sebastian, *Specific report on the EU policies in the Stabilisation and Association Process*, EURAC Research, January 2008, 4.

spect for and protection of minority rights" as a precondition for the EU accession. In addition, the 2000 SAP introduced some additional criteria with the aim to stabilize the majority-minority relations in the Western Balkans, thus facilitating the reconciliation and democratization in the region against the post-conflict ethnic hatred, intolerance and regional tensions.[6] Some other requirements can be further derived from the European cultural integration, which since the 2004 EU Eastern enlargement requests to all candidate countries (and potential candidates) to come to terms with their own non-democratic past in an unbiased way, which in the case of the Western Balkans means, among others, recognizing national guilts committed in the Yugoslav Wars of the 1990s.[7] Under the EU conditionality, Croatia's approach toward ethnic minorities inevitably became more collaborative; the country also changed the normative framework within which majority-minority relations are regulated, including the Constitution. On the eve of the accession to the EU, the President of the European Commission, then José Manuel Barroso, even expressed appreciation for the difficult reforms undertaken, and congratulated Croatia for reaching out for reconciliation.[8] Croatia's accession to the EU made indeed believe the European institutions that the time of ultra-nationalism and ethnic conflict belongs to the dark period of the 1990s, and that democracy and reconciliation would be preserved and safeguarded within the broader European framework. However, recent events show us that exactly the opposite took place. Immediately after the

[6] The additional accession criteria envisaged by the SAP for the Western Balkans include: *a*) regional cooperation (i.e. the requirement to establish a network of close contractual relationships between the Western Balkans countries); *b*) good neighbourly relations (which encourages the Western Balkans countries to work with each other in a manner comparable to the relationships that exist between the EU Member States), and *c*) the respect for international obligations (in particular, the full cooperation with the ICTY).

[7] For example, it has been argued that the inclusion of the Holocaust as an important element of national history was one of the entrance tickets to the EU in the 2000s. See T. Judt, *Postwar: A History of Europe Since 1945*, New York, 2005, 803. On the "culturalisation" of the accession criteria in relation to the Western Balkans see M. Milenković, M. Milenković, *Serbia and the European Union. Is the "Culturalisation" of Accession Criteria on the Way?*, in F. Laursen (ed.), *EU Enlargement. Current Challenges and Strategic Choices*, Brussels, 2013, 153-174.

[8] See José Manuel Barroso President of the European Commission Speech at the Croatian Parliament, Zagreb, 7 April 2011 (available at: *https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_250*).

EU accession, Croatia has experienced a significant resurgence of nationalism accompanied by illiberal trends in memory politics, which is largely used as a tool for creating divisions along ethnic lines. International observers are warning that reconciliation has stalled, democracy is backsliding, and the most important human rights problem in the country is still the discrimination and violence on grounds of race, ethnic origin, and national belonging.[9]

Yet the existing studies generally assume that Croatia has a respectable normative framework on minority rights protection,[10] but that the main problem is given by the lack of the EU post-accession monitoring for its implementation.[11] Contrary to such assumptions, this article explores the Croatian constitutional framework on majority-minority relations by claiming that, despite the changes introduced under the EU conditionality, it still contains a "dark side." With the aim to unveil this "dark side", the article proceeds as follows. First, it explores the relationship between memory engineering, nation-building and minority rights protection through the lengths of the Croatian Constitution. Second, it shows the effect the mnemonic engineering may have through the Constitution, especially on the definition of the nation, nation-state and national minorities. Third, the article shows the ways in which a constitutionally defined national memory and identity may influence the legal sphere through an exam of two legislative acts: the 1991 Croatian Citizenship Act, and the 2002 Constitutional Act on the Rights of National Minorities. Finally, the article examines the impact of constitutional memory on the definition of constitutional identity through the lengths of the case law of the Croatian Constitutional Court. The main aim of the article is to draw attention on threats related to mnemonic engineering through the Constitution by showing that it can represent a practice which may easily intersect with the very concept of democracy in a way that can destabilize

[9] See European Commission against Racism and Intolerance (ECRI), *Report on Croatia*, 5 May 2018.

[10] See for example A. Petričušić, *Wind of Change: The Croatian government's Turn towards a Policy of Ethnic Reconciliation*, in *European Diversity and Autonomy Papers EDAP*, 6, 2004, 1.

[11] See generally, G. Schwellnus, L. Mikalayeya, *It ain't over when it's over: The Adoption and Sustainability of Minority Protection Rules in New EU Member States*, in *European Integration Online Papers*, 2009, 17.

the democratic consolidation and justify illiberal turns. In approaching this topic, the article uses an innovative interdisciplinary approach which integrates constitutional law with nationalism studies and memory studies.

2. *The Croatian Christmas Constitution: a document full of nationalist imaginations?*

The fundamental framework within which majority-minority relations are constructed in the Republic of Croatia is provided by the country's Constitution. The latter was adopted on 21 December 1990 and because of the date of its approval it is popularly known as the "Christmas Constitution".[12] The Constitution opens with a Preamble, which is entitled "Historical Foundations." It represents a typical example of nation-building through the Constitution,[13] as it touches upon fundamental questions of *who are 'We the People'?*, *what binds us together?*, *and whose is the State?*. In an attempt to provide the answer to these questions, the Preamble deals with ethnic relations by invoking Croatia's past and introducing concepts such as nation, nation-state and national minorities.

Although the text of the Preamble deals with majority-minority relations, it has only occasionally received some scholarly attention and thus still lacks of an exhaustive interpretation. This is largely because constitutional law is not sufficient to properly address its meaning; on the contrary, it could lead (and has led) to some erroneous interpretations.[14] Research focusing on concepts such as nation, nation-state or common past pertained to other scientific disciplines. For this reason, the only way to provide for an exhaustive interpretation of the Preamble is to place constitutional law into a dialogue with other fields, mainly nationalism studies and memory studies. By applying such interdisciplinary dialogue, it can

[12] See R.L. Maddex, *Constitutions of the World*, Washington, 2008, 112.

[13] On nation-building through the Constitution see generally A. von Bogdandy, S. Häußler, F. Hanschmann, R. Utz, *State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches*, in *Max Planck Yearbook of United Nations Law*, 9, 2005, 579. On constitutional preambles see generally J.O. Frosini, *Constitutional Preambles. At a Crossroads between Politics and Law*, Santarcangelo di Romagna, 2012.

[14] See para. 2.1 below.

be sustained that the Preamble to the Croatian Constitution is largely composed of three parts: *a*) the constitutionalization of collective memory which acts as a foundation of *b*) national identity, and legitimizes *c*) the existence of today's Croatia as an independent nation-state. What follows is an exam of the three parts of the Preamble by revealing their impact on majority-minority relations.

2.1. *The constitutionalization of collective memory: founding myths and symbols of an ethnically defined nation*

The text of the Preamble starts by announcing "the millennial national identity of the Croatian nation and the continuity of its statehood" – an expression which acts as a basis for further declaring the "historical right to full sovereignty of the Croatian nation." Both the millennial identity of the Croatian nation and the continuity of its statehood are proven through the Preamble by invoking a series of state formations and independent and sovereign decisions, starting from the creation of Croatian principalities in the 7th century; the independent medieval Kingdom of 9th century; the Kingdom of the Croats of 10th century; the Kingdom of Croats under Austro-Hungarian domination (1527-1868); the preservation of the attributes of statehood under the Croatian-Hungarian personal union; […] the conclusions of the Croatian Parliament of 1848 regarding the restoration of the integrity of the Triune Kingdom of Croatia under the authority of the *ban* (viceroy), rooted in the historical, national and natural right of the Croatian nation; […] the decision of the Croatian Parliament of 29 October 1918 to sever all constitutional ties between Croatia and Austria-Hungary, and the simultaneous accession of independent Croatia, invoking its historical and natural national rights, to the State of Slovenes, Croats and Serbs, proclaimed in the former territory of the Habsburg Empire […]; the establishment of the Banate of Croatia in 1939, which restored Croatian state autonomy within the Kingdom of Yugoslavia; the establishment of the foundations of state sovereignty during the course of WWII, as expressed in the decision of the Territorial Antifascist Council of the National Liberation of Croatia (1943) in opposition to proclamation of the Independent State of Croatia (1941), and then in the Constitution of the People's Republic of Croatia (1947) and in all subsequent Constitutions of the Socialist

Republic of Croatia (1963-1990). The Preamble then continues by stating that on the threshold of the historical changes, marked by the collapse of the communist system, the Croatian nation reaffirmed its millennial statehood by establishing today's Croatia through the first democratic elections of 1990, the present Constitution and the victory of the Croatian nation and Croatia's defenders in the just, legitimate and defensive war of liberation, the Homeland War (1991-1995).

All of these are considered to be historical facts, thus the Preamble claims that it contains real history. According to Peter Häberle, the inclusion of the detailed Croatian history in the Preamble to the Constitution amounts to a kind of "history lesson" conceived of in order to make the Constitution more accessible to the citizens and especially young people, which is claimed to confirm the position that contemporary Constitutions also have a pedagogical dimension.[15] Branko Smerdel further emphasizes the relevance of the Croatian Preamble by comparing it to the American Declaration of Independence (1777) and the French Declaration of the Rights of Man and of the Citizen (1789) as its main objective is to explain to the world the historical constitutional basis and the reasons – based on the 1991 referendum of independence – behind the actions taken by Croatian authorities in their pursuit of the "Croatian dream of independence" (that is the establishment of an independent sovereign Croatian state). Although the Preamble is not legally binding and its primarily significance is historical, the same author explains that its text has an enormous symbolic and therefore political significance; it seriously influences the interpretation of the Constitution and serves as an expression of historical orientation in the development of the Constitution.[16]

Yet the main problem is that the Preamble to the Croatian Constitution is lying. History based on facts and truth is very different from what it has been assumed to be in the Preamble. First, the proclamation of antiquity and naturalness of the Croatian nation by invoking its multimillennial existence and continuity of its

[15] See P. Häberle, *The 1991 Croatian Constitution in the European Legal Comparison*, in *Croatian Political Science Review*, 1, 2000, 50.

[16] See B. Smerdel, *Republic of Croatia*, in L. Besselink, P. Bovend Eert, H. Broeksteeg, R. De Lange, W. Voermans, (eds.), *Constitutional Law of the EU Member States*, Deventer, 2014, 201.

statehood is a fabricated history. Nations, as Benedict Anderson puts it, are imagined communities, meaning that they do not constitute a natural phenomenon; in order to exist they should be politically constructed.[17] At the same time, nations and nation-states are products of modern time as they construction was possible only with the emergence of nationalism. In other words, it is nationalism that creates the nation (this is in fact its main ability), not the other way around.[18] The rise of nationalism is historically specific; it started in the late 18th century, and exploded in the 19th century, which is also called the "age of nationalism".[19] Croats are not thus neither a millennial nation nor a natural nation, but as all other nations, a relatively recent imagined community. Moreover, as Avishai Margalit observes, anchoring the source of legitimacy in the events of an ancient past is something typical of authoritarian, traditional and theocratic regimes. Non-democratic regimes are marked by an ardent desire to control the past through an imposition of their own versions of history (the only that are allowed) because by so doing they exercise monopoly on all sources of legitimacy. Democracy, on the contrary, finds the source of its legitimacy in elections and the Constitution.[20] What appears to be quite interesting in the Croatian Preamble is that it seems to contain a mixture of both authoritarian and democratic elements. While the authoritarian elements are enclosed in anchoring the legitimacy of present-day Croatia in an ancient past (starting from Croatian principalities of 7th century), which together with the millennial continuity of the statehood and the more recent Homeland War (1991-1995) provide Croatia with the historical right to exist (or as the Preamble claims, the historical right to full sovereignty of the Croatian nation), the democratic elements are enclosed in establishing as further sources of legitimacy the first 1990 democratic elections and the present Constitution.

Second, the thousand year independence and continuity of present day Croatia with a series of state formations and decisions listed in the Preamble is an invented tradition. For example, the Croatian medieval state existed, but it was not an independent na-

[17] See B. Anderson, *Imagined Communities*, London, 1983.

[18] *Ibidem*.

[19] See generally E. Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality*, Cambridge, 1992.

[20] See A. Margalit, *The Ethics of Memory*, Cambridge and London, 2004, 11.

tion-state. Medieval states were dynastic states, centered on the ruler, while nation-states have emerged only in the age of nationalism. In addition, Croatia has never been established through the history as a viable independent state as its territory was always part of broader empires, larger states or federations.[21] The first Croatian nation-state is the one established in 1991, following the secession from the former Yugoslavia. Moreover, the basis for the 1991 independence and international recognition were not certainly given by the historical right to exist, as the Preamble claims, but by the last 1974 Yugoslav Constitution, which endorsed the principle of self-determination, including the right of secession. The Preamble is thus backdating history for thousands of years. This is because it does not contain Croatian history, but the collective memory of Croatian nation. There is a significant difference between history and memory. While history's goal is the discovering of historical facts and truth, memory's goal is the creation of national identity and it is thus traditionally considered as an essential component of nation-building.[22] The importance of memory in forging national identity resides in its strong integrative potential; it binds the nation together by providing for a sense of group's cohesion and unity and a sense of common belonging.[23] In so doing, memory creates boundaries between the common We-identity and otherness. Yet memory has always enjoyed a very complicated relation with the truth. Since its goal is the identity creation, it is content to rearrange the past by elevating it to a mythical dimension; for this reason, it is often associated to fabrication of history, invented traditions or historical revisionism.[24] The fact that national collective

[21] See J.V.A. Fine, *When Ethnicity Did Not Matter in the Balkans. A Study of Identity in Pre-Nationalist Croatia, Dalmatia and Slavonia in the Medieval and Early Modern Periods*, Ann Arbor, 2006, 3.

[22] See generally M. Halbwachs, *The Collective Memory*, New York, 1980.

[23] See C. Calhoun, *Nationalism and Ethnicity*, in *Annual Review of Sociology*, 19, 1993, 211.

[24] See E. Hobsbawm, T. Ranger (eds.), *The Invention of Tradition*, Cambridge and New York, 1983. See also C. Fogu, W. Kansteiner, *The Politics of Memory and the Poetics of History*, in R.N. Lebow, W. Kansteiner, C. Fogu (eds.), *The Politics of Memory in Postwar Europe*, Durham, NC, and London, 2006, 284-306. Official national memories are constantly transmitted through the society by people in power through what has been called material and immaterial *lieux de mémoire* (sites of memory): founding myths, symbols, monuments, museums, memorials, etc. See P. Nora Pierre (ed.), *Les lieux de mémoire*, 3 tomes, Paris, 1984-1992. Although funding myths and

memory never reflects historical truth does not mean, however, that it denotes necessary a negative phenomenon. Memory may serve peace projects when the past is re-designed towards the integration and reconciliation of the society (see for example the Preamble to the 1996 South African Constitution).[25] Conversely, the past can be manipulated for political ends so as to justify divisions, conflicts and even wars.[26]

The Croatian Constitution follows the second path. In other words, it represents a formidable example of how Constitutions should not be written whether the goal is to conceive ethnic reconciliation. By contrast, it is an exemplary case of how to use the Constitution as a tool for promoting ethnic divisions. In fact, the past which is enclosed in "Historical Foundations" is strongly marked by political developments which occurred in Croatia in the early 1990s, when under ethno-nationalist ideologies historical revisionism became an official state policy in the name of nation-building.[27] Ethno-nationalism exchanged history for myths, and myths became to function as official history. Notably, the first Croatian President, Franjo Tudjman – a nationalist revisionist – re-wrote the whole his-

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symbols represent fictitious or distorted versions of past events, they are all perceived as sacred for the nation. On the role of symbols in nation-building see also D. Kertzer, *Ritual, Politics and Power*, New Haven 1988, 179, who further claims: "Far from being window dressing on the reality that is the nation, symbolism is the stuff of which nations are made."

[25] See L. Du Plessis, *The South African Constitution as Memory and Promise*, in *Stellenbosch Law Review*, 11, 2000, 385-394. An another exemplary case of the reconciliatory potential of memory is given by the EU, which founding myth is a narrative about the construction of an united Europe as project of peace, prosperity and shared values so as to ensure that never again World Wars start from the conflict between European states. On founding myths of the EU see A. Sierp, *Integrating Europe, Integrating Memories: The EU's Politics of Memory since 1945*, in L. Bond, J. Rapson (eds.) *The Transcultural Turn Interrogating Memory Between and Beyond Borders*, Berlin and Boston, 2014, 103-118, and V. Della Sala, *Europe's odyssey?: Political myth and the European Union*, in *Nations and Nationalism*, 3, 2016, 524-541.

[26] See C. McGrattan, S. Hopkins, *Memory in Post-Conflict Societies: From Contention to Integration?*, in *Ethnopolitics*, 5, 2017, 488-499. An example of a conflictual potential of memory is given by the Yugoslav Wars of the 1990s which are often depicted as wars of memory. See T. McConnell, *Memory abuse, violence and the dissolution of Yugoslavia: a theoretical framework for understanding memory in conflict*, in *Innovation: The European Journal of Social Science Research*, *Special Issue: Memory Wars*, 3, 2019, 331-343.

[27] See among others I. Goldstein, S. Goldstein, *Revisionism in Croatia: The case of Franjo Tudman*, in *East European Jewish Affairs*, 1, 2002, 52-64.

tory of Croatia.[28] Since the Preamble to the Constitution was penned by Tudjman himself, it may be assumed that it largely reflects what was intended to become a new official Croatian history. With the aim to prove the correlation between the nationalistic myth-making and the Constitution, the next paragraphs position the wording of the Preamble in relation to what Balkan studies identifies as (nationalistic) founding myths of Croatian national identity: the ethnogenesis myth; the myth about WWII, and the myth about the Homeland War (1991-1995).[29]

2.1.1. *The ethnogenesis myth*

The ethnogenesis myth is a fantasy narrative about the origins of the Croatian nation. It basically affirms that Croatia was formed as a nation by centuries of continuous statehood, going so far as to assert the formation of the Croatian nation in the 7th century.[30] The myth not only glorifies the history of a very old nation, but stresses also its suffering and the perennial claim to have its own nation-state.[31] The ethnogenesis myth is clearly constitutionalized through the Preamble by paying homage to Croatia's ancient past: the origins of the nation and the centuries long statehood are identified in the Croatian principalities of 7th century. The Preamble explains

[28] *Ibidem*.

[29] The Balkan studies is an "area studies" devoted to topics such as Yugoslav dissolution, nationalism, national identities, memories and memorials, history narratives, etc. See for example M. Todorova (ed.), *Balkan Identities: Nation and Memory*, London, 2004, J.R. Lampe, M. Mazower (eds.), *Ideologies and National Identities: The Case of Twentieth-Century Southeastern Europe*, Budapest, 2004, P. Kolstø, *Strategies of Symbolic Nation-building in South Eastern Europe*, London and New York, 2014. Among the literature produced by scholars from the region see D. Gavrilović, V. Perica, (eds.), *Political Myths in the Former Yugoslavia and Successor states. A Shared Narrative*, The Hague, 2011.

[30] On the ethnogenesis myth see A.J. Bellamy, *The formation of Croatian national identity. A centuries-old dream*, Manchester and New York, 2003.

[31] In a similar fashion, the revisionist scholarship assumes that "archaeological and linguistic studies indicate that the end of the 8th century can be considered as the latest date by which the early medieval Croats had assumed all the essential characteristics of an autonomous nation, with all the attributes inherent in the concept of 'People'." Accordingly, the process of ethnogenesis was completed by the end of the 9th century, when "Croats entered the historical scene in the 9th century with an already established state of their own, with its territory and its hierarchy at the level of the whole ethnos." See M. Suić, *Some Reflections on the Question of the Ethnogenesy of the Croats*, in N. Budak (ed.), *Etnogeneza Hrvata*, Zagreb, 1995, 195.

that both the nation and the statehood were firstly preserved in the medieval kingdom and then in centuries-long series of state formations and decisions.

Yet in all the passages in which the Preamble invokes the Croatian nation, the latter has an ethnic rather than civic connotation, thus excluding those who are not ethnically Croats.[32] Croatia (but the same is the case of other Western Balkans countries and more generally Eastern Europe) is often seen as an exemplary case of predominance of ethnic nationalism rather than its civic alternative (which is deemed to prevail in Western Europe). The definition of the nation in Croatia is thus the one in which *ethnos* prevails over *demos*, meaning that the Croatian nation is primarily defined in terms of ethnic origins, language, culture and common past. According to this vision, the nation-state incorporates the ethnic nation and is primarily defined in terms of ethnic homogeneity.[33] When in fact the Constitution was adopted in the 1990 Croatia was still one of the constituent republics of the former Yugoslavia, and the ethnogenesis myth had two objectives: *a*) distinguish as much as possible Croats from other Yugoslav nations (which are all ethnic groups with almost same language and history), thus establishing the boundaries between Croatian national identity and otherness, and *b*) legitimize the birth of Croatia as an independent nation-state. The normative part of the Constitution contains some further identity markers of ethnic Croats. For example, Article 11 introduces the ethnically Croat coat of arms and flag as official state symbols, while Article 12 specifies that the official language and script of Croatia are the Croatian language and Latin script.

2.1.2. *The myth about WWII*

The myth about WWII is more complex. The Preamble clearly states that today's Croatia is founded on anti-fascist values and that

[32] In this sense see also R.M. Hayden, *Constitutional Nationalism in the Formerly Yugoslav Republics*, in *Slavic Review*, 4, 1992, 654.

[33] On the concept of the nation in Eastern Europe see U.K. Preuss, *Constitutional powermaking for the new polity: some deliberations on the relations between Constituent power and the Constitution*, in *Cardozo Law Review*, 14, 1992/1993, 639. See also A. Hastings, *The Construction of Nationhood. Ethnicity, Religion, Nationalism*, Cambridge, 1997, 101, and M. Ignatieff, *Blood and Belonging: Journeys into the New Nationalism*, Toronto, 1993.

it has been constructed in opposition to the Independent State of Croatia (hereinafter NDH). The latter was a Nazi puppet state which existed from 1941 to 1945. It was run by the Croatian fascist movement, the Ustasha, responsible of sending thousands of Jews, Serbs, Roma and anti-fascist Croats to concentration camps. The role of the NDH in the Holocaust had disastrous consequences: Croatian concentration and death camp Jasenovac (based in central Croatia) is a place in which Ustasha killed between 100,000 and 110,000 people.[34] Despite this, in the 1990s the Tudjman government gradually rehabilitated the NDH regime in the name of the nation-building. In particular, the first Croatian President claimed that the NDH was not simply a quisling creation and a fascist crime, but also an expression of the historical yearnings of Croatian nation for its own independent state. This was followed by allowing the resurgence of Ustasha symbols and downplaying the long established number of Holocaust victims killed during WWII in camps of the NDH.[35] The rehabilitation of the NDH was combined with a more ambitious project aimed at reconciling Croatian fascist and anti-fascist of their supposed shared fight for an independent Croatian state.

As WWII revisionism was officially promoted by the state in the 1990s, the constitutional proclamation on the construction of today's Croatia in opposition to the NDH largely appears as a an irrelevant statement; in fact, the normative part of the Constitution narrates a very different story; Article 11 establishes that the official symbols of present day Croatia are the chessboard coat of arms (depicted as historical Croatian symbol), and the Croatian national anthem. Although the origin of these symbols is an object of dispute between historians and revisionist, very similar or identical symbols, together with *kuna* (the current official Croatian currency), were used as official symbols of the NDH regime, and were thus symbolically compromised. Nonetheless, the 1990 Constitution restored them as official state symbols, thus paving the way for con-

[34] On Jasenovac camp see I. Goldstein, S. Goldstein, *Jasenovac i Bleiburg nisu isto*, Zagreb, 2011.

[35] On WWII revisionism in Croatia see generally V. Pavlaković, *Flirting with Fascism: The Ustaša Legacy and Croatian Politics in the 1990s*, in D. Gavrilović (ed.), *The Shared History and The Second World War and National Question in ex Yugoslavia*, Novi Sad, 2008, 115-143.

ceiving today's Croatia in continuity with the fascist Ustasha regime.

What is more, several attempts aimed at even enforcing such continuity have been put in practice over the years. For example, the 1997 constitutional reform changed the official denomination of the Croatian legislative body to "Hrvatski državni Sabor" (Croatian State Parliament), that was the official title of the Croatian legislature under the NDH regime. While the 2000 constitutional reform renamed the legislature in "Hrvatski Sabor" (Croatian Parliament), in 2015 – under the new resurgence of ethnic nationalism – the President of the Parliament proposed to introduce again the title used by the NDH as the official denomination of the Croatian Parliament. Moreover, in 2015 a popular initiative (signed by 3900 people, including many academics) has been addressed to the President of the Republic to urge legislative changes aimed at including the pro-fascist chant "For the Homeland Ready," used by the Ustasha in WWII, as the official chant of the present-day Croatian Army. In the same period, new younger revisionist, historians and politicians, started to rehabilitate the NDH regime by denying (and not only relativizing as it was before) the mass crimes against humanity committed by the Ustasha movement. At the same time, anti-fascism has been considered as an empty value since associated exclusively to the Socialist Yugoslavia, with the result that the glorification of the Ustasha regime and its symbols is today flourishing and gaining legitimacy.[36] This implied continuity between the NDH and today's Croatia renders probably quite problematic the approval of an appropriate legislation which defines the very nature of the NDH, or criminalizes the public display of its symbols (such as the capital blue letter "U" or the chant "For the Homeland Ready"). The lack of a specific legislation which defines the NDH as criminal or fascist has made possible the integration of the Ustasha iconography into the emblems of various legally recognized associations. Similarly, the use in the public space of the Ustasha chant "For the Homeland Ready" is generally tolerated even though the Constitutional Court condemned its use.[37] Yet this

[36] See C. Pistan, *Satira e libertà di espressione tra comunismo, democrazia e nazionalismo: i casi dell'Ungheria e della Croazia*, in *Percorsi costituzionali*, 1, 2018, 117-165.

[37] See Croatian Constitutional Court, decision U-III-1296/2016, 25 May 2016.

"flirting with fascism" not only denotes illiberal trends in memory politics, but is seriously damaging the relations with the country's minorities, particularly Serbs, Jews, and Roma communities, haunted by memories of Ustashe atrocities against them in the 1940s.

2.1.3. *The myth about the Homeland War (1991-1995)*

The Homeland War is the official name of the armed conflict that took place in Croatia from 1991 to 1995 during the violent break-up of the former Yugoslavia. The Homeland War is strictly related to WWII as the first is often depicted as a continuation of the latter. The main reason of this resides in the official narrative about the War of the 1990s promoted under Tudjman's ultra-nationalist regime, when Croatia's struggle for independence in the 1990s was linked to the Croatian "independence struggle" of the 1940s under the Ustasha movement.[38]

An explicit reference to the "victory in the Homeland War" was introduced firstly in the Preamble to the Constitution by the 1997 constitutional reform. Smiljko Sokol describes the constitutional reference to the Homeland War as very relevant since it introduced a "constitutionally expressed determination and readiness" for the establishment, and preservation of the Republic of Croatia as an independent sovereign and democratic state.[39] More recently, the 2010 Euro-amendments (the constitutional reform adopted in order to create the constitutional basis for Croatia's EU membership)[40] further changed the text of the Preamble dedicated to the Homeland War by adding the expression of "the victory of Croatian nation and Croatia's defenders in the just, legitimate and defensive war of liberation, the Homeland War (1991-1995), wherein the Croatian nation demonstrated the will to establish and preserve Croatia as an independent state." The new constitutional definition of the Homeland War resembles the official narrative of

[38] See V. Pavlaković, D. Pauković, *Framing the nation. An introduction to commemorative practice in Croatia*, in V. Pavlaković, D. Pauković (eds.), *Framing the Nation and Collective Identities Political Rituals and Cultural Memory of the Twentieth-Century Traumas in Croatia*, London and New York, 2019, 1-28.

[39] S. Sokol, *Promjene Ustava Republike Hrvatske*, in S. Sokol, B. Smerdel (eds.), *Ustavno pravo*, Zagreb, 2009, 36.

[40] See B. Smerdel, *Republic of Croatia*, cit., 191.

the war of the 1990s, which emphasizes its defensive character and considers it as the resistance of Croatian nation to the greater Serbian aggression. In particular, the term "defenders" was introduced in the 1990s as an official and legal title for Croatian soldiers in the war, reinforcing in this way the assumption that Croats were leading a defensive war on their own territory, which united all patriotic forces of the same ethnic group against ethnic others.[41]

Yet the constitutionalization of such narrative about the armed conflict of the 1990s is very problematic if the intent of Croatia was to move toward reconciliation – a requirement that represented also one of the preconditions for the country's EU accession. Indeed, the description of the Homeland War as defensive, just and legitimate war does not clarify why Croatia considered during the Yugoslav Wars of the 1990s part of Bosnia-Herzegovina as its own territory, and that the country's intervention in Bosnia-Herzegovina, formally justified as a support to the Croat community, led to the creation of a new autonomous region, Herceg-Bosna, with the intention of annexation. In addition, it does not take into account the civilian victims of the war, as well as the exodus of approximately 300,000 Serbs following military actions for which Croatia was accused of ethnic cleansing of its Serb population. The myth about the Homeland War is thus extremely divisive: for the dominant Croatian nation it represents a powerful narrative positioned at the very heart of national identity; for national minorities, especially Serb community, it represents a synonym for ethnic cleansing.[42]

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[41] See A. Ljubojević, D. Gavrilović, V. Perica, *Myths and Countermyths and the incorporation of Myth into new national ideologies*, in D. Gavrilović, V. Perica, (eds.), *Political Myths in the Former Yugoslavia and Successor states. A Shared Narrative*, cit., 70.

[42] According to the results of the last 2001 census, Croatia has a total population of 4.437,460 with ethnic Croats representing 90%, and national minorities 7,47% of the total population. The latter include: 15,082 Albanians, 247 Austrians, 20,755 Muslims, 331 Bulgarians, 4,926 Montenegrins, 10,510 Czechs, 16,595 Hungarians, 4,270 Macedonians, 2,902 Germans, 576 Poles, 9,463 Roma, 475 Romanians, 906 Russians, 2,337 Ruthenians, 2,712 Slovaks, 201,631 Serbs, 19,636 Italians, 300 Turks, 1,977 Ukrainians, 22 Vlachs and 576 Jews. When compared to the 1991 census, the differences in the total number of members belonging to national minorities are quite evident. According to the 1991 census, ethnic Croats represented 72% of the total population, while the percentage of persons belonging to national minorities was double of the 2001 total number, and included: 12,032 Albanians, 214 Austrians, 43,469 Muslims, 458 Bulgarians, 9,724 Montenegrins, 13,068 Czechs, 22,355 Hungarians, 6,280 Macedonians, 2,635 Germans, 679 Poles, 6,695 Roma, 810 Romanians, 706 Russians,

What is more, several recent efforts attempted to further reinforce the link between the Homeland War and WWII. For example, in 2017 the Croatian government set up the Council for Dealing with the Consequences of Undemocratic Regimes, composed of historians, political scientist, lawyers and even the former President of the Constitutional Court, with the competence to issue a series of recommendations which would help the drafting of a future possible legislation banning the public display of totalitarian symbols. In 2018, the Council issued the so called Dialogue Document.[43] It is formally an advisory opinion although its structure largely resembles a judicial decision since it not only obsessively invokes the country's 1990 Constitution, supranational law and case law, but contains even dissenting opinions. The central part of the Dialogue Document deals with the Ustasha iconography, especially the Ustasha chant "For the Homeland Ready." By invoking *Vajnai v. Hungary* of 8 July 2008, that is the case in which the ECtHR explained that the red star represents a symbol which has multiple meanings, the Council applied the same reasoning to the Ustasha chant "For the Homeland Ready." It thus affirmed that the latter was genuinely an Ustasha salute, but it was also used by Croatian defenders who died during the Homeland War of the 1990s. Moreover, the Council underlined that in Croatia's recent past its use has been tolerated. It subsequently concluded that the public use of the Ustasha chant "For the Homeland Ready" should be considered as unconstitutional, but also that there are some exceptions, and that therefore it can be used in all events in which respect is paid in public

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5,606 Slovaks, 581,663 Serbs, 21,303 Italians, 320 Turks, 2,494 Ukrainians, 22 Vlachs, 600 Jews, and 3.012 other ethnic and national minorities. The 2001 census thus indicates a drop in number of almost all national minorities represented in population. It is particularly sharp in the case of the Serb ethnic group as a result of the persecution and expulsion of the Serb community in the Homeland War (especially in the 1995 Operation Storm – a military action in which Croatian forces regained control of the Serbian-occupied territory in Croatia). A. Petričušić, *Constitutional Law on the Rights of National Minorities in the Republic of Croatia*, in *European Yearbook of Minority Issues*, 3, 2002, 607-629 further argues that many people of mixed Serbo-Croatian marriages now prefer to register themselves as Croats, which may be an another reason for a sharp drop of their numbers since the 1991 census.

[43] See Council for Dealing with the Consequences of Undemocratic Regimes, *Dialogue document: postulates and recommendations on specific normative regulation of symbols, emblems and other insignia of totalitarian regimes and movements*, Zagreb, 28 February 2018.

spaces (including graveyards) to defenders who died fighting for today's Croatia under this slogan. In other words, when the Ustasha iconography is used to pay respect to people evoking the Ustasha memory in the Yugoslav Wars of the 1990s it should be considered evidently in line with the country's democratic Constitution – a statement that is not only in conflict with the case law of the Constitutional Court but further reinforced the historical continuity between the NDH regime, the Homeland War and today's Croatia.

2.2. *The foundation of national identity and the legitimation of the nation-state*

The incorporation of key components of Croatian collective memory into the Preamble to the Constitution served to open its second part which expressly specifies who is included in and who is excluded from the definition of the nation and whose is the state. By relying on the past contained in the first part, the Preamble declares the inalienable right of the Croatian nation to self-determination and state sovereignty, and solemnly announces that the Republic of Croatia is established as the nation-state of the Croatian nation and as a state of members of other national minorities who are its citizens. The latter statement is crucial for establishing the constitutional framework on majority-minority relations. It clearly constitutionalizes the supremacy of the dominant Croatian nation, and subsequently an unequal position of other ethnic minorities. As Robert M. Hayden observes, the statement clarifies that Croatia is the state of a collective individual, that is the Croatian nation defined in terms of ethnicity, which is the only one entitled to the statehood and sovereignty. The same author further argues that in a state which privileges members of one ethnically defined nation over residents, national minorities have no future: "as a people they will be disfavored; as individuals they will face discrimination".[44] Moreover,

[44] R.M. Hayden, *Constitutional Nationalism in the Formerly Yugoslav Republics*, cit., 656. The a. indicates that the Preamble to the Croatian Constitution establishes a system of constitutional nationalism, that is a constitutional and legal structure that privileges the members of one ethnically defined nation over other residents in a particular state. Similarly, S. Mancini, *Secession and Self-Determination*, in *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012, 481, observes that the Preamble to the Croatian Constitution defines Croatia as a state of a collective subject (Croatian people) entitled to the statehood, and of some other individuals that do not

the fact that the Preamble privileges an ethnically defined nation over residents represents a departure from currently accepted democratic constitutional norms which view the individual citizen as the basic subject of the Constitution.[45]

The drowning of a clear line of demarcation between the dominant ethnic nation (Croatian people) and national minorities has had severe consequences through the Constitution. First, the Preamble states that the sovereignty resides in a particular nation (in fact, it opens by declaring a historical right of Croatian nation to full sovereignty). This seems in contradiction to the Article 1 of the Constitution which introduces a civic concept of the nation (according to which *demos* prevails over *ethnos*) by establishing that the power in the Republic of Croatia derives from the people and rests with the people as a community of free and equal citizens.[46] Second, Article 3 of the Constitution introduces a list of universally accepted democratic values which are positioned as the highest values of the Croatian constitutional order. However, alongside values such as freedom, equal rights, social justice, respect for human rights, and the rule of law […], Article 3 includes the term "national equality" among the greatest values of the constitutional order. The term appears to evoke the equality between people belonging to the Croatian nation rather than the equality of citizens.[47] Such interpretation appears further confirmed by Article 15 which

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belong to it. This exclusion of national minorities from the body that confers legitimacy on the new state, risks to transform the members of minority groups in second class citizens.

[45] *Ibidem*.

[46] This conflict between constitutional provisions is not accidental. As L.J. Cohen, *Embattled democracy: postcommunist Croatia in transition*, in K. Dawisha, B. Parrott (eds.), *Politics, Power and the Struggle for Democracy in South-East Europe*, Cambridge, 2000, 83, indicates, Tudjman's key lieutenant during the drafting of the Constitution, Vladimir Šeks, admitted that the Constitution was designed to create an "ethnic state," and not the "pure civic state." The Constitution, as Šeks claimed, does not negate the civic state but it is not in conflict with the original foundation of Croatia as an ethnic state. After all one does not eliminate the other. Furthermore, K. Čavoški, *Nationalism and Constitutionality: The National and the Universal in the Constitutions of Serbia and Croatia*, University of Belgrade, Faculty of Law, 1994, unpublished paper, observes that in the early 1990s the framers of Croatian Constitution produced a document that had a "civil form externally," but its fundamental aim was national or ethnical.

[47] In this sense see also R.M. Hayden, *Constitutional Nationalism in the Formerly Yugoslav Republics*, cit., 658.

separately declares the equality between members of all national minorities. Moreover, Article 45 of the Constitution further defines the concept of the ethnic nation which includes not only ethnic Croats living on the territory of Croatia, but also ethnic Croats abroad (the so called diaspora) as they have the right to vote, with the consequence that the ethnic nation is imagined as a trans territorial community.

2.3. *The position of national(istic) minorities in an ethnically defined nation-state*

Since the original version of the Preamble, the definition of Croatia as a nation-state of Croatian nation and a state of other national minorities who are its citizens has been accompanied by providing for a list of minority's groups living within its territory. The original text of the Preamble included "Serbs, Muslims, Slovenes, Czechs, Slovaks, Italians, Hungarians, Jews and others." It was later changed by the 1997 constitutional reform, which not only added to the Preamble a specific reference to "the victory in the Homeland War," but also erased the mention of "Muslims" (mainly Albanians and Bosniaks) and "Slovenes" from the list of national minorities, while simultaneously adding other ethnic groups: "the Germans, Austrians, Ukrainians and Ruthenians." The measure represented a clear example of the climate of intolerance Croatia had in the 1990s toward ethnic others. Subsequently, from 1997 to 2010 the Preamble stated that Croatia is established as the nation state of the Croatian nation and the state of the members of autochthonous national minorities: "Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians and Ruthenians and the others who are citizens." The exclusion of Muslims and Slovenes caused great discontent and protests among individuals of those ethnic origins as they were deprived of the status of the autochthonous minorities even though they constituted numerous minority communities in Croatia. In 2000, the Venice Commission had the opportunity to observe that "it became clear later, when the electoral law was adopted, that this amendment had negative effects on the representation of the minority groups whose mention in the Preamble was deleted."[48] In fact, the 1997 constitutional reform es-

[48] See Venice Commission, *Opinion on the Croatian Constitutional Law amend-*

tablished an unequal position not only between the dominant Croatian nation and other national minorities, but also among the members of different national minorities, which were distinguished in two groups: the autochthonous minorities and the others.

Finally, the list of minority groups was amended by the 2010 Euro-amendments. However, in relation to majority-minority relations the 2010 constitutional reform represents a formidable example of how countries can elude the requirements of the EU conditionality, with European institutions without realizing it. On the one hand, under the pressures of the EU a list of 22 national minorities was added to the Preamble: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Rusyns, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs, Albanians and others […]. On the other hand, such list has been introduced without changing the supremacy of the Croatian nation. On the contrary, it has been even reinforced by contemporary introducing in the Preamble the extremely divisive narrative about the Homeland War (1991-1995).[49] By positioning at the constitutional level the description of the Homeland War as just, legitimate and defensive war of liberation, the Constitution precluded the possibility for the country to recognize its own guilts in the Yugoslav Wars of the 1990s even though "dealing with the past" represents a precondition for the EU integration. Reconciliation stopped here in Croatia, therefore before the EU accession.[50]

3. *The impact of nationalistic constitutional memory on the Croatian legal order*

The mnemonic engineering through the Constitution aimed at providing for constitutional definitions of the nation, nation-state

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ing the Constitutional Law of 1991, 20 June 2000 (available at: *https://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2000)010-e*).

[49] See para. 2.1.3 above.

[50] According to B. Smerdel, *Republic of Croatia*, cit., 191, the aim of 2010 changes to "Historical Foundations" was to declare the intention to correct past injustices. While the inclusion of a list of 22 national minorities could be seen in this light, it is not clear how a notably divisive narrative about the Homeland War serves to declare, as the author claims, certain good intentions, that is the aim to correct mistakes committed in the 1990s.

and national minorities paved the wave to the implementation of the principle of supremacy of the ethnic nation through the legislation. The main examples are given by the 1991 Citizenship Act, and 2000 Constitutional Act on the Rights of National Minorities.

3.1. *The 1991 Citizenship Act and the ethnic principle*

The Croatian Citizenship Act was symbolically adopted on 8 October 1991, that is the same day Croatia enacted the Declaration of independence from the former Yugoslavia. Since its adoption, the Citizenship Act has been heavily criticized for its ethnic overtones, open discrimination against ethnic non-Croats and Croatia's policy of granting citizenship to ethnic Croats abroad, particularly to those living in the 'near abroad', such as Bosnia and Herzegovina.[51] Although the Citizenship Act has been amended in 1992 as well as under the EU conditionality in 2011, its key features still remain robust.[52]

The Citizenship Act basically reflects the definition of the nation contained in the Preamble to the Constitution, thus representing a tool of nation-building which advantages the majority ethnic group. More specifically, the Citizenship Act envisages four basic modes of acquiring Croatian citizenship. A first specific procedure was initially introduced for residents of Croatian ethnicity. It was of crucial importance after the 1991 proclamation of independence since the legal continuity with the previous citizenship of the Socialist Republic of Croatia was the determining factor for the establishment of the initial citizenry of the newly independent Croatia. Today, the dominant mode of acquisition of Croatian citizenship is the *ius sanguinis* principle (acquisition by descendant), while the *ius soli* principle (acquisition by birth on territory) is added as a residual category in order to prevent statelessness. The last mode of acquiring Croatian citizenship is naturalization. It represents the most controversial mode of acquiring Croatian citizenship as the Citizenship Act foresees two modes of naturalization: the "regular" naturalization, and the "facilitated" naturalization.[53]

[51] See F. Ragazzi, I. Štiks, V. Koska, *Country report: Croatia*, EUDO Citizenship Observatory, February 2013.

[52] *Ibidem*.

[53] J. Omejec, *Initial Citizenry of the Republic of Croatia at the Time of the Dissolution of Legal Ties with the SFRY, and Acquisition and Termination of Croatian Citizenship*, in *Croatian Critical Law Review*, 3, 1998, 99.

The "regular" naturalization is applied to ethnic non-Croats, thus involving national minorities (in particular nations from the former Yugoslav republics). According to the original text of the 1991 Citizenship Act, in order to be naturalized a resident had to demonstrate at least five years of registered residence in Croatia and met some further conditions: *a*) that he or she has renounced to a foreign citizenship or would submit a proof that he or she will be released from a previous citizenship if admitted to Croatian citizenship; *b*) that he or she is familiar with the Croatian language and Latin script, Croatian culture and social system; *c*) that it can be concluded from the applicant's conduct that he or she respects the legal order and customs of the Republic of Croatia. On the contrary, the "facilitated" naturalization is mainly applied to the "diaspora," i.e. ethnic Croats abroad without previous or current residence. Non-resident ethnic Croats are classified in three categories: *a*) emigrants and their descendants in the overseas and European states; *b*) Croats living in Bosnia and Herzegovina (who represent about 16 per cent of the total population of that country), and *c*) Croat ethnic minority living in the "near abroad" (other former Yugoslav republics and European states). The generous provisions for inclusion of ethnic Croats regardless of their residency resembles the constitutional notion of Croatia which is primarily imagined as a nation-state of a trans territorial Croat ethnic community. As has been argued, the goal of facilitated naturalization is to expand the sovereign power of the state beyond the limits of its territorial borders not only by institutionally recognizing the existing Croat communities abroad, but also imagining and constructing diaspora communities where they otherwise do not exist.[54]

Yet the distinction between "regular" and "facilitated" naturalization has produced the following situation: Croatian citizenship has been granted to ethnic Croats abroad with no genuine link to the country whereas national minorities (in particular Croatian Serbs who left Croatia during the armed conflict of the 1990s) had to provide a proof of previous residence. In addition, until the 2011 Croatian Citizenship Amendment Act, the original version of the Citizenship Act included for ethnic non-Croats a subjective category of "respect of the Croatian culture." The latter has been often

[54] See F. Ragazzi, I. Štiks, V. Koska, *Country report: Croatia*, cit.

used in the 1990s to deny Croatian citizenship to ethnic non-Croats with long-term residence in Croatia. It was only in the 2000s that, under the EU conditionality, the administrative practice started to reveal a greater degree of inclusiveness toward ethnic non-Croats without, however, withdrawing privileges offered to ethnic Croats abroad. The 2011 Croatian Citizenship Amendment Act introduced some changes to the process of "facilitated" naturalization according to which Croatian emigrants and their descendants' entitlements to Croatian citizenship through facilitated naturalization procedures have been limited up to the third generation straight-line relationship. In addition, it has been introduced the citizenship test also in relation to the "facilitated" naturalization, which was previously envisaged only in the case of regular naturalization (the exam consists of applicants' familiarity with the Croatian language and Latin alphabet, Croatian culture and social system). However, the Citizenship Act still identifies the same categories of applicants for both the "regular" and "facilitated" naturalization, thus still providing a preferential treatment for ethnic Croats abroad and members of the Croatian emigration. Moreover, as of the 2011 Croatian Citizenship Amendment Act non-ethnic Croats with residency in Croatia have to meet higher residency requirements in the process of "regular" naturalization; in order to be naturalized, a resident has now to demonstrate at least eight years (and not five years as was envisaged in the original version of the Citizenship Act) of registered residence in Croatia.

The 2011 developments did not thus lead to major changes in the dominant concept of Croatian nation. Although national minorities (especially Croatian Serbs) today face no significant obstacles in acquiring the proof of Croatian citizenship,[55] the 2011 Croatian Citizenship Amendment Act did not abolish the element of ethnic preference in the processes of "facilitated" naturalization; it only introduced a more detailed procedure for determining the candidate's entitlement to Croatian citizenship. In line with the Preamble to the Constitution, the Croatian Citizenship Act preserves

[55] Although some issues related to the citizenship policies of the 1990s remain unresolved. For example, the status of persons of non-Croat ethnic origin who were permanent residents of Croatia before the 1991 Citizenship Act still awaits regulation. See S. Imeri (ed.), *Rule of Law in the Countries of the Former SFR Yugoslavia and Albania: Between Theory and Practice*, Gostivar, 2006, 63.

its ethnocentric character most obviously by maintaining strong ties to and influence on the diaspora. The example shows also that even within the EU institutional framework it is possible to maintain ethno-centric citizenship laws. What is more, on 18 October 2019 Croatia passed a new Croatian Citizenship Amendment Act by expanding the category of Croatian emigrants which now includes not only persons emigrated from present-day Croatia but also from areas where Croats lived which, at the time of emigration, were in the territory of present-day Croatia.[56]

3.2. *The 2002 Constitutional Act on the Rights of National Minorities and its* falsa nominatio

The legislative framework on minority rights protection is today regulated in Croatia by the 2002 Constitutional Act on the Rights of National Minorities (hereinafter CA RNM). It replaced the previous 1991 Constitutional Act on Human Rights and Freedoms and on the Rights of Ethnic and National Communities and Minorities, but also the 1995 Constitutional Act on the temporary non implementation of the 1991 Constitutional Act on Human Rights and Freedoms and on the Rights of Ethnic and National Communities and Minorities. The example clearly shows Croatia's hostile approach toward minority rights in the 1990s; in fact, the adoption of the 1991 Constitutional Act was followed by its temporary non application.

The situation was significantly improved with the approval of a new legal framework on minority rights protection. The 2002 CA RNM was adopted under international pressures (mainly Council of Europe and the EU) and is based on internationally established minority protection standards. It affirms minority rights as both individual and collective rights, and contains a number of provisions

[56] According to the 2019 Croatian Citizenship Amendment Act, the Croatian citizenship has been extended to two categories: *a*) a person older than 21 who was born abroad, and one of whose parents was a Croatian citizen at the time of said person's birth, will be able to become a Croatian citizen if he or she applies to be registered as such in the next two years and if the Interior Ministry establishes that there are no obstacles to it, and *b*) a person born between 8 January 1977 and 8 October 1991, both of whose parents were Croatian citizens at the time of said person's birth but who was registered as having a different citizenship, will also be considered a Croatian citizen if he or she applies to have their citizenship established in the next two years.

that guarantee the full respect of the principle of non-discrimination; the protection against any activities which could endanger the existence of any minority or community; the protection of the identity, culture and religion of national minorities; the public and private use of national minority's language and script, and the right to education and equal participation. In addition, the 2002 Constitutional Act guarantees to representatives of national minorities a certain number of seats in the Croatian Parliament and in the bodies of local self-government.[57]

The legislative framework on minority protection is today further composed of the 2000 Law on the Use of the Languages and the Alphabets of National Minorities, which guarantees that minority languages and their scripts are to be equal with the Croatian language before the law and the 2000 Law on Education in the Languages and Alphabets of National Minorities, which authorizes the educational authorities to provide for education in minority languages. Furthermore, the electoral legislation guarantees the exercise of political rights to minorities such as the proportional representation by ensuring in the national parliament three seats for the Serb minority, one seat each for Italian and Hungarian minorities, while other minorities are divided into two groups of which each is entitled to elect one representative. Minority representatives are elected in a special constituency, while the rest of population votes in ten electoral constituencies. At both state and local levels, minorities have representatives also in other elected bodies, as well as judicial and administrative bodies of municipalities and cities.

The regulation of the basic legal framework on minority rights through the 2002 CA RNM has been seen positively by several legal scholars as it gave to the protection of minority rights a constitutional status.[58] What is, however, less known is that the 2002 CA RNM is not a constitutional act, but an organic law. The difference between the two sources of law is quite relevant. Constitutional acts are positioned in Croatia at the same level of the Constitution,

[57] See A. Petričušić, *Wind of Change: The Croatian government's Turn towards a Policy of Ethnic Reconciliation*, cit.

[58] See among others A. Petričušić, *Constitutional Law on the Rights of National Minorities in the Republic of Croatia*, and M. Dicosola, *The rights of national minorities in Croatia: Beyond European conditionality?*, in B. Vizi, N. Toth, E. Dobos (eds.), *Beyond International Conditionality. Local Variations of Minority Representation in CEE and SEE*, Baden-Baden, 2016, 79-100.

while organic laws represents a source of law which is positioned between the Constitution and ordinary legislation. The Constitution establishes also the division of competences by listing what should be regulated by each of the two sources of law. Nonetheless, such division has been introduced in a quite misleading and confusionary way. According to Article 83 of the Constitution, the Parliament shall adopt laws (organic laws) elaborating constitutionally established human rights and fundamental freedoms, the electoral system, the organization, remit and operation of state bodies, and the organization and remit of local and regional self-government by a majority vote of all members. Article 83 thus implies that minority rights should be regulated by an organic law as they appear included under constitutionally established human rights and fundamental freedoms. However, Article 15 (3) of the Constitution affirms that equality and protection of the rights of national minorities shall be regulated by a constitutional act to be enacted under the procedure stipulated for organic laws. The conflict between Articles 83 and 15(3) of the Constitution raised the question of which source of law should be used to regulate minority rights. The confusion has been clarified by the Constitutional Court, which in relation to the 2002 CA RNM expressly stated that "despite its name, the CA RNM is an organic law that does not have constitutional force because it was not passed in the procedure for passing and amending the Constitution. The fact that some acts are called constitutional does not change the legal nature of these acts, does not make them legally different from what they are under the Constitution and according to their content, and the Constitutional Court does not review them according to their name but according to their legal nature".[59] By considering the 2002 CA RNM as an organic law, the Constitutional Court deprived minority rights from their constitutional status. Paradoxically, the decision could be also seen in a positive light. The Croatian Constitutional Court has not the power to declare the unconstitutionality of constitutional acts. This means that any changes to the 2002 CA RNM aimed for ex-

[59] The same conclusion was reached by the Constitutional Court in relation to the previous 1991 Constitutional Act on Human Rights and Freedoms and on the Rights of Ethnic and National Communities and Minorities. See Croatian Constitutional Court, decisions, U-I-774/2000, 20 December 2000, and U-I-1029/2007; U-I-1030/2007, 7 April 2010.

ample at diminishing minority rights could not have been declared unconstitutional. On the contrary, by considering the 2002 CA RNM as an organic law, the Constitutional Court introduced the possibility to review its constitutionality. The way in which it used this power remains, however, more questionable.

3.3. *Croatia's constitutional identity: a way to justify illiberal trends?*

Alongside the Constitution, the Croatian Constitutional Court had also the opportunity to deal with the definition of concepts of national identity and national minorities most notably in its decision on the 2010 Constitutional Act on Amendments to the Constitutional Act on on the Rights of National Minorities (C(A)A RNM) of 29 July 2011. The 2010 C(A)A RNM attempted to create two models of positive discrimination for national minorities by introducing a new voting scheme. In particular, it established that those national minorities that exceed 1.5% of the population on the day of entry into force of 2010 C(A)A RNM were guaranteed at least three seats in the Parliament through the general right to vote (this is mainly the Serb community); on the contrary, national minorities that constitutes less than 1.5% of the general population were given dual voting rights (that is a right to vote for general elections lists, and a special right to elect at least five of their minority parliamentary representatives in special electoral units) in view of the fact that the members of national minorities that participate in the total population with less than 1.5% may not achieve their right to representation in the Croatian Parliament through the general right to vote (only). The constitutional ground for enacting the 2010 C(A)A RNM was given by the Article 15(3) of the Constitution which provides that "besides the general electoral right, the special right of the members of national minorities to elect their representatives to the Croatian Parliament may be provided by law."

The Constitutional Court struck down the 2010 C(A)A RNM on the basis that it was in contrast with the Article 1 of the Constitution, viewed in the light of equal rights, national equality and the multiparty democratic system, which constitute the highest values of the Croatian constitutional order (Article 3 of the Constitution).[60] Although the decision has been seen by both national and foreign legal scholars in positive light,[61] what remains questionable

is not the proclaimed unconstitutionality of the 2010 C(A)A RNM per se, but rather the part of the reasoning centred on the definition of national identity which the Court followed to declare it. By firstly recalling its previous case law (resembling the BverGE) on the Constitution which has to be read as a unity, the Court announced without providing any further explanation that the Croatian constiutional identity is based on para 2 of the Preamble, that is the statement which announces that Croatia is a nation state of Croatian nation, and a state of other national minorities by listing 22 minority groups. It then invoked Article 1 (which established a civic concept of the nation) and Article 3 of the Constitution (which introduces among the highest values of the Croatian constitutional order national equality), and claimed that para 2 of the Preamble and the above-mentioned articles have established the civic concept of the state in which all its citizens – including members of the Croatian people and members of all national minorities – make up "the people." The Court further recalled the Venice Commission's Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries,[62] on which basis then declared that the 2010 C(A)A RNM in granting dual voting rights to small-sized minorities (thus excluding only the Serb community as it constitutes a large-sized minority) does not violate the Article 15 of the Constitution which establishes the equality between members of national minorities. On the contrary, the violation occurred because dual voting rights singled out one minority group of citizens from the total body of "the people," using the criterion of national affiliation. This has thus "acknowledged and recognized" it as a separate "part of the people," which is in breach of the constitutional tenet about the

[60] See Croatian Constitutional Court, decisions U-I-3597/2010, U-I-3847/2010, U-I-692/2011, U-I-898/2011 and U-I-994/2011, 29 July 2011.

[61] See generally J. Toplak, D. Gardasevic, *Concepts of National and Constitutional Identity in Croatian Constitutional Law*, in *Review of Central and East European Law*, 42, 2017, 263. See also M. Dicosola, *La Croazia (e le sue minoranze) verso l'Unione Europea: un nuovo ruolo per la Corte costituzionale?*, in *Diritti Comparati*, 27 February 2012.

[62] See Venice Commission, *Report on electoral rules and affirmative action for national minorities participation in decision-making process in European countries*, CDL-AD(2005)009, 11-12 March 2005.

"one and integral people" which, as the community of citizens, realizes power in Croatia.

Undoubtedly, the Court's attempt aimed at defining the nation according to the civic concept represents a positive step forward as its goal is to construct a more inclusive definition of "the people." At the same time, such construction remains problematic for several reasons. First, it does not take into consideration that para 2 of "Historical Foundations" draws a clear line of demarcation between the ethnic nation and ethnic minorities, thus containing the determining features of ethnic-nationalism, that is the concept of the nation and a nation-state defined primarily in terms of ethnicity. By denying that "Historical Foundations" contain the ethnic principle, the latter penetrated into the concept of constitutional identity. Second, it is truth that Article 1 of the Constitution contains the civic concept of the nation but this does still not mean that the latter prevails over the ethnic principle. As Robert M. Hayden observes, when the "nation" is defined in terms of race, language and culture, the equality of citizenship is basically impossible. Even if one accepts as legitimate the concept of "separate but equal," those not of the dominant ethnic group will be always politically subordinated to the dominant ethnic group.[63] Moreover, the exam of the 1991 Citizenship Act clearly showed that the ethnic imperative penetrated even into the legislation. For this reason, positive discrimination for national minorities should be intended here as a synonym for measuring the level of democracy. Nonetheless, the Constitutional Court preferred a different approach. Yet this approach was largely influenced by the Venice Commission which considers dual voting as an exceptional measure. This is because ideally, in a well-integrated society, persons belonging to minorities are members of or vote for parties which are not organized on ethnic lines, but are sensitive to the concerns of minorities. The Croatian reality, however, does not reflect this ideal situation: Croatia is a deeply divided society, and divisions are still marked along ethnic lines. What thus appears is that the Court used the concept of the civic nation as a tool to reject positive discriminations for national minorities, with the final goal to protect the incontestable sovereignty of Croatian nation.

[63] R.M. Hayden, *Constitutional Nationalism in the Formerly Yugoslav Republics*, cit., 658.

4. *Concluding remarks*

Post conflict and ethnically divided societies notoriously represent difficult cases for the integrative potential of memory. Frequently, in these cases the legacy of non-democratic past (nationalist violence, ethnic hatred, historical exclusions, etc.) creates deep divisions and contributes to the resurgence of nationalism and renewal of ethnic tensions rather than ameliorate them. The troubling aspects in such situations is that collective memory is very often mediated through an exclusive and exclusionary nationalistic interpretations of history.

Croatia largely resembles such trends. By constitutionalizing the main components of collective memory in the name of nation-building, the 1990 Constitution became both the author and the narrator of nation's past. It can be thus considered as a *lieu of mémorie*, that is the place in which the nation deposits its memories of past glorious and dramatic events. However, the past the Constitution is narrating primarily serves to design Croatia as a state of and for the Croatian nation defined in terms of ethnicity. As such, it is based on exclusive ethno-centric narratives which promote illiberal rather than democratic values: the ethnogenesis myth imagines the boundaries between the common We-identity and the otherness by drawing divisions on the basis of ethnic origin, language, and common past; the myth about WWII is flirting with fascism, while the myth about the Homeland War (1991-1995) is a narrative about self-victimization and apportioning all blames to the ethnic other. By introducing ethno-centric interpretations of the past, the Croatian Constitution makes deep political choices. It closes the rank of the 'we' and decides who belongs and who does not belong to the nation, as well as what is legitimate to think as official national history even though this history is largely based on imaginations. Yet the formation of national identity through memory engineering is a non-stop procedure, meaning that renegotiations of collective memory are always possible and have as a consequence the change of the content of national identity. However, by positioning exclusive ethno-centric narratives at constitutional level, the impression is that the Croatian Constitution precluded the possibility to change the content of national identity and thus also the creation of a more integrative culture of remembrance, and a more inclusionary concept of the nation. Moreover, the constitutionalization of collective mem-

ory has opened a constitutional space through which dormant non-democratic ideologies can be reawakened, or at least the Constitution did not create any barricade to prevent their resurgence, as the current illiberal memory politics promoting WWII revisionism aimed at rehabilitating the past fascist Ustasha regime largely confirms.

Abstract

The article focuses on the relationship between mnemonic engineering, nation-building and minority rights protection in the Republic of Croatia through the lengths of the country's 1990 Constitution. It argues, in particular, that the Constitution – despite the requirements of EU conditionality Croatia had to fulfill before the EU membership – still contains a "dark side," which is identified through the article in a constitutionally defined collective memory and its impact on the constitutional definition of concepts such as nation, nation-states and national minorities. The main aim of the article is to draw attention on threats related to mnemonic engineering through the Constitution by showing that it can represent a practice which may easily intersect with the very concept of democracy in a way that can destabilize the democratic consolidation and justify illiberal turns. The article uses an innovative interdisciplinary approach which integrates constitutional law with nationalism studies and memory studies.

L'articolo esamina il rapporto tra costruzione della memoria collettiva, *nation-building* e protezione dei diritti delle minoranze nazionali nella Repubblica di Croazia attraverso le lenti della Costituzione del 1990. Si sostiene, in particolare, che la Costituzione – nonostante i requisiti della condizionalità democratica che la Croazia ha dovuto soddisfare al fine di accedere all'UE – contenga tuttora un "lato oscuro," identificato nella memoria collettiva costituzionalmente definita e nel suo impatto sulla definizione costituzionale di concetti quali nazione, stato-nazione e minoranze nazionali. L'obiettivo principale dell'articolo è quello di attirare l'attenzione sulle minacce della costruzione della memoria collettiva tramite la Costituzione, dimostrando che ciò può rappresentare una pratica che può facilmente intersecarsi con il concetto stesso di democrazia in un modo che può destabilizzare il consolidamento democratico e giustificare svolte illiberali. L'articolo è basato su un approccio interdisciplinare innovativo che integra il diritto costituzionale con studi sul nazionalismo e studi sulla memoria.

Keywords

Constitutional Memory; Illiberal Memory Politics; Nation; Nation-State; National Minorities; Republic of Croatia

MARKO MILENKOVIĆ

RESPONSES TO THE COVID-19 CRISIS IN SERBIA - DEMOCRACY AND THE RULE OF LAW ON VENTILATORS?

1. *Introduction*

The outbreak of COVID-19 has proved to be an unprecedented challenge to nations worldwide, sparking wide ranging responses from governments with significant implications for human rights and democracy.[1] This analysis looks into the responses of the Serbian Government to the crisis, and particularly to the most im-

[1] The body of scholarly analysis is growing as the crisis unfolds. At this point, most academic work is available in the form of blogs, or as working papers or pre-published drafts. The authoritative source and place of debate is available at: *https://www.democratic-decay.org/covid-dem*, run by Prof. Tom Daly. Among many valuable contributions see: P. Schmitter, *Food for Thought about the Impact of the COVID-19 Virus upon the Institutions and Practices of 'Real-Existing' Democracy'*, in *Democratic Decay - COVID-DEM*, 2020, (last accessed on 8th June 2020). See also: J. Keane, *Democracy and the Great Pestilence*, in *Institute for Human Sciences - Coronavirus: How Will it Affect Our Lives?*, 2020. Available at: *https://www.iwm.at/closedbutacitve/corona-focus/john-keanedemocracy-and-the-great-pestilence/* (last accessed on 8th June 2020).

portant legal aspects of the response, namely the proclamation of the State of Emergency (SoE) and the subsequent human rights derogations and limitations imposed with the proclaimed aim of curbing the epidemic. It specifically concentrates on the fifty-three day period between 15 March 2020, when the SoE was declared amidst a Europe-wide alert over the spread of the corona virus, and 6 May, when the National Assembly of Serbia (Parliament) decided to end it. It presents an early analysis of the legal framework put in place in response to the emergency and the initial judicial reluctance to control the action of the executive during the period scrutinised. In the second part, the introduction of the SoE[2] as a response to the European health crisis, and the way it was done by the Serbian ruling elite, is examined. In the third part alternatives to the introduction of the SoE under Serbian law are explored. The fourth part turns to the most important consequences of the SoE for human rights and derogations introduced through governance by decree. Part five offers a brief analysis of the Decision and presents the legal reasoning of the Constitutional Court of Serbia, which decided to dismiss all legal claims that the SoE was unconstitutional and proclaimed in an unconstitutional manner.[3] It is claimed that this troublesome, yet not unexpected decision, allows some important conclusions on the position of the Court towards the executive to be drawn, adding to the generally weak track record of the Institution.[4] This case study is not intended simply as a critical overview of the Government measures, but is primarily an interpretive piece in the puzzle of a worldwide trend of unprece-

[2] See inter alia: J. Ferejohn, P. Pasquino, *The Law of the Exception: a Typology of Emergency Powers*, in *International Journal of Constitutional Law*, 2, 2, 2004, 210-239, L.C. Keith, S. C. Poe, *Are Constitutional State of Emergency Clauses Effective? An Empirical Exploration*, in *Human Rights Quarterly*, 26, 4, 2004, 1071-1097, E. Özbudun, M. Turhan, *Emergency Powers*, Venice Commission, Report CDL-STD(1995) 012, 1-33. R. Lillich, *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, in *American Journal of International Law*, 79, 4, 1985, 1072-1081.

[3] Constitution Court of the Republic of Serbia, Decision IUo-42-2020 of 21. May 2020. Available in Serbian at: *http://www.ustavni.sud.rs/page/view/sr-Latn-CS/88-102626/obavestenje* (last accessed on 8th June 2020).

[4] On long lasting issues regarding the independence and inactivity of the Court see further: V. Beširević, *Governing Without Judges: the Politics of the Constitutional Court in Serbia*, in *International Journal of Constitutional Law*, 12, 4, 2014, 954-979. T. Papić, V. Djerić, *On the Margins of Consolidation: the Constitutional Court of Serbia*, in *Hague Journal on the Rule of Law*, vol. 10, 2018, 59-82.

dented measures to tackle the health emergency, in almost all countries with very different forms of government. It should also be examined as a part of trend of the erosion of democratic institutions and the rule of law in the country, leading to its recent categorisation as a «hybrid regime»,[5] a «stabilocracy»[6] and the general trend of democratic decline and turn to illiberal governance.[7] For that matter, even if this study is examining the measures in the context of the country's developing authoritarian turn, it is done in the full knowledge that (dis)proportionate measures and responses can also be observed in many democratic societies with an independent judiciary and a long tradition of the rule of law.

2. *The Declaration of a State of Emergency as a Response to the Health Crisis*

The current health crisis caught most governments unprepared, and Serbia was no exception. After an initially relaxed approach to the coming threat (in January and up to late February), including mocking it as «the funniest of all viruses»,[8] the government came to terms with the magnitude of the crisis in early March, with the first case being registered on 6 March, in the midst of the initial phase of the parliamentary and local election campaigns.[9] With a rising number of cases, and public services seemingly un-

[5] As recently assessed by Freedom House, see further: *https://freedomhouse.org/country/serbia/nations-transit/2020* (last accessed on 8th June 2020).

[6] See further: F. Bieber, *The Rise of Authoritarianism in the Western Balkans*, London, 2020. The term was first used by Bieber in 2017: F. Bieber, *What is Stabilocracy?*, in *BiEPag*, 2017. Available at: *https://biepag.eu/what-is-a-stabilitocracy/* (last accessed on 8th June 2020).

[7] For one of the first academic analyses of the COVID-19 crisis in the context of illiberal democracies see: K. Brzechczyn, *The Coronavirus in Liberal and Illiberal Democracies and the Future of the Globalized World*, in *Society Register*, 4, 2, 2020, 83-94.

[8] K. Stojanović, *The Aleksandar Vučić Show Serbia's President as Mr. Fix-It*, Rosa Luxemburg Stiftung, 30th March 2020. Available at: *https://www.rosalux.de/en/news/id/41862/the-aleksandar-vucic-show* (last accessed on 8th June 2020).

[9] The handling of the COVID-19 crisis against the backdrop of elections has been offered by Marinković. See further: T. Marinković, *The Fight against Covid-19 in Serbia: Saving the Nation or Securing the Re-election?*, in *VerfassingsBlog*, 2020. Available at: *https://verfassungsblog.de/fight-against-covid-19-in-serbia-saving-the-nation-or-securing-the-re-election/* (last accessed on 8th June 2020).

prepared, the decision was made to declare a SoE,[10] which led to widespread derogations of human rights and what can be considered a turn towards authoritarianism.[11]

The SoE is governed by Article 200 of the Constitution of Serbia[12] and it envisages that the National Assembly shall proclaim a state of emergency «when the survival of the state or its citizens is threatened by a public danger». The Constitution limits the decision to declare a SoE by specifying that it shall be effective for a maximum of 90 days. Upon expiry of that period, the National Assembly may extend the SoE for another 90 days but an overall majority of the total number of deputies must vote in favour. It is further specified that, during the SoE, the National Assembly shall

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[10] *https://www.srbija.gov.rs/vest/en/151398/state-of-emergency-declared-throughout-serbia.php* (last accessed on 8th June 2020).

[11] However, Serbia was not the only example in this regard, especially in the region. For the Bulgarian experience see: R. Vassileva, *Bulgaria: COVID-19 as an Excuse to Solidify Autocracy?*, in *Verfassungsblog*, 2020. Available at: *https://verfassungsblog.de/bulgaria-covid-19-asan-excuse-to-solidify-autocracy/* (last accessed on 8th June 2020). For the case of North Macedonia see the piece whose author wanted to remain anonymous: Anonymous, *The Case of the Republic of North Macedonia: a State of Emergency without Parliamentary Control*, in *Democratic Decay - COVID-DEM*, 2020. Available at: *https://www.democratic-decay.org/research* (last accessed on 8th June 2020). Among Serbia's neighbouring countries Hungary, as may have been expected, attracted the most attention during the corona pandemic: K. Kovács, *Hungary's Orbánistan: a Complete Arsenal of Emergency Powers*, in *Verfassungsblog*, 2020. Available at: *https://verfassungsblog.de/hungarys-orbanistan-a-complete-arsenal-of-emergency-powers/* (last accessed on 8th June 2020). For Hungary see also: L. Szerencsés, *Hungary and COVID-19: the Pandemic as a Political Economy Tool for Political Survival*, in PEX, 2020. Available at: *https://pex-network.com/2020/05/21/hungary-and-covid-19-the-pandemic-as-a-political-economy-tool-for-political-survival/* (last accessed on 8th June 2020).

[12] *Official Gazette of the Republic of Serbia*, no. 98/2006. All of the formulations used in the analysis are from the official translation of the Constitution in English provided on the official web page of the Constitutional Court. Available at: *http://www.ustavni.sud.rs/page/view/en-GB/235-100028/constitution* (last accessed on 8th June 2020). There have been several studies on States of Emergency under the 2006 Constitution, all in Serbian: N. Rajić, *Instruments of Government Control during States of Emergency in the Case of the Constitution of the Republic of Serbia from 2006*, in *Zbornik Radova Pravnog Fakulteta u Nišu*, 57, 2011, 245-255., D. Avramović, *Declaration of a State of Emergency According to the 2006 Constitution of the Republic of Serbia*, in *NBP-Nauka, Bezbednost, Policija*, 15, 2, 2010, 127-135., J. Jovičić, *The Position of Parliament in the State of Emergency and State of War within the Constitutional System of the Republic of Serbia*, in *NBP - Nauka, Bezbednost, Policija*, 20, 1, 2015, 163-172. The State of Emergency in Serbian Constitutional tradition was analysed in: Belgrade Centre for Security Policy, *Security of the State and Citizens in the Serbian Constitutional Tradition - Overview of Norms in the Area of Security in Constitutions in Force between 1835 & 2006*, Belgrade, 2018 (in Serbian).

convene without any special call for assembly and it may not be dissolved. The Constitution explicitly provides in the same article that when proclaiming a SoE, the National Assembly may prescribe the measures which shall provide for derogations from the human and minority rights guaranteed by the Constitution.

The Constitution further provides for situations in which the National Assembly is not in a position to convene, prescribing that the declaration of a SoE shall be adopted by the President of the Republic together with the President of the National Assembly and the Prime Minister, under the same terms as by the National Assembly. When the SoE decision has not been passed by the National Assembly, the National Assembly shall verify it within 48 hours of its proclamation, that is, as soon as it is in a position to convene. If the National Assembly does not verify this decision, it shall cease to be effective upon the end of the first session of the National Assembly held after the declaration of the SoE. This extraordinary procedure for the declaration of a SoE was used in the case considered.

It is further specified that when the National Assembly is not in a position to convene, the measures which provide for derogations from human and minority rights may be approved by the Government, in a decree, with the President of the Republic as a co-signatory. Under the same Art. 200 of the Constitution, measures providing for derogations from human and minority rights prescribed by the National Assembly or Government shall be effective for 90 days at the most, and upon expiry of that period may be extended under the same terms. In a situation where measures providing for derogations from human and minority rights have not been prescribed by the National Assembly, as with the SoE the Government is obliged to submit the relevant decree to the National Assembly within 48 hours, that is, as soon as the National Assembly is in a position to convene. These measures providing for derogations shall cease to be effective 24 hours prior to the beginning of the first session of the National Assembly held after the declaration of SoE.

Article 202 provides for derogations from human and minority rights in a State of Emergency or War,[13] and envisages that, upon

[13] The State of War is governed separately by Article 201 of the Constitution.

the proclamation of a State of Emergency or War, any such derogations from the rights guaranteed by the Constitution shall be permitted «only to the extent deemed necessary». These measures cease to be effective when the State of Emergency or War ends. While the Serbian Constitution enumerates seventeen rights which may not be derogated,[14] including the right to a fair trial, the right to dignity and the freedom of religion, rights which can be limited are the right to freedom and the right of movement.

As underlined, the Constitution requires the National Assembly to declare the SoE, and, if it is not able to convene, then the President, Prime Minister and President of the Parliament may do so. Despite many Parliaments continuing and alternating work during the peak of the pandemic[15] and the strong majority of the ruling coalition in the Serbian Parliament, which would in any case have backed the decision to declare a SoE, the second option was chosen on the evening of 15 March.[16] Little or no explanation was given to the public for not taking the standard constitutional parliamentary route except for the danger to the health of MPs and the Order of the Health Minister banning gatherings of more than 50 people. Paradoxically, the Government (i.e. Health Minister) formally declared the epidemic only on 19 March,[17] thus sending a confusing message to the public regarding the reasons for the absence of a parliamentary vote. As will be demonstrated in the following analysis, the Constitutional Court commented very briefly on this fact and did not accept the argument that it was impossible to claim that Parliament was unable to meet during the epidemic if that epidemic had not yet been declared in the country. To what extent this sequence of steps by the ruling majority are signs of authoritarian disregard for institutions and to what extent it is a prime example of plain unpreparedness to address the health emergency remains

[14] Measures providing for derogation shall by no means be permitted in terms of the rights guaranteed pursuant to Articles 23, 24, 25, 26, 28, 32, 34, 37, 38, 43, 45, 47, 49, 62, 63, 64 and 78 of the Constitution.

[15] A. Williamson, *How are Parliaments Responding to the Coronavirus Pandemic?*, in *Hansard Society*, 2020, see *https://www.hansardsociety.org.uk/blog/how-are-parliaments-responding-to-the-coronavirus-pandemic* (last accessed on 8th June 2020).

[16] *Decision on the Proclamation of the State of Emergency*, in *Official Gazette of the Republic of Serbia*, no. 25/2020.

[17] *Order on the Declaration of Epidemic of Communicable Disease COVID-19*, in *Official Gazette of the Republic of Serbia*, no. 37/2020.

among the main dilemmas. What followed was 42 days of government by decree with the consent of the President, and no parliamentary oversight until Parliament met again on 27 April and confirmed the decision to declare a SoE, and all decrees and other decisions adopted by the Government. This *modus operandi* has been widely criticised by legal experts[18] and several claims (initiatives as defined by the Serbian Constitution) were lodged before the Constitutional Court of Serbia regarding the constitutionality of the declaration and various measures adopted during the SoE.[19] After a brief account of possible alternatives to the SoE in Serbian and adopted measures, observations will be provided on the decision and its argumentation.

3. *Alternatives to the Declaration of the State of Emergency*

There were plausible alternatives to introducing the SoE. The Government was able to introduce a number of measures to combat the crisis without declaring the SoE by employing the existing Law on the protection of the population from infectious diseases[20] and the Law on disaster risk reduction and management of emergency situations.[21] The latter provides for the epidemic to be a reason to declare an Emergency situation and subsequently employ the necessary measures and resources to combat it. However, it seems that is was never considered an option. There are several possible reasons why the ruling elite did not consider it. One is the ability offered by a SoE to use the army widely in managing the situation, which among technical aid included army control of the borders and complete control over the centres for the accommodation of asylum seekers and migrants transiting through Serbia, who were

[18] For critical observations made by Serbian legal experts (in English) see for example: T. Marinković, *The Fight against Covid-19 in Serbia: Saving the Nation or Securing the Re-election?*, in *VerfassingsBlog*, 2020, see. *https://verfassungsblog.de/fight-against-covid-19-in-serbia-saving-the-nation-or-securing-the-re-election/* (last accessed on 8th June 2020).

[19] Among which is the one by the prominent Belgrade Centre for Human Rights. See further: *http://www.bgcentar.org.rs/bgcentar/eng-lat/bchr-initiates-review-of-constitutionality-of-the-decree-on-state-emergency-measures-and-the-order-restricting-and-prohibiting-movement-of-individuals-in-the-territory-of-the-republic-of-serbia/*.

[20] *Official Gazette of the Republic of Serbia*, no. 15/2016 and 68/2020.

[21] *Official Gazette of the Republic of Serbia*, no. 87/2018.

not allowed to exit the centres without special permission.[22] Another important reason why they did not use these alternatives, but opted for a SoE, was possibly so that the Government could widely limit human rights, including the right to freedom and the right of movement. Nevertheless, with the exception of the already-mentioned nationwide curfew, the Laws listed above governing communicable diseases and emergencies, coupled with the Law on police and various other sectorial legislation, do provide wide ranging possibilities to limit the spread of the epidemic by introducing the limitation of gatherings, movement, transport, and the operation of businesses and various other societal activities in order to prevent contacts. Applying these laws would, however, have required a carefully planned set of measures that would have been more challenging to enforce and police in comparison to a nationwide curfew. The complete lockdown of part of the population (elderly) and the rest of citizens for extended periods of the day or week was easier to police, but has had significant consequences for the health and wellbeing of the population, especially the elderly.[23] Comparative examples do vary, as analysis has shown,[24] but here it is strongly argued that, in most cases, limiting contacts between individuals from different households and curbing the spread of disease in a proportionate and legitimate manner, without harshly restrictive measures, was manageable.

Finally, and most importantly, Serbia was, as mentioned above, in the middle of an electoral campaign for elections to be held on 26 April. The Constitution sets firm rules on deadlines for elections with the parliamentary term nearing its end. According to Article 101, the Election of Deputies shall be called by the President of the Republic 90 days before the end of the term of office of the National Assembly, so that elections are finished within the following 60 days. With the parliamentary term ending on 3 June, the elec-

[22] See further: *https://balkaninsight.com/2020/03/17/serbia-restricts-movement-for-migrants-asylum-seekers/*.

[23] United Nations Population Fund, *Pandemic Leaves Older Populations Struggling with Isolation in Serbia*, 2020. See: *https://www. unfpa.org/news/pandemic-leaves-older-populations-struggling-isolation-serbia* (last accessed on 8th June 2020).

[24] For various national reports on measures introduced see further: European Association of Health Law, *EAHL Newsletter Special Issue on Legal Landscape Concerning the Coronavirus Outbreak* - April 2020, available at: *https://eahl.eu/sites/default/files/NEWSLETTER.pdf* (last accessed on 8th June 2020).

tions were scheduled for just a week before the last constitutionally possible date to hold them. In line with Article 109 of the Constitution, simultaneously with the dissolution of the National Assembly, the President of the Republic shall schedule the Election of Deputies, so that elections finish not later than 60 days from the day of their announcement. Therefore, the elections were called on 4 March, 90 days before the expiry of the term of the current Parliament and a little less than 60 days – which is the maximum duration allowed for the election process – before the actual Election would be held. According to the same Article, the National Assembly, which has been dissolved, shall only perform current or urgent tasks, as stipulated by the Law but «in case of the declaration of a State of War or Emergency, its full competence shall be re-established and last until the end of the State of War, that is, Emergency». Therefore, the declaration of the SoE allowed the elections to be postponed.[25] Elections were postponed in some other European countries.[26] Bearing in mind the health emergency, it was manifestly necessary to postpone the elections until the epidemiological situation became appropriate for holding regular pre-election and electoral activities.[27] In this situation, the prudent solution could have been the adoption of a Constitutional Amendment (Article 202) with a special Constitutional Law for its implementation.[28] Nevertheless, article 204 prohibits changes to the Constitution during a State of Emergency or War, thus this trajectory could have been taken only if the ruling coalition decided not to implement a SoE but rather one of the alternative approaches described above. As will be demonstrated in the following analysis, the Constitutional Court did not put emphasis on the fact that the SoE was the only constitutional way to postpone the elections, even thought it

[25] See further: *https://www.reuters.com/article/us-health-coronavirus-serbia/serbia-postpones-april-26-elections-as-part-of-response-to-coronavirus-outbreak-idUSKBN2133M1* (last accessed on 8th June 2020).

[26] See further: *https://www.coe.int/en/web/electoral-assistance/elecdata-covid-impact* (last accessed on 8th June 2020).

[27] For an analysis of how voting could have been organised during the pandemic see further: R. Krimmer, D. Dueñas - Cid, I. Krivinosova, *Debate: Safeguarding Democracy during Pandemics. Social Distancing, Postal, or Internet Voting - the Good, the Bad or the Ugly?*, in *Public Money & Management*, 2020. Available at*: https://doi.org/10.1080/09540962.2020.1766222* (last accessed on 8th June 2020).

[28] Articles 205 on constitutional law for implementation of amendments.

would be the strongest argument to employ. Even if it is accepted that this reason prevailed, and that the SoE had to be declared in order to keep the electoral process within the constitutional frame, the troublesome declaration of the SoE and the disproportionate measures implemented remain. With this in mind, the emergency regime and human rights derogations will now be analysed.

4. *The Consequences of the State of Emergency: Human Rights Derogations and Governance by Decree*

Another very important issue for consideration is the strict and, as is argued, disproportionate and selective imposition of restrictions upon citizens during the SoE and governance by decree.[29] The measures were extensive,[30] but to a great degree similar to restrictions worldwide[31] including those of many European nations.[32] As Spadaro has argued, «the war-like responses to the pandemic have been characterised by the taking of measures severely limiting the enjoyment of personal freedoms, to an extent that was unprecedented in democratic countries in times of peace».[33] Similar to those in many other nations, and to the very restrictive regimes employed elsewhere in the region,[34] these measures in Serbia comprised wide closures of non-essential business, bans on gatherings,

[29] However, it must be stressed that executive actions in this unprecedented situation were comparatively extraordinary, and it is yet to be fully determined to what extent parliaments were truly able to scrutinise government measures. For a critical overview of the UK experience see: K.D. Ewing, *Covid-19: Government by Decree*, in *King's Law Journal*, 31, 1, 2020, 1-24.

[30] The overview of human rights limitations was provided by Lawyers Committee for Human Rights (YUCOM), see further: *http://en.yucom.org.rs/wp-content/uploads/2020/04/HUMAN-RIGHTS-AND-COVID-19.pdf* (last accessed on 8th June 2020).

[31] See further: N. Coghlan, *Dissecting Covid-19 Derogations*, in *VerfassingsBlog*, 2020, Available at: *https://verfassungsblog.de/dissecting-covid-19-derogations/* (last accessed on 8th June 2020).

[32] For the overview see: European Association of Health Law, *EAHL Newsletter Special Issue on Legal Landscape Concerning the Coronavirus Outbreak* - April 2020, available at. *https://eahl.eu/sites/default/files/NEWSLETTER.pdf* (last accessed on 8th June 2020).

[33] A. Spadaro, *COVID-19: Testing the Limits of Human Rights*, in *European Journal of Risk Regulation*, 11, 2, 2020, 317-325.

[34] There are two very useful analyses: M. Brändle *et al.*, *Democracy and the State of Emergency - Responses to the Corona Crisis in the Western Balkans, Croatia and*

and the cessation of kindergartens, schools and universities. However, there were a number of dubious restrictions that deserve attention. In the first place, there was an absolute ban on movement for all citizens over the age of 65 (70 in towns and villages under 5000 inhabitants) which kept them locked in their places of residence for 33 days starting 18 March, which was among the strictest on the continent.[35] Fines to the equivalent of two to six average monthly pensions were introduced for all in breach of the decision. Even though the supply system for the elderly was patchy and inconsistent throughout the country, this section of the population was only allowed to go shopping once a week, between 4am and 7am, with officials declaring that the time of day and cold weather conditions were deliberately chosen to discourage senior citizens from going out. The omnipresent narrative was the need to «protect the lives of our grandmas and grandpas», a significant conceptual reduction of elderly citizens to their biological and social functions typical of patriarchy. The Constitutional Court has (still) not dealt with this issue, but it is highly doubtful whether this discriminatory measure could pass the proportionality test. As underlined by the UN Human Rights Committee in the Statement on Derogations from the International Covenant on Civil and Political Rights in connection with the COVID-19 pandemic – «States parties cannot resort to emergency powers or implement derogating measures in a manner that is discriminatory, or which violates other obligations they have undertaken under international law, including under other international human rights treaties from which no derogation is allowed».[36] Thus, it remains to be seen how this derogation will be scrutinised by the Constitutional Court and eventually

Slovenia Report One, Friedrich Ebert Stiftung, 2020, see: *http://library.fes.de/pdf-files/bueros/belgrad/16119.pdf*; (last accessed on 8th June 2020). S. Blockmans *et al.*, *Southeast Europe - COVID-19 Bulletin No 1 Domestic Medical Situation and Social Responses,* CEPS, 2020, see: *https://3dcftas.eu/publications/southeast-europe-covid-19-bulletin-no-1* (last accessed on 8th June 2020).

[35] An overview of restrictions of movement was provided by the Belgrade Centre for Human Rights, see further: *http://www.bgcentar.org.rs/bgcentar/eng-lat/restrictions-of-the-freedom-of-movement-of-serbias-citizens-during-the-covid-19-pandemic-amongst-the-most-drastic-in-europe/* (last accessed on 8th June 2020).

[36] UN Human Rights Committee, *The Statement on Derogations from the Covenant in Connection with the COVID-19 Pandemic*, 24th April 2020, available at: *https://www.ohchr.org/Documents/HRBodies/CCPR/COVIDstatementEN.pdf* (last accessed on 8th June 2020).

the European Court of Human Rights and UN Committee for Human Rights.

In addition, the nationwide curfew[37] with a complete ban on movement on workdays between 5pm and 5am, and for the whole day during the weekends, remained for the majority of the SoE period. It was initially introduced by virtue of the Order on Limitations and Restrictions of Movement made by the Minister of the Interior[38] and then by Government Decrees. This measure culminated during the Orthodox Easter weekend, with a complete ban imposed for 108 continuous hours. Fines for breaching the ban ranged from one to three average monthly salaries in the country, and even though prison sentences were initially envisaged, after warnings from experts that criminal acts and prison sentences cannot be prescribed by virtue of Government Act, they were removed. Many citizens (including over 65s) were arrested during the observed period and the Misdemeanour Courts mostly handed down minimal fines. However, it was not reported that the Misdemeanour Court judges at any point questioned the legality and constitutionality of the Acts on which they based the decisions. The ban on movement was, however, compromised by the generous issuing of movement permits that included non-essential workers such as restaurant and delivery staff. Finally, after the vocal mobilisation[39] of dog owners, movement restrictions were lifted during the curfew for limited time slots, privileging pets and their owners over the rest of population. In spite of continuous calls to allow senior citizens the right to a daily walk or exercise during the curfew it was only allowed after 33 days of complete lockdown. The Constitutional Court remained silent over this confusing and discriminatory system throughout the SoE.

There were many interesting but debatable aspects of the measures adopted to counter the epidemic. As large numbers of Ser-

[37] As noted by Čavdarević this was the first curfew imposed in Serbia since Nazi occupation in World War II. See further: I. Čavdarević: *Serbia and Covid-19: State of Emergency in a State in Disarray*, in *VerfassingsBlog*, 12th May 2020. Available at: *https://verfassungsblog.de/serbia-and-covid-19-state-of-emergency-in-a-state-in-disarray/* (last accessed on 8th June 2020).

[38] *Official Gazette of the Republic of Serbia*, no. 34/20, 39/20, 40/20, 46/20, 50/20.

[39] See further: *https://www.washingtontimes.com/news/2020/mar/29/dog-walking-ban-sparks-outrage-serbia/* (last accessed on 8th June 2020).

bian citizens, mostly working in temporary and low paid positions in Western Europe, were forced to return to the country in mid-March, attention turned to the possible wide importation of the virus.[40] Many of these citizens returned in the days before the Government, in order to be able to impose the measures to combat it, officially declared COVID-19 an infectious disease. The response of the public authorities was inconsistent, with some of those entering the country being given no advice whatsoever regarding health precautions, some only recommendations, yet others were issued the self-isolation orders of either 14 or 28 days depending on the origin of their journey (all decisions were later automatically extended by Government decree to 28 days). The police were under tremendous pressure to check the implementation of the self-isolation measures on a daily basis, working from an allegedly inconsistent data base put together by the health authorities. There were numerous cases of people being arrested for not being at their address during the control period, with some claiming to have never received the self-isolation orders.[41] In these cases, the authorities claimed that citizens were given so called oral decisions (a rare form of Administrative Act existing under the Serbian Administrative Procedure Act) which are indeed possible in exceptional circumstances and for specific reasons such as the protection of health. However, it is widely questioned whether such orders in the form of oral decision were ever given, as contested by some citizens who ended up in detention units.

This led to another questionable measure, the introduction of so called «Skype trials»[42] to avoid bringing those accused of criminal offences – primarily the breach of health regulations – into court rooms, but also without the right to directly and privately consult with their attorney of choice. Firstly implemented by some judges upon the mere recommendation of the Ministry of Justice, this measure was later formalised in one of numerous decrees adopted by the Government. The measure was widely criticised by

[40] See further: *https://balkaninsight.com/2020/04/03/serbia-pins-coronavirus-blame-on-returning-serbs-concealing-infection/* (last accessed on 8th June 2020).

[41] See further: *https://balkaninsight.com/2020/04/08/birn-fact-check-when-did-serbia-order-all-arrivals-to-self-isolate/* (last accessed on 8th June 2020).

[42] See further: *http://www.bgcentar.org.rs/bgcentar/eng-lat/skype-hearings-erode-safeguards-against-ill-treatment/* (last accessed on 8th June 2020).

professional associations and civil society.[43] Indeed, the COVID-19 crisis did pose a challenge for the operation of courts around Europe, with various practical challenges and solutions put in place.[44] The rule of law and human rights situation took an additional turn for the worse through the decree centralising the possibilities of getting any information on the handling of the situation, effectively prescribing that all inquiries for each individual case or measure should be submitted to the central crisis unit in Belgrade,[45] leaving the media in a dire situation. This culminated in the arrest of a journalist who reported on the lack of personal protection equipment in her city's COVID-19 hospital.[46] Among wide opposition[47] and a limited degree of international pressure, the decree was repealed after two days and the journalist freed with the charges against her later dropped. However, these remain as worrying testaments of the turns which the handling of a health emergency can take, and point to the precarious position of journalists and, in the case of a pandemic, highly important whistle-blowers.[48] Finally, the most controversial measure imposed by the government was the compulsory hospitalisation of all persons testing positive for the corona virus, even those who were asymptomatic or had very mild symptoms. All those found positive were obliged to accept isolation in facilities dedicated for that purpose, prescribing that these persons are «obliged to accept isolation in facilities dedicated for this and to adhere to the measures and guidelines ordered(!) by doctors of medicine or epidemiologists» with the threat that a «person who does not adhere to the guidance of doctors is forcefully isolated» in the

[43] See further: *http://en.yucom.org.rs/wp-content/uploads/2020/05/HUMAN-RIGHTS-AND-COVID-The-right-to-a-fair-trial.pdf* (last accessed on 8th June 2020).

[44] See further: *https://www.pinsentmasons.com/out-law/guides/coronavirus-courts-response-europe* (last accessed on 8th June 2020).

[45] See further: *https://balkaninsight.com/2020/04/01/serbian-govt-takes-control-of-information-flow-about-pandemic/* (last accessed on 8th June 2020).

[46] See further: *https://europeanwesternbalkans.com/2020/04/02/serbian-journalist-arrested-for-reporting-on-difficult-working-conditions-of-medical-staff-in-covid-19-pandemic/* (last accessed on 8th June 2020).

[47] See further: *http://en.yucom.org.rs/the-state-institutions-should-fight-against-the-coronavirus-not-the-freedom-of-media/* (last accessed on 8th June 2020).

[48] For comparative examples of censorship and whistleblowing in COVID-19 time, including in Serbia, Hungary and Poland see: V. Abazi, *Truth Distancing? Whistleblowing as Remedy to Censorship during COVID-19*, in *European Journal of Risk Regulation*, 11, 2, 2020, 375-381.

«presence of the police».[49] This was apparently done on the recommendation of the Chinese medical team sent to help the Serbian response to the outbreak of the disease. People were taken to temporary hospitals set up on trade fair sites and in sports halls.[50] As preliminary research shows, this kind of approach to curb the spread of the disease based on Chinese experiences was not recorded in other European countries, where people were normally required to self-isolate. Given the nature of the disease and the conditions under which this was implemented, such hospitalisations would hardly pass the test of proportionality either.

In the decision analysed, the Constitutional Court did not consider any particular measure adopted during the SoE, in particular the proportionality of these measures against the criteria that derogations from the European Convention on Human Rights (Article 15) should only occur to an extent «strictly required by the exigencies of the situation».[51] It remains to be seen what the Court will do with separate initiatives filled against the measures.

Even though this study does not deal with Chinese government influence in this country during the COVID-19 crisis,[52] it can be concluded that it was evident in the modelling of some of the measures imposed on the population during the SoE, namely compulsory and forced hospitalisations. However, the picture remains confusing, as on the one hand citizens were subjected to harsh curfew measures over weekends and for half of the weekdays but were granted relatively large margins to act outside the curfew hours.

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[49] Decision on declaration of COVID-19 disease caused by the SARS-COV-2 virus for communicable disease, *Official Gazette of the Republic of Serbia*, nos. 23/20, 27/20, 28/20, 30/20, 32/20, 35/20, 43/20, 45/20, 48/20, 49/20, 59/20,60/20,66/20, 67/20, 72/20, 73/20, 75/20, 76/20.

[50] For media coverage of this move see for example: *https://www.bizlife.rs/en/in-focus/news-of-the-day/bg-fair-turning-into-temporary-hospital-army-setting-up-3000-beds-video/* (last accessed on 8th June 2020).

[51] See further: R. Comte, *State of Emergency: Proportionality Issues Concerning Derogations under Article 15 of the European Convention on Human Rights*, Council of Europe, 2018. Available at: *http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=24505&lang=en* (last accessed on 8th June 2020).

[52] S. Subotić, M. Janjić, *What Have We Learned from the COVID-19 Crisis in Terms of Sino-Serbian Relations? China's Influence in Serbia Will Grow as Much as the EU Allows it to*, in *CEP Blog*, 2020. See: *https://cep.org.rs/en/publications/what-have-we-learned-from-the-covid-19-crisis-in-terms-of-sino-serbian-relations/* (last accessed on 8th June 2020).

Many businesses tried to remain partially open, factories were never ordered to close even though in many workers were not able to keep the recommended distance,[53] and people used to congregate in front of cafes and restaurants which were allowed to serve take-aways. In this confusing approach, the measures implemented almost seem to have fluctuated between the «relaxed Swedish model» during the day and the «Chinese model» during the night, even though the government was handling the same public health challenge.

5. *The Constitutional Court of Serbia - Delayed Reaction and Siding with the Government*

In this section, the recent Decision IUo 42-2020 of the Constitutional Court of Serbia, adopted on 21 May, two full weeks after the SoE was abolished by the Parliament, is explored. Firstly the competences of the Court to scrutinise the constitutionality of general legal acts is considered, and then two important questions that the Court answered (or tried to) when dismissing several initiatives, as well as those issues which remained unaddressed or were just briefly touched upon by the Court, are analysed. These include (an unknown number of) initiatives regarding the constitutionality of particular measures adopted by the government.

5.1. *The Constitutional Court of Serbia and the Control of Constitutionality*

Under Art. 167 of the Constitution, the Constitutional Court decides on the compliance of laws and other general acts with the Constitution, the generally accepted rules of international law and ratified international treaties. The procedure for assessing constitutionality (article 168) may be instituted by: state bodies, bodies of territorial autonomy or local self-government, as well as at least 25 deputies. These participants in the proceedings are according to the law on the Constitutional Court defined as «authorised pro-

[53] Due to this fact the industrial output during the single full month of emergency measures - April - fell by only 16.6% compared to the same month the previous year. See further: *https://www.stat.gov.rs/en-US/vesti/20200529-indeksi-industrijske-proizvodnje-april-2020* (last accessed on 8th June 2020).

pounders».[54] The procedure may also be instituted by the Constitutional Court in its own right, which in this case the Court failed to do. In addition, any legal or natural person has the right to an initiative to institute a proceeding of assessing the constitutionality and legality of a law or act. This latter opportunity was used by a number of individuals and groups; however it was not specified in the Constitutional Court decisions studied how many initiatives were submitted, nor by whom.

Pursuant to Article 36 of the Law on the Constitutional Court, the Court shall dismiss a motion to initiate or institute a procedure before the Constitutional Court on seven grounds. These are: 1) when it determines that the Constitutional Court is not competent to issue a decision; 2) if the motion is not filed within the designated time-limit; 3) if the motion is anonymous; 4) when the submitter has not rectified shortcomings which preclude processing within a designated time-limit; 5) when it determines that the motion is manifestly unfounded; 6) if it determines that the motion represents an abuse of law; 7) when other preconditions for conducting a procedure and determination do not exist, as established by law. If an initiative is not dismissed, and the Court goes into in merit deliberation, it normally organises a public hearing and reaches a decision either to accept the initiative and declare the general act unconstitutional, or to reject it.

According to the information available, it is not fully known in which mode the Court and its services operated during the state of emergency,[55] and whether, if at all, it acted upon any initiative filed to the Court in the period of interest. According to Article 56 of the Law on the Constitutional Court, «In the course of a procedure, until the issuing of a final decision, the Constitutional Court may suspend the enforcement of an individual act or action taken on the basis of the general act whose constitutionality or legality are being assessed, where such enforcement could cause irreversible detri-

[54] Article 29. Law on the Constitutional Court. *Official Gazette of the Republic of Serbia*, nos. 109/07 of 28 November 2007, 99/11 of 27 December 2011, 18/13 (CC) of 26 February 2013, 40/15 of 7 May 2015 and 103/15 of 14 December 2015 As far as is known, only one request of this kind regarding the SoE was made by a local ombudsperson deputy of the city of Kraljevo in the South of Serbia.

[55] The Court did however announce in late March on its webpage that it will be receiving all petitions by post.

mental consequences». It would, therefore, be expected that the Court be in operation during the whole period in order to act in these situations, but the silence of the Court and the lack of official statements on its operation during this period on one hand, and conflicting reports of local media on whether any activities were taking place on the other, allow only speculation as to what extent the «guardian of constitutionality» was in operation during the SoE. This is not surprising, bearing in mind its track record of inactivity in delicate cases. Only on 21 May did the Court decide to dismiss all initiatives submitted. Interestingly, in the decision dismissing the initiatives, the Court did not explicitly list any of the reasons provided by law, but rather concluded that the «petitioners claims are not constitutionally grounded, i.e. reasons provided do not support the claim that there are grounds to initiate the procedure to examine the compliance of constitutionality and legality of the Decision on the State of Emergency».[56] The court stopped short of determining that the motions were manifestly unfounded, but gave a confusing explanation for dismissal, including a puzzling ten page set of arguments for the decision announced 15 days after the SoE had ended, raising doubts over the rushed preparation of the decision after the Court had remained silent during the period it was most needed.

5.2. *Summary of the Questions Answered by the Court*

Even though the Court decided to dismiss the initiatives in preliminary procedure, it did provide a ten-page reasoning for doing so, which indeed partially turns this decision into an *in merit* deliberation on the SoE. The court basically addressed two main issues – firstly, whether the state of emergency was *per se* constitutional, and secondly whether the (above described) proclamation was in line with the constitution. As the Court decided to examine all the (unspecified number) initiatives together, it has not provided information on which applicant made which kind of claim. It has generally concluded that applicants have argued that the «conditions were not met for the State of Emergency to be declared» and that the SoE was «declared unconstitutionally by the President,

[56] Decision IUo-42-2020, 11.

Prime Minister and President of the Parliament instead of by the National Assembly».[57] Applicants have argued that the decision did not specify the length of the state of emergency and that it was not a «proportionate or adequate measure to achieve a declared goal».[58] The court underlined that all the initiatives claimed that there were no reasons preventing Parliament from convening and adopting the decision, and furthermore that no decision of the executive, in this case the Order on banning gatherings in closed spaces[59] issued by the Health Minister could be a reason for the body not to convene. The decision contains the argument by petitioners that «this kind of action would lead to an institutionalised power takeover by the executive and concentration of power, contrary to constitutional separation of powers between Parliament, the executive and the judiciary».[60] The petitioners also stressed that the epidemic could not be used as an argument for not convening Parliament as it was proclaimed only on 19 March,[61] invoking the general ban on retroactivity (Article 197 of the constitution).[62]

5.3. *Was the State of Emergency Constitutional? When the Court Tries to Explain that the Government had No Other Viable Option*

Regarding the first question considered, the Court has reasoned that there are four constitutive elements of the SoE – 1. Constitutional condition – «public danger threatening the survival of the state or its citizens», 2. Protective object – «state or citizens», 3. Means or mechanisms of protection – «measures derogating from constitutionally guaranteed human and minority rights», 4. Goal – «efficiency in overcoming public threats and the urgency of return to regular constitutional state». The Court also added two important aspects – the limited character of the SoE (up to 90 days with renewal for up to a further 90) and «constitutional elements of the

[57] Decision IUo-42-2020, 1.
[58] Decision IUo-42-2020, 2.
[59] *Official Gazette of the Republic of Serbia*, no. 25/20.
[60] Decision IUo-42-2020, 2.
[61] *Official Gazette of the Republic of Serbia*, no 31/2020.
[62] Decision IUo-42-2020, 2.

procedure to declare the State of Emergency».[63] In defining these criteria, the Court didn't point to any comparative examples or academic authority. The Court went on to reason that «Constitutional condition» is given in the form of the legal standard which can be defined as «public danger threatening the survival of the state or its citizens». This legal standard is equivalent to the formulation of Article 15 of the European Convention on Human Rights on derogation from human rights when «public danger is threatening the survival of the nation» (as formulated by the Constitutional Court).[64] The Court then tried to analyse summarily in one paragraph three relevant cases of the European Court of Human Rights (ECtHR), concluding that the ECtHR position is that the competent national authority has «the margin of appreciation» when deciding on a SoE.[65] After listing facts about the COVID-19 outbreak in China, and its spread there and in Italy, underlining that the «unknown disease was spreading uncontrollably» the court reiterated the margin of appreciation at the disposal of state authorities and concluded that «the occurrence of the infectious disease COVID-19 and the danger of its uncontrolled spread in the territory of the Republic of Serbia could be considered a danger that significantly threatens the health of the general population, thus compromise the normal course of life in the state, including the functioning of its institutions, public services and the economy, and in particular the health system».[66]

The Court also decided to consider claims arguing that it would have been sufficient to declare the above mentioned emergency situation which the court stresses is a legal instrument based on ordinary legislation[67] and not the Constitution, adding that «In constitutional law doctrine, the prevailing view is that it is difficult, if not impossible, to make a clear distinction between a State of

[63] Decision IUo-42-2020, 4.
[64] Decision IUo-42-2020, 5.
[65] Decision IUo-42-2020, 5.
[66] Decision IUo-42-2020, 6.
[67] Law on Public Health (*Official Gazette of the Republic of Serbia*, no. 15/16), Law on Protection of the Population from Infectious Diseases (*Official Gazette of the Republic of Serbia*, no. 15/16) and Law on Disaster Risk Reduction and Emergency Management (*Official Gazette of the Republic of Serbia*, no. 87/18).

Emergency and an emergency situation».[68] The court underlines that: «…measures of deviation from human rights, provided that they are justified and proportionate, as well as other measures that can be adopted in a State of Emergency … give far greater opportunities for the state to react in a timely and effective manner in eliminating public danger to the lives of citizens». In words of the Court: «the legal "capacity" of the extraordinary situation does not even guarantee such an effective response of state bodies and services (insufficient efficiency of services, problems in coordination, impossibility of fundamental health reorganisation, etc.)».[69] The Court added: «when declaring a State of Emergency, other factors that justify such a decision must be taken into account, and in this particular case it would be the state and capacities of the health system, the health culture of citizens, mentality, age structure of the nation, etc.».[70] This aspect of the Court's reasoning deserves special attention, as invoking the «health culture of citizens [and] mentality» as reasons to introduce the SoE echoes the dominant narrative of state officials in blaming citizens for the failures of the system during the crisis, and the extent to which it can be considered autochauvinistic is yet to be analysed by sociologists and anthropologists. The string of problematic arguments continued with the Court trying to explain that the imbalance of competences is a common feature of a SoE and that, to a certain extent, a concentration of power occurs, even if the National Assembly is providing for derogations from constitutionally guaranteed rights.[71]

Overall, the Court made a modest effort to analyse what constitutes an emergency, with one paragraph covering the case law of the ECtHR and a single reference to scholarly works – namely de Vergottini's *Comparative Constitutional Law*. The Court pointed out that the decision to declare the SoE is of a specific nature, as it represents the act by which the state is taken from the regular to the emergency constitutional state, whose legal basis is «necessity, understood as the supreme need to preserve the constitution, and in that matter, the source allowing acceptance of legislation dero-

[68] Decision IUo-42-2020, 6.
[69] Decision IUo-42-2020, 6-7.
[70] Decision IUo-42-2020, 7.
[71] Decision IUo-42-2020, 7.

gating from the formal text of the constitution, but which ought to preserve the essence of the constitution».[72]

5.4. *Was the State of Emergency Declared in a Constitutional Manner? When the Court Upholds the Power Grab.*

In terms of the second main question examined – whether the proclamation itself was made in a constitutional manner – the Court offered very few arguments. It strikingly argued that «The Constitution does not determine who assesses and on the basis of which criteria and reasons that the National Assembly is not able to meet».[73] The court also went on to analyse relevant legislation governing the work of Parliament and concluded that «none of the above acts stipulates the obligation of the Speaker of the National Assembly to convene this body to declare a State of Emergency before independently assessing whether the National Assembly is able to meet».[74] The court then further tried to avoid deliberating on whether it was possible for the Assembly to convene:

> «The issue of the (im)possibility for the National Assembly to meet is, in the opinion of the Constitutional Court, a factual and not a legal issue, bearing in mind that the Constitution and other legal acts have not determined the situations when the National Assembly is unable to meet, and especially bearing in mind the fact that the Constitutional Court cannot assess the organisational possibilities of the National Assembly to meet without delay in the conditions of danger to human life and health. Therefore, the Constitutional Court does not have a constitutional or other legal "criterion" on the basis of which it could question the notification of the Speaker of the National Assembly that the Parliament was not able to meet».[75]

As has already been underlined, these are not surprising moves by the Constitutional Court of Serbia. Based on her study of a number of decisions in post-Milošević Serbia, Beširević has highlighted

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[72] Decision IUo-42-2020, 8 (Author's translation from Serbian to English of the cited sentence). It should be noted that in this single reference to the academic work the Court also made a citation omission as the text does not correspond to the page cited in the Serbian edition of Comparative Constitutional Law.

[73] Decision IUo-42-2020, 9.

[74] Decision IUo-42-2020, 9.

[75] Decision IUo-42-2020, 10.

that the «play-it-safe strategy the Court applied in the most controversial political cases, in which it would have been possible to initiate changes in public policy, including cases concerning constitution-making, the state of emergency, judicial reform, and political decentralization».[76] In this concrete case, even if we accept that the Government had no alternative to declaring the SoE (first question), it remains highly dubious and unconvincing that there was no alternative to the above described manner in which it was executed.

5.5. *Important Issues the Court Considered Briefly or Did Not Considered at All*

In addition, there are two other interesting aspects of the decision which the Court dealt with but only summarily. Firstly, the duration of the SoE, which some applicants claimed should be defined in the proclamation decision. The Court argued that «it is not up to the state body that declares the State of Emergency to determine in advance how long it will last»,[77] noting that time is already limited to up to 90 days plus up to an additional 90 days. Bearing in mind the exceptional nature of the SoE, this reasoning sounds plausible. However, the Court failed to underline that the SoE should be strictly limited to the shortest necessary time to protect the state and citizens from the public threat. In practice, the authorities decided to end the SoE after 53 days, arguing in the media that the epidemiological situation allowed for it. Bearing in mind that the ruling elite didn't opt for the maximum use of extraordinary powers, but rather decided to try to bring life «back to normal», it might be interpreted that the measures introduced and the way they were introduced testify more in favour of a Government unready to deal with an unknown threat rather than (developing) authoritarianism. However, it is also plausible to argue that the end of the SoE was done in a rushed fashion in order to continue with the election process before the full effects of the global economic crisis brought about by the COVID-19 outbreak are manifested.[78]

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[76] V. Beširević, *Governing Without Judges: the Politics of the Constitutional Court in Serbia*, in *International Journal of Constitutional Law*, 12, 4, 2014, 954-979.

[77] Decision IUo-42-2020, 8.

[78] Relevant projections for Serbia and the wider Western Balkan region differ, however, depending on the length of the health emergency they are expected to be se-

Secondly, it was also argued by some applicants that it was necessary for a decision on the declaration of the SoE to contain reasoning for the proclamation. The decision itself is very rudimentary: «Based on Article 200, paragraph 5 of the Constitution of the Republic of Serbia, the President of the Republic, the President of the National Assembly and the President of the Government adopt a DECISION on declaring a State of Emergency 1. A State of Emergency is declared on the territory of the Republic of Serbia. 2. This Decision shall enter into force on the day of its publication in the *Official Gazette of the Republic of Serbia*.[79] Indeed, no mention of the health emergency or any other reason was made in this decision. To that end, the Court surprisingly argued: «Regarding the allegation of the initiative that the disputed Decision does not contain a reasoning, i.e. a strict and formal legal reasoning for the decision on the State of Emergency as an integral part of that decision, the Constitutional Court points out that when announcing the decision on declaring a State of Emergency the reasoning is not published, as the reasoning of any general legal act is not published».[80] As in many other legal systems, all individual acts in Serbian law do need to contain reasoning («obrazloženje» in Serbian). Proposals of general Acts, primarily Laws passed by Parliament and usually presented by the Government, normally contain the text of the proposed Law and «obrazloženje» – an accompanying document explaining the reasons for the legislative intervention which is again present in many systems. At the end of the legislative process, only the text of the Law is published in the *Official Gazette*. It is not fully clear why the Court resorted to this kind of confusing play with concepts of individual and general acts if not to justify the evident shortcomings of the decision to declare the SoE.

As the Court decided to dismiss the initiatives, it also dismissed requests to stay the execution of individual acts adopted

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vere. See further: L. Van Gelder, G.A. Vincelette, M.T. Schiffbauer, E. Kikoni, *Hard Times Require Good Economics: the Economic Impact of COVID-19 in the Western Balkans*, in *Brooking blog*, 2020. See: *https://www.brookings.edu/blog/future-development/2020/04/29/hard-times-require-good-economics-the-economic-impact-of-covid-19-in-the-western-balkans/* (last accessed on 8th June 2020).

[79] *Official Gazette of the Republic of Serbia*, no. 29/20.

[80] Decision IUo-42-2020, 9.

pursuant to the decision to declare the SoE.[81] However, various initiatives challenging the constitutionality of different governmental and ministerial Acts – decrees and orders adopted during the SoE – still remain unanswered. At this point it is unknown how many have been lodged and when the Court is going to act upon these initiatives. In its decision, the Constitutional Court did not consider any particular measure adopted during the SoE, in particular the proportionality of these measures against the criteria that derogations from the European Convention on Human Rights (article 15) should only take place to the extent «strictly required by the exigencies of the situation».[82] What the court should do when a (single known) proposal to evaluate constitutionality made by a state official comes to consideration is to measure the proportionality of each of the measures adopted delicately, especially the two general bans on movement for the elderly and the whole population.

6. *Concluding Remarks: A Step Towards Autocracy or Simply a Disproportionate Response to an Unknown Threat*

This piece has aimed to provide a critical overview of the major legal aspects of the Serbian Government measures implemented to fight the COVID-19 crisis and the late and weak, although not unexpected, judicial response of siding with the government. The preliminarily analysis was started as the events unfolded and is being concluded at a time when the health crisis is yet to finish. In light of that, all the conclusions ought to be revisited from an adequate distance, and more comprehensive comparative studies carried out, in order to better position this case study in the wider context. As has been outlined, there were possibilities to employ the current system for handling epidemic and emergency situations, together with a comprehensive set of measures designed to flatten the epidemic curve and stop contacts. However, as they were difficult to police and could not be as far reaching as curfews, the decision was made to take more drastic measures that were executed in an authoritarian manner. Another important aspect was the coinci-

[81] Decision IUo-42-2020, 1, 11.

[82] See further: *http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-en.asp?FileID=24505&lang=en* (last accessed on 8th June 2020).

dence of the epidemic with the regular elections, which further challenged the handling of the situation, with the SoE seen as the only plausible option if the Government wanted to postpone the elections and not resort to changing the Constitution amidst the health emergency. Interestingly, in the decision on the constitutionality of the SoE that has been studied, the Court decided not to give prominence to the fact that the SoE was the only constitutional way to postpone the elections, even though that would have been the strongest argument to use. Even if it is acknowledged that this justification prevailed, and that there were no alternatives to the SoE in order to keep the electoral activities constitutional, the very fashion in which the SoE was proclaimed without the National Assembly, and adopted disproportionate measures without parliamentary scrutiny leave a troublesome legacy. It remains to be seen how the Court will deal with separate initiatives filed against particular measures, especially the two general bans on movement for the elderly and for the whole population. Finally, what the practice of the European Court of Human Rights will be once it gets to deal with the unprecedented derogations that took place across the continent during the period observed remains to be seen.

After failing to react to the developing situation and to breaches of the Constitution during the SoE, the Court rushed to dismiss several initiatives filed against the decision to declare the SoE in preliminary examination without undertaking a full procedure, holding a public hearing or commissioning the legal opinions of leading scholars, as has now become customary in matters of great importance for the rule of law and constitutionality in the country. In a rather confusing manner, and with weak argumentation, the Court basically examined two questions – whether the declaration of the SoE was constitutional and whether the proclamation itself was made in a constitutional manner. Even if it is accepted that the gravity of the situation coupled with incapability of the Government and public services to handle the crisis dictated a need for the introduction of a SoE, the Court failed in grand manner to explain how bypassing Parliament and the executive capture of power was in line with the Constitution. Overall, the Court made a modest effort to analyse what constitutes an emergency, with one paragraph covering the case law of the ECtHR and a single reference to a scholarly work. Additionally, the Court's explanation that

the «health culture of citizens [and] mentality» can be seen as reasons to introduce a SoE echoes the overarching narrative of state officials who basically blamed different categories of citizens for the health emergency. The gravest doubts, however, are over the long term consequences which the handling of the crisis will have for democracy and the rule of law in the country. Will it remain a one-off episode in which decision makers faced with a(n) (un)known threat dealt with it in a (dis)proportionate manner? Or will it be the one more step in a worrying trend of democratic backsliding and autocracy?

Abstract

This study presents a preliminary analysis of the Serbian Government response to the COVID-19 crisis, concentrating on legal aspects – the proclamation of the State of Emergency (SoE) and subsequent human rights derogations imposed with the declared aim of curbing the epidemic. As is concluded in the analysis, many of the measures can be considered disproportionate and their implementation a sign of the illiberal backsliding of the country. The Decision of the Constitutional Court of Serbia to dismiss all initiatives regarding the unconstitutionality of the SoE is scrutinised in the light of the Court's traditional siding with the Government in power. It is concluded that the gravest doubts, however, are over the long term consequences which the handling of the crisis will have for democracy and the rule of law in the country, and that it is not easy to determine whether the crisis response was a sign of unpreparedness to deal with a(n) (un)known threat or rather a firm sign of growing authoritarianism.

Il presente studio rappresenta un'analisi preliminare della risposta del governo serbo alla crisi sanitaria da COVID-19, concentrandosi sui suoi aspetti giuridici: la proclamazione dello stato di emergenza e le conseguenti deroghe ai diritti umani imposte con l'obiettivo dichiarato di arginare l'epidemia. Come concluso nell'analisi, molte delle misure adottate possono ritenersi sproporzionate e la loro implementazione un segno del rovesciamento illiberale del paese. La decisione della Corte costituzionale della Serbia di respingere tutti i ricorsi relativi all'incostituzionalità dello stato di emergenza è esaminata alla luce del tradizionale schieramento della Corte con la compagine governativa al potere. Si è concluso che i dubbi più gravi, tuttavia, sono le conseguenze a lungo termine che la gestione della crisi avrà per la democrazia e lo stato di diritto nel paese, e che non è facile determinare se la risposta alla crisi sia stata un segno di

impreparazione nell'affrontare una minaccia (ig)nota o piuttosto un segno decisivo di un crescente autoritarismo.

Keywords

Serbia; State of Emergency; Constitutional Court; Constitutional Review, COVID-19.

CRISTINA GAZZETTA

L'OPPOSITION CONSTITUTIONNELLE EN TUNISIE ET AU MAROC: QUELQUES BRÈVES RÉFLEXIONS

«*La démocratie ne saurait exister sans majorité et minorité, majorité et opposition*».
M. Marzouki, Président *ad interim* Tunisien (2011-2014).

1. *Introduction: Printemps arabe, constitutionnalisme et principes chariatiques*

Le 17 décembre 2010, Mohamed Bouazizi, un vendeur ambulant de fruits et légumes s'est immolé par le feu à Tunis pour protester contre la saisie de ses biens par la police; ce geste isolé a donné lieu à une série de protestations et de révoltes dans les Pays de l'Afrique du Nord, entraînant des changements politiques aussi importants que différents les uns des autres et qui ont été considérés comme faisant partie du même mouvement appelé Printemps arabe. Mais il faut noter qu'il semble plus approprié de parler de Printemps arabes[1], en raison de la diversité des changements qui ont eu lieu, de la simple réforme constitutionnelle (Algérie) à la dissolution de l'ordre politique (Libye), au renouvellement du système politique et institutionnel (Maroc), jusqu'à ouvrir un nouveau cycle constitutionnel (Tunisie, Egypte).

[1] Voir F. Sahli, A. El Ouazzani, A. Peters (eds.), *Droit et mouvements sociaux: quelles interactions? Le cas des révoltes dans le monde arabe*, Touluse, 2017.

Les phénomènes politiques des Printemps arabes ont pris au dépourvu la plupart des chercheurs et des analystes occidentaux qui, du point de vue de la culture européenne (mais pas seulement), se sont trouvés spectateurs de la volonté de l'élite politique de reconstituer un nouvel ensemble de pouvoirs publics libéraux et démocratiques-constitutionnels, bien qu'en l'absence d'un espace public laïc, élément considéré comme essentiel pour la construction et le maintien d'un Etat démocratique et de droit, alors que, dans la plupart des cas, les élites militaires ont été, avec une partie significative de l'opinion publique, actrices incontestées de la prétendue réexpansion du «principe de l'ordre islamique»[2], qui oppose le paradigme typique de la culture politique occidentale, à celui islamique, holistique-communiste et conduisant, par exemple, à la croyance que la conquête de certains droits fondamentaux (tels que le pluralisme politique ou la transparence dans les opérations électorales) doit passer par une laïcisation, même partielle, de l'espace public[3].

La question mérite une attention particulière, car si nous entendons ici le Constitutionnalisme comme «limitant la doctrine du pouvoir» qui, par opposition à l'absolutisme qui s'est établi au cours des siècles précédents dans les Etats-nations européens soutenait avec force «la limitation de l'absolutisme du souverain et la conquête d'un système de garanties contre le pouvoir politique»[4], il semble alors que l'Islam, comme phénomène géopolitique ancien et complexe, soit incompatible avec le Constitutionnalisme même, entendu comme doctrine politico-juridique; donc il semble correct d'éviter la comparaison entre le Constitutionnalisme et la Charia, ensemble (extrêmement) vaste de principes, de normes primaires et secondaires, de jurisprudence, d'interprétations doctrinales et de coutumes locales et régionales.

Il semble donc plus approprié de se référer aux principes de la Charia comme hypothèses des systèmes juridiques du monde islamique, afin de vérifier si à la lumière de la définition ci-dessus de

[2] Voir C. Sbailò, *La riespansione del principio ordinatore islamico: riflessioni di metodo comparatistico e di dottrina costituzionale sulla "primavera araba"*, dans *Diritto pubblico comparato ed europeo*, 2012, III, 811 ss.

[3] Voir A.G. Sabet, *Islam and the Political Theory, Governance and International Relations*, London, 2008.

[4] Voir G. de Vergottini, *Diritto costituzionale comparato*, I, VIII ed., Padova, 2011, 337.

Constitutionnalisme on pourra vérifier si les systèmes d'Afrique du Nord correspondent au standard de la démocratie.

Si «le constitutionnalisme moderne […] s'articule autour de cinq noyaux forts: la constitution écrite […], le pouvoir constituant […], la déclaration des droits […], la séparation des pouvoirs […], le contrôle de constitutionnalité des lois […]»[5], il semble opportun de se demander si les principes de la Charia sont compatibles avec le constitutionnalisme ou s'il est possible d'envisager un système politique dans lequel, d'une part, les principes de la Charia sont placés au sommet des sources normatives et les valeurs islamiques sont reconnues comme base de la coexistence et, de l'autre, le respect des valeurs fondamentales du constitutionnalisme est garanti[6].

2. *Démocratie et opposition parlementaire: quelques éclaircissements (méthodologiques)*

En 1966, R.A. Dahl dans sa préface aux écrits *Political Opposition in Western Democracies*, affirmait que le développement de la démocratie était principalement dû à trois facteurs: le droit de participer à la formation des décisions politiques par le vote, le droit d'être représenté et le droit à une opposition politique organisée, à laquelle le droit d'expression contre la politique du gouvernement est reconnu, soit pendant les élections au sein du Parlement. Dahl, en indiquant l'opposition parlementaire parmi les éléments qui contribuent au développement de la démocratie, en a souligné deux aspects, qui sont enracinés dans l'ordre constitutionnel: le droit d'exister en tant qu'opposition politique et le système de garanties suffisantes pour permettre à la fonction d'opposition de se dérouler dans l'Assemblée parlementaire, où l'opposition politique peut s'exprimer à travers ses fonctions de critique, de contrôle et d'élaboration d'un projet politique alternatif à celui de la majorité[7].

Reconnaissant la difficulté de rechercher une définition aussi claire que précise du sens de l'opposition politique, il semble donc

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[5] Voir N. Matteucci, *Lo stato moderno. Lessico e percorsi*, Bologna, 1997, 128.

[6] Voir C. Sbailò, *"Identità religiosa" e "spazio pubblico": spunti di riflessione in una sentenza della Corte di giustizia dell'Unione Europea*, dans *Diritto pubblico comparato ed europeo*, 1, 2013, 260.

[7] Voir R.A. Dahl (eds.), *Political Opposition in Western Democracies*, New Haven-London, 1966, *Preface*, XIII.

nécessaire de rechercher la relation qui est à la base de l'opposition qu'on veut considérer, qui en sont les acteurs, quel en sont le contenu et ses enjeux et, enfin, définir la question des termes, des méthodes et des instruments, aux fins de la preuve de la nature démocratique effective des systèmes juridiques de l'Afrique du Nord[8].

Du point de vue de la méthodologie du droit comparé, l'exercice à réaliser suppose de considérer le «statut de l'opposition» comme modèle théorique de référence; après avoir défini le modèle en fonction des catégories actuelles, on examinera si et dans quelle mesure le modèle lui-même se reflète dans les Etats de l'Afrique du Nord.

Le thème de l'opposition parlementaire se caractérise par sa polyvalence et par ses innombrables implications historiques, politiques et sociales ainsi que juridiques, en obligeant à accorder une grande attention à la délimitation et la définition de l'objet de la recherche.

Pour sa part, le droit constitutionnel, tant interne que comparé, ne peut pas manquer de considérer l'interaction continue entre éléments politiques, éléments juridiques et éléments normatifs que le thème met en évidence[9], car l'opposition politique est considérée comme un facteur indéfectible des systèmes démocratiques libéraux.

L'opposition politique se manifestera de nombreuses formes, surtout celle qui a une importance constitutionnelle particulière, celle interne à l'Assemblée parlementaire, siège d'une importance institutionnelle maximale, car ici à la même opposition politique est reconnue la possibilité de s'exprimer par des fonctions de critique, de contrôle et d'élaboration d'un projet politique alternative à celle du Gouvernement.

Du rôle fondamental des partis politiques et du système des partis dans la dynamique de la dialectique typique entre les forces politiques majoritaires et celles de la minorité (qui s'opposent au projet politique du gouvernement), la difficulté pour le juriste de «définir» l'opposition se pose s'il se limite à regarder l'opposition par le rôle des partis politiques et la structure des systèmes des par-

[8] Voir O. Roy, *Le printemps arabe et le mythe de la nécessaire sécularisation*, dans *Socio*, 2, 2013, 25-36.

[9] Voir A. Rinella, *Materiali per uno studio di diritto comparato sullo Statuto costituzionale dell'"opposizione parlamentare"*, Trieste, 1999, en particulier 9-15.

tis[10]: en acceptant la thèse selon laquelle l'opposition est elle-même parmi les facteurs de développement de la démocratie[11], cette étude devra mettre l'accent sur la pertinence constitutionnelle du phénomène de l'opposition parlementaire, afin de mettre en évidence ses traits les plus exquisément juridiques.

Il est intéressant de noter que l'opposition parlementaire se qualifie comme telle car elle exerce son action de confrontation au sein du Parlement, de sorte que les règles et les outils de son action seront trouvés dans l'ensemble des règles, plus ou moins codifiées, que chaque système juridique se donne, dans ses sources constitutionnelles et ayant pour objet l'activité politique au sein de l'Assemblée parlementaire; on doit cependant préciser que la plupart des Constitutions contemporaines ne mentionne pas expressément l'opposition parlementaire, bien que, comme on le constatera ci-dessous, cela ne conduit pas à l'absence d'un cadre réglementaire de l'opposition elle-même[12].

Elaboré donc un modèle d'analyse du statut constitutionnel de l'opposition parlementaire, le présent ouvrage entend mettre en évidence la présence ou l'absence des éléments d'identification du modèle dans certains systèmes constitutionnels de l'Afrique du Nord puis vérifier le degré de démocraticité des systèmes considérés.

Le concept d'opposition politique (un concept certes polyédrique et relatif, mais qui dans ce contexte est considéré dans sa capacité d'opposition interne aux institutions du gouvernement, tout en laissant de côté l'opposition externe, comme celle qui peut être obtenue par les mouvements, les associations, les groupes de pression ou les associations de travailleurs) rappelle nécessairement la présence d'une relation dynamique entre pouvoir et contre-pouvoir, qui dans un ordre constitutionnel démocratique signifie la relation entre les sujets dominants (forces majoritaires et gouvernement) et les sujets qui s'opposent au projet du gouvernement à travers des instruments de critique et de contrôle (forces minoritaires et opposition)[13]. Avec la conséquence que, de ce point de vue, l'op-

[10] A. Rinella, *op. cit.*, 13.

[11] Voir R. Dahl, *op. cit.*, XVIII.

[12] Voir A. Del Monaco, *L'opposizione politica in trasformazione: a proposito di un convegno su «L'opposizione in Europa: Valori, Regole, Programmi»*, dans *Il Politico*, 4 (152), 1989, 641-650.

[13] C'est à dire forces de minorité et opposition; Voir O. Massari, *Natura e ruolo*

position politique ne peut pas se définir comme une simple force de résistance négative ou d'antithèse au pouvoir[14], puisque l'adhésion aux principes constitutionnels permet à la même opposition d'obtenir la reconnaissance et des garanties institutionnelles utiles à l'exercice de ses fonctions dans le débat parlementaire[15], en influençant ainsi les décisions politiques du gouvernement et en se délester du rôle absolument négatif de contre-pouvoir[16].

A propos de l'opposition interne aux institutions et aux pouvoirs constitués, on doit mentionner des formes d'opposition qui peuvent exister entre les organes constitutionnels[17] ou même l'opposition qui pourrait résulter de la célébration d'un référendum comme un outil dans les mains des minorités parlementaires «qualifiées», non pas exercé sur une loi déjà publiée, mais plutôt sur la délibération parlementaire[18].

Considérant la possibilité de catégoriser un système juridique comme démocratique si, parmi les éléments qui se combinent pour l'identifier, il existe un ensemble d'outils qui assurent légalement et

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delle opposizioni politico-parlamentari, dans O. Massari, A. Missiroli, G. Pasquino (a cura di), *Opposizione, governo ombra, alternativa*, Roma-Bari, 1990, 29.

[14] Voir A. Vulpius, *Die Allparteienregierung*, Frankfurt am Main-Berlin, 1957, 193 ss.

[15] Voir M. Kraiem Dridi, *L'opposition et le contre-pouvoir*, Tunis, 2017.

[16] Voir G. Burdeau, *Traité de science politique*, IV, Paris, 1968-1973, 339 ss., G. De Vergottini, *Lo shadow cabinet. Saggio comparativo sul rilievo costituzionale dell'opposizione nel regime parlamentare britannico*, Milano, 1973, 2; selon ces Auteurs, l'opposition doit être considérée comme une limite interne au pouvoir et non comme une simple force antigouvernementale.

[17] Il faut penser aux conflits d'autorité ou à la déclaration d'inconstitutionnalité d'une loi de la part des Cours constitutionnelles qui «coadiuvi [l'opposizione] a fare fronte e a resistere alla maggioranza: è la logica istituzionale che porta ad erigere o sviluppare un'istituzione per reazione contro il potere eccessivo di altra istituzione»; Voir L. Mezzetti, *Teorie della giustizia costituzionale e legittimazione degli organi di giustizia costituzionale*, in *Estudios Constitucionales*, Año 8, 1, 2010, 307.

[18] Voir H. Kelsen, *La democrazia*, dans *Il primato del Parlamento*, Milano, 1982, 180; selon l'Auteur si la plénitude de liberté s'expérimente au moment où l'individu exprime son vote avec la majorité, le même individu avertit immédiatement qu'il ne peut pas affirmer sa volonté quand, ayant changé d'opinion et en se retrouvant membre de la minorité, il ne réussit pas à former une majorité différente en faveur de son nouvel avis; donc la liberté de ceux qui ont voté la majorité se termine quand ils ne sont pas autorisés à changer d'avis. Cela peut être modifié en prévoyant un système complexe de mesures pour garantir et protéger les minorités et qui permettrait de réduire le principe de la majorité. Avec la conséquence que la majorité a donc le droit de prévaloir dans le respect des droits des minorités ou d'agir dans les limites de la minorité; Voir G. Sartori, *Democrazia. Cosa è*, Milano, 1993, 24.

efficacement la fonction de l'opposition politique, il semble superflu de rappeler que le cadre constitutionnel de référence devra reconnaître et protéger les droits et les libertés fondamentales, en particulier les droits politiques comme prémisse incontournable de la fonction d'opposition[19].

Lorsque l'on considère la fonction constitutionnelle de l'opposition comme non étrangère aux Constitutions catégorisées comme démocratiques, il est nécessaire de se demander quelles sont les dispositions constitutionnelles relatives à la même, explicites ou implicites, précisant la fonction d'opposition et quels sont ses principes fondamentaux, donc tout ce que permet de délimiter les éléments d'un statut constitutionnel de l'opposition[20].

L'observation de l'absence quasi générale de la formalisation constitutionnelle de l'opposition politique-parlementaire dans les systèmes démocratiques ne doit pas induire en erreur sur l'importance qu'elle assume dans les systèmes juridiques eux-mêmes, puisque les normes constitutionnelles (démocratiques) confèrent généralement des fonctions et des pouvoirs aux minorités organisées sur la base de la qualification démocratique de ces mêmes systèmes, de sorte que les groupes politiques représentés au Parlement, mais exclus du gouvernement, aient la faculté (la liberté politique) de jouer le rôle de l'opposition et ils agissent en tant que tels du gouvernement (expression de la majorité) et éventuellement de proposer une politique alternative (en rappelant que les minorités ne peuvent pas nécessairement être qualifiées d'opposition, même si elles coïncident souvent avec celle-ci[21] et font ainsi disparaître la séparation entre la sphère des droits politiques des minorités et la sphère des relations entre majorité et opposition)[22].

La recherche du degré d'institutionnalisation de la fonction de l'opposition politique, en l'absence de formalisation constitutionnelle, doit donc considérer la protection juridique réservée aux minorités d'opposition par la législation ordinaire, notamment les règlements parlementaires, mais aussi les pratiques, les conventions et les coutumes.

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[19] A. Rinella, *op. cit.*, 12.
[20] A. Rinella, *op. cit.*, 91-95.
[21] Voir A. Manzella, *Opposizione parlamentare*, dans *Enc. Giur.*, XXI, 1990, 1 ss.
[22] A. Rinella, *op. cit.*, 52-55.

Les règlements, les pratiques, les conventions et les coutumes parlementaires constituent donc, ensemble, ce qui a été défini comme le statut juridique de l'opposition[23] et qui répond à la nécessité d'assurer une situation juridique d'équilibre entre majorité et opposition dans l'accès aux instruments d'une politique active qui permette d'assurer un consensus minimum sur les questions essentielles, de ne pas rendre le choix de la majorité irréversible et de faciliter l'attente des exclus du système parlementaire[24].

Si nous excluons les systèmes dans lesquels l'opposition est reconnue officiellement, dans les systèmes juridiques où cela ne se produit pas, l'identification du sujet juridique ayant droit au statut, peut présenter certaines difficultés, avec la conséquence que sa reconnaissance doit également tenir compte de la fonction constitutionnelle qu'il accomplit, par des règles écrites et des règles non écrites, qui déterminent et règlent un ensemble de droits, de pouvoirs, de devoirs, de compétences et de moyens utiles aux minorités en général, qui représentent le sujet politique de l'opposition.

Assumé comme un fait certain que l'opposition parlementaire est un sujet dont les contours ne sont pas exclusivement juridiques, mais influencés par les circonstances et les conditions sociales et politiques, il est évident que le statut constitutionnel de l'opposition n'est qu'une partie du plus large statut juridique de l'opposition parlementaire; bien que son utilité soit incontestée pour fournir les informations de base qui permettent d'appréhender la fonction d'opposition, même si le degré d'efficacité de celle-ci est complètement indépendant de la discipline constitutionnelle. Concrètement, le statut sera constitué par les dispositions constitutionnelles qui: *a*) font explicitement référence à l'opposition politique-parlementaire; *b*) traitent implicitement des problèmes liés à la fonction d'opposition; *c*) concernent le *status*, le rôle et les pouvoirs des minorités politiques[25].

Il semble à peine nécessaire de souligner que les règles constitutionnelles relatives au statut de l'opposition sont liées à d'autres

[23] A. Rinella, *op. cit.*, 96-98.

[24] Voir S. Cassese, *Maggioranza e minoranza*, Milano, 1995, 37.

[25] A. Rinella, *op. cit.*, 91-124, en particulier 111-124; l'Auteur propose un modèle d'analyse, basé sur la dichotomie structurelle de l'opposition, sa composante organique et sa composante fonctionnelle, cette dernière, en particulier, faisant référence au dynamisme de l'opposition parlementaire et qui laisse généralement le champ à la règle de la majorité dans la phase de décision.

règles, elles-mêmes constitutionnelles, qui contiennent des principes et des règles fonctionnels relatifs au statut: par exemple, les prévisions de l'inviolabilité de certaines situations juridiques subjectives, le principe d'égalité ou même le calendrier et les délais pour lesquels les procédures de vérification du consensus et de la représentation politique sont activées, à travers des consultations électorales, afin d'assurer la survie du système démocratique en le protégeant du risque de la tyrannie de la majorité; avec la conséquence que l'opposition politique-parlementaire sera étroitement liée au contexte constitutionnel dans lequel elle vit[26].

3. *Le statut constitutionnel de l'opposition parlementaire après les Printemps arabes*

Malgré la difficulté d'une définition univoque des lignes évolutives des révoltes des Printemps arabes et bien conscients de l'instabilité du cadre institutionnel qui en découle, elles ont été saluées comme un «véritable tournant dans l'histoire contemporaine du monde arabe», similaire aux «Indépendances substantielles après la Seconde Guerre mondiale (…), la guerre des Six Jours de 1967, la mise en place des mouvements islamistes radicaux dans les années 1980 et 2000, le 11 septembre 2001»[27].

La caractéristique incontestée des Printemps semble être l'exigence de justice sociale et d'équité et surtout le renforcement des institutions publiques, une rationalisation de la protection sociale, afin de combattre l'autoritarisme pour ne pas laisser libres les revendications identitaires, surtout islamistes[28].

Les révoltes et la phase de transition qui en découle paraissent diversifiées et non uniformes, avec la conséquence que leur étude systématique devra réfléchir non aux modalités de la transition, mais plutôt sur les sujets de l'ordre constitutionnel et sur les relations qui se sont établies et qui sont en cours d'établissement entre les sujets eux-mêmes[29].

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[26] Voir S. Sicardi, *Maggioranze, minoranze e opposizione nel sistema costituzionale italiano*, Milano, 1984, 27.

[27] Voir M. Campanini, *Le rivolte arabe. Verso un nuovo modello politico?*, dans *Il Mulino*, 2, 2013, 289-297.

[28] Voir H. Haqqani, A. Stepan, J. Linz, *Islamists and the "Arab Spring"*, dans *Journal of Democracy*, April 2013, vol. 24, 2, 14-30.

[29] *Ex multis*, voir S. Hamid, *The Rise of Islamists, How Islamists Will Change Po-*

Le présent travail examine la Constitution du Maroc du 1er juillet 2011[30] et la Constitution de la Tunisie du 27 janvier 2014[31], puisque l'Assemblée constituante a opté pour une constitutionnalisation formelle de l'opposition parlementaire avec un véritable statut de l'opposition. A cet égard il faudra vérifier si cette constitutionalisation correspond à une reconnaissance réelle du pluralisme politique qui peut permettre à la même opposition de contraindre le pouvoir politique ou plutôt à la volonté de la majorité de recevoir sa légitimation par la même existence de l'opposition.

Il semble donc d'un certain intérêt de vérifier si ce choix correspond à la volonté de la majorité de garantir et protéger les droits et les libertés constitutionnels ou s'il répond à des exigences purement politiques de recherche du consensus de la minorité sur les choix de la majorité.

La constitutionnalisation de l'opposition parlementaire apparaît en droit comparé un choix assez rare[32], parce que en général les constituants ont montré, à cet égard, une certaine réticence, qui pourrait trouver sa justification dans la difficulté de définir une notion qui fait référence à «une réalité insaisissable quelque part entre droit et politique, entre le jeu des institutions et celui des rapports de forces»[33]. En général, il semble possible d'affirmer que l'opposition se distingue de la minorité parce qu'elle ne présuppose aucun jugement envers le détenteur du pouvoir (ici identifié comme la majorité politique), alors que l'opposition peut exprimer la désapprobation envers les décisions prises par la majorité politique et proposer des solutions alternatives à celles-ci.

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litics, and Vice Versa, dans *Foreign Affairs*, May-June 2011, 40-47; C. Merlini, O. Roy (eds.), *Arab Society in Revolt: The West's Mediterranean Challenge*, Whashington, 2012, *passim*.

[30] Voir O. Bendourou, *Les droits de l'homme dans la constitution marocaine de 2011: débats autour de certains droits et libertés*, dans *La Revue des droits de l'homme*, 6, 2014, 1-26.

[31] R. Ben Achour, *La Constitution tunisienne du 27 janvier 2014*, dans *Revue française de droit constitutionnel*, 4, 2014 (100), 783-801.

[32] Outre au Maroc et la Tunisie, on peut citer, par exemple, mais sans s'y limiter, les cas de la France, du Portugal et de Madagascar; Voir A. Gelblat, *De l'opposition constituante à l'opposition constitutionnelle: réflexion sur la constitutionnalisation de l'opposition parlementaire à partir des cas tunisien et marocain*, dans *La Revue des droits de l'homme*, 6, 2014, 1-21.

[33] C.M. Pimentel, *L'opposition ou le procès symbolique du pouvoir*, dans *Pouvoirs*, 108, (*L'opposition*), 2004, 45; selon l'Auteur l'opposition est «un rôle, une fonction endossée par un groupe, mais non-pas le groupe lui-même».

L'opposition est certainement qualifiée comme une activité complexe dont les manifestations varient en fonction de la situation politique dans laquelle elle trouve à s'exprimer, avec le résultat que, non sans difficulté, elle changera de rôle, de celui d'activité politique à celui d'institution juridique, car «la politique est saisie par le droit»[34].

La constitutionalisation de l'opposition devrait permettre la garantie du pluralisme politique et, par conséquent, de la démocratie, en représentant «une valeur en soi»[35], étroitement liée aux principes de la démocratie et de l'Etat de droit et, en même temps, protégée des risques de la tyrannie de la majorité, en pouvant ainsi mieux jouer le rôle d'anti-pouvoir[36].

Il semblerait donc que la reconnaissance constitutionnelle de l'opposition politique représente un outil essentiel pour défendre les principes libéraux et démocratiques de l'Etat, de sorte que la reconnaissance des droits de l'opposition aura une incidence sur la structure démocratique du pays[37], car l'octroi des droits et des libertés à l'opposition découlerait de la volonté de garantir au mieux les droits et les libertés constitutionnels, bien qu'il puisse sembler que la constitutionnalisation des droits de l'opposition parlementaire ne garantisse aucune logique des droits politiques à elle-même, ce n'est donc pas une question de limitation du pouvoir et non pas une question de limiter le pouvoir de la majorité par reconnaissance des droits de l'opposition.

L'inclusion des droits de l'opposition dans le texte constitutionnel se justifie principalement par des considérations politiques, qui confirment la volonté du constituant, autant tunisien que marocain, de légitimer le pouvoir de la majorité et non pas de fournir à l'opposition même les outils pour s'y opposer et pour soumettre des propositions alternatives, de sorte que la constitutionalisation de l'opposition parlementaire, contrairement à l'objectif visé, entraîne-

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[34] L. Favoreu, *La politique saisie par le droit: alternances, cohabitations et Conseil constitutionnel*, Paris, 1988, 153.

[35] M.C. Ponthoerau, *L'opposition comme garantie constitutionnelle*, dans *Revue de droit public et de science politique en France et à l'étranger*, 4, 2002, 1127.

[36] A. de Tocqueville, *De la démocratie en Amérique*, Paris, Gosselin, 1835, Vol. 2, P. 2, Chap. VII, 137.

[37] P. Avril, *Le statut de l'opposition: un feuilleton inachevé*, dans *Les petites affiches*, 254, 19 décembre 2008, 9.

rait le renforcement du pouvoir de la majorité et de la dépendance de l'opposition à la majorité même.

Le durcissement du régime en Tunisie a conduit à l'annulation de toute opposition politique au Parlement de l'ancien régime, processus qui est terminé par la fuite du président Ben Ali le 14 janvier 2011 et le passage du pouvoir législatif des Chambres au Président ad intérim, avec la conséquence de l'impossibilité pour l'opposition de s'exprimer comme si «le peuple souverain recouvre sa souveraineté et aucun acteur politique identifié ne peut revendiquer une légitimité révolutionnaire sinon le peuple lui-même»[38], de sorte que la nouvelle Assemblée nationale constituante aurait été guidée par la volonté de créer «une démocratisation non problématique et consensuelle»[39].

Au Maroc, c'est la figure du Roi qui donne vie au processus constitutionnel, après les luttes du Mouvement populaire du 20 Février 2011 (qui réclamait la mise en place d'une monarchie parlementaire et qui a agi en surprenant les partis politiques représentés au sein du Parlement), même si sans céder à la pression du Mouvement et à celle de l'opposition parlementaire, en présentant la procédure constituante comme participative (en réalité étant-elle entièrement à sens unique) et en confiant celle-ci à une Commission Consultative de Révision de la Constitution (qui ne comprend pas le Parlement dans le processus constituant et exclue donc l'opposition parlementaire), dont les travaux auraient dû être présentés au roi, dans les trois mois suivants, le texte d'une nouvelle Constitution avant de le soumettre à un référendum[40].

Il semble important qu'on ait ajouté à la Commission une instance nommée Mécanisme de Suivi politique de la Réforme constitutionnelle, présidée par le conseiller du Monarque et composée des dirigeants des partis politiques et des syndicats, dans le but (et, pourrait-on dire, avec le résultat) de «pallier le déficit de légitimité politique et démocratique dont souffre la Commission Consultative»[41].

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[38] J.P. Bras, *Le peuple est-il soluble dans la constitution? Leçons tunisiennes*, dans *L'année du Maghreb*, 8, 2012, 115.

[39] A. Allal, V. Geissier, *La Tunisie de l'après Ben-Ali, Les partis politiques à la recherche du peuple introuvable*, dans *Cultures et conflits*, 83, 2011, 118.

[40] A. Tourabi, L. Zaki, *Maroc: Une révolution royale?*, dans *Mouvements*, 66, 2011, 99.

[41] O. Bendourou, *La consécration de la monarchie gouvernante*, dans *L'année du Maghreb*, 8, 2012, 392.

En Tunisie, les différentes formes d'opposition au nouveau projet de Constitution ont été réprimées par le titulaire du pouvoir constituant et privées de toute protection juridique, de sorte que le processus constitutionnel est le résultat non pas du consensus, mais du principe majoritaire (on doit préciser que, non obstant l'exigence inutile de l'opposition de maintenir une procédure consensuelle pour la réalisation d'une nouvelle Constitution, son rôle est néanmoins déterminant dans la réalisation de la nouvelle Constitution, dont elle a provoqué la suspension des travaux en août et en novembre 2013, en obtenant des concessions importantes qui reconnaissent son rôle politique, à la fois pendant le moment constituant et, ensuite, au niveau constitutionnel[42].

Au Maroc, le désir du Roi de donner vie à une réforme constitutionnelle consensuelle a également conduit à ne pas tenir compte des critiques du nouveau projet de Constitution présenté par les différents partis politiques (de l'opposition) un mois après la connaissance du projet proposé par la Commission, tandis que le Roi présentait le projet dans un discours public le 17 juin, en annonçant un référendum sur le même texte le 1er juillet. Dans ce cas, le manque de transparence sur l'ensemble du processus constituant et la rapidité avec laquelle le Roi voulait appeler à un référendum ont donné lieu à ne pas tenir compte de l'opposition dans ce même processus et à réduire son rôle à une forme obligée de légitimation de l'octroi de la nouvelle Constitution par le monarque[43].

3. *Processus constitutionnel et opposition parlementaire*

En Tunisie comme au Maroc, le pouvoir constituant consacre spécifiquement un article de la Constitution à l'opposition parlementaire.

Cependant, le choix de la constitutionnalisation de l'opposition ne permet pas de préciser ses contours en tant qu'institution politique (reconnue) pour l'avenir, bien qu'elle ait une très forte valeur symbolique.

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[42] L. Chouikha, E. Gobe, *La Tunisie en 2012: heurs et malheurs d'une transition qui n'en finit pas*, dans *L'année du Maghreb*, 9, 2013, 388.

[43] M. Touzeil-Divina, *Un rendez-vous constituant manqué? Où fleuriront au Maroc le jasmin et la fleur d'oranger*, dans *Revue du droit public et de la science politique en France et à l'étranger*, 3, 2012, 691.

Mais le choix de constitutionnaliser l'opposition parlementaire n'est pas tout à fait évident, puisqu'il «contribue à faire de l'opposition parlementaire la seule forme d'opposition constitutionnellement légitime. L'opposition n'est pas appréhendée comme une activité, un comportement ou une attitude politique que chaque parlementaire est libre d'adopter mais comme un pouvoir constitué au positionnement prédéterminé. Dès lors, les droits qui lui sont reconnus sont octroyés aux groupes parlementaires et non aux parlementaires eux-mêmes. Il s'agit donc de compétences spécifiques, reconnues à une institution, et non d'un droit individuel du parlementaire à s'opposer. L'opposition ne peut être mise en œuvre qu'à l'échelle du groupe parlementaire et les députés qui n'appartiennent à aucun d'entre eux sont ignorés… La constitutionnalisation de l'opposition s'apparente ainsi à une recherche de structuration de l'espace et de l'activité parlementaire»[44]. Elle dirige l'activité de l'opposition vers le seul couple majorité / gouvernement. En tout état de cause, ces constitutions n'envisagent pas l'hypothèse d'une opposition au chef de l'Etat. Pourtant, au Maroc, le roi conserve malgré la révision constitutionnelle des pouvoirs importants[45]. D'ailleurs la constitutionnalisation de l'opposition peut être vue comme un moyen pour ce dernier de contrebalancer le transfert de pouvoirs qu'il consent au chef du Gouvernement pour conserver une situation enviable d'arbitre entre les deux camps. Quant à la Constitution tunisienne, elle attribue, au moins en théorie, des pouvoirs non négligeables au Président de la République[46]. Il n'est donc pas question de penser constitutionnellement une opposition présidentielle ou royale quand bien même ces institutions exerceraient effectivement des pouvoirs non négligeables. Dès lors, «l'octroi d'un statut à l'opposition peut être considéré comme un moyen de limiter ses cibles potentielles. Volontairement ou non, la constitutionnalisation de l'opposition contribue à réduire le champ des

[44] S. Milacic, *L'esprit de l'idée de contre-pouvoir en marche sur une généalogie inachevée*, dans R. Ben Achour (ed.), «*Constitution et contre-pouvoirs*», Carthage, 2015, 29-49.

[45] N. Barnoussi, *Les rapports entre les pouvoirs*, dans R. Ben Achour, *Les nouvelles constitutions arabes: Tunisie, Maroc, Égypte*, Carthage, 2015, 133-138.

[46] M. Kraiem Dridi, «*Le Chef de l'Etat dans la nouvelle Constitution tunisienne*», dans R. Ben Achour (ed.), *Les nouvelles constitutions arabes: Tunisie, Maroc, Égypte*, cité, 97-105.

oppositions politiques légitimes sans permettre d'identifier précisément celle qui peut se prévaloir de cette qualité»[47].

En particulier, il convient de noter que les Constitutions de la Tunisie et du Maroc ne fournissent pas d'outils utiles pour identifier l'opposition parlementaire, dont la définition apparaît certainement plus complexe que celle de minorité, puisque la première «renvoie à un positionnement politique, et non plus à un simple constat arithmétique»[48] et sa constitutionnalisation ne répond pas à la nécessité d'une identification claire et précise, mais plutôt à un besoin «éminemment symbolique»[49], bien que décisif en tant que compromis qui a pour objectif le bon fonctionnement des institutions et l'identification de la seule opposition légitime, en tant que «composante essentielle des deux chambres» (article 60 de la Constitution du Maroc) et «composition essentielle» de la Chambre des représentants (article 59 de la Constitution de la Tunisie).

4. *Droits et devoirs de l'opposition parlementaire*

Les nouvelles Constitutions de la Tunisie et du Maroc accordent pour la première fois des droits spécifiques à l'opposition parlementaire, afin de lui permettre de participer aux décisions prises par la majorité et qui sont conçus comme une contrepartie aux larges devoirs dont l'opposition elle-même est investie.

Il convient de noter que les droits spécifiquement attribués à l'opposition visent à associer les décisions parlementaires majoritaires à celle-ci et non à la protéger contre les actions de la majorité.

Au Maroc, la plupart des droits visés à l'article 10 de la Constitution ne sont pas spécifiquement dédiés à l'opposition. Certains d'eux réaffirment des droits déjà reconnus, plus généralement, ailleurs (comme la liberté d'opinion, d'expression et de réunion, déjà consacrées par les articles 25 et 29 de la Constitution ou le bénéfice du financement public ou encore la représentation des citoyens à travers les partis politiques déjà mentionnés à l'article 7 de

[47] A. Gelblat, *op. cit.*, 1-21.

[48] E. Thiers, *La majorité contrôlée par l'opposition: pierre philosophale de la nouvelle répartition des pouvoirs?*, dans *Pouvoirs*, 143 *(La séparation des pouvoirs)*, 2012, 63.

[49] A. Vidal-Naquet, *L'institutionnalisation de l'opposition*, dans *Revue française de droit constitutionnel*, 1, 77, 2009, 166.

la Constitution …). D'autres droits semblent être reconnus à tous les parlementaires, quelle que soit leur position vis-à-vis de la majorité gouvernementale (l'affirmation d'une participation effective au processus législatif et le contrôle de la politique gouvernementale, la représentation proportionnelle dans les organes parlementaires ou le droit d'obtenir les moyens nécessaires pour effectuer le travail parlementaire). Enfin, certains de ces droits ne semblent pas conférer des pouvoirs (comme l'«exercice du pouvoir dans le cadre d'une alternance démocratique»), alors que deux droits sont reconnus spécifiquement à l'opposition parlementaire: la présidence du Comité législatif de la Chambre des représentants et le droit de voir examiner ses propres propositions législatives (tous les mois) par l'Assemblée législative.

En Tunisie, l'article 60 de la Constitution affirme que la présidence du Comité des finances et la fonction de rapporteur de la Commission des affaires étrangères sont reconnus à l'opposition. De plus, chaque année, l'opposition peut demander la création d'une Commission d'enquête qu'elle a le droit de présider. Par le biais du droit à la présidence de certaines commissions parlementaires, l'opposition, est informée, au moins partiellement, de l'activité du gouvernement sur laquelle elle exerce une forme de contrôle, y compris le droit de constituer une Commission d'enquête. Au Maroc, l'opposition est associée, à travers la discussion de ses propositions législatives, à la fonction législative, donc elle peut ainsi faire connaître un projet de loi alternatif à celui de la majorité.

Le contraste entre les droits de l'opposition garantis par la Constitution et ceux dont l'exercice est reconnu à une minorité de parlementaires, auxquels sont accordés des droits individuels (c'est-à-dire à chaque parlementaire) et qui ne peuvent être exercés collectivement, est tout à fait clair: on peut penser, par exemple, au droit de proposer la procédure du contrôle de constitutionnalité des lois.

Selon l'article 117 de la Constitution de la Tunisie, le droit de recours devant la Cour constitutionnelle est reconnu à trente parlementaires.

Au Maroc, conformément à l'article 132 de la Constitution, les lois et les accords internationaux peuvent être déférés à la Cour constitutionnelle par un cinquième de la Chambre des représentants ou quarante membres de la Chambre des conseillers.

Cette disposition apparaît comme une mesure de protection des droits des minorités. De même, si un membre requiert la majorité qualifiée pour un vote auquel il attache une certaine importance, cette exigence ne peut aller à l'encontre des droits fondamentaux de la minorité par une majorité potentiellement oppressive.

Comme dans le cas de la révision constitutionnelle pour laquelle une majorité qualifiée des deux tiers est requise à la fois en Tunisie (article 140 de la Constitution) et au Maroc (articles 173 et 174 de la Constitution).

La même logique est à la base de la désignation des juges constitutionnels, pour lesquels une majorité de trois cinquièmes est requise en Tunisie (article 115 de la Constitution), mais seulement deux tiers au Maroc (article 130 de la Constitution).

Les droits accordés à la minorité peuvent également être utilisés par l'opposition parlementaire, mais selon une logique distincte puisque dans le premier cas ils seront utilisés conformément à une logique négative, et ils permettent à la minorité le droit d'exister dans une logique de séparation des pouvoirs, typique des revendications des Printemps arabes[50], alors que dans le cas de l'opposition parlementaire, dans une logique tout à fait positive, de tels droits favorisent la réalisation de la politique majoritaire, en justifiant, à certains égards, aussi bien en Tunisie comme au Maroc, que la reconnaissance des droits de l'opposition parlementaire (constitutionnelle) s'accompagne de l'affirmation de ses devoirs.

Il a été noté (dans le cas de la France, mais de toute évidence cela est valable dans ces études de cas) que les droits de l'opposition parlementaire reconnus par les deux Constitutions affaiblissent le principe de proportionnalité, également garanti par la Constitution car «ce que l'on désigne (avec un peu d'emphase) sous le terme de 'statut' de l'opposition s'analyse en une discrimination positive, c'est-à-dire une dérogation aux principes d'égalité et de proportionnalité qui régissent la situation des partis et des groupes parlementaires en droit public: égalité dans l'expression, notamment à l'occasion des élections, proportionnalité dans la participation des

[50] M. Touzeil-Divina, *Un rendez-vous constituant manqué? Où fleuriront au Maroc le jasmin et la fleur d'oranger*, dans *Revue du droit public et de la science politique en France et à l'étranger*, 3, 2012, 691.

groupes au fonctionnement des assemblées conformément à leur importance numérique, la proportionnalité n'étant en l'espèce que le corollaire de l'égalité entre les élus. Le 'statut' évoqué depuis des lustres réside essentiellement dans l'attribution à certains partis et à certains groupes de prérogatives supérieures à celles que leur assure normalement cette importance numérique»[51]; avec la conséquence que l'opposition devra se montrer «prête à assumer ses devoirs et, en particulier, à jouer loyalement son rôle de critique du gouvernement sans contester les 'règles du jeu'»[52].

En Tunisie l'article 60 de la Constitution affirme que «l'opposition est une composante principale de l'Assemblée des représentants du peuple. […] Il lui incombe de participer activement et de façon constructive au travail parlementaire»; au Maroc, l'article 10 de la Constitution affirme que «les groupes d'opposition sont tenus d'apporter une contribution active et constructive au travail parlementaire».

L'opposition ne peut donc pas simplement critiquer les décisions politiques de la majorité, mais elle est investie par son propre devoir par sa participation et sa coopération, à la fois «actives» et «constructives», puisque la Constitution fonctionne dans le sens d'un équilibre de droits reconnus à la même opposition avec la reconnaissance de la titularité de ses devoirs. La participation et la coopération deviennent donc la mission de l'opposition même, en vue du bon fonctionnement des institutions, dont la responsabilité apparaît donc partagée entre majorité et opposition, avec pour conséquence que le recours à l'obstruction par une partie de l'opposition est évidemment limité par la constitutionnalisation des devoirs parlementaires de l'opposition, c'est-à-dire par la reconnaissance de son «statut constitutionnel».

L'article 10 de la Constitution du Maroc établit que «les modalités d'exercice par les groupes de l'opposition des droits sont fixés, selon le cas, par des lois organiques ou des lois ou encore, par le règlement intérieur de chaque Chambre du Parlement» et l'article 69 de la Constitution affirme que ce sont précisément les règlements qui déterminent «les règles d'appartenance, de composi-

[51] P. Avril, *Le statut de l'opposition: un feuilleton inachevé*, dans *Les petites affiches*, 254, 19 décembre 2008, 9.

[52] M.C. Ponthoerau, *L'opposition comme garantie constitutionnelle*, dans *Revue de droit public et de science politique en France et à l'étranger*, 4, 2002, 1127.

tion et de fonctionnement concernant les groupes et groupements parlementaires et les droits spécifiques aux groupes d'opposition».

En Tunisie, au contraire, la Constitution ne se réfère pas explicitement à d'autres normes, puisque l'article 58 de la Constitution se borne à déclarer que l'Assemblée a le «droit de former et de présider une commission d'enquête», donc selon des normes inférieures, bien qu'il ne semble pas que la majorité soit obligée d'adopter de tels actes.

En particulier, au Maroc, après un premier examen préliminaire du règlement intérieur de la Chambre des représentants en janvier 2012, un deuxième règlement fut rédigé à l'été 2013; de même, après un refus initial du Conseil Constitutionnel, la Chambre des Conseillers a récemment adopté un nouveau règlement intérieur. Il faut souligner que ces règles prévoient, pour leur approbation, une majorité absolue et non des majorités qualifiées, avec la conséquence que la même majorité déterminera les modalités d'exercice des droits de l'opposition; de cette manière, les mêmes droits pourront être élargis ou restreints en fonction de la majorité qui sera au pouvoir et la majorité risque de devenir le «juge de l'attitude 'positive' ou 'constructive' de l'opposition, sous le contrôle éventuel d'un Président de chambre dont l'autorité est toutefois corrélée au crédit que lui accorde l'opposition quant à son impartialité. Si les dispositions constitutionnelles visent à protéger l'opposition, elles peuvent tout aussi bien aboutir à accroitre sa mise sous tutelle par le pouvoir majoritaire. Si le but affiché d'une telle constitutionnalisation est l'établissement d'un contrôle par l'opposition d'un Gouvernement majoritaire et responsable, il ouvre pourtant la voie à un contrôle par le Gouvernement majoritaire de la responsabilité de l'opposition»[53].

La question qui se pose est si l'opposition peut faire appel à la Cour constitutionnelle pour dénoncer la violation des droits qui lui sont garantis constitutionnellement.

Selon l'article 117 de la Constitution Tunisienne et l'article 132 de la Constitution marocaine les tribunaux constitutionnels sont appelés à réaliser un contrôle *a priori* des règlements parlementaires et l'opposition parlementaire peut saisir la Cour constitutionnelle favorisant ainsi le contrôle volontaire et concret de la constitution-

[53] A. Gelblat, *op. cit.*, 1-21.

nalité des lois a posteriori (qui doit être joint aux violations éventuelles des droits propres à l'opposition).

Si la plupart des droits de l'opposition se réfèrent à un plus grand contrôle des activités du gouvernement, plutôt qu'à l'*iter* de la loi, il semble que les juges constitutionnels marocains et tunisiens ne soient pas appelés à régler les différends qui peuvent survenir entre le Parlement et Gouvernement.

Mais au Maroc, le Gouvernement ou le Président de la Chambre peuvent faire appel à la Cour constitutionnelle pour une controverse éventuelle sur les commissions d'enquête.

D'autre part, en Tunisie, conformément à l'article 99 de la Constitution, la Cour constitutionnelle est compétente pour juger les conflits de compétence entre l'exécutif et le législatif, mais il semble très peu probable qu'ici la question d'inconstitutionnalité pourrait conduire à la défense des droits de l'opposition et à un examen réel de ces conflits par le tribunal constitutionnel[54].

Au Maroc l'article 133 de la Constitution parle exclusivement des «droits et libertés garantis par la Constitution» et, en effet, la Cour constitutionnelle marocaine ne semble pas vouloir se lancer dans un examen concret du droit parlementaire, en manifestant une certaine retenue à cet égard[55]. Avec la conséquence que la Cour constitutionnelle ne se présentera pas comme la garante des droits de l'opposition parlementaire.

L'opposition parlementaire, par conséquent, ne participe ni au Maroc ni en Tunisie à la reconnaissance et à la protection des droits garantis par la Constitution en sa faveur, car sa légitimation est di-

[54] Il semble approprié de noter que le 3 décembre 2015, l'Assemblée du peuple a approuvé la loi organique n. 2015/50, portant création de la Cour constitutionnelle tunisienne, dont le Chapitre V (articles 62 à 64) est consacré au contrôle de constitutionnalité des règlements de l'Assemblée des représentants du peuple; le retard dans la création de la Cour constitutionnelle se justifie par les difficultés liées à l'approbation de la loi sur la création du Conseil supérieur de la magistrature du 23 mars 2016 (à laquelle la Constitution attribue la nomination de quatre juges constitutionnels); la non-entrée en vigueur de l'organe de justice constitutionnelle semble encore plus grave lorsqu'on considère que de nombreuses lois de nature autoritaire sont toujours en vigueur dans le système juridique tunisien, qui ne peut cependant pas être purgé à ce jour, car l'Instance provisoire pour le contrôle de constitutionnalité des lois est compétente pour statuer uniquement sur les projets de loi approuvés par l'Assemblée des représentants du peuple et elle ne peut donc pas juger les lois en vigueur; Voir T. Abbiate, *Tunisia - approvata la legge che istituisce la Corte costituzionale*, dans *Diritto pubblico comparato ed europeo online*, 1, 2016, 377-381.

rectement liée à l'action du pouvoir constituant (expression directe des forces majoritaires) et la protection est seulement réservée à l'interprétation éventuelle du juge constitutionnel.

5. *En conclusion*

À la lumière de ces brèves considérations, il semble opportun d'insister sur la relation entre les principes de la Charia, le constitutionnalisme et la démocratie en Tunisie et au Maroc, à travers la lecture du «statut constitutionnel» de l'opposition parlementaire comme un test de démocraticité, en particulier des Pays examinés.

Si l'on considère la définition du Constitutionnalisme comme «doctrine de limitation du pouvoir»[56], il faudra se demander s'il est possible de parler des limites du pouvoir politique dans les systèmes qui sont inspirés par les principes de la Charia et qui permettent une reconstruction des droits et des devoirs dans une vision communautaire (islamiste) du pouvoir et de l'espace public.

En effet, ici, l'espace public n'est pas identifié par la réunion de plusieurs volontés, individuelles ou collectives, mais plutôt par le bien-être de la communauté universelle[57], qui est un don de Dieu, dont le respect est *conditio sine qua non* pour la reconnaissance de cet espace public (commun) avec pour résultat que le droit positif cède à la loi divine et la limite au pouvoir politique est définie par la volonté de Dieu, c'est-à-dire l'intérêt de l'*Umma*, laquelle, selon le Coran est la communauté des fidèles[58].

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[55] En particulier, elle est déclarée incompétente à juger l'élection du Président de la Chambre et elle s'est refusée de statuer sur les litiges relatifs à la formation des groupes parlementaires et des associations, *Décision du Conseil constitutionnel* n ° 830-2012 du 14 février 2012, BO n ° 6025 du 27 février 2012, 745.

[56] G. de Vergottini, *op. cit.*, 337.

[57] M. Oliviero, *Il Costituzionalismo dei Paesi Arabi, Le Costituzioni del Maghreb*, Milano, 2003, 7, n. 11; F. Castro, *Diritto Musulmano*, dans *Dig. Disc. Civil.*, Torino, 2010; A.G. Sabet, *Islam and the Political Theory, Governance and International Relations*, London, 2008.

[58] Il faut même rappeler que les nouvelles Constitutions post-révolutionnaires des Pays de l'Afrique du Nord semblent reconnaître l'identité arabo-musulmane comme identité culturelle de la nation et, dans quelques cas, même de l'Etat; voir A. Amor, *La place de l'Islam dans les constitutions des États arabes, modèle théorique et réalité juridique*, dans *Islam et droits de l'homme*, Paris, 1994, 20; N. Bernard-Maugiron, *Les réformes constitutionnelles dans les Pays arabes en transition*, Paris, 2013, 54.

Le peuple, source de légitimation du caractère islamique du régime, est ici reconnu comme un élément constitutif de l'Etat, à condition qu'il reconnaisse la souveraineté de Dieu; par conséquence, la légitimation du pouvoir trouvera ses limites dans la volonté de Dieu, entendue comme bien-être de la communauté universelle, établie par Dieu lui-même, et non dans la limite, toute occidentale, des droits inaliénables de la personne humaine. La Charia se présentera alors comme une voie à suivre pour construire et défendre la civilisation humaine, en soumettant l'espace public à Dieu, à travers le processus nécessaire d'islamisation de la société[59].

Il ne semble donc pas surprenant que, en Tunisie et au Maroc le statut constitutionnel de l'opposition parlementaire est si présent, non comme instrument de garantie du pluralisme politique et d'affirmation des principes démocratiques à travers la reconnaissance du droit de limiter le pouvoir de la majorité, mais plutôt comme son exploitation par la majorité, pour légitimer son pouvoir, selon le principe divin du bien-être de la communauté universelle établie par le Créateur.

La constitutionnalisation de l'opposition parlementaire implique non seulement son identification et non simplement son activité politique, mais aussi sa reconnaissance en tant qu'institution juridique[60].

La constitutionnalisation de l'opposition apparaît ici comme un outil de démocraticité: telle constitutionalisation court le risque de faire de l'opposition parlementaire la seule opposition légitime, car elle ne correspondrait pas à plusieurs activités, comportements ou attitudes politiques que chaque député a le droit d'adopter aux fins de la réalisation éventuelle de l'alternance politique entre la majorité et l'opposition, mais plutôt elle semble s'identifier à un pouvoir constitué: par exemple, l'article 61 para. 1 de la Constitution du Maroc affirme que «Tout membre de l'une des deux Chambres qui renonce à son appartenance politique au nom de laquelle il s'est porté candidat aux élections ou le groupe ou groupement parlementaire auquel il appartient, est déchu de son mandat»; avec le résultat que les droits ne sont pas reconnus aux parlemen-

[59] K. Abou El Fadl, *Rebellion and violence in Islamic Law*, Cambridge, 2002.

[60] L. Favoreu, *La politique saisie par le droit: alternances, cohabitations et Conseil constitutionnel*, Paris, 1988, 153.

taires, mais plutôt aux groupes politiques auxquels ils appartiennent et qui se configurent donc comme institution juridique (cela ne permet aucune reconnaissance, politique ou juridique, aux parlementaires qui ne sont pas membres des groupes de l'opposition reconnue, bien que les Constitutions du Maroc et de la Tunisie ne disent rien sur les voies et sur les moyens d'une telle reconnaissance).

Au sein des deux Constitutions, la valeur constitutionnelle de l'opposition parlementaire semblerait donc justifiée par la volonté des constituants de vouloir en faire un symbole fort de démocratie et de rupture avec le passé, avec la conséquence que l'opposition parlementaire serait définie comme une composante essentielle de l'organe parlementaire (tout en augmentant sa dépendance vis-à-vis des pouvoirs constitués) et la Constitution comme moteur des changements politiques[61]: l'opposition sera donc "contrainte" de jouer une fonction "positive" de légitimation des choix politiques majoritaires pour éviter le risque de ne pouvoir exercer les droits que la Constitution lui reconnaît.

A cet égard on peut rappeler que «l'opposition parlementaire qui se caractérise par sa critique de l'action du gouvernement, trouve dans le parlement un moyen privilégié d'expression»[62], et, par conséquence, les notions de contre-pouvoir et d'opposition convergent autour de l'exigence démocratique de limitation des pouvoirs, car «par la définition même, la majorité suppose l'existence d'une minorité et, par conséquence, le droit de la majorité suppose le droit d'une minorité à l'existence»[63].

Abstract

Dahl (1966), indicated parliamentary opposition as one of the elements that contribute to the development of democracy. In particular, he highlighted two aspects: the right of political opposition to exist and a system of adequate safeguards that allow the opposition to exercise their functions and to indicate alternative policies to those of the majority.

[61] L. Heuschling, «*La Constitution formelle*», in M. Troper, D. Chagnollaud (dir.), *Traité international de droit constitutionnel: Théorie de la Constitution* (Tome 1), Paris, 2012, 294.

[62] O. Duhamel, Y. Meny, *Dictionnaire constitutionnel*, Paris, 1993, 667 ss.

[63] H. Kelsen, *La démocratie. Sa nature - Sa valeur*, (trad. C. Eisemann), Rééd, 2004, 63.

Bearing in mind the difficulty of finding a clear and precise definition of political opposition, it is, in any case, of scholarly interest to examine the role of the opposition in Tunisia and Morocco in order to verify how effective their democracy is within the new constitutional orders that arose after the Arab spring.

Dahl (1966), indicava l'opposizione parlamentare tra gli elementi che contribuiscono allo sviluppo della democrazia, mettendone in rilievo due aspetti, il diritto di esistere come opposizione politica e il sistema delle garanzie idonee sufficienti a consentire lo svolgimento della funzione oppositoria e di un indirizzo politico alternativo a quello della maggioranza. Riconosciuta la difficoltà di ricercare una definizione che sia la più chiara e la più precisa possibile del significato dell'opposizione politica, appare interessante una sua indagine in Tunisia e in Marocco al fine di verificare l'effettiva democraticità dei due nuovi ordini costituzionali sorti dopo la Primavera araba.

TATIANA S. MASLOVSKAYA

ELEMENTS D'ANALYSE SUR L'ÉTAT DE LA DÉMOCRATIE DANS LES PAYS DE LA COMMUNAUTÉ DES ETATS INDÉPENDANTS

1. *Introduction*

Cette analyse a pour objet d'identifier les questions relatives au concept de démocratie, tant dans sa dimension libérale que dans sa dimension non libérale, dans les systèmes constitutionnels des pays de la CEI. L'analyse portera notamment, sur l'Arménie, la Biélorussie, le Kazakhstan, la Russie, le Turkménistan, le Tadjikistan. En parallèle, nous prendrons en compte, en tant que de besoin, les règles propres à d'autres Etats.

Nous partirons du constat selon lequel les textes constitutionnels reprennent pour l'essentiel les standards occidentaux de ce que l'on appelle la démocratie libérale, pour déterminer ce qui relève de ses principes libéraux ou non libéraux, avant d'analyser la manière dont ces principes sont mis en œuvre et de tenter d'expliquer les spécificités qui caractérisent la manière dont la démocratie et le libéralisme sont compris dans ces pays de l'espace post soviétique.

J'aborderai donc deux points:

I - Le cadre juridique dans lequel s'inscrit la notion de démocratie dans les pays de la CEI

II - Le contenu et les limites de la démocratie libérale dans les systèmes politiques des pays de la CEI.

2. *La notion de démocratie et le cadre juridique de sa mise en œuvre dans les pays de la CEI*

L'ambiguïté du concept de démocratie tient non seulement aux différences qui affectent l'analyse théorique, mais aussi au contexte historique, politique et social dans lequel il s'exprime, que l'on songe à l'évolution politique qui conduit à des formes tribales de gouvernement, au libéralisme classique en passant par la démocratie athénienne. L'intérêt pour l'étude du concept, des formes historiques de démocratie dans la littérature juridique des pays de la CEI, est apparu dans les années 1990[1]. Dans la littérature moderne sur le droit constitutionnel de l'espace post-soviétique, les études approfondies du phénomène de la démocratie, y compris l'analyse de la démocratie libérale et non libérale, ne sont pas très répandues[2].

Le triomphe de la démocratie libérale[3] est lié à une certaine société civile, à des formes constitutionnelles de gouvernement, à une conception de la souveraineté du peuple et à la reconnaissance des droits inaliénables des citoyens. Les principales caractéristiques du modèle moderne de la démocratie libérale tel que l'on peut l'identifier aujourd'hui sont:

1) l'individualisme, qui se traduit de fait par la priorité des droits de l'individu sur les intérêts de l'État;

2) l'absolutisation de la liberté, qui n'est pas comprise comme la participation active des citoyens en politique, mais comme l'absence de coercition et de restrictions dans les activités individuelles;

3) le parlementarisme, c'est-à-dire la prédominance des formes représentatives en politique;

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[1] Cf. A.I. Kovler, *Formes historiques de la démocratie: problèmes de théorie politique et juridique*, Moscou, 1990; V.A. Chetvernin, *Etat constitutionnel démocratique: introduction à la théorie*, Moscou, 1993; A.A. Golovko, *Principes de base de la démocratie* in *Bulletin de la Cour constitutionnelle de la République du Bélarus*, 1997, 2; A.I. Kovler, *Crise de la démocratie? La démocratie au tournant du 21e siècle*, Moscou, 1997.

[2] A.A. Golovko, *Fondements théoriques de la démocratie (aspect constitutionnel)*, Minsk, 2003; V. Komarova, *Le mécanisme de la démocratie directe de la Russie moderne (système et procédures)*, Moscou, 2006; L.A. Nudnenko, *Théorie de la démocratie*, Moscou, 2001; A.V. Petrov, *Démocratie moderne: théories et pratiques*, Irkoutsk, 2013; T. E. Voronova. *Modèle de démocratie du Kazakhstan: expérience et caractéristiques*, Pavlodar, 2015.

[3] Cf. F.P. Benoit, *La Démocratie libérale*, Paris, 1978.

4) la non-ingérence de l'Etat dans la sphère privée et dans l'économie;

5) la limitation du pouvoir de la majorité sur la minorité afin de garantir les droits des minorités et des individus.

Il existe d'autres conceptions de la démocratie. On relèvera de ce point de vue que le terme démocratie est toujours accompagné d'un adjectif qui la qualifie, probablement du fait qu'il est impossible d'identifier une démocratie pure. Ainsi a-t-on pu parler de démocratie collectiviste, démocratie plébiscitaire, démocratie déléguée, etc. En effet, la *démocratie présente de multiples facettes*, et peut combiner des éléments de démocratie directe (référendum et participation au travail des organes locaux), de démocratie représentative, sur la base de la coordination et de l'équilibre entre les intérêts des divers groupes sociaux et la protection législative des droits et libertés individuels. En toute hypothèse, la démocratie présente certaines exigences: liberté d'expression et d'association, suffrage universel, etc.

La démocratie ne renvoie donc pas à une doctrine globale et définitive[4], elle s'est adaptée à des situations et à des contextes particuliers, qu'il convient de prendre en considération. Ainsi le même terme a pu recouvrir des réalités et des formes très différentes, qui certes renvoient à des formes de gouvernement ou de régime politique, mais à propos desquelles il convient de s'interroger sur la pertinence de l'emploi de ce terme. Dans certaines de ces hypothèses, *le terme de démocratie a une connotation idéologique plus qu'il ne renvoie à un concept juridique précis*[5]. De ce point de vue, le contexte social, politique, historique des pays de la CEI est particulier à partir du moment où certains de ces Etats ont commencé à passer du socialisme à un régime qui se rapprocherait de la démocratie libérale, sans cependant en retenir tous les éléments.

Après la proclamation de des indépendances au début de 1990 de nouvelles constitutions ont été adoptées dans tous les pays de la Communauté des Etats Indépendants (CEI). L'adoption même de la Constitution était le résultat des changements qui étaient en train de se produire dans ces pays. *Ces changements, créés par le l'appé-*

[4] P. Ardant, B. Mathieu, *Droit constitutionnel et institutions politiques*, 29 edition, Paris, 164.

[5] Cf. B. Mathieu, *Le droit contre la démocratie?*, Paris, 2017.

tence des peuples (biélorusse, russe, ukrainien etc.) *pour la liberté, le droit et la démocratie*, ont conduit à l'effondrement du système socialiste, ce qui a engendré des changements significatifs dans l'ordre juridique mondial. Des processus de globalisation se sont superposés à ces événements, apportant avec eux de nouveaux changements dont certains effets positifs ne relèvent pas de l'évidence.

Bien sûr, il faut se rappeler que le processus de démocratisation peut prendre beaucoup de temps. Dans ce contexte, on peut se référer à l'affirmation par Giovanni Sartori, qui a déclaré que la démocratisation est «le processus en deux étapes qui consiste à sortir de la dictature, puis à accéder à la démocratie». Ainsi, «quand on sort d'un régime, on n'entre pas ipso facto dans un nouveau régime»[6].

La démocratie est un mécanisme qui ne peut s'apprécier de manière isolée. Comme le note le professeur Kovler la démocratie dans le monde post-communiste s'accompagne d'une phénomène plus global de modernisation qu'elle conditionne. Cependant, il n'y a pas et ne peut pas y avoir de voie universelle vers la démocratisation[7].

En réalité, dans la pratique, l'affirmation dans la constitution de valeurs démocratiques libérales ne suffit pas à faire exister un système politique réellement libéral et démocratique. En ce sens, la littérature juridique scientifique utilise parfois le terme «démocratie transitionnelle» pour les Etats qui se trouvent dans un processus de transition. Quelle que soit la préférence qui peut se manifester en faveur de la structure démocratique de la société et de l'État, nous ne devons pas oublier que les pays occidentaux ont mis plusieurs siècles pour faire ce chemin et cette évolution ne s'est pas produite "d'un seul saut"[8]. Comme dit justement B. Mathieu, «La démocratie libérale n'est pas, par nature, un modèle universel, elle est le produit d'une évolution historique et politique et correspond à des mentalités»[9].

La constitution est la «carte de visite» de tout État. Elle établit les valeurs et les principes du fonctionnement de l'État et de la so-

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[6] G. Sartori, *Repenser la démocratie: mauvais régimes et mauvaises politiques* dans *Revue Internationale des Sciences Sociales*, 129, août 1991, 466.

[7] Cf. A.I. Kovler. *Crise de la démocratie? La démocratie au tournant du 21e siècle*, Moscou, 1997.

[8] V. D. Zorkin, *Le droit du pouvoir et le pouvoir du droit // http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=71.*

[9] Cf. Mathieu, *Le droit contre la démocratie?*, cit.

ciété. La constitution définit les caractéristiques de l'Etat y compris son caractère démocratique.

Le concept de la démocratie[10] se traduit de différentes manières dans les constitutions des pays de la CEI. D'une part, toute les constitutions post-soviétiques font référence à la démocratie. Par exemple, l'article premier de la Constitution biélorusse de 1994 (modifiée en 1996 et 2004) proclame que la République de Biélorussie est un État démocratique. Il est de même pour la Constitution de la Fédération de Russie (article 1), celle du Kazakhstan dont l'article 1 al. 1 fait référence à l'existence d'un Etat démocratique, laïc, social et de droit dont les valeurs les plus élevées sont l'individu, sa vie, ses droits et sa liberté (alinéa 1 art. 1). Il en est également ainsi s'agissant des constitutions de la Moldavie (art. 1), du Kirghizistan, du Turkménistan, de l'Arménie etc.

Notons que certaines constitutions consolident *le caractère démocratique de l'Etat comme une réalité objective établie* (Arménie, Russie), d'autres soulignent à travers le prisme des tâches relevant de l'Etat que tel est *le but vers lequel l'Etat se dirig* (Azerbaïdjan, Kazakhstan). La deuxième approche est jugée préférable pour les pays qualifiés de «jeune démocratie». Elle signifie que le gouvernement a *l'intention* de développer un système démocratique respectueux des droits et les libertés de chaque citoyen (préambule de la Constitution de la Biélorussie), ou d'assurer, dans le cadre de la constitution, l'ordre démocratique (préambule de la Constitution de l'Azerbaïdjan). Cette approche vise également à souligner le caractère irréversible du processus.

Par ailleurs, les constitutions fixent dans d'autres dispositions certains éléments ou principes qui relèvent de la démocratie[11]. Si l'on fait abstraction des conditions de mise en œuvre de ces principes, il convient de relever que les pays de la CEI, sont des États inscrits dans une logique démocratique. On y retrouve un certain nombre d'indicateurs «de base» d'un Etat démocratique, notamment:

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[10] Cf. H. Kelsen, *La démocratie, sa nature, sa valeur*, Paris, 1932; R. Aron, *Démocratie et totalitarisme*, Paris, 1965.

[11] Dans la littérature juridique française, on trouve parfois le terme «conditions de démocratie». Par exemple, P. Pactet et F. Melin-Soucramanien identifient les conditions de la démocratie, ils distinguent les conditions nécessaires et les conditions favorables. Voir, Id., *Droit constitutionnel*, Paris, 2012, 77.

1) L'affirmation, qui a déjà été soulignée, selon laquelle la personne et ses droits et libertés, constituent la valeur suprême de la société et de l'État[12] et la référence à la reconnaissance internationale de ces droits et libertés;

2) L'établissement des principes du pluralisme économique, social, politique et idéologique[13] et le renvoi à la loi pour leur mise en œuvre.

3) Des dispositions relatives aux conditions dans lesquelles le peuple exerce son pouvoir, directement ou par l'intermédiaire d'organes créés par l'État et d'autres autorités publiques[14].

4) Le principe du suffrage universel et égal dans le cadre d'élections libres à bulletins secrets, notamment pour l'élection des chambres basses des parlements et d'autres organes représentatifs.

5) La libre concurrence entre les partis politiques qui remplissent les exigences de la constitution et des lois au sujet de la compétition pour le leadership au sein de l'Etat.

6) Le principe d'unité du pouvoir de l'État et de division de ses branches (séparation du pouvoir)[15].

7) L'adoption dans les organes politiques collégiaux de la règle majoritaire tout en prenant en compte et en garantissant les droits de la minorité.

8) La référence à des méthodes démocratiques de gouvernement.

9) La responsabilité des pouvoirs publics et des fonctionnaires vis-à-vis des populations aux différents échelles de gouvernement[16].

10) La réelle mise en œuvre des dispositions démocratiques de la constitution à travers les normes juridiques démocratiques et la pratique politique étatique[17].

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[12] Art. 2 de la Constitution biélorusse, art. 2 de la Constitution de la Fédération de la Russie.

[13] Art. 4, 5 de la Constitution biélorusse, art. 8, 13 de la Constitution de la Fédération de la Russie.

[14] Art. 3 de la Constitution biélorusse, art. 3 de la Constitution de la Fédération de la Russie.

[15] Art. 7 de la Constitution biélorusse.

[16] Pour la responsabilité du Chef de l'Etat dans les pays de la CEI on peut voir T. Maslovskaya, *L'immunité du chef de l'Etat dans les pays de la CEI et la séparation des pouvoirs judiciaire et exécutif*. Contribution présentée au Congrès mondial de droit constitutionnel, Oslo, 19 juin 2014.

[17] V. E. Chirkin (ed.), *La Constitution au XXIe siècle: une étude juridique comparative*, Moscou, 2011, 325-326.

Alors même que tous ces indicateurs ne figurent pas dans toutes les constitutions des pays de la CEI, la véritable question ne porte pas sur l'analyse détaillée du contenu de ces textes mais sur la véritable incarnation de ces principes dans la réalité.

3. *Le contenu et les limites de la démocratie libérale dans les systèmes politiques des pays de la CEI*

Les systèmes politiques des pays de la CEI sont des systèmes «jeunes», ayant à la fois des spécificités et des points communs. Nés dans les mêmes conditions, sur le même «sol», unissant des peuples qui pendant 70 ans formaient un seul peuple soviétique, ils ont pris à la fin du XX siècle la même voie de la démocratie libérale. Si certains de ces pays sont encore au début de ce processus (Turkménistan, Tadjikistan), d'autres États, ont tenté de faire, ce que l'on peut considérer «un saut artificiel» vers la démocratie libérale.

Selon la juste expression du Professeur français B. Mathieu, «La démocratie libérale est un système qui met en œuvre deux principes: le principe démocratique – qui renvoie à la souveraineté du Peuple, comme instrument de légitimation du pouvoir - et le principe libéral – qui implique la limitation du pouvoir (séparation des pouvoirs et droits fondamentaux)»[18].

Si le principe démocratique, est établi par les législations et la pratique des pays de la CEI, selon bon nombre d'opinions doctrinales étrangères, ces pays ne respectent pas le principe libéral. Ainsi, aujourd'hui, certains Etats de la CEI se réfèrent à la notion de démocratie non libérale. Elle renvoie à un système où la volonté du Peuple, qui se manifeste par l'élection de représentants ou le referendum, prévaut sur les instruments de limitation du pouvoir.

C'est le politologue américain Fareed Zakaria, qui a forgé l'expression de «démocratie illibérale», dans un article publié dans la revue Foreign Affairs en 1997[19]. Il remarquait déjà, à l'époque, un phénomène politique qui s'est beaucoup répandu depuis: des régimes qui conservent les procédures électorales classiques, mais qui restreignent les droits civiques.

La question de l'existence de la démocratie non libérale a été

[18] P. Ardant, B. Mathieu, cit., 164.
[19] *https://www.foreignaffairs.com/articles/1997-11-01/rise-illiberal-democracy*.

posée sous un nouveau angle par Bertrand Mathieu[20]. Sans aborder les arguments théoriques sur l'existence et la compatibilité du concept de démocratie non libérale[21] (la démocratie peut-elle être non libérale? les démocraties peuvent-elles exister en l'absence du libéralisme?), notons que ce concept a récemment été appliqué à des pays tels que la Russie et d'autres États post-soviétiques.

Prenant en compte cette distinction entre démocratie et libéralisme et en se bornant à analyser le système institutionnel, faisant abstraction, pour le moment, de la question des droits fondamentaux, les lignes qui suivent visent à appréhender la réalité de la démocratie dans les pays de la CEI.

Il convient d'abord de considérer que, pour que la démocratie ne soit pas seulement et formellement un principe de légitimation, sans prise réelle sur la vie politique, un certain nombre de conditions doivent être remplies. Dans sa forme représentative, qui est, rappelons-le, la seule possible dans une société politique étendue, elle implique, pour l'essentiel, des élections libres et disputées à intervalles réguliers. Elle comprend la liberté d'expression, l'existence d'une opposition[22].

Au cœur de la démocratie se trouve la participation du peuple à la gestion des affaires de la société et de l'État. Ce principe général est consacré dans toutes les constitutions des pays de la CEI. La constitution dispose que le peuple est la seule source du pouvoir de l'État et le porteur de la souveraineté.

Ce pouvoir du peuple se manifeste d'abord par *les élections.* Afin de garantir le caractère véritablement démocratique d'un régime politique, il est indispensable que les principes relatifs au suffrage soient consacrés par la Constitution et les règles fixées de manière suffisamment précise pour éviter toute part d'arbitraire dans leur application[23]. Ces règles et ces principes concernent à la fois les électeurs, l'élection et l'élu[24].

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[20] Cf. B. Mathieu, *Le droit contre la démocratie?*, cit.

[21] Cf. L. Jeume, *Démocratie illibéral: nouvelle notion?* Dans *Constitutions. Revue de droit constitutionnel appliqué, avril-juin 2019.*

[22] cf. B. Mathieu, *Le droit contre la démocratie?*, cit.

[23] L. Favoreu, P. Gaia, R. Ghevontian, J.L. Mestre, O. Pfersmann, A. Roux. G. Scoffoni, *Droit constitutionnel*, Paris, 2015, 611.

[24] T. Maslovskaya, *Les conditions d'accès aux élections: quelle incidence sur les résultats électoraux?* dans *Revue Est Europa. Revue d'études politiques et constitutionnelles*, Bayonne, 2016-2017, 131-142.

Les principes d'élections libres, universelles, égalitaires, au scrutin direct et secret sont garantis par la Constitution dans de nombreux pays de la CEI: Arménie (art. 7), Azerbaïdjan (alinéa 2, art. 2), Biélorussie (art. 64-68), Kirghizstan (alinéa 4 art. 2), Ukraine (art. 71) etc. Les lois électorales prévoient des dispositions plus précises[25].

Les élections présidentielles et législatives dans les pays de la CEI ont lieu à intervalles réguliers. Parallèlement, comme le montre la pratique, dans plusieurs pays les partis politiques participent assez activement à ce processus (Arménie, Géorgie, Russie, Ukraine) et dans d'autres, le rôle des partis politiques dans le processus électoral est minimal (Biélorussie, Turkménistan, Tadjikistan).

Dans certains pays de la CEI pour les élections de portée nationale, notamment les élections parlementaires, il est très difficile de se présenter, et d'avoir des chances d'être élu, si l'on n'est pas investi et soutenu par un parti politique. Il en est ainsi dans la Fédération de la Russie, au Kazakhstan, au Kirghizstan et en Arménie**.** Dans ces pays les partis politiques jouent un rôle, non seulement pour la désignation des candidats mais aussi dans la répartition des mandats au regard du caractère proportionnel du mode de scrutin (totalement ou partiellement).

Le mode de scrutin exerce en effet une influence directe sur le rôle des partis dans le processus électoral. Dans de nombreux pays de la CEI, on est passé d'un scrutin majoritaire à un scrutin proportionnel pour élire les membres de la chambre basse ou unique du parlement[26], ce qui a contribué au développement d'un système des partis. La Biélorussie a choisi une autre voie. On peut trouver une explication à ce choix dans la volonté de ne pas créer un système multipartiste qui, au regard d'une situation politique spéci-

[25] On peut remarquer qu'immédiatement après la proclamation de l'indépendance des Etats ex-soviétiques, au début de 1990, ont été adoptées des lois électorales régissant respectivement les élections présidentielles, législatives et locales. La législation électorale dans les pays de la CEI se développe dans le sens du respect d'élections pluralistes qui conditionnent l'existence d'une véritable démocratie représentative, en tenant compte des normes internationales et européennes. Dans le même temps, l'espace issu de l'ex Union- soviétique a formé ses propres standards électoraux, comme en témoigne l'adoption en 2002 de la Convention de la CEI.

[26] Par exemple, au Kazakhstan après la réforme constitutionnelle de 2007, au Kirghizstan après la réforme constitutionnelle de 2010, en Arménie suite à la réforme constitutionnelle de 2015 – qui n'est pas encore entrée en vigueur.

fique, pourrait être considéré comme artificiel. De ce point de vue, chaque Etat doit trouver non pas un système électoral théorique optimal mais tenir compte de l'expérience historique, des traditions nationales et de la culture juridique.

Par ailleurs dans certains cas, c'est le principe démocratique lui-même qui est en cause lorsque le Chef de l'Etat intervient dans la désignation de son successeur. Ce fut le cas en Azerbaïdjan et au Turkménistan. Le caractère démocratique de cette pratique est très douteux.

Le pouvoir du peuple s'exprime aussi par la voie référendaire. Au cours des 25 années d'existence des nouveaux États indépendants, leurs dirigeants ont souvent soumis au référendum, des questions généralement liées à l'adoption de réforme constitutionnelle ou à la demande d'un vote de confiance au chef de l'État. Il a été recouru au référendum constituant en Azerbaïdjan (la révision constitutionnelle de 2016), au Kazakhstan (la révision constitutionnelle de 1998 et de 2007), et en Arménie (référendums constitutionnels de 2005 et surtout de 2015 qui a prévoit le passage à un système parlementaire), et au référendum-plébiscite en Biélorussie en 2004.

Les principaux changements constitutionnels dans les pays de la CEI concernent le statut ou les attributions du président, ce qui n'est pas sans incidence sur les systèmes politiques. Le plus souvent ces dispositions relatives au chef de l'Etat ont été modifiées par référendum:

– la durée du mandat présidentiel (dans le sens de son allongement) – Arménie, Azerbaïdjan, Russie,

– les limites des mandats (ont été supprimées par référendum en Azerbaïdjan en 2009, Biélorussie en 2004, pour le Premier Président de Kazakhstan en 2007),

– le renforcement des attributions de Chef de l'Etat (la révision constitutionnelle en Biélorussie de 1996) ou la réduction des compétences du chef de l'Etat (Kazakhstan en 2017, de l'Arménie en 2015, de Kirghizstan de 2010);

– la constitutionnalisation du statut du Premier président du pays – le Leader de la Nation, en raison de son rôle historique particulier (Kazakhstan, Tadjikistan) avec un certain nombre de privilèges qui s'attachent à son statut.

Dans ces systèmes politiques marqués par l'existence d'un Leader, le pouvoir est «personnalisé», la figure du chef de l'Etat est dé-

cisive non seulement en tant que détenteur de pouvoirs importants, mais aussi en termes de détermination de l'orientation idéologique et politique de l'Etat. Cette «personnalisation» du pouvoir peut être fixée juridiquement, comme en témoignent les exemples de certains pays de la CEI – le Kazakhstan et le Tadjikistan.

La loi constitutionnelle de la République du Kazakhstan «Sur le Premier Président de la République du Kazakhstan – Leader de la Nation» a été adoptée par le Parlement le 27 juin 2000. Cette loi détermine le statut politique et juridique du Premier Président du Kazakhstan, en tant que chef de la Nation, ainsi que ses prérogatives et ses garanties à l'issue de l'exercice de ses fonctions.

La même approche est utilisée au Tadjikistan. La loi de la République du Tadjikistan «Sur le Fondateur de la paix et de l'unité nationale – Leader de la Nation» du 25 décembre 2015 lui reconnaît une immunité (art. 4). La loi fixe le rôle du chef de l'Etat en tant que fondateur de la paix et de l'unité nationale, symbole de la pérennité de l'Etat souverain tadjik, à vie. La loi définit ses droits et privilèges, y compris les garanties sociales et les mesures de sécurité dont il bénéficie.

Mais le pluralisme est également l'une des conditions d'une réelle démocratie. Son principe est inscrit dans les constitutions des pays de la CEI. Par exemple, l'article 4 de la Constitution de la République de Biélorussie dispose que «La démocratie dans la République de Biélorussie est exercée sur la base de la diversité des institutions politiques, des idéologies et des opinions. L'idéologie des partis politiques, des associations religieuses et autres, des groupes sociaux ne peut être rendue obligatoire pour les citoyens». Ce texte renvoie à l'existence d'un système multipartiste.

Mais en réalité dans les pays de la CEI, il n'existe pas de tradition démocratique ayant permis l'émergence d'un système multipartite. Le monopole d'un parti et d'une idéologie est fortement enraciné dans la pensée et la conscience d'un grand nombre de citoyens. La proclamation constitutionnelle d'un système multipartite dans de nombreux pays de la CEI n'a donc pas généré un réel multipartisme contrairement à ce qui s'est passé dans un certain nombre de pays d'Europe centrale n'ayant pas la même tradition (par exemple, en Pologne, au début des années 1990 environ 200 partis politiques se sont formés). La construction démocratique a été conçue comme le développement progressif d'un système poli-

tique basé sur une diversité de points de vue et d'institutions politiques.

Cependant dans les premières années qui ont suivi l'indépendance des pays de la CEI on a assisté à un développement de l'activité politique des citoyens et à l'amorce d'un système multipartiste. Par exemple, en Biélorussie le nombre de partis politiques enregistrés a atteint 43, mais leur membres étaient peu nombreux. En 2009 en Biélorussie, il y avait 17 partis et aujourd'hui, 15 partis sont enregistrés. Une tendance similaire est caractéristique de nombreux pays de la CEI, à l'exception de l'Ukraine, qui compte aujourd'hui plus de 300 partis politiques. Il y a 54 partis enregistrés en Russie, plus de 70 en Arménie, 7 au Kazakhstan, 5 au Ouzbékistan, 3 au Turkménistan.

Il n'en reste pas moins que ces systèmes sont caractérisés par une absence de multipartisme réel qui prend diverses formes.

Dans certains pays de la CEI un parti dominant coexiste avec d'autres partis beaucoup plus faibles. C'est la cas notamment en Russie – «Russie unie», en Azerbaïdjan – «Nouvel Azerbaïdjan», au Kazakhstan – «Lumière de la Patrie». Ainsi, la création d'un «parti du pouvoir» est devenue une caractéristique des régimes politiques de nombreux pays de la CEI.

Dans d'autres pays de la CEI, les partis politiques sont inactifs (comme, par exemple, en Biélorussie)[27] ou peu nombreux (Ouzbékistan, Turkménistan, Tadjikistan). Depuis 1991, il y avait un parti politique au Turkménistan – le Parti démocratique du Turkménistan («parti du pouvoir»). Avec un système multipartite formellement proclamé constitutionnellement, le Turkménistan est resté pendant longtemps un état avec un «système quasi-multipartite». En réalité, il y avait un parti unique au Turkménistan de 1991 à 2012. Pour la première fois en 2012 dans le pays a été adoptée la loi «Sur les partis politiques», qui a servi de fondement pour la formation d'un véritable système multipartite. À ce jour, le Turkménistan

[27] Lors des élections législatives qui se sont tenues le 11 septembre 2016 en Biélorussie, 9 partis politiques, parmi les 15 enregistrés, ont présenté plus de la moitié de l'ensemble des 630 candidats, soit – 387, mais seulement 16 des 110 députés élus de la Chambre des représentants représentent 5 des 15 partis politiques enregistrés en Biélorussie. Lors des élections législatives qui se sont tenues le 17 novembre 2019 en Biélorussie, 12 partis politiques, parmi les 15 enregistrés, ont présenté 325 candidats sur 562 candidats enregistrés. Seulement 21 des 110 députés élus à la Chambre des représentants sont membres des 5 sur 15 partis politiques enregistrés en Biélorussie.

a trois partis politiques: le Parti démocratique du Turkménistan au pouvoir, le Parti des industriels et des entrepreneurs et le Parti agraire.

Il y a quatre partis politiques en Ouzbékistan: le Parti démocratique d'Ouzbékistan «Milliy Tiklanish», le Parti démocratique libéral d'Ouzbékistan, le Parti démocratique populaire d'Ouzbékistan et le Parti social-démocrate d'Ouzbékistan «Adolat». Ce n'est pas le nombre des partis qui est intéressant mais le fonctionnement du système partisan. Après 2005, le Parti démocratique populaire d'Ouzbékistan s'est proclamé comme le parti de l'opposition parlementaire. Le principal problème est de savoir si les partis de l'opposition peuvent effectivement exercer leurs activités, ou s'ils sont soumis à des restrictions de la part de l'État.

Autre condition d'une réelle démocratie, le respect des droits de l'opposition n'est pas reconnu par les constitutions des pays de la CEI. Pourtant, l'opposition existe dans certains de ces pays et elle tente d'influer sur le processus politique. En particulier, le Front populaire a été créé dans les années 1990 au Tadjikistan, parti d'opposition au départ, il a finalement porté au pouvoir le Président actuel, E. Rahmon.

En avril 2018, en Arménie, l'opposition a dirigé des manifestations populaires pacifiques contre la nomination de l'ex-président Serge Sarkissian au poste de Premier ministre. En effet, en accédant à la présidence, en décembre 2015, S. Sarkissian a initié un référendum constitutionnel qui a donné lieu à une transition vers une république parlementaire. A cette occasion le nouveau président avait déclaré qu'il ne serait pas candidat aux fonctions de Président ou de Premier ministre, afin que personne ne doute de ses intentions démocratiques et libérales. A la suite de ces manifestations de 2018, Serge Sarkissian et le gouvernement ont démissionné, le Parlement a élu (lors d'une deuxième tentative) comme premier ministre le leader de l'opposition Nikol Pashinyan.

Cet exemple démontre que le «lobbying de la rue», la pression de la rue, peut directement influencer la formation du gouvernement. Les mouvements de protestation s'insèrent ainsi dans le processus démocratique, mais faute de procédures, les risques de manipulation des masses populaires existent. En tout état de cause une scission de cette nature au sein de la société, présente des risques importants pour le développement du pays.

Si l'on aborde la question des droits fondamentaux, dans leur conception individualiste qui est au «cœur» du libéralisme, il convient de relever que les constitutions actuelles des pays de la CEI incluent, comme on l'a vu, le catalogue universel des droits et des libertés, basé sur les standards internationaux.

Pour apprécier la réalité des choses, il faut encore se tourner vers l'histoire. Les Constitutions soviétiques ignoraient les droits individuels. Les titulaires des droits et libertés étaient des «*travailleurs*» et non des individus. La Constitution de 1936 a introduit les droits du citoyen, mais leur source se trouvaient dans l'Etat. La Constitution de 1977 avait un chapitre, inscrit à la fin du texte, sur les droits de l'homme appelé «l'Etat et l'individu» Il y était affirmé que le *citoyen*, et non l'individu, disposait d'un ensemble de droits et libertés. Selon l'expression d'un célèbre savant russe, spécialiste dans le domaine des droits de l'homme Elena Andréevna Lukashova: «Les processus qui ont eu lieu après la Révolution d'Octobre, n'étaient pas des écarts aléatoires dans le développement du pays. Ils étaient naturels pour la Russie, qui était définie par sa communauté idéologie anti-individualiste, avec l'obéissance aveugle à l'autorité, avec un rejet psychologique massif de toutes les manifestations personnelles…»[28].

«L'idéologie des droits humains inaliénables, de la liberté et de l'égalité formelle des sujets comme principes fondamentaux de la régulation juridique, …n'est pas générée par la pratique sociale russe»[29].

Pour mieux comprendre les caractéristiques des constitutions dans l'espace post-soviétique, tournons-nous vers l'analyse de A.I. Kovler «L'Etat de droit et les droits de l'homme». Selon le professeur A. Kovler, «A bien des égards, la Constitution russe de 1993 a été rédigée comme construite sur l'opposition de la thèse et de l'antithèse. Par exemple, prenons n'importe quel article des deux premiers chapitres de la Constitution – ils sont, bien sûr, construits sur une antithèse. Ainsi, selon l'article 13: «La Fédération de Russie reconnaît la diversité idéologique, aucune idéologie ne peut être établie en tant qu'idéologie d'État ou obligatoire», ù…. Nous compre-

[28] Citation sur le A.I. Kovler, *L'Etat de droit et les droits de l'homme // http://www.ksrf.ru/ru/Info/Reading/Pages/PerformanceKovler.aspx.*

[29] A.I. Kovler, *op. cit.*

nons parfaitement le sens de ce message. J'explique souvent à mes étudiants occidentaux, d'où [cette disposition] vient, à savoir la négation du passé. Ils demandent: «Pourquoi est-il nécessaire d'écrire de telles choses élémentaires – la censure est annulée ou interdite»? Oui, parce que nous nions l'expérience du passé. Nous écrivons: «La Fédération de Russie reconnaît la diversité politique, le multipartisme». Était-il nécessaire d'écrire ceci? C'est nécessaire. Parce que cela diffère de l'article 6 de la Constitution de 1977»[30].

Ainsi, la «clé» des références à la démocratie dans les constitutions actuelles des pays de la CEI devrait être recherchée dans l'histoire de ces États. Mais la mise en œuvre des droits et libertés constitutionnels dans l'espace post-soviétique a ses propres particularités qui divergent de la conception actuelle qui prévaut dans les pays occidentaux et qui place au premier plan l'absolu des droits et libertés de l'individu.

Une *caractéristique* des constitutions des pays de la CEI est le *pluralisme des valeurs*[31], qui se manifeste dans la détermination simultanée à la fois de valeurs démocratiques occidentales libérales (comme l'humanisme, la séparation des pouvoirs, le pluralisme, etc.), et de valeurs communautaires (le dialogue social, la responsabilité sociale, etc.).

À cet égard, il convient de noter que dans la tradition juridique russe et biélorusse, l'accent est mis sur le principe de solidarité[32]. La conception parfois exclusivement libérale et individualiste des

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[30] *Ibidem.*

[31] T. Maslovskaya. *Les procédures de saisines directes ou indirectes des juridictions constitutionnelles par les justiciables* in *Revue Est Europa. Revue d'études politiques et constitutionnelles*, Bayonne, numero special 2016-1 «L'invocabilité des principes constitutionnels par les citoyens dans les pays de l'Est de l'Europe», 2016, 28.

[32] Notons que l'article premier de la Constitution biélorusse de 1994 proclame que la République du Biélorussie est un État démocratique et un État de droit. La réalisation des droits, libertés et garanties de l'individu constitue le but et la valeur suprêmes de la société et de l'État (art. 2). La Constitution de la République de Biélorussie fixe les valeurs libérales et démocratiques des pays de l'Europe occidentale (par exemple, l'humanisme (art. 2), la souveraineté populaire (art. 3), le pluralisme (art. 4), le séparation et l'équilibre des pouvoirs (art. 6), la suprématie du droit (art. 7), l'égalité (art. 22) etc., qui ne sont pas le résultat d'une évolution de la société biélorusse. D'autre part, le constitutionalisme biélorusse se caractérise par le pluralisme des valeurs qui comprend également les valeurs communautaires (anglais - *communitarian*), par exemple, le principe d'Etat social (art. 1), le dialogue social, la responsabilité sociale (art. 13, art. 14), le droit d'un niveau de vie digne (art. 21), le droit à l'éducation gratuite (art. 49) etc.

droits de l'homme, qui est dominante dans la jurisprudence de la Cour européenne des droits de l'homme, peut se trouver en porte à faux, comme en témoignent certaines décisions de la Cour constitutionnelle russe.

En 2014, cette juridiction a examiné la constitutionnalité de l'article 6.21 du Code administratif de la Fédération de Russie, qui établit l'interdiction de la propagande contre des relations sexuelles «non traditionnelles», c'est-à-dire entre personnes du même sexe, chez les mineurs.

La Cour constitutionnelle a considéré que, d'une part, l'Etat doit prendre des mesures visant à éliminer les éventuelles violations des droits et intérêts légitimes des personnes en raison de leur orientation sexuelle, et à assurer une protection de leurs droits sur la base de l'article 19 (partie 1) de la Constitution de la Fédération de Russie, à savoir, le principe de l'égalité de tous devant la loi et la justice. Ce principe implique notamment l'interdiction de discriminations positives ou négatives en raison de l'appartenance à un groupe social particulier, se définissant notamment par son orientation sexuelle. D'autre part, en se fondant sur les exigences de l'article 17 (partie 3) et 55 (partie 3) de la Constitution, la Cour a considéré que l'exercice du droit des citoyens à diffuser les informations relatives aux questions d'autodétermination sexuelle de l'individu ne doit pas porter atteinte aux droits et libertés d'autrui, et qu'un équilibre doit être assuré entre les valeurs constitutionnellement reconnues. Par conséquent, compte tenu du caractère sensible de ces questions liées à la sphère de l'autonomie individuelle, l'Etat a le droit d'apporter certaines restrictions à la diffusion de telles informations si elle prennent un caractère agressif et intrusif et sont susceptibles de nuire, aux intérêts légitimes des mineurs. En conséquence, la diffusion de prises de position relatives à l'orientation sexuelle et à des formes spécifiques de relations sexuelles, ne doit pas porter atteinte à la dignité d'autrui et à la moralité publique dans le sens que lui reconnait la société russe, sauf à violer l'ordre public.

La Cour constitutionnelle a relevé que l'objectif poursuivi par le législateur fédéral dans l'établissement de ces normes pour protéger les mineurs contre l'exposition à des informations qui pourraient les inciter à des relations sexuelles «non traditionnelles» est de protéger la famille dans le sens que lui donne les traditions et la

Constitution russes. Il a néanmoins tenu compte du fait que ces restrictions ciblaient les mineurs et ne faisaient ainsi pas obstacle à l'exercice du droit constitutionnel de la liberté d'information dans ce domaine.

4. *Quelques mots en conclusion*

Les pays de la CEI ont d'importantes particularités culturelles et historiques, qui expliquent les difficultés à adopter, au-delà d'une reconnaissance formelle, la démocratie libérale durant la période de transition. Mais aujourd'hui, nous observons l'affaiblissement de l'influence du passé communiste dans le choix des voies de développement de ces pays.

Il n'en reste pas moins que la démocratie ne peut se pratiquer de manière abstraite sans tenir compte de la culture, des traditions et des institutions de chaque pays. Si certains standards minimaux s'imposent, qu'il conviendrait d'ailleurs de définir comme socle minimum, ou plus petit dénominateur commun, il n'est pas possible de transposer tel quel le modèle de démocratie libérale occidentale qui ne nous semble pas approprié pour tous les pays du monde et notamment ceux de la CEI.

Dans de nombreux pays, nous voyons que le libéralisme, notamment, sous la forme de ce que l'on appelle l'Etat de droit, c'est-à-dire l'ensemble des limitations apportées à l'exercice du pouvoir l'emporte sur le principe démocratique, c'est-à-dire le mode de légitimation du pouvoir.

Il convient de rappeler que l'éminent juriste et philosophe russe, le libéral B. Chicherin (1828-1904), qui défendait un libéralisme[33] compatible avec les réalités de la vie russe avait érigé en devise de gouvernement «Mesures libérales et gouvernement fort»[34]. Cette formule caractérise bien le défi qui se pose à tous les gouvernements, mais pas nécessairement dans les mêmes termes selon les pays.

Le mouvement vers la démocratie renvoie non seulement à une exigence qui présente un caractère universel, mais c'est aussi un

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[33] V.D. Zorkin, *La justice constitutionnelle au stade transitoire du développement historique de la Russie // http://www.ksrf.ru/ru/News/Speech/Pages/ViewItem.aspx?ParamId=75*.

[34] B.N. Chicherin, *Mémoires*, Moscou, 1929-1934, 3, 24.

vecteur de développement économique pour les pays de la CEI. L'expérience de l'Europe occidentale constitue incontestablement une référence utile et fertile. La première limite à cette évolution tient au fait que la transition du totalitarisme à la démocratie n'est pas facile. Sur cette voie, les pays de la CEI doivent surmonter plusieurs difficultés et s'habituer *in concreto* à des procédures démocratiques, dont ils n'ont jamais eu l'usage. La seconde limite devrait probablement conduire à déterminer quels sont les critères minimums communs d'un système démocratique, tout en acceptant, qu'au-delà, des modèles différents et adaptés aux sociétés auxquelles ils ont vocation à s'appliquer puissent être adoptés. A défaut le risque du rejet d'un modèle jugé utopique et inadapté, ou au contraire celui d'une démocratie libérale de façade qui n'existerait que dans les textes mais non dans la réalité, ne peuvent être exclus.

De ce point de vue, la situation des pays de la CEI illustre la tension entre la volonté d'accéder à la démocratie et une histoire particulière ainsi qu'une une structure socioculturelle spécifique.

Abstract

This study takes into account the way the democratic concepts were integrated into the normative texts of the CIS countries which briefly passed from socialism to a democratic system. Also, the article studies the technics the democratic elements were translated into the institutional functioning borrowing the specificity of the socio-cultural and political context and at the same time the democracy factors and the factors of the not liberal tradition.

L'articolo analizza il modo in cui i concetti democratici sono stati integrati nei testi normativi dei paesi della Comunità di stati indipendenti (CSI), i quali sono passati, in un lasso di tempo brevissimo, dal socialismo al sistema democratico. Più precisamente, l'articolo illustra gli strumenti tecnici che rappresentano la traduzione a livello istituzionale degli elementi democratici tenendo in considerazione la specificità del contesto socioculturale e politico nonché i fattori democratici e i fattori della tradizione non liberale.

SERGIO GEROTTO

NOTE SPARSE SULLA DEMOCRAZIA E I SUOI LIMITI. OVVERO, DEL PERCHÉ LA SVIZZERA HA QUALCOSA DA INSEGNARE IN TEMA DI DEMOCRAZIA DIRETTA

1. *Introduzione*

Chiedo venia al lettore se queste note gli parranno a tratti un po' pedanti. Non è segno di superficialità nell'approcciarmi a un tema tanto delicato com'è quello della democrazia. Sono però persuaso che nelle cose umane il rischio cresce quanto più si è soliti dare per scontati i risultati acquisiti. Come in aviazione il rischio di errore umano cresce nei piloti con maggior esperienza nel momento in cui attenuano l'attenzione, convinti di aver raggiunto la piena maturità, anche in democrazia il pericolo di derive illiberali aumenta laddove la si ritenga esente da qualsivoglia deviazione per essere ormai compitamente e pienamente matura[1]. Non temo dunque

[1] Non me ne vogliano quanti sono soliti salire su un aereo con un certo timore. Voglio tranquillizzarli. In realtà il rischio non cresce all'aumentare dell'esperienza, ma ha solo un andamento non lineare raggiungendo un picco nel momento in cui, maturata una certa esperienza, il pilota tende inconsciamente a sovrastimarla. Ora, nonostante tale picco sia in realtà un altopiano, la cui estensione è stata giudicata più ampia di quanto non lo fosse nello studio che ha dato origine al concetto di *killing zone* (P.A. Craig, *The killing zone*, New York, 2001), tutti noi voliamo su aerei pilotati da professionisti che hanno abbondantemente passato quella fase. Questo non inficia, in ogni caso, l'uso della metafora con riferimento alla democrazia. Per chi fosse interessato, un più recente studio sul rapporto tra esperienza del pilota e rischio: W.R. Knech, *Predicting Accident Rates From General Aviation Pilot Total Flight Hours*, Civil Aerospace Medical Institute, Federal Aviation Administration, 2015.

di essere didascalico nel riflettere sull'essenza stessa della democrazia in termini anche molto generali. In fondo, il dibattito sulla crisi della democrazia non si è mai sopito da quando, agli inizi degli anni '70 fu pubblicato il celebre rapporto della Commissione trilaterale *The Crisis Of Democracy*[2]. Anzi, semmai il dibattito si è ancor più acceso per le nuove sfide poste alle democrazie dall'evoluzione della società e delle tecnologie.

Non è neppur lontanamente pensabile di ricostruire in queste poche pagine il complesso dibattito sulla crisi della democrazia, tanto più che manca una definizione condivisa sia del termine crisi, senz'altro abusato, sia del concetto stesso di democrazia. Non a caso vi è chi si chiede se la crisi della democrazia non sia l'invenzione di «*theoretically complex but empirically ignorant theorists who usually adhere to an excessively normative ideal of democracy*»[3]. Lo scopo che mi propongo è, più limitatamente, quello di una riflessione che prenda lo spunto dalle richieste di "maggior democrazia" che sembrano essere il tratto comune di molte forze politiche in molti paesi, richieste che spesso si traducono in proposte di introdurre nuovi istituti di democrazia diretta, o nuove forme di voto, come il voto elettronico, o l'abbassamento della età di voto.

Una richiesta di maggior partecipazione, insomma, perché «democrazia è partecipazione», per dirla alla Gaber. In effetti credo sia questa la chiave per comprendere gli sviluppi che potrebbe (o dovrebbe) avere la democrazia, che resta un modello organizzativo finalizzato all'assunzione di decisioni condivise. Certo, decisioni condivise, ma come è possibile condividere le decisioni laddove il cittadino non può, per ragioni fin troppo ovvie, partecipare direttamente al processo decisionale? È per rispondere a questo interrogativo che si chiede più democrazia, nel senso di più democrazia diretta, perché gli istituti di democrazia diretta dovrebbero garantire maggior partecipazione, e conseguentemente maggior condivisione delle decisioni. A tal riguardo i fautori della democrazia diretta tendono a ritenere che le decisioni che scaturiscono dal circuito della

[2] M. Crozier, S.P. Huntington, J. Watanuki, *The Crisis of Democracy: On the Governability of Democracies*, New York, 1975.

[3] W. Merkel, *Is There a Crisis of Democracy?*, in *Democratic Theory*, volume monografico dal titolo *The Crisis of Democracy: Which Crisis? Which Democracy?*, 1, 2, (Dec. 2014), 11-25; Si veda anche S. Cassese, *La democrazia e i suoi limiti*, Milano, 2018.

democrazia diretta sono necessariamente più partecipate di quelle processate nel circuito della democrazia rappresentativa. In realtà, se alla democrazia in quanto tale si può imputare più d'una difficoltà intrinseca, non si può non riconoscere che anche la sua forma più diretta non ne è del tutto esente. Se la democrazia nella sua forma rappresentativa può degenerare in dittatura della maggioranza, ad esempio, nella forma diretta può addirittura degenerare in conflitto contro-minoritario[4]. In epoca di diffuso astensionismo può infatti accadere, ed è accaduto, che decisioni prese per il tramite di processi democratici diretti (referendum, iniziativa popolare) vedano un esiguo numero di elettori contribuire a decisioni sfavorevoli a minoranze di per sé già marginalizzate[5]. Come è possibile imputare al "popolo", inteso come entità detentrice della sovranità, decisioni prese dal 90% dei votanti in un referendum con affluenza diciamo al 20% dell'elettorato. Nell'esempio appena fatto quel 90% di voti coincide con il 18% circa degli aventi diritto. Non si tratta di cifre messe a caso per sottolineare con un paradosso il pericolo contro-minoritario della democrazia diretta. Sono infatti approssimativamente le cifre con cui l'elettorato slovacco ha deciso nel 2015 di limitare alle coppie eterosessuali l'applicazione della definizione di matrimonio. 21.4% affluenza, 90.5% favorevoli. Se dunque la matematica non è un'opinione, questa decisione "del popolo" è stata ratificata dal 23.6% dell'elettorato[6].

[4] Come mette in evidenza M. Di Bari, *A majoritarian one-shot, a minority being shot: Direct democracy and the «counter-minoritarian dilemma»*, in questa stessa rivista.

[5] M. Di Bari, *A majoritarian one-shot, a minority being shot*, cit.

[6] E non è un caso isolato. Ci sono altri esempi di votazioni popolari di questo tenore, alcune favorevoli a misure che hanno ristretto la definizione di matrimonio alle sole coppie eterosessuali, altre in cui la maggioranza ha respinto misure tese ad allargare alle coppie omosessuali il diritto a una qualche forma di unione. Esempi del primo tipo: California (2008), dove il 52.24% dei voti su una affluenza del 79,42% degli aventi diritto rappresenta di fatto un 41,48% dell'elettorato; Croatia (2013), dove il 66.28% dei voti su una affluenza del 37,88% degli aventi diritto rappresenta il 25,10% dell'elettorato; Taiwan (2019), dove il 72,48% su una affluenza del 55,80% rappresenta il 40,44% dell'elettorato; Slovenia (2012), dove il 54,55% su una affluenza del 30,31% rappresenta il 16,53% dell'elettorato. Esempi del secondo tipo: Slovenia (2015), dove il 65.51% dei voti su una affluenza del 36,38% degli aventi diritto rappresenta il 23,83% dell'elettorato; Taiwan (2019), dove il 67,26% dei voti su una affluenza del 53,37% rappresenta il 35,89% dell'elettorato. Per una approfondita analisi si veda in questa stessa rivista il contributo di M. di Bari, *A majoritarian one-shot, a minority being shot*, cit.

Eppure, anche a fronte di tali paradossi, si assiste sempre più all'affermazione del dogma della pretesa superiorità della democrazia diretta su quella rappresentativa, al punto che per qualcuno la prima è destinata a soppiantare inevitabilmente la seconda[7]. In realtà, è un errore fin troppo banale, ma comune, quello di mettere in relazione democrazia diretta e rappresentativa considerando la prima come correttivo della seconda.

Che l'approccio sia quanto meno discutibile è facilmente dimostrabile. Si dice, ad esempio, che la democrazia rappresentativa è degenerata ad una forma di oligarchia, o di elitismo. Ma non è forse vero che anche nella sua forma diretta la democrazia è esposta allo stesso rischio? La democrazia non è mai diretta nel modo più puro del termine. Sarebbe infatti più corretto parlare di democrazia organizzata e non spontaneamente partecipata. È organizzata perché il cittadino è stimolato ad intervenire da un gruppo di promotori che si attiva per proporre una iniziativa o chiedere un referendum. E non c'è dunque il rischio che queste forme di stimolo siano utilizzate da una ristretta cerchia di persone, facendo ricadere anche la democrazia diretta nella degenerazione elitista ed oligarchica?[8] Il rischio è tanto maggiore in quanto i nuovi media consentono azioni molto efficaci per intervenire nella formazione del consenso.

Di un secondo limite della democrazia diretta ho già accennato. Mi riferisco al rischio definito come contro-minoritario[9], quello cioè che attraverso strumenti di per sé democratici (referendum, iniziativa popolare) si giunga all'approvazione da parte di maggioranze relative di provvedimenti che comprimono la sfera dei diritti di minoranze già marginalizzate. In sostanza, si tratta della possibilità che gli strumenti democratici producano dei risultati antidemocratici[10].

Chi esalta acriticamente i pregi della democrazia diretta spesso ne banalizza i limiti. Il problema dell'astensionismo è spesso margi-

[7] Davide Casaleggio, patron del M5S, in una intervista del 23 luglio 2018 a La Verità, si esprimeva così: «Oggi grazie alla Rete e alle tecnologie, esistono strumenti di partecipazione decisamente più democratici ed efficaci in termini di rappresentatività popolare di qualunque modello di governo novecentesco. Il superamento della democrazia rappresentativa è inevitabile».

[8] In tal senso J. Haskell, *Direct Democracy Or Representative Government? Dispelling The Populist Myth*, New York, 2001.

[9] M. Di Bari, *A majoritarian one-shot, a minority being shot*, cit.

[10] Vedi infra.

nalizzato affermando che chi non partecipa avrebbe poco da recriminare per le decisioni che non condivide. In realtà, l'astensione è un fallimento della democrazia che non può essere banalizzato mettendo a margine le minoranze (o addirittura maggioranze) che non hanno contribuito alla decisione. E mi pare poco corretto, e altresì banale, risolvere la questione attribuendo al non voto una precisa scelta politica.

Insomma, la questione non è se la democrazia diretta possa essere un correttivo alle inefficienze della democrazia rappresentativa, ma come debba essere articolato il complesso dei rapporti tra le due per garantire la democrazia stessa dalle derive dei populismi da una parte, e dall'erosione della rappresentanza politica dall'altra. Proverò solo a fare qualche semplice riflessione con l'esempio svizzero come cartina di tornasole.

2. *È veramente necessario proteggere la democrazia?*

«La democrazia è la peggior forma di governo, eccezion fatta per tutte quelle forme che si sono sperimentate fino ad ora», affermava Winston Churchill in un discorso alla Camera dei Comuni nel novembre 1947. Mi si perdoni l'uso di una citazione forse tra le più abusate che la storia ricordi, ma il nocciolo della questione non è cambiato. Possiamo fare a meno della democrazia? La risposta è scontata. L'essenza della democrazia deve essere preservata e garantita, senza che ciò significhi un ingessamento delle sue forme.

Ma come si garantisce la democrazia nella sua essenza? La prima risposta che viene alla mente è finanche banale: la democrazia è garantita laddove essa stessa incontra dei limiti. È infatti evidente che il popolo non può rinunciare alla democrazia attraverso una decisione pur presa con metodo democratico. Non è solo il modo in cui è presa la decisione a renderla democratica, contano anche i contenuti. È il motivo per cui devono essere tenuti ben separati i poteri costituiti dal potere costituente. Il processo decisionale democratico si svolge entro i limiti dei poteri costituiti, limiti che sono tracciati *in primis*, ma non solo, nella Costituzione. Il rischio che si incorre idealizzando la democrazia diretta con la sua pretesa superiorità su quella rappresentativa sta proprio nella difficoltà di riconoscere i limiti alle decisioni prese "direttamente" dal popolo. L'equazione «è stato votato, quindi è democratico», non funziona.

I limiti a cui è soggetto il processo decisionale democratico sono vari, ma uno li riassume tutti: garanzia della minoranza. In democrazia la maggioranza decide. Ma a fronte di una maggioranza che decide esiste una minoranza che deve subire decisioni che non condivide. La minoranza (le minoranze) può essere garantita con vari strumenti. Il primo è l'alternanza, ma vi sono anche garanzie sostanziali, come la sottrazione di taluni temi alle decisioni prese sia pure a maggioranza (limiti alla revisione costituzionale), e garanzie procedurali (quorum, legittimazione a chiedere referendum ecc.). Altri strumenti sono quelli cosiddetti compromissori, quelli cioè che mirano ad ampliare la base del consenso, o ridurre il numero dei soggetti scontentati da una decisione.

Va da sé che l'esistenza di limiti ha senso solo laddove esiste un meccanismo di controllo che permetta di accertare se e quando essi sono travalicati, eventualmente comminando una sanzione. È il caso del controllo di costituzionalità, o *judicial review*, al quale soggiacciono tanto le decisioni prese nel circuito della democrazia rappresentativa, quanto quelle prese nel circuito della democrazia diretta, senza che a quest'ultima sia riservato un trattamento preferenziale per una supposta maggior legittimazione democratica[11].

3. *Una "questione di fiducia" e di efficienza*

La democrazia ha il suo fondamento nella fiducia. L'elettore ripone la propria fiducia nel proprio rappresentante. Confida cioè

[11] Come dice chiaramente la Corte suprema statunitense in *West Virginia State Bd. Of Educ.* v. *Barnette*, 319 U.S. 624 (1943), 638. «The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections». La stessa impostazione è rinvenibile anche a livello statale. La Corte suprema californiana, ad esempio, in materia di matrimonio omosessuale afferma che «although California decisions consistently and vigorously have safeguarded the right of voters to exercise the authority afforded by the initiative process (see, e.g., Associated Home Builders, etc., Inc. v. City of Livermore (1976) 18 Cal.3d 582, 591), our past cases at the same time uniformly establish that initiative measures adopted by the electorate are subject to the same constitutional limitations that apply to statutes adopted by the Legislature, and our courts have not hesitated to invalidate measures enacted through the initiative process when they run afoul of constitutional guarantees provided by either the fede-

che questi agisca nel miglior modo possibile. Questo punto è estremamente importante, anzi, più importante di quanto non appaia a prima vista. In effetti, l'elettore non si aspetta che il proprio rappresentante agisca come lui stesso avrebbe agito se fosse spettato a lui decidere, ma, ripeto, che lo faccia nel miglior modo possibile. Per questo si tratta di una "questione di fiducia".

Il meccanismo è di per sé semplice, se non fosse che, come è ben noto, la fiducia è un bene di difficile formazione ma di fragilissima costituzione. Ora, per ovvie ragioni la libertà degli eletti è garantita nelle forme più ampie da istituti fortemente consolidati, fra i quali il più noto è il divieto di mandato imperativo. Per questa ragione il rapporto elettore-eletto non può essere ricostruito con la figura della delega. Il primo non può infatti porre dei vincoli al secondo. Ed è fin troppo noto, inoltre, che la rappresentanza politica non ha le medesime caratteristiche dell'istituto che nel diritto civile porta la stessa denominazione.

Dunque, l'elettore ripone la propria fiducia nell'eletto. Per farlo deve però essere certo di riporla nella persona giusta. A tal proposito assumono una estrema rilevanza tutte quelle variabili che incidono sui meccanismi di designazione dei candidati, come il sistema elettorale, ma ancor di più i meccanismi di funzionamento interni dei partiti. Se si deteriora il sistema di filtro entra in crisi il meccanismo della rappresentanza. Si tratta, in senso lato, di una crisi di fiducia che può innescare un circolo vizioso. Quanto più scende la fiducia nei rappresentanti, tanto più decresce l'interesse alla partecipazione politica. Ma tanto minore è la partecipazione, più si deteriora l'intero sistema democratico[12].

La democrazia funziona meglio, riconosceva già De Tocqueville, laddove i cittadini possono associarsi per scopi comuni. L'associazionismo parte dal basso, dalla famiglia, e le regole che lo ga-

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ral or California Constitution». *In re Marriage Cases*, 43 Cal. 4th 757 (2008), 851, che peraltro si richiama espressamente al precedente di *West Virginia State Bd. Of Educ.* v. *Barnette*.

[12] Sul tema si rinvia alla dottrina politologica, che è piuttosto vasta. Si veda almeno, P.T. Lenard, *The Decline of Trust, The Decline of Democracy?*, in *Critical Review of International Social and Political Philosophy*, 2005, 363-378; Id. *Trust Your Compatriots, but Count Your Change: The Roles of Trust, Mistrust and Distrust in Democracy*, in *Political Studies*, 2008, 312-332; M.E. Warren (a cura di), *Democracy and trust*, Cambridge-New York, 1999; T.W.G. Van der Meer, *Political trust and the "crisis of democracy"*, in *Oxford Research Encyclopedia of Politics*, 2017 (disponibile online).

rantiscono e proteggono sono quelle che ingenerano fiducia nel sistema. I diritti di associazione, parola, coscienza, petizione ingenerano fiducia nella misura in cui viene riconosciuta la possibilità di usare degli strumenti per far emergere problemi e proporre soluzioni. Meglio ancora, la fiducia che sta alla base del sistema democratico dipende dall'efficienza di tali strumenti, nel senso che essa trae forza dalla consapevolezza che gli strumenti messi a disposizione del cittadino siano effettivamente in grado di produrre dei risultati concreti.

L'efficienza di un sistema è la sua capacità di produrre i risultati per cui è progettato. Non basta però che produca dei risultati, deve anche produrli rispettando le modalità previste e rispettando i limiti sostanziali eventualmente individuati a priori. Nel caso dei sistemi democratici l'efficienza può essere meglio definita come la capacità di produrre decisioni condivise che rispettino i limiti, formali e sostanziali, stabiliti in Costituzione.

Questa semplice considerazione vale tanto per il circuito della democrazia rappresentativa, quanto per quello della democrazia diretta. Dalla prima prospettiva l'efficienza del sistema, e la collegata fiducia, dipende dai risultati che il governo è in grado di produrre, tenendo fede al programma in base al quale ha ottenuto il voto della maggioranza degli elettori. Gli elettori si aspettano dei risultati, anzi proprio quei risultati. Tutto quello che si frappone tra le aspettative dell'elettore e gli effettivi risultati mette in crisi il sistema. E può trattarsi di variabili sistemiche istituzionali (bicameralismo paritario ad esempio) o politiche (frammentazione politica, multipartitismo, coalizioni poco coese ecc.).

Dalla prospettiva della democrazia diretta, l'efficienza, ed anche qui, ovviamente, la conseguente fiducia, dipende dalla concreta efficacia degli strumenti partecipativi messi a disposizione dei cittadini. L'iniziativa legislativa popolare congegnata in modo da rendere impervio il percorso che la conduce, eventualmente, a diventare legge, non può generare fiducia. Perché questa possa instaurarsi è necessario che le aspettative che il cittadino ripone nell'utilizzare gli strumenti di democrazia diretta abbiano la possibilità di concretizzarsi realmente.

I sistemi democratici permettono di canalizzare la sfiducia. La mancata rielezione è una attestazione del fatto che è venuta a mancare la fiducia dell'elettore nei confronti del proprio rappresen-

tante. Certo, occorre distinguere la fiducia che intercorre nel vincolo di rappresentanza politica da quella che il cittadino nutre nei confronti delle istituzioni. La prima cresce e decresce fisiologicamente, mentre la seconda non può venire a mancare, perché il suo venir meno rappresenta una patologia per l'intero sistema democratico. La sfiducia nei confronti degli eletti può essere canalizzata solo laddove esiste fiducia nel sistema istituzionale. Può esserlo, ad esempio, solo se il cittadino confida nel corretto funzionamento del principio dell'alternanza.

Certo è che non tutti i rapporti basati sulla fiducia sono compatibili con la democrazia. Le associazioni mafiose si fondano su un vincolo fiduciario fra criminali. Le associazioni segrete si fondano su un vincolo fiduciario fra consociati. Né una né l'altra, però, sono compatibili con la democrazia. Non lo sono perché in un caso lo scopo stesso dell'associazione non è accettabile dalle persone che sono toccate dalle sue azioni, mentre nell'altro non è addirittura conoscibile. Per la stessa ragione non è democraticamente accettabile il clientelismo, che pure si basa su un rapporto di tipo fiduciario.

4. *Perché la Svizzera ha qualcosa da insegnare in tema di democrazia diretta?*

Ridotta la questione al tema della fiducia (ma sarebbe meglio dire allargata la questione …) gli interventi correttivi a fronte di una crisi della democrazia vanno ricercati tra gli strumenti, istituzionali e non, che possono incidere sull'efficienza del sistema e sulla fiducia, che come ho detto fa parte delle fondamenta stesse della democrazia. Vista in quest'ottica, la questione non è più se la democrazia diretta debba soppiantare quella rappresentativa, ma come combinarle insieme per ottenere il risultato di dare una più solida legittimazione alle decisioni.

L'opzione dell'alternativa tra le due forme della democrazia appare così in tutta la sua superficialità. Essa non tiene conto, infatti, delle molteplici variabili che incidono su un sistema democratico. Non è infatti detto che l'una non soffra degli stessi mali che affliggono l'altra. Pensiamo ad esempio alla democrazia diretta in una prospettiva più ampia della mera definizione di insieme di strumenti partecipativi. Come abbiamo detto la democrazia deve produrre decisioni condivise, per cui, quando essa assume le forme più

direttamente partecipate deve essere in grado di garantire l'effettivo coinvolgimento del cittadino. Il cittadino deve cioè poter avere la concreta possibilità di incidere sul risultato finale del processo decisionale. Ma può esserlo se gli viene offerta la sola possibilità di rispondere con un sì o un no ad una questione posta da altri, come avviene nel referendum? O è coinvolto il cittadino che ha il diritto di presentare petizioni o iniziative che non vengono neppure prese in considerazione? O ancora, è coinvolto il cittadino al quale viene chiesto un parere che non avrà alcun peso sulla decisione finale? Analizzare gli strumenti della democrazia diretta senza tener conto della loro capacità di incidere concretamente sui *legislative outcomes* risulterebbe una ricerca sterile.

L'ordinamento svizzero desta al contempo interesse ed ammirazione. Interesse per l'originalità delle soluzioni adottate, in particolare per ciò che riguarda il complesso strumentario di istituti di democrazia diretta, e più in generale partecipativi; ammirazione per come esso riesce a mantenere un efficace equilibrio tra democrazia diretta e democrazia rappresentativa.

Eppure, sembra che la Svizzera sia osservata con attenzione solo dalla dottrina dei paesi ad essa geograficamente più prossimi[13]. Infatti, l'ordinamento svizzero è spesso osservato con una certa superficialità. Proprio per la sua singolarità, il sistema svizzero o viene

[13] Limitando lo sguardo alla sola dottrina italiana si possono vedere, in tema di democrazia diretta nell'ordinamento elvetico: C. Bova, *L'iniziativa legislativa popolare in Italia e in Svizzera*, Padova, 2012; Id., *L'iniziativa legislativa popolare ed il referendum in Italia e Svizzera*, in *Diritto pubblico comparato ed europeo*, 4, 2007, 1793-1810; S. Gerotto, *La "dinamica costituzionale" nella Confederazione svizzera: qualche riflessione sul ruolo dei diritti popolari nella revisione costituzionale*, in AA. VV. (a cura di), *Federalismo, decentramento e revisione costituzionale negli ordinamenti policentrici*, Padova, 2010; G. Grasso, *La balestra di Guglielmo Tell e l'iniziativa legislativa popolare. Note minime a proposito del disegno di legge costituzionale in materia di iniziativa legislativa popolare e di referendum*, in *Osservatorio costituzionale AIC*, n. 1/2019, 245-250; S. Rodriquez, *I limiti della democrazia diretta. L'iniziativa popolare nell'esperienza svizzera e statunitense, con uno sguardo all'Italia*, in *Riv. trim. dir. pubb.*, 2017/2, 451-502; M.P. Viviani Schlein, *Il rifiuto popolare al potenziamento della democrazia diretta in Svizzera*, in N. Zanon, F. Biondi (a cura di), *Percorsi e vicende attuali della rappresentanza e della responsabilità politica*, Milano, 2001, 241-270; Id., *L'iniziativa popolare costituzionale in California e in Svizzera*, in AA.VV., *Scritti in onore di Giuseppe de Vergottini*, Padova, 2015, 2129 ss.; Id., *La Svizzera e il suo referendum*, in *Scritti in ricordo di Paolo Cavaleri*, Napoli, 2016, 833-856; Id., *Uno strumento insostituibile per la democrazia semidiretta elvetica: il referendum*, in *Diritto pubblico comparato ed europeo*, 3, 2005, 605-635.

lasciato ai margini dell'analisi comparatistica, perché in fondo esso sfugge ad ogni tentativo di classificazione, oppure viene frainteso sull'onda di un mal celato entusiasmo dovuto all'infatuazione per un modello partecipativo di successo.

Ho sempre pensato che fosse limitante liquidare il caso svizzero come un non-modello, e credo anzi che esso possa fornire interessanti spunti per delle buone pratiche cui sarebbe bene prestare attenzione anche in altri ordinamenti, ferma restando la cautela d'obbligo laddove invece ci trovi a ragionare di esportabilità di istituti. A tal proposito credo sia utile fissare alcuni punti per delineare il quadro della situazione svizzera.

Prima considerazione: la Svizzera è nota per essere il paese in cui vi è il maggior impiego di istituti di democrazia diretta, al punto che la vulgata vuole che in Svizzera si tengano annualmente la metà delle votazioni dell'intero mondo democratico. Anche se non fosse possibile confermare il dato esatto, possiamo senz'altro confermare che in Svizzera si vota molto e spesso, molto più che in altri ordinamenti democratici. Questo perché, i tre tradizionali istituti di democrazia diretta (referendum, iniziativa e petizione) sono presenti, ed ampiamente utilizzati, su tutti e tre i livelli di governo: comunale, cantonale e federale[14].

Seconda considerazione: in Svizzera la democrazia diretta è presa sul serio. Ci sono varie ragioni per sostenerlo. Innanzitutto non esistono limiti (quasi) a ciò che può essere deciso direttamente dal popolo. Se si fa eccezione per il limite logico cui accennavo sopra, cioè l'impossibilità di sopprimere la democrazia attraverso una decisione democratica, e lo *ius cogens* internazionale, non esiste materia che non possa essere oggetto di referendum o di iniziativa. Anche la qualificazione del popolo come vero e proprio organo dello Stato testimonia dell'importanza attribuita alla democrazia diretta. Nel caso del referendum obbligatorio di popolo e Cantoni previsto per le revisioni costituzionali si usa addirittura riferirsi alla endiadi popolo e Cantoni come il Costituente.

Terza considerazione: in Svizzera il popolo ha (quasi) sempre l'ultima parola. Salvo l'ipotesi del decreto federale semplice, tutti

[14] A tal proposito corre l'obbligo del riferimento all'opera manualistica più completa in argomento: E. Grisel, *Initiative et référendum populaires. Traité de la démocratie semi-directe en droit Suisse*, Berna, 2004, 3ª ed.

gli atti normativi approvati dall'Assemblea federale sono o sottoposti a referendum obbligatorio o comunque soggiacciono alla possibilità che venga attivato il referendum facoltativo. È la Costituzione a stabilire quali tipologie di atti ricadono nell'una e quali nell'altra ipotesi. Con ciò, si può affermare, con riferimento al referendum facoltativo, che anche laddove il popolo non si sia pronunciato, avrebbe potuto farlo se solo qualcuno avesse attivato la procedura. Vista da altra prospettiva, l'ipotesi del referendum pende come una spada di Damocle sulla quasi totalità degli atti approvati dal legislatore federale. Questo ragionamento è estensibile, ovviamente, anche agli altri livelli di governo, quello cantonale e quello comunale. Questo aspetto ha una influenza determinante sul modo in cui interagiscono i due circuiti della democrazia diretta e rappresentativa, come dirò di qui a poco.

Ciò che rende la democrazia svizzera diversa dalle altre democrazie non è però solo il più intenso impiego di strumenti di democrazia diretta. È piuttosto l'efficienza del processo democratico misurata come capacità di limitare il conflitto. La domanda da porsi è dunque la seguente: «perché il sistema svizzero sarebbe più efficiente in confronto ad altre democrazie?» La risposta non è: «perché si vota di più», o perlomeno questa è una risposta semplicistica. Il sistema è più efficiente perché genera decisioni più condivise, o almeno percepite come tali da un più ampio numero di persone di quanto non sia la stretta maggioranza[15].

[15] Quello dell'efficienza dei processi politici è tema che rientra nella sfera di interesse del politologo che non in quella del giurista. Tuttavia, non ci si può sottrarre da una analisi di questo tipo, soprattutto laddove si faccia sempre più questione di trapiantare istituti "alieni" all'ordinamento ricevente, come nel caso del progetto di legge d'iniziativa dei Deputati d'Uva ed altri sulla modifica all'articolo 71 della Costituzione in materia di iniziativa legislativa popolare (PDL 1173). Per alcuni spunti sull'efficienza (o inefficienza) dei processi decisionali di democrazia diretta, con particolare attenzione alla Svizzera, si vedano: Eli M. Noam, *The Efficiency of Direct Democracy*, in *Journal of Political Economy*, 88, 4, 1980, 803 ss.; L. Neidhart, *Plebiszit und pluralitäre Demokratie: eine Analyse der Funktion des schweizerischen Gesetzesreferen-dums*, Berna, 1970; Y. Papadopoulos, *Analysis of Functions and Disfunctions of Direct Democracy: Top-Down and Bottom-Up Perspectives*, in *Politics & Society*, 23, 4, 1995, 448 ss.; Id., *Les mécanismes du vote référendaire en Suisse: l'impact de l'offre politique*, in *Revue française de sociologie*, 1996, 37-1, 5 ss.; W. Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies*, Londra, 2010, 3a ed.; K.W. Zimmermann-T. Just, *Interest Groups, Referenda, and the Political Process: On the Efficiency of Direct Democracy*, in *Constitutional Political Economy*, 11, 2000, 147ss.

Mi si obietterà di dare per dimostrato il fatto che la democrazia svizzera sia più efficiente, senza però fornirne le prove. Ne sono consapevole, ma credo ci siano vari indizi che orientano verso una simile conclusione. Innanzitutto il sistema funziona senza che l'elevata frammentazione sociale (culturale) e politica determini una conflittualità tale da paralizzarlo. Già questo, credo, induce a qualificarlo come efficiente. È un sistema che ha prodotto una revisione totale della Costituzione nel 1999, ad esempio, ma soprattutto è un sistema nel quale vengono assunte decisioni fortemente divisive senza che per ciò si verifichi quella conflittualità che si riscontra in altri paesi[16].

Dunque, dato per assodato che il sistema è efficiente, nei termini di cui ho detto, esso deve dunque essere valutato per i modi in cui viene garantita concretamente la massimizzazione del consenso. A tal proposito credo si possa ragionare su alcune variabili che incidono sul funzionamento del circuito democratico: separazione dei poteri; limitazioni imposte agli strumenti di democrazia diretta; modalità partecipative; alternanza.

4.1. *Democrazia diretta e separazione dei poteri*

In Svizzera il principio della separazione dei poteri è implementato in modo più simile ad un sistema presidenziale che non ad

[16] Il tema dei rapporti con la UE, ad esempio, è molto divisivo in Svizzera. Storicamente, infatti, tutta l'area romanda, quella cioè della Svizzera francofona, è da sempre favorevole addirittura ad un ingresso nell'Unione, mentre tutta l'area di lingua tedesca è fortemente contraria. Eppure, questa divisione non si è tramutata in conflitto quando nel 1992 il 50,3% dei votanti (affluenza del 78,73%) ha respinto il Decreto federale sullo Spazio economico europeo (SEE). Preso atto del risultato le autorità svizzere hanno intrapreso la strategia degli accordi bilaterali, a cui si è giunti con grande difficoltà. Nonostante ciò, gli sforzi fatti sono stati rimessi in discussione nel 2012, quando è stata approvata l'iniziativa popolare «Contro l'immigrazione di massa», approvata dal 50,3% dei votanti (affluenza del 56,57%), iniziativa chiaramente confliggente con l'accordo sulla libera circolazione delle persone. Tale voto ha riproposto la divisione tra le due Svizzere, senza che ciò si tramutasse in conflitto in grado di paralizzare il funzionamento delle istituzioni.

Ma ci sono numerosi esempi di decisioni prese con strumenti di democrazia diretta su temi particolarmente divisivi senza che ciò abbia determinato un acceso conflitto. Si pensi alla Iniziativa popolare federale «per l'adesione della Svizzera all'Organizzazione delle Nazioni Unite (ONU)», approvata il 3.3.2002 dal 54,6% (affluenza del 58,44%), iniziativa che mal si conciliava con la storica neutralità della Svizzera. O si pensi ancora alle decisioni che toccano diritti fondamentali come quello alla libertà di culto. Tale il caso dell'Iniziativa popolare «Contro l'edificazione di minareti», approvata il 29.11.2009 dal 57,5% dei votanti (affluenza del 53,76%).

un sistema parlamentare. Non esiste infatti vincolo fiduciario tra Parlamento e governo, e quest'ultimo rimane in carica per lo stesso periodo previsto per la camera di rappresentanza nazionale (Consiglio Nazionale). Diversamente da un sistema presidenziale, però, l'esecutivo svizzero non ha un vertice eletto direttamente dal popolo, ed è anzi costituito da soggetti posti su un piano di parità eletti, ciascuno singolarmente, dal Parlamento in seduta comune.

Quel che avvicina il sistema svizzero ad un presidenzialismo è il fatto che la separazione dei poteri è più netta di quanto non sia in un sistema parlamentare. Non vorrei sembrare eretico, per cui dico subito che questa considerazione non va letta come ascrizione della Svizzera al modello presidenziale. Quel che è certo, però, è che laddove i poteri sono ben separati essi funzionano meglio come *checks and balances*. In tutto ciò c'è una peculiarità svizzera di cui occorre tener conto: il fatto che il popolo sia considerato come un vero e proprio organo dello Stato[17]. Stando così le cose, la logica conseguenza è che il popolo stesso entra come organo nel meccanismo dei pesi e contrappesi.

Un esempio aiuterà a chiarire come ciò condizioni il concreto funzionamento delle istituzioni. Il governo svizzero (Consiglio federale) è composto di 7 membri espressione di 4 forze politiche che insieme rappresentano più o meno stabilmente i 3/4 dell'elettorato[18]. Il principio che regge il funzionamento dell'esecutivo è quello collegiale[19]. Ciò significa che nell'entrare a far parte dell'esecutivo, l'esponente della forza politica cui spetta il seggio che va a occupare deve agire come membro del collegio e non come singolo rappresentante della forza politica di appartenenza. Se quindi il suo partito si facesse promotore o sostenitore di una iniziativa popolare

[17] Per tutti A. Auer, G. Malinverni, M. Hottelier, *Droit constitutionnel suisse*, vol. I, L'Etat, 3a ed., Berna, 2013, 22.

[18] Le forze di governo sono l'Unione Democratica di Centro, il Partito Socialista Svizzero, il Partito Liberale Radicale - I Liberali Radicali ed il Partito Popolare Democratico. L'UDC conta 53 seggi sui 200 totali del Consiglio nazionale, Il PS 39, il PLR - I Liberali Radicali 29 ed il PPD 25.

[19] Sul principio collegiale si vedano in particolare: M. Breitenstein, *Reform der Kollegialregierung: Bundesrat und Staatssekretäre in einen zweistufigen Regierungsmodell*, Basilea, 1993; R. De Pretto, *Bundesrat und Bundespräsident: das kollegiale Regierungssystem schweizerischer Pragüng*, Coira, 1988; W. Gut, *Das Kollegialitätsprinzip*, in ZBl, 1989, 1 ss.; P.G. Lucifredi, *La forma di governo elvetica*, in *Parlamento*, 1991, 7-8, 41 ss.; P. Saladin, *Probleme des Kollegialitätsprinzips*, in *Revue de droit suisse*, 1985, I, 271 ss.; H. Ueberwasser, *Das Kollegialprinzip*, Basilea, 1989.

o di un referendum, per il quale le autorità prendessero una posizione contraria, questa sarebbe la posizione che egli deve assumere. In altre parole, non è ammesso utilizzare gli strumenti della democrazia diretta stando dentro le istituzioni. Non a caso nel 2007, proprio per non aver tenuto fede al principio collegiale, Christoph Blocher, uno dei due esponenti dell'UDC in seno al Consiglio federale, non è stato riconfermato alla fine del mandato, cosa assai rara in Svizzera[20]. In qualche modo il principio collegiale assolve alla funzione di mantenere separato l'esecutivo dal popolo, inteso come organo. Guardando da una prospettiva più ampia è in qualche modo garantito che i due circuiti della democrazia diretta e rappresentativa rimangano separati, più di quanto non avvenga in ordinamenti parimenti democratici e a funzionare di conseguenza secondo la logica dei pesi e contrappesi. Non si tratta di un aspetto irrilevante, posto che ciò rende più difficile che dalle istituzioni rappresentative ci si avvantaggi della posizione di potere per sfruttare gli istituti di democrazia diretta nelle degenerate forme plebiscitarie[21].

4.2. *Le limitazioni imposte agli strumenti di democrazia diretta*

In alcuni paesi le vicende storiche che hanno condotto all'adozione di una Costituzione democratica sono state tali da ingenerare una certa diffidenza per gli strumenti di democrazia diretta. Il caso italiano è a tal proposito esemplare. Il ricordo dei modi in cui era stata utilizzata la propaganda per manipolare la formazione del consenso, oltre che alla fallimentare esperienza weimariana, ha indotto i costituenti a guardare con sospetto e circospezione alla democrazia diretta. Ciò sia per il timore che nell'affidare la sovranità al popolo, dandogli poi ampi strumenti per esercitarla direttamente, si ingenerasse una pericolosa confusione tra potere costituente e poteri costituiti, sia perché, come ebbe a dire Carlo Esposito, «*fuori dalla Costituzione e dal diritto non c'è sovranità ma l'arbitrio popo-*

[20] Come giustamente è stato osservato, con la mancata rielezione di Blocher l'Assemblea federale ha voluto dare al Consiglio federale quella legittimazione che si era progressivamente alterata proprio per l'agire del Consigliere al di fuori delle regole della collegialità. Cfr. K.-H. Voizard, *Réflexions autour de la légitimité du conseil fédéral suisse*, in *Revue Revue française de droit constitutionne*, 2013, 1, 93, 149 ss.

[21] Con un accenno vagamente polemico si potrebbe dire che non sarebbe possibile per un membro dell'esecutivo svizzero sfruttare la propria posizione per avvantaggiarsi in una campagna elettorale permanente.

lare, non c'è il popolo sovrano, ma la massa con le sue passioni e le sue debolezze»[22]. Così, senza rinunciarvi del tutto[23], i Costituenti hanno circondato i pochi istituti accolti di una serie di vincoli e limiti atti a scongiurare il rischio di un loro impiego nelle forme del plebiscitarismo. Così si spiegano i limiti di materia imposti al referendum abrogativo, come anche il limite formale del quorum di validità, limiti che poi la Corte costituzionale ha ulteriormente esteso ben oltre la traccia del testo costituzionale[24].

Quel che emerge guardando all'ordinamento svizzero è che la visione della democrazia diretta è diametralmente opposta. Semplificando, l'idea è che il popolo possa decidere su tutto, senza limiti. Anzi, la prospettiva è completamente opposta a quella della Costituzione italiana; non si sottraggono materie al voto popolare perché troppo delicate, ma proprio perché delicate devono essere sottoposte alla ratifica popolare. Con ciò si spiega, ad esempio, perché il referendum obbligatorio sia chiesto per le leggi federali dichiarate urgenti (art. 140 c. 1 lett. *c*) o per l'adesione a organizzazioni di sicurezza collettiva (art. 140 c. 1 lett. *b*).

Ciò non significa che il circuito decisionale della democrazia diretta sia sottratto ad ogni forma di limitazione, ma solo che i limiti tendono a coincidere con quelli posti alla revisione costituzionale. La forma federale dello Stato è un limite, ad esempio, come lo è lo *ius cogens* internazionale. Certo, c'è molto da discutere sulla concreta configurazione di tali limiti, soprattutto con riferimento allo *ius cogens*[25], ma ciò non toglie che la percezione del cittadino sviz-

[22] C. Esposito, *La Costituzione italiana*, Padova 1954.

[23] Ma quasi, verrebbe da dire, posto che come è noto la proposta presentata da Costantino Mortati alla seconda sottocommissione dell'Assemblea costituente spaziava su un ventaglio di istituti più ampio di quanto non figuri oggi nel testo della Costituzione: referendum di iniziativa governativa, referendum di iniziativa popolare sospensivo, abrogativo e propositivo, referendum regionali.

[24] Per tutti A. Pertici, *l giudice delle leggi e il giudizio di ammissibilità del referendum abrogativo*, Torino, 2010.

[25] L'Assemblea federale ha dichiarato nulla un'iniziativa popolare per violazione del diritto internazionale imperativo (*jus cogens*) nel 1996. Si trattava dell'iniziativa popolare «per una politica d'asilo razionale», ritenuta contrastante con il principio di non respingimento (decreto federale del 14 marzo 1996, FF 1996 I 1157). È il caso, peraltro, a cui si deve l'inserimento nella nuova Costituzione federale del 1999 del limite riguardante il rispetto delle «disposizioni cogenti del diritto internazionale». Questo limite è stato poi applicato una seconda volta, nel 2013-2015, all'iniziativa popolare «per l'attuazione dell'espulsione degli stranieri che commettono reati (Iniziativa per l'attuazione)», invalidata parzialmente poiché pretendeva di definire in modo re-

zero è che egli possa realisticamente decidere su tutto, fosse anche, per paradossale che possa sembrare, la reintroduzione della pena di morte[26].

4.3. *Gli strumenti partecipativi*

L'esperienza della democrazia diretta non si limita agli istituti dell'iniziativa popolare e del referendum, aggiungendo, ovviamente anche la petizione. In realtà, l'esempio svizzero mostra l'esistenza di una terza modalità di partecipazione diretta e attiva dei cittadini nel processo decisionale statale. Si tratta della procedura di consultazione dei soggetti interessati, prevista all'art. 147 della Costituzione e disciplinata dalla Legge federale sulla procedura di consultazione[27]. Sul punto si è detto e scritto molto, in Svizzera e all'estero[28], per cui non vorrei soffermarmi sui tecnicismi del modo di funzionamento della procedura. Va però detto che da una prospettiva ampia un simile istituto si presenta come realmente e concretamente partecipativo, giacché consente l'intervento dei cittadini, in forma organizzata, ma spesso anche individualmente, nella fase di definizione dei contenuti dell'atto in formazione. È qualcosa di diverso dal chiedere ai cittadini di pronunciarsi con un sì o un no ad un quesito posto da altri (referendum), o dargli il potere di formalizzare iniziative che spetterà comunque al circuito della democrazia rappresentativa processare.

Un parallelo potrebbe forse essere fatto con quegli strumenti che consentono l'acquisizione di informazioni e pareri da parte del legislatore, sul tipo delle *congressional hearings* negli Stati Uniti[29], o

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strittivo, nella Costituzione, la nozione di diritto internazionale cogente (cfr. FF 2013 8139-8192, spec. 8147-8152, e FF 2015 2247-2250).

[26] Iniziativa presentata nel 2010, la quale però non ha raccolto il numero di firme richiesto.

[27] Legge federale sulla procedura di consultazione (Legge sulla consultazione, LCo) del 18 marzo 2005, RS 172.061.

[28] Y. Papadopoulos, *La consultation: Un outil de gouvernabilité? Fonctions et dysfonctions de la phase préparlamentaire*, in *LeGes* II, 1997, 43; S. Gerotto, *L'apertura democratica del procedimento legislativo svizzero nella fase pre-parlamentare: funzionamento e ruolo della progettazione legislativa*, in *Diritto pubblico comparato ed europeo*, 1999, 1287; R. Sanchez Ferriz, *Un mecanismo de integración federal y ciudadana*, in *Teoría y Realidad Constitucional*, 36, 2015, 353 ss.

[29] D. Diermeier, T.J. Feddersen, *Information and Congressional Hearings*, in *American Journal of Political Science*, 44, 1, (Jan., 2000), 51-65; H. Brasher, *Listening to Hearings. Legislative Hearings and Legislative Outcomes*, in *American Politics*

delle audizioni informali in Italia[30]. A ben vedere, però, la sovrapponibilità con l'istituto della consultazione presente nell'ordinamento svizzero è piuttosto limitata. Le *hearings*, o le altre forme di audizioni a queste assimilabili, sono generalmente previste per acquisire informazioni di carattere tecnico-giuridico, e non hanno alcun potere vincolante nei confronti del legislatore. Diversamente, le consultazioni in fase pre-parlamentare svizzere sono strumenti che assolvono ad una funzione eminentemente politica, essendo aperte a tutti i soggetti interessati[31].

Di fatto, l'apertura del procedimento ai soggetti interessati si spiega con l'esigenza di ampliare il consenso al fine di sottrarre le decisioni prodotte dal circuito della democrazia rappresentativa al rischio di una bocciatura nel circuito della democrazia diretta. Da questa prospettiva l'istituto delle consultazioni pre-parlamentari rappresenta un completamento necessario del sistema, completamento che funziona nella misura in cui il cittadino può riporre la propria fiducia sui rappresentanti circa il fatto che il suo sforzo nell'esprimere delle opinioni non sia vano. Questo in Svizzera è garantito dal fatto che le autorità hanno tutto l'interesse a non tradire la fiducia del cittadino, proprio perché se lo facessero esporrebbero il proprio prodotto (la legge) al rischio di una bocciatura.

Dunque, se la capacità di incidere positivamente sugli indicatori che misurano l'efficacia del sistema democratico dipende da quanto essi sono in grado di contribuire alla produzione di decisioni condivise, e quindi da quanto il cittadino percepisce il suo intervento come potenzialmente capace di incidere sui contenuti dell'atto in formazione, la consultazione in Svizzera è senza dubbio più performante delle *congressional hearings* statunitensi o delle audizioni italiane.

Research, 34, 5 (Sep. 2006), 583-604.; L.W. Perna-K. Orosz-D.C. Kent, *The Role and Contribution of Academic Researchers in Congressional Hearings: A Critical Discourse Analysis*, in *American Educational Research Journal*, 56, 1, (Feb. 2019), 111-145.

[30] Con riferimento ai recenti progetti di riforma dell'art. 71 della Costituzione italiana, ad esempio, la Commissione affari costituzionali ha sentito i pareri di ben 18 docenti universitari di discipline pubblicistiche dal 3 al 7 dicembre 2018. È ad ogni modo lecito dubitare sull'efficacia di tale strumento nell'influenzare le scelte del legislatore. È infatti significativo che le audizioni sino trasmesse in diretta, ma solo se lo acconsente il relatore, e non lascino traccia nei resoconti stenografici delle sedute della Commissione in cui si svolgono. Manca loro, come del resto traspare dalla stessa denominazione (audizioni informali) il crisma dell'ufficialità.

[31] Si rinvia alla dottrina citata alla nota 28.

4.4. *Democrazia diretta ed alternanza*

L'alternanza è uno dei cardini della democrazia. Chi detiene la maggioranza dei consensi governa, mentre chi fa parte della minoranza deve poter nutrire la legittima aspettativa di diventare maggioranza ed accedere così alle funzioni di governo.

L'alternanza, se non è solo fittizia, induce chi detiene il potere a non abusarne, visto che presumibilmente non lo deterrà per sempre, e rende più accettabili le decisioni non condivise dalla minoranza, giacché questa ha, come dicevo, la legittima aspettativa di diventare un giorno maggioranza. Questo secondo effetto dell'alternanza si realizza anche con riferimento alla democrazia diretta. In un paese come la Svizzera, dove l'impiego degli strumenti di democrazia diretta è quotidiano, capita spesso di votare su argomenti fortemente divisivi. Anzi, molto spesso le decisioni prese dal popolo su iniziativa del popolo stesso (iniziativa popolare di revisione costituzionale) sono più divisive di quanto non siano quelle che provengono dalle istituzioni rappresentative. Basti pensare, per fare un solo esempio, al voto del 9 febbraio 2014 sull'iniziativa «Contro l'immigrazione di massa». Tale voto non solo ha messo in tensione il sistema per il suo potenziale dirompente sulla strategia di avvicinamento alla UE faticosamente perseguita dalle autorità attraverso gli accordi bilaterali, ma ha anche riproposto la frattura fra Svizzera romanda e Svizzera tedesca, che storicamente sono sempre state su posizioni opposte circa i rapporti con la UE. I risultati mostrano inoltre in maniera inequivocabile che si è trattato di una decisione divisiva. Lo scarto è infatti stato di solo lo 0,6% di voti a favore dell'iniziativa. Ma la percezione è che non tutto sia scritto nella pietra.

5. *Conclusioni*

Trattandosi di note sparse le conclusioni non possono essere definitive. Quanto ho esposto, in modo finanche troppo superficiale, è suscettibile di ulteriori approfondimenti ed integrazioni, e spero che questi possano venire dal confronto con chi vorrà criticarmi o anche solo puntualizzare qualche mia incoerenza o dimenticanza. Credo che una bozza di conclusione si possa comunque estrapolare. Il sistema svizzero è congegnato in modo tale da forzare la ricerca del compromesso. Le quattro variabili che ho isolato

– ma ce ne sono sicuramente altre – interagiscono fra loro spingendo nella direzione del compromesso. La fase consultiva pre-parlamentare non si spiegherebbe fuori dal contesto di un sistema di democrazia semi-diretta come quella svizzera. Le autorità consultano (e ascoltano) i cittadini perché essi hanno il potere di opporsi alle decisioni prese nel circuito della democrazia rappresentativa. I cittadini accettano poi anche le decisioni che non condividono perché sanno che non è mai detta l'ultima parola.

Ha poco senso guardare agli strumenti di democrazia diretta svizzeri isolandoli dall'ambiente in cui operano, come fa, ad esempio la proposta di revisione dell'art. 71 Cost. avanzata in Italia dai deputati del M5S. Prendiamo ad esempio una delle variabili che ho isolato, quella relativa all'assenza pressoché totale di limiti posti alle decisioni che possono essere prese direttamente dai cittadini. È difficile, da una prospettiva esterna alla Svizzera, accettare l'idea di una tale estensione della democrazia diretta. Ma quale è la giusta prospettiva da assumere? Il problema è legato alle possibili derive plebiscitarie della democrazia diretta. Contestualizzare la questione significa chiedersi, ad esempio, se la previsione di limiti materiali stringenti inibisce l'uso strumentalmente politico della democrazia diretta, e quindi la possibilità di un impiego in forma plebiscitaria. Credo che la risposta sia di segno negativo. La storia recente mostra come in Italia l'istituto referendario sia usato per la ricerca del consenso politico più che come strumento partecipativo. Bisogna però anche chiedersi se l'assenza di limiti aumenti il rischio di derive plebiscitarie. Qui, a mio parere la risposta non è più negativa, anzi, è molto probabile che laddove sia possibile pronunciarsi su tutto, il rischio di utilizzi strumentali della democrazia diretta aumenti. Certo, sempre tenendo conto della complessità di ciascun contesto. Non esiste infatti un nesso di causalità diretta unico ed inequivocabile tra una sola variabile ed un effetto prodotto nel sistema.

Ma la Svizzera ha qualcosa da insegnare in tema di democrazia diretta. Qualche buona pratica da tradurre in istituti o formule organizzative adeguate all'ordinamento in cui si voglia realmente rafforzare la democrazia diretta nel segno della sua complementarietà con quella rappresentativa. Credo che al proposito si possano individuare almeno tre spunti di riflessione: separazione dei poteri, concreta efficacia degli strumenti partecipativi, valore pedagogico della democrazia.

Quanto al primo aspetto, come ho cercato di dimostrare nelle pagine che precedono, in Svizzera è garantita in vario modo la separazione tra il circuito decisionale della democrazia diretta e quello della democrazia rappresentativo. A tal proposito ho impiegato l'esempio del principio collegiale, che comunque non è l'unico strumento utilizzabile allo scopo. Ad ogni buon conto questa separazione permette di ricostruire un quadro in cui la democrazia diretta funziona sì da contropotere rispetto a quella rappresentativa, ma non in modo conflittuale. La spada di Damocle del referendum stimola le istituzioni rappresentative a cercare il consenso e non forzare la mano con decisioni che potrebbero essere bocciate dal corpo elettorale.

Sul secondo aspetto c'è poco, almeno a mio parere, da dire. Quali che siano le scelte fatte in merito agli strumenti atti ad allargare la partecipazione democratica dei cittadini (iniziativa popolare, referendum propositivo ecc.), questi devono essere congegnati in modo tale da limitare e non già di accrescere il divario tra cittadino e decisione politica. Una democrazia matura deve fidarsi di lasciare nelle mani dei cittadini alcune decisioni, o quanto meno di permettere loro di influire concretamente sui contenuti finali della decisione. In ciò i due DDL tendenti alla modifica dell'art. 71 della Costituzione Italiana, sono profondamente diversi. L'uno è forse animato da una certa infatuazione per il modello svizzero e tende a enfatizzare in modo eccessivo il ruolo della democrazia diretta[32], ma nell'altro si percepiscono timori non ancora sopiti per il rischio di derive plebiscitarie, ciò che porta ad una impostazione che mette nelle mani delle istituzioni rappresentative il ruolo di decisore ultimo[33]. Come sempre è questione di equilibrio.

Il terzo aspetto è quello più sfuggente. La democrazia diretta può avere un valore pedagogico? Può essere palestra di democrazia? Ci sono esempi che inducono a credere che possa essere così. Nel cantone di Glarona l'età di voto è stata abbassata a 16 aggi già nel 2007 perché qualcuno riunito in *Landgemeinde* ha alzato la mano ed ha espresso la sua idea dicendo che gli sembrava una buona cosa. E i suoi concittadini hanno approvato. Detto, fatto. Ma

[32] DDL 1173, Proposta di legge costituzionale d'iniziativa dei deputati D'uva e altri, presentata il 19 settembre 2018.

[33] DDL 726, Proposta di legge costituzionale d'iniziativa dei deputati Ceccanti e altri, presentata il 13 giugno 2018.

è anche stata approvata l'iniziativa che mette al bando la costruzione di Minareti. C'è da dire, d'altro canto, che in Svizzera ci sono stati numerosi esempi di autolimitazione della democrazia diretta. L'iniziativa sulla pena di morte cui ho fatto cenno nelle pagine che precedono non ha raggiunto il numero di firme necessarie perché non ha avuto il sostegno proprio dalle forze che l'avrebbero sostenuta se non fosse stato evidente che una forzatura su questo punto avrebbe avvantaggiato i fautori dell'introduzione di limiti materiali al potere di iniziativa popolare. Anche in questo caso si tratta di una questione di fiducia. Se democrazia diretta deve essere, che democrazia diretta sia. Non priva di limiti, certo, ma neppure una scatola vuota.

Abstract

Il questo lavoro l'autore sostiene che nell'ordinamento svizzero si possono individuare alcune variabili che permettono ai due circuiti della democrazia diretta e rappresentativa di funzionare in parte in un rapporto di tipo collaborativo, in parte secondo lo schema dei pesi e contrappesi. Con il riferimento a variabili e non ad istituti l'autore mira a sottolineare come l'assetto democratico non dipende dalla presenza o meno di questo o quell'istituto, ma dal modo in cui è garantita che esso svolga la funzione per cui è stato introdotto.

The relationship between direct and representative democracy is influenced by some variables, which are clearly evident in the Swiss system. With reference to these variables, the author aims to underline that the democratic structure does not depend on the presence of a specific institution, but on the way the function for which it was originally introduced is guaranteed.

SARA PENNICINO

HAS LIBERAL CONSTITUTIONALISM YIELDED TO POPULISM OR HAVE THE POPULIST YIELDED TO LIBERAL CONSTITUTIONALISM? THE CASE OF ITALY AND THE FIVE STAR MOVEMENT

1. *Introduction*

On 16th July 2005 Beppe Grillo, a popular Italian comedian, presented his fans with the idea of moving from the web to the material world, thus changing Italian politics forever.

A controversial entertainer during the 80s and the 90s, Grillo built a successful stand-up theater career after a long exile from TV. In 2005, he discovered the internet, which – in his words – represents a «Rotary for disgraced ones, those who are not usually in the limelight, but help winning battles»,[1] and in collaboration with Gianroberto Casaleggio, a web strategist,[2] started a blog. A quite popular one. Not only was it one of the few non-English language blogs

[1] See C. Moretti, *Grillo l'eroe scelto da Time che batte tutti i record*, in *La Repubblica Spettacoli e Cultura*, 16th February 2006. More in general, on the history of the blog see M. Musso, M. Maccaferri, *At the origins of the political discourse of the 5star Movement (M5S): Internet, direct democracy and the future of the past*, in *Internet Histories. Digital Technology, Culture and Society*, 2, 1-2, 2018, 104-111.

[2] …and previously a candidate in local elections.

to become known worldwide (it will make the list of the *Time*'s 2008 top 25 blogs thanks to internauts' vote[3]), but it also spoke a language of rage which resonated globally. Grillo was included in a 2005 *Time* magazine list of 37 European Heroes[4] and that same year he published an appeal in the daily *International Herald Tribune* for the resignation of 23 Italian MPs who had been finally convicted of various crimes.[5] In order to do so, it became crucial to offer the opportunity to his followers to share a physical space so as to exchange ideas, rather than simply debate them on a blog.[6] He also suggested using social networks to communicate and coordinate local meetings.[7] Born as a vehicle to create space for political debate on issues relevant to specific local communities, these thematic working groups would soon demonstrate an extraordinary aggregative force. By addressing topics typically embraced by the Left,[8] local groups started organizing, on a regular basis, national meetings in different cities across Italy.

What seemed to be the origin of a new form of civic engagement would quickly develop into a nationwide political movement[9]

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[3] See *http://content.time.com/time/specials/2007/article/0,28804,1725323_ 172 7246,00.html*, last retrieved May 2020.

[4] See J. Geary, *Why They're Heroes*, in *Time*, 2nd October 2005.

[5] *Grillo sbatte in "prima"i deputati condannati*, *Corriere della Sera*, 23 novembre 2005, (*https://www.corriere.it/Primo_Piano/Politica/2005/11_Novembre/22/grillo.html*). See also *https://www.ilblogdellestelle.it/2005/11/stand_up_clean.html*.

[6] M.E. Lanzone, *Il MoVimento Cinque Stelle: Il popolo di Grillo dal web al Parlamento*, Novi Ligure, 2015; M. Musso, M. Maccaferri, *At the origins of the political discourse of the 5-Star Movement (M5S): Internet, direct democracy and the "future of the past"*, in *Internet Histories*, 2:1-2, 2018, 98-120.

[7] Meetup is a service used to organize online groups that host in-person events for people with similar interests. It was founded in 2002 by Chief Executive Officer Scott Heiferman and four co-founders *http://www.beppegrillo.it/meetup-la-nuova-p3/*.

[8] Topics such as technology and innovation; press communication; ethical consumerism; currency studies; abolition of incinerators and so forth. We deem not relevant to discuss here whether Beppe Grillo is or not a political figure leaning toward left and especially what his relationship has been with the Left wing political parties (especially the Democratic Party) during different phases of Italian history, however it seems reasonable to affirm that Beppe Grillo's personal stance and that of the initial bulk of supporters stem from what was called anti-Berlusconi galaxy. For a detailed description of the initial phases of the M5S, see R. Vignati, *Beppe Grillo and the Movimento 5 Stelle: A Brief History of a "Leaderist" Movement with a Leaderless Ideology*, in F. Tronconi (ed.), *Beppe Grillo's Five Star Movement. Organisation, Communication and Ideology*, London, 2016, 9 ss.

[9] F. Fornaro, *Un non-partito: il Movimento 5 stelle*, in *il Mulino*, 2, 2012, 253-261.

with long term consequences for Italy's political system[10] and constitutional order.

It is common knowledge that forms of populism[11] have spread across Europe over the last few years, but it has to be underlined that in Italy it has taken on a quite distinctive form.[12] Quite frankly populism is a tag that could be applied to more than one leader in Italian politics,[13] however one has to emphasize the fact that the adjective «populist» was first used by Beppe Grillo himself with some pride. Known for his utterly irreverent tone, Grillo defined the Five Star Movement (*MoVimento Cinque Stelle* - M5S) as a «populist political subject», thus taking the term "out of quarantine" as the Italians would say.[14] In other words the adjective «pop-

[10] In Italy the, as of 2018, «hypothesis of switching from a left-right split to one of establishment versus anti-establishment actually seems to have been proven», see J.-W. Müller, *Italy: The Bright Side of Populism*, in *The New York Review of Books*, 8th June 2018.

[11] Of course, gallons of ink have been spilled writing about populism, but its definition remains problematic. Is it, paraphrasing Joseph Arditti, «like the drunken guest at a dinner party, who doesn't respect the rules of public contestation but spells out the painful but real problems of society»? Is it a permanent shadow of representative politics, as J.-W. Müller wrote in 2016? Is it nothing but a cyclical manifestation of the phases representative government goes through? Does it feature a "context based character", thus explaining its cyclical appearance, as Nadia Urbinati argues (see *Political theory of Populism*, in *Annual Review of Political Science*, 22, 2019, 11-127)?

[12] This is particularly true considering that, after the 2018 election cycle, the M5S and Lega formed a coalition, thus forming the first all-populist governing majority, which was highly praised by Steve Bannon (on the role played by the latter in cementing the coalition by easing the relationship between Lega and 5SM see *https://www.ansa.it/english/news/politics/2019/06/04/bannon-eased-league-m5s-alliance_54591c6d-7b56-4dbc-b8b4-86f4a3741918.html*).

[13] Cfr. G. Delledonne, G. Martinico, M. Monti, F. Pacini, *Introduction: A Constitutional Viewpoint on Italian Populism*, in G. Delledonne, G. Martinico, M. Monti, F. Pacini (eds.), *Italian Populism and Constitutional Law*, London, 2020, 1: «After the end of Cold War, populism has characterized many of the new parties and movements that have come to the forefront in Italian politics». This term has always been fashionable in Italy. In the 1990s, the country was «considered by many social scientists as a fertile testing ground for populism or even as populist "paradise"», see M. Tarchi, *Italy: the promised land of populism?*, in *Italian Contemporary Politics*, 2015, 273 who goes at length analyzing the various embodiments of the populist mentality within the Italian Political system. Moreover, it has been underlined that «With the emergence of Silvio Berlusconi on the political scene, a populist grammar has established itself on the national level», see M. Anselmi, P. Blokker, *Introduction. Multiple populisms: Italy as democracy's mirror*, in M. Anselmi, P. Blokker (eds.), *Multiple populisms: Italy as democracy's mirror*, London, 2019, 3.

[14] The Italian term is "*sdoganare*" and was utilized, in particular, during the gen-

ulist» with reference to a political movement was given a positive connotation.

From a strictly constitutional perspective, the M5S, from the outset, has been a proponent of introducing more instruments of direct democracy in the Italian legal system. This was mainly due to its anti-elitist sentiments and the desire to break with a stagnated bipolar political system. It should be pointed out, however, that during the first few years after its foundation, the M5S toyed with moderate versions of direct democracy, but its main emphasis was actually on the concept of participatory democracy. Gradually, however, due to their electoral success, their ideas concerning direct democracy became a central part of their *sui generis* manifesto[15] and were turned into concrete proposals to amend the Constitution.[16]

Using the case-study method, this article will offer an overview of the main items on the constitutional reform agenda of the M5S over the past 10 years in order to, on one hand, verify whether the Italian Constitution is equipped to cope with populist constitutionalism and, on the other hand, to corroborate whether, over time, the M5S – sometimes referred to by the Italian press as the *grillini* or *pentastellati* – has been mellowed by the Constitution itself.

In a nutshell: does the Italian Constitution risk becoming more populist or have the populist *grillini* embraced liberal constitutionalism since they have been in office?

2. *Research Methodology*

This article will combine two methods of scientific investigation: the diachronic method and the case-study method.

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eral election of 1994 when Berlusconi and Forza Italia decided to break with past tradition and form a political pact in the South of Italy with the National Alliance – formerly the Italian Social Movement – i.e. the heirs of the National Fascist Party and the combatants of the Social Republic of Salò.

[15] The M5S' electoral program has always been rather fluid give the fact that it was nearly always online and rarely produced in hard copy. This means that as the M5S has shifted position on certain important themes the relevant posts on their blog have been removed

[16] We shall see this, in particular, when we address the document published for the 2018 general election campaign: MoVimento Cinque Stelle, *Programma Affari Costituzionali*, 2018.

The diachronic method is essential in order for us to be able to highlight the evolution over time of the M5S within the Italian political and constitutional system. One cannot understand the true nature of this populist movement unless one studies its history from the foundation to the present day. Of course, the historical approach has been advocated by numerous scholars of comparative constitutional law. What we intend to do is not just to provide a historical narration of the most important events – from a political and constitutional perspective – concerning the M5S, but to ponder over the evolution of the constitutional project as envisioned in the main statements and official documents of this rather unique political movement.[17]

The case-study method is important because the investigation concerning Italy and the M5S might produce results that are useful for better understanding, on one hand, the resilience[18] of legal systems founded upon liberal constitutionalism and, on the other, the trajectory[19] of populist movements elsewhere in Europe and across the globe. One of the staunchest defenders of the case-study method is Danish scholar Bent Flyvbjerg.

It is common knowledge that there is a very lively scholarly debate as to the utility of the case-study method and indeed, the Oxford scholar has very effectively dismounted various points of criticism.[20] Critics are of the opinion that general, theoretical, (context-independent) knowledge is more valuable than concrete, practical (context-dependent) knowledge or that no generalization can be

[17] Not surprisingly the M5S has been the object of numerous studies. Among the many allow us to cite: G. Grasso, *La «cifra democratica» del MoVimento 5 Stelle alla prova dell'art. 49 della Costituzione*, in *Quaderni costituzionali*, 3, 2017, 616-619; T. Casadei, *Il mito del popolo della rete e le realta del capo. Nuove tecnologie e organizzazioni politiche nel contesto italiano*, in *Diritto pubblico comparato ed europeo*, 3, 2015, 879-902; S. Ceccanti, S. Curreri, *I partiti antisistema nell'esperienza italiana: il MoVimento 5 Stelle come partito personale autoescluso*, 3, 2015, 799-832; M. Bassini, *Rise of Populism and the Five Star Movement Model: an Italian Case Study*, in G. Delledonne, G. Martinico, M. Monti, F. Pacini (eds.), cit., 200-218.

[18] C. Grabenwarter, *Constitutional Resilience*, in *Verfassungblog*, 6th December 2018, *https://verfassungsblog.de/constitutional-resilience/*.

[19] Cfr. D. Landau, *Populist Constitutions*, in *The University of Chicago Law Review*, 85, 2, 537.

[20] B. Flyvbjerg, *Five Misunderunderstandings About Case-Study Research*, in *Qualitative Inquiry*, XII-2, 2006, 219.

made on the basis of the individual case. With regard to the object of this analysis, Italy experienced the first self-styled populist government coalition in Western Europe and, if on one hand, it is impossible to imply a universally predictive theory based on one specific case, it is also true that assessing its implications from a constitutional perspective could be valuable. In fact, «Populist political challengers tend to be deeply intolerant of pluralism. As a result, they also tend to be intolerant of political norms that reinforce comity and collegiality», and «such norms are important because they underpin constitutional arrangements».[21]

There is an obvious tension between constitutionalism and populism, but they should not be seen as mutually excluding.[22] First of all, because populists themselves use the language of constitutionalism, but offer a relevant counter-narrative[23] of its lexicon. Second, due to its «thin centered nature»,[24] populism can be combined with other value-based content, thus having a «politically» inclination that tracks back to institutionalized party-politics (i.e. left or right). This intellectual operation may be comforting, but it is misleading[25] when adopting a strictly constitutional perspective.

One could argue that the case-study method is useful for generating hypotheses, but the case of the M5S and of Italy more in general qualify as an exceptional case of multiple populism[26] or of

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[21] E. Jones, *Populism in Europe: What Scholarship tell us*, in *Survival*, 61, 4, 19.

[22] J.-W. Müller, *What Is Populism?*, University of Pennsylvania Press, Philadelphia, 2016.

[23] L. Corrias, *Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity*, in *European Constitutional Law Review*, 12, 1, 2016, 6-26.

[24] C. Mudde, *The Populist Zeitgeist*, in *Government and Opposition*, 39, 4, 2004, 543-44.

[25] P. Norris, R. Inglehart, *Cultural Backlash: Trump, Brexit, and Authoritarian Populism*, Cambridge, 2019 and in particular their definition of populist party according to which not all populists are authoritarian, and not all authoritarians are populists and that the establishment can also be challenged to advance a progressive agenda. For a recent overview of the various approaches – Left and Right-Wing,"good" or "bad" – to populism, especially from the point of view of whether they aim at changing the liberal democratic constitutional system to an authoritarian one, see G. Halmai, *Populism, Authoritarianism and Constitutionalism*, in *German Law Journal*, 2019, 696-698. Cfr. P. Aslanidis, *Avoiding Bias in the Study of Populism*, in *Chinese Political Science Review*, 2, 2017, 296-298.

[26] M. Anselmi, P. Blokker, *Introduction. Multiple populisms: Italy as democracy's mirror*, cit.

cohabitation between two forms of populism[27] and it is therefore of strategic importance in relation to the general problem. And it is of course the paradigmatic case which is able to highlight more general characteristics of the society in question, operating as a reference point. Also, researchers' biases may overplay their effect in identifying the case in object of study, however the significant advantage of the case study is that it can "close in" on real-life situations and test views directly in relation to phenomena as they unfold in practice. Finally, good narratives typically approach the complexities and contradictions of real life. For all these reasons, the next section of this article is devoted to an overview of the origins and expansion of M5S, from civic activism to party in government,[28] and will be followed by the illustration of its constitutional amendment plan aimed at enhancing direct democracy. The concluding remarks will weigh the question of whether the Italian Constitution is equipped to cope with this manifestation of populist constitutionalism and, ultimately whether liberal constitutionalism in Italy has yielded to populism or whether, on the contrary, populist have yielded to liberal constitutionalism.

3. *The Origins of the Five Star Movement: the Reformist, Utopian and Plebiscitary Challenges*

What are the origins of the M5S? Well, it was founded by the above-mentioned Beppe Grillo and by Gianroberto Casaleggio on 4th October 2009. In their early days the M5S resorted to technological determinism[29] in order to interpret the disaffection of citizens for political intermediation. According to the founders, wide-

[27] S. Fabbrini, *Europe's Future: Decoupling and Reforming*, Cambridge University Press, 2019, 66 who makes the distinction between *nationalist populism*, which is anti-technocratic and anti-European, and a *populist nationalism*, which is anti-immigration.

[28] The reference to E.E. Schattschneider's classic study is aimed at highlighting the full circle M5S came about over the past ten years, see E.E. Schattschneider's, *Party Government: American Government in Action. Intro by Sidney A. Pearson, Jr.)*, Routledge, 1st edition, 2003.

[29] That is to say the reductionist theory that assumes that a society's technology determines the development of its social structure and cultural values, see M.R. Smith, L. Marx (eds.) *Does Technology Drive History? The Dilemma of Technological Determinism*, Cambridge, MA, 1994.

spread diffusion of information technology tools would facilitate the use of instruments of direct democracy, allowing citizens to take part in political decisions without politicians and political parties' intermediation.[30] However, there was more. The very concept of representative democracy was put into question although it was not clear what "idea" of democracy (deliberative? direct? participatory?) would take its place. Floridia and Vignati, in 2014, analysed documents and statements of the *pentastellati* in order to show the way in which the movement was trying to combine three different challenges to representative democracy. The first was what we might define as the "reformist challenge" (through the strengthening of a set of instruments of direct democracy, such as referendums, within an institutional frame that remains centered on parliament). The second was what can be defined as the "utopian challenge" (the complete transcendence of representative democracy through the massive use of ICT tools) and, third, the "plebiscitary challenge" (which is expressed via a top-down use of the web).[31]

In order to meet these challenges, the M5S had to enter the electoral competition, thus transforming a network of activists into an electoral competitor.[32] The Italian regulation of the electoral process offered a perfect vessel to transfer civic engagement into the political system: civic lists.[33] This has happened before in Italian politics,[34] however, contrary to these precedents, the 2008 *liste*

[30] M. Bassini, *Rise of Populism and the Five Star Movement Model: an Italian Case Study*, cit., 200. For an empirical study of this relation see M. Musso, M. Maccaferri, *At the Origins of the Political Discourse of the 5 Star Movement (M5S): Internet, direct democracy and the "future of the past"*, in *Internet Histories*, 2, 1-2, 98-120.

[31] A. Floridia; R. Vignati, *Deliberativa, diretta o partecipativa? Le sfide del Movimento 5 stelle alla democrazia rappresentativa*, in *Quaderni di Sociologia*, 2014, 58, 51-74.

[32] For an explanation of this transformation from a sociological point of view, see P. Ceri, F. Veltri, *Il Movimento nella rete. Storia e struttura del Movimento a 5 stelle*, Rosenberg & Sellier, Torino, 2017, 35-57.

[33] Civic lists are "non-party lists" that are most common in administrative elections. They have no official connection with a national political party and campaign on local issues. See M. Gamalerio, *Do national political parties matter? Evidence from Italian municipalities*, in *European Journal of Political Economy*, 63, 2020, 1-31.

[34] See among various experiences: Lista Sturzo (1952), Lista per Trieste (1975), the experience of Taranto (1970s and 1990s), La Rete a Palermo (1991) and the so called "mayor revolutions" (1993). M. Cerruto, C. Facello, *Il cambiamento dei partiti tradizionali al tempo dell'antipolitica (The change of mainstream parties in times of antipolitics)*, in *Quaderni di sociologia*, 65, 2014, 75-96.

civiche a 5 stelle quickly overcame the inherent local scope of civic lists[35] to enter national politics.

4. *Civic lists and the Charter of Florence*

The call for the formation of civic lists came with a post on the beppegrillo.it blog entitled *Comuni a 5 Stelle*.[36] In the meantime, a first group of meet-uppers started discussing possible ways forward[37] and this represents probably the first experiment of direct democracy via internet ever to take place in the history of M5S. This national aspiration definitely changed the tone and, despite being contrasted by a part of the movement which was closer to traditional social movements, represents the origins of the M5S as we know it today. This led to a meeting in 2007 in Parma, gathering local meetup delegates and representatives of a series of civic lists that ran in that year's local elections, to discuss political representation. During this meeting they established a national coordination between «associations, movements, organizations and civic lists practicing, promoting and experimenting direct and participatory democracy».[38] They also drafted and approved a document of intent[39] which, amongst its main objectives, included the: 1) establishment of propositive and abrogative referendums; 2) direct election of the civic defender, 3) institution of participatory budgetmaking, 4) protection of common goods and public companies; 5) imperative mandate for public administrators;[40] 6) open primaries.

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[35] Cfr. D. Della Porta, *Comitati di cittadini e democrazia urbana*, Cosenza, 2004.

[36] *https://www.beppegrillo.it/comuni-a-5-stelle-2/*.

[37] A group named Gruppo 280, which involded a small group of people, a number of which are still part of the core group of M5S these days, produced an agenda for the meeting which is larger in scope than the list of concerns drawn on Beppe Grillo's blog, see P. Ceri, F. Veltri, *Il Movimento nella rete. Storia e struttura del Movimento a 5 stelle*, cit., 46.

[38] So called document of Perugia, available at *files.Meetup.com/1274856/storia_partecipa.rtf*.

[39] *www.meetup.com/beppegrillo-533/message/boards/view/viewthread?trax_also_in_algorithm2=original&traxDebug_also_in_algorithm2_pickedoriginal&thread=3941486*.

[40] We will return to this issue later on, but it should be noted that this proposal was in stark contrast with Art. 67 of the Italian Constitution which states that: «Each Member of Parliament shall represent the Nation and carry out their duties without a binding mandate».

The blog is careful in explaining that these meetings are not to be considered national Meetups, but rather a separate initiative undertaken by a small number of activists in coordination with other political entities, with the aim of running for elections.[41]

Direct and deliberative democracy are entangled in a purely local political project. Preoccupations regarding the constitutional legitimacy of above listed proposals, such as the imperative mandate and the transformative power of enhanced instruments of direct participation of citizens at a municipal and provincial level are, at this point, mellowed down by the mere local scope of these political initiatives. Grillo, who is not directly involved in this project, is however simultaneously pursuing an attack on institutionalized politics through an act of direct democracy. Around 350.000 citizens signed a M5S' petition to introduce three bills of popular initiative,[42] a legislative package called *Clean Parliament*, in order to: declare citizens convicted in a final judgment not subject to appeal as ineligible, two-term limit for MPs, introduction of preferences in the electoral system.[43] In the wake of this success, which however did not lead to a bill being actually presented in Parliament, Beppe Grillo's blog first published the guidelines on how to create a civic list and then presented the symbol of the Five Star Civic Lists (to be used in the 2009 local elections). The move marks the departure from the original project led by a number of activists and that was supposed to stay distinct from the blog itself, especially with regard to the internal rules of democracy. On the contrary, under the condition of being vetted and then certified by the blog, Beppe Grillo becomes the gate keeper of the M5S' institutionalization process.

In 2009, he then announced the creation of a National M5S. The latter is inspired by a 12-point program (known as the Charter of Florence) partially based on the experience of various local civic lists[44] and which is the Manifesto of the "certified civic lists", but is

[41] P. Ceri, F. Veltri, *Il Movimento nella rete. Storia e struttura del Movimento a 5 stelle*, cit., 54. It should be noted that to mark the distinction, a separate digital space is created to support this parallel initiative (partecipa.info) with repect to the blog of Beppe Grillo.

[42] Art. 71 It. Const. See M. Tarchi, *Populism and Political Science. How to Get Rid of the "Cinderella Complex"*, in S. Gherghina *et al* (eds.), *Contemporary Populism: A Controversial Concept and Its Diverse Forms*, Cambridge, 2013.

[43] See *infra* par. 8.

in fact the day the die was cast: M5S was about to enter into (and become a protagonist) of national politics. But none of the points of the Charter refer to direct democracy. The only innovation in this regard is the rule on live-streaming local council meetings, but this has very little to do with direct democracy.

5. *M5S becomes a National Political Actor*

Between 2009 and 2012 the M5S works on defining a program based on members' active participation. The process was not exactly a success and the final document will mainly reflect the original version submitted to the discussion.[45] In the meantime, thanks to successful civic lists, M5S first started winning seats on city and regional councils and then took control of some important cities, such as Parma.[46] At that point, of course, their performance came under the close scrutiny of their political opponents. The lack of internal democracy, the ambiguity of the role of Beppe Grillo (and the blog) and the growing aggressive tone of anti-elite discourse was stigmatized by many, but none of them hit the mark. In fact, the call for morality in politics led Beppe Grillo to announce, on 29th October 2012, the rules to stand as an M5S candidate in the upcoming general election of 2013. For the first time in Italy, candidates were chosen by internet-users who registered as M5S members through a *sui generis* primary election, which was online and lasted three days. The candidates presented their program with short videos.

The general election in February 2013 represented a major political breakthrough for the *pentastellati*. Thanks to the disorientation and the disaffection of the electorate towards traditional parties, the M5S won 25.6% of the vote for the Chamber of Deputies, more than any other single party did. Here a few words need to be spent on the electoral system that Italy had at the time.[47]

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[44] P. Ceri, F. Veltri, *Il Movimento nella rete. Storia e struttura del Movimento a 5 stelle*, cit., 72.

[45] P. Ceri, F. Veltri, *Il Movimento nella rete. Storia e struttura del Movimento a 5 stelle*, cit., 75 ff.

[46] Regarding the specific experience in Parma, see M. Morini, M.E. Lanzone, *Parma: 5 anni a 5 stelle?: Pizzarotti, da Grillo a Effetto Parma*, Novi Ligure, 2018.

[47] Italy is without doubt the consolidated democracy that has changed its electoral system the most.

One should remember that back in 2005 the then centre-right majority in Parliament very controversially approved a new electoral law that reintroduced a system of proportional representation (PR)[48] based on block lists, but with an important majoritarian corrective. First of all, a bonus of seats was assigned to the coalition that obtained the greatest number of votes in order to strengthen the stability of the parliamentary majority. The bonus was assigned at national level for the Chamber and at regional level for the Senate. This explains the very peculiar result of 2013. With just 29.55% the centre-left coalition was assigned 344 seats out 630 thus assuring it an overall majority in the Chamber of Deputies. With 25.6% M5S was the largest single party but because the movement's policy at the time was to refuse alliances with any other party (as we shall see this will change over time) it only obtained 108 seats. On the contrary, in the Senate, where the bonus of seats was assigned at regional level, no single party or coalition had an overall majority.[49] On 21st March Grillo, together with Crimi e Lombardi, the interim leaders of the parliamentary groups in the Chamber of Deputies and the Senate, declared that they would not support any other government except one led by their own movement. This position was confirmed in a meeting with the leader of the PD Bersani who, in the meantime, had been charged by President Napolitano with the task of forming a government. This meeting, held on 27th March, was famously transmitted live on streaming and frankly proved to be a political humiliation for Bersani.[50] When, a month later, Bersani saw his party's candidate for the Presidency of the Republic[51] defeated over the course of five secret ballots he was forced, together with the incumbent Prime Minister Mario Monti and the leader of the centre-right Silvio Berlusconi, to plea Napolitano to stay on for a second term. Bersani was politically defeated and despite being the leader of the PD and therefore, on

[48] With the exception of the elections of 1953 when a bonus of seats was introduced, but not assigned (so-called *Legge Truffa*), Italy had a system of pure PR from 1948 to 1992 and then through the referendum movement led by Mario Segni the electoral system became 75% FPTP and 25% PR.

[49] In other parliamentary forms of government this would not be such a big issue, but in Italy one should remember that the Government requires the initial confidence of both Chambers of Parliament.

[50] P. Corbetta, *M5S. Come cambia il partito di Grillo*, Bologna, 2017, 24-27.

[51] First Franco Marini and then Romano Prodi.

the basis of its statute,[52] the Democrats, candidate for the post of Prime Minister, he decided to step aside and give his deputy leader Enrico Letta the chance to form a government which he eventually did. Up until November 2013 the Letta Cabinet, the 62nd Government since 1948, was supported by a very broad Grand Coalition that included the PD and the People of Freedom (PdL) and a series of smaller parties[53] then Silvio Berlusconi decided to withdraw his confidence and, as consequence the PdL with Berlusconi and his supporters reverting back to Forza Italia. In the meanwhile most of the incumbent ministers of his party, led by Angelino Alfano, decided to maintain their support for Letta and thus created a party called the New Centre Right (NCD).

At this point the rising star of the PD, Matteo Renzi bursts onto the scene by deciding to contest the leadership of the party for the second time[54] and indeed becoming its new leader in December 2013. In February 2014 he became Italy's new Prime Minister much to the chagrin of Enrico Letta. Renzi, who some might say has some faint traces of the populist, positioned himself as the principal opponent of M5S. In the meanwhile, the rules on how the Movement's elected members should conduct themselves became stricter: they were not allowed to take part in TV shows or openly criticize the internal democracy of the organization. Anyone breaking these rules was immediately expelled. During their first term in Parliament, M5S' MPs were very aggressive and indeed they were accused of sabotaging parliamentary procedure by using filibustering techniques that some thought to be illegal. In truth, the latter is rather difficult to prove, especially if one considers the kind of filibustering techniques used in the past both in Italy and elsewhere.[55] In a way there was a kind of contradiction between the Movement's total disrespect for the two Houses' standing orders and, on the other, its constant narrative concerning the "heavenly dimension"

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[52] These numbers are partially misleading…

[53] Scelta civica, UDC, NCD.

[54] *Primarie, Bersani stravince: oltre il 60%*, in *la Repubblica*, 2 December 2012, *https://www.repubblica.it/speciali/politica/primarie-pd/edizione2012/2012/12/02/news/primarie_primi_risultati_bersani_boom_renzi_al_38_5_-47936304/*.

[55] More in general, on how populism has further marginalized national legislature C. Fasone, *Is there a Populist Turn in the Italian Parliament? Continuity and discontinuity in the Non-legislative Procedures*, in G. Delledonne, G. Martinico, M. Monti, F. Pacini (eds.), *Italian Populism and Constitutional Law*, cit., 41-74.

of Parliament. Indeed, the *grillini* considered the latter as the only truly essential institution of the Republic (see, for example, Grillo's praising of the Belgian experience).[56] It should be underlined that during the 2013-2018 legislature, M5S managed to obtain the chair of most of the parliamentary watchdog committees such as the committee responsible for monitoring RAI (Italy's public broadcasting company) and the committee assigned with the delicate task of keeping a watch on the secret services. Moreover, M5S had a controversial relationship with parliamentary practice and procedure. They proposed that standing orders come under constitutional review and, in January 2014, they initiated an impeachment procedure against the President of the Republic[57] despite the fact that the procedure had no chance of succeeding because it was not in pursuance of the rules contained in the Constitution.[58]

6. *The Setback in the 2014 European Elections*

In 2014 the M5S took part in the European elections for the first time, but the opinion polls, which were heavily in their favor, evidently misjudged the popularity of new Prime Minister Renzi. Indeed, the PD obtained a staggering 40.81% while M5S came in second with 21.15% thus obtaining 17 MEPs.

In a nutshell, the European elections were a big disappointment for M5S supporters and with a good degree of self-irony Grillo promised to take a large dose of Maalox to overcome his irritation for the bad result of the M5S, combined with the unexpected success of their arch-enemy Matteo Renzi. Indeed, there had been great expectations based on pre-election polls and many political commentators in Italy attributed the electoral defeat to the behavior of some of M5S' MPs during the first fifteen months of the parliamentary term.

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[56] That is to say 589 days without a Government: from the general election on 13th June 2010 to the formation of the Di Rupo Cabinet on 6th December 2011.

[57] They will threaten something similar against President Mattarella during the formation of the M5S-Lega coalition government in 2018.

[58] Cfr. Art. 90 It. Const.: «The President of the Republic shall not be responsible for the actions performed in the exercise of presidential duties, except in case of high treason or attack on the Constitution. In such cases, the President may be impeached by Parliament in joint session, with an absolute majority of its members».

Among these one could list the: expulsion of dissenting MPs, denial of autonomy to elected representatives, public consultations on all important issues of policy, refusal to participate in coalition governments, extremely aggressive parliamentary tactics, refusal to interact with trade unions and the board of industry and, of course, their (again aggressive) communications strategy. On one hand, these were all manifestations of M5S' anti-representative stance, on the other, some of them were true and proper encroachments of parliamentary practice and procedures.

The Movement's disdain for the concept of political representation had in fact quickly spread to the institutions embodying the very idea of representative democracy. The notion was that if the elites, represented by traditional political parties, were the devil then Parliament was where they partied. Accordingly, M5S' MPs symbolically refused to employ the title *Onorevole* (Honorable), using instead the term *Cittadino* (Citizen). This policy was advertised as a form of modesty and a way of showing that the M5S were just ordinary people speaking in the name of their pairs. At that moment in time, the movement clearly conceived elected members as being mere delegates and spokespersons of the citizens and, as a consequence, it believed that traditional MPs, who according to the Italian Constitution have a free mandate, were disregarding the will of ordinary citizens and acting in their own interest. For this reason, MPs who dissented with the Movement's line were seen (and actually still are) as exercising a free rather than imperative mandate. Accordingly, M5S proposed the introduction of mechanisms which would allow voters to recall MPs and indeed expulsions were seen as a surrogate for legally entrenched recall mechanisms.

However, as Cesare Pinelli has rightly pointed out, there is a clear contradiction here:

> «[…] it is the *party*, not the citizens, that decides to expel an MP in cases of political dissent. These regulations thus *contrast strikingly* with the assumption that MPs are mere spokespersons of citizens, and on the other hand, *with Art. 67* of the Italian Constitution that prohibits the MPs binding mandate»[59] (emphasis added).

[59] C. Pinelli, *The Rise of Populism and the Malaise of Democracy*, in S. Garben, I. Govaere, P. Nemitz (eds.), *Critical Reflections on Constitutional Democracy in the European Union*, Oxford, 2019, 42.

The same logic justifies the rotation in office of roles such as the presidency of the parliamentary groups. More in general, this is even true with regard to the very name chosen for this political group, i.e. «movement»[60] rather than «party».

Going back to the aftermath of the European elections it is interesting to note that the M5S struggled to find an affiliation in the European Parliament. First rejected by the Greens/EFA and then by the Alliance of Liberals and Democrats for Europe (ALDE), M5S finally ended up with the parliamentary group Europe of Freedom and Democracy (EFD), co-chaired by Nigel Farage. This decision was the result of an online consultation[61] which offered at least two other more moderate options (i.e. European Conservatives and Reformists (ECR), or the Non-Inscrits[62]). Grillo, however, tipped the balance by underlining that he appreciated Farage's «sense of humour» and pointing out that he was not «a racist». He then added that there was a lot of false propaganda similar to that used against Grillo himself.[63] Farage, in turn, said of Grillo that he was «doing great things for Italy» and defined the M5S as «great stuff: it's exciting, it's modern… quite remarkable».[64]

The alliance between Grillo and Farage in the group initially called *Europe of Freedom and Democracy* and then significantly changed into *Europe of Freedom and Direct Democracy* – under the request of Grillo who wanted a reference to direct democracy – was dismissed by most observers as a "marriage of convenience". Indeed, in order for a political grouping to be formed in the European Parliament there needs to be 25 MEPs from seven different

[60] Generally, a movement differs from a party because it focuses on a specific issue instead of elaborating a political agenda rooted in values or, more broadly an ideology. According to Italian Constitutional scholarship, traditionally, a *movimento* is conceptually close to lobbies or pressure groups (cfr. G. Amato, A. Barbera, *Manuale di Diritto pubblico*, 4th ed., Bologna, 1984, 288-289).

[61] 29,584 people took part in the online vote and 78% opted for the alliance Nigel Farage.

[62] Non-Inscrits are Members of the European Parliament (MEP) who do not belong to one of the recognized political groups.

[63] *www.repubblica.it/politica/2014/05/30/news/grillo_su_farage_non_e_razzista-87642073/* (ultimo accesso il 30 maggio 2020).

[64] J.O. Frosini, *Lo UK Independence Party e la sua antisistemicità relazionale*, in *Diritto pubblico comparato ed europeo*, 3, 2015, 747-750. For a detailed account of the alliance formed between M5S and UKIP see Id., *Dalla sovranità del Parlamento alla sovranità del Popolo. La rivoluzione costituzionale della Brexit*, Padova, 2020, 64-5.

states. Being part of a group grants access to funds and committees. There was, however, one element that united M5S and UKIP: their Euroscepticism.[65] This is a characteristic of the M5S which some of the *grillini* in Government today would probably like to shake off while others remain faithful to this line.[66] Leaving aside this common feature (and possibly the desire to curb immigration[67]), however, there is no doubt that M5S and UKIP had an ideology and an economic policy that was to a great extent incompatible. Grillo and Farage, however, did not deny this and Farage actually defined the European parliamentary group a *loose association* according to which there was freedom of vote. An enquiry carried out by the Italian weekly magazine l'Espresso based on data provided by VoteWatch-Europe and updated to 24th March 2015 demonstrated that the parties/movements voted in the same way 148 times out of 541 (27.3%). In particular, the MEPs of M5S had a much more pragmatic approach and often voted in the same way as the group of the Socialist and Democrats and the European People's Party.[68] Of course is was never going to be an easy relationship and one could see this from the outset: during the inaugural session of the European Parliament elected in 2013 the MEPs led by Farage turned their back on the orchestra that was playing the Ode to Joy, while,

[65] One should remember that the term «Euroscepticism» was first used by *The Times* in a series of articles publised in 1985 and 1986 as a way of defining the right wing side of the British Conservative which was becoming more and more critical of the policies being enacted by the then President of the European Commission Jacques Delors, see P. Rowinski, *Evolving Euroscepticisms in the British and Italian Press*, London, 19; M. Spiering, *A Cultural History of British Euroscepticism*, London, 2014, 127.

[66] On Europe the position of the M5S is rather opaque. In the past, however, it was openly hostile. One just has to remember December 2013 when the Movement collected signatures to propose a law through popular initiative in order to abandon the Euro and then during the European elections of 2014 Grillo argued in favour of a referendum on Italy's membership of the EU (which would actually require an amendment to Art. 75 of the Italian Constitution). Finally, as this contribution goes to print, one should note the Movement's opposition to using the European Stability Mechanism in order to obtain resources for Italy's healthcare system which has been put under unprecedented stress due to the Covid-19 pandemic

[67] See *Nigel Farage, la verità*, *https://www.ilblogdellestelle.it/2014/05/nigel_farage_la_verita.html*, 30th May 2014.

[68] *www.espresso.repubblica.it/palazzo/2015/04/02/news/grillo-farage-la-finta-alleanza-m5s-e-UKIP-uniti-a-strasburgo-ma-divisi-su-tutto-1.206866*.

on the contrary, the *pentastellati* listened to the music in an orderly fashion.

Bringing our analysis back to the national arena, another distinguishing feature of the M5S is that MPs had to sign a legally binding contract requiring them to pay a consistent sum of money were they to ever violate the Movement's code of conduct or disregard the outcome of official online polls, open to all registered members of M5S, and usually conducted before a parliamentary vote occurred.

7. *Guardians of the Constitution? M5S Oppose Renzi's Reform of the Constitution*

During the 2013-2018 legislature, the Renzi Government decided to embark on a path that was supposed to lead to the reform of the second part of the Italian Constitution. After initially harnessing the backing of the leader of the centre-right Silvio Berlusconi, Renzi gradually saw the support for his package of reforms diminish and therefore, due to the fact that the amendment was approved with an absolute majority and not a majority of two thirds after the second readings (see Art. 138 It. Const.) the changes had be put to a referendum if a request were made by 500,000 voters, five regional councils or fifth of the members of one of the two chambers, and that was indeed the case.[69] Renzi made it very clear that if the referendum were to be defeated he would resign. This led to a situation which occurs quite frequently with referendums of this sort and that is to say that many voters went to the polling stations in order to express their dissatisfaction for the Government's performance rather than looking at the merits (or demerits) of the constitutional reform itself. Although Renzi's proposal certainly contained elements that the *pentastellati* concurred with – such as the reduction of the number of Senators,[70] changes to pop-

[69] In actual fact Renzi had always insisted on the fact that the reform should be put to a popular vote in any case and this is the very reason why members of his own party proposed the so-called confirmative referendum which was held on 4th December 2016.

[70] If the reform had been approved, the composition of the Senate would have been as follows: 95 senators elected by the Regional Councils and by the Councils of the autonomous provinces of Trento and Bolzano. In each region and autonomous

ular legislative initiative,[71] the reduction of the threshold to render a referendum valid,[72] the abolition of the provinces and the National Council for Economics and Labour (CNEL) – Grillo's movement waged a passionate battle against the reform because the referendum had clearly become vote for or against Renzi. M5S wanted to seize their opportunity to bring down the Government and so they did. Renzi resigned and Paolo Gentiloni[73] presided over the Council of Ministers until the general election on 4th March 2018.[74]

8. *M5S' Proposals to Reform the Constitution: a Problem of Text or Context?*

During the campaign for the 2018 general election the M5S presented a document containing their proposals for reforming the Constitution.[75] It began by clearly distancing itself from attempted reforms of the past:

> «We have learned to be wary of grand reforms that claim to change the rules that were made for everyone for the benefit of one party only. Reforms intervening on the state machinery in a disorganized and confused way. With bad results. This is why we thought of a program of punctual and targeted innovations that can produce rad-

province, one senator (21 in total) would have been elected by the mayors of the respective territories. 5 senators would still have been appointed by the President of the Republic but only for a seven-year term. The Senate would not have been dissolution, but instead, when a Regional Council ended its five year term, so would the senators elected by it.

[71] 150,000 voters would have been required to propose new legislation, but once the text had been received, the Parliament would have been obliged to discuss it. The current Constitution requires only 50,000 signatures, but Parliament is not obliged to debate the bill.

[72] If a referendum were to be requested by more than 800,000 voters, up from 500,000 under the current Constitution, the threshold for it to be valid would have been lowered i.e. more than half of the turnout registered in the last general election, down from the absolute majority of the electorate under the current Constitution.

[73] European Commissioner for Economy in the von der Leyen Commission since 1 December 2019.

[74] On the predictions of might happen in aftermath of the referendum see J.L. Newell, *Who's afraid of the Five Star Movement? Why Italy leaving the euro remains unlikely regardless of what happens on Sunday*, in *LSE Blog*, 2016.

[75] MoVimento Cinque Stelle, *Programma Affari Costituzionali*, 2018, *https://www.ilfoglio.it/userUpload/20180121152419_M5S_programma_Affari_costituzionali.pdf*.

> ical changes, without destroying the guarantees to protect everyone and without further and unnecessarily complicating the administrative process».[76]

The concept expressed herein is actually very interesting from a constitutional standpoint because there are numerous scholars that believe that very broad-ranging constitutional amendments that may then be put to a referendum could actually come under the unconstitutional amendments doctrine because the question put to the voters would be multiple and heterogeneous thus violating a logical limit to constitutional amendment.[77] In fact, unlike the case of abrogative referendums provided for in Art. 75 It. Const. the Constitutional Court does not have the jurisdiction to verify the admissibility of constitutional referendums, however, as some scholars have observed it «would be absurd if the requisite of homogeneity and clarity that is applied to the *less* important referendum is not applied to the *more* important one».[78]

The document goes on to underline the M5S' opposition to the constitutional reform of 2016 comparing it to the constitutional changes proposed by Berlusconi in 2005:

> «The Constitution of the Republic, which entered into force on 1 January 1948, has guaranteed freedom and democracy in an unknown measure in previous Italian history for the past 70 years. We think that the 1948 Constitution does not need extensive and general reforms. In addition to its democratic danger, this is also why we opposed the distortion of the Constitution proposed by the Renzi Government in 2016, which developed on the wrong lines of what the Berlusconi government had already proposed in 2006. The Italian people gave us reason: as the referendum of the 2006 had rejected Berlusconi's proposal, likewise on 4 December Renzi's was rejected».[79]

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[76] MoVimento Cinque Stelle, *Programma Affari Costituzionali*, 2018, 2 (Author's translation).

[77] See S. Bartole, *Conferme e novità nella giurusprudenza costituzionale in materia di referendum*, in *Giurisprudenza costituzionale*, 1978, 167-180; A. Cerri, *Commento al messaggio presidenziale del 26 giugno 1991 concerente le riforme istituzionali e le procedure idonee a realizzarle*, in *Giurisprudenza costituzionale*, 1991, 3242-3239; J.O. Frosini, *Further Amendments to the Italian Constitution?*, in J.O. Frosini, G. Pasquino (eds.), *For a Fistful of Votes*, CLUEB, Bologna, 2006, 67-68.

[78] J.O. Frosini, *Further Amendments to the Italian Constitution?*, cit., 67.

[79] MoVimento Cinque Stelle, *Programma Affari Costituzionali*, 2018, 3.

Then the document goes on to state that «these are the various points of our program on constitutional reform in order of the priority given to them by our members».[80] The curious thing is that the first topic to be addressed, strictly speaking, has nothing to do with constitutional reform i.e. «Cuts to the cost of politics and the fight against privileges». Indirectly, this paragraph does contain proposals which have important constitutional implications. Indeed, after a long preamble on the need to lower the salaries, severance package and pension of MPs and accusations towards the "partocracy" for having constantly blocked all attempts to make any cutbacks (which were actually not true), the document goes on to propose the removal of any form of parliamentary privilege putting MPs on an equal footing with ordinary citizens with what concerns criminal investigations, trials in front of the ordinary courts and so forth.[81] This section then goes on to propose a two-term limit for Members of Parliament and a reduction of the overall members of the Chamber of Deputies and the Senate.[82]

The second section of the constitutional reform program is entitled «Stopping the turncoats in Parliament» and here the M5S proposed to amend the standing orders of the two Houses of Parliament so as to only allow political parties/movements that actually ran at the elections and that have a sufficient number of elected members to form a parliamentary group. The *grillini*'s main aim is to disincentivize floor-crossing.[83]

The third proposal in order of priority is for all (new?) EU Treaties to be put to popular referendum. Here the Movement's vocation for direct democracy emerges very clearly and so does a trace of Euroscepticism although this section is quite brief and does not clarify whether treaties that have already been ratified could be the object of a referendum too.[84]

The next section also targets the EU by proposing the abolition of the Italian State's obligation to balance revenue and expenditure in its budget (Art. 81 It. Const.).[85] This was a constitutional

[80] *Ibidem*.
[81] MoVimento Cinque Stelle, *Programma Affari Costituzionali*, 2018, 4.
[82] *Ibidem*.
[83] MoVimento Cinque Stelle, *Programma Affari Costituzionali*, 2018, 4-5.
[84] This is currently prohibited by Art. 75 It. Const.
[85] MoVimento Cinque Stelle, *Programma Affari Costituzionali*, 2018, 5. On the

amendment that was approved under the Monti Administration after a request by the EU. The M5S' document accuses those political parties that propose to repeal the fiscal compact from the EU Treaties of hypocrisy because without amending the Constitution this change would be futile. The *grillini* underline that:

> «It must be the Italian Parliament to decide, freely, when it is appropriate to tighten the belt and when it is the case of investing for development; if necessary, even by resorting to the deficit, as it happens in the United States or the United Kingdom».[86]

The document then goes on to illustrate the idea of propositive referendums without a threshold of validity and here, once again, the M5S' original mission with regard to direct democracy clearly emerges:

> «Direct democracy is the revolutionary conception of politics thanks to which everyone is called to commit to and share choices on how to govern and manage the common good. Referendums are one of the tools through which this form of direct participation takes place».[87]

The *pentastellati*'s program explains that their aim is to strengthen the instrument of direct democracy that is already contained in the Constitution and to introduce a new propositive referendum whose «revolutionary magnitude will change one's understanding of politics».[88]

The next three proposals are pretty self-explanatory: abolition of futile entities,[89] digital citizenship and lowering of the age to vote[90] and to be elected.[91]

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amendment of Art. 81 It Const. see T. Groppi, *The Impact of the Financial Crisis on the Italian Written Constitution*, in *Italian Journal of Public Law*, 2, 2012, 1-14.

[86] MoVimento Cinque Stelle, *Programma Affari Costituzionali*, 2018, 5.

[87] *Ibidem.*

[88] *Ibidem.*

[89] For example, the administrative decentralized entities called Provinces and the CNEL.

[90] Following the trend in other countries such as Austria (Austria lowered the active voting age from 18 to 16 years and the passive voting age from 19 to 18 years in 2007) and Scotland (e.g. independence referendum 2014), the M5S proposed to lower the voting age to 16.

[91] Here the Movement is more generic, but basically intends to remove the one

The proposal that follows is certainly very interesting if observed though the lens of comparative constitutional law i.e. the creation of what the *grillini* call a *comitato di controllo parlamentare*, which we will call a parliamentary scrutiny committee and which would have the function of doing «MOT of all the laws»,[92] in order to verify whether the concrete effects were those intended by the lawmakers or whether amendments or even repeal are required. The other task of this committee would be to monitor the implementation on the part of the Executive of motions, resolutions and so forth approved by Parliament.

The program of reform goes on to argue in favour of systemizing Italy's legal codes with the aim of «chopping down the normative jungle»[93] and then it addresses the Italian *vexata quaestio* (especially in the last 25 year): conflict of interest.

> «From our experience we have been able to see how the conflict of interest arises already in the parliamentary chambers: those who should pass this law are in fact the same subjects sitting in a situation of conflict of interest, […]. Even the partisan nature of the body called upon judging cases of ineligibility or incompatibility, that is to say the *Giunta per le elezioni*, […], contributes to making any legislation on the matter substantially unimplemented».[94]

The *grillini* underline, *inter alia*, that they intend to broaden the applications of the rule on conflict of interest to other office holders other than members of the Government (such as the Mayors of large cities and the managers of public holdings). To this the M5S proposes creating a truly independent authority though they do not clarify how they would go about this.

Of course, it was obvious that this document would also deal with one of Italian politicians' "pet topics" i.e. the electoral law. In pure propagandistic style the *grillini* define their electoral law as the *Democratellum*.[95] This section begins with a scathing attack on

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of the major differences between the Senate and the Chamber of Deputies by lowering the age to vote and to be elected to the former.

[92] MoVimento Cinque Stelle, *Programma Affari Costituzionali*, 2018, 8.

[93] *Ibidem*.

[94] MoVimento Cinque Stelle, *Programma Affari Costituzionali*, 2018, 9.

[95] The Latinization of the names of all Italy's electoral laws began in 1993 when Giovanni Sartori, the political scientist, decided to deride Sergio Mattarella, a Profes-

the drafters of the current electoral (the so-called law *Rosatellum bis*) and the two previous ones – the *Italicum* (approved by the Renzi Government) and the infamous *Porcellum* approved by the 4th Berlusconi Administration just before the general election of 2006 – both of which were declared partially unconstitutional by the Constitutional Court.[96] First and foremost the electoral law proposed by the *pentastellati* is a system of proportional representation based in medium-sized electoral districts. The system would also reintroduce preferences, but in such a way that it would avoid the distortions of the past (that is, however, not clarified in the document). There will be no rigid, artificial threshold but a flexible, natural threshold of around 5% with a correction based on corrected electoral dividers capable of ensuring governability. The aim of the M5S' electoral system is to ensure the election of a Parliament that represents all the political forces that have substantive electoral support with the exclusion of small and tiny parties,[97] provide incentives for «intraparty stability»,[98] facilitation in the creation of stable majorities and a strengthening of the opposition concentrated in a small number of parliamentary groups thus allowing them to be an effective check towards the government majority. All of this with creating «fictious and artificial bipolar constrictions».[99] This proposal looks more like a "wish list" than a concrete proposal. The great majority of Italian voters would probably immediately sign a petition to have an electoral law of this sort, but as we well know (especially in this field) the devil is in the detail which is clearly lacking from this section.

The following section deals with another much debated in the realm of Italian constitutional law and that is to say the definition of the relationship between the State, the Regions and the local authorities. In coherence with this predilection for participatory democracy the document avers that:

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sor of Law with a passion for Latin, who at the time was an MP of the Italian People's Party and had just drawn up a new mixed electoral law in order to respect the result of the referendum that has taken place in June 1993.

[96] It. Const. Court, no. 1 of 2014 striking down law no. 270 of 2005; It. Const. Court, no. 35 of 2017 striking down law no. 52 of 2015.

[97] With the exception of regionally based parties.

[98] MoVimento Cinque Stelle, *Programma Affari Costituzionali*, 2018, 14.

[99] *Ibidem*.

> «public institutions should be organized in such a way as to allow citizens to take part in the decision-making process. The closer the seats of public decision are to the citizens the more it is possible for the latter to decide. The more they are distant from the citizens the more they are subtracted from the democratic process and end up being occupied by people who are unaccountable to the collectivity».

The document goes on to state that the M5S is committed to the original framework of the 1948 Constitution and in particular to Art. 5 which, on one hand, established that the Republic is one and indivisible and, on the other, recognizes autonomy and decentralization. In a very cunning way the document goes in to attack the Constitutional reform of 2001[100] (which of course is legitimate and has been done by many eminent constitutionalists), but by underling that it was approved by the razor-thin majority that propped up the Amato Government, but (intentionally?) forgetting to mention that this reform was confirmed in a constitutional referendum held on 7th October 2001. The *grillini's* program goes on to highlight (correctly in our opinion) that this amendment to the Constitution has complicated the relationship between the State and the Regions and that the list of competences devolved to the latter are confused and badly drafted (see Art. 117 It. Const.). According to the document, the consequence has been long series of claims that have had to be decided by the Constitutional Court in order to draw up the perimeters of the legislative powers of the Regions and the State. Having said that, in coherence with the stance taken with respect to the Renzi Reform the *penstellati* clarify that it would be extremely complicated to amend Art. 117 especially now that we have had 15 years of established constitutional case law so the document tamely proposes that «the State should orient its legislation in way that is more respectful to the Regions». This statement inevitably provokes a wry smile in the light of the recent Covid-19 pandemic and the serious clashes that there have been between the Regions and the 2nd Conte Government.[101]

[100] In 2001 the Italian Parliament passed a constitutional reform regarding the decentralized system. See L. Cuocolo, *The Regions*, in G.F. Ferrari (ed), *Introduction to Italian Public Law*, Milano, 2018, 127 ff; S. Pajno, *Regionalism and the Italian Constitutional System*, in *Diritto e questioni pubbliche*, 9, 2009, 625 ff.

[101] See *infra* par. 10.

The rest of this section goes on to underline that any other proposed changes to the relationship between the States and the Regions will be put to a classic online vote of the members of the Movement. Finally, the *grillini* make the case for allocating the Regions and local authorities greater fiscal autonomy.

The final topic that is addressed in the M5S' program constitutional changes is the pluriennial debate on the reform of Italy's public administration. For reasons of brevity here we will simply list the specific themes which again are in order of priority as per the result of an online poll of the members of the Movement: initiation of a broad, public debate on large public works and any other intervention with territorial impact that is in the collectivity's interest; evaluation of public managers and staff on the basis of their performance; public managers must not be politically partisan; introduction of greater transparency through a reform of Italy's legislation on freedom of access to information and free access to administrative procedures; simplification of the public administration through existing legislation (and not by introducing even more rules); modification of the appointments procedure for independent authorities.

To summarize, one could conclude this review of M5S' proposals for constitutional reform by saying that while homage is undoubtedly paid to instruments that populists typically support (referendums; popular legislative initiative; recall and so forth) there is also a return to the Movement's origins in the section on the relationship between the State, the Regions and the local authorities where the document clearly refers to the concept of «participatory democracy».

9. *2018, the Year M5S is Given the Keys of Power*

Sergio Mattarella dissolved the Italian Parliament on 28th December 2017 and the general election was held on 4th March 2018. The center-right coalition emerged with a plurality of seats in the Chamber of Deputies and in the Senate with the right-wing League, led by Matteo Salvini, emerging as the largest party within that grouping. Led by Luigi Di Maio, the M5S won the largest number of votes. The center-left coalition, led by former Prime Minister Matteo Renzi, came a disappointing third. However, due to the new

electoral law[102] (the much criticized *Rosatellum-bis*, see, *supra*, § 8) no coalition or party obtained an overall majority, resulting in a hung parliament. More importantly the centre-right and Berlusconi's Forza Italia did not have enough seats to be able to form a Government with the Lega and Giorgia Meloni's Fratelli d'Italia.[103] Renzi conceded defeat and made it clear that the PD would sit on the opposition benches.[104] At that point, to the great dismay of Berlusconi and Meloni, Salvini seized his opportunity, broke away from the center-right coalition and began talks with the M5S to form a government.[105]

And indeed, after a strenuous three-month negotiation with a significant role played by the President of the Republic,[106] a coalition was finally formed on 1st June between the M5S and the League, whose leaders both became Deputy Prime Ministers in a

[102] 232 seats shall be assigned from single-member constituencies (6 For Trentino Alto Adige, 2 for Molise and 1 for Val d'Aosta), 386 seats shall be assigned from plurinominal electoral districts (The number of electoral districts is still to be defined, but will be around 65), 12 Seats from foreign constituencies. 3% on a national basis, in both Houses. Exception: electoral lists referring to linguistic minorities (in that case, the threshold is 20% in the corresponding region where the minority is located. Minimum threshold for coalitions: 10% (at least one list must have passed the 3% threshold).

[103] Indeed, there had been much talk just before the elections about the idea of Renzi and Berlusconi reaching an agreement in order to form a government in the highly likely case of a hung parliament. Some observers believe that this actually fueled the populist propaganda and penalized both Renzi's and Berlusconi's parties.

[104] Not everyone in the PD agreed with Renzi's course of action thus rendering self-evident the serious divisions within the party which will eventually lead to Renzi splitting away and forming a new party called Italia Viva.

[105] Cfr., G. Pasquino, *The Formation of the Government*, in L. Ceccarini, J. Newell (eds.), *The Italian General Election of 2018*, London, 2019, 297-315.

[106] Mattarella opposed the appointment of Paolo Savona, an 81 year old economist, former Minister of Industry in the Ciampi cabinet (1993-1994) and a board member with a number of important Italian banks and companies. Mattarella cited concerns about Savona's Euroskepticism. As a consequence, Di Maio and Salvini accused the Head of State of treason and the former even asked to impeach the President of the Republic (see *https://www.agi.it/politica/mattarella_di_maio_salvini_impeachment-3957535/news/2018-05-27/*). Cfr. M. Guidi, *What can we expect from Italy's new government?*, in *LSE European Politics and Policy (EUROPP) Blog* (5th June 2018). Eventually, M5S and Lega accepted the replacement of Paolo Savona with a less contested (and less Eurosceptic) Minister of the Economy (another Economics Professor, Giovanni Tria). Similarly, the appointment of Enzo Moavero Milanesi (Mario Monti's chief of staff at the DG Competition in the 1990s, and Minister of European affairs in the Monti and Letta cabinets) as Foreign Minister reaffirmed Italy's role in the EU and NATO.

government led by the M5S-linked University professor, Giuseppe Conte, as Prime Minister.[107] It was the first self-declared populist coalition to take power in Western Europe. With 354 out 630 seats, the coalition was ready to implement what they called their «Contract for the Government of Change».[108] From a constitutional standpoint, M5S and Lega had different, but theoretically not incompatible objectives: the first aimed at shifting the system from representative democracy to a strongly direct one,[109] while the second was keen to implement an asymmetrical form of enhanced regional autonomy.

This coalition ended with Conte's resignation on 20th August 2019 after Lega pulled its support of the government.

10. *From Conte to Conte*

Eventually, this coalition will implode leaving the stability (and the credibility) of the Country in the hands of the President of the Republic's ability to find a political party willing to partner with M5S after the ousting of Matteo Salvini's Lega. In the end, the PD accepted the challenge and the new coalition was formed under a number of conditions.[110] *In primis*, the support to the Constitu-

[107] R. D'Alimonte, *How the Populists Won in Italy*, in *Journal of Democracy*, 30, 1, 2019, 114-127.

[108] See *Contratto per il Governo del Cambiamento*. Note that on page 3 of the latter there is a facsimile of a contract to be signed by Luigi Di Maio and Matteo Salvini.

[109] Riccardo Fraccaro, who serves as the Minister for Relations with Parliament and Direct Democracy, announced the constitutional reform strategy of the Cabinet. An MP during the previous legislature, Mr. Fraccaro had presented a Bill to amend the Constitution in the sense of introducing the confirmative referendum and the initiative referendum, for both statute and constitutional laws (see Proposta di legge costituzionale Fraccaro ed altri: "Modifiche agli articoli 73, 75, 80 e 138 della Costituzione, in materia di democrazia diretta") the text in Italian is available at *http://documenti.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0032700.pdf*).

[110] C. Bastasin, *Italy's political turmoil shows that parliaments can confront populists*, in *Brookings Institution*, 9th September 2019; available at *https://www.brookings.edu/blog/order-from-chaos/2019/09/09/italys-political-turmoil-shows-that-parliaments-can-confront-populists/*. The last version of the agreement's document states that: «It is necessary to schedule at the earliest time the debate in front of the Chamber of Deputies, the reduction in the number of parliamentarians, at the same time starting a path to increase the appropriate constitutional guarantees and democratic representation, ensuring political and territorial pluralism. In particular, it is necessary

tional amendment bill cutting the number of representatives from 630 to 400[111] in the Lower Chamber and from 315 to 200 in the Higher Chamber, and right after that the promotion of referendum and popular initiative laws. Paired with a troubling use of a privately-owned online platform (*piattaforma Rousseau*)[112] used to write bills through a bottom-up method and to "constrain" MPs voting, this populist constitutional agenda – inspired, in theory, by the Swiss and Californian Constitutions – is championed by the M5S.

More specifically, with regard to a bill to introduce a referendum in support of popular legislative initiatives, it should be noted that the constitutional bill presented on 19th September 2018,[113] intends to modify the Constitution by introducing the indirect popular initiative and the possible referendum on the relevant proposal.[114] Positive and negative aspects of this indirect initiative

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to start a path of reform, as parliamentary in character as possible, of the electoral law. At the same time, it is necessary to proceed with the reform of active and passive electoral rights for the election of the Senate of the Republic and the Chamber of Deputies, as well as launch a constitutional review aimed at introducing institutions that ensure more balance to the system and that help to bring the citizens to the institutions». Programma di Governo, Item no. 10, 4th September 2019, *https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3A94235fe2-3784-4ca0-a025-51f726158c94#pageNum=4*.

[111] A confirmative referendum was scheduled for the Spring and has been postponed to the Fall in the wake of Covid 19 (See art. 81, legislative decree no. 18/2020 (*https://dait.interno.gov.it/elezioni/notizie/referendum-del-29-marzo-2020-nuovi-termini-per-consultazione-referendaria*). Should the majority of the voters vote in favor for lowering the number of seats in Parliament, this will be the new constitutional rule.

[112] Many have pointed out the fact that the «M5S has been factually set up by a web marketing company (Casaleggio Associati) whose present owner, Davide Casaleggio, holds full and personal control of the movement's official internet platform (and the related big data).The latter is significantly named 'Rousseau' after the Swiss-French theoretician of direct democracy», C. Fusaro, *More direct democracy or a more directed democracy in populist-run Italy?*, in *The Constitution Unit*, 12 October 2018 (*https://constitution-unit.com/2018/10/12/more-direct-democracy-or-a-more-directed-democracy-in-populist-run-italy/*).

[113] A.C. n. 1173.

[114] «Firstly, it intends to abolish the validity threshold created by Article 75 of the Constitution. Secondly, it plans to introduce a strengthened popular initiative process. Under the new system, a bill proposed by 500,000 voters would have to be discussed and passed by Parliament within 18 months. if this does not happen, it would be submitted to a referendum. The promoters of the initiative would be entitled to renounce it in case of agreement (assumedly with Parliament) on a different proposal; otherwise both the initiative and the parliamentary text would be submitted to the voters who could choose their second-best option. Express reference is made to the Swiss model: although the Italian prototype would exclude constitutional amend-

model include whether the initiative is adequate to pursue the goal of increasing public participation and the quality of public decision-making. Ultimately, the question is whether instruments based on popular initiative can substantially improve the quality of Italian democracy.

11. *Concluding Remarks: Populist Constitutional Reform Plans and the Italian Constitution*

Considering what we have said so far, one could come to the conclusion that the "reformist challenge" posed by M5S has been met thanks to the gradual implementation of their constitutional project. The proposals pending at the moment, despite being at different stages of the approval procedure, are: the cut in the number of MPs;[115] the removal of the National Council for Economy and Labour (CNEL)[116] from the Constitution (without necessarily abolishing it); the creation of an electoral appeal procedure in front of the Constitutional Court against parliamentary decisions concerning electoral complaints[117] and, most importantly, a set of innovations concerning referendums.

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ments, and the initiative would have to respect principles and fundamental rights guaranteed by the Constitution as well as European Union and other international obligations. This is very relevant because in the past the two parties of the majority have mentioned the possibility of a referendum to decide Italy's continuing participation in the EU. Unfunded initiatives would also be excluded and it would be for the Constitutional Court to decide whether an initiative could be admitted or not» C. Fusaro, *More direct democracy or a more directed democracy in populist-run Italy?*, cit.

[115] See *supra* par. 10.

[116] See *supra* par. 8.

[117] Reforms of Art. 66 of the Italian Constitution have been presented in the past. The object of the reform is not per se a novelty. According to the current wording of the Constitution, each Chamber shall verify the credentials of its members and the causes of ineligibility and incompatibility that may arise at a later stage). This is an innovation often proposed in the past. For an overview of past reform projects, including that regarding the appeal jurisdiction of the Constitutional Court, see F. Biagi, S. Pennicino, *L'introduzione di una commissione elettorale indipendente: una riforma costituzionale a complemento della modifica della legge elettorale*, in E. Catelani, F. Donati, M. C. Grisolia (eds.), *La giustizia elettorale: atti del seminario svoltosi a Firenze il 16 novembre 2012*, Napoli, 2013, 373-396; F. Biagi, S. Pennicino, *Proposta di modifica dell'art. 66 Cost.: una commissione elettorale indipendente*, in *Percorsi costituzionali*, n. 1-2, 2012, 237-267. On electoral justice more in general, cfr., L. Pegoraro, G. Pavani, S. Pennicino (eds.), *Chi controlla le elezioni? Verifica parlamentare dei poteri, tribunali, commissioni indipendenti*, Bologna, 2011.

The Italian Constitution currently provides for three kinds of referendums: confirmative (art. 138 of the Constitution), in cases where a constitutional amendment is passed in a second reading, by less than two-thirds of the total number of the members of each Chamber; one to create new Regions or merging existing ones (art. 132 of the Constitution); abrogative referendums, by which 500,000 voters or five Regional Councils may request a public vote in order to repeal all, or parts of, an existing law (art. 75 of the Constitution), but its result is binding only if the majority of those entitled to cast a ballot take part in the referendum.

In addition to the genetic role in the birth of the Republic,[118] referendums have played an important part in Italian constitutional law.[119] Abrogative referendums were initially framed by the Constitution's drafters as a «stimulus to keep the institutions in touch with their citizens»,[120] however despite a frequent use of this instrument overtime[121] the actual number of referendums which exerted real effect on the legal systems have been few and far between. This is due mainly to the constraints foreseen by the Italian Constitution, the most important of which is the function assigned to the Italian Constitutional Court.[122] Indeed, the latter controls the admissibility of referendums. However, despite initially narrowly verifying whether the law subject to referendum belonged to exceptions mentioned by Art. 75, the Court later became more pro-active, offering a fundamental contribution to the "rationalisation" of the referendum.[123] In fact, «thanks to this case law, the Italian Constitutional Court has [also] contributed to guaranteeing the space reserved to political institutions by minimising the risk of collisions

[118] On 2nd June 1946, Italians voted in favor of the Republican form of government, thus abandoning Monarchy, and this is the only explicit limit to constitutional amendment foreseen in the Constitution (Art. 139 It. Const.).

[119] On the pre-constitutional praxis of holding referendums and popular initiative, see P.V. Uleri, *Referendums and Initiatives from the Origins to the Crisis of a Democratic Regime*, in M. Gallagher, P.V. Uleri, *The referendum experience in Europe*, Berlin, 1996, 106-125.

[120] C. Mortati, *Relazione alla II Sottocommissione*, 3rd September 1946. Available at *https://www.nascitacostituzione.it/05appendici/0 1generali/00/02/06-mortati.htm*.

[121] Close to 70 referendums have been held since the Constitution entered into force.

[122] Constitutional law no. 1/1953.

[123] A. Barbera, A. Morrone, *La Repubblica dei referendum*, Bologna, 2003.

between direct and representative democracy».[124] More in general, the reality is that, over the past 20 years, the turn out has been low,[125] thus rarely granting, after 1995, the necessary threshold to make the outcome of the popular consultation valid.

Moreover, with regard to popular legislative initiative, it should be noted that, despite the empowering language of the Constitution, out of the nearly 230 proposals presented (after collecting 50000 citizens' signatures) around 60% were never even scheduled for discussion in Parliament and only three became laws.

In other words, the truth of the matter is that the reforms proposed by M5S are not unreasonable or revolutionary. In fact, the last version of the plan envisages a combination between direct and representative democracy in forms which have been discussed before. However, the consequences of a piecemeal implementation may «result in a severe distortion of the constitutional order, which is not equipped to balance the effects of disinformation of voters especially considering the preponderant role played by the internet and social media more specifically».[126] Rules on pluralism of sources of information and the right to truth are in fact unsatisfactory considering the new technological scenario,[127] and in the case of «zero-sum decision-making procedures» as is the case of referendums, one is particularly «at risk of being influenced by emotional arguments and deliberately misleading information».[128] In a nutshell, one could say that the aim of these reforms is filling the gap of popular participation present in the Constitution by oversimplifying the institutional system, claiming that technology can

[124] G. Martinico, *Populism and Referendum: the Italian Debate from a Comparative Perspective*, cit., 89.

[125] Table attached to the Preliminary Dossier on the *Iniziativa legislativa popolare e referendum A.C. 726 e A.C. 1173*, published on 16th October 16 October 2018 and available at *http://documenti.camera.it/leg18/dossier/testi/AC0168.htm?_1585744047534#_Toc527446922*.

[126] C. Fusaro, *More direct democracy or a more directed democracy in populist-run Italy?*, cit.

[127] See M. Gobbo, *La propaganda politica nell'ordinamento costituzionale: esperienza italiana e profili comparatistici*, Padova, 1997; M. Monti, *Italian Populism and Fake News on the Internet: A New Political Weapon in the Public Discourse*, in G. Delledonne, G. Martinico, M. Monti, F. Pacini (eds.), *Italian Populism and Constitutional Law*, cit., 184-187.

[128] C. Fusaro, *More direct democracy or a more directed democracy in populist-run Italy?*, cit.

project individuals at the center of deliberation. For example, claims that the new popular legislative initiative rules will trigger forms of "collaborative" legal drafting between proponents and the lawmakers, by incentivizing the latter to cooperate in order to avoid the popular referendum do not seem realistic. Rather this system will create more space for private, organized interest,[129] which would then branch out directly in legislative drafting, thus reaching a result exactly opposite compared to the one originally envisioned. This hypothesis is strongly supported by the analysis of the various types of comments posted on the *Rousseau* platform, which feature three main categories of contributions with regard to the law-making process: a limited number of "highly technical" posts and a few "trolls", and many general comments of support for Beppe Grillo or M5S.[130]

Moreover, it should be noted that this step will (most likely) be taken in the context of a smaller Assembly, pending the implementation of the coalition's roadmap of electoral reform. In such a scenario, the idea that the result will be more direct participation of people is pure utopia. Probably, the only way in which this could become true is through the «complete transcendence of representative democracy through the massive use of ICT tools».[131]

We shall see whether the plebiscitary deviation can be avoided, or whether the recent decline of popular support for M5S will favour right-wing sovreignists[132] (such as Lega and Fratelli d'Italia) leading Italy towards populist authoritarianism. Is the Italian Constitution equipped to face an authoritarian backdrop, one that populists may have – in good faith – paved the way to? The overall answer is no. The Italian Constitution does not provide for specific instruments aimed at protecting democracy. It does not provide for

[129] P.L. Petrillo, *Democrazie sotto pressione: Parlamenti e lobby nel diritto pubblico comparato*, Milano, 2011; Id., *Il dialogo in Parlamento tra politica e interessi organizzati*, in *Il Filangieri. Quaderno 2015-2016*, 2017, 283-303.

[130] For a description of the evolution of the platform Rousseau see P. Ceri, F. Veltri, *Il Movimento nella rete. Storia e struttura del Movimento a 5 stelle*, cit.

[131] V. *supra* the utopian challenge, as identified by A. Floridia; R. Vignati, *Deliberativa, diretta o partecipativa? Le sfide del Movimento 5 stelle alla democrazia rappresentativa*, cit.

[132] S. De Spiegeleire, C. Skinner, T. Sweijs, *The Rise of Populist Sovereignism: What It Is, Where It Comes From, and What It Means for National Security and Defence*, The Hague, 2017.

a ban on political parties (exception made for the Fascist party) nor does it provide for limits to constitutional amendments (exception made for the Republican form of government).[133]

Having said this, thanks to the design of the parliamentary regime, the Constitution has scaled back the most significant discrepancies of the constitutional reform plan regarding direct democracy and governance more in general. For example, even before it was necessary to find a compromise with the PD in order to start the 2nd Conte government in 2019, the proposals on direct democracy have already been watered down thanks to the activity of the opposition during debates and negotiations on the amendments. If one were to compare the 2015 proposal and today's constitutional bill, one would immediately notice that, for example, the popular initiative is now limited to statute laws and the proposal foresees a threshold (i.e. 25% of the eligible voters) in order for the outcome to be valid.

Considering the current Covid-19 pandemics and the consequences this will have in the political arena, one should underline that M5S's populist constitutional agenda has for now yielded to liberal democracy. However, this will only continue provided that M5S obtains its desire to strengthen the instruments of direct democracy contained in the Italian Constitution.

Of course, it remains to be seen whether this populist constitutional agenda is brought forward as a natural propension towards civic activism typical of Italian society, or whether technology will bring about a much more significant transformation of the very nature of Italy's liberal democratic constitutional system.

Abstract

Using the case-study method, the article offers an overview of the main items on the constitutional reform agenda of the *Movimento Cinque*

[133] J.O. Frosini, S. Pennicino, *Ban on Political Parties*, in R. Grote, F. Lachenmann, R. Wolfrum (eds.), *Max Planck Encyclopedia of Comparative Constitutional Law* [MPECCoL], 2017. Here we refer to the future, because the question of whether M5S can or cannot be banishing according to the Xii transitional provisions or more in general due to the compatibility with art. 49 It. Const. has been discussed by many Authors. Among others, see M. Bassini, *Rise of Populism and the Five Star Movement Model: an Italian Case Study*, cit., 205-208; G. Grasso, *La «cifra democratica» del MoVimento 5 Stelle alla prova dell'art. 49 della Costituzione*, cit.

Stelle (M5S) as it developed over the past 10 years in order to, on one hand, verify whether the Italian Constitution is equipped to cope with populist trends in constitutionalism and, on the other hand, to corroborate whether, over time, the M5S' constitutional amendment plan has been mellowed by the Constitution. Based on a detailed description of the context in which these reform projects came to be, the analysis shows that M5S's populist constitutional agenda has yielded to liberal democracy under the condition of being successfully implemented. In fact, the piecemeal approach adopted by M5S might be end up serving the purpose of a gateway for illiberal turns in the context of the liberal democratic system of the Italian Constitution.

Attraverso l'analisi di caso di studio, l'articolo offre una panoramica dei principali punti del programma di riforma costituzionale sviluppato negli ultimi 10 anni dal Movimento cinque stelle (M5S) al fine di verificare, da un lato, se la Costituzione italiana è in grado di far fronte alle tendenze populiste del costituzionalismo e, dall'altra, se la Costituzione italiana, pur non prevedendo vere e porprie forme di protezione della democrazia, abbia costretto questa forza politica a moderare i propri propositi di riforma della democrazia rappresentativa. Sulla base di una descrizione dettagliata del contesto in cui sono nati questi progetti di revisione costituzionale, l'analisi mostra che l'agenda costituzionale populista del M5S ha fino ad oggi riconosciuto l'essenzialità del carattere liberale della democrazia in Italia, ma a condizione di ottenere il rafforzamento degli strumenti di democrazia diretta contenuti nella Costituzione italiana.

MICHELE DI BARI

A MAJORITARIAN ONE-SHOT, A MINORITY BEING SHOT DIRECT DEMOCRACY AND THE «*COUNTER-MINORITARIAN DILEMMA*»

1. *Introduction*

The aim of this paper is to analyze whether the risk of compromising fundamental rights of individuals belonging to minority groups is higher when direct democracy – in particular if no *quorum* is provided for it – is used to decide over laws/regulations granting minorities specific guarantees.

Nowadays, when not achieving their goals through the legislature, it is now common for minority groups to be granted rights through judicial activity, even despite the mood of the elected majority.[1] This, in turn, brings to the so-called counter-majoritarian dilemma.[2]

Hence, when initiatives or referendums to repeal a legislative reform or judicial decisions '*pro minority rights*' take place, they might be perceived as a way to reassert the power of the electoral

[1] As Barack argues, since human rights are the true essence of democracy, individuals' rights, in particular the rights of those belonging to minority groups, '*cannot be left only in the hands of the legislature and the executive, which, by their nature, reflect majority opinion*'. A. Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, in *Harvard Law Review*, 116, 16, 2002, 21.

[2] A recent interesting analysis is given by M.C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, in *Journal of Constitutional Law*, vol. 13, n. 2, 2010, 283 ff.

majority against either the judicial power or the representative legislature.[3]

On several occasions in the last decade, referendums on socially delicate issues concerning minority groups have been called upon and used. It is of utmost importance to investigate these 'backlash phenomena' in order to prevent the danger underpinning direct democracy.

In the first section of this contribution, a brief and general overview concerning direct democracy devices is provided. For the sake of brevity, and given the attention paid to case studies, the relation between direct democracy and populism will not be analyzed in detail.

In the second paragraph, case studies are examined to verify what the outcomes of popular consultations have been, when the issue of same-sex marriage has been under ballots.

As it will be shown in all examined cases, popular consultation has resulted in a decision against minority groups (namely LBGT people). Therefore, given this scenario, is there a *counter-minoritarian dilemma* democratic states should deal with when allowing the use of direct democracy to decide over minorities' rights?

Since this contribution takes a comparative approach on the issue of direct democracy's possible negative outcomes, it is necessary to clarify – though very briefly – the methodology that has been adopted. The approach taken by this article will be functional[4] to the extent this analysis will try to investigate direct democracy devices when used against specific social minorities, i.e. individuals belonging to the LGBT community.

The issue of same-sex marriage referendums will be investigated considering: (*a*) California and Taiwan as examples in which

[3] T. Donovan, *Direct democracy and campaign against minorities*, in *Minnesota Law Review*, 97, 2013, 1739 ff.

[4] R. Michaels, *The Functional Method of Comparative Law*, in M. Reimann, R. Zimmerman (eds.), *Oxford Handbook of Comparative Law*, 2006, 364 ff.; See, also, R. Michaels, *Two Paradigms of Jurisdiction*, in *Michigan Journal of International Law*, 27, 4, 2006, 1003-1069. As Van Hocke argues, 'comparing domestic law with the way the same area has been regulated in one or more countries has become almost compulsory in doctrinal legal research'. M. Van Hoecke, *Methodology of Comparative Legal Research*, in *Law and Method*, 12, 2015, 1. As Scarciglia argues '*legal scholars might use comparison to do research, lawmakers to elaborate new piece of legislation, judges to adjudicate*'. R. Scarciglia, *Metodi e comparazione giuridica*, Padova, 2018, 43

– despite ballot results – judicial review has favored the minoritarian social group; (*b*) central and eastern European countries,[5] namely Croatia, Slovenia, Slovakia, as cases in which LGBT people's rights have been limited through popular voting, or at least there has been an effort to do so, and courts have not intervened to stop these attempts. Case studies will be presented from the prior (2008) to the most recent (2019) popular consultation.[6]

In all analyzed cases, one or more referendums have been run asking people to decide over same-sex marriage (or civil partnership) either to introduce a constitutional ban, or to prevent/allow the introduction of an *ad hoc* legislative/constitutional reform.

In the concluding section, data will be discussed to underline to what extent direct democracy might affect the rights of minorities, thus considering possible solutions to tackle what I call the democratic «counter-minoritarian dilemma»

2. *Direct democracy: models and open issues and the role of judicial review*

While during general elections individuals are asked to vote for a person who will represent them (*acting on behalf*) and this is the basis of *representative democracy*, in case of popular initiatives or referendums, there is the possibility for individuals to vote directly on a specific issue or policy, i.e. to exercise *direct democracy*.[7]

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[5] See, N. Palazzo, M. Tomasi, *I referendum in materia di diritti delle coppie omosessuali: minoranze e vox populi*, in *Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere GenIUS*, 1, 2016, 89-103.

[6] In 2017, also in Australia, citizens have been involved in the so-called *Australian Marriage Law Postal Survey*, which was a national survey designed to understand citizens' attitude toward the introduction of same-sex marriage in Australia. The survey was held via the postal service between 12 September and 7 November 2017. Nevertheless, unlike voting in elections and referendums, which is compulsory in Australia, responding to the survey was voluntary. This is way the Australian ballot is not considered in this analysis. As for asked question, this was framed in these terms: '*Should the law be changed to allow same-sex couples to marry?*' The survey returned 7,817,247 (61.6%) "Yes" responses and 4,873,987 (38.4%) "No" responses. An additional 36,686 (0.3%) responses were unclear and the total turnout was 12,727,920 (79.5%). See *https://www.abs.gov.au/ausstats/abs@.nsf/mf/1800.0* (last retrieved on 25th September).

[7] It is possible to list also another instrument for the electoral majority: the *recall*. In this last case, people might decide to remove from office and elected representative.

Thus, simplifying at the extreme, while during elections it is a matter of '*person-voting*' in the case of referendum it is all about '*issue-voting*'.[8]

When analyzing direct democracy instruments,[9] a distinction should be drawn between popular initiatives and referendum *stricto sensu*.[10] In fact, while in the first case, individuals are proponents (authors) of a new legislative measure/reform, in the latter case individuals vote on an existing legal text/proposal.[11]

The contemporary debate on direct democracy is mainly focused on how, and to what extent, a constitutional democratic system should rely on *direct popular issue-voting* instead of preferring the classical decision-making process carried on exclusively through representative democratic institutions.[12]

Citizens in a democratic purely representative system might exclusively decide which party or candidate to vote into office, having various cues and available information. Accordingly, elaborating an idea on which party or candidate better responds to one's political view might seem relatively simple. On the other hand, when it comes to direct democracy, matters of popular votes can range from complicated fiscal policy or infrastructure projects to moral politics or political integration (e.g. European integration).[13]

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[8] L. Morel, *Referendum*, in M. Rosenfeld, A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, 2012, 457 ff.

[9] According to some Swiss scholars, differences in direct democracy devices «can be classified by two main dimensions. The source of the proposition describes who controls the issues which are subject to a popular vote, or in other words who sets the political agenda. In the Swiss case, this can be either the government or the parliament or the citizens. The other dimension relates to who can call for a vote. This can be either through a constitutional requirement or it can be through collecting signature». G. Luts, *Switzerland: Citizens' Initiatives as a Measure to Control the Political Agenda*, in M. Setälä, T. Schiller. (eds.), *Citizens' Initiatives in Europe: Procedures and Consequences of Agenda-Setting by Citizens*, London, 2012, 20.

[10] Terminology in this specific context might be confusing. Defining correctly what a referendum or a popular initiative is requires a deep analysis of these specific and different instrument of direct democracy. See, M. Suski, *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum*, Leiden, 1993, 10

[11] For a comprehensive historical and comparative analysis, see M. Qvortrup, *Referendums Around the World*, London, 2018 E. Palici Di Suni Elisabetta, E. Garcia, M. Rogoff, *Gli istituti di democrazia diretta nel diritto comparato*, Padova, 2018.

[12] E. De Marco, *Democrazia in trasformazione: i nuovi orizzonti della democrazia diretta*, in *Federalismi.it*, 1, 2017, 3 ff.

[13] M. Fatke, *Participation and Political Equality in Direct Democracy: Educative Effect or Social Bias*, in *Swiss Political Science Review*, vol. 21, n. 1, 2014, 99-118;

In this context, preference allocation is not so obvious. On the contrary, it may take considerable resources to understand complex issues and develop a preference.

Scandals associated with corruption and bad administration have led citizens to mistrust political parties and representative democratic institutions.[14] Direct democracy is seen as a possible way to overcome the political class' inability to respond to societal demands.[15]

«Populism», which is a word that has always been perceived in a negative fashion, is now used with a positive connotation[16] («*the people rule*!»). By distinguishing between 'the people' and 'the elite', populism emphasizes the power of 'common people', 'the sovereign nation', in opposition to the liberal understanding of democracy and its main features[17] (e.g., rule of law, checks and balances, the protection of minority rights).

Supporters of direct democracy believe that by giving citizens the possibility to vote directly, even overruling previous decisions made by representatives, might be the right corrective tool in all cases where elected representatives fail to follow electorate's preferences.[18] Some scholars also believe that pushing direct democracy

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P. Selb, *Supersized votes: ballot length, uncertainty, and choice in direct legislation elections*, in *Public Choice*, 135, 3, 2008, 319-336; M. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and 'Disclosure Plus'*, in *UCLA Law Review*, 50, 2003, 1141-1188.

[14] See T. Ginsburg, A. Huq, *How to Save a Constitutional Democracy*, Chicago and London, 2018; G. Allegri, A. Sterpa, N. Viceconte (eds.), *Questioni costituzionali al tempo del populismo e del sovranismo*, Napoli, 2019; S. Garben, I. Govaere, Nemitz (eds.), *Critical Reflections on Constitutional Democracy in the European Union*, Hart Publishing, Oxford, 2019; M.A. Graber, S. Levinson, M. Tushnet (eds.), *Constitutional Democracy in Crisis?*, Oxford University Press, Oxford, 2019; W. Sadurski, *Poland's Constitutional Break- down*, Oxford University Press, Oxford, 2019.

[15] See, G. Baldini, *Populismo e democrazia rappresentativa in Europa*, in *Quaderni di Sociologia*, vol. 65, 2014, 11-29; N. Rossi, *Giudici popolo e populismi*, in *Questione Giustizia*, 1, 2019, 14 ff; P. Serra, *Populismo, democrazia e limiti del potere politico*, in *Questione Giustizia*, 1, 2019, 55 ff.

[16] S. Mohrenberg, R. A. Huber, T. Freyburg, *Love at First Sight? Populism and Direct Democracy*, (March 1, 2018) available at SSRN: *https://ssrn.com/abstract=3375589*; J.G. Matsusaka, *The Eclipse of Legislatures: Direct Democracy in the 21st Century*, in *Public Choice*, 124, 1/2, 2005, 157-177.

[17] H. Kriesi, *The Populist Challenge*, in *West European Politics*, 37, 2, 2014, 363 ff.

[18] Le Bihan, *Popular Referendum and Electoral Accountability*, in *Political Science Research and Methods*, 6, 4, 2018, 715-731.

in terms of popular initiatives could allow policy makers to change their preferences based on popular will before a legislature 's choice is annulled by a referendum[19] (a sort of «saving-time device»).

On the other hand, according to those who oppose an extensive recourse to direct democracy, there is no evidence that referendum or popular initiative can improve the quality of democracies.[20] Therefore, while elected representatives might be in a better position to aggregate preferences and discuss properly on the consequences of a given political choice bringing to the elaboration of a new legislative measure, the «*people*» itself tends to follow party lines and stereotypes,[21] instead of allocating preferences based on individual speculations.

Furthermore, if popular initiatives or referendums become very frequent, popular participation tends to decrease,[22] to the extent that the outcome of direct democracy can become – *de facto* – the reflection of minority views (the proponents' view) on a given subject.

To minimize the potential side effects of direct democracy, judicial review might play a role. Indeed, popular initiatives can be challenged in court through a multiplicity of ways. They can be challenged early to keep them off the ballot, or later after voters' approval (as it will be shown through the analysis of selected case studies).

In the majority of legal systems,[23] judicial review mainly covers *the process*, i.e. it is about those rules to be respected: (*a*) in relation to the demand of a direct vote on a specific issue; (*b*) the campaigning process; (*c*) the rules pertaining the voting process itself, e.g. in case of referendums whether there is a quorum or not, or in case of popular initiatives, whether the proposal must be written in general terms or as a bill ready to be discussed.

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[19] See, T. Besley, S. Coate, *Issue Unbundling via Citizens' Initiatives*, *in Quarterly Journal of Political Science*, 3, 2008, 379-397; E.R. Gerber, *Legislative response to the threat of popular initiatives*, in *American Journal of Political Science*, 40, 1, 1996 99-128.

[20] L. Morel, *op. cit.*, 457.

[21] P. Selb, *op. cit.*, 323 ff.

[22] S. Chambers, *Constitutional referendums and democratic deliberation*, in M. Mendelsohn, A. Parkin (eds.), *Citizens, Elites and Deliberation in Referendum Campaigns*, London, 2011.

[23] M. Fatin-Rouge Stéfanini *Le contrôle du référendum par la justice constitutionnelle*, Aix-en-Provence, 2004, 167 ff.

In relation to its formulation, i.e. whether the wording of the proposal is clear enough, and whether it narrowly identify a specific subject, a formal scrutiny can be required (e.g. in Croatia,[24] California)[25].

As far as the *asked question* is concerned, judicial review might involve an evaluation of both the formal and the material validity of the proposed question.[26] Material validity refers mainly to whether a referendum or popular initiative covers a matter which is open to referendum, or the conformity of the popular proposal to the *status quo*, i.e. its compatibility with higher ranking legislation such as fundamental rights embedded in the Constitution or Bill of rights.[27]

Oversight of direct democracy devices might be either automatic or compulsory, and it might depend on which social actor is allowed to seize the authority in charge of reviewing the legitimacy of the proposal. In this respect, among the selected case studies legal systems present different solutions.

3. *Referendums on same-sex marriage*

The issue of legal recognition of same-sex couples has been heavily debated in recent years.

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[24] R. Podolnjak, *Constitutional Reforms of Citizen-Initiated Referendum Causes of Different Outcomes in Slovenia and Croatia*, in *Revus*, 26, 2015, 143 ff.

[25] D.C. Lewis, *Direct Democracy and Minority Rights: Same-Sex Marriage Bans in the U.S. States*, in *Social Science Quarterly*, 92, 2, 2011 364 ff; T. Donovan, *op. cit.*, 1746 ff.

[26] See, K. Pócza (ed.), *Constitutional Politics and the Judiciary*, Oxford, 2018; M. Belov (ed.), *Courts, Politics and Constitutional Law. Judicialization of Politics and Politicization of the Judiciary*, Oxford, 2019; C. Landfried (ed.), *Judicial power. How Constitutional Courts affect political transformations*, Cambridge, 2019; E. Garcia, E. Palici di Suni, M. Rogoff, *op. cit.*, 103 ff.

[27] An example is represented by the Slovakian Constitution. According to article 93, para. 3, the Constitution provides for the so-called «irrevocability clause» in the field of human rights. In other words, standards of human rights as set in the constitutional text cannot be reduced. «If the subject of the referendum would reduce human rights to such a degree that it would jeopardize the nature of the rule of law, such a referendum would not be constitutionally acceptable […] In the Slovak Republic, by comparison, the inalterability of constitutional provisions guaranteeing fundamental rights and freedoms is protected primarily by Article 12.1 of the Constitution (Basic rights and freedoms are irrevocable, inalienable, imprescriptible, and indefeasible), but provisions with the same purpose are undoubtedly included also in Article 93.3 of the Constitution». Slovakian Constitutional Court, decision 2014-3-003, 28.12.2014,

In Europe, as well as worldwide very different solutions have been adopted to accommodate the demand for recognition of LGBT couples.

Nevertheless, while in many states same-sex partners can register or enter into civil partnership, only in some countries it is possible to find *le* «*mariage pour tous*», i.e. an equal legal recognition of partners regardless of their sexual orientation.

These social and legal developments never come without creating social conflicts and opposition. Indeed, as it will be shown in the following subsection, describing each case study separately, in a number of occasions, legal measures – or judicial decisions – opening to gay marriage have become an *easy*[28] target for supporters of a traditional understanding of marriage.

3.1. *California (2008)*

In the United States marriage has been recognized as a legal institution (possibly) open to both heterosexual and homosexual couples since 2015. The path through recognition has not been without obstacles and the role of the Supreme Court has been essential to override conflicts over this specific social issue. Indeed, in the landmark civil rights case of *Obergefell v. Hodges*,[29] the Supreme Court established once for all that the right to marry is open to same-sex partners in the same terms and conditions as opposite-sex couples, given the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[30]

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available in English at: *https://www.ustavnysud.sk/en/zakladne-pravne-dokumenty* (last retrieved on 7.9.2019).

[28] I use the adjective *easy* in order to emphasize how it has been quite simple for conservative parties to promote ballots on LGBT people's rights and win their challenge, being always a very noise minority, yet greater than the LGBT minority.

[29] 135 S.Ct. 2584 (2015).

[30] See. D. H.J Hermann, *Extending the Fundamental Right of Marriage to Same-Sex Couples: The United States Supreme Court Decision in Obergefell v. Hodges*, in *Indiana Law Review*, 49, 2015; S. E: Isaacson, *Obergefell v Hodges: The US Supreme Court Decides the Marriage Question*, in *Oxford Journal of Law and Religion*, 4, 3, 2015. Another interesting analysis has been developed in a specific focus published by *Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere, GenIUS*, 2, 2015: A. Sperti: *La sentenza Obergefell v. Hodges e lo storico riconoscimento del diritto al matrimonio per le coppie same-sex negli Stati Uniti. Introduzione al Focus*; S. Chriss,

In 1993, the Hawaiian Supreme Court made the first prudent step toward the recognition of same-sex marriage in *Baer*.[31] In this case,[32] the court decided that in order to prevent same-sex partners from entering into marriage, the State should have demonstrated a compelling state interest.[33] This decision created an immediate social response by conservative political parties, which, following a struggle, obtained a state constitutional amendment to ban same-sex marriage before the introduction of same-sex marriage provisions by the legislature.

Against the enactment of same-sex marriage, supporters of traditional marriage started popular initiatives in several of the fifty states.

California represents an interesting and emblematic case in which direct democracy seems to have clashed with other constitutional constraints/mechanisms and the judiciary has played a crucial role in redefining the margin of popular sovereignty.

Firstly, in 2000, a ban on same-sex marriage was introduced[34] through *Proposition 22*, which changed California Family Code to formally define marriage in California between a man and a woman. *Proposition 22* was a statutory change (i.e. ordinary legislation) through initiative process, not a constitutional change via initiative process.[35]

D.C. Wright: *After Obergefell v. Hodges: the continuing battle over equal rights for sexual minorities in the United States*; N. G. Cezzi: *I dissensi nel caso Obergefell; R. Ibrido: L'argomento sociologico nella giurisprudenza costituzionale in materia diorientamento sessuale. Esperienze e casi*.

[31] *Baer v. Lewin*, 852 2d. 44 (Hawaii, 1993).

[32] A similar, though not identical case has been decided by the Supreme Court of Alaska, namely *Brause v. Bureau of Vital Statistic*, 1998 WL 88743 (Alaska Superior Ct., Feb. 27, 1998). See K.G. Clarkson, D. Coolidge, W.C. Duncan, *The Alaska amendment: the people's choice on the last frontier*, in *Alaska Law Review*, 16, 2, 1999.

[33] For an analysis of the levels of scrutiny in the United States, see E. Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, in *Georgetown Journal of Law & Public Policy*, 14, 2016, 401 ff; R.H. Fallon, *Strict Judicial scrutiny*, in *UCLA Law Review*, 54, 2007, 1267 ff.

Case n. 17-cv-1249, *U.S.D.C. E.D.Pa*, (*Order)*, 63 ff.

[34] Before *Proposition 22*, in California there was a statute enacted in 1977 by the legislature which prevented same-sex partners from getting married. Yet, those rulings delivered in other states concerning the admissibility of gay marriage (e.g. Hawaii, and Alaska) raised social concern in all US states and campaigns for the introduction of constitutional bans spread all over the federation.

[35] This *Propositions*, provided by art. 2 of the California Constitution, has been voted by 53.8% of the voters, with 'yes' prevailing with a majority of 61.4%.

Subsequently, the California Supreme Court ruled in a 4-3 decision[36] that laws directed at gays and lesbians were subject to strict scrutiny, thus, given that the right to marry is a fundamental right under article 1, section 7 of the California Constitution, barring same-sex marriage was unconstitutional. Therefore, license marriage started to be issued by several municipalities.

Nevertheless, opponents of same-sex marriage had already begun their efforts to qualify *Proposition 8*, a popular initiative aimed at amending the California Constitution, i.e. imposing a ban on same-sex marriage stronger than the one provided by the *Proposition 22*. *Proposition 8* was aimed at introducing a constitutional amendment, by adding to the Constitution these words '*Only marriage between a man and a woman is valid or recognized in California*'.

Again, the ballot was successful for its proponents. The turnout among eligible voters reached the 50.1%, with '*yes*' prevailing 52.24% on the 47.76% '*no*'.[37] Since amending California Constitution requires a simple majority, the ban on same-sex marriage was constitutionalized.

LGBT advocates immediately brought the case before the Supreme Court of California aimed at stopping the ballot.

According to those who were opposing *Proposition 8*, this initiative was not meant to amend the Constitution – possibly allowed under art. 2 of the California Constitution – but it represented a constitutional revision, which – on the contrary – is not allowed.

Nonetheless, the California Supreme Court upheld *Proposition 8* with a majority of 6 to 1. Following the Court's reasoning, while couples married before the ballot could remain married, because unaffected by the new law, the ban on same-sex marriage could remain.

In 2010, this decision was repealed by the District Court for the Northern District of California's decision in *Perry v. Schwarzenegger*.[38] Following Justice Walker reasoning, '*An initiative measure*

[36] *In re Marriage Cases*, 183 P3d 384 (Cal. 2008). See, A. S. Leonard, *Backlash and Marriage Equality*, in *Indiana Journal of Law and Social Equality*, 2, 2, 2014.

[37] Data can be analyzed in *Supplement to the Statement of Vote Statewide Summary Propositions*, available at *https://elections.cdn.sos.ca.gov/sov/2008-general/ssov/10-ballot-measures-statewide-summary-by-county.pdf* (last retrieved on 10.9.2019).

[38] *Perry v. Schwarzenegger*, 704 F.Sup2d 921 (N.D.Cal. 2010). The fulltext of this decision is available at *https://socialchangenyu.files.wordpress.com/2012/09/perry-v-schwarzenegger_ndca_2010.pdf* (last retrieved on 10/09/2019). For an analysis of this

adopted by the voters deserves great respect. [however] *California's obligation is to treat its citizens equally, not to «mandate [its] own moral code»*'.[39] Hence, following the reasoning of Justice Walker, the principle of non-discrimination must prevail over moral considerations, and any attempt to undermine fundamental rights cannot be based on stereotypes.

Proponents of *Proposition 8* challenged the District Court decision before the Supreme Court of the United States. However, this decision was not reversed since Supreme Court Justices argued that petitioners had not been persuasive in demonstrating they did not lack standing to appeal.[40] Therefore, although indirectly, the Supreme Court supported the lower court decision.

3.2. *Croatia (2013)*

The Croatian Constitution has undergone different revisions. While in 1991, to run a referendum it was necessary to have the Parliament or the Head of State intervening, now according to article 87.3 of the Croatian Constitution citizens – at least a tenth of the electorate – might propose a constitutional or legislative referendum.[41] No quorum is needed in order to make the ballot valid, so each vote counts (art. 87.4 Croatian Constitution).

When Croatia was about to enter into the European Union, social concern started to rise among conservative parties on the possibility for Croatia to legalize same-sex marriage as it was happening in several other EU countries. Opponents (mainly the group named *U ime obitelji*, i.e. 'on behalf of the family'), started a petition to run a constitutional referendum[42] imposing a constitutional

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case, see C.J. Rosky, *Perry v. Schwarzenegger and the Future of Same-Sex Marriage Law*, in *Arizona Law Review*, 59, 2011.

[39] C.J. Rosky, *op. cit.*, 82.

[40] See, S.L. Kafker, A.D. Russcol, *Standing at a Constitutional Divide: Redefining State and Federal Requirements for Initiatives after Hollingsworth v. Perry*, in *Washington and Lee Law Review*, 71, 2014; R.B. Siegel, *Equality Divided The Supreme Court 2012 Term*, in *Harvard Law Review*, 127, 1, 2013.

[41] The Fifth Amendment of the Constitution was adopted for the first in a decision taken directly by the electorate, on a specific proposal to amend the Constitution based on a popular initiative, i.e., based on a proposal to amend the Constitution submitted by voters.

[42] The asked question was: *Are you in favor of the constitution of the Republic of Croatia being amended with a provision stating that marriage is matrimony between a woman and a man?*

ban on the possibility to introduce in the Croatian legal system same-sex marriage.

More than 700.000 signatures were collected by May 2013, so the *Sabor*, (the Parliament), as established by art. 87.3 of the Constitution, voted in favor of holding a referendum.

The constitutional popular consultation was held on first December 2013, with a very low popular participation: just the 37.9% of the electorate allocated its preference. Yet, it was enough to make the referendum passing with the 66.28% of *yes*.[43] Thus, art. 61.2 of the Croatian Constitution was amended as follow '*Marriage is a living union between a woman and a man*'.[44]

During the referendum campaign, concern about the constitutionality of the referendum itself started to grow within the Croatian public sphere, to the extent that the Parliament voted on a proposal to submit a request for the review of constitutionality of the referendum to the Constitutional Court.

Nonetheless, the majority of MPs voted against, and the Constitutional Court was not able to exercise its scrutiny.

However, while declaring the validity of the ballot,[45] the Court – taking an opportunity to state its own view – emphasized that *inter alia*, from the substantive law aspect, the Republic of Croatia legally recognized both marriage and common-law marriage, and same-sex unions (through unregistered same-sex unions introduced in 2003). Thus, Croatian law was aligned with the European legal standards regarding the institutions of marriage and family.[46] The Court stressed how it is '[…] *necessary to point out the following: any supplementation of the Constitution by provisions according to which marriage is the living union of a woman and a man may not have any influence on the further development* [since] *everyone in*

[43] Data concerning this popular vote can be found at *http://c2d.ch/referendum/HR/5bbc030992a21351232e5775* (last retrieved on 10th September 2019).

[44] R. Podolnjak, *op. cit.*, 145 ff.

[45] *Decision on the completion of the proceedings of supervision of the constitutionality and legality in implementing the national referendum held on 1 December 2013*, decision No. SuP-O-1/2014 of 14 January 2014, Official Gazette No. 5/14. English versions of decisions are available at: *https://sljeme.usud.hr/usud/prakswen.nsf/vPremaDatumuDonos.xsp* (last retrieved on 9th September 2019).

[46] Communication by the Constitutional Court of Croatia, No. SuS-1/2013 of 14 November 2013. English versions of decisions are available at: *https://sljeme.usud.hr/usud/prakswen.nsf/vPremaDatumuDonos.xsp* (last retrieved on 9th September 2019).

the Republic of Croatia has the right to respect and legal protection of their personal and family life, and their human dignity.[47]

Eventually, in 2014, the *Life Partnership Act* passed in the Parliament with 89 votes for and 16 against. It was published in the official gazette on 28 July 2014, and took effect 8 days later (except for the part on parental responsibility which came into force on 1 September 2014).

3.3. *Slovenia (2012-2015)*

In Slovenia, same-sex partners have been granted legal recognition since 2005, according to the Registration of Same Sex Partnerships Act (*Zakon o registraciji istospolne partnerske skupnosti - ZRIPS*), which provided legal guarantees in terms of property rights but excluded social security rights, i.e. pension rights.

In 2009, the Constitutional Court found the law on registered partnership in violation of the Constitution[48] because it discriminated partners on the basis of sexual orientation in the context of inheritance rights, and other property rights. According to Slovenian constitutional judges – who decided unanimously by all nine – the situation of registered same sex partners, in relation to the right to inheritance, was comparable with the situation of spouses. Hence, the Court gave the legislature six months to remedy this situation.[49]

The National Assembly started developing a new bill introducing a new family code. The 2011 bill expanded existing same-sex registered partnerships rights, so that partner could have all rights of married couples, except adoption (excluding stepchild adoption).

However, according to art. 90 of the Slovenian Constitution,[50] once a bill has been passed, it is possible – with some limitations –

[47] Communication by the Constitutional Court of Croatia, para. 12.

[48] Constitutional Court of Slovenia, case U-I-425/06-10, Blazic and Kern v. Slovenia, 2010.

[49] *Ibidem*.

[50] Art. 90 of the Slovenian Constitution allowed one third of the deputies (thus the parliamentary minority), the National Council, or forty thousand voters to call for an adverse referendum. After the 2013 constitutional reform, according to art. 90 of the Constitution, it is now possible to do so only by collecting forty thousand voters' signatures.

to ask an «*adverse referendum*», i.e. a referendum aimed at rejecting a draft bill under approval.[51]

The conservative group '*Civil Initiative for the Family and the Rights of Children*', supported by the conservative-centrist Slovenian People's Party, was able to collect the required signatures to force a referendum on the law.

Doubts were raised on the constitutionality of such a referendum, so the Government referred the question to the Constitutional Court, which, in the end, decided on the admissibility of the popular consultation.[52]

With a turnout of 30.31% – no quorum was provided by art. 90 of the Constitution in its prior 2013 version – the 54.55% of voters agreed on rejecting the new family code.[53]

The Parliament, on 3 March 2015 approved a new bill redefining marriage as a «union of two». Immediately, conservative opponents started a campaign against this legislative reform, and gathered enough signatures to force a referendum.

The National Assembly reacted to this attempt to block this new piece of legislation, voting to block the referendum on the ground that it would violate the constitutional provision which prohibits popular votes *on laws eliminating an unconstitutionality in the field of human rights and fundamental freedoms* (art. 90.2 of the Constitution) The proponents of the referendum appealed to the Constitutional Court.

Again, the Court has been compelled to decide whether the popular vote was in violation of the Constitution, in particular with the revised version of art. 90.2 which explicitly forbids voting '*on laws eliminating an unconstitutionality in the field of human rights and fundamental freedoms or any other unconstitutionality*'. In its 2014 decision, constitutional judges upheld that while '[i]*n Slovenia power is vested in the people*',[54] in order to allow or dismiss ad ad-

[51] This kind of referendum is provided only by the Danish and Slovenian Constitutions. See R. Podolnjak, *op. cit.*, 135 ff.

[52] Slovenian Constitutional Court, case U-II-3/11. Translation in English is available at *http://odlocitve.us-rs.si/en/odlocitev/AN03521?q=U-II-3%2F11* (last retrieved on 13 September 2019).

[53] Data concerning this popular vote can be found at *http://c2d.ch/referendum/SI/5bbc01bb92a21351232e5593* (last retrieved on 10th September 2019).

[54] Slovenian Constitutional Court, case U-II-1/15, 28 September 2015, para. 31.

verse referendum, the Court must establish whether the law passed by the Parliament is about '*eliminating an unconstitutionality in the field of human rights*'.

Following this line of reasoning, the Court went further by observing how it '*has never established that the definition of marriage currently in force and the conditions for entering into marriage are unconstitutional*'.[55] Hence, the new bill passed by the Parliament defining marriage as a «union of two» instead of a «union of a man and a woman» was not to be considered immune from a direct popular decision.

As in 2012, the popular participation was quite low (turnout 36.38%) but it reached the quorum – *one fifth of all qualified voters have voted against the law* (art. 90.4 of the Constitution) – and votes against the bill prevailed with 63.51% of *no*.[56]

Finally, in 2016, the Parliament approved a new bill to grant same-sex partnerships all rights of marriage, except joint adoption and in vitro fertilization.

3.4. *Slovakia (2015)*

No legal recognition is provided to same-sex unions in Slovakia, except for some rights granted to those unions legalized in another EU Member State, since the European Court of Justice ruled – in 2018 – that Members States must grant married same-sex couples, where at least one partner is an EU citizen, full residency rights, in light of Directive 2004/38/EC (*Citizens' Rights Directive or Free Movement Directive*).[57]

In addition, since 2018, ordinary legislation provides some inheritance rights to a «close persons», i.e., a brother, a sister, a spouse or a person in a stable relationship; however, according to article 116 of the civil code, the life companions can be considered under law a «close persons» only '*if a detriment suffered by one of them is reasonably felt as own by the other*'.

Translation in English is available at *http://odlocitve.us-rs.si/en/odlocitev/AN03847* (last retrieved on 13th September 2019).

[55] *Ibidem*, para 52.

[56] Data concerning this popular vote can be found at *http://c2d.ch/referendum/SI/5caf179361af8403c235ddc9* (last retrieved on 10th September 2019).

[57] ECJ, Case C-673/16, Coman and Others *v.* Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne.

The Slovakian case is peculiar since the Slovak Constitution provided for a specific ban on same-sex marriage (art. 41 of the Constitution).

Therefore, there was no (legal) need to further provide other possible limitations on LGBT couples' rights. In addition, according to art. 93.3 of the Slovak Constitution '[b]*asic rights and freedoms* […] *may not be the subject of a referendum*'.

Despite that, the collection of signatures to initiate a referendum was started by the group named Alliance for Family, which was able to gather 400,000 signatures calling for a vote aimed at preventing a legalization of same-sex partners and asking the electorate an opinion on three different interrogatives: (a) *do you agree that only a bond between one man and one woman can be called marriage?;* (b) *do you agree that same-sex couples or groups should not be allowed to adopt and raise children?* (c) *do you agree that schools cannot require children to participate in education pertaining to sexual behavior or euthanasia if the children or their parents don't agree?*

Consequently, a complete list of stereotypes was provided at the ballot.

According to art. 95.2 of the Slovak Constitution, the Constitutional Court may review whether the subject (*question*) of the referendum conforms to the Constitution on the request of the President of the Republic, and, so the President did in this case.

The Court replied by arguing that *'[t]he irrevocability of human rights means that the standard (level) of human rights as set in the constitutional text cannot be reduced. If the subject of a referendum would lead to the broadening of human rights, such a referendum would be constitutionally acceptable. If the subject of the referendum would reduce human rights to such a degree that it would jeopardize the nature of the rule of law, such a referendum would not be constitutionally acceptable*'.[58] Nonetheless, according to the Court, given that marriage in Slovakia is only between opposite sex partners, no rights can be reduced in the absence of rights[59] (i.e.,

[58] Constitutional Court of Slovakia, decision SVK-2014-3-003. English version of the summary is available at *https://www.ustavnysud.sk/documents/10182/71853347/PL_24_2014.pdf/7042a660-ad01-4386-8f31-865f459b8b75* (last retrieved on 12th September 2019).

though the right to marry is a human right, same-sex marriage is not, for now at least).

Interestingly, the referendum failed because of the low turnout, which was 21.4% of the eligible voters, quite far from the 50% required by art. 98 of the Slovak Constitution in order to obtain a legally valid result.[60]

3.5. *Taiwan (2019)*

On May 2017, the Constitutional Court of Taiwan (namely the *Judicial Yuan*)[61] ruled that those civil code provisions preventing same-sex partner from entering into marriage were in violation of the Taiwanese Constitution. According to the Court, the guarantees and freedoms enshrined in the constitutional text require marriage to be open on equal basis regardless of sexual orientation. According to the *Judicial Yuan Interpretation No. 748* the ban on same-sex marriage in Taiwan's civil code was '*in violation of both the people's freedom of marriage as protected by Article 22 and the people's right to equality as guaranteed by Article 7 of the Constitution*'.[62]

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[59] *Ibidem*.

[60] Data concerning this popular vote can be found at *http://c2d.ch/referendum/SK/5bbc03cd92a21351232e58b7* (last retrieved on 10th September 2019).

[61] According to Taiwanese scholars, the Taiwanese Constitutional Court (TCC) could only partially be considered a judicial body of specialized constitutional review rooted in the Civil Law tradition, similar to those familiar to a European scholar. Indeed, its official designation, the Council of Grand Justices, suggests something else. When created, the TCC was not obliged to hold any public oral hearings (prior to 1993). Then, things have changed when it was approved the constitutional amendment (additional article of 1992) which first provided for the TCC jurisdiction on the dissolution of unconstitutional parties, namely, political parties that were judged to endanger the free and democratic constitutional order. That constitutional provision (currently Amendment V, section 4) was later implemented through the Constitutional Interpretation Procedure Act (CIPA), which replaced its predecessor, the Council of Grand Justices Act of 1958, in 1993. It is important to underline how the last constitutional amendment of 2005 further provides for the TCC jurisdiction on the trial of the President and the vice-President with the "judicialization" of (vice) presidential impeachment process. See, See J-Y. Hwang, M-S. Kuo, H-W. Chen, *The clouds are gathering": Developments in Taiwanese constitutional law: The year 2016 in review*, in *International Journal of Constitutional Law*, 15, 3, 2017, 753-762.

[62] In Judicial Yuan Interpretation No. 748, 2017, the Court has pointed out how «[…] the five classifications of impermissible discrimination set forth [in] Article 7 are only illustrative, rather than exhaustive. Therefore, different treatment based on other classifications, such as disability or sexual orientation, shall also be governed by the

In this landmark decision,[63] the Court gave the legislature (the *Legislative Yuan*) two years[64] to amend the civil code.

In February 2018, a Taiwanese conservative Christian group opposing same-sex marriage[65] (*the Alliance for Next Generation's Happiness*) proposed different popular initiatives, colleting signature to allow citizens to vote on this issue.[66] The declared aim was to overturn the ruling by the Constitutional Court.[67]

In response to this campaign against same-sex marriage recognition, LGBT activists collected enough signatures to submit their own claims for popular consultation.[68]

The Central Election Commission (CEC) approved all proposals.[69]

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right to equality under the said Article». This decision, translated in English, is available at: *http://cons.judicial.gov.tw/jcc/en-us/jep03/show?expno=748* (last retrieved on 10.9.2019). See, D. KC Huang, *The Court and the legalisation of same-sex marriage: a critical analysis of the Judicial Yuan interpretation*, in *University of Pennsylvania Asian Law Review*, 14, 2019, 63 ff.

[63] See M-S. Kuo, H-W. Chen, *The Brown Moment in Taiwan: Making Sense of the Law and Politics of the Taiwanese Same-Sex Marriage Case in a Comparative Light*, in *Columbia Journal of Asian Law*, 31, 2017, 73-146.

[64] As the Taiwanese Court stated: «The authorities concerned shall amend or enact the laws as appropriate, in accordance with the ruling of this Interpretation, within two years from the announcement of this Interpretation. It is within the discretion of the authorities concerned to determine the formality for achieving the equal protection of the freedom of marriage. If the authorities concerned fail to amend or enact the laws as appropriate within the said two years, two persons of the same sex who intend to create the said permanent union shall be allowed to have their marriage registration effectuated at the authorities in charge of household registration, by submitting a written document signed by two or more witnesses in accordance with the said Marriage Chapter». Judicial Yuan Interpretation No. 748, 2017.

[65] M.-S. Ho, *Taiwan's Road to Marriage Equality: Politics of Legalizing Same-sex Marriage*, in *The China Quarterly*, 238, 2019, 482-503.

[66] The two relevant questions were: (*i*) Do you agree with using means other than the marriage regulations in the civil code to protect the rights of two people of the same gender to build a permanent life together?; (*ii*) Do you agree that the marriage regulations in the civil code should define marriage as between a man and a woman?

[67] See, to have insight on how media have described this movement, *https://www.taiwangazette.org/news/2018/10/5/who-is-behind-taiwans-opposition-to-same-sex-marriage-and-why-are-they-so-afraid* ((last retrieved on 10th September 2019).

[68] The relevant question was: *Do you agree that the Civil Code marriage regulations should be used to guarantee the rights of same sex couples to get married?*

[69] J.M.K Cho, L.Y.L Kam, *Same-Sex Marriage in China, Hong Kong and Taiwan: Ideologies, Spaces and Developments*, in F.L. Yu, D. Kwan (eds.) *Contemporary Issues in International Political Economy*, Palgrave Macmillan, Singapore, 2019, 289 ff.

On 24 November 2018, Taiwanese voters approved the two initiatives against the legalization of same-sex marriage, thus rejecting the pro-LGBT initiative by wide margins.[70]

Interestingly, one week before the vote, the Taiwanese government announced that the Constitutional Court ruling would have been respected regardless of the referendum results.

Therefore, despite the outcome of popular vote, on 20 February 2019, the *Executive Yuan* presented a draft bill – *Act for Implementation of J.Y. Interpretation No. 748*[71] – allowing same-sex partners to create a '*a permanent union of intimate and exclusive nature for the purpose of living a common life*' (art. 2). This new piece of legislation covers inheritance rights, medical rights, and adoption of the biological children of their partner.

Penalties for adultery and bigamy are provided similarly to opposite-sex marriages.

This new legislation does not amend the existing marriage laws in the civil code, but rather creates a separate law.

In other words, the idea of policy makers was somehow to respect the outcome of the 2018 referendum, while, at the same time, respecting the *Judicial Yuan Interpretation No. 748*, by creating a legal institution which is *de facto* identical to marriage.

4. *Conclusion*

Only in two of the analyzed case studies, namely California and Taiwan, the use of direct democratic has resulted in popular participation above the 50% of the total number of potential voters. This seems to confirm the assumption that, in general, if popular initiatives or referendums become very frequent, popular participation tends to decrease.[72]

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[70] The two «against questions» obtained respectively 72.48% and 61.12% support; the in «favor question» was failed with the 67.26% of votes. Data concerning this popular vote can be found at *https://web.archive.org/web/20181124220825/http://referendum.2018.nat.gov.tw/pc/en* (last retrieved on 10th September 2019).

[71] Available at: *https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=B0000008* (retrieved on 10.9.2019).

[72] M. Freitag, I. Stadelmann-Steffen, *Stumbling block or stepping stone? The influence of direct democracy on individual participation in parliamentary elections*, in *Electoral Studies*, 29, 3, 2010, 472 ff.

In addition, in all analyzed cases, people have voted against the possibility to introduce legal provisions introducing same-sex marriage. As it has been described, in the case of Croatia, Slovenia and Slovakia, parliaments have been ready to address LGBT rights, but they have been hindered or limited in doing so through direct democracy devices promoted by conservative electoral social minorities.[73]

Interestingly, both in California and Taiwan, popular vote confirmed how there exists a gap between voters' attitude toward minority rights, and judges' decisions. Courts seem to face the so called «counter-majoritarian difficulty»[74] with no particular troubles when dealing with sexual minorities fundamental rights.

However, in these two case studies a distinction must be drawn: while in California *Proposition n. 8* has been struck down after the ballot, challenging the legitimacy of the *Proposition* itself vis-à-vis the Constitution, in Taiwan the decision taken by the majority of voters was delivered after the decision of the Judicial Yuan.

Thus, if on the one hand supreme justices seem to be able to play their role as guardians of fundamental constitutional freedoms despite the actual feeling of the people (either before or after a ballot), on the other hand it seems reasonable to affirm that popular vote, i.e. the allocation of preferences, does not seem to be influenced/shaped by authoritative decisions such as those coming from a Constitutional Court.

In both the Californian and Taiwanese cases, the potential conflict between popular sovereignty and constitutional guarantees appear evident, bringing to a highly challenging question to be an-

[73] Indeed, by considering ballot turnouts, it is evident that results have been determined by conservative minoritarian part of voters. In fact, considering the total amount of registered voters, those determining ballot results were: (*a*) the 24.96% of potential voters in the Croatian 2013 referendum); (*b*) the 16.37% of potential voters in the Slovenian 2012 referendum, and the 22.99% in the 2015 referendum; the 20.23% of potential voters in the Slovakian 2015 referendum. These data are available at *http://c2d.ch/* (retrieved on 10th December 2019).

[74] See, N. Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, in *Harvard Civil Rights-Civil Liberties Law Review*, vol. 47, 2012, 373 ff.; B. Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, in *New York University Law Review*, 1998, 333 ff; W. Mishler, R. S. Sheehan, *The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, in *The American Political Science Review*, 87, 1, 1993, 87 ff.;

swered concerning direct democracy: *is it possible to simply discharge a clear-cut popular decision*? In this context, it might be argued that constitutions are there to limit powers, and «the people power» is not exempted from constitutional constraints.[75]

The Taiwanese legislature had somehow to reconcile two opposite positions (judicial *v.* popular), and it did so, bypassing (*ideally*) this problem adopting a legislation introducing same-sex partnership (instead of same-sex marriage), granting rights and obligations overlapping those provided for by the civil marriage, but maintaining a distinction between the two legal institutions.

In addition, given the counter-minoritarian attitude of voters, this brings to what I call a democratic «counter-minoritarian dilemma», whenever direct democracy is used to decide over/against minorities' rights, especially in those cases in which targeted groups are associated with negative social stereotypes.

This lack of empathy toward minority rights could be related to the idea that rights of minorities represent, somehow, a threat for the others.

In Croatia, Slovenia, and Slovakia, the turnout in ballots limiting LGBT rights was below the 40%, with Slovakia having only 21.4% of voters. Hence, it is evident that the majority of voters simply ignored the ballot, allowing conservative voters to achieve their goals easily.

This «popular indifference» must be taken in due consideration, and possible solutions need to be investigated in order not to compromise minority groups' rights.

One possible solution could be found in the introduction of a «constitutional irrevocability of human rights clause» better framed then the one enshrined in art. 93.3 of the Slovakian Constitution, therefore considering the issue of social minorities, and imposing the adoption of the principle of non-discrimination in the analysis of the validity of the proposed referendum.

Indeed, using as a possible limitation for direct democracy a generic reference to "*human rights*" does not seem to configure a

[75] J.E. Castello, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, in *California Law Review*, vol. 74, n. 2, 504 ff.; B. Caravita, *I circuiti plurali della decisione nelle democrazie moderne*, in *Federalismi.it*, numero speciale 1, 2017, 5 ff; S. Bowler, *When Is It OK to Limit Direct Democracy?*, in *Minnesota Law Review*, 97, 2013, 1781 ff.

real safeguard, given the open space for interpretation (as shown in the Slovakian case study). The adoption of the principle of non-discrimination could give judges the possibly to scrutinize proposals of referendum using a *strict scrutiny* approach, as it happens with ordinary legislation passed by parliaments.

To address the issue concerning the «voting social minority» able to decide – outnumbering it – over the rights of another (smaller) social minority, the introduction of higher quorums of voters might discourage an abuse of direct democracy devices against minorities. Indeed, given the number of voters, this seems to be the most efficient way out to avoid the tyranny of conservative minorities over the LGBT minority (or other possible minorities). In other words, what I called the democratic «counter-minoritarian dilemma» could be – if not totally – at least partially solved through a higher quorum required to validate direct voting.

Which is the right quorum? This is an issue that remains open to future investigation.

Abstract

Direct democracy is now being regarded both as an alternative and an adjustment with respect to representative constitutional democracy. Nevertheless, as it is discussed in this article, direct democracy devices, particularly in those legal systems where no quorum is provided for validating referendums, can harm minorities. The case of "same-sex marriage referendums" is analyzed as an emblematic example of how a minority group can be easily outnumbered, when decisions are taken using direct popular voting.

Gli istituti di democrazia vengono oggi considerati come un'alternativa alla, o come un "aggiustamento" della, democrazia costituzionale rappresentativa. Tuttavia, come evidenziato in questo contributo, l'uso di strumenti di democrazia diretta, in particolare in quegli ordinamenti in cui non è previsto alcun quorum per la validazione dei referendum, può avere conseguenze negative per le minoranze. L'analisi comparata dei referendum concernenti il same-sex marriage in diversi ordinamenti, rappresenta un esempio emblematico di questo pericolo. Nello specifico, questo articolo evidenzia come, laddove si faccia ricorso al voto popolare diretto in relazione ai diritti di una minoranza, quest'ultima possa essere facilmente *outnumbered*.

OSSERVATORIO

CARLA BASSU

PARITÀ DI GENERE AI TEMPI DEL CORONAVIRUS: L'IMPATTO DIRETTO E INDIRETTO DELLA CRISI SANITARIA SUI DIRITTI DELLE DONNE

1. *Pandemia e crisi economica, i rischi per la parità di genere*

«State a casa», il refrain che ha risuonato nelle orecchie da quando la minaccia del Covid-19 ha imposto a tutti una reclusione responsabile tra le mura domestiche non è stata certo una novità per le donne che nei secoli sono state destinatarie di inviti declinati in forma diversa ma analoghi nella sostanza. Ed effettivamente pare che l'esortazione abbia trovato maggior riscontro nei confronti della componente femminile della società se è vero che il 4 maggio, in corrispondenza dell'inizio della tanto attesa fase 2, sui 2,7 milioni di chi è tornato al lavoro dopo lo stop forzato del lockdown il 72 per cento è di sesso maschile[1]. Naturalmente questo dato non è

[1] Cfr. R. Amato, *La pandemia aggrava la condizione femminile: il 72 per cento dei lavoratori che rientrano il 4 maggio sono uomini*, in *La Repubblica*, 1 maggio 2020.

[2] Da sottolineare il ruolo fondamentale svolto dalle Costituenti con riferimento alle questioni di genere in sede di elaborazione della Carta Costituzionale, cfr. M. D'Amico, *La Costituzione al femminile. Donne e Assemblea costituente*, in B. Pezzini, A. Lorenzetti (a cura di), *70 anni dopo tra uguaglianza e differenza*, Giappichelli, Torino, 2019; 17 ss.; M. Iacometti, *Il contributo delle donne dell'Assemblea costituente all'elaborazione della Costituzione italiana*, in M. D'Amico, S. Leone (a cura di), *La donna dalla fragilitas alla pienezza dei diritti?*, *Un percorso non ancora concluso*, Giuffrè, Milano, 2017, 170; M.V. Ballestriero, *La Costituzione e il lavoro delle donne: eguaglianza,*

conseguenza di una scelta volontariamente discriminatoria, dato che formalmente l'uguaglianza di genere rappresenta un pilastro dell'ordinamento costituzionale[2], ma deriva dalla tipologia delle attività che per prime sono state riaperte (manifattura, costruzioni) in cui la forza lavoro occupata è prevalentemente maschile. In concreto il rientro al lavoro di molti uomini ha determinato una ricaduta sulla situazione delle donne per le quali prosegue il fagocitante impegno casalingo che somma *smart working* (quando c'è) e cura della prole alle prese con didattica online[3]. Questa situazione si inserisce in un contesto nazionale già contraddistinto dal basso tasso di occupazione femminile che stride con l'alto livello di istruzione e qualificazione registrato in media nelle donne italiane e che marchia il Bel Paese come fanalino di coda europeo per il numero di lavoratrici[4]. In Italia il 56% delle persone laureate è donna, la presenza femminile è nettamente prevalente negli studi post lauream (59,3%) e anche dal punto di vista dei risultati la componente femminile ottiene in media valutazioni migliori negli studi di ogni ordine e grado. I dati parlano chiaro: a conclusione del ciclo di scuola secondaria di primo grado il 5,5% delle ragazze si licenzia con il massimo dei voti contro il 2,5% dei ragazzi; l'esito medio di maturità è 79/100 per le donne a fronte del 76/100 degli uomini; all'università il 55,5% delle studenti si laurea in corso con il 24,9% delle donne che si laurea con 110 e lode, contro il 19,6% maschile e il voto medio ottenuto è pari a 103,7 per le donne e a 101,9 per i ma-

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parità di trattamento, pari opportunità, in M. Gigante (a cura di), *I diritti delle donne nella Costituzione*, Napoli, Editoriale scientifica, 2007, 75 ss.; M.T.A. Morelli, *Le donne della Costituente*, Laterza, Roma, 2007.

[3] Cfr. A. Casarico, S. Lattanzio, *Nella "fase 2" a casa giovani e donne*, in *lavoce.info*, 28 aprile 2020, «Questo massiccio rientro al lavoro di uomini finirà per caricare di ulteriori compiti di cura le donne all'interno delle famiglie, rischiando di ridurre ancora di più la loro offerta di lavoro, già minata dalla chiusura delle scuole e dalla assenza di alternative credibili alla gestione diretta dei carichi familiari».

[4] Un recente rapporto Istat segnala che in Italia il tasso di occupazione femminile è pari al 49,9%, e arriva al 53,8% con riferimento alla fascia di età tra i 20 e i 64 anni. Si tratta di un dato preoccupante soprattutto se confrontato con la media europea che si attesta al 67,3% con punte che superano ampiamente il 70% (in Svezia si arriva all'80%). Il rapporto è consultabile all'url *https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20200306-1*; per un'analisi della situazione delle lavoratrici nel contesto costituzionale italiano si v. E. Catelani, *La donna lavoratrice nella "sua essenziale funzione familiare" a settant'anni dall'approvazione dell'art. 37 Cost.*, in Federalismi.it, 25 ottobre 2019, *www.federalismi.it*.

schi[5]. Le capacità femminili sono dunque ben rappresentate in tutte le fasi della formazione e trovano riscontro nella presenza sempre più diffusa nelle professioni ad alta qualificazione, basta consultare gli albi professionali per rendersene conto[6]. Ma, evidentemente, a un certo punto accade qualcosa che fa inceppare il meccanismo di ascesa professionale e le donne, ampiamente rappresentate nella maggioranza degli ambienti lavorativi diventano presenza rara, ai limiti dell'evanescenza, nelle posizioni di vertice dei rispettivi settori. Tante sono quelle che rinunciano al lavoro dopo il primo o il secondo figlio a causa della carenza dei servizi per l'infanzia mentre i padri non smettono di lavorare[7].

La crisi sanitaria si inserisce come ulteriore elemento esacerbante le differenze di genere rispetto all'occupazione. L'emergenza da coronavirus ha per esempio avuto un grave impatto su settori tradizionalmente a prevalente occupazione femminile come dimostra l'aumento del 30% dei licenziamenti rispetto all'anno precedente per colf e badanti[8].

In ambito internazionale il *World Economic Forum* ha constatato l'impatto maggiore esercitato dalla pandemia sulla vita delle donne perché se è vero che le statistiche mostrano che il virus attacca gli uomini con più violenza, le conseguenze indirette della crisi sanitaria sembrano pesare maggiormente sulla componente femminile. La direttrice dell'Ente delle Nazioni Unite per l'uguaglianza di genere e l'empowerment delle donne (UN Women), che lavora per favorire il processo di crescita e sviluppo della condi-

[5] V. Censis, *Donne: hanno il primato negli studi, altro che gender gap*, 7 novembre 2010, in *https://www.censis.it/formazione/donne-hanno-il-primato-negli-studi-altro-che-gender-gap*.

[6] Sulla situazione del lavoro femminile in Italia e sugli strumenti di tutela delle lavoratrici introdotti nel tempo si v. F. Covino, voce *Donna lavoratrice* (dir. cost), in R. Bifulco, A. Celotto, M. Olivetti, *Digesto disc. pubbl.*, Agg., UTET, Torino, 2015, 128 ss. e l'ampia letteratura ivi riportata.

[7] Secondo una ricerca condotta da Manageritalia basata su dati Istat e Isfol, il 27% delle donne lascia il lavoro dopo la nascita del primo figlio, per cui se prima della gravidanza lavorano 59 donne su 100 dopo il parto ne continuano a lavorare solo 43 con un tasso di abbandono pari al 27,1%, v. *Rapporto donne Manageritalia*, marzo 2019 in *https://www.manageritalia.it/it/lavoro/rapporto-donne-manageritalia-marzo-2019*.

[8] V. AGI Agenzia Italia, *I licenziamenti di colf e badanti sono aumentati del 30%*, 20 aprile 2020, in *https://www.agi.it/economia/news/2020-04-17/licenziamenti-colf-badanti-coronavirus-8366467/*.

zione delle donne e della loro partecipazione pubblica, Phumzile Mlambo-Ngcuka, ha richiamato i governi a prestare attenzione alla prospettiva di genere nella definizione della strategia di ripresa post pandemia. Un documento programmatico emanato dall'Onu nell'aprile 2020 mette in risalto una serie di evidenze che dimostrano come la pressione esercitata dal coronavirus sugli ordinamenti mostra, soprattutto in alcuni casi, la fragilità di servizi sociali e sanitari che in tempi di crisi si dimostrano particolarmente deficitari nei confronti delle donne. In sostanza, l'emergenza sanitaria contribuisce ad accentuare diseguaglianze già esistenti. Basti pensare in questo senso alla difficoltà per le donne – registrata anche in questa sede – di accedere alle cure pre e post natali in ragione delle condizioni critiche in cui si trovano i sistemi sanitari nel frangente di gestione del Covid-19. Il dossier delle Nazioni Unite registra i cambiamenti sperimentati da ragazze e adulte in ragione del coronavirus e profila misure che dovrebbero essere adottate in ambito nazionale per rispondere a criticità di immediato riscontro (influenza sulla salute; gestione della casa e dei figli in assenza di servizi di sostegno e conciliazione con le modalità di lavoro agile etc.) e favorire un processo di ripresa di lungo termine che salvaguardi i diritti delle donne[9]. Dal punto di vista dell'integrazione economica e sociale l'impatto negativo è più rilevante per le donne che già di base subiscono il gender gap nei salari e sono impiegate in misura maggiore in lavori precari[10]. A ciò si aggiunge l'incremento esponenziale del lavoro domestico, di cura e assistenza non pagato dovuto alla chiusura delle scuole e degli aumentati bisogni delle persone anziane a causa delle regole anti-contagio.

In molti paesi i casi di licenziamenti o messa in cassa integrazione registrati da quando il coronavirus si è manifestato si sono verificati in settori quali la vendita al dettaglio, il turismo e l'ospitalità, tutti comparti in cui le donne sono notoriamente sovrarappresen-

[9] V. UN Women, *The Impact of Covid-19 on women*, 9 April 2020, in *https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2020/policy-brief-the-impact-of-covid-19-on-women-en.pdf?la=en&vs=1406*.

[10] *Ibidem*, 4, «Emerging evidence on the impact of COVID-19 suggests that women's economic and productive lives will be affected disproportionately and differently from men. Across the globe, women earn less, save less, hold less secure jobs, are more likely to be employed in the informal sector. They have less access to social protections and are the majority of single-parent households. Their capacity to absorb economic shocks is therefore less than that of men»

tate. La situazione peggiora nelle economie in via di sviluppo dove gran parte delle donne (fino al 70%) risulta impiegata in lavori sommersi e non gode di strumenti di ammortizzazione sociale[11]. Inoltre, le occasioni di lavoro per le donne in molti casi sono legate alla accessibilità di spazi pubblici e alla possibilità di interazioni sociali: opportunità precluse durante il regime di contenimento vigente durante la pandemia[12].

Tra gli interventi suggeriti: il potenziamento degli aiuti diretti per le donne impegnate a diversi livelli nei contesti sanitari; la definizione concordata di orari di lavoro flessibile e la predisposizione di ammortizzatori sociali volti ad alleviare il carico fisico e mentale e a preservare l'indipendenza delle donne nell'ambito della famiglia e della società, la garanzia della presenza equilibrata dei generi nei circuiti decisionali dedicati alla pianificazione della ripresa ma non solo.

L'esperienza del virus Ebola ha dimostrato che isolamento e distanziamento interpersonale hanno ridotto notevolmente la capacità delle donne e aumentato di conseguenza il tasso di povertà[13]. Inoltre, si è constatato che mentre le attività economiche gestite da uomini una volta conclusa l'emergenza sono tornate alla condizione

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[11] V. United Nations Shared Responsibility, *Global Solidarity: Responding To The Socio-Economic Impacts Of Covid-19*, March 2020, in *https://unsdg.un.org/sites/default/files/2020-03/SG-Report-Socio-Economic-Impact-of-Covid19.pdf*, «In South Asia, over 80 percent of women in non-agricultural jobs are in informal employment; in sub-Saharan Africa this figure is 74 percent; and in Latin America and the Caribbean 54 percent of women in non-agricultural jobs participate in informal employment. Access to benefits such as health insurance, paid sick and maternity leave, pensions and unemployment benefits need to reach beyond formal employment and be accessible to women in all spheres of work»

[12] Cfr. International Labour Organization, *Social protection responses to the Covid-19 pandemic in developing countries: strenghtening resilience by building universal social protection*, May 2020, in *https://www.ilo.org/wcmsp5/groups/public/—-ed_protect/—-soc_sec/documents/publication/wcms_744612.pdf*.

[13] V. African Women's Development Fund (AWDF), *Report on the multisector impact assessment of gender dimension of the Ebola Virus Desease (EVD) in Sierra Leone*, Decembre 2014, reperibile al sito *http://awdf.org/report-of-the-multisector-impact-assessment-of-gender-dimensions-of-the-ebola-virus-disease-evd-in-sierra-leone-dec-2014/* Basti pensare in questo senso al caso della Liberia dove circa l'85 per cento delle attività commerciali nei mercati (limitate o vietate durante l'epidemia) è gestita da donne, cfr. UN Women, *In Liberia mobile banking to help Ebola-affected women traders*, novembre 2014, in *https://www.unwomen.org/en/news/stories/2014/11/in-liberia-mobile-banking-to-help-ebola-affected-women-traders*.

precedente alla crisi gli effetti negativi sullo stato di sicurezza economica e stile di vita delle donne sono durati molto più a lungo. Mettendo in relazione quanto accaduto in passato con la situazione attuale è possibile elaborare una proiezione dell'impatto del Covid-19, prevedendo che la recessione globale probabilmente inevitabile determinerà una seria diminuzione negli introiti delle donne con conseguenze gravissime per chi già vive in condizioni di povertà. Un quadro normativo e una politica economica *gender-responsive* è una priorità per gli ordinamenti che si devono confrontare con la piaga del coronavirus. Una panoramica in prospettiva comparata mostra come molti paesi abbiano già introdotto (o siano in procinto di attuare) sistemi di protezione sociale e di sostegno al lavoro[14]. Ebbene è fondamentale che tali interventi, opportuni e necessari, siano effettuati tenendo conto di dati disaggregati per genere, secondo un'ottica che consideri misure differenti per situazioni specifiche riguardanti le donne. Per esempio, sarebbe auspicabile favorire l'accesso al credito e trasferimenti di liquidità in settori colpiti dal coronavirus in cui le donne risultano occupate in misura preponderante per sostenere le lavoratrici e disincentivare la rinuncia al lavoro. Anche nella determinazione dei destinatari di forme di sussidio economico bisognerebbe tenere conto della peculiare situazione delle donne e delle ragazze spesso impiegate in nero per studiare percorsi ad hoc volti a favorire un sostegno e un indirizzo in canali lavorativi sicuri. In questo senso forme importanti di sgravio fiscale per l'assunzione di colf, badanti o baby sitter risultano misure efficaci ai fini della garanzia di personale spesso non tutelato e funzionali alla emersione del lavoro sommerso. In generale, la rimozione delle barriere che ostacolano il pieno coinvolgimento femminile in attività lavorative extradomestiche, la garanzia della parità

[14] V. University of Oxford, Blavatnik School of Government, *Coronavirus Government Response Tracker*, in *https://www.bsg.ox.ac.uk/research/research-projects/ oxford-covid-19-government-response-tracker*, 29 April 2020, «105 countries had passed fiscal response packages equivalent to a total of US$4.8 trillion. A total of 106 countries had introduced or adapted social protection and jobs programs in response to COVID-19. Within these packages, social assistance (non-contributory transfers) is the most widely used tool, followed by social insurance and supply-side labor market interventions», cfr. anche U. Gentilini, M. Almenfi, I. Orton, *Social Protection and Jobs Responses to COVID-19: A Real-Time Review of Country Measures*, "Living paper" version, 3 April 2020, in *http://www.ugogentilini.net/wp-content/uploads/2020/04/Country-social-protection-COVID-responses_April3-1.pdf*.

di salario e di opportunità di carriera e schemi efficaci di protezione sociale studiati appositamente per tutelare le donne sono presupposti imprescindibili da considerare nel momento in cui si pianifica la strategia per la ripresa. Sia con riferimento al settore pubblico che privato, l'eguaglianza sostanziale e la parità tra i generi dovrebbero essere perseguite definendo canali specifici che intervengano per chi, come le donne, parte da una situazione di svantaggio. Via libera dunque a finanziamenti per imprese femminili o meccanismi di supporto a forme di lavoro autonomo per le donne. Detto in maniera brutale, è importante che gli Stati «*put cash in women's hand*»[15] perché solo l'investimento diretto attraverso iniezioni di liquidità a imprenditrici e professioniste può agire nell'immediato conferendo non solo un aiuto concreto ma esercitando anche un ruolo psicologico e risollevando lo spirito prostrato di donne scoraggiate dallo status quo. È innegabile che l'indipendenza delle donne passi attraverso l'autosufficienza economica che deve essere promossa in ogni modo perché i motivi per cui non viene raggiunta autonomamente prescindono dalla volontà e dalla potestà di persone che – come dicono i dati – si impegnano a fondo nello studio e nel lavoro, ottenendo risultati non sempre proporzionati agli sforzi profusi. Dal punto di vista operativo si potrebbe procedere facendo affidamento sui sistemi di protezione sociale già esistenti, modulando le misure in ragione di target specifici con interventi in settori particolarmente colpiti dalla crisi da coronavirus, come turismo, ospitalità, istruzione, commercio, ristorazione, che incidentalmente impiegano una significativa proporzione di donne. Utile anche alleggerire la pressione fiscale sulle attività gestite da donne e investire su programmi di sostegno rivolti a chi lavora nella "economia informale" con l'obiettivo di far promuovere l'emersione del sommerso.

Lungi dal voler indossare lenti distorsive che dipingono la situazione di rosa, pare ragionevole quantomeno cercare di ritagliare nel contesto di questa crisi drammatica uno spiraglio di opportunità che possa servire a individuare sacche di diseguaglianza e disagio preesistenti alla epidemia, in una prospettiva di superamento stabile di difficoltà che l'emergenza ha solo acutizzato.

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[15] United Nations Shared Responsibility, *Global Solidarity: Responding To The Socio-Economic Impacts Of Covid-19*, cit.

2. *Diritto alla salute: l'impatto del Covid-19 sul corpo delle donne*

Rispetto alla situazione specifica della salute femminile, il terribile Covid-19 esercita un impatto sotto due dimensioni: il benessere fisico delle lavoratrici in ambito sanitario e di *caregiving* e la libertà di scelta di cure o trattamenti.

Sotto il primo profilo l'elemento che rileva è squisitamente concreto perché i numeri rivelano che le donne impiegate nel comparto della sanità, inteso in senso largo fino a ricomprendere anche chi si occupa della cura di anziani e di persone con disabilità, sono in larga maggioranza e dunque sostanzialmente molto più esposte al contagio. Secondo dati Eurostat in Europa il lavoro in sanità è svolto da donne per il 70% con punte che arrivano fino al 78% per le professioni sanitarie di tipo ausiliario (mansioni infermieristiche e di assistenza)[16]. Questa evidenza mette in risalto ancora una volta la necessità, con riferimento agli effetti della pandemia, di procedere a un'analisi dei dati disaggregati per genere perché la raccolta e l'esame indifferenziato potrebbero portare a risultanze incomplete e fuorvianti[17]. Per esempio, con riguardo agli operatori sanitari risulta che in Italia ben il 69% degli infetti sia donna[18]; questa risultanza potrebbe essere determinata dalla elevata presenza di donne nella categoria professionale, di cui si è già dato conto ma si tratta di una deduzione intuitiva, non fondata su evidenze scientifiche che sarebbero invece necessarie per affrontare la questione in modo ragionato ed efficiente non solo dal punto di vista preventivo e terapeutico bensì anche ai fini della definizione di una strategia normativa attenta e mirata. In questo senso misure dedicate, per esempio, appositamente alle esigenze delle lavoratrici più esposte al contagio risulterebbero utili per bilanciare i dati e contrastare con più efficacia il virus. Per questo si ritiene che la considerazione del genere in rapporto alla tutela del diritto alla salute non debba considerarsi un elemento eventuale e sussidiario ma un criterio primario e impre-

[16] Cfr. Eurostat, *Statistiche dell'occupazione, dati estratti a maggio 2019*, *https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Employment_statistics/it*.

[17] V. J. Gausman, A. Lausner, *Sex and Gender Disparities in the COVID-19 Pandemic*, in *The Journal of Women's Health*, Volume 29, Number 4, 2020, 465 ss.

[18] Dati analoghi si registrano negli Stati Uniti (73%); in Spagna (72%) e in Germania (75%), cfr. BMJ Global Health, Sex, *Gender and Covid-19: disaggregated data and health disparities*, 24 marzo 2020, in *https://blogs.bmj.com/bmjgh/2020/03/24/sex-gender-and-covid-19-disaggregated-data-and-health-disparities/*.

scindibile nella determinazione di sistemi sanitari equi ed efficienti[19].

Con riguardo alla seconda dimensione di pressione del coronavirus sulla salute delle donne, ovvero gli effetti sulla libertà di scelta e di cura, è stata registrata una tendenza specificamente restrittiva dei diritti delle donne giustificata dall'esigenza di contenere il contagio da Covid-19 ma non supportata da un nesso di causalità tra la misura attuata e l'obiettivo perseguito[20]. Ci si riferisce soprattutto a questioni delicate ed eticamente sensibili come il diritto all'aborto che in molti paesi ha subito significative limitazioni dichiaratamente a causa delle misure anti Covid-19[21]. Così, nel marzo 2020 l'atteso provvedimento di liberalizzazione dell'aborto in Argentina è stato bloccato e rinviato a data da destinarsi a causa dell'emergenza sanitaria; in alcuni Stati degli USA, come Texas, Ohio,

[19] V. Istituto superiore di sanità, *Differenze di genere in Covid-19: l'importanza dei dati disaggregati per sesso*, 25 aprile 2020, in *https://www.epicentro.iss.it/coronavirus/sars-cov-2-differenze-genere-importanza-dati-disaggregati*; in generale sulla questione della medicina di genere si v. F. Rescigno, *Medicina di genere e autodeterminazione femminile. Un percorso accidentato*, in B. Pezzini, A. Lorenzetti (a cura di), *op. cit.*, 203 ss.; M. Tomasi, *Sperimentazioni cliniche e medicina di genere: la ricerca dell'eguaglianza attraverso la valorizzazione delle differenze*, in *ibidem*, 215 ss.; A. Lorenzetti, *L'accesso ai beni e servizi sanitari come prisma dell'uguaglianza, fra non discriminazione, uguaglianza e diritto alla differenza: verso la formulazione di un principio di antisubordinazione di genere*, in *ibidem* 243 ss.

[20] Cfr. C. Provost, *Some governments are using coronavirus to restrict women's rights*, in AlJazeera.com, 14 april 2020 *https://www.aljazeera.com/indepth/opinion/governments-coronavirus-restrict-women-rights-200412095859321.html*.

[21] Per una ricognizione della normativa adottata in risposta alla crisi sanitaria da coronavirus paese per paese si v. Osservatorio Comparato Covid, Comparative Covid Law, in *www.comparativecovidlaw.it*; il generale per un esame analitico dell'impatto della normativa emergenziale in prospettiva comparata si v. L. Cuocolo (a cura di), *I diritti costituzionali di fronte all'emergenza Covid-19. Una prospettiva comparata*, in Federalismi.it, aggiornato al 5 maggio 2020, in *www.federalismi.it*: su alcuni aspetti specifici e significativi riguardanti l'impatto della pandemia sulle istituzioni democratiche cfr. B. Caravita, *L'Italia ai tempi del coronavirus: rileggendo la Costituzione italiana*, in Federalismi.it, *www.federalismi.it*, 18 marzo 2020; F. Clementi, *Proteggere la democrazia rappresentativa tramite il voto elettronico: problemi, esperienze e prospettive (anche nel tempo di coronavirus)*, in *Federalismi.it*, 18 marzo 2020, in *www.federalismi.it*; E.C. Raffiotta, *Sulla legittimità dei provvedimenti del governo a contrasto dell'emergenza virale da coronavirus*, in Biodiritto, 18 marzo 2020, in *www.biodiritto.org*; I.A. Nicotra, *L'epidemia da Covid-19 e il tempo della responsabilità*, in Riv. Diritti regionali, 1/2020; G. Cerrina Feroni, *Tra l'isolamento felice e l'abominevole gerarchia di chi curare*, in *Il Dubbio*, 3 aprile 2020, in *www.ildubbio.org*; T.E. Frosini, *La tecnologia ai tempi del coronavirus*, in *Dimt - Diritto, mercato, tecnologia*, 13 marzo 2020, in *https://www.dimt.it/news/coronavirus-tecnologia-istruzione-lavoro-giustizia/*.

Indiana Iowa, Alabama, Oklahoma, North Carolina, Kansas e Kentucky, le interruzioni di gravidanza sono state sospese durante la pandemia perché ritenute «non essenziali» e rinviate al termine dell'emergenza ma non è dato sapere quando la crisi da Covid-19 potrà dirsi conclusa e i termini legali per l'aborto potrebbero nel frattempo scadere. La giustificazione alla base dei provvedimenti è la necessità di riservare prioritariamente risorse umane e dispositivi medici al trattamento dell'epidemia, facendo passare in subordine interventi ritenuti dagli estensori dei provvedimenti non necessari quali appunto le interruzioni di gravidanza. I medici e gli ausiliari che pratichino aborti o forniscano assistenza professionale durante le operazioni rischiano sanzioni fino a mille dollari o 180 giorni di carcere. Il Procuratore generale del Texas, Ken Paxton, ha ribadito l'esecutività del divieto di praticare aborti per tutti i consultori e le cliniche pubbliche e private.

C'è da dire che gli Stati che hanno disposto i provvedimenti di cui sopra sono gli stessi che negli ultimi anni hanno introdotto normativa seriamente restrittiva del diritto di aborto: Alabama, Iowa, Arkansas e Ohio negli ultimi due anni hanno approvato leggi che limitano a casi estremamente residuali la possibilità di ricorrere all'aborto e lo Stato della Louisiana è attualmente coinvolto in una causa pendente di fronte alla Corte Suprema avente per oggetto una legge che prevede l'individuazione di un solo medico ammesso a praticare interruzioni volontarie di gravidanza su tutto il territorio dello Stato[22].

In alcuni casi il potere giudiziario è intervenuto censurando le leggi statali ritenute eccessivamente restrittive e lesive dei diritti individuali: così è avvenuto in Iowa[23], Alabama[24], Oklao-

[22] Cfr. R. Barnes, A.E. Barimow, *At Supreme Court, Louisiana abortion case might come down to Roberts*, in The Washington Post, 5 March 2020 Nello Stato dell'Ohio i consultori aderenti al circuito Planned Parenthood hanno comunicato che proseguiranno a praticare gli aborti programmati in consapevole e volontaria violazione della legislazione statale, ritenuta lesiva dei diritti delle donne. La presidente della National Abortion Federation, Katherine Hancock Ragsdale, ha dichiarato che «l'aborto può essere una corsa contro il tempo che è un fattore chiave e l'assistenza sanitaria è essenziale».

[23] V. 5th District Court of Iowa, Case no. 17-1579, *Planned Parenthood of the Heartland and Jill Meadows v. Kimberly K. Reynolds ex rel. State of Iowa and Iowa Board of Medicine*, January 22 2019.

[24] District Court of the United States for the Middle District of Alabama,

ma[25] e Ohio[26], ma la minaccia del Covid-19 ha portato alla sostanziale reviviscenza delle norme incidenti sulla interruzione di gravidanza che sono state riproposte dai legislatori statali più vicini alle posizioni "pro life".

Nonostante il clima emergenziale causato dalla pandemia l'introduzione delle restrizioni non è stata sempre accolta di buon grado ma è stata oggetto di aspre contestazioni soprattutto da parte degli operatori sanitari e dalle associazioni impegnate sul fronte della libertà di scelta e dei diritti delle donne. In alcuni casi si è instaurato un confronto tra potere legislativo e giudiziario, come accaduto in Tennessee[27] e in Texas[28].

La vicenda del Texas è emblematica: qui il governatore Greg Abbott il 22 marzo 2020 ha emesso un ordine esecutivo che sospendeva gli interventi di interruzione di gravidanza, sia di tipo chirurgico che indotti tramite somministrazione di medicinali[29]. Il provvedimento è stato impugnato da alcuni operatori clinici, tra cui l'organizzazione attiva a livello nazionale Planned Parenthood, che hanno denunciato il sostrato politico della misura affermando che l'aborto è una procedura essenziale e «time-sensitive» e per questo non può essere sospesa del tutto, nemmeno durante una pandemia[30]. La District Court for the Western District of a Texs ha accolto l'istanza ed emesso una ordinanza restrittiva temporanea (TRO)

Northern Division, *Yashica Robinson M.D. et al. v. Steven Marshall in his official capacity as Alabama Attorney General*, civil action n. 2:19cv365-MH (WO).

[25] *Oklahoma Supreme Court, Oklahoma Coalition for Reproductive Justice v. Cline*, case number 11660/2019

[26] United States Court of Appeals for the 6th Circuit, Preterm Cleveland; Planned Parenthood Southwest Ohio Region et at. v. Lance Himes, Director, *Ohio Department of Health et al*., case number 18-3329, October 11, 2019

[27] V. R. Salamancha, *Federal judge blocks Tennessee order to limit surgical abortion during Covid-19*, in *Jurist*, University of Pittsburgh, April 20 2020, *https://www.jurist.org/news/2020/04/federal-judge-blocks-tennessee-order-to-limit-surgical-abortions-during-covid-19/#*.

[28] Fith Circuit Court of Appeals, re Abbott, case n. 20-50269, il documento è reperibile al sito *http://www.ca5.uscourts.gov/opinions/pub/20/20-50296-CV0.pdf*.

[29] V. Executive Order No. GA-09 relating to hospital capacity during the Covid-19 disaster, il provvedimento è reperibile all'url *https://gov.texas.gov/uploads/files/press/EO-GA_09_COVID-19_hospital_capacity_IMAGE_03-22-2020.pdf*.

[30] V. Planned Parenthood Centre for Choice *et al.* v. Greg Abbott, in his official capacity as Governor of Texas *et al.*, case no. No. 1:20-cv-323, March 25 2020, consultabile al sito *https://www.plannedparenthood.org/uploads/filer_public/a0/8f/a08fcd02-501c-4d99-a3b7-c32776b5ecfe/001_-_2020-03-25_-_complaint.pdf*.

con l'effetto di bloccare l'ordine esecutivo. La Fifth Circuit Court ha però annullato il TRO, ritenendo che in situazioni di emergenza alcuni diritti fondamentali tra cui il ricorso all'aborto possono essere limitati al fine di tutelare la sicurezza collettiva[31]. Si segnala la *dissenting* opinion del giudice James Dennis che ha richiamato le vicende processuali di provvedimenti analoghi a quelli del Texas in Ohio, Oklahoma e Alabama in cui le restrizioni all'accesso all'aborto a causa della pandemia sono state dichiarate dalle corti incompatibili con il regime di libertà garantito dal quadro costituzionale statunitense, così come definito grazie alla giurisprudenza della Corte Suprema federale[32]. La questione è comunque ancora aperta e sensibile e il Texas resta l'epicentro di un'area comprensiva di una serie di Stati in cui il conflitto tra pro-choice e pro-life è più vivo che mai e risulta esacerbato in un contesto a forte rischio di strumentalizzazione come quello definito dall'emergenza coronavirus[33]. Come emerge da una ricerca condotta dal Guttmacher Institute, la crisi da Covid-19 esercita un serio impatto sul diritto alla salute degli statunitensi, soprattutto con riferimento all'accesso a cure per HIV/AIDS, trattamenti per la fertilità, esami prenatali, contraccezione e, appunto, aborto[34].

In questo senso gli Stati Uniti non rappresentano un caso isolato. In Polonia, per esempio, il Covid-19 interviene in modo diverso ma influisce ugualmente il dibattito sul diritto di aborto. Il paese presenta una delle normative più restrittive sull'interruzione di gravidanza nel panorama europeo che prevede la possibilità di ri-

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[31] United States Court of Appeals for the Fifth District, case no. No. 20-50296, 20 April 2020, reperibile all'url *http://www.ca5.uscourts.gov/opinions/pub/20/20-50296-CV0.pdf*.

[32] V. J.L. Dennis, *Dissenting in part, United States Court of Appeals for the Fifth District*, case no. No. 20-50296, cit., «(the ruling inflicts further panic and fear on women in Texas by depriving them, without justification, of their constitutional rights, exposing them to the risks of continuing an unwanted pregnancy, as well as the risks of travelling to other states in search of time-sensitive medical care»

[33] Cfr. J. Burns, States that use COVID-19 *To ban abortion increase our Risks, hardships and fear nationwide*, in *Forbes*, 12 April 2020, *https://www.forbes.com/sites/janetwburns/2020/04/11/states-using-covid-19-to-ban-abortion-increase-everyones-risks-and-hardships-in-a-crisis/#7a06cb6daa8c*.

[34] V. Z. Ahmed, A. Sonfield, *The Covid-19 Outbreak: Potential Fallout for Sexual and Reproductive Health and Rights*, March 11 2020, in *https://www.guttmacher.org/article/2020/03/covid-19-outbreak-potential-fallout-sexual-and-reproductive-health-and-rights#*.

correre all'aborto solo in caso di stupro, incesto, di accertato pericolo di vita per la madre o gravi malformazioni del feto. In conseguenza di ciò molte donne polacche si recano in Stati vicini per praticare interruzioni di gravidanza in strutture cliniche ma tale prassi è resa impossibile dalle limitazioni alla libertà di movimento imposte in ragione della crisi sanitaria. Inoltre, nell'aprile 2020, in piena emergenza da coronavirus, è stata presentata una proposta di legge volta a ridurre ulteriormente le possibilità per una donna di interrompere la gravidanza imponendo, per esempio, di portare a termine la gestazione anche in caso di gravi disabilità o malattie genetiche diagnosticate al feto. Nel 2016 il tentativo di introdurre una legge dal contenuto analogo era stato bloccato dalla massiccia mobilitazione popolare nota alle cronache come *Czarny Protest* (Protesta Nera): le donne polacche avevano sfilato infatti nelle piazze delle principali città vestite di nero, con i visi dipinti dello stesso colore e tenendo in mano grucce di ferro od ombrelli come simbolico riferimento agli utensili utilizzati negli aborti illegali che in Polonia sono ancora una pratica tristemente diffusa, proprio a causa della rigidità delle norme già vigenti[35]. Il divieto di assembramento e le regole di distanziamento sociale imposte dall'emergenza sanitaria non hanno impedito a migliaia di donne di organizzare di fronte alla sede del Parlamento polacco una contestazione condotta nel rispetto dei protocolli di sicurezza con distanziamento interpersonale, uso di guanti e mascherine.

Diversa la situazione in Italia, dove la legge garantisce alle donne il diritto di interrompere volontariamente la gravidanza entro i primi novanta giorni dal concepimento[36] ma l'emergenza coronavirus ha reso di fatto molto complicato accedere alla proce-

[35] V. D. Longo, *Polonia: il diritto di aborto ai tempi del coronavirus*, in East Journal, 10 maggio 2020, *https://www.eastjournal.net/archives/105154*, Il movimento trae ispirazione dalle proteste delle donne islandesi che nel 1975 erano scese in piazza con le stesse modalità per contestare la differenza di salario tra donne e uomini; cfr. E. Farruku, *Interruzione della gravidanza e pianificazione familiare in Polonia. Dibattito sull'abolizione dell'aborto*, in *Diritto e Processo*, Annuario giuridico della Università degli Studi di Perugia, 2015; A. Fligel, *New Scandalous Revolutions in Poland: Abortion Law and Constitutional Court Cases - Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, in Council of Europe, Venice Commission, April 2016, *http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29001-e*.

[36] V. art. 4 Legge 22. 05. 1978 n. 194.

dura. Una circolare emanata dal Ministero della Salute il 30 marzo 2020 ha compreso le interruzioni di gravidanza tra le prestazioni in ambito ostetrico e ginecologico non differibili, che non possono dunque essere rinviate, nemmeno a causa della pandemia. Eppure alcune associazioni[37] hanno denunciato l'effettiva difficoltà ad accedere ai trattamenti in ragione della riconversione di alcuni reparti ospedalieri in sezioni Covid-19 e alla sospensione delle attività dei consultori che ostacolano anche la possibilità di ricevere informazioni o sostegno psicologico oltre che clinico. Le complicazioni di carattere pratico che impediscono o comunque intralciano l'accesso all'aborto praticato ai sensi di legge sono ulteriori nei casi di donne che si trovano in situazioni precarie perché, per esempio, sono vittime di violenza, hanno problemi di salute o risultano positive al Covid-19. In questi casi è facile che si arrivi a superare i termini previsti dalla legge per poter praticare l'interruzione di gravidanza e per rispondere a queste situazioni di vulnerabilità i ginecologi italiani[38] hanno proposto di estendere il limite temporale dell'attuazione del trattamento farmacologico da 7 a 9 settimane, come già è previsto in altri paesi europei come Spagna e Germania. Ancora, gli operatori auspicano misure che favoriscano il ricorso all'aborto farmacologico rispetto a quello, ora più diffuso, chirurgico che oltre a risultare più traumatico per le donne richiede un impegno di risorse umane e strutture ospedaliere che in questo momento sarebbe bene riservare al trattamento del coronavirus[39]. Ancora, si auspica il ri-

[37] Le associazioni che si sono esposte per chiedere il rispetto della Legge 194 anche nelle circostanze emergenziali da Covid-19 sono Laiga, Pro-Choice, Amica e Vita di Donna che hanno rivolto al Presidente del Consiglio, al Ministro della Salute e all'Aifa una lettera aperta in cui si chiede l'introduzione di misure urgenti volte ad assicurare il diritto all'aborto, privilegiando l'interruzione di gravidanza farmacologica in deroga al regime di ricovero previsto per legge. Questa possibilità è sostenuta anche dai dai ginecologi e prevede di procedere all'intervento in ambito ambulatoriale, limitando l'ospedalizzazione che risulterebbe rischiosa per le probabilità di contagio. Il testo della lettera è consultabile al sito *https://secure.avaaz.org/it/community_petitions/presidente_del_consiglio_dei_ministri_ministero_de_aborto_farmacologico_durante_emergenza_covid19_/details/*.

[38] Le sigle rappresentative dei ginecologi promotori della richiesta sono: SIGO (Società Italiana di Ginecologia e Ostetricia), AGUI (Associazione Ginecologi Universitari Italiani) e AOGOI (Associazione Ostetrici Ginecologi Ospedalieri).

[39] La presidente dell'AOGOI (Associazione Ostetrici Ginecologi Ospedalieri), Elsa Viora, ha dichiarato che la proposta presentata «riguarda la possibilità di introdurre il regime ambulatoriale con un unico passaggio della donna nell'ambulatorio

corso agli strumenti di telemedicina, sviluppati e già diffusi in altri settori e molto utilizzati in Francia e UK, che permettono il monitoraggio a distanze delle pazienti da parte degli operatori sanitari.

3. *Lockdown e violenza domestica: donne in trappola*

Secondo una ricerca realizzata da United Nation Population Fund (UNFPA), l'agenzia ONU competente a condurre indagini sulle popolazioni, in collaborazione con la John Hopkins University, all'Università australiana dello Stato di Victoria e ad Avenir Health, nei primi tre mesi di confinamento a causa del Covid-19 i casi di violenza domestica sono aumentati in media del 20% nei paesi esaminati, ovvero i centonovantatre Stati membri delle Nazioni Unite. Si tratta di circa 15 milioni di episodi, tra aggressioni e femminicidi, in più rispetto allo stesso periodo dello scorso anno[40]. Nella sola Gran Bretagna più di quattromila persone sono state arrestate per abusi domestici nelle prime sei settimane di isolamento e le chiamate al numero appositamente istituito dal governo per raccogliere richieste di aiuto sono aumentate del 49% rispetto allo scorso anno. Con riferimento alle donne uccise tra le mura di casa, in Argentina in due settimane sono state assassinate 12 donne, quasi una al giorno e in Messico si è registrato un incremento del 9,1% dei femminicidi rispetto allo stesso periodo dell'anno passato. Il trend dell'aumento dei casi, sebbene in diverse percentuali, è una costante in moltissimi Stati, tra cui l'Italia. *Amnesty International* riporta le statistiche del Telefono Rosa che mostrano una diminuzione del 55,1% (da 1104 a 496) nelle prime due settimane di marzo, attribuibile alla difficoltà delle donne di chiamare liberamente essendo confinate in casa con l'abusante, salvo aumentare esponenzialmente a partire dalla seconda metà di marzo quando il

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ospedaliero o in consultorio. In questo modo la donna potrebbe assumere il primo farmaco in ambulatorio e ricevere già il secondo – sono due i medicinali previsti – in modo da poterlo prendere a casa e fare un solo accesso in ospedale o in consultorio», dichiarazione riportata da V. Rita, *Aborto negato: le proposte dei ginecologi*, in *La Repubblica*, 15 aprile 2020

[40] V. UNFPA, Avenir Health, Johns Hopkins University (USA), Victoria University (Australia), *Impact of the COVID-19 Pandemic on Family Planning and Ending Gender-based Violence, Female Genital Mutilation and Child Marriage*, April 2020, in *https://www.unfpa.org/resources/impact-covid-19-pandemic-family-planning-and-ending-gender-based-violence-female-genital*.

protrarsi del confinamento contribuiva ad aggravare la situazione[41]. L'associazione Donne in rete contro la violenza (D.i.R.e.) ha registrato un aumento del 74% dei casi di donne che si sono rivolte a centri antiviolenza tra aprile e maggio 2020, a fronte degli ultimi dati disponibili, raccolti nel 2018, pari al numero impressionante di quasi 3000 donne[42]. Il Dipartimento per le Pari Opportunità della Presidenza del Consiglio dei Ministri ha istituito un numero gratuito (1522) dedicato alle donne vittime di violenza, che possono contattarlo gratuitamente e offre anche la possibilità di comunicare via chat, nel caso in cui non si possa parlare. La Polizia di Stato ha esteso l'app YouPol, realizzata per la segnalazione di casi di bullismo e spaccio di stupefacenti ai casi di violenza domestica e, in collaborazione con la Federazione farmacisti, la rete dei centri antiviolenza ha promosso una iniziativa in virtù della quale richiedendo in farmacia «mascherina 1522» le donne segnalano la violenza subita e richiedono aiuto.

Fa riflettere che ben il 98% delle donne che chiedono aiuto siano cittadine italiane; è un dato che sottintende la maggiore difficoltà per le migranti di accedere ai servizi di sostegno e assistenza e lo stesso vale per le donne con disabilità[43].

Nonostante, come si evince da tutto quanto sopra detto, l'aumento dei casi di violenza ai danni delle donne sia una costante in tutti gli ordinamenti in cui sono stati raccolti e analizzati i dati, l'impatto della pandemia e delle misure adottate per evitare il contagio è più forte nei paesi con servizi sanitari e di assistenza meno solidi[44]. Secondo le statistiche pubblicate dalle Nazioni Unite durante il periodo di applicazione delle misure di contenimento del Covid-19, il

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[41] Amnesty International Italia, *Covid-19 in Italia: in aumento casi di violenza domestica nei confronti delle donne*, 23 aprile 2020, in *https://www.amnesty.it/covid-19-in-italia-in-aumento-casi-di-violenza-domestica-nei-confronti-delle-donne/*.

[42] D.i.R.e. - Donne in rete contro la violenza, *2.956 donne si sono rivolte ai centri D.i.Re tra il 6 aprile e il 3 maggio, il 33 per cento per la prima volta*, 11 maggio 2020, in *https://www.direcontrolaviolenza.it/2-956-donne-si-sono-rivolte-ai-centri-d-i-re-tra-il-6-aprile-e-il-3-maggio-il-33-per-cento-per-la-prima-volta/*.

[43] Cfr. le statistiche raccolte dalla ONG Differenza Donna, *Donne migranti*, in *https://www.differenzadonna.org/donne-migranti/* e *Violenza sulle donne con disabilità*, in *https://www.differenzadonna.org/violenza-sulle-donne-diversamente-abili/*.

[44] United Nations Human Rights Office of the High Commissioner, *COVID-19 and Women's human rights: what is the impact of Covif-19 on Gendr-based Violence?*, in *https://www.ohchr.org/Documents/Issues/Women/COVID-19_and_Womens_Human_Rights.pdf*.

numero di richieste di aiuto da parte di donne vittime di violenza è raddoppiato in paesi come Malesia e Libano e addirittura triplicato in Cina, rispetto alle medie registrate negli anni precedenti. In Kosovo i casi di violenza di genere sono incrementati del 17%[45]. Il segretario generale dell'ONU, Antonio Guterres, ha rivolto un appello a tutti i paesi membri dell'Organizzazione affinché procedano alla implementazione di un piano di prevenzione della violenza di genere e alla previsione di sistemi di soccorso e sostegno delle vittime, come parte integrante della strategia nazionale di contrasto al Covid-19. In particolare, Guterres invita a promuovere l'istituzione di sistemi di allarme di emergenza nelle farmacie e nei negozi di alimentari (attività aperte anche durante in lockdown imposto dal coronavirus), rilevando che la violenza non è confinata ai campi di battaglia ma per molte donne e ragazze si manifesta nel luogo che per eccellenza dovrebbe essere il più confortevole e sicuro: la casa[46]. Il segretario generale ha richiamato sette raccomandazioni che le Nazioni Unite hanno stilato allo scopo di contrastare la violenza di genere tra cui si citano: l'incremento di servizi online di supporto; la qualificazione dei rifugi anti violenza come servizi essenziali da tenere attivi anche durante il lockdown e la determinazione di modalità semplici che consentano di denunciare gli aggressori in sicurezza.

La crisi sanitaria ha un'influenza negativa anche sui programmi internazionali di assistenza di genere come i piani contro le mutilazioni genitali femminili e i matrimoni infantili[47].

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[45] V. ONU Italia, Covid-19: Onu lancia allarme, terribile aumento delle violenze contro le donne, 8 aprile 2020, in *https://www.onuitalia.com/donne/*.

[46] A. Guterres, Make the prevention and redress of violence against women a key part of national response plans for COVID-19, United Nations Covid-19 response,«I urge all governments to make the prevention and redress of violence against women a key part of their national response plans for COVID-19. That means increasing investment in online services and civil society organizations. Making sure judicial systems continue to prosecute abusers. Setting up emergency warning systems in pharmacies and groceries. Declaring shelters as essential services. And creating safe ways for women to seek support, without alerting their abusers. Women's rights and freedoms are essential to strong, resilient societies. Together, we can and must prevent violence everywhere, from war zones to people's homes, as we work to beat COVID-19», April 2020, in *https://www.un.org/en/un-coronavirus-communications-team/make-prevention-and-redress-violence-against-women-key-part*

[47] Cfr. N. Kamen, *Women, girls, health workers must not be overlooked in global COVID-19 response*, 26 March 2020, in *https://www.unfpa.org/press/women-girls-health-workers-must-not-be-overlooked-global-covid-19-response*

L'Italia ha sottoscritto il comunicato congiunto promosso in seno all'ONU dal Sud Africa e dalla Svezia e ratificato da 59 Paesi finalizzato alla tutela dei diritti sessuali e riproduttivi delle donne e alla promozione della prospettiva di genere nel contesto della dinamica di contrasto della pandemia Covid-19[48]. Il documento sancisce la necessità di definire strategie di risposta emergenziale che tutelino i diritti delle donne con particolare attenzione alla situazione delle rifugiate e delle migranti. È importante adottare misure specifiche che tengano conto del particolare influsso della pandemia sulle donne e in questo senso gli Stati firmatari affermano la volontà di procedere alla realizzazione della dichiarazione politica sulla Copertura Sanitaria Universale, con riferimento alla garanzia dei diritti riproduttivi e della maternità. *Last but not least*, si ritiene fondamentale che le donne partecipino in misura concreta e rilevante ai processi decisionali connessi alla strategia di reazione alla pandemia[49].

4. *Task forces al maschile: le esperte emarginate*

Come si è appena visto, l'Italia ha sottoscritto un documento stilato in sede Onu che prevede tra l'altro l'impegno a garantire il coinvolgimento attivo delle donne nei circuiti decisionali dedicati alla determinazione delle misure di contrasto della pandemia e allo studio di strumenti di sostegno alla ripresa socio economica dopo il blocco forzato delle attività. Ciononostante, prima che una mobilitazione di scienziate e professioniste spingesse a una integrazione

[48] V. Joint press statement Protecting Sexual and Reproductive Health and Rights and Promoting Gender-responsiveness in the COVID-19 crisis, 6 May 2020, in *https://www.government.se/statements/2020/05/joint-press-statement-protecting-sexual-and-reproductive-health-and-rights-and-promoting-gender-responsiveness-in-the-covid-19-crisis/* La Vice ministra Emanuela Del Re, che ha aderito per l'Italia al comunicato congiunto ha dichiarato che «(…) l'impatto della pandemia sta acuendo la vulnerabilità di donne e bambine a violenze domestiche e abusi e rischia di limitarne le capacità di accesso a servizi sanitari, educativi e di tutela legale. Per questo la difesa e la promozione dei diritti delle donne devono essere poste al cuore degli sforzi per combattere il virus e avviare una ripresa sostenibile», cfr. Ministero degli Affari Esteri e della Cooperazione Internazionale, Del Re: Covid19, *Italia aderisce a appello Onu diritti donne*, in *https://www.esteri.it/MAE/it/sala_stampa/archivionotizie/eventi/del-re-covid19-italia-aderisce-a-appello-onu-diritti-donne.html*.

[49] Cfr. *Joint press statement Protecting Sexual and Reproductive Health and Rights and Promoting Gender-responsiveness in the COVID-19 crisis*, cit.

della componente femminile dei consulenti governativi, le task force costituite in risposta al Covid-19 erano costituite in misura quasi totale da uomini. Un dato eclatante e inquietante. Nella sua composizione originaria la task force per la ricostruzione voluta dal Presidente del Consiglio Conte e guidata dal manager Vittorio Colao era composta da 17 componenti di cui solo 4 donne; addirittura nessuna figura femminile nel Comitato tecnico scientifico della Protezione civile, incredibilmente monogenere. Ancora, nella la squadra di esperti in campo tecnologico formata per sostenere il Ministero dell'Innovazione guidato da Roberta Pisano solo 17 donne su 76 partecipanti[50]. Sono numeri disturbanti, che richiamano scenari di stanze dei bottoni degli anni Cinquanta del secolo scorso che si pensavano ormai superati. Dati che stupiscono ulteriormente se si considera, come già evidenziato in questa sede, che le donne non solo sono presenti a tutti i livelli (sebbene sempre residuali nelle posizioni di vertice) in tutti i settori lavorativi ma rappresentano i due terzi del personale sanitario; l'80% del personale alla cassa in negozi e supermercati, e il 90% della assistenza domestica oltre a curare in gran parte la didattica a distanza dei figli. La componente femminile dunque è protagonista attiva della società in particolar modo in questa fase di crisi e compensa l'assenza di servizi di welfare adeguati. Eppure le donne vengono escluse quasi del tutto dalla dinamica di determinazione di decisioni destinate, come si è appena visto, a esercitare un impatto pregnante proprio sul genere femminile. L'eccezione è data dal pool interamente al femminile «Donne per un nuovo Rinascimento», creato dalla ministra della Famiglia e delle pari opportunità Elena Bonetti per contribuire con idee e proposte alla fase della ricostruzione post pandemia. È un organo che rischia di assumere le fattezze di una riserva indiana, risultando l'ennesima sede in cui le donne decidono per le donne; una malsana aria di ghettizzazione che accetta il ruolo di leadership femminile solo con riferimento a tematiche considerate prerogativa tipica del gentil sesso.

Se il marziano di Flaiano fosse planato sull'Italia in questi tempi pandemici e avesse fatto affidamento sulla composizione originaria dei tavoli tecnici costituiti per rispondere all'emergenza si

[50] Cfr. M. Terragni, *Comitati per soli uomini. Le donne tagliate fuori dalle task force*, in *Quotidiano Nazionale*, 22 aprile 2020.

sarebbe fatto l'idea di una società in cui le competenze di alta specializzazione e le qualità professionali sono quasi esclusivamente maschili: niente di più lontano dal vero.

Un dato lontanissimo dalla realtà che è sotto gli occhi di tutti e vede una presenza capillare (e talora prevalente) delle donne in tutti i settori scientifici, economici e professionali con posizioni conquistate con impegno e abnegazione e spesso con grandi sacrifici imposti dall'accumulo di incombenze lavorative e domestiche che grava ancora soprattutto sulle spalle femminili.

Le task force governative anti Covid, nella formazione originaria, proiettavano un'immagine offensiva e bugiarda di un paese privo di esperte e richiamavano amaramente l'attenzione su modalità di selezione della leadership ancora ancorate a un'ottica maschilista.

La reazione è stata forte: 71 scienziate hanno rivolto dalle pagine del Corriere della Sera una lettera aperta rivolta alle istituzioni dal titolo eloquente: «Questo non è un paese per donne» in cui si evidenzia la necessità che i due sessi siano rappresentati in maniera bilanciata nei circuiti decisionali e perché privarsi del contributo delle donne significa rinunciare a una parte significativa delle potenzialità del Paese. È una questione di convenienza oltre che di civiltà e democrazia. Escludere le esperte ha un costo in termini di qualità, efficienza e visione prospettica. Il network «Noi Rete Donne» ha denunciato la situazione indirizzando un messaggio a Cristine Lagarde e Ursula Von der Leyen e più di cento associazioni, Ong e migliaia di cittadine e cittadini hanno aderito alla petizione #datecivoce volta a garantire l'equa rappresentanza di genere nelle task force della ricostruzione[51].

[51] V. D. Poggio, *Covid-19 e la task force per la ricostruzione, #Datecivoce: 4 donne su 17, non rappresenta l'Italia*, in *La27esimaOra Corriere della Sera*, 12 aprile 2020, in *https://27esimaora.corriere.it/20_aprile_12/covid-19-task-force-la-ricostruzione-datecivoce-4-donne-17-non-rappresenta-l-italia-f688dd1e-7ccb-11ea-9e96-ac81f1df708a. shtml*; la presenza equilibrata di donne e uomini nelle istituzioni è da tempo al centro del dibattito pubblico e anche recentemente, prima dello scoppio dell'emergenza Covid-19, era emersa con forza una questione di genere con riferimento alla mancata indicazione di donne tra le nomine dei membri laici del Csm, dei Consigli di presidenza della giustizia amministrativa, della Corte dei Conti, della Giustizia tributaria ed di un giudice della Corte costituzionale, cfr. E. Catelani, *Facciamo due conti sulle istituzioni. Questo non era un paese per donne*, in La27esima Ora *Corriere della Sera*, 25 agosto 2019, in *https://27esimaora.corriere.it/19_agosto_25/21-21-18-5-30-3-numeri-un-ex-governo-che-non-ha-rispettato-parita-63b222a6-c773-11e9-b283-cf539d3cc34f.shtml*.

La reazione istituzionale è stata tardiva ma ha rappresentato comunque un segnale positivo: all'inizio di maggio il Capo del Governo ha deciso di integrare il Comitato di esperti diretto da Vittorio Colao con cinque tecniche, «nell'esigenza di garantire una rappresentanza di genere»[52]. Sempre su invito del Presidente Conte, il capo della Protezione civile e Commissario per l'emergenza Covid-19, Angelo Borrelli, è stato chiamato a inserire nel Comitato tecnico-scientifico sei esperte[53]. L'auspicio è che il riconoscimento della valenza indispensabile della presenza equilibrata dei generi non solo negli organi rappresentativi ma anche in commissioni e, in generale, nei circuiti di carattere tecnico porti alla considerazione della prospettiva di genere nella prima fase di formazione, a scapito dei meccanismi di cooptazione viziati da un maschilismo duro a cedere[54].

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[52] V. *Equilibrio di genere nei gruppi di lavoro*, nota del Presidente del Consiglio, 4 maggio 2020, in *http://www.governo.it/it/articolo/equilibrio-di-genere-nei-gruppi-di-lavoro-nota-del-presidente-del-consiglio/14559*, il Comitato di esperti è integrato da Enrica Amaturo, professoressa di sociologia all'Università degli Studi di Napoli Federico II; Marina Calloni, professoressa di Filosofia politica e sociale dell'Università degli Studi di Milano-Bicocca e fondatrice di 'ADV - Against Domestic Violence', il primo centro universitario in Italia dedicato al contrasto alla violenza domestica; Linda Laura Sabbadini, direttrice centrale dell'Istat; Donatella Bianchi, presidente del Wwf Italia; Maurizia Iachino, dirigente di azienda

[53] Il Comitato tecnico scientifico guidato da Borrelli è integrato da: Kyriakoula Petropulocos, direttrice generale Cura della Persona e Welfare della Regione Emilia Romagna; Giovannella Baggio, già ordinario di Medicina interna e titolare della prima cattedra di Medicina di genere in Italia, attualmente Presidente del Centro Studi Nazionale di Salute e Medicina di Genere; Nausicaa Orlandi, Presidente della Federazione Nazionale degli ordini dei chimici e dei fisici ed esperta di sicurezza sul lavoro; Elisabetta Dejana, biologa a capo del programma di angiogenesi dell'istituto di Oncologia molecolare di Milano e capo dell'unità di Biologia vascolare nel Dipartimento di immunologia, genetica e patologia dell'Università di Uppsala, in Svezia; Rosa Marina Melillo, professoressa di Patologia Generale presso Il Dmmbm dell'Università "Federico II" di Napoli; Flavia Petrini, professoressa di Anestesiologia presso l'Università degli studi G.D'Annunzio di Chieti-Pescara e direttrice dell'Unità operativa complessa di anestesia, rianimazione e terapia intensiva dell'Ospedale Santissima Annunziata di Chieti.

[54] In generale, sull'equilibrio di genere nelle istituzioni rappresentative e non, tra la ricchissima bibliografia si v. M. D'Amico, *Il mondo politico italiano e il monopolio maschile. Ovvero: la paura delle donne*, in S. Luraghi (a cura di), *Il mondo alla rovescia*, Franco Angeli, Milano, 2009; A. Apostoli, *Rappresentanza paritaria o duale?*, in B. Pezzini, A. Lorenzetti (a cura di), *op. cit.*, 43 ss.; E. Catelani, *La selezione per merito nelle istituzioni: iniziamo a parlarne*, in *ibidem*, 65 ss.; A. Deffenu, *Parità di genere e istituzioni politiche: prime note per un bilancio*, in *ibidem*, 83 ss.; M. Caielli, *Per una democrazia duale: perché il genere dei nostri rappresentanti continua ad avere importanza*, in

5. *Il peso della pandemia sulle spalle delle donne: scuole chiuse, lavoro agile e gravami casalinghi, anche il multitasking ha un limite*

È vero che la condivisione equa dei compiti è una realtà sempre più diffusa nelle famiglie ma è un'evidenza supportata dai dati che le donne risultano ancora maggiormente gravate dagli impegni domestici rispetto ai partner. Lo dimostra, in Italia, l'ultima indagine ISTAT sulla vita quotidiana dalla quale emerge che le donne nella fascia di età 25-45 anni, in coppia con figli, che risultano occupate al pari dei loro compagni, dedicano in media al lavoro familiare ogni giorno il 21, 6% del proprio tempo, a fronte del 9,5% dichiarato dagli uomini[55]. Gli strumenti fino a ora previsti a supporto dei genitori che lavorano, come il bonus baby sitter, sono apprezzabili ma ben lungi dall'essere sufficienti a garantire soprattutto i diritti delle madri.

In un recente articolo pubblicato su The Atlantic, Helen Lewis ricorda che molti – per smorzare la drammaticità delle restrizioni alle libertà imposte dalle misure anti contagio – hanno evocato i casi di Isaac Newton e William Shakespeare che sono riusciti a dare il meglio di sé durante una terribile epidemia di peste che imponeva un isolamento forzato. Ebbene, nota la Lewis, questo è stato possibile solo perché «*Neither of them had child-care responsibilities*»[56].

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ibidem, 93 ss.; L. Azzena, *L'eguaglianza "diversa". Quella tra i sessi come eguaglianza costituzionalmente qualificata: l'accesso agli uffici pubblici e alle cariche elettive*, in *ibidem*, 107 ss.; A.O. Cozzi, *Le quote di genere servono ancora? La rappresentanza elettiva negli enti nazionali di ricerca*, in *ibidem*, 117 ss.; M.F. Monterossi, *Quote di genere, libertà e diritti, verso l'eguaglianza, oltre la parità*, in *ibidem*, 127 ss.; S. Leone, *L'equilibrio di genere negli organi politici*, Franco Angeli, Milano, 2013.

[55] V. Istat, Indagine multiscopo sulle famiglie: aspetti della vita quotidiana 2019, consultabile al sito *https://www.istat.it/it/archivio?&customThemes=26&customTypologies=2560*

[56] V. H. Lewis, *The coronavirus is a disaster for feminism. Pandemics affect men and women differently*, in The Atlantic, 19 March 2020, *https://www.theatlantic.com/international/archive/2020/03/feminism-womens-rights-coronavirus-covid19/608302/*, «(…) For those with caring responsibilities, an infectious-disease outbreak is unlikely to give them time to write King Lear or develop a *theory of optics*. A pandemic magnifies all existing inequalities (even as politicians insist this is not the time to talk about anything other than the immediate crisis). Working from home in a white-collar job is easier; employees with salaries and benefits will be better protected; self-isolation is less taxing in a spacious house than a cramped apartment. But one of the most striking effects of the coronavirus will be to send many couples back to the 1950s. Across the world, women's independence will be a silent victim of the pandemic».

Questo dovrebbe essere il punto di partenza imprescindibile per una riflessione sugli strumenti da adottare per sostenere la componente femminile della società, risorsa attiva e preziosa non solo tra le mura domestiche, e non dilapidare il patrimonio di conquiste sul fronte della parità che rischia di essere compromesso da un massiccio e obbligato ritorno al focolare per le lavoratrici. Ogni donna che suo malgrado rinuncia al lavoro o che è costretta a ridurlo rappresenta una sconfitta enorme e una grave perdita economica non solo per le dirette interessate ma per lo Stato che ha investito sulla formazione scolastica e professionale e per l'intero Paese che perde un individuo che contribuisce al benessere generale.

Nello strumentario strategico che si profila per accompagnare la ripresa dopo lo stop forzato è fondamentale tenere conto delle situazioni concrete che vedono le donne andare incontro a difficoltà specifiche e studiare misure orientate a rispondere alle esigenze delle famiglie in considerazione dell'ottica di genere che fino a ora è stata trascurata, lasciando che il carico di lavoro fisico ed emotivo si accumulasse sulle spalle di chi storicamente è abituato a portarlo. Ignorare le cifre che dichiarano il calo dell'occupazione femminile imposto dalla necessità di dedicarsi alla casa e ai figli in assenza di servizi equivale a una resa rispetto agli obiettivi di parità e a una rinuncia onerosa da parte del sistema paese che perde forza lavoro qualificata e può condurre a una regressione del ruolo delle donne, ancora una volta richiamate a prendersi cura innanzitutto delle faccende casalinghe. Tutto ciò comporterebbe una sconfitta su tutta la linea del modello di Stato costituzionale pluralista che si fonda sulla uguaglianza e sulla promozione della capacità dell'individuo, a prescindere dal genere, ma che si dimostra arrendevole quando si tratta di proteggere e affermare i diritti delle donne.

Un problema enorme è quello derivante dalla chiusura delle scuole di ogni ordine e grado e sulla conseguente necessità di gestire figlie e figli di età diverse, intrattenendo, alleviando il disagio dell'isolamento e seguendo la didattica erogata online[57]. Tutto ciò si

[57] Sulla necessità imprescindibile di colmare il digital divide e riconoscere l'accesso a internet come diritto fondamentale, strumentale alla realizzazione di diritti costituzionali come, nel caso di specie, il diritto all'istruzione v. T. E. Frosini, *Dalla scuola alla salute, perché ci serve una rete forte*, in Formiche. Analisi, commenti e scenari, 8 aprile 2020, in *https://formiche.net/2020/04/scula-salute-rete-frosini/*: in generale, sul rapporto tra tecnologia e diritti, v. T.E. Frosini, *Liberté Egalité Internet*, Editoriale Scientifica, Napoli, 2019.

accompagna alle ordinarie mansioni e, per chi ha un impiego extrafamiliare, alla necessità di conciliare le esigenze di lavoro, in presenza o in modalità "agile". Lo stesso genere di considerazione vale a maggior ragione con riferimento alle famiglie con componenti anziani, con patologie o disabilità fisiche o psichiche o con esigenze speciali che, in un contesto di precarietà diffusa, hanno subito più degli altri l'impatto negativo di una situazione che a lungo ha precluso la possibilità di avvalersi dell'aiuto di personale specializzato o di servizi indisponibili a causa del lockdown. I danni provocati da questi mesi su tutte le fasce sociali e sulle diverse individualità colpite in modo diverso dagli effetti del Covid-19 potranno essere valutati solo nel tempo.

La questione che più preoccupa a livello diffuso è che nel momento in cui si scrive manca una prospettiva di medio termine che consenta di pianificare il *menage* familiare in un'ottica di progressivo ritorno alla normalità. A differenza di quanto avviene altrove, in Italia ancora non è presente una strategia, anche generica o prospettica che metta in fila le priorità e le misure finalizzate a realizzarle. Questa lacuna è particolarmente evidente con riferimento alla questione scuola o alla cura delle bambine e dei bambini più piccoli. Le prime e tanto attese riaperture delle attività sono avvenute senza che ci fosse una contestuale predisposizione di interventi rivolti ai genitori che richiamati al lavoro hanno l'esigenza molto pratica di lasciare i figli in buone mani. L'estensione di alcuni giorni dei permessi di astensione dal lavoro per questioni familiari risulta una risposta frammentaria e del tutto inadeguata. Dal punto di vista delle famiglie, allo stato dei fatti, l'unica soluzione percorribile per chi deve uscire di casa per andare a lavorare ma anche per chi deve disporre dello spazio fisico e mentale necessario per concentrarsi sullo *smart working* è che uno dei genitori rinunci all'impiego o riduca il carico di occupazione per prendersi cura dei figli o, più in generale, dei familiari non autosufficienti. Inutile sottolineare che nel caso in cui si sia costretti a una scelta tra chi debba abbandonare il lavoro a favore dell'impegno domestico l'opzione ricade nell'ampia maggioranza dei casi sulle donne. Ciò non è dovuto (almeno non soltanto) a un pur radicato retaggio patriarcale che associa ancora prevalentemente alla figura maschile la responsabilità del sostentamento familiare ma a considerazioni di ordine pratico legate alla entità degli introiti derivanti dal lavoro dei genitori. Le sta-

tistiche dimostrano che in media gli uomini guadagnino ancora più delle donne[58] e, sebbene le cose stiano cambiando, per molte famiglie risulta economicamente più conveniente che sia la donna ad abbandonare il lavoro.

Inutile dire che tutto questo è inaccettabile e semplicemente incompatibile con il regime di eguaglianza a pari opportunità delineato dalla nostra Costituzione[59]. Le donne non sono ammortizzatori sociali.

Se è vero che il grado di tutela dei diritti delle donne e la presenza bilanciata dei generi nei ruoli strategici dell'economia e della società può essere considerato un indicatore di salubrità di una democrazia, il quadro clinico dell'Italia non può dirsi tranquillizzante e non solo a causa del Covid-19. La pandemia ha esacerbato aspetti di criticità preesistenti, esponendo allo sguardo dell'osservatore attento un sostrato culturale in cui l'eguaglianza di genere e le pari opportunità non risultano priorità.

In questo senso pare emblematico, sebbene non espressamente connesso alla condizione specifica delle donne, il ruolo (ma sarebbe più corretto dire «il mancato ruolo») assunto dalla "questione bambini" nel piano di ripresa. I bambini di tutte le età sono stati finora in Italia i grandi assenti nella determinazione delle misure intraprese per gestire il virus e contenere le conseguenze negative dovute all'isolamento sociale. Questa lampante mancanza di attenzione risulta intanto un segnale della scarsa partecipazione femminile ai circuiti di elaborazione dei piani di intervento perché, mi sento di affermare, se le donne avessero assunto un ruolo sostanziale già dalle prime fasi di gestione dell'emergenza difficilmente la situazione dei bambini sarebbe stata trascurata in maniera così netta. Imporre (come sacrosanta misura di precauzione, preme sottolinearlo) la repentina chiusura degli asili e delle scuole anche quando tutte le altre attività restavano operative (le scuole sono state chiuse il 5 marzo mentre il

[58] tra la ricchissima bibliografia si segnala M. D'Amico, *Gendergap e principi costituzionali*, in *Lavoro Diritti Europa*, n. 2, 2019, in *https://www.lavorodirittieuropa.it/images/GENDERGAP_E_PRINCIPI_COSTITUZIONALI_15.7.19_1.pdf*.

[59] Cfr. M.G. Rodomonte, *L'eguaglianza senza distinzioni di sesso in Italia. Evoluzioni di un principio a settant'anni dalla nascita della Costituzione*, Giappichelli, Torino, 2018; B. Pezzini, *Costruzione del genere e Costituzione*, in B. Pezzini (a cura di), *La costruzione del genere. Norme e regole*, Bergamo University Press, Bergamo 2012; E. Stradella, *Differenza, genere, pari opportunità e costituzionalismo: possibili intrecci, brevi note*, in B. Pezzini, A. Lorenzetti (a cura di), *op. cit.*, 403 ss.

lockdown generalizzato è stato attuato a livello generalizzato in tutto il paese a partire dal 11 marzo) senza pensare immediatamente a ipotesi alternative per tenere i bambini in sicurezza mentre i genitori lavorano implica il retropensiero che ci sia sempre qualcuno in casa a occuparsi di loro. Considerando che nella circostanza specifica è venuto a mancare l'altro cruciale strumento di supporto sociale alla cura dei più piccoli, ovvero i nonni, oggetto di cautele speciali perché categoria a rischio e dunque da preservare dal contatto con i nipoti, piaccia o meno nella maggioranza dei casi sono le donne a dover assorbire la gestione dei figli.

Fermo restando che la scuola non è né può essere considerata "un parcheggio", ossia un luogo utile solo a ospitare i bambini durante le ore di lavoro degli adulti, è innegabile che l'assenza della possibilità di una situazione sicura in cui tenere i più piccoli preservando le esigenze dei genitori rappresenta una questione concreta con cui tutte le famiglie si sono dovute confrontare in questi mesi. E non è finita. Ciò che infatti non si accetta, più che la gestione dei mesi appena passati in cui l'esigenza di contenere il virus ha messo in subordine tutte le altre esigenze, è la mancata e tempestiva riflessione costruttiva su possibilità pratiche per il futuro.

Anche considerando ormai come persi i mesi appena trascorsi, nella consapevolezza che le conseguenze psicologiche e non solo dell'isolamento in casa potranno essere valutate solo nel tempo, quello che manca nel nostro paese è una visione prospettica e una pianificazione del futuro. Altrove nel mondo si è provveduto a studiare possibilità che consentissero il rientro a scuola in sicurezza e in alcuni paesi le attività scolastiche sono già riprese, nel rispetto di rigide misure cautelari e sotto l'occhio attento di chi monitora l'andamento dei contagi. La riapertura viene vista con sospetto da chi teme una riacutizzazione del virus ma non si può pensare di privare a tempo indefinito scolari e studenti dei diritti di istruzione e socializzazione che costituiscono pilastri nella formazione di ogni persona.

Come è noto, per definizione l'emergenza è una situazione transitoria e circoscritta nel tempo. In un contesto democratico già mentre si affronta una situazione straordinaria occorre cominciare a pensare al dopo, a come ripristinare lo status quo ante e garantire i diritti che solo temporaneamente possono subire limitazioni. In Italia il diritto alla istruzione e il diritto dei genitori (e delle madri in

particolare) di gestire il proprio tempo e la propria attività lavorativa non sono evidentemente considerati prioritari perché anche in piena fase 2 non è dato sapere se e a quali condizioni le attività didattiche potranno riprendere nelle sedi dedicate.

Intanto in Europa molti hanno già disposto la riapertura delle scuole[60], suscitando talora critiche dagli esperti e dall'opinione pubblica nazionale. È il caso della Francia, in cui gran parte delle scuole materne ed elementari hanno ripreso le attività l'11 maggio con frequenza su base volontaria da parte degli alunni e coinvolgimento dei Comuni per le modalità pratiche relative al rispetto dei requisiti di sicurezza. La ripresa delle attività è differenziata in ragione all'ubicazione degli istituti scolastici in dipartimenti "verdi" ovvero "rossi" secondo la suddivisione del territorio operata in ragione della diffusione del virus. Le classi non potranno superare i quindici componenti e dagli 11 anni di età tutti devono obbligatoriamente indossare la mascherina. Già pochi giorni dopo la riapertura alcune scuole che avevano ripreso a operare sono state nuovamente chiuse, sollevando grande clamore soprattutto tra chi riteneva che la riapertura fosse prematura e incauta. In realtà si è chiarito che la chiusura è avvenuta per il riscontro di persone positive al virus contagiate però prima del ritorno a scuola così che non è fino a ora possibile individuare la potenzialità di pericolo della riapertura. Al contrario, il governo di Macron ha indicato la scelta di risospendere le attività di alcune scuole appena aperte è segnale di efficienza e funzionalità dei controlli[61].

In Germania le scuole hanno riaperto i battenti per i maturandi il 27 aprile e il 4 maggio per gli altri scolari in procinto di concludere un ciclo scolastico con procedure e requisiti di sicurezza differenziati, dettati a livello territoriale. In base a un accordo tra governo centrale e Länder le attività scolastiche in presenza sono riprese per tutti gli studenti tedeschi il 6 maggio con lezioni previste a frequenza parziale. Contestualmente si registra un potenziamento

[60] Per un excursus sulle modalità di riapertura delle scuole nei diversi ordinamenti europei si v. ISC Research, Coronavirus Covid-19 update, *International School updates by key countries*, 19 May 2020, *https://www.iscresearch.com/cornavirus-covid-19-update*.

[61] V. J. Pili, *Coronavirus. 70 scuole per Covid-19 in Francia? Non è andata così*, 19 maggio 2020, in Open online, *https://www.open.online/2020/05/19/coronavirus-70-scuole-chiuse-per-covid-19-in-francia-non-e-andata-cosi/*.

della didattica digitale e un aumento dei posti disponibili nelle strutture per l'infanzia (Notbetreuung) per i figli di chi svolge mansioni ritenute essenziali nella fase di crisi sanitaria. Nonostante i dati diffusi all'inizio di maggio, quando si è registrato un aumento del coefficiente R a 1,1 il trend dei contagi risulta in diminuzione anche in Germania. Gli aumenti segnalati sono infatti riconducibili in realtà a un episodio specifico riguardante lavoratori romeni e bulgari impegnati in alcune strutture per la macellazione della carne nel Baden Wuttenberg e nel Nord Reno Westfalia[62]. In Austria il ritorno a scuola è stato riservato il 4 maggio agli studenti dell'ultimo anno di superiori che saranno chiamati a sostenere come esame di maturità una prova scritta e solo facoltativamente una orale. Il 18 maggio hanno ripreso le attività anche le scuole primarie e medie e a giugno si prevede la ripresa anche per gli studenti dei primi 4 anni delle superiori. Anche qui i contagi sono in progressiva diminuzione[63]. La Danimarca è stato il primo paese a riaprire le scuole primarie (il 15 aprile) mentre il 18 maggio sono riprese le lezioni per i maturandi, per tutti gli altri prosegue l'erogazione della didattica a distanza. La frequenza scolastica è subordinata al rigido rispetto di norme e igieniche e di sicurezza: le classi devono essere composte fino a un massimo di otto alunni; tutti gli spazi esterni disponibili sono utilizzati per le lezioni all'aperto ed è previsto che bambini e maestri si lavino le mani ogni ora e mezza. Queste precauzioni non sono state ritenute sufficienti da un gruppo di genitori che si sono mobilitati lanciando sui social media l'hashtag "# i nostri figli non sono cavie", ritenendo poco cauta la scelta del governo danese. Tut-

[62] Il coefficiente registrato in Germania a metà maggio è pari a 0,8 e l'incidenza dei casi su 100mila abitanti è di 207 casi; la progressione risulta dunque rallentata con circa 900 casi al giorno; sulla gestione tedesca dell'emergenza da coronavirus si v. Jens Woelk, *L'emergenza sanitaria da Covid-19 nella Repubblica federale tedesca*, in Comparative Covid Law, maggio 2020, *https://www.comparativecovidlaw.it/germany/#a3*.

[63] In Austria il numero complessivo dei contagiati è di 15mila, con 600 morti, ma dagli oltre 1000 casi al giorno di fine marzo a maggio si è arrivati a quota 50; per una ricognizione analitica della strategia adottata in Austria per affrontare la crisi sanitaria si v. F. Palermo (a cura di), *Osservatorio Comparato Covid-19 Austria*, in Comparative Covid Law, maggio 2020, in *https://www.comparativecovidlaw.it/austria/* In generale sull'impatto degli effetti delle misure anticoronavirus sui diritti fondamentali in Austria cfr. FRA - European Union Agency for Fundamental Rights, Coronavirus COVID-19 outbreak in the EU Fundamental Rights Implications, aprile 2020, *https://fra.europa.eu/sites/default/files/fra_uploads/austria-report-covid-19-april-2020_en_0.pdf*.

tavia, fino a ora, il numero dei contagi pare smentire i timori dato che i dati registrano un calo costante[64]. A partire da giugno, con l'avvio della Fase 3, saranno consentiti assembramenti di più di trenta persone e ad agosto, quando è previsto l'inizio della Fase 4, riapriranno anche le Università. Anche in Olanda è stata disposta una parziale riapertura delle scuole materne e di primo grado e dal 1 giugno riprenderanno le superiori. Si segnala però che in tutto il periodo dell'emergenza Covid-19, ai figli dei lavoratori nel settore sanitario e nelle forze dell'ordine è stata garantita la frequenza scolastica e l'accesso ad asili nido e centri per l'infanzia. Anche qui il trend dei contagi registra un calo progressivo[65] al pari di quanto accade in Norvegia dove le scuole di infanzia ed elementari sono state riaperte già a fine aprile secondo uno schema di «riapertura sicura» condivido dai danesi. Il modello adottato dai due paesi scandinavi, cui si aggiunge la Svezia dove le attività scolastiche non sono mai cessate completamente, preclude ai genitori l'entrata agli edifici scolastici, imponendo loro di lasciare i bambini e andare via senza possibilità di sosta alcuna. All'ingresso sono predisposti termometri per il controllo della temperatura e appena entrati gli alunni sono tenuti a lavarsi le mani per un minuto, secondo le indicazioni di un tutorial. Il personale docente e ausiliario controlla a distanza che le procedure siano effettuate correttamente e aiuta i più piccoli nel rispetto delle norme di sicurezza: tutti gli adulti devono indossare mascherina e guanti. I bambini – che accedono alla scuola secondo orari prestabiliti e scansionati – sono tenuti a cambiarsi le scarpe non appena entrati e svolgono le attività divisi in piccoli gruppi e, per quanto possibile, si lavora e gioca all'aperto. Anche per la mensa si prevedono diversi turni così da evitare la concentrazione di molte persone in spazi chiusi[66].

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[64] V. G. Pelosi, *Dalla Danimarca alla Germania, dove riaprono le scuole in Europa non si registra un aumento dei contagi*, in Il Sole 24 Ore, 16 maggio 2020, in *https://www.ilsole24ore.com/art/dalla-danimarca-germania-dove-riaprono-scuole-europa-non-si-registra-aumento-contagi-AD1yc3Q*, «(in Danimarca) il 4 maggio erano stati individuati 9670 casi con 493 decessi con un incremento di circa 8-10 morti al giorno. Alla data del 14 maggio i contagi erano di poco superiori ai 10mila e solo 4 morti rispetto al giorno precedente»

[65] A metà maggio 43mila contagi e un numero di nuovi positivi che non supera i 300 al giorno, in netto calo rispetto al mese precedente.

[66] V. G. Fregonara, *Scuole, come funzionano gli asili in Danimarca e Norvegia: si gioca in 3 alla volta* (e c'è l'«angolo della tosse»), in *Il Corriere della Sera*, 20 aprile

Ora, senza voler sminuire la legittima pretesa di cautela che impone una accurata ponderazione delle scelte istituzionali in ragione del pericolo potenziale, gli esempi di cui sopra dimostrano una considerazione dei diritti allo studio e alla socializzazione dei bambini che in Italia, spiace constatarlo, non si riscontra. Il solo fatto di aver intrapreso piani di riapertura graduale e condizionata al rigoroso rispetto di requisiti di sicurezza e distanziamento interpersonale presuppone il ruolo cruciale riconosciuto dai paesi considerati ai percorsi educativi già dalle primissime fasi dell'infanzia. Ciò spinge a soffermarsi in generale sulla collocazione tutt'altro che prioritaria assunta nel nostro Paese dall'istruzione di ogni ordine e grado, compresi gli asili nido che accolgono i neonati e li accompagnano con programmi pedagogici nei primi tre anni di età, fino all'ingresso alla scuola dell'infanzia. Il fatto che solo dopo forti pressioni da parte degli attori sociali il dibattito sull'apertura delle scuole si sia acceso e che nei provvedimenti relativi alla ripresa sia contemplata la riapertura di quasi tutte le attività, compresi negozi, ristoranti, centri benessere e sportivi ma non delle scuole non può essere trascurato. La riapertura delle scuole evidentemente non rappresenta una priorità per il governo italiano che fino a ora non ha prospettato nessuna ipotesi di pianificazione. Non potendoci soffermare in questa sede su una questione, quella dello stato della scuola italiana, che merita una riflessione profonda, ci si limita a rilevare come le conseguenze degli istituti chiusi ricadano in primis sugli studenti, privati di fondamentali spazi di trasmissione del sapere e di socializzazione, ma subito dopo sui genitori e, *ça va sans dire*, sulle madri che – come si è avuto modo di constatare – sono le più coinvolte nelle attività di cura e assistenza della prole.

Un gruppo di madri tedesche ha aderito alla iniziativa di Karin Hartmann che ha pensato di organizzare in una sorta di class action le lavoratrici/madri che durante la fase del lockdown si sono trovate a dover svolgere una imponente mole di lavoro, sopperendo loro malgrado all'assenza dei servizi causata dalla chiusura forzata. La Hartman, mamma sassone di tre figli in età scolare e titolare di uno studio di architettura si è trovata, come tantissime altre in questo

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2020, in *https://www.corriere.it/scuola/primaria/20_aprile_25/riapertura-scuole-si-gioca-solo-tre-modello-scandinavo-che-piace-veneto-f3f46dc6-8724-11ea-9b77-4fc0668b38e0.shtml*.

periodo, a dover gestire la propria attività in smartworking dovendo nel contempo occuparsi di seguire la didattica a distanza dei bambini e la maggior parte delle faccende domestiche che, pur in presenza di un compagno collaborativo, di fatto sono ricadute sulle sue spalle. L'idea è stata quella di emettere fattura nei confronti del governo federale per l'attività svolta in supplenza dei servizi pubblici per i quali si sono pagate le tasse e che sono stati sospesi. Nello specifico, il "conto" presentato alle istituzioni corrisponde alle ore impiegate nell'assistere i figli nelle attività didattiche svolgendo il lavoro degli insegnanti e sottraendo tempo ed energie al proprio lavoro: a tutti gli effetti un lucro cessante.

Il gesto simbolico e provocatorio è servito per attirare l'attenzione sul rilievo economico (oltre che sociale) del lavoro domestico femminile e ha scatenato un acceso dibattito sui social grazie all'hashtag #CoronaElternRechnenAb che si può tradurre come #icontideigenitoriperil coronvirus. In base ai calcoli svolti in media una madre ha lavorato per un corrispettivo pari a 8mila euro, svolgendo mansioni di educatrice di asilo nido, maestra elementare, docente di scuola media o superiore, infermiera, colf, cuoca e naturalmente psicologa[67].

6. *Salvaguardare i diritti delle donne e scongiurare la regressione nel percorso verso la piena parità: alcune proposte*

La situazione causata dall'epidemia da coronavirus è degna della letteratura distopica, popolare forse proprio perché i foschi scenari dipinti venivano considerati troppo improbabili per fare davvero paura. Invece quelle trame hanno assunto forma concreta e da un giorno all'altro siamo stati catapultati in una dimensione di pericolo e costrizione che fino a ora avevamo sperimentato solo virtualmente, tramite letture, film e racconti delle generazioni passate, apprezzati anche per il sollievo dato dalla consapevolezza di essere

[67] Rune Weichert, *Rechnung für die Betreuung des Kindes: "Es geht vieles in die falsche Richtung"*, in *Stern*, 15 Mai 2020, *https://www.stern.de/panorama/gesellschaft/-coronaelternrechnenab – es-geht-vieles-in-die-falsche-richtung – 9266240.html*; F. Giansoldati, *Mamme tedesche emettono fattura, chiedono 8 mila euro al Governo per il lavoro domestico in lockdown*, in *Il Messaggero*, 19 maggio 2020, *https://www.ilmessaggero.it/mondo/germania_donne_merkel_lavoro_domestico_euro_protesta_mamme_figli_coronavirus-5237030.html*.

di fronte a opere di fantasia o pagine della storia definitivamente chiuse. L'analisi svolta in questa sede e supportata dall'esperienza concreta dimostra che l'impatto già grave esercitato dalla pandemia su tutte le persone coinvolte direttamente o indirettamente è particolarmente nocivo per le donne che per diverse ragioni si sono trovate maggiormente esposte rispetto al virus e in relazione agli effetti negativi che questo ha comportato sulla situazione economica e sociale di ognuno[68].

Mettendo a sistema quanto messo in evidenza fino a ora, al fine di delineare una prospettiva organica di intervento volta a tutelare le donne si registra innanzitutto l'esigenza di tenere conto di dati disaggregati per genere nell'elaborazione delle strategie di contrasto del virus e di ripresa delle attività che è stata evidenziata dagli studiosi e considerata in alcuni ordinamenti che hanno agito con misure specificamente rivolte ad alleviare il peso gravante soprattutto sulle donne. La carica di efficacia delle decisioni pubbliche è condizionata dal fatto che esse siano basate su dati certi e dettagliati.

Le politiche pubbliche volte a reagire alla crisi devono essere accomunate, a livello locale, da un'ottica di genere che dovrebbe rappresentare un sottotesto costante, finalizzato all'obiettivo di alleviare la pressione speciale esercitata dalla pandemia sulla parte femminile della popolazione. L'affidabilità delle azioni da intraprendere è proporzionale alla conoscenza delle esigenze specifiche di gruppi sociali determinati, che costituisce la base per la ponderazione degli effetti primari e secondari della pandemia. Per questo non si può prescindere da un'analisi integrata che tenga conto di elementi di ordine demografico, razziale, socio economico e fisiologico. Data la diffusione mondiale del Covid-19 sarebbe auspicabile un'opera di classificazione dei dati standardizzata secondo criteri comuni da parte dei singoli Stati, così da mettere a disposizione della comunità scientifica e politica una piattaforma omogenea e omnicomprensiva. La pandemia potrebbe offrire l'occasione per definire un quadro normativo non frammentario volto al contrasto delle discriminazioni e alla promozione della parità nei settori in cui le donne risultano ancora svantaggiate (lavoro, posizione economico-sociale, violenza di genere).

[68] Cfr. Council of Europe, *Women's Rights and the Covid Pandemic*, april 2020, in *https://www.coe.int/en/web/genderequality/women-s-rights-and-covid-19-*

Con riguardo alla piaga della violenza contro le donne, esacerbata ovunque durante la crisi da coronavirus, la Convenzione di Istambul[69] risulta lo strumento più rilevante e deve essere rispettata e applicata in tutte le sue parti anche in tempi di pandemia. Dal punto di vista operativo è importante che si garantiscano servizi che consentano assistenza online alle vittime di violenza e la possibilità di denunciare attraverso canali ulteriori rispetto ai canonici. Positivi in questo senso gli sforzi di alcuni Stati, tra cui l'Italia, di predisporre numeri verdi e modalità straordinarie di richiesta di supporto (v. app dedicate e la frase in codice da rivolgere in farmacia per ricevere assistenza).

Importante anche la costruzione o il rafforzamento dei rapporti di collaborazione con le associazioni impegnate nell'affermazione dei diritti delle donne e contro la violenza di genere che durante la fase di emergenza sono state più che mai attive, risultando più che mere strutture di supporto alle azioni pubbliche e rivelandosi potente mezzo di sensibilizzazione e attivazione del cambiamento. Basti pensare al ruolo svolto a livello comparato dai movimenti femminili, strutturati o estemporanei, nelle campagne volte a denunciare la violazione di diritti e promuovere la parità (es. datecivoce; scuola etc.).

Ancora, è indispensabile che la disponibilità di servizi essenziali di tutela della salute, fisica e psicologica, siano sempre disponibili. Così, per esempio, alle donne in difficoltà per una gestazione con complicazioni o per diverse ragioni indesiderata deve essere garantito l'accesso ai consultori per usufruire dell'assistenza informata su tutte le prospettive possibili e giungere a una decisione ponderata e consapevole in ordine a una eventuale interruzione di gravidanza.

Ampio e complesso è poi il tema della gestione della vita familiare che grava maggiormente sulle donne: occorre una campagna di informazione che chiarisca una volta per tutte che sulle donne non incombe alcun dovere di cura, che non esiste una predisposizione alle faccende domestiche legata al genere e che la condivisione delle

[69] Convenzione del Consiglio di Europa sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica, in *https://www.gazzettaufficiale.it/do/atto/serie_generale/caricaPdf?cdimg=13A05789000000101100 02&dgu=2013-07-02&art.dataPubblicazioneGazzetta=2013-07-02&art.codiceRedazionale=13A05789&art.num=1&art.tiposerie=SG*, 2 luglio 2013.

incombenze casalinghe su base paritaria è una necessità imprescindibile in un contesto di equità. A ciò si deve affiancare un solido strumentario di misure di incentivo alla emersione del lavoro sommerso di colf, babysitter e badanti, persone – soprattutto donne – che svolgono un ruolo cruciale adiuvando il menage familiare con ripercussioni positive sulla società dal momento che il fatto di poter contare su un aiuto a casa consente ai padri e alle madri di svolgere più serenamente la propria occupazione. Certo non tutti possono permettersi questo genere di aiuto con la conseguenza che, per sopperire, come più volte sottolineato, sono solitamente le donne a rinunciare al lavoro. Un sistema di sgravi fiscali su modello francese[70], per esempio, servirebbe per ottenere il doppio risultato di consentire alle famiglie di godere dell'aiuto di cui hanno bisogno senza che nessun componente si sacrifichi, favorendo nel contempo l'occupazione regolare e tutelata di lavoratrici e lavoratori del settore della cura e assistenza domestica. Il modello del *chèque emploi-service universel* (Cesu) introdotto in Francia nel 2005 su impulso dell'allora Ministro del lavoro Jean-Louis Barloo prevede il pagamento come corrispettivo di prestazioni quali quelli fornite da baby sitter, badanti, colf, ma anche ripetizioni private, interventi di bricolage o giardinaggio sia il salario che i contributi in un'unica soluzione, tramite una sorta di assegno, Cesu per l'appunto. Lo strumento ha avuto grande successo e a dieci anni dalla istituzione per più di 1,3 milioni di famiglie l'utilizzo dei chèque emploi è diventato la modalità consueta di pagamento per i servizi alla persona e alla casa[71]. Come si evince chiaramente dagli esempi sopra segnalati, il voucher è utilizzabile con riferimento a mansioni spesso svolte in nero e la semplicità e convenienza dello strumento ha consentito l'emersione di un'ampia fetta del comparto. Si tratta anche di settori in cui, come è noto, le donne sono impiegate in misura maggioritaria e il fatto che le posizioni vengano alla luce produce una ricaduta importante in termini di garanzie e sicurezza sociale di ge-

[70] Cfr. Ai-Thu Dang Jean-Marie Monnier, *Gender Regimes and Welfare States in France: A historical perspective*, Working Paper 2011-40, in *Economix*, 2011, *http://economic.fr*

[71] Cfr. A. Ginori, *Dalle colf alle baby sitter, il voucher dei francesi è una questione di donne*, in *La Repubblica*, 12 gennaio, 2017, *https://ricerca.repubblica.it/repubblica/archivio/repubblica/2017/01/12/dalle-colf-alle-baby-sitter-il-voucher-dei-francesi-e-donne04.html*.

nere. Il ricorso ai Cesu determina un risparmio significativo perché la metà della somma spesa è detraibile dalle tasse, di qui la convenienza all'utilizzo da parte delle famiglie. È vero che talora sono gli stessi lavoratori a rifiutare i *cheques d'emploi* perché il superamento di una determinata soglia di reddito comporta la perdita dei sussidi pubblici ma l'unico modo per evitare questa controindicazione è intervenire con campagne di sensibilizzazione per promuovere civismo e cultura della legalità. Ciò che preme sottolineare in questa sede è che ben l'80 per cento dei Cesu è usato per impiegare donne e ciò rende lo strumento una potente misura di sostegno attivo al lavoro femminile: proprio quello che ci vuole.

In conclusione, i dati raccontano che la pandemia ha esacerbato le diseguaglianze di genere già presenti nella società, peggiorando la vita quotidiana di molte donne e ragazze. È necessaria un'azione organica, meglio se coordinata a livello sovranazionale, volta ad alleviare il carico fisico ed emotivo gravante sulle donne incoraggiando in primis il lavoro femminile. L'obiettivo è assicurarsi che le donne perseguano la via per la propria realizzazione per quanto possibile a prescindere da condizionamenti esterni. Quella di occuparsi esclusivamente della casa e dei figli (un lavoro di per sé oneroso e difficile) dovrebbe essere sempre una libera scelta, sappiamo che non è così. Da ultimo, risorse straordinarie dovrebbero essere dedicate per debellare la piaga della violenza di genere, acutizzata diffusamente in questi mesi di isolamento in casa e sradicare una volta per tutte il sostrato culturale di patriarcato brutale che macchia ancora la nostra società e non può essere tollerato nel contesto costituzionale liberal democratico[72].

Abstract

L'emergenza sanitaria causata dal Covid-19 ha esercitato un impatto particolarmente significativo sulla componente femminile della società. Le conseguenze del coronavirus sono state specificamente dannose per le donne con riferimento al diritto alla salute, alla libertà di scelta e al diritto al lavoro. Molte le donne che hanno dovuto rinunciare al lavoro o ridurlo per fare fronte alle incombenze domestiche e di cura dei figli che ancora

[72] Per una prospettiva stimolante, ad ampio respiro sul costituzionalismo contemporaneo v. T. Groppi, Menopeggio, *La democrazia costituzonale del XXI secolo*, Il Mulino, Bologna, 2020.

incombe soprattutto su di loro. Molto grave risulta l'incremento dei casi di violenza di genere, aumentati a causa dell'isolamento forzato che ha trasformato le case da rifugio in luoghi di pericolo. Per colmare lo svantaggio di genere è necessario reagire alla crisi adottando politiche che tengano conto dell'ottica di genere e siano rivolte ad alleviare la pressione sociale esercitata dalla pandemia sulla parte femminile della popolazione.

The medical emergency due to coronavirus has had a very strong negative impact on women. In particular, women have suffered for effects on their health and work rights. Many women had to give up work or to reduce working time in order to cope with the tasks of housework and childcare that still weigh too heavily on them. The gender-based violence is also a very serious emergency since the enforced isolation has caused a serious increase of the cases. In order to fill the gender gap it is necessary to adopt public policies which consider the gender perspective in improving solutions to the crisis and relieve the social and economic pressure that weighs on women.

VINCENZO PEPE

LA PERSONALITÀ ANIMALE TRA NUOVI DIRITTI E ANTICHE TRADIZIONI. ESPERIENZE DI DIRITTO COMPARATO

SOMMARIO: 1. Interessi e diritti degli animali. – 2. Il riconoscimento internazionale dei diritti degli animali: principi. – 3. Costituzioni, legislazioni e animali: esperienze europee. – 4. I diritti degli animali nell'esperienza indiana. – 5. La personalità animale. – 6. Conclusioni.

1. *Interessi e diritti degli animali*

Il complesso dibattito sul riconoscimento di uno *status* giuridico in favore degli animali[1], pur impegnando da anni la dottrina italiana[2], ha di recente ricevuto nuova linfa, imponendo una riflessione tanto in relazione alla necessità di un rafforzamento della legislazione di protezione animale quanto sulla possibile previsione, in seno ai testi costituzionali, di una specifica tutela.

In questo contesto l'impegno del giurista deve quindi indirizzarsi verso l'ampliamento della categoria dei diritti oltre la specie, verificando preliminarmente se esistano condizioni che ostino a tale

[1] Per quanto attiene al profilo dello statuto morale degli animali, basti in questa sede evidenziare che l'etica animale riguarda tutti quei multiformi aspetti che toccano le nostre relazioni con gli animali. Pur trattandosi di un'etica applicata, include al suo interno una vasta gamma di questioni: dall'alimentazione alla ricerca biomedica, dai doveri che abbiamo nei confronti degli animali domestici che dipendono da noi alla questione degli animali selvaggi e molto altro ancora. Affrontare il tema dell'etica animale da una prospettiva di etica applicata serve a chiarire che valore siamo pronti a riconoscere agli animali e cosa ciò implichi, oltre le posizioni spesso retoriche o incoerenti che affollano la discussione pubblica. Per approfondimenti sul tema dell'etica e diritti per gli animali si veda F. Zuolo, *Etica e animali*, Il Mulino, Bologna, 2018.

[2] Si vedano, per tutti, F. Rescigno, *I diritti degli animali. Da res a soggetti*, Giappichelli, Torino, 2005 e, nell'ambito del *Trattato di biodiritto* diretto da Stefano Rodota' e Paolo Zatti, il volume S. Castignone, L. Lombardi Vallauri (a cura di), *La questione animale*, Giuffrè, Milano, 2012. Per una ricostruzione sotto il profilo storico dei movimenti animalisti in Italia si veda G. Guazzaloca, *Primo: non maltrattare. Storia della protezione degli animali in Italia*, Editori Laterza, Bari, 2018.

espansione o se la mancata soggettività animale sia solo frutto di un atteggiamento antropocentrico e specista degli ordinamenti giuridici[3].

Affinché ciò si realizzi va ricordato che l'impiego del concetto dei diritti degli animali confligge con la possibilità di derivare tali diritti dagli interessi umani, ovvero eliminando posizioni giuridiche puramente antropocentriche. Affrontare le questioni connesse allo statuto giuridico degli animali impone talune considerazioni preliminari in ordine al loro statuto morale. Una visione non antropocentrica riconosce difatti gli animali come soggetti autenticamente morali, meritevoli di considerazione morale in base ai loro precipui interessi. Il conferimento di diritti agli animali è anche la conseguenza della constatazione, al di là delle pur notevoli diversificazioni esistenti, che tra umani e animali sussistono proprietà comuni, come la capacità di provare dolore e gioia. Da tale similitudine ci si può appellare al principio etico-giuridico del simile trattamento per situazioni simili quale fonte del diritto degli animali che si erge in quanto meta-principio di ogni diritto[4].

Fissato l'obiettivo, altrettanto necessaria è la valutazione di quali siano i diritti da riconoscere agli animali.

Chiarito che gli animali, avendo caratteristiche comuni con gli umani, i quali salvaguardano i propri interessi e diritti, hanno parimenti diritto alla tutela dei loro interessi, la domanda è: di quali diritti, sulla base di quali interessi, sono legittimi portatori gli animali?[5]

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[3] Il giurista ha pertanto il compito di costruire un sistema in cui alla giuridicità umana si affianchi quella animale, poiché è solo all'idea di diritto soggettivo che si collega una reale tutela da parte dell'ordinamento e dei suoi organi. Gli esseri animali devono dunque venire considerati quali soggetti del diritto e accedere ad uno *status* giuridico. Tale rivoluzione giuridica non comporta il godimento per gli esseri animali di qualsiasi diritto ascritto agli esseri umani e non svilisce i diritti umani: solo alcuni diritti, infatti potranno essere riconducibili agli esseri animali e cioè quelle situazioni giuridiche immediatamente collegabili con gli interessi primari di cui anche gli animali sono portatori. Infine, i nuovi diritti animali avranno quale connotato essenziale una sostanziale relatività in quanto, in alcuni casi, un loro bilanciamento con alcuni interessi umani potrà comportare la loro soggezione.

[4] Per approfondimenti si veda V. Pocar, *Gli animali non umani*, Einaudi, Torino, 1998. "*I cosiddetti diritti non sono che i doveri degli altri nei nostri confronti, sulla base della reciprocità e della parità di trattamento, secondo la presenza di caratteristiche rilevanti ed empiricamente definibili e riscontrabili*".

[5] Molti contrari agli interessi degli esseri viventi non umani ritengono assurdo, ad esempio, conferire diritti politici agli animali. Lo slogan usato è: potrebbero mai vo-

Secondo una tendenza concettuale che nasce in ambito sociologico, i diritti da conferire agli animali manterranno sempre una certa caratteristica "specista", nel senso che i contenuti dovranno necessariamente variare da specie a specie, ma non dovranno avere un carattere specista rispetto alla forma. I criteri della reciprocità, della parità di trattamenti, della non aggressione della sfera dell'individuo sono paradigmi che si mantengono al di là del concreto contenuto o della specie di riferimento. Analogamente a quanto concerne la problematicità dei diritti umani, anche per i diritti degli animali si può affermare che ogni diritto ruota attorno a tre questioni: la differenziazione dei soggetti, la differenziazione dei loro interessi, la differenziazione del loro potere relativo. Ma occorre compiere un ulteriore passo. Mentre le differenze giuridiche tra gli umani sembrano sempre più diradarsi, perché ritenute ingiuste della condizione umana, non è così per le differenze tra umani e animali che pur non essendo chiaramente fondate e concettualmente dimostrate, sono percepite spesso come evidenti e ancora da accettare acriticamente in quanto "verità assolute". Ovviamente le differenze esistono come esistono differenze tra gli umani.

Nell'attuale momento storico, l'assertività del pensiero che designa l'uomo "misura di tutte le cose" mostra evidenti crepe, mentre emerge con forza l'infondatezza della tesi della radicale diversità ontologica tra umani e animali; un'inconsistenza che si va chiarendo sempre più palese man mano che procedono le ricerche scientifiche.

L'anima, che gli umani avrebbero e gli animali no, la razionalità, che gli umani avrebbero e gli animali no, insomma le cosiddette nature spirituali convergenti nell'essere umano non bastano più a segnare il confine che ha conferito per secoli il predominio "naturale" agli uomini. Il fatto che gli animali non abbiano ancora uno status giuridico universalmente accolto non è altro che l'esito della disponibilità da parte degli uomini di strumenti e pratiche di coercizione alle quali gli animali non umani non possono opporre resistenza[6].

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tare? La questione dei diritti politici agli animali è certamente più complessa e segue necessariamente il riconoscimento giuridico soggettivo.

[6] Nel caso della liberazione animale il compito fondamentale è quello di cambiare il paradigma teorico. Finché i membri di specie diverse dalla nostra verranno considerati esseri di seconda categoria, semplici oggetti, non sarà possibile incidere seriamente sulla loro situazione. Bisogna dunque lavorare per un cambiamento etico che preluda ad un cambiamento giuridico fondamentale: la rimozione degli esseri non-

Dunque per avviare una concreta politica dei diritti degli animali occorre senza dubbio partire dagli interessi di cui sono portatori gli animali non umani. Gli interessi sono valori morali imprescindibili. Il primo interesse, che è quello su cui noi umani abbiamo fondato l'idea stessa di civiltà, è la sopravvivenza della specie. Lo diamo per scontato, ma è giusto riconoscerlo, a tutte le specie viventi che intraprendono una lotta, faticosa e dispendiosa, talvolta vana, per la sopravvivenza, individuale o del gruppo a cui si appartiene e in conflitto con l'ambiente e le altre specie viventi. Non è possibile in alcun modo confutare tale specifico ed universale interesse che resta valido per ogni specie vivente. Il secondo è quello che ogni essere senziente porti con sé l'interesse a conseguire il piacere e ad evitare le sofferenze. È naturalmente possibile che la capacità di provare piacere e sofferenza sia differenziata in relazione alle specie dal punto di vista biologico e culturale, ma tale capacità è senza dubbio un tratto comune di tutte le specie viventi.

La spinta alla sopravvivenza e la ricerca per il conseguimento del piacere e per evitare la sofferenza costituiscono certamente già due interessi più che sufficienti per riconoscere e tutelare i diritti degli animali. Le future relazioni tra umani e animali non umani dovranno per forza di cose tenere conto della tutela dei suddetti interessi, andando a costituire una nuova relazionalità fra i gruppi viventi fondata sulla reciproca limitazione e sul rispetto degli interessi specifici. In pratica non saranno più giustificabili comportamenti che arrecheranno dolori e sofferenza oltre ogni ragionevole e proporzionale beneficio[7].

Gli interessi ora specificati rappresentano una sorta di statuto minimo dei futuri diritti degli animali.

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umani dalla categoria delle cose e la loro inclusione tra i soggetti di diritto. Per approfondimenti si veda P. Cavalieri, *La questione animale. Per una teoria allargata dei diritti umani*, Bollati Boringhieri, Torino, 1999; P. Cavalieri, P. Singer (a cura di), *Il progetto grande scimmia. Eguaglianza oltre i confini della specie umana*, Theoria, 1993.

[7] Per quanto riguarda il tema della sofferenza-beneficio molte e articolate sono le posizioni, ad esempio nel campo della sperimentazione. Paola Cavalieri sostiene che "*Anche la sperimentazione invasiva su esseri umani può contribuire a sconfiggere delle malattie. Ma ovviamente il problema non è questo, ma piuttosto: è lecito o no infliggere danni fondamentali ad alcuni individui perché altri possano trarne beneficio? Nel caso degli esseri umani la nostra risposta è negativa. Nessuno di noi, pensiamo, può essere ridotto a semplice mezzo per i fini altrui. Ebbene, una volta che si abbandoni il pregiudizio a favore della nostra specie, è evidente che lo stesso vale per gli animali non-umani. Se le caratteristiche psicologiche sono simili – e, come abbiamo visto considerando il caso*

2. *Il riconoscimento internazionale dei diritti degli animali: principi*

A livello internazionale un punto di riferimento fondamentale sulla disciplina delle specie animali è costituito dalla CITES[8], ovvero la Convenzione di Washington (1975) sul commercio internazionale delle specie di fauna e flora selvatiche minacciate di estinzione.

Lo scopo fondamentale della carta è quello di garantire che, ove sia consentito, lo sfruttamento commerciale internazionale di una specie di fauna o flora selvatiche sia sostenibile per la specie e compatibile con il ruolo biologico che la specie riveste nel suo habitat. In questa normativa vi sono elencate oltre 30 mila specie, animali e vegetali, con diversi gradi di protezione. Principio rilevante della Convenzione è anche la protezione non solo degli esemplari vivi ma anche le parti degli animali morti (come l'avorio e la pelle) o prodotti derivati, come i medicinali ricavati da animali o piante.

Sostanzialmente si tratta di un accordo internazionale a cui gli Stati aderiscono volontariamente e che è stato ratificato in Italia con la legge n. 874 del 19.12.1975. Il suo scopo è quello di garantire che il commercio internazionale di esemplari di animali e piante selvatiche non minacci la loro sopravvivenza.

La CITES è stata anche adottata in tutta l'Unione Europea mediante alcuni particolari regolamenti che costituiscono un punto di partenza per lo studio e l'approfondimento della disciplina europea di settore[9].

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dell'umano mentalmente menomato, non esiste alcuna capacità eticamente rilevante che possa distinguere tutti gli umani da tutti i non-umani – il trattamento etico deve essere analogo. Questo vuol dire che la ricerca condotta su esseri non-umani deve essere praticata alle medesime condizioni, e in base ai medesimi principi etici, universalmente accettati nel caso della ricerca su esseri umani", in *Progetto Etica e diritti degli animali*, 2017.

[8] Tra i più recenti provvedimenti legislativi statali ispirati alla Cites ci sono la sospensione da parte della Cina del commercio di zanne e prodotti derivati da elefanti acquisiti prima che la specie interessata fosse inclusa per la prima volta nelle appendici della Convenzione CITES, manufatti di avorio derivato da elefante africano ottenuti dopo l'entrata in vigore della Convenzione CITES e zanne ottenute come trofeo di caccia in Africa dal 13 marzo 2015 in Australia sono in vigore misure più restrittive rispetto alla Convenzione per l'importazione, le esportazioni e le riesportazioni di esemplari di leoni, elefanti, rinoceronti e cetacei. In Nuova Zelanda sono in vigore misure più restrittive rispetto alla Convenzione per l'importazione di oggetti personali e domestici.

[9] Gli attuali regolamenti in vigore nell'Unione Europea per la CITES sono il Regolamento (CE) n. 338/97 del Consiglio, del 9 dicembre 1996, relativo alla protezione

Accanto al 1975, una altra data fondamentale per il riconoscimento dei diritti degli animali è stata quella del 15 ottobre 1978, quando venne formulata la *Dichiarazione dei diritti universali dell'animale* ad opera di numerose associazioni, europee e americane in maggior parte, impegnate nella protezione degli animali[10].

I principi elencati nei 14 articoli della Dichiarazione pur non possedendo alcun valore propriamente normativo e vincolante, hanno in seguito trovato richiamo in numerose proposte di legge a livello internazionale e hanno trovato spazio nel dibattito politico e giuridico anche nel nostro ordinamento nazionale.

Nella Dichiarazione Unesco, adottata a Parigi il 15 ottobre 1978, si proclama che ogni animale ha dei diritti; si stabilisce, in particolare, che il disconoscimento e il disprezzo di questi diritti hanno portato e continuano a portare l'uomo a commettere crimini contro la natura e contro gli animali.

Il riconoscimento da parte della specie umana del diritto all'esistenza delle altre specie animali costituisce il fondamento della coesistenza delle specie nel mondo.

In questa Dichiarazione si legge che il rispetto degli animali da parte degli uomini è legato al rispetto degli uomini tra loro, considerando che l'educazione deve insegnare sin dall'infanzia ad osservare, comprendere, rispettare e amare gli animali.

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di specie della flora e fauna selvatiche mediante il controllo del loro commercio, inclusi gli Allegati di tale regolamento contenenti un elenco di specie soggette a commercio disciplinato; il regolamento di attuazione (CE) n. 865/2006 della Commissione, del 4 maggio 2006, recante modalità di applicazione del regolamento (CE) n. 338/97 del Consiglio relativo alla protezione di specie della flora e fauna selvatiche mediante il controllo del loro commercio. Queste due normative costituiscono il quadro legale per tutti i governi dell'UE e disciplinano il commercio internazionale e interno di animali e piante selvatiche nell'UE stessa. I regolamenti comunitari prevedono quattro Allegati (A, B, C e D), gli Allegati A, B e C corrispondono in linea di massima alle Appendici I, II e III della CITES, ma contengono anche alcune specie non elencate dalla CITES, protette dalla legislazione interna dell'UE.

[10] La Dichiarazione Universale dei Diritti dell'Animale, redatta dalla Lega Internazionale dei Diritti dell'Animale, è stata presentata a Bruxelles il 26 gennaio 1978 e sottoscritta da personalità del mondo filosofico, giuridico, scientifico; successivamente è stata proclamata a Parigi, presso la sede dell'Unesco il 15 ottobre 1978 alla presenza di Remy Chauvin, etologo e scrittore. Alfred Kastler, premio Nobel per la fisica, S.E. Hamza Boubakeur, rettore dell'Istituto Mussulmano della Moschea di Parigi, il Professor Georges Heuse. La delegazione italiana era costituita dalla Dottoressa Laura Girardello, dal Dottor Giovanni Peroncini, dal Professor Mario Girolami e dalla Professoressa Clara Genèro.

Secondo la dichiarazione tutti gli animali nascono uguali davanti alla vita e hanno gli stessi diritti all'esistenza (art. 1). Secondo l'articolo 2 ogni animale ha diritto al rispetto; l'uomo, in quanto specie animale, non può attribuirsi il diritto di sterminare gli altri animali o di sfruttarli violando questo diritto. Egli ha il dovere di mettere le sue conoscenze al servizio degli animali; ogni animale ha diritto alla considerazione, alle cure e alla protezione dell'uomo. La dichiarazione all'articolo 3 stabilisce che nessun animale dovrà essere sottoposto a maltrattamenti e ad atti crudeli; la disposizione stabilisce inoltre che se la soppressione di un animale è necessaria, deve essere istantanea e senza dolore.

L'articolo 4 stabilisce che ogni animale che appartiene ad una specie selvaggia ha il diritto di vivere libero nel suo ambiente naturale terrestre, aereo o acquatico e ha il diritto di riprodursi; pertanto ogni privazione di libertà, anche se a fini educativi, è contraria a questo diritto.

Nell'articolo 5 si legge che ogni animale appartenente ad una specie che vive abitualmente nell'ambiente dell'uomo ha diritto di vivere e di crescere secondo il ritmo e nelle condizioni di vita e di libertà che sono proprie della sua specie; *b*) ogni modifica di questo ritmo e di queste condizioni imposta dall'uomo a fini mercantili è contraria a questo diritto.

All'articolo 6 si dichiara che ogni animale che l'uomo ha scelto per compagno ha diritto ad una durata della vita conforme alla sua naturale longevità; l'abbandono di un animale è un atto crudele e degradante; invece con l'articolo 7 si afferma che ogni animale che lavora ha diritto a ragionevoli limitazioni di durata e intensità di lavoro, ad un'alimentazione adeguata e al riposo.

All'articolo 8 si stabilisce che la sperimentazione animale che implica una sofferenza fisica o psichica è incompatibile con i diritti dell'animale sia che si tratti di una sperimentazione medica, scientifica, commerciale, sia d'ogni altra forma di sperimentazione; anche le tecniche sostitutive devono essere utilizzate e sviluppate.

L'articolo 9 continua e afferma che nel caso che l'animale sia allevato per l'alimentazione deve essere nutrito, alloggiato, trasportato e ucciso senza che per lui ne risulti ansietà e dolore. Secondo l'articolo 10, invece, n*essun animale deve essere usato per il divertimento dell'uomo; b) le esibizioni di animali e gli spettacoli che utilizzano degli animali sono incompatibili con la dignità dell'animale.*

L'articolo 11 recita che ogni atto che comporti l'uccisione di un animale senza necessità è un biocidio, cioè un delitto contro la vita, mentre l'articolo 12 stabilisce che ogni atto che comporti l'uccisione di un gran numero di animali selvaggi è un genocidio, cioè un delitto contro la specie; l'inquinamento e la distruzione dell'ambiente naturale portano al genocidio.

L'articolo 13 afferma che l'animale morto deve essere trattato con rispetto e le scene di violenza di cui gli animali sono vittime devono essere proibite al cinema e alla televisione salvo che non abbiano come fine di mostrare un attentato ai diritti dell'animale. All'articolo 14, infine, si stabilisce che: *a) Le associazioni di protezione e di salvaguardia degli animali devono essere rappresentate a livello governativo; b) i diritti dell'animale devono essere difesi dalla legge come i diritti dell'uomo.*

A livello europeo, con il Trattato di Lisbona del 2007 è stata inaugurata la stagione europea della disciplina sul benessere animale; all'articolo 13 il Trattato ha previsto per gli Stati membri di tenere conto delle esigenze del benessere degli animali come esseri senzienti[11].

In questa cornice, a livello europeo l'uniformità della legislazione sul benessere degli animali è peraltro un traguardo ancora da raggiungere. La normativa vigente si limita a stabilire i requisiti minimi che regolano il rapporto uomo-animale e la salvaguardia degli animali in libertà[12]. Per il resto, l'attuazione concreta è lasciata agli Stati membri. Un esempio è la corrida spagnola: sebbene sia uno spettacolo crudele, la Spagna è di fatto libera di applicare o non applicare localmente i divieti di tenere le corride (Le Canarie l'hanno

[11] Per approfondimenti sulle novità introdotte dal Trattato di Lisbona nell'ordinamento europeo anche nell'ambito dei diritti degli animali si vedano M. Fragola, *Il Trattato di Lisbona. Che modifica il Trattato sull'Unione europea e il Trattato della Comunità europea*, Giuffrè editore, Milano, 2010. J.C. Piris, *Il Trattato di Lisbona*, Giuffrè editore, Milano, 2013. E.R. Acuna, *La Costituzione per l'Europa. Dalla Carta Costituzionale europea al trattato di Lisbona*, Aras edizioni, 2011. C. Zanghi. L. Panella, *Il trattato di Lisbona tra conferme e novità*, Giappichelli, Torino, 2011. *I diritti dopo il Trattato di Lisbona*, a cura di F. Manganaro, A. Romano Tassone, F. Saitta, Rubbettino, Soveria Mannelli, 2013.

[12] Commissione Europea. Sesta relazione sulle statistiche riguardanti il numero di animali utilizzati a fini sperimentali o ad altri fini scientifici negli Stati membri dell'Unione europea SEC(2010) 1107. "Nel 2008, gli animali utilizzati a fini sperimentali e ad altri fini scientifici nei 27 Stati membri dell'UE sono stati complessivamente poco più di 12,0 milioni".

bandita nel 1991 e così il parlamento catalano dal 2012, mentre altrove è ancora possibile praticarla).

In questo quadro, l'obiettivo primario della Dichiarazione Unesco del 1978 è stato quello di sensibilizzare la società riguardo la cura e il rispetto degli animali al fine di avviare un dibattito anche giuridico per realizzare una successiva disciplina vincolante sul tema.

3. *Costituzioni e animali: esperienze europee*

Sulla scorta di queste premesse, va notato che la questione dei diritti degli animali appare estremamente articolata; a fronte di un'opinione pubblica sempre più attenta verso il riconoscimento dei diritti degli animali, non si riscontra una produzione giuridico-legislativa altrettanto valida e di inclusione dei diritti nelle varie carte costituzionali e nelle legislazioni nazionali.

Fino ad una quindicina d'anni fa, soprattutto nel mondo occidentale, solo sporadicamente si è provato a risolvere o mitigare la questione con la realizzazione di apposite legislazioni.

Ad esempio si può segnalare il caso della Svizzera che nel 1992 modificò la Costituzione federale per ampliare il concetto dello status di "esseri" ed arrivare in qualche modo a comprendere anche gli animali. Vi si è affermata la teoria dei doveri indiretti, poiché i non umani non assurgono al rango di persone, né di soggetti giuridici. L'art. 80 della Costituzione Svizzera richiama una certa "protezione" e implicitamente l'adesione al sistema *welfaristico*, che, pur facendo riferimento all'importanza della biodiversità e della preservazione della fauna, non contiene alcun rinvio concettuale alla rilevanza dei singoli esemplari in qualità di titolari di diritti soggettivi. In sostanza quel recepimento a livello costituzionale degli animali non umani, di per sé, non implica l'attribuzione di alcun diritto, né della soggettività giuridica.

Nel 2002 il parlamento tedesco ha votato per aggiungere le parole "*e degli animali*" all'art. 20a della Costituzione che obbliga lo Stato a rispettare e proteggere la dignità degli esseri umani. L'affermazione dell'art. 20a recante l'obbligo di "tutela" da parte dello Stato, non introduce però alcun parametro assoluto e impassibile di interpretazione, ma, al contrario, rimette all'interprete la definizione di "tutela". La riforma tedesca affonda le radici nella prima metà de-

gli anni '90 del secolo scorso: già nel 1994 e, successivamente, nel 1997 e nel 2000, infatti, si era tentato di introdurre la modifica, ma l'opposizione di molti partiti aveva vanificato i tentativi.

La tutela degli animali ha trovato, dunque, un espresso riconoscimento nella Costituzione tedesca, per cui l'art. 20a della Legge fondamentale impone allo Stato di proteggere le basi naturali della vita e gli animali.

L'art. 72 della Costituzione slovena, nel riconoscere il diritto ad un ambiente sano, stabilisce che «La protezione degli animali dalla crudeltà è regolata dalla legge».

Diversamente la Costituzione austriaca e quella svizzera annoverano la tutela degli animali tra le materie oggetto di ripartizione delle competenze tra enti territoriali, rispettivamente agli artt. 11 e 80.

Peraltro, una risalente tradizione in tema di legislazione a tutela degli animali si rintraccia nell'esperienza del Regno Unito, che nell'anno 2006 ha adottato l'*Animals Welfare Act*.

Nell'ordinamento italiano, come noto, la disciplina dell'animale è lasciata ai codici di diritto sostanziale e alle leggi di settore; tuttavia non può mancarsi di rilevare come nelle recenti legislature vi siano stati numerosi disegni di legge costituzionale finalizzati anche ad introdurre un riconoscimento degli stessi quali "esseri senzienti", formula che ripropone quella dell'art. 13 del TFUE così come modificato dal Trattato di Lisbona, o una vera e propria tutela in favore degli animali, prevalentemente in seno all'art. 9 Cost., al fine di demandare allo Stato la competenza esclusiva in materia[13].

Della tematica relativa al legame che si instaura tra uomo e animale è stata anche investita nel tempo la giurisprudenza. Si pensi, esemplificativamente, alla dibattuta categoria del danno da perdita dell'animale da affezione.

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[13] Con riguardo ai disegni di legge costituzionale volti ad inserire in Costituzione un riferimento agli animali si vedano, per la sola 18ª Legislatura, i seguenti d.d.l. costituzionale: A.S.83, A.S.1203, A.S.212, A.C.15, A.C.143. Per i progetti di legge in materia di tutela degli animali si veda l'*Audizione resa il 30 novembre 2017 innanzi alla Commissione Giustizia della Camera dei Deputati concernente diversi Progetti di legge in materia di tutela degli animali* da F. Rescigno, disponibile su OSSERVATORIO AIC, fasc. 3/2017, 2 dicembre 2017, all'url: *https://www.osservatorioaic.it/it/osservatorio/ultimi-contributi-pubblicati/francesca-rescigno/audizione-resa-il-30-novembre-2017-innanzi-alla-commissione-giustizia-della-camera-dei-deputati-concernente-diversi-progetti-di-legge-in-materia-di-tutela-degli-animali*.

Sul punto vi è da rilevare che un'apertura verso il riconoscimento dell'importanza di tale relazione si rintraccia, grazie al contributo offerto dalla giurisprudenza di merito, in materia di diritto familiare e in particolare in costanza di separazione personale tra i coniugi.

In numerosi provvedimenti volti all'omologa delle condizioni di separazione, l'animale domestico diviene oggetto di regolamentazione per quanto attiene all'affido, anche in considerazione del rapporto che si è instaurato con uno dei componenti della coppia.

È possibile citare, sotto detto profilo, il decreto emesso dal Tribunale Ordinario di Sciacca in data 19 febbraio 2019[14] in cui si legge: «rilevato che in mancanza di accordi condivisi e sul presupposto che il sentimento per gli animali costituisce un valore meritevole di tutela, anche in relazione al benessere dell'animale stesso, assegna il gatto (…) al resistente che dalla sommaria istruttoria appare assicurare il miglior sviluppo possibile dell'identità dell'animale ed il cane (…), indipendentemente dall'eventuale intestazione risultante nel microchip, ad entrambe le parti, a settimane alterne, con spese veterinarie e straordinarie al 50%».

La problematica *de qua* veniva affrontata già dal Tribunale di Roma nella sentenza n. 5322 del 15 marzo 2016, in cui il giudicante, preso atto della lacuna normativa esistente e del tentativo di colmarla operato con la proposta di legge volta all'introduzione dell'art. 455-*ter* nel codice civile, che disciplinasse l'affido degli animali in caso di separazione tra coniugi, richiama due decisioni, l'una del Tribunale di Foggia e l'altra del Tribunale di Cremona, in cui, optandosi per un affido condiviso dell'animale, si regolamentavano anche gli aspetti propriamente economici scaturenti dal mantenimento.

Invero, anche il Tribunale di Como, con una decisione del 3 febbraio 2016[15], ha qualificato come meritevole di tutela l'interesse dei coniugi a dare una regolamentazione al rapporto con l'animale

[14] Sul punto vedasi il decreto del Tribunale di Sciacca del 19 febbraio 2019 reperibile su *http://www.quotidianogiuridico.it/~/media/Giuridico/2019/03/11/separazione-il-gatto-al-marito-e-il-cane-a-entrambi-a-settimane-alterne-il-decreto-del-tribunale-di-sciacca/sciacca%20pdf.pdf*.

[15] Si veda il provvedimento reperibile su *https://www.altalex.com/documents/news/2017/01/24/separazione-personale-fra-coniugi-e-affido-dell-animale-di-affezione#provvedimento*.

di affezione, pur ponendosi in senso critico rispetto ad un approccio che tenda ad una equiparazione dello stesso alla relazione genitoriale.

In conclusione, ad oggi, è dagli orientamenti giurisprudenziali sviluppatisi nella materia del diritto familiare, in cui entrano in gioco delicati interessi, che vengono i maggiori stimoli onde ripensare la visione dell'animale che ha caratterizzato sinora la nostra esperienza giuridica.

Ampliando lo sguardo in molti paesi si sono votate leggi contro la crudeltà o il maltrattamento di animali per la regolamentazione delle condizioni in cui gli animali vengono allevati, ma la menzione esplicita di "diritto" appare un obiettivo ancora alquanto vago[16]. A livello di sensibilizzazione dell'opinione pubblica va segnalata la data del 10 dicembre 2007 che è stata proclamata da un'associazione animalista inglese, la Uncaged, la Giornata Internazionale per i Diritti degli Animali mentre sul piano degli studi di una certa rilevanza è stato il congresso del 1993 *Human Rights for the 21th century* organizzato dal Comitato di ricerche internazionale della sociologia del diritto, in cui si è discusso di come concretamente fare approvare leggi che sancissero i diritti degli animali. Tra gli ultimi importanti sviluppi sui diritti degli animali vanno segnalate due rilevanti novità che giungono dall'India dove, è doveroso ricordarlo, il rispetto degli esseri animali è da sempre uno dei tratti costituenti della società. La prima riguarda il provvedimento del governo centrale indiano di vietare la cattività e l'utilizzo dei delfini a scopi di intrattenimento e spettacoli[17]. La seconda novità giunge dallo stato del Punjab dove l'Alta Corte dello Stato del Punjab e dell'Haryana, con una recente sentenza, ha statuito che «The entire animal kingdom including avian and aquatic are declared as legal entities having a distinct persona with corresponding rights, duties

[16] Cfr., P. Mazza, *I reati contro il sentimento degli animali*, Padova, 2012, 224, ivi attente analisi della legge 20 luglio 2014, n. 189.

[17] La decisione indiana di vietare qualsiasi tipo di cattività per i delfini va certamente accolta con favore; si resta invece perplessi rispetto alla definizione dei delfini quali "*persone non umane*" (come riportato nel provvedimento), si rischia, a mio avviso, di rimanere nell'ambito dell'approccio antropocentrico se si considerano meritevoli di protezione solo coloro che ci somigliano pur non essendo propriamente umani; il passo da compiere invece è più grande e riguarda il riconoscimento della dignità animale al di là delle somiglianze con il genere umano. Solo in questo modo potrà realmente realizzarsi il principio di eguaglianza anche al di là della barriera della specie.

and liabilities of a living person. All the citizens throughout the State of Haryana are hereby declared persons *in loco parentis* as the human face for the welfare/protection of animals»[18].

L'intero regno animale, compresi aviari e acquatici, è dichiarato come entità giuridica che ha una personalità distinta con i diritti, i doveri e gli obblighi corrispondenti di una persona vivente. Tutti i cittadini in tutto lo Stato di Haryana sono persone dichiarate in loco parentis, come volto umano per il benessere/protezione degli animali.

4. *I diritti degli animali nell'esperienza indiana*

L'esperienza dell'Unione indiana, nella prospettiva del diritto comparato, ha offerto di recente nuovi spunti di riflessione nell'ambito del dibattito relativo al riconoscimento della personalità giuridica in favore di nuove entità materiali e immateriali.

Come si è anticipato la recente pronuncia del 31 maggio 2019 resa dalla High Court dello Stato del Punjab e dell'Haryana risulta, in quest'ottica, di pregnante interesse per aver statuito che «The entire animal kingdom including avian and aquatic are declared as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person. All the citizens throughout the State of Haryana are hereby declared persons in loco parentis as the human face for the welfare/protection of animals»[19].

In altri termini, come già evidenziato, l'intero regno animale, compresi aviari e acquatici, è dichiarato come entità giuridica che ha una personalità distinta con i diritti, i doveri e le passività corrispondenti di una persona vivente. Tutti i cittadini in tutto lo Stato di Haryana sono persone dichiarate in loco parentis come volto umano per il benessere/protezione degli animali.

L'animale viene qualificato come centro di imputazione di diritti, doveri e responsabilità, circostanza questa che assume una portata assolutamente innovativa, inserendosi peraltro in un conte-

[18] Così alla 29esima *direction* di cui al paragrafo 95 della decisione resa dalla High Court of Punjab & Haryana, CRR-533-2013, 31.5.2019, nel caso *Karnail Singh and others Versus State of Haryana*.

[19] Così alla 29esima *direction* di cui al paragrafo 95 della decisione resa dalla High Court of Punjab & Haryana, CRR-533-2013, 31.5.2019, nel caso *Karnail Singh and othersVersus State of Haryana*.

sto in cui la giurisprudenza da tempo ha intrapreso un percorso verso il riconoscimento della personalità giuridica in favore di entità naturali e spirituali[20].

Detta decisione si inserisce, invero, nel solco tracciato dalla Corte Supremacon la sentenza *Animal Welfare Board Of India vs A. Nagaraja & Ors*[21].

Nell'anno 2014, difatti, l'organo di vertice della giustizia indiana – nella sua funzione di giurisdizione civile di appello e in un complesso contenzioso scaturente dalla riunione di più procedimenti – è stata chiamato a pronunciarsi dall'AWBI (*id est* dall'Animal Welfare Board of India) sulla liceità di taluni spettacoli tradizionali, tra cui il Jallikattu tipico dello Stato del Tamil Nadu e le Bullock-cart races dello Stato del Maharashtra.

Il parametro di giudizio, sotto il profilo normativo, è costituito in questo caso dalle previsioni del *Prevention of Cruelty to Animals Act*, 1960 (PCA Act) e del *Tamil Nadu Regulation of Jallikattu Act*, 2009 (TNRJ Act), ma anche da un provvedimento emesso dal Governo centrale(una *notification*) datato 11 luglio 2011 che vietava la mostra dei tori o l'addestramento degli stessi come animali da spettacolo, essendo invocata dall'appellante una lettura in combinato disposto della disciplina legislativa con gli articoli 21 e 51A(g) della Costituzione.

Tali norme costituzionali prevedono, come noto, che nessuno possa essere privato della vita o della libertà personale se non in forza di una procedura stabilita dalla legge e che è dovere di ogni cittadino proteggere e migliorare l'ambiente naturale ed avere compassione per le creature viventi.

La *Supreme Court*, partendo dall'esame dell'etologia comportamentale dei tori e ricostruita l'origine degli spettacoli in questione, al fine di verificare la sussistenza della paventata crudeltà dei medesimi, richiama la dottrina della necessità e analizza al con-

[20] Per un inquadramento generale della tematica relativa al riconoscimento della personalità giuridica in favore di nuove entità materiali e immateriali nell'ordinamento indiano è possibile richiamare, il caso relativo ai fiumi Ganga e Yamuna e il provvedimento della High Court dell'Uttarakhand del 30 marzo 2017 che, nel pronunciarsi su una *public interest litigation*, ha attribuito la qualifica di "legal entity" a qualsivoglia fiume, ghiacciaio, lago, foresta, alla stessa aria e, dunque, agli ecosistemi tutti.

[21] Il riferimento è alla decisione resa dalla Supreme Court of India nel caso *Animal Welfare Board Of India Versus A. Nagaraja and Others* in data 7 maggio 2014, 2014 (7) SCC 547.

tempo il regime dei "performing animals", pervenendo alla conclusione che lo Jallikattu e le Bullock-cart Races costituiscono pratiche illegittime perché violano le disposizioni di legge e regolamentari, costituendo attività che arrecano sofferenza all'animale in quanto volte ad incitarlo al combattimento.

L'iter argomentativo seguito affonda le proprie radici in elementi culturali e tradizionali dell'ordinamento indiano, che la Corte non manca di esaminare, rilevando che dette pratiche, nella forma in cui sarebbero state condotte nei tempi più recenti, sarebbero contrarie alla tutela del benessere e della salute del toro che orienta la cultura e la tradizione Tamil, che adora questo animale considerandolo un veicolo del Signore Shiva.

Difatti, richiamato un precedente del 2002[22], nella decisione si legge: «Any custom or usage irrespective of even any proof of their existence in pre-constitutional days cannot be countenanced as a source of law to claim any rights when it is found to violate human rights, dignity, social equality and the specific mandate of the Constitution and law made by Parliament. (…) As early as 1500-600 BC in Isha-Upanishads, it is professed as follows: The universe along with its creatures belongs to the land. No creature is superior to any other. Human beings should not be above nature. Let no one species encroach over the rights and privileges of other species»[23].

E pertanto, ad opinione della Corte, in detta affermazione è racchiusa la cultura e la tradizione del Paese e in particolare degli Stati del Tamil Nadu e del Maharashtra.

Viene inoltre esaminato "lo stato dell'arte" in punto di tutela degli animali nell'ambito del diritto internazionale e di talune esperienze straniere, in particolare europee, evocando altresì la *Universal Declaration of Animal Welfare* (UDAW), Dichiarazione universale del benessere degli animali, e l'attività della *World Health Organization of Animal Health* ed in particolare le sue Linee-guida, che al capitolo 7.1.2 individuano le cinque libertà note come "Brambells Five Freedoms" riconosciute in favore degli animali (*freedom from hunger and thirst*; *freedom from discomfort*; *Freedom from pain, injury and disease*; *freedom to express normal behaviour*;

[22] Cfr. *N. Adithayan v. Thravancore Dewaswom Board and Others*, AIR 8 SCC 106.

[23] Così ai par. 43 e 44 della decisione *Animal Welfare Board Of India Versus A. Nagaraja and Others*.

freedom from fear and distress) e consacrate dal *Farm Animal Welfare Council* nel 2009.

Così la Corte Suprema, onde elevare tali libertà (che trovano espresso riconoscimento anche nel *PCA Act*, ma che costituiscono esclusivamente degli *statutory rights*) allo *status* di diritti fondamentali, esaminato il concetto di "specismo" coniato da Richard Ryder e riconosciuto che ogni specie ha diritto alla vita, offre una interpretazione di quest'ultima in forza dell'articolo 21 della Costituzione, attribuendo alla vita dell'animale un valore intrinseco, ritenendo che la stessa sia meritevole di onore e dignità.

Tale passaggio viene testualmente richiamato nella successiva pronuncia della High Court dello Stato del Punjab e dell'Haryana, relativa al caso *Karnail Singh and Others v. State of Haryana*, in cui viene ribadito che «"vita" significa qualcosa di più della mera sopravvivenza o esistenza o valore strumentale per gli esseri umani, ma condurre una vita con qualche intrinseco valore, onore o dignità. Tutti gli animali hanno onore e dignità. Ogni specie ha un intrinseco diritto a vivere ed è necessario che venga protetto dalla legge»[24].

In questo caso la fattispecie da cui scaturisce l'imputazione, oggetto di una *revision petition*in relazione al giudiziodi appello, riguarda l'esportazione di vacche in violazione delle previsioni del *Punjab Prohibition of Cow Slaughter Act* 1955.

La Alta Corte, muovendo dalla considerazione che la Corte Suprema nella propria giurisprudenza abbia offerto una interpretazione evolutiva del concetto del "*species' best interest*", afferma che al fine di tutelare e promuovere il benessere degli animali sia necessario conferire loro lo *status* di *persona giuridica*–non potendo gli stessi essere trattati come un oggetto o una proprietà.

Copioso in detta pronuncia è il riferimento ad altre decisioni delle giurisdizioni indiane (ma non solo) in tema di personalità giuridica, partendo dagli storici casi *Yogendra Nath Naskar v. Commission of Income-Tax, Calcutta*[25] della Corte suprema indiana e *Sierra*

[24] Così al par. 93 della decisione resa dalla High Court of Punjab & Haryana del 31.5.2019, nel caso *Karnail Singh and others Versus State of Haryana*.

[25] Cfr. *Yogendra Nath Naskar v. Commission of Income-Tax, Calcutta*, 1969 (1) SCC 555, in cui la Corte Suprema ha statuito che «*a Hindu idol is a juristic entity capable of holding property and of being taxed through its Shebaits who are entrusted with the possession and management of its property*», ma si veda altresì la decisione relativa

Club vs. Morton, Sec. Int. della Corte suprema statunitense[26], rispettivamente risalenti all'anno 1969 e 1972, nonché il riferimento alle nozioni di *natural person* e *artificial persons* così come ricostruite dalla dottrina[27], ma anche numerose recenti opere come il noto lavoro di David R. Boyd intitolato «The Rights of Nature».

Rammentato che la prima legge americana che vietava la crudeltà verso gli animali era stata approvata dai Puritani della colonia della Massachusetts Bay nel 1641, viene rilevato al par. 78: «We have to show compassion towards all living creatures. Animals may be mute but we as a society have to speak on their behalf. No pain or agony should be caused to the animals. Cruelty to animals also causes psychological pain to them. In Hindu Mythology, every animal is associated with god. Animals breathe like us and have emotions. The animals require food, water, shelter, normal behaviour, medical care, self-determination».

Risalita alle origini del giainismo[28] e non mancando di rievocare la celebre affermazione del Mahatma Gandhi "*The greatness of a nation and its moral progress can be judged by the way its animals are treated*" (la grandezza di una nazione e il suo progresso morale possono essere giudicati dal modo in cui i suoi animali sono trattati), il nucleo dell'argomentazione utilizzata dalla High Court si rintraccia nell'affermazione che è dovere fondamentale di ciascuno ai sensi dell'art. 51-A della Costituzione mostrare compassione per le creature viventi e dovere dello Stato di proteggere l'ambiente ai sensi dell'art. 48-A, doveri a cui consegue il riconoscimento della personalità giuridica, come detto, nei confronti dell'intero mondo animale e l'individuazione in capo a tutti i cittadini dello Stato dell'Haryana della qualità di persone *in loco parentis* per il benessere e la protezione degli animali.

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al caso *Ram Jankijee Deities & Others v. State of Bihar & Others*, 1999(5) SCC 50, in cui la Corte Suprema, muovendo dalla distinzione tra immagini Sayambhu "*self-existent or self-revealed*" e Pratisthita "*established*", ha ribadito che la divinità/idolo è una persona giuridica autorizzata a detenere beni in proprietà.

[26] Cfr. *Sierra Club vs. Morton, Sec. Int.*, 405 U.S. 727 (1972) e, in particolare, le opinioni dissenzienti dei giudici Douglas e Blackmun.

[27] Il riferimento è, tra i tanti, al *Corpus Juris Secundum* e all'opera del Professor Peter Birks, *English Private Law.*

[28] Nella decisione viene richiamata l'opera «Sacred Animals of India» di Nanditha Krishna che ripercorre il pensiero del Gautama Buddha e del Vardhamāna Mahāvīra; con riguardo al secondo viene esaminato, in particolare, il concetto della *ahimsa* (non violenza).

L'approccio in tema di tutela del mondo animale adottato dall'ordinamento indiano, così come emergente dal contenuto delle pronunce qui esaminate, appare senza dubbio rivoluzionario, sebbene nel panorama globale il riconoscimento della personalità giuridica in favore di entità naturali non sia un fenomeno del tutto sconosciuto.

In questa cornice, l'esempio dell'India costituisce, sul piano giuridico, un modello straordinario e grave errore sarebbe considerarlo una "stranezza" giuridica[29].

Ancorché con modalità meno stringenti, si può affermare che ad oggi molte legislazioni nazionali scoraggiano il maltrattamento degli animali pur lasciando contemporaneamente spazio a tradizioni locali, quali la corrida, i palii, gli spettacoli circensi o addirittura i combattimenti.

Nonostante la conservazione di tradizioni e costumi in cui sono protagonisti gli animali e le loro sorti, la sensibilità animale sta conquistando sempre di più terreno sino a entrare nel lessico giuridico e nei dibattiti dottrinali.

5. *La personalità animale*

Alla luce di quanto illustrato mi preme infine sottolineare i doveri del giurista per una migliore visione e più proficua interpretazione della questione. A mio avviso è oramai indispensabile, al fine di abbandonare l'antropocentrismo giuridico, modificare l'approccio dei sistemi giuridici e riconoscere status costituzionale alla dignità animale. Potrebbe essere questo il percorso più convincente per "elevare" gli animali da *res* a soggetti contraddistinti da una propria dignità senza compromettere la specificità dei diritti umani.

In tal modo il sistema costituzionale, da sempre antropocentrico (ed autoreferenziale), sorto per garantire all'uomo un bagaglio di specificità intoccabili dallo stesso potere dei governi, potrà aprirsi alla specificità animale senza condurre a temute situazioni di parità tra lo *status* costituzionale umano e quello animale. Lo status di parità potrebbe indurre ad una complessa interpretazione sino

[29] Si vedano A. Valastro, *La tutela giuridica degli animali e i suoi livelli*, in *Quaderni costituzionali*, 2006. F. Rescigno, *I diritti degli animali. Dares a soggetti*, Giappichelli, Torino, 2005. Id., *Animali (diritti degli)*, voce *Dizionario di Diritto Pubblico*, a cura di S. Cassese, Milano, 2006, vol. I, 321.

all'avallo di accoppiamenti tra esseri umani ed animali. La costituzionalizzazione della soggettività animale è già stata intrapresa da Paesi a noi culturalmente e giuridicamente più vicini dell'India, come ad esempio Svizzera e Germania.

Con l'auspicabile avvio di un processo di revisione costituzionale si aprirebbe dunque una nuova fase nel rapporto uomo-animale, passando dalle politiche di tutela e di preservazione alla condivisione di un destino comune in virtù di una innegabile vicinanza ontologica. La soggettività animale potrebbe così completare e realizzare il principio di eguaglianza da sempre arenato sulla barriera della specie[30].

L'esperienza francese, dimostra come sia possibile considerare gli animali come esseri viventi dotati di una propria personalità intesa come sensibilità. In questo senso l'animale è riconosciuto nel codice civile (nuovo articolo 515-14) come un "essere vivente dotato di sensibilità" e non è più considerato solo un bene mobile.

Il dibattito in dottrina consente di approfondire la normativa codicistica che in più occasioni sottolinea l'attualità della *sensibilità animale* come fattore di novità dell'ordinamento giuridico (Billet)[31]. Secondo l'articolo L. 214-1 del codice rurale e della pesca marittima francese "Tutti gli animali che sono animali sensibili devono essere collocati dai loro proprietari in condizioni compatibili con i requisiti biologici delle loro specie".

Tuttavia, l'idea rivoluzionaria sta nel fatto che gli animali non sono più *res*, ma esseri senzienti ma sono solo assoggettati al regime giuridico dei beni. Possiamo notare una progressiva evoluzione della giurisprudenza che riconosce l'animale "*une forme d'intelligence et de sensibilité*" (C.A. d'Amiens du 16 septembre 1992), ovvero una forma di intelligenza e sensibilità.

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[30] Si vedano F. Rescigno, Nota alla Sentenza 7 luglio 2006, n. 173, del Giudice di Pace di Rovereto dal titolo: *Una nuova frontiera per i diritti esistenziali: gli esseri animali*, in *Giurisprudenza Costituzionale*, 2006, 3181. Sulla costituzionalizzazione della dignità animale G. Gemma, *Costituzione e tutela degli animali*, in *Quaderni costituzionali*, 2004, 615. F. Rescigno, *I diritti degli animali. Da res a soggetti*, Giappichelli, Torino, 2005.

[31] Si veda in particolare l'intervento di P. Billet tenuto al Convegno internazionale *Soggettività giuridiche emergenti nel diritto comparato* (Emerging legal subjects: a comparative debate - Les nouvelles personnalités juridiques: une approche de droit comparé), promosso dall'Università della Campania e tenutosi a Vatolla (SA) presso la Fondazione G.B. Vico il 21 e il 22 settembre 2019.

In questa direzione una decisione della Corte di Cassazione francese ha ricordato e stabilito che "Un animale domestico non può essere sostituito da un altro animale" perché si tratta di un "essere vivente, unico e insostituibile" (C. Cass. 1st Civil Chamber, 9 dicembre 2015, n. 14-25.910).

Sul piano comparativo meritevole di pregio è la decisione del tribunale di Mendoza, in Argentina, che nel 2017 ha riconosciuto *le statut de personne juridique non humaine à un chimpanzé femelle* (Cecilia); il tribunale argentino ha definito l'animale come «sujet de droit non humain» e quindi soggetto di diritti. Anche la *legge sull'agricoltura e l'alimentazione del 2018*[32] in Francia ha introdotto il rispetto del benessere degli animali, ha modificato le disposizioni del codice penale e ha previsto pene più severe nei casi di maltrattamenti di animali.

Pertanto il benessere animale comprende sensazioni, stati di salute e condizioni che possono essere misurato scientificamente; si tratta di un concetto biologico, molto diverso dai diritti, ma che riguarda solo animali vivi. La salute degli animali è così importante in quanto costituisce un elemento centrale per il benessere degli animali. Anche l'articolo 3 della direttiva 98/58/CE del Consiglio relativa alla protezione degli animali allevati a fini agricoli stabilisce che "*Gli Stati membri assicurano che i proprietari o i detentori adottino tutte le misure appropriate per garantire il benessere dei loro animali e garantire che tali animali non subiscano alcun dolore, sofferenza o danno inutile*". In definitiva la salute degli animali è dunque particolarmente importante in quanto può anche avere conseguenze per l'economia e per le malattie umane.

Il trattato di Lisbona che ha sostituito il trattato di Amsterdam, introduce nell'articolo 13 del trattato sul funzionamento dell'Unione europea la stessa formulazione di "animali come esseri senzienti".Un altro riferimento più recente individuato nella legislazione dell'Unione europea è riportato nel *considerando 12* della direttiva 2010/63/UE sulla protezione degli animali utilizzati a fini scientifici, secondo cui "gli animali hanno un valore intrinseco che deve essere rispettato".

[32] L. Colella, *La «loi agriculture et alimentation» nel modello francese: il primo passo per l'affermazione del «diritto al cibo sano e sostenibile» come valore costituzionale, Diritto e giurisprudenza agraria, alimentare e dell'ambiente*, n. 6/2018, 1-9.

La *sensibilità degli animali* si rinviene anche nella recente decisione della Corte amministrativa d'appello di Versailles che ha accolto l'11 luglio 2019 i contenuti della sentenza della Corte di giustizia europea del 27 febbraio 2019, accogliendo la tesi secondo cui non è possibile certificare come carni biologiche quelle in cui gli animali siano stati macellati senza preventivo stordimento e ciò anche al fine di evitare un attentato al benessere animale.

67. *Conclusioni*

In questo quadro il riconoscimento dei diritti degli animali può rappresentare una nuova sfida per il giurista.

L'esperienza comparativa dimostra che l'essere vivente animale non può essere equiparato solo ad una "*res*" e ciò perché gli animali, come dimostrato anche dal dibattito giurisprudenziale, sono degli esseri *viventi sensibili*, che soffrono (si pensi al caso emblematico dell'uso del collare elettrico)[33] e che, pertanto, sono meritevoli di protezione e benessere fisico e psichico.

La dignità animale è al centro del recente dibattito sulla gestione degli animali da circo ed è spesso oggetto di condotte con-

[33] Cfr. la sentenza n. 21932 del 25 maggio 2016 della Corte di Cassazione, sez. III Penale; tale decisione stabilisce che il padrone che usa il collare elettrico per addestrare il proprio cane commette reato. Anche se non si configura il reato di cui all'ex art. 544-ter c.p. (perché non si parla di "lesioni" all'animale), le scosse generano sofferenza ed è così integrato il reato di cui all'art. 727, comma 2, c.p., dalla cui contravvenzione il responsabile (un uomo che utilizzava il collare elettrico per addestrare i suoi due cani all'attività venatoria). Con altra sentenza n. 38034 del 17 settembre 2013 della Corte di Cassazione, 3° Sez. penale, la Suprema Corte di Cassazione ha ribadito un principio già affrontato in precedenza (Corte di Cassazione, sentenza n. 15061/2007) e cioè che usare il collare antiabbaio (o elettronico, o anche detto "elettrico") configura il reato di maltrattamento di animale (art. 727, comma 2 del Codice Penale) poiché si basa sull'impiego di impulsi somministrati tramite telecomando per provocare al cane un dolore che incide sulla sua qualità fisica e psichica. In dettaglio, la Cassazione dichiara infatti che "*la somministrazione di scariche elettriche per condizionarne i riflessi ed indurlo tramite stimoli dolorosi ai comportamenti desiderati produce effetti collaterali quali paura, ansia, depressione ed anche aggressività*". Ricordiamo che in passato il Ministro della Salute aveva emanato diverse ordinanze per vietare l'uso di collari antiabbaio, ordinanze sospese dal Tar e via via reintrodotte e, in tal senso, da notare sempre la Cassazione ora dice che "*l'uso del collare antiabbaio, a prescindere dalla specifica ordinanza ministeriale e dalla sua efficacia, rientra nella previsione del codice penale che vieta il maltrattamento degli animali*".

trarie alla c.d. sensibilità animale[34] ricostruita e riconosciuta dalla giurisprudenza[35].

Un importante contributo al dibattito intorno al riconoscimento della personalità degli animali giunge proprio dall'esperienza francese. Nel recente codice civile francese (art. 515-14 del 2015) gli animali sono considerati né cose, né persone, ma una sorta di limbo, o "*tertium genus*"[36]. Accanto alla categoria della persona umana e dei beni si accosta una nuova entità rappresentata dalla dignità o sensibilità animale.

Proprio la giurisprudenza costituisce, a nostro avviso un primo formante della personalità animale. In una recente sentenza (Tribunale di Milano settembre 2019), per esempio, ai gatti è stata riconosciuta la libertà di movimento e proprio per la loro propria natura di esseri liberi sono definiti animali sociali in grado di circolare liberamente; per queste ragioni, secondo la giurisprudenza, i gatti che stazionano e vengono alimentati nelle zone condominiali non possono essere allontanati o catturati per nessun motivo. Questa come altre sentenze riconoscono una sorta di personalità animale certamente ancora da definire ed elaborare sul piano teorico, ma che sicuramente potrebbe essere annoverata tra i nuovi diritti emergenti.

In questa direzione sarà proprio la personalità animale, intesa prima di tutto come "sensibilità animale", il nuovo criterio cardine che potrà in un futuro guidare gli interventi normativi del legislatore in Italia[37] finalizzati alla tutela dell'animale come essere libero, sensibile e dotato di propria dignità.

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[34] A. Gasparre, *Diritti degli animali. Antologia di casi giudiziari oltre la lente dei mass media*, Key editore, 2015.

[35] Si pensi al caso del gestore di un circo condannato per aver detenuto cinque elefanti in condizioni incompatibili con le loro caratteristiche etologiche, in quanto legati con corte catene limitative dei più elementari movimenti, in una situazione incompatibile con la loro natura e produttiva di gravi sofferenze (art. 727, comma 2°, c.p.).

[36] J.P. Marguènaud, L'art. 515-14 del Code Civil au secours des animaux de ferme, in Revue semestrielle de Droit animalier, RSDA, 2/2018, pag. 25.

[37] Il Consiglio Regionale della Campania ha approvato all'unanimità la mozione per un circo senza animali. La Giunta regionale infatti è stata impegnata ad attivarsi presso il governo nazionale per arrivare a una rapida approvazione dei decreti attuativi previsti dall'articolo 2 della Legge 175/2018. La normativa punta alla revisione delle disposizioni nei settori delle attività circensi e degli spettacoli viaggianti finalizzata al superamento dell'utilizzo degli animali nel loro svolgimento, cfr. *https://napoli.fanpage.it/circo-senza-animali-la-regione-campania-approva-la-mozione*.

Abstract

Il complesso dibattito sul riconoscimento di uno status giuridico in favore degli animali ha di recente ricevuto nuova linfa, imponendo una riflessione tanto in relazione alla necessità di un rafforzamento della legislazione di protezione animale quanto sulla possibile previsione, in seno ai testi costituzionali, di una specifica tutela. L'esperienza comparativa dimostra che l'essere vivente animale non può essere equiparato solo ad una "*res*" e ciò perché gli animali, come dimostrato anche dal dibattito giurisprudenziale, sono degli esseri viventi *sensibili*, che soffrono e che, pertanto, sono meritevoli di protezione e benessere fisico e psichico.

The complex debate on the recognition of a legal status in favour of animals has recently been given a new lease of life, requiring reflection both on the need to strengthen animal protection legislation and on the possible provision in constitutional texts for specific protection. Comparative experience shows that the living animal cannot be equated only with a "*res*", and this is because animals, as also demonstrated by the debate in jurisprudence, are *sensitive* living beings who suffer and therefore deserve protection and physical and mental well-being.

PASSATO E PRESENTE

OTTO VON GIERKE*

CONCETTI DI BASE DEL DIRITTO DELLO STATO E LE PIÙ RECENTI TEORIE AL RIGUARDO

Tubinga
Ed. MOHR (Paul Siebeck)
1915[1]

III[2]

I due scritti citati [ossia, Max Seydel, *Grundzüge einer allgemeiner Staatslehre*, Würzburg 1873 e Albert Th. Van Kriecken, *Über die sogennante organische Staatstheorie; ein Beitrag zur Geschichte des Staatsbergiffs*, Lipsia 1873 - *n.d.C*], come ripetiamo, meritano l'attenzione ad essa dedicata non tanto per il loro intento, quanto perché sono sintomi della tendenza spirituale che si sta di recente ampliando nel diritto dello Stato come in tutti i settori del diritto. Entrambi sono più o meno figli spirituali della scuola di Gerber, entrambi combattono con tutta l'energia contro il pragmatismo prima dominante nel diritto dello Stato, entrambi omaggiano per questo il formalismo e il dogmatismo unilaterali prima descritti. La loro discussione in dettaglio ci ha dimostrato, in due esempi particolarmente eclatanti, che la strada intrapresa da questa tendenza in ordine al perfezionamento del diritto dello Stato non può essere la retta via.

Del tutto giustificati in effetti ci appaiono il nocciolo e l'obiettivo delle aspirazioni cui questa tendenza deve la propria esistenza.

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[1] Edizione non modificata del saggio apparso nel *Zeitschrift für die gesamte Staatswissenschaft*, 1874, quaderni 1 e 2.

[2] [La Parte della Sezione II di cui al precedente numero della Rivista, dedicata all'illustrazione in dettaglio delle opere citate dei due autori, non è stata oggetto di traduzione - *n.d.C.*].

Si tratta effettivamente di superare i difetti e le unilateralità della precedente dottrina del diritto dello Stato; è importante liberare i concetti di fondo del diritto dello Stato dall'oscurità, dall'indeterminatezza e dal carattere metaforico ad essi propri e dal mescolamento del loro contenuto giuridico con elementi non giuridici di ogni tipo, e si tratta di collegarli ad un oggettivo sistema scientifico effettivo; è anche importante, essendo il diritto dello Stato diritto, costruire la sua scienza in modo specificamente giuridico ed inserirlo come componente paritaria all'interno dell'organismo complessivo della scienza giuridica. Solo che l'assolvimento di questi compiti non si pone sulla strada di un formalismo che fa teoria con superficialità. In esso abbiamo visto Seydel e van Kriecken naufragare regolarmente nella loro parte critica così come in quella positiva. Nella parte critica una tendenza che non si attenga alla essenza, ma solo all'apparenza, non porterà mai a riconoscere, nella precedente dottrina del diritto pubblico, il nocciolo trovato come contenuto, la conquista irrinunciabile di un grandioso lavoro spirituale. Essa è più o meno destinata, come Seydel, ad accontentarsi della semplice negazione ovvero, come van Kriecken, a perforare, con il più grande apparato bellico in senso critico, davanti al pensiero avverso che essa immagina di colpire al cuore, in realtà solo un muro addobbato con gioielli falsi e una gran quantità di lustrini. Ma ancor meno sarà in grado di porre un qualche fondamento sostenibile in quanto nuova costruzione di un diritto dello Stato positivo una tendenza che sostituisca il concetto del diritto con la forma del diritto. Essa piuttosto si accontenterà, come van Kriecken, di termini giuridico-tecnici ovvero, come Seydel, nonostante l'attuazione più conseguenziale della formula di base sostenuta con una metodologia matematica, perverrà solo ad uno schema tanto vuoto quanto infruttuoso.

Ma se noi ora abbiamo riconosciuto come tale la strada sbagliata che abbiamo imboccato verso un obiettivo giustamente desiderato ed abbiamo gettato uno sguardo di fondo sulle cause della confusione, non ci può più riuscire difficile l'indicazione della retta via verso uno scopo. Con la conoscenza della via, certo, non è stato ancora conquistato molto. Il vero e proprio lavoro inizia proprio quando viene realmente fatto il primo passo su questa strada. Ma, alla fine, si realizza la prima precondizione del progresso ed è garantito il successo da parte di aspirazioni serie!

La giusta strada ora ai fini della formazione e del chiarimento sul piano giuridico del diritto pubblico, porta ad attraversare la costruzione, laboriosamente scavata in profondità nel corso dei secoli, ma non porta né davanti ad essa né direttamente ad essa. Tuttavia, è importante ripulire il sistema di pensiero dominante di tutte le superfetazioni e liberarlo di tutte gli involucri nebbiosi, mentre deve essere al contrario preservato il suo nocciolo puro e ritrovato. Ed è tuttavia importante formalizzare i pensieri spesso vaghi ed indeterminati in ordine ai rapporti giuridici dello Stato, riformularli in concetti giuridici tecnici e collegarli all'interno di un sistema giuridico puro, anche se il loro contenuto materiale non può andar perso nella tipizzazione e la sostanza della loro essenza non può cadere vittima della pura superficialità. Solo così sono destinati a trovare al contempo un chiarimento ed un approfondimento i concetti di base del diritto dello Stato e ci si terrà lontani dalla carenza di una forma non giuridica e dall'essenza di formule non filosofiche.

Per scoprire, nella sua sintesi indistruttibile, il solido fondamento posto dalla scienza più recente e su cui d'ora in poi dovrà incondizionatamente basarsi ogni ulteriore costruzione del diritto dello Stato, dobbiamo anzitutto ricordarci che alla nostra epoca, tanto per la vita quanto per la scienza, è posto il compito di sciogliere in un'unità superiore due tendenze di fondo nella concezione dello Stato. Di queste tendenze di fondo l'una è riuscita a negare il momento giuridico del diritto dello Stato quando ha preso le mosse dall'unica realtà costruita a partire dal dato generale e l'altra è riuscita a distruggere il concetto di Stato nel momento in cui ha fissato esclusivamente la realtà dell'individuo.

La prima di queste due tendenze estreme dominava il mondo antico ed aveva festeggiato la propria rinascita nella filosofia, nella giurisprudenza e nella politica, ravvivando le antiche idee. Per essa l'uomo è per lo Stato. Solo ciò che è generale ha piena effettività, è *tout court* scopo in sé stesso, porta esclusivamente in sé stesso il motivo della propria esistenza. L'individuo esiste in ultima istanza non per sé stesso, ma per la collettività. Ne derivano, quanto alla nascita dello Stato, tutte quelle molteplici teorie che variano il tema di fondo di Aristotele, secondo cui l'intero viene prima delle parti. Ma per sua essenza, lo Stato si rappresenta come un tutto autonomo *tout court*, con le parti semplicemente non indipendenti, è unità per sé stesso, in sé stesso e per propria volontà. Su questa concezione di

base non rileva poi come lo Stato sia rappresentato, se esso venga considerato come essenza naturale, fondazione divina, volontà sovrana, idea realizzata o concetto che si sviluppa da sé. Nei rapporti giuridici deve essere comunque attribuita ad esso una personalità, che è non solo *tout court* unitaria, ma anche onnicomprensiva, sicché, per tutti quei rapporti con cui esso si relaziona, non può essere pensata una personalità propria da parte degli individui riuniti all'interno dello Stato. Certo, anche agli individui può essere attribuita una personalità, ma ciò è possibile solo in modo tale che venga per essa ritagliato un ambito di rapporti individuali perfettamente delimitato dalla sfera statale, ambito all'interno del quale la singola libera volontà mantiene un potere sovrano. Ne deriva per il diritto, il cui compito è ordinare le relazioni di volontà che nascono dalla vita comune delle persone, che esso, per sua essenza, non comprende affatto, in fondo, l'istituzione interna dello Stato. Perché, anzi, solo in riferimento alla sfera individuale lasciata libera dallo Stato esiste, *tout court*, una pluralità di persone i cui ambiti di volontà necessitano, l'un l'altro, di delimitazione; e a prescindere da come possa essere pensato il rapporto con lo Stato da parte dell'ordinamento che dà attuazione a ciò, il suo contenuto per il singolo uomo è vero ed autentico. Per contro, l'ordinamento riferito all'esistenza dello Stato, che è l'unico caso in cui si concede a sé stessi una volontà sovrana unitaria, deve avere un carattere specifico diverso dal diritto privato. Per quanto il diritto pubblico possa chiaramente offrire così tante somiglianze con il diritto privato, mancano comunque ad esso quelle caratteristiche decisive che rendono *tout court* diritto il secondo. Perché non ci può essere mai una contrapposizione di relazioni di volontà tra una personalità semplicemente unitaria e i suoi membri semplicemente non indipendenti, tra un tutto causale e le sue parti realizzate.

L'inclinazione verso l'estremo opposto da parte della concezione dello Stato individualistica fu predominante nel medioevo germanico e deve alla scuola di diritto naturale la propria realizzazione nella filosofia, nella giurisprudenza e nella politica, quale ha avuto luogo con molteplici modifiche di forma. Questa tendenza pone alla base il principio secondo cui lo Stato sta lì in vista delle persone. Solo l'individuo ha la propria realtà, è esso stesso fine, esiste per sua natura come unità. Lo Stato è solo uno strumento per meglio poter perseguire gli interessi comuni, ma non per questo

meno individuali, di tutti o dei molti individui con una forza unificata. In merito alla nascita dello Stato ne consegue che, comunque, l'individuo era precedente allo Stato, per quanto si possa pensare ora ad una realtà creativa più o meno consapevole da parte degli individui di prima non riuniti, ad un'attività più o meno libera dell'umana volontà, ad un accordo o ad una forza di sottomissione fissata in questo o in quel modo. Per sua essenza lo Stato si rappresenta qui *tout court* solo come un insieme di persone e di istituti che combinano indifferentemente le parti di una macchina complessa in vista di un risultato unitario. Questo Stato non possiede però una propria unitarietà di essenza ad esso immanente. Quindi in sé, anche nelle relazioni giuridiche, solo gli individui che costituiscono lo Stato sono dotati di una personalità propria ed originaria. Lo Stato in quanto tale non è in sé una persona, ma una somma di persone singole collocate inegualmente, in parte dominanti, in parte dominate. Mentre però le prime, nel tirare le conseguenze dell'individualismo, negano assolutamente nei fatti la personalità dello Stato e vi sostituiscono gli individui dominanti, le seconde, senza con ciò lasciare, in fondo, il terreno dell'individualismo, attribuiscono allo Stato il ruolo di un soggetto giuridico unitario in base a ciò che è opportuno verso l'esterno. Anche nel secondo caso, con il fatto di presupporre una personalità giuridica dello Stato non si esprime affatto, necessariamente, un'essenza propria di ciò che è generale, ma occorre costruire solo una finzione per scopi tecnico-formali. Questa personalità dello Stato costituisce un semplice comando artificialmente necessario, uno strumento d'ausilio ai fini della costruzione, un oggetto di pensiero astratto, cui non corrisponde una realtà. Essa rappresenta un'unità presente solo nelle idee, su cui vengono trasferite quelle caratteristiche dell'individuo di cui essa ha bisogno con la finalità della personificazione. E così, anche qui, nei fatti, non viene abbandonata la base individualistica, ma viene solo affiancato un individuo-Stato artificiale agli individui naturali. Ma ora, per quanto riguarda il diritto, a partire dalla concezione individualistica dello Stato esiste la possibilità di concepire allo stesso modo le relazioni dello Stato come quelle dell'individuo. Perché anche l'ordinamento relativo all'esistenza dello Stato, quando quest'ultima è il risultato della collaborazione tra individui, ha a che fare con la reciproca delimitazione degli ambiti di volontà autonomi. Solo che il diritto pubblico alla fine deve essere costruito su

questa base esattamente in modo così individualistico come il diritto privato, e, per quanto lo riesca a nascondere, in fondo ogni dottrina di diritto pubblico la quale si basi solo sull'individuo, è destinata a venir fuori sul fondamento di una concezione giusprivatistica. Viene però salvaguardato in tal modo, per il diritto dello Stato, nella misura in cui non vi si contrappongano altri fondamenti, il carattere pieno del diritto, anche se ciò riesce solo nella misura in cui il diritto dello Stato viene sottoposto alle idee del diritto privato. E con questo ciò che guadagna il pensiero giuridico, lo perde irrimediabilmente il pensiero sullo Stato.

Queste visioni di fondo contrapposte sono state ora di certo realizzate, nella scienza come nella vita, spesso in totale purezza. La tendenza verso l'assolutismo statalistico, pur essendo stata da un lato dilatata fino alla negazione socialista anche del diritto privato, ha d'altro lato sperimentato molteplici modificazioni nel senso di un peso dell'individuo nel diritto pubblico, certo, derivato, ma pur tuttavia relativamente autonomo. E la tendenza individualistica, pur essendosi spesso persa da un lato nel materialismo più esteriore, nel meccanicismo e nell'atomismo, è stata d'altra parte ridimensionata nel modo più vario possibile a favore dell'autogiustificazione della totalità riguardante lo Stato. Inoltre, a seguito della diversa concezione dei rapporti reciproci tra Stato e diritto, a seconda del diverso significato attribuito alle associazioni non statuali etc. sono emerse le più disparate rotture e sfumature dell'una come dell'altra tendenza di fondo. Ed in molti punti non sono mancate, da entrambi i sistemi di pensiero, svariate e certo il più delle volte molto esteriori combinazioni di pezzi di varia natura. Solo che un avvicinamento dall'interno e un mescolamento effettivo di entrambe le tendenze, per quanto fosse raccomandato un tentativo in tal senso tenuto conto del naufragio da entrambi i lati, non potevano essere certo avviati prima che venisse trovato un punto di partenza positivo per il diritto dello Stato, tale da raccogliere unitariamente le contrapposte concezioni di base delle tendenze fino ad allora in lotta. La più grande conquista tedesca moderna della scienza del diritto pubblico sta nell'acquisizione di un nuovo principio di fondo, tale da costituire al contempo il cuore più intimo della moderna vita dello Stato in contrapposizione all'antichità così come al medioevo. Una conquista che, certo, risulta poco portata ad una chiara consapevolezza, rimane più volte nascosta e dissimulata e risulta finora effetti-

vamente utilizzata solo in minima parte – una conquista però che costituisce la base e la garanzia di tutto il progresso del diritto dello Stato.

Partiamo dalla circostanza esistente storicamente secondo cui la persona ha portato con sé dappertutto ed in ogni tempo la doppia caratteristica di essere un individuo in sé stesso ed un membro dell'associazione di cui al genere umano. Nessuna di queste caratteristiche avrebbe reso la persona tale senza l'altra; né le particolarità del singolo né la sua appartenenza alla collettività possono essere immaginate senza negare l'essenza della persona. Così, non solo accettiamo come un dato di fatto naturale, ma fissiamo come caratteristica concettuale della persona il fatto che la sua esistenza in parte si riferisce a sé stessa e in parte ad una comunità che le è superiore. Constatiamo, in accordo con ciò, una doppia tendenza della coscienza e delle attività umane. La persona non può avere una coscienza di sé senza sapersi al contempo come qualcosa di particolare e come parte di una collettività. La sua volontà riceve contenuto e direzione solo per un verso da sé stessa, ma per altro verso viene determinata da altre volontà. E nella misura in cui attribuiamo uno scopo all'esistenza, per noi la singola vita umana non è semplicemente né un fine in sé né uno strumento di promovimento del genere umano, ma crediamo che l'individuo e la collettività sussistano anzitutto per sé stessi e tuttavia al contempo anche l'un con l'altro, e crediamo che il compito dell'umanità consista nello stabilire l'armonia tra i fattori del particolare e del generale, tali da completarsi reciprocamente.

A partire da questa posizione dobbiamo attribuire piena realtà ed essenza unitaria tanto all'individuo umano quanto alla comunità umana. Per noi l'individualità che esiste solo per sé stessa e che si riferisce solo a sé stessa costituisce un'unità di vita naturale ed effettiva. Ma per noi costituisce un'unità di vita altrettanto naturale ed effettiva ogni associazione del genere umano che raccolga una somma di individui mediante il parziale superamento della loro individualità nella direzione di una totalità nuova ed autonoma. Perché la quintessenza dell'essere umano non è esaurita sommando semplicemente il contenuto della vita di tutti gli individui, così come non si esprime facendo semplicemente risaltare momenti unitari della vita collettiva. Per noi esiste, al di là dell'ordinamento di vita degli individui, un secondo ed autonomo ordinamento di vita

della generalità umana. Al di là dello spirito del singolo, della volontà del singolo, della coscienza del singolo, noi riconosciamo, nelle mille espressioni di vita, la reale esistenza dello spirito comune, della volontà comune e della coscienza comune. E parliamo dell'"essenza comune" al di là di quella singola non in senso figurato, ma nel vero e proprio significato letterale.

Ora, la vita comune umana non si concentra affatto in una singola forma esistenziale tale da essere valida per la collettività, ma, all'interno di una ricchezza sempre in crescita, si manifesta con il progresso della cultura, con il progresso dei più variegati modelli di vita. Al di sopra delle esistenze comuni in senso stretto e semplificato dei livelli culturali più antichi, si sviluppano sempre comunità più elevate, più onnicomprensive e più sviluppate, senza che con ciò le associazioni più ristrette nei loro contenuti di vita abbiano perso *tout court* l'esistenza. Inoltre, l'umana vita comune sempre di più si ramifica e si frantuma in base al contenuto e agli scopi. In origine, le associazioni basate in modo puramente fisico della famiglia, della *gens* e del popolo assolvono ai compiti generali dell'esistenza del genere umano; esse realizzano al contempo, in modo unitario ed esclusivo, la comunità di lingua, di costumi, di fede, di economia, di diritto e di vita politica. Ma sempre di più nel corso del tempo gli organismi unitari della società si disgregano in un gran numero di organismi sociali autonomi, di cui ognuno conserva solo alcuni aspetti della comune vita umana quanto a contenuto esistenziale. Quando *ab origine* anche queste comunità particolari si sono sviluppate senza consapevolezza e in un modo vincolato solo su base fisica, lo spirito dell'uomo maturo ha intrapreso anche la creazione, consapevole e programmata, di comunità affini in vista di scopi determinati, tali da porsi al di là dell'esistenza individuale. Al divenire degli organismi della società corrisponde perciò un trascorrere, all'attività creativa uno sciogliere e un distruggere. Se la costruzione della comunità è concepita in tal modo, sempre e dappertutto, come un flusso vivente, debbono anche trovarsi, sempre e dappertutto, accanto ad unità associative realizzate, numerose esistenze di comunità incompiute o degenerate, puri germi e morti rimasugli, approcci irrealizzati ed informi, forme dubbie di transizione e di passaggio di ogni tipo. I diversi organismi sociali possono anche incrociarsi e coprirsi per una volta l'un con l'altro, in molteplici forme imprevedibili, possono perdersi ovvero intrecciarsi intimamente,

possono ramificarsi a partire dalla comune origine oppure crescere insieme a partire da radici diverse. E così il mondo della comune vita umana offre un quadro altrettanto colorato, variamente stratificato ed articolato, indeterminato e sfuocato tenuto conto dei suoi confini, come il mondo del corpo organico. Anche in quest'ultimo le esistenze più elevate e più basse hanno compiti e significato infinitamente variegati, ma a tutte esse è comune la caratteristica della vita. Anche qui, tra semi e individui sviluppati, anzi tra vita e morte, i confini sono fluidi, solo che la realtà della vita non ne viene sconvolta. Anche qui un ponte tra incerte forme di passaggio porta nel regno dei collegamenti inorganici, anche se permane il fatto di costituire l'essenza autentica dell'organismo realizzato, un'autonoma unità di vita. Anche qui però è spesso dubbio dove, nella suddivisione di un organismo, inizi l'esistenza dei singoli individui e dove, nella crescita unitaria di formazioni singole, inizi l'esistenza di un tutto organico, anche se la natura unitaria rimane per noi la caratteristica essenziale dell'organismo.

Lo Stato appartiene ora in particolare all'esistenza sociale dell'uomo. L'essenza del vincolo "statuale" si basa sul fatto di avere come contenuto la potente realizzazione della volontà generale. Essa è la comunità dell'agire politico. La sua sostanza è la volontà generale, la sua forma di manifestazione è il potere organizzato, il suo compito è l'attività consapevole degli scopi. La vita comune statuale esiste da sempre: di uno Stato vero e proprio si parla però non appena prende forma un organismo autonomo e particolare di vita statale. Anche la *gens* isolata, l'orda errabonda, la stirpe itinerante danno attuazione a funzioni statali, solo che lo Stato qui non è ancora pervenuto ad un'essenza autonoma. Quando ciò accade, possono essere accollati i compiti statuali di associazioni più o meno ristrette e di comuni, organismi e confederazioni politiche in progressivo ampliamento. Tutti essi hanno natura statuale. Quell'associazione di potere il cui potere non è limitato verso l'alto e verso il basso da nessun altro potere similare è destinata però a mostrare un carattere specifico nonché una serie di differenze qualitative rispetto a tutte le altre associazioni politiche. Perché un potere che sia il più elevato si differenzia da ogni altro potere per la caratteristica specifica di essere potere completo, potere *tout court*; e una volontà cui corrisponda un simile potere è diversa da ogni altra volontà in quanto volontà sovrana, una volontà *tout court* generale,

determinata solo da sé stessa. Perciò, all'interno delle associazioni politiche, quantunque tutte pubbliche, si chiama "Stato" solo l'associazione di potere di volta in volta di rango più elevato.

Lo Stato costituisce quindi la realizzazione di un aspetto della vita comune umana determinato nella sua essenza. In riferimento alla sua nascita ne deriva anzitutto che è connaturato all'umanità il fatto di vivere in forme statuali e che quindi lo Stato ha semplicemente la stessa età dell'individuo. Ma neanche il singolo Stato è una libera creazione dell'individuo, ma il prodotto necessario delle forze sociali che agiscono tra gli individui. Originariamente, gli Stati mutano e crescono senza alcuna collaborazione da parte di una volontà che crei consapevolmente, come prodotto naturale dell'attività sociale inconsapevole. Successivamente, essi vengono certo conformati intenzionalmente e secondo un programma e possono del pari essere fondati con un atto di volontà consapevole: solo che, anche allora, non si tratta di un'unione di volontà individuali, ma dell'attività creatrice di una volontà generale che chiama ad esistenza lo Stato ovvero la nuova forma di Stato. Non c'è anzi nessun individuo che sia individuo *tout court*, nessuna volontà individuale libera, non vincolata, priva di premesse, che potrebbe, vincolando ed alienando sé stessa, produrre la volontà dello Stato a partire dalla somma delle individualità. Piuttosto, anche gli uomini per intanto privi di Stato, che si possono immaginare come fondatori di uno Stato, sono sempre vincolati allo Stato nel loro modo di pensare e di volere e fanno a meno solo momentaneamente della realizzazione verso l'esterno del loro fatto di essere Stato. Né il concetto di Stato né la decisione in ordine alla sua realizzazione avrebbero quindi radice nello spirito individuale; anche qui non verrebbe in considerazione la singola volontà individuale in azione in quanto tale, ma in quanto elemento della volontà generale; e non si sarebbe in presenza di un'unione di volontà di molti individui, ma di un atto unitario della volontà generale vivente in molti individui e solo momentaneamente priva di forma, tale dunque da approvare il proprio essere e da crearne la forma.

Per ciò che riguarda, inoltre, l'essenza dello Stato in generale, in base a quanto detto, dobbiamo attribuire ad essa un'esistenza reale propria. Esso ci appare come un organismo sociale dell'uomo con una vita unitaria complessiva diversa dalla vita dei suoi membri. Tuttavia, essendo collettività, esso sussiste a partire da altre es-

senze che costituiscono in sé una particolarità; esso si compone, come organismo sociale, a partire da molti organismi in parte semplici, in parte di nuovo sociali; la sua vita viene a comparire nell'attività vitale di componenti ed organismi che al contempo conducono un'esistenza particolare. Solo che esso è, nonostante ciò, un'unità reale, in quanto tutte le esistenze particolari, nella misura in cui costituiscono elementi dello Stato, si raggruppano, si articolano e si vincolano in base all'idea della totalità dello Stato, e trovano contenuto della loro esistenza non in sé stesse, ma nella determinazione in vista della vita generale di livello più elevato. Se si fosse voluta negare l'unità dello Stato per amore della sua natura composita, ciò sarebbe stato possibile nello stesso spirito e nello stesso senso in cui si fossero dovuti considerare allora semplicemente solo gli atomi come unità ed il mondo solo come somma variegata di tali unità!

Ma poiché l'esistenza umana non si risolve nella vita del genere umano, ma costituisce al contempo essa stessa un fine, anche davanti allo Stato dobbiamo riconoscere l'individuo come un'essenza originaria, che esiste di per sé stesso e che reca in sé stesso i propri fini. Solo con una parte della propria esistenza, dunque, la singola persona appartiene allo Stato in quanto suo componente: il restante contenuto della propria esistenza viene lasciato del tutto intatto dalla vita comune di cui allo Stato e costituisce la sostanza della sua libera individualità. L'essenza statale e quella individuale stanno l'una di fronte all'altra come due campi di vita autonomi, di cui certo nessuno può stare senza l'altro ed ognuno fa rinvio all'altro come proprio completamento, ma che, a prescindere da ciò, hanno entrambi in sé stessi il loro scopo più immediato.

Lo Stato alla fine è sì collettività, ma non è affatto, come insegna una concezione diffusa, la generalità umana *tout court*. È solo uno tra gli organismi sociali dell'umanità e solo un determinato aspetto della vita del genere umano costituisce il suo contenuto concettuale essenziale. È tuttavia possibile che presso un determinato popolo ed in una determinata epoca lo Stato si accolli tutte ovvero moltissime funzioni della vita collettiva: ma proprio nelle civiltà altamente sviluppate ed anzitutto nel mondo moderno, gli aspetti non politici dell'umana esistenza sociale trovano la loro espressione in modelli di vita particolari che in nessun modo coincidono con l'organizzazione riferita allo Stato. Già la comunità fisica di sangue, di lingua e di terra costituisce, certo, fino ad un de-

terminato punto, la base indispensabile per il fiorire dello Stato, ma essa concettualmente non può esistere così bene senza lo Stato, così come lo Stato senza di essa. Ed anche se lo Stato si avvicina il più possibile al proprio ideale, di essere cioè l'organo politico di un popolo unico ed unitario, il concetto naturale di popolo e quello politico non coincideranno mai perfettamente l'uno con l'altro. Ad un certo punto l'unità di vita del popolo ben costituisce il punto mediano più importante, ma nient'affatto l'unico dato, naturalmente, ai fini della comunità politica, così come per tutte le altre comunità. Piuttosto, come esistenze sociali dell'uomo in senso stretto ed in senso ampio, la stirpe, il comune e la famiglia e, al di sopra di essi, la comunità internazionale dei popoli civilizzati e, infine, l'umanità *tout court* coesistono con un particolare ambito di vita all'interno dell'unità del popolo. E nella misura in cui a queste associazioni più ristrette e più ampie corrisponde un'organizzazione politica, questa, da un lato, può essere titolare, nei confronti dello Stato, di una certa autonomia, ma dall'altro, così come lo Stato, può concettualmente allontanarsi dal suo equivalente naturale. A quel punto, inoltre, ai vari livelli, la vita comune etico-sociale, quella religiosa, artistica e letteraria nonché quella economica finiscono con il crearsi i propri organismi particolari, i quali – per quanto possano essere maturi come fatto naturale ovvero costruiti consapevolmente, per quanto possano essere formalmente caratterizzati come unità ovvero avere validità solo come poteri latenti, per quanto possano durare tanto come la Chiesa oppure essere effimeri come molte associazioni – godono collettivamente di esistenza autonoma nei confronti dello Stato. Ma se ora, davanti ad una vita collettiva non statale così ricca di vita, lo Stato è costretto a rinunciare alla pretesa di rappresentare *tout court* il genere umano, esso rappresenta però, di fatto, l'elemento semplicemente generale per quei rapporti comuni la cui realizzazione dà corpo alla sua essenza. Nella misura in cui, dunque, si tratta di rapporti di potere generali, tutte le altre esistenze associative con una propria sfera di potere costituiscono, nei confronti dello Stato, solo associazioni particolari, il cui potere politico si allinea e si subordina in ultima istanza alla sfera di potere dello Stato. E così, nei fatti, l'elemento politico vitale di tutte le altre esistenze comuni ed individuali trova la propria determinazione finalistica ultima e la propria delimitazione definitiva nello Stato, che però, in quanto organismo sovrano di potere sociale tra tutti gli

organismi, non ha più un'essenza comune tale da limitare il potere al di sopra di sé stesso, né come totalità politica prende al contempo parte di un'altra totalità politica. Certo, quanto basti ora, dopo di ciò, l'orizzonte statale non lo si può fissare una volta per tutte, ma dipende dalla delimitazione, positivamente condizionata dal momento e dalle circostanze, delle funzioni della vita politica di contro alle altre funzioni di vita sociali. Ma in qualche modo i compiti e le competenze del potere politico si proietteranno sempre in tutti i rami dell'umana vita comune. Perché in generale, ai fini della delimitazione dell'ambito politico, sarà sempre decisiva la considerazione della misura in cui un interesse generale ha bisogno, per trovare realizzazione, della piena attuazione della volontà generale. Le funzioni complessive della società, per svilupparsi completamente e senza disturbi, fino ad un certo punto, in ogni tempo ed in ogni rapporto civilizzato fanno riferimento alla difesa ed agli sforzi di un potere a ciò autorizzato volti a piegare verso l'esterno volontà contrarie. E così lo Stato, nonostante che solo una determinata parte della vita comune costituisca il suo contenuto essenziale sul piano concettuale, non è, in base al proprio scopo di vita, un'associazione fondata per determinati e singoli scopi, ma i suoi compiti coincidono con quelli civili del genere umano, nella misura in cui è necessario sussista un potere più elevato per la loro realizzazione. –

Ma se ora vogliamo dare fondamento ad un diritto statuale basandoci su una tale concezione dello Stato, dobbiamo ancora caratterizzare anzitutto l'essenza del diritto e il rapporto tra concetto di diritto e concetto di Stato. Ciò in quanto il diritto dello Stato ha a che fare solo con una determinata parte dello Stato, anzi con una sua parte sinora non oggetto di considerazione.

L'essenza del diritto sta nel fatto di approvare e di limitare il dominio verso l'esterno delle volontà della comunità umana. Non appena una pluralità di volontà aspira a realizzarsi, c'è bisogno di un ordinamento giuridico del genere. Certo, c'è ancora un'altra funzione sociale che disciplina le volontà ed impedisce l'imposizione senza rispetto. Si tratta della morale. Solo che la morale intende determinare le volontà puramente dall'interno; essa si rivolge alla coscienza del singolo e impianta in lui l'idea del dovere; essa ha come scopo l'armonia tra la volontà e la natura spirituale autentica dell'uomo. La vita sociale tuttavia non riesce ad esistere senza che anche verso l'esterno le volontà che si incontrano non abbiano una

norma limitatrice; accanto all'idea del dovere morale esiste quella per cui, nelle relazioni sociali, sussistono un potere e un dovere verso l'esterno; non c'è bisogno solo dell'armonia della volontà con sé stesse, ma di un'armonia fra tutte le volontà l'una con l'altra. E così si produce il concetto di diritto, con il che, certo, il criterio ultimo riguardo al se qualcosa costituisca un ordine etico o giuridico, consiste solo nella concezione in ordine a ciò da cui viene dominata la coscienza generale in riferimento alla volontà normativa in questione. Dopo, in base a come appare, il diritto si manifesta nei suoi rapporti oggettivi come contenuto di norme, nei suoi rapporti soggettivi come contenuto di autorizzazioni e doveri. In quanto norma esso è un ordinamento di dominio verso l'esterno circa le volontà da esso incontrate; in quanto diritto soggettivo è la realizzazione verso l'esterno della libertà di volontà cui al contempo viene riconosciuta, con le autorizzazioni, una sfera di attività e, con i doveri, viene imposta una sfera di vincoli.

Il rapporto del diritto con lo Stato si determina per il fatto che esso, da un lato, costituisce un aspetto particolare e proprio della vita comune umana, ma dall'altro riesce a trovare tanto poco realizzazione senza lo Stato quanto lo Stato senza il diritto. Accade qui come con tutte le funzioni dell'umana vita comune, di cui ognuna ha una propria radice ed un'essenza specifica e di cui però ognuna è condizionata e determinata in qualche modo da tutte le altre, sicché proprio tutte esse, nella loro interezza, si completano nell'esistenza complessiva del genere umano. Solo che tra Stato e diritto le relazioni di scambio hanno una natura particolare, affine ed intima.

Questa relazione viene alla luce già in riferimento alla nascita del diritto e dello Stato. Il diritto è pari allo Stato. Esso è tanto poco prodotto dello Stato quanto lo Stato del diritto. Solo che entrambi, quantunque con radici autonome, si sono prodotti l'uno con l'altro, per realizzarsi del tutto l'uno con l'altro. Come per l'idea dello Stato, l'idea del diritto è nata del tutto con gli uomini. Ma il diritto positivo è la forma che un qualche spirito comune, *in primis* uno spirito del popolo, conferisce a quest'idea originaria. Qui ora però lo spirito del popolo sviluppato si serve in misura preponderante dello Stato come organo atto a conferire una forma. Solo in tal modo lo Stato non diventa né l'ultima fonte del diritto né il suo unico organo che conferisce una forma. L'ultima fonte di tutto il diritto rimane piuttosto la coscienza comune di una qualche esistenza

sociale. Certo, la comune convinzione che qualcosa è diritto necessita, per giungere ad esistenza verso l'esterno come principio di diritto, di essere incarnata in una massima generale. Solo che questa massima può sussistere in modo differenziato. Molte volte essa si determina attraverso lo Stato; è persino uno dei compiti principali dello Stato civilizzato quello di tipizzare la coscienza giuridica del popolo come legge, e in alcuni momenti quasi tutte le altre fonti del diritto vengono rimosse dalla legge statale. Però anche altri organismi sociali dotati di caratterizzazione formale, come le chiese, le famiglie, i comuni etc., funzionano in modo simile e di tanto in tanto in modo molto ampio, in quanto organi che danno una forma al diritto. E a quel punto rimane sempre valida, di fianco alla legge e allo statuto dell'autonomia, quell'informale tipizzazione del diritto, originariamente del tutto preponderante, di cui alla consuetudine, quando la comune convinzione giuridica perveniva ad espressione nella vita giuridica e con ciò ad esistenza esterna in quanto principio di diritto, mediante la diretta attività vitale del circolo sociale corrispondente. Ma proprio nel procedimento che ha luogo con tali forme, divengono chiare due cose. Anzitutto, si dimostra che nei fatti sono due diverse forze spirituali dell'umanità a trascinare lo Stato ed il diritto. Perché l'uno è la sconfitta della volontà generale, ma il diritto è l'esito della coscienza generale. Indirettamente però, quanto più l'attività inconscia della volontà viene trascinata dalla sua decisione consapevole, nell'opera intesa a dar forma allo Stato un contributo lo fornisce anche la consapevolezza frutto di riflessione; e al contrario, nella conformazione del diritto, quanto più l'oscuro sentimento del diritto cede ad una chiara convinzione giuridica, la comune volontà formata assume il ruolo di intermediario: rimane solo la vera e propria sostanza, nell'un caso la volontà personificata e, nell'altro, la convinzione personificata. In secondo luogo, si chiarisce di conseguenza che, nelle relazioni soggettive, svariati circoli sociali possono essere responsabili della vita giuridica e politica. Così, un popolo disperso dal punto di vista statale può però custodire l'unità della vita giuridica e, all'interno di un popolo, possono sussistere numerosi e particolari circoli giuridici viventi che non necessariamente coincidono con l'articolazione politica; e dalla comunità generale dei popoli civili, anche se non tale da includere un legame di tipo statuale, può germogliare il diritto internazionale.

Lo stesso rapporto tra Stato e diritto ci viene incontro nella sua precipua attività vitale e tuttavia appartenente a tutti. Vita dello Stato e vita del diritto rappresentano due aspetti autonomi e specificamente differenziati della vita comune. La prima si manifesta nella potente realizzazione di scopi comuni voluti e culmina nel fatto politico, la seconda si manifesta nella messa a punto della sfera delle attività per le volontà da essa vincolate e raggiunge il culmine nel riconoscimento giuridico ("riconoscere come diritto"). Mentre il potere costituisce la premessa concettuale per lo Stato, sicché uno Stato non rimane più Stato senza tutti gli strumenti di potere, per il concetto di diritto è in sé indifferente se esso disponga di mezzi di potere verso l'esterno, ed il diritto impotente o violentato rimane sempre ancora diritto. Solo che, in tal modo, Stato e diritto risultano funzioni sociali differenziate, ma che rinviano però l'una all'altra e possono del tutto trovare il loro completamento vitale l'una con l'altra. Lo Stato ha bisogno del sostegno dell'idea del diritto per ottenere la forza interna in ordine alla realizzazione della propria missione di civiltà; se esso fosse percepito solo come potere in azione, che, avendo la forza fisica, pretende e trova obbedienza per ogni atto di volontà considerato opportuno, tutta la vita politica sarebbe destinata a solidificarsi nel dispotismo, e così lo Stato sano cerca di dare fondamento al proprio potere anche con il diritto, sicché la circostanza di un determinato ordinamento sovrano viene contemporaneamente percepita dalla coscienza popolare collettiva come principio di diritto, con il che sussistono da sé limitazioni alle competenze statali e corrispondenti doveri giuridici per lo Stato. Il diritto, al contrario, necessita, per raggiungere il proprio scopo, di un'ordinata vita collettiva degli uomini e del ripagante aiuto da parte dello Stato; come mostra l'esempio del diritto internazionale (*Völkerreicht*), esso non può del tutto adempiere al proprio compito senza la difesa del potere statuale e rimane piuttosto un diritto incompiuto, incompleto; e così il diritto trova il proprio completamento proprio quando lo Stato mette a disposizione per esso il proprio potere, impianta i tribunali per renderlo chiaro e riconduce coercitivamente ogni singola volontà che contrasti con il diritto all'obbedienza nei confronti della norma.

Così neanche i compiti cui Stato e diritto debbono assolvere nella vita delle persone sono identici. Perché né i compiti dello Stato si esauriscono nella difesa del diritto, né quelli del diritto si

esauriscono nel dare un ordinamento alla vita dello Stato; e, mentre lo Stato deve promuovere positivamente in tutti i settori sociali il fine umano della collettività, il diritto deve solo tracciare i confini al cui interno può aver luogo il libero perseguimento degli scopi individuali così come di quelli comuni, con tutte le volontà presenti. Ciò nondimeno, sussistono nel diritto una parte essenziale di compiti dello Stato e nello Stato una parte essenziale di compiti del diritto. Perché, da un lato, la produzione e la difesa del diritto rappresentano funzioni necessarie dello Stato e, dall'altro lato, è un compito del diritto, indispensabile e richiesto sul piano concettuale, ordinare e permeare la vita interna dello Stato. La storia però mostra alcuni discostamenti da questo fisiologico rapporto tra Stato e diritto. Nel medioevo germanico lo Stato era ridotto ad una mera costruzione giuridica, appariva come un puro prodotto nonché un puro strumento del diritto e si esauriva in una somma di facoltà giuridiche; sono ancora chiare per noi situazioni in cui il diritto non arrivava allo Stato ed era degradato a mero strumento di utilità in vista degli obiettivi dello Stato. Ma in linea di principio tali unilateralità risultano superate nella vita moderna e non possono essere fatte rivivere da nessun tentativo di nuova fondazione teorica. Per quanto possano esistere manchevolezze nella realizzazione, dal punto di vista concettuale l'autonomia dell'idea di Stato e di quella del diritto rimangono per noi in rapporto l'una con l'altra. Lo Stato dell'epoca presente è per noi lo Stato civile (*Kulturstaat*), non essendo esso limitato alla difesa del diritto, ma aspirando esso alla completa realizzazione della comunità umana da qualsivoglia punto di vista; ma esso è al contempo per noi Stato di diritto, ponendosi non al di fuori del diritto, ma dentro il diritto, e riconoscendo volentieri l'ordinamento giuridico, in cui vede l'esito di un pensiero ad esso pari, quale norma e limite anche della propria volontà sovrana.

L'autonomia dei due concetti, da mantenere alla base della nostra scienza, ci riporta al nostro punto di partenza. Perché l'unilateralità di voler dedurre o il concetto di diritto da quello di Stato ovvero il concetto di Stato da quello di diritto, l'abbiamo già prima incontrata come conseguenza di una concezione complessiva unilaterale della comune vita umana a partire dalla prospettiva universalistica ovvero da quella individualistica. E così, nonostante la presente, apparente semplicità e giustezza delle formulazioni, tanto

più decisamente per noi ogni teoria scientifica che prenda le mosse da una tale unilateralità si presenta come un travisamento che ha il proprio punto centrale non nell'epoca presente, ma nei periodi superati di sviluppo unilaterale. Ma noi ci aspettiamo uno sviluppo effettivo solo sulla base di una concezione che, per quanto riesca ad avere sfumature, prenda le mosse dall'autonoma giustificazione di ciò che è complessivo così come di ciò che è individuale e deduca i concetti di diritto e di Stato nella vita delle persone indipendentemente l'uno dall'altro, a partire dalle loro radici autonome. Nonostante tutte le costruzioni nuove e più recenti, dovremo pertanto tener incrollabilmente ferma questa concezione di fondo, per come essa, nei fatti, sta alla base della dottrina dominante del diritto dello Stato, quantunque spesso in modo nascosto ed appannato.

Il diritto dello Stato è, quindi, ora, quella parte dell'ordinamento giuridico il cui oggetto consiste nella normazione della volontà unitaria quale si protende verso l'esistenza dello Stato. La dottrina del diritto dello Stato è una parte della dottrina dello Stato, nel momento in cui tratta un aspetto essenziale dello Stato; ma essa non crea la dottrina dello Stato, dal momento che, al di là della natura giuridica dello Stato, la natura di quest'ultimo può essere fisica, etica, economica e politica e, al di là della conformità al diritto, l'opportunità dell'agire politico può essere oggetto di discussione scientifica. La dottrina del diritto dello Stato costituisce inoltre una parte della dottrina del diritto in quanto essa non tratta altro se non diritto nel senso autentico del termine; ma non crea la dottrina del diritto, perché il diritto deve anche regolamentare rapporti che non hanno niente a che vedere direttamente con l'esistenza dello Stato.

Il diritto dello Stato si presenta, ad una considerazione più approfondita, come la parte più importante e soprattutto caratteristica del diritto pubblico, il cui opposto è il diritto privato.

La bipartizione di tutto il diritto in pubblico e privato ci proviene da una suddivisione fondamentale e creativa in sé stessa, che viene da ciò che preesisteva. Perché, se il diritto è normazione delle sfere di volontà, ma la volontà umana ci si presenta sin dall'inizio nella doppia caratterizzazione ed incarnazione come volontà individuale e come volontà collettiva, anche il diritto deve presentare allora uno specifico carattere differenziato, nel delimitare, come diritto privato, la libertà individuale del volere oppure, come diritto pubblico, nell'organizzare la sfera della volontà generale.

Indubbiamente, gli ultimi concetti di base circa i due aspetti del diritto debbono stare in un sistema comune, costituendo entrambi diritto. Essi fluiscono dalle stesse fonti, aspirano allo stesso obiettivo, utilizzano lo stesso strumento della norma sovraordinata rispetto alle volontà e delle sfere di dominio e di sovranità loro assegnate nelle autorizzazioni e nei doveri. Inoltre, nel diritto pubblico così come nel diritto privato il comune concetto di personalità costituisce il punto mediano di tutto il diritto soggettivo, essendo la persona l'esclusivo titolare riconosciuto dal diritto quale soggetto di una sfera di volontà unitaria. Ed anche in riferimento all'oggetto del dominio giuridico della volontà, i due aspetti del diritto sono destinati ad essere allineati, nel momento in cui in entrambi sussiste il triplice rapporto di volontà che si basa su sé stesso, sulle altre volontà e sugli oggetti privi di volontà.

Solo che la successiva costruzione dei due aspetti del diritto è destinata ad essere molto diversificata ed a portare a specifici e differenti concetti giuridici. Perché entrambi considerano la personalità da una prospettiva opposta circa la sua essenza.

Il diritto privato astrae dalla persona solo la caratteristica di essere un individuo, un'essenza individuale in sé conclusa e determinata in sé stessa. Questa caratteristica è presente anzitutto presso le singole persone. Ma anche nelle esistenze di ogni tipo e presso lo Stato stesso si trova che tali esistenze presentano, accanto al significato come fatto generale, quello della singola individualità. Perciò il diritto privato pone i singoli come punto centrale delle sfere di volontà individuali e mette le comunità sullo stesso piano degli individui, nella misura in cui esse si inseriscono nel circolo delle relazioni regolamentate da parte del diritto privato. Ora, tutti questi individui sono persone coordinate ai fini del diritto privato, ma non risultano riunite in un'unità superiore. Certo, neanche nel diritto privato gli individui vengono presentati come del tutto privi di relazioni, come atomi isolati, come portatori di volontà in sé privi di diritti e di doveri; solo che le loro reciproche relazioni vengono sempre pensate come singoli legami meccanici tra unità di vita chiuse e le loro facoltà del momento non appaiono, in base alla legge, come esito dell'appartenenza ad una totalità, ma solo come sfumature, ampliamenti e delimitazioni della loro sfera individuale, ed il fatto di dar vita, nei fatti, ad un libero campo di attività su cui l'individuo fondi e cui egli conformi le proprie relazioni giuridiche

attraverso la propria libera attività di volontà, costituisce il cuore del diritto privato. Per questo, la base del diritto privato è la libertà soggettiva; perciò, il concetto di diritto soggettivo qui sta prima, mentre la norma oggettiva spesso ha spazio solo come eventuale, di completamento o di mediazione; perciò predomina la flessibilità del libero diritto dei traffici; perciò, infine, la facoltà è il concetto primario del diritto privato, da cui consegue propriamente il dovere.

Il diritto pubblico astrae dalla persona l'aspetto rivolto alla vita comune. Per esso, quindi, le associazioni riconosciute come persone non sono equiordinate rispetto alle persone singole, ma come elementi generali che stanno al di sopra dei singoli e le singole persone non sono per esso esistenze che sussistono in sé e per sé, quantunque componenti degli elementi generali. Il diritto pubblico non riconosce una singola persona non associata, ma solo associazioni e membri di associazioni. Invece del mondo delle volontà coordinate ed in sé conchiuse, esso disciplina un mondo di esistenze comuni in cui sin dall'inizio la volontà viene determinata dai rapporti organici rispetto ad altre volontà, l'unità composta del tutto rinvia ad una pluralità di volontà, la pluralità dei singoli rinvia ad un'unità di volontà comune e, insieme al riconoscimento della comune personalità del tutto nonché della personalità del singolo in quanto componente, viene subito instaurata una graduazione qualitativa dell'essenza del diritto, un duplice ordinamento di vita delle volontà. Anche il diritto pubblico crea per la libera volontà un ambito di attività in cui tale volontà può influire sulla configurazione dei rapporti giuridici, ma confina, da questo punto di vista, tale libera volontà nei limiti della posizione organica che quella volontà assume una volta per tutte in forza dell'ordinamento pubblico, ed il suo nocciolo più autentico sta nel solido complesso di norme che costituisce l'organismo comune delle volontà. Nel diritto pubblico predomina dunque il principio della necessità, il diritto soggettivo arretra davanti a quello oggettivo, la fissità domina al posto del movimento ed il dovere appare come il fondamento delle facoltà.

Ora, il limite principale tra diritto privato e diritto pubblico si confonde, certo, nella vita e può dunque essere fissato in maniera diversa da parte del diritto positivo, che deve fare dappertutto un'opera di ritaglio. Perché l'ambito di sovranità che rimane disponibile per l'individuo può essere tracciato in modo molto diseguale, a seconda della struttura più lasca o più rigida della comunità. A quel

punto, in assenza di un conflitto naturale, secondo quanto detto prima, tra la somma degli individui legati dalle singole relazioni e l'organismo sociale, può essere data, dal diritto positivo, una risposta molto differenziata alla questione circa quali associazioni possono essere valide giuridicamente in quanto comunità con un'essenza propria e quali altre singole relazioni meccaniche possono essere giuridicamente dissolte in qualcosa di complessivo. Così, la famiglia può essere, sì, costruita come comunità con un ordinamento di vita pubblico ad essa immanente, ma la sua esistenza giuridica, nonostante il perdurare della sua unità naturale ed etica, può essere dissolta in una somma di individui con singole facoltà e doveri l'uno verso l'altro ed il diritto di famiglia può essere del tutto configurato dal punto di vista del diritto privato. Del pari, una gran parte del diritto delle società può essere concepita a partire da un diritto nel senso di relazioni contrattuali obbligatorie tra una pluralità, mentre l'altro diritto caratterizza anche giuridicamente il momento comune quale ordinamento di vita societario. Ed infine, il concetto di diritto pubblico è relativo soprattutto nella misura in cui la stessa associazione che viene riconosciuta nel suo ambito come elemento generale, può essere trattata dal diritto solo come individuo, con il che però, allora, anche il diritto pubblico ha per essa solo il significato del diritto privato al di fuori della sua sfera interna di vita. Così stanno le cose per tutte le cosiddette società (*Körperschaft*) di diritto privato cui il diritto, nonostante riconosca loro una personalità diversa rispetto ai loro componenti, assegna però dall'esterno solo una personalità individuale. L'ordinamento di vita interno di una tale società si forma del tutto nel senso del diritto pubblico e, nella misura in cui si tratta solo dell'esistenza giuridica di questa singola società, costituisce un particolare ambito del diritto pubblico. Solo che, dal punto di vista di tutta la vita giuridica che ne rimane fuori, questa società non è altro che un'essenza giuridica equiparata al singolo individuo e perciò trova anche il proprio diritto interno generale dentro il sistema giuridico complessivo – per il quale viene in considerazione solo come strumento ai fini dell'emersione di una personalità individuale – e trova la propria collocazione all'interno del diritto privato. Che anche qui il limite sia fluido, che gli stessi organismi, come per es. le chiese, possano essere considerati anche verso l'esterno talora come elementi generali pubblici, talaltra solo come organismi privati, lo si comprende facilmente.

Ma, in ogni circostanza ed in ogni tempo, esiste un campo del diritto che è diritto pubblico *tout court*, assoluto e per tutti, e quindi esiste la tipologia vera e propria del diritto pubblico nonché l'opposizione diametrale al diritto privato. Questo campo del diritto è il diritto dello Stato. Perché il diritto dello Stato è quel diritto che concerne lo Stato come elemento generale, ma tutti i singoli e tutte le altre associazioni come componenti dello Stato. Non essendo un elemento generale organizzato giuridicamente, per il quale lo Stato sarebbe solo un fatto particolare, questo diritto non può essere considerato da nessun punto di vista come diritto individuale. Il diritto dello Stato è pertanto diverso da tutto l'altro diritto pubblico così come lo Stato stesso rispetto a tutte le altre esistenze collettive; esso è costretto a dimostrare una particolare caratteristica di tutti i concetti e di tutti gli istituti quando viene in considerazione la specifica natura dello Stato quale essenza comune sovrana. Ma come lo Stato però rimane, sempre e solo, la più elevata tra le essenze comuni umane e rimane ad esse equiparato dal punto di vista delle caratteristiche generali dell'organismo sociale, anche il diritto dello Stato ha il proprio posto al vertice, anche se all'interno della costruzione complessiva del diritto pubblico delle associazioni. Per questo, tutti i concetti di base del diritto pubblico possono essere considerati come l'elevazione dei corrispondenti concetti societari e la costruzione interna del diritto dello Stato è analoga a tutto il diritto delle società. E per questo che è caratteristico di tutto il diritto pubblico uno specifico sistema di pensiero che si replica, in quantità e significato molto diseguali, dagli strati più bassi dell'unione organica fin su allo Stato, ma che si contrappone al sistema di pensiero del diritto privato come un tutto chiuso.

Il sistema dei concetti di diritto pubblico si deve dunque differenziare già nel suo fondamento dal sistema dei concetti di diritto privato, perché, mentre il diritto privato ha a che fare solo con la vita esteriore delle persone, il diritto dello Stato disciplina, come ogni diritto societario, la vita interna di una personalità complessiva. Il diritto privato presuppone una somma di volontà pronte e personificate, le introduce come persone e disciplina le loro sfere di dominio verso l'esterno. Qui, per contro, la formazione e la personificazione della volontà sono esse stesse oggetto dell'ordinamento giuridico e i rapporti di volontà vengono normati giuridicamente all'interno di una sfera di volontà composita. Certo, dal diritto non

viene colta l'intera vita interna dello Stato o di un altro organismo sociale, né è solo il diritto a regolare il vincolo di ciò che è molteplice nei confronti dell'unità ed il mantenimento della molteplicità all'interno dell'unità. Solo che, trattandosi del dominio e del carattere vincolante della volontà, l'ordine esistenziale interno di un sistema collettivo costituisce ordinamento giuridico; e, dal momento che l'unità naturale, etica, storica, economica e sociale di un'associazione ha valore anche come unità giuridica, come persona, ed il permanere della peculiarità delle sue parti deve avere un significato non solo naturale, etico e sociale, ma anche giuridico, sono i princìpi del diritto a regolare il rapporto tra unità e pluralità all'interno di un tutto organico.

Ma se è così, con relazioni totalmente sconosciute al diritto privato in merito ad un ordinamento esistenziale interno, ha inizio chiaramente, nel diritto pubblico, anche una serie del tutto nuova di concetti giuridici, che non trovano analogia nel diritto privato. Questi concetti giuridici, alla cui caratterizzazione e catalogazione solo il complesso dell'organismo fisico riesce a dare e ad aver dato da tempo sostanza, sono destinati a trovare riconoscimento in quanto concetti specifici.

Soprattutto, il concetto centrale di personalità assume nel diritto pubblico un diverso contenuto di pensiero rispetto al diritto privato. La caratteristica generale di essere soggetto di diritto ritorna dappertutto nel concetto di persona. Ma il diritto privato mette in risalto, nel concetto di persona, proprio quelle caratteristiche da cui il diritto pubblico prescinde. Perché il diritto privato nel concetto di personalità individuale colloca ogni titolare di volontà come punto centrale di una sfera di dominio chiusa in sé stessa e tale da basarsi del tutto in sé stessa dall'esterno; e, attraendo nel proprio ambito l'esistenza collettiva nonché lo Stato stesso, non attribuisce anche a loro, all'interno del concetto di persona giuridica e di fisco, nessun'altra personalità individuale se non quella di questo tipo. Il diritto pubblico, per contro, prescinde del tutto dalla caratteristica dello Stato di essere come fisco alla pari degli individui, così come dalla qualità del singolo di avere diritti come individuo, e mantiene dunque, per il proprio concetto di personalità, solo quelle caratteristiche che derivano vicendevolmente dal rapporto tra ciò che è generale e ciò che è particolare. A partire dall'essenza dello Stato ovvero delle società, il diritto dello Stato mette in risalto quindi, nella

persona dello Stato, ed il diritto delle società nella persona delle società, quelle qualità che rendono la loro personalità una personalità di carattere generale. In quanto unità immanenti di una generalità di persone, essenze complessive composte a partire da un'essenza singola autonoma nonché da una totalità vivente all'interno di una molteplicità, Stato e società sono persone di diritto pubblico. Nel singolo, al contrario, o nelle associazioni parziali rispetto all'associazione complessiva, il diritto pubblico mette in risalto quelle qualità che rendono la loro personalità quella di un componente all'interno di una personalità complessiva. Esso riconosce loro, dunque, in quanto componenti viventi di una totalità, in quanto essenza di una parte legata a ciò che è generale, una personalità davvero autentica, anche se condizionata e determinata dall'appartenenza a ciò che è generale. Così emergono qui, come essenza della persona, la relazione al posto dello stare per sé stessi, la subordinazione e la sovraordinazione invece della coordinazione, la differenza dal punto di vista dei princìpi nella loro doppia forma di apparizione dell'essere generale e dell'esserne una componente, al posto dell'eguaglianza di princìpi. E così diventa possibile che una totalità e le sue parti siano titolari vicendevolmente di diritti e di doveri come persone – il che deve essere del tutto inconcepibile per il pensiero giusprivatistico a partire dal suo concetto di persona e con cui però la possibilità di un diritto dello Stato coesiste e viene meno –.

Se uno Stato ovvero un'altra associazione costituiscono un'esistenza generale ordinata dal punto di vista giuridico, anche quei processi che danno fondamento, modificano ovvero cancellano una tale esistenza debbono presentare, accanto al loro significato altro, la natura di processi giuridici. Ma per essi il diritto privato non è destinato ad offrire un'analogia. Piuttosto, ci sarà bisogno del nuovo ed autentico concetto di procedimento giuridico di carattere costitutivo, la cui essenza è costituita dall'organizzazione delle volontà invece che dal vincolo alle volontà voluto dagli atti di diritto privato. Un tale procedimento costitutivo, nella misura in cui si tratta di un crescere e di un passare naturali, sarà rappresentato allora giuridicamente come una consuetudine di carattere costitutivo; nella misura in cui esso però consta di un atto di volontà consapevole, dovrà essere concepito come un atto di volontà dal carattere costituente, che può essere, certo, ora un atto generale, ora un atto singolo, ma che in entrambi i casi non ha nulla in comune con i cor-

rispondenti procedimenti di diritto privato del contratto ovvero dell'atto dispositivo.

Del pari, nell'atto di volontà unilaterale ovvero bilaterale, mediante il quale una persona diventa componente di un organismo generale ovvero si libera di esso, sarà contenuto un procedimento giuridico estraneo al diritto privato. Sia esso volontario ovvero un'entrata o un'uscita forzosa di un membro, per ciò stesso non è un atto obbligatorio, ma una modifica della personalità in quanto tale, nel momento in cui è destinato ad assorbire parte di un'altra personalità oppure a restituirla alla particolarità dell'individuo. Ma ai fini della personalità complessiva l'accoglimento ovvero l'espulsione di un membro costituisce un atto di volontà comune attraverso cui quest'ultima adotta una disposizione circa l'ampliamento o la limitazione della propria esistenza giuridica.

L'ordinamento di diritto pubblico necessiterà inoltre di una serie di concetti giuridici propri nella misura in cui è chiamato a fissare ed a limitare gli elementi che costituiscono gli organismi dell'esistenza comune all'atto della loro composizione. Esso perverrà qui al concetto di substrato come a quello degli elementi essenziali di per sé stessi ai fini dell'identità della personalità generale e da cui si differenziano le singole parti, il cui scambio, accrescimento e riduzione è irrilevante ai fini dell'essenza giuridica del tutto.

A proposito di una serie di associazioni sarà richiesta, sul piano dei concetti, la disponibilità di un determinato sostrato oggettivo. In particolare, poiché lo Stato di oggi costituisce un sistema collettivo cresciuto indissolubilmente con un determinato territorio, il diritto dello Stato è destinato ad individuare un territorio in quanto substrato essenziale dello Stato. Il diritto è chiamato a normare subito, da una parte, il concetto verso l'esterno di ambito, la sua delimitazione e la sua struttura. Ma, d'altra parte, dovrà anche fissare e limitare il concetto di ambito come determinata caratteristica giuridica di base (*Grund*) ed afferente al territorio, tenendo conto del suo contenuto e, a partire da questo, dovrà pervenire ai concetti di diritto di sovranità e di appartenenza territoriale. Da questo punto di vista esso ha bisogno anzitutto di una delimitazione giuridica tra la proprietà territoriale del suolo e la coeva caratteristica sua propria di essere oggetto di proprietà di diritto privato, così come all'interno delle duplici relazioni umane di dominio che ne risultano sul medesimo oggetto fisico.

Ma il vero e proprio sostrato vivente sarà sempre una pluralità di persone e si incrementa pertanto, per il diritto pubblico, l'ulteriore compito di normare l'*an* ed il *quantum* dell'appartenenza delle persone a questa collettività. In particolare, il diritto dello Stato è destinato ad elaborare il concetto politico di popolo sul piano statuale. Al riguardo, esso è destinato a fissare ed a delimitare una volta per tutte, nelle relazioni verso l'esterno, l'appartenenza al popolo. In secondo luogo, deve però tracciare i confini tra quel tratto di personalità che viene incorporato nell'organismo statuale attraverso l'appartenenza allo Stato e, sia per il diritto individuale che per le attività vitali, il tratto di personalità che rimane libero in quanto componente di altre associazioni. Qui si radica allora l'idea dei diritti di base o di libertà individuali ed associativi, quali garantiscono all'individuo e ad altre associazioni una certa sfera in quanto ambito giuridico non solo non toccato dall'associazione di cui allo Stato, ma intangibile *tout court* anche per lo Stato.

L'appartenenza allo Stato in quanto tale, alla pari di ogni appartenenza ad una società, si caratterizza su questa base come un diritto articolato in senso proprio, da acquisire e da perdere nelle forme del diritto, di carattere personale. Il contenuto generale di questo diritto è la collocazione di membro all'interno della persona generale di cui allo Stato. Quali diritti e doveri singoli risultino dati, però, con questo contenuto concettuale, viene fissato in maniera differenziata dal diritto positivo. Se è prevalente la concezione secondo cui, nel concetto di appartenenza allo Stato, è contenuta solo la partecipazione passiva alla totalità di cui allo Stato stesso, si staglia il concetto di sudditanza; se, per contro, nel concetto di appartenenza allo Stato si trova il fatto di essere membro attivo nell'organismo di cui allo Stato stesso, detto concetto si eleva a cittadinanza nello Stato. I diritti e i doveri generali del cittadino dello Stato, per come derivano dall'appartenenza ad esso, necessitano fin dall'inizio, come elementi di base della costruzione statale, di essere fissati e delimitati per princìpi. Se si fa valere al riguardo l'idea secondo cui ad ogni appartenente allo Stato deve essere garantita come intangibile una determinata serie di diritti di partecipazione alla vita dello Stato stesso, viene fuori il concetto dei diritti di base cosiddetti politici o di cittadinanza.

Ora, però, l'insieme delle persone non dà luogo all'organismo statuale come somma di atomi eguali fra di loro, bensì – come si ri-

pete per la gran parte delle società – all'interno di una determinata struttura di diritto pubblico. Questa struttura non manca in nessuno Stato, ma può essere configurata in maniera molto differenziata.

Dove è sviluppato il concetto di sudditanza, gli appartenenti allo Stato decadono nelle classi rudemente differenziate tra dominatori e dominati. Per quanto il dominatore possa essere un singolo o una pluralità, egli viene pensato solo come il responsabile della vita dello Stato, mentre i dominati vengono rappresentati come un sostrato morto e puramente materiale dell'organismo di cui allo Stato. Tale suddivisione è pertanto inconciliabile con lo sviluppo del concetto di cittadino. Perché, se la vita dello Stato pulsa in ogni suo membro, non c'è un membro dello Stato solo dominatore ovvero solo dominato.

Per contro, si concilia molto con la concezione dello Stato quale organismo che vive in tutto il popolo il fatto che l'ordinamento giuridico pubblico assegni, all'interno di tutti i membri dello Stato, ad uno oppure ad una pluralità di essi, una posizione molto preponderante all'interno del corpo statuale. In particolare, fa parte dell'essenza della monarchia il fatto che una persona rivesta, nei confronti di tutti gli altri membri dello Stato, un significato specifico e proprio ai fini dell'organismo statuale. Il monarca non appare come una componente normale dello Stato, tale da essere fissata solo dalla costituzione quale organo supremo della vita dello Stato, ma si pone come il vertice dell'organismo di cui allo Stato stesso quale componente sin dall'inizio particolarmente qualificata, semplicemente come essenziale, chiamata per sua natura interna ad un'attività preminente ai fini della collettività. Nella misura in cui il diritto statuisce e delimita questa posizione del monarca, si riconosce a questi un diritto autonomo sullo Stato, tale da qualificarsi come persona salita molto in alto all'interno dell'organismo complessivo. Se si descrive come sovranità del principe tale diritto del monarca, in base all'usanza storica, per contro va ricordato che, se si mantiene fermo tutto questo, tale sovranità (nella misura in cui non è semplicemente pura rappresentanza della sovranità dello Stato) non trova fondamento nei confronti né dello Stato né del diritto, ma solo dei restanti membri dello Stato. Poiché il diritto della corona non è un diritto di tipo amministrativo, come per esempio il diritto dell'ufficio più alto in carica nel libero Stato, ma trattandosi

di un diritto proprio nello stesso senso come, per esempio, il diritto di cittadinanza ovvero quello dei ceti, anche nel sistema del diritto dello Stato esso deve essere considerato tra gli elementi di base dell'organismo di cui allo Stato stesso e non può essere fatto rifluire, per esempio, nella dottrina dell'organizzazione dello Stato.

A prescindere da queste differenze, che intervengono con forza tra le componenti dello Stato, ci possono essere alcune altre gradazioni nella partecipazione. Sesso, età, derivazione familiare, religione, capacità spirituale, mestiere, ceto, proprietà ed alcuni altri momenti possono fornire la base per la costruzione di classi o gruppi di diritto statuale, in ciascuno dei quali l'appartenenza allo Stato assume un contenuto proprio e sperimenta ampliamenti, riduzioni e sfumature di varia forma. Anche queste sono modalità del fatto di essere componenti elementari dell'organismo di cui allo Stato.

Infine, è importante soprattutto la situazione della composizione per associazioni dell'organismo statuale, da cui deriva di nuovo una serie di relazioni giuridiche peculiari ed estranee al diritto privato. In effetti, nella misura in cui viene in considerazione semplicemente una società oppure, per certe relazioni nei confronti dello Stato, solo un'esistenza particolare, anche la relativa posizione di diritto pubblico all'interno dello Stato sarà uguale o analoga a quella del singolo cittadino. Ma subentrano veri e propri rapporti giuridici nella misura in cui una società viene in considerazione per lo Stato quale esistenza comune ristretta, quale organismo intermedio tra la totalità dello Stato ed il singolo cittadino. Perché qui c'è bisogno anzitutto di tirare la linea tra le due caratteristiche dell'associazione in senso stretto, di essere un'essenza generale di per sé e di essere una componente dello Stato. Occorrerà distinguere allora, all'interno di una tale associazione, non solo l'aspetto di diritto privato e di diritto pubblico della personalità, ma ulteriormente, all'interno della sfera di diritto pubblico, il significato generale di questa personalità per sé stessa e quello di componente in riferimento allo Stato. Però, nella misura in cui basta la collocazione di membro dell'associazione ristretta, allo Stato spetterà un diritto più o meno esteso alla vita dell'organismo in esso inserito non solo verso l'esterno, ma anche verso l'interno. Nascita e modifica, composizione, acquisto, contenuto e dimensione dell'essere componente, organizzazione ed attività vitale non vengono determinati affatto, ai fini

dell'essenza collettiva più ristretta, per mezzo della volontà individuale, ma fino ad un certo grado costituiscono il terreno di dominio della volontà dello Stato. E queste relazioni giuridiche, che si ritrovano in modo analogo anche nelle società strutturate, sono nei fatti del tutto estranee al diritto privato, non potendoci essere, nel diritto privato, evidentemente, un diritto alla vita interna di una persona. Nel diritto dello Stato, però, proprio queste relazioni giuridiche appartengono ai fondamenti elementari della costruzione giuridica statuale e la loro configurazione ineguale decide sui momenti essenziali in ordine al carattere dello Stato. Occorre in questo ricordare che questa suddivisione per associazioni può non solo essere diversa a seconda dei differenti scopi della vita, ma può sovrapporsi più volte l'una con l'altra per i medesimi scopi; che nello Stato unitario tutto il diritto dei comuni e delle associazioni locali e provinciali di ordine più o meno elevato appartiene a questi fondamenti decisivi ai fini della composizione elementare dello Stato; e che, infine, anche il compattamento del singolo Stato federale all'interno di uno Stato complessivo appare solo come un ampliamento della stessa idea e, pertanto, può essere oggetto di una delimitazione concettuale nei confronti tanto dello Stato unitario fatto di membri, quanto della confederazione degli Stati di diritto internazionale dal punto di vista dell'articolazione differenziata da parte di una personalità di carattere generale.

Ma se il diritto dello Stato ha ora gli elementi di cui si compone l'organismo di cui allo Stato stesso e si determina e si delimita nel suo significato e nella sua posizione di componente, esso ha assolto solo a metà al proprio compito in riferimento all'ordinamento circa l'esistenza interna dello Stato. Perché in tal modo ha raggiunto solo gli ingredienti di cui all'organismo statuale propriamente qualificati in vista del concetto di pluralità, caratterizzati da diritti e doveri. Ma queste essenze parziali non sono legate, nell'organismo di cui allo Stato, da una mera somma, per la quale sarebbe indifferente in quale ordine si fosse attuata questa sommatoria, ma diventano, con una forma del tutto determinata e propria che chiamiamo organizzazione, espressione di un'unità vivente che le permea del tutto e che però è diversa dalla loro somma. Deve costituire compito ulteriore del diritto dello Stato il fatto di caratterizzare questa organizzazione come ordinamento giuridico, nella misura in cui si tratta di un ordinamento frutto di volontà, attraverso un con-

tenuto di norme che denominiamo come costituzione o legge fondamentale (*Verfassung oder Konstitution*).

Il concetto di organizzazione giuridica e conseguentemente di diritto costituzionale è di nuovo comune al diritto dello Stato come ad ogni diritto societario e pertanto non ha analogie nel diritto privato. Il diritto privato non ha né l'esigenza né la possibilità di ordinare l'attuazione dell'unità della volontà nell'individuo e di verificare, nei singoli atti di volontà di quest'ultimo, la conformazione coerente con l'ordinamento del risultato unitario a partire da una molteplicità di fattori. Il diritto pubblico per contro, dal momento che gli stessi elementi comuni delle unità sono riconosciuti giuridicamente e rappresentano incarnazioni di volontà riconoscibili dall'esterno, è costretto ad attrarre, nel campo dei propri princìpi, lo stesso ordinamento di vita interno che costituisce l'essenza unitaria del tutto; è costretto a disciplinare giuridicamente, in occasione di ogni polemica da parte delle esistenze parziali, il processo organico che porta all'unità delle volontà e dei fatti ed è costretto a fissare una serie di premesse verificabili dall'esterno per la cui esistenza un qualsivoglia atto di volontà proveniente dalla vita comune valga anche giuridicamente come volontà e una qualsivoglia azione prodotta da tale volontà valga anche come azione giuridicamente rilevante della personalità complessiva. In tal modo, ciò che per l'individuo si sottrae al diritto come decisione interna, ricade qui nel diritto come decisione, ciò che si realizza lì solo all'interno come considerazione, conflitto e decisione, diventa qui trattazione giuridicamente ordinata, dibattito e voto; ciò che lì viene constatato con leggi fisiche e psicologiche come un fatto della individualità, assume qui la conformazione di un atteggiamento posto in essere da determinate parti della collettività, per il quale è proprio la legge del diritto a decidere se è la totalità ad agire attraverso la propria parte ovvero si è in presenza di un'azione da parte di esistenze particolari, in base a come si pongono al contempo queste parti. Per ogni processo vitale rilevante giuridicamente nella vita collettiva, perché esso abbia *tout court* giuridicamente il significato di un processo vitale dell'intera persona in quanto tale, ne consegue l'esigenza della conformità alla costituzione.

Ora, in ogni organismo l'unità di vita si conferma attraverso il fatto che determinate parti o determinati complessi parziali assumono, in qualità di suoi organi, determinate funzioni. Quanto più

l'organismo è altamente sviluppato, tanto più questi organi si differenziano in modo decisivo per formazione ed attività e tanto più cresce la divisione del lavoro e tanto più gli organi funzionano autonomamente nella loro sfera vitale. Ma, finché si è in presenza soprattutto di un organismo, in tutti questi organi si manifesta solo un'individualità vitale quale è presente ed è attiva come unità onnipresente ed onnipotente in ogni atto di un organo, un'individualità in vista della quale ed attraverso la quale sussiste e funziona qualsivoglia organo e la cui esistenza viene sconquassata dalla temporanea lotta tra gli organi, che viene però annullata dalla loro definitiva disarmonia. Nell'organismo naturale tutto ciò è indifferente dal punto di vista giuridico. Nell'organismo sociale, per contro, la formazione e l'effettività degli organi – per quanto, anche qui, essi costituiscano un processo al contempo naturale e storico – risultano oggetto del diritto in una determinata dimensione. E così emerge qui il concetto giuridico, di nuovo totalmente estraneo al diritto privato, di organo quale membro dotato di personalità generale chiamato costituzionalmente ad una determinata funzione vitale della vita collettiva. Con il concetto di diritto privato del sostituto, del tutore, del plenipotenziario e via dicendo, in breve della persona che agisce per conto dell'altra persona, questo concetto dell'organo generale non ha al proprio interno nulla in comune. Perché l'organo non vuole e non agisce per un'altra persona, ma è la personalità generale a volere e ad agire attraverso i propri organi. Sono la stessa unità della totalità e la persona collettiva indivisibile ad affermarsi nel diritto come essenza vitale, quando l'organo a ciò chiamato costituzionalmente funziona in conformità alla costituzione.

Nello specifico, il diritto dello Stato dovrà anzitutto normare gli organi dello Stato quali istituzioni oggettive all'interno dell'organismo statuale in base alla quantità, al modo e all'ambito dell'effettività, delimitare vicendevolmente le loro competenze e fissare la loro posizione rispetto ai singoli membri dello Stato. Ne risulta una quantità imprevedibile di veri e propri rapporti giuridici statuali, il cui contenuto è sempre, da una parte, l'autorizzazione all'esercizio della volontà sovrana da parte dello Stato e, dall'altra parte, la sottoposizione alla volontà quale in qualche modo viene a manifestarsi. Non solo i molteplici organi saranno conformati con grandi differenze sul piano giuridico in base alle loro mansioni, ma anche la loro posizione all'interno dello Stato sarà del tutto diseguale. Sarà il

diritto a fissare la loro sovraordinazione o la loro subordinazione; esso farà la differenza a seconda se essi sono essenziali o non essenziali per lo Stato ed ordinerà ovvero renderà possibile, accanto alle costruzioni organiche permanenti e necessarie, anche quelle temporanee e discrezionali. Ma, in particolare, si determinerà una scomposizione degli organi principali in organi subordinati e una ricomposizione dei singoli organi in quelli di carattere generale, sicché ci saranno posizioni indirette e dirette, autonome e dipendenti, e l'intero organismo risulterà articolato, a partire dal vertice fino alla base, in molteplici complessi organici di ampiezza maggiore o minore. Trovano quindi riconoscimento, nella monarchia costituzionale, come organi di base dello Stato diretti e del tutto indipendenti, solo la corona, le assemblee degli elettori, la rappresentanza popolare e i tribunali; tutti gli altri uffici, funzionari, collegi e commissioni vengono collocati giuridicamente come sottoordini di questi ordinamenti di base. Infine, verso il basso c'è ancora bisogno di fissare giuridicamente limiti fluttuanti sul piano fattuale tra l'istituzione di un organo dello Stato ed i rapporti giuridici quali si realizzano nella vita dello Stato in merito alle deleghe, agli affitti di servizio e via dicendo, nonché tra lo Stato e le singole persone.

Il diritto dello Stato deve a quel punto normare, nelle relazioni soggettive, la nomina e la posizione dei singoli membri dello Stato che esercitano la funzione di organi e la cui consistenza è mutevole. In riferimento alla nomina c'è subito qui una differenza. Cioè, in parte, alcuni membri in quanto tali vengono chiamati dalla stessa costituzione a funzioni organiche. Così per es., sempre nella monarchia costituzionale, tanto il re, che come vertice dell'organismo è al contempo l'organo dello Stato più elevato, quanto i cittadini elettori, che vengono chiamati a funzioni elettorali quali membri a pieno titolo; del pari, tutte le persone titolari di prerogative sul piano politico riguardo ai fattori costituzionali relativi ai ceti e all'aristocrazia; parimenti, tutte le associazioni più ristrette all'interno dello Stato articolato sulle associazioni, le quali debbono attuare in quanto tali, in nome dello Stato, certe funzioni della vita dello Stato. Dall'altra parte, però, la costituzione rimette ad un organo costituito dello Stato il fatto di nominare, con un particolare atto di volontà, determinati membri dello Stato, in via temporanea o permanente, in una posizione organica all'interno dello Stato stesso. A questo ambito appartiene ogni nomina o scelta (incluso il comple-

tamento dei collegi) che si manifesti come un atto costituzionale della corona, di un'assemblea di elettori, di un organismo o di un qualche ufficio, sempre quale attività dello Stato stesso. Da parte della persona nominata o scelta c'è bisogno di una accettazione della posizione organica, ora rimessa alla libera volontà, ora forzabile. C'è poco un accordo, in questo atto di volontà bilaterale, anche là dove esso è totalmente libero per entrambe le parti, come nell'accettazione e nell'ingresso di un membro. Piuttosto, lo Stato si costruisce un organo con un atto di volontà comune, ma è il singolo ad entrare nella sfera, ordinata oggettivamente, di una determinata posizione organica. Così accade per es. nella scelta di un rappresentante del popolo ovvero nell'accettazione del mandato, ma con altrettanta precisione nella nomina di un funzionario e nell'assunzione dell'ufficio. Dal momento che la posizione, in quanto organo dello Stato, coglie sempre e solo una parte della personalità, c'è bisogno, in questo rapporto, della delimitazione e della disciplina sul piano normativo; e nella misura in cui al rapporto tra lo Stato come personalità complessiva e il titolare dell'ufficio come suo organo risultano collegati anche i rapporti tra lo Stato da una parte e la libera personalità dei funzionari dell'altra parte, si è in presenza di rapporti giuridici individuali in relazione ai quali è ammissibile anche il concetto di accordo. – Alle determinazioni in ordine all'acquisizione di una posizione organica dovranno corrispondere naturalmente disposizioni sulla sua perdita volontaria o non volontaria. Ciò nondimeno i rapporti giuridici personali – le facoltà come i doveri – quali vengono prodotti per il fatto che viene creato un organo dello Stato, necessitano di regolamentazione. Alla fine, nella misura in cui un organo non viene costituito da una persona, ma da un collegio, la vita interna di questa totalità di persone dovrà essere disciplinata con l'ordinamento giuridico in modo tale che siffatto organo riesca a fungere da potere unitario dotato di volontà. Ne deriva l'intera massa di norme di diritto pubblico sulla conduzione, sulla trattazione e sulla votazione, sulla convocazione, sul *quorum* e sulla maggioranza e soprattutto sull'ordine del giorno delle assemblee collegiali, che di nuovo accomunano il diritto dello Stato ed il diritto delle società, ma che sono nell'intimo estranee al diritto privato.

Dopo che il diritto dello Stato in tal modo ha realizzato l'opera di costituzione sul piano giuridico della personalità dello Stato, fis-

sato giuridicamente i relativi elementi ed ordinato sul piano del diritto la sua organizzazione, rimane, infine, solo il compito di occuparsi del contenuto dell'attività vitale dello Stato, nella misura in cui quest'ultima viene còlta dal diritto. Esso è destinato a delimitare l'uno nei confronti dell'altro i diversi campi della vita dello Stato; in ognuno di questi campi determinerà gli organi, l'oggetto e le forme giuridiche dell'attività statale; normerà e scomporrà, nelle singole facoltà e nei singoli doveri, i rapporti giuridici pubblici quali vengono a sussistere come prodotto di quest'attività tra i diversi membri dello Stato nonché tra lo Stato e le sue componenti.

Nel dettaglio, il diritto dello Stato deriverà dalla tripartizione, già sopra difesa, delle funzioni vitali dello Stato ed in ognuno di questi campi ci sarà tanto da realizzare quanto da delimitare la sovranità della volontà dello Stato.

In riferimento, anzitutto, alla legislazione è compito del diritto dello Stato fissare, per un verso, gli organi, i contenuti e le forme della legislazione nelle loro diverse ramificazioni, in particolare della vera e propria legislazione, dell'attività relativa ai decreti e della pura regolamentazione, nonché delimitarle a vicenda e, per un altro verso, fissare il rapporto tra il potere della legge e la produzione giuridica non statale.

Un compito simile assume dimensioni maggiori in riferimento alla giurisdizione, ma in forma molto più estesa. Nella dottrina dell'organizzazione della giustizia debbono essere disciplinati i suoi organi, nella dottrina della competenza giuridica i suoi ambiti, nella dottrina del processo giudiziario le sue forme. Ovunque emergono, qui, perciò, nelle relazioni giuridiche, delle particolarità rispetto a tutte le altre funzioni dello Stato, perché è proprio il diritto a costruire qui il contenuto positivo dell'attività statale. La volontà della sovranità statale in questo campo riveste solo il contenuto formale secondo cui da parte di determinati organi, in determinate relazioni ed osservando determinate forme viene fatto parlare il diritto. Il contenuto della sentenza per contro, il contenuto materiale dell'attività giurisdizionale, viene determinato in modo del tutto esclusivo dal diritto, che si contrappone autonomamente alla volontà dello Stato così come ad ogni altra volontà. I tribunali non sono quindi solo organi dello Stato, ma al contempo organi diretti del diritto: essi sono, nell'ambito di un rapporto formale, organi dello Stato, il quale, per mezzo di essi, dà attuazione ai propri compiti di difesa

del diritto; ma essi sono, nell'ambito di un rapporto materiale, organi diretti del diritto, il quale si manifesta attraverso di essi nella sua concreta applicazione alle singole relazioni di vita. Perciò, non si basa su ragioni solo formali, bensì interne, il fatto che il diritto processuale si sia liberato dal diritto dello Stato come ramo particolare del diritto pubblico. Solo che, in futuro, ciò che è stato sinora attuato esclusivamente nel campo del diritto privato e penale dovrà essere realizzato sull'intero diritto pubblico anche in riferimento alla giurisprudenza.

Infine, il diritto dello Stato è chiamato a costruire una quantità di norme per il campo delle libere attività attraverso le quali lo Stato persegue, sulla base delle leggi ed all'interno dei limiti del diritto da costruire giudizialmente in caso di necessità, i propri scopi di vita positivi verso l'esterno e verso l'interno. Quest'attività, che viene descritta come amministrazione in senso lato ovvero come esecuzione, la si può scomporre nelle singole funzioni in base ai punti di vista più disparati. Vi fanno parte tutta l'attività di pace e di guerra in riferimento alle potenze straniere, la finanza statale, la cosiddetta amministrazione interna ovvero la polizia con i sottosettori del sistema della sicurezza, della salute, dei poveri, del traffico e dei costumi, la gestione della cultura inclusa l'amministrazione della scuola, della scienza, dell'arte e della religione, così come alla fine, sul terreno del diritto, l'esecuzione forzata e l'attuazione della pena. Debbono essere fissati e delimitati in tutti questi settori i diritti di sovranità dello Stato, stabiliti gli organi per il loro esercizio, regolate le forme dei procedimenti e normati i diritti e i doveri cui va dato fondamento per lo Stato o per i membri dello Stato con i rapporti giuridici che si verificano pubblicamente. Se, a partire da questa materia così offerta, dal diritto dello Stato viene delimitata una parte in quanto diritto amministrativo – ciò si basa solo su ragioni esterne.

Da questa panoramica deriva che nei fatti, come era stato prima notato, il sistema concettuale del diritto dello Stato è specificamente diverso dal sistema concettuale del diritto privato, mentre nel sistema dei concetti associativi si trova un analogo in misura rimpicciolita. Niente può essere dunque più sbagliato, come ha tentato Seydel, del fatto di voler basare un sistema di diritto dello Stato su una differenza di autorizzazioni pubbliche in base all'oggetto attenendosi senza speranze agli schemi del sistema delle pandette!

Ogni sana sistematica dovrà qui invece derivare da un pensiero assolutamente non presente nel diritto privato e dalla costruzione giuridica di un sistema comune a partire dalle singole essenze. Come al riguardo si distribuiscano le singole specie di diritti e di doveri pubblici, può qui rimanere non oggetto di esame. Tuttavia, nell'opera di riordino sistematico sarà importante non il carattere formale del rapporto soggettivo ed oggettivo in esso espresso, ma solo la sua posizione ai fini della costruzione complessiva dell'organismo statale.

Se guardiamo indietro, potrebbe essere chiaro ciò che segue: la dottrina dominante del diritto dello Stato, in riferimento alla concezione di base dello Stato e del diritto nonché in riferimento alla caratterizzazione e alla sistematica dei singoli concetti di cui allo Stato, nasconde idee idonee allo sviluppo ed adeguate alla coscienza moderna. Le teorie più recenti e più nuove del diritto dello Stato non hanno squassato queste idee né le hanno sostituite con altre migliori. Esse ammoniscono però sul fatto che venga ancora richiesto un lavoro spirituale tanto potente, su questo difficile ed intricato terreno, al fine di far venir fuori cristallizzandolo, a partire dal caos crescente delle idee che sgorgano dalla visione dal profondo dell'idea organica dello Stato, il quadro plastico e trasparente di concetti giuridici chiari.

(*traduzione italiana di Clemente Forte.*
Seconda ed ultima parte)

CLEMENTE FORTE

POSTFAZIONE

È stato qui proposto, diviso in due parti, il famoso saggio del 1874 di Gierke definito da M. Fioravanti[1] *come la sede in cui si affronta "il tema della teoria dello Stato e della scienza del diritto pubblico". Lo scritto è infatti dedicato "alle 'nuove' teorie formulate nel campo dello* Staatsrecht*, in sostanza alle tematiche ed ai problemi sollevati dai "*Grundzüge *gerberiani", e riveste una sua rilevanza anche in quanto manifestazione di uno sforzo intellettuale inteso a sistemare, dopo un'ampia disamina, il problema di un diritto dello Stato fondato il più possibile solidamente. Scrive infatti Gierke che "*proprio il diritto dello Stato fa a meno il più possibile di un metodo riconosciuto di trattazione giuridica. Fino a poco tempo fa prevaleva qui una modalità di trattazione esclusivamente pragmatica. La scienza del diritto dello Stato si era a malapena emancipata al proprio interno dalla filosofia del diritto, da una parte, e dalla storia dello Stato, dall'altra parte; essa aveva a malapena fatto il tentativo di estrapolare, dalla materia messa a disposizione, un sistema in sé unitario di concetti giuridici autonomi. Si filosofeggiava sulla base, sull'essenza e sullo scopo dello Stato, ma si perdeva la solida formulazione giuridica del suo concetto. Si rappresentavano accuratamente i rapporti di diritto pubblico, ma si trascurava la relativa analisi giuridica". *Sicché è necessario* "un lavoro spirituale tanto potente, al fine di far venir fuori cristallizzandolo, a partire dal caos crescente delle idee che sgorgano dalla visione dal profondo dell'idea organica dello Stato, il quadro plastico e trasparente di concetti giuridici chiari".

Gierke fa vedere la contrapposizione tra la tendenza formalistica e quella pragmatica nella scienza giuridica, sottolineando le insufficienze sia dell'una che dell'altra per motivi non solo legati al contenuto, ma anche al loro estremismo. A suo modo di vedere, al di là

[1] Cfr. *Giuristi e costituzione politica nell'Ottocento tedesco*, Milano, 1979, 324.

delle polemiche, esiste e va accertato un terreno comune su cui tutti possano fare affidamento, un terreno che conferisca alla scienza del diritto pubblico un'indipendente in sé, che la stacchi dagli influssi del diritto privato.

Dopo ave presentato in dettaglio gli scritti di Max Seydel, Grundzüge einer allgemeiner Staatslehre*, Würzburg 1873 e di Albert Th. Van Kriecken,* Über die sogennante organische Staatstheorie; ein Beitrag zur Geschichte des Staatsbergiffs*, Lipsia 1873 (parte, questa, del cap. II che, come indicato nell'apposita nota, è stata omessa nella traduzione per eccessivo dettaglio), egli passa alla* pars costruens*, che sembra però la meno effervescente, come spesso accade. Ciò che appare chiaro è l'esigenza di superare la contrapposizione tra assolutismo statalistico e concezione individualistica, in vista di una nuova sintesi tra singolo ed elemento comune. La statualità, dunque, come persona pubblica che mette insieme il particolare, ma non lo annulla, puntando alla compresenza di tanti elementi particolari. Da questo punto di vista si pone dunque il problema della coesistenza tra diritto e Stato, entrambi necessari, ma all'interno della quale emerge la primazia non solo cronologica del diritto, la cui fonte ultima risiede pur sempre nella coscienza comune dell'esistenza sociale. Le ultime pagine della seconda parte sono tutte intese ad esaminare la maggior parte dei rapporti e delle reciproche interrelazioni tra diritto e Stato, con un livello di profusione che non va certo a vantaggio della chiarezza.*

Del tutto evidente è comunque la battaglia di Gierke contro la concezione privatistica del diritto applicata allo Stato, tipica di Gerber, mentre va riconosciuto che lo Stato ha una personalità autonoma, entro la quale le sue varie componenti stanno necessariamente, ciascuna conservando però la propria individualità. Il punto per Gierke è dunque trovare un equilibrio sostenibile tra ciò che è generale e ciò che è particolare: sembra di capire che tale punto di equilibrio starebbe nel concetto di organismo-società, che permette di formare una personalità collettiva partendo dalle singole individualità. Sul piano tecnico, coma nota ancora una volta M. Fioravanti[2]*, sembrerebbe che sia il concetto di organo a permettere di superare l'endiadi tra le due personalità autonome, tipica del diritto privato (rappresentanza, mandato etc.), consentendo la costruzione di una personalità autonoma,*

[2] *Ibidem*, 331.

tale da esprimere quella complessiva "in quanto… Glied *di essa medesima", sempre nelle parole di M. Fioravanti.*

Detto questo, la sensazione è – si ripete – che tanto chiara e persuasiva è la ricostruzione, tanto poco lo è la parte costruttiva. Non è un caso che un autore del calibro di E.W. Böckenförde non abbia manifestato grande entusiasmo per le conclusioni di Gierke[3].

Comunque, davanti alla dissoluzione delle forme indotta dalla tecnica, è chiaro che teorie che cercano di far coesistere molteplice ed unitario non possono che essere sempre fonte e motivo di riflessione. Al di là del dato storico e di teoria generale del diritto, è questo il senso della proposizione – oggi – al lettore italiano del saggio di Gierke del 1874.

[3] Cfr. *La storiografia costituzionale tedesca*, 186-7, Napoli, 1970.

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