The rule of law crisis and democratic backsliding in the EU

Open questions and outstanding challenges

Edited by

Luca Pantaleo and Marco Siddi

Giappichelli

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INTRODUCTION

Luca Pantaleo and *Marco Siddi* [*]

This volume is the final result of a 2-year research project titled "The Rule of Law Crisis and Democratic Backsliding in the European Union. Domestic and International Implications", fully funded by the Fondazione di Sardegna, to which we are, of course, immensely grateful. Some of the chapters included in this book originate from papers presented at a conference held in Cagliari on 16 May 2024, which benefited from the financial support of the *Ambassade de France en Italie* and the *Institut français*. We are immensely grateful to them, too.

When this book was first conceived back in 2021, when we applied for funding, the European Union faced pressing internal challenges in safeguarding the rule of law and preventing democratic backsliding within its own ranks. Hungary and Poland stood at the forefront of this debate, having openly contested the EU's constitutional architecture, for instance by creatively arguing that national legislation had primacy over EU law. Their cases seemed to epitomise a more profound tension within the European project: a tension between state sovereignty and collective constitutional principles, between majoritarian government and liberal democracy, and between national selfishness and the EU's founding values. At that time, the concern was that these challenges would set dangerous precedents, erode trust in the Union's legal order, and ultimately test the very credibility of the European experiment.

Today, those concerns remain far from resolved. The dynamics in Hungary and Poland continue to unfold – perhaps a bit less so in the latter Member State, where illiberal forces have suffered a major political setback in the Polish parliamentary elections of October 2023. The underlying issues, however, remain urgent - democratic norms are still at risk, institutional checks and balances

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remain fragile, and fundamental rights are still being contested. The Union's toolbox has proven largely insufficient despite several attempts to improve it. Yet, these once-front-and-centre matters have been dwarfed in the public debate and international agenda by even more immediate and worrisome developments.

Foremost among these, from a European perspective, is the Russian war of aggression against Ukraine, an event that has radically reshaped the European political and security landscape. Faced with the return of conventional warfare on the continent, the EU has found itself preoccupied with existential questions concerning defence, energy security, refugee protection, and geopolitical stability. Another issue of rule of law has reemerged: the international rule of law and the role of the EU in protecting and promoting it. The crisis provoked by the war in Ukraine offers both challenges and opportunities for the EU. On the one hand, it spurs greater unity, prompting Member States to close ranks around shared European values. On the other hand, it further exacerbates vexed questions, such as the rigidity of the decision-making process in the Common Foreign and Security Policy (CFSP). These critical aspects have become even more apparent and urgent following Donald Trump's return to the White House.

Meanwhile, the process of EU enlargement has been reinvigorated by the war, following a much more 'geopolitical' rationale than in the past. The EU appears to be much keener on integrating Ukraine and Moldova as new Member States in order to counter Russian attempts to draw them – by force or, in the latter case, through interference in domestic elections – into Moscow's sphere of influence. However, the geopolitical factors behind the EU's drive for enlargement has raised questions on whether the Union might make too many concessions in terms of conditionality, including the respect of the rule of law in prospective members, in order to achieve its geopolitical goals.

Similarly, the ongoing crisis in Gaza and the EU's struggle to respond coherently and humanely to evolving events in the Middle East add yet another layer of complexity. Faced with urgent humanitarian crises and volatile diplomatic landscapes, European leaders must navigate an environment where the defence of legal principles and fundamental rights outside the Union collides with political realities and conflicting interests. While the Union has been unanimous in condemning Hamas terror attacks on 7 October 2023 – including the hostage-taking of over 200 people, many Member States have been reluctant to condemn or even criticise Israel's disproportionate response – including the killing of thousands of Palestinians and the destruction of vast parts of the Gaza Strip. When, in November 2024, the International Criminal Court (ICC) issued arrest warrants for Israeli Prime Minister Benjamin Netanyahu and former Minister of Defence Yoav Gallant – as well as Hamas commander Mohammed Deif – some EU members and leaders expressed reservations about the ICC's

decision. Some high-level European politicians have stated that Netanyahu would be welcome in their country despite the pending accusations at the ICC. Furthermore, Israel went on to conduct targeted military operations in Lebanon (from where Hezbollah had been launching rockets towards northern Israel) and Syria with the direct or indirect support of some Western allies.

The EU and the West, more broadly, have thus faced accusations of double standards in the application of the international rule of law. These accusations emanated not only from geopolitical rivals such as Russia and China, but also from countries of the so-called Global South. It has been noted that Western leaders increasingly refer to the 'rule-based international order' in their public pronouncements and much less to international law or to the UN Charter. According to an interpretation, this is because 'rule-based international order' is a much less clear expression that can be filled with meaning selectively by Western leaders, for instance to condemn geopolitical rivals when they violate international norms, while absolving allies when they do the same.

Against this backdrop, the essays collected in this volume serve as a reminder that the issue of the rule of law within the EU is not merely an internal housekeeping matter. It is intricately connected to Europe's global role and credibility as an international actor committed to democratic principles and fundamental rights. While the eyes of the world are drawn to the tragedies and aggression unfolding in Europe's east and south, the need to ensure robust democratic institutions at home has not weakened. On the contrary, these tumultuous times only reinforce the importance of reflecting critically on the EU's internal legal order and renewing our commitment to the rule of law as a foundational stone of the European project.

In a famous quote, former Secretary-General of the United Nations, Mr Ban Ki-moon, said that "[t]he rule of law is like the law of gravity. It is the rule of law that ensures that our world and our societies remain bound together and that order prevails over chaos. It unites us around common values and anchors us in the common good". [1] These words are particularly apposite for the European Union. We are convinced that everything in the EU would fall apart without the rule of law. This volume attempts to offer a small contribution to one of the most, if not the most, pressing political and legal challenges the Union is currently facing. It features 8 chapters dealing with different yet interrelated issues from different disciplinary perspectives, in line with the interdisciplinary nature of the project from which it emanates.

In **Chapter 2**, written in Italian, **Angela Taraborrelli** deals with the Italian model of civil integration of migrants, assessing its compatibility with the legal framework of the so-called *espace juridique européen* from the perspective of

[1] See United Nations General Assembly, 67th session, A/67/PV.3, p. 2.

the rule of law. Her critical assessment concludes that more must be done to promote and develop democracy in both the political sphere and the social, civil and cultural dimensions.

Chapter 3, written by **Marco Siddi** and **Barbara Gaweda**, investigates the political dimension of the rule of law and democratic backsliding. It analyses concepts used in recent scholarship to qualify democratic backsliding with a focus on Europe, but with an eye to broader global developments. It focuses more specifically on selected national case studies – Hungary, Poland, Italy – that are particularly relevant and representative of democratic backsliding, even if in different ways and to varying extent. A discussion of democratic backsliding at the European level is also presented, with references to trends in EU politics and to the current domestic politics of other Member States.

Chapter 4 also deals with political issues. Here, **Manuel Müller** examines the far-right parties in the main EU institutions at the onset of the 2024-29 legislature, including the ways in which they are likely to influence European policy. When in government, these parties have often been associated with decision-making leading to the infringement of the rule of law (i.e. in Hungary and Poland). The chapter outlines the various political families that make up the European far right, which is currently fragmented into three European political parties and three corresponding groups in the European Parliament. It also takes a closer look at each of the three main EU institutions – the European Parliament, the European Commission, and the EU Council – to ascertain both the quantitative presence of far-right parties and their role in political majority-building and decision-making.

Chapter 5, written by **Anne Hamonic**, is the first one dealing with the legal dimension of the crisis. In her contribution, Anne examines one of the silver linings of Russia's war against Ukraine, which has opened a new chapter for EU cooperation in military and defence matters. Using the original case of solidarity in the field of defence in the context of the Union's response to the war of aggression in Ukraine, the chapter highlights the interactions between the internal and external dimensions of the promotion of the Union's essential values and principles, which could perhaps benefit the rule of law.

In **Chapter 6**, **Sara Poli** focuses on a very specific yet extremely delicate rule of law issue generated by the Russian war of aggression. As is well-known, the post-war reconstruction of Ukraine will be highly costly. While the EU is willing to support Ukraine financially, a debate has arisen about confiscating Russian assets to pay for such reconstruction. While this might sound like a good idea that adheres to conventional wisdom (you break it, you pay it), Sara aptly demonstrates that there are several legal issues at stake, including the risk of breaching the international rule of law (as well as undermining trust in the Euro in the financial markets) that the EU is committed to protect and promote.

Chapter 7, co-authored by **Luca Pantaleo** and **Beatrice Sanna**, also deals with the international rule of law issues raised by the Russo-Ukrainian war. In their contribution, they observe that the crisis has been judicialised by intensive use of so-called lawfare instruments, reinforcing a trend towards judicialisation that has already emerged in international politics.

Chapter 8, written in Italian by **Alessandra Pisu**, is devoted to the analysis of a different front of the rule of law battlefield, that of biopolitics and biolaw. Alessandra provides an insightful overview of the current situation, focusing on the most recent developments in Hungary and Italy. She demonstrates that the general backsliding taking place in some countries in this field is part of a profoundly illiberal political project unfolding globally. Alessandra sees the EU Charter of Fundamental Rights and the European Convention of Human Rights as the last bastions of hope that can ensure durable resistance and protection.

Finally, **Chapter 9** examines a relatively new dimension of the rule of law and democratic crisis that is connected with the rise of digital democracy. After a comprehensive analysis, **Massimo Farina** emphasises the ambivalent nature of technology for the future of democracy, offering both opportunities and risks. He concludes that its ultimate impact will depend on the ability of democratic systems to adapt to technological transformations without betraying their fundamental principles of freedom, equality, and participation.

INTEGRAZIONE DEI/LLE MIGRANTI E STATO DI DIRITTO

Angela Taraborrelli[*]

1. *Il modello di integrazione civica dei migranti*

A partire dalla fine degli anni Novanta alcuni Stati europei hanno cominciato ad introdurre requisiti di integrazione civica, ossia la padronanza della lingua e la conoscenza della storia e della cultura politica del paese ricevente nonché l'adesione ai valori liberali e democratici [1], come condizioni per l'acquisizione della cittadinanza [2]. Tale "svolta civica" ha suscitato un ampio dibattito che dimostra un persistente disaccordo nel valutare il nuovo modello di integrazione [3]. Alcuni manifestano un'opposizione netta alla sua introduzione,

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[1] S.W. Goodman, *Integration Requirements for Integration's Sake? Identifying, Categorising and Comparing Civic Integration Policies*, in *Journal of Ethnic and Migration Studies*, 36, 5, 2010, pp. 753-772.

[2] See S.W. Goodman, *Immigration and Membership politics in Western Europe*, Cambridge University Press, Cambridge, 2014; C. Joppke, *Civic Integration in Western Europe: Three Debates*, in *West European Politics*, 40, 6, 2017, pp. 1153-1176.

[3] See S.W. Goodman, *Fortifying Citizenship: Policy Strategies for Civic Integration in Western Europe*, in *World Politics*, 64, 4, 2012, pp. 659-698; S.W. Goodman, *Immigration and Membership politics in Western Europe*, cit.; E. Guild, *Immigration Law in the European Community*, Brill Nijhoff, Leiden, 2001; E. Guild-M. Grundler, *The EU Visa Policy: To Deter and to Facilitate*, in E.L. Tsourdi (a cura di), *Research Handbook on EU Migration and Asylum Law*, Edward Elgar, Brussels, 2022, pp. 391-407; K.K. Jensen-P. Mouritsen, *Nationalism*

respingendo l'idea che gli stranieri e le straniere debbano essere "sottoposti a test" per acquisire la cittadinanza di un paese [4]. Altri lo criticano vedendo in esso una forma di "nuovo paternalismo", basato sull'assunto implicito che gli stranieri siano "carenti", ossia privi di specifiche competenze, e che pertanto necessitino di essere guidati e supervisionati per raggiungere una maturità civica e politica adeguata.

Alcuni perché contrari alla concezione di cittadinanza che presuppone, considerata più come un premio o uno status da guadagnare e da meritare, piuttosto che come un diritto che lo Stato dovrebbe garantire a tutti/e; altri, infine, perché lo considerano una forma di nazionalismo escludente o di neo-assimilazionismo culturale.

Vi sono poi coloro che sollevano dubbi sugli effetti dell'applicazione di tale modello sostenendo che, contrariamente agli obiettivi dichiarati – ossia l'acquisizione di conoscenze e competenze che permettano un adeguato livello di autonomia e di partecipazione attiva alla vita pubblica della società ricevente – servirebbe più a regolare i flussi migratori che a integrare i migranti e, di fatto, finirebbe per discriminare determinate categorie di migranti, soprattutto le più vulnerabili come gli anziani, le persone con scarsa istruzione, le donne svantaggiate e gli individui traumatizzati.

Altri autori e autrici, pur non rigettando il modello in sé, mettono in discussione la sua compatibilità con i principi liberali, evidenziandone alcuni aspetti sotto questo profilo problematici. Tra questi, l'obbligatorietà dei corsi e dei test, che potrebbe trasformare le buone intenzioni di salvaguardare le società liberali in una contraddittoria forma di «liberalismo repressivo» o di «liberalismo illiberale» [5]. Illiberali sarebbero alcuni contenuti dei corsi e dei test, a partire dal presupposto che uno Stato liberale possa «solo regolare il comportamento esterno delle persone, non le loro motivazioni interne» [6] e che, pertanto, i test non dovrebbero valutare la moralità dei partecipanti, né la loro disponibi-

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in a Liberal Register: Beyond the 'Paradox of Universalism', in *British Journal of Political Science*, 49, 3, 2017, pp. 837-856; C. Joppke, *Beyond national models: Civic integration policies for immigrants in Western Europe*, in *West European Politics*, 30, 1, 2007, pp. 1-22; C. Joppke, *Civic Integration in Western Europe: Three Debates*, cit.; P. Mouritsen-K. Jensen-S. Larin, *Introduction: Theorizing the Civic Turn in European Integration Policies*, in *Ethnicities*, 19, 4, 2019, pp. 595-613; A. Taraborrelli, *Migrazione e integrazione. Il nuovo paradigma dell'integrazione civica*, in *Iride. Filosofia e discussione pubblica*, 1, 2019, pp. 95-114.

[4] D. Kostakopoulou, *The Anatomy of Civic Integration*, in *Modern Law Review*, 73, 6, 2010, pp. 933-958.

[5] C. Joppke, *How liberal are citizenship tests?*, in R. Bauböck-C. Joppke (a cura di), *How liberal are citizenship tests?*, EUI working papers RSCAS, 41, 2001, p. 2.

[6] C. Joppke-E. Morawska, *Toward Assimilation and Citizenship. Immigrants in Liberal Nations-States*, Palgrave, London, 2014, p. 25.

lità a credere in valori comuni, tanto meno, «prescrivere concezioni sostanziali su 'ciò che è buono'» [7]. Di qui il dibattito su quando e come gli Stati liberali possano giustificare l'acculturazione civica degli immigrati e fino a che punto sia legittimo richiedere o promuovere specifiche conoscenze politiche, culturali o storiche, l'impegno partecipativo, determinate pratiche familiari e di genere, o l'adesione a certi "valori".

All'interno di questo contesto, con il presente contributo intendo limitarmi a individuare le forme legittime e illegittime di condizionalità all'acquisizione della cittadinanza e, in particolare, di verificare se il modello di integrazione civica adottato in Italia sia compatibile con lo stato di diritto.

Come è noto, la *Commissione di Venezia* ha individuato gli elementi fondanti dello stato di diritto ed ha elaborato una *Rule of Law Check List* (2016) quale strumento per valutarne il grado di rispetto nelle varie comunità statali. Riguardo al parametro che qui ci interessa, ossia quello della *Legalità*, nel sotto-paragrafo 3. intitolato *Relazione tra legge internazionale e legge nazionale*, si chiede: «L'ordinamento giuridico interno garantisce che lo Stato rispetti gli obblighi vincolanti previsti dal diritto internazionale?» e, in particolare, «Garantisce il rispetto del diritto internazionale dei diritti umani, comprese le decisioni vincolanti dei tribunali internazionali?» [8].

Partendo dalla definizione di stato di diritto presente in questo documento, cercherò di valutare se il modello di integrazione civica adottato in Italia rispetti lo stato di diritto per quanto concerne l'osservanza degli obblighi internazionali, con particolare riguardo alla protezione dei diritti fondamentali e al rispetto del principio di non discriminazione.

2. *Il modello di integrazione civica in Italia: l'"Accordo di integrazione"*

In Italia, si riscontrano diversi casi che possono essere considerati applicazioni del modello di integrazione civica dei migranti. Il primo riguarda i richiedenti l'acquisizione della cittadinanza; il secondo riguarda i titolari di pro-

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[7] R. Oers van, *Deserving Citizenship*, Martinus Nijhoff Publishers, Leiden-Boston, 2014, p. 25.

[8] *Rule of Law Checklist*, CDL-AD(2016)007-e, adottata dalla *Commissione di Venezia*, Venezia, 11-12 marzo 2016, p. 19. Ufficialmente *Commissione europea per la Democrazia attraverso il Diritto* di cui fanno parte soggetti indipendenti provenienti da diverse nazioni, esperti in diritto costituzionale (https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf. La *Commissione* ha individuato cinque elementi fondamentali dello stato di diritto: legalità, certezza del diritto, prevenzione dall'abuso di potere, eguaglianza di fronte alla legge e non discriminazione, accesso alla giustizia. (ultimo accesso: 16 marzo 2025).

tezione internazionale e di permesso di soggiorno Ue di lungo periodo [9]; infine, il terzo concerne l'ottenimento del permesso di soggiorno di durata almeno annuale.

La Legge 1° dicembre 2018, n. 132 lega l'ottenimento della cittadinanza italiana per residenza al possesso del livello B1 in lingua italiana [10], in conformità con quanto previsto dal *Quadro comune europeo di riferimento per le lingue* (Qcer) (2001). Dal 2021 è stato introdotto un questionario per chi abbia fatto istanza di cittadinanza per residenza [11] nel quale al/alla candidato/a viene chiesto di rispondere a venti domande, per verificare se possieda una «conoscenza sufficiente» dell'Italia, dell'italiano e dei suoi valori democratici. In effetti, si tratta di autocertificare la conoscenza della «struttura politica ed amministrativa dell'Italia», della «Costituzione italiana nei suoi principi generali» e le leggi italiane e di impegnarsi a «rispettare le regole di convivenza civile dell'ordinamento italiano» [12].

Per quanto concerne i titolari di protezione internazionale, nel quadro del *Piano nazionale di integrazione per i titolari di protezione internazionale* introdotto nell'ottobre 2017, è stato previsto l'obbligo di frequentare corsi di lingua italiana nei centri di accoglienza dove è richiesto che vengano somministrati test iniziali per valutare il livello di alfabetizzazione e le competenze linguistiche dei beneficiari di protezione internazionale, al fine di definire le modalità di insegnamento più idonee e personalizzate per ciascun soggetto. Inoltre, si invitano i centri «ad adottare misure per migliorare e semplificare la partecipazione, inclusa la previsione di incentivi collegati a percorsi di inclusione socio-lavorativa e di penalità economiche» [13]. Il rilascio del permesso di

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[9] *Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero* (*Tui*), d.lgs. n. 2. 286/1998, art. 2-*bis*: «Il rilascio del permesso di soggiorno Ue per soggiornanti di lungo periodo è subordinato al superamento, da parte del richiedente, di un test di conoscenza della lingua italiana, le cui modalità di svolgimento sono determinate con decreto del Ministro dell'interno, di concerto con il Ministro dell'istruzione, dell'università e della ricerca».

[10] Si può presentare almeno uno dei seguenti titoli attestanti la conoscenza della lingua italiana: certificazione del livello linguistico B1 del Qcer; titolo di studio rilasciato da un Istituto riconosciuto dal Ministero dell'Università e della Ricerca; accordo di integrazione; permesso di soggiorno per soggiornanti di lungo periodo.

[11] Ai sensi dell'art. 9, legge n. 91/1992.

[12] Il questionario introdotto nel 2021 è composto da 20 domande, che riguardano una serie di argomenti, tra cui: la conoscenza della lingua italiana; la conoscenza della storia e della cultura italiana; la conoscenza della Costituzione italiana; la conoscenza dei diritti e dei doveri dei cittadini italiani. https://prefettura.interno.gov.it/sites/default/files/42/2023-12/questionario_cittadinanza.pdf (ultimo accesso: 16 marzo 2025).

[13] *Piano nazionale d'integrazione dei titolari di protezione internazionale*, p. 20. Il *Piano*

soggiorno Ue per soggiornanti di lungo periodo, destinato agli stranieri che risiedono stabilmente nel territorio nazionale, è subordinato al superamento, da parte del richiedente, di un test di conoscenza della lingua italiana [14].

Infine, ai fini dell'ottenimento del *permesso di soggiorno*, il caso di cui mi occuperò, lo/a straniero/a di età superiore ai sedici anni che entri in Italia per la prima volta e presenti istanza di rilascio del permesso di soggiorno di durata non inferiore a un anno, è tenuto/a sottoscrivere l'*Accordo di integrazione* (noto anche come permesso di soggiorno a "punti") introdotto dalla legge sulla sicurezza (legge n. 94/2009) [15] e reso operativo con l'adozione del relativo Regolamento di attuazione (d.p.r. 14 settembre 2011, n. 179) [16]. Con tale accordo il/la richiedente si impegna ad acquisire un livello adeguato di conoscenza della lingua italiana, nonché una sufficiente conoscenza dei principi fondamentali della Costituzione della Repubblica, della cultura civica e della vita civile in Italia. Una volta sottoscritto l'*Accordo* [17], il/la firmatario/a ha a disposizione un periodo di due anni di tempo per conseguire un determinato numero di crediti attraverso la dimostrazione della conoscenza della lingua italiana parlata (livello A2 del Qcer), la conoscenza della vita civile in Italia nonché la «dichiarazione di aderenza» alla *Carta dei valori della cittadinanza e dell'integrazione* e, nel caso, l'adempimento degli obblighi scolastici per i figli. Lo Stato mette a disposizione degli stranieri corsi di lingua gratuiti e sessioni informative e formative riguardanti la vita in Italia e l'educazione civica. La perdita integrale dei crediti comporta la revoca del titolo di soggiorno e l'espulsione amministrativa dello straniero.

3. *L'Accordo di integrazione e lo stato di diritto: l'aderenza al diritto della Ue*

In questa sezione procederò ad analizzare la compatibilità dell'*Accordo di integrazione* con i principi dello stato di diritto, verificando la sua conformità alla normativa nazionale e agli obblighi internazionali. In particolare, esami-

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prevede che coloro ai quali sia riconosciuta la protezione internazionale, si impegnino a imparare la lingua italiana, condividere i valori della Costituzione italiana, rispettare le leggi, partecipare alla vita economica, sociale e culturale del territorio in cui vivono; la Repubblica si impegna ad assicurare l'uguaglianza e la pari dignità, la libertà di religione, l'accesso all'istruzione e alla formazione, interventi diretti a facilitare l'inclusione nella società.

[14] *Legge sulla sicurezza* (legge n. 94/2009), art. 1, comma 22, lett. i).

[15] Nel 2011 la *Legge sulla sicurezza* ha introdotto nel *Tui* l'art. 4-*bis (Accordo di integrazione*. https://www.gazzettaufficiale.it/eli/id/2009/07/24/009G0096/sg (ultimo accesso: 26 ottobre 2024).

[16] https://www.gazzettaufficiale.it/eli/id/2011/11/11/011G0221/sg.

[17] Presso l'Ufficio immigrazione o la Questura.

nerò la sua coerenza con la definizione di *integrazione*, nonché con i *requisiti stabiliti*, quali la padronanza della lingua, la conoscenza della vita civile in Italia e l'adesione alla *Carta dei valori*. L'analisi si concentrerà esclusivamente sul diritto dell'Unione europea, in quanto costituisce la fonte normativa di riferimento più pertinente per il tema oggetto di studio nel presente saggio.

Infatti, come è stato osservato, nonostante il contributo fondamentale del diritto internazionale, «gli strumenti internazionali relativi ai rifugiati e ai diritti umani non forniscono, né singolarmente né collettivamente, un quadro normativo esaustivo per lo sviluppo di politiche nazionali di integrazione» [18]. Il diritto internazionale non prevede infatti un *diritto* generale all'integrazione né un obbligo per gli Stati di agevolare tale processo, se non nella misura stabilita dall'art. 34 della *Convenzione sullo status dei rifugiati* del 1951 [19]. Inoltre, i diritti relativi all'integrazione dei migranti nel contesto del diritto internazionale sono frammentari e differiscono in base allo status giuridico degli stessi che può variare a seconda che si tratti di rifugiati, lavoratori migranti o familiari di questi ultimi, nonché di individui appartenenti a specifiche categorie vulnerabili (donne, bambini o membri di gruppi etnici minoritari). Nel contesto del diritto internazionale dei rifugiati, la mancanza di un organismo di monitoraggio competente per la Convenzione del 1951 ha comportato uno sviluppo normativo limitato in relazione all'art. 34.

3.1. *Il concetto di "integrazione" in Italia*

Nel 2004, il *Programma dell'Aia* ha adottato i *Common Basic Principles for Immigrant Integration Policy* (*CBP*) [20] i quali, pur non avendo natura vincolante, delineano i principi fondamentali dell'approccio dell'Unione all'integrazione. Questi principi hanno fornito di fatto «una prima definizione di ciò che intendiamo per integrazione nell'Ue» [21], interpretata come un «processo dinamico e bilaterale di adeguamento reciproco da parte di tutti gli immigrati e di tutti i residenti della Ue» (*CBP* 1).

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[18] C. Murphy, *Immigration, Integration, and the Law. The Intersection of Domestic, EU and International Legal Regimes*, Routledge, London-New York, 2013, p. 123.

[19] Art. 34 – Naturalizzazione: «Gli Stati Contraenti facilitano, entro i limiti del possibile, l'assimilazione e la naturalizzazione dei rifugiati. Essi si sforzano in particolare di accelerare la procedura di naturalizzazione e di ridurre, per quanto possibile, le tasse e le spese della procedura».

[20] Justice and Home Affairs Council Conclusions, *Common Basic Principles on Immigrant Integration*, Council Document 14615/04; Bruxelles, 19 novembre 2004.

[21] S. Pratt, *Immigration, Integration and Citizenship: Latest Developments and the EU's Role*, in S. Carrera (a cura di), *The Nexus Between Immigration, Integration and Citizenship in the EU*, CEPS *Challenge Papers*, 10, 2, 2006, pp. 10-13.

Il concetto di «integrazione» è stato introdotto per la prima volta in Italia con la *Legge sulla sicurezza* del 2009, dove viene definito come «quel processo finalizzato a promuovere la convivenza dei cittadini italiani e di quelli stranieri, nel rispetto dei valori sanciti dalla Costituzione italiana, con il reciproco impegno a partecipare alla vita economica, sociale e culturale della società» [22]. Tale definizione rispecchia sostanzialmente quella adottata a livello europeo, poiché anch'essa concepisce l'integrazione come processo piuttosto che come un risultato finale, di natura bilaterale, ossia implicante un impegno reciproco, e multidimensionale, riguardante i vari ambiti della vita sociale, economica e culturale.

3.2. *Le conoscenze richieste*

L'art. 2 del *Regolamento concernente la disciplina dell'accordo di integrazione tra lo straniero e lo Stato* stabilisce che, all'atto della sottoscrizione, lo/la straniero/a si impegna a:

a) acquisire un livello adeguato di conoscenza della lingua italiana parlata equivalente almeno al livello A2 di cui al quadro comune europeo di riferimento per le lingue emanato dal Consiglio d'Europa;
b) acquisire una sufficiente conoscenza dei principi fondamentali della Costituzione della Repubblica e dell'organizzazione e funzionamento delle istituzioni pubbliche in Italia;
c) acquisire una sufficiente conoscenza della vita civile in Italia, con particolare riferimento ai settori della sanità, della scuola, dei servizi sociali, del lavoro e agli obblighi fiscali;
d) garantire l'adempimento dell'obbligo di istruzione da parte dei figli minori.

Tali richieste potrebbero configurarsi come obblighi di risultato, il cui mancato adempimento comporta conseguenze di natura coercitiva, e per tale motivo sono da considerarsi particolarmente gravose [23]. Tuttavia, la richiesta

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[22] *Legge sulla sicurezza* (legge n. 94/2009), art. 4-*bis*. Nel *Piano di integrazione nazionale dei titolari di protezione internazionale* del 2017 si assume la seguente definizione di integrazione: «un processo complesso che parte dalla prima accoglienza e ha come obiettivo il raggiungimento dell'autonomia personale» (p. 9). (ultimo accesso: 2 gennaio 2025).

[23] Benché si tratti di requisiti esigenti, tuttavia, l'art. 8 chiarisce che «Non si fa luogo alla stipula dell'accordo ai fini del rilascio del permesso di soggiorno e, se stipulato, questo si intende adempiuto, qualora lo straniero sia affetto da patologie o da disabilità tali da limitare gravemente l'autosufficienza o da determinare gravi difficoltà di apprendimento linguistico e culturale, attestati mediante una certificazione rilasciata da una struttura sanitaria pubblica o da

di cui al punto a) relativa alla conoscenza della lingua, risulta conforme ai *Common Basic Principles*, i quali sottolineano che «la conoscenza di base della lingua, della storia e delle istituzioni della società ospitante è indispensabile per l'integrazione» (*CBP* 4) e che «gli sforzi nel campo dell'istruzione sono fondamentali per preparare gli immigrati» (*CBP* 5). Inoltre, la richiesta di un livello adeguato di competenza linguistica è coerente con le raccomandazioni contenute nel *Final Report* degli *European Modules on Migrant Integration* del 2014 (*EMMI*), che evidenzia come un buon livello di competenza linguistica possa favorire una maggiore autonomia e indipendenza dei migranti, contribuire a una maggiore coesione sociale e migliorare le opportunità occupazionali. A ciò si aggiunge il fatto che la competenza linguistica dei genitori possa generare vantaggi educativi per migranti di "seconda generazione" [24].

Per quanto riguarda le richieste al punto b) e c), come chiaramente esposto nelle *Linee guida per la progettazione della sessione di formazione civica e di informazione* [25], previste dall'*Accordo di integrazione*, i contenuti dei corsi riguardano principalmente le informazioni relative ai diritti e ai doveri degli stranieri in Italia, le facoltà e gli obblighi connessi al soggiorno, nonché i diritti e i doveri reciproci dei coniugi e i doveri dei genitori verso i figli, in conformità con l'ordinamento giuridico italiano, con particolare riferimento all'obbligo di istruzione. Tali corsi hanno l'obiettivo di fornire allo/a straniero/a informazioni sia sulle principali iniziative a sostegno del processo di integrazione, sia sulla normativa di riferimento in materia di salute e sicurezza sul lavoro. Inoltre, mirano a far conoscere la vita civile in Italia, offrendo indicazioni pratiche riguardanti sanità, scuola, servizi sociali, lavoro, e obblighi fiscali, al fine di facilitare l'inserimento sociale e lavorativo del/la migrante nel contesto italiano.

La sessione di formazione ha una durata di dieci ore, è obbligatoria, gratuita e viene condotta nella lingua scelta dal/la migrante [26].

Il carattere obbligatorio dei corsi, che potrebbe sollevare dubbi in ordine alla sua compatibilità con i principi liberali, appare tuttavia conforme alle raccomandazioni fornite agli Stati membri della Ue (*EMMI*) che invitano a introdurre misure incentivanti per favorire il completamento dei corsi introduttivi e

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un medico convenzionato con il Servizio sanitario nazionale». Non sembra previsto il caso di stranieri o straniere analfabeti.

[24] European Commission, DG Home, *European Modules on Migrant Integration*, Final Report, 2014, p. 9.

[25] Ministero dell'Università e della Ricerca, *Linee guida per la progettazione della sessione di formazione civica e di informazione*, di cui all'art. 3 del d.p.r. n. 179/2011. Indicazioni per la declinazione delle conoscenze di cui all'art. 2, comma 4, lett. b) e c) del d.p.r. n. 179/2011.

[26] Il Mur offre moduli formativi in 19 lingue.

linguistici [27]. È opportuno, inoltre, osservare, che in alcuni paesi europei è previsto l'obbligo legale per specifici gruppi di migranti a partecipare a tali corsi, condizionando la loro frequenza all'accesso a prestazioni sociali.

Per quanto riguarda i contenuti dei corsi introduttivi di orientamento civico, criticati da alcuni come espressione di tendenze neo-assimilazioniste, se non addirittura disciplinanti e razziste, risultano coerenti con gli obiettivi degli *EMMI*, anzi, non sembrano presentare gli stessi presupposti paternalistici. Infatti, nei *Moduli* non solo si afferma che i corsi «possono contribuire a far coincidere le aspettative dei migranti con quelle delle società di accoglienza, fornendo conoscenze, comprensione e approfondimenti sulla vita nello Stato membro»; ma anche che si propongono principalmente di «promuovere l'autosufficienza dei migranti partecipanti» assumendo, in modo esplicito, che «molti di loro non sono abituati a una cultura in cui l'individualismo e l'autoresponsabilità ricoprono un ruolo così determinante». A tale differenza culturale sarebbe dovuta la difficoltà da parte dei migranti di soddisfare le richieste della società di accoglienza (come, ad esempio, la ricerca di un lavoro in autonomia); di conseguenza, si aggiunge, risulta particolarmente importante fornire, attraverso i corsi, «una comprensione di come la società europea influisca sull'individuo» e, di conseguenza, una consapevolezza adeguata della costituzione, dei valori fondamentali e del sistema di governo dello Stato membro di accoglienza. Agli stranieri di paesi terzi si richiede anche di acquisire «una competenza interculturale per sviluppare la capacità di comunicare e di orientarsi in contesti caratterizzati da presupposti culturali diversi». Vero è che la preoccupazione per questa presunta o reale carenza di cultura civica e politica sembrerebbe derivare dall'obiettivo generale di promuovere «la partecipazione attiva e la cittadinanza» [28]. I corsi di introduzione civica rappresenterebbero dunque il primo stadio di un processo di integrazione che aspira alla piena inclusione dei migranti nella comunità, culminando nell'acquisizione della cittadinanza. Tali corsi, quindi, non si limitano a fornire un semplice

[27] Gli *EMMI* propongono, ad esempio, di integrare la formazione linguistica con altri servizi, come l'assistenza all'infanzia; di agevolare la conciliazione tra la partecipazione ai corsi e l'orario di lavoro, e di offrire bonus legati ai risultati ottenuti; di rimborsare le tasse scolastiche; nonché di rilasciare i certificati solo dopo il superamento di un corso. Nel *Final Report* si cita come esempio di *good practice* il progetto *Vivere in Italia* (Lombardia) che, al fine di facilitare l'accesso ai servizi di formazione e di garantire al tempo stesso un approccio globale all'integrazione, prevede l'offerta di servizi complementari che comprendono: servizi di assistenza all'infanzia, utili per incoraggiare la partecipazione delle donne migranti; servizi per l'impiego, come la valutazione delle competenze e il riconoscimento dei titoli; l'orientamento al lavoro e le informazioni sulla sicurezza sul posto di lavoro e, infine, aggiornamenti sulla legislazione (*Final Report*, cit., p. 18).

[28] Tutte le citazioni sono tratte da *EMMI*, cit., p. 13.

orientamento alla vita sociale e lavorativa, ma si pongono anche come strumento per l'acquisizione delle basi necessarie all'esercizio di una cittadinanza attiva e di una partecipazione democratica consapevole.

Le *Linee guida per la progettazione della sessione di formazione civica e di informazione*, si prefiggono un obiettivo meno ambizioso, ossia di offrire informazioni relative alle caratteristiche del paese ospitante, nonché ai diritti e ai servizi disponibili per i migranti. In tal senso, la partecipazione a queste sessioni viene vista come strumento di "capacitazione", per facilitare l'inserimento del/la migrante nella società ospite e per promuovere la sua autonomia.

Per quanto riguarda il punto d), l'impegno a garantire l'adempimento dell'obbligo scolastico, può essere interpretato come un segno di volontà di integrazione e di rispetto dei principi di eguaglianza di genere da parte dei/le migranti; mentre da parte dello Stato italiano rappresenta un atto di tutela del diritto dei minori all'istruzione.

3.3. *La Carta dei valori della cittadinanza e dell'integrazione*

L'art. 2 dell'*Accordo di integrazione* impone una condizione ulteriore per il rilascio del permesso di soggiorno: «Lo straniero dichiara, altresì, di aderire alla *Carta dei valori della cittadinanza e dell'integrazione* e si impegna a rispettarne i principi». Tale condizione appare più discutibile e per diverse ragioni. Non solo appare problematico chiarire cosa significhi «aderire» alla *Carta dei valori*, ma anche comprendere quale sia il rapporto tra la *Carta dei valori* e i principi costituzionali della Repubblica italiana. Più in generale, la distinzione tra valori e principi meriterebbe un'analisi più approfondita soprattutto in un contesto giuridico che tende a fondarsi su principi di universalità e neutralità. Appare inoltre lecito domandarsi se una simile condizione sia compatibile con i principi fondamentali del liberalismo, che tradizionalmente enfatizza l'adesione ai principi costituzionali, piuttosto che a valori specifici; in particolare, quando tale requisito sia richiesto per il rilascio del semplice permesso di soggiorno, e non per l'ottenimento della piena cittadinanza [29]. Non intendo qui rispondere a tutti gli interrogativi sollevati, ma piuttosto esaminare se la *Carta dei valori* rispetti lo stato di diritto, in particolare sotto il profilo della sua conformità al diritto della Ue [30].

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[29] L'adesione ai valori della *Carta* era richiesta originariamente per ottenere la cittadinanza; dal 2012 è richiesta per ricevere il permesso di soggiorno.

[30] Per quanto riguarda il diritto internazionale, vale la pena citare l'art. 27 de l'*International Covenant on Civil and Political Rights* (1966) che proibisce l'assimilazione forzata: «In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minor-

A tale scopo, sarà opportuno offrire un breve inquadramento del contesto politico e culturale in cui è maturata la sua redazione, del suo contenuto, nonché delle obiezioni che essa ha suscitato.

La *Carta dei valori della cittadinanza e dell'integrazione* (2007) è stata concepita con l'intento di enucleare e rendere espliciti i principi fondamentali dell'ordinamento italiano, principi che regolano la convivenza sia dei cittadini che degli immigrati [31]. Come era prevedibile, la sua adozione ha suscitato diverse perplessità, riguardo, ad esempio, alla sua presunta neutralità. Infatti, la *Carta* è stata percepita non già come rivolta «a tutti coloro che desiderano risiedere stabilmente in Italia, di qualsiasi gruppo o comunità facciano parte, di natura culturale, etnica o religiosa», ma come indirizzata principalmente ai membri della comunità islamica. In verità, nel presentare la *Carta*, i redattori dichiarano esplicitamente che pur essendosi ispirati ai principi della Costituzione italiana e alle principali concezioni europee ed internazionali in materia di diritti umani, hanno focalizzato la propria attenzione «su quei problemi che la multiculturalità pone alle società occidentali» [32]. I motivi che hanno spinto alla stesura della *Carta* risalgono a eventi che avevano destato allarme nell'opinione pubblica, come alcune dichiarazioni rilasciate da esponenti di comunità islamiche sulla Shoa e il caso drammatico dell'omicidio da parte di un padre musulmano della figlia, rea di voler «vivere come le altre» [33]. Tali episodi hanno alimentato il timore che l'integrazione degli immigrati, e in particolare della comunità islamica, potesse entrare in conflitto con i valori fondamentali della società italiana.

Nonostante le critiche ricevute, la *Carta* è in linea con i *Common Basic*

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ities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language». Le politiche nazionali di integrazione non possono costringere i membri di una minoranza a rinunciare alla propria cultura, lingua o religione a favore di quella dello Stato ospitante senza violare questa disposizione.

[31] Con il decreto pubblicato nella *Gazzetta Ufficiale* del 15 giugno 2007 è avvenuto il "varo" della *Carta*, alla quale si riconosce il valore di direttiva generale per l'Amministrazione dell'Interno.

[32] http://www.libertaciviliimmigrazione.dlci.interno.gov.it/it/carta-dei-valori-della-cittadinanza-e-dellintegrazione-0 (ultimo accesso: 26 ottobre 2024).

[33] Alla *Carta dei valori* è seguita, nel 2008, la *Dichiarazione di intenti per la federazione dell'Islam italiano*, sottoscritta dagli esponenti delle organizzazioni e delle associazioni musulmane che si riconoscevano nei principi della *Carta* e poi il *Patto nazionale per un islam italiano, espressione di una comunità aperta, integrata e aderente ai valori e principi dell'ordinamento statale*, sottoscritto a Roma il 1° febbraio 2017 (www.interno.gov.it/it/servizi-line/documenti). Le Istituzioni musulmane italiane firmatarie del Patto assumono l'impegno di promuovere un esercizio delle libertà di religione, individuali e collettive, in armonia con i principi costituzionali e con le norme giuridiche vigenti in Italia.

Principles, che impongono agli Stati il dovere di tutelare «la pratica di culture e religioni diverse», a condizione che queste «non confliggano con altri diritti inviolabili europei o con le leggi nazionali» (*CBP* 8). La *Carta*, inoltre, non si presenta come un documento imposto dall'alto e meramente formale, bensì come un "patto" accettato e condiviso dai rappresentanti delle diverse comunità di stranieri e religiose presenti sul territorio italiano [34].

Un aspetto problematico che può riguardare documenti di questa natura è la discrepanza che può esistere tra la rappresentazione idealizzata del Paese, da un lato, e la realtà quotidiana delle esperienze vissute, dall'altro: la mancata o difforme applicazione dei valori comuni che vengono posti alla base della convivenza civile e del patto come, ad esempio, l'eguaglianza, potrebbe infatti compromettere la credibilità di tali accordi e alimentare un senso di disaffezione nei confronti della società di accoglienza. Pertanto, i valori espressi nella *Carta* non dovrebbero essere presentati come già pienamente realizzati ma piuttosto come obiettivi in corso di attuazione, evidenziando le imperfezioni, i limiti e le contraddizioni che esistono all'interno della società, nonché i contesti storici che li hanno generati [35]. Da parte sua, la *Carta dei valori* fa giustamente «riferimento all'impegno dell'Italia in vista del conseguimento di determinati risultati (eguaglianza dei diritti, occupazione, problemi abitativi, ecc.)» e riconosce chiaramente il carattere *programmatico* delle sue enunciazioni, soprattutto per quanto riguarda gli obiettivi di carattere sociale, in considerazione del fatto che essi «richiedono tempo per essere pienamente raggiunti nell'ambito di una crescita socio-economica che riguardi la società italiana nel suo complesso» [36]. In tale prospettiva, la *Carta* va intesa anche come un impegno a realizzare un progressivo miglioramento delle condizioni di vita e di integrazione.

A questo proposito, si rivelano particolarmente utili i suggerimenti avanzati da alcuni autori che propongono di creare contesti, tanto all'interno dei corsi formativi quanto nella vita sociale, in cui venga mostrato concretamente come e perché i valori funzionano nella vita quotidiana degli individui [37], favorendo al contempo «il dibattito sul significato, l'applicazione e le contraddizioni dei

[34] Ciò è dimostrato dalla partecipazione al Comitato scientifico incaricato della redazione della *Carta* di rappresentanti islamici come Khaled Fuad Allam e Adadne Mokrani, nonché Francesco Zannini, Docente presso il Pontificio istituto di studi arabi e islamistica di Roma. Essa è stata accettata da sette organizzazioni islamiche come base per stabilire relazioni con lo stato in vista del raggiungimento di un'intesa ai sensi dell'art. 8 della Costituzione.

[35] N. Banulescu-Bogdan-M. Benton, *In Search of Common Values amid Large-Scale Immigrant Integration Pressures*, Migration Policy Institute Europe, Brussels, 2017, p. 17.

[36] C. Cardia, *Commento* alla *Carta dei valori*, p. 3.

[37] N. Banulescu-Bogdan-M. Benton, *op. cit.*, p. 14.

valori astratti»[38]. In tale ottica, il confronto critico sulle implicazioni pratiche e le potenziali contraddizioni dei valori stessi risultano fondamentali per una comprensione più profonda e per un'adozione consapevole degli stessi.

Resta da chiarire se la richiesta di adesione a determinati valori sia compatibile con i principi dello stato di diritto, e in particolare con il diritto della Ue. I *Common Basic Principles* stabiliscono che l'integrazione «implica il rispetto dei valori fondamentali della Unione europea» (*CBP* 2). L'introduzione di tale requisito, unitamente alla richiesta della conoscenza di base della lingua, della storia e delle istituzioni della società ospitante (*CBP* 4), è stata interpretata come una svolta nelle politiche di integrazione della Ue, avendo introdotto un nesso tra l'integrazione e l'adozione di "valori" che era assente nel precedente approccio all'integrazione, incentrato sul *paradigma di equità e parità di trattamento* delineato nel *Programma di Tampere* del 1999[39]. Con i *Common Basic Principles* è di fatto emerso un nuovo paradigma, che collega più esplicitamente l'integrazione all'adozione di valori condivisi. Anche la *Comunicazione della Commissione* (2005) relativa al *Common Framework for the Integration of non-EU Nationals*[40], che mira ad approfondire e sviluppare i *Com-*

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[38] P. Mouritsen-A. Jaeger, *Designing Civic Education for Diverse Societies: Models, tradeoffs, and outcomes*, Migration Policy Institute Europe, Brussels, 2018, p. 15. Si veda il progetto finanziato dalla Ue, *Euroregions, Migration and Integration* (EUMINT) che utilizza un approccio *bottom-up*, partecipativo e di apprendimento attivo e offre un materiale didattico interattivo innovativo per organizzare incontri di integrazione civica in cui rifugiati, richiedenti asilo e membri della popolazione locale discutono i valori chiave dell'Unione europea (R. Medda-Windischer-A. Carlà, *European Civic Integration and Common Values: The Experience of a Board Game*, in *Peace Human Rights Governance*, 5, 1, 2021, pp. 9-39).

[39] Conclusioni della Presidenza, *Programma di Tampere*, 15-16 ottobre 1999. III. *Equo trattamento dei cittadini dei paesi terzi*: 18. «L'Unione europea deve garantire l'equo trattamento dei cittadini dei paesi terzi che soggiornano legalmente nel territorio degli Stati membri. Una politica di integrazione più incisiva dovrebbe mirare a garantire loro diritti e obblighi analoghi a quelli dei cittadini dell'Ue. Essa dovrebbe inoltre rafforzare la non discriminazione nella vita economica, sociale e culturale e prevedere l'elaborazione di misure contro il razzismo e la xenofobia»; 21. «Occorre ravvicinare lo status giuridico dei cittadini dei paesi terzi a quello dei cittadini degli Stati membri. Alle persone che hanno soggiornato legalmente in uno Stato membro per un periodo di tempo da definire e che sono in possesso di un permesso di soggiorno di lunga durata dovrebbe essere garantita in tale Stato membro una serie di diritti uniformi il più possibile simili a quelli di cui beneficiano i cittadini dell'Ue, ad esempio il diritto a ottenere la residenza, ricevere un'istruzione, esercitare un'attività in qualità di lavoratore dipendente o autonomo; va inoltre riconosciuto il principio della non discriminazione rispetto ai cittadini dello Stato di soggiorno. Il Consiglio europeo approva l'obiettivo di offrire ai cittadini dei paesi terzi che soggiornano legalmente in maniera prolungata l'opportunità di ottenere la cittadinanza dello Stato membro in cui risiedono» (https://www.europarl.europa.eu/summits/tam_it.htm) (ultimo accesso: 26 ottobre 2024).

[40] *Comunicazione* della Commissione al Consiglio, al Parlamento europeo, al Comitato

mon Basic Principles e che propone misure concrete per la loro applicazione, sia a livello nazionale che a livello europeo[41], in relazione alla questione dei valori, raccomanda agli Stati membri non solo di rafforzare «la componente di integrazione nelle procedure di ammissione», ma anche di garantire che «tutti i residenti, compresi gli immigrati, comprendano, rispettino e beneficino dei valori comuni europei e nazionali»[42]. Tale approccio, dunque, propone un modello di integrazione che non solo implica il rispetto delle leggi, ma esige anche una comprensione condivisa dei valori che definiscono l'identità della comunità politica europea.

Il *Programma di Stoccolma* (2010)[43] conferma il nesso tra integrazione e valori, sottolineando che «l'interconnessione tra migrazione e integrazione rimane cruciale, tra l'altro per quanto riguarda i valori fondamentali dell'Unione». Esso fornisce una sintesi dei "valori" dell'Ue[44], quali il rispetto per la persona umana, la dignità umana e per gli altri diritti sanciti dalla *Carta dei diritti fondamentali* e dalla *Convenzione europea dei diritti dell'uomo*; valori incompatibili con i crimini contro l'umanità, genocidio e crimini di guerra; la democrazia, i diritti umani e lo Stato di diritto. Nonostante le critiche mosse all'approccio civico dell'Ue, è innegabile che i valori evocati non richiedano una assimilazione o omologazione culturale, ma piuttosto l'accettazione dei principi universali che tutelano i diritti umani e la dignità umana.

Si può, a mio avviso, sostenere lo stesso anche a proposito della *Carta dei valori* italiana che, in fondo, si propone esplicitamente di difendere e di promuove i valori fondanti della Costituzione del 1947, tra cui l'eguaglianza, la libertà e la dignità della persona, la giustizia, la democrazia, la solidarietà, la

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economico e sociale europeo e al Comitato delle regioni del 1° settembre 2005 – *Un'agenda comune per l'integrazione – Quadro per l'integrazione dei cittadini di paesi terzi nell'Unione europea* [COM(2005) 389 def].

[41] Ad esempio, report annuali e pubblicazioni sull'integrazione che contengono esempi di buone pratiche e lezioni apprese dai responsabili politici degli Stati membri.

[42] *Comunicazione* della Commissione al Consiglio, *op. cit*.

[43] *Il Programma di Stoccolma – Un'Europa aperta e sicura al servizio e a tutela dei cittadini*, Documento del Consiglio, OJ C 115, 04.05.2010.

[44] Il *Programma di Stoccolma* sembra quindi fondere il paradigma dell'equità e della parità di trattamento del *Programma di Tampere* con la più recente enfasi sul dovere da parte dei migranti di adottare i valori della Ue, sviluppata nel corso del *Programma dell'Aia*. Sulla presenza di un paradigma di integrazione misto nel *Programma di Stoccolma*, si veda C. Murphy (*op. cit*., p. 160 ss.). Si veda anche l'*Agenda Europea per l'Integrazione dei cittadini di paesi terzi* del 2011 in cui si afferma che «l'integrazione implica che la società ospite si impegni a dare una sistemazione agli immigrati, a rispettarne i diritti e la cultura e a informarli dei loro obblighi. Allo stesso tempo, gli immigrati devono dar prova di voler integrarsi e rispettare le regole e i valori della società in cui vivono» (*op. cit*., p. 4).

laicità, il pluralismo culturale e religioso, la pace, il rifiuto di ogni forma di totalitarismo e di antisemitismo. La *Carta*, inoltre, nell'ottica di garantire il pieno esercizio delle libertà e dei diritti fondamentali, non si limita a enunciare valori, principi e doveri, ma si propone anche un obiettivo informativo. Infatti, mira a far conoscere agli stranieri gli strumenti di tutela (sia sostanziale che processuale) previsti dall'ordinamento giuridico italiano in materia di diritti e libertà. Allo stesso tempo, svolge una funzione pedagogica e promozionale, poiché intende sensibilizzare gli immigrati riguardo all'esistenza, alla rilevanza valoriale e alla portata giuridica delle diverse forme di libertà riconosciute dall'ordinamento, quali, ad esempio, la libertà di opinione, la libertà religiosa, e il diritto all'istruzione.

In questa prospettiva e coerentemente con le disposizioni del diritto europeo in materia, la *Carta* sollecita i suoi destinatari a "fare propri" i valori richiamati, li invita a condividerli in maniera leale, coerente e responsabile, e a riconoscerli quali capisaldi del *particolare* modello di convivenza che caratterizza la società civile italiana[45]. Il modello di integrazione civica, infatti, prevede che il processo di inclusione all'interno di una società ricevente si configuri come un impegno attivo da parte dell'individuo a conoscere, comprendere e assimilare gli elementi che fanno di un individuo il/la cittadino/a di una *determinata* comunità o nazione, con la sua lingua, la sua storia, la sua cultura, le sue istituzioni, i suoi valori.

Tale richiesta appare compatibile con il valore del pluralismo culturale e religioso purché appartenga all'autodefinizione e autocomprensione della comunità o nazione ricevente il valore dell'apertura nei confronti della diversità. Del resto, il motto dell'Unione europea, "unità nella diversità", implica necessariamente il riconoscimento che le numerose e variegate culture, tradizioni e lingue presenti sul continente costituiscono una risorsa imprescindibile e un valore da difendere.

Anche il diritto internazionale, per parte sua, riconosce la centralità della cittadinanza e sottolinea l'importanza di diventare parte di una nuova entità politica e sociale. Tale prospettiva ha avuto particolare rilievo nel caso *Nottebohm*, in cui la Corte internazionale di giustizia ha evidenziato che:

> «La naturalizzazione non è una questione da prendere alla leggera. La sua richiesta e ottenimento non rappresentano eventi frequenti nel corso della vita di

[45] Si vedano anche gli *EMMI* nei quali si sottolinea che, sebbene si debbano tenere in considerazione i diversi gradi di educazione dei migranti, tuttavia, a prescindere dalle diverse capacità, «è importante trasmettere una comprensione delle istituzioni e della struttura della società di accoglienza, nonché del significato dei diritti civili e del diritto all'autodeterminazione dell'individuo» (p. 16).

> un essere umano. Essa implica la rottura di un legame di lealtà preesistente e l'instaurazione di un nuovo legame di lealtà» [46].

Con ciò si sottolinea che la cittadinanza è una dimensione essenziale, non solo giuridica, ma anche etico-politica, che segna un passaggio significativo nell'identità e nella fedeltà dell'individuo verso la comunità che lo/la accoglie.

In conclusione, si può affermare che, nel proporre l'aderenza ai propri valori, la normativa nazionale debba sempre fare riferimento ai principi fondamentali sanciti dalla Costituzione e che, qualora venga richiesto il rispetto di determinate pratiche sociali, ciò debba comunque essere fatto in conformità ai principi enunciati nell'articolo 2 del Trattato dell'Unione europea, che recita così:

> «L'Unione si fonda sui valori del rispetto della dignità umana, della libertà, della democrazia, dell'uguaglianza, dello Stato di diritto e del rispetto dei diritti umani, *compresi i diritti delle persone appartenenti a minoranze*. Questi valori sono comuni agli Stati membri in una società caratterizzata dal pluralismo, dalla non discriminazione, dalla tolleranza, dalla giustizia, dalla solidarietà e dalla parità tra donne e uomini».

Pertanto, ogni legislazione nazionale che promuova o imponga valori e pratiche sociali deve essere orientata al rispetto dei principi universalmente riconosciuti, in particolare quelli che tutelano i diritti fondamentali e la dignità umana, affinché l'adesione a tali valori avvenga in un contesto di pluralismo e non discriminazione, come richiesto dall'ordinamento giuridico sovranazionale.

4. *L'Accordo di integrazione e lo stato di diritto: il principio di non discriminazione*

Finora, si è valutata la compatibilità dell'*Accordo di integrazione* con il principio dello stato di diritto, con particolare riferimento alla sua conformità al diritto dell'Unione europea rispetto alla definizione di integrazione, ai contenuti dei test e dei corsi e alla richiesta di aderenza ad alcuni valori comuni.

In questo paragrafo l'analisi si concentra su un aspetto più specifico: la conformità dell'*Accordo* al diritto dell'Ue per quanto riguarda il rispetto dell'art. 14 della *Convenzione europea dei diritti umani*, che stabilisce il divieto di discriminazione.

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[46] Caso *Nottebohm*, giudizio del 6 aprile 1955, I.C.J. Reports 1955, p. 24.

L'obiettivo dell'articolo 14 è di fornire protezione contro qualsiasi forma di discriminazione, nell'esercizio dei diritti e delle libertà garantiti dalla Convenzione stessa, sulla base di motivazioni quali sesso, razza, colore, lingua, religione, le opinioni politiche o di altro genere, origine nazionale o sociale, appartenenza a una minoranza nazionale, ricchezza, nascita o qualsiasi altra condizione. Tuttavia, come è stato osservato, «una volta che l'applicazione dei test non discrimini direttamente determinati gruppi (ad esempio, imponendo la somministrazione dei test di integrazione esclusivamente a persone che appartengono a una certa religione, a donne o a individui di specifiche nazionalità), gli Stati possono godere di un ampio margine di discrezionalità nell'introdurre i test di integrazione nella loro legislazione»[47]. Per alcuni gruppi particolari, come rifugiati e apolidi, «tale margine di discrezionalità è più ridotto, in quanto gli Stati sono tenuti, in generale, a promuovere l'acquisizione della cittadinanza e, di conseguenza, i test di integrazione che ostacolano tale processo risultano problematici»[48]. Dunque, è fondamentale che test siano concepiti e utilizzati esclusivamente come uno strumento di integrazione per i non cittadini, e non come uno strumento discriminatorio tramite il quale uno Stato seleziona i propri cittadini. Tuttavia, resta difficile determinare in modo inequivocabile sia le reali motivazioni alla base della introduzione dei test, sia i loro effetti. Di conseguenza, risulta complicato dimostrare l'esistenza di discriminazioni, soprattutto quando i governi tendono a giustificare politiche più restrittive facendo riferimento ai presunti benefici che queste potrebbero apportare ai migranti stessi. In tale contesto, l'accettazione di principio dei test di integrazione e linguistici da parte del diritto internazionale ed europeo, unita all'ampio margine di discrezionalità generalmente concesso ai governi in materia di cittadinanza, consente agli Stati di eludere in modo relativamente facile la questione della discriminazione indiretta.

Entro questo quadro, occorre valutare se l'*Accordo* generi effetti diretti o indiretti nella sua applicazione che violano l'articolo 14 della *Convenzione*, ad esempio, imponendo oneri eccessivi a determinati migranti o categorie di migranti, per via dei costi e delle modalità di erogazione dei corsi e dei test, del livello linguistico richiesto, o delle conseguenze del mancato adempimento dei requisiti previsti.

La *Risoluzione 1973* (2014)[49] dell'Assemblea parlamentare del Consiglio d'Europa stabilisce che i livelli di competenza linguistica richiesti dai test de-

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[47] C. Murphy, *op. cit.*, p. 235.

[48] *Ibidem*.

[49] Adottata dalla Assemblea il 29 gennaio 2014 sulla base del report di Tineke Strik, *Integration tests: helping or hindering integration?*, Committee on Migration, Refugees and Displaced Persons, Doc. 1336, 4 dicembre 2013.

vono essere ragionevoli e differenziati; i test dovrebbero tenere conto delle diverse esigenze e capacità, come quelle di chi non ha un elevato livello di alfabetizzazione o di istruzione, nonché dei migranti in situazioni di vulnerabilità, come gli anziani o i rifugiati. Laddove possibile, lo Stato dovrebbe finanziare corsi di preparazione gratuiti per i migranti e adottare misure adeguate a evitare che i tassi di fallimento nei test, che potrebbero essere elevati, abbiano effetti discriminatori. È essenziale che i fallimenti non conducano all'esclusione sociale o a uno stato di limbo per coloro che non riescono a superarli, né che comportino la privazione di diritti fondamentali, quali il ricongiungimento familiare, il diritto di residenza permanente o l'accesso alla cittadinanza.

L'*Accordo di integrazione* richiede un requisito linguistico di livello A2, conformemente alla *Risoluzione 1973.* Inoltre, concede un periodo di due anni per il conseguimento di tale livello e offre corsi gratuiti di lingua e di educazione civica, nonché materiali preparatori gratuiti, nella lingua scelta dallo/a straniero/a. In caso di mancato superamento dei test di integrazione, gli/le immigrati/e e i/le rifugiati/e non vengono esclusi/e dal godimento dei loro diritti fondamentali, come quelli sanciti dall'Articolo 8 della *Convenzione europea dei diritti umani* e dalla *Carta sociale europea*. In linea con la *Risoluzione*, l'*Accordo* esplicita le categorie di persone che sono esentate dall'obbligo di sottoscriverlo [50].

Tuttavia, alcune raccomandazioni dell'Assemblea parlamentare del Consiglio di Europa risultano disattese. Innanzitutto, non sempre corsi e test sono facilmente accessibili o adeguatamente tarati sulle esigenze specifiche, personalizzate e di genere dei migranti [51]. Inoltre, come è stato osservato, il sistema di decurtazione dei punti risulta problematico, perché viene applicato, in caso di provvedimenti giudiziari penali e di misure di sicurezza personale previste dal Codice penale, anche in presenza di condanne non definitive [52]. Ciò appare

[50] Inoltre, non si procede alla sottoscrizione dell'*Accordo* per: *a*) i minori non accompagnati affidati ovvero sottoposti a tutela, per i quali l'accordo è sostituito dal completamento del progetto di integrazione sociale e civile di cui all'art. 32, comma 1-*bis*, del testo unico; *b*) le vittime della tratta di persone, di violenza o di grave sfruttamento, per le quali l'accordo è sostituito dal completamento del programma di assistenza ed integrazione sociale di cui all'art. 18 del *Tui* (*Regolamento concernente la disciplina dell'accordo di integrazione tra lo straniero e lo Stato*, art. 8).

[51] In alcuni paesi il costo degli esami di lingua/educazione civica è sostenuto dagli stessi cittadini di paesi terzi (Grecia, Russia e Regno Unito). Costi troppo elevati o tariffe sproporzionate possono ostacolare l'integrazione di alcuni richiedenti e precludere il ricongiungimento familiare e dunque il godimento del diritto al rispetto della propria vita familiare e privata.

[52] Si veda punto *a*): «la pronuncia di provvedimenti giudiziari penali di condanna anche non definitivi, compresi quelli adottati a seguito di applicazione della pena su richiesta ai sensi dell'articolo 444 del codice di procedura penale»; *b*) «l'applicazione anche non definitiva di

in contrasto, oltre che con il divieto di discriminazione, anche con il principio della presunzione di innocenza e con il principio del diritto di difesa [53]. Qualora il numero dei crediti finali risulti pari o inferiore a zero, l'accordo viene risolto per inadempimento, con conseguente revoca del permesso di soggiorno o rifiuto del rinnovo, e l'espulsione dello straniero dal territorio nazionale. Sebbene tale misura sia severa, essa può essere sospesa [54] qualora si verifichi uno dei casi di divieto di espulsione previsti dal *Tui* [55], o nel caso in cui, riguardo all'obbligo di istruzione dei figli minori, venga dimostrato l'impegno ad adempierlo [56].

Il sistema di permesso di soggiorno basato sui punti resta comunque discutibile, poiché può dar luogo a forme di discriminazione indiretta nei confronti di individui fragili e vulnerabili, mentre, al contrario, potrebbe avvantaggiare in modo indebito coloro che si trovano in una posizione privilegiata e che riescono più facilmente a raggiungere i trenta crediti necessari per adempiere agli obblighi previsti dall'*Accordo*. Ad esempio, potrebbe verificarsi il caso di persone che commettono illeciti senza rischiare l'espulsione, mentre individui in situazioni più vulnerabili potrebbero essere penalizzati senza la possibilità di superare gli ostacoli linguistici o di integrazione. Questo meccanismo potrebbe rappresentare dunque una forma di discriminazione indiretta che merita una riforma, se non una revisione complessiva, dell'intero sistema di accreditamento a punti.

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misure di sicurezza personali previste dal codice penale o da altre disposizioni di legge»; *c*) «l'irrogazione definitiva di sanzioni pecuniarie di importo non inferiore a 10 mila euro, in relazione a illeciti amministrativi e tributari».

[53] P. Cuttitta, *L'accordo di integrazione come caso di discriminazione istituzionale in Italia*, in V. Carbone-E. Gargiulo-M. Russo Spena (a cura di), *I confini dell'inclusione. La 'Civic integration' tra selezione e disciplinamento dei corpi migranti*, DeriveApprodi, Roma, 2018, pp. 171-186; pp. 271-272.

[54] *Regolamento concernente la disciplina dell'accordo di integrazione tra lo straniero e lo Stato*, art. 6, comma 8.

[55] Nell'art. 4-*bis* del *Tui* sono previste delle esenzioni: «La perdita integrale dei crediti determina la revoca del permesso di soggiorno e l'espulsione dello straniero dal territorio dello Stato, eseguita dal questore secondo le modalità di cui all'articolo 13, comma 4, ad eccezione dello straniero titolare di permesso di soggiorno per asilo, per protezione sussidiaria, per i motivi di cui all'articolo 32, comma 3, del decreto legislativo 28 gennaio 2008, n. 25, per motivi familiari, di permesso di soggiorno Ue per soggiornanti di lungo periodo, di carta di soggiorno per familiare straniero di cittadino dell'Unione europea, nonché dello straniero titolare di altro permesso di soggiorno che ha esercitato il diritto al ricongiungimento familiare».

[56] *Regolamento concernente la disciplina dell'accordo di integrazione tra lo straniero e lo Stato*, art. 6, comma 1.

5. *Osservazioni conclusive*

Per essere davvero tale l'integrazione deve comprendere diverse dimensioni e, soprattutto, deve fondarsi sul rispetto dei diritti fondamentali degli stranieri da parte del paese ricevente.

Il Quadro della Ue sull'integrazione promuove un approccio olistico che comprende le dimensioni sociali, economiche e politiche, oltre a quelle civico-culturali. Inoltre, offre un modello misto di integrazione, che combina il *paradigma dell'equità* e *della parità di trattamento*, che si fonda sui diritti umani (*Programma di Tampere*), con il *paradigma civico* (*Common Basic Principles*, *Programma di Stoccolma*) che richiede agli immigrati di accettare un insieme minimo di valori condivisi. In questo senso, l'*Agenda europea per l'integrazione dei cittadini terzi* (2011) della Commissione europea sembra riflettere questa duplice impostazione [57].

La tutela dei diritti fondamentali dei migranti rappresenta un prerequisito essenziale per una integrazione effettiva, in quanto li colloca su un piano di parità con i cittadini dello Stato ricevente. I trattati sui diritti umani costituiscono le pietre miliari dell'integrazione basata sui diritti e il punto di partenza per lo sviluppo di una strategia di integrazione inclusiva. Più in generale, i principi di non discriminazione e di uguaglianza, che costituiscono il filo conduttore dei trattati, stanno a fondamento del paradigma di integrazione centrato sui diritti umani, all'interno del quale deve essere inquadrata qualsiasi discussione sull'integrazione civica a livello nazionale [58].

D'altra parte, i modelli di integrazione devono non solo tutelare i diritti dei migranti, ma anche favorire la coesione e la stabilità delle società riceventi. Le politiche di integrazione civica, se non supportate da un forte impegno sui diritti e sul pluralismo, rischiano di risultare controproducenti e di non promuovere una società davvero integrata. D'altra parte, le politiche che pongono al centro i diritti e il pluralismo potrebbero compromettere la coesione sociale, se non sono accompagnate da strategie di integrazione civica efficaci [59]. Una

[57] La Commissione formula raccomandazioni agli Stati membri affinché adottino iniziative volte, tra le altre cose, a perfezionare i metodi per il riconoscimento delle qualifiche e delle competenze dei migranti; a favorire la partecipazione degli immigrati con politiche attive del mercato del lavoro; a predisporre programmi introduttivi per i nuovi arrivati, come corsi di lingua e di educazione civica; ad assicurare il rispetto del principio della parità di trattamento. Per un quadro sui documenti rilevanti si veda https://leg16.camera.it/465?area=10&tema=811&Integrazione.

[58] Ciò si riflette nello sviluppo di un nascente paradigma di integrazione nel lavoro della CPR, del CESCR e del Comitato CERD, basato sulla non discriminazione e sulla progressiva realizzazione dell'uguaglianza per i migranti (si veda C. Murphy, *op. cit*., parte III).

[59] K. Banting-W. Kymlicka, *Is there really a retreat from multiculturalism policies? New*

combinazione di entrambi questi approcci risulta quindi essere necessaria per affrontare le sfide dell'integrazione dei migranti. Questo sembra essere lo spirito che anima il *Piano d'azione per l'integrazione e l'inclusione* (2021-2027) [60] il quale, ribadendo l'importanza di garantire pari diritti ai migranti e di contrastare la discriminazione, sottolinea la necessità di una formazione linguistica adeguata e «dell'acquisizione delle leggi, della cultura e dei valori della società di accoglienza, affinché i migranti possano partecipare pienamente alla società che li accoglie» (p. 10) e, a questo fine, di rimuovere le barriere che impediscono, in particolare alle donne [61], l'accesso alla formazione e al lavoro.

Tornando, in particolare, alla questione dello stato di diritto, l'applicazione delle garanzie giuridiche e la protezione effettiva dei diritti umani sono concetti strettamente interconnessi. Come evidenziato nella *Checklist* della *Commissione di Venezia*, «lo stato di diritto risulterebbe un 'guscio vuoto' se non consentisse l'accesso ai diritti umani, mentre la protezione dei diritti umani trova la sua piena realizzazione esclusivamente nel rispetto dello stato di diritto» [62]. Tuttavia, quest'ultimo ha bisogno di una solida base culturale e politica per prosperare. A questo proposito è opportuno ricordare gli artt. 42 e 43 della *Checklist* della *Commissione di Venezia*. L'art. 42 afferma che

> «Gli elementi contestuali dello stato di diritto non si limitano ai soli fattori giuridici. La presenza (o l'assenza) di una cultura politica e giuridica condivisa all'interno di una società e il rapporto tra tale cultura e l'ordinamento giuridico, giocano un ruolo fondamentale nel determinare in che misura e con quale livello di concretezza i vari elementi dello stato di diritto debbano essere esplicitamente enunciati nella legge scritta».

L'art. 43 ribadisce che

> «Lo stato di diritto può prosperare solo in un Paese in cui i suoi abitanti si sentono collettivamente responsabili della sua attuazione, facendo di esso una componente integrante della propria cultura giuridica, politica e sociale».

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evidence from the multiculturalism policy index, in *Comparative European Politics*, 11, 5, 2013, pp. 577-598: p. 592.

[60] Si veda la *Comunicazione* della Commissione al Parlamento europeo, al Consiglio, al Comitato economico e sociale europeo e al Comitato delle regioni, *Piano d'azione per l'integrazione e l'inclusione 2021-2027*, Bruxelles, 24 novembre 2020 COM(2020) 758 final.

[61] Il *Piano d'azione* 2021-2027 riconosce la necessità di promuovere un'azione più incisiva rispetto a quella del *Piano* del 2016, per favorire l'integrazione delle donne migranti (p. 5).

[62] *Rule of Law Checklist*, cit., art. 31, p. 13.

Quindi, affinché un modello di integrazione sia legittimo ed efficace, deve essere non solo coerente con lo stato di diritto, ma anche in grado di contribuire a proteggerlo e a rafforzare una cultura politica e giuridica condivisa che lo sostenga. Di fatto, quanto maggiore è l'influenza della sovra-nazionalizzazione dei diritti fondamentali degli individui e dei doveri degli Stati, attraverso il diritto internazionale dei diritti umani e il diritto della Unione europea, sulla politica di integrazione nazionale, tanto più diventa necessario individuare strumenti di integrazione che favoriscano lo sviluppo e la conservazione di una cultura politica e giuridica condivisa, in grado di sostenere lo stato di diritto all'interno di Stati multiculturali e multietnici.

In conclusione, se si vuole difendere e sviluppare ulteriormente un modello di integrazione basato sui diritti, orientato a favorire l'accesso alla cittadinanza; se si vuole concepire quest'ultima come uno strumento di integrazione, piuttosto che come un premio per il completamento di un processo di integrazione, ossia come un diritto individuale anziché un privilegio concesso dallo Stato; oppure, se si desidera fare riferimento a concezioni giuridiche alternative della cittadinanza, fondate sulla promessa cosmopolita del diritto internazionale o sulla forma eterogenea di cittadinanza sancita dall'art. 20 del *Trattato sul funzionamento dell'Unione europea*; se si desidera costruire e preservare società aperte democratiche e plurali; se si vuole favorire il godimento dei diritti politici dei migranti anche prima dell'acquisizione della cittadinanza, seguendo l'indicazione degli *EMMI* di «superare le barriere legislative o strutturali che ostacolano la partecipazione politica degli immigrati» e di «coinvolgere gli immigrati e i loro rappresentanti nello sviluppo e nell'attuazione delle politiche» [63]; allora, sarà tanto più necessario investire nella progettazione di politiche di integrazione e di strumenti che sostengano e rafforzino una cultura politica e giuridica capace di tutelare lo stato di diritto, salvaguardando così anche la democrazia in Stati liberal-democratici e multiculturali. Come esplicitato nel Preambolo dello Statuto del Consiglio di Europa, insieme alla libertà individuale e alla libertà politica, lo stato di diritto è uno dei principi «dai quali dipende la vera [democrazia]» [64].

È in questione se il modello di integrazione civica sia sufficiente per conseguire obiettivi così complessi e impegnativi. Anche se tale modello e le sue pratiche non violassero i diritti umani né il principio di non discriminazione, e producesse effetti inclusivi anziché selettivi, sarebbe ragionevole dubitare del fatto che la sola *conoscenza* della lingua e della cultura della società ricevente, insieme alla adesione a valori comuni, garantiscano una vera e piena integra-

[63] *EMMI*, *op. cit*., p. 53.

[64] Statuto del Consiglio d'Europa, Londra, 5 maggio 1949. Sul rapporto tra stato di diritto e democrazia si veda anche la *Rule of Law Checklist*, ai punti: 5, 11, 23, 33, 50, 51.

zione. Le politiche di integrazione civica possono certamente «fornire le competenze [...] ma non possono imporre la pratica»: resta sempre aperta la possibilità che le persone scelgano di non integrarsi o di farlo solo formalmente [65].

Per tale motivo ritengo particolarmente importante investire nel sistema educativo come strumento fondamentale per la formazione di cittadini e cittadine consapevoli di un paese liberal-democratico e multiculturale, e credo che questo sia lo spirito della proposta di acquisizione della cittadinanza attraverso lo *ius scholae* [66]. Inoltre, seguendo l'insegnamento di Norberto Bobbio, ritengo essenziale sviluppare la democrazia non solo nell'ambito politico, ma anche in quello civile e sociale. Questo significa incrementare sia la quantità che la qualità delle pratiche democratiche, che dovrebbero coinvolgere anche i migranti e le migranti nei luoghi di lavoro, nelle associazioni, nelle scuole, nei quartieri, ovunque sia possibile creare uno spazio pubblico condiviso di confronto e di deliberazione collettiva [67]. Come ammonisce il filosofo, la democrazia non è semplicemente una forma di governo, ma un modo di vivere insieme, costruito attraverso il coinvolgimento attivo di tutti i membri della società, senza alcuna esclusione. Inoltre, egli aggiunge, la vera misura di un progresso democratico in un Paese, non risiede solo nel numero di coloro che hanno il diritto di partecipare alle decisioni che li riguardano ma anche nel numero «degli *spazi* in cui possono esercitare questo diritto» [68] (corsivo mio).

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[65] S.W. Goodman, *Immigration and Membership politics in Western Europe*, cit., p. 241.

[66] Si veda il *Piano d'azione per l'integrazione e l'inclusione* (2021-2027), cit.: «Dall'educazione e cura della prima infanzia (Ecec) all'istruzione terziaria e per adulti e all'istruzione non formale, l'istruzione e la formazione costituiscono la base per una partecipazione riuscita alla società e sono tra gli strumenti più potenti per costruire società più inclusive» […] «Le scuole hanno il potenziale per essere veri e propri poli di integrazione per i minori e le loro famiglie […] Insegnando la democrazia, la cittadinanza e le capacità di pensiero critico, le scuole svolgono un ruolo importante nel prevenire l'attrazione dei giovani verso le ideologie, le organizzazioni e i movimenti estremisti violenti […] Imparare la lingua del paese ospitante è fondamentale per integrarsi con successo» (pp. 9-10).

[67] In questa direzione si veda anche *Piano d'azione per l'integrazione e l'inclusione* (2021-2027), cit.: «L'inclusione dei migranti e dei cittadini dell'Ue provenienti da un contesto migratorio e la promozione della loro partecipazione attiva ai processi consultivi e decisionali possono contribuire alla loro emancipazione e garantire che le politiche di integrazione e di inclusione siano più efficaci e riflettano i bisogni reali». […] «Che sia a scuola, in ufficio, in un circolo sportivo o nel quartiere, mettere a disposizione luoghi e opportunità di incontro e di interazione per i migranti e le comunità locali è un forte mezzo di inclusione e di maggiore coesione sociale» (p. 8).

[68] N. Bobbio, *Il futuro della democrazia*, Einaudi, Torino, 1997, p. 16.

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DEMOCRATIC BACKSLIDING IN THE EUROPEAN UNION

Marco Siddi and *Barbara Gaweda* [*]

1. *Introduction*

Much scholarly literature concurs in arguing that the European Union has been facing a complex set of crises with both a domestic dimension – including for instance economic crisis, a refugee reception crisis, the effects of climate change on EU territory – and an external dimension – encompassing the Russo-Ukrainian war, war in the Middle East and the Sahel, growing US-China competition and the ensuing pressure to abandon long-held liberal approaches to international trade and governance. This picture is compounded by a crisis of democracy that has been more acute in some member states, such as Hungary and Poland, but is present throughout the Union. The crisis of democracy includes various aspects, from the subversion of the constitutional and juridical order (in the most extreme cases) to the rise of chauvinistic, far-right parties in numerous countries and threats to media freedom. While some of these challenges may be seen as part of normal, day-to-day politics, it is the depth and concomitance of many of them that represents a threat to democracy. The situation is complicated further by the palpable diffi-

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culties of mainstream political parties and the establishment to devise effective responses to the crises, including in the oldest and most consolidated European democratic systems.

Democracy is challenged also in large democratic systems beyond the EU, such as the United States and India, while it has already been curtailed or eradicated in countries like Russia and Türkiye, where it appeared to have made some inroads in recent decades. Indeed, the decline of democratic quality and the emergence of competitive authoritarian regimes have been among the main political phenomena across the globe over the past twenty years.[1] The regression of democratic standards in the EU – or democratic backsliding, to use one of the comprehensive terms devised by scholars to identify the issue – should be understood and analyzed against these broader international trends. Global trends and networks between authoritarian, illiberal and anti-democratic leaders facilitate the diffusion of democratic backsliding by creating certain "models" of leadership and governance styles. Most importantly, they are by no means confined to undemocratic countries, but have indeed spread to mainstream European political parties and even governing coalitions. Already in 2018, scholars argued that a "third wave of autocratization" was under way and mainly affected democracies with gradual setbacks under a legal *façade*.[2]

This chapter investigates key concepts used in recent scholarship to analyze and qualify democratic backsliding with a focus on Europe, but with an eye to broader global developments. After outlining the conceptual framework, it focuses more specifically on selected national case studies – Hungary, Poland, Italy – that are particularly relevant and representative of democratic backsliding, even if in different ways and to varying extent. A discussion of democratic backsliding at the European level is also presented, with references to trends in EU politics and to the current domestic politics of other member states.

2. *Conceptualising the crisis of democracy: illiberalism, populism, unpolitics and democratic backsliding*

Political scientists have used several terms and concepts to describe the crisis of democracy in the European Union. Recurrent links are made to political

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[1] R. Labanino-M. Dobbins, *Democratic Backsliding and Organized Interests in Central and Eastern Europe: An Introduction*, in *Politics and Governance*, 11, 1, 2023, p. 1, https://doi.org/10.17645/pag.v11i1.6532.

[2] A. Lührmann-S.I. Lindberg, *A third wave of autocratization is here: what is new about it?*, in *Democratization*, 26, 7, 2018, pp. 1095-1113.

ideologies or developments that are seen as hindering democracy, notably illiberalism and populism. The literature on both concepts is vast. Recent works on illiberalism focus on aspects including power concentration, an authoritarian drive of the state and a closed society.[3] Power concentration is advanced by rejecting constraints on the executive power and through the curtailment of political rights. The authoritarian drive involves the imposition of cultural standards by the state and the exclusion of groups that do not conform with the standards from participation in democratic deliberations (typically ethnic, sexual or religious minorities, as well as political opposition). A closed society entails the resistance to social changes, which are perceived as generated by external forces, and the rejection of norms that extend beyond a self-defined national or societal paradigm, for example universal human rights or various forms of global governance.

Attacks on equality policies have been an important feature of illiberalism and democratic backsliding. For example, gender equality policy has been attacked through a combination of strategies involving discursive delegitimation, policy dismantling and reframing, undermining of implementation and the erosion of accountability and inclusion mechanisms.[4] Central and Eastern Europe has been a laboratory of such policies, ranging from opposition to gender in Slovakia, gender policy backsliding in Romania, state anti-feminism in Poland and a combination of these measures in Hungary.[5]

The diffusion of conspiracy theories in recent years, particularly during the Covid-19 pandemic, has catalysed illiberal and anti-democratic ideas. Research has shown that conspiracy believers tend to be sceptical of open and diverse societies and favour "anything but" representative democracy;[6] this includes a preference for direct democracy, but also a positive predisposition to authoritarian decision-making Meanwhile, the contradictions between key elements of illiberalism and basic notions associated with democracy (the division of power, a liberal or inclusive state, an open society) has not prevented the emergence of terms such as "illiberal democracy" to describe regimes whose rulers win genu-

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[3] Z. Enyedi, *Concept and Varieties of Illiberalism*, in *Politics and Governance*, 12, 2024, https://doi.org/10.17645/pag.8521.

[4] A. Krizsán-C. Roggeband, *Reconfiguring state-movement relations in the context of De-democratization*, in *Social Politics*, 28, 3, 2021, pp. 604-628.

[5] M. Bogaards-A. Pető, *Gendering De-Democratization: Gender and Illiberalism in Post-Communist Europe*, in *Politics and Governance*, 10, 4, 2022, pp. 1-5, https://doi.org/10.17645/pag.v10i4.6245.

[6] A. Küppers, *Anything but Representative Democracy: Explaining Conspiracy Believers' Support for Direct Democracy and Technocracy*, in *Politics and Governance*, 12, 2024, https://doi.org/10.17645/p. 8582.

ine, democratic elections but then violate liberal freedoms. [7]

Populism is an often overused term to describe a perceived malaise of democratic systems, particularly in the political debate and in the representation of the relationship between governing establishment and citizens. The most defining idea of populism is the dichotomous and antagonistic construction of society as divided between a "pure people" (usually constructed as the underdogs) and a "corrupt elite". However, "people" and "elite" are empty (or floating) signifiers that can be filled with meaning by political actors based on their ideas. They can therefore be constructed differently depending on the social context, and their boundaries are in constant flux. [8] For instance, right-wing populists often make the people coincide with the ethnic nation, whereas left-wing populists adopt a more inclusive stance towards ethnic, sexual and other minorities. As Anna Grzymala-Busse argues, such appeals can be used as a legitimizing narrative to conduct an illiberal assault on formal and informal democratic norms and institutions to counteract the power of the so-called enemies of the people. [9] Here, "illiberal" refers to the rejection of constitutional guarantees for counter-majoritarian institutions, especially for particular groups and for minorities. [10]

Scholars have approached populism in three main ways: as a political ideology, as a political style and as a political strategy. Definitions of populism as a political ideology stress that it is a «thin-centred ideology», namely a loose bundle of ideas focusing on a selection of socio-political questions. [11] As the scope of thin-centred ideologies is limited, they are often compatible with other ideologies and can therefore be reconciled with traditional left– and right-wing thought. This also justifies the use of terminology such as "right-wing populists" and "left-wing populists". [12] Conceptualisations of populism as a political strategy shed light on its mechanisms of mobilisation and organisation and tend to focus on issues such as charismatic leadership and policies of

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[7] M.F. Plattner, *Illiberal Democracy and the Struggle on the Right*, in *Journal of Democracy*, 30, 1, 2019, p. 18.

[8] E. Laclau, *Populism: what's in a name?* In: F. Panizza (ed.) *Populism and the mirror of democracy*, Verso, London, 2005, pp. 32-49.

[9] A. Grzymala-Busse, *How Populists Rule: The Consequences for Democratic Governance*, in *Polity*, 51, 4, 2019, pp. 707-717.

[10] M.A. Vachudova, *Ethnopopulism and democratic backsliding in Central Europe*, in *East European Politics*, 36, 3, 2020, pp. 318-340.

[11] C. Mudde, *The populist Zeitgeist*, in *Government and Opposition*, 39, 4, 2004, pp. 542-563.

[12] C. Mudde-C.R. Kaltwasser, *Populism in Europe and the Americas*, Cambridge University Press, Cambridge, 2012.

redistribution. [13] A third way of approaching populism involves its conceptualisation as a discursive style, a way of making claims about politics. This approach relies mostly on interpretive discourse analysis of public texts (Laclau, 2005).

"Unpolitics" is a term that has appeared in scholarly debates more recently, often in relation to populism, and that also denotes an internal crisis of democratic systems. Paul Taggart (2018) defines the term as "'the repudiation of politics as solving conflict". In populist unpolitics, elites are seen as corrupt and politics as corrupting, so its norms are rejected. [14] Unpolitics involves the rejection of formal and informal rules of decision-making and of traditional means of ensuring compromises, often with the deliberate goal of perpetuating crises. [15] It is intrinsically linked to vote-seeking strategies, where populist governments use EU decision-making to mobilise domestic audiences. Ripoll Servent and Zaun (2024) detected these mechanisms at play in the way populist politicians and governments negotiated migration policy and refugee distribution at the EU level. While, according to them, EU institutions have so far proven resilient to it, unpolitics is gradually unsettling and hollowing out norms, institutions, and discourses. Further studies have detected unpolitics in numerous fields of EU decision making, from vaccine procurement to development policy, from financial policy to social and foreign and security policy. [16]

In this chapter, we use the term "democratic backsliding" to describe «the state-led debilitation or elimination of the political institutions sustaining an existing democracy». [17] It is a broad concept that subsumes the main aspects of de-democratization characterizing current illiberal, populist and unpolitics trends in European politics.

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[13] F. Panizza (ed.), *Populism and the mirror of democracy*, Verso, London, 2005.

[14] P. Taggart, *Populism and "unpolitics"*, in G. Fitzi-J. Mackert-B. Turner (eds.) *Populism and the Crisis of Democracy*, Routledge, London, 2018, p. 81.

[15] A. Ripoll Servent-N. Zaun,*Under Which Conditions Do Populist Governments Use Unpolitics in EU Decision-Making*, in *Politics and Governance*, 12, 2024, https://doi.org/10.17645/pag.8923.

[16] A. Ripoll Servent-N. Zaun, eds. *Unpolitics: The Role of Populist Governments in EU Decision-Making*, in *Politics and Governance*, 12, 2024, https://www.cogitatiopress.com/politicsandgovernance/issue/view/381.

[17] N. Bermeo, *On Democratic Backsliding*, in *Journal of Democracy*, 27, 1, 2016, pp. 5-19.

3. *Case studies of democratic backsliding*

As argued, democratic backsliding takes various forms and does not necessarily lead to dictatorship or full-scale authoritarianism. In Central and Eastern Europe (CEE), for instance, the nature of democratic backsliding and the re-engineering of political institutions are more subtle.[18] Some CEE governments have incrementally engaged in state capture, with governing parties (invariably on the right side of the political spectrum) monopolizing essential state institutions such as courts and public companies and using public power to pursue private interests. In Hungary, nationalist authoritarianism has been a defining feature of Viktor Orban's government since 2010. Between 2015 and 2023, governments led by the populist right-wing Law and Justice party in Poland (PiS) have attempted to imitate Hungary (as reflected in the common use of the term "Budapest on the Vistula" to describe the government's direction and the goals), initiating a rule of law crisis that has not been solved at the time of writing, despite the return to power of the more moderate, pro-European parties in late 2023. Under the leadership of Andrej Babiš's Ano party, Czech politics has displayed a newer brand of managerial populism based on allegedly technocratic and entrepreneurial principles.[19] In Slovakia, Robert Fico returned to the post of prime minister in October 2023 (after two earlier periods in the same post, in 2006-2010 and 2012-2018), having won the elections on a political platform shaped by social populism, nationalism, anti-liberalism and de facto pro-Russian positions. Upon taking office, Fico engaged in tirades against EU migration policy and the rights of sexual minorities, and abolished a special prosecutor's office that had been dealing with serious corruption issues (many of which involved Fico's political and business allies).[20]

The so-called Visegrad Group countries (often referred to as Visegrad-4) – the Czech Republic, Hungary, Poland and Slovakia, which established a political and cultural alliance soon after their transition out of state socialism – have therefore been at the forefront of democratic backsliding. Hungary was the first of them to experience de-democratisation, only a few years after EU accession, and partly as a result of considerable disillusionment fanned by the heavy consequences of the 2008 financial crisis on the country. Poland and the Czech Republic followed suit in the 2010s, with much more serious developments in

[18] R. Labanino-M. Dobbins, *op. cit.*

[19] L. Bustikova-P. Guasti, *The State as a Firm: Understanding the Autocratic Roots of Technocratic Populism*, in *East European Politics and Societies*, 33, 2, 2019, pp. 302-330.

[20] K. Jochecova-N. Camut, *Slovakia, the EU's next rule of law headache*, in *Politico*, 20 March 2024, https://www.politico.eu/article/slovakia-eu-rule-of-law-prime-minister-robert-fico/.

Warsaw during the chauvinist and xenophobic Law and Justice governments. Political commentators have expressed the concern that Slovakia could follow the same path as Hungary if Fico's domestic policies are not addressed by the European Commission at an early stage.[21] While there are other significant instances of democratic backsliding in the EU beyond the Visegrad-4, we start our analysis with two case studies from the region, Hungary and Poland, before moving to an "older" member state, Italy, and the broader European level.

4. *Hungary, the EU's "Frankenstate"*

Hungary's de-democratization path began in 2010, following the parliamentary elections in which the alliance of Fidesz and the Christian Democratic People's Party (KDNP) won a majority of votes and a two-thirds majority of seats. Orbán's Fidesz received 53% of the party-list vote on a 64% turnout, and the election law gave him 68% of the seats in the unicameral parliament, which was enough to amend and eventually change the constitution. This reveals a fundamental issue in Hungary's democratic system that preceded Orban's rise to power. The Hungarian architects of the post-state socialism transformation believed that the new Hungarian constitution should be flexible and adaptable in a time of rapid changes. A large number of parties was seen as a guarantee against the takeover of a single party. However, by 2010 the number of parties able to elect members of parliament had shrunk considerably, meaning that it was relatively easy to win a two-thirds majority in the parliament with a minority of public support. This was compounded by the lack of an upper house and of an independently elected president – further issues revealing the absence of adequate checks and balances in the Hungarian democracy. Thanks to this, and without gross violations of the constitutional order, Orban was able to create what has been metaphorically described as a "Frankenstate":[22] similar to Victor Frankenstein's monster in Mary Shelley's novel, who was assembled from various component parts of once recognizably reasonable bodies, Orban stitched together legal and reasonable constitutional components to create a "monster state".

The new prime minister and leader of Fidesz, Viktor Orbán, immediately pursued a series of drastic changes to the Hungarian political system.[23] In the

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[21] *Ibidem*.

[22] K.L. Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, in *Governance*, 26, 4, 2013, pp. 559-704.

[23] M. Bogaards, *De-democratization in Hungary: diffusely defective democracy*, in *Democratization*, 25, 8, 2018, pp. 1481-1499.

first years in office, Orban and his Fidesz colleagues amended the existing constitution twelve times to facilitate the passage of a new constitution. After they adopted the new constitution, it too was amended frequently. They passed more than 700 new laws, changing everything from the civil code and the criminal code to legislation on the judiciary, the constitutional court, national security, the media, elections, data protection. All of this was done with the votes of Fidesz alone.[24] While considerable opposition to Orban and Fidesz has existed in Hungary, they have managed to retain strong support in Hungarian society. Fidesz's authoritarian-leaning elites have succeeded in «offering targeted compensations to different groups, ultimately building a mosaic of support among voters to secure enduring electoral backing».[25]

Despite his formal adherence to the constitutional order (which, as stated earlier, was possible also thanks to constantly adapting that order), Orban did not shy away from publicly declaring that Hungary was departing from a liberal democratic model. In a widely reported speech of July 2014, he argued: «The new state that we are constructing in Hungary is an illiberal state, a non-liberal state [...] It does not make this ideology the central element of state organisation, but instead includes a different, special, national approach [...] A democracy does not necessarily have to be liberal. Just because a state is not liberal, it can still be a democracy [...] Societies that are built on the state organisation principle of liberal democracy will probably be incapable of maintaining their global competitiveness in the upcoming decades and will instead probably be scaled down unless they are capable of changing themselves significantly».[26] In the following years, Orban continued on his course of undermining Hungarian democracy through an ever tightening control of the media, public institutions and the curtailment of independent organisations, including educational institutions such as the Central European University, which was eventually compelled to relocate outside Hungary.[27]

Orban's attacks on liberal and representative democracy eventually took

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[24] K.L. Scheppele, *op. cit.*

[25] N. Wunsch-T. Gessler, *Who tolerates democratic backsliding? A mosaic approach to voters' responses to authoritarian leadership in Hungary*, in *Democratization*, 30, 5, 2023, pp. 914-937.

[26] V. Orban, *Speech at the 25th Bálványos Summer Free University and Student Camp*, 30 July 2014. https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camph.

[27] S. Walker, '*Dark day for freedom': Soros-affiliated university quits Hungary*, in *The Guardian*, 3 December 2018, https://www.theguardian.com/world/2018/dec/03/dark-day-freedom-george-soros-affiliated-central-european-university-quits-hungary.

him on a collision course with EU institutions and other member states, which accused him of violating basic EU values and principles. In September 2018, the European Parliament activated the so-called Article 7 procedure in relation to Hungary. Paragraph 1 of Article 7 of the Treaty on European Union (TEU) provides for a preventive phase, empowering one third of Member States, Parliament and the Commission to initiate a procedure whereby the European Council can determine by a four-fifths majority the existence of a clear risk of a serious breach in a member state of the EU values proclaimed in Article 2 of the same treaty, which include respect for human rights, human dignity, freedom and equality and the rights of persons belonging to minorities. The procedure remains blocked in the Council, where a number of hearings took place but no recommendations – let alone determinations – were adopted. The European Council determines the existence of the breach of EU values by unanimity and can decide to suspend certain membership rights of the member state in question, including voting rights in the European Council, this time acting by qualified majority. While the member state concerned does not take part in the votes in the European Council, the adoption of sanctions remains difficult to achieve due to the unanimity requirement, as demonstrated by the fact that the governments of Hungary and Poland – the only two member states in relation to which the Article 7 procedure was initiated – announced they would veto any such decisions concerning the other member state. [28]

5. *Poland, the former "poster child" of democratization*

From the 1990s until the mid-2010s, Polish and international political elites considered the country to be a model of democratic regime change, democratization, and economic transformations. European and international media applauded the Polish democratic transformation, its Europeanizing reforms, and the successes of the implemented democratization processes. Yet, following the electoral victory of the nationalist and conservative Law and Justice in October 2015, Poland took an "illiberal swerve" [29] and until 2023 was classifiable as a "defective democracy". During two successive parliamentary terms, the right-wing populist PiS party not only demonstrated authoritarian tendencies because of its disregard for the constitution, the rule of law, parliamentary procedures [30]

[28] European Parliament, *The protection of Article 2 TEU values in the EU*, 2024, https://www.europarl.europa.eu/factsheets/en/sheet/146/the-protection-of-article-2-teu-values-in-the-eu.

[29] L. Bustikova-P. Guasti, *op. cit.*

[30] R. Markowski, *Creating Authoritarian Clientelism: Poland After 2015*, in *Hague Journal on the Rule of Law*, 11, 2019, pp. 111-132.

but also restricted women's and minority rights.[31] Furthermore, the Polish government was broadly criticised for undermining the independence of the judiciary, the public administration, and the media. In 2017, Freedom House downgraded Poland from "free" to "partly free" due to government intolerance of critical reporting.

Between 2015 and 2023, PiS and its junior coalition partners pursued the agenda of consolidating political power by curtailing the judiciary and the independence of the administration; dismantling checks and balances, environmental standards, and civic freedoms; and violating women's and minority rights, triggering several European Court of Justice cases against Poland for breaches of EU fundamental values.[32] Poland was an example of party state capture, where Law and Justice managed to monopolize the political system in their own and their clients' favour.[33] Specifically, Law and Justice used its parliamentary majority to force through changes of judges to the Constitutional Tribunal in 2015, leading to a constitutional crisis. The government continued to expand its hold on the judiciary following with attacks and reforms of the Supreme Court in 2017, and to the judicial disciplinary panel law in 2019. These events allowed the legislative and executive branches of the Polish government to hold *de facto* control over the judiciary. This elimination of "horizontal" checks and balances – the seizing of control of the constitutional court and the prosecutor's office, ending the independence of judges, changing electoral rules, side-lining the opposition and controlling the media – was one of the most consequential sources of power for Law and Justice in Poland.[34] Wojciech Sadurski argued that Law and Justice conducted themselves like an organised criminal group that «colonised virtually all state institutions: the presidency, Parliament, the constitutional court, the civil service, state-run companies, public media – and it has dismantled nearly all major constitutional checks and balances in the process».[35]

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[31] A. Graff-E. Korolczuk, *Anti-gender politics in the populist moment*, Routledge, Abingdon, 2022.

[32] See I. Karolewski, *Towards a political theory of democratic backsliding? Generalising the East Central European experience*, in A. Lorenz-L. Anders (eds.), *Illiberal trends and anti-EU politics in East Central Europe*, Palgrave Macmillan, Basingstoke, 2021, pp. 301-21; A. Krizsán-C. Roggeband, *op. cit.*

[33] See I. Karolewski, *op. cit.*; R. Sata-I. Karolewski*, Caesarean politics in Hungary and Poland*, in *East European Politics*, 36, 2, 2020, pp. 206-225.

[34] See K.L. Scheppele, *op. cit.*; W. Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press, Oxford, 2019; M.A. Vachudova, *op. cit.*

[35] W. Sadurski, *I criticized Poland's government. Now it is trying to ruin me*, in *Washington Post*, 21 May 2019, https://www.washingtonpost.com/opinions/2019/05/21/i-criticized-polands-government-now-its-trying-ruin-me/.

In 2017, the European Commission argued that the judicial reforms of the Polish government could constitute a serious breach of the rule of law principle because they undermined the separation of powers between the executive and the judiciary. Hence, the Commission initiated the procedure based on Article 7 of the Treaty on European Union concerning the violation of basic EU values and principles identified in Article 2 of the treaty (see also previous section on Hungary). Moreover, in 2019 the European Court of Justice ruled that the reform of Poland's Supreme Court breached EU law. Despite its clash with the EU, the Law and Justice-led government retained domestic popularity between 2015 and 2023. The Polish economy continued to grow after 2015 and redistributive programmes increased the purchasing power of many Poles. The PiS government introduced social welfare reforms, such as new cash child benefits, which increased the popularity of the governing party in the more disadvantaged sectors of society. These reforms were seen as a clear break from the agenda of the previous center-right government, which neglected welfare policies and rising inequalities.

One of the most societally nefarious aspects of PiS' anti-democratic tendencies was the government-led attack on women's and LGBTQ+ rights, which both played out as discursive campaigns and had policy consequences (through the restriction of sexual and reproductive health and rights). Law and Justice sees gender in binary and populist terms and voices gendered claims that advocate the preservation of the "traditional" family and gender roles, as well as populist anti-LGBTQ+ claims questioning the very existence of diverse gender and sexual identities.[36] In terms of gender equality and justice, women's rights, and LGBTQ+ rights worsened considerably between 2015-2023, even though Poland already had a well-deserved bad reputation in those areas prior to the rise of PiS.

In 2016, PiS withdrew state funding for the *in vitro fertilization* treatment[37] and restricted access to emergency contraception.[38] Moreover, the Law and Justice government supported the 2020 Constitutional Tribunal anti-abortion ruling. Even before that, several attempts were made to illegalize or criminalize abortion completely. Poland's abortion law remains one of the strictest in Europe. The 1993 legislation on family planning allowed termination only if

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[36] A. Gwiazda, *Gender Ideologies and Polish Political Parties*, in *Government and Opposition*, 2021, pp. 1-20.

[37] E. Korolczuk, *The Purest Citizens' and 'IVF Children'. Reproductive citizenship in contemporary Poland*, in *Reproductive Biomedicine & Society Online* 3, 2017, pp. 126-133.

[38] A. Wierzcholska, *Gender in the Resurgent Polish Conservatism*, in K. Bluhm-M. Varga (eds.), *New Conservatives in Russia and East Central Europe*, Routledge, Abingdon, 2018, pp. 198-222.

the pregnancy was the result of a crime, if there were serious problems in the development of the foetus, or if the woman's life was in danger. In October 2020, the Constitutional Tribunal, dominated by judges associated with Law and Justice, further restricted the right to abortion, pronouncing it unconstitutional to terminate pregnancies with foetal abnormalities, which constituted the basis for almost all abortions in the country.

The Law and Justice government also implemented several policies that have been internationally criticized for being discriminatory towards the LGBTQ+ community. For example, in 2019, over 100 municipalities and districts in the South-Eastern regions of Poland declared themselves "LGBT-free", in collaboration with the Catholic-fundamentalist organization Ordo Iuris, by adopting various forms of legislative resolutions.[39] These zones refer to resolutions or declarations, stating their opposition to "LGBT ideology" or promoting PiS "traditional family values". Despite their non-legislative character, these declarations were a form of discrimination against LGBTQ+ individuals and an infringement on their rights because they promoted intolerance, discrimination, and exclusion. They also violated international human rights norms and principles of equality, non-discrimination, and freedom of expression.

The Law and Justice party ran the 2020 presidential campaign largely based on an anti-LGBTQ+ platform. President Andrzej Duda stated that «LGBT are an ideology, not people», calling it an «ideology of evil, even more dangerous to mankind than communism».[40] PiS embarked on a reinvigorated discrimination campaign against "LGBT ideology" and feminists; as a result, Polish democracy regressed further in terms of the democratic principles of equality, anti-discrimination, tolerance, and justice.

In October 2023, a center-right opposition coalition won the parliamentary elections in Poland and removed PiS from power. The new government led by veteran politician Donald Tusk embarked on a series of legislative reforms to roll back the previous PiS measures and to restore the rule of law to Poland, opposed by Duda, who remained President. The new government focused on removing PiS appointees from the public companies, media, and the judiciary as first order. Arguably, the reform priorities were set in such a way as to unlock the EU Recovery and Resilience Facility (RRF), the funds which had been blocked by the Commission due to the breaches of the rule of law in Poland. The Commission released the RRF funds to Poland finally in 2024. At the same time, a year later, the status of the equality agenda remains largely

[39] Atlas of Hate (2023). https://atlasnienawisci.pl.

[40] TVN24.pl, *Próbuje się nam wmówić, że to ludzie, a to jest po prostu ideologia*, 13 June 2020. https://tvn24.pl/wybory-prezydenckie-2020/wybory-prezydenckie-2020-andrzej-duda-o-lgbt-probuje-sie-nam-wmowic-ze-to-ludzie-a-to-jest-po-prostu-ideologia-4609609.

unchanged. Despite official electoral promises, the Tusk government has done nothing to liberalize access to abortion, or emergency contraception. They have not legislated civic partnerships or criminalized hate speech based on sexual orientation and gender identity.

The Polish case demonstrates the ambiguity of the processes of democratization and Europeanization as it illustrates the relative ease with which they can be undermined and dismantled. Despite initial successes, democracy in post-1989 Poland could be contested, showing that democratization processes yield opportunity moments to both progressive and veto actors.[41] The ambivalent commitment of the so-called pro-democracy forces to values of equality, social justice, and tolerance paved the way for the PiS-led dismantling of the weak institutional guarantors of democracy, anti-discrimination, and equality.

6. *Democratic backsliding à la italienne*

While the most serious violations of the rule of law in the EU to date occurred in Hungary and Poland, other member states are not exempt from democratic backsliding. This includes founding EU members such as Italy. Italy has often been considered a fragile polity, displaying low levels of societal trust and governmental effectiveness.[42] For around twenty years, from the 1990s to the early 2010s, national politics was largely dominated by Silvio Berlusconi, an entrepreneur and media mogul who brought the Italian post-fascists and the xenophobic League to power, while inaugurating himself a style of politics that earned him the fame of early or model Western European populist. Today, Italy is the only Western European country whose main governing party – the Brothers of Italy, led by Giorgia Meloni – is commonly classified as a radical right populist party.[43] Brothers of Italy is both another peculiar manifestation of the multifaceted populist phenomenon and a proponent of illiberal programmatic goals. This is particularly worrying in the light of the party's neofascist roots, from which its top leaders have never distanced themselves.[44]

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[41] B. Gaweda, *Europeanization, Democratization, and Backsliding: Trajectories and Framings of Gender Equality Institutions in Poland*, in *Social Politics*, 28, 3, 2021, pp. 629-655.

[42] G. Baldini, *From 'anomaly' to 'laboratory'? Fratelli d'Italia, illiberalism and the study of right-wing parties in Western Europe*, in *Political Studies Review*, 22, 2, 2023, pp. 402-411.

[43] G. Baldini-F. Tronconi-D. Angelucci, *Yet Another Populist Party? Understanding the Rise of Brothers of Italy*, in *South European Society & Politics*, 27, 3, 2022, pp. 385-405.

[44] D. Broder, *Mussolini's Grandchildren: Fascism in Contemporary Italy*, Pluto Press, London, 2023.

Giorgia Meloni's government – in power since October 2022 – has announced or launched several policies that are conducive to democratic backsliding and will worsen the quality of Italian democracy if they are implemented. The most serious example, even if currently still held up in the legislative process, is Meloni's proposed constitutional reform that should purportedly lead the Italian political system towards presidentialism. The proposal is framed in terms of establishing the figure of a strong man or woman with a direct connection to the will of the people through direct election.[45] However, the institutional setting that would result from this reform is not a presidential one. While providing for the direct election of the head of State, Meloni's proposed reform leaves in place a government led by a prime minister that would require a parliamentary vote of confidence; in fact, this is rather a semi-presidential form of government. Overall, the reform is primarily interested in establishing the figure of a strong leader directly linked with the people. For this reason, it has been criticised by the opposition and authoritative voices in civil society for paving the way to an illiberal and authoritarian turn. Meloni's eurosceptic rhetoric and her ideological affinities with the likes of Orban and the Polish Law and Justice leadership do little to assuage such concerns.[46]

A glance at policies implemented during the first two years of Meloni's government reveals illiberal stances in immigration and security policy, law and order and equality policy, three areas that are central to Brother of Italy's programmatic profile.[47] In 2022, Meloni campaigned with an unrealistic promise of a naval blockade of the northern African coasts to prevent migrants from departing towards Italy. A year later, the number of migrants arriving by boat had nearly doubled. Meloni's government passed a decree that allows placing migrants who lost asylum bids and who come from so-called "safe countries" in holding centers for as long as 18 months, pending repatriation; to avoid that, migrants can pay a deposit of nearly 5,000 euros, which is unaffordable for many of them. However, some Italian judges concluded that these restrictions violate Italy's constitution and let the migrants go free.[48] These developments are an example of how Meloni's government has attempted to

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[45] G. Baldini, *op. cit.*

[46] B. Gaweda-M. Siddi-C. Miller, *What's in a name? Gender equality and the European Conservatives and Reformists' group in the European Parliament*, in *Party Politics*, 29, 5, 2023, pp. 829-839.

[47] See G. Baldini, *op. cit.*; B. Gaweda-M. Siddi, *The 2022 Italian Elections and Gender+ Equality*, in *Femina Politica*, 32, 1, 2023, pp. 120-124.

[48] F. D'Emilio, *Italy's far-right Premier Meloni defies fears of harming democracy and clashing with the EU*, in *AP*, 18 October 2023, https://apnews.com/article/italy-meloni-farright-migrants-2b3fc3bb92058eff65a7b38fa639693c.

introduce illiberal policies that bypass the constitution, but the checks and balances of the Italian system have hindered their implementation so far.

However, it is by no means certain that these checks and balances will endure if they are subjected to a sustained attack by the executive. Meloni's government is trying to pass a reform that mandates the separation of the training, careers and status of judges and prosecutors, who right-leaning governments in Italy have long accused of colluding to the detriment of the defence. In fact, it is easy to see the reform as an attempt by politics to exert control over the judiciary; this was a key goal of Silvio Berlusconi, who used his political role and parliamentary immunity to avoid prosecution, but was eventually convicted of tax fraud in 2012.[49] While Berlusconi died in 2023, numerous politicians in his party and beyond have not renounced the goal of undermining the independence of the judiciary, and thus an essential aspect of the separation of powers that is typical of a functioning democracy.

Meanwhile, Meloni's government has already adopted legislation that undermines the rights of sexual minorities; for instance, it refused to allow the names of same-sex parents to be on their children's birth records and launched a rhetorical campaign against the right to abortion, which is already severely constrained in some Italian regions due to the very large numbers of so-called conscientious objectors among gynecologists. "Optimists" argue that passing some laws that restrict civil rights for some minorities is possible also in Italy, but bending and breaking liberal institutions involves many further steps that seem unlikely, at least for the time being.[50] While extensive subversion of democratic standards like in Hungary or in Poland in 2015-2023 appears indeed unlikely, the restriction of minority rights is very worrying. If such policies continue to be implemented, they could very likely be the harbingers of further erosion of democracy and of the rule of law.

7. *Concluding remarks: more democratic backsliding in the EU?*

The chapter has shown that democratic backsliding has become a major issue in several EU member states, both "new" members such as Hungary and Poland and "older", founding members with a longer democratic history such as Italy. The extent of backsliding has been different, with Poland and especially Hungary experiencing a crisis of democratic institutions that seems difficult to reverse.

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[49] L. Milasin, *Italian judges threaten strike over justice reform*, in *The Local*, 30 May 2024. https://www.thelocal.it/20240530/italian-judges-threaten-strike-over-justice-reform.

[50] A.L.P. Pirro-B. Stanley, *Forging, bending, and breaking: enacting the 'Illiberal playbook' in Hungary and Poland*, in *Perspectives on Politics*, 20, 1, 2022, pp. 86-101.

In Italy, the rights of minorities and asylum seekers have been under threat; democratic institutions have so far proven resilient, but they face potentially serious challenges from proposed reforms that would weaken the separation of powers while strengthening the prerogatives of individual executive leaders.

Despite their differences, taken together, the Hungarian, Italian and Polish cases point to a set of trends concerning democratic backsliding. The deterioration of democratic standards has been associated with the rise to power of radical right parties – Fidesz in Hungary, Brothers of Italy in Italy and Law and Justice in Poland. These parties have ideological affinities and cooperate at the EU level, notably in the European Parliament and in the Council.[51] From a political perspective, this suggests that democratic backsliding is not merely a feature of national/member state political developments, but it is part of a broader transnational trend driven by radical right parties. Their current attitudes and policies on issues such as migration and equality have been "normalised" in EU policy and decision-making environments, where radical right parties collaborate and find a positive reception also in mainstream parties.

Based on the outcome of the June 2024 European Parliament elections, where radical right parties increased their votes and institutional representation (see Müller in this book), further instances of democratic backsliding can be expected in the near future – or at the very least, we can expect challenges to the EU's fundamental values and principles. As representatives of these parties acquire more and more prominent positions in the EU's institutional architecture and, perhaps more worryingly, as their views are mainstreamed, prospects for upholding high democratic standards do not look bright. At the same time, the EU's initiating the Article 7 procedure in relation to Hungary (and, until 2024, Poland), while belated, highlights that the rule of law and democratic standards are issues of primary importance to the vast majority of member states. Likewise, the use of conditionality mechanisms focusing on the rule of law to access EU funding is an important incentive for member states to comply with EU values and principles. Whether these mechanisms are sufficient to protect the EU from major democratic backsliding in coming years largely depends on the political line that mainstream European parties will take, including decisions on forming coalitions with the radical right in EU institutions.

[51] B. Gaweda-M. Siddi-C. Miller, *op. cit.*

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A CRUMBLING "CORDON SANITAIRE": THE RISE AND NORMALISATION OF FAR-RIGHT PARTIES AT THE EUROPEAN UNION LEVEL

Manuel Müller [*]

The EU elections of 6–9 June 2024 brought major changes in the composition of the European Parliament. Far-right parties won more seats in the European Parliament than ever before, for the first time exceeding a quarter of the total number of seats. This success came at the expense of centre and centre-left parties, especially the Greens and the liberal Renew group. At the same time, the number of member states in which far-right parties participate in government has been growing over the past years. While the decision to include the Freedom Party of Austria (FPÖ) in the Austrian government led to harsh reactions by the governments of the then 14 other EU member states in 2000, a quarter-century later the presence of far-right ministers in the Council of the European Union has become increasingly normalised. In October 2024, far-right parties are leading the governments of three member states, are junior coalition partners in another four, and support minority centre-right governments in two more.

While not all far-right parties are equally extreme, the line between the illiberal-populist radical right and the openly anti-democratic extreme right has become increasingly blurred in recent years. This has resulted in a complex spectrum of ideological nuances along which individual parties are not always

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easy to place and may shift over time.[1] But while the European far-right groups are internally heterogeneous, they also show many similarities with regard to some core policy positions. All of them take a hard line on migration, favour traditionalist gender policies, and reject ambitious climate action. Even more crucially, all of them include some member parties that have been criticised for not respecting the EU's fundamental values of democracy, human dignity, and the rule of law – the most obvious cases being Hungary's Fidesz (in government since 2010) and Poland's Law and Justice party (PiS, in government from 2015 to 2023). This also corresponds to a high tolerance of authoritarianism among far-right parties' electorates.[2] There is, thus, a clear connection between the rise of far-right parties and democratic backsliding in Europe (see Siddi/Gaweda in this book).

In addition, far-right parties also share hostility to supranational European integration, albeit to varying degrees.[3] While some of them merely emphasize national sovereignty and aim to diminish the influence of the European Parliament and Commission, others openly push for their countries' withdrawal from the EU, question the primacy of EU law, and/or want to reduce the EU's institutional framework to a purely intergovernmental cooperation between fully sovereign states. Although far-right parties tend to denigrate the EU, they have also learned to use it to shield their own national authoritarian aspirations[4] – or even to advance their political agenda, for example on asylum and migration policy. The EU's consensus-based system is a safeguard against the sudden seizure of power by far-right parties, but it also makes it difficult for others to override them once they have achieved a certain position.

This chapter examines the far-right parties in the EU institutions in the 2024–29 legislature and the ways in which they are likely to influence European policy. The first section outlines the various political families that make up the European far right, currently fragmented in three European political parties with their corresponding groups in the European Parliament. The following sections take a closer look at each of the three main EU institutions – the European Parliament, the European Commission, and the EU Council – to ascertain both the quantitative presence of far-right parties and their role in political majority-building and decision-making.

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[1] A.L.P. Pirro, *Far right. The significance of an umbrella concept*, in *Nations and Nationalism*, 29, 1, 2023, pp. 101-112.

[2] M.W. Svolik-E. Avramovska-J. Lutz-F. Milačić, *In Europe, Democracy Erodes from the Right*, in *Journal of Democracy*, 34, 1,2023, pp. 5-20.

[3] S. Vasilopoulou, *The radical right and Euroskepticism*, in J. Rydgren (ed.), *The Oxford Handbook of the Radical Right*, Oxford University Press, Oxford, 2018, pp. 122-140.

[4] R.D. Kelemen, *The European Union's authoritarian equilibrium*, in *Journal of European Public Policy*, 27, 3, 2020, pp. 481-499.

1. *The far right at the European level*

Far-right parties in the European Union have traditionally been organised in a number of EU-level groups, which have been frequently restructured and renamed. In general, all of these groups have been internally heterogeneous and can partly be seen as alliances of convenience. Attempts to merge them into a single group have repeatedly failed – because of ideological differences, but more importantly because of tactical considerations and rivalries among their member parties. However, the membership of the groups has not been stable, with various national parties moving back and forth between them over time. Some far-right parties are currently not members of either group.

After the 2024 European Parliament election, there are three far-right groups in the European Parliament: the European Conservatives and Reformists (ECR), Patriots for Europe (PfE), and Europe of Sovereign Nations (ESN). Each of these groups has their own corresponding EU-level party, although memberships do not fully coincide in every case.

The ECR group was originally founded by the United Kingdom's Conservative Party (popularly known as Tories) and the Czech Civic Democratic Party (ODS) in 2009, partly building on previous national-conservative groups. While the ECR started with relatively moderate, Eurosceptic-conservative positions, over time it was joined by more extreme parties and moved further to the right. After the Tories left the group as a result of Brexit, it became dominated first by the Polish PiS and then by Giorgia Meloni's Brothers of Italy (FdI).[5] In the 2024 elections, the ECR group increased its number of seats from 69 to 78, for the first time exceeding 10% of the total number of seats (720). This was mainly due to the good results of the FdI and the inclusion of new parties entering the European Parliament for the first time, such as the Alliance for the Union of Romanians (AUR).

The PfE group is the *de facto* successor of the Identity and Democracy (ID) group in the 2019–24 Parliament, which itself was preceded by the Europe of Nations and Freedom (ENF) group, founded in 2015. While the ENF had been a relatively small group dominated by Marine Le Pen's National Rally (RN) from France and Italy's Lega, the ID group was significantly larger, also due to the inclusion of the Alternative for Germany (AfD). However, at the instigation of the RN, the ID group expelled the AfD a few weeks before the 2024 elections following a number of scandals involving AfD candidates.

After the 2024 elections, there were talks between the Polish PiS (ECR),

[5] B. Gaweda-M. Siddi-C. Miller, *What's in a name? Gender equality and the European Conservatives and Reformists' group in the European Parliament*, in *Party Politics*, 29, 5, 2023, pp. 829-839.

the Hungarian Fidesz (previously unaffiliated) and the Czech ANO (previously a member of the centrist-liberal Renew Europe group) about a new "Central and Eastern Europe Group". When the PiS decided against this model and remained in the ECR group, Fidesz, ANO and the Freedom Party of Austria (FPÖ, formerly a member of the ID group) joined forces to form the new PfE group. This group was quickly joined by almost all other members of the ID group as well as the Spanish Vox (previously ECR) and other, smaller parties that had entered the European Parliament for the first time. As a result, the PfE grew from 49 seats immediately before the elections to 84 seats, becoming the third largest political group in the current Parliament – after the centre-right European People's Party (EPP) with 188 seats and the centre-left Socialists and Democrats (S&D) with 136 seats – and the largest EU-level far-right group ever. The dominant force within the group is still the French RN.

The ESN group was newly formed after the 2024 election by the German AfD, which after an unsuccessful attempt to rejoin the PfE group decided to ally with several small extremist parties from other member states. With 25 MEPs from eight countries – more than half of them belonging to the AfD – the ESN is by far the smallest group in the European Parliament. Most of the smaller member parties are new to the Parliament. Several of them, such as the French Reconquête and the Czech Freedom and Direct Democracy (SPD), were unable or unwilling to join one of the other far-right groups because of domestic rivalries with other parties from their country.

Finally, as of October 2024, there are 11 far-right MEPs that do not belong to any political group. These include, for example, The Party Is Over (SALF) from Spain, which seems to have been considered too unreliable by the three far-right groups, or SOS Romania, which was rejected by the ESN at the instigation of the Our Homeland Movement (MHM) from Hungary because of its anti-Hungarian irredentist ideology.

As noted above, the three far-right groups share many political goals. While they vary in their degree of radicalism, their internal heterogeneity is often greater than the differences between them. In terms of policy, the clearest dividing line between the groups is their relationship with Russia. While the ECR is generally pro-NATO and advocates a hard line towards Russia, many PfE and ESN parties have traditionally been sympathetic to the Putin regime and in some cases have openly opposed Western support for Ukraine.

Beyond this, there are also some structural differences between the groups, for example in terms of their government experience at the national level. The ECR has traditionally been dominated by parties that are or have been in government – either alone or in a coalition, often with members of the centre-right EPP. The ID, on the other hand, has been led by parties with no executive experience and has played the role of "systemic opposition", often resulting in a

more populist and extreme rhetoric on their part. In recent years, however, this line has become increasingly blurred, with ID member parties joining national governments in Austria (2017–19), Italy (2018-19 and since 2021), Slovakia (since 2023)[6] and the Netherlands (since 2024). After the 2024 elections, the number of PfE member parties with government experience grew further with the entry of Hungary's Fidesz and Czechia's ANO. In addition, the largest PfE member party, Marine Le Pen's RN, is now giving external support to the centre-right minority government in France. Consequently, the role of systemic opposition is now played only by the small ESN group, whose member parties do not have any government experience at all.

Still, the different roles of the ECR and ID member parties also led to a different treatment by the other political groups in the European Parliament. The groups of the political centre – EPP, S&D, Renew Europe, and the Greens – have maintained a *cordon sanitaire* towards the ID group, excluding its members from influential parliamentary positions such as committee chairs and European Parliament vice-presidencies and refusing any active cooperation on policy. Relations with the ECR, on the other hand, have traditionally been less tense. The ECR was traditionally included in the distribution of parliamentary positions; before the departure of the Tories, the EPP, Renew and ECR groups also regularly cooperated to advance legislation. In 2019, however, this centre-right alliance lost its majority in the European Parliament, mostly due to a relatively weak performance of the EPP. At the same time, the ECR's shift to the right made agreements with the political centre more difficult. To give just one highly symbolic example, the Parliament's 2023 proposals for EU treaty reform were to be drafted by a team of co-rapporteurs nominated by all political groups except ID, but the ECR co-rapporteur withdrew during the process, fiercely attacking the Parliament's «federalist and centralist majority».[7]

Despite the overall increase of far-right seats in the 2019 election, the *cordon sanitaire* against the ID and the ECR's increasing detachment from the political centre meant that the far right was hardly relevant for majority-building in the European Parliament during the 2019–24 term. Following the 2024 election, however, this pattern is set to change. The following section will delve deeper into the political discussions about majority building in the European Parliament and the *cordon sanitaire* in the 2024–29 term.

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[6] The Slovakian National Party (SNS) was a member of the ID group but failed to win any seats in the 2024 European Parliament election and has not joined the PfE.

[7] European Conservatives and Reformists, *Federalist and centralist majority in European Parliament wants an oligarchic superstate,* Press release, 25 October 2023, https://ecrgroup.eu/article/federalist_and_centralist_majority_in_european_parliament_wants_an_oligarch.

2. *European Parliament: The EPP's openness to the right*

Majorities in the European Parliament are generally flexible and depend strongly on the issue at hand. Without a government-opposition dynamic and with relatively low party cohesion, group voting patterns are less clear-cut than in most national parliaments. Still, most decisions in the European Parliament have always been based on an 'informal grand coalition' between the two largest groups, the EPP and the S&D, which is usually expanded to Renew and/or the Greens. After the 2014 elections, the EPP, S&D and Renew groups gave this cooperation a more formal character through a memorandum of understanding, which was, however, terminated by the S&D in 2017. Nevertheless, cooperation between the three groups continued and was also decisive in Ursula von der Leyen's election as President of the European Commission in 2019, giving rise to the term "von der Leyen majority". In 2022, they adopted a joint programme of priorities for the remaining parliamentary term.

However, the "grand coalition" has never been without alternatives. Traditionally, both the centre-right alliance of EPP, Renew and ECR mentioned above and a centre-left alliance between the S&D, Renew, the Greens and the Left played important roles as alternative options to build majorities without one of the two main groups. Therefore, the *de facto* loss of the centre-right option significantly weakened the EPP during the 2019–24 term: Even though it remained the strongest party, its only plausible majority option was the "grand coalition". By contrast, the S&D and Renew could also rely on the centre-left alternative in order to outvote the EPP – and effectively did so several times, especially on climate and on social policy.

Conversely, the 2024 results put the EPP back into a strong power position: As the centre-left alliance has lost its majority, the EPP has become an indispensable party without which no plausible majority can be built. Still, if the EPP does not want to depend on the grand coalition only, it also needs to (re-) build alternative majority options to the right – including at least some of the parties in the three far-right groups.

Indeed, this opening to the far right became one of the key issues of public contestation among the main European parties during the 2024 European elections campaign. Ever since Giorgia Meloni was elected as Italian prime minister in 2022, EPP group leader Manfred Weber sought a rapprochement with her party, and thus indirectly with the ECR. In May 2023, he set the three criteria of "pro-European", "pro-Ukraine" and "pro-rule of law" as a benchmark for cooperation with parties to the right of the EPP.[8] In March 2024, he pub-

[8] A. Georgian, *We won't work with far-right "extremists", EPP chief Manfred Weber says*, in *France 24*, 26 May 2023, https://www.france24.com/en/tv-shows/talking-europe/20230526-we-won-t-work-with-far-right-extremists-epp-chief-manfred-weber-says.

licly declared that «occasional cooperation with pro-European conservatives is just as conceivable for me as cooperation with the Greens». [9]

These announcements immediately led to questions as to which parties exactly the EPP was going to consider acceptable and which not. While Weber repeatedly mentioned Meloni's FdI and the Czech ODS (both ECR) as positive examples, and the French RN (then ID, now PfE), the German AfD (then ID, now ESN) and the Polish PiS (ECR) as negative ones, he remained silent about many others. For her part, EPP lead candidate Ursula von der Leyen ruled out cooperation with the ID group, but not with the ECR, depending «on how the composition of the Parliament is, and who is in what group». [10]

Still, the EPP's coalition policy at national level raised concerns that it was prepared to interpret both the "pro-European" and the "no ID" criterion rather flexibly. For example, member parties of the EPP group are in coalitions with the Italian Lega (ID/PfE), which ran in the European elections on the slogan «More Italy! Less Europe», [11] with the Finns Party (ECR), whose election manifesto demanded that leaving the EU «should not be treated as a taboo», [12] and with the Dutch PVV (ID/PfE), which dropped its long-standing commitment to a Dutch EU exit in 2024 but still polemicised against «Europhile dreams» and promised to «curb the power of Brussels» in its manifesto. [13]

On the other side, the S&D, Renew, Greens and Left groups reacted to the EPP's opening to the right by pushing for a reinforced *cordon sanitaire* that would exclude not only ID but also the ECR. In May 2024, they published a joint statement in response to various far-right acts of violence against campaigners, in which they called on «all democratic European parties to firmly reject any normalisation, cooperation or alliance with the far-right and radical parties» in their election manifestos. [14]

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[9] C.B. Schiltz, *Das Verbrenner-Aus kommt ganz gewiss auf den Prüfstand*, in *Welt am Sonntag*, 4 March 2024, https://www.welt.de/politik/ausland/plus250352536/Manfred-Weber-CSU-Das-Verbrenner-Aus-kommt-ganz-gewiss-auf-den-Pruefstand.html.

[10] E. Wax, *Von der Leyen opens the door to Europe's hard right*, in *Politico*, 30 April 2024, https://www.politico.eu/article/von-der-leyen-hard-right-maastricht-debate-giorgia-meloni-viktor-orban-schmit/.

[11] Lega per Salvini Premier (2024), *Programma elezioni europee 2024,* available at: https://static.legaonline.it/europee-2024/Programma+Lega+-+Europee+2024.pdf.

[12] Perussuomalaiset, *Päätetään itse. Perussuomalaisten eurovaaliohjelma 2024* (2024), available at: https://www.perussuomalaiset.fi/wp-content/uploads/2024/04/PS-eurovaaliohjelma Verkko.pdf.

[13] Partij voor de Vrijheid, *Nederland op 1: Verkiezingsprogramma Europees Parlement,* 2024, available at: https://www.pvv.nl/images/2024/EP/PVV-Verkiezingsprogramma-EP-2024.pdf.

[14] Socialists and Democrats-Renew Europe-Greens/EFA-The Left, *In Defence of Democracy. Declaration from the S&D, Renew, Greens and The Left European Parliament Political*

The election results further complicated the EPP's strategy of building right-wing majority options. The traditional centre-right alliance of EPP, ECR and Renew was not only repudiated by the Renew group, but also failed to win a majority on its own again. At the same time, a right-wing alliance without Renew is only possible if the EPP cooperates with all three far-right groups – i.e. including the ESN, which clearly fails to meet the EPP's three criteria.

As a consequence, the grand coalition of EPP, S&D and Renew took the stage again after the election, meeting several times in order to prepare the re-election of von der Leyen as Commission president and the distribution of the main parliamentary positions. Von der Leyen herself also sought dialogue only with the four centrist groups and avoided making any public concessions to the ECR or PfE. As a consequence, the relations between the EPP and the far right cooled off immediately: When von der Leyen was re-elected in the European Parliament in mid-July, the far-right groups voted largely unanimously against her. [15] Also in the European Council, Giorgia Meloni (ECR) and Hungary's Viktor Orbán (PfE) were the only heads of government not to vote in favour of a second term for von der Leyen. [16]

Still, the EPP continued to reject a possible written coalition agreement with the other centrist groups that could have excluded cooperation with the far right – and the conflicts over the *cordon sanitaire* did not take long in flaring up again. In the distribution of the main parliamentary positions, the centrist parties agreed on blocking all candidates from the new PfE group. In some cases, however, the EPP allied with the three far-right groups in order to push through ECR candidates that the other centrist groups had rejected. [17] In the autumn of

Group Leaders, 8 May 2024, available at: https://www.socialistsanddemocrats.eu/sites/default/files/2024-05/declarationleaders.sd_.re_.greens.theleft-5.pdf.

[15] The vote was secret and the ECR group did not issue an official line to vote against von der Leyen. However, the number of votes cast in her favour (401) was significantly lower than the sum of the seats of the four centrist groups that officially supported her (454). There must therefore have been numerous dissenters in the EPP, S&D, Renew and Greens/EFA who voted against von der Leyen or abstained, and at most very few MEPs from other groups who voted in her favour.

[16] Meloni abstained on von der Leyen and voted against Antonio Costa as European Council president and Kaja Kallas as high representative; Orbán voted against von der Leyen but in favour of Costa and abstained on Kallas. The ECR's second prime minister, Czechia's Petr Fiala, publicly criticised the top-jobs nominations but ultimately voted in favour of them. See J. Liboreiro, *EU leaders agree top jobs, Meloni and Orbán hold out*, in *Euronews*, 27 June 2024, https://www.euronews.com/my-europe/2024/06/27/eu-leaders-agree-on-top-jobs-ursula-von-der-leyen-antonio-costa-and-kaja-kallas.

[17] M. Griera, *Serious healing needed in a Parliament on edge*, in *Politico*, 26 July 2024, https://www.politico.eu/newsletter/eu-election-playbook/serious-healing-needed-in-a-parliament-on-edge/.

2024, the EPP-ECR-PfE-ESN alliance reappeared in several other votes.[18] This was strongly criticised by the centre-left groups, whereas the EPP insisted that it was still maintaining the *cordon sanitaire,* as it had not actively coordinated with the far-right groups but had merely coincided in voting the same way.

All this suggests that, unlike the 2019 election, the far right will effectively be able to translate its 2024 seat gains into power gains in the European Parliament. With a combined total of just over a quarter of the overall seats, the three far-right groups are still far from having a majority on their own, or even a blocking minority for decisions that require a two-thirds majority (such as the opening of an Article 7 TEU procedure to determine that a member state is violating EU values). Still, the EPP's openness to active cooperation with the ECR and its relaxed attitude to voting in alliance with the PfE and ESN make the far right a power factor in the Parliament.

Even if the EPP-ECR-PfE-ESN alliance is unlikely to become a regularly used option and most majorities will still be formed by the grand coalition, there are also other ways in which the far right could play a role. Given the relatively low level of group cohesion in the European Parliament, the EPP might try to use the support of at least some ECR (or even PfE) member parties in order to dispense with the more left-leaning members of the S&D and Renew in contested votes. Such a strategy could lead to outcomes that are very close to the EPP's own positions, but it would also lead to a further normalisation of "moderate" far-right parties and increase their influence on policy.

In this respect, the increasing fragmentation of the European far right – now represented in three instead of two political groups in the European Parliament – may even end up being politically advantageous for them. Fragmentation still hampers the capacity for cooperation between far-right groups, also on matters related to constitutional affairs and democratic backsliding.[19] However, it also allows for a strategy of "normalisation by demarcation" in which far-right parties can present themselves as moderate by pointing to other far-right parties that are perceived as even more extreme. Thus, the existence of the PfE allows the EPP to justify cooperation with the ECR while claiming to maintain the *cordon sanitaire*. Similarly, distancing itself from the even more radical ESN could also make it easier for the PfE to become part of the political mainstream and be included in majority-building processes in the future.

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[18] E. Wax, *Where did the VDL coalition go?*, in *Politico*, 24 October 2024, https://www.politico.eu/newsletter/brussels-playbook/where-did-the-vdl-coalition-go/.

[19] M. Chiru-N. Wunsch, *Democratic backsliding as a catalyst for polity-based contestation? Populist radical right cooperation in the European Parliament*, in *Journal of European Public Policy*, 30, 1, 2021, pp. 64-83.

3. *European Commission: Few far-right commissioners – but a vice-president*

Among the EU institutions, the European Commission has so far been the least affected by the surge of far-right parties. According to the EU treaties, the appointment of the Commission requires a majority in both the Council and the European Parliament. With the exception of the Commission president and the high representative for foreign affairs – who are nominated by the European Council –, the commissioners are proposed by their respective member state governments. As a result, they usually belong to a ruling party in their respective countries, which typically leads to a broad party mix in the overall composition of the Commission.

Once formally nominated, the commissioners-designate must undergo hearings before the European Parliament, which can reject individual commissioners and call for their replacement. However, since replacement candidates are also suggested by the respective member state governments, the Parliament has only limited influence over the party-political composition of the Commission.

The distribution of portfolios within the Commission is decided by the Commission president. This gives national governments an incentive to send commissioners who are acceptable to the president, and even member states with far-right parties in government tend to propose more moderate personalities. Among the 2024 commissioners-designate, there were 14 EPP members, five Liberals, four Socialists, two independents, and only one representative each of ECR and PfE member parties – namely Raffaele Fitto (FdI) from Italy and Olivér Várhelyi (Fidesz) from Hungary.

The treatment of these two candidates by the other European parties before the hearings strongly reflected the changing debates about the *cordon sanitaire* in the European Parliament. On the one hand, Várhelyi – who had already been a commissioner since 2019 – was met with little sympathy among the centrist parties. There was even some media speculation that the Hungarian government expected him to be rejected anyway and had only nominated him to increase the pressure on the Parliament to accept a planned replacement candidate.[20] Von der Leyen assigned him the responsibility for "health and animal welfare", generally considered a minor portfolio.

On the other hand, the reactions to Fitto were highly polarised. While the EPP strongly supported him – with Manfred Weber personally calling him a

[20] S. Wheaton, *Budapest's commissioner calculus*, in *Politico*, 30 July 2024, https://www.politico.eu/newsletter/brussels-playbook/budapests-commissioner-calculus/.

«close friend» and publicly pushing for him to get «a strong role» in the next Commission[21] –, both S&D and Renew reacted very negatively. The S&D even warned that giving an ECR member a vice-presidential position might be a reason for the group to reject the Commission altogether.[22] Despite this, von der Leyen proposed Fitto as a vice-president with a responsibility for "cohesion and reform".

At the time of writing this chapter, the 2024 hearings had not yet taken place, and the fate of both Fitto and Várhelyi was still undecided. Even if they are confirmed, the low number of far-right commissioners suggests that they will only have limited sway over the Commission college. Nevertheless, von der Leyen's support for giving Fitto a strong role underlines her openness to working closely with at least some ECR representatives, further adding to the normalisation of perceived "moderate" far-right parties.

4. *Council: Shying away from confrontation*

The EU Council consists of national ministers who represent the governments of the EU member states, in different formations depending on the policy area concerned. In countries with coalition governments, the ministers' negotiating and voting line in the Council is usually agreed between the coalition parties; in some cases, national parliaments are also involved. Voting in the Council therefore does not primarily follow transnational party lines but is characterised by national interests. However, as national interests can be interpreted from different party-political perspectives, the party composition of member state governments – and thus of the Council – also has an impact on EU policy.

Over the last years, the number of member states where far-right parties participate in government has been increasing. As of October 2024, ECR member parties lead the governments of Italy and Czechia, hold ministerial positions in Finland and Croatia, and have a confidence-and-supply agreement that also includes cooperation on EU matters with the centre-right minority government in Sweden. The PfE have full control over the government of Hungary, have ministers in Italy and the Netherlands, and give informal exter-

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[21] A. Peretti, *EPP leader Weber hints at prominent role for next Italian Commissioner*, in *EurActiv*, 29 August 2024, https://www.euractiv.com/section/politics/news/epp-leader-weber-hints-at-prominent-role-for-next-italian-commissioner/.

[22] Socialists and Democrats, *Socialists and democrats issue warning over next Commission mandate*, 10 September 2024, available at: https://socialistsanddemocrats.eu/newsroom/socialists-and-democrats-issue-warning-over-next-commission-mandate.

nal support to the centre-right minority government in France. In addition, a former ID member party is a junior partner in the Slovakian coalition government.

Still, these governments are only a minority in the Council. Excluding France, they represent 30% of the member states and 27% of the EU's population, which would not be enough to form a blocking minority in decisions where qualified majority voting applies.[23] The far right is thus significantly weaker than the EPP, the Socialists, or the Liberals, each of which currently participate in governments representing at least 47% of the EU population.

Unlike in the European Parliament, however, it is not common for representatives of centrist parties to simply outvote the far right in the Council. This has various reasons: Several key policy areas – such as foreign and security policy or the EU budget – are subject to unanimity rules, giving each member state government a veto that is sometimes used to force concessions also on other issues. Even where no formal vetoes apply, the Council is characterised by a diplomatic culture of consensus that generally seeks the broadest possible majorities even if they are not strictly necessary for a particular decision. The fact that many far-right ministers belong to national coalition governments that also include EPP members further reduces other member states' willingness to isolate them. Finally, member states often see the risk that a confrontation in the Council would lead national voters to rally around their government – as was the case with the counterproductive "sanctions" against Austria in 2000.[24] As a result, there has never again been an effective *cordon sanitaire* against any far-right government in the Council. Even in the case of Hungary's Fidesz government, its increasing isolation over the rule of law and the support for Ukraine has not been systematically extended to other policy areas.

Overall, therefore, the Council is the institution where the far right has the greatest influence on EU policy. Given its generally consensual functioning, this does not mean that far-right parties dominate policymaking in the Council. However, their involvement in consensual procedures allows them to take part in negotiations, to set conditions for agreements and to push through certain aspects of their political agenda. Already in past legislatures, the Council has often been to the right of the European Parliament on policy issues (such as migration, climate change, or fiscal solidarity), less supranationalist on con-

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[23] Under qualified majority voting, governments representing 55% of the member states and 65% of the population are required for a decision. This means that the blocking minority is 45% of the member states or 35% of the population.

[24] B. Schlipphak-O. Treib, *Playing the blame game on Brussels: the domestic political effects of EU interventions against democratic backsliding*, in *Journal of European Public Policy*, 24, 3, 2016, pp. 352-365, https://doi.org/10.1080/13501763.2016.1229359.

stitutional issues (such as EU treaty reform), and less willing to take action on democratic backsliding (such as the Article 7 procedure against Hungary, triggered by the European Parliament in 2018 but never put to a vote in the Council). As more far-right parties enter governments in member states, this inter-institutional divide is likely to continue.

5. *Conclusion: EU consensualism gradually normalising the far right*

As the largest and pivotal party in the European Parliament and Commission, and a key player in the Council, the EPP rather than the far right is likely to have the greatest influence on the EU's policy agenda during the 2024–29 term. Nevertheless, the success of the far-right parties in the 2024 election will translate into more speaking time and financial resources in the European Parliament, giving their ideas more visibility in the political discourse.

At the same time, there are also signs of convergence between the centre-right and the far right in many member states. On the one hand, far-right parties with governmental ambitions have tended to moderate their rhetoric in order to appeal to a centre-right electorate and to appear acceptable to the EPP as a coalition partner. On the other hand, centre-right (and even centre-left) parties have been tempted to adopt far-right policy positions in order to win back voters lost to these parties, despite empirical evidence indicating that such a strategy contributes to normalising the far right and does not pay off for centrist parties. [25]

At the EU level, this is reinforced by the specific effect that governing parties are usually interested in presenting Council compromises to the public as their own successes. If compromises are only possible by including far-right positions, centrist parties therefore have an incentive to justify these positions as politically acceptable. In recent years, this has been most evident in asylum policy, where far-right governing parties in Italy, Poland and Hungary have played a key role in shifting the debate away from the reallocation of refugees within the EU towards stricter border procedures and the externalisation of asylum applications to third countries – proposals that have subsequently been taken up by the parties of the political centre.

The impact of far-right parties is not limited to mere policy issues, but also extends to constitutional matters like EU enlargement and institutional reform. Here, too, there has been a gradual convergence between the far right and the

[25] W. Krause-D. Cohen-T. Abou-Chadi, *Does accommodation work? Mainstream party strategies and the success of radical right parties*, in *Political Science Research and Methods*, 11, 1, 2023, pp. 172-179.

EPP, which over time has moved away from its traditional supranationalism towards more intergovernmentalist positions. In addition, the presence of far-right parties in member state governments has a paralysing effect on the EU's constitutional development, contributing to its reformability crisis.[26] Finally, coalition considerations at the national level as well as interdependencies in the Council also impede that centrist parties form a united alliance to defend EU values against far-right attacks on democracy and the rule of law.

On a more fundamental level, this is indicative of the different ways in which different democratic systems are susceptible to far-right threats. In a majoritarian democracy, extremist power grabs have an almost binary character: as long as far-right parties remain in the minority, they are largely excluded from political power, but a single sweeping victory can give them far-reaching control. In a consensus democracy, on the other hand, a large number of checks and balances prevents any one political actor from seizing *full* power. However, this also implies that once extremist parties cross a certain threshold, it is very difficult for other parties to keep them from exercising *some* power.

The EU, of course, falls squarely into this second category. While it is highly unlikely that far-right parties will ever dominate the EU institutions in the way that they control the governments of some member states, their gradual normalisation and inclusion in decision-making processes allows them a considerable political impact and contributes to the slow erosion of common European values. Paradoxically, it is the very mechanisms that are supposed to protect national sovereignty (such as unanimity requirements in the Council) that give them a foothold to influence EU policy – even at a time when they represent only a minority of EU citizens and could still be outvoted in a more majoritarian democracy.

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[26] M. Müller, *A Democratic Approach to EU Reform. Impetus for the EU reform debate,* Policy Paper, 2024, available at: https://www.boell.de/en/2024/10/08/democratic-approach-eu-reform.

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THE EUROPEAN UNION AND THE WAR OF AGGRESSION IN UKRAINE: AN INSPIRING SOLIDARITY IN THE FIELD OF DEFENCE?

Anne Hamonic [*]

1. *Introduction – Solidarity, a possible inspiration for the rule of law*

Article 21 TEU lists a series of "principles which have inspired [the European Union's] own creation, development and enlargement, and which it seeks to advance in the wider world". [1] These principles are thus considered to be

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[1] Article 21(1) (1) TEU. "[D]emocracy, the rule of law, the universality and indivisibility of

consubstantial with the identity and development of the Union, and their promotion in the Union's external action contributes to the objective of asserting the Union's identity on the international stage and "safeguard[ing] its [own] values".[2] The "virtuous circle" thus drawn postulates a shared and enduring understanding of these principles, and suggests that these principles are projected externally because they have been tested internally and found to be efficient and successful. Conversely, inaction or divergences and tensions within the Union regarding such principles relativise the weight of the experience extolled by Article 21 TEU. With its premise thus called into question, the virtuous circle does not necessarily become a vicious circle, but can be seen as a circular argument, and the Union's influence on the international stage is inevitably diminished as a result.

This is the risk run by the rule of law, which has been challenged in several Member States in recent years, notably in Poland and Hungary.[3] Indeed, the rule of law is identified as a value of the Union by Article 2(1) TEU and, as such, may justify the triggering of Article 7 TEU procedure when it is the subject of a serious and persistent breach by a Member State. However the rule of law is also mentioned in the list of Article 21 TEU, and is regarded as a "guiding principle"[4] of the EU's external action, which the Union thus promotes in its relations with third parties. Its internal weakening reduces the Union's legitimacy in seeking to promote respect for it and its dissemination on the international stage. But perhaps the international context and the Union's external action can then inspire or encourage the strengthening of the principle internally. This is what can be seen in the case of solidarity, in the context of the Union's response to the war of aggression in Ukraine provoked by Russia.

Indeed, solidarity is also an inherent principle of the EU and its law. Despite the ambiguity of the primary law of the European Union (EU or Union), especially since the Treaty of Lisbon, which has multiplied its occurrences[5]

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human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".

[2] Article 21 (2) (a) TEU.

[3] See the Introduction of this Volume and Chapter 3 written by Marco Siddi and Barbara Gaweda.

[4] L. Pech, *Rule of law as a guiding principle of the European Union's external action*, CLEER Working Papers, 2012/3, 56 p.

[5] The Treaty on European Union (TEU) contains 10 references to "solidarity" (Preamble (6), articles 2, 3(3) [twice], 3(5), 21, 24(2) and 24(3) [twice], 31(1), 32); in the Treaty on the functioning of the European Union (TFEU), "solidarity" occurs 7 times (Preamble (7), articles 67(2), 80, 122(1), 194(1), 222(1) and 222(3)); in the annexed protocols and declarations, it occurs 4 times (Protocol No 28, Declaration n°37 [twice], Declaration n° 66).

and qualifications,[6] it is also listed in article 21 TEU, it has inspired the creation and underpinned the development of the Union.[7] It is also one of the principles that the Union "seeks to advance in the wider world"[8] and "[i]n its relations with the wider world",[9] in order to "promote multilateral solutions to common problems",[10] in the service of its ambition to assert its identity on the international scene. However, there was very little solidarity between the Member States of the Union in the specific area of defence. The war of aggression provoked by Russia profoundly changed things, but in the opposite way to the logic of Article 21(1) TEU. Massive support for Ukraine initially took the form of a wide range of military solidarity in favour of this third country as part of the Union's external action, which then imposed solidarity between the Member States themselves, encouraging the creation or improvement of numerous legal instruments for cooperation in the development of Member States' defence capabilities, with a view to the Union's strategic autonomy, and subsequently making it more decisive for its own defence as well as on the international stage.

In its Section 2, this chapter will show how the war of aggression in Ukraine constitutes a new test of solidarity for the EU, in the specific area of defence. Section 3 will then focus on expressions of solidarity with Ukraine, a source of innovation in military matters within the framework of the Union's external action, before Section 4 presents the consecutive development of sol-

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[6] "Solidarity" is not among the "values" listed in article 2(1) TEU, on which the EU is based, but "[t]hese values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, *solidarity* and equality between women and men prevail" (article 2(2) TEU) (emphasis added). Solidarity is also described as one of the "indivisible, universal values" on which "the Union is founded" (Preamble (2)). The wording of Article 3(5) TEU also suggests that "solidarity [...] among peoples" is a value of the Union which it will "uphold and promote" "[i]n its relations with the wider world". In primary law, solidarity is also described as a "principle" (article 80 TFEU), especially in the context of the EU's external action (articles 21 TEU and 24 TEU). It is even an "obligation" of the Union "towards a Member State which is the object of a terrorist attack or the victim of natural or man-made disaster" (declaration n°37 on Article 222 [TFEU]). There are also several references to the "spirit" of (mutual) solidarity between Member States (articles 24(3) and 31(1) TEU; articles 122, 194 and 222 TFEU).

[7] In his Opinion delivered on 26 July 2017, Advocate General Y. Bot "recall[ed] that solidarity is among the cardinal values of the Union and is even among the foundations of the Union. [...] It is therefore appropriate to emphasise at the outset the importance of solidarity as a founding and existential value of the Union" (Cases C-643/15 and C-647/15, *op. cit.*, points 17-18).

[8] Article 21(1)(1) TEU.

[9] Article 3(5) TEU.

[10] Article 21(1)(2) TEU.

idarity in favour of the Union's strategic autonomy in defence matters, a vector for the development of military capabilities through internal policies. Section 5 will conclude with some final remarks, raising the question of the possible inspiration of this reversed movement for the principle of the rule of law.

2. *A new test of solidarity triggered by the war of aggression in Ukraine, in the specific field of defence*

Before addressing the question of the impact of solidarity on the Union's defence policy since Russia's aggression against Ukraine, it is necessary to review some of the characteristics of the principle of solidarity itself (2.1), as well as the specific features of defence in EU law (2.2), and the way in which the war in Ukraine has profoundly changed things (2.3).

2.1. *The multifaceted nature of solidarity*

Despite – or perhaps because of – its relatively simple definition, solidarity in the context of EU law has been described as "polymorph[ic]", [11] "polyvalent[t]", [12] or even as a "a catch-all concept", [13] a "totem" [14] or a "slogan". [15]

In a general sense, solidarity is defined as "a relationship between people who are aware of a community of interests, which entails, for one member of the group, a moral obligation not to harm others and to provide them with assistance". [16] The application and adaptation of such a definition in the context

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[11] E. Brosset-R. Mehdi-N. Rubio, *Avant-Propos*, in E. Brosset-R. Mehdi-N. Rubio (eds.), *Solidarité et droit de l'Union européenne: un principe à l'épreuve*, DICE Editions, Coll. Confluence des droits, Aix-en-Provence, 2022, p. 11.

[12] J.-Cl. Masclet, *Préface*, in (ed.), *La solidarité dans l'Union européenne – Eléments constitutionnels et matériels*, Dalloz, Paris, 2011, p. 3.

[13] M. Borgetto, *Solidarité*, in D. Alland-S. Rials (eds.), *Dictionnaire de la culture juridique*, Lamy, PUF, Quadrige, Paris, 2003, p. 1430.

[14] K. Abderemane, *Le "mot" solidarité en droit de l'Union européenne*, in E. Brosset-R. Mehdi-N. Rubio (eds.), *Solidarité et droit de l'Union européenne: un principe à l'épreuve*, cit., p. 18.

[15] S. De La Rosa, *La transversalité de la solidarité dans les politiques matérielles de l'Union*, in C. Boutayeb (ed.), *La solidarité dans l'Union européenne – Eléments constitutionnels et matériels*, Dalloz, Paris, 2011, p. 175.

[16] J.-Cl. Masclet, *Préface*, cit., p. 1, using a definition provided by the dictionary *Le Robert de la langue française*. Our translation ["une relation entre personnes ayant conscience d'une communauté d'intérêts, qui entraîne, pour un élément du groupe, l'obligation morale de ne pas desservir les autres et de leur porter assistance"].

of European Union law gives rise to a variety of expressions and implications of solidarity. This regularly requires legal writers to choose an angle of approach and has led them to identify different levels and meanings of solidarity in EU law, which could feed into or be further nourished by it our analysis.

For example, the various facets of solidarity in EU law can be approached *ratione loci* or through a geographical approach. This leads to a distinction between the "internal" solidarity, which is expressed on the territory of the Member States and is mainly embodied in the Union's "internal" policies and actions, and "external" solidarity, which applies to relations between the Union and its partners and is based on external policies or, more generally, the Union's external action. [17]

The study of solidarity can also focus on its actors and/or beneficiaries, thus favouring a *ratione personae* approach. A distinction can then be made between "horizontal" solidarity, which is expressed in primary law at various levels (among peoples, [18] between generations, [19] between Member States [20]), and "vertical" solidarity (between Member States and the Union [21]). Solidarity between the EU and third countries is not so explicitly mentioned in the Treaties, but it is at the heart of several of the Union's external policies. In the context of the Union's external action, two forms of solidarity coexist and often complement each other. On the one hand, the solidarity-cooperation is based on the Union's actions and instruments, and involves a logic of reciprocity in the relationship with the third country or international organisation, offering another hypothesis of horizontal solidarity. On the other hand, the solidarity-assistance is implemented through the EU external policies and instruments, which aim at supporting the third-party partner, through unilateral EU action, which tends to reflect a more vertical conception of solidarity.

The substantive or *ratione materiae* approach to the analysis of solidarity

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[17] See F. Terpan, *Le traité de Lisbonne a-t-il rendu la solidarité possible dans le domaine de la sécurité et de la défense ?*, in E. Brosset-R. Mehdi-N. Rubio (eds.), *Solidarité et droit de l'Union européenne: un principe à l'épreuve*, cit., p. 152. For studies dedicated to solidarity in the context of external action more generally, see for example E. Neframi, *La solidarité et les objectifs d'action extérieure de l'Union européenne*, in C. Boutayeb (ed.), *La solidarité dans l'Union européenne – Eléments constitutionnels et matériels*, Dalloz, Paris, 2011, pp. 137-154; I. Bosse-platiere, *Solidarité – La solidarité européenne à l'épreuve de la crise en Ukraine*, in *Abécédaire de droit de l'Union européenne. En l'honneur de Catherine Flaesch-Mougin*, Presses universitaires de Rennes, Rennes, 2017, pp. 507-519.

[18] Article 3(5) TEU.

[19] Article 3(3) TEU.

[20] Articles 3(3) TEU, 24 TEU, 32(2) TEU; articles 67 TFUE, 80 TFUE, 122 TFUE, 194 TFUE.

[21] Article 222 TFUE and declaration n° 37 on Article 222 TFEU.

usually leads to the identification of its manifestations and consequences in an EU area of competence or policy. It makes it possible to highlight, where appropriate, the specific features of solidarity in a given substantive area, or even within the various components of an area of competence or policy. However, it must be used flexibly, so as not to prevent a more crosscutting approach and the identification of links between manifestations of solidarity in different policies, nor to prevent a comparison between the internal and external dimensions of solidarity, which is essential for assessing solidarity in military matters within the Union, for example.

Then, the *instrumental approach* is, in a way, an extension of the substantive approach, in that it leads to the study of solidarity through the instruments of EU law. It allows for a more in-depth reflection, in particular because the links between instruments are easier to establish, and can reveal different vectors of solidarity. For example, operational solidarity can be distinguished from normative solidarity and financial solidarity. There is also institutional solidarity, for which it is also interesting to analyse the methods used – supranational or intergovernmental – to adopt and implement these instruments. Even if solidarity is the basis of both methods, the rules for adopting and/or implementing the instruments reflect different types and degrees of commitment and therefore different implications.

Finally, these different approaches contribute to, or are part of, a *functional approach* to solidarity, which aims to determine its objective and/or distinguish its effects, leading to a wide variety of meanings of solidarity in EU law, [22] depending on the areas, actors and instruments.

The function(s) of solidarity may then evolve, and a *ratione temporis* approach may prove relevant, leading in particular to the evaluation or re-evaluation of solidarity in the light of a major (legal as well as political) event, as was the case with the entry into force of the Lisbon Treaty, but also with the migration or Covid-19 crises. In this respect, Russia's aggression and the war in Ukraine have provided a remarkable new opportunity to "test the solidarity" [23] of the Union and through the Union and its law, especially in the field of defence, which is a specific area of EU law.

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[22] See for example, N. Ruccia who distinguishes between "preventive solidarity", "corrective solidarity", "redistributive solidarity" and "emergency solidarity" (in *La nature juridique de la solidarité en droit de l'Union européenne*, cit.); or E. Neframi who distinguishes between "solidarity-assistance" and "solidarity-linkage" (in *La solidarité et les objectifs d'action extérieure de l'Union européenne*, cit. Our translation).

[23] E. Brosset-R. Mehdi-N. Rubio (eds.), *Solidarité et droit de l'Union européenne: un principe à l'épreuve*, cit., p. 11.

2.2. *The specific features of defence in EU law*

The EU's response to the war of agression in Ukraine implements the EU's "comprehensive approach to external conflicts and crises",[24] mobilising a wide range of EU competences and instruments.[25] They are vectors of (different kinds of) solidarity, especially, in an accentuated and innovative way, in the field of defence. The study of the manifestations of solidarity by and through the Union in the military or defence field[26] must therefore take into account the specific characteristics of this field of action in the context of EU law. As the European Court of Auditors pointed out in 2019, defence is "a unique domain in the EU legal and institutional framework".[27]

A first important feature concerns the specific nature of the market and the industry in the military field. The close link between defence and sovereignty has meant that defence has for a long time been dealt with only marginally in the context of the Union's other policies, and often in order to organise specific exceptions for this sector.[28] The defence industry has remained largely dependent on the political and industrial decisions of governments.[29] The result is a fragmented European defence market and a lack of standards and cooperation between Member States, estimated in 2017 at between €25 billion and €100 billion per year.[30] Solidarity was therefore largely lacking in this sector.

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[24] Joint Communication to the European Parliament and the Council, "The EU's comprehensive approach to external conflict and crises", JOIN/2013/030 final, 11 December 2013.

[25] See for example, A. Hamonic, *Guerre en Ukraine : réaction multidimensionnelle de l'Union au titre de son action* extérieure, in *RTD eur.*, 3, 2022, pp. 514-521.

[26] As it is not possible to analyse the difference between these two terms here, they are considered equivalent for the purposes of this chapter.

[27] European Court of Auditors, *European Defence*, Review n° 9, 2019, p. 9.

[28] See article 346 TFEU.

[29] See the Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and social Committee and the Committee of the regions, "European Defence Action Plan", COM/2016/0950 final, 30 November 2016: "The defence industry is dependent on the launch of capability development programmes by governments and more generally on the level of public spending and investment in defence. As end-customers for defence equipment, governments specify the requirements and act as contracting authorities, regulators and, often, as supporters of exports. In addition, defence system development takes place with a long-term perspective and implies high risks, as operational needs may change over the course of product development. This means defence companies will not invest in military technologies without a commitment from public authorities to buy them".

[30] European Commission, *Reflection Paper on the Future of European Defence*, COM/2017/0315 final, 7 June 2017, p. 9; Commission; DG DEFIS, Factsheet, *The European Defence Fund (EDF)*, 28 April 2021; Joint Communication on the Defence Investment Gaps Analysis and Way Forward, JOIN/2022/24 final, 18 May 2022.

This is an obstacle to the development of the Union, particularly as a crisis management player, since article 42 TEU emphasises that the development of the crisis management capacities of the EU Member States is necessary to enable the Union to conduct crisis managements operations (CMOs) in third countries.

From the point of view of the Union's external action, the Common Foreign and Security Policy (CFSP), including the Common Security and Defence Policy (CSDP), plays a key role in military and defence matters. Within the provisions of primary law relating to these policies, the "solidarity" is reaffirmed and reiterated, in particular through the expressions "spirit of mutual solidarity"[31] and "mutual political solidarity",[32] which "is also one of the foundations of the Common Foreign and Security Policy (CFSP) and one of the instruments used to implement it".[33] However, this reiteration in favour of a "mutual political solidarity" compensates for the intergovernmental method applied to the CFSP/CSDP[34] and the limited effectiveness of sincere cooperation in the absence of judicial control.[35] Indeed, as stated in Article 24 TEU, "[t]he common foreign and security policy is subject to specific rules and procedures", among which the requirement for unanimity in Council votes, the exclusion of legislative acts and the marginalisation of the Commission and the European Parliament, as well as the principle of the Court of Justice of the European Union's lack of jurisdiction over CFSP provisions. Even if the number of exceptions is increasing,[36] the intergovernmental nature of the CFSP/CSDP limits the "judicialisation" of this branch of EU law, including as regards human rights,[37] which undermines the rule of law within the EU and therefore tends to reduce its legitimacy to defend judicialisation at international level.[38] The regular reminder that the CSDP "shall respect the obligations

[31] Articles 24(3) and 31(1)(2) TEU.

[32] Articles 24(2) and 24(3) TEU.

[33] I. Bosse-platiere, *op. cit*., p. 508.

[34] Summarised in Article 24 TEU.

[35] A. Hamonic, *Coopération loyale et politique de sécurité et de défense commune (PSDC),* in J.F. Delile-M. Fartunova (eds.), *La coopération loyale dans le droit des relations extérieures de l'Union européenne*, Bruylant, Coll. Droit de l'Union européenne, Bruxelles, 2023, pp. 241-280.

[36] ECJ, 10 September 2024, *KS and KD v. Council e.a and Commission v. KS e.a*., joined cases C-29/22 P and C-44/22 P, ECLI:EU:C:2024:725.

[37] See the Opinion delivered by Advocate General T. Capeta on 23 November 2023, joined cases *KS and KD v. Council e.a.* (C-29/22 P) and *Commission v. KS, KD e.a.* (C-44/22 P), ECLI:EU:C:2023:901.

[38] See Chapter 7 co-authored by Luca Pantaleo and Beatrice Sanna.

of certain Member States, which see their common defence realised in the North Atlantic Treaty Organisation (NATO)"[39] also has an impact on the definition and implementation of this policy. Consequently, solidarity is central to the CFSP/CSDP, but the ways in which it can be achieved seemed limited. At least until Russia's armed aggression against Ukraine.

2.3. *The inevitable acceleration of solidarity in the face of the war in Ukraine*

The EU's response to Russia's aggression and the war in Ukraine has provided a new opportunity for the EU to exercise and develop the value of solidarity it defends, including in the field of defence. Since 24 February 2022, the Union has mobilised its institutions, policies and instruments to develop a dual response combining opposition to Russia (and its allies) and support for Ukraine (and the other European States affected by the conflict), without going so far as to act as a cobelligerent or to accept Ukraine's accelerated accession. Over the months, a number of differences have emerged within the Union. However, the Union as such remains unquestionably on Ukraine's side.

The EU's response to the war in Ukraine therefore involves manifestations of both vertical and horizontal solidarity, internal and external solidarity, mobilising and combining different EU competences and policies, through different types of instruments, governed by the intergovernmental or the Community method and giving concrete form to operational, institutional or financial solidarity. The main function of solidarity is therefore to support Ukraine. However, the implementation of this "solidarity-support", which is mainly based on the Union's external action, has favoured the development of the "solidarity-autonomy", which should contribute to the Union's strategic autonomy in the field of defence, and to which various internal EU policies contribute. Consequently, this new test of solidarity by EU law, in the military field, suggests an innovative order or dynamic between the external and internal dimensions of the EU action and the role of founding principles.

The following sections will show how solidarity in support of Ukraine is a source of innovation in military matters within the framework of the Union's external action (section 3), which promotes the expressions of solidarity for the Union's strategic autonomy, a vector for the development of military capabilities through internal policies (section 4).

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[39] Articles 42(2)(2) and 42(7) TEU; Protocols 10 and 11 annexed to the treaties.

3. *Solidarity in support of Ukraine, a source of innovation in military matters within the framework of the Union's external action*

Following Russia's aggression against Ukraine, solidarity in support of Ukraine was immediately expressed in the military field and proved to be a source of interesting innovations in the Union's external action. This solidarity in support of Ukraine combined a bold use of CFSP instruments giving concrete expression to the Union's solidarity *with Ukraine* (3.1), made possible by an effective intergovernmental cooperation demonstrating the solidarity *between Member States* (3.2).

3.1. *A bold use of CFSP instruments to demonstrate the Union's solidarity* with Ukraine

The Union's solidarity with Ukraine through CFSP instruments has taken the form of an operational solidarity through the establishment of the EUMAM Ukraine military mission, facilitated by its "delocalisation" (3.1.1), complemented by a financial solidarity supported by the constructive use of the European Peace Facility (EPF) (3.1.2).

3.1.1. *Operational solidarity facilitated by the "delocalisation" of EUMAM Ukraine*

The European Union military assistance mission in support of Ukraine (EUMAM Ukraine) is an EU crisis management operation (CMO) based on the CSDP and created in October 2022.[40] It is a military mission with a non-executive mandate[41] to "contribute to enhancing the military capability of Ukraine's Armed Forces (UAF) to regenerate and to effectively conduct operations",[42] mainly by providing training to Ukrainian military personnel and by coordinating and synchronising Member States' activities in support of the provision of training assistance to the UAF.[43] EUMAM Ukraine has been set up for an initial period of two-year and the financial reference amount for its common costs is €106,7 million.[44]

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[40] Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine), *OJ* L 270, 18 October 2022, p. 85.

[41] *Ibidem*, article 1(7).

[42] *Ibidem*, article 1(2).

[43] *Ibidem*, Article 1(3).

[44] *Ibidem*, Article 11(5).

If the CMOs as such can be seen as an illustration of solidarity,[45] the case of EUMAM Ukraine goes further. Indeed, the specific features of this military mission reflect a clear desire on the part of the EU to express and give practical expression to its solidarity with Ukraine, despite the circumstances.

Indeed, EUMAM Ukraine is the first military mission to be carried out in support of a European State, all the others having been in support of the armed forces of African States since 2010.[46]

Above all, however, EUMAM Ukraine is the first EU "delocalised" military mission. Indeed, according to its founding decision, "EUMAM Ukraine shall operate in the territory of the Member States",[47] and not in the Ukrainian territory itself, which is also reflected in the name of EUMAM Ukraine, which is a military mission "in support of Ukraine", and not "in Ukraine". Admittedly, it is justified by "the exceptional circumstances resulting from Russia's war of aggression against Ukraine and for as long as those circumstances prevail".[48] However, this is a flexible interpretation – to say the least – of Article 42(1) TEU, according to which the CSDP provides the Union with an operational capability that it can use in missions "outside the Union". This "delocalisation" reflects the firm intention to support Ukraine and offer an operational solidarity, while limiting the risk of being assimilated to a co-belligerent. It has also enabled the EU to reach the target of 40 000 trained soldiers in February 2024, and in May the Member States agreed to increase the target to 60 000 trained soldiers by the end of summer 2024.[49] In mid-2024, the mission was still taking place on the territory of several Member States, as there is no consensus on the possibility of sending military trainers to Ukrainian territory.[50]

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[45] See F. Terpan, *op. cit*., pp. 153-154; K. Lenaerts-S. Adam, *op. cit*., pp. 414-415.

[46] Ongoing in September 2024: EUTM Somalia, EUTM RCA, EUMAM (former EUTM) Mozambique; Completed: EUMAM RCA, EUTM Mali, EUMPM Niger. See EEAS, "Missions and Operations – Working for a stable world and a safer Europe", https://www.eeas.europa.eu/eeas/missions-and-operations_en#11927.

[47] Council Decision (CFSP) 2022/1968, *op. cit.*, article 1(5).

[48] *Ibidem*, §10 of the preamble.

[49] Council Conclusions on EU Security and Defence, doc. 9225/24, 27 May 2024, §6.

[50] N. Gros-Verheyde-O. Jehin, *EUMAM Ukraine. Objectif : 100.000 militaires… Des instructeurs européens en Ukraine ? Discussions en cours à tous les étages (v2)*, in *B2 Pro Le quotidien de l'Europe géopolitique*, 29 mai 2024, https://club.bruxelles2.eu/2024/05/actualite-objectif-100-000-militaires-formes-des-instructeurs-europeens-en-ukraine-discussions-en-cours-a-tous-les-etages/.

3.1.2. *A financial solidarity supported by a constructive use of the European Peace Facility (EPF)*

The EPF is an EU off-budget financial instrument created in 2021[51] and consists of two components. The "operations" component is intended to finance the common costs of EU military operations and missions, including those of the EUMAM Ukraine mission. The "assistance measures" component is intended to finance actions to strengthen the military and defence capacities of third States and regional and international organisations, and to support the military aspects of peace support operations led by a regional or international organisation or by third States.[52] Since 2022, the EU has made a determined use of these assistance measures, demonstrating remarkable financial solidarity with Ukraine, to the point of developing the instrument itself, as the following four illustrations show.

First, in February 2022, the EU adopted for the first time an assistance measure under the EPF to support the supply of military equipment and platforms, "designed to deliver lethal force".[53] After lengthy discussions,[54] the decision establishing the EPF in 2021 allowed for this,[55] but until then only decisions on the supply of non-lethal equipment had been adopted, for the benefit of various third countries,[56] including Ukraine.[57] By adopting an assistance measure to support the supply of lethal military equipment, the EU did not supply arms to Ukraine, as only Member States have military capabilities. Nor did it finance the supply of arms through the EU budget. Instead, it is through an off-budget financial instrument, financed by contributions from Member States based on a gross national income (GNI) distribution key, that it organised the solidarity financing, by all the EU Member States, of the arms supply to Ukraine, which was carried out by some of them. This decision was adopted on the same day as a second assistance measure "to support the

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[51] Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, *OJ* L 102, 24 March 2021, p. 14.

[52] *Ibidem*, article 1(2)(b).

[53] Council Decision (CFSP) 2022/338 of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, *OJ* L 60, 28 February 2022, p. 1.

[54] S. Santopinto-J. Marechal, *La Facilité européenne pour la paix : un nouvel outil au service de la politique d'assistance militaire de l'UE*, in *Eclairages, GRIP*, 1st February 2021, p. 6.

[55] Article 5(3) of Council Decision (CFSP) 2021/509 of 22 March 2021, *op. cit.*

[56] Esp. Bosnia-Herzegovinia, Mozambique, Moldova, Georgia, Mali.

[57] Council Decision (CFSP) 2021/2135 of 2 December 2021 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, *OJ* L 432, 3 December 2021, p. 59.

Ukrainian Armed Forces",[58] with other military equipment (non-lethal, "such as personal protective equipment, first aid kits and fuel").[59]

Second, the close complementarity between operational solidarity and financial solidarity with Ukraine was clearly expressed by the adoption, on 14 November 2022, of a Council decision on an assistance measure under the EPF "to support the Ukrainian Armed Forces trained by the [EUMAM Ukraine] with military equipment, and platforms, designed to deliver lethal force".[60] This assistance measure finances "the provision by Member States of: (a) munitions, military equipment, and platforms, designed to deliver lethal force, as required to meet the operational requirements of EUMAM Ukraine; and (b) services, including transportation, custody and maintenance and repair of the items under point (a) made available by Member States, for the training under EUMAM Ukraine".[61] And it is the EUMAM Ukraine mission itself that "shall implement the activities […], relating to the reimbursement and monitoring of the ammunition, military equipment, and platforms, designed to deliver lethal force, provided by Member States".[62]

Third, in March 2023, the Member States endorsed the principle of an 'ammunition package', aimed in particular at "speed[ing] up the delivery and joint procurement aiming at one million rounds of artillery ammunition for Ukraine in a joint effort".[63] This package included two CFSP decisions, each increasing EU assistance to Ukraine under the EPF for the supply of munitions by €1 billion.[64]

Finally, and fourthly, the desire to provide military assistance to Ukraine has meant that the financial ceiling of the EPF has had to be raised on several occasions, leading to a kind of restructuring of the instrument. Indeed, the fi-

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[58] Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, *OJ* L 61, 28 February 2022, p. 1.

[59] *Ibidem*, article 1(3).

[60] Council Decision (CFSP) 2022/2245 of 14 November 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces trained by the European Union Military Assistance Mission in support of Ukraine with military equipment, and platforms, designed to deliver lethal force, *OJ* L 294, 15 November 2022, p. 25. Emphasis added.

[61] *Ibidem*, article 1(3).

[62] *Ibidem*, article 4(2).

[63] Council of the EU, Note, *Delivery and joint procurement of ammunition for Ukraine*, §1, doc. 7632/23, 20 March 2023.

[64] Council Decision (CFSP) 2023/810 of 13 April 2023 amending Decision (CFSP) 2022/338 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force, *OJ* L 101, 14 April 2023, p. 64 and Council Decision (CFSP) 2023/927 of 5 May 2023 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces through the provision of ammunition, *OJ* L 123, 8 May 2023, p. 27.

nancial ceiling of the EPF for the period 2021-2027 was increased in March and in July 2023, due to the size of the amounts granted through assistance to the Ukrainian armed forces.[65] The Council then decided in March 2024[66] to increase the amount by €5 billion and to allocate this additional amount to Ukraine through the creation of a "Ukraine Assistance Fund" within the framework of the EPF.[67] In May, the Council also decided that this fund could be financed, at least temporarily, by the exceptional net profits from immobilised Russian assets.[68] As a result, the EPF has had a dedicated fund for Ukraine, and it is specifically funded.

This bold use of CFSP instruments to demonstrate the Union's solidarity with Ukraine has required an effective intergovernmental cooperation demonstrating the solidarity between the Member States.

3.2. *Effective intergovernmental cooperation demonstrating the solidarity* between Member States

As the EUMAM Ukraine mission and the assistance measures under the EPF are CFSP instruments, their adoption and implementation are subject to the logic of intergovernmental cooperation, which continues to dominate this area of competence,[69] in particular where there are military or defence implications.[70] The Member States therefore have an essential role to play in this area, and solidarity between them is a prerequisite for EU action. As part of the response to the war in Ukraine, solidarity between Member States in support of Ukraine was also clearly expressed, both in terms of the decision-making process (2.2.1) and funding (2.2.2).

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[65] See *infra*, 3.2.2.

[66] Council Decision (CFSP) 2024/890 of 18 March 2024 amending Decision (CFSP) 2021/509 establishing a European Peace Facility, *OJ* L, 2024/890, 19 March 2024.

[67] Council of the EU, Press release, *Ukraine Assistance Fund: Council allocates €5 billion under the European Peace Facility to support Ukraine militarily*, 18 March 2024, https://www.consilium.europa.eu/en/press/press-releases/2024/03/18/ukraine-assistance-fund-council-allocates-5-billion-under-the-european-peace-facility-to-support-ukraine-militarily/.

[68] Council Decision (CFSP) 2024/1470 and Council Regulation (EU) 2024/1469 of 21 May 2024 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *OJ* L, 2024/1470 and 2024/1469 respectively, 22 May 2024. See also Council Decision (CFSP) 2024/1471 of 21 May 2024 on the allocation of the amounts of the financial contribution paid to the European Peace Facility pursuant to Decision (CFSP) 2024/1470, *OJ* L, 2024/1471, 22 May 2024. See Chapter 6 written by Sara Poli.

[69] Article 24 TEU.

[70] Articles 31(4), 41(2), 48(7) TEU; articles 222(3), 333(3) TFEU; Article 5 of the Protocol (No 22) on the position of Denmark.

3.2.1. *A decision-making process doubly marked by solidarity between Member States*

The process of adopting the decisions establishing the EUMAM Ukraine mission and establishing the assistance measures for Ukraine under the EPF illustrates the solidarity between the Member States in two respects.

On the one hand, the very existence of these CFSP decisions presupposes that they were adopted in accordance with Article 31(1)(1) TEU, which requires unanimity in the Council, a procedure designed to preserve the freedom of choice and hence the sovereignty of each Member State. The adoption of the decisions thus depends on the agreement of all the Member States, reflecting the "mutual political solidarity" on which the CFSP is based.[71] While unanimity is usually seen as a source of slowness or even blockage,[72] the decisions on EUMAM Ukraine and on the assistance measures for Ukraine have been adopted, and quickly, even though they contain or involve major innovations. This is particularly true of the decision on the assistance measures concerning lethal equipment, which was adopted on 28 February 2022, just four days after the Russian aggression. This first expression of solidarity between Member States in the decision-making process was facilitated by the use of another mechanism based on their solidarity in CFSP matters.

On the other hand, the decisions on EUMAM Ukraine and the EPF assistance measures in support of the supply of lethal equipment to Ukraine were adopted after one or more Member States had decided to use the possibility of constructive abstention under Article 31(1)(2) TEU.[73] Between its incorporation into primary law by the Treaty of Amsterdam and 2022, this option had been used only once, for the establishment of the civilian mission EULEX Kosovo in 2008.[74] By contrast, it has been used several times for the decisions

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[71] Article 24 TEU.

[72] Communication from the Commission, *A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy*, COM/2018/647, 12 September 2018.

[73] "When abstaining in a vote, any member of the Council may qualify its abstention by making a formal declaration under the present subparagraph. In that case, it shall not be obliged to apply the decision, but shall accept that the decision commits the Union. In a spirit of mutual solidarity, the Member State concerned shall refrain from any action likely to conflict with or impede Union action based on that decision and the other Member States shall respect its position. If the members of the Council qualifying their abstention in this way represent at least one third of the Member States comprising at least one third of the population of the Union, the decision shall not be adopted."

[74] Communication, *A stronger global actor: a more efficient decision-making for EU Common Foreign and Security Policy*, cit.; R.A. Wessel-V. Szep, *The implementation of Article 31 of the Treaty on European Union and the use of Qualified Majority Voting: Towards a*

on military assistance to Ukraine in 2022/2023. Austria, Ireland and Malta used it for the adoption of the decision on assistance measures for lethal equipment of 28 February 2022[75] and reiterated their position when it was amended,[76] joined by Hungary from April 2023.[77] The four Member States also used constructive abstention for the adoption of the assistance measure under the EPF "to support the Ukrainian Armed Forces trained by the European Union Military Assistance Mission in support of Ukraine with military equipment, and platforms, designed to deliver lethal force" in November 2022[78] and for the adoption of the Council decision on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces through the provision of ammunition in May 2023.[79] Hungary did the same when the decision to establish EUMAM Ukraine was adopted in October 2022.[80] From the perspective of solidarity, constructive abstention can be interpreted in two ways. From one point of view, the decisions have indeed been adopted, but not all the Member States will actively implement them, suggesting reduced solidarity. From another point of view, however, by not opposing the decision, which commits the Union, the abstaining States exercise a kind of passive solidarity, which is part of the "spirit of mutual political solidarity".

In addition to this political solidarity expressed in the decision-making process, the intergovernmental cooperation that characterises the CFSP decisions

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more effective Common Foreign and Security Policy?, Study Requested by the AFCO committee of the European Parliament, 2022, pp. 61-63.

[75] "Extraordinary meetings of the Permanent Representatives Committee, 22, 24, 27, 28 February, 1, 3 and 4 March 2022 – Summary Record", doc. 7282/22 du 16 March 2022.

[76] See, *Summary Record – Permanent Representatives Committee, 22, 23 and 25 March 2022*, doc. 8284/22, 21 April 2022; *Summary Record – Permanent Representatives Committee, 13 April 2022*, doc. 8505/22, 28 April 2022; *Summary Record – Permanent Representatives Committee, 18 and 20 May 2022*, doc. 10300/22, 15 June 2022; *Draft Minutes – Council of The European Union (Foreign Affairs) 17 October 2022*, doc. 13777/22 ADD 1, 27 October 2022, annex 1; *End of Written Procedure for the adoption of Council Decision on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces*, doc. CM 2408/23, 13 April 2023.

[77] See *End of Written Procedure for the adoption of Council Decision on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces*, doc. CM 2408/23, 13 April 2023.

[78] *Draft Minutes Council of The European Union (Foreign Affairs) 14 and 15 November 2022*, doc. 14945/22 ADD 1, 29 November 2022.

[79] *End of Written Procedure for the adoption of Council Decision on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces*, doc. CM 2613/23, 5 May 2023.

[80] *Draft Minutes – Council of The European Union (Foreign Affairs) 17 October 2022*, cit.

adopted in the context of the EU's response to the war in Ukraine reveals a growing financial solidarity between Member States.

3.2.2. *Instruments strengthening financial solidarity between Member States*

The common costs of the operational expenditure of the EUMAM Ukraine mission as well as the assistance measures are financed by the European Peace Facility, which is funded by contributions from Member States based on a gross national income (GNI) distribution key. Although the EPF can be considered less integrated than the EU budget,[81] the CFSP instruments adopted and implemented in support of Ukraine both favour an increased financial solidarity between Member States.

Firstly, as EUMAM Ukraine is a military mission, its operational expenditure is not financed by the EU budget, in accordance with article 41(2) TEU. However, the "common costs" of the mission, which are the only ones to be financed by the EPF and thus by all Member States,[82] have been extended beyond their usual scope.[83] In particular, in connection with the decision to conduct military training of the Ukrainian armed forces on the territory of the Member States, the decision establishing EUMAM Ukraine stipulates that the costs relating to "transportation from the Ukrainian border to the training facilities and return, and on, around and between training facilities"[84] are common costs under the EPF. The operational expenditure of the mission that are not included in the common costs, are then borne solely by the Member States that have decided to contribute to the military mission. However, by April 2024, no less than 24 EU Member States had offered training modules and

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[81] For an analysis of the EU budget from the point of view of solidarity, see A. Potteau, *Le budget de l'Union, test de la solidarité entre Etats – Le traité de Lisbonne a-t-il changé les choses ?,* in E. Brosset-R. Mehdi-N. Rubio (eds.), *Solidarité et droit de l'Union européenne: un principe à l'épreuve*, cit., pp. 167-198.

[82] Including Denmark, which has decided not to avail itself of its opt-out anymore under article 5 of Protocol n° 22 as from 1 July 2022. Council Decision (CFSP) 2023/994 of 22 May 2023 on the consequences of Denmark informing the other Member States that it no longer wishes to avail itself of Article 5 of Protocol No 22 on the position of Denmark, and amending Decision (CFSP) 2021/509 establishing a European Peace Facility and Decision 2014/401/CFSP on the European Union Satellite Centre, *OJ* L 135, 23 May 2023, p. 120.

[83] See the list of the scope of the common costs in annexes III to V to the Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility […], *OJ* L 102, 24 March 2021, p. 14.

[84] Article 11(2) of Council Decision (CFSP) 2022/1968 of 17 October 2022 on a European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine), *OJ* L 270, 18 October 2022, p. 85.

personnel.[85] For this mission, the "lack of solidarity in sharing the financial burden"[86] resulting from Article 41(2) TEU is thus reduced.

Secondly, as regards the financing of military assistance measures under the EPF for the supply of military equipment to the Ukrainian Armed Forces, two points worth highlighting.

The first one concerns the abstaining Member States and the compensation system provided for in decision (CFSP) 2021/509 establishing the EPF. According to the latter, "[i]n cases where a Member State has abstained in a vote […] regarding an assistance measure which allows for the supply of military equipment, or platforms, designed to deliver lethal force, that Member State shall not contribute to the costs of that assistance measure. In such a case, that Member State shall make an additional contribution to assistance measures other than those concerning the supply of such equipment or platforms".[87] Assistance measures for the solidarity financing of the supply of non-lethal military equipment were also adopted in support of the Ukrainian Armed Forces,[88] with the possibility for abstaining States to provide a compensation in favour of Ukraine.[89]

The second point concerns the remarkable size of the amounts granted to Ukraine through military assistance measures (non-lethal[90] but above all lethal[91]), which were so large that they quickly jeopardised the viability of the instrument.[92] On three occasions, however, the Member States have decided to increase the EPF ceiling. For the period 2021-2027, it was raised from

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[85] SEAE, *European Union Military Assistance Mission Ukraine*, Factsheet, April 2024, https://www.eeas.europa.eu/sites/default/files/documents/2024/2024-EUMAMUkraine.pdf

[86] J. Auvret-Finck, *Rapport introductif – la nécessité d'une relance de la PSDC*, in J. Auvret-Finck (ed.), *Vers une relance de la politique de sécurité et de défense commune ?*, Larcier, Bruxelles, 2014, p. 32.

[87] Article 5(3) of the Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, *OJ* L 102, 24 March 2021, p. 14.

[88] Council Decision (CFSP) 2022/339 of 28 February 2022 on an assistance measure under the European Peace Facility to support the Ukrainian Armed Forces, *OJ* L 61, 28 February 2022, p. 1.

[89] See the last paragraph of each of the three Formal Declaration in EU Council, *Extraordinary meetings of the Permanent Representatives Committee, 22, 24, 27, 28 February, 1, 3 and 4 March 2022 – Summary Record*, cit.

[90] It has reached €380 million in February 2023.

[91] It has reached €4,12 billion in April 2023.

[92] C. Schneider, *La Facilité européenne pour la paix (FEP) ou les nouveaux avatars de l'Union et de sa PSDC en tant que contributeur de paix et de sécurité*, in L. Potvin-Solis (ed.), *L'Union européenne et la paix*, Bruylant, Bruxelles, 2023.

€5,692 billion [93] to €7, 979 billion in March 2023, [94] then to €12,04 billion in June 2023 [95] and to €17,04 billion in March 2024. [96] While the financial solidarity initially envisaged may have seemed timid, the reality of the conflict in Ukraine has made it necessary to be more assertive.

Even if the difficulty of getting all the Member States to agree remains real and should not be ignored, [97] there is no doubt that the solidarity-support for Ukraine has promoted an innovative use of several CFSP instruments in the military field, to the benefit of asserting the EU's identity on the international stage as a credible operational and financial actor. However, contrary to what the Treaties – especially Article 21 TEU – might suggest, this external solidarity in military matters did not result from the extension of a pre-existing internal solidarity. On the contrary, solidarity towards Ukraine has led to solidarity in favour of strategic autonomy, through the development of European military capabilities, served, for its part, by the Union's internal policies.

4. *Solidarity for the strategic autonomy of the Union, a vector for the development of the military capabilities through internal policies*

Although not ignored before, the insufficient military capabilities of Member States and the need for more initiative and cooperation towards an effective European Defence Technological and Industrial Base (EDTIB) have been highlighted and even reinforced, by the war in Ukraine. The development of the military capabilities is therefore crucial and forms part of the EU's "strategic autonomy", as reaffirmed in the March 2022 Strategic Compass. [98] To this

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[93] Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, *OJ* L 102, 24 March 2021, p. 14.

[94] Council Decision (CFSP) 2023/577 of 13 March 2023 […], *OJ* L 75, 14 March 2023, p. 23.

[95] Council Decision (CFSP) 2023/1304 of 26 June 2023 […], *OJ* L 161, 27 June 2023, p. 66.

[96] Council Decision (CFSP) 2024/890 of 18 March 2024 […], *OJ* L, 2024/890, 19 March 2024.

[97] Hungary comes to mind, which is blocking the amendment of the assistance measures under the FEP for Ukraine since May 2023 (N. Gros-Verheyde, "Comment contourner le veto hongrois sur la Facilité européenne pour la paix ?", *B2 Pro Le quotidien de l'Europe géopolitique*, 28 August 2024).

[98] Council of the EU, *A Strategic Compass for Security and Defence – For a European Union that protects its citizens, values and interests and contributes to international peace and security*, doc. 7371/22, 21 March 2022. See also Paragraph 31 of the preamble of Regulation (EU) 2024/795 of the European Parliament and of the Council of 29 February 2024 establishing the Strategic Technologies for Europe Platform (STEP) […], *OJ* L, 2024/795, 29 February 2024. The ambition of the EU's strategic autonomy in the defence field was already expressed

end, in addition to the CFSP instruments,[99] the EU institutions have recently proposed and adopted several instruments for the development of military capacity building on the legal basis of Union's internal policies. This paradigm shift in the military field gives rise to new hypotheses and facets of solidarity under EU law. More specifically, the Union's quest for strategic autonomy has led to an accelerated mobilisation of the Union's internal policies to enhance solidarity within the Union in an emergency context (4.1), and now the challenge is one of long-term solidarity in the military sphere (4.2).

4.1. *An accelerated mobilisation of internal policies to enhance solidarity within the Union in a context of emergency*

A few days after the Russian aggression, the EU's Heads of State or Government, meeting in Versailles on 11 March 2022, undertook to "bolste[r] [their] defence capabilities".[100] This led to an accelerated mobilisation of the Union's internal policies, through the proliferation of instruments promoting cooperation in the development of defence capabilities (4.1.1) and the trivialisation of the Community method (4.1.2), which tend to strengthen solidarity within the Union.

4.1.1. *The proliferation of instruments promoting cooperation in the development of defence capabilities*

The mobilisation of EC/EU internal policies to address defence issues is not new. In particular, the directives of the 2009 "Defence Package" came under the internal market policy.[101] Then, in 2016, the European Commission

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in the Communication from the Commission, "European Defence Action Plan", COM(2016) 950 final, 30 November 2016, p. 3, and in the Joint Communication on the Defence Investment Gaps Analysis and Way Forward, JOIN (2022)24 final, 18 May 2022.

[99] In particular the Permanent structured cooperation (PESCO) and the European Defence Agency (EDA). They are involved in the EU's response to the war in Ukraine, have not undergone fundamental changes as a result.

[100] Informal meeting of the Heads of State or Government, *Versailles Declaration*, 10 and 11 March 2022. They therefore agreed to "increase substantially defence expenditures […]; develop further incentives to stimulate Member States' collaborative investments in joint projects and joint procurement of defence capabilities; […] invest further in the capabilities necessary to conduct the full range of missions and operations […]; […] foster synergies […] and invest in critical and emerging technologies and innovation for security and defence; […] take measures to strengthen and develop our defence industry, including SMEs" (§ 9).

[101] Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Communi-

presented its European Defence Action Plan, which aims to help "create the conditions for more defence cooperation to maximise the output and the efficiency of defence spending", a strategy that must "go hand-in-hand with a strong, competitive and innovative defence industrial base". [102] The Commission's aim with this Action Plan was to show how "the Union's policies and instruments may provide added-value". [103] The Action Plan led to a number of innovations, in particular the European Defence Fund (EDF). Officially launched by a Commission communication on 7 June 2017, [104] it has been tested, under the 2014-2020 Multiannual Financial Framework, through two "precursor" programmes: the Preparatory Action on Defence Research (PADR) and the European Defence Industrial Development Programme (EDIDP), which aims to support the competitiveness and innovative capacity of the EU defence industry. [105] Then, in April 2021, the regulation establishing the European Defence Fund was adopted for the period 2021-2027, with the aim of "foster[ing] the competitiveness, efficiency and innovation capacity of the European defence technological and industrial base (EDTIB) throughout the Union, which contributes to the Union strategic autonomy and its freedom of action [...]" [106] The Fund is intended to "cover the entire cycle of defence industrial development from research through to placing products on the market". [107] It consists of two legally distinct "windows", a "Research" window, which finances collaborative research projects in defence-related technologies and products, and a "Capabilities" window, which provides co-financing to

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ty, *OJ* L 146, 10 June 2009, p. 1; Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security […], *OJ* L 216, 20 August 2009, p. 76.

[102] Communication from the Commission, *European Defence Action Plan*, COM/2016/0950 final, 30 November 2016.

[103] *Ibidem*, p. 5.

[104] Communication from the Commission, *Launching the European Defence Fund*, COM/2017/0295 final, 7 June 2017.

[105] Regulation (EU) 2018/1092 of the European Parliament and of the Council of 18 July 2018 establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovation capacity of the Union's defence industry, *OJ* L 200, 7 August 2018, p. 30.

[106] Article 3(1) of the Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092, *OJ* L 170, 12 May 2021, p. 149.

[107] Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Industrial Development Programme aiming at supporting the competitiveness and innovative capacity of the EU defence industry, COM/2017/0294 final, 7 June 2017.

"promot[e] joint development and joint acquisition of key defence capabilities". [108] In principle, financial support will be given to consortia consisting of at least three eligible legal entities established in at least three different Member States.

Continuing the movement initiated by the European Defence Fund (EDF), the EU has accelerated the mobilisation of its internal policies to extend solidarity between national defence actors following the outbreak of the war in Ukraine. Two "temporary" instruments were adopted to deal with the emergency.

In October 2023, the instrument to strengthen the European defence industry through joint procurement (EDIRPA) was adopted. [109] With a budget of €300 million [110] for the period from 27 October 2023 to 31 December 2025, this instrument aims to adapt the EDTIB to support high-intensity conflicts and "to address, in particular, the most urgent and critical defence product needs, especially those revealed or exacerbated by the response to the Russian war of aggression against Ukraine". [111] EDIRPA aims to encourage cooperation between Member States in the field of defence procurement and to this end allows for partial reimbursement from the EU budget when a consortium of at least three Member or associated States is involved in a joint procurement of defence products.

A little earlier, in July 2023, the regulation on support for the production of ammunition (ASAP) [112] was adopted. [113] With a budget of €500 million for just under two years (25 July 2023-30 June 2025), this regulation aims to accelerate the production of ammunition and missiles as a matter of urgency, in order to replenish Member States' stocks of these crucial defence products, to supply Ukraine and to enable European manufacturers to increase the predictability of government orders. To this end, the regulation co-finances, from the EU budget, the costs of increasing or modernising the production capacity of public or private entities in the field of ammunition and missiles, thus contributing "to the industrial reinforcement sought to foster the efficiency and over-

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[108] Communication from the Commission, *Launching the European Defence Fund*, cit.

[109] Regulation (EU) 2023/2418 of the European Parliament and of the Council of 18 October 2023 on establishing an instrument for the reinforcement of the European defence industry through common procurement (EDIRPA), *OJ* L, 2023/2418, 26 October 2023.

[110] A budget of €500 million was initially planned, but €200 million was eventually transferred to the ASAP regulation, which has now been adopted. See *infra*.

[111] Article 3(2) of Regulation (EU) 2023/2418, cit.

[112] Regulation (EU) 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production (ASAP), *OJ* L 185, 24 July 2023, p. 7.

[113] It is part of the "ammunition package". See *supra*, 3.1.2.

all competitiveness of the EDTIB with respect to the relevant defence products".[114]

Although they intervene at different stages of the industrial process and operate in different ways,[115] these instruments all aim to encourage cooperation between the Member States and/or their defence industries by providing financial support for the implementation of a research project, the development of an industrial production and/or the joint acquisition of defence capabilities. The aim is thus to promote a chain of solidarity, for which the war in Ukraine has been a remarkable catalyst, leading to trivialisation of the Community method in the military field within the Union.

4.1.2. *The trivialisation of the Community method in the field of defence*

The various regulations adopted or proposed are based on legal bases relating to Union's internal policies, to which the Community method is applied.

More specifically, since the EDF has both a Capabilities and a Research windows, the regulation establishing it is based on the following legal bases: articles 173(3) TFEU (Industry) and 182(4), 183 and 188(2) of the treaty on the functioning of the EU (TFEU) (Research and Technological Development and Space). EDIRPA concerns joint procurement by defence industries and is based solely on Article 173(3) TFEU. The ASAP Regulation[116] is also based on Article 173(3) TFEU, supplemented by Article 114 TFEU on the approximation of laws for the establishment and functioning of the internal market. Finally, the Commission's proposal for a European Defence Industrial Programme and a framework of measures to ensure the availability and supply of defence products (EDIP) is structured around three pillars, which falling under three different areas of competence. As regards internal policies,[117] the first pillar concerns measures to ensure the existence of the conditions necessary for the competitiveness of the EDTIB and justifies Article 173(3) TFEU as one of the legal bases of the proposed regulation, while the second pillar con-

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[114] Article 11 of the Regulation (EU) 2023/1525, cit.

[115] The eligible actions, the criteria for allocating funds, the rate of co-financing or the nature of the funding vary and are detailed in each regulation.

[116] Regulation (EU) 2023/1525 of the European Parliament and of the Council of 20 July 2023 on supporting ammunition production (ASAP), *OJ* L 185, 24 July 2023, p. 7.

[117] The third pillar consists of measures contributing to the recovery, reconstruction and modernisation of the Ukrainian DTIB and progressive integration into the EDTIB, for which the appropriate legal basis is Article 212(2) TFEU, which refers to the "Economic, financial and technical cooperation with third countries", and thus forms part of the EU's external action.

sists of measures having as their object the functioning of the internal market and in particular the European Defence Equipment Market (EDEM), which is provided for in Article 114 TFEU. [118]

Defence is thus becoming an integral part of several of the Union's internal policies. Increasingly, it is no longer confined to the CFSP/CSDP, but is becoming a "Community" issue within the Union, being "communitised", with a number of consequences for solidarity within the Union.

Indeed, these internal policies are governed by the Community method, which implies significant differences compared to the intergovernmental method used for CFSP instruments. This is particularly the case with regard to the decision-making process and financing.

As far as the decision-making process in concerned, the new regulations to strengthen military capabilities are adopted through the ordinary legislative procedure (OLP). The OLP involves the Commission, the Parliament and the Council. A kind of institutional solidarity – embodied in the principle of sincere cooperation – is therefore required between the components of this "institutional triangle" in order for EU law to take shape and serve the EU objectives. The European Commission's desire to intervene in the field of defence is nothing new, [119] nor is the European Parliament's support for the development of European defence. However, the acceptance of the communitisation of defence by the Council's – and by extension the Member States – was not self-evident. The very existence of the EDF, the EDIRPA and the ASAP instruments testifies to the solidarity between the EU Member States and between the Union's institutions to achieve the common objective of strategic autonomy in the field of defence.

In terms of financing, these instruments are financed by the EU budget. This implies a participation of all the Member States. It also involves other categories of contributors, such as consumers or companies, through the various own resources. It is a form of extended financial solidarity. This trivialisation of the financing of the reinforcement of military capabilities by the EU

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[118] Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products ('EDIP'), COM/2024/150 final, 5 March 2024.

[119] See in particular the following Communications of the Commission: *The Challenges Facing The European Defence – Related Industry, A Contribution for Action at European Level*, COM(96) 10 final, 24 January 1996; *Implementing European Union strategy on defence-related industries*, COM(97) 583 final, 4 December 1997; *European defence – Industrial and market issues – Towards an EU Defence Equipment Policy*, COM(2003) 113 final, 11 March 2003; *A strategy for a stronger and more competitive European defence industry*, COM(2007) 764 final, 5 December 2007; *Towards a more competitive and efficient defence and security sector*, COM(2013)542 final, 24 July 2013.

budget also reveals a more flexible interpretation of article 41(2) TEU, which is no longer seen as preventing any financing of military initiatives by the EU budget. [120]

This accelerated mobilisation of the Union's internal policies, which enhances solidarity within the Union in military capacity-building, must therefore be maintained, and even strengthened.

4.2. *The challenge of long-term solidarity in the field of defence*

The use of Community instruments to strengthen the military capabilities of the EU Member States does not, by its very nature, guarantee total or continuous solidarity. Beyond the emergency situation, with a view to the long term and the effectiveness of the Union's strategic autonomy, solidarity must be reaffirmed, both from an institutional point of view, through convergence between the Union's institutions (4.2.1), and from a more normative point of view, through the development of an ambitious comprehensive and integrated approach (4.2.2). In this respect, the fate of the Commission's proposal for a regulation "establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products (EDIP)", [121] which accompanies the European Defence Industrial Strategy (EDIS), [122] should be a crucial "test of solidarity".

4.2.1. *For greater convergence between the EU institutions*

The adoption of legislation to promote cooperation in the development of defence capabilities has sometimes proved complex. While the intergovernmental method under the CFSP, in particular unanimity, can slow down or block decision-making, the OLP is not entirely without its shortcomings. Firstly, in practice, the Council rarely votes by qualified majority in favour of consensus, without the possibility of constructive abstention. Secondly, the institutional balance that the rules of the decision-making process are supposed to reflect can lead to arduous debates and a result equivalent to the lowest

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[120] S. Rodrigues, *Financing European Defence: The End of Budgetary Taboos*, in *European Papers*, vol. 8, n° 3, 2023, pp. 1155-1177.

[121] Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products (EDIP), COM/2024/150 final, 5 March 2024.

[122] Joint Communication, *A new European Defence Industrial Strategy: Achieving EU readiness through a responsive and resilient European Defence Industry*, COM/2024/10, 5 March 2024.

common denominator outcome or to disappointing compromises, both within the Council and the Parliament and at the end of the shuttle procedure or trialogues with the Commission.

Thus, the adoption of the EDF had already given rise to a difference of opinion between institutions, which led to a drastic reduction in the amount allocated to this financial instrument – set at €7,953 billion for 2021-2027 [123] – compared with the amount proposed by the Commission, i.e. €13 billion. [124] In order to meet the needs related to support for Ukraine, this amount was increased to €9,453 billion in February 2024, [125] which is far from the initial budget proposed by the Commission, well before the armed attack.

Then, with regard to EDIRPA, the procedure took much longer than expected, mainly because of tensions within the European Parliament between the ITRE (industry) committee and the SEDE (security and defence) sub-committee. Then, as the procedure progressed, differences emerged between the Commission, the Council and the European Parliament on legal aspects (whether or not to use a delegated act; opening up to third countries), financial aspects (the amount; the bonus for Member States close to Ukraine and Russia) and temporal aspects (the period of application). [126] Faced with the European Parliament's amendments, the Commission even threatened to withdraw its proposal. [127] It was only after a second trialogue that a political agreement was finally reached on 27 June 2023 [128] and the regulation was adopted on 18 October 2023, more than a year after the Commission's proposal. Moreover, whereas the Commission had proposed a budget of €500 million for a period of just over two years, [129] the regulation

[123] Regulation (EU) 2021/697 of the European Parliament and of the Council of 29 April 2021 establishing the European Defence Fund and repealing Regulation (EU) 2018/1092, *OJ* L 170, 12 May 2021, p. 149.

[124] Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Fund, COM/2018/476 final, 13 June 2018.

[125] Article 18 of Regulation (EU) 2024/795 of the European Parliament and of the Council of 29 February 2024 establishing the Strategic Technologies for Europe Platform (STEP) […], *OJ* L, 2024/795, 29 February 2024.

[126] O. Jehin, *Edirpa, l'instrument d'acquisition en commun pour la défense européenne*, in *B2 Pro Le quotidien de l'Europe géopolitique*, 16 mai 2023, https://club.bruxelles2.eu/2023/05/fiche-memo-edirpa-linstrument-dacquisition-en-commun-pour-la-defense-europeenne/.

[127] A. Pugnet, *EU executive threatens withdrawal of €500m arms procurement fund proposal*, in *Euractiv.com*, 27 March 2023, https://www.euractiv.com/section/defence-and-security/news/eu-executive-threatens-withdrawal-of-e500m-arms-procurement-fund-proposal/.

[128] Regulation (EU) 2023/2418 of the European Parliament and of the Council of 18 October 2023 on establishing an instrument for the reinforcement of the European defence industry through common procurement (EDIRPA), *OJ* L, 2023/2418, 26 October 2023.

[129] Proposal for a Regulation of the European Parliament and of the Council on establishing

provides for a budget of €300 million for the period from 27 October 2023 to 31 December 2025. [130]

For ASAP, on the other hand, the amount of €500 million up to 30 June 2025 proposed by the Commission [131] was maintained and the regulation was adopted very quickly, [132] to the point of evoking a possible "legislative record". [133] However, this was only possible at the cost of adoption under the urgency procedure and without amendment by the European Parliament, and the removal of a number of provisions of the "regulatory pillar" opposed by certain Member States. [134]

Admittedly, the very purpose of the OLP is to bring together the interests represented by the institutions in the decision-making triangle in order to arrive at a decision that will thus enjoy maximum legitimacy for optimal implementation. However, given the delays and the reduced ambition of the texts, both in terms of standards and funding, this is not in keeping with the sense of urgency that is constantly reaffirmed in speeches regarding the strengthening of the military capabilities of EU Member States. As a result, Community policies and methods alone do not guarantee the desired dynamic. This underlines the importance of complementing action with CFSP instruments, in particular for emergency responses. In addition, the shared ambition and solidarity of the institutions to build capacity for strategic autonomy must guide the decision-making process and be regularly reaffirmed and evaluated.

There are a number of signs that the "communitisation" of defence may continue. These include the mid-term review of the increase of the Multiannual Financial Framework (MFF) in 2024, which will increase the amount under the "security and defence" heading, [135] the designation of defence as a "new

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the European defence industry Reinforcement through common Procurement Act, COM/2022/349 final, 19 July 2022.

[130] 200 million has been reallocated to the ASAP regulation proposed and adopted in the meantime.

[131] Proposal for a Regulation of the European Parliament and of the Council on establishing the Act in Support of Ammunition Production, COM/2023/237 final, 3 May 2023.

[132] The Regulation (EU) 2023/1525 wad adopted by the European Parliament and the Council on 20 July 2023, less than three months after the Commission's proposal dated 3 May 2023.

[133] Rédaction de B2, *Accord en trilogue sur ASAP. Juste après minuit. Entrée en vigueur fin juillet (v2*), in, *B2 Pro Le quotidien de l'Europe géopolitique*, 10 Juillet 2023, https://club.bruxelles2.eu/2023/07/decryptage-accord-en-trilogue-sur-asap-juste-apres-minuit-entree-en-vigueur-fin-juillet-v2/.

[134] E. Bernard, *Le soutien de l'Union européenne à la production de munitions*, in E. Bernard-Q. Loiez-S. Rodrigues (eds.), *L'Union européenne de la défense – Commentaire article par article*, Bruylant, Bruxelles, 2024, p. 616.

[135] And more precisely, in Heading 5 "Security and Defence", an additional EUR 1,5 billion

industrial priority of the next European Commission", [136] or the creation of a "defence" portfolio within the new Commission. While the position of the Member States, and consequently that of the Council, is necessarily more variable, the international context, particularly in Eastern Europe and the Middle East, does not seem to cast doubt on the Member States' interest in further developing cooperation on military capabilities within the EU framework and on strategic autonomy.

Consequently, the Commission's proposal for a regulation "establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products (EDIP)" [137] of March 2024 will be closely scrutinised. With a proposed amount of €1.5 billion between the entry into force of the regulation and 31 December 2027, the proposed regulation aims in particular to support the industrial preparedness of the Union and its Member States in the field of defence by strengthening the competitiveness, responsiveness and capability of the European Defence Technological and Industrial Base (EDTIB) in order to ensure the availability and timely supply of defence products. Unlike EDIRPA and ASAP, this is not a temporary instrument but, on the contrary, a long-term instrument that will replace the two previous ones and significantly extend their scope. [138] It will also complement the EDF by supporting projects at a later stage in the life cycle of defence equipment than the latter. [139] All that remains is for the EU institutions to agree on the content of EDIP and, moreover, to adopt an ambitious global and integrated approach.

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allocated to the European Defence Fund (EDF), under the new instrument STEP (Strategic Technologies for Europe Platform), "[i]n order to boost the defence investment capacity". See the Conclusions of Special meeting of the European Council, doc. EUCO 2/24, 1st February 2024, § 13.

[136] Ph. Jacque, *La défense, nouvelle priorité industrielle de la prochaine Commission européenne*, LeMonde.fr, 29 April 2024.

[137] Proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products (EDIP), COM/2024/150 final, 5 March 2024.

[138] Not only will it not be limited to ammunition and missiles, as ASAP is, but it will not be limited to the "the most urgent and critical defence product needs", as EDIRPA is. See E. Simon, *Proposition de règlement établissant un programme pour l'industrie de défense européenne et d'un cadre de mesures visant à assurer la disponibilité et la fourniture en temps utile des produits de défense (EDIP): un instrument de transition et de transformation*, in E. Bernard-Q. Loiez-S. Rodrigues (eds.), *L'Union européenne de la défense – Commentaire article par article*, cit., pp. 639-650.

[139] S. Rodrigues, *Le Fonds européen de la défense*, in E. Bernard-Q. Loiez-S. Rodrigues (eds.), *L'Union européenne de la défense – Commentaire article par article*, cit., pp. 603-604.

4.2.2. *For an ambitious comprehensive and integrated approach*

The objective of an EU's strategic autonomy in the military field, sometimes translated and summarised by the slogan "to invest more, better, together, and European",[140] requires an ambitious comprehensive and integrated approach, both in terms of tools and control.

As regards the diversification of the tools used, the instruments adopted in recent years have been almost exclusively to financial incentives, an approach considered to be skilful in terms of preserving the sovereignty of the Member States.[141] Although the financing of defence remains crucial,[142] additional vectors are needed for an effective and sustainable strengthening of the EDTIB. With the adoption of the European Defence Industrial Strategy (EDIS) in March 2024,[143] the Commission intends to present "a coherent set of instruments to support cooperation in armaments programmes, from the upstream research phase through to development, industrialisation, acquisition, maintenance in operational condition and finally the withdrawal of systems".[144] The main instrument for its implementation is the EDIP regulation proposed by the Commission on the same date. It reflects the Commission's ambition to take a more comprehensive approach to strengthening of the EDTIB, and to explicitly pursue the objective of solidarity between Member States.[145] In addition to co-financing, it includes in particular a regulatory pillar and an institutional

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[140] Joint Communication, *A new European Defence Industrial Strategy: Achieving EU readiness through a responsive and resilient European Defence Industry*, JOIN (2024)10 final du 5 mars 2024.

[141] O. Marty, *La défense européenne a peut-être trouvé son embryon*, in *Les Echos*, 15 décembre 2016, p. 12.

[142] F. Liberti, *Une nouvelle stratégie pour l'industrie européenne de la défense (EDIS) visant à préparer l'Union à toute éventualité*, in E. Bernard, Q. Loiez, S. Rodrigues (eds.), *L'Union européenne de la défense – Commentaire article par article*, cit., p. 588. He advocates a massive increase in the budget for EU programmes in support of the EDTIB in the next MFF (2028-2034), and in particular an increase in the funds available for the EDF and even more for the EDIP.

[143] Joint Communication, "A new European Defence Industrial Strategy […]", cit.

[144] F. Liberti, *Une nouvelle stratégie pour l'industrie européenne de la défense (EDIS) […],* cit., p. 586. Our translation ["présente un ensemble cohérent d'instruments pour soutenir la coopération dans les programmes d'armement, en partant de la phase de recherche en amont, jusqu'au développement, l'industrialisation, l'acquisition, le maintien en condition opérationnel et finalement le retrait des systèmes"].

[145] See in particular article 4(1)(b) of the proposal for a Regulation of the European Parliament and of the Council establishing the European Defence Industry Programme and a framework of measures to ensure the timely availability and supply of defence products ('EDIP'), COM/2024/150 final, 5 March 2024.

dimension. The Commission had already introduced a regulatory pillar in its proposal for an ASAP regulation.[146] However, it was almost completely emptied of its content by the Council.[147] It was intended to be included in a subsequent instrument, and the proposed EDIP regulation does indeed include regulatory provisions on the mapping of the Union's defence supply-chains[148] and on priority-rated orders,[149] as part of a legal framework to ensure security of supply.[150] Most importantly, the proposed EDIP regulation goes further and also provides, *inter alia*, for the establishment of a European Military Sales Mechanism (EU MSM) (article 14), a legal framework setting out the requirements and procedures for the establishment of a Structure for European Armament Programmes (SEAP) (Chapter III), and the creation of a specific governance framework through a Defence Industrial Preparation Board (article 57).[151] These provisions provide for greater integration, trust and solidarity between Member States within the Union.

On the question of control, the EU's ambition for strategic autonomy presupposes that the instruments put in place promote the development of Member States' defence capabilities in order to strengthen the EDTIB but also the EU as a defence actor and, ultimately, a common defence. However, there is still room for improvement in terms of independence from third countries and return on investment for the EU.

Firstly because of the involvement of third countries. On the one hand, third countries and third-country entities may benefit from financial incentives from the EU budget. In the case of the EDIRPA and ASAP regulations, the co-legislators have adopted a more flexible approach to the participation of eligible entities under the control of a non-associated third country or a non-

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[146] E. Bernard, *Le soutien de l'Union européenne à la production de munitions*, cit., pp. 612-613.

[147] *Ibidem*, pp. 616-617. It was finally limited to two provisions, one aimed at accelerating the permit-granting process for the timely availability and supply of ammunition and missiles (article 13 of Regulation (EU) 2023/1525, cit.), the other at facilitating common procurement during the ammunition supply crisis (article 14 of Regulation (EU) 2023/1525, cit.). These provisions justify Article 114 TFEU as a legal basis alongside Article 173(3) TFEU on Industry. In particular, the provisions on "Identification of needs, mapping and monitoring of capacities" and "Priority Rated Orders" have been dropped.

[148] Article 40 in the Commission's proposal.

[149] Articles 47 and 50 in the Commission's proposal.

[150] However, they are adapted to the extended scope of application, and the Commission has taken precautions to ensure greater modularity and progressiveness in the intensity of the measures. E. Bernard, *Le soutien de l'Union européenne à la production de munitions […]*, cit., p. 623; F. Liberti, *Une nouvelle stratégie […]*, cit. p. 585.

[151] E. Simon, *Proposition de règlement […]*, cit., pp. 639-650.

associated third country entity [152] than that proposed by the Commission. [153] On the other hand, there is the question of restrictions that third countries and entities of such countries might impose on products and technologies financed by the EU financial instruments. In both the EDIRPA and ASAP proposals, the Commission had proposed to prohibit any restrictions by third countries or entities on the products and technologies financed by these funds. [154] However, in both regulations, the co-legislators limited the prohibition of restrictions by third countries or entities to *the use* of the defence products, thus allowing them, *a priori*, to the export. [155] On both issues, the co-legislators – and in particular the Council, i.e. the Members States – gave priority to the objective of replenishing stocks quickly and being able to export quickly to a country at war, rather than the objective of strengthening the EDTIB and the independence of the Union. [156] This preference for urgency to the detriment of autonomy does not seem acceptable in the context of the EDIP regulation, which is based on a long-term perspective. In its proposal, the Commission provides for a more flexible approach inspired by that adopted by ASAP and EDIRPA with regard to eligible entities, [157] but proposes a strict approach to restrictions by third countries or third country entities. [158] The co-legislators should not soften the conditions and should accept a more autonomous and integrated approach to defence industry and, even further, to defence. With a view to strategic autonomy, solidarity among Member States and with the EU must prevail, even at the expense of third countries.

Secondly, because of the lack of controls and obligations regarding the use of defence products manufactured or purchased with EU financial support. According to one interpretation of the CFSP provisions of the TEU, "[t]he Member States undertake to develop their operational capabilities so as to be able to conduct external operations and missions within the framework of the

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[152] Article 10(1) and (2) of Regulation (EU) 2023/1525 (cit.) for ASAP; article 9(5) to (9) of Regulation (EU) 2023/2418 (cit.) for EDIRPA.

[153] Article 10(3) for ASAP (COM/2023/237, cit.); article 8(4) to (8) for EDIRPA (COM/2022/349, cit.).

[154] Article 10(3)(b) for ASAP (COM/2023/237, cit.); article 8(9) for EDIRPA (COM/2022/349, cit.).

[155] Article 10(6) of Regulation (EU) 2023/1525 (cit.) for ASAP; article 9 (10) to (12) of Regulation (EU) 2023/2418 (cit.) for EDIRPA.

[156] E Bernard, *Le renforcement de l'industrie européenne de la défense au moyen d'acquisitions conjointes,* in E. Bernard-Q. Loiez-S. Rodrigues (eds.), *L'Union européenne de la défense – Commentaire article par article*, cit., pp. 628-629.

[157] Article 10(4) to (7).

[158] Article 11(8)(c).

Union, and with a view to affording each other mutual assistance". [159] Consequently, products that have been financially supported by the EU under its internal policies with a view to strengthening the EDTIB should then benefit the EU. However, there is currently no obligation for Member States to buy the defence products financed by the EU budget, or even to "buy European". Between Russia's aggression and June 2023, "78% of the defence acquisitions by EU Member States […] were made from outside the EU". [160] Moreover, just as there is no obligation for Member States to participate in EU-led crisis management by providing capabilities, there is no obligation for Member States to make available to the EU capabilities partly financed by EU financial instruments, either to implement the solidarity clause in Article 222 TFEU or the mutual assistance clause in Article 42(7) TEU, which are undoubtedly based on solidarity between Member States, or to contribute to the Union's military operations and missions and thus to the security of, and solidarity with, third countries. This would complete the circle of solidarity, if such an obligation existed.

5. *Concluding remarks*

Using the original case of solidarity in the field of defence in the context of the Union's response to the war of aggression in Ukraine, this chapter has sought to highlight the interactions between the internal and external dimensions of the promotion of the Union's essential values and principles.

The Treaties, and in particular Article 21 TEU, equate the principles that the Union must promote on the international stage with those that underpin its creation and development. Implicitly, they validate the relevance (and therefore the legality) of these principles at international level, while at the same time basing the Union's legitimacy in disseminating them on the fact that these principles have been successful for it and/or correspond "to the strict observance and the development of international law, including respect for the principles of the United Nations Charter". [161] Thus, for example, the Union has developed conditionality clauses in the international agreements it concludes with third parties and in the unilateral acts of which they are beneficiaries, to

[159] F. Terpan, *Le traité de Lisbonne a-t-il rendu la solidarité possible […]*, cit., p. 156. Our translation ["[l]es Etats membres s'engagent à développer leurs capacités opérationnelles afin de pouvoir mener des opérations et des missions extérieures dans le cadre de l'Union, et dans le but de se porter mutuellement assistance"].

[160] Joint Communication, "A new European Defence Industrial Strategy […]", cit.

[161] Article 3(5) TEU.

promote respect for democracy, human rights and the rule of law, [162] but also the ratification of international legal instruments for cooperation in security matters (including the Rome Statute of the International Criminal Court), [163] or the raising of social and environmental standards. [164] However, if respect for the principle is lacking within the Union, this necessarily erodes the Union's legitimacy to impose it on the international stage.

The experience of solidarity in the field of defence matters shows, however, that the movement can be reversed and that the realisation of a value or principle in the context of the Union's external action can create or accelerate its fulfilment within the Union through internal policies. In the field of defence, military support for Ukraine has led to the development of EU instruments to strengthen the military capabilities of Member States; the need for external solidarity has been a catalyst for internal solidarity. Without being directly transposable, the approach may perhaps constitute a source of inspiration for the rule of law.

Tools for promoting the rule of law in the European Union's external action may have inspired or can influence tools aimed at ensuring respect for the rule of law by the Member States of the Union. This is already the case with negative financial conditionality, which consists of withdrawing a financial advantage in the event of non-compliance with a rule or principle and which is traditionally provided for in the Union's relations with third countries. [165] This type of sanction was also chosen in the 2020 "Conditionality Regulation", [166] which allows the EU to suspend payments in the event of a breach of the rule

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[162] A. Hamonic, *La projection du standard de l'État de droit dans l'action extérieure de l'Union européenne*, in R. Tinière and F. Ippolito (eds.), *Les mécanismes de suivi du respect de l'État de droit en Europe*, *R.T.D. eur.* avril-juin 2019, pp. 337-350.

[163] I. Bosse-Platière, *L'insertion des clauses de coopération en matière de sécurité dans les accords externes de l'Union européenne*, in J. Auvret-Finck (ed.), *Vers une relance de la Politique de sécurité et de défense commune ?*, cit., pp. 315-336.

[164] See, for example, Articles 764(1), 771 and 772 of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, *OJ* L 149, 30 April 2021, p. 10), under which "acts or omissions [by a Party] that would materially defeat the object and purpose of the Paris Agreement" allow the other Party to decide to terminate or suspend the operation of this Agreement or any supplementing agreement in whole or in part.

[165] See, for example, Paragraph 40 of the preamble of the Regulation (EU) 2021/947 of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe […] (*OJ* L 209, 14 June 2021, p. 1).

[166] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, *OJ* L 433I, 22 December 2020, p. 1.

of law by a Member State. It was activated against Hungary in 2022, leading to the suspension of certain funds intended for that country,[167] in the service of more concrete and effective protection of the rule of law within the EU. It is also conceivable that, in the context of the relaunch of enlargement following Russia's aggression against Ukraine and the granting of candidate status to Ukraine, Moldova and Georgia, the importance usually attached to respect for the rule of law in the accession process[168] can only be justified and credible if the Union shows real rigour towards its failing Member States. While the procedure under Article 7 TEU,[169] activated against Poland and Hungary, has never resulted in sanctions, on 1 January 2025 Hungary lost the first tranche of funds suspended under the Conditionality Regulation, amounting to approximately one billion euros. This is a first for the European Union, and strengthens its credibility as a promoter of principles and values such as the rule of law, democracy and solidarity, both internally and then beyond, on the international stage. This is an important signal at a time when the political balance is shifting within the Member States and the EU institutions,[170] and when the prospect of Donald Trump's return to the presidency of the United States is forcing the EU to assert itself as a zealot for lawfare, while preparing for warfare.

[167] After the Commission activated the mechanism in April 2022, the Council decided on 12 December 2022 to suspend €6.3 billion earmarked for Hungary.

[168] After being highlighted by the Copenhagen European Council in June 1993, the "rule of law" criterion was elevated to the rank of primary law by the Treaty of Amsterdam, through the article on the accession procedure, which states that "any European State which respects the values referred to in Article 2 [TEU] and is committed to promoting them may apply to become a member of the Union". The Lisbon Treaty added, at the end of the paragraph: "[t]he conditions of eligibility agreed upon by the European Council shall be taken into account". In practice, compliance with the accession criteria, including the rule of law, is now required throughout the accession process, and even both upstream (as part of the Commission's screening of the candidate country's state of preparedness) and downstream (through the Cooperation and Verification Mechanism (CVM) for Bulgaria and Romania). This allows the EU to respond to violations of the rule of law by delaying the granting of candidate status or freezing the opening of negotiations on new chapters of the Accession Treaty, as was done with Turkey and, more recently, with Georgia.

[169] In the event of a breach by a Member State of the values referred to in Article 2, Article 7 TEU allows more generally the Council to decide "to suspend certain of the rights deriving from the application of the Treaties to the Member State".

[170] See Chapter 4 written by Manuel Müller.

THE EU'S CONTRIBUTION TO UKRAINE'S RECONSTRUCTION: THE LEGALITY OF THE WINDFALL TAX ON THE EXTRAORDINARY REVENUE GENERATED BY THE IMMOBILISED ASSETS AND RESERVES OF THE RUSSIAN CENTRAL BANK

Sara Poli *

1. *Introduction*

According to estimations of the Word Bank, Ukraine needs 486 billion euros to reconstruct the country. [1] The UN General Assembly has recognised that Russia must bear the legal consequences of all of its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts. [2] It is submitted that Regional international organisations play an important role in implementing this Resolution. For example, a register of the damage caused by the aggression of the Russian Federation against Ukraine was

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[1] https://www.worldbank.org/en/news/press-release/2024/02/15/updated-ukraine-recovery-and-reconstruction-needs-assessment-released.

[2] Resolution A/RES/ES-11/5 of 15 November 2022.

established on 12 May 2023 by the Council of Europe[3] and the EU has financially supported it. This is the first step towards the setting up of a compensation mechanism for victims of the aggression of the Russian Federation against Ukraine.[4] At the same time, the EU has a special responsibility in ensuring Ukraine's reconstruction, in cooperation with G7 members.[5]

This chapter focuses on one of the instruments devised by the EU to achieve the mentioned objective: this is the windfall tax on the extraordinary revenues generated by the immobilised assets of the Central Bank of Russia (CBR). This essay is structured as follows. After a short introduction on the Ukraine Facility (section 2) the attention is shifted to the different legal options available to support Ukraine's reconstruction (section 3). Next, the legislative initiatives taken by Canada and the United States are hinted at in section 4 while the windfall tax on the extraordinary revenues generated by the immobilised assets and the reserves[6] of the CBR – which were frozen by the EU on 28 February 2022[7] – is discussed in section 5. An assessment of the legality of the windfall tax is made in section 6. We shall see that the EU had the difficult task to use the assets of an aggressor country to the benefit of the victim of the aggression without breaching international law. The present author takes the view that the tax is legal. Before concluding the chapter, section 7 briefly dwells on Ukraine Loan Cooperation Mechanism which is designed to continue supporting this country to repay the loans by making use, amongst other things, of the extraordinary revenues generated by the immobilised assets of CBR.

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[3] See Council of Europe Committee of Ministers resolution, CM/Res (2023)3, establishing the Enlarged Partial Agreement on the Register.

[4] COM (2024) 224, Proposal for a Council decision on the position to be taken on behalf of the Union in the Council of Europe bodies on the change of status of the European Union from Associate Member to Participant in the Enlarged Partial Agreement on the Register of Damage caused by the Aggression of the Russian Federation against Ukraine, p. 3.

[5] G7 members mentioned the need to direct extraordinary revenues held by private entities stemming directly from Russia's immobilised sovereign assets to support Ukraine since December 2023.

[6] They amount at 286 billion euros.

[7] Council adopted Decision (CFSP) 2022/335 (3) amending Decision 2014/512/CFSP, which prohibited any transactions related to the management of reserves of, as well as of assets of, the Central Bank of Russia, including transactions with any legal person, entity or body acting on behalf of, or at the direction of, the Central Bank of Russia, *OJ* L 57, 28 February 2022, p. 4.

2. *The Ukraine Facility and the possibility to use the revenues generated by the immobilised assets and reserves of the Central Bank of Russia*

In addition to humanitarian aid and to the delivery of weapons, the EU has granted macro financial assistance to Ukraine since 2022, [8] in a complementary manner with respect to the International Monetary Fund.

In February 2024, the EU has set up the Ukraine Facility [9] overcoming Hungary's opposition. This is an exceptional instrument on account of the direct implications for the security of the Union. [10] The first of the three pillars is designed to provide financial support to Ukraine (50 billion euros of which 33 billions in loans and 5,27 billions in grants [11] between 2024 and 2027).

The facility is based on 'highly concessional loans' [12] and is aimed at addressing Ukraine's financing needs, attract private investments and to contribute to the recovery, reconstruction and modernization of this country. More precisely, the EU engages to provide exceptional macro-financial assistance to Ukraine in the form of a loan (the "MFA Loan") and a non-repayable financial support which is designed to assist the country to repay loans provided to support it. [13]

The idea at the basis of the Ukraine Facility is that the assisted country will use the financial support provided by the EU to «address the social, economic and environmental consequences of Russia's war of aggression» [14] and to carry out a series of reforms that prepare Ukraine for the EU accession and alignment to EU values and standards. [15] The Ukraine facility serves multiple purposes: it ensures the continued functioning of the State, the rebuilding and modernisation of infrastructure damaged by the war, [16] and at the same time,

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[8] The EU has supported Ukraine's macro-financial stability since 2022. See Regulation (EU) 2022/2463 of the European Parliament and of the Council of 14 December 2022 establishing an instrument for providing support to Ukraine for 2023 (macro-financial assistance +), *OJ* L 322, 16 December 2022, p. 1. The EU made 18 billion euros available in loans and grants.

[9] Regulation (EU) 2024/792 of the European Parliament and of the Council of 29 February 2024 establishing the Ukraine Facility PE/10/2024/REV/1, *OJ* L, 2024/792, 29 February 2024, ELI: http://data.europa.eu/eli/reg/2024/792/oj.

[10] Joint declaration of the European Parliament, the Council and the Commission relating to the exceptional nature of the Ukraine Facility, C/2024/1969, 29 February 2024.

[11] Grants are paid out through the EU budget.

[12] Recital n. 16 of Regulation (EU) 2024/792, cit.

[13] Recital n. 9, *ibidem*.

[14] Art. 3(1) a, *ibidem*.

[15] Art. 3(1) b and c, *ibidem*.

[16] Art. 3(2) a and b.

it lays the ground for the country's accession to the Union. Under the Regulation on the Ukraine Facility, the MFA loan is subject to respect of political conditions [17] and the Commission is in charge of monitoring the fulfillment of these conditions. [18]

The preamble of the Regulation on the Ukraine Facility refers to the possibility to use the potential revenues generated by the use of extraordinary revenues held by private entities (central securities depositories) stemming directly from immobilised CBR assets. [19] Indeed, G7 countries hold a considerable share of these assets. About 210 billion euros worth of assets, are held under EU Member States' jurisdictions while a small percentage of them is located in the United States [20] and Canada. In principle, the best available option in order to ensure that the victims of Russia's aggression are compensated for the damages suffered as a result of the war or to reconstruct Ukraine is to use the assets and reserves of the CBR. The Parliamentary Assembly of the Council of Europe had envisaged the confiscation of the Russian Federation's assets to pay for damage caused by the war in Ukraine in 2023. [21] Aware of the limits posed by international law, the EU has devised the windfall tax on the extraordinary revenues in May 2024. [22]

The EU started the preparatory work to use the revenues generated by the

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[17] Under art. 5 of Regulation 2024/792 «Ukraine must continue to uphold and respect effective democratic mechanisms, including a multi-party parliamentary system and the rule of law, and to guarantee respect for human rights, including the rights of persons belonging to minorities». See a similar condition in art. 11(1) of the See Regulation (EU) 2024/2773 of the European Parliament and of the Council of 24 October 2024 establishing the Ukraine Loan Cooperation Mechanism and providing exceptional macro-financial assistance to Ukraine PE/96/2024/REV/1 *OJ* L, 2024/2773, 28.10.2024 https://eur-lex.europa.eu/eli/reg/2024/2773/oj.

[18] In November 2024 the Commission positively assessed the reforms made by Ukraine to fight against corruption, business environment, labour market, regional policy, energy market and environmental protection and has given the green light to the transfer of 4.1 billion euros, https://neighbourhood-enlargement.ec.europa.eu/news/commission-paves-way-release-second-regular-payment-ukraine-close-eu41-billion-under-ukraine-2024-11-14_en.

[19] Preamble n. 49 of Regulation 2024/792, cit.

[20] A Caprile, *Immobilised Russian central bank assets*, EPRS, PE 769.514 – March 2025, https://www.europarl.europa.eu/RegData/etudes/ATAG/2025/769514/EPRS_ATA(2025)769514_EN.pdf, p. 1.

[21] Resolution 2516 (2023) "Ensuring a just peace in Ukraine and lasting security in Europe." In a later resolution the Parliamentary Assembly had been open to other solutions such as the confiscation of private assets following a criminal conviction for sanctions violations, the introduction of windfall taxes on the interest or profits derived from frozen Russian State assets or these use of these assets as collateral for loans to Ukraine. Resolution *Ukraine's reconstruction*, 2539 (2024), par. 12.9.

[22] See section 5.

assets and reserves of the CBR in February 2024: the Council imposed a number of obligations on central securities depositories holding assets and reserves of the CBR with a total value exceeding EUR 1 million.[23] These obligations were functional to making the extraordinary revenues accrued from the cashflow of the frozen assets available to Ukraine, as we shall see in section 5. The next section addresses different legal options to support Ukraine's reconstruction and the limits to be respected under international and EU law.

3. *Supporting Ukraine's reconstruction: different legal options and their limits*

Since the EU respects international law, important legal issues had to be addressed in making any decision concerning the CBR's assets and reserves. The most important concern is whether the assets of a State organ, such as the CBR of a country that has breached art. 2(4) of the UN Charter by waging a war of aggression, could be transferred to Ukraine on the basis of a legislation repurposing the assets concerned. While freezing these resources is widely regarded as a permissible third country countermeasure, the legality of repurposing these assets to the benefit of Ukraine is contested in international law. For some scholars the repurpose of Russian state assets (including reserves of CBR) by a third party breaches the principle of sovereign immunity from adjudication or enforcement by national courts.[24] Other scholars take the opposite view: confiscation of state assets (including reserves of CBR) by an administrative act of a third party does not trigger immunity from adjudication or enforcement measures by national courts. For example, according to Kamminga,[25] confiscating the reserves of the CBR is permissible in international law:[26] the waging of a war of aggression by a permanent member of the UNSC and the detention of the reserves on the territory of a third country makes it possible to qualify the confiscation as a lawful

[23] *Ibidem*.

[24] S. Kotanidis, *Legal options for confiscation of Russian state assets to support the reconstruction of Ukraine*, EPRS, PE 759.602, February 2024, https://www.europarl.europa. eu/thinktank/en/document/EPRS_STU(2024)759602 , p. 49-52.

[25] M.T. Kamminga, *Confiscating Russia's Frozen Central Bank Assets: A Permissible Third-Party Countermeasure?*, in *Netherlands International Law Review*, 2023.

[26] For other scholars the confiscation of the mentioned assets could be qualified as a counter measure taken to react to Russia's violation of art. 2(4) of the UN Charter. M. Goldmann, *Hot War and Cold Freezes: Targeting Russian Central Bank Assets*, VerfBlog, 2022/2/28, https://verfassungsblog.de/hot-war-and-cold-freezes/, DOI: 10.17176/20220301-001108-0.

measure, within the meaning of art. 54 of the ARSIWA.[27] The latter provision is the legal basis for the EU to confiscate in the interest of Ukraine (injured State) the assets of Russia to ensure the cessation of the breach of the obligation to repair the damages caused by the war. The logical consequence of this position is that Russian state assets, including reserves of CBR, can be repurposed by an act of the executive.

Leaving aside the academic perspective and looking at the position of EU institutions, the President of the European Central Bank took a very clear stance: she discarded the possibility to confiscate the assets of the CBR. As she puts it, «seizing some $260 billion in Russian assets currently frozen in Europe would undermine the *international rule of law* (emphasis added), with unforeseeable consequences. Moving from freezing the assets to confiscating the assets, disposing of them, is something that needs to be looked at very carefully». President Lagarde added that this initiative would «start breaking the international legal order that you want to protect, that you would want Russia and all countries around the world to respect»[28]

Two main options were explored to support Ukraine's reconstruction. The first is the confiscation of private assets frozen by G7 members. This measure would enable the EU to gather 30 billion US dollars. Yet the confiscation of these funds clashes with the fundamental right to property. According to Rosas, «confiscating Russian property on the sole basis that it has been frozen should probably be excluded;»[29] confiscation cannot be considered as a legal countermeasure since it affects obligations for the protection of human rights. He also reckons that «The right to property is far from an absolute right and it could be argued that subjecting persons supportive of an act of aggression would not benefit from the exclusion of countermeasures contained in art. 50(1)(b)».[30] He further contends that in EU law there is no legal basis for confiscation measures. «[...] In view of restraints imposed by public international law or EU law, outright and general confiscation of frozen property is not considered possible or at any rate desirable»[31]

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[27] «This chapter does not prejudice the right of any state, entitled under article 48, paragraph 1, to invoke the responsibility of another state, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured state or of the beneficiaries of the obligation breached».

[28] https://www.politico.eu/article/ecbs-lagarde-digs-in-as-us-pushes-europe-on-using-russian-assets-for-ukraine-aid/.

[29] A. Rosas, *From Freezing to Confiscating Russian Assets?*, 48 *European Law Review*, 3, 2023, 337, 347.

[30] A. Rosas, cit., p. 345.

[31] *Ibidem*.

The second legal avenue to support Ukraine's reconstruction is the confiscation of the assets of those who breach restrictive measures. As the Council stresses in its guidelines on best practices on restrictive measures, «If the national legislation on penalties applicable in case of breach of sanctions provides for it, preventive freezing, seizure and confiscation may be applied as a penalty for infringing restrictive measures» [32] Confiscated assets could be used in this situation to the benefit of Ukraine.

Under the terms of two new Directives, the assets of persons who commit a violation of restrictive measures can be confiscated by national authorities. Therefore, the proceeds of the confiscation could be used for the purpose of supporting Ukraine.

The EU has relied on art. 83(1) TFEU to add the violation of restrictive measures to the number of forms of transnational crime which can be regulated by EU law. This has laid the ground to the adoption of minimum rules concerning the penalties that should be applied to persons violating restrictive measures. [33] The legal regime is detailed in Directive 2024/1226. [34] One of the objectives of this measure is to facilitate the confiscation of the assets and resources subject to sanctions in case there is a link with a criminal activity. Directive 2024/1260 on asset recovery and confiscation, [35] which entered into force the same day as Directive 2024/1226, applies to confiscated property of those who violate restrictive measures. [36] It is interesting that art. 19 of the new piece of legislation makes it possible for Member States to use instrumentalities, proceeds or property confiscated in relation to the offences referred to in Directive (EU) 2024/1226 «to contribute to mechanisms to support third countries affected by situations in response to which Union restrictive measures have been adopted, in particular in cases of war of aggression» [37] The Commission is

[32] Council – Update of the EU Best Practices for the effective implementation of restrictive measures, Council document n. 11623/24, 3 July 2024, par. 29.

[33] One of the consequences of the war in Ukraine is that the EU relied on art. 83(1)TFEU to include the restriction of restrictive measures to the list of euro crimes, thus enabling the adoption of a harmonising directive. This is Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, *OJ*, L 2024/1226.

[34] *Ibidem*.

[35] Directive (EU) 2024/1260 of the European Parliament and of the Council of 24 April 2024 on asset recovery and confiscation, *OJ*, L 2024/1260. Member States will have to comply with the terms of this Directive by 20 May 2025.

[36] *Ibidem*, art. 2(1) lett. p.

[37] Art. 19 of Directive 2024/1226, cit.

enshrined the power to provide guidance on the arrangements for such contributions. An important limit to the use of the confiscated assets is defined: the EU must respect international law in contributing to the mentioned mechanism of support. [38] The mentioned provision of the Directive has the clear aim of encouraging Member States to use the confiscated assets to support Ukraine. The envisaged allocation of confiscated assets to the benefit of Ukraine is in line with international law. Indeed, while it is not possible to confiscate the assets of natural and legal persons through restrictive measures since they are not criminal measures in nature, in contrast the confiscation of the assets of those who breached restrictive measures is legal; indeed, this conduct was criminalized on the basis of Directive 2024/1260. Art. 19 of this act makes it possible to use the proceeds generated by the confiscation of property belonging to those who violate restrictive measures. Therefore, persons subject to EU law who carry out an action that amount to a violation of restrictive measure may see their assets confiscated. The definition of "violation of restrictive measure" under the terms of the Directive is very broad and includes the circumvention of restrictive measures. The persons whose assets may be confiscated could be either nationals of EU Member States or Russian citizens. It is noteworthy that under the terms of art. 19 of the mentioned Directive, Member States are not obliged to use the confiscated assets to the benefit of Ukraine. It is to be hoped that a common decision is made at Council level to transfer the confiscated assets to the Ukraine Facility. At the moment, Member States have discretion on this issue.

The mechanism envisaged by Directive 2024/1260 to support Ukraine is likely to make a modest contribution to Ukraine's reconstruction; yet, the adoption of these measures is an expression of the EU's political support to a country that is the object of an aggression.

It is now necessary to briefly refer to the choices made by other jurisdictions of G7 members to address the problem of Ukraine's reconstruction.

4. *The legislative choices made by Canada and the United States on Ukraine's reconstruction: an overview*

In December 2022 the Canadian minister of foreign affairs announced that Canada would seize and pursue the forfeiture of US $26 million from Granite Capital Holdings Ltd., a company owned by Roman Abramovich who is a Russian oligarch sanctioned under the Special Economic Measures (Russia)

[38] The provision starts with the following statement: «Without prejudice to international law».

Regulations.[39] It was the first time that a G7 country made use of its powers under this Statute to confiscate the assets of a private person. One year later an aircraft owned by Volga-Dnepr Airline, a Russian person, located in Toronto, was seized.[40] In both cases, the government justified its decision on the ground that the actions of the Russian Federation constituted a serious breach of international peace and security that has resulted in a serious international crisis.

In the US the "Rebuilding Economic Prosperity and Opportunity for Ukrainians Act" (the "REPO for Ukrainians Act") authorises the President to confiscate and vest in the U.S. government any sovereign assets of Russia or Belarus that are under U.S. jurisdiction. This Statute makes it possible to allocate Russian sovereign assets (except for what is covered by diplomatic immunities) to a "Ukraine Support Fund," which may then be used for "providing assistance to Ukraine for the damage resulting from" the 2022 invasion. As it has already been stressed, the confiscation of sovereign state assets is not compatible with international law; yet the US may consider that the assets and reserves of the Russian Federation are covered by immunity and therefore cannot be used to feed the Ukraine support fund. In this case the US government would not commit any breaches of international law. A further issue that should be considered is that the value of the sovereign state assets frozen in the US is limited compared to that of the assets held in the EU. Therefore, the decision of EU countries to use or not use those assets to the benefit of Ukraine has a greater impact on Russia than that of the US and other countries. At the moment the US has not made use of its powers under the REPO and it is clear that the for the foreseeable future the situation will remain unchanged due to the pro Russia stance adopted Donald Trump. In May 2024 the US government has authorised the first-ever transfer of the confiscated assets of the Russian oligarch Konstantin Malofeyev in the amount of $5.4 million for rebuilding Ukraine.[41] The grounds for confiscation is sanction evasion, on whose legality under international law there are no doubts.

Despite the possibility to confiscate the assets and reserves of the CBR, at the moment there has been great caution by members of the G7 in using those assets and other legal avenues were taken to support Ukraine. In contrast, the latter country has enacted legislation that makes it possible to confiscate the assets of private persons.[42]

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[39] S.C. 1992, c. 17, https://www.canada.ca/en/global-affairs/news/2022/12/canada-starts-first-process-to-seize-and-pursue-the-forfeiture-of-assets-of-sanctioned-russian-oligarch.html.

[40] https://laws.justice.gc.ca/eng/regulations/SOR-2023-120/index.html.

[41] Kiev Independent, 4 February 2024, https://kyivindependent.com/us-allocates-5-4-million-confiscated-from-russian-oligarch-to-help-rebuild-ukraine/.

[42] See *Law of Ukraine "On Sanctions"*, 14 August 2014, n. 1644-VII as reported and

5. *The EU's windfall tax on the extraordinary revenues generated by the immobilized assets of the Central Bank of Russia as an instrument to support Ukraine's self defence, recovery and reconstruction*

Since May 2022 the European Council has shown an interest in using frozen Russian assets to support Ukraine's reconstruction, in line with EU law as well as public international law. In October 2022 the Commission was invited to present options for using the frozen assets. The proposal was made to set up a structure to manage the frozen public funds and to invest them and use the proceeds in favour of Ukraine. The idea was that after the lifting of the EU sanctions, the Commission released the assets and reserves of the CBR. This could be linked to a peace agreement, which compensated Ukraine for the damages it has suffered. The assets of the CBR could be offset against war reparation. [43]

The Commission's proposal was in line with international law since the frozen assets would be returned to the Russian Federation after the EU restrictive measures, freezing the assets and reserves of the CBR, were lifted. Yet the Commission left the door open to the confiscation of these assets in case Russia refused to pay for war damages. This institution was extremely cautious in defining the circumstances under which the confiscation could take place. Indeed, even assuming that the confiscation of these assets is carried out and justified as a collective countermeasures overcoming legal hurdles under international law, there are perils [44] in confiscating the CBR's assets and reserves held in the EU member States.

Taking into consideration the uncertainty related to the confiscation of the assets and reserves of the CBR and of private funds of Russian nationals, the EU has devised a *sui generis* mechanism to support Ukraine's reconstruction: this is a windfall tax on the revenues generated by the immobilized assets of the CBR. First, the Commission has advanced the idea that the extraordinary revenues generated by the immobilized assets of CBR could be used to the benefit of Ukraine. This solution was welcomed by G7 members. [45] Few

commented by I. Chernohorenko, *Seizing Russian Assets to Compensate for Human Rights Violations in Ukraine: Navigating the Legal Labyrinth*, 8 *European Papers*, 2023, p. 1067, 1072.

[43] https://ec.europa.eu/commission/presscorner/detail/es/ip_22_7311.

[44] The aggressor country may respond to the confiscation of the RCB's assets and reserves by expropriating EU citizens' properties in its own territory.

[45] G7 Leaders' Statement 24 February 2024, https://www.g7italy.it/wp-content/uploads/G7-Leaders-Statement.pdf. In December 2023 G7 members had advanced the idea of directing the extraordinary revenues held by private entities stemming directly from Russia's immobilised sovereign assets to support Ukraine. G7 Leaders' Statement, 6 December 2023, https://www.consilium.europa.eu/en/press/press-releases/2023/12/06/g7-leaders-statement/.

months later, a mechanism to manage frozen assets and reserves of the CBR was set up. The EU's action was inspired by the need to provide support to Ukraine without undermining «the trust in the euro as a global currency and cause greater losses for the EU than the potential benefits for Ukraine» [46]

It is necessary to examine the steps taken by the EU to set up a mechanism that is in line with international law. The first move was made in February 2024 when the EU clarified that the «balance sheet management transactions linked to assets and reserves of the CBR, or linked to assets and reserves of any legal person, entity or body acting on behalf of, or at the direction of, the Central Bank of Russia, such as the Russian National Wealth Fund, [were] not within the scope of the prohibition of transactions which applies since 28 February 2022» [47] In addition, certain Central Securities Depositaries (CSDs) [48] had to account for the mentioned cash balances separately; a similar obligation was imposed in respect of revenues accruing from or generated by the mentioned cash balances as from 15 February 2024. [49] Finally, the net profits determined in respect of revenues accumulated by the CSDs could not be disposed of by way of distribution in the form of dividends or in whatever form to the benefit of shareholders or any third party until the Council decided on a possible establishment of a financial contribution to the Union budget that shall be raised on those net profits to support Ukraine and its recovery and reconstruction. [50]

In May 2024 the Council took the second step: a «windfall tax» [51] was set up to be applied on the profits made as of 15 February 2024 by CSDs after reinvesting the extraordinary cash balances accumulating due to the immobilisation of the frozen funds of the RCB.

Most of these reserves and assets (some $207 billion) are held by CSD Euroclear, which is based in Bruxelles and has derived extraordinary profits from the reinvestment of the cashflow. The financial contribution will be levied at a

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[46] https://www.reuters.com/legal/transactional/legal-challenges-confiscating-russian-central-bank-assets-support-ukraine-2024-08-01/.

[47] Recital n. 14 of Council Decision (CFSP) 2024/577 of 12 February 2024 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, ST/5437/2024/INIT, *OJ* L, 2024/577, 14.2.2024, https://eur-lex.europa.eu/eli/dec/2024/577/oj/eng .

[48] Only those CSDs holding reserves and assets with a total value of more than 1 million euro.

[49] Art. 1, Council Decision (CFSP) 2024/577.

[50] *Ibidem*.

[51] Council Decision (CFSP) 2024/1470 of 21 May 2024 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. *O.J.* L, 2024/1470, 22.5.2024, ELI: http://data.europa.eu/eli/dec/2024/1470/oj.

rate of 99,7% of the net profits determined in respect of revenues accruing from or generated by the cash balances accumulating exclusively due to the restrictive measures.[52] In May 2024 the Council decided that 90% per cent of the funds raised from the financial contribution were used to fund the European peace facility (EPF)[53] through which the EU provides weapons to Ukraine; 10% percent were directed at Union programmes financed from the Union budget.[54] In July 2024 the first transfer of 1,5 billion euros[55] were made available by Euroclear and were channeled to Ukraine through the European Peace Facility and the Ukraine facility to support this country's military capability and reconstruction. It is noteworthy that Russia considered this transfer illegal; in addition, Switzerland announced that it could not generate any extraordinary income in connection with the funds of the CBR.[56]

Turning to the financial contribution, this was initially allocated to support the EDF. Thus, the Council decided to favour Ukraine's self defence over this country's recovery and reconstruction.[57] This decision can be shared considering that priority must be given to the preservation of Ukraine's existence over the reconstruction of this country, as stressed by the High Representative of the Union Borell on 23rd April 2024.[58] Ukraine's self defence depends on weapons made available not only by the US but also by EU member States through the EPF. Since the latter is in short of funds, there is a need to provide a constant flow of money which will be used to reimburse Member States's delivery of weapons to Ukraine. Yet, in October 2024 the allocation of the financial contribution was reversed with respect to the previous one: 5% was allocated to the EPF and 95% to Union programmes financed from the Union budget,[59] that is

[52] Art. 1(2) of Council Decision (CFSP) 2024/1470.

[53] Council Decision (CFSP) 2021/509 of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528, *OJ* L 102, 24.3.2021, p. 14, http://data.europa.eu/eli/dec/2024/1470/oj.

[54] Art. 1(2) of Council Decision (CFSP) 2024/1470.

[55] https://enlargement.ec.europa.eu/news/first-transfer-eu15-billion-proceeds-immobilised-russian-assets-made-available-support-ukraine-today-2024-07-26_en.

[56] https://www.swissinfo.ch/eng/foreign-affairs/eu-releases-%E2%82%AC1-5b-frozen-assets-to-ukraine-switzerland-opts-out/85134978.

[57] The new instrument has a double objective: this is to support Ukraine and its recovery and reconstruction as well as its self-defence against the Russian aggression.

[58] The HR stated: «we initially envisaged to use revenues [generated by CSDs] to support Ukraine's recovery and reconstruction». He then concluded that «before thinking on reconstruct ion, we need to think about avoiding destruction», https://www.eeas.europa.eu/eeas/russia-ukraine-speech-high-representative-vice-president-josep-borrell-ep-plenary-moscows-frozen_en.

[59] Art. 1 of Council implementing Decision (CFSP) 2024/2760 Council Implementing Decision (CFSP) 2024/2760 of 24 October 2024 implementing Decision 2014/512/CFSP concerning

the Ukraine Facility. This time the revenues accruing from the immobilized assets will be used to support Ukraine to repay the loans.

6. *An assessment of the EU's windfall tax: a legal but limited instrument to ensure Ukraine's reconstruction in line with the international rule of law*

Council Decision (CFSP) 2024/1470 of 21 May 2024, defining the financial contribution that CSDs should make to the EU, justifies the legality of this mechanism in par 17. The latter states: «The unexpected and extraordinary revenue do not have to be made available to the CBR under the applicable rules, even after the discontinuation of the transaction prohibition. Thus, they do not constitute sovereign state assets. Therefore, the rules protecting sovereign assets are not applicable to these revenues.» In this statement the Council implies that the EU has committed neither a breach of the law protecting sovereign assets, nor has it violated art. 345 TFEU. [60] This is because there is no transfer of property from the CBR to Euroclear and other CSDs: indeed, the revenues generated by the frozen assets of the CBR do not belong to the Russian Federation but to the CSDs which, under EU law, are obliged to reinvest the cashflow generated by the immobilised assets. [61] Doubts were raised on the legality of the financial contribution under international and EU law by Fabbrini [62] who argues that the tax marks the first time the EU takes steps towards the expropriation of foreign sovereign assets; he further suggests that there is a conflict with art. 345 TFEU governing the system of property ownership.

It is submitted that the windfall tax is legal under international law as well as EU law. Indeed, the sovereign assets of the CBR are left intact by the EU's financial contribution. It is true that the revenues generated from the reinvestment of cashflow due to the immobilised assets would not exist, absent the

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restrictive measures in view of Russia's actions destabilising the situation in Ukraine ST/14089/2024/INIT, *OJ* L, 2024/2760, 28 October 2024, https://eur-lex.europa.eu/eli/dec_impl/2024/2760/oj/eng.

[60] «The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership».

[61] This obligation stems from the EU Capital Requirements Regulation (CRR), which is referred in Euroclear press release, 'Euroclear continues to deliver strong results in 2024,' of 05/02/2025, https://www.euroclear.com/newsandinsights/en/press/2025/mr-05-euroclear-delivers-strong-results-in-2024.html.

[62] F. Fabbrini, *"To Establish Justice": The EU Response to the War in Ukraine in the Field of Justice and Home Affairs*, *E.L. Rev.* 49(4), 2024, p. 359, 374. For a discussion on the legality of the use of extraordinary revenues see S. Kotanidis, cit., pp. 41-42.

frozen assets. Yet, this does not mean that the EU has confiscated sovereign assets. The transfer of most of the net profits to the EU through the windfall tax is not a measure of confiscation of sovereign state assets; indeed, the EU is not seizing the interests earned on capital that belong to the owner.[63] The CSDs take the profits generated by the cashflow since they are the property holders. Thus, the EU is not making a forced transfer of property.

Although the Council does not specify the legal nature of the windfall tax, in the author's opinion, the mentioned contribution is a 'legal measure' within the meaning of art. 54 of the ARSIWA.[64] It is designed to ensure the reparation of damages in the interest of the injured State (Ukraine) by non directly injured States.[65] After Russia ceases the aggression and compensates Ukraine for the damages caused by the war, the EU will put an end to the freezing of Russia's sovereign assets, which can be qualified as a countermeasure. In sum, the windfall tax does not breach the international rule of law, to the extent that this principle governs the horizonal relations between States.[66] In particular, the concerned financial contribution safeguards «a fair, stable and predictable legal framework»[67] which is an aspect of the international rule of law, at the heart of the concerns raised by the President of the European Central Bank.[68] Having said this, the revenues generated by the immobilized assets are likely to be insufficient to compensate Ukraine for the damages incurred as a result of the protracted aggression. This is why it has been crucial for the Commission to borrow the necessary funds to support Ukraine on the capital markets in the context of the Ukraine Loan Cooperation Mechanism, which is illustrated in the next section.

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[63] F. Fabbrini, cit., p. 374.

[64] Article 54 ARSIWA provides that Article 48 ARSIWA is without prejudice to the right of not directly injured states to take «lawful measures […] to ensure reparation in the interest of the injured State».

[65] These are the 27 Member States of the EU or the EU acting on behalf of the group of Member States.

[66] On this issue see R. McCorquodale, *Defining the International Rule of Law: Defying Gravity?* (2016) ICLQ 277 and N. De Sadeleer-I. Damjanovic *The Rule of Law Between National and International Contexts: Introduction to the Special Issue on International Economic Law and the Rule of Law*, 15 *European Journal of Risk Regulation*, 2024, p. 477, 484. See https://doi.org/10.1017/err.2024.39.

[67] For a definition of the various aspects of the international rule of law see UN General Assembly Resolution 67/1 "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels" (30 November 2012) UN Doc A/RES/67/1, in particular par. 8.

[68] See section 3.

7. *The EU and G7 countries' contributions to Ukraine's reconstruction: a coordinated effort through the Ukraine Loan Cooperation Mechanism*

In October 2024 the Ukraine Loan Cooperation Mechanism ('ULCM' or 'The Mechanism'), providing exceptional macro-financial assistance to Ukraine,[69] was set up. This instrument, which is managed by the Commission, is complementary to the Ukraine Facility and is additional to other programs of macro financial assistance enacted to the benefit of Ukraine in 2022 and 2023.[70] The ULCM takes the form of a MFA Loan (for a maximum of 35 billion euros)[71] and of a non-repayable financial support to Ukraine which is designed to assist this country to repay the MFA Loan and eligible bilateral loans.[72] It is noteworthy that the Commission is empowered, on behalf of the Union, to borrow the necessary funds on the capital markets or from financial institutions.[73] Bilateral loans may also be provided by G7 members, acting under the Extraordinary Revenue Acceleration Loans for Ukraine' initiative.[74] A further interesting aspect of the ULCM is that third countries may also transfer the future flows of the extraordinary revenues generated by the immobilized assets of the CBR in their jurisdictions to the Mechanism. Therefore, the ULCM represents a vehicle to coordinate the efforts of the EU and G7 members to support Ukraine, in line with international law.

Recital 14 of the Regulation setting up the Mechanism makes possible for Member States concerned by the immobilisation of Russian sovereign assets to voluntarily pay into the Mechanism the extraordinary revenues that accrue from reinvestment of the cash balances assets. It is not clear how this provision can be reconciled with a similar one in the Regulation of the Ukraine facility.[75]

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[69] Regulation (EU) 2024/2773 of the European Parliament and of the Council of 24 October 2024 establishing the Ukraine Loan Cooperation Mechanism and providing exceptional macro-financial assistance to Ukraine PE/96/2024/REV/1 *OJ* L, 2024/2773, 28.10.2024, ELI: http://data.europa.eu/eli/reg/2024/2773/oj.

[70] The EU has provided 7,2 billion euros in 2022 and 19 billions euros 2023 in macro financial assistance to Ukraine, https://commission.europa.eu/strategy-and-policy/eu-budget/eu-borrower-investor-relations/mfa-programmes-including-ukraine_en.

[71] Art. 10, Regulation (EU) 2024/2773, cit.

[72] The non repayable financial support may be requested twice per year by Ukraine. See art. 8 of Regulation (EU) 2024/2773, cit.

[73] Art. 14 of Regulation 2024/792.

[74] The G7 members committed to set up the 'Extraordinary Revenue Acceleration Loans for Ukraine' initiative at the end of June 2024 to make USD 50 billion to fund Ukraine's military, budget and reconstruction needs by the end of 2024, https://www.g7italy.it/wp-content/uploads/Joint-Declaration-1.pdf.

[75] See Recital n. 49 of Regulation 2024/792, referred to in section 2.

Finally, it should be recalled that under art. 19 of Directive (EU) 2024/1260, Member States may use instrumentalities, proceeds or property confiscated in relation to the offences referred to in Directive (EU) 2024/1226 «to contribute to mechanisms to support third countries affected by situations in response to which Union restrictive measures have been adopted, in particular in cases of war of aggression» [76] The ULCM is certainly a mechanism that fulfills this condition.

In conclusion, the mechanism is designed to enable Ukraine's resilience and to avoid that Member States, holding the frozen assets of the CBR, breach international law.

8. *Conclusions*

The windfall tax is a *sui generis* legal instrument that supports Ukraine's self defence and makes a modest contribution to Ukraine's reconstruction. Euroclear has transferred funds accrued from the extraordinary revenues generated by the immobilized assets of the CBR into the EPF and the Ukraine Facility in July 2024. Member States may also decide to use the assets confiscated from those who breach restrictive measures and pay them into the Ukraine Facility or the ULCM. Third countries will also use the latter as vehicle to support Ukraine to repay for the bilateral loans. The EU had the opportunity to contribute to the development of a new customary rule of international law whereby the sovereign assets of an aggressor State, which has a veto right in the UNSC, can be used for the purpose of repairing the damages suffered by the victim of the armed aggression. Yet, it refrained from doing so. Two main concerns are the basis of this choice: the first is that the EU has sought to preserve the international rule of law, in line with the objective of contributing to the strict observance of international law. [77] The second is that most of the assets of the CBR are placed within the jurisdiction of EU Member States, in particular of Belgium. As a result, the EU and its Member States bear special risks in confiscating the assets and reserves of the CBR. In order to preserve the financial stability of the euro, the EU has chosen to be pragmatic.

In conclusion, it may be hard to decide whether the creative solution of the windfall tax is based more on respect of international law than on the fear to undermine the euro's financial stability and the rule-based international order. It remains to be seen how the EU will act when Russia and Ukraine will discuss

[76] See section 3.

[77] Art. 3(5) TEU. See R. Dunbar, *Article 3(5) TEU a decade on: Revisiting 'strict observance of international law' in the text and context of other EU values*, in *Maastricht Journal of European and Comparative Law*, 2021, pp. 1-21.

about war damages at the peace table; the possibility that the war comes to an end in 2025 is realistic. In case the aggressor State refuses to pay for the damages, the EU may decide to transfer the frozen assets of the CBR to Ukraine. In this case the EU measure would cease to be a counter measure since it would permanently transfer the property of the sovereign state assets to Ukraine. At the moment, the discussion on the confiscation of these assets has re-started; [78] the final outcome should be that war damages in Ukraine can be repaired.

[78] https://www.eeas.europa.eu/eeas/foreign-affairs-council-remarks-high-representative-kaja-kallas-press-conference_en. See also the favorable position of the European Parliament in resolution of 19 September 2024 on continued financial and military support to Ukraine by EU Member States (2024/2799(RSP)), par. 5.

THE JUDICIALISATION OF (INTERNATIONAL) POLITICS: THE CONTRIBUTION OF THE EU TO THE ADVANCEMENT OF THE INTERNATIONAL RULE OF LAW IN LIGHT OF THE WAR IN UKRAINE [*]

Luca Pantaleo and *Beatrice Sanna* [**]

SOMMARIO: 1. Introduction. – 2. What is the judicialisation of politics, and how it applies in the international context. – 3. The judicialization of politics in the context of the Russian war of aggression in Ukraine. – 4. The judicialisation of the Russian aggression against Ukraine: an appraisal. – 5. The role of the EU: where do we currently stand? – 6. Concluding remarks.

1. *Introduction*

The judicialisation of politics, particularly within the context of international relations, has gained prominence in recent years. Defined as the growing involvement of judicial organs in what were once strictly political matters, judicialisation encompasses the increased reliance on courts and legal pro-

[*] This article results from joint efforts and discussions of the authors, who share the same views on the issues examined. However, Luca Pantaleo is responsible for sections I, II, IV, V and VI, and Beatrice Sanna is responsible for section III. It was first presented in the form of a conference paper at the event titled "The European Union's Reaction to the Russian War against Ukraine through the Lens of European Values", organised by the University of Cagliari in cooperation with the University of Rennes. The event took place in Cagliari on 16 May 2024. It benefited from the generous financial support of the Ambassade de France under the Cassini Programme 2023, as well as the Fondazione di Sardegna, which funded the entire research collected in this volume. The authors are grateful to the participants at that event who asked interesting questions and provided useful comments. We are particularly grateful to Federico Casolari and Sara Poli for their comments.

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cesses to address disputes traditionally handled by political means. This chapter will delve into this phenomenon, examining how the judicialisation of international politics is shaping the global landscape. It will examine this phenomenon by assessing the role of the European Union (EU) in promoting the international rule of law in the ongoing conflict between Ukraine and Russia. By exploring the EU's and Ukraine's legal initiatives to counter the Russian aggression – the so-called lawfare – this work will highlight how judicialisation can serve as a tool for advancing the rule of law on the world stage.

Central to this discussion is the EU's support for judicial responses to the Russian aggression, a move consistent with its foundational principles that emphasise peace, the rule of law, and respect for human rights. As is well-known, the international legal order has witnessed the proliferation of judicial bodies and specialised tribunals in the last few decades.[1] This trend reflects a broader shift in which legal means of conflict resolution are constantly gaining ground over purely diplomatic or military responses. This chapter will contend that the EU's approach to these issues aligns with its broader geopolitical strategies and constitutional foreign policy objectives.

The analysis will proceed as follows. Section 2 will introduce the concept of judicialisation as applied internationally. Section 3 will provide an overview of the main initiatives Ukraine took, with the support of the EU, to judicialise the Russian aggression. Section 4 will attempt to frame these initiatives within the discourse on the judicialisation of international politics, while section 5 will focus on the implications of this situation for the EU. Finally, section 6 will offer some conclusions.

2. *What is the judicialisation of politics, and how it applies in the international context*

As is well-known, the judiciary has become significantly more influential in contemporary constitutional systems. Some authors have referred to the expansion of the role of judicial organs as the judicialisation of politics, or juristocracy.[2] This phenomenon has gone hand in hand with the parallel rise of the executive branch over the legislative, which has admittedly made the ascent of the ju-

[1] See the foundational C.P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, in *NUY Journal of International Law and Politics*, 3, 1999, p. 709 ff.

[2] Or "the global expansion of judicial power". See C.N. Tate-T. Vallinder, *The Global Expansion of Judicial Power*, New York University Press, New York, 1995; see also M. Shapiro-A. Stone Sweet, *On Law, Politics, and Judicialization*, Oxford University Press, Oxford, 2002.

diciary somewhat inevitable, or at least a necessary counterbalance.[3] As a matter of principle, the existence of the following four ingredients are considered vital to favour this juridification: a) the presence of an independent judiciary with a pro-active apex court on top of it, b) the existence of a "bill of rights" featuring a catalogue of individual rights recognised in a hierarchically superior legal source, such as a constitution, c) the availability of effective judicial remedies to invoke those rights and d) a high degree of awareness of such rights on the part of the right-holders.[4]

More specifically, according to one of his leading proponents, the theory of the judicialisation of politics can be considered a broad concept that includes three different but closely related phenomena. The first dimension "refers to the spread of legal discourse, jargon, rules, and procedures into the political sphere and policy-making fora and processes [which] is evident in virtually every aspect of modern life".[5] The second dimension refers to "the expansion of the province of courts and judges in determining public policy outcomes, mainly through administrative review".[6] The third and perhaps most fundamental dimension

> «is the reliance on courts and judges for dealing with what we might call "mega-politics:" core political controversies that define (and often divide) whole polities. The judicialization of mega-politics includes a few subcategories: judicialization of electoral processes; judicial scrutiny of executive branch prerogatives in the realms of macroeconomic planning or national security matters (i.e. the demise of what is known in constitutional theory as the "political question" doctrine); fundamental restorative justice dilemmas; judicial corroboration of regime transformation; and above all, the judicialization of formative collective identity, nation-building processes and struggles over the very definition – or *raison d'etre* – of the polity as such – arguably the most problematic type of judicialization from a constitutional theory standpoint. These emerging areas of judicialized politics expand the boundaries of national high-court involvement in the political sphere beyond the ambit of constitutional rights or federalism jurisprudence, and take the judicialization of politics to a point that far exceeds any previous limit. […] The result has been the trans-

[3] See P. Minkkinen, *"Enemies of the People"? The Judiciary and Claude Lefort's "Savage Democracy"*, in M. Arvidsson-L. Brännström-P. Minkkinen (eds.), *Costituent Power. Law, Popular Rule and Politics*, Edinburgh University Press, Edinburgh, 2020, p. 30.

[4] See R. Hirschl, *The Judicialization of Politics*, in G.A. Caldeira-R.D. Kelemen-K.E. Whittington (eds.), *The Oxford Handbook of Law and Politics*, Oxford University Press, Oxford, 2008, pp. 129-135.

[5] See R. Hirschl, *op. cit.*, p. 121.

[6] *Ibidem*.

> formation of supreme courts worldwide into a crucial part of their respective countries'national policy-making apparatus» [7]

Prominent examples of this dimension are the *Maastricht-Urteil* [8] and *Lissabon-Urteil* [9] of the *Bundesverfassungsgericht*, which set the boundaries of Germany's participation in the European Union, as well as the landmark *Quebec Secession Reference (1998)*, [10] in which the Supreme Court of Canada dealt with the issue of bilingualism and the political future of Quebec. These decisions can be ascribed to what could be termed juristocracy proper, that is, the third fundamental dimension of the judicialisation of politics.

However, one should wonder whether, and if yes, how, this conceptual framework can be applied to the international context, and in particular to the international legal order. To begin with, it should be emphasised that the judicialisation of politics is a constitutional theory developed in the context of democratic systems based on the rule of law. [11] It rests on the premise that the legal system concerned features three branches of government under the traditional doctrine known as the separation of powers. The analogy between the international legal order and the domestic constitutional system of a democratic State is valid only to a very limited extent. Therefore, the transposition to the international legal context of concepts designed to capture the dynamics at play in the relationship between the different branches of power in a constitutional State must be handled with extreme care. It is true that, especially after World War II, the international community has successfully developed legally recognised standards of State conduct in various fields and that this circumstance "must be accounted a victory for the rule of law". [12] If a State complies with those far-reaching legal standards, ranging from *ius ad bellum* to the protection of human rights, it can reasonably be said to be adhering to the international rule of law *lato sensu*. Yet, it is also true that the full establishment of

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[7] See R. Hirschl, *op. cit.*, p. 123.

[8] German Federal Constitutional Court (BVG) judgment of 12 October 1993 2 BvR 2134/92, 2 BvR 2159/92 (*Zustimmungsgesetz zum Vertrag über die Europäische Union*).

[9] German Federal Constitutional Court (BVG) judgment of 30 June 2009 2 BvE 2/08 BvR 2656/18 (*Gesetz vom 8. Oktober 2008 zum Vertrag von Lissabon vom 13. Dezember 2007*) ECLI:DE:BVerfG:2009:es20090630.2bve000208.

[10] Supreme Court of Canada judgment of 20 August 1998 no. 25506, 2 SCR 217.

[11] For an application of this theory to the EU legal system, see L. Pantaleo, *The Climate Crisis and the Separation of Powers in the EU. What Role for the Court of Justice?*, in *Dir. pubbl. comp. ed eur.*, 3, 2024, p. 653 ss.

[12] See T. Bingham, *The Rule of Law*, Penguin Books, London, 2010, p. 32.

the rule of law «on the international or global level […] remains a work in progress» [13] to a large extent, as the Russian aggression on Ukraine clearly demonstrates. Strictly speaking, of the four key ingredients that are considered vital to favour the judicialisation of politics, only the points under letter b) and letter d) can be said to exist to a limited extent, [14] while the other two are entirely absent.

With this (huge) caveat in mind, it is undeniable that, in the last few decades, the international legal order has also experienced a rise in importance of international jurisdictional and quasi-jurisdictional organs, whose role had remained marginal for centuries. While it is probably overkill to speak of proper judicialisation of (international) politics, a similar phenomenon in international law has parallelled the process observed in domestic systems. As a prominent scholar has pointed out, more and more often «international decisions are […] removed from the political control of states and put into the hands of what is, in effect, a new international player: the international judiciary» [15]

In a nutshell, there is a growing and unprecedented tendency in international law to arbitrate or litigate disputes before arbitral or judicial bodies, more and more often giving such bodies a saying on matters which States traditionally kept away from them as much as possible, essentially for political convenience. This is reminiscent of the domestic phenomenon described above as the judicialisation of politics. The most tangible example (but by no means the only one) of this tendency is the so-called proliferation of special international tribunals with limited jurisdiction, which a prominent scholar once meaningfully called «islands of judicialisation in the broader sea of international law» [16]

In the next section, we will provide an overview of the legal initiatives (so-

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[13] See B. Tamanaha, *On The Rule of Law. History, Politics, Theory*, Cambridge University Press, Cambridge, 2004, p. 127.

[14] When it comes to the point under letter b), that is, the existence of a "bill of rights" featuring a catalogue of individual rights recognised in a hierarchically superior legal source, international law features the category of *ius cogens*, in which some foundational rights are included, such as those deriving from the principle of self-determination, that are remotely comparable to fundamental individual rights in domestic systems. The point under letter d), that is, a high degree of awareness of such rights on the part of the right-holders, is also questionable, if only because the concept of right-holder in international law applies to sovereign States and, to a more limited extent, international organisations.

[15] See P. Sands, *Turtles and Torturers: The Transformation of International Law*, in *New York University Journal of International Law and Politics*, 2001, p. 555.

[16] See N. Krisch, *The Path of Judicialization: A Comment on Karen Alter's The New Terrain of International Law*, in *EJIL:Talk!*, 23 April 2014, https://www.ejiltalk.org/the-path-of-judicialization-a-comment-on-karen-alters-the-new-terrain-of-international-law/.

called lawfare, as opposed to warfare) taken by Ukraine and the EU (in a supporting or leading capacity, as the case may be) to judicialise the Russian war of aggression.

3. *The judicialization of politics in the context of the Russian war of aggression in Ukraine*

As pointed out above, the phenomenon of the judicialization of politics has become widespread in contemporary constitutional systems thanks to a significant rise of the judiciary. *Mutatis mutandis*, this phenomenon can also be detected in the context of the Russian Federation's war of aggression in Ukraine. Indeed, on 24 February 2022, President Putin announced the beginning of a "special military operation", which was an euphemistic expression to say that it was invading and attacking Ukraine. The intentions of the Russian Federation's President were clear since days before when, on 21 February 2022, he recognised the independence of the self-proclaimed People's Republics of Donetsk and Luhansk.[17] Or, even before that, when in 2014 Russia invaded the Autonomous Republic of Crimea, the city of Sevastopol, and certain territories of Donetsk and Luhansk regions. This aggression killed 14 000 people and caused more than 30 000 injured. This number also includes 298 passengers of the MH17 flight killed by the terrorist attack that occurred on 17 July 2014 as a result of the BUK missile system that was transferred to the occupied territory of Donbas from the Russian Federation, shooting down the Malaysian Airlines plane.[18]

As is well-known, Ukraine decided to bring this situation to the attention of the international community, in particular of the International Court of Justice (ICJ) and the International Criminal Court (ICC). More specifically, in 2014 Ukraine took the very first legal initiative by invoking before the ICJ the International Convention for the Suppression of the Financing of Terrorism (ICSFT)[19] and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[20] requesting it to indicate provisional

[17] M. Ray, *Russia-Ukraine War*, Encyclopedia Britannica, 15 April 2024, https://www.britannica.com/event/2022-Russian-invasion-of-Ukraine.

[18] Russian Aggression, Permanent Mission of Ukraine to the United Nations in New York, 2016, https://ukraineun.org/en/ukraine-and-un/russian-aggression/.

[19] See the International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY-&mtdsg_no=XVIII-11&chapter =18&clang=_en.

[20] See the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-elimination-all-forms-racial.

measures of protection.[21] The decision of the ICJ, delivered on 19 April 2017, established that the conditions required for the indication of provisional measures in respect of the rights alleged by Ukraine on the basis of the ICSFT were not met, while urgency in the respect of provisional measures with regard to CERD was required to guarantee the respect of the Crimean Tatar Community's rights. Among the Russian Federation's preliminary objections was the request to declare the ICJ lack of jurisdiction over the Ukrainian claim.

Nevertheless, the ICJ declared to have jurisdiction for the case *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* based on art. 24, par. 1, of the ICSFT and art.22 of the CERD. The same cannot be said for the International Criminal Court's jurisdiction in the same case. Ukraine has twice exercised its prerogatives to accept the Court's jurisdiction over alleged crimes under the Rome Statute, invoking art.12 (3)[22] of the Statute.[23] Indeed, the Government of Ukraine accepted the ICC jurisdiction in relation to the alleged crimes committed on Ukrainian territory from 21 November 2013 to 22 February 2014, for what concerns the first declaration, and from 20 February 2014 onwards, for the second declaration. Furthermore, on 2 March 2022, the ICC Prosecutor opened an investigation concerning the situation in Ukraine on the basis of the joint referral submitted by the coordinated group of State Parties.[24]

In this context, it is possible to notice the request for intervention by the two major international courts, even when the Parties are not directly allowed to do so. In addition to this, a judicial intervention was not only required by the Parties, but many other States of the international community had the same request. Since 21 July 2022 several States filed a declaration of intervention invoking art. 63[25] to intervene in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Geno-*

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[21] See the request for the indication of provisional measures of protection submitted by Ukraine, 16 January 2017, https://www.icj-cij.org/sites/default/files/case-related/166/19316.pdf.

[22] Article 12(3) of the Rome Statute states that «If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.", https://www.icc-cpi.int/sites/default/files/Publications/Rome-Statute.pdf.

[23] See "Situation in Ukraine", ICC-01/22, https://www.icc-cpi.int/situations/ukraine.

[24] *Op. cit.*

[25] See the Statute of the International Court of Justice, https://www.icj-cij.org/statute#CHAPTER_III.

cide (Ukraine v. Russian Federation). The declaration of intervention filed by Latvia was just the first of an unprecedented mass intervention with 33 states and the European Union, representing the highest number of interventions ever filed before the ICJ. It is relevant to consider not only the specific arguments presented by each State but also the multi-participation phenomena at the International Court of Justice.[26] Furthermore, it is also relevant the unprecedented cooperation in the preparation of their declarations of interventions to offer a joint interpretation of the Genocide Convention.[27] The declared purpose of these interventions is «to make submissions on construction of the Genocide Convention on issues relating to merits as well as jurisdiction»[28]

Analysing the process of the judicialization of politics and how States implemented this phenomenon, it is possible to notice the participation in the case of several European Union Member States. On the one hand, this presence is a consequence of geographical reasons since the Russian invasion of Ukraine refers to a war on European soil; on the other hand, this wide participation of the EU Member States has historic, economic, and political reasons. In fact, this aspect has also been stressed by the Conference of Presidents, which underlined that the commitment to Ukraine's EU membership «represents a geostrategic investment in a united and strong Europe»[29]

Furthermore, as the number of declarations of interventions submitted proliferates, the EU Member States try to mark their own common position. In fact, they declared their willingness «to assist the Court by grouping its intervention together with similar interventions from other State parties, in particular European Union Member States»[30] Moreover, the EU position is underlined by the fact that the European Union filed a "memorial" before the ICJ

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[26] K. Wigard-O. Pomson-J. McIntyre, *Keeping score: an empirical analysis of the interventions in Ukraine v Russia*, in *Journal of International Dispute Settlement*, vol. XIV, No. 3, 2023, p. 306.

[27] *Op. cit.*

[28] Allegation of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) (Declaration of intervention of the Republic of Latvia), 21 July 2022, https://www.icj-cij.org/sites/default/files/case-related/182/182-20220719-WRI-01-00-EN.pdf.

[29] Statement of the Conference of Presidents on support for Ukraine, 28 November 2023, https://www.europarl.europa.eu/news/it/press-room/20231128IPR15455/statement-of-the-conference-of-presidents-on-support-for-ukraine.

[30] See Allegation of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) (Declaration of intervention of Poland), 15 September 2022, https://www.icj-cij.org/sites/default/files/case-related/182/182-20220915-WRI-01-00-EN.pdf.

invoking art. 34(2) [31] of the Statute and art. 69(2) [32] of the Rules of Court. As a consequence of this commitment by the international community, and in particular, the European Union Member States, the Russian Federation presented before the ICJ written observation on the admissibility of the Declarations of intervention submitted by Croatia and the Czech Republic, stating that the purpose of these interventions «is not the construction of the convention but pursuing a joint case with Ukraine» [33] adding that

> «[t]hese statements are clear evidence of a collective political strategy by a group of forty-seven States and the European Union, in close coordination with Ukraine, to intervene in this case with the object of assisting, strengthening or bolstering Ukraine's claims before the Court» [34]

Additionally, the Russian Federation contested the purpose of the EU's initiative in filing its memorial, underling that

> «[t]he memorial which the European Union filed invoking Article 34(2) of the Statute and Article 69(2) of the Rules of Court on its own initiative, without being so requested by the Court, sheds further light on the range of matters unrelated to the interpretation of the Genocide Convention that the Declarants may wish to address or put on the record if they obtain the status of interveners, pursuant to the Joint Declarations. In this respect, the EU's memorial could be said to address everything but the construction of the Convention and is irrelevant to the present proceedings» [35]

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[31] Article 34(2) of the ICJ Statute declares that «The Court, subject to and in conformity with its Rules, may request of public international organizations information relevant to cases before it, and shall receive such information presented by such organizations on their own initiative." https://www.icj-cij.org/statute.

[32] Article 69(2) of the Rules of Court states that «[w]hen a public international organization sees fit to furnish, on its own initiative, information relevant to a case before the Court, it shall do so in the form of a Memorial to be filed in the Registry before the closure of the written proceedings. The Court shall retain the right to require such information to be supplemented, either orally or in writing, in the form of answers to any questions which it may see fit to formulate, and also to authorize the parties to comment, either orally or in writing, on the information thus furnished." https://www.icj-cij.org/rules.

[33] Allegation of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) (Written observations of the Russian Federation on the Declarations of Intervention filed by Croatia and Czechia), 12 December 2022, p.9, https://www.icj-cij.org/index.php/node/203028.

[34] Allegation of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) (Written observations of the Russian Federation on the Declarations of Intervention filed by Croatia and Czechia), cit.,15.

[35] Allegation of Genocide under the Convention on the Prevention and Punishment of the

Croatia clarified the position of the EU Member States, specifying that «the intervention is concerned solely with the construction of the Genocide Convention and has been submitted for that purpose alone» [36] Other States, namely Italy and Luxembourg responded to the Russian Federation's written observation, specifying that «it is in the interest of all State Parties to the Genocide Convention, and more broadly of the international community as a whole that the Convention not be misused or abused. This is why the signatories of the present declaration which are Parties to the Genocide Convention intend to intervene in these proceedings» [37] Even France intervened in response to the Russian Federation's written observations, describing the Russian considerations on the position of the EU Member States as irrelevant conjectures. Furthermore, France underlined as the political considerations which may have prompted a State to invoke art. 63 of the Statute are in no way relevant to the assessment of the admissibility of a declaration of intervention. [38] With its words, France does not deny the presence of political considerations that prompt European Union States to intervene. Hence, in this context, it is important to remember that the phenomenon of judicialization of politics is enacted when the Parties are not able to demise political questions through negotiation and consequently, they appeal to the judiciary, considering it able and competent to demise the issues that are merely political, rather than juridical.

Interestingly, it has already been mentioned that for the case under analysis, on 17 August 2022 the European Union submitted a memorial before the ICJ, as a public international organisation which has the right to intervene. The present document has been considered relevant to the case by the ICJ, and it has been transmitted to the Ukrainian and Russian governments. [39] In fact,

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Crime of Genocide (Ukraine v. Russian Federation) (Written observations of the Russian Federation on the Declarations of Intervention filed by Croatia and Czechia), cit., 16.

[36] Allegation of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) (Written observations of the Republic of Croatia on the admissibility of its Declaration of Intervention with regard to the objection of the Russian Federation), 10 February 2023, https://www.icj-cij.org/sites/default/files/case-related/182/182-20230213-wri-08-00-en.pdf.

[37] Allegation of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) (Written observations of Italy on the admissibility of its Declaration of Intervention), 13 February 2023, https://www.icj-cij.org/sites/default/files/case-related/182/182-20230213-wri-17-00-en.pdf.

[38] Allegation of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) (Written observations of France on the admissibility of its Declaration of Intervention), 13 February 2023, https://www.icj-cij.org/sites/default/files/case-related/182/182-20230213-wri-15-00-fr.pdf.

[39] Allegation of Genocide under the Convention on the Prevention and Punishment of the

the European Union has a central role in dealing with the Russian war of aggression in Ukraine. It is not a case that on 13 April 2022 the Council of the European Union amended the mandate of the EU Advisory Mission for Civilian Security Sector Reform in Ukraine (EUAM Ukraine).[40] Among the purposes of this amendment is the support to Ukrainian authorities to facilitate the investigation and the prosecution of any international crimes committed in the context of the military aggression by the Russian Federation. The work of EUAM Ukraine consists of providing strategic advice, training, and donating funds or equipment. Particularly relevant is the cooperation with Eurojust[41] and the ICC.[42] Moreover, on 24 May 2022, the European Parliament and the Council of the European Union adopted the amendment of the Regulation (EU) 2018/1727 which refers to the preservation, analysis and storage of evidence relating to genocide, crimes against humanity and war crimes at Eurojust. This regulation has been amended in art. 4(1), which adds the fact that the Member States's action should be directly available to the competent national authorities and international judicial authorities, in particular the ICC. The amendment also refers to art. 80, par. 8, which adds the fact that Eurojust may process operational personal data for the performance of the task, respecting the highest standards of cyber security.[43]

In addition to this, particularly significant is the position of the European Parliament which, with resolution 2022/2655(RSP) of 19 May 2022, called on the EU institutions to create «a special international tribunal for the punishment of the crime of aggression committed against Ukraine by the political

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Crime of Genocide (Ukraine v. Russian Federation) (Judgment), 2 February 2024, https://www.icj-cij.org/sites/default/files/case-related/182/182-20240202-jud-01-00-en.pdf.

[40] The European Union Advisory Mission (EUAM) Ukraine is a non-executive mission of the European Union that began its operations in 2014. Its goal is to guarantee the civilian security. The civilian security sector comprises institutions responsible for law enforcement and the rule of law, https://www.euam-ukraine.eu/our-mission/about-us/.

[41] Eurojust is the European Union Agency for Criminal Justice Cooperation, a specialized hub where national judicial authorities work together in investigating and prosecuting transnational crime.

[42] See *EUAM Ukraine: Council further amends the mandate to also provide support in the investigation and prosecution of international crimes*, Council of the European Union, https://www.consilium.europa.eu/en/press/press-releases/2022/04/13/euam-ukraine-council-further-amends-the-mandate-to-also-provide-support-in-the-investigation-and-prosecution-of-international-crimes/.

[43] Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating the genocide, crimes against humanity, war crimes and related criminal offences, Council of the European Union, 24 May 2022, https://data.consilium.europa.eu/doc/document/PE-18-2022-INIT/en/pdf.

leaders and military commanders of Russia and its allies; calls on the EU institutions, in particular the Commission, to provide, as soon as possible, all the necessary human and budgetary resources and administrative, investigative and logistic support for the establishment of this tribunal» [44] This request also mentioned the support of the UN and the Council of Europe. [45] The just-mentioned proposal was endorsed during the European Council's conclusions on June 29 and 30, 2023, which stated as follows:

> «The European Council took stock of efforts to establish a tribunal for the prosecution of the crime of aggression against Ukraine, including work done in the Core Group, and calls for the work to continue. The tribunal should enjoy the broadest cross-regional support and legitimacy». [46]

With these words, the European Council officially endorsed the setting up of the special tribunal, and it called for international cooperation in the investigation and prosecution of the most serious crimes. This is a clear sign of the process of judicialisation of politics carried out by the EU institutions.

Interestingly, concerning the case *Ukraine v. Russian Federation*, several Presidents of the European Union institutions delivered their statements. Indeed, Josep Borrell, the High Representative of the European Union for Foreign Affairs and Security Policy, during the 9065th meeting of the Security Council focused on the cooperation between the United Nations and regional and subregional organisations in maintaining international peace and security, delivered his speech emphasising the importance of the cooperation between the UN and the EU. Referring to the war of aggression of the Russian Federation in Ukraine, Borrell pointed out «the rise in power political competition. The competition among power politics is back. In recent years, we have seen more distrust, more point-scoring and more vetoes at the United Nations. That has a price. The price has been paid in terms of problems not being solved, wars and conflicts that fester and people left at the mercy of events». [47] He also stressed the importance of cooperating to end the war with the words, claiming that «[w]e join our voices to that of the International Court of Jus-

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[44] European Parliament resolution of 19 May 2022 on the fight against impunity for war crimes in Ukraine (2022/2655(RSP)), https://www.europarl.europa.eu/doceo/document/TA-9-2022-0218_EN.html.

[45] *Op. cit.*

[46] European Council meeting (29 and 30 June 2023) – Conclusions, https://data.consilium.europa.eu/doc/document/ST-7-2023-INIT/en/pdf.

[47] S/PV.9065, Cooperation between the United Nations and regional and subregional organizations, Security Council, 16 June 2022, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv.9065.pdf.

tice».[48] The same position is pursued by the Member States, which act as spokespersons at the UN underling the values and position of the European Union. Indeed, during the 9069th meeting of the Security Council, the Special Adviser to the Secretary-General on the Prevention of Genocide, Ms. Nderitu, recalled the fact that on 18 March 2022, she acknowledged the order by the ICJ indicating provisional measures. She emphasised the fact that States parties must respect their obligations to prevent and punish the crime of genocide, as pronounced by the Court. During this meeting, France, Ireland and Lithuania intervened, showing their coordinated position under the framework of the EU, reiterating their support for the International Court of Justice.[49] The same position is stressed during the following Security Council's meetings focused on the Maintenance of peace and security of Ukraine (S/PV.9115 of 24 August 2022;[50] S/PV.9135 of 22 September 2022;[51] S/PV.9286 of 17 March 2023;[52] S/PV.9421 of 20 September 2023;[53] S/PV.9431 of 9 October 2023[54]) where the appeal to the International Court of Justice becomes more urgent, accompanied by speeches emphasising the role of the judiciary in guaranteeing justice and the settlement of disputes. These statements were delivered by the EU Member States (France, Lithuania, Czech Republic, Croatia, Spain, Slovakia), but also by the European Union.

Besides Borrell, the President of the European Parliament, Roberta Met-

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[48] See S/PV.9135, Maintenance of peace and security of Ukraine, 22 September 2022, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv.9135.pdf.

[49] S/PV.9069, Maintenance of peace and security in Ukraine, Security Council, 21 June 2022, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv.9069.pdf.

[50] See S/PV.9115, Maintenance of peace and security of Ukraine, Security Council, 24 Aug. 2022, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_9115.pdf.

[51] See S/PV.9135, Maintenance of peace and security of Ukraine, Security Council, 22 Sept. 2022, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv.9135.pdf.

[52] See S/PV.9286, Maintenance of peace and security of Ukraine, Security Council, 17 March 2023, https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv.9286.pdf.

[53] See S/PV.9421, Maintenance of international peace and security, Security Council, 20 Sept. 2023, https://documents.un.org/doc/undoc/pro/n23/273/13/pdf/n2327313.pdf?token=lk4rUMaNXyfmlnJVPU&fe=true.

[54] See S/PV.9431, Maintenance of international peace and security, Security Council, 09 Oct. 2023, https://digitallibrary.un.org/record/4023714?ln=en&v=pdf.

sola, intervened, appealing to the judicial power. Indeed, mentioning that Ukrainian people deserve justice, she also mentioned the possibility of setting up a Special Tribunal. At the same time, she also stressed the work of the European Parliament in collecting evidence to support the investigations of the crimes to hold accountable those responsible for the crimes and atrocities committed against the Ukrainian people. [55]

Having concluded this overview of the legal initiatives taken by the EU in support of Ukraine, we can now go back to the process of judicialisation, and see how it manifests itself in the context of the Ukrainian conflict.

4. *The judicialisation of the Russian aggression against Ukraine: an appraisal*

In the previous section, we have provided an account of the many legal initiatives taken by Ukraine and/or the EU to judicialise the Russian war of aggression.

An important part of this lawfare has only been announced and may take actual form in the future, provided that a number of conditions are met and a number of obstacles are circumvented. This is the case of the proposed Special Tribunal on the crime of aggression against Ukraine, [56] whose draft legal framework is currently under political consideration. [57] Another part of it, which in reality concerned only Russian conduct undertaken before the launch of the full-scale war against Ukraine, has already failed because of the inherent limits of the international legal order and, in particular, of the international adjudication system. This is the case of the first application made by Ukraine against Russia before the International Court of Justice (ICJ). [58] In that dis-

[55] See the speech of the President of the European Union Roberta Metsola, 04 March 2023. https://the-president.europarl.europa.eu/home/ep-newsroom/pageContent-area/actualites/justice-must-be-served.html.

[56] What form will it take exactly should it ever be approved is currently unclear. For a discussion of these aspects see T. Dannenbaum, *A Special Tribunal for the Crime of Aggression?*, in *Journal of International Criminal Justice*, 4, 2022, p. 859 ss.; as well as P. Butchard, *Conflict in Ukraine: A Special Tribunal on the Crime of Aggression*, 27 August 2024, House of Commons Library, https://researchbriefings.files.parliament.uk/documents/CBP-9968/CBP-9968.pdf.

[57] See Council of Europe, Press release of 31 March 2025, "Core Group finalised technical work on draft documents on the establishment of the Special Tribunal for the Crime of Aggression against Ukraine", available here.

[58] The outcome of International Court of Justice, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on*

pute, the ICJ seems to have resorted to a most typical avoidance strategy, under which jurisdiction is retained, but the final decision is crafted in a way that sidesteps the most politically sensitive issues. This is a strategy that has been defined as expressive of judicial minimalism,[59] and it is not a novel one.

Nor are hopes high on the ongoing ICC's attempts to bring to justice some individuals involved in the war, including President Putin himself. The practical and legal challenges of the ICC's lack of jurisdiction remain. They are unlikely to be sorted out in the near future, in much the same way a Special Tribunal is unlikely to be established at this point.

However, as demonstrated by the chart below, the number of new applications brought even to the ICJ, despite its (alleged) conservatism, is gradually but steadily growing.[60] Of the new cases, many recent ones, most of which are still (currently) pending, have to do with highly sensitive political issues. The two applications arising out of the Israeli operations in Gaza following the terrorist attack of 7 October 2023 are textbook illustrations.[61] Another current case in point is climate litigation, which is based mainly on international instruments (but not necessarily litigated before international tribunals).[62]

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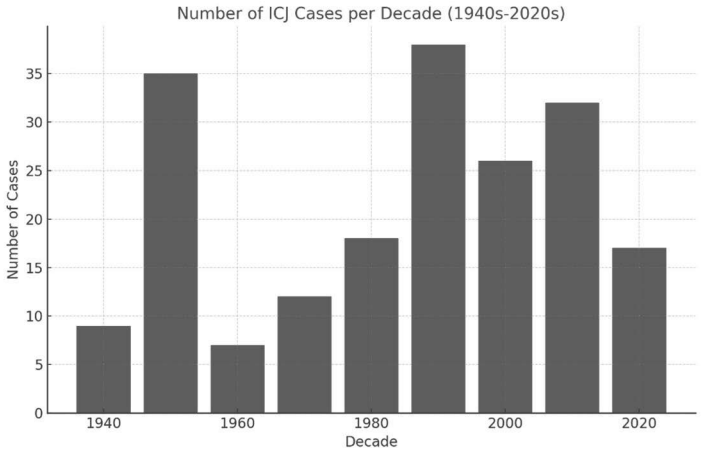
the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgment of 31 January 2024, has been described as a sobering experience (allegedly) confirming the ICJ's traditionally conservative attitude. See the considerations made by I. Marchuk, *Unfulfilled Promises of the ICJ Litigation for Ukraine: Analysis of the ICJ Judgment in Ukraine v Russia (CERD and ICSFT)*, in *EJIL:Talk!*, 22 February 2024, https://www.ejiltalk.org/unfulfilled-promises-of-the-icj-litigation-for-ukraine-analysis-of-the-icj-judgment-in-ukraine-v-russia-cerd-and-icsft/.

[59] See J. Odermatt, *Patterns of Avoidance: Political Questions before International Courts*, in *International Journal of Law in Context*, 2, 2018, p. 233.

[60] Except for the 1990s, whose data are somewhat distorted by the fact that Serbia and Montenegro brought several separate applications in 1999 against different countries on similar legal issues, the number of new applications has been constantly (but slowly) rising since the 1960s. The trend is confirmed in the current decade. The number of (projected) applications in the 2020s is slightly higher than in the previous decade. The chart was created with the help of IA, to which we fed data taken from the ICJ's website.

[61] An overview of the cases is available at https://www.icj-cij.org/list-of-all-cases?dateorder=introduction&order=desc.

[62] For an overview, see L. Maxwell-S. Mead-D. van Berkel, *Standards for Adjudicating the Next Generation of Urgenda-style Climate Cases*, in *Journal of Human Rights and the Environment*, 1, 2022, 35 ff.



Therefore, Ukraine's lawfare deployed against Russia seems to fit squarely in line with this general trend. That said, whether the legal initiatives will succeed and bring about tangible results is a completely different matter and seems to depend largely on political rather than legal factors. After all, as has been rightly pointed out, one of the consequences of the judicialisation of international politics is the politicisation of international dispute settlement. [63]

We will go back to these issues in the next section, where an assessment of the role of the EU will be provided.

5. *The role of the EU: where do we currently stand?*

From the Union's perspective, it can be affirmed that supporting the judicialisation of the conflict in Ukraine makes perfect sense, as this attempt appears to be fully consistent with achieving its foreign policy objectives as enshrined, for example, in Article 3(5) and 21 TEU. [64] The promotion of the rule of law internationally, compliance with the UN Charter and in general with principles of international law are foundational constitutional objectives of the "Union's action on the international scene", to borrow from the opening sentence of Article 21 TEU.

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[63] See J. Ferejohn, *Judicializing Politics, Politicizing Law,* in *Law and Contemporary Problems*, 1, 2002, 61 ff.

[64] On the role of foreign policy objectives, see the comprehensive and thoughtful study carried out by J. Larik, *Foreign Policy Objectives in European Constitutional Law*, Oxford University Press, Oxford, 2016.

As already pointed out, whether this attempt to judicialise the war in Ukraine will lead to tangible results remains to be seen. The judicialisation of the Ukrainian situation inevitably entails the risk of politicising the legal disputes based on it. The discussions that have already taken place before the ICJ, as illustrated above (see section 3), are an unequivocal demonstration thereof. This may, in turn, entail the risk that the judicial organs involved will either accept to become more political or refuse to take up such a role and shy away from it in order to avoid a possible backlash. The second scenario appears frankly more likely.

Therefore, the Union's contribution may not be decisive in itself. Despite the unprecedented nature of such a collective mobilisation of EU Member States and the EU, a positive outcome of this ongoing mobilisation cannot be taken for granted. However, irrespective of the actual results in the specific case at hand, it seems that the Union's actions in this context are aimed at promoting the idea that international law can be mobilised, or even weaponised, to advance the global justice agenda and to make a (intrinsically political) statement that international wrongdoers should be ready to be held accountable in case of serious violations of international law. From the Union's perspective, given the objectives of its external action, this may have a value of its own, even if only symbolical. [65]

The idea that peace can be achieved through (international) law is reminiscent of the famous peace through law idea of Hans Kelsen. [66] This is an attitude that permeates the Union's action on the international scene in virtually all fields, as testified, for example, by the Union's commitment towards rules-based trade, in which the EU has a truly global leadership role. It could even be said that this Kelsenian attitude is part of the DNA of a normative global actor such as the EU.

6. *Concluding remarks*

This chapter has explored the evolving phenomenon of judicialisation in international politics, using the EU and Ukraine's responses to Russian aggression as a case study. It has illustrated how the judicialisation of political

[65] This is not the place to engage in a discussion concerning the symbolic functions of the law. See F. Ferraro, *When Expressiveness Flows Back: the Symbolic Functions of Legislation and their Legal Significance*, in T. Gizbert-Studnicki-F. Poggi-I. Skoczen (eds.), *Interpretivism and the Limits of Law*, Edward Elgar, Cheltenham, 2022, p. 194 ff.

[66] See H. Kelsen, *Peace Through Law*, University of North Carolina Press, Chapel Hill, 1944.

conflicts is becoming increasingly prominent. Through the involvement of the ICJ and the ICC, Ukraine has strategically engaged with international legal avenues to challenge Russian actions, transforming the conflict into legal disputes on the global stage. These moves signify a broader trend of lawfare as a tool of foreign policy, with implications that resonate far beyond this specific conflict.

The EU's active role underscores its dedication to the rule of law as a core principle of its external policy. This approach aligns with foundational EU values, promoting peace, stability and accountability through legal channels. By supporting Ukraine's appeals to international courts and coordinating a collective response among its Member States, the EU has sought to reinforce the legitimacy of international law as a means to counter unlawful state actions. An idea at the heart of the international rule of law. This legal mobilisation not only aids Ukraine in its defence but also signals the EU's commitment to strengthening the international legal order.

However, the findings of this chapter also highlight the limitations and potential risks of judicialising international conflicts. While the EU's legal interventions emphasise accountability, the entanglement of legal proceedings with political motivations could risk politicising judicial bodies, potentially undermining their overall authority and neutrality. Furthermore, the contribution pointed out that the practical impact of these judicial efforts remains uncertain. The legal initiatives may not yield immediate, tangible outcomes, especially when major international actors resist compliance.

In conclusion, the EU and Ukraine's use of judicialisation in response to the Russian invasion exemplifies the strategic potential of international law in addressing global crises. This approach reflects a deliberate effort by the EU to establish a rules-based framework for international relations, one that is based on accountability and upholds the rules of international law. Although the efficacy of judicialisation in resolving international conflicts remains debatable, this chapter has shown that it can serve as a powerful means to assert normative values and influence global discourse. The EU's stance on judicialisation thus addresses current geopolitical challenges and sets a precedent for future conflicts.

RULE OF LAW BACKSLIDING IN EUROPA: RIFLESSI NELLA SFERA DELLA BIOPOLITICA E DEL BIODIRITTO

Alessandra Pisu [*]

1. *Diritti fondamentali, Stato di diritto e democrazia*

Il connubio tra diritti fondamentali, Stato di diritto e democrazia è inscritto nella storia dell'Unione ed è suggellato in diverse norme contenute nelle principali fonti di diritto europeo [1]. Non a caso, uno degli aspetti più vitali del processo di integrazione riguarda la c.d. "Europa dei diritti" e tra i parametri più significativi per misurare la tenuta dello Stato di diritto e il livello di democra-

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[1] Nel preambolo della Carta dei diritti fondamentali si legge: «l'Unione si fonda sui valori indivisibili e universali della dignità umana, della libertà, dell'uguaglianza e della solidarietà; essa si basa sul principio della democrazia e sul principio dello Stato di diritto». V. anche gli artt. 2 e 21 del TUE a mente dei quali, rispettivamente: «L'Unione si fonda sui valori del rispetto della dignità umana, della libertà, della democrazia, dell'uguaglianza, dello Stato di diritto e del rispetto dei diritti umani, compresi i diritti delle persone appartenenti a minoranze» e la sua azione «sulla scena internazionale si fonda su principi che ne hanno informato la creazione, lo sviluppo e l'allargamento e che essa si prefigge di promuovere nel resto del mondo: democrazia, Stato di diritto, universalità e indivisibilità dei diritti dell'uomo delle libertà fondamentali, rispetto della dignità umana, principi di uguaglianza e di solidarietà e rispetto dei principi della Carta delle Nazioni Unite e del diritto internazionale».

ticità dei sistemi politici e sociali spicca la capacità di preservare e promuovere i **diritti dell'uomo** e le **libertà fondamentali**, tenendo la persona umana al centro dell'azione dell'UE [2], oltreché delle politiche dei governi nazionali. D'altra parte, alla base della convivenza civile di ogni comunità esistono principi fondamentali e un sistema di diritti delle persone che rappresentano un riferimento imprescindibile per le scelte che le stesse autorità statali possono, o in alcuni casi devono, effettuare nell'esercizio dei poteri loro attribuiti.

Storicamente, il **principio** dello **Stato di diritto**, spina dorsale di ogni democrazia costituzionale moderna, si basa sull'idea di mutua indipendenza tra i poteri legislativo, esecutivo e giudiziario, assicurata da un sistema di garanzie definite a livello domestico dalle singole nazioni [3]. Lo Stato di diritto e gli altri **valori** fondamentali ad esso **connessi** – dignità umana, libertà, uguaglianza, solidarietà, democrazia, rispetto dei diritti umani – costituiscono altresì la base su cui si fonda l'Unione e, in ragione di ciò, sono stati inclusi con forza cogente nella Carta dei diritti fondamentali dell'UE e nelle norme dei Trattati europei.

Esistono molti modi di intendere lo Stato di diritto e il corrispondente principio del *rule of law* [4].

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[2] Scrive la Commissione Europea nell'*incipit* della Relazione sullo Stato di diritto 2024: «Lo Stato di diritto è una garanzia essenziale per il buon funzionamento delle nostre democrazie, per la protezione dei diritti individuali e, di conseguenza, per la vitalità e la prosperità delle nostre società ed economie».

Il legame intercorrente tra diritti umani, democrazia e Stato di diritto emerge in moltissimi campi. Tra l'altro, è suggellato dalle più recenti iniziative europee assunte per la regolamentazione dell'intelligenza artificiale, come si evince dall'apertura del Consiglio d'Europa (Vilnius, 5 settembre 2024) alla firma di una "Convenzione quadro sull'intelligenza artificiale e i diritti umani, la democrazia e lo stato di diritto". Un trattato globale, unico nel suo genere, finalizzato al rispetto dei diritti delle persone mediante un uso responsabile dell'IA, improntato al rispetto dei principi di "dignità umana e autonomia individuale" (art. 7), "uguaglianza e non discriminazione" (art. 10). La Convenzione – CETS 225 – Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (coe.int) – entrerà in vigore il primo giorno del mese successivo alla scadenza di un periodo di tre mesi dalla data in cui cinque firmatari, tra cui almeno tre Stati membri del Consiglio d'Europa, lo avranno ratificato.

[3] Per un sintetico e rigoroso quadro sull'origine dello Stato di diritto, «divenuto la forma politica prevalente nell'Europa degli stati nazionali tra il XIX e la prima metà del XX secolo», v. B. Pastore-F. Viola-G. Zaccaria, *Le ragioni del diritto*, Il Mulino, Bologna, 2017, p. 189 ss., laddove è descritto come «un tipo di Stato in cui la limitazione e l'autolimitazione dei meccanismi del potere attraverso la strumentazione tecnica del diritto ha per obiettivo l'ordinata convivenza tra gli individui nel rispetto della loro libertà» (*ivi,* p. 193).

[4] Per un approfondimento, v. A. Pin, *Il* rule of law *come problema*, Editoriale Scientifica, Napoli, 2021, *passim*; F. Viola, *Il* rule of law *come idea di società*, in *Materiali per una cultura della legalità*, a cura di G. Acocella, Giappichelli, Torino, 2020, p. 25 ss.; R. Bin, Rule of law *e*

Disponiamo di una **definizione legislativa**, inserita nel regolamento di condizionalità [5] e dettata ai fini della sua applicazione, secondo cui nel valore sancito dall'art. 2 TUE «rientrano i principi di legalità, in base alla quale il processo legislativo deve essere trasparente, responsabile, democratico e pluralistico; certezza del diritto; divieto di arbitrarietà del potere esecutivo; tutela giurisdizionale effettiva, compreso l'accesso alla giustizia, da parte di organi giurisdizionali indipendenti e imparziali, anche per quanto riguarda i diritti fondamentali; separazione dei poteri; non discriminazione e uguaglianza di fronte alla legge». La norma specifica ulteriormente che «Lo Stato di diritto è da intendersi alla luce degli altri valori e principi dell'Unione sanciti nell'articolo 2 TUE».

Tuttavia, al di là delle enunciazioni formali, la vera sostanza dello Stato di diritto «è nella percezione che quando ci troviamo soli e inermi di fronte a un'autorità di qualunque tipo non siamo alla mercé di questa, perché da qualche parte è stato deciso cosa è giusto o meno, senza che ciò possa cambiare per l'umore o le preferenze del giorno di chi veste un'uniforme o pensa – a torto o a ragione – di essere "nell'esercizio delle proprie funzioni"» [6].

Analogamente, le analisi del **principio del *Rule of law*** muovono da un approccio formalista e da uno sostanzialistico. Il primo, attento ai caratteri strutturali del sistema giuridico, mette al centro la certezza del diritto per salvaguardare l'esigenza di un ordinamento stabile e prevedibile ed ha tra i suoi capisaldi la necessità di un sistema di corti indipendenti [7]. Il secondo introduce –

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ideologie, in Rule of Law. *L'ideale della legalità*, a cura di G. Pino e V. Villa, Il Mulino, Bologna, 2016, p. 37 ss.

[5] V. art. 2 Regolamento (UE, Euratom) 2020/2092 del Parlamento europeo e del Consiglio del 16 dicembre 2020, relativo a un regime generale di condizionalità per la protezione del bilancio dell'Unione, ossia quel meccanismo istituito *ad hoc* dall'Unione per condizionare i finanziamenti europei al rispetto dello Stato di diritto.

[6] Così A. Simoni, *L'inafferrabile Stato di diritto*, in *Democrazia e* rule of law *in Europa. Criticità e sfide aperte alla vigilia delle elezioni per il Parlamento europeo*, Gli speciali di *Questione e Giustizia*, maggio 2024, p. 22. Il volume è disponibile in Democrazia e rule of law in *Europa. Criticità e sfide aperte alla vigilia delle elezioni per il Parlamento europeo (questionegiustizia.it*).

[7] Secondo l'insegnamento della Corte di giustizia, il requisito di indipendenza della magistratura implica due aspetti: il primo, di carattere esterno, richiede che l'organo interessato eserciti le sue funzioni in piena autonomia, senza essere soggetto ad alcun vincolo gerarchico o di subordinazione e senza ricevere ordini o istruzioni, con la conseguenza di essere tutelato da interventi o da pressioni esterne idonee a compromettere l'indipendenza di giudizio dei suoi membri e a influenzare le loro decisioni; il secondo aspetto, di carattere interno, si ricollega alla nozione di imparzialità e concerne l'equidistanza dalle parti della controversia e dai loro rispettivi interessi, imponendo il rispetto dell'obiettività nella soluzione da dare al conflitto. V. G. Michelini, *Crisi della democrazia costituzionale e dello Stato di diritto in Europa: uno sguardo cronologico e uno sguardo sincronico*, in *Democrazia e* rule of law *in Europa*, cit., p.

quale elemento innovativo rilevante – la tensione dell'ordinamento verso l'obiettivo di una piena tutela dei diritti delle persone.

Alla visione formalistica si associa, in un'accezione più estesa, un concetto sostanziale di *rule of law* quale «forza attrattiva e propulsiva di democrazia, uguaglianza e rispetto dei diritti fondamentali, di precondizione per l'indipendenza del potere giudiziario e delle fonti di informazione, nonché di garanzia per l'efficace attuazione delle politiche economiche dell'Unione» [8].

In questa prospettiva, l'ordinamento deve prioritariamente tutelare i diritti fondamentali, anche attraverso un apparato giurisdizionale in grado di far fronte agli eventuali abusi dell'autorità [9]. La struttura dei sistemi giuridici correttamente funzionanti si arricchisce, pertanto, associando all'elemento della **certezza** del **diritto** l'idea di un'effettiva **tutela** dei **diritti** della **persona umana**.

La *rule of law* ha come obiettivo evitare l'arbitrio del potere cosicché, secondo una condivisibile opinione [10], ogni forma di potere deve essere esercitata nei modi ed entro i limiti stabiliti dal diritto, ma soprattutto il diritto deve essere capace di guidare l'azione umana. Ne consegue che, in uno Stato di diritto, le regole giuridiche devono essere formulate in modo da poter essere seguite da esseri ragionevoli, capaci di un'attività di deliberazione e di scelta. Per essere in grado di guidare la condotta umana, quindi, le norme devono fornire ragioni che giustifichino, in qualche modo, la pretesa di obbedienza insita nelle stesse. Ecco perché si dice che «la formulazione del *rule of law* ha sempre un carattere storico e contingente» e la sua configurazione «deve mantenere un carattere elastico e flessibile, capace di adattarsi ai mutamenti della cultura giuridica e alle metamorfosi del potere» [11].

La *rule of law* si associa, inoltre, ad una pretesa di **giustizia** [12], o ragionevolezza, della regola giuridica che contribuisce ad assicurarne la spontanea osservanza, consentendo la penetrazione – in quel prodotto artificiale che è il diritto – di giudizi di valore condivisi nella società.

La realizzazione di queste aspirazioni è agevolata dal favore che le istitu-

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30 ss., al quale si rinvia anche per ulteriori considerazioni sulle violazioni registrate in Polonia e Ungheria.

[8] Così S. Cocchi, *L'allargamento dell'Unione europea come «responsabilità condivisa»: un'opportunità per rafforzare la* rule of law, in *Democrazia e* rule of law *in Europa*, cit., p. 90.

[9] Sul concetto di autorità e le sue connessioni con la *rule of law*, v. B. Pastore-F. Viola-G. Zaccaria, *op. cit.*, p. 157 ss.

[10] F. Viola, *op. cit.*, p. 25 s.

[11] Ancora F. Viola, *op. cit.*, p. 27.

[12] Sul valore della giustizia: B. Pastore-F. Viola-G. Zaccaria, *op. cit.*, p. 71 ss.; N. Lipari, *Elogio della giustizia*, Il Mulino, Bologna, 2021, *passim*.

zioni decidono di accordare alla partecipazione civica e al **dibattito pubblico** nella fase che precede la produzione delle leggi. Ciò vale in ogni ambito, ma l'esigenza è particolarmente avvertita ove si operi nel campo del **biodiritto**, settore sul quale concentreremo l'analisi. A questo proposito, val la pena ricordare che la possibilità di affrontare in una dimensione pubblica le questioni poste dalla biomedicina e dalla bioetica è espressamente prevista dalla "Convenzione sui Diritti dell'Uomo e la biomedicina", nella quale gli Stati aderenti hanno assunto l'impegno a vigilare che: «le domande fondamentali poste dallo sviluppo della biologia e della medicina siano oggetto di un dibattito pubblico appropriato alla luce, in particolare, delle implicazioni mediche, sociali, economiche, etiche e giuridiche pertinenti, e che le loro possibili applicazioni siano oggetto di consultazioni appropriate» [13].

È il modo moderno di intendere la **biopolitica**, nata come tecnica di controllo pubblico della vita e dei corpi.

2. Rule of law backsliding *in Europa e crisi della democrazia in Italia: chi decide sul corpo umano?*

Negli ultimi anni, il principio dello Stato di diritto ha conosciuto un pesante arretramento in Europa. Il fenomeno, ben descritto dall'espressione "***rule of law backsliding***" – che rimanda all'idea di una regressione rispetto allo *standard* di tutela acquisito a livello europeo – si è manifestato nelle forme più gravi in Polonia, Ungheria [14] e Romania [15]. Le esperienze di questi paesi, che si sono allontanati dai valori fondanti di cui all'art. 2 TUE, hanno messo in luce le difficoltà di reazione dell'Unione, connesse alla limitata deterrenza e alle scarse possibilità di un funzionamento effettivo del complesso meccanismo di autotutela previsto dall'art. 7 TUE [16], la cui attuazione si scontra con le logiche

[13] V. art. 28 Convenzione per la protezione dei Diritti dell'Uomo e della dignità dell'essere umano nei confronti dell'applicazioni della biologia e della medicina, Oviedo, 1997.

[14] La parabola di questi due Stati membri, che si sono distinti nel sostenere posizioni euroscettiche, sovraniste e lesive dell'indipendenza della magistratura, dei diritti delle minoranze e per politiche migratorie particolarmente rigide è esaminata da R. Calvano, *Itinerari di studio su UE, legalità, crisi dello Stato*, Giappichelli, Torino, 2023, p. 65 ss.

[15] Con riguardo alla Romania, v. la recente Corte di Giustizia UE, 26 settembre 2024, *MG, C-792/2022*, sulla quale G. Bronzini, *Primato del diritto dell'Unione, garanzie di indipendenza del giudice nazionale ed effettività del diritto alla salute e sicurezza nel luogo di lavoro di matrice comunitaria (questionegiustizia.it)*.

[16] L'art. 7 TUE consente al Consiglio di constatare l'esistenza di un evidente rischio di violazione grave dei valori dell'UE. Esso configura uno strumento eccezionale che l'Unione può utilizzare per affrontare le carenze più gravi in materia di Stato di diritto in uno Stato membro.

nazionaliste e sovraniste recentemente rafforzatesi, ben oltre i confini territoriali di quegli Stati, nel contesto europeo.

In Italia non si riscontra una violazione sistemica e deliberata dei valori dell'Unione [17], ma alla crisi dei partiti politici, sempre più personalizzati, e ai ridottissimi livelli di partecipazione politica si associano forti tensioni che investono il sistema dell'informazione e la giurisdizione [18].

Importanti riflessi di questo clima si avvertono, inoltre, sull'antichissima, ma perdurante disputa tra **libertà** sul **corpo umano** e **controllo** della **politica**. Nell'ambito del "governo del corpo" e delle libertà delle persone nelle scelte esistenziali, è evidente, infatti, la preoccupante affinità di vedute del nostro attuale governo rispetto al modello polacco-ungherese.

Il più delle volte, essa si manifesta con modalità formalmente ineccepibili: si pensi, ad esempio, alla scelta dell'esecutivo italiano di costituirsi al fianco del governo ungherese nel procedimento intentato da un cittadino di quello Stato che lamentava la violazione della Cedu da parte di una legislazione nazionale particolarmente restrittiva per l'autodeterminazione individuale nelle scelte di fine vita [19]; o, ancora, ad analoghe iniziative assunte nei due paesi con riguardo al procedimento per l'interruzione volontaria di gravidanza al fine di disincentivare, se non impedire di fatto alla gestante che lo richieda, l'accesso all'aborto.

Sempre in ambito domestico, si sono potuti osservare labili tentativi volti ad influenzare l'atmosfera istituzionale in attesa di decisioni di organismi giurisdizionali indipendenti. Mi riferisco ora alla sospetta tempistica con la quale il Comitato Nazionale di Bioetica, organo governativo, ha ritenuto di rendere nota la risposta al quesito sottopostogli il 3 novembre 2023 dal Comitato Etico

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Finora la procedura è stata attuata due volte: la prima dalla Commissione nei confronti della Polonia, nel dicembre 2017, la seconda dal Parlamento europeo nei confronti dell'Ungheria, nel settembre 2018. Nel contesto di entrambe le procedure, il Consiglio ha tenuto diverse audizioni formali e sessioni sullo stato di avanzamento, senza tuttavia decidere di portare nessuna delle due procedure fino alla fase successiva (cfr. *Relazione sullo Stato di diritto*, 2024, p. 7).

[17] I rilievi mossi al nostro paese si leggono nell'allegato alla Relazione sullo Stato di diritto 2024, p. 13. *Relazione sullo Stato di diritto* 2024 - Comunicazione e capitoli dedicati ai singoli paesi - Commissione europea (*europa.eu*).

[18] N. Rossi, *Democrazia deliberativa e Stato democratico di diritto*, in *Democrazia e* rule of law *in Europa*, cit., p. 96 s., constata che il sistema dell'informazione è insidiato da concentrazioni che ne limitano libertà e pluralismo, mentre la giurisdizione è investita a tutti i livelli – sino all'organo costituzionale – da attacchi e polemiche dirette a minarne la credibilità e sminuirne la legittimazione. L'autore osserva come la somma di questi fenomeni negativi e delle tendenze regressive in atto hanno fatto sì che l'Italia, nel giro di alcuni decenni, abbia cessato di essere il vivace laboratorio di democrazia che era stato negli anni Settanta, mostrando oggi un tessuto democratico impoverito e slabbrato.

[19] V. CEDU, sez. I, 13 giugno 2024, ric. n. 32312/23 – D.K. c. Ungheria, sulla quale *infra*, par. 4.

Territoriale della Regione Umbria in ordine al concetto di trattamento sanitario di sostegno vitale, ai fini dell'applicazione della nota sentenza della Corte costituzionale n. 242/2019 [20]. La risposta è stata difatti approvata e pubblicata [21] a ridosso del deposito di un'altra attesissima decisione della Consulta in materia di suicidio medicalmente assistito [22].

Al di là delle palesi minacce all'indipendenza dei sistemi giudiziari registrate in Polonia e Ungheria, anche negli Stati membri non interessati da conclamati processi di regressione democratica come il nostro si avvertono chiari segni dell'attuazione di un **progetto** di **svuotamento** della **democrazia** nella sua dimensione sostanziale che si esprime, tra l'altro, mediante scelte politiche involutive per i diritti civili e, in particolare, per i diritti delle c.d. minoranze. Emblematico di questo atteggiamento il rifiuto di iscrizione all'anagrafe dei genitori non biologici di figli nati mediante tecniche di riproduzione assistita vietate dalla legge italiana e la conseguente menomazione dei diritti dei bambini inseriti in famiglie composte da coppie omosessuali. Scelta che, secondo un'autorevole dottrina, costituisce uno dei segnali del tentativo delle forze politiche attualmente al governo di imporre una nuova egemonia culturale [23].

Tutti gli esempi ricordati muovono da istanze eticamente sensibili che meritano una rinnovata considerazione da parte delle autorità, non solo perché provenienti dal tessuto sociale, ma anche in quanto strumentali al libero sviluppo e all'affermazione dell'identità personale che ogni moderno Stato di diritto dovrebbe garantire ai propri cittadini. La negazione aprioristica di ogni forma di tutela giuridica alle rivendicazioni connesse, sia che attengano alla salute procreativa, ai diritti riproduttivi, all'avanzare di nuovi modelli di famiglia e genitorialità, ovvero all'assistenza medica alla morte volontaria di persone che versano in gravi condizioni di sofferenza, può porsi in conflitto con i principi e i valori fondativi dell'UE che rappresentano le precondizioni del processo democratico: la dignità umana, la solidarietà e l'uguaglianza [24].

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[20] V. Corte cost., 25 settembre 2019, n. 242, (caso Cappato-Antoniani), sulla quale mi sia consentito rinviare alle considerazioni espresse nel mio scritto, *Dignità e autodeterminazione alla fine della vita tra bioetica e biodiritto*, in *Resp. civ. prev.*, 1, 2020, p. 138 ss.

[21] V. Comitato Nazionale per la Bioetica - Comunicato Stampa CNB n. 4/2024 del 1 luglio 2024 - Risposta al quesito del CET Umbria sui trattamenti di sostegno vitale *(governo.it)*.

[22] Ossia, Corte costituzionale, 18 luglio 2024, n. 135, sulla quale v. P. Veronesi, *A primissima lettura: se cambia, come cambia e se può ulteriormente cambiare il "fine vita" in Italia dopo la sentenza n. 135 del 2024*, in *Biolaw Journal – Rivista di biodiritto*, 3, 2024, p. 329 ss. Torneremo sulla questione *infra* al par. 4.

[23] V. L. Ferrajoli, *Crisi e rifondazione della democrazia nell'Unione europea*, in *Democrazia e* rule of law *in Europa*, cit., p. 75.

[24] Sull'impatto di questi valori nel campo dei diritti della persona, C. Camardi, *Pluralismo e statuti giuridici delle persone*, in *Jus civile*, 1, 2023, p. 64 ss.; G. Alpa, *Solidarietà. Un princi-*

Nelle resistenze della politica italiana a farsi carico di questi problemi, se non per mortificare l'autodeterminazione sul proprio corpo, si potrebbe rinvenire la traccia di un più complesso meccanismo che con «tanti e separati interventi istituzionali, legali e culturali, nessuno dei quali in sé drammatico» indebolisce la struttura della *rule of law* preparando, nella scarsa attenzione generale, un cambio di paradigma che in questo modo potrà apparire, poi, inevitabile o addirittura scontato [25].

Tanto basta a non sottovalutare il fenomeno e induce a porre sotto la lente d'ingrandimento ogni iniziativa, come ogni omissione di interventi doverosi, che si collochi su questa linea d'azione. Si tratta infatti di indici che segnalano una deprecabile prossimità alle politiche attuate nelle democrazie illiberali, che rispondono alla tendenza autoritaria di comprimere gli spazi di libertà ed autodeterminazione di singoli e specifici gruppi di persone.

Questo indirizzo politico si manifesta in forme preoccupanti che investono, da una parte, la negazione di alcuni diritti, ovvero un loro formale riconoscimento non accompagnato da sufficienti garanzie nella concreta attuazione. Dall'altra, un significativo rallentamento del percorso teso all'acquisizione di nuovi diritti corrispondenti a bisogni emergenti e che attengono all'uguaglianza di genere, alla tutela delle minoranze e, più in generale, al pieno sviluppo della persona umana. Le recenti vicende cui è andato incontro l'aborto, come quelle che investono i diritti riproduttivi delle coppie omosessuali sono emblematiche in tal senso.

Eppure, se vi fosse la volontà politica di seguire vie alternative, attivando percorsi democratici virtuosi, la paralisi nutrita dagli scontri ideologici – scientemente alimentati anche dai rappresentanti dei partiti politici – su questi ed altri temi potrebbe essere superata.

La stessa difesa dello Stato di diritto dalle pulsioni illiberali che percorrono anche il nostro paese imporrebbe di affrontare la crisi democratica analizzando e superando le ragioni della sfiducia dei cittadini verso le istituzioni che trop-

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pio normativo, Il Mulino, Bologna, 2022, spec. p. 179 ss.; Id., *Dignità personale e diritti fondamentali*, in *Riv. trim. dir. proc. civ.*, 2011, p. 21 ss.; Id., *Dignità. Usi giurisprudenziali e confini concettuali*, in *Nuova giur. civ. comm.*, 1997, II, p. 425 ss.; N. Lipari, *Personalità e dignità nella giurisprudenza costituzionale*, in *Riv. trim. dir. proc. civ.*, 2017, p. 847 ss.; V. Scalisi, *L'ermeneutica della dignità*, Milano, 2018; G. Resta, *La disponibilità dei diritti fondamentali e i limiti della dignità (note a margine della Carta dei diritti)*, in *Riv. dir. civ.*, 2002, p. 801 ss.; M. Rosen, *Dignità. Storia e significato*, trad. it. F. Rende, Torino, 2013, *passim*; C. Piciocchi, *Il principio d'eguaglianza nell'ambito del Biodiritto*, in *Biolaw Journal – Rivista di biodiritto*, 2, 2019, p. 113 ss.

[25] V., anche per il virgolettato che precede, L. Marini, *Verso le elezioni europee. L'importanza della* rule of law*: capire di più per un voto consapevole*, in *Democrazia e* rule of law *in Europa*, cit., p. 15.

po spesso restano inermi, o ergono ostacoli che minano l'effettività dei diritti, di fronte a questioni fondamentali. Tra le proposte più interessanti a questo riguardo v'è quella di integrare e rinvigorire – con istituti di partecipazione diretta e di **democrazia deliberativa** – le strutture della democrazia rappresentativa nell'Unione e nei singoli Stati membri [26].

L'esperimento, recentemente attuato in Francia [27], si rivela proficuo nella definizione dei diritti fondamentali di nuova generazione che rappresentano declinazioni dell'autodeterminazione individuale in vari campi dell'esperienza umana, dall'inizio alla fine della vita. La loro regolamentazione è un compito cui il legislatore italiano tende colpevolmente a sottrarsi in ragione delle implicazioni etiche sottese alle decisioni da assumere e dello scontro ideologico che si agita intorno ai grandi temi della vita umana. Eppure, trattandosi di scelte politiche che devono poggiare su basi solide e radicate nel corpo sociale, esprimendo istanze sentite ed accettate dalla comunità in cui i nuovi diritti aspirano a farsi valere, è molto importante promuovere forme di coinvolgimento diretto dei cittadini. La democrazia deliberativa rappresenta, difatti, uno strumento chiave per accostarsi in modo consapevole, equilibrato e plurale alle ultime frontiere delle libertà individuali e dei diritti fondamentali della persona che costituiscono manifestazioni dell'autodeterminazione sul proprio corpo [28].

In Italia manca una strategia tesa a favorire strumenti di ascolto dei cittadini su temi cruciali che andrebbero regolati per legge all'esito di un processo di effettiva partecipazione politica e democratica, così da rafforzare lo Stato di diritto [29].

3. *L'attacco globale ai diritti riproduttivi: la questione dell'aborto*

Particolarmente significative per il discorso che si va svolgendo sono le vi-

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[26] In tal senso, N. Rossi, *Democrazia deliberativa*, cit., p. 93 ss.

[27] Dove nel 2022 è stata istituita la "*Convention citoyenne sur la fin de vie*" (v. *infra*, par. 4).

[28] Così N. Rossi, *op. cit.*, p. 96 s.

[29] La promozione e la tutela di uno spazio pubblico in cui i cittadini e la società civile, attiva e indipendente, possano beneficiare di condizioni e giusti strumenti per una partecipazione e un coinvolgimento significativi nell'elaborazione delle decisioni politiche destinate ad avere ricadute sui diritti della persona costituisce una delle più moderne ed efficaci iniziative per preservare e rafforzare lo Stato di diritto, migliorando la qualità del processo legislativo negli Stati membri. D'altra parte, «la democrazia è decisione sostanziale sul "bene comune" nelle forme necessarie ad assicurare che la volontà dal basso si possa trasfondere nell'ordinamento attraverso la determinazione legislativa; ma una siffatta *Res Publica* democratica può assicurare il flusso della volontà del popolo se risulta animata dai cittadini», così sulla democrazia S. Mangiameli, *Autodeterminazione Libertà Democrazia*, in *Dirittifondamentali.it*, 3, 2024, p. 94.

cissitudini dell'**aborto**. Il diritto delle donne all'interruzione volontaria di gravidanza [30], difatti, ha conosciuto recenti involuzioni non solo in democrazie europee illiberali, come la Polonia e l'Ungheria, ma anche oltreoceano. Segnali poco rassicuranti di questa tendenza si registrano in diversi altri paesi, tra cui l'Italia, così da muovere iniziative dal basso dei cittadini europei [31] e rivitalizzare una nuova ondata di femminismo tesa a promuovere una moderna visione di ciò che significa "l'agire libero e responsabile" delle donne di fronte a forme di paternalismo che si esprimono in una rinnovata tendenza dei poteri pubblici ad esercitare un controllo sulla libertà procreativa e il corpo delle stesse.

Ripercorriamo gli eventi degli ultimi anni.

Il 22 ottobre **2020**, il **Tribunale costituzionale polacco**, pronunciatosi su ricorso presentato da alcuni deputati appartenenti al gruppo parlamentare di destra del partito *PiS* (Diritto e giustizia) [32], ha dichiarato la parziale illegittimità costituzionale dell'art. 4a della "*Legge sulla pianificazione familiare, la protezione dell'embrione umano e le condizioni di ammissibilità dell'aborto*", che dal 1993 regola le ipotesi di accesso legale all'interruzione volontaria della gravidanza in Polonia.

Nella formulazione previgente alla sentenza, la norma consentiva ai medici di eseguire una procedura di aborto volontario in tre casi, ossia qualora: *a*) la diagnosi prenatale o altre risultanze mediche avessero indicato l'elevata probabilità di una grave e irreversibile menomazione dell'embrione o del feto o di una patologia incurabile tale da minacciarne la vita; *b*) la gravidanza potesse costituire un rischio per la vita della donna; *c*) vi fosse il sospetto che la gestazione facesse seguito ad una violenza sessuale, con limitazione al termine di dodici settimane dalla presunta data del concepimento.

Il Tribunale polacco ha dichiarato l'incostituzionalità della prima delle tre circostanze che legittimava l'IVG, ossia la presenza di gravi malformazioni fetali – casistica che riguardava la stragrande maggioranza delle procedure eseguite ogni anno – facendo salvi i casi di pericolo immediato per la salute della donna e di violenza sessuale.

Ne è derivata una delle normative più restrittive in materia tra gli Stati membri dell'Unione Europea [33].

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[30] D'ora in poi, anche IVG.

[31] La campagna "*My Voice, My Choice*" è diretta a garantire in tutta Europa l'accesso all'aborto sicuro e legale come questione di salute pubblica (artt. 9 e 168 TFUE) sulla quale l'Unione Europea deve intervenire per garantire il rispetto dei valori su cui si fonda (art. 2 TUE), v. Informazioni sull'iniziativa | Iniziativa dei cittadini europei (*europa.eu*).

[32] Parte essenziale della coalizione che ha dominato la scena politica in Polonia dal 2015 fino alle più recenti elezioni che hanno individuato l'attuale governo in carica.

[33] L'eccezionale reazione popolare che si è scatenata quando il contenuto della sentenza è

La Polonia in questo triste primato è seconda solo a Malta, dove l'accesso alla procedura di IVG è oggetto di una totale criminalizzazione [34].

Per effetto della decisione del 2020, dunque, il diritto delle donne polacche ad interrompere la gravidanza risulta fortemente compresso, essendo vietato l'aborto in caso di malformazione del feto. Tale assetto normativo è stato stigmatizzato da una recente pronuncia della Corte di Strasburgo che ha riconosciuto la violazione del diritto alla vita privata (art. 8 Cedu) di una donna polacca alla quale, all'indomani della sentenza del Tribunale costituzionale, fu impedito nel suo paese l'accesso all'IVG nonostante la scoperta di una grave anomalia genetica del nascituro [35].

Come è stato immediatamente evidenziato dalla dottrina, la pronuncia del Tribunale costituzionale polacco si colloca nel contesto di progressivo arretramento nel rispetto dei principi della *rule of law* che ha investito il paese in quegli anni [36]. L'annichilimento delle funzioni di garanzia un tempo svolte dal Tribunale costituzionale e la progressiva erosione della tutela dei diritti e delle libertà individuali, particolarmente marcata con riferimento alle donne e alle persone LGBTIQ, rappresentano uno sviluppo coerente al declino democratico attraversato dalla Polonia dalla fine del 2015, quando il *PiS* assunse la guida dell'esecutivo. La composizione filogovernativa dell'organo giurisdizionale ha avuto una forte incidenza sulle sorti della legge e, difatti, è stata immediatamente stigmatizzata dall'UE che ha dichiarato "illegittimo" il Tribunale polacco, considerandolo uno strumento per legalizzare le attività illegali delle autorità sotto il precedente governo.

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trapelato presso l'opinione pubblica ha probabilmente influito sulla decisione di ritardare la pubblicazione della sentenza, intervenuta solo il 27 gennaio 2021.

[34] Come si legge nella Risoluzione del PE 2024/2655(RSP) dell'11 aprile 2024, lett. R, la riforma del luglio 2023 ha portato un preoccupante cambiamento in seno al parlamento maltese, con l'eliminazione di diritti e l'aggiunta di ancor più rischi e ostacoli nell'accesso all'assistenza all'aborto. Uno di questi è rappresentato dal fatto che i medici possono interrompere una gravidanza solo se la persona corre un rischio di vita immediato e prima che sia raggiunta la "vitalità fetale"; sono inoltre tenuti a deferire la persona incinta morente a una commissione medica composta da tre consulenti. I casi di grave rischio per la salute sono esclusi dalla legge e a Malta una donna incinta affetta da cancro deve attendere la nascita del bambino per poter accedere al trattamento oncologico, con una evidente riduzione delle probabilità di successo delle terapie. Le autorità maltesi sono state pertanto sollecitate a depenalizzare immediatamente l'aborto e a fornire l'accesso a un aborto "sicuro e legale", sulla scorta delle linee guida 2022 dell'OMS (WHO releases new guidelines on safe abortion).

[35] Cedu, sez. I, 14 dicembre 2023, ric. n. 40119/21, M.L. v. Poland, M.L. v. Poland (*coe.int*)

[36] V. E. Caruso-M. Fisicaro, *Aborto e declino democratico in Polonia: una riflessione a margine della sentenza del Tribunale costituzionale del 22 ottobre 2020*, in *GenIUs*, 2, 2020; J. Sawicki, *Il divieto quasi totale dell'aborto in Polonia: una disputa ideologica senza fine*, in *Nomos*, 2, 2022.

Si tratta dunque di un caso lapalissiano di come la mancanza di indipendenza della magistratura, indice di una profonda crisi dello Stato di diritto, si possa ripercuotere su diritti acquisiti, soprattutto ove costituiscano prerogative oggetto di forti scontri ideologici [37].

La vicenda polacca, più di tutte, è sembrata «drammaticamente paradigmatica di quel nesso inscindibile che sussiste tra "genere, democrazia e Stato di diritto", secondo cui ogni regressione dello Stato di diritto incide negativamente sui diritti delle donne e ogni violazione dei diritti delle donne finisce per indebolire lo Stato di diritto di un Paese» [38].

Non a caso, in quegli anni, anche in **Ungheria** il governo è intervenuto sulla legge n. 32/1992 dedicata alla "*protezione della vita fetale*", che consente alle donne ungheresi di abortire entro la dodicesima settimana di gestazione. Con un decreto entrato in vigore il 15 settembre 2022 si è prescritto l'inserimento di un paragrafo aggiuntivo nel modulo standard che la donna deve compilare per l'accesso all'interruzione volontaria della gravidanza. Tale modifica richiede che l'operatore sanitario attesti di aver presentato alla gestante, prima di procedere con l'intervento, un chiaro segno che dimostri i segni vitali del feto, ossia la rilevazione del battito cardiaco. Ufficialmente la novità è stata giustificata con l'esigenza di rendere alla donna informazioni più complete sulla gravidanza, ma come si può facilmente intuire – di fatto – è tesa a disincentivare ed ostacolare l'esercizio del diritto, sottoponendo la donna che si determina all'IVG ad un ulteriore faticoso adempimento [39].

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[37] A seguito di questi eventi, la Polonia è stata sottoposta alle procedure preventive relative al rispetto dello Stato di diritto previste dal c.d. *Rule of Law Framework* e dall'art. 7, par. 1, TUE, ed è stato il primo paese le cui riforme giudiziarie sono state considerate dalla Corte di giustizia in contrasto con il principio di indipendenza della magistratura. Occorre però dare atto che il neoeletto governo polacco (in carica da dicembre 2023), guidato dal *leader* centrista ed europeista *Donald Tusk*, si è immediatamente impegnato a proporre nuove leggi per garantire i diritti delle donne, compresa l'assistenza all'aborto e l'accesso alla salute sessuale e riproduttiva.

[38] Così V. Valenti*, La questione di genere: una sfida (ancora attuale) per le democrazie del XXI secolo*, *Introduzione* a *Il corpo delle donne. La condizione giuridica femminile (1946-2021)*, a cura di P. Torretta e V. Valenti, Giappichelli, Torino, 2021, p. XXVI, secondo la quale non è un caso che la degenerazione del sistema democratico polacco, prima ancora e/o oltre che attraverso modifiche costituzionali-istituzionali, riguardanti in particolare l'autonomia e l'indipendenza della magistratura sia passata "*dal e sul corpo*" delle donne.

[39] La Commissione per i diritti delle donne e l'uguaglianza di genere nel parere reso (sotto forma di lettera del 7 novembre 2023 indirizzata al Presidente della Commissione per gli affari esteri) nell'ambito della procedura RELAZIONE sui diritti umani e la democrazia nel mondo e sulla politica dell'Unione europea in materia – relazione annuale 2023 | A9-0424/2023 | Parlamento Europeo (*europa.eu*) ha condannato la decisione adottata nel 2020 dal Tribunale costituzionale polacco e la scelta del governo ungherese di costringere le gestanti che intendono accedere all'aborto ad ascoltare il battito cardiaco del feto chiedendo che "tali decisioni siano immediatamente revocate" (cfr. par. 5).

La questione dell'aborto è globale e negli ultimi anni si è riaccesa anche oltreoceano.

Com'è noto, un pesante arretramento si è concretizzato negli **Stati Uniti** con la decisione del caso *Dobbs*[40], che ha ribaltato la storica sentenza *Roe v. Wade* in forza della quale dal 1973 si riconosceva il diritto costituzionale della donna all'aborto e lo si legalizzava a livello nazionale[41]. Cancellando l'aborto come diritto costituzionale fondato sulla *privacy*, la sentenza del 2022 ha ripristinato la facoltà dei singoli Stati di approvare leggi che lo proibiscano, sancendo che la Costituzione degli Stati Uniti non vi fa alcun riferimento e nessun diritto del genere è implicitamente protetto da alcuna disposizione costituzionale.

Anche in questo caso, è cambiata la composizione della Corte e, per l'effetto, è mutata l'interpretazione della Costituzione, con pesanti ripercussioni sull'autodeterminazione procreativa delle donne negli Stati più conservatori. A seguire, sono stati approvati nuovi divieti: ad esempio, in *Indiana* e *West Virginia*, dove l'aborto non è consentito in qualsiasi fase della gravidanza, tranne nei ristretti casi di stupro, incesto, minaccia alla vita della madre o anomalia fetale fatale.

Gli spazi così conquistati dalle correnti antiabortiste hanno prodotto effetti anche in **Europa** dove la riluttanza alla pratica abortiva da parte di alcuni Stati è considerata inaccettabile dalle istituzioni UE perché ritenuta contraria alla difesa della **salute sessuale** e **riproduttiva** e ai diritti delle donne.

Da qui la Risoluzione del Parlamento europeo del 7 luglio 2022 «sulla decisione della Corte suprema statunitense di abolire il diritto all'aborto negli Stati Uniti e la necessità di tutelare il diritto all'aborto e la salute delle donne nell'UE», con la quale si è proposto di inserire il diritto nella Carta dei diritti fondamentali[42], invitando gli Stati membri a riconoscere e difendere l'aborto sicuro e legale e i diritti in materia di salute sessuale e riproduttiva. Ad essa ha fatto seguito la **Risoluzione** dell'11 aprile 2024 che esorta il Consiglio europeo ad avviare le procedure di revisione dei trattati per inserire nella **Carta** di **Nizza** l'assistenza sanitaria sessuale e riproduttiva e il diritto a un aborto sicuro e legale[43]. La proposta prevede la modifica dell'art. 3 della Carta fin dalla

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[40] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. (2022).

[41] *Roe v. Wade*, 410 U.S. 113 (1973).

[42] La Risoluzione del Parlamento europeo 2022/2742(RSP) proponeva l'inserimento di un nuovo articolo *7 bis* rubricato "Diritto all'aborto", secondo il quale «Ogni persona ha diritto all'aborto sicuro e legale».

[43] V. TA *(europa.eu*) Il testo, con un breve commento di sintesi, è disponibile anche qui: *UE – Parlamento europeo – Risoluzione del Parlamento europeo dell'11 aprile 2024 sull'inclusione del diritto all'aborto nella Carta dei diritti fondamentali dell'UE / Docs / Biolaw-pedia / Biodiritto - Biodiritto.*

rubrica nella quale al "**Diritto all'integrità della persona**" si aggiungerebbe quello "**all'autonomia del corpo**". L'inserimento di un comma 2 *bis* sancirebbe poi che: «Ogni persona ha diritto all'autonomia del corpo e all'accesso libero, informato, pieno e universale alla salute sessuale e riproduttiva e relativi diritti, come pure a tutti i servizi di assistenza sanitaria correlati, senza discriminazioni, compreso l'accesso a un aborto sicuro e legale». La proposta non si è ancora concretizzata in un risultato definitivo che non sarà semplice raggiungere: la modifica richiede, difatti, l'accordo unanime di tutti gli Stati membri.

Anche in **Italia** l'accesso all'assistenza sanitaria all'aborto sta subendo importanti erosioni, non solo per il cronico problema della prevalenza di medici che si dichiarano obiettori di coscienza, ma anche in conseguenza di iniziative politiche particolarmente insidiose assunte in regioni governate da partiti di destra [44].

A livello nazionale si è assistito, invece, alla riproposizione di vecchie istanze, quale la modifica dell'art. 1 c.c. volta al riconoscimento della capacità giuridica fin dal momento del concepimento. L'intento, come si legge nella relazione di accompagnamento al disegno di legge, è «di prevenire l'aborto volontario, in qualsiasi forma, legale o clandestino che sia» [45].

Parificando la condizione soggettiva dell'embrione e del feto a quella della persona nata, la modifica è difatti strumentale ad equiparare il valore della vita del concepito a quello di chi è già persona, così contraddicendo quanto affermato nella storica sentenza con cui la nostra Corte costituzionale ha dichiarato l'illegittimità della «prevalenza totale e assoluta» degli interessi del concepito, su cui si basava il reato di aborto (art. 546 c.p.) aprendo, invece, la strada all'argomentazione per cui «non esiste equivalenza fra il diritto non solo alla

[44] In Liguria, ad esempio, la coalizione vincitrice alle elezioni del 2022 aveva immediatamente avanzato una proposta di legge per l'istituzione degli "Sportelli *pro vita*" in ogni ospedale della regione in cui si eseguono interruzioni di gravidanza. Decisioni analoghe sono state più di recente attuate in Piemonte dove, nell'ospedale in cui viene praticato il maggior numero di IVG della regione, è stata aperta "la stanza dell'ascolto" gestita da associazioni antiabortiste, alla quale le utenti possono rivolgersi spontaneamente o essere indirizzate dal personale sanitario dell'ospedale. Ciò significa, in pratica, che ogni donna che richiede l'IVG può trovarsi sottoposta a un particolare colloquio con persone di incerta qualificazione professionale, ma di estrazione *pro-life* ben definita, nel quale si tendono a verificare le ragioni della sua scelta. Situazioni di questo tipo espongono la gestante ad interferenze e condizionamenti che possono dar luogo a forme di colpevolizzazione, se non di coartazione della sua volontà, in violazione della legge n. 194/1978. Queste manovre sono in linea con il significativo aumento dei finanziamenti di cui beneficiano i gruppi anti-genere e anti-scelta in tutto il mondo.

[45] V. d.d.l. Gasparri, 13 ottobre 2022, Parlamento Italiano – Disegno di legge S. 165 – XIX Legislatura (*senato.it*). Come si diceva nel testo, non si tratta di una novità, trattandosi dell'ennesima riproposizione di disegni di legge risalenti a precedenti legislature: cfr. d.d.l. n. 1915/2009 e d.d.l. n. 950/2018.

vita ma anche alla salute proprio di chi è già persona, come la madre, e la salvaguardia dell'embrione come persona ancora da diventare»[46]. Ora è naturale che il voto democratico che ha condotto all'ascesa dei partiti di destra in Italia orienti le scelte politiche in modo significativo, ma nessuna maggioranza parlamentare dovrebbe mai intaccare diritti civili faticosamente acquisiti.

Intanto, nella vicina **Francia** l'aborto è entrato in **Costituzione**. Con legge 4 marzo 2024, all'art. 34, è stata inserita la disposizione per la quale «la legge determina le condizioni alle quali si esercita la libertà garantita alla donna di ricorrere all'interruzione volontaria della gravidanza». Oltre all'importante valore simbolico, la novella consente di assicurare il massimo livello di tutela alle donne che intendono procedere all'IVG dal momento che la garanzia di un accesso libero ed effettivo all'aborto costituisce ora un parametro attraverso cui valutare la legittimità costituzionale di tutti gli interventi in materia[47].

3.1. *Segue. Genitorialità delle minoranze LGBTI+ e* status filiationis *dei nati da tecniche "controverse" di procreazione medicalmente assistita*

Il regresso dei diritti delle donne, ben esemplificato dalla negazione all'accesso all'aborto quale forma di violenza di genere, si accompagna – soprattutto negli Stati caratterizzati da regimi autoritari e dal declino democratico – all'intensificarsi degli attacchi rivolti alle minoranze LGBTI+[48].

La situazione è monitorata a livello europeo: la **Relazione sui diritti fondamentali** dell'Agenzia dell'Unione europea per i diritti fondamentali (FRA),

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[46] Corte cost., 18 febbraio 1975, n. 27. Per considerazioni più approfondite rinvio al mio contributo *Capacità giuridica al concepito e tutela della vita nascente. La proposta di modifica dell'articolo 1 del codice civile italiano nel nuovo scenario globale sull'aborto*, in *BioLaw Journal – Rivista di BioDiritto*, *Special Issue*, 1, 2023, p. 319 ss.

[47] V. F. Paruzzo, *Francia. Il diritto all'aborto è in Costituzione*, in *Quest. e giust.*, 10 aprile 2024 Non solo l'8 marzo. Francia. Il diritto all'aborto è in Costituzione (*questionegiustizia.it*); M. Fasan, *L'interruzione volontaria di gravidanza in Francia. Verso la definitiva costituzionalizzazione del diritto all'aborto?*, in *Biolaw Journal – Rivista di biodiritto*, *Special Issue*, 1, 2023, p. 417 ss. L'interruzione volontaria di gravidanza in Francia. Verso la definitiva costituzionalizzazione del diritto all'aborto? | *BioLaw Journal – Rivista di BioDiritto (unitn.it)*.

[48] Il collegamento emerge con evidenza oltreché dai fatti di cronaca, da diversi documenti delle istituzioni europee: v., tra gli altri, *P9_TA(2024)0050 — Situazione dei diritti fondamentali nell'UE nel 2022 e nel 2023 — Risoluzione del Parlamento europeo del 18 gennaio 2024 sulla situazione dei diritti fondamentali nell'Unione europea – Relazione annuale 2022 e 2023 (2023/2028(INI)) (*europa.eu*) specialmente i considerando P e Q e par. 34; ma anche la Risoluzione del Parlamento Europeo dell'11 aprile 2024 sull'inclusione del diritto all'aborto nella Carta dei diritti fondamentali dell'UE (considerando N); nonché la Relazione sui diritti umani e la democrazia nel mondo e sulla politica dell'Unione europea in materia – relazione annuale 2023 | A9-0424/2023 | Parlamento Europeo (*europa.eu*).

che annualmente fa il punto della situazione individuando i risultati ottenuti e i settori che destano ancora preoccupazione, dedica una specifica analisi alla "***Uguaglianza e Non Discriminazione delle persone LGBTI***". Nel 2022, l'Agenzia registrava alcuni **progressi**, con riguardo al crescente riconoscimento da parte della giurisprudenza internazionale e nazionale, dei diritti familiari delle coppie dello stesso sesso e dei genitori omosessuali, ma rilevava al contempo **difficoltà** nel riconoscimento reciproco tra Stati membri dell'omogenitorialità, in considerazione delle discrepanze normative tra i paesi dell'UE in merito alle coppie dello stesso sesso e ai loro diritti familiari, soprattutto con riferimento all'adozione, alla maternità surrogata e alla riproduzione assistita. La Relazione del 2023 dà atto che, nell'anno precedente, diversi Stati hanno adottato misure per promuovere i diritti fondamentali delle persone lesbiche, gay, bisessuali, transgender, intersessuali e queer introducendo cambiamenti giuridici e misure politiche in relazione agli *status* famigliari, nonché procedure semplificate per il riconoscimento del genere sulla base dell'autodeterminazione e, infine, misure di prevenzione e repressione dell'incitamento all'odio e dei reati generati dall'odio. L'Agenzia constata che in alcuni casi, laddove il quadro normativo era inadeguato, i giudici hanno spianato la strada per ulteriori sviluppi legislativi o ne hanno assicurato la corretta attuazione. Tuttavia, registra anche come alcuni Stati membri abbiano introdotto misure che compromettono il diritto fondamentale alla parità di trattamento delle persone LGBTIQ+ che hanno avuto un impatto tangibile sull'aumento dell'ostilità e della violenza contro chi appartiene a questa comunità [49].

Negli ultimi anni si è verificato un incremento delle manifestazioni d'odio, fenomeno certamente da censurare per la gravità insita nei comportamenti e perché istiga ulteriormente alla discriminazione. Ma, anche il cammino del riconoscimento di **nuovi diritti** alle **minoranze sessuali** – in materia di famiglia e di salute riproduttiva – ha conosciuto un brusco arresto.

La legislazione sul matrimonio egualitario è in stallo in molti paesi europei.

In **Italia**, benché le coppie dello stesso sesso possano formalizzare il rapporto con l'unione civile [50], è loro precluso l'accesso alla procreazione medicalmente assistita [51] e, per i figli avuti lecitamente nei paesi esteri dotati di una

[49] Così la Relazione sui diritti fondamentali – 2023. Pareri della FRA (*europa.eu*).

[50] Regolata dalla legge n. 76/2016 (che, però, non ha previsto la c.d. *Stepchild Adoption*). Per un quadro critico dell'articolato normativo, v. G. Alpa, *La legge sulle unioni civili e sulle convivenze. Qualche interrogativo di ordine esegetico*, in *Nuova giur. civ.*, 12, 2016, p. 1718 ss. Ad avviso dell'illustre civilista l'unione civile, lungi dal rappresentare una minaccia alla famiglia fondata sul matrimonio, costituisce il risultato dell'emancipazione delle minoranze e contribuisce all'affermazione dei diritti umani fondamentali.

[51] D'ora in poi, anche PMA. L'art. 5 della legge n. 40/2004 limita l'accesso alle «coppie di maggiorenni di sesso diverso, coniugate o conviventi, in età potenzialmente fertile, entrambi

legislazione più permissiva sui requisiti soggettivi per la PMA, si vedono negato il riconoscimento automatico della cogenitorialità. Ciò implica doversi rivolgere ai Tribunali con lunghe e costose procedure, nonostante la Corte costituzionale abbia da tempo esortato il Parlamento a legiferare sul punto [52].

Allo stato attuale, le scelte esistenziali che attengono alla formazione di una famiglia e all'aspirazione alla genitorialità delle coppie *same sex* [53] trovano sovente realizzazione all'estero, anche oltre l'UE. Ne conseguono problemi di riconoscimento giuridico degli *status* familiari particolarmente complessi perché gli Stati membri muovono da prospettive culturali diverse e tendono a rivendicare una competenza esclusiva e una piena discrezionalità legislativa in materia.

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viventi», ma si tratta di una scelta discutibile e probabilmente destinata al cambiamento. In dottrina, G. Ferrando, *La legge 40/2004 e i problemi attuali della riproduzione assistita*, in *Oss. dir. fam.*, 3, 2023, p. 10, osserva: «Fin da quando, in anni lontani, ho cominciato ad occuparmi di questi temi, ho sempre ritenuta illegittima la pretesa di fissare rigidi criteri di accesso alla PMA, vietandola alle donne sole o alle coppie dello stesso sesso. Questi divieti mi appaiono lesivi dei diritti fondamentali della persona (art. 2 Cost.), dell'autonomia nelle scelte personali (art. 13 Cost.), senza che questo sacrificio sia adeguatamente bilanciato dalla tutela di beni di peso eguale o superiore. Se si guarda al bambino, il divieto gli toglie qualsiasi possibilità di nascita: l'alternativa non è una vita migliore, è non nascere affatto. Dietro l'apparente tutela dei diritti del bambino si cela allora la difesa di un modello di famiglia, quello "tradizionale", "socialmente accettato", corrispondente al paradigma eterosessuale».

[52] V. i moniti contenuti nelle sentenze gemelle, Corte cost., 28 gennaio 2021, n. 32 (due madri) e 33 (due padri) per colmare il vuoto di tutela e porre rimedio alla situazione di insufficiente tutela degli interessi del minore.

[53] Dal punto di vista socio-antropologico non si dubita dell'irrilevanza dell'orientamento sessuale sulla capacità di assumere responsabilmente il ruolo genitoriale. Anche la nostra giurisprudenza «ha escluso che vi siano certezze scientifiche, dati di esperienza o indicazioni di specifiche ripercussioni negative sul piano educativo e della crescita del minore, derivanti dall'inserimento del figlio in una famiglia formata da una coppia omosessuale, atteso che l'asserita dannosità di tale inserimento va dimostrata in concreto e non può essere fondata sul mero pregiudizio» (così Cass. civ., sez. I, 30 settembre 2016, n. 19599, in *Corr. giur.*, 2017, p. 181, par. 12.1 *Motivazione*; precedentemente, Cass., sez. I, 11 febbraio 2013, n. 601, in *Foro it.*, 2013, I, c. 1193). L'argomento si legge anche in Corte cost., 23 ottobre 2019, n. 221, secondo la quale ugualmente «non esistono neppure certezze scientifiche o dati di esperienza in ordine al fatto che l'inserimento del figlio in una famiglia formata da una coppia omosessuale abbia ripercussioni negative sul piano educativo e dello sviluppo della personalità del minore, dovendo la dannosità di tale inserimento essere dimostrata in concreto» (par. 13.2 del *Considerato in diritto*) e in Corte cost., 9 marzo 2021, n. 32. La circostanza che le ultime tre sentenze si inseriscano in un filone giurisprudenziale riferito ai nati da due donne mediante PMA eterologa (fattispecie ugualmente vietata dalla legge n. 40/2004, ma tenuta rigorosamente distinta dalla surrogazione di maternità dalla medesima giurisprudenza) non vale ad inficiare il dato di fatto – oramai pacifico a livello mondiale – dell'idoneità genitoriale degli omossessuali; giudizio che può ben riferirsi anche alla coppia omoaffettiva, la quale ricorre necessariamente alla gestazione di una donna terza, pratica che attira severe critiche ed integra un reato per la legge italiana.

Per tali ragioni è stato finora difficile costruire uno *ius commune*, né sembra vi siano i presupposti perché il risultato si realizzi nell'immediato futuro.

Quindi, da una parte, esplode come problema sociale la rivendicazione del "**diritto di essere sé stessi**"[54] – anche nella formazione di **nuove famiglie** – da parte di individui che lamentano **discriminazioni** fondate sul proprio **orientamento sessuale**[55]; dall'altra, nell'ordinamento italiano, resiste l'idea che, sebbene la provenienza genetica non costituisca un imprescindibile requisito della famiglia stessa[56], la famiglia *ad instar naturae* resterebbe il luogo più idoneo ad accogliere e crescere un bambino[57] nonostante, in relazione al ruolo genitoriale, non costituisca più il modello unico o quello ritenuto esclusivamente adeguato per la nascita e la crescita dei figli[58].

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[54] G. Alpa, *Il diritto di essere sé stessi*, La nave di Teseo, Milano, 2021, *passim*, il quale elabora la figura come forma di garanzia delle diverse sfaccettature dell'identità individuale associata al riconoscimento, alla garanzia e all'esercizio dei diritti umani e fondamentali, sottolineando che «l'identità non può essere discriminatoria, ma presuppone la lotta alle discriminazioni».

[55] Per il divieto di discriminazioni fondate sul sesso, v. artt. 14 Cedu e 21 Carta di Nizza. Pur non potendosi approfondire in questa sede tutti i profili connessi, occorre ricordare la rilevanza degli *status* familiari anche sotto il profilo dei diritti patrimoniali, ad esempio, quelli conseguenti al decesso di uno dei componenti della famiglia. L'incertezza dei rapporti giuridici si ripercuote, difatti, su molteplici fronti, tra cui quello dei diritti previdenziali nel contesto delle unioni tra persone dello stesso sesso, pacificamente inserite tra le formazioni sociali di cui all'art. 2 Cost. (v. Corte cost., 14 aprile 2010, n. 138). È così che, da ultimo, con ordinanza interlocutoria, la Suprema Corte italiana (Cass. civ., sez. IV, 21 agosto 2024, n. 22992), ha rimesso gli atti alla Prima Presidente per l'eventuale assegnazione alle Sezioni Unite della questione relativa al diritto alla pensione di reversibilità a favore dell'unito civilmente (nel caso di assicurato deceduto prima dell'entrata in vigore della legge n. 76/2016) e del figlio della coppia nato all'estero con maternità surrogata. Nella fattispecie, l'atto di matrimonio – celebrato negli USA nel 2013 – era stato trascritto in Italia come unione civile non appena entrata in vigore la legge n. 76/2016 (ma dopo il decesso di uno dei due *partner*); nel 2017, poi, anche la sentenza statunitense, che l'anno precedente aveva accertato la paternità del genitore intenzionale (deceduto), era stata annotata nel registro di stato civile italiano sull'atto di nascita del minore.

[56] Lo ha chiarito da tempo la nostra giurisprudenza costituzionale: Corte cost., 9 aprile 2014, n. 162; Corte cost., 18 dicembre 2017, n. 272.

[57] Cfr. Corte cost., 23 ottobre 2019, n. 221.

[58] V. Cass. civ., Sez. Un., 31 marzo 2021, n. 9006, per la quale, deve conseguentemente escludersi che il modello di unione matrimoniale previsto dall'art. 29 Cost. possa essere ritenuto un limite al riconoscimento degli effetti di un atto che attribuisce la genitorialità adottiva ad una coppia omoaffettiva, peraltro unita in matrimonio in uno Stato estero, tanto più che – in relazione alla genitorialità sociale – l'*imitatio naturae* manca *ab origine* ed è ampiamente compensata dalle ragioni solidaristiche dell'istituto e, con riferimento al minore, dalla realizzazione, da assoggettarsi a verifica giurisdizionale, del processo di sviluppo personale e relazionale più adeguato alla sua crescita. Il tutto però, aggiunge la Corte, purché sia esclusa la preesistenza di un accordo di surrogazione di maternità a fondamento della filiazione.

Le tensioni che ne derivano, nella ricerca di un nuovo equilibrio normativo e nel bilanciamento tra i valori fondamentali coinvolti, incidono sulla **tutela** dei **minori nati** mediante il ricorso a **tecniche di procreazione medicalmente assistita** vietate in alcuni Stati e consentite in altri [59]: pensiamo alla fecondazione eterologa in favore di coppie omosessuali o alla gestazione per altri, alla quale ricorrono oltre a molte coppie eterosessuali con problemi di salute riproduttiva, anche coppie omosessuali e, necessariamente, quelle omoaffettive. I figli nati con queste metodiche patiscono, in Italia, l'assenza di regole che consentano di riconoscere in modo stabile e celere il rapporto con il genitore con il quale non hanno un legame biologico [60].

Perdura, dunque, una situazione di **incertezza giuridica** che interferisce non soltanto con il **diritto alla libera circolazione di queste persone**, ma anche con il **diritto alla vita familiare**, dal momento che alcuni Stati membri, tra cui l'Italia, negano il riconoscimento dei legami familiari tra genitori e figli che si sono legalmente costituiti altrove.

Occorre però dare atto, a questo proposito, di una recentissima decisione della Corte costituzionale: i giudici hanno stabilito che l'attuale impedimento al nato in Italia di ottenere fin dalla nascita lo stato di figlio riconosciuto anche della donna che ha prestato il consenso alla pratica fecondativa all'estero insieme alla madre biologica non garantisce il miglior interesse del minore e costituisce violazione di diversi parametri della carta fondamentale [61].

Tra le iniziative assunte per affrontare questi problemi occorre segnalare la proposta di "Regolamento europeo sulla genitorialità" elaborata allo scopo di

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[59] Tutela sovente realizzata *ex post*, e con incolmabili ritardi, nelle aule di giustizia, facendo ricorso al principio del superiore interesse del minore sancito all'art. 25 della Carta di Nizza e in diverse Convenzioni internazionali a partire da quella di New York (1989) sui "Diritti del fanciullo".

[60] Corte EDU, Grande Chambre, *Advisory opinion*, Requested by *the French Court of Cassation no. P16-2018-001*, 10th April 2019, ha sottolineato la necessità di tutelare l'interesse dei figli alla bigenitorialità e, dunque, all'instaurazione di un legame parentale anche con il genitore sociale non biologico, riconoscendo però agli Stati margini di discrezionalità quanto ai modi per realizzare il risultato, a condizione che le modalità scelte dall'ordinamento interno assicurino una tutela "pronta" ed "effettiva" al minore. Sul punto, T. Pasquino, *Famiglie, genitorialità e interesse del minore: recenti orientamenti in materia di maternità surrogata*, in *Pers. e merc.*, 3, 2024, p. 804 ss.

[61] Ovvero, dell'art. 2 Cost., per la lesione dell'identità personale del nato e del suo diritto a vedersi riconosciuto sin dalla nascita uno stato giuridico certo e stabile; dell'art. 3 Cost., per la irragionevolezza dell'attuale disciplina che non trova giustificazione in assenza di un controinteresse di rango costituzionale; dell'art. 30 Cost., perché lede i diritti del minore a vedersi riconosciuti, sin dalla nascita e nei confronti di entrambi i genitori, i diritti connessi alla responsabilità genitoriale e ai conseguenti obblighi nei confronti dei figli (v. Corte cost., 22 maggio 2025, n. 68).

agevolare la costituzione e la conservazione, almeno nello spazio europeo, dello *status filiationis* mediante il rilascio di un "**Certificato europeo della genitorialità**" [62]. Il Parlamento UE – considerando che «tutti gli Stati membri sono tenuti ad agire nell'interesse superiore del minore, anche attraverso la tutela del diritto fondamentale di ciascun minore alla vita familiare e il divieto di discriminare un figlio sulla base dello stato civile o dell'orientamento sessuale dei genitori o del modo in cui è stato concepito» [63] – ha approvato la proposta [64]. In quella sede, ha avuto cura di specificare che se, per un verso, come affermato dalla CEDU, l'interesse superiore del minore riduce il margine di discrezionalità degli Stati nel riconoscimento del rapporto che intercorre tra figli e genitori e «comporta l'identificazione legale delle persone responsabili di crescerlo, soddisfarne i bisogni e garantirne il benessere, nonché la possibilità per il minore di vivere e di svilupparsi in un ambiente stabile» [65], per l'altro, il «rego-

[62] La proposta di regolamento "relativo alla competenza, alla legge applicabile e al riconoscimento delle decisioni e all'accettazione degli atti pubblici in materia di filiazione e alla creazione di un certificato europeo di filiazione" – rivolta al Consiglio e pubblicata dalla Commissione europea il 7 dicembre 2022 COM_COM(2022)0695_EN.pdf – prevede l'istituzione dello «*European Certificate of Parenthood*», da richiedere all'autorità giudiziaria preposta dello Stato Membro in cui la genitorialità è stabilita, affinché esso possa valere, nella parte in cui attesta il rapporto di genitorialità in un altro Stato Membro senza alcuna speciale procedura di validazione (v. artt. 24 e 53 «*The Certificate shall produce its effects in all Member States without any special procedure being required*»), salvo alcuni casi tassativamente indicati all'art. 31. Tra i primi commenti della nostra dottrina, A. Gorgoni, *Il favor per lo stato di figlio tra verità biologica e interesse del minore*, in *Persona e mercato*, 2022/4, p. 563; M. Bianca, *Una prima lettura della proposta di Regolamento del Consiglio relativo alla competenza, alla legge applicabile e al riconoscimento delle decisioni e all'accettazione degli atti pubblici in materia di filiazione e alla creazione di un certificato europeo di filiazione COM (2022) 569*, in *Familia*, 20 marzo 2023; in chiave critica: M.C. Baruffi, *La proposta di regolamento UE sulla filiazione: un superamento dei diritti derivanti dalla libera circolazione*, in *Fam dir.*, 2023, p. 505 ss.

[63] *Considerando* n. 2 (come emendato). È stato anche inserito un nuovo *Considerando* 11 *bis* nel quale si dà atto che: «Il mancato riconoscimento, da parte di uno Stato membro, della filiazione accertata in un altro Stato membro colpisce in modo particolare le famiglie arcobaleno (famiglie LGBTIQ+), come pure altre tipologie di famiglie che si discostano dal modello di famiglia nucleare. Ciò vale, in particolare, quando non vi è un legame biologico tra i genitori e il figlio. Il presente regolamento garantirà che i figli godano dei loro diritti e mantengano il loro *status* giuridico in situazioni transfrontaliere, indipendentemente dalla loro situazione familiare e senza discriminazioni».

[64] Come si diceva, la Risoluzione legislativa del Parlamento europeo del 14 dicembre 2023 ha approvato la proposta di regolamento del Consiglio con alcuni emendamenti. Il testo è disponibile al seguente link: Testi approvati – Competenza, legge applicabile, riconoscimento delle decisioni e accettazione degli atti pubblici in materia di filiazione e creazione di un certificato europeo di filiazione – Giovedì 14 dicembre 2023 (*europa.eu*).

[65] V. il *Considerando* n. 17 *bis* (nuovo).

lamento non può essere interpretato nel senso di obbligare uno Stato membro a modificare le proprie norme sostanziali in materia di diritto di famiglia in modo da accettare la pratica della maternità surrogata» [66]. I governi degli Stati membri sono chiamati a trovare un accordo su una normativa che si stima sia destinata a produrre un concreto impatto nella vita di due milioni di minori [67].

Quanto alle tecniche di PMA cui lecitamente ricorrono le coppie dello stesso sesso, sovente oltre i confini dell'Europa, occorre prendere atto che il clima politico prevalente nel nostro continente non sembra attualmente favorevole alla regolamentazione della **gestazione per altri** in nessuna forma, con l'eccezione di alcuni Stati che hanno già provveduto, come il Portogallo e il Regno Unito [68]. Nel mondo, invece, si è più propensi a distinguere la *surrogacy* a fini di lucro da quella solidale, lecitamente praticata in diversi paesi [69].

Mentre in passato il Parlamento europeo nelle sue Relazioni annuali sui diritti umani aveva iniziato ad operare delle differenziazioni riferendo il giudizio di disapprovazione non alla GPA in quanto tale, bensì esclusivamente «alla pratica ***commerciale*** della maternità surrogata» [70] e alle «pratiche coercitive in materia di salute sessuale e riproduttiva che non rispettano il diritto al **consen-**

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[66] V. il *Considerando* n. 18 laddove in modo inequivoco è scritto che «Le competenze degli Stati membri devono essere, a tal riguardo, rispettate». Da tempo, però, una considerevole parte della dottrina suggerisce di intraprendere la strada dell'armonizzazione dei principi anche in materia di diritto di famiglia al fine di equiparare i rapporti giuridici familiari, instaurati fuori dai propri confini, a veri e propri vincoli riconoscibili ovunque. Cfr. T. Pasquino, *op. cit.*, p. 812 s. e *ivi* ulteriori riferimenti bibliografici.

[67] Tanti sarebbero i minori che attualmente potrebbero trovarsi in una situazione tale per cui i loro genitori non sono riconosciuti come tali in un altro Paese UE, v. il comunicato stampa Riconoscimento della genitorialità: pari diritti per tutti i minori | Attualità | Parlamento europeo (*europa.eu*). Per l'*iter* della proposta in Italia, v. Senato della Repubblica – Atto dell'Unione europea n. COM(2022) 695 definitivo – XIX Legislatura che ha contestato la mancata conformità del progetto di atto legislativo al principio di sussidiarietà.

[68] Per una panoramica, v. G. Giaimo, *La gestazione per altri. Persistenti criticità e prospettive di regolamentazione in chiave comparatistica*, in *Dir. fam. pers.*, 2023, p. 698 ss.

[69] Per una mappatura aggiornata, Ecco dove è consentita la Gestazione per altri nel Mondo | Associazione Luca Coscioni. Il panorama internazionale e il dibattito sulla GPA nella letteratura, non solo giuridica, sono complessi. Per un approfondimento sul tema e gli opportuni riferimenti bibliografici e giurisprudenziali, rinvio al mio *La gestazione per altri: problemi e prospettive tra pregiudizi e complessità*, in *Riv. dir. fam. pers.*, 1, 2024, p. 374 ss.

[70] La Relazione annuale 2022 del Parlamento europeo sui diritti umani ribadiva la «condanna della pratica *commerciale* della maternità surrogata» invocando un quadro giuridico europeo per affrontare le conseguenze negative della maternità surrogata a fini commerciali, v. par. 63 *Relazione* sui diritti umani e la democrazia nel mondo e sulla politica dell'Unione europea in materia – relazione annuale 2022 | A9-0298/2022 | Parlamento Europeo (*europa.eu*). Nello stesso senso si esprimeva la Relazione del 2021.

so libero e **informato** delle **donne**» [71], nell'ultima Relazione ha generalizzato il giudizio di condanna affermando che la maternità surrogata «espone le donne di tutto il mondo allo **sfruttamento** e alla **tratta** di **esseri umani**», prendendo di mira soprattutto le donne finanziariamente e socialmente vulnerabili [72].

Il **Parlamento italiano**, dal canto suo, ha recentemente approvato una norma che estende la punibilità del reato di cui all'art. 12, comma 6, legge n. 40/2004 ai fatti commessi all'estero da cittadini italiani. La legge che originariamente stabiliva: «chiunque, in qualsiasi forma, realizza, organizza o pubblicizza la commercializzazione di gameti o di embrioni o la surrogazione di maternità è punito con la reclusione da tre mesi a due anni e con la multa da 600.000 a un milione di euro», a distanza di dieci anni, è stata integrata con la previsione secondo cui: «se i fatti di cui al periodo precedente, con riferimento alla surrogazione di maternità, sono commessi all'estero, il cittadino italiano è punito secondo la legge italiana» [73].

Si tratta di un'estensione della punibilità sulla quale la dottrina, fin dall'inizio dell'*iter* legislativo, ha mosso severe critiche [74]. Essa ha l'evidente scopo di disincentivare il ricorso alla GPA in ogni sua forma mediante la minaccia della sanzione penale ed è coerente con l'impostazione repressiva, ideologicamente orientata, delle forze politiche da cui la nuova legge promana. Forze troppo propense a colpire chi si avvale di queste pratiche e, nel contempo, colpevolmente disattente verso i figli, trascurati nelle garanzie che dovrebbero spettare loro nel rapporto con coloro che hanno assunto la responsabilità della nascita.

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[71] V. Relazione annuale 2019 del Parlamento europeo sui diritti umani.

[72] V. par. 39 *Relazione* sui diritti umani e la democrazia nel mondo e sulla politica dell'Unione europea in materia – Relazione annuale 2023 | A9-0424/2023 | Parlamento Europeo.

[73] V. legge 4 novembre 2024, n. 169, entrata in vigore il 3 dicembre 2024. Per l'iter legislativo: Parlamento Italiano – Disegno di legge S. 824 – XIX Legislatura, "Modifica all'articolo 12 della legge 19 febbraio 2004, n. 40, in materia di perseguibilità del reato di surrogazione di maternità commesso all'estero da cittadino italiano" approvato il 16 ottobre 2024.

[74] V. M. Pelissero, *Surrogazione di maternità: la pretesa di un diritto punitivo universale. Osservazioni sulle proposte di legge n. 2599 (Carfagna) e 306 (Meloni), Camera dei Deputati*, in *Sist. pen.*, 29 giugno 2021; ID., *Surrogazione di maternità: la pretesa di un potere punitivo universale*, in AA.VV., *La surrogazione di maternità nel prisma del diritto*, a cura di F. Pesce, Editoriale Scientifica, Napoli, 2022, p. 139 ss. Sull'inappropriatezza (dal punto di vista della legittimità costituzionale) della scelta di affidare allo strumento penale la soluzione del problema del "turismo procreativo" finalizzato all'accesso alla GPA, v. le considerazioni critiche di M. D'Amico, *Il "reato universale" di maternità surrogata nei progetti di legge all'esame del Parlamento*, in *Oss. cost. AIC*, 4, 2023, p. 4 ss.

4. *Il diritto all'autodeterminazione nel fine vita: il caso dell'ungherese* Karsai *alla Corte Edu e gli ultimi approdi della Corte costituzionale italiana*

Altra istanza che cresce a livello globale, rispetto alla quale molti ordinamenti giuridici hanno iniziato un percorso di progressivo ampliamento delle libertà individuali, è quella volta al riconoscimento di un maggior spazio all'**autodeterminazione** nelle scelte di **fine vita**. Anche su questo fronte, la definizione di nuovi diritti – per via legislativa e/o giurisprudenziale – ha subito un arresto in diversi paesi europei. La questione è troppo complessa per essere riassunta in poche battute. La letteratura e la giurisprudenza sterminate, così da rendere impossibile una sintesi in questa sede [75].

Per cogliere gli aspetti attualmente più problematici del dibattito e il nesso con la tematica affrontata in questo studio, può essere utile partire da quanto recentemente stabilito dalla **Corte europea** dei diritti dell'uomo a seguito del ricorso promosso nel 2023 da un cittadino ungherese, *Dániel András* ***Karsai***. Nato nel 1977, residente a Budapest, *Karsai* è un avvocato attivo nella tutela dei diritti umani, affetto da sclerosi laterale amiotrofica (SLA) in stadio avanzato. Si è rivolto alla Corte Edu rivendicando il diritto di decidere quando e come porre fine alla propria vita, con modalità che richiedono l'assistenza di terzi per l'autosomministrazione di un farmaco letale.

Il caso è paradigmatico.

La SLA, diagnosticata nel 2021, condurrà presto il ricorrente alla paralisi completa del corpo, nel quale resterà imprigionato (sindrome di *locked-in*), senza alcuna possibilità di comunicare, con la prospettiva di crisi respiratorie fatali (cui si potrebbe ovviare soltanto con un'anticipata sottoposizione a trattamenti di respirazione artificiale) e senza altra prospettiva di liberazione dalla sofferenza che la morte. Prima di giungere definitivamente a questo stadio e per evitare una condizione che egli considera intollerabile, *Karsai* intende abbreviare la fase terminale della malattia, avvalendosi dell'aiuto medico alla morte volontaria *Physician-Assisted Dying* (PAD). Tuttavia, né l'eutanasia né il suicidio assistito sono legali in Ungheria. L'unica alternativa al suicidio, che potrebbe praticare autonomamente prima di perdere definitivamente il controllo del proprio corpo, sarebbe il rifiuto di trattamenti di sostegno vitale: nella specie, nutrizione, idratazione e respirazione artificiali. La morte, allora, sopraggiungerebbe più in là nel tempo, ma lo esporrebbe ad una condizione di

[75] Per un accurato quadro generale, v. F.G. Pizzetti, *L'autodeterminazione alla fine della vita: punti di riferimento costituzionali, disciplina legislativa e applicazioni giurisprudenziali*, in AA.VV., *Scelte di cure di fine-vita: profili giuridici, etici, clinici*, a cura di M.G. Salvadori, Giappichelli, Torino, 2023, p. 3 ss.

sofferenza esistenziale che egli considera ai limiti del trattamento inumano e degradante (art. 3 Cedu); il decesso, inoltre, si attuerebbe con modalità incompatibili con i suoi personali convincimenti etici, filosofici e religiosi (art. 9 Cedu), in violazione della sua dignità. Necessitando di un'assistenza qualificata per l'attuazione del suo proposito, con il rischio – in forza delle leggi ungheresi – di sanzioni penali per chiunque la fornisca, il ricorrente ha lamentato davanti alla Corte di Strasburgo un'ingerenza statale ingiustificata e sproporzionata nella sua vita privata (art. 8 Cedu). Ritiene, inoltre, di essere ingiustamente discriminato (art. 14 Cedu) rispetto ai malati terminali tenuti in vita da trattamenti di sostegno vitale, i quali possono invece legittimamente chiedere – ed hanno diritto ad ottenere – l'interruzione delle cure, con esito inevitabilmente fatale per la loro esistenza.

Il **Codice penale ungherese** criminalizza il favoreggiamento del suicidio, anche se commesso da cittadini ungheresi all'estero, nonché l'eutanasia. La **legge sull'assistenza sanitaria** rispetta invece l'autodeterminazione del paziente consentendo il rifiuto di trattamenti sanitari non voluti, finanche se necessari a surrogare funzioni vitali (*Refusal or Withdrawal of life-sustaining Interventions*, RWI). In questo senso, il quadro normativo dell'Ungheria è simile a quello vigente in Italia nel periodo tra l'approvazione della legge n. 219/2017 [76] e la pronuncia della Corte costituzionale sul suicidio medicalmente assistito del 2019 (caso Cappato) [77].

La Corte Edu non ha accolto il ricorso affermando che il divieto della legge ungherese di indurre attivamente la morte di un malato terminale su richiesta di quest'ultimo, fornendo o somministrando una sostanza (o con qualsiasi altro mezzo), può considerarsi una restrizione necessaria e proporzionata del diritto all'autodeterminazione: la preferenza personale del paziente di non avvalersi di procedure considerate medicalmente appropriate e disponibili, difatti, non può di per sé imporre alle autorità statali l'obbligo positivo di fornire soluzioni alternative, quali quelle che discenderebbero dalla legalizzazione del suicidio assistito e dell'eutanasia.

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[76] La legge n. 219/2017 – in attuazione dell'art. 32, comma 2, Cost. – attribuisce il diritto a rifiutare trattamenti sanitari finalizzati a un mantenimento artificiale in vita non più voluto (v. art. 1, comma 5).

[77] La Consulta, nelle more dell'approvazione di un'apposita legge per la quale ha più volte sollecitato il Parlamento ad intervenire, ha riconosciuto la liceità delle condotte di aiuto al suicidio, ma solo in presenza di specifiche condizioni, ovvero se la richiesta proviene da un paziente affetto da patologia irreversibile, che sopporta una grave sofferenza fisica o psicologica per lui intollerabile ed è altresì dipendente da trattamenti di sostegno vitale, nonché capace di prendere decisioni libere e consapevoli ed informato delle sue condizioni, della possibilità di accesso alle cure palliative ed, eventualmente, alla sedazione profonda continua (sentenza n. 242/2019).

A detta dei giudici, l'esame comparato delle legislazioni degli Stati membri del Consiglio d'Europa evidenzia come le modalità di assistenza medica alla morte volontaria lecitamente attuate mediante aiuto al suicidio o eutanasia richiesta dal paziente siano ancora minoritarie, cosicché non può dirsi formato un consenso europeo.

La Corte, dunque, per quanto attiene alla lamentata violazione dell'art. 8 della Convenzione, ha concluso che, sebbene l'interesse del ricorrente ad avere accesso alla PAD riguardi aspetti essenziali del suo diritto al rispetto della vita privata, il carattere generalizzato del divieto di suicidio assistito stabilito dalla legge ungherese non sia sproporzionato. La prestazione di servizi di morte medicalmente assistita comporta, difatti, implicazioni sociali estremamente ampie, nonché rischi di errori e abusi tali da giustificare l'ingerenza statale. Come meglio emerge dall'esame contestuale dell'art. 2 Cedu, che tutela il diritto alla vita, le limitazioni a una morte autodeterminata – si legge in sentenza – perseguono obiettivi legittimi, ossia la protezione della vita delle persone vulnerabili a rischio di abuso e la tutela della morale sociale sul significato e il valore della vita umana. Sulla scorta di motivazioni simili, la Corte ha ritenuto giustificato il differente trattamento giuridico dei malati non sottoposti a trattamenti di sostegno vitale rispetto a coloro che lo sono.

Eppure, le conclusioni raggiunte nel caso esposto non possono considerarsi definitive. Né l'assetto normativo dell'Ungheria, paese al quale il nostro Governo ha ritenuto (unico tra le parti terze legittimate) di dare supporto costituendosi nel giudizio, è privo di alternative ugualmente compatibili con l'assetto valoriale ricavabile dalla Convenzione europea.

Nella medesima sentenza, si sottolinea come la Cedu sia uno strumento di **diritto vivente**, che deve essere interpretato alla luce delle idee prevalenti nelle moderne democrazie. A questo proposito la Corte Edu se, da una parte, constata come gli Stati membri siano ben lungi dall'aver raggiunto un consenso in merito al diritto di decidere come e quando porre fine alla propria vita, dall'altra, riconosce che nel corso degli ultimi anni si sono verificati importanti sviluppi giuridici a favore dell'accesso alla PAD in diversi paesi europei, quali l'Austria, l'Italia, la Germania, la Spagna e il Portogallo.

La precedente giurisprudenza europea, inoltre, aveva chiarito che l'art. 2 Cedu non osta a che le autorità nazionali autorizzino o forniscano la PAD, a condizione che quest'ultima sia accompagnata da garanzie adeguate e sufficienti per prevenire gli abusi [78].

Anche nel merito del caso ungherese, spiccano in sentenza le opinioni discordanti di due giudici del collegio. Il primo, il polacco *Wojtyczek*, sposa una

[78] Tra i precedenti, v. *Affaire Mortier c. Belgio* (Corte Edu, 4 ottobre 2022); *Haas c. Svizzera* (Corte Edu, 20 gennaio 2011).

posizione assai intransigente secondo la quale la formulazione dell'art. 2 Cedu richiede un'interpretazione letterale rigorosa e preclude l'inserimento di ulteriori eccezioni alla tutela del bene vita rispetto a quelle ricavabili dal secondo comma. Egli esclude la compatibilità con la Convenzione di sistemi che depenalizzano il suicidio assistito e l'eutanasia. Dissente, pertanto, dall'opinione ribadita dalla Corte secondo la quale la morte medicalmente assistita potrebbe essere disciplinata ed effettuata in conformità all'art. 2 Cedu in giurisdizioni che forniscano garanzie adeguate.

All'estremo opposto si colloca l'opinione, totalmente dissenziente, del giudice Felici secondo il quale non sussistono ostacoli giuridici insormontabili all'affermazione di un obbligo positivo degli Stati di assecondare le richieste dei pazienti affetti da patologie irreversibili ad esito infausto a beneficiare di un aiuto medico alla morte volontaria. Ne consegue che, a suo giudizio, l'ingerenza realizzata nel criminalizzare coloro che prestano assistenza al suicidio di persone gravemente malate e sofferenti – in particolare se l'atto è extraterritoriale – non è conforme all'art. 8 della Convenzione. Sotto il profilo della discriminazione lamentata dal ricorrente, il giudice di San Marino ritiene che la subordinazione della liceità delle condotte di aiuto all'esistenza di un trattamento salvavita rappresenti un'ingerenza ingiustificata nella vita privata, intesa come diritto all'autodeterminazione dell'individuo nel fine vita. Sottolinea, infine, l'occasione persa con la scelta di non deferire il caso alla Grande Camera.

La questione del trattamento giuridico da riservare alle richieste di assistenza medica alla morte volontaria di persone malate non sottoposte a trattamenti di sostegno vitale è molto discussa anche in **Italia**. Il dubbio di un'ingiustificata **discriminazione** di queste categorie di pazienti nell'accesso al **suicidio medicalmente assistito** era, in quei giorni, *sub iudice* nel nostro paese per effetto di una nuova questione di legittimità costituzionale dell'art. 580 c.p. sollevata dal Tribunale di Firenze [79].

[79] Trib. Firenze, GIP, ordinanza 17 gennaio 2024. Il dubbio del rimettente atteneva alla compatibilità con alcuni parametri costituzionali del requisito di liceità dell'aiuto al suicidio che consiste nella sottoposizione della persona che lo richiede ad un trattamento sanitario di sostegno vitale, secondo quanto stabilito nella decisione della Corte costituzionale n. 242/2019. Da allora la casistica, che si è via via ampliata, ha imposto alla giurisprudenza di merito approfonditi ragionamenti su come tale presupposto debba essere inteso. È stata conseguentemente adottata presso alcune corti territoriali un'interpretazione estensiva secondo la quale – oltre alla condizione di dipendenza da macchinari e presidi sanitari che surrogano funzioni vitali (respirazione e nutrizione/idratazione) – il requisito deve considerarsi altresì integrato in presenza di terapie farmaceutiche o forme di assistenza personale di tipo medico o paramedico che consistano in "trattamenti interrompendo i quali si verificherebbe la morte del malato, anche in maniera non rapida" (Corte d'Assise Massa, 27 luglio 2020).

Come si diceva, lo spazio costituzionalmente garantito all'autodeterminazione nel fine vita in Italia oggi è più ampio di quello definito dall'ordinamento ungherese: il perimetro è disegnato dalla legge n. 219/2017 e dalle sentenze della Consulta n. 242/2019 e n. 135/2024 [80].

La nozione di **trattamento di sostegno vitale** è da sempre assai dibattuta in ambito sanitario laddove la letteratura – anche in ragione della rapida evoluzione della medicina d'urgenza e degli strumenti in uso – offre svariate definizioni di diversa portata e ampiezza [81].

Sul piano morale, molti evidenziano il paradosso dell'attuale assetto normativo italiano che, a parità di altre condizioni (patologia irreversibile ad esito infausto e sofferenza insopportabile) riconosce, ovvero sacrifica, l'autodeterminazione individuale nel fine vita in base a una condizione meramente accidentale, ossia il fatto che la malattia implichi, o meno, la sottoposizione del paziente a trattamenti di sostegno vitale. Il paradosso risulta particolarmente odioso laddove si àncora il diritto all'aiuto medico a morire a un'interpretazione rigida della nozione di TSV.

A questo proposito occorre tuttavia segnalare che le ultime pronunzie della nostra Corte costituzionale in materia hanno chiarito il significato dell'espressione avvalorando l'interpretazione estensiva già adottata da alcune corti territoriali. Premesso che «il paziente ha il diritto fondamentale di rifiutare ogni trattamento sanitario praticato sul proprio corpo, indipendentemente dal suo grado di complessità tecnica e di invasività», anche le procedure che sono normalmente compiute da personale sanitario e la cui esecuzione richiede competenze oggetto di specifica formazione professionale, ma che potrebbero essere apprese da familiari o "*caregivers*" che si facciano carico dell'assistenza del paziente, come «l'evacuazione manuale dell'intestino del paziente, l'inserimento di cateteri urinari o l'aspirazione del muco dalle vie bronchiali» qualora «si rivelino in concreto necessarie ad assicurare l'espletamento di funzioni vitali del paziente, al punto che la loro omissione o interruzione determinerebbe prevedibilmente la morte del paziente in un breve lasso di tem-

[80] Alle quali deve aggiungersi l'intermedia Corte cost., 15 febbraio 2022, n. 50 resa in sede di giudizio di ammissibilità del referendum abrogativo parziale dell'art. 579 c.p., promosso con lo scopo di rendere legale l'eutanasia.

[81] Non a caso, il Comitato Etico Territoriale della Regione Umbria, chiamato ad istruire la richiesta di aiuto al suicidio di una paziente non sottoposta a nessuno dei classici trattamenti di nutrizione, idratazione e respirazione artificiali, aveva rivolto al Comitato Nazionale per la Bioetica un'apposita richiesta sui criteri da assumere per l'individuazione di "ciò che debba essere considerato un trattamento sanitario di sostegno vitale" ai fini dell'applicazione della sentenza della Corte costituzionale n. 242/2019. Il CNB si è espresso il 20 giugno 2024, v. Comitato Nazionale per la Bioetica - Risposta al Quesito del Comitato Etico Territoriale della Regione Umbria.

po», «dovranno certamente essere considerate quali trattamenti di sostegno vitale, ai fini dell'applicazione dei principi statuiti dalla sentenza n. 242 del 2019». Tutte queste procedure – proprio come l'idratazione, l'alimentazione o la ventilazione artificiali – «possono essere legittimamente rifiutate dal paziente, il quale ha già, per tal via, il diritto di esporsi a un rischio prossimo di morte, in conseguenza di questo rifiuto. In tal caso, il paziente si trova nella situazione contemplata dalla sentenza n. 242 del 2019, risultando pertanto irragionevole che il divieto penalmente sanzionato di assistenza al suicidio nei suoi confronti possa continuare ad operare» [82].

Come si accennava all'inizio, le questioni sono così delicate da richiedere decisioni di politica legislativa equilibrate, che siano comprese e condivise dal corpo sociale. Seguendo un metodo esemplare, la **Francia** negli anni scorsi, ha avviato e concluso un importante esperimento di democrazia deliberativa con la "***Convention citoyenne sur la fin de vie***": un'assemblea formata da 184 cittadini, estratti a sorte, alla quale è stato assegnato il compito di verificare se l'insieme delle misure previste dalla legge francese per l'accompagnamento del paziente al fine vita fosse adeguato rispetto alla complessità e varietà delle situazioni concrete, o se – a giudizio del consesso rappresentativo della società – dovessero essere introdotte modifiche [83].

Le ragioni dell'istituzione del nuovo organismo, come ha spiegato il presidente del Comitato per la *governance* della Convenzione, risiedono nel fatto che «il tema del fine vita richiede l'apertura di un dibattito nazionale, un dialogo tra cittadini di diversa estrazione, rappresentativo delle diverse sensibilità che si esprimono all'interno della società francese, il più vicino possibile alla complessità degli interessi e delle opinioni». Si è voluto, pertanto, «ricreare una *agorà*, costruire un luogo di discussione e di confronto per favorire la libera espressione di opinioni al fine di far conoscere ai decisori politici gli orientamenti della popolazione su di un tema potenzialmente divisivo» [84].

Il risultato dei lavori – articolati in lezioni di esperti, confronti e discussioni tra i partecipanti – è confluito in un rapporto dal quale risulta che la maggioranza (75,6% dei votanti) si è espressa a favore dell'assistenza attiva alla mor-

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[82] Così Corte cost., 1° luglio 2024, n. 135, par. 8 *motivazione*. Ma v. anche la successiva Corte cost., 20 maggio 2025, n. 66.

[83] Per un quadro sulla regolamentazione del "fine vita" in Francia, v. P. Mistretta, *L'aiuto medico a morire nell'ordinamento francese*, in AA.VV., *Scelte di cure di fine-vita: profili giuridici, etici, clinici*, cit., p. 69 ss., il quale si sofferma anche sulla consultazione del popolo francese analizzando gli scenari aperti dall'esperimento. Su quest'ultimo profilo, v. altresì N. ROSSI, *op. cit.*, p. 101 ss.

[84] Così N. Rossi, *op. cit.*, p. 104.

te volontaria (suicidio medicalmente assistito ed eutanasia), considerando l'innovazione normativa necessaria per rimediare alle carenze del quadro giuridico e rispettare la libertà di scelta individuale [85]. La consultazione – realizzata con un metodo improntato alla trasparenza e alla neutralità delle informazioni fornite ai partecipanti, invitati ad attente riflessioni individuali e di gruppo prima del voto – costituisce ora una solida base di ancoraggio per le più impegnative decisioni da assumere a livello politico-istituzionale [86].

5. *Conclusioni*

All'esito dell'analisi compiuta si può concludere che l'attacco ai diritti civili in Europa sembra costituire una componente importante di un progetto politico profondamente illiberale che si è diffuso a livello globale. Il fenomeno merita una ferma e convinta reazione perché il suo sviluppo sembra il frutto dell'attuazione di nuove forme di biopotere che mettono in pericolo diritti fondamentali faticosamente conquistati ed ostacolano l'affermazione di nuovi, intaccando alla radice la filosofia illuminista che sta alla base delle nostre democrazie costituzionali.

La democrazia, lo Stato di diritto e i diritti fondamentali, infatti, sono valori che si rafforzano, o si indeboliscono a vicenda. E, laddove compromessi, si determina una minaccia per l'Unione e per i diritti e le libertà di tutti i suoi cittadini.

Il richiamo che si impone per il futuro, dunque, è ad esercitare un vigile controllo, misurando costantemente l'efficacia delle strategie intraprese ad ogni livello rispetto ad alcuni obiettivi centrali nell'azione delle istituzioni europee. Tra questi, innanzitutto, garantire l'effettiva applicazione della Carta dei diritti fondamentali e della Convenzione Edu da parte degli Stati membri e **promuovere regolamentazioni uniformi**, almeno nello **spazio europeo**, nelle materie di cui si è detto, sulle quali – nonostante l'universalità delle questioni sottese – gli Stati tendono a rivendicare la massima autonomia e discrezionalità delle scelte, anche a scapito delle conseguenze negative che ne derivano in ragione della crescente tendenza al "turismo dei diritti". È auspicabile, inoltre, che si adottino strategie volte a rafforzare la consapevolezza dei cittadini europei circa i propri diritti e a favorire ogni forma

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[85] V. *Conventioncitoyenne_findevie_Rapportfinal.pdf.*

[86] Come osserva N. Rossi, *op. cit.*, p. 105, il ricorso alla democrazia deliberativa nel campo del fine vita «ha uno specifico valore aggiunto, che consiste nella possibilità di superare – grazie al senso della realtà e al pragmatismo dei cittadini comuni – eventuali pregiudiziali culturali e ideologiche delle forze politiche sull'eutanasia e sull'aiuto al suicidio».

di partecipazione civica nei processi legislativi, affinché la tutela della persona non funzionalizzata possa diventare patrimonio universale e aumentino per tutti le possibilità di scelte libere e consapevoli, quindi responsabili, dal principio alla fine della vita.

TECHNOLOGICAL REVOLUTION, DEMOCRATIC CRISIS, AND NEW FORMS OF PARTICIPATION

Massimo Farina [*]

1. *Challenges and opportunities for democracy in the digital age: a brief introductory overview*

Citizens' political participation, a fundamental pillar of modern democracies, has undergone profound changes in the digital era (Cotta, 1985). With the rise of the Internet and social media, the way citizens participate has been reimagined-bringing both opportunities and challenges to democratic systems (Rodotà, 2014; Habermas, 1996; Sartori, 2012; Fioriglio, 2017). Historically, traditional media like radio, television, and print shaped public opinion through a one-sided flow of information from elites to the public. Today, the digital era has disrupted this dynamic, introducing "digital democracy" or "e-democracy," where access to information is democratized, enabling citizens to engage directly in debates in real-time (Lévy, 1998; Costanzo, 2003; Gometz, 2017).

The European Union has taken a leading role in this new era, not only protecting the rule of law within its borders but also showing how digital tools

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can enhance democracy and safeguard fundamental rights. By tackling issues like disinformation, digital exclusion, and the dominance of big tech, the EU is promoting a vision of a fair and inclusive digital space. Its initiatives on artificial intelligence ethics, data privacy, and platform accountability demonstrate how technology can align with democratic values (Floridi, 2019; Zuboff, 2019). For example, the Digital Democracy Initiative (DDI), [1] launched in partnership with Denmark, empowers civil society to use digital tools in defending and promoting democracy globally.

Social media and digital platforms have also revolutionized political mobilization, as seen in movements like "Occupy Wall Street" [2] and the "Arab Spring". [3] These examples highlight how digital tools can fuel political en-

[1] The Digital Democracy Initiative is a new program initiated in 2023 by the Government of Denmark in collaboration with the European Commission during the Summit for Democracy. It will have a thematic focus on promoting and protecting inclusive democratic spaces in the digital era, with particular emphasis on civil society from the Global South that experiences democratic backsliding and pressures on civic space. The DDI is implemented with the objective of enabling local civil society to utilize digital technologies to amplify their agendas, promote inclusive democratic spaces online and offline, while defending and supporting existing and emerging civil society actors leveraging digital tools to advance democracy. It is implemented by organizations such as CIVICUS, Global Focus, Digital Defenders Partnership, and Access Now for the 2023-2026 period. Key thematic areas include combating technology-facilitated gender-based violence, leveraging digital technologies for climate activism, and strengthening youth engagement in the digital democratic sphere. For more information, see: Digital Democracy Initiative 2023-2026, a programmatic document describing its objectives and management approach (https://um.dk/en/-/media/websites/umen/danida/about-danida/danida-transparency/digital-democracy-initiative-excl-annexes.ashx); Promoting inclusive democracy in the digital age: EU and Denmark launch Digital Democracy Initiative, an article describing the launch and objectives of the initiative (https://international-partnerships.ec.europa.eu/news-and-events/news/promoting-inclusive-democracy-digital-age-eu-and-denmark-launch-digital-democracy-initiative-2023-03-29_en).

[2] "Occupy Wall Street" was a social protest movement that began in 2011 in New York, in response to economic inequalities and the influence of large financial corporations on politics. The movement, characterized by the slogan "We are the 99%", gained widespread international attention, highlighting the disparities between the economic elite and the majority of the population. For an in-depth discussion, see: M. Hardt-A. Negri, *Declaration*, Argo Navis, New York, 2012; D. Graeber, *The Democracy Project: A History, a Crisis, a Movement*, Spiegel & Grau, New York, 2013; C. Crouch, *Il potere dei giganti. Perché la crisi non ha sconfitto il neoliberismo*, Laterza, Roma-Bari, 2012.

[3] The "Arab Spring" will be discussed further in the section dedicated to case studies. Here, it can be briefly defined as a wave of popular protests, uprisings, and revolutions that swept through several Arab countries starting at the end of 2010. It was characterized by a plurality of causes and objectives, with extremely variable outcomes depending on the national contexts. For further insights, see: L. Anderson, *Demystifying the Arab spring: parsing the differences between Tunisia, Egypt, and Libya*, in *Foreign Affairs*, 3, 2011, pp. 2-7; J. Brownlee, *Authoritarianism in an Age of Democratization*, Cambridge University Press, Cambridge,

gagement, but they also expose the limitations of technology in ensuring lasting democratic change without strong institutions and supportive social frameworks (Lynch, 2013).

However, the digital revolution also entails challenges and risks for democracy, inasmuch as the quality of online participation is usually superficial and fragmented. A case in that respect is the so-called "slacktivism",[4] a very low-cost activism with very poor effects (Gladwell, 2010). Moreover, technological mediation came with new methods of control and manipulation: "surveillance capitalism" as proposed by Zuboff (2019), would not be compatible at all with the defense of people's privacy and autonomy of choice that citizens are entitled with. This has also been an enabling environment for populist movements (Gometz, 2019), which often present themselves as representatives of popular discontent and distrust of traditional institutions, with declared interests in fighting corruption. Moreover, digital platforms' algorithms are designed in such a way as to obtain greater and greater engagement; for this purpose, emotionally divisive contents privileged by the polarization of public opinion, the spreading of fake news, and creation of "echo chambers"[5] are capable of reducing pluralistic dialogue (Urbinati, 2020).

2007; M. Lynch, *The Arab Uprising: The Unfinished Revolutions of the New Middle East*, in *PublicAffairs*, New York, 2013.

[4] *Slacktivism* (or armchair activism) refers to behaviour where political or social engagement is limited to symbolic digital actions, such as signing online petitions or sharing posts on social media, which require minimal effort and have a limited impact in reality. For further reading, see: E. Morozov, *The Net Delusion: The Dark Side of Internet Freedom*, in *PublicAffairs*, New York, 2011; C. Shirky, *Here Comes Everybody: The Power of Organizing Without Organizations*, Penguin Press, New York, 2008; C. Vaccari-A. Valeriani, *Digital Politics in Western Democracies: A Comparative Study*, Johns Hopkins University Press, Baltimore, 2013.

[5] The phenomenon of echo chambers metaphorically describes an informational environment where an individual's preexisting ideas and opinions are constantly reinforced and amplified through a positive feedback mechanism, limiting exposure to alternative perspectives. This phenomenon, often facilitated by digital technologies, can polarize opinions and hinder constructive debate. Within an echo chamber, dissenting views are often marginalized or excluded, creating an environment dominated by a narrow and homogenized view of reality. For an introduction on the topic, see: C.R. Sunstein, R*epublic.com 2.0*, Princeton University Press, Princeton, 2007; E. Pariser, *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think*, Penguin Press, New York, 2011; W. Quattrociocchi-A. Vicini, *Misinformation. Guida alla società della disinformazione e della credulità*, FrancoAngeli, Milano, 2016, p. 76; A. Testa, *Vivere ai tempi della post-verità*, in *Internazionale.it*, 22 novembre 2016. Additionally, see Luciano Floridi's discussion on how the digital "infosphere" can be distorted by algorithms that foster the creation of echo chambers, where citizens are exposed only to information that confirms their preexisting beliefs, potentially undermining the quality of public debate (L. Floridi, *La quarta rivoluzione: Come l'infosfera sta trasformando il mondo*, Raffaello Cortina, Milano, 2017.

Events like the manipulation of the 2016 U.S. presidential elections through digital platforms have shown how manipulation of information compromises the integrity of democratic processes. Besides, new social exclusion has developed both inside the advanced societies and globally (Floridi, 2014) by the digital divide, which increasingly stands as a great challenge to the principle of equality.

Such has been the context of "democratic recession", marked by the rise of authoritarianism and deep distrust in institutions, in which technology becomes an instrument for the reinforcement of state control over freedom of expression, as witnessed in "sham democracies",[6] where institutional weakness makes authoritarian practices pass with the veneer of democratic procedures, such as in Russia, Turkey, and Hungary (Freedom House, 2021; Bogaards, 2018). In these contexts, the reduction of electoral turnout – quite among the young – and the increase in economic and political power concentrated in narrow digital elites are very strong challenges to democracy's future (Mounk, 2018). The greatest challenge in this direction will be to balance technological innovation with the protection of fundamental rights, so that progress may be of service to the common good.

All those things help to leverage the democratic potential of digital technologies and reduce risks: digital literacy, regulation of online platforms, more significant and more engaged forms of political participation, and policy reducing the digital divide (Ferrajoli, 1989; Landemore, 2020). Only through the painstaking process of regulation and informed public debate can the founding principles of the emergent democratic order be maintained and reinforced through the opportunities afforded by the digital revolution and the need to preserve freedom and equality.

[6] Russia is often described as a "sham democracy" because, while maintaining formal elements such as elections and a constitution, it lacks the substantive conditions for genuine political competition and the protection of civil rights. Elections are characterized by manipulations and restrictions on opposition participation; the media, including social media, are widely controlled by the government, which also uses technology to monitor and suppress online dissent; and institutions, such as the judiciary, do not enjoy full independence, often being instrumentalized to target political opponents. For further reading on the topic, among others: S. Levitsky-L.A. Way, *Competitive Authoritarianism: Hybrid Regimes after the Cold War*, Cambridge University Press, Cambridge, 2010; P. Rutland, *The Politics of Economic Stagnation in the Soviet Union: The Role of Local Party Organs in Economic Management*, Cambridge University Press, Cambridge, 1993; V. Gel'man, *Authoritarian Russia: Analyzing Post-Soviet Regime Changes*, University of Pittsburgh Press, Pittsburgh, 2015.

2. *The potential of technology for democratic renewal*

Although, as highlighted, the digital context has led to a weakening of certain aspects of democracy, the same technologies can serve as the foundation for a new type of participation and governance. Their potential is significant, yet complex, and the main challenge lies in understanding how to leverage these tools to strengthen democratic institutions, promote more inclusive participation, improve transparency, and ensure that technological choices are oriented toward the common good.

In this context, the importance of "digital citizenship" (Rodotà, 2014), which enables citizens to actively participate in public life through new technologies, can harmoniously align with the model of deliberative democracy (different from the traditional representative one), which encourages participation based on collective discussion and informed reflection (Habermas, 1996). Examples like the 2011 constitutional revision process in Iceland and the Decide Madrid platform in Spain (Royo et al., 2020) demonstrate how technology can foster a more transparent and inclusive democratic dialogue (Landemore, 2020).

A fundamental element for such a democratic renewal lies in the transparency and accountability of decision-making processes. Open data and online public records offer new possibilities for monitoring the work of governments and public institutions. In this regard, Agenzia per l'Italia Digitale (AGID) has promoted and published the National Guidelines for the Enhancement of Public Information Assets, contributing to greater administrative transparency (AGID, 2019). From a purely technological perspective, blockchain (Atzori, 2017), with its decentralised and immutable system for recording transactions, could be the appropriate tool to guarantee transparency, as demonstrated by the implementation of electronic voting (Farina, 2020; Trucco, 2011; Aventaggiato, 2013; Spanu, 1986) in Estonia (Madise-Vinkel, 2016; Solvak-Vassil, 2016). However, it has been pointed out (Floridi, 2019) that adopting these technologies requires careful consideration of ethical and social implications.

On another front, digital technologies can also represent a significant opportunity to address the exclusion of certain segments of the population from the political process. However, it is essential to tackle the issue of the digital divide (Bentivegna, 2009) to ensure that technology truly contributes to a more inclusive democracy (Floridi, 2013; Castells, 2012). In this regard, to prevent technologies from further amplifying existing inequalities, the need for public policies aimed at digital literacy for citizens and the expansion of universal Internet access has been widely emphasised (De Kerckhove, 2016).

In this scenario, it is certainly worth mentioning artificial intelligence (AI), which stands out as one of the most relevant, and above all, current innova-

tions for improving the quality of governance and public policies. However, its use raises ethical and legal issues that require mechanisms for democratic control (Floridi, 2023). In this area, the insightful contribution of Luciano Floridi (Floridi, 2013) offers valuable perspectives for understanding the ethical implications of AI in the public sphere. Among emerging technologies, virtual reality (VR) and augmented reality (AR) are also finding applications in civic innovation, offering new ways of interacting with public information.

Thus, realising the full potential of these technologies requires a joint commitment from institutions and civil society. An inclusive approach, involving continuous dialogue between citizens, technology experts, and policymakers, is essential to developing tools that serve the common good. In a theoretical framework useful for assessing the impact of new technologies on democratic systems, the concept of "continuous democracy" (Rodotà, 2012) certainly offers an innovative vision of how digital technologies can renew democratic practices and improve their quality (Floridi, 2017; Pasquino, 2007).

The opportunity provided by new technologies to renew and strengthen democratic practices is certainly unprecedented; however, it is crucial to adopt a critical and informed approach in their implementation. Only through ongoing reflection and open dialogue among all stakeholders will it be possible to fully harness the potential of digital technologies to create a more participatory, transparent, and inclusive democracy in the 21st century.

3. *Case studies: successes and failures of democratic technologies*

The range of case studies on the successes and failures of democratic technologies is broad, allowing for a critical analysis. On one hand, there are examples showing how digital tools have enhanced democratic participation, improved transparency, and made public information more accessible. On the other, they highlight the vulnerabilities introduced by these same technologies, including the manipulation of public opinion, the polarisation of political debate, and the erosion of trust in institutions. The brief overview of the following cases is useful for understanding how democracies can navigate the adoption and regulation of technologies to ensure the protection of fundamental democratic principles.

3.1. *The Estonian model: an example of advanced e-democracy*

Estonia stands as an emblematic case of effective technological implementation in the democratic realm, having adopted technology as a cornerstone of

its post-Soviet reconstruction. Since 1991, the country has systematically invested in the digitalisation of public services (Di Maria-Micelli, 2004), also developing an e-democracy[7] system considered among the most advanced globally (Heiberg *et al*., 2014; Nunziata, 2021). A crucial element of this digital transformation has been the introduction of electronic voting (e-voting). Initially launched at the local level in 2005 and later extended to parliamentary elections in 2007, the system allows citizens to cast their votes online using a secure digital ID card. This innovative approach has significantly lowered barriers to political participation, particularly benefiting geographically isolated communities and Estonian citizens residing abroad. As a result, voter turnout has increased, especially among younger demographics (Madise-Martens, 2006).

The technical architecture of the Estonian system stands out for adopting cutting-edge security principles, including the use of blockchain technology to ensure vote integrity. Thanks to these innovative measures, Estonia has demonstrated remarkable resilience against cyberattacks, illustrating how e-voting can be implemented securely and efficiently, provided that appropriate precautions are taken (Floridi, 2020).

Despite its undeniable merits, the Estonian model raises questions about its replicability in different contexts. The country's success has been facilitated by specific factors, such as a relatively small population, a high level of digital literacy, and a culture strongly oriented toward technological innovation. These conditions may not be easily replicated in countries with different socioeconomic and demographic characteristics, demonstrating that the success of digital technologies, while offering significant opportunities for democratic innovation, is not guaranteed. It largely depends on their ability to address the specific needs of the local context and to gain social acceptance.

A diametrically opposite example to the Estonian experience can be found in Norway[8] (Pasquino, 2007; Cortier-Wiedling, 2017), where, after some ex-

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[7] On this point, it is recommended to delve into the difference between e-government and e-democracy, clearly illustrated in G. Gometz, *Democrazia elettronica. Teoria e tecniche*, Edizioni ETS, Pisa, 2017.

[8] The experience of electronic voting in Norway took place between 2011 and 2013 as a pilot project aimed at exploring the possibility of modernizing the traditional electoral system. The initiative was launched with the goal of facilitating access to voting and improving participation, especially among young people and citizens residing abroad. However, the project raised concerns regarding the security and secrecy of the vote, crucial issues for ensuring voter trust. Despite the implementation of advanced security measures, such as the possibility for voters to verify their votes online, the initiative faced resistance from both the public and the authorities. Ultimately, the Norwegian government decided to suspend the project, highlighting the importance of broad social consensus for the introduction of electronic voting systems.

perimentation, the idea of adopting an electronic voting system was abandoned due to concerns about security and, consequently, a lack of public trust in the system.

3.2. *Iceland and the constitutional revision: a disappointed hope*

The Icelandic experience of constitutional revision initiated in response to the 2008 financial crisis represents a paradigmatic case for analysing the potentials and limits of using digital technologies in democratic participation processes. In response to the economic collapse following the global banking crisis, Iceland embarked on an ambitious attempt at constitutional reform, conceived as a tool to rebuild trust in public institutions and promote more transparent and accountable governance (Gylfason, 2012).

The most innovative aspect of this process was the direct involvement of citizens through digital platforms and social media. This methodology, known as "constitutional crowdsourcing," allowed Icelandic citizens to actively participate in the debate and drafting of the constitutional text through the use of Facebook and dedicated online forums. This approach has been widely recognised internationally as a pioneering example of participatory democracy enhanced by digital technologies (Landemore, 2020; Della Porta, 2013).

However, despite the initial enthusiasm and the drafting of a constitutional draft approved by a consultative referendum, the process ended in political and institutional failure. The Icelandic Parliament, in fact, never proceeded with the official ratification of the new text, raising critical questions about the actual capacity of digital participation to influence institutional decision-making processes, especially in the absence of solid support from traditional political elites (Landemore, 2020; Urbinati, 2020).

The critical analysis of the Icelandic experience highlights how, although technology can indeed facilitate participation and increase the transparency of decision-making processes, it is not sufficient on its own to ensure substantial and lasting political change. Thus, there is a need to integrate digital participatory innovations within a broader framework of institutional reforms and a renewed political culture, capable of translating participatory demands into tangible results (Floridia, 2017; De Blasio-Sorice, 2016).

The Icelandic case also offers valuable insights for a broader reflection on the potentials and limits of digital technologies in democratic innovation processes, emphasising the importance of a holistic approach that combines innovative participatory tools with strong institutional commitment and a genuine political will for renewal.

3.3. *"Arab Spring": the ambivalent role of social media in mobilisation and democratisation processes*

The "Arab Spring", a far-reaching socio-political phenomenon that unfolded between 2010 and 2011, serves as a significant case for analysing the role of digital technologies in political mobilisation and democratisation processes, particularly in contexts characterised by authoritarian regimes. This movement, which affected several countries in North Africa and the Middle East, witnessed the extensive use of social platforms like Facebook, Twitter, and YouTube. These platforms played a crucial role in coordinating protests, organising collective actions, and rapidly disseminating information on a global scale, circumventing the censorship mechanisms imposed by regimes on traditional media (Howard-Hussain, 2013; Mercuri-Torelli, 2012).

The initial impact of these digital tools was especially significant in empowering citizens with new capacities for self-organisation, facilitating the emergence of popular resistance movements that openly challenged state authority. In Tunisia, for example, digital mobilisation played a decisive role in the success of protests that led to the ousting of President Zine El-Abidine Ben Ali, paving the way for a process of democratic transition (Diamond, 2015; Corrao, 2011). These early successes fueled an optimistic interpretation of the democratising potential of social media, particularly in contexts with strong restrictions on freedom of expression.

However, the subsequent evolution of events highlighted the inherent limitations of these tools in fostering lasting political change. In countries like Egypt and Syria, for instance, the same technologies that initially facilitated mobilisation were quickly co-opted by authoritarian regimes to suppress dissent. Specifically, in Egypt, after the fall of Hosni Mubarak, the new regime exploited digital technologies to consolidate its power by monitoring and manipulating the flow of information. In Syria, Bashar al-Assad's government used social media to identify dissidents and suppress protests, turning these tools into effective devices for control and surveillance (Diamond, 2015; Campante-Chor, 2012).

The observation of these different experiences makes it clear that while social media can facilitate rapid political mobilisation, they are not sufficient on their own to ensure a stable and lasting democratic transition, especially in contexts characterised by significant power asymmetries and a limited democratic culture (Morozov, 2011). This underscores, once again, the need for a contextualised assessment of the role of digital technologies in political change processes, considering not only their emancipatory potential but also the risks of co-optation and manipulation by authoritarian actors (Pizzorno, 2019).

The "Arab Spring" offers important insights into the ambivalent nature of social media as tools for political participation. On the one hand, they can amplify voices of dissent and facilitate mobilisation; on the other hand, their effectiveness in promoting lasting democratic change largely depends on the political, social, and cultural context in which they operate (Della Porta-Diani, 2020).

3.4. *The German pirate party and "liquid democracy": limits and criticisms of a digital participatory model*

The experience of the Pirate Party in Germany represents a political experiment based on the concept of "liquid democracy," which sought to implement a system of continuous and direct political participation through the use of the LiquidFeedback platform. This approach aimed to promote an inclusive and dynamic form of engagement, allowing party members to propose and vote in real-time on political issues of common interest (Blum-Zuber, 2016; Deseriis, 2020).

Despite the initial enthusiasm and the apparent inclusive potential of the platform, the practical implementation of the model revealed significant challenges. First, there was a tendency towards the centralisation of decision-making power in the hands of a small group of individuals with advanced technical skills (Sorice, 2019), effectively contradicting the goal of inclusivity and widespread participation (Gerbaudo, 2019). This phenomenon led to the de facto exclusion of a considerable portion of less digitally literate members, raising crucial questions about the actual democratic nature of the system. Moreover, the absence of adequate mechanisms for mediation and negotiation between different viewpoints resulted in excessive fragmentation of internal debate, which significantly slowed down decision-making processes. This undermined the operational effectiveness of the party and its ability to develop coherent and impactful political proposals (Floridi, 2017; Mosca, 2018).

This experience underscored the inherent flaws of the liquid democracy model (Gometz, 2014), which, despite initial expectations, ended up favouring elitist and technocratic participation over inclusive democratic engagement. As these shortcomings became apparent, criticism grew, ultimately leading to the party's decline due to its inability to translate digital participation into meaningful decision-making and impactful political action (Gerbaudo, 2019; Urbinati, 2020).

As previously highlighted, the Digital Democracy Initiative, by contrast, exemplifies how well-structured support can enable civil society to tackle challenges like disinformation and digital exclusion. With its focus on marginalized groups such as women and youth, the initiative directly addresses

the inclusivity gaps that plagued liquid democracy, while reinforcing the importance of linking digital innovation with governance frameworks that emphasize equity and accountability. By doing so, it demonstrates how technology, when guided by thoughtful policy, can genuinely strengthen democratic participation (Blum-Zuber, 2016; Floridi, 2019).

The case of the German Pirate Party further illustrates the necessity of considering the social, political, and cultural contexts in which digital tools for political participation are applied. Without this attention, even ambitious efforts risk replicating the same exclusionary pitfalls that hindered liquid democracy's success.

3.5. *The vTaiwan project: an innovative model of digital participation in Public governance*

The vTaiwan project, launched by the Taiwanese government, stands out for its innovative approach to facilitating public participation in legislative decision-making processes through the use of a technologically advanced online platform (Hsiao *et al*., 2018). A key feature of vTaiwan lies in its use of artificial intelligence technologies, particularly the Polis software, which enables sophisticated analysis of opinions expressed by participating citizens. This tool is notable for its ability to highlight points of consensus and effectively synthesise diverse viewpoints, contributing to a more nuanced representation of public debate. The platform has been practically applied to engage citizens on complex political and social issues, such as the regulation of ride-sharing platforms and copyright law reform. The project has been praised for its ability to mitigate political polarisation, promote constructive dialogue between government institutions and citizens, and contribute to the development of more balanced and widely accepted public policies (Mancini, 2015).

Two key factors emerge from this case as crucial to the success of digital democracy initiatives: on the one hand, the presence of a well-designed and functional technological infrastructure; on the other hand, a cultural and political context that values open dialogue and the search for compromise (Sorice, 2019). In particular, it is evident that the integration of artificial intelligence tools can facilitate the management and analysis of large volumes of input from citizens, overcoming some of the traditional limitations associated with large-scale participatory processes (Gerbaudo, 2019; Urbinati, 2020). However, it is important to note, even in successful cases like this, that the outcome cannot be attributed solely to technological innovation. The political and cultural context of Taiwan, characterised by a strong democratic tradition and a participatory civic culture, has played a crucial role in fostering the adoption and effectiveness of this tool (Della Porta-Diani, 2020; Floridia, 2017).

4. *The role of the European Union in promoting digital democracy and the rule of law*

In an era where digital technologies are reshaping the foundations of democratic participation, the European Union (EU) has emerged as a global advocate for integrating these tools into frameworks that respect and reinforce the rule of law. The EU's efforts are grounded in the principle that democracy cannot flourish without robust legal protections for fundamental rights, such as freedom of speech, freedom of association, and the right to access information. Recognizing that the digital sphere can both enhance and undermine these rights, the EU has adopted a dual approach: rengthening legal safeguards and actively promoting the responsible use of technology in democratic processes.

A cornerstone of this strategy is just the Digital Democracy Initiative, which exemplifies how digital tools can be used to uphold the principles of democratic governance in challenging contexts. As said earlier, the Digital Democracy Initiative exemplifies the European Union's commitment to integrating digital technologies into the broader framework of democratic governance. At its heart, the initiative is designed to protect and promote the fundamental rights that underpin democratic societies, such as freedom of expression, freedom of association, and access to information. These rights, often threatened in restrictive environments, are bolstered through tools and resources that enhance the digital resilience of civil society, such as secure communication platforms, training on digital security, and mechanisms to circumvent censorship, enabling human rights defenders (a generically term used to describe individuals and groups who work – often at great personal risk – to protect and promote fundamental rights such as freedom of expression, association, and peaceful assembly) to operate effectively and safely in increasingly adversarial context (for example journalists, that reporting on corruption, activists, that advocating for marginalized communities, and legal professionals, that fighting for accountability). In many restrictive environments, such individuals face surveillance, harassment, and censorship, often enabled by digital tools wielded by authoritarian regimes (United Nations, 1998). In this sense, Digital Democracy Initiative, ensuring that democratic principles are upheld even in challenging contexts aligns with the EU Action Plan on Human Rights and Democracy 2020-2024, which emphasizes the protection of civic space as a core priority.

Combating disinformation through the promotion of transparency ensures accurate information, informed civic participation and, consequently, democratic governance of the rule of law (Floridi, 2019). In this sense, by equipping civil society actors with tools to counter false narratives and polarisation, the

DDI actively supports the legal principle of transparency, a cornerstone of democratic governance and the rule of law (Floridi, 2019).

Beyond its focus on countering disinformation, the initiative addresses a spectrum of other challenges, among which the focus on promoting digital inclusion and equity. Recognizing that the digital divide disproportionately affects women, youth, and marginalized communities, the initiative seeks to bridge these gaps by supporting access to digital tools and training. By doing so, it empowers these groups to participate fully in civic and political life, addressing structural inequalities that often hinder their representation in decision-making processes. This effort reflects the broader objectives of the Charter of Fundamental Rights of the European Union, particularly the principles of equality and non-discrimination (European Union, 2000).

The Digital Democracy Initiative also reinforces the legal and institutional frameworks necessary for safeguarding the integrity of democratic processes. For example, by providing technical support for independent election monitoring and facilitating transparent electoral campaigns, the initiative ensures that democratic systems remain fair and accountable. These measures are particularly important in contexts where digital technologies are weaponized to manipulate public opinion or interfere with elections. In such cases, the initiative complements the regulatory frameworks established by the Digital Services Act (DSA) and the Digital Markets Act (DMA),[9] which impose legal obligations on platforms to prevent the spread of illegal content and to operate transparently.

Beyond regulation, the EU has tied digital transformation to broader democratic objectives through mechanisms like the Recovery and Resilience Facility,[10] where substantial funding for digitalization is conditioned on adherence

[9] The Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services (DSA) focuses on removing illegal content while protecting users' rights, while the Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector (DMA) seeks to prevent monopolistic practices that distort the digital marketplace. Together, these measures reflect the EU's holistic approach to embedding democratic values into the governance of digital technologies.

[10] The Recovery and Resilience Facility (RRF) is the cornerstone of the NextGenerationEU program, the European Union's main financial instrument to support the economic and social recovery following the Covid-19 pandemic. With a budget of €672.5 billion, it aims to foster reforms and investments in Member States to create more sustainable, resilient, and digitally advanced economies. At least 20% of the funds allocated under each National Recovery and Resilience Plan (NRRP) must be dedicated to projects fostering digital transformation. These include investments in digital infrastructure (e.g., high-speed networks such as 5G and fiber optics), the digitalization of public administration, the development of digital skills among citizens and workers, and the enhancement of cybersecurity.

to the rule of law. This innovative approach links technological progress to social justice and institutional strengthening, in line with the principles enshrined in the EU Charter of Fundamental Rights (European Parliament, 2000).

On the global stage, the EU has positioned itself as a leader in ethical AI standards through legislative measures such as the Regulation on Artificial Intelligence, [11] designed to ensure that AI development aligns with human rights.

Importantly, the Digital Democracy Initiative addresses the growing threat of digital authoritarianism, where governments misuse technology to suppress dissent and consolidate power. By strengthening the capacity of civil society to resist these practices, the EU sends a strong message about the importance of safeguarding democratic values in the face of emerging challenges. This includes combating surveillance and promoting secure digital environments that protect the privacy and autonomy of users, reinforcing legal protections that are essential for maintaining trust in democratic systems.

The Digital Democracy Initiative's emphasis on fostering collaborative governance highlights its innovative approach. By involving a diverse range of stakeholders – civil society organizations, private sector actors, and international partners – it ensures that the governance of digital technologies reflects a plurality of voices and interests. This aligns with the EU's broader vision for multilateralism and participatory democracy, emphasizing the shared responsibility of all actors in upholding democratic principles.

For all these aspects, it can be said that the Digital Democracy Initiative goes beyond addressing immediate threats to democracy. It represents a forward-looking vision of how technology can be harnessed to strengthen democratic institutions, empower citizens, and ensure that the rule of law remains a cornerstone of digital transformation. By integrating these efforts within a coherent legal and policy framework, the EU sets a powerful example of how democracies can adapt to the challenges and opportunities of the digital age.

The RRF contributes to bridging the digital divide and fostering democratic participation by improving access to technologies and digital literacy, ensuring a more inclusive and transparent decision-making process. It also ties funding disbursement to compliance with the rule of law, reflecting the EU's commitment to upholding fundamental values. Examples of digital projects supported by the RRF include Italy's "Italia Digitale 2026", which aims to fully digitize public services, Spain's initiatives to support SMEs' digitalization, and Poland's creation of a national e-health platform.

[11] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence.

5. *Conclusions*

In this brief overview, we have highlighted the effects of the digital revolution on the modalities of political participation and the dynamics of democratic governance. On one hand, opportunities for inclusion in decision-making processes have expanded, offering new channels of participation to previously marginalised groups of citizens. On the other hand, new issues have arisen concerning the risks of information manipulation, disinformation, and a crisis of trust in traditional democratic institutions. The phenomenon of the 21st-century "democratic recession," analysed by scholars like Larry Diamond, underscores the difficulties democracies face in adapting to the rapid transformations brought about by the digital age (Bobbio, 1984; Diamond, 2015; Morlino, 2021).

The analysis of the case studies presented, particularly the vTaiwan experience, demonstrates that the integration of digital technologies into democratic processes can indeed enhance civic participation if appropriately accompanied by deep political and institutional reforms. The success of these experiments depends not only on the quality of the technological platforms used but also, and perhaps more importantly, on the existence of a political culture that favours dialogue and inclusion.

However, the cases of failure observed in different contexts, such as the experiences of the "Arab Spring" or digital democracy experiments in authoritarian regimes, should not be overlooked, as their analysis can provide useful insights for improvement and correction. In these instances, digital technologies not only failed to promote democratisation processes but paradoxically contributed to the reinforcement of authoritarian control and the exacerbation of political polarisation (Howard-Hussain, 2013; Gerbaudo, 2019). These examples underline that technology alone cannot solve the structural problems of democracy; rather, it tends to amplify both the virtues and the flaws of the political systems in which it is implemented.

It becomes clear that the future of democracy in the digital age requires an integrated and multi-level approach, and that the introduction of information and communication technologies must necessarily be accompanied by structural reforms aimed at making political institutions more open, transparent, and inclusive (Landemore, 2020; Urbinati, 2020). Technological progress can certainly facilitate these processes of change, but it cannot replace the essential role of an active and informed citizenry, nor the efficiency of institutions capable of addressing the complex global and local challenges of our time, such as the climate crisis, economic inequalities, and transformations in the world of work (Sorice, 2019).

Technology presents an ambivalent element for the future of democracy,

offering both opportunities and risks but its ultimate impact will depend on the ability of democratic systems to adapt to technological transformations without betraying their fundamental principles of freedom, equality, and participation.

The EU's efforts, including the Digital Services Act, the Digital Markets Act, and the Digital Democracy Initiative, illustrate how democracies can adapt to the digital age without compromising their core values. These policies not only address immediate challenges like disinformation but also lay the foundation for resilient and inclusive democratic institutions. The Digital Democracy Initiative, in particular, reflects the EU's commitment to empowering civil society and ensuring that technology serves as a force for good. However, achieving these goals requires consistent implementation across Member States and the ability to navigate the tensions between democratic ideals and geopolitical realities. By addressing these challenges head-on, the EU offers a model for how technology can be harnessed to strengthen democracy globally (Landemore, 2020).

As Norberto Bobbio once stated, "democracy is never complete, but always evolving" (Bobbio, 1984), and in an era marked by the digital revolution, this reflection takes on renewed relevance: contemporary democracies are called to a continuous process of evolution and adaptation to face the challenges posed by new technologies, while preserving the essential values that define and legitimise them (Floridia, 2017; Della Porta-Diani, 2020).

The future challenge lies, therefore, in the ability to develop governance models that effectively integrate technological innovation with the fundamental principles of democracy, promoting inclusive and informed participation, ensuring transparency in decision-making processes, and strengthening institutional accountability towards citizens (Habermas, 1996); Diamond, 2015). Only through this continuous process of negotiation and adaptation can democracies fully harness the potential of digital technologies while minimizing their risks and challenges.

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